STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
PETE'S TOP QUALITY LANDSCAPE LLC **No. 17-44**
TO THE ASSESSMENT ISSUED UNDER
LETTER ID NO. L0062305344

DECISION AND ORDER

A protest hearing occurred in the above captioned matter on September 25, 2017 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Mr. Wayne G. Chew, Esq. (Wayne G. Chew, P.C.) appeared representing Pete's Top Quality Landscape, L.L.C. ("Taxpayer"). Ms. Sandra Vigil, owner, appeared and testified on behalf of Taxpayer. Staff Attorney, Mr. David Mittle, appeared representing the Taxation and Revenue Department of the State of New Mexico ("Department"). Protest Auditor, Ms. Veronica Galewaler, appeared as a witness for the Department. Staff Attorney, Ms. Luciane Yeh, also appeared as an observer in training for the Department. Taxpayer Exhibit 1 and Department Exhibits A and B were admitted into the record without objection and are described in the Administrative Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On June 8, 2010, the Department assessed Taxpayer the amounts of $103,489.33 in weight distance tax, $20,697.87 in penalty, and $28,696.85 in interest. The assessment also included a separately stated penalty of $4,000 for weight distance tax underreporting. The total amount due under the assessment was $156,884.05 under Letter ID No. L0062305344 for the reporting periods from December 31, 2003 to June 30, 2009.

2. On August 19, 2010, the Department's Protest Office received Taxpayer's Formal

Protest. The protest was executed by Sandra Vigil on August 16, 2010.

3. On August 19, 2010, the Department acknowledged the receipt of Taxpayer's protest.

4. There was no outward activity in Taxpayer's protest from August 19, 2010 until April 4, 2017.

5. On April 4, 2017, the Department requested a hearing in the matter subject of Taxpayer's protest. The Department's request brought Taxpayer's protest to the attention of the Administrative Hearings Office for the first time. Before that date, the Administrative Hearings Office had no knowledge of Taxpayer's protest nor any statutory obligation to set a hearing.

6. On April 5, 2017, the Administrative Hearings Office issued a Notice of Administrative Hearing setting a hearing on the merits of Taxpayer's protest for April 26, 2017.

7. On April 7, 2017, Ms. Vigil requested a continuance of the hearing on the merits scheduled for April 26, 2017.

8. On April 10, 2017, the Department indicated that it did not oppose Taxpayer's request for a continuance.

9. On April 14, 2017, the Administrative Hearings Office issued an Amended Notice of Administrative Hearing setting a hearing on the merits of Taxpayer's protest for June 16, 2017.

10. On May 18, 2017, the Administrative Hearings Office filed a Notice of Reassignment of Hearing Officer for Administrative Hearing which reassigned the matter to the undersigned Hearing Officer.

11. On May 22, 2017, Ms. Vigil requested a continuance of the hearing on the merits scheduled for June 16, 2017.

12. On May 23, 2017, the Department indicated that it did not oppose Taxpayer's second request for a continuance.

13. On May 31, 2017, the Administrative Hearings Office issued a Second Amended Notice of Administrative Hearing setting a hearing on the merits of Taxpayer's protest for July 5, 2017.

14. On June 20, 2017, Taxpayer filed a Motion to Vacate Hearing Setting. The motion represented Taxpayer's third request for a continuance and the initial entry of appearance of Taxpayer's counsel of record.

15. On June 29, 2017, the Department indicated that it did not oppose Taxpayer's third request for a continuance.

16. On June 30, 2017, the Administrative Hearings Office issued an Order Granting Continuance, Scheduling Order, and Notice of Administrative Hearing which in addition to establishing various deadlines, set a hearing on the merits of Taxpayer's protest for September 25, 2017.

17. On July 5, 2017, the Department filed a Certificate of Service specifying that is served its First Set of Interrogatories and Request for Production of Documents on Taxpayer.

18. On August 11, 2017, Taxpayer filed a Certificate of Service specifying that is served its Answers to the Taxation and Revenue Department's First Set of Interrogatories and Request for Production of Documents on the Department.

19. On August 23, 2017, the Department filed Department's Motion to Compel Production. The motion included a copy of the Answers to the Taxation and Revenue Department's First Set of Interrogatories and Request for Production of Documents.

20. On September 6, 2017, the Administrative Hearings Office entered its Order

Compelling Taxpayer's Production of Documents.

21. On September 6, 2017, after entry of the Order Compelling Taxpayer's Production of Documents, Taxpayer filed a Response to the Department's Motion to Compel Production.

22. On September 6, 2017, the parties filed a Joint Prehearing Statement.

23. On September 12, 2017, the Department filed Department's Notice of Noncompliance that asserted Taxpayer's failure to comply with the Order Compelling Taxpayer's Production of Documents.

24. Taxpayer is registered in the State of New Mexico to engage in business. [Testimony of Ms. Vigil].

25. Taxpayer has been engaged in business for 35 years. [Testimony of Ms. Vigil].

26. Taxpayer performs landscape installation services and hauls landscape materials, including sand and gravel. [Testimony of Ms. Vigil].

27. Ms. Vigil is a member of the limited liability company through which Taxpayer engages in business. She shares ownership of the business with her spouse. [Testimony of Ms. Vigil].

28. In normal circumstances, Taxpayer delivers or picks up materials on a one-way basis meaning that Taxpayer's trucks are regularly empty during their outgoing or returning trips from Taxpayer's place of business. [Testimony of Ms. Vigil].

29. Taxpayer estimates that at least 50 percent of the miles its trucks travel are empty of all load. [Testimony of Ms. Vigil].

30. Taxpayer's trucks are registered in the State of New Mexico. [Testimony of Ms. Vigil].

31. Taxpayer usually relies on fuel tickets to record the number of miles its trucks travel. [Testimony of Ms. Vigil].

32. Since Taxpayer's vehicles do not travel beyond 150 miles from its center of business, it does not maintain driver's logs. [Testimony of Ms. Vigil; Department Ex. B-3].

33. The Department performed an audit of Taxpayer's weight distance tax reporting in 2009. [Testimony of Ms. Vigil; Testimony of Ms. Galewaler; Department Ex. B].

34. Taxpayer described providing all requested documentation, including its field tickets, fuel receipts, and registrations to the individual's performing the audit for the Department at or near that time. [Testimony of Ms. Vigil].

35. Taxpayer did not retain copies of the field tickets, fuel receipts, registrations, or other records that may have been relevant to its protest. [Testimony of Ms. Vigil].

36. The Department's audit determined that Taxpayer underreported its weight distance tax by more than 25 percent during all years within the audit period eventually giving rise to the assessment. [Testimony of Ms. Galewaler; Taxpayer Ex. B-7].

37. Taxpayer protested the assessment and described several attempts to follow up with the Department regarding the status of its protest, or to retrieve documents that Ms. Vigil may have provided to the Department. [Testimony of Ms. Vigil].

38. Taxpayer Exhibits 1.A – 1.I represent Taxpayer's efforts to prove that it only provides one-way hauling services and represent the statements of individuals purporting to have knowledge regarding Taxpayer's hauling practices. [Testimony of Ms. Vigil; Taxpayer Exs. 1.A – 1.I].

39. With the exception of Taxpayer Exhibit 1.B, which was executed by Peter Vigil, Jr., all other statements are from customers or vendors who have engaged in business with

Taxpayer. [Testimony of Ms. Vigil; Taxpayer Exs. 1.A – 1.I].

40. Ms. Galewaler is the Department's protest auditor. She reviewed the file and did not see any documents that may have been provided by Taxpayer to the Department that would have established entitlement to a reduced rate for one-way haulers, including invoices, bills, or fuel receipts. [Testimony of Ms. Galewaler].

41. Despite assertions that documents had been provided to the Department, the audit narrative indicated that Taxpayer did not maintain vehicle-specific fuel statements containing information pertinent to calculating the numbers of miles traveled with or without load. [Testimony of Ms. Galewaler; Dept. Ex. B-2 – B.4].

42. Ms. Galewaler indicated that Ms. Vigil agreed to send her additional documents relevant to the application of the one-way haul rate. Ms. Vigil did not provide any additional documents. [Testimony of Ms. Galewaler].

43. Taxpayer failed to maintain appropriate records to establish entitlement to a one-way haul rate. [Testimony of Ms. Galewaler; Dept. Ex. B].

44. As of the date of the hearing, Taxpayer's weight distance tax liability was $144,579.96 less an offset in the amount of $61,673.64, for a total of $82,906.32. Taxpayer's weight distance tax penalty was $26,602.12 less an offset in the amount of $1,904.25, for a total penalty of $24,697.87. Taxpayer's weight distance tax interest was $49,854.41 less an offset in the amount of $711.05, for a total of $49,143.36. Therefore, the total outstanding liability was $156,747.55. [Testimony of Ms. Galewaler; Dept. Ex. A-1].

DISCUSSION

Although Taxpayer protested the overall assessment of weight distance tax, penalty, and interest, the only issues addressed by Taxpayer's evidence and argument concerned: 1) whether

it should be entitled to the reduced rate afforded to one-way haulers under NMSA 1978, Sec. 7-15A-6; and 2) what records were lawfully required for establishing such entitlement. However, prior to addressing the substance of Taxpayer's protest, the Hearing Officer will briefly address the delay in bringing Taxpayer's protest to hearing.

Significance of Delay and Statute of Limitations

By the time the Department's Hearing Request was filed with the Administrative Hearings Office on April 4, 2017, Taxpayer's protest had been pending more than six years. A Notice of Administrative Hearing was promptly entered and served on the parties on April 5, 2017, setting a hearing on the merits of Taxpayer's protest for April 26, 2017. After several unopposed requests to continue by Taxpayer, the hearing on the merits in this protest occurred more than seven years from the date that Taxpayer's protest was initially received and acknowledged by the Department.

Although disconcerting, the delay from 2010 to 2017 does not impair the Department's efforts to collect an outstanding liability in this case. New Mexico courts have applied the general rule of tardiness in administrative hearings under the Tax Administration Act: the "tardiness of public officers in the performance of statutory duties is not a defense to an action by the state to enforce a public right or to protect public interests." *See Kmart Props., Inc. v. Taxation & Revenue Dep't*, 2006-NMCA-026, 139 N.M. 177, 131 P.3d 27; *See also Matter of Ranchers-Tufco Limestone Project*, 1983-NMCA-126, 100 N.M. 632, 674 P.2d 522. Collection of taxes is the enforcement of a public right and interest which the Department has an obligation to administer under the rationale of *Kmart*.

Taxpayer justifiably expressed a general frustration with the delay, but it stopped short of asserting prejudice. Even had Taxpayer claimed prejudice, there was simply no evidence upon

which the assertion could be sustained. *See In re Ranchers-Tufco Limestone Project Joint Venture*. The only evidence in the record to even remotely suggest prejudice was that Taxpayer was no longer in possession of any records upon which its protest could rely. However, Taxpayer did not attribute its lack of records to the delay, as will be addressed more thoroughly in the discussion regarding the merits of Taxpayer's protest.

The Department's efforts to collect the assessed tax are also within the applicable statute of limitations. NMSA 1978, Section 7-1-18 (D) provides "[i]f a taxpayer in a return understates by more than twenty-five percent the amount of liability for any tax for the period to which the return relates, appropriate assessments may be made by the department *at any time within six years from the end of the calendar year in which payment of the tax was due*." In this case, the evidence established that the assessment arose from an audit in which the Department concluded that Taxpayer underreported its liability by more than 25 percent, which provided the Department with six years to assess Taxpayer from the end of the calendar year in which the tax was due. Because the earliest reporting period at issue in this protest ended on December 31, 2003, the date on which the tax was due for that period was January 31, 2004. *See* NMSA 1878, Sec. 7-15A-9. Consequently, the end of the calendar year in which the tax was due was December 31, 2004. Six years from that date, which represented the deadline under the statute of limitations, was December 31, 2010. The assessment in this protest, dated June 8, 2010, was timely and within the period required by Section 7-1-18 (D). Taxpayer's protest was thereafter acknowledged on August 19, 2010.

NMSA 1978, Section 7-1-19 then provides that "[n]o action or proceeding shall be brought to collect taxes administered under the provisions of the Tax Administration Act and due under an assessment or notice of the assessment of taxes after the later of either *ten years from*

the date of such assessment or notice or, with respect to undischarged amounts in a bankruptcy proceeding, one year after the later of the issuance of the final order or the date of the last scheduled payment." In the present matter, the Department remains within the ten-year period provided by Section 7-1-19 because the assessment was issued less than 10 years ago.

Therefore, Taxpayer was not prejudiced by the delay observed in the present matter nor was the Department prohibited from pursuing Taxpayer for payment of an assessed tax liability.

Presumption of Correctness and Burden of Proof

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed to be correct. Consequently, Taxpayer has the burden to overcome the assessment and show it was entitled to an abatement of tax, penalty and interest under the Weight Distance Tax Act. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Accordingly, it is Taxpayer's burden to present some countervailing evidence or legal argument to show that it is entitled to an abatement, in full or in part, of the assessment issued against it. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. "Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness." *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217; *See also* Regulation 3.1.6.12 NMAC.

Seeking the reduced rate afforded to a one-way hauler is analogous to claiming a deduction or exemption of tax that otherwise would be owed. Case law addressing a taxpayer's burden when claiming a deduction is persuasive in considering whether Taxpayer is entitled to the reduced rate. "Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by

the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447.

Weight Distance Tax Act and the One-Way Haul Rate

The Weight Distance Tax Act ("WDTA") imposes a tax on all registered vehicles with a declared weight in excess of 26,000 pounds that travel on state highways. *See* NMSA 1978, Sec. 7-15A-3 (1988).

The rates to be imposed under the WDTA are provided at NMSA 1978, Section 7-15A-6 (2004) which also authorizes a reduced rate for vehicles that qualify as one-way haulers. Section 7-15A-6 (B) states as follows in reference to the reduced one-way haul rate at issue in this protest:

> B. All motor vehicles for which the tax is computed under Subsection A of this section shall pay a tax that is two-thirds of the tax computed under Subsection A of this section if:
>
> (1) the motor vehicle is customarily used for one-way haul;
>
> (2) forty-five percent or more of the mileage traveled by the motor vehicle for a registration year is mileage that is traveled empty of all load; and
>
> (3) the registrant, owner or operator of the vehicle attempting to qualify under this subsection has made a sworn application to the department to be classified under this subsection for a registration year and has given whatever information is required by the department to determine the eligibility of the vehicle to be classified under this subsection and the vehicle has been so classified.

If the registrant, owner or operator of the vehicle can satisfy the one-way haul rate criteria, then the applicable rate shall be established at two-thirds of the base tax rate established under Subsection A. The central issue raised by Taxpayer is whether it should be entitled to the

reduced rate afforded to one-way haulers and what records were necessary to establish that entitlement.

Various regulations address one-way haulers for the purposes of Section 7-15A-6 (B). Regulation 3.12.6.7 NMAC provides definitions for empty miles, loaded miles, and one-way haulers. Regulation 3.12.6.7 (A) NMAC provides that "empty miles" means the "number of miles traveled on New Mexico roads when the vehicle or vehicle combination is transporting no load whatsoever."

Regulations 3.12.6.10 and 3.12.6.11 NMAC respectively impose the methods by which one-way haulers are to report miles traveled and the records they are required to maintain. With concern for records, Regulation 3.12.6.11 states:

> **3.12.6.11 ONE-WAY HAULERS - REQUIRED RECORDS:**
>
> One-way haulers shall maintain the following records on a reporting period basis. All records shall be referenced by vehicle unit number:
>
> A. Vehicle trip mileage records for each vehicle operated in New Mexico. The mileage records shall reflect the total empty miles and the total loaded miles traveled on New Mexico roads. Accurate trip mileage records indicating empty and loaded miles may include:
>
> (1) accurate map mileage for each trip;
>
> (2) hubometer or odometer readings; or
>
> (3) vehicle-specific log books.
>
> B. Vehicle itineraries including the origin and destination point of each trip, and the routes taken.

The problem for Taxpayer in this protest arose in its inability to produce any type of records, either described in the regulation or otherwise, which will be discussed in more detail

below. Instead, Taxpayer relied entirely on the testimony of Ms. Vigil to establish that it should qualify for the one-way hauler rate under the WDTA. In an effort to complement Ms. Vigil's testimony, Taxpayer also proffered unsworn, written statements of individuals who were neither called to testify in this matter, nor whose statements the Hearing Officer found to be reliable because it was questionable whether any of the declarants had personal knowledge regarding the subject matter of their own statements. [Taxpayer Ex. 1].

Lack of Records to Establish Entitlement to One-Way Haul Rate

Taxpayer attempted to explain why it could not produce any records to establish its entitlement to the reduced one-way hauler rate. Ms. Vigil asserted that Taxpayer previously provided all relevant records to the Department, but erred by not retaining copies for itself. Taxpayer also alleged that the Department never returned its documents. Although, Taxpayer does not explicitly accuse the Department of losing or destroying its records, the insinuation is evident.

However, despite Taxpayer's suggestion, the contents of the administrative file contradict Taxpayer's explanation of events. As recently as September 6, 2017, counsel for Taxpayer expressed its intention to introduce the following records at the hearing in this protest: "[i]nvoices and bills for materials sold and delivered in the year in issue. Fuel receipts, books and records which reflect mileage and weight of vehicles." *See Joint Prehearing Statement*, Page 5 (Exhibit Lists – Para. 2.a.) (filed 9/6/2017). The Joint Prehearing Statement did not indicate that Taxpayer's records, upon which it intended to rely at the hearing, were not in its possession.

There is more. The Department conducted discovery in this matter, which eventually gave rise to filing Department's Motion to Compel Production on August 23, 2017 (hereinafter "Motion to Compel"). As an attachment to its Motion to Compel, the Department provided

Taxpayer's Answers to Taxation and Revenue Department's First Set of Interrogatories and Request for Production of Documents (hereinafter "Answers and Responses"). *See Motion to Compel*, TRD Exhibit A-0001 – A-0010. The final page of the Answers and Responses, as attached to the Motion to Compel, was the Verification of Ms. Vigil. She verified that, being duly sworn and upon oath, the Answers and Responses were "true and correct to the best of [her] knowledge and belief." The verification was executed on August 11, 2017 before a Notary Public of the State of New Mexico.

Turning to the Answers and Responses, Interrogatory No. 7 requested that Taxpayer "identify all exhibits that [it] will or may introduce into evidence at the formal hearing in this matter." Taxpayer's answer, verified to be true and correct to the best of Ms. Vigil's knowledge, stated "[i]nvoices and bills for materials sold and delivered in year in issue. Fuel receipts, books and records which reflect mileage and weight of vehicles." *See Motion to Compel*, TRD Exhibit A-0006.

Similarly, Interrogatory No. 8 requested that Taxpayer "fully explain why the Audit Assessment should not be assessed" and that Taxpayer "be specific as to dates, persons with knowledge, records or documents that support that [Taxpayer] should not be assessed." The Taxpayer's answer, verified to be true and correct to the best of Ms. Vigil's knowledge, stated "[i]nvoices and bills reflect sales of landscape materials delivered to customer. The customer normally does not require pick-up of materials to return facility." *See Motion to Compel*, TRD Exhibit A-0007.

Requests for Production Nos. 1, 2, 3, and 8, then requested all documents which Taxpayer specifically relied upon, referenced, identified, or for which it indicated an intention to introduce into evidence at the hearing. This request would include the documents referenced in

Taxpayer's answers to Interrogatories 7 and 8. In response to the request for production, verified to be true and correct to the best of Ms. Vigil's knowledge, Taxpayer clearly represented that the documents "will be available for inspection at Taxpayer's place of business." *See Motion to Compel*, TRD Exhibit A-0007 – A-0009 (Response Nos. 1, 2, 3, and 8).

The responses prompted the Department to file its Motion to Compel. The Taxpayer responded to the Motion, albeit after the Motion to Compel had been granted, and stated "Taxpayer has satisfied the request for production of documents by the Department and will submit requested documents at the hearing set for September 25, 2017 at 10 a.m." *See Response to Department's Motion to Compel Production* (filed 9/6/2017). Consistent with all prior representations, the response suggested that the documents were within Taxpayer's possession or control.

At no time that is evident from the pleadings contained in the administrative file, did Taxpayer ever suggest the possibility that it was not in possession or control of its own records. In contrast, Taxpayer plainly represented in the weeks preceding the hearing in this matter that it possessed all relevant records and they were available for inspection at its place of business. Taxpayer's counsel then seemed to reaffirm Taxpayer's representations when he stated that Taxpayer would "submit requested documents at the hearing[.]" *See Response to Department's Motion to Compel Production*.

However, in absolute and inexplicable contradiction, Ms. Vigil then testified at the hearing that Taxpayer *did not* actually possess records because the Department purportedly lost, destroyed, or even perhaps continued to retain them despite her requests for their return. Regrettably, Ms. Vigil's testimony was not credible. The events to which she testified, which supposedly resulted in the misplacement, destruction, or even misappropriation of Taxpayer's

records, were completely contradicted by reference to Taxpayer's own pleadings in the administrative file.

It was obvious that Taxpayer did not maintain or possess any records to establish its entitlement to the reduced one-way haul rate. This conclusion was consistent with the remarks contained in the original audit, more than seven years preceding the hearing, indicating that Taxpayer simply did not maintain records sufficient to establish an entitlement to the reduced rate for one-way haulers. [Dept. Ex. B]. At the time of the hearing in this protest, the evidence established that nothing had changed. Taxpayer still could not provide any records sufficient to establish an entitlement to the one-way haul rate.

Legality of Record Keeping Regulations

Taxpayer argued that despite its lack of records, the Department's record keeping regulations exceed what is required by NMSA 1978, Sec. 7-15A-6 (B). Accordingly, Taxpayer argues it should not be penalized for its lack of records, because it has nevertheless provided evidence to meet the minimum requirements of the statute. The regulation to which this argument is directed is Regulation 3.12.6.11 NMAC.

Taxpayer's argument fails to persuade. The Department is empowered and directed by law to issue regulations in order to accomplish its statutory obligations of administering the tax laws of this state. *See* NMSA 1978, Sec. 9-11-6.2 (A). In doing so, the Department is afforded the presumption that any regulation, ruling, instruction, or order is a proper implementation of the law. *See* NMSA 1978, Sec. 9-11-6.2 (G). Thus, Regulation 3.12.6.11 is presumed to be a proper implementation of the law.

However, the Department may only promulgate regulations that *interpret and exemplify* the statutes to which they relate. *See* NMSA 1978, Section 9-11-6.2 (B) (1). Therefore, the

question is whether Regulation 3.12.6.11 NMAC interprets or exemplifies Section 7-15A-6, or whether it exceeds the requirements of what the statute permits, or imposes unreasonable or irrelevant requirements.

In deciding whether a regulation interprets or exemplifies a statute, a regulation may not abridge or otherwise limit the scope of the related statutory enactment. *See, Rainbo Baking Co. of El Paso, Tex. v. Comm'r of Revenue,* 1972-NMCA-139,¶¶ 10-12, 84 N.M. 303, 305-306. In *Rainbo Baking Co.*, the court held that the Commissioner of Revenue may not promulgate a regulation that would nullify a deduction authorized by the Legislature. In *Rainbo*, the Commissioner promulgated a regulation that required a nontaxable transaction certificate to be in the possession of the buyer at the time of an audit, which contradicted the statute which only required the buyer to have in its possession a nontaxable transaction certificate. Consequently, the Court ruled that a regulation may not add a requirement that the Legislature has not also authorized or imposed.

In *Gonzales v. Educ. Retirement Bd.*, 1990-NMSC-024, 109 N.M. 592, 788 P.2d 348, the Court held that the Educational Retirement Board could not enact a regulation that was "unreasonable or irrelevant." In *Gonzales*, the Board, by regulation, required a member who was requesting an award of disability benefits to hold no property interest in a bus contract. The Court said that there was nothing within the statutory grant of authority to award disability benefits which authorized the Board to refuse to accept an application for disability if the applicant continued to have a property interest in a bus contract. The Court held that the Board did not have the "statutory power to create unreasonable or irrelevant requirements within the application process before it considers the application." *Gonzales*, 109 N.M. at 594, 788 P.2d at 350. Thus, the Board's regulation was held to create an unreasonable or irrelevant requirement.

Turning to Taxpayer's argument in this case, the Legislature has repeatedly recognized the importance of records to the administration of its tax laws. In addition to the general requirements that taxpayers maintain records pursuant to Section 7-1-10, the WDTA contains additional references relevant to the maintenance of records. Section 15A-9 D requires:

> *All registrants, owners or operators required to pay the weight distance tax shall preserve the records upon which the periodic payments required by Subsections A and B of this section are based for four years following the period for which a payment is made.* Upon request of the department, the registrant, owner or operator shall make the records available to the department at the owner's office for audit as to accuracy of computations and payments. If the registrant, owner or operator keeps the records at any place outside this state, the department or the department's authorized agent may examine them at the place where they are kept. The department may make arrangements with agencies of other jurisdictions administering motor vehicle laws for joint audits of any such registrants, owners or operators.
>
> (Emphasis Added)

It is unlikely that the Legislature would impose a requirement on taxpayers to retain records, if it also intended that taxpayers be entitled to qualify for the reduced one-way hauler rate based merely on verbal representations, which Taxpayer seeks in the present matter.

The Legislature has also empowered the Department to establish the method by which all taxpayers are to report total mileage traveled in New Mexico, which is an essential element of establishing entitlement to the one-way haul rate. Section 7-15A-8 (B) provides as follows:

> Registrants, owners and operators of all motor vehicles to which the tax applies shall report to the department, *in the manner required by the department*, the total mileage traveled in New Mexico and the total mileage traveled in all states during the tax payment period applicable to that registrant, owner or operator.

When read together, Sections 7-15A-9 (D) and 7-15A-8 (B) embody the Legislature's grant of authority to establish the manner in which information is to be reported to the

Department and the records that must be retained to substantiate those reports.

The Department's promulgation of Regulation 3.12.6.11 comes well within that grant of authority. The regulation does not impose *additional* requirements, but instead places all taxpayers on notice of the types of records the Department and taxpayer alike may rely upon in administering the WDTA. Taxpayer's arguments that the Department has exceeded its authority in Regulation 3.12.6.11 is rejected. In contrast, Regulation 3.12.6.11 represents a proper implementation of the law which neither imposed unreasonable nor irrelevant requirements on Taxpayer in this protest.

Taxpayer had the burden of rebutting the presumption of correctness that attached to the assessment, as well as the burden to establish entitlement to the reduced rate afforded to one-way haulers. Taxpayer offered no records whatsoever, instead relying exclusively on Ms. Vigil's testimony and the unsworn statements of individuals whose personal knowledge was questionable. It then attempted to shift responsibility for its failure to maintain records to the Department with a recitation of events that was easily contradicted by its own pleadings. In conclusion, the evidence in support of Taxpayer's protest was inadequate and unreliable. Contrary to the rule propounded by *Casias*, Taxpayer failed to present some countervailing evidence or legal argument to show that it is entitled to an abatement, in full or in part, of the assessment issued against it. Taxpayer instead relied completely on unsubstantiated statements which cannot overcome the presumption of correctness. *See MPC Ltd.*, 2003-NMCA-21, ¶13.

Because Taxpayer did not present evidence or argument to rebut the presumption of correctness as applied to the assessment of interest or penalty in this protest, but instead specified that it was only asserting an entitlement to the reduced rate for one-way haulers, the Hearing Officer will not address arguments that Taxpayer did not raise. Therefore, the Hearing Officer

will not address the imposition of penalty or interest, except to reiterate that Taxpayer did not rebut the presumption of correctness that attached to the assessment.

For the reasons discussed herein, Taxpayer's protest should be DENIED.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely written protest to the assessment issued under Letter ID No. L0062305344 and jurisdiction lies over the parties and the subject matter of this protest.

B. Pursuant to NMSA 1978, Section 7-1-17 (C) (2007), the Department's assessment is presumed to be correct, and it is Taxpayer's burden to come forward with evidence and legal argument to establish that it was entitled to an abatement. Taxpayer did not meet its burden.

C. Under Section 7-1-67, Taxpayer is liable for interest under the assessment.

D. Under Section 7-1-69, Taxpayer is liable for penalty in failing to report or pay weight distance tax when due or in the accurate amount for the periods covered by the assessment.

E. Under Section 7-15A-16, Taxpayer is liable for penalty by virtue of underreporting mileage or weight for the periods covered by the assessment.

F. Taxpayer did not establish an entitlement to a reduced rate for one-way haulers under NMSA 1978, Sec. 7-15A-6 (B).

For the foregoing reasons, Taxpayer's protest **IS DENIED.** As of the date of the hearing, Taxpayer's weight distance tax liability was $144,579.96 less an offset in the amount of $61,673.64, for a total of $82,906.32. Taxpayer's weight distance tax penalty was $26,602.12.96 less an offset in the amount of $1,904.25, for a total penalty of $24,697.87. Taxpayer's weight distance tax interest was $49,854.41 less an offset in the amount of $711.05, for a total of $49,143.36. Therefore, Taxpayer's total outstanding liability was $156,747.55. Taxpayer shall be

liable for the total outstanding balance as of September 25, 2017, plus interest accruing since that date until the assessment is paid in full.

DATED: October 12, 2017

Chris Romero
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

On October 12, 2017, a copy of the foregoing Decision and Order was mailed to the parties listed below in the following manner: