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**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

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**IN THE MATTER OF THE PROTEST OF
DISTRIBUTION MANAGEMENT CORPORATION INC.
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1293029552**

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and

Case Numbers 18.12-328A and 18.12-330A

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LETTER ID NO. L0219287728

Decision and Order No. 20-03

10
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v.

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NEW MEXICO TAXATION AND REVENUE DEPARTMENT

12

DECISION AND ORDER

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On October 3, 2019, Hearing Officer Ignacio V. Gallegos, Esq., conducted a merits administrative hearing in the matter of the tax protest of Distribution Management Corporation Inc. (Taxpayer) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Attorney Wayne G. Chew appeared representing Taxpayer. Mr. Stephen Griego, president, appeared in person as the Taxpayer's primary witness, and witnesses Ricky Lee Shriver and Robert Esparza appeared by telephone for Taxpayer. Staff Attorney Peter Breen appeared, representing the opposing party in the protest, the Taxation and Revenue Department (Department). Department protest auditor Mary Griego appeared as a witness for the Department. Department Exhibits were admitted into the record without objection. Taxpayer Exhibit 1 was admitted over the Department's relevancy objection. Taxpayer also offered and retracted its offer of a box of driver records from 2015, which the Department objected to as being irrelevant and burdensome to sort. Taxpayer offered to prepare and present a summary of the contents of the box of exhibits, and the Hearing Officer allowed an additional two weeks' time to do so. Taxpayer never provided the 2015 driver records summary.

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In quick summary, this protest involves Taxpayer's International Fuel Tax Agreement (IFTA) returns and the adequacy of records supplied upon audit and thereafter. Taxpayers

1 protested the imposition of fuel tax, penalty, and interest in this case, arguing that, although the
2 required records were destroyed under the company's internal record-keeping policy, the
3 Taxpayer was able to replicate the fuel tax miles per gallon records using a different year, to
4 corroborate its 2015 reporting, and that the Department's default calculation of tax was
5 unfounded. Ultimately, after making findings of fact and discussing the issue in more detail
6 throughout this decision, the Hearing Officer finds that Taxpayers' protest must be denied. IT IS
7 DECIDED AND ORDERED AS FOLLOWS:

8 FINDINGS OF FACT

9 Procedural Findings

10 1. On September 25, 2018, under Letter Id. No. L1293029552, the Department
11 issued a Notice of Assessment of Taxes and Demand for Payment to Taxpayer, indicating that
12 Taxpayer owed \$952.63 for an International Registration Plan (IRP) Fleet Audit assessment for
13 tax period of April 30, 2017. [Administrative File].

14 2. On October 11, 2018, Taxpayer protested the IRP assessment alleging the audit
15 was erroneous. [Administrative File].

16 3. On November 7, 2019, under Letter Id. No. L1783861424, the Department
17 acknowledged receipt of Taxpayer's IRP protest. [Administrative File].

18 4. On November 13, 2018, Taxpayer filed a Qualified Representative Information
19 authorization, allowing Attorney Wayne G. Chew to receive all state tax information.
20 [Administrative File].

1 5. On December 20, 2018, the Department submitted a Hearing Request to the
2 Administrative Hearings Office, requesting a hearing on the protest under the IRP.
3 [Administrative File].

4 6. On December 21, 2018, the Administrative Hearings Office issued a Notice of
5 Telephonic Scheduling Hearing, setting the IRP matter for a telephonic hearing on January 9,
6 2019. [Administrative File].

7 7. The undersigned Administrative Hearing Officer Ignacio V. Gallegos conducted
8 the telephonic scheduling conference on January 9, 2019 with the parties present. Neither the
9 Department nor the Taxpayer objected that conducting the scheduling hearing satisfied the 90-
10 day hearing requirements of Section 7-1B-8 (A) (2015). The Hearing Officer preserved a
11 recording of the hearing. [Administrative File].

12 8. On September 25, 2018, under Letter Id. No. L0219287728, the Department
13 issued a Notice of Assessment of Taxes and Demand for Payment to Taxpayer, indicating that
14 Taxpayer owed tax in the amount of \$31,075.13, penalty of \$200.00, and interest of \$4,835.79,
15 for a total assessment of \$36,110.92 for an International Fuel Tax Agreement (IFTA) Carrier
16 Audit assessment for tax periods of March 31, 2015 through December 31, 2015.
17 [Administrative File].

18 9. On October 11, 2018, Taxpayer protested the IFTA assessment alleging the audit
19 was erroneous. [Administrative File].

20 10. On November 7, 2019, under Letter Id. No. L0710119600, the Department
21 acknowledged receipt of Taxpayer's IFTA protest. [Administrative File].

1 11. On November 13, 2018, Taxpayer filed a Qualified Representative Information
2 authorization, allowing Attorney Wayne G. Chew to receive all state tax information.

3 [Administrative File].

4 12. On December 21, 2018, the Department submitted a Hearing Request to the
5 Administrative Hearings Office, requesting a hearing on the protest under the International Fuel
6 Tax Agreement. [Administrative File].

7 13. On December 21, 2018, the Administrative Hearings Office issued a Notice of
8 Telephonic Scheduling Hearing, setting the IFTA matter for a telephonic hearing on January 9,
9 2019. [Administrative File].

10 14. The undersigned Administrative Hearing Officer Ignacio V. Gallegos conducted
11 the telephonic scheduling conference on January 9, 2019 with the parties present. Neither the
12 Department nor the Taxpayer objected that conducting the scheduling hearing satisfied the 90-
13 day hearing requirements of Section 7-1B-8 (A) (2015). The Hearing Officer preserved a
14 recording of the hearing. [Administrative File].

15 15. On January 10, 2019, the Administrative Hearings Office issued an Order
16 Consolidating Cases and Notice of Second Telephonic Scheduling Hearing, giving the parties
17 notice that a second scheduling hearing concerning the consolidated IFTA and IRP matters
18 would take place on February 20, 2019. [Administrative File].

19 16. The undersigned Administrative Hearing Officer Ignacio V. Gallegos conducted
20 the second telephonic scheduling conference on February 20, 2019 with the parties present. The
21 Hearing Officer preserved a recording of the hearing. [Administrative File].

1 17. On February 26, 2019, the Administrative Hearings Office issued a Notice of
2 Third Telephonic Scheduling Hearing, giving the parties notice that a third scheduling hearing
3 would take place on April 11, 2019. [Administrative File].

4 18. On March 29, 2019, Taxpayer filed a Notice of Non-Availability. [Administrative
5 File].

6 19. On March 29, 2019, Taxpayer filed a Motion to Vacate and Reset Administrative
7 Hearing in Albuquerque, under the misapprehension that a merits hearing was scheduled for May
8 7, 2019. [Administrative File].

9 20. Via email, the Department, through Staff Attorney Kenneth Fladager, agreed to a
10 continuance of the hearing, but objected to holding a hearing in Albuquerque. [Administrative
11 File].

12 21. The undersigned Administrative Hearing Officer Ignacio V. Gallegos conducted
13 the third telephonic scheduling conference on April 11, 2019 with the parties present. The
14 Hearing Officer preserved a recording of the hearing. [Administrative File].

15 22. On April 17, 2019, the Administrative Hearings Office issued a Scheduling Order
16 and Notice of Administrative Hearing, setting discovery and motions deadlines as well as
17 providing notice to the parties that the merits hearing would take place on October 3, 2019 in
18 Santa Fe, New Mexico. [Administrative File].

19 23. On October 2, 2019, Taxpayer filed its Affidavit of Stephen A. Griego, including
20 unmarked exhibits of (1) distances between El Paso, Texas and San Simon, Arizona, and
21 between San Simon, Arizona and Phoenix, Arizona; (2) a summary of receipts from the Phoenix
22 route procurement card statement between October 26, 2018 and December 21, 2018 for gallons
23 of fuel purchased in 2018; and (3) a summary of receipts from the El Paso route procurement

1 card statement between August 26, 2018 and December 21, 2018 for gallons of fuel purchased in
2 2018. [Administrative File].

3 24. The undersigned Administrative Hearing Officer Ignacio V. Gallegos conducted
4 the merits hearing on October 3, 2019 with the parties present at the Administrative Hearings
5 Office in the Wendell Chino Building in Santa Fe, New Mexico. The Hearing Officer preserved
6 a recording of the hearing in two parts: Hearing Record 1 and Hearing Record 2 (hereinafter
7 “H.R.1” and “H.R.2”). [Administrative File].

8 25. On October 4, 2019, the Department submitted a Notice of Late-Filed Exhibit,
9 TRD substitute exhibit C-001. [Administrative File].

10 26. On October 15, 2019, the Taxpayer submitted a Notice of Filing Late-Filed
11 Supplemental Exhibit. The filing did not contain any exhibits but did contain additional
12 argument. [Administrative File].

13 27. On October 17, 2019, the Department submitted a Summary of the Case,
14 containing additional argument. [Administrative File].

15 28. On October 18, 2019, the Taxpayer submitted its Surreply to Department’s
16 Summary of the Case, containing additional argument. [Administrative File].

17 **Substantive Findings**

18 29. The Department fully abated the IRP Audit assessment issued under Letter Id. No.
19 L1293029552 at some point before the merits hearing, although no supporting document
20 evidencing the same was provided by the parties. [Statement of Department Attorney Peter
21 Breen, H.R.1 at 6:30-7:30; Direct examination of Mary Griego, H.R.2 11:40-12:05].

1 30. Taxpayer Distribution Management Corporation, Inc. is a New Mexico
2 Corporation. The Taxpayer does business as DMC Logistics, LLC. [Affidavit of Stephen A.
3 Griego, Direct examination of Stephen A. Griego, H.R.1 29:30-30:05].

4 31. Stephen A. Griego is the president and chief executive officer for Taxpayer and
5 has operated the business for approximately 34 years. Mr. Griego has degrees from the
6 University of New Mexico Anderson School of Business and the University of Wisconsin.
7 [Direct examination of Stephen A. Griego, H.R.1 29:10-30:15].

8 32. Taxpayer provides pickup and delivery services throughout the southwest,
9 primarily in Texas, New Mexico, Arizona, Utah and Nevada. [Direct examination of Stephen A.
10 Griego, H.R.1 30:30-31:30].

11 33. Taxpayer's only 2015 self-operated interstate route using vehicles of a weight
12 greater than 26,000 pounds was from Phoenix to El Paso, with a return trip from El Paso to
13 Phoenix (hereinafter the "Phoenix/El Paso circuit route"). The Taxpayer owned a total of six
14 Peterbilt straight trucks for this route, and only two drove the route on any given workday.
15 [Direct examination of Stephen A. Griego, H.R.1 56:40-59:55, H.R.1 1:04:20-1:07:10].

16 34. The Phoenix/El Paso circuit route consisted of two trucks and two drivers
17 travelling on the same night, leaving their respective terminals in Phoenix and El Paso. The
18 circuit route consisted of two truck routes – the Phoenix route and the El Paso route. The
19 Phoenix route consisted of a truck leaving the hub in Phoenix loaded with a cargo of
20 pharmaceuticals from a warehouse in Phoenix (Tolleson) travelling to the El Paso hub where
21 they were unloaded and the cargo was separated and directed to the end users (hospitals and
22 pharmacies). The truck leaving El Paso was not loaded with cargo, except for returns and empty
23 totes, but was returning to the Phoenix hub for reloading. Over one night, one loaded truck

1 would leave from Phoenix and stop for fuel in San Simon, Arizona. On the same night, an
2 empty truck would leave El Paso and stop for fuel in San Simon, Arizona. In San Simon, the
3 two drivers met and traded trucks. The driver from Phoenix would then drive the empty truck to
4 Phoenix and the driver from El Paso would drive the loaded truck to El Paso. [Direct
5 examination of Stephen A. Griego, H.R.1 42:30-45:45; Direct examination of Ricky Lee Shriver,
6 H.R.1 2:17:50-2:22:00; Direct examination of Robert Esparza, H.R.1 2:26:00-2:28:31;
7 Department's Exhibit A-2].

8 35. Taxpayer purported that the total mileage for the Phoenix/El Paso circuit route did
9 not change between 2015 and 2018 yet provided no documentary support for this claim. The
10 Department accepted the reported miles of 2015 as correct. [Direct examination of Stephen A.
11 Griego, H.R.1 59:45-1:02:55; Direct examination of Robert Esparza, H.R.1 2:28:00-2:28:25;
12 Direct examination of Mary Griego, H.R.2 12:25-14:55; Department Exhibit A-13].

13 36. The Taxpayer purported that Phoenix/El Paso circuit route ran consistently five
14 times per week both in 2015 and 2018 yet provided no documentary support for this claim.
15 [Direct examination of Stephen A. Griego, H.R.1 59:45-1:02:55; Direct examination of Ricky
16 Lee Shriver, H.R.1 2:17:50-2:20:10; Direct examination of Robert Esparza, H.R.1 2:26:15-
17 2:28:30].

18 37. The audit report workpapers indicate that the circuit route was not so consistent as
19 purported. The IFTA reported miles in all jurisdictions during the first quarter of 2015 was
20 156,114. The reported miles in all jurisdictions during the second quarter of 2015 was 158,592.
21 The reported miles during the third quarter of 2015 was 158,592. The reported miles in all
22 jurisdictions during the fourth quarter of 2015 was 56,320. The fourth quarter of 2015 had a
23 102,272 -mile discrepancy from the previous two quarters that remained unexplained, showing

1 inconsistency. There was no document provided to support the claim that 2018 matched 2015,
2 whether through an IFTA report of 2018 or another document that could verify the consistency
3 in variables for mileage and fuel usage. [Exhibit A-13, Exhibit A-14, and Exhibit A-15 (Column
4 A); Exhibit A-16 (IFTA summary statement)].

5 38. Taxpayer destroyed its fuel purchase records for tax year 2015. When the
6 Department audited the Taxpayer's fuel use under the International Fuel Tax Agreement, the
7 Taxpayer was unable to provide original records of fuel purchases for the time frame under audit.
8 [Direct examination of Stephen A. Griego, H.R.1 45:35-47:00].

9 39. Taxpayer tracks its trucks electronically, especially those containing
10 pharmaceuticals, using a global positioning system (GPS). [Direct examination of Stephen A.
11 Griego, H.R.1 53:30-55:45; Cross examination of Stephen A. Griego, H.R.1 1:44:30-1:45:30].

12 40. The only original physical records that remained from 2015 were driver logs (also
13 referred to as manifests) which contained no fuel purchase records. The 2015 driver logs were
14 purported to contain starting and ending odometer readings, yet no summary of their contents
15 was ever provided to directly compare with the 2018 summary provided in the Taxpayer's
16 Affidavit. Miles reported for IFTA returns were taken from MapQuest, for the circuit route,
17 rather than as a sum of the driver logs or directly from GPS. [Direct examination of Stephen A.
18 Griego, H.R.1:20:40-1:21:55; H.R.1 2:31:45-2:36:25; Cross examination of Stephen A. Griego,
19 H.R.1 1:41:35-1:44:30; AHO examination of Stephen A. Griego, H.R.1 2:08:55-2:10:20].

20 41. Taxpayer submitted its fuel purchase receipts and its procurement card statements
21 for approximately the same four months subject to audit (September through December) of a
22 different year not the subject of audit (2018) to provide an alternative (or "test period") to the
23 records the Department requested for the audit period in 2015. The procurement card statements

1 submitted covered only the El Paso route (El Paso to San Simon and back to El Paso) and not the
2 Phoenix route (Phoenix to San Simon and back to Phoenix). [Affidavit of Stephen A. Griego;
3 Taxpayer's Exhibit 1; Direct examination of Stephen A. Griego, H.R.1 1:11:50-1:20:40].

4 42. Taxpayer purported to have reported 2015 miles per gallon (MPG) as 7.0 MPG to
5 be conservative, rounding down, rather than the 7.7 MPG he claimed the trucks ran at using the
6 2018 summary. The miles per gallon (MPG) reported to IFTA were consistently 7.77 miles per
7 gallon in all four quarters of 2015, and the 2018 records summary shows a monthly average of
8 7.76 miles per gallon. [Affidavit of Stephen A. Griego (summary of 2018 fuel usage); Direct
9 examination of Stephen A. Griego, H.R.1 1:15:30-1:20:40, H.R.1 1:23:10-1:24:20; Cross
10 examination of Stephen A. Griego, H.R.1 1:27:50-1:28:30; Department's Exhibit A-13, A-14, A-
11 15, A-16 (Column C)].

12 43. The procurement cards used by the truck drivers were assigned to the routes for
13 diesel fuel purchases only. There are different procurement cards for the driver leaving from and
14 returning to El Paso, and the driver leaving from and returning to Phoenix. [Department Exhibit
15 B; Taxpayer's Exhibit 1; Direct Examination of Stephen A. Griego, H.R.1 1:11:40-1:12:30;
16 Cross examination of Stephen A. Griego, H.R.1 1:48:30-1:50:30].

17 44. In 2015 the El Paso route designation on the procurement card statement was
18 ELP406, account ending in 5147, for a time period unrelated to the audit. In 2018 the El Paso
19 route designation on the statement was ELP409, account ending in 2315. [Department exhibit B;
20 Taxpayer exhibit 1-001, 1-019, 1-032, 1-057; Cross examination of Stephen A. Griego, H.R.1
21 1:48:30-1:50:30].

22 45. Once unloaded, the vehicles would travel within the cities of El Paso and
23 Phoenix, for service and maintenance as well as other reasons. The trucks required frequent

1 maintenance. There is no mechanic employed at the El Paso hub. [Direct examination of
2 Stephen A. Griego, H.R.1 1:18:55-1:19:15; 1:23:00-1:24:00; Cross examination of Stephen A.
3 Griego, H.R.1 1:43:15-1:43:45; Cross examination of Ricky Lee Shriver, H.R.1 2:22:15-2:23:30;
4 Cross examination of Robert Esparza, H.R.1 2:28:50-2:29:00].

5 46. New Mexico is the IFTA home base jurisdiction of this Taxpayer/Licensee
6 [Direct examination of Mary Griego, H.R.2 4:45-4:55].

7 47. The Department used the most recent IFTA Articles of Agreement, Procedures
8 Manual, and Audit Manual available on the IFTA official website when conducting this audit.
9 These were effective December 1, 2018. The earlier versions were not available on the website.
10 [AHO examination of Mary Griego, H.R.2 33:45-37:15; Re-cross examination of Mary Griego,
11 H.R.2 47:00-47:20; Department Exhibit A].

12 48. The Taxpayer provided procurement card statements with fuel purchase dollar
13 amounts for the timeframe at issue in the audit to the auditor but did not provide gallonage, fuel
14 type, or truck numbers. The Taxpayer did not provide the same procurement card statements as
15 evidence to support its position at the merits hearing. [Direct examination of Mary Griego, H.R.2
16 5:10-5:40; Cross examination of Mary Griego H.R.2 15:20-23:20].

17 49. The Department considered the procurement card statements inadequate to
18 support gallonage, type of fuel, and the identity of the vehicle into which the fuel was placed.
19 [Cross examination of Mary Griego, H.R.2 21:00-23:20].

20 50. The Department applied the 4.0 MPG default miles per gallon rate based on the
21 Taxpayer's inability to provide adequate fuel records. [Direct examination of Mary Griego,
22 H.R.2 5:35-7:55; Department Exhibit A-7].

23 **DISCUSSION**

1 Taxpayer claims that the quantity of fuel it used in 2015 was comparable to the fuel it
2 used in 2018 and asserted that providing records for 2018 should satisfy the Department for
3 support of its reported fuel used in 2015. Taxpayer seeks to apply the miles per gallon
4 calculation justified by receipts in the last four months of 2018 as a substitute for records to
5 support the miles per gallon it reported in the last four months of 2015. The Taxpayer has
6 offered this alternative method because its internal records retention policy required retention of
7 fuel purchase records for only ninety days, and the records of 2015 fuel purchases had been
8 destroyed by the time of the audit in 2018. The International Fuel Tax Agreement (IFTA), under
9 which the audit was conducted, requires participating carriers to retain supporting documents for
10 four years. Although the Department accepted the reported miles travelled, there remained
11 variables unsupported by Taxpayer's evidence. The Taxpayer's witnesses' testimony, although
12 credible, was at times directly contradicted by documentary evidence, causing the Hearing
13 Officer to hesitate to accept any general statements at face value. When the Taxpayer was given
14 the opportunity to provide a late-filed exhibit to supplement the record by summarizing the 2015
15 trip logs, which were purported to corroborate the testimony that the fuel receipts for 2018
16 matched the variables (gallons purchased and miles travelled within each state) from 2015 that
17 go into the computation of fuel use taxes, Taxpayer failed to take the opportunity. Taxpayer's
18 approach to support its 2015 reporting, by the comparison to 2018, was both unorthodox and
19 ultimately unconvincing.

20 Under NMSA 1978, Section 7-1-17 (C) (2007) an assessment issued by the Department
21 is presumed correct. Likewise, under IFTA, an assessment against a licensee, issued by a base
22 jurisdiction is presumed correct. *See* International Fuel Tax Agreement, Art. XII, R1210.300 (as

1 amended through July 1, 2000)¹. Consequently, “where the validity of the assessment is
2 questioned, the burden shall be on the licensee to establish by a fair preponderance of evidence
3 that the assessment is erroneous or excessive.” *See Id.* Likewise, unless otherwise specified, for
4 the purposes of the Tax Administration Act, “tax” is defined to include interest and civil penalty.
5 *See* NMSA 1978, Section 7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption
6 of correctness under Section 7-1-17 (C) extends to the Department’s assessment of penalty and
7 interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation & Revenue*, 2006-NMCA-50,
8 ¶16, 139 N.M. 498, 134 P.3d 785 (agency regulations interpreting a statute are presumed proper and
9 are to be given substantial weight). Accordingly, it is a taxpayer’s burden to present some
10 countervailing evidence or legal argument to show that they are entitled to an abatement, in full
11 or in part, of the assessment issued in the protest. *See N.M. Taxation & Revenue Dep’t v. Casias*
12 *Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. When a taxpayer presents sufficient evidence to
13 rebut the presumption, the burden shifts to the Department to show that the assessment is correct.

¹ The IFTA governing documents (Articles of Agreement, Procedures Manual and Audit Manual) are the substantive legal documents pertinent to the resolution of this dispute and contain the law governing the case. It should be noted that the Articles of Agreement and Procedures Manual were revised, re-published and made effective December 1, 2018, less than three months after the assessment was issued on September 25, 2018. The previous versions were removed from the IFTA clearinghouse official website. *See* IFTA, Inc. website, <https://iftach.org/manualnew.php> (last visited November 22, 2019). Nevertheless, each section and subsection of the governing documents integrates legislative history in the form of commentary, and only a few subsections actually took effect on December 1, 2018. *See* IFTA Articles of Agreement, Art. XXI, R1220; *see also*, IFTA Procedures Manual, P1030. Subsections pertinent to this protest, and the remainder of the governing documents were in effect prior to the issuance of the Department’s assessment, unless so noted. For the sake of consistency and accessibility, this Decision and Order will cite to the December 1, 2018 publications of the Articles of Agreement and Procedures Manual, noting effective dates and pertinent differences, when necessary. While the changes are minor, the proper substantive record-keeping requirements applied here are those in effect in 2015. The penalty and interest provisions are those in effect at the time of the assessment. *See GEA Integrated Cooling Tech. v. State Taxation and Revenue Dep’t*, 2012-NMCA-010, ¶ 11, 268 P.3d 48 (recognizing that “the law in place at the time of [the] assessment would govern the penalty to be imposed”); *Bradbury & Stamm Constr. Co. v. Bureau of Revenue*, 1962-NMSC-078, ¶ 43, 70 N.M. 226, 372 P.2d 808 (interest is computed using the rate in effect at the time the liability accrued, and if the rate changes, prospectively using the new rate, unless a retroactive effect is clearly apparent). The Audit Manual was revised, effective July 1, 2017, and the earlier version remains on the IFTA clearinghouse official website. While the application of one publication over the other publication may affect the analysis of some issues, it does not affect the ultimate decision reached in this case. The six different publications (two of each of the governing documents) are retained in the administrative file for ease of reference.

1 *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217, 62 P.3d
2 308.

3 As a distinct difference particular to IFTA, the Hearing Officer retains some discretion as to
4 assessed penalties. IFTA states: “the base jurisdiction commissioner may waive penalties
5 authorized by this Article for reasonable cause.” *See* IFTA, Art. XII, R1260.100 (as amended
6 through January 1, 2006).

7 **International Fuel Tax Agreement.**

8 The assessment in this protest arises from an audit conducted pursuant to the International
9 Fuel Tax Agreement (IFTA), uncodified in New Mexico Statutes, but applicable to participating
10 states (member jurisdictions) and participating motor carriers (licensees) under federal law. IFTA is
11 an interstate and international compact among the 48 contiguous States of the United States of
12 America, and 10 provinces in Canada, specifically permitted by Congress. IFTA is primarily a
13 mechanism for the participating jurisdictions to enforce state taxes.

14 The Commerce Clause of the United States Constitution has granted Congress the power
15 “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian
16 Tribes.” USCS Const. Art. I, § 8, Cl 3. Interstate trucking is quintessentially interstate commerce.
17 Yet, the Compact Clause of the United States Constitution disallows states from entering into “any
18 agreement or compact with another state” without the consent of Congress. USCS Const. Art. I, §
19 10, Cl 3. Therefore, in order to facilitate collection of individual state fuel use taxes, Congress
20 enacted the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-
21 240, 105 Stat. 1914, which amended the Motor Carrier Act, 49 USCS §§ 31701-31708. In pertinent
22 part, the ISTEA provides that “[a]fter September 30, 1996, a State may establish, maintain, or
23 enforce a law or regulation that has a fuel use tax reporting requirement (including any tax reporting

1 form) only if the requirement conforms with the International Fuel Tax Agreement.” 49 USCS §
2 31705.

3 Each state has the power to tax economic activity conducted within their respective borders,
4 and states, including New Mexico, have enacted laws imposing taxes on diesel fuel used in the state.
5 *See* NMSA 1978, Section 7-16A-1 through 7-16A-21 (Special Fuels Supplier Tax Act). Likewise,
6 our neighbor states of Arizona and Texas (both at issue here) have enacted laws imposing fuel use
7 taxes for diesel and a variety of other fuels. Under New Mexico law, the Department has the
8 ability to enter into cooperative agreements such as IFTA “for the exchange of information, the
9 reciprocal, joint or common enforcement and administration of revenue or transportation laws of
10 the party jurisdictions or the reciprocal, joint, or common collection, remittance and audit of
11 revenues of the party jurisdictions.” *See* NMSA 1978, Section 9-11-12 (A) (2001).

12 New Mexico is an IFTA member. Because the state has entered into IFTA, the state is
13 required, as a base jurisdiction, to administer and execute the provisions of the agreement for the
14 benefit of all participating states. *See* IFTA, Art. I, R150 (as amended through July 1, 2003).
15 The duties of the base jurisdiction include, but are not limited to, issuing licenses to interstate
16 carriers whose principal place of business is located within the base jurisdiction, collect and
17 distribute fuel use taxes for each jurisdiction the licensee operates within, to perform regular
18 audits of licensees, and to revoke a license if a licensee does not comply with the agreement.
19 The provisions of the Audit Manual, the Procedures Manual and the Articles of Agreement,
20 known collectively as the Governing Documents, “are equally binding upon the member
21 jurisdictions and IFTA licensees.” *See Id.* Art. I, R120 (as amended through July 1, 1998).

22 Without IFTA, fuel use taxes could be difficult to enforce, considering that fuel users are on
23 the move. A fuel user can purchase fuel from a vendor out of state and then transport the fuel

1 wherever the road may lead. This travelling fuel is used within the state without raising the
2 eyebrows of even the most diligent tax enforcement official. Conceptually, this seems to be the
3 reason why fuel use taxes are based on the raw data of quantity of fuel (gallons) purchased as well
4 as total mileage broken down into state-by-state mileage. See Regulation 3.16.110.8 NMAC
5 (6/14/01). The use tax administered by the IFTA organization for New Mexico is the Special Fuels
6 Supplier Tax Act. NMSA 1978, Section 7-16A-1 through 7-16A-21. For computing the tax due,
7 the method is clear.

8 Regulation 3.16.110.8 (B) NMAC (6/14/01) provides the following example:

9 Example 1: Trucker's fleet logged 1,000,000 miles with 100,000 travelled in New
10 Mexico. Trucker used 202,100 gallons of special fuel. Trucker has used 20,202
11 gallons in New Mexico, computed as follows:

12 1,000,000 miles everywhere
13 divided by 202,100 gallons of special fuel everywhere
14 equals 4.948 = 4.95 average miles per gallon

15
16 100,000 New Mexico miles
17 divided by 4.95 average mile per gallon
18 equals 20,202 New Mexico special fuel gallons

19
20 Once the in-state gallonage is known, the reporting taxpayer multiplies that by the applicable tax
21 rate of twenty-one cents per gallon (\$.21) and the tax due results. In the example above, the tax due
22 would be \$4,242.42. See NMSA 1978, Section 7-16A-3(B) (2003). New Mexico has only the
23 diesel fuel tax, as noted above, but adjoining states of Arizona and Texas have their own special fuel
24 taxes. To properly enforce the taxes, it is essential for states to cooperate to provide a mechanism
25 for reciprocal licensing, reporting, and enforcement. IFTA provides that cooperative tax
26 enforcement mechanism.

27 IFTA requires that licensees retain records "to substantiate information reported on the tax
28 returns." Art. VII, R700 (as amended through January 1, 2006). The Procedures Manual in effect

1 in 2015 informs licensees that “[t]he licensee is required to preserve the records upon which the
2 quarterly tax return or annual tax return is based for four years from the tax return due date or filing
3 date, whichever is later...” P510.100 (as amended through January 1, 2006) (2013 revision).²

4 IFTA requires retention of distance records. To this end, IFTA requires that records are kept
5 for each individual vehicle’s distance travelled, and distance recaps for each vehicle for each
6 jurisdiction in which the vehicle is operated. P540.100 (as amended through January 1, 2001) (2013
7 revision). These records “should include” the start and end date of each trip, the origin and
8 destination, route of travel, beginning and ending odometer or hubometer reading, total mileage,
9 miles by jurisdiction, unit number or vehicle identification number, fleet number, registrant’s name,
10 and any additional information required by the base jurisdiction. P540.200 (as amended through
11 January 1, 2001) (2013 revision).³

12 IFTA also requires retention of fuel records. To this end, IFTA requires “a licensee must
13 maintain complete records of all motor fuel purchased, received, and used in the conduct of its
14 business.” P550.100 (as amended through January 1, 2001) (2013 revision). These records “shall
15 contain” the date of each receipt of fuel, the seller, the number of gallons, the type of fuel, and the
16 vehicle into which the fuel was placed. P550.400 (as amended through January 1, 2001) (2013
17 revision).⁴

² The current manual is very similar: the Procedures Manual informs licensees that “[a] licensee shall retain records of its operations to which IFTA reporting requirements apply for a period of four years following the date the IFTA tax return was due or was filed, whichever is later...” IFTA Procedures Manual, P510 (as amended through January 1, 2017). Application of either subsection does not materially affect the inquiry or decision here.

³ Under the current manual, IFTA requires that records be kept for each individual vehicle’s dates of travel, origin and destination, route, distance travelled (using odometer hubometer, engine control module, or other device), and distances for each jurisdiction in which the vehicle is operated. IFTA Procedures Manual, P540.100 (as amended through January 1, 2017).

⁴ Under the current manual, IFTA requires: “[t]he licensee shall maintain complete records of all motor fuel purchased, received, and used in the conduct of its business, and on request, produce these records for audit.” P550.100 (as amended through January 1, 2017). Acceptable records must be adequate for the auditor “to verify the total amount of fuel placed into the licensee’s qualified motor vehicles, by fuel type.” *Id.* The elimination of the “should” and “shall” language might give licensees a little more leeway under the current revision but does not affect the inquiry or decision here.

1 IFTA informs licensees that non-compliance with record-keeping requirements may result
2 in an assessment and revocation of a license. “Failure to maintain records upon which the licensee’s
3 true liability may be determined or to make records available upon proper request may result in an
4 assessment as stated in IFTA Articles of Agreement Section R1200.” Procedures Manual,
5 P530.100 (as amended through January 1, 2006) (2013 revision). In addition, “[n]on-compliance
6 with any recordkeeping requirement may be cause for revocation of a license.” Procedures Manual,
7 P530.200 (2013 revision).⁵ And in the event that a licensee fails to maintain records “from which
8 the licensee’s true liability may be determined,” an assessment of tax, or a revocation or suspension
9 of the license is appropriate, or both. *See* IFTA, Art. XII, R1210.100, R1210.200, R1210.300 (as
10 amended through July 1, 2000).

11 If the licensee “fails to maintain records from which the licensee’s true liability may be
12 determined,” the IFTA Articles provide for the base jurisdiction to “determine the tax liability of the
13 licensee for each jurisdiction.” Art. XII, R1210.100.015 and R1210.200.005 (as amended through
14 July 1, 2000). The Procedures Manual in effect at the time the tax liability was incurred did not
15 make mention of a method of accomplishing the goal of determining the tax liability, yet the Audit
16 Manual allows the base jurisdiction, after determining that “the licensee’s records are lacking or
17 inadequate to support any tax return filed” to either “estimate the fuel use” using prior experience of
18 the licensee, licensees with similar operations, industry averages, records available from fuel

⁵ The current IFTA Procedures Manual, P530 (as amended through January 1, 2017) provides a thorough revision of the section: “The adequacy of a licensee’s records is to be ascertained by the records’ sufficiency and appropriateness. Sufficiency is a measure of the quantity of records produced; that is, whether there are enough records to substantially document the operations of the licensee’s fleet. The appropriateness of the records is a measure of their quality; that is, whether the records contain the kind of information the auditor needs to audit the licensee for the purposes stated in the preceding paragraph [i.e., to verify distances travelled and fuel purchased]. Records that are sufficient and appropriate are to be deemed adequate. . . . Licensee records which do not contain all of the elements set out in P540, P550 and P560 may still, depending on the sufficiency and appropriateness of the records and of the licensee’s operations, be adequate for an audit.” This last paragraph provides a safety valve, creating more leeway for taxpayers who have not kept thorough records.

1 distributors, and other pertinent information, and “in the absence of adequate records, a standard of
2 4 MPG/1.7 KPL will be used.” Audit Manual, A550.100 (as amended through January 2006).⁶

3 **The Audit.**

4 The Department’s audit of tax year 2015 found issues with the sampling months September,
5 October, November and December. The auditor found that the Taxpayer failed to provide records
6 adequate to support the Taxpayer’s IFTA report of fuel usage. In detailing the Taxpayer’s
7 methodology, the auditor reported that the Taxpayer used “departure and arrival times” as a
8 substitute for actual odometer readings when determining mileage. For fuel usage, the Taxpayer
9 has acknowledged that the fuel purchase receipts for 2015 were destroyed before the audit. The
10 auditor determined that a question remained as to the number of gallons of fuel used, which is
11 required to apply the arithmetic for an accurate calculation of average miles per gallon. The miles
12 per gallon figure, rounded to two decimal places, is necessary for the computation of gallons of
13 diesel fuel used in each of the three states the Taxpayer operated within. *See* Regulation 3.16.110.8
14 NMAC.

15 The audit report found the mileage reporting method inadequate but accepted the reported
16 miles. Both the IFTA Audit Manual of 2017, and the earlier version effective at the time the
17 liability arose, have identical sections, differently numbered, offering guidance for auditors faced
18 with inadequate records. The auditor can use “[p]rior experience of the licensee; [l]icensees with
19 similar operations; [o]ther vehicles in the fleet with similar operations; [i]ndustry averages;

⁶ The newer Audit Manual had this numbered differently and adds a secondary method. Under the new Audit Manual, if the auditor finds inadequate records, the auditor may “reduce the vehicle MPG or KPL by 20% or adjust the vehicle MPG to 4.00 or the KPL to 1.7.” A350.300 (effective July 1, 2017). Likewise, the current Procedures Manual recapitulates this base jurisdiction responsibility. *See* IFTA Procedures Manual, P570 (as amended through January 1, 2017). “If the base jurisdiction determines that the records produced by the licensee for audit do not, for the licensee’s fleet as a whole, meet the criterion for the adequacy of records set out in P530, . . . the base jurisdiction shall impose an additional assessment by either: adjusting the licensee’s reported fleet MPG to 4.00 or 1.70 KPL; or reducing the licensee’s reported MPG or KPL by twenty percent.” *Id.* While there is a slight difference in language, the inquiry and decision reached here is not affected by the choice of using one manual over the other.

1 [r]ecords available from fuel distributors or other third parties; [and] [o]ther pertinent information
2 the base jurisdiction may obtain or examine” to determine the licensee’s tax liability. Audit
3 Manual, A350.200 (as amended through July 1, 2017); Audit Manual, A550.100 (as amended
4 through January 2006) (1996-2016 revision). After finding that there were inadequate records to
5 support the reported gallonage used, the Department assessed the Taxpayer applying the default 4.0
6 miles per gallon to the miles reported. Audit Manual, A350.300.10 (as amended July 1, 2017);
7 Audit Manual, A550.100 (as amended through January 2006) (1996-2016 revision).

8 Under the procedures in effect at the time the liability was incurred, distance records “should
9 include” the start and end date of each trip, the origin and destination, route of travel, beginning and
10 ending odometer or hubometer reading, total mileage, miles by jurisdiction, unit number or vehicle
11 identification number, fleet number, registrant’s name, and any additional information required by
12 the base jurisdiction. Procedures Manual, P540.200 (as amended through January 1, 2001) (2013
13 revision).⁷

14 In determining that the records for distance were inadequate, the audit found that the
15 Taxpayer’s method did not record “the unit number, beginning and ending odometers,
16 origin/destination and no original fuel receipts or fuel statements were kept. DMC uses a time
17 period to track the units and no reports are verified.” As anyone stuck in a snowstorm, a
18 construction zone or rush hour traffic can affirm, and it should go without saying, that time spent on
19 the road is not a reliable substitute for specific miles travelled. Likewise, time spent on the road for
20 the Phoenix/El Paso circuit route does not account for the additional miles travelled within the

⁷ Under the latest procedures manual, for distance records not produced by a vehicle-tracking system, IFTA requires taxpayers keep trip dates, trip origin and destination, travel routes, beginning and ending vehicle mileage, total distance, distance for each jurisdiction, and vehicle identification or unit number. Procedures Manual, P540.100 (as amended through January 1, 2017). The revision does not affect the analysis or decision in this matter.

1 terminal city for maintenance and other reasons. IFTA does not allow this time-distance
2 methodology.

3 Under the procedures in effect at the time the liability was incurred, fuel use records “shall
4 contain” the date of each receipt of fuel, the seller, the number of gallons, the type of fuel, and the
5 vehicle into which the fuel was placed. P550.400 (as amended through January 1, 2001) (2013
6 revision).⁸ Taxpayer, shifting the focus from gallons used to its calculated miles per gallon, testified
7 that the 2015 miles per gallon were conservatively reported at 7 miles per gallon. On the contrary,
8 the audit work papers indicate the miles per gallon reported in the 2015 IFTA returns were
9 consistently 7.77 mpg, for each of the four quarters. This, by itself, raises red flags and suggests
10 that the Taxpayer’s witness was unaware of the actual reporting that went on. The audit narrative
11 and testimony indicated that the supervisors at the respective terminals in Phoenix, AZ and El Paso,
12 TX were responsible for recording the miles the trucks drove. The audit found that Taxpayer was
13 able to provide only procurement card statements to support the Taxpayer’s report of fuel purchases.
14 The procurement card statements did not provide data to support the number of gallons, price per
15 gallon, tax paid (if any), or the vehicle unit number into which the fuel was placed.

16 Generally, IFTA requires that “[e]very licensee shall maintain records to substantiate
17 information reported on the tax returns. Operational records shall be maintained or be made
18 available for audit in the base jurisdiction. Recordkeeping requirements shall be specified in the
19 IFTA Procedures Manual.” *See* Articles of Agreement, Art. VII, R700 (as amended through
20 January 1, 2006). The agreement also requires: “The licensee must report all fuel placed in the

⁸ Under the latest procedures manual, IFTA requires: “[t]he licensee must maintain complete records of all motor fuel purchased, received, and used in the conduct of business, and on request, produce these records for audit.” Rather than specify all the data necessary, the manual only requires that “[t]he records shall be adequate for the auditor to verify the total amount of fuel placed into the licensee’s qualified motor vehicles, by fuel type.” Procedures Manual, P550.100 (as amended through January 1, 2017). And in order to obtain credit for tax-paid retail purchases, there are even greater strictures. Procedures Manual, P550.300 (as amended through January 1, 2017).

1 supply tank of a qualified motor vehicle as taxable on the tax return.” *See* Art. VIII, R820 (as
2 amended through January 1, 2001). When fuel is placed in a vehicle, the retail vendor usually
3 applies the tax of the local jurisdiction. For a licensee to obtain credit for the tax paid at the time of
4 purchase, “the licensee must retain a receipt, invoice, credit card receipt, or automated vendor
5 generated invoice or transaction listing, showing evidence of such purchases and taxes paid.” *See*
6 Art. X, R. 1000.100 (as amended through January 1, 1996). And in the event that a licensee fails to
7 maintain records “from which the licensee’s true liability may be determined,” an assessment of tax,
8 or a revocation or suspension of the license is appropriate. *See* Art. XII, R1210.100, R1210.200,
9 R1210.300 (as amended through July 1, 2000).

10 **Sufficiency of evidence to support IFTA report**

11 The question that must be addressed in this proceeding is whether the Taxpayer’s evidence
12 at hearing is sufficient to meet the Taxpayer’s burden of establishing that the claims contained in the
13 IFTA reports matched the actual, audited miles within each jurisdiction, total gallons of fuel
14 purchased, miles per gallon average, and the subsequent per-jurisdiction apportionment of tax. The
15 Department first contends that the 2018 data supplied by the Taxpayer is irrelevant. The
16 Department further contends that, without any contemporaneous document from 2015 (receipts or
17 summary of receipts) showing the amount of fuel purchased, the testimony alone that the 2015
18 numbers matched 2018 numbers is insufficient. The Taxpayer contends that the 2018 records are
19 both relevant and sufficient because the reported miles travelled were accepted at audit as true, and
20 the trucks used in 2015 and 2018 had the same fuel efficiency, hence the miles per gallon figure was
21 substantially similar. Taxpayer contends that the “reference number” contained in the procurement
22 card statements is sufficient for the Department to audit the gallonage. Taxpayer contends that, with
23 the evidence supportive of the reported 7.77 mpg average, the Department’s application of the 4.0

1 mpg standard is unreasonable and punitive. The “good enough” approach the Taxpayer wishes to
2 apply is simply not legally sufficient to overcome the presumption of correctness.

3 When considering the Department’s objection as to relevancy, the Hearing Officer
4 considered that the IFTA governing documents allow the tax auditor to use “prior experience of the
5 licensee; licensees with similar operations; industry averages; records available from fuel
6 distributors; [and] other pertinent information the auditor may obtain or examine” to determine the
7 licensee’s tax liability. Audit Manual, A350.200 (as amended through July 1, 2017); Audit
8 Manual, A550.100 (as amended through January 2006) (1996-2016 revision). This does not
9 prohibit the Department or the Hearing Officer from considering even unorthodox means to justify
10 an IFTA tax report. Similarly, while the best evidence is the raw data, IFTA recognizes that
11 “monthly fleet summaries” which “at a minimum, must include distance data on each individual
12 vehicle for each trip” may be adequate to substantiate reported travel distances. *See* Procedures
13 Manual, P540.200 (as amended through January 1, 2001) (2013 revision).⁹ While the 2015
14 information is certainly the best evidence, bearing the greatest evidentiary weight, the complete
15 evidence of 2018, if in fact comparable, would be relevant, yet of lesser evidentiary weight.

16 Taxpayer provided the Department with a summary of records, procurement card records,
17 and fuel receipts for the months of September, October, November and December of 2018, a “test
18 period” it claimed would produce the same or similar results as the audit period at issue. The
19 Taxpayer’s eight -page “Affidavit of Stephen A. Griego” (Affidavit) of the 2018 “test period,”
20 Taxpayer’s Exhibit 1, and Department’s Exhibit B are the only documentary evidence the Taxpayer
21 has provided the Hearing Officer to support its contention. Upon close review, Department’s

⁹ Under the latest version of the Procedures Manual, summaries of the “distance travelled by and the fuel placed into each vehicle in the fleet..., both in total and by jurisdiction, may be necessary for the efficient audit of the licensee’s records.” P560 (as amended through January 1, 2017).

1 Exhibit B is a credit card or procurement card statement and contains no entries for the four-month
2 sampling time-frame at issue here. Also, the Taxpayer's Affidavit (pages 4 through 8) provides no
3 distance data in the form of odometer readings for trip beginning mile or ending mile, no unit
4 number, or other identifying information for the vehicle into which fuel was placed. The Affidavit
5 provides an unsupported statement of mileages between the Phoenix and El Paso terminals and the
6 refueling station in San Simon. The Affidavit purports to summarize the gallons used, and a per-trip
7 miles per gallon calculation, as well as monthly averages of miles per gallon.

8 The Taxpayer's Affidavit is unsupported by raw data, is inconsistent, and therefore
9 unreliable. For example, the Affidavit does not give a total mileage travelled by each truck. In
10 looking at the first page of the Phoenix summary, statement month of November, the columns
11 contain information of number of transactions (26), statement month (November), receipt date
12 (beginning 10/26 and ending 11/21), total gallons in a transaction, miles per gallon per transaction,
13 and average miles per gallon in a statement month. The only information that may be relevant for
14 computation of tax are (1) the column indicating the number of transactions, and (2) the information
15 contained in the column for total gallons purchased. Taxpayer forces one to extrapolate from the
16 Affidavit that the total monthly mileage is 244 miles multiplied by the total number of monthly
17 transactions -- 26 -- for a total mileage of 6,344 (assuming the truck fuels up only once per trip).
18 One also must extrapolate from the Affidavit that the total gallons purchased in the statement month
19 of November was the sum of the total gallons' column, or 742.316. So, using the data as
20 extrapolated from the evidence in the Affidavit, the average for the statement month of November is
21 total miles of 6,344 divided by total gallons purchased of 742.316. The miles per gallon for the
22 Phoenix statement month of November 2018 is then 8.546225 mpg. The Taxpayer's Affidavit
23 reported that the average mpg for the statement month was 8.674705 mpg. The discrepancy in

1 average mpg stems from methodology: the Taxpayer used the miles per gallon per trip and averaged
2 those per-trip calculations. This calculation is simply an example of the inadequacy of Taxpayer's
3 summary data, which ignores the relevant raw data, and provides statement month averages, not
4 based on the raw data, but on per trip averages. The affidavit for the Phoenix card statements is not
5 supported by the actual statements or the actual fuel receipts showing gallons. IFTA requires
6 licensees to use and retain raw data. *See* Procedures Manual, P510-P570 (as amended through
7 January 1, 2006) (2013 revision).

8 It should be noted that regardless of how the Phoenix procurement card statement summary
9 is or is not skewed, there was no evidence providing any way to compare the 2018 statements to the
10 2015 statements, since the 2015 card statements of the time frame at issue were never offered as
11 evidence (Department Exhibit B1 and B2 related to May 26 through June 18 of 2015). Likewise,
12 the 2018 Phoenix route statement summary provided had no supporting documentation, such as
13 receipts. To compare, the El Paso route statement summaries did have other supporting
14 documentation, such as copies of receipts and copies of procurement card statements, i.e.,
15 Taxpayer's Exhibit 1.

16 Turning to the El Paso route procurement card statements of 2018, the summary within the
17 Affidavit is somewhat supported by Taxpayer's Exhibit 1. For example, the Affidavit provides a
18 line entry from the November statement month, for a transaction that took place on October 24.
19 The transaction yielded 30.947 gallons of fuel. In support of this summary entry, Taxpayer's
20 Exhibit 1-032 is the card statement for the November statement month, and shows a transaction that
21 took place on October 24, which charged \$99.00 to the Taxpayer, from a Shell Oil in El Paso, TX.
22 Taxpayer's Exhibit 1-033 has the receipt from the transaction showing that, on October 24,
23 Taxpayer purchased 30.947 gallons of regular diesel, for a total cost of \$99.00. This line entry for

1 the summary has evidentiary support. Yet, Taxpayer has not provided anything but unreliable
2 testimony to support that the 2018 procurement card statements matched 2015 procurement card
3 statements. The Taxpayer never provided the Hearing Officer with the statements from 2015 that it
4 provided the original auditor; nor did the Taxpayer provide a summary of statements from 2015 to
5 justify the comparison.

6 Also, one need not look far within the same November statement month to find a transaction
7 that undercuts the reliability of the Affidavit summary. Taxpayer's Exhibit 1-032 lists a transaction
8 on November 16 for \$78.11. Taxpayer's Exhibit 1-054 has the same transaction receipt, showing
9 that Taxpayer purchased 24.725 gallons of diesel for a total cost of \$78.11 from a Petroleum
10 Wholesale LP Sunmart in San Simon, Arizona on November 16, 2018. Yet, the Affidavit summary
11 does not report this transaction on the November statement for the El Paso route (or the Phoenix
12 route, for that matter). The Affidavit summary reports thirteen transaction for the statement month
13 of November while the November statement shows forty transactions. Sloppy and incomplete
14 evidence is not reliable evidence.

15 Likewise, I note again that no evidence presented at the hearing corroborated the 2018
16 summary or exhibits to the 2015 card statements, as no 2015 procurement card statements for the
17 last four months of 2015 were offered into evidence. Although potentially helpful to the Taxpayer's
18 theory of the case at times -- for the sake of comparison to 2015 -- the evidentiary weight of the
19 2018 summary affidavit is effectively nil because: (1) it is for a different year; (2) it does not
20 provide any evidence of the year at issue that would allow comparison; (3) it omits necessary data
21 points (i.e., odometer readings to support total miles travelled, miles by jurisdiction, vehicle into
22 which the fuel was placed, etc.); (4) it omits necessary refueling transactions (i.e. for the statement

1 month of November, only 13 of 40 transactions were reported); and (5) it provides skewed averages
2 of miles per gallon.

3 The State of New Mexico, Taxation and Revenue Department has published regulatory
4 guidance for taxpayers who file special fuel use tax returns. *See* Regulation 3.16.110.8 NMAC
5 (Computation of miles-per-gallon factor); Regulation 3.16.110.9 NMAC (Required records);
6 Regulation 3.16.110.10 NMAC (Alternative calculation available for certain vehicles); Regulation
7 3.16.110.11 NMAC (Records required for alternative calculation method); Regulation 3.16.110.12
8 NMAC (Application of alternative calculation method).

9 Taxpayer provided testimonial evidence that the truck route ran five days a week, used the
10 same trucks, carried the same type of cargo, and originated from the same location and arrived at the
11 same terminal. Yet these claims were unsupported by actual mileage records, per jurisdiction
12 mileage records, and fuel records, and was directly contradicted by a substantial variance of miles
13 reported in the fourth quarter of 2015. Also undermining the Taxpayer's claim was evidence that,
14 although Taxpayer claimed that trip miles were static, the mileage could vary. It could vary from
15 trip to trip if a driver took one exit or another, or when maintenance and other matters required
16 driving around the terminal city (El Paso or Phoenix). The Taxpayer acknowledged using
17 Mapquest.com miles to assess mileage, despite its having access to GPS vehicle monitoring and
18 actual miles of 2015 from driver logs. And despite the ability to supplement the record with a
19 summary of the 2015 driver logs after the hearing had concluded, the Taxpayer refused to provide
20 any actual summary; instead, Taxpayer simply provided another unsubstantiated claim. The records
21 provided for the "test period" were insufficient, skewed and unreliable.

1 The Department has issued instructions for IFTA licensees. The IFTA Quarterly Tax
2 Return Instructions¹⁰ require that each IFTA licensee “maintain records for a period of four years
3 from the filing date of the report to substantiate information reported. Such records shall be made
4 available on request by any member state for an audit.” NMSA 1978, Section 9-11-6.2 (G) (2015)
5 indicates: “[a]ny regulation, ruling, instruction or order issued by the secretary or delegate of the
6 secretary is presumed to be a proper implementation of the provisions of the laws that are charged to
7 the department, the secretary, any division of the department or any director of any division of the
8 department.” Equally compelling is the following language in the Tax Administration Act, NMSA
9 1978, Section 7-1-10 (A) (2007): “[E]very taxpayer shall maintain books of account or other
10 records in a manner that will permit the accurate computation of state taxes.” The regulation that
11 accompanies this statute also requires that “[b]ooks of account, documents and other records shall
12 be kept and maintained by a taxpayer in a manner that will permit the accurate computation of state
13 taxes...If state taxes cannot be accurately or readily computed by the secretary or secretary’s
14 delegate from the records, the records are not sufficient or adequate.” Regulation 3.1.5.8 (A) NMAC
15 (12/29/01). *See also Archuleta v. O’Cheskey*, 1972-NMCA-165, ¶16, 84 N.M. 428, 504 P.2d 638
16 (“The taxpayer has a duty to provide the commissioner with books and records upon which to
17 establish a standard for taxation”) (specially concurring opinion).

18 IFTA also sets standards for accuracy in reporting. “Failure to maintain records upon which
19 the licensee’s true liability may be determined or to make records available upon proper request
20 may result in an assessment as stated in IFTA Articles of Agreement Section R1200.” *See*
21 *Procedures Manual*, P530.100 (as amended through January 1, 2006) (2013 revision).¹¹ The IFTA

¹⁰ Available through the New Mexico Taxation and Revenue Department, Motor Vehicle Division website. *See* <http://mvd.newmexico.gov/commercial-forms.aspx> (last accessed 11/22/19).

¹¹ The 2018 revision sets standards for “adequacy of a licensee’s records,” providing greater leniency in determining sufficiency and appropriateness of licensee’s records. *See Procedures Manual*, Section P530 (as amended through

1 Articles of Agreement provide that “[i]n the event that any licensee... fails to maintain records from
2 which the licensee’s true liability may be determined, the base jurisdiction shall proceed in
3 accordance with .200 and .300.” Article XII, R1210.100 (as amended through July 1, 2000).¹²
4 Subsections .200 and .300 provide for revocation or suspension of an IFTA license, and for the
5 imposition of tax, penalties, and interest. *See* Article XII, R1210.200 and R1210.300 (as amended
6 through July 1, 2000). The IFTA Audit Manual allows the auditor to use the default standard of 4
7 mpg, absent “substantial evidence to the contrary.” A550.100 (as amended through January 2006)
8 (1996-2016 revision). The Taxpayer has not provided substantial evidence to support the accuracy
9 of its IFTA reports. Taxpayer’s records suggest that its IFTA reports are inaccurate and do not
10 provide the “substantial evidence to the contrary” required to disallow use of the default 4 mpg
11 standard. In short, the records are inadequate under state law and under IFTA.

12 The fact that the Taxpayer kept no organized business records to support the fuel use taxes it
13 reported is the salient feature of this controversy. It is the Taxpayer’s duty to prove with substantial
14 evidence that it properly reported taxes owed. “Substantial evidence is relevant evidence that a
15 reasonable mind might accept as adequate to support a conclusion.” *State v. Largo*, 2012-NMSC-
16 015, ¶ 30, 278 P.3d 532 (internal quotation marks and citation omitted). Without reliable and
17 relevant supporting documents entered into evidence, we are left with Mr. Griego’s word alone. “It
18 is the sole responsibility of the trier of fact to weigh the testimony, determine the credibility of the
19 witnesses, reconcile inconsistencies, and determine where the truth lies.” *N.M. Taxation & Revenue*
20 *Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶ 23. Although he was cordial and composed, Mr.
21 Griego’s unsubstantiated statements are insufficient to overcome the presumption of correctness that

January 1, 2017). The inadequate records assessment provision gives auditors the options of imposing either the default rate of 4.00 MPG, or a reduction by 20%. *Id.*

¹² The provisions of Article XII remain constant in the 2018 revision of the IFTA Articles of Agreement.

1 attached to the assessment. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021,
2 ¶13, 133 N.M. 217, 62 P.3d 308. *See also* Regulation 3.1.6.12 (A) NMAC (1/15/01). The
3 Department properly applied the default standard miles per gallon of 4.0 to the miles reported by
4 Taxpayer. *See* Audit Manual, A550.100 (as amended through January 2006) (1996-2016
5 revision).¹³

6 The IFTA Articles of Agreement provide that “[t]he base jurisdiction may assess the
7 licensee a penalty of \$50.00 or 10 percent of delinquent taxes, whichever is greater, for failing to
8 file a tax return, filing a late tax return, [or] underpaying taxes due.” Art. XII, R1220.100 (as
9 amended through January 1, 2006). Similarly, the Articles of Agreement require the base
10 jurisdiction to assess interest, “for itself and on behalf of the other jurisdictions.” Art. XII, R1230
11 (as amended through July 1, 2013). Taxpayer provided no evidence amounting to good cause to
12 override the Department’s assessment of penalty.

13 CONCLUSIONS OF LAW

14 A. Taxpayer filed a timely, written protest of the Department’s assessment and
15 jurisdiction lies over the parties and the subject matter of this protest.

16 B. The hearing was timely set and held within 90-days of protest under NMSA 1978,
17 Section 7-1B-8 (2015).

18 C. Taxpayer failed to meet his burden to overcome the presumption of correctness in
19 the Department’s assessment of IFTA tax, penalty, and interest. *See* NMSA 1978 Section 7-1-17
20 (C) (2007). *See also MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶13, 133

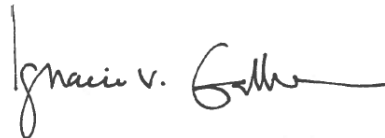
¹³ This differs somewhat from the 2017 Audit Manual revision. The 2017 IFTA Audit Manual, A350.100-
A350.400, gives tax auditors the option of reducing the reported MPG by 20% or applying the default 4.00 MPG.

1 N.M. 217, 62 P.3d 308. *See also* Regulation 3.1.6.12 (A) NMAC (1/15/01). *See also* International
2 Fuel Tax Agreement, July 1, 1998, Art. XII, R1210.300 (as amended through July 1, 2000).

3 D. Taxpayer's IFTA license may be revoked by the Department. *See* International
4 Fuel Tax Agreement, July 1, 1998, Art. XII, R420 and R1210.200.010 (as amended through July
5 1, 2000).

6 For the foregoing reasons, the Taxpayer's protest **IS DENIED. IT IS ORDERED** that
7 Taxpayer is liable for \$31,075.13 in tax, \$200.00 in penalty, and \$4,835.79 in interest (through
8 October 4, 2019), less offsets of \$84.91, for a total outstanding liability of \$37,709.38. Interest
9 continues to accrue at the rates of the applicable member jurisdictions until the tax is paid.

10 DATED: February 4, 2020.

11


12 Ignacio V. Gallegos
13 Hearing Officer
14 Administrative Hearings Office
15 P.O. Box 6400
16 Santa Fe, NM 87502
17

18
19 **NOTICE OF RIGHT TO APPEAL**

20 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
21 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
22 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
23 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates

1 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
2 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative
3 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
4 Hearings Office may begin preparing the record proper. The parties will each be provided with a
5 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
6 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
7 statement from the appealing party. *See* Rule 12-209 NMRA.

8 **CERTIFICATE OF SERVICE**

9 On February 4, 2020, a copy of the foregoing Decision and Order was submitted to the
10 parties listed below in the following manner:

11 *First Class Mail*

Interdepartmental Mail

12 INTENTIONALLY BLANK

13 _____
14 John Griego
15 Legal Assistant
16 Administrative Hearings Office
17 P.O. Box 6400
18 Santa Fe, NM 87502