STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
DIAMOND T U.S. MAIL SERVICE INC.
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1167412528

v. **D&O No. 18-28**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A protest hearing occurred in the above-captioned matter on July 16, 2018 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. At the hearing, Mr. Santiago Juarez, Esq. (AMPARO Legal Services, LLC), appeared representing Diamond T U.S. Mail Services, Inc. ("Taxpayer"). Mr. Richard Torrez and Mr. Andrew Perkins, CPA appeared by telephone and testified as witnesses for the Taxpayer. Mr. Peter Breen, Esq. appeared representing the Taxation and Revenue Department of the State of New Mexico ("Department") accompanied by Ms. Amanda Carlisle, protest auditor, who also testified as a witness for the Department. Taxpayer Exhibits 1, 2, 3, 4, 5, and 6 and Department Exhibits A and B were admitted into the record without objection. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 4, 2017, through Letter ID No. L1167412528, the Department assessed Taxpayer $146,687.88 in gross receipts tax, $28,206.33 in gross receipts tax penalty, $6,778.35 in gross receipts tax interest, $469.00 in withholding tax, $67.64 in withholding tax penalty, and

$11.05 in withholding tax interest, for a total assessment in the amount of $182,220.25 for the reporting periods from April 30, 2013 to December 31, 2016. [*See* Administrative File].

2. On August 28, 2017, the Department received Taxpayer's protest of the Department's assessment under Letter ID No. L1167412528. [*See* Administrative File].

3. On September 1, 2017, the Department's Protest Office acknowledged receipt of Taxpayer's valid and timely protest under Letter ID No. L1831005488. [*See* Administrative File].

4. On October 10, 2017, the Department filed a Hearing Request in which it requested that the Administrative Hearing Office conduct a scheduling hearing in reference to Taxpayer's protest. [*See* Administrative File].

5. On October 10, 2017, the Administrative Hearings Office issued a Notice of Telephonic Scheduling Conference, setting this matter for a scheduling hearing on October 27, 2017. [*See* Administrative File].

6. On October 27, 2017, Taxpayer's counsel of record, Mr. Juarez, entered his appearance on Taxpayer's behalf. [*See* Administrative File].

7. On October 27, 2017, a scheduling conference occurred in which the parties agreed that the hearing satisfied the 90-day hearing requirement established in NMSA 1978, Section 7-1B-8 (A). [*See* Administrative File].

8. On October 30, 2017, the Administrative Hearings Office issued a 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 January 11, 2018. [*See* Administrative File].

9. On December 22, 2017, Taxpayer, by and through its counsel of record, filed a Motion to Continue Hearing on the Merits Set for January 11, 2018. [*See* Administrative File].

10. On December 28, 2017, the Administrative Hearings Office entered a Continuance

Order and Notice of Administrative Hearing that continued the previously-set hearing on the merits of Taxpayer's protest to May 24, 2018. [*See* Administrative File].

11. On April 26, 2018, Taxpayer, by and through its counsel of record, filed its Motion to Continue Hearing on the Merits Set for May 24, 2018. [*See* Administrative File].

12. On May 3, 2018, the Administrative Hearings Office entered an Order Denying Motion to Continue Hearing on the Merits Set for May 24, 2018. [*See* Administrative File].

13. On May 7, 2018, Taxpayer, by and through its counsel of record, filed its Motion to Reconsider on the Motion to Continue Hearing on the Merits Set for May 24, 2018. [*See* Administrative File].

14. On May 8, 2017, the Administrative Hearings Office entered a Second Continuance Order and Notice of Administrative Hearing that continued the previously-set hearing on the merits of Taxpayer's protest to July 16, 2018. [*See* Administrative File].

15. On May 24, 2018, Taxpayer filed correspondence disclosing the names of witnesses it intended to call and describing the exhibits it contemplated relying upon at the hearing. [*See* Administrative File].

16. On July 10, 2018, Taxpayer filed its Motion for Telephonic Appearance of Expert Witness and Taxpayer for Hearing on the Merits Set for July 16, 2018. [*See* Administrative File].

17. On July 12, 2018, the Administrative Hearings Office entered an Order Allowing Telephonic Testimony. [*See* Administrative File].

18. Mr. Richard Torrez resides in Lubbock, Texas where he manages Taxpayer's business operations. [Testimony of Mr. Torrez].

19. Taxpayer has been owned and operated by Mr. Torrez' family for more than 20 years. [Testimony of Mr. Torrez].

20. During all periods relevant to the protest, Taxpayer was based in Roswell, New Mexico. [*See* Taxpayer Exhibit 2; Taxpayer Exhibit 3; Taxpayer Exhibit 4; Taxpayer Exhibit 5; Taxpayer Exhibit 6].

21. Since May of 2013, Taxpayer has been engaged in transporting bulk mail between the U.S. Mail processing facility in Lubbock, Texas and various locations in southeast New Mexico. [Testimony of Mr. Torrez; *See* Department Exhibit A].

22. Services are provided in accordance with a contract with the U.S. Postal Service. Taxpayer did not produce a copy of the contract, but the terms and conditions are similar to those provided in the Processing Network Transportation Terms and Conditions[1]. [Testimony of Mr. Torrez; *See* Taxpayer Exhibit 1, Part 3, Page 16].

23. The HCR Schedule Information, referencing contract number 793A2 specifies Taxpayer's routes, establishing the origin and final destination for each trip, the locations of scheduled stops[2], if any, occurring between a location of origin and final destination, and specific departure and arrival times for each scheduled stop. [Testimony of Mr. Torrez; *See* Taxpayer Exhibit 2].

24. Taxpayer's compensation under the contract is fixed, meaning that the U.S. Postal Service compensates Taxpayer based on annual mileage established per trip rather than by the quantity of mail transported between locations. [Testimony of Mr. Torrez].

25. With regard for trips originating in Lubbock, Texas, Taxpayer's vehicles are loaded at the U.S. Postal Service processing facility, and subsequently unloaded and loaded at various

[1] Although referred to as "the contract," Taxpayer Exhibit 1 more closely resembles a governmental solicitation for services. It establishes the procedure for preparing and evaluating proposals (Part 2), and contains what appears to be notice of boilerplate contract terms (Part 3). Unlike a proper contract, it does not identify the parties to the contract, the term of the contract, including the statement of work (Part I), the dates on which it was executed, or the individuals executing any contract, just to name a few apparent deficiencies.

[2] References to "stops" are intended to be synonymous with the term "delivery points." The Hearing Officer's selection of terms will depend on the context in which it is used, but the meanings shall not vary.

locations in southeast New Mexico, before traveling back to Lubbock, Texas. [Testimony of Mr. Torrez].

26. An in-depth review of Taxpayer Exhibit 2 illustrated a more complex operation than that described. Upon review of the HCR Schedule Information, no less than 31 individual trips[3] were identified, some of which originated or concluded in Lubbock, Texas, and some of which did not. Each trip is assigned a trip number. [*See* Taxpayer Exhibit 2]:

a. Twelve trips originate in Lubbock, Texas (Trip Numbers 601, 605, 603, 619, 609, 621, 611, 607, 617, 613, 504, and 506).

b. Ten trips conclude in Lubbock, Texas (Trip Numbers 602, 604, 606, 610, 622, 608, 612, 614, 505, and 503).

c. Nine trips originate and conclude in New Mexico (Trip Numbers 3, 1, 2, 4, 5, 6, 615, 501, and 502).

d. The frequencies of each trip per year determine the actual number of trips traveled, and associated stops made along the route of each trip.

e. Some trips are traveled as little as 20 times per year (Trip Numbers 505, 503, 504, and 506) while other routes were traveled as many as 365 days per year (Trip Number 608). The majority of trips were scheduled to occur no less than six days per week, except for specified holidays (Trip Numbers 3, 1, 2, 4, 601, 5, 6, 602, 603, 604, 606, 615, 609, 610, 621, 622, 611, 607, 612, 501, and 502).

f. Multiplying the trip by the annual frequency reveals the number of times per year Taxpayer is scheduled to complete a particular trip, along with the number of stops

[3] Even if a route eventually results in a round-trip, the schedule assigns separate trip numbers for the outgoing and incoming legs of the route. The various stops along each route are displayed in the center column. It is also worth noting that each route may call for multiple trips with different departure and arrival times, and scheduled stops made during an outgoing trip may not be the same as scheduled stops made during the incoming trip along the same route.

scheduled along the route of each trip.

g. Taxpayer is scheduled to complete a total of 4,711.20 trips to and from Lubbock, Texas per year.

h. For trips originating in Texas and concluding in New Mexico, Taxpayer is scheduled to make no less than 4,998.84 stops per year in New Mexico, including its final New Mexico destination.

i. For trips originating in New Mexico and concluding in Lubbock, Texas, Taxpayer is scheduled to make no less than 2,522.74 stops per year in New Mexico, not including its New Mexico point of origin[4].

j. The total number of stops per trip per year in New Mexico, for trips both originating and concluding in Lubbock Texas, is 7,521.58.

k. The difference between the total number of trips traveled per year and the sum of the number of trips originating and concluding in Lubbock, Texas, reveals the total number of trips that are completed entirely within New Mexico, or 2,727.36.

l. For intrastate trips both originating and concluding in New Mexico, Taxpayer is scheduled to make no less than 3,939.91 stops per year in New Mexico, not including its point of origin, but including its final destination.

m. The total number of stops occurring in New Mexico, regardless of the trips place of origin, and including the final destination of that location if it is within New Mexico, is 11,461.49.

n. Lubbock, Texas is the final destination for 2,350.03 trips per year, meaning

[4] The Hearing Officer has omitted from the calculations New Mexico points of origin because those points have already been counted as a final destinations attributed to another trip. Counting it again would incorrectly inflate the number of stops per trip by counting it as both a point of origin and a destination.

that it also serves as a delivery point for that number of trips per year.

o. If the total number of delivery points in New Mexico is 11,461.49 and the total number of delivery point in Texas is 2,350.03, then the sum of all delivery points per year is 13,811.52.

p. The physical locations of each scheduled stop within New Mexico are contained at Pages 7 – 9 of Taxpayer Exhibit 2. The New Mexico delivery points consist exclusively of U.S. post office facilities in Jal, Dexter, Eunice, Artesia, Tatum, Hobbs, Lake Arthur, Lakewood, Hagerman, Lovington, and two facilities each in both Carlsbad and Roswell. Accordingly, the total number of New Mexico locations served is 14.

q. Taxpayer's only stop in Texas is at the U.S. Postal Service processing facility in Lubbock.

27. The Department's audit makes reference to a second contract bearing number 88265 in which the auditor concluded that the services performed under that contract were entirely within New Mexico. Taxpayer did not reference that contract or seek to introduce evidence to dispute the auditor's conclusions with respect to that contract. [*See* Department Exhibit A, Page 2].

28. With respect to contract 793A2, the auditor identified 8 separate routes and concluded that only one route had a Texas delivery point. The auditor thereafter allowed a deduction from gross receipts in the amount of 12.5 percent representing 1/8 of Taxpayer's gross receipts. The denominator presumably represented the total number of routes contained on Taxpayer Exhibit 2 and the numerator correspondingly represented the single route the auditor perceived as having a Texas delivery point. [*See* Department Exhibit A].

29. The auditor's evaluation did not appear to consider the frequency with which trips

were traveled or stops made within each trip such that a trip conducted 20 times per year was regarded as equivalent to a trip that was completed 365 days per year. [*See* Department Exhibit A].

30. The auditor's evaluation also did not appear to consider the number of stops, or delivery points, per route of each trip, instead focusing on the final destination of the route.

31. Taxpayer Exhibit 2 reveals that the same calculation utilized by the auditor, but reflecting consideration of the frequency of each trip and its corresponding stops results in a slightly higher deduction of 17 percent, rather than 12.5 percent. The formula utilized in both instances requires dividing the total number of delivery points in New Mexico and Texas by the total number of delivery points in Texas (2,350.03/13,811.52=*.17*).

32. Taxpayer did not present any evidence to dispute the imposition of withholding tax, withholding tax penalty, or withholding tax interest. [*See* Record of Hearing].

DISCUSSION

This protest involves the question of whether Taxpayer is entitled to a deduction from gross receipts for delivery of U.S. mail transported between Lubbock, Texas and various delivery points in New Mexico under a contract with the United States Postal Service. Taxpayer relies on the application of NMSA 1978, Section 7-9-55 which provides that "[r]eceipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States constitution."

This protest represents a sequel to a prior protest involving the same parties and addressing similar facts and issues of law. The previous protest was filed in 2016 and was the subject of Decision and Order 17-02, entered on January 4, 2017, well before the Department issued the assessment giving rise to the present protest. On February 1, 2018, the Court of Appeals in the

matter of *N.M. Taxation and Revenue Dep't v. Diamond T US Mail Services, Inc.* affirmed the decision of the Hearing Officer in that matter. *See New Mexico Taxation and Revenue Dep't. v. Diamond T US Mail Services*, No. A-1-CA-36165 (N.M. Ct. App. September 20, 2017) (non-precedential).

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment from which this protest arises is presumed correct and the burden is on Taxpayer to overcome the presumption. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503, 134 P.3d 785, 791 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight).

For these reasons, Taxpayer carries the burden of presenting countervailing evidence or legal argument to show that it is entitled to an abatement of the assessment. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. "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-021, ¶13, 133 N.M. 217, 62 P.3d 308; *See also* Regulation 3.1.6.12 NMAC. If a taxpayer presents sufficient evidence to rebut the presumption, then the burden shifts to the Department to re-establish the correctness of the assessment. *See MPC*, 2003-NMCA-021, ¶13.

Withholding Tax, Penalty, and Interest.

Although the underlying assessment imposed a nominal amount of withholding tax and associated interest and penalty, Taxpayer did not present any evidence intended to rebut the presumption of correctness of that portion of the assessment. To the extent Taxpayer intended to protest that part of the assessment, its protest should be denied.

Gross Receipts Tax.

For the privilege of engaging in business, New Mexico imposes a gross receipts tax on the receipts of any person engaged in business. *See* NMSA 1978, Section 7-9-4 (2017). The Gross Receipts and Compensating Tax Act establishes a presumption that *all* receipts of a person engaged in business are taxable. *See* NMSA 1978, Section 7-9-5 (2002). "Engaging in business" is defined as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." *See* NMSA 1978, Section 7-9-3.3 (2003). The term "gross receipts" is defined at NMSA 1978, Section 7-9-3.5 (A) (1) (2007) to mean:

> the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico.

The term "service" is defined to mean "all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from selling or leasing property." *See* NMSA 1978, Section 7-9-3 (M). The evidence in this protest established that Taxpayer was providing services in New Mexico and for that reason, receipts derived from providing those services were taxable as gross receipts.

However, a taxpayer may also avail itself of any number of potentially applicable exemptions or deductions. If a taxpayer asserts entitlement to an exemption or deduction from gross receipts, then the burden is on the taxpayer to prove the entitlement. *See Pub. Serv. Co. v.*

N.M. Taxation & Revenue Dep't, 2007-NMCA-050, ¶32, 141 N.M. 520, 157 P.3d 85. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743, 497 P.2d 745. "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." *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 1988-NMCA-068, ¶8, 107 N.M. 540, 760 P.2d 1306; *See also Wing Pawn Shop v. Taxation & Revenue Dep't*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649; *See also Chavez v. Comm'r of Revenue*, 1970-NMCA-116, ¶7, 82 N.M. 97, 476 P.2d 67.

Easing Taxpayer's burden in this protest was the fact that the Department did not contest the deductibility of receipts under NMSA 1978, Section 7-9-55. Rather, the primary dispute revolved around the breadth of the deduction. In other words, Taxpayer argued that all of its receipts were in interstate commerce because its trucks crossed state boundaries to and from New Mexico. The Department argued that the amount of the deduction should be measured by employing Regulation 3.2.213.10 B NMAC, consistent with the prior ruling in Decision and Order 17-02.

Regulation 3.2.213.10 B (1) NMAC provides that a person who holds a contract for the transportation of United States mail from points within New Mexico to other points outside of New Mexico may deduct a portion of gross receipts which were derived from transactions in interstate commerce. Regulation 3.2.213.10 B (2) NMAC goes on to establish the method by which the deduction should be calculated. The total receipts from the contract are to be multiplied by a fraction, the numerator of which is the total number of delivery points in New Mexico and the denominator of which is the total number of delivery points. The term "delivery point" is used to denote any point where mail is required to be delivered under the contract.

Taxpayer presented the testimony of an expert witness to establish that all of Taxpayer's receipts were in interstate commerce. However, the Hearing Officer did not find the expert's testimony to be particularly helpful or enlightening to the issues at hand. Instead, the most informative piece of evidence consisted of the HCR Schedule Information admitted as Taxpayer Exhibit 2, which although unassuming at first glance, is bursting with all the information necessary to calculate the amount of the deduction to which Taxpayer might be entitled under NMSA 1978, Section 7-9-55 and Regulation 3.2.213.10 NMAC.

Taxpayer Exhibit 2 revealed that Taxpayer is scheduled to complete a total of 4,711.20 trips per year to and from Lubbock, Texas, as well as 3,939.91 intrastate trips which originate and conclude in New Mexico. During its performance of those trips, Taxpayer will make no less than 11,461.49 stops in New Mexico, and 2,350.03 stops in Texas. The total number of stops is 13,811.52.

Applying a variation of the formula contained in Regulation 3.2.213.10 NMAC, the Department identified a deductible percentage by multiplying Taxpayer's total receipts by a fraction, in which it concluded that the total number of delivery points in Texas should be the denominator, and the total number of delivery points in New Mexico and Texas would represent the numerator. Accordingly, it multiplied Taxpayer's receipts by 1/8 or 12.5 percent.

However, the Hearing Officer observed that the Department's evaluation of Taxpayer Exhibit 2 was oversimplified because it did not consider the frequencies of the various trips or the individual stops that each trip required. Considering stops along each trip is significant because those represent "delivery points" which according to the regulation denote "any point at which mail is required, by contract, to be delivered."

Reevaluating Taxpayer Exhibit 2 with these factors in mind, and employing the formula

provided in Regulation 3.2.213.10 B (2) NMAC, the Hearing Officer determined that the taxable portions of receipts derived from Taxpayer's services should be calculated by multiplying its receipts by a fraction, the numerator of which is the total number of delivery points in New Mexico (11,461.49) and the denominator of which is the total number of delivery points (13,811.52). The result of 11,461.49/13,811.52 is .83, or 83 percent. *See* Regulation 3.2.213.10 B (2) NMAC. The difference, or 17 percent, represents the amount of the deduction from receipts in interstate commerce under NMSA 1978, Section 7-9-55.

Taxpayer argued in Decision and Order 17-02 that Regulation 3.2.213.10 NMAC did not apply because the regulation makes specific reference to "star route contractors[,]" and because Taxpayer provided service under a HCR contract or a Highway Contract Route, the regulation was not applicable. Taxpayer does not raise that argument in the current protest, but argues instead that the same regulation is only applicable to the delivery of mail from points within New Mexico to points outside New Mexico. Taxpayer's perception of the rule is nonsensical because the end result of that interpretation might be that mail transported from New Mexico to Texas is deductible in interstate commerce, with the Department remaining silent with respect to the transportation of mail from Texas to New Mexico, implying a policy that perhaps such receipts are *not deductible* in interstate commerce. Not only does that interpretation defy logic and common sense, but it also tends to contradict the result that Taxpayer seeks in its protest.

Rather, NMSA 1978, Section 7-9-55, the statute which Regulation 3.2.213.10 B (2) NMAC implements, simply makes reference to interstate commerce, and does not distinguish commerce departing New Mexico from commerce entering New Mexico. Although the Court of Appeals did not engage in an in-depth comprehensive analysis of the regulation, it had some opportunity to consider its application in similar facts involving the same parties, and did not disapprove of its

application in the manner described herein. *See New Mexico Taxation and Revenue Dep't. v. Diamond T US Mail Services*, No. A-1-CA-36165 (N.M. Ct. App. September 20, 2017) (non-precedential). The relevant facts establishing the applicability of Regulation 3.2.213.10 B (2) NMAC remain unchanged since entry of Decision and Order 17-02 and the Court's summary disposition in No. A-1-CA-36165.

Nevertheless, in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), the United States Supreme Court established a four-part test to determine whether a state's attempts at taxation of multijurisdictional corporations conducting business and generating income in multiple states impermissibly interferes with the Commerce Clause. That four part test is (1) whether there is a substantial nexus between a taxpayer and the taxing State; (2) whether the tax is fairly apportioned; (3) whether the tax discriminates against interstate commerce; and (4) whether the tax is fairly related to the services provided by the State. *Id*.

Taxpayer did not address *Complete Auto*. However, the Hearing Officer was persuaded that the evidence clearly establishes that Taxpayer had substantial nexus in New Mexico because it was headquartered in New Mexico. *See* Taxpayer Exhibits 2 – 6 (each providing Taxpayer's address in Roswell, New Mexico). Moreover, the formula provided at Regulation 3.2.213.10 B (2) NMAC fairly apportions tax in a manner that does not discriminate against foreign commerce, and it is fairly related to the services provided by the state.

As previously recognized, this is the second time addressing this issue involving these parties in this forum. The significant difference this time around is that Taxpayer has provided sufficient information to apply the formula in Regulation 3.2.213.10 B (2) NMAC. In doing so, the Hearing Officer finds that Taxpayer's deduction from receipts should be 17 percent, rather than 12.5 percent as originally calculated by the Department.

The Hearing Officer also considered whether the deduction provided at NMSA 1978, Section 7-9-56 might be applicable. Taxpayer did not specifically address the potential relevance of this deduction, but the Hearing Officer will address several concerns with regard for its usage, and the evidence that could be pertinent to its hypothetical application. Section 7-9-56 provides that "[r]eceipts from transporting persons or property from one point to another in this state may be deducted from gross receipts when such persons or property, including any special or extra service reasonably necessary in connection therewith, is being transported in interstate or foreign commerce under a single contract."

Establishing an entitlement to a deduction under Section 7-9-56 (A), required that Taxpayer prove three elements: 1) the receipts must be from transporting persons or property from one point to another in New Mexico; 2) the transportation must have been in interstate commerce; and 3) the transportation must have been under a single contract. *See McKinnley Ambulance Serv. v. Bureau of Revenue*, 92 N.M. 599, 592 P.2d 515 (Ct.App.1979). Since the evidence required to establish entitlement to a deduction under Section 7-9-56 and *McKinnley* differs from the evidence required to establish a deduction under Section 7-9-55 and Regulation 3.2.213.10 B (2) NMAC, evidence viewed as sufficient for establishing entitlement to one may not necessarily be sufficient for establishing entitlement to the other.

Mr. Torrez and his expert witness emphasized that Taxpayer's compensation under the contract was "fixed rate", meaning Taxpayer was compensated solely on the number of miles it traveled. This distinction is significant for the purpose of evaluating Section 7-9-56 because it demonstrates that Taxpayer's receipts were not necessarily derived from delivering property between points in New Mexico, but rather, for making trips at regularly scheduled intervals. In other words, Taxpayer would be compensated whether its trucks were empty or chockfull of mail

suggesting that NMSA 1978, Section 7-9-56 is not applicable.

Even if Section 7-9-56 were potentially applicable, despite the foregoing observation, the Hearing Officer is nevertheless unpersuaded that Taxpayer's evidence establishes entitlement to the deduction, thereby rebutting the statutory presumption of correctness.

Unlike consideration of Section 7-9-55, which refers generally to interstate commerce, Section 7-9-56 specifically references a *contract*, which the Hearing Officer considers to be an essential component for establishing entitlement to the deduction. However, the actual contract was not admitted. Rather, the document that the parties referred to as "the contract" appeared to derive from a solicitation for proposals to provide services to the U.S. Postal Service. [*See* Taxpayer Exhibit 1]. Although Mr. Torrez testified that the terms and conditions contained in Taxpayer Exhibit 1 were the same as those contained in the actual contract, the Hearing Officer was not persuaded that it was reasonable to rely on that exhibit to surmise the material terms of the actual contract.

If a taxpayer asserts that the terms of a contract are material to the protest, then the best evidence of those terms is the contract itself, and it is incumbent on a taxpayer to present its best evidence. Otherwise, relying on Taxpayer Exhibit 1 to surmise the terms of the contract would require some degree of speculation and conjecture, in which the Hearing Officer declines to engage.

Moreover, the Hearing Officer found Taxpayer's testimonial evidence on points potentially relevant to this deduction to be fairly vague, and even contradictory. Mr. Torrez seemed to emphasize that Taxpayer was in the business of transporting mail from Lubbock to New Mexico only, and he did not specifically address whether Taxpayer transported mail between locations in New Mexico or from New Mexico back to Texas. Meanwhile, the HCR Schedule Information

suggests that Taxpayer did engage in intrastate transportation of mail in New Mexico, in addition to the transportation of mail from New Mexico back to Texas. For example, refer to Trip Numbers 1, 2, 3, 4, 5, 6, 501, 502, and 615 which originate and conclude in New Mexico, suggesting that Taxpayer's business involved more than what Mr. Torrez described. There are also a number of trips in which Taxpayer makes scheduled stops in New Mexico on its way back to Lubbock, suggesting that it was picking up cargo for delivery back to Texas, which Mr. Torrez's testimony seemed to refute. For example, refer to Trip Numbers 505, 602, 604, 606, 610, and 622. *See* Taxpayer Exhibit 2.

However, it is again worth noting that Taxpayer did not raise Section 7-9-56 as applicable in this protest, and for that reason, probably did not concentrate its evidence on establishing an entitlement to that deduction. Accordingly, this observation is not intended, nor should it be perceived as criticizing Taxpayer. In contrast, it is intended to clarify that the Hearing Officer considered the potential application of Section 7-9-56 in light of the evidence on the record, but remained unpersuaded that it should apply, especially in light of the general rule that deductions must be narrowly construed. *See Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779

In conclusion, the Hearing Officer finds that the deduction provided at Section 7-9-56 is not applicable, and even if it were, Taxpayer's evidence was insufficient to establish entitlement to it.

Penalty and Interest.

Although Taxpayer devoted no effort to disputing interest and penalties, they should nevertheless be acknowledged. When a taxpayer fails to make timely payment of taxes due to the state, "interest shall be paid to the state on that amount from the first day following the day on

which the tax becomes due...until it is paid." *See* NMSA 1978, Section 7-1-67 (2007). Under the statute, regardless of the reason for non-payment of the tax, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 206 P.3d 135 (statutory use of the word shall indicates mandatory requirement). The language of Section 7-1-67 also makes it clear that interest begins to run from the original due date of the tax until the tax principal is paid in full. The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer.

Under NMSA 1978, Section 7-1-69 (2007), when a taxpayer fails to pay taxes due to the state because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, by its use of the word "shall," civil penalty must be added to the assessment. As discussed above, the statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meet the legal definition of "negligence."

Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, Taxpayer's failure to pay gross receipts tax meets the legal definition of negligence as defined under Regulation 3.1.11.10 NMAC and Taxpayer presented no evidence or argument to rebut that finding. Since the Department's assessment of penalty and interest is presumed correct, and the Taxpayer did not offer evidence or argument to rebut that presumption, the Department's assessment of penalty and interest was appropriate.

Conclusion.

For the reasons stated herein, Taxpayer's protest is GRANTED to the extent it should be entitled to a deduction representing 17 percent of its gross receipts derived from providing services illustrated in the HCR Schedule Information, in lieu of 12.5 percent. The remainder of Taxpayer's protest is DENIED.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's Notice of Assessment of Taxes and Demand for Payment issued under Letter ID No. L1167412528, and jurisdiction lies over the parties and the subject matter of this protest.

B. A hearing was timely set and held within 90-days of the Department's acknowledgment of receipt of a valid protest under NMSA 1978, Section 7-1B-8 (2015).

C. Under NMSA 1978, Section 7-9-5 (2002), Taxpayer's gross receipts derived from engaging in business in New Mexico are presumed taxable.

D. Except as provided in the discussion above, pertinent to the percentage of the Taxpayer's deduction, Taxpayer did not overcome the presumption of correctness that attached to the assessment under NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, 84 N.M. 428, 504 P.2d 638.

E. Taxpayer had the burden to establish entitlement to a deduction under NMSA 1978, Section 7-9-55 or Section 7-9-56.

F. Deductions must be narrowly construed. *See Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779.

G. Taxpayer is entitled to a deduction from gross receipts under NMSA 1978, Section 7-9-55, as calculated pursuant to Regulation 3.2.213.10 B (2) NMAC.

H. Taxpayer is not entitled to a deduction from gross receipts under NMSA 1978, Section

9-9-56.

I. Under NMSA 1978, Sec. 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessment. Interest continues to accrue until the tax principal is satisfied.

J. Under NMSA 1978, Sec. 7-1-69 (2007), Taxpayer is liable for civil negligence penalty under the negligence definition found under Regulation 3.1.11.10 (C) NMAC

K. Taxpayer did not establish non-negligence under Regulation 3.1.11.11 NMAC.

For the foregoing reasons, Taxpayer's protest is **GRANTED in part and DENIED in part**. Taxpayer is entitled to a deduction equivalent to 17 percent instead of 12.5 percent of its gross receipts from services provided pursuant to Taxpayer Exhibit 2. The remainder of Taxpayer's protest is denied. IT IS THEREFORE ORDERED that the Department recalculate Taxpayer's liability based on the percentage indicated herein (17%). IT IS FURTHER ORDERED that Taxpayer be liable for, and remit payment to the Department in that amount.

DATED: September 4, 2018.

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 September 4, 2018, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail *Interagency Mail*

INTENTIONALLY BLANK

John D. Griego
Legal Assistant
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502