STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
DISCOVER BANK
TO TAXATION AND REVENUE DEPARTMENT'S
FAILURE TO GRANT OR DENY A REFUND

v. **D&O No. 18-44**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On November 28, 2017, Chief Hearing Officer Brian VanDenzen, Esq., conducted a merits administrative hearing in the matter of the tax protest of Discover Bank (Taxpayer) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Kathleen Dill, CPA, of PricewaterhouseCooper LLP appeared representing Taxpayer. Robert Garvey of PricewaterhouseCooper LLP appeared as a Taxpayer witness. Staff Attorney David Mittle appeared, representing the opposing party in the protest, the Taxation and Revenue Department (Department). Department protest auditors Tom Dillon, CPA, Milagros Bernardo, and Department corporate income tax supervisor Dan Armer, CPA, appeared as witnesses for the Department. Taxpayer Exhibit #1 and Department Exhibit H, I, and J were admitted into the record, as described in the detailed exhibit logs included in the record. Additionally, the hearing officer took administrative notice of New Mexico's 2012 Form CIT-1 Corporate Income and Franchise Tax Return Instructions, a document referenced and quoted by Taxpayer in testimony. (http://rfcmstrd.sks.com/?folderGUID=c4bd3ee6-7ed3-411c-927f-ff9901df7cd2#).

In quick factual summary, this matter stems from a series of assessments the Department made against Taxpayer for corporate income tax returns in 2011 and 2012, 2013, and 2014. In all

years at issue, in filing its corporate income tax returns, Taxpayer used the Department's special rules for apportionment of financial institutions. After the Department's Gentax system detected that Taxpayer's everywhere payroll denominator in the payroll factor compared to apportionable income was below a de minimis threshold level, Gentax flagged the returns for review. The Department ultimately made an equitable adjustment to the apportionment by eliminating the payroll factor. Taxpayer initially paid the assessment of tax for the two short periods in 2011 and 2012, but upon further investigation, protested the assessments in 2013 and 2014. Taxpayer's protests of 2013 and 2014 were successful in that the Department decided internally to abate the assessments rather than to pursue those years. Based upon the satisfactory determination of those years, Taxpayer filed a refund claim for the two short periods in 2011 and 2012. When the Department failed to act to either grant or deny that claim for refund, Taxpayer filed this protest specifically challenging the Department's inaction.

The main legal dispute in this matter is whether the Department appropriately and reasonably made equitable adjustments to Taxpayer's two short periods in 2011 and 2012 corporate income tax returns, which Taxpayer had filed in compliance with the special regulation governing apportionment for financial institutions. Taxpayer further argues that the imposition of penalty was inappropriate in this case and that it is entitled to costs and fees in this matter. Ultimately, after making findings of fact and discussing the issue in more detail throughout this decision, Taxpayer is entitled to its claim for refund but is not entitled to costs and fees. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer converted from calendar year to fiscal year in 2012, resulting in two short period years: one for 11-months (period starting December 1, 2011 through November 30,

2012) in 2011 and a one-month return (period starting December 1, 2012, ending December 31, 2012) for 2012. [11-28-17 CD 01:13:00-01:13:45].

2. The Department assessed Taxpayer corporate income tax, penalty, and interest for the two short periods in 2011 and 2012. [11-28-17 CD 01:13:00-01:13:45; Administrative Record, Claim for Refund Attachments, Assessment numbers L1354176976 and L1695983056].

3. Taxpayer initially paid the assessments for the two short periods in 2011 and 2012. [11-28-17 CD 01:13:00-01:13:45].

4. The Department also issued assessments for corporate income tax years 2013 and 2014, but fully abated those assessments after Taxpayer protested those years. [11-28-17 CD 01:13:00-01:14:38; 01:28:00-01:29:30].

5. During the abatement process of the 2013 and 2014 assessments and upon Taxpayer's inquiry about abatement of the paid assessments for the two short periods in 2011 and 2012, the Department informed Taxpayer that it would have to claim a refund for those periods. [11-28-17 CD 01:29:00-01:30:00].

6. On May 13, 2016, Taxpayer filed a claim for refund for $233,950.59 in corporate income tax for the two short periods in 2011 and 2012. [Administrative Record, Application for Refund].

7. The Department took no action to either grant or deny Taxpayer's claim for refunds within 120-days of the filing of the claim. [11-28-17 CD 01:29:30-01:32:38].

8. On December 8, 2016, Taxpayer timely protested the Department's failure to grant or deny its claim for refunds, a protest the Department received on December 9, 2016. [Administrative Record, Formal Protest].

9. On December 28, 2016, the Department acknowledged receipt of a valid protest in this matter. [Administrative Record, Acknowledgement Letter].

10. On January 3, 2017, the Department requested a hearing in this matter with the Administrative Hearings Office. [Administrative Record, Hearing Request].

11. On February 24, 2017, a scheduling hearing occurred, satisfying the 90-day hearing requirement without objection of the parties. At that time, the parties agreed on the November 28, 2017 hearing date. [Administrative Record, Audio Recording of Scheduling Hearing and Scheduling Notice; 11-28-17 CD 01:32:12-21].

12. On November 6, 2017, 22-days before the scheduled hearing, the Department emailed Taxpayer's representative that after "careful consideration," Taxpayer's claims for refund had been denied. [11-28-17 CD 01:35:00-01:36:00].

13. Taxpayer is in the business of lending money to its customers across the country primarily through credit cards and other personal loan products. [11-28-17 CD 01:16:50-01:16:59].

14. The vast majority of Taxpayer's activities are conducted from its principal place of business in Delaware. [11-28-17 CD 01:17:00-10].

15. Taxpayer does not have branches, work locations, offices, or employees in New Mexico. [11-28-17 CD 00:33:30-45; 01:17:10-18].

16. Taxpayer does not conduct business activities in New Mexico. [11-28-17 CD 01:16:20-01:17:18].

17. 6% of Taxpayer's customers are located in New Mexico and .6% of Taxpayer's revenue comes from New Mexico customers. [11-28-17 CD 01:13:50-01:14:07; 01:20:00-10].

18. .2% of Taxpayer's income is apportioned to New Mexico. [11-28-17 CD 01:14:07-17].

19. During the relevant period, Taxpayer had 1,000 employees and over $44,000,000.00 in payroll. [11-28-17 CD 01:28:00-01:29:41; 01:39:18-39; 02:04:00-21].

20. The employees' functions included establishment of all credit policies, new account analysis and approval, arranging for financing of daily and ongoing operations, accounting for daily settlement with merchants, and overall management of Taxpayer's activities. These activities are necessary for Taxpayer to generate income. [11-28-17 CD 00:43:01-00:43:30; 02:04:00-21].

21. Taxpayer's 1,000 employees were involved in the management and dispatch of $60-billion in capital, necessary for Taxpayer as a financial institution to generate income. [11-28-17 CD 01:28:00-01:29:41; 01:39:18-39; 02:04:00-21].

22. Relying on the advice of tax counsel and accountants, Taxpayer followed and apportioned its income pursuant to New Mexico's special regulations for financial institutions found at 3.5.19.17 NMAC during the relevant short periods in 2011 and 2012. [11-28-17 CD 01:10:21-34; 01:37:38-01:38:55].

23. With input from financial institutions, money-center states, and market states, the Multistate Tax Commission (MTC) developed a model rule for apportionment of financial institutions. [Taxpayer Ex. #1; 11-28-17 CD 01:18:30-01:23:04].

24. The MTC's model rule for apportionment of financial institutions balanced the interest of money-center states and market states and developed a fair and uniform apportionment. [Taxpayer Ex. #1; 11-28-17 CD 01:21:05-01:23:04].

25. The Department adopted the MTC's model rule for apportionment of financial institutions by special regulation 3.5.19.17 NMAC. [Taxpayer Ex. #1; 11-28-17 CD 01:18:30-01:21:05].

26. Using the apportionment method required under special regulation 3.5.19.17 NMAC, on Taxpayer's 2011 CIT-A for the period between December 1, 2011 and November 30, 2012, Taxpayer reported the following regarding apportionment:

a. $56,524,671,322.00 in total everywhere property (denominator), with zero property in New Mexico (numerator) for a property factor of 0%.

b. $43,917,056.00 in total everywhere payroll (denominator) with zero payroll in New Mexico (numerator) for a payroll factor of 0%.

c. $8,299,656,462.00 in total everywhere sales (denominator) with $46,627,741.00 in New Mexico sales (numerator) for a sales factor of 0.5618%.

d. After summing the three factors and dividing by three, Taxpayer listed an average New Mexico factor of 0.1873%.

[Dept. Ex. H-1; Administrative Record, claim for refund attachment, 2011 CIT-A].

27. Using the apportionment method required under special regulation 3.5.19.17 NMAC, on Taxpayer's 2012 CIT-A for the one-month December 1, 2012 through December 31, 2012 short period, Taxpayer reported the following regarding apportionment:

a. $59,320,641,369.00 in total everywhere property (denominator), with zero property in New Mexico (numerator) for a property factor of 0%.

b. $3,457,735.00 in total everywhere payroll (denominator) with zero payroll in New Mexico (numerator) for a payroll factor of 0%.

c. $797,809,851.00 in total everywhere sales (denominator) with $4,594,897.00 in New Mexico sales (numerator) for a sales factor of 0.5759%.

d. After summing the three factors and dividing by three, Taxpayer listed an average New Mexico factor of 0.1920%.

[Dept. Ex. H-1; Administrative Record, claim for refund, attachment 2012 CIT-A].

28. Dan Armer, CPA, is currently a Supervisor of the Corporate Income Tax Bureau of the Department. Mr. Armer has been a corporate income tax auditor with the Department since 1998 and has received significant training in corporate income tax over the years, including attending well-known corporate income tax education training programs at the University of California-Davis and Georgetown University. [11-28-17 CD 00:19:45-00:21:10].

29. Mr. Armer first became aware of this protest in 2017. [11-28-17 CD 00:55:30-00:56:14].

30. When a taxpayer files a corporate income tax return, that return is entered into the Department's Gentax computer system. [11-28-17 CD 00:27:00-00:27:55].

31. Gentax will process the data, run a math check on the return, and flag any return where the denominator of an apportionment factor in relation to income falls below a 3% de minimis threshold. [11-28-17 CD 00:27:56-00:29:06].

32. The Department's Corporate Income Tax Bureau reviews and audits any corporate income tax return where Gentax has flagged a denominator of an apportionment factor to determine whether that factor is distortive to the apportionment formula and must be eliminated. [11-28-17 CD 00:27:56-00:29:06].

33. During an audit, the Department reviews the type of industry that the taxpayer is in and whether that industry would require the inclusion of an otherwise de minimis factor,

compare the three factors in one particular year versus several years of filings, and then compares that factor against the other two factors to see if it is in fact a significant contributor to the generation of apportionable income. [11-28-17 CD 00:29:20-00:30:51].

34. The Department does not eliminate a factor because the numerator is zero. The Department looks at the relevance of the factor to the apportionable income and will include factors that have a significant impact in income generation. [11-28-17 CD 00:35:40-00:36:21].

35. The Department does not have an administrative routine, practice or policy to disregard the payroll factor from financial institutions under the special reporting methods for financial institutions. Instead, the Department will disallow a factor if a factor falls below a 3% of income de minimis standard. [2012 NM Instructions for Form CIT-1 Corporate Income and Franchise Tax Return Instructions, p.12; 11-28-17 CD 00:57:17-01:03:58].

36. New Mexico's 2012 CIT-1 return instructions provide the following information regarding exclusion of an apportionment factor (emphasis added):

> If the allocation and apportionment provisions of the Uniform Division of Income for Tax Purposes Act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may without prior approval or the Department may require - **if reasonable** - the **exclusion** of any one or more of the factors (property, payroll or sales). This would include removal of one or more of the factors whose factor is insignificant. **A factor is insignificant if the denominator (column 1) is between 0% and 3% of net income**. Use the number of significant factors included to compute the average. If you include an insignificant factor, attach an explanation.

[2012 NM Instructions for Form CIT-1 Corporate Income and Franchise Tax Return Instructions, p.12; 11-28-17 CD 01:39:00-15].

37. Taxpayer's corporate income tax returns during the audit period were flagged by Gentax as having a potentially de minimis or distortive payroll factor. [11-28-17 CD 00:52:36-00:53:28].

38. Department Exhibit H-1, a spreadsheet, shows Taxpayer's Corporate Income Tax returns during the relevant years as reported to New Mexico. [Department Ex. H-1; 11-28-17 CD 00:31:01-00:33:03].

39. Department Exhibit H-1, under the column labeled CIT-A Apportionment Income, shows the apportionment during the relevant years as reported to New Mexico as reported to the Department, which resulted in an average New Mexico percentage of 0.1878% in 2010, 0.1873% in 2011, 0.1920% in the month short period in 2012, 0.1910% in 2013, and 0.1896% in 2014 (an allocation adjustment in 2014 resulted in a final New Mexico percentage of 0.1907%). [Department Ex. H-1; 11-28-17 CD 00:33:03-00:34:38].

40. Department H-2, a spreadsheet, shows the Department's analysis of Taxpayer's corporate income tax return. [Department Ex. H-2; 11-28-17 CD 00:35:14-00:34:45].

41. In reviewing Taxpayer's relevant corporate income tax returns, the Department examined the relationship between Taxpayer's everywhere payroll factor (the denominator in the payroll fraction) against Taxpayer's apportionable income everywhere after allowance of state additions and deductions to examine the relationship between payroll and the generation of income. [11-28-17 CD 00:36:22-00:37:10].

42. In 2010, Taxpayer's total payroll of $39,448,670.00 was 2.0034% of Taxpayer's total apportioned income of $1,969,110,247.00. [Department. Ex. H.2; 11-28-17 CD 00:37:50-59].

43. In 2011, for the short period between December 1, 2011 and November 30, 2012, Taxpayer's total payroll of $43,917,056.00 was 1.5941% of Taxpayer's total apportioned income of $2,755,005,289.00. [Department. Ex. H.2; 11-28-17 CD 00:37:58-00:38:04].

44. In 2012, for the one-month short period of December 1, 2012, through December 31, 2012, Taxpayer's total payroll of $3,457,735.00 was 1.4496% of Taxpayer's total apportioned income of $238,536,719.00. [Department. Ex. H.2; 11-28-17 CD 00:38:04-17].

45. In 2013, Taxpayer's total payroll of $49,752,654.00 was 1.5709% of Taxpayer's total apportioned income of $3,167,173,685.00. [Department. Ex. H.2; 11-28-17 CD 00:38:17-22].

46. In 2014, Taxpayer's total payroll of $56,626,767.00 was 1.6037% of Taxpayer's total apportioned income of $3,530,912,516.00. [Department. Ex. H.2; 11-28-17 CD 00:38:22-26].

47. In looking at 2010, 2011, 2013, and 2015 (and excluding the one-month 2012 short period), the Department found that 1.69% is the average total payroll denominator against the apportionable total income. [Department. Ex. H.2; 11-28-17 CD 00:38:26-49].

48. When comparing everywhere payroll to everywhere property (comparing the denominators of the two factors), total payroll is .08% of total property. [Department. Ex. H.2; 11-28-17 CD 00:40:15-47].

49. When comparing everywhere payroll to everywhere sales (comparing the denominators of the two factors), total payroll is .53% of total sales. [Department. Ex. H.2; 11-28-17 CD 00:40:15-54].

50. The Department determined that an average of 1.69% payroll to income was indicative that payroll was not a significant contributor to Taxpayer's generation of income and thus concluded that inclusion of the payroll factor was de minimis and distortive of Taxpayer's true business activity in New Mexico. The Department made an equitable adjustment by

eliminating the payroll factor from Taxpayer's New Mexico apportionment. [Department. Ex. H.2; 11-28-17 CD 00:37:10-00:41:33; 00:51:42-00:52:12].

51. By elimination the payroll factor, the Department created a higher apportionment New Mexico percentage in the two periods at issue:

a. Under Return Adjustment Notice # L0293771728, the adjusted New Mexico percentage for the short period ending on November 30, 2012, after the Department's elimination of the payroll factors was .28% [Administrative Record, claim for refund attachment, Return Adjustment Notice #L0293771728, Page 2, line 11].

b. Under Return Adjustment Notice # L0667067856, the adjusted New Mexico percentage for the short period ending on December 31, 2012, after the Department's elimination of the payroll factors was .29% [Administrative Record, claim for refund attachment, Return Adjustment Notice # L0667067856, Page 2, line 11].

[11-28-17 CD 00:39:35-00:40:41; 00:51:26-42].

52. Mr. Armer opined that including all three factors including payroll understated Taxpayer's business activities in New Mexico and that the elimination of the payroll factors with the resultant increase in the New Mexico percentage was a fairer and more reasonable representation of Taxpayer's business activities in New Mexico. [11-28-17 CD 00:39:35-00:40:41; 00:45:33-54; 00:51:26-42].

53. While Mr. Armer agreed that Taxpayer's employees may be necessary for generation of income, Mr. Armer opined that as a result of the comparison of the factors, the employees represented in the payroll factor were not contributing significantly to the generation of income to warrant a full equal weighting with the other factors and thus payroll should not be included in Taxpayer's apportionment. [11-28-17 CD 00:40:41-00:44:19].

54. Mr. Robert Garvey is state and local tax principle at PricewaterhouseCoopers with 23-years of experience in state and local taxation, and in particular a focus on financial institution. Mr. Garvey has bachelor of science in Finance from Miami University and a juris doctorate from the University of Cincinnati. [11-28-17 CD 01:11:26-01:12:12].

55. Mr. Garvey opined that the Department did not and could not establish that payroll was not an important component of the generation of income, that special regulatory apportionment method for financial institutions did not fairly represent Taxpayer's activities in the state, could not reasonably justify the elimination of the payroll factor, and could not establish that its alternative apportionment more fairly and reasonably captured the extent of Taxpayer's activities in the state. [11-28-17 CD 01:15:00-01:16:38; 01:28:07-01:29:09; 01:31:10-1:31:39; 01:39:10-1:39:41].

56. Mr. Garvey indicated that Taxpayer follows the MTC model rule for apportionment of financial institutions in other states. Mr. Garvey further opined that deviating from that special rule of apportionment for financial institutions in New Mexico will result in double taxation in other states where it follows the special rule. [11-28-17 CD 01:38:15-1:38:31].

DISCUSSION

As stated in the introduction, the main issue in this protest is whether, during the two short periods at issue in the claim for refund, the Department's elimination of the payroll factor from the special regulatory apportionment formula for financial institutions was justified. In short answer, the Department did not carry its burden to eliminate the payroll factor from the proscribed special apportionment method, and thus Taxpayer's refund claims must be granted. While Taxpayer is the prevailing party, Taxpayer will not be granted costs and fees because the closeness of the case established that the Department had a reasonable application of the law to the facts.

Burden of Proof at Protest.

The Department originally issued an assessment in this case for Taxpayer's two periods in 2012 corporate income tax, which Taxpayer paid. Those original assessments, including the assessment for penalty and interest, were entitled to the statutory presumption of correctness under NMSA 1978, Section 7-1-17 (C) (2007). *See also* NMSA 1978, §7-1-3 (X) (2013); *See also* Regulation 3.1.6.13 NMAC.

Taxpayer now seeks a refund on the amount paid under those assessments. Taxpayer has the burden to establish its entitlement to the claim for refund and accompanying interest. *See* Regulation 3.8.10 (A) NMAC. When claiming refunds related to the payment of Department assessments, the issue must be analyzed through the "lens of presumption of correctness." *Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17, 142 N.M. 779 (Court of Appeals reviewed a refund denial through "lens of presumption of correctness").

However, this case also involves a competing burden of proof. Taxpayer's claim for refund is premised on payment for an assessed tax after the Department made an equitable adjustment to Taxpayer's apportionment. As will be discussed in more detail, the party seeking to depart from the proscribed apportionment method bears the burden of proving by clear and convincing evidence that such departure is appropriate. Because of this burden, the Department agreed in this matter to present its case first.

The Corporate Income Tax and Franchise Tax Act, UDITPA, and Apportionment.

There is no dispute that Taxpayer is subject to the New Mexico Corporate Income Tax and Franchise Tax Act and that Taxpayer filed its corporate income tax returns using a special regulatory method for financial institutions. Nevertheless, a brief overview of the requirements of the Corporate Income Tax Act and the Uniform Division of Income for Tax Purposes Act ("UDITPA") provides

helpful context to resolution of the specific issue in this protest.

Subject to the limitations of the United States Constitution's Due Process and Commerce Clause, under NMSA 1978, Section 7-2A-3, New Mexico levies an income tax on "the net income of every domestic corporation and upon the net income of every foreign corporation employed or engaged in the transaction of business in, into or from this state or deriving any income from any property or employment within this state." As used under the Corporate Income and Franchise Tax Act, the term "corporations" includes corporations, joint stock corporations, certain real estate trusts, financial corporations, banks, other business associations, limited liability companies and partnerships taxed as corporations under the Internal Revenue Code. *See* NMSA 1978, § 7-2A-2 (D).

Generally, states may not impose an income tax on the value earned outside of its border under the Due Process and Commerce Clauses of the United States Constitution. *See ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 314 (1982). Specifically, the Commerce and Due Process Clauses of the United States Constitution impose distinct but parallel limitations on New Mexico's power to tax value earned from out-of-state business activities. *See Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 454 (1980); *Norfolk & Western R. Co. v. Missouri Tax Comm'n.*, 390 U.S. 317, 325, n.5 (1969). However, states may tax a fairly apportioned share of a multistate entity's business income. *See Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458-462 (1959). In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court held that a state tax on foreign corporations performing exclusively interstate business will not violate the protections of the Commerce Clause if the tax meets the following four-part test: (1) a sufficient nexus exists between the activity being taxed and the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to services provided by the state.

New Mexico, like many states, has adopted the Uniform Division of Income for Tax Purposes Act ("UDITPA") to address fair apportionment and allocation of income earned by multistate or multinational entities. *See* NMSA 1978, §§7-4-1 through 7-4-21; *see also ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 311 fn.3 (1982) (short discussion of history of UDITPA) ; *see also J. Hellerstein & W. Hellerstein*, State Taxation, ¶9.01 (3rd ed. 2001-2015) (discussion of history of adoption of UDITPA, or similar statutory regimes, by numerous states). UDITPA distinguishes between business income (apportionable to any state where a multistate taxpayer is subject to corporate income tax) and nonbusiness income (allocated only to a single location, usually a taxpayer's domicile). *See* NMSA 1978, §7-4-10 (A) (2013) ("…all business income shall be apportioned..."). Under UDITPA, business income is apportioned according to a three-factor formula based on the amount of a corporation's respective property, payroll, and sales everywhere (the denominators) against the respective amount of its property, payroll, and sales within a state (the numerators). Using the denominator and numerator in each category of property, payroll, and sales, a percentage is calculated for each of the three factors, and the average percentage of the three is then applied against the corporation's total income to determine the percentage amount of apportioned income subject to New Mexico's corporate income tax. *See* NMSA 1978, §§ 7-4-10 through 7-4-18.

The general idea behind UDITPA, amongst others, is to ensure that each state only taxes an apportioned share of a taxpayer's income, a share under the formula roughly commensurate with the portion of the income attributable to activities conducted within that respective state. *See e.g. Kmart Props., Inc. v. Taxation & Revenue Dep't,* 2006-NMCA-026, ¶ 46, 139 N.M. 177, 131 P.3d 27 (New Mexico Court of Appeals provide a brief overview of the apportionment process under a UDITPA and describes that process as "an effort at fair and uniform allocation of taxable income among the

states.”). UDITPA has two basic goals: “(1) fair apportionment of income among the taxing jurisdictions; and (2) uniformity of application of the statutes. *Twentieth Century-Fox Film Corp. v. Dep't of Revenue*, 299 Or. 220, 227, 700 P.2d 1035 (1985). If all states applied the UDITPA formula in a uniform manner, then a 100% of a multistate taxpayer’s income, and “no more or no less,” would be subject to tax. W.J. Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 Taxes 747, 748 (1957), as cited in *Twentieth Century-Fox Film Corp. v. Dep't of Revenue*, 299 Or. 220, 226-27, 700 P.2d 1035 (1985).

Although not the only permissible method of apportionment, UDITPA’s standard three-factor formulary apportionment has become the “benchmark” for fair apportionment. *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 170 (1983). As the United States Supreme Court noted, the reason why UDITPA’s standard three-factor apportionment has become the approved standard is because “payroll, property, and sales appear in combination to reflect a very large share of the activities by which value is generated.” *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 183 (1983). While there is expected variance between the three factors, the three factors averaged are designed in most cases to arrive at a reasonably reliable determination of a taxpayer’s activities in a state. Thus, the three-factor apportionment, even if such formula is “necessarily imperfect,” is generally able to avoid the “sort of distortions” that raise constitutional issues with state taxation of multistate businesses. *Id*.

UDITPA itself contains a provision that allows for equitable adjustment to the standard three factor apportionment when the three-factor formula does not fairly capture the business activity of a multistate taxpayer. This equitable adjustment provision of UDITPA has been adopted in New Mexico and codified as NMSA 1978, Section 7-4-19. Section 7-4-19 (emphasis added) reads:

> **If the allocation and apportionment** provisions of the Uniform Division of Income for Tax Purposes Act [7-4-1 NMSA 1978] **do not fairly represent the extent of the taxpayer's business activity in this state**, the taxpayer may petition for, or **the department may require**, in respect to all or any part of the taxpayer's business activity, **if reasonable**:
>
> > A. separate accounting;
> > B. the **exclusion of any one or more of the factors**;
> > C. the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
> > D. the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

UDITPA was designed primarily to address manufacturing and merchandising. *See Twentieth Century-Fox Film Corp.*, 299 Or. 220, 227, 700 P.2d 1035. The drafters of UDITPA created this equitable apportionment provision to provide flexibility to tax administrators and taxpayers when the standard three-factor apportionment would reach an "unreasonable result." W.J. Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 Taxes 747, 781 (1957), as cited in *Twentieth Century-Fox Film Corp.*, 299 Or. 220, 227, 700 P.2d 1035. As Professor Pierce, the drafter of UDITPA expounded, the equitable apportionment provision of UDITPA allows for

> some latitude for showing that for the particular business activity, some more equitable method of allocation and apportionment could be achieved. Of course, departures from the basic formula should be avoided except where reasonableness requires. Nonetheless, some alternative method must be available to handle the constitutional problem as well as the unusual cases, because no statutory pattern could ever resolve satisfactorily the problem for the multitude of taxpayers with individual business characteristics.

W.J. Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 Taxes 747, 781 (1957), as cited in *Twentieth Century-Fox Film Corp.*, 299 Or. 220, 226-227, 700 P.2d 1035.

The party seeking to depart from the standard apportionment formula carries the burden of persuasion as to why the modification is necessary. *See Kmart Props., Inc. v. Taxation &*

Revenue Dep't (KPI), 2006-NMCA-026, ¶¶ 50-51, 139 N.M. 177 (reversed on other grounds; certiorari as to corporate income tax issues quashed). In order to meet this burden of departure, the party seeking the departure must prove two things: first, that statutory formula as a whole does not fairly represent the extent of the taxpayer's business activity in the state and second that the alternative method of apportionment employed is reasonable. *See Twentieth Century-Fox Film Corp.*, 299 Or. 220, 233, 700 P.2d 1035 (1985). When there is substantial evidence that the standard formula distorts the reality of the taxpayer's state activity, it is appropriate to depart from the standard three factor formula. *See KPI*, ¶51.

Equitable Adjustments and Special Apportionment for Financial Institutions.

This protest involves a special regulatory apportionment method for financial institutions under Regulation 3.5.19.17 NMAC. Regulation 3.5.19.17 NMAC is based on the model rule developed by the Multistate Tax Commission (MTC). *See* Taxpayer Ex. #1 (Report of MTC Hearing Officer). Regulation 3.5.19.17 (A)(1) NMAC requires all financial institutions whose business activity is taxable both within and without this state to use the special apportionment method described in that regulation. There was no dispute that Taxpayer is a financial institution required to apportion under Regulation 3.5.19.17 (A)(1) NMAC. Under Regulation 3.5.19.17 (A)(2) NMAC, the apportionment percentage is determined by averaging of receipts, property, and payroll with certain adjustments compared to the standard apportionment. The special regulation, unlike UDITPA, allows inclusion of intangibles into the property factor, and changes the rules of assignment under the sales factor, assigning the revenue to the location of the taxpayer's customers. *See* Regulation 3.5.19.17 NMAC; *see also* testimony of Mr. Garvey to [11-28-17 CD 01:17:53-01:20:18]. Regulation 3.5.19.17 NMAC retains the same payroll factor as UDITPA. *See id*. If a factor is missing i.e. both the numerator and denominator are zero, then that

factor is eliminated from the averaging of the factors. *See id*.

There was some debate in testimony and questioning whether Regulation 3.5.19.17 NMAC is part of or separate from UDITPA, however the semantics of that debate are not particularly helpful in reaching a resolution[1]. While it is true that the special rule for financial institutions is not expressly found in the statutory language of UDITPA, that special rule is found in New Mexico's regulations interpreting UDITPA and specifically the application of the equitable adjustment statutory provision contained in UDITPA. In title 3, chapter 5, part 19, the Department has promulgated a series of rules that "interpret, exemplify, implement, and enforce [UDITPA]." *See* 3.5.19.6 NMAC. The title of Part 19 of those rules is "Equitable Adjustment of Standard Allocation or Apportionment," suggesting that the rules under Part 19 give further guidance to the Department's implementation of UDITPA's Section 7-4-19 equitable adjustment provision. Regulation 3.5.19.8, which addresses the general application of the special rule regulations, recites the equitable adjustment UDITPA provision nearly verbatim. Thus, even if not technically included in the statutory provisions of UDITPA, the special apportionment rule is certainly part of the regulations addressing, interpreting, and implementing the equitable adjustment provision contained in the UDITPA statutes.

Moreover, the special apportionment method for financial institutions articulated by Regulation 3.5.19.17 (4) NMAC (emphasis added) contains a provision substantively identical to UDITPA's equitable adjustment provision under Section 7-4-19:

> **If the allocation and apportionment provisions** of this section **do not fairly represent the extent of the taxpayer's business activity in this state**, the taxpayer may petition for or **the Secretary may require**, in respect to all or any part of the taxpayer's business activity, **if reasonable**:
> (a) separate accounting;

[1] Taxpayer did not challenge New Mexico's adoption of the special regulation requiring alternative apportionment for financial institutions.

> (b) **the exclusion of any one or more of the factors**,
> (c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
> (d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

In other words, like under the statutory provisions of UDITPA, even under the special apportionment rules for financial institutions, there is a provision for equitable adjustments if the special apportionment rules do not fairly represent the actual business activity of the taxpayer in New Mexico.

Although this protest does not involve the standard three factor apportionment addressed in *KPI*, the standard articulated in *KPI* applies equally to the Department's attempt to eliminate the payroll factor under the special regulation for apportionment for financial institutions. The accepted practice is that when a state promulgates special rules on apportionment pursuant to UDITPA's equitable adjustment provisions, those special rules for apportionment become the standard requirement for apportionment. *See J. Hellerstein & W. Hellerstein*, State Taxation, ¶9.20[4] (3rd ed. 2001-2015). Like in the standard articulated in *KPI*, once it is clear that the conditions of the special regulation apply, the special regulation becomes the default apportionment unless the party seeking the departure from the special regulation apportionment formula can show by clear and cogent evidence that the regulation "does not fairly represent the extent of the taxpayer's activities" in the state. *Id*., citing *Matter of the Appeal of Fluor Corporation*, 1995 WL 799363 (Cal.St.Bd.Eq.). Thus, the Department carries the burden of establishing by clear and cogent evidence that the special regulatory apportionment under Regulation 3.5.19.17 NMAC does not fairly represent Taxpayer's business activities in the state in order to invoke the UDITPA-equivalent equitable adjustment provisions contained under that regulation.

Taxpayer argued that the Department failed to meet its burden of showing that the payroll

factor is distortive and that it was reasonable of the Department to disregard the payroll factor. Taxpayer argued that by using the special apportionment regulation addressing financial institutions, the Department cannot establish that it was reasonable to eliminate the payroll factor identified in the special regulation. Taxpayer argued that payroll was critically important to Taxpayer's generation of income. To the extent that Taxpayer argues that there is no provision for the Department to seek equitable adjustments once a Taxpayer follows the special regulatory apportionment method for financial institutions under Regulation 3.5.19.17 NMAC, such argument is not persuasive for a couple of reasons already partially addressed in the overview of the special rule. First, the regulation itself contains a virtually identical equitable adjustment provision as contained in statute, making clear that the regulation intended to permit further equitable adjustments as necessary. And second, as Hellerstein and Hellerstein indicate in their preeminent state tax treatise, equitable adjustment relief remains viable even under the special apportionment methods specifically designed for the industry in question. *See J. Hellerstein & W. Hellerstein*, State Taxation, ¶9.20[7][o] & 10.08[4][b] (3rd ed. 2001-2015).

However, since there is no dispute during the protest that Taxpayer is a financial institution that was required to and did follow the special regulatory apportionment method, Taxpayer met its burden of showing potential entitlement for its claim for refund, shifting the burden to the Department. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217 (when a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department). In order to defeat the claim for refund, the Department must establish by clear and cogent grounds why the elimination of the payroll factor was necessary. *See KPI,* 2006-NMCA-026, ¶¶ 50-51, 139 N.M. 177. *See also Twentieth Century-Fox Film Corp.*, 299 Or. 220, 233, 700 P.2d 1035 (1985). When there is substantial evidence that the standard formula

distorts the reality of the taxpayer's state activity, it is appropriate to depart from the standard three factor formula. *See KPI*, ¶51.

The evidence in this case on distortion is mixed. On the one hand, the Department clearly established that Taxpayer's payroll factor played a small part in Taxpayer's generation of income in that it was 1.69% of total income, which mathematically fell below the Department's 3% de minimis threshold. The testimony of Mr. Armer was very helpful, both on this point and his overview of the Department's practice on apportionment. But on the other hand, aside from covering this mathematical component, the Department presented very little evidence, analysis, or research specific to this Taxpayer's actual activities to support its claim that a payroll of under 3% of income was a distortive factor in the generation of this Taxpayer's overall income. The Department's argument at its logical core breaks down into a syllogism: any factor less than 3% is de minimis; Taxpayer's payroll was less than 3%; therefore, Taxpayer's payroll was distortive. The Department's syllogism fails because the conclusion introduces a new concept, "distortive," that is not contained in either the major or minor premise. In other words, the Department's evidence and argument requires the assumption that de minimis necessarily means distortive.

While de minimis and distortive may frequently overlap, they are not necessarily always equivalent without some more information. Simply stating that a payroll with a 1.69% ratio to income appears de minimis without more does not in itself prove that the payroll factor is so distortive of Taxpayer's generation of income that an equitable adjustment must be applied to eliminate that factor. *See Paris Mfg. Co. v. Commonwealth*, 505 Pa. 15, 22, 476 A.2d 890 (1984) (Pennsylvania Supreme Court rejected an approach that relies on the mere disparity between the magnitude of property, payroll, and sales fractions to invoke equitable adjustments). *See also Microsoft Corp. v. Franchise Tax Bd.*, 39 Cal. 4th 750, 766, 47 Cal. Rptr. 3d 216, 139 P.3d 1169

(2006) (California Supreme Court established a two prong approach requiring both qualitatively difference and a quantitative distortion before granting equitable adjustment relief). *See cf. Kennecott Copper Corp. v. State Tax Comm'n*, 27 Utah 2d 119, 493 P.2d 632 (1972) (Utah Supreme Court allowed equitable adjustment to apportionment by elimination of factor with a ratio of 0.831% and 0.568%)[2]. As Hellerstein and Hellerstein caution, disparity with a single factor in the apportionment factor without more should not justify relief under equitable apportionment provisions. *See J. Hellerstein & W. Hellerstein*, State Taxation, ¶9.20[7][m] (3rd ed. 2001-2015). Instead, the focus must be on considering all three factors together to determine the distortive effect. *See id.* Although expressly addressing the standard three-factor apportionment, the Pennsylvania Supreme Court's rationale in *Paris Mfg.* is perhaps even more convincing as applied to a special apportionment method specifically designed for a narrow line of business like financial institutions:

> [w]e reject the Commonwealth's assertion that mere disparity between the magnitudes of the property, payroll, and sales fractions is, in itself, indicative of a failure of the apportionment formula to fairly reflect the loci of business activities. Indeed, for the typical company, such activities are of varied types and may normally occur in widely differing concentrations in multiple states. In recognition of this, the legislature has provided a standard apportionment formula comprised of the foregoing three fractional components, each of which reflects a realm of business activity capable of having its primary locus in a different state. When, as applied to a given taxpayer, the fractional components do in fact widely vary, the apportionment formula will normally provide the measure of business activity contemplated by the legislature, absent circumstances subverting the representations provided by the fractional components.

Paris Mfg. Co. v. Commonwealth, 505 Pa. 15, 22, 476 A.2d 890 (1984).

As Taxpayer argued, a credit card company by the nature of its business relies on its

[2] Hellerstein and Hellerstein, in discussing the "justified" dissent, appear to reject the approach of the majority of the Utah Supreme Court. *See J. Hellerstein & W. Hellerstein*, State Taxation, ¶9.20[7][c] (3rd ed. 2001-2015).

employees to a significant extent, even if the payroll amount will almost always be small in comparison to property, sales, and total income. Because of the unique nature of financial institutions, the MTC found it necessary to develop a model rule for apportionment of financial institutions, a rule that New Mexico adopted by regulation. That special rule still includes the unaltered payroll factor from the standard formula under the special apportionment method for financial institutions, suggesting that despite the unique model of financial institutions the MTC (and New Mexico in subsequent adoption of the regulation) believed payroll still played a part in income generation and the apportionment formula.

In contrast to the adopted model MTC rule under the special regulatory apportionment method, there is no statutory or regulatory finding that any factor whose denominator is under 3% of total income is de minimis. This 3% de minimis standard comes from the Department's 2012 CIT-1 instructions. *See* NMSA 1978, § 9-11-6.2(G) (the Department's instructions are presumed to be a proper implementation of the law). Given the burden of the party seeking to depart from the proscribed apportionment formula, the lack of any statutory or regulatory support for the 3% de minimis threshold, and the fact that Taxpayer followed the special apportionment method for financial institutions, it is not enough for the Department to simply point to the mathematical threshold alone as a basis to disregard the factor without showing a more particularized explanation as to why falling below that threshold means that apportionment does not fairly represent Taxpayer's business activity in the state. That is not to say that the Department can never eliminate a factor when it falls below the 3% threshold, only that it did not present enough evidence in this case that the special regulatory method of apportionment for financial institutions understated Taxpayer's activities in this state.

In this case, there is little evidence that aside from Gentax flagging the return, performing

a math check, and a quick review, that the Department undertook any sort of detailed or formal audit or consulted/inquired with Taxpayer about the nature of its activities before disregarding the payroll factor. Nor at hearing did the Department present any expert witness testimony who studied Taxpayer's activities and income generation, which occurred in the other cases that the Department cites in support of the deviation here. Mr. Armer's testimony was extremely helpful and insightful about the Department's general policies and practices on alternative apportionment and he did offer some general opinions about the mathematics insignificant of a 1.69% payroll to income ratio. While still appreciative of Mr. Armer's insight, Mr. Armer did not get involved in this matter until 2017, well after the Department had made the decision to disregard the payroll factor. Nor did his testimony offer much concrete analysis of Taxpayer's actual business activity in New Mexico or the role that Taxpayer's employees actually had in the generation of income.

In surveying other cases where elimination of a factor was permitted, it appears that there was a much more particularized justification other than citing of the mathematically de minimis ratio between the factor and income or there was a significantly lower ratio between the eliminated factor and income then is present in this protest. The Department cited *KPI* in support of its position in this protest. In the underlying hearing that led to the Court of Appeals decision in *KPI*, the hearing officer found that KPI generated approximately $300,000,000.00 a year in royalty income based upon a payroll of less than $200,000.00 per year. *See In the Matter of the Decision and Order of Kmart Properties*, *Inc.*, Tax & Rev'n Department Decision and Order 00-04, p.67, (February 1, 2000) (non-precedential). That means the ratio of KPI's payroll to income was 0.067%, a ratio that is some twenty-five times smaller than the average 1.69% payroll to income ratio present in this protest. Moreover, in reviewing the hearing officer's decision *In the Matter of the Decision and Order of Kmart Properties*, *Inc.*, it is clear that there was a far greater

evidentiary record developed by the parties[3] that made the distortion much more detectable than the record developed in this case.

Another decision and order that the Department cited, *In the Matter of the Protest of Wal-Mart Stores, Inc.*, Tax & Rev'n Depart. Decision and Order No. 06-07, p.8 F.o.F. #53 (May 1, 2006) (non-precedential), the hearing officer found that property and payroll (the two eliminated factors in that case) represented only 1/100ths percent of net income. 1/100th (0.01%) of a percent is far less than the 1.69% ratio in this protest. Unlike in this protest, in *Wal-Mart Stores, Inc.*, (where the Department also sought to depart from the operative three-factor apportionment formula), the Department produced an expert witness—an economist—who looked closely at how that taxpayer earned its income to determine what would be a more appropriate sourcing and apportionment method. *See id.*, p. 21-22. In other words, in *Wal-Mart Stores, Inc*., the Department did not rely simply on an assertion of a low ratio of total payroll/property to income under the 3% threshold for the eliminated factors but instead studied how that taxpayer actually earned its income to determine whether the apportionment formula fairly represented business activity in the state and whether the adjusted apportionment was reasonable. Moreover, in addition to the quantitative distinction between the ratio in the two cases and this protest, there is a qualitative difference between the facts of this protest, where Taxpayer had a 1,000 employees with more than 44-million in payroll and the skeleton staff and payroll at issue in both *KPI* and *Wal-Mart*.

In closing argument, the Department argued that to the extent the special regulatory

---

[3] The hearing in this case lasted only 2 hours and 45-minutes, and involved the presentation of only four exhibits and two witnesses. While both witnesses were quite informative and both representatives made effective arguments, there is little doubt that the evidentiary record in *KPI* and *Wal-Mart Stores, Inc*. had a much greater factual record than here.

apportionment method for financial institutions limits the Department's ability to make an equitable adjustment, that regulation must be rejected as violative of Section 7-4-19[4]. The Department itself promulgated and adopted the special regulatory apportionment method for financial institutions, and such regulations are presumed to be proper implementation of statutes. The Department always has the power to repeal its own regulations if it believes the regulation contradicts the statutory authority. Even if the hearing officer were to entertain the Department's invitation to invalidate the its regulation under 3.5.19.17 NMAC, it is unclear the Department would reach the result it argues for in this protest. As Mr. Garvey indicated [11-28-17 CD 01:16:18-01:16:31; 01:17:18-52], it is arguable that elimination of the special regulation in this case might mean that the Department has no ability to force Taxpayer to apportion any income to New Mexico. In any event, a Department argument that requires rejecting the Department's own regulation in order to prevail in one discrete protest is not particularly persuasive and appears to be inconsistent with effective and uniform administration of tax, one of the two major goals of UDITPA.

In summary, while this case represents a close analysis given the low, de minimis payroll to income ratio of 1.69% and Mr. Armer's thoughtful testimony, if the analysis is close, the party using the proscribed apportionment method must prevail. Where Taxpayer followed the special regulation for apportionment for financial institutions and the Department presented little

---

[4]Hellerstein and Hellerstein suggest that there is a question about whether it is appropriate for tax administrators, as opposed to the legislatures who adopted UDITPA, to use regulations to proscribe whole classes of equitable apportionment methods. *See J. Hellerstein & W. Hellerstein*, State Taxation, ¶9.20[1] (3rd ed. 2001-2015). Taxpayer did not raise a challenge to the regulation and the Department's concern is not with the existence of the financial category regulatory method as opposed to the statute but a desire to make further equitable adjustments within the special regulatory method as otherwise permitted by statute. Moreover, it seems clear that the Department had the authority to promulgate the regulation and that the regulation is presumed a proper implementation of the statute, making Hellerstein and Hellerstein's concerns an interesting philosophical question but not an issue in this case.

evidence or explanation of how following that special apportionment was in fact distortive of Taxpayer's business activities in this state beyond the de minimis mathematical ratio between total payroll and income, the hearing officer does not find that the Department met its burden to eliminate the payroll factor from the proscribed special apportionment formula. That is not to say that the Department could never prove that a de minimis mathematical ratio is not distortive, as happened in *KPI* and *Wal-Mart*. But 44-million in payroll from 1,000 employees, while certainly small compared to Taxpayer's revenue (1.69% on average from 2011 through 2014), is both quantitatively and qualitatively different from even lower payroll-to-income ratios and the barebones payroll of the two trademark companies at issue in *KPI* and *Wal-Mart*. In those two cases, the ratios between the factors and income were significantly lower and the Department presented evidence beyond the ratios as to why inclusion of the standard apportionment factors resulted in significantly understating those Taxpayers' business activities in the state. Consequently, Taxpayer's refund claims in this matter must be granted.

<u>Taxpayer's Argument for Awarding of Costs and Fees.</u>

Taxpayer argued that under NMSA 1978, Section 7-1-29.1 (2003), Taxpayer was entitled to attorney's fees and costs in this protest. Section 7-1-29.1 (2003) provides that when a taxpayer is the prevailing party in an administrative proceeding before the Department, the taxpayer shall be awarded reasonable administrative costs, including attorney's fees. The taxpayer is a "prevailing party" if it has substantially prevailed with respect to (a) the amount in controversy or (b) most of the issues involved in the case or the most significant issue or set of issues involved in the case. § 7-1-29.1(C)(1). In this case, because the refund should be granted, Taxpayer was the prevailing party, potentially entitling Taxpayer to the award of costs and fees under Section 7-1-29.1.

However, the taxpayer will not be treated as a prevailing party if the Department "establishes that the position of the department in the proceeding was based upon a reasonable application of the law to the facts of the case." § 7-1-29.1(C)(2). This case presented a close analysis, as a 1.69% total payroll to total income is quite low and potentially indicative that the payroll factor is distortive. Thus, the Department's position that an under 3% payroll factor was de minimis and potentially distortive of the true extent of Taxpayer's business activities in the state was a reasonable application of the law to the facts of the case, even though the Department ultimately did not prove sufficiently the distortion necessary to deviate from the proscribed apportionment method. Wherefore, Taxpayer's request for attorney's fees and costs is denied under Section 7-1-29.1(C)(2).

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the Department's failure to grant or deny a claim for refund and jurisdiction lies over the parties and the subject matter of this protest.

B. Regulation 3.5.19.17 NMAC is a valid implementation of equitable adjustment pursuant to NMSA 1978, Section 7-4-19 (1986).

C. Because Taxpayer was a financial institution, it was required to follow the apportionment proscribed under Regulation 3.5.19.17 NMAC.

D. Regulation 3.5.19.17 NMAC specifies inclusion of the payroll factor for a financial institution.

E. Regulation 3.5.19.17 NMAC allows for further equitable adjustments in a similar manner to permitted equitable adjustments under NMSA 1978, Section 7-4-19 (1986): when the party seeking a departure proves that that the formula as a whole does not fairly represent the extent of the taxpayer's business activity in the state and the alternative method of apportionment

employed is reasonable. *See J. Hellerstein & W. Hellerstein*, State Taxation, ¶9.20[4] (3rd ed. 2001-2015), quoting Matter of the Appeal of Fluor Corporation, 1995 WL 799363 (Cal.St.Bd.Eq.); *Cf. Kmart Props., Inc. v. Taxation & Revenue Dep't (KPI)*, 2006-NMCA-026, ¶¶ 50-51, 139 N.M. 177; *Cf. also Twentieth Century-Fox Film Corp. v. Dep't of Revenue*, 299 Or. 220, 233, 700 P.2d 1035 (1985).

F. The Department did not establish that Taxpayer's apportionment in compliance with the special regulatory apportionment method for financial institutions contained in Regulation 3.5.19.17 NMAC was as a whole distortive of Taxpayer's business activities in this state.

G. Because the Department's position was a reasonable application of the law to the facts of the case, Taxpayer is not entitled to the awarding of costs and fees in this matter. *See* NMSA 1978, Section 7-1-29.1 (2015).

For the foregoing reasons, Taxpayer's protest **IS GRANTED**. The Department is ordered to pay the claimed refund with appropriate interest as calculated under NMSA 1978, Section 7-1-68 (2017).

DATED: December 21, 2018

____

Brian VanDenzen, Esq.
Chief Hearing Officer
Administrative Hearings Office
P.O. 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 being 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 December 21, 2018, a copy of the foregoing Decision and Order was mailed to the parties listed below in the following manner:

First Class Mail and Email

INTENTIONALLY BLANK

Interoffice Mail and Email

____

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