

1   **STATE OF NEW MEXICO**  
2   **ADMINISTRATIVE HEARINGS OFFICE**  
3   **TAX ADMINISTRATION ACT**

4     **IN THE MATTER OF THE PROTEST OF**  
5     **JACKSON ROCK SPRINGS STAGES**  
6     **TO THE ASSESSMENT ISSUED UNDER**  
7     **LETTER ID NO. L1165810864**

8                     **v.**

**AHO Case No. 20.02-033A**  
  **D&O No. 20-09**

10           **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

11   **DECISION AND ORDER**

12                     On March 12, 2020, Hearing Officer Dee Dee Hoxie, Esq. conducted a hearing on the  
13     merits of the protest to the assessment of weight distance tax (WDT). The Taxation and Revenue  
14     Department (Department) was represented by Kenneth Fladager, Staff Attorney. Nicolas Herrera,  
15     Auditor, and Angelica Rodriguez, Auditor, also appeared on behalf of the Department. Jackson  
16     Rock Springs Stages (Taxpayer) was represented by its vice president, Dennis Copyak. Mr.  
17     Copyak appeared by telephone for the hearing. Mr. Copyak, Mr. Herrera, and Ms. Rodriguez  
18     testified.

19                     The Hearing Officer took notice of all documents in the administrative file. Mr. Copyak  
20     was given until March 16, 2020 to submit the Taxpayer’s exhibits, and Mr. Fladager was given  
21     until March 23, 2020 to respond. The Taxpayer’s exhibit #1 (notice of intent to assess), #2  
22     (assessment), #4 (copy of statute), and #5 (summary of position)<sup>1</sup> were submitted timely. The  
23     Department did not object to the Taxpayer’s exhibits, and they were admitted. The Department’s  
24     exhibits A (IFTA mileage reports), and B (WDT account record) were admitted.

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<sup>1</sup> The Taxpayer did not identify or submit an Exhibit #3.

1 On March 20, 2020, the Hearing Officer issued an order for clarification based on  
2 Taxpayer's Exhibit #1. The Department was given until April 10, 2020 to correct the tax rate  
3 applied to the Taxpayer or to produce evidence that it had already applied the correct tax rate.  
4 The Taxpayer was given until April 17, 2020 to respond to any submission by the Department.  
5 On April 9, 2020, the Department filed an abatement letter (Letter ID No. L1979123376). The  
6 Taxpayer did not file a response.

7 The Taxpayer conceded that it owed the tax, standard penalty, and interest. The main  
8 issue to be decided is whether the Taxpayer owes the WDT penalty. The Taxpayer also raised  
9 issues regarding the statute of limitations and the timeliness of the hearing. The Hearing Officer  
10 considered all of the evidence and arguments presented by both parties. The Taxpayer failed to  
11 establish that the WDT penalty did not apply. The assessment and hearing were timely under the  
12 applicable statutes. Consequently, the Hearing Officer finds in favor of the Department. IT IS  
13 DECIDED AND ORDERED AS FOLLOWS:

#### 14 FINDINGS OF FACT

15 1. On August 13, 2019, under letter id. no. L1165810864, the Department issued an  
16 assessment to the Taxpayer, indicating that Taxpayer owed WDT in the amount of \$2,703.28,  
17 penalty of \$540.65, and interest of \$441.54. The Taxpayer was also assessed WDT penalty in  
18 the amount of \$5,800.00. The Taxpayer's total liability was \$9,485.47. [Administrative file,  
19 Exhibit #2]

20 2. On August 27, 2019, the Taxpayer protested the assessment. [Administrative file]

21 3. On August 30, 2019, the Department acknowledged its receipt of the Taxpayer's  
22 protest. [Administrative file]

1           4.       On February 26, 2020, the Administrative Hearings Office learned of the  
2 Taxpayer’s protest when the Department filed a request for hearing. [Administrative file]

3           5.       On February 26, 2020<sup>2</sup>, the Administrative Hearings Office sent notice of hearing  
4 to the parties. [Administrative file]

5           6.       On March 10, 2020, the Taxpayer filed a request to appear by telephone due to  
6 the recent public health concerns regarding the coronavirus. The Department did not object to  
7 the request. [Administrative file]

8           7.       The request was granted, and amended notice was sent to the parties by email on  
9 March 11, 2020 with the option to appear in-person or by telephone for the hearing.  
10 [Administrative file]

11          8.       The Taxpayer owns tour buses and provides transportation for its customers in  
12 New Mexico. [Testimony of Mr. Copyak]

13          9.       The Taxpayer’s drivers are required to stop at the ports of entry in New Mexico.  
14 [Testimony of Mr. Copyak]

15          10.      At the ports of entry during the tax periods at issue, the drivers gave information  
16 about where they were going and calculated their mileage. [Testimony of Mr. Copyak]

17          11.      The Taxpayer paid the WDT charged at the ports of entry based on the drivers’  
18 calculated mileage. [Testimony of Mr. Copyak, Testimony of Mr. Herrera]

19          12.      The Taxpayer was not registered with the WDT program in New Mexico.  
20 [Testimony of Mr. Herrera, Testimony of Ms. Rodriguez]

21          13.      The Taxpayer was registered with the federal International Fuel Tax Agreement  
22 (IFTA) program. [Testimony of Mr. Copyak, Testimony of Mr. Herrera, Exhibit “A”]

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<sup>2</sup> The filing date is stamped February 25, 2020, which was an error.

1           14.     Under the federal IFTA program, the Taxpayer reports to the federal government  
2 the miles that it traveled as a commercial carrier in various states. [Testimony of Mr. Herrera,  
3 Exhibit #1, Exhibit “A”]

4           15.     The Taxpayer believed that registration with the federal IFTA program was  
5 sufficient and proper registration for paying all taxes owed to New Mexico. [Testimony of Mr.  
6 Copyak]

7           16.     The Department reviewed the Taxpayer’s IFTA reports for New Mexico-traveled  
8 miles. [Testimony of Mr. Herrera]

9           17.     The Taxpayer’s reported New Mexico-traveled miles did not match the WDT  
10 program. [Testimony of Mr. Herrera, Exhibit #1, Exhibit “A”, Exhibit “B”]

11          18.     The Department created a WDT account for the Taxpayer and applied its IFTA-  
12 reported New Mexico-traveled miles. [Testimony of Mr. Herrera, Exhibit #1, Exhibit “B”]

13          19.     The Department found some payments made by the Taxpayer at the ports of  
14 entry, but the total payments were less than the total WDT owed. [Testimony of Mr. Herrera,  
15 Exhibit #1, Exhibit “B”]

16          20.     The Department sent a notice of intent to audit the Taxpayer and requested that  
17 the Taxpayer respond within 60 days, including an opportunity to report its miles. [Testimony of  
18 Mr. Herrera, Exhibit #1]

19          21.     The Taxpayer did not respond, and the assessment was issued. [Testimony of Mr.  
20 Herrera, Exhibit #2]

21          22.     The Taxpayer concedes that its New Mexico-traveled miles that it reported to  
22 IFTA did not match the miles for which tax was paid at the ports of entry but did not know why  
23 there was a discrepancy. [Testimony of Mr. Copyak, Exhibit #1]

1           23.     The Taxpayer concedes that it owes additional WDT, the standard penalty, and  
2 the interest. [Testimony of Mr. Copyak]

3           24.     The Taxpayer believes its customers bring economic benefits to New Mexico, by  
4 millions of dollars, in tourism. [Testimony of Mr. Copyak, Exhibit #4]

5           25.     The Taxpayer did not intend to evade New Mexico tax and does not understand  
6 New Mexico's WDT system. [Testimony of Mr. Copyak]

7           26.     The Taxpayer requests that the WDT penalty be waived as the Taxpayer's failure  
8 to pay was not intentional and the amount of WDT penalty is unduly burdensome. [Testimony  
9 of Mr. Copyak]

10          27.     The Department applied the WDT rate of \$0.04378 to the Taxpayer's New  
11 Mexico-traveled miles. [Exhibit #1] *See also* NMSA 1978, § 7-15A-6 (2004).

12          28.     The maximum WDT rate for buses is \$0.02729. NMSA 1978, § 7-15A-7 (2004).

13          29.     All of the Taxpayer's vehicles are buses. [Testimony of Mr. Copyak,  
14 Administrative file]

15          30.     The Department responded to the order for clarification on the WDT rate by  
16 issuing an abatement letter to the Taxpayer. [Letter ID No. L1979123376]

17          31.     The abatement was for \$1,018.20 of tax, \$1,003.64 of penalty, and \$146.75 of  
18 interest. [Letter ID No. 1979123376]

19          32.     Although the abatement of the standard penalty and the WDT penalty were not  
20 shown separately on the abatement, it was apparent that some amounts of both were abated based  
21 on the totals. [Letter ID No. L1979123376, Exhibit #2]

1 33. The total amount of WDT, standard penalty, interest, and WDT penalty abated  
2 was \$2,168.59, leaving a total liability of \$7,316.88<sup>3</sup>. [Letter ID No. L1979123376].

### 3 DISCUSSION

#### 4 Timeliness of the hearing.

5 The Taxpayer filed its protest on August 27, 2019. [Administrative file]. The  
6 Department acknowledged the Taxpayer’s protest on August 30, 2019. [Administrative file].  
7 The Department filed the request for hearing with the Administrative Hearings Office on  
8 February 26, 2020, which was 180 days after the protest was acknowledged. [Administrative  
9 file]. *See* 22.600.3.8 NMAC (2018) (indicating that deadlines begin to run from the date of  
10 acknowledgement). Sixty days after the protest, either party may request a hearing with the  
11 Administrative Hearings Office. *See* NMSA 1978, § 7-1B-8 (B) (2019).

12 The Taxpayer argued that it requested a hearing with the Department more than 90 days  
13 prior to hearing that was conducted by the Administrative Hearings Office. [Testimony of Mr.  
14 Copyak]. The Taxpayer did not request a hearing with the Administrative Hearings Office.  
15 [Administrative file, Testimony of Mr. Copyak]. When the Department files a request for  
16 hearing with the Administrative Hearings Office, the hearing must be set within 90 days of that  
17 request. *See* NMSA 1978, § 7-1B-8 (F) (2019). When a taxpayer files a request for hearing with  
18 the Administrative Hearings Office, the hearing must be set within 90 days of the Department’s  
19 answer to the request, but no later than 120 days after the taxpayer’s request. *See id.* The only  
20 request for hearing in this protest that was filed with the Administrative Hearings Office was  
21 filed by the Department on February 26, 2020. [Administrative file]. The hearing occurred on

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<sup>3</sup> The total provided by the Department is \$7315.90; however, this is not mathematically correct as \$9485.47 minus \$2168.59 equals \$7316.88, not \$7315.90. The Department’s total is off by \$0.98. Without evidence or explanation to justify this discrepancy, the Hearing Officer will rely on the mathematical total.

1 March 12, 2020, well within 90 days of the request. [Administrative file]. Consequently, the  
2 hearing was conducted timely.

3 **Burden of Proof.**

4 Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17  
5 (2007). Tax includes, by definition, the amount of tax principal imposed and, unless the context  
6 otherwise requires, “the amount of any interest or civil penalty relating thereto.” NMSA 1978, §  
7 7-1-3 (Z) (2019). *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department,*  
8 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed  
9 to be correct, and it is the Taxpayer’s burden to present evidence and legal argument to show that  
10 it is entitled to an abatement.

11 **Weight distance tax.**

12 The owners of vehicles with a gross weight in excess of 26,000 pounds that drive on New  
13 Mexico highways are required to pay the WDT. *See* NMSA 1978, § 7-15A-3 (1988). The  
14 Taxpayer conceded that its tour buses are driven on New Mexico highways. [Testimony of Mr.  
15 Copyak]. Some buses are exempt from the WDT. *See* NMSA 1978, § 7-15A-5 (2006)  
16 (exempting school buses, buses that only transport agricultural laborers, and buses that belong to  
17 religious or nonprofit charitable organizations). The Taxpayer’s buses do not fall within the  
18 exemption. *See id.* Therefore, the Taxpayer’s buses are subject to WDT.

19 The Taxpayer also briefly argued that the WDT was inappropriate based on the reciprocity  
20 policy. *See* NMSA 1978, § 65-1-32 (1989). Under the reciprocity policy, vehicles registered in  
21 other jurisdictions may be exempt from all or part of the taxes required for unusual use of highways.  
22 *See id.* However, the provision will only apply if vehicles registered in New Mexico are also  
23 exempt in the other jurisdiction. *See id.* There was no evidence or argument presented as to what

1 part of the taxes the Taxpayer might be exempt from, nor was there any evidence that the  
2 Taxpayer's home jurisdiction affords like exemptions to New Mexico-registered vehicles.  
3 Consequently, the Taxpayer's argument is unproven. Moreover, the Taxpayer conceded that it  
4 owes WDT and already paid a portion of the WDT at the ports of entry. The Taxpayer also  
5 conceded that it owes standard penalty and interest.

6 **Statute of limitations.**

7 The Taxpayer argued that part of the Department's assessment was beyond the statute of  
8 limitations for making an assessment. In general, the Department may assess within three years of  
9 the end of the calendar year in which the tax was due. *See* NMSA 1978, § 7-1-18 (2013).

10 However, when a taxpayer fails to complete and file any required return, the Department has seven  
11 years to assess from the end of the calendar year in which the tax was due. *See id.* Under the WDT,  
12 taxpayers are required to file reports with the Department that include the total number of miles  
13 traveled in New Mexico and the total number of miles traveled in all states for the tax period. *See*  
14 NMSA 1978, § 7-15A-8 (B) (1988). *See also* 3.12.9.9 NMAC (2001) (requiring WDT returns be  
15 submitted on forms provided by or approved of by the Department). *See also* NMSA 1978, § 7-  
16 15A-9 (A) (1999) (requiring tax payments be made every quarter of the year).

17 The Taxpayer did not file any reports on the WDT with the Department from 2012 through  
18 2017. [Testimony of Mr. Herrera, Testimony of Ms. Rodriguez]. Therefore, the Department had  
19 seven years from the end of each calendar year to assess. *See* NMSA 1978, § 7-1-18. The earliest  
20 tax year assessed was 2012. [Exhibit #2]. Seven years from the end of 2012 was December 31,  
21 2019. The assessment was made on August 13, 2019. [Administrative file, Exhibit #2]. Therefore,  
22 the assessment was timely as it occurred within seven years of the end of every year involved from  
23 2012 through 2017. *See* NMSA 1978, § 7-1-18.



1 **Weight distance penalty.**

2 The Taxpayer argues that the weight distance penalty is overly burdensome and should not  
3 apply to an unintentional failure to pay. Anyone required to report who is found to have reported  
4 less than the actual miles traveled on New Mexico highways “shall, in addition to any other  
5 applicable fees, penalties and interest, pay an additional penalty”. NMSA 1978, § 7-15A-16 (2009).  
6 The word “shall” in a statute indicates that the provision is mandatory, not discretionary. *See*  
7 *Marbob Energy Corp. v. N.M. Oil Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24.

8 The WDT penalty is calculated by the tax payment period, which is every quarter for WDT.  
9 *See id.* *See also* NMSA 1978, § 7-15A-9 (1999). The WDT penalty has the potential to be as low  
10 as \$100 or as high as \$4,000 for one quarter, depending on the amount of WDT owed for that  
11 quarter. *See* NMSA 1978, § 7-15A-16. The WDT penalty is only applied when the Department  
12 conducts an audit. *See* 3.12.13.8 NMAC (2010). The WDT penalty is not applied when a taxpayer  
13 reports additional miles on its own through amended returns or managed audits. *See id.* The  
14 amount of WDT penalty will always be in excess of the amount of tax owed per quarter, until the  
15 amount of tax owed is \$4,000 or more. *See* NMSA 1978, 7-15A-16. The amount of standard  
16 penalty is always less than the amount of tax owed, with a maximum standard penalty of 20% of the  
17 tax owed. *See* NMSA 1978, § 7-1-69 (2007).

18 As originally assessed, the Taxpayer’s liability for the WDT, standard penalty, and interest  
19 was \$3,685.47. [Exhibit #2]. The WDT penalty alone was \$5,800.00, an amount more than the tax,  
20 standard penalty, and interest combined. [Exhibit #2]. So, the Taxpayer’s total liability was  
21 \$9,485.47. [Exhibit #2]. After the abatement, the Taxpayer’s liability for the WDT, standard  
22 penalty, and interest is \$2,316.88. [Letter ID No. L1979123376, Exhibit #2]. The WDT penalty is

1 \$5,000.00<sup>4</sup>, still an amount greater than the tax, standard penalty, and interest combined. [Letter  
2 ID No. L1979123376, Exhibit #2]. The Taxpayer’s dismay and outrage at the amount of WDT  
3 penalty, which is nearly 300% of the tax owed, is understandable<sup>5</sup>. Nevertheless, the statute is  
4 clear on the amount of WDT penalty that must be applied to each quarter based on the amount of  
5 tax owed. *See* NMSA 1978, § 7-15A-16. The Department is bound by the statutory language  
6 and must impose the amount of WDT penalty specified by the Legislature. *See Marbob Energy*  
7 *Corp.*, 2009-NMSC-013, ¶ 22 (indicating that statutes that say “shall” are mandatory, not  
8 discretionary). To the extent that the Taxpayer’s argument might be construed as a challenge to  
9 the statute, it is overruled as the Hearing Officer has no authority to overturn a statute. *See Maso*  
10 *v. State*, 2004-NMCA-025, 135 N.M. 152 (holding that a constitutional challenge to the statute  
11 would have been beyond the scope of the administrative hearing). *See also AA Oilfield Serv. v.*  
12 *N.M. State Corp. Comm’n*, 1994-NMSC-085, ¶ 18, 118 N.M. 273 (holding that the quasi-judicial  
13 powers of an administrative body are limited to making factual and legal determinations as  
14 authorized by the statute). *See Gzaskow v. Pub. Employees Ret. Bd.*, 2017-NMCA-064, ¶35  
15 (recognizing *AA Oilfield Serv.* for the proposition that an agency with quasi-judicial powers did  
16 not have authority to grant an equitable remedy). *See also* NMSA 1978, § 7-1B-1, *et seq.*

## 17 CONCLUSIONS OF LAW

18 A. Taxpayer filed a timely, written protest of the Department’s assessment and  
19 jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA 1978, § 7-1B-8  
20 (2019).

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<sup>4</sup> After the abatement, the total penalty is \$5337.01. Since \$337.01 is 20% of the tax owed, that is the amount of the standard penalty, with the remaining \$5000.00 being the WDT penalty.

<sup>5</sup> After the abatement, based on the amount of WDT owed without standard penalty and interest, the WDT penalty amounts to 296.7% of the WDT.

1 B. The hearing was set and held within 90 days of the request for hearing. *See id.*

2 C. The Taxpayer's tour buses are subject to the WDT, and the Taxpayer underreported  
3 its New Mexico-traveled miles. *See* NMSA 1978, § 7-15A-3 (1988) and § 7-15A-7 (2004).

4 D. The Department's assessment was within the statute of limitations. *See* NMSA  
5 1978, § 7-1-18 (2013).

6 E. Because the Taxpayer underreported its New Mexico-traveled miles, it is subject to  
7 the WDT penalty, and the amount of penalty is defined by the statute. *See* NMSA 1978, 7-15A-16.

8 For the foregoing reasons, the Taxpayer's protest is **DENIED. IT IS ORDERED** that  
9 Taxpayer is liable for WDT of \$1,685.08, standard penalty of \$337.01, interest of \$294.79, and  
10 WDT penalty of \$5,000.00, for a total liability of \$7,316.88. Interest continues to accrue until  
11 the tax principal is paid.

12 DATED: May 11, 2020.

13 *Dee Dee Hoxie*

14 \_\_\_\_\_  
15 Dee Dee Hoxie  
16 Hearing Officer  
17 Administrative Hearings Office  
18 P.O. Box 6400  
Santa Fe, NM 87502

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  
24 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.

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

7 **CERTIFICATE OF SERVICE**

8 On May 11, 2020, a copy of the foregoing Decision and Order was submitted to the parties  
9 listed below in the following manner:

10 *Email*

*Email*

11 INTENTIONALLY BLANK

12  
13 \_\_\_\_\_  
14 John Griego  
15 Legal Assistant  
16 Administrative Hearings Office  
17 P.O. Box 6400  
Santa Fe, NM 87502