STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
TYREE OIL INC.
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L0776238768

v. **Case Number 21.03-012A; D&O #22-10**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On August 25, 2021, Hearing Officer Ignacio V. Gallegos, Esq., conducted an administrative hearing on the merits in the matter of the tax protest of Tyree Oil Inc. (Taxpayer) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Payton Wayne, Chief Financial Officer, and Christopher Swires, Tax Compliance specialist, appeared representing Taxpayer and as Taxpayer's witnesses. Staff Attorney Peter Breen appeared, representing the opposing party in the protest, the Taxation and Revenue Department (Department). Department protest auditor Elvis Dingha appeared as a witness for the Department. The parties stipulated to the admission of late-filed exhibits, and Taxpayer exhibits 1 through 5 were received within the timeframes allowed and are admitted. Exhibits are more fully described in the Exhibit Log, which is made part of the Administrative File. Parties agreed that the Taxpayer's Motion to Dismiss and the Department's Response to the Motion to Dismiss would be considered as argument on the merits.

Based on the evidence in the record, after making findings of fact, the Hearing Officer finds that Taxpayer overcame the presumption of correctness that attached to the Department's assessment, which disregarded Taxpayer's port of entry payments under the Trip Tax Act,

superseding the application of the Weight Distance Tax, therefore the Taxpayer's protest must be granted. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Procedural findings

1. On July 9, 2020, the Department issued a Notice of Assessment of Taxes and Demand for Payment to Tyree Oil Inc. for weight distance tax reporting periods beginning January 1, 2014 and ending September 30, 2014. The assessment was for weight distance tax and permit of $1,686.75, civil penalty of $337.35, interest of $418.61, and weight distance underreporting penalty of $2,500.00 for a total assessment due of $4,942.71. [Letter ID# L0776238768].

2. On August 6, 2020, the Taxpayer submitted a letter of protest (form ACD-31094) alleging that the Department erred in issuing the assessment because the tax liability had already been satisfied by paying port-of-entry taxes paid, that the miles were driven on private roadways associated with railways, and it was beyond the statute of limitations. [Administrative file].

3. On August 31, 2020, the Department issued a letter acknowledging a timely protest of the Notice of Assessment. [Letter ID# L1017728688].

4. On March 1, 2021, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a scheduling hearing, alleging the amount at protest was $4,942.71. [Administrative file].

5. On March 1, 2021, the Department filed an Answer to Protest challenging the Taxpayer's protest, denying the claim of an assessment beyond the statute of limitations, and asserting that it is the Taxpayer's duty to maintain records that support its tax compliance. [Administrative file].

6. On March 3, 2021, the Administrative Hearings Office sent a Notice of Telephonic Scheduling Hearing, setting the matter for a telephonic scheduling conference on March 19, 2021. The notice was sent to all parties by email only. [Administrative file].

7. On March 19, 2021, the undersigned Hearing Officer conducted a telephonic scheduling hearing with the parties present by telephone conference. Mr. Christopher Swires and Mr. Payton Wayne appeared representing Taxpayer. Staff Attorney Peter Breen appeared representing the Department. The hearing was conducted within 90-days of the Department's request for hearing, pursuant to NMSA 1978, Section 7-1B-8 (F). Parties did not object that the hearing satisfied the deadline. The Hearing Officer preserved an audio recording of the hearing. [Administrative file].

8. On March 19, 2021, the Administrative Hearings Office sent a Scheduling Order and Notice of Motion Hearing, setting various deadlines and giving the parties notice that the motion hearing would take place by videoconference on July 20, 2021, and providing a unique URL with which to participate. The notice was sent to all parties by email only. [Administrative file].

9. On June 29, 2021, the Department filed its Preliminary Exhibit List with the Administrative Hearings Office, providing copies of the proposed exhibits to Taxpayer's representatives by email. [Administrative file].

10. On July 20, 2021, the undersigned Hearing Officer conducted a hearing by videoconference, which had to be converted to a scheduling conference because Taxpayer had not filed its proposed motion in accordance with the Scheduling Order. Christopher Swires appeared at the hearing on behalf of Taxpayer. Attorney Peter Breen appeared at the hearing on

behalf of the Department. The Hearing Officer preserved an audio recording of the hearing. [Administrative file].

11. On July 20, 2021, the Administrative Hearings Office sent a Notice of Administrative Hearing, giving the parties notice that the merits hearing would take place by videoconference on August 25, 2021, and providing a unique URL with which to participate. The notice was sent to all parties by email only. [Administrative file].

12. On August 6, 2021, Taxpayer submitted its Motion to Dismiss, citing port-of-entry payments as a rationale for falling outside the extended statute of limitations for issuance of assessments. [Administrative file].

13. On August 13, 2021, the Department submitted its Response to Motion to Dismiss, accompanied by a Declaration of Valerie Garcia, asserting that as a non-filer the utilization of the extended statute of limitations for issuance of the assessment was proper. [Administrative file].

14. The undersigned Hearing Officer conducted a hearing on the merits of Taxpayer's protest on August 25, 2021 by video conference using the Zoom video conference application. Taxpayer's representatives Christopher Swires and Payton Wayne appeared at the merits hearing by video. The Department was represented by Staff Attorney Peter Breen, who appeared by video conference. Witness Elvis Dingha appeared by video conference. The Taxpayer's Motion to Dismiss and the Department's Response to Motion to Dismiss are considered as closing arguments since they were late-filed and contained no stipulations of fact. The Hearing Officer preserved an audio record of the hearing. [Administrative file].

15. Following the hearing, on August 25, 2021, Taxpayer submitted an email containing Taxpayer Exhibits 1, 2, 3, 4, and 5. Without objection from the Department, the exhibits were admitted. [Administrative file].

16. On March 3, 2022, the Hearing Officer issued an Order Requesting Additional Briefing. The Order provided parties an additional 14 days from the date of issuance to meet and confer, file responsive briefs, request a status hearing, or any combination of those options. [Administrative file].

17. On March 24, 2022, twenty-one days after the issuance of the Order Requesting Additional Briefing, the Administrative Hearings Office had received no response from either party. The Administrative Hearings Office emailed parties reminding them of the deadline, and resending the Order Requesting Additional Briefing. [Administrative file].

18. As of the date and time of issuance of this decision and order, which is more than two weeks after the reminder email in the previous finding of fact, no additional briefs or documents were submitted by parties following the invitation to submit additional information, briefs, or requests as outlined in the Order Requesting Additional Briefing. [Administrative file]

Substantive findings

19. Taxpayer Tyree Oil Inc., during the timeframes at issue in 2014, was a company based in Oregon, which provided a railroad lubricating service in New Mexico. [Administrative file; Examination of Payton Wayne, H.R. 23:00-23:45, 25:30-26:55; Direct examination of Chris Swires, H.R. 27:45-28:00; Cross examination of P. Wayne, H.R. 31:05-33:30; Taxpayer exhibit 5].

20. The Department issued a Notice of Assessment of tax based on a mismatch between New Mexico miles as reported on International Fuel Tax Agreement (IFTA) returns, compared to New Mexico weight distance tax returns, which were never filed. [Administrative file; Direct examination of E. Dingha, H.R. 37:00-38:40; Taxpayer exhibit 5].

21. The Taxpayer paid port-of-entry fees during the timeframes at issue. The port-of-entry fees were referred to as "trip tax" within the exhibit spreadsheet. [Department Attorney colloquy/opening, H.R. 18:15-19:05; Examination of C. Swires, H.R. 28:15-28:40; Examination of E. Dingha, H.R. 39:15-39:50; Taxpayer Exhibit #5].

22. The Taxpayer's port-of-entry payments contained on the spreadsheet cover the periods from December 31, 2011 through September 30, 2014. For the period covered by the assessment (January 1, 2014 through September 30, 2014), there were eighteen entries. Each entry contains several columns, identifying the Taxpayer FEIN, filing period, port name, account number, DOT number, Taxpayer name, Taxpayer address, the vehicle license plate number, permit type, make, model year, miles, trip tax, payment, transaction date, amount due, method of payment (cash or credit), and original DOT number. During the relevant period, the taxes paid total $642.82, and the miles associated with these payments total 6,556 miles. The tax is called a "trip tax" within the Department's document. [Taxpayer's Exhibit #5].

23. Taxpayer representatives Christopher Swires and Payton Wayne were unable to reconstruct Taxpayer's mileage records for the tax periods at issue, reporting that records had been destroyed prior to the audit and assessment. The only records available were Department records. [Administrative file; Examination of P. Wayne, H.R. 23:45-24:40, 25:30-26:55; Cross examination of P. Wayne, H.R. 33:50-34:40; Examination of C. Swires, H.R. 27:40-28:00; Taxpayer exhibit 5].

1 24. The Department agreed to provide some credit, and at times full abatement (later
2 retracted), for payments made by Taxpayer. [Examination of C. Swires, H.R. 28:50-29:30;
3 Examination of E. Dingha, H.R. 39:25-39:55; Cross examination of E. Dingha, H.R. 41:00-
4 42:00; Taxpayer exhibits 1,2,3,4].

5 **DISCUSSION**

6 **Port of Entry payments and the Trip Tax Act rebut the presumption of correctness.**

7 The Taxpayer is a motor carrier based in Eugene, Oregon. Taxpayer provided a railroad
8 lubricator refilling service in 2014. During that time, Taxpayer paid port-of-entry fees, known as
9 a Trip Tax, for the vehicles it operated in New Mexico. The assessment issued under the Weight
10 Distance Tax Act came after a comparison of mileage travelled as reported under the
11 International Fuel Tax Agreement (IFTA) and weight distance tax reporting. Taxpayer's protest
12 presents a question of whether a trip tax which is imposed in lieu of the weight distance tax is
13 able to rebut the presumption of correctness in an assessment issued six years after the weight
14 distance tax would have been due.

15 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is
16 presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See*
17 *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638. Unless otherwise
18 specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and
19 civil penalty. *See* NMSA 1978, Section 7-1-3 (Z) (2019); *see also* Regulation § 3.1.1.16
20 (12/29/2000). Under Regulation § 3.1.6.13 NMAC, the presumption of correctness under Section
21 7-1-17 (C) extends to the Department's assessment of penalty and interest. *See Chevron U.S.A.,*
22 *Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-050, ¶16, 139 N.M. 498, 134 P.3d

785 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Accordingly, it is a taxpayer's burden to present some countervailing evidence or legal argument to show that they are entitled to an abatement, in full or in part, of the assessment issued in the protest. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436.

Here, Taxpayer provided a document which it had obtained from the Department, showing that it had paid port-of-entry taxes. The taxes were described within the document as "Trip Tax." The trip tax is a highway usage fee similar to the weight distance tax. NMSA 1978, Section 7-15-2.1 (G); NMSA 1978, Section 7-15A-3. Both the trip tax and the weight distance tax impose a fee depending on the weight of the vehicle, and the miles driven on New Mexico highways. NMSA 1978, Section 7-15-3.1 (B); NMSA 1978, Section 7-15A-8. However, the trip tax "is imposed *in lieu of registration fees and the weight distance tax* on the registrant, owner or operator of any foreign-based commercial motor carrier vehicle…" NMSA 1978, Section 7-15-3.1 (A) (emphasis added).

The Uniform Statue and Rule Construction Act, NMSA 1978, Section 12-2A-1 through Section 12-2A-20, provides guidance in interpretation of statutes and regulations. "The text of a statute or rule is the primary, essential source of its meaning." NMSA 1978, Section 12-2A-19. A statutory construction analysis begins by examining the words chosen by the legislature and the plain meaning of those words. *See State v. Hubble*, 2009-NMSC-014, ¶13, 146 N.M. 70, 206 P.3d 579. When interpreting undefined terms in a statute, courts often use dictionary definitions to ascertain the ordinary meaning of words and phrases. *State v. Lindsey*, 2017-NMCA-048, ¶14, 396 P.3d 199. The phrase "in lieu of" is a well-worn phrase in legal writing and should not require much interpretation. The online Merriam-Webster Dictionary defines the noun "lieu" as "place, stead,"

defines the phrase "in lieu" as "instead," and defines the phrase "in lieu of" as "in the place of" or "instead of."[1]

So, by imposing the trip tax, the Department placed a use tax in lieu of, or instead of, a weight distance tax on this out-of-state carrier. By paying the trip tax at the port of entry, the Taxpayer proved that it was not subject to the weight distance tax reporting and payment requirements, thus rebutting the presumption of correctness that attached to the assessment.

When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217, 62 P.3d 308. Following the presentation of the evidence of payment of the trip tax, the Department did not present any evidence to support a finding that the assessment was correct. While the Department had mentioned in its Preliminary Exhibit List that there was a notice of intent to assess dated April 23, 2020, showing a mileage discrepancy, it did not present the document at the hearing or thereafter for consideration by the Hearing Officer. The Department acknowledged at the hearing that some sort of credit was due Taxpayer for the port-of-entry taxes paid. And after the Hearing Officer gave a fair opportunity to submit additional briefing on the apparent dispositive language of the Trip Tax in this protest, the Department did not provide any additional legal argument, response, or additional documents in support of its assessment. Furthermore, no documents were submitted by the Department to show that a discrepancy existed, or how to calculate a credit against the purported discrepancy.

For unknown reasons, the Department did not submit the briefing ordered by the Hearing Officer in the Order Requesting Additional Briefing. The Hearing Officer had clear authority to require the Department to submit additional briefing in support of its assessment under NMSA

[1] Online definition is available at: https://www.merriam-webster.com/dictionary/lieu (last visited 03/29/2022).

1978, Section 7-1B-6 (D) (2) (2019) (allowing the hearing officer to order written briefing on the case). *See also* Regulation 22.600.3.23 NMAC; *see also* 22.600.3.26 NMAC. By not submitting the ordered briefing on the identified potentially determinative issue when given the extended opportunity to do so, Regulation 22.600.3.18 (A)(3) NMAC (8/25/2020) permits the Hearing Officer to infer that the issue is adverse to the Department's position and as such, the Hearing Officer infers that the Department has effectively conceded on that determinative issue. Here, the Taxpayer, using the Department's own records, rebutted the assessment of weight distance tax. The Department did not provide facts or argument to uphold the assessment even after being given an opportunity thereafter to respond. Consequently, the Taxpayer has overcome the presumption of correctness and the Department has failed to reestablish the correctness of its assessment.

Time limit on assessments.

Generally, an assessment must be made within three years from the end of the calendar year in which payment of the tax was due. *See* NMSA 1978, Section 7-1-18 (A) (2013). Because Taxpayer was alleged to be a non-filer in the three quarters of 2014 that its trucks travelled on New Mexico roads, the Department issued an assessment in 2020 looking as far back as January of 2014. The primary contention of Taxpayer was that because it had paid at the port of entry, it was not a non-filer, hence the assessment was beyond the statutory limit.

The fact that this Taxpayer is an out-of-state carrier, and it paid port-of-entry taxes under the Trip Tax Act, fortifies the Taxpayer's position that it was not required to report and pay weight distance taxes. *See* NMSA 1978, Section 7-15-3. The primary evidence that trip tax was paid was contained in a spreadsheet forwarded to the Taxpayer by the Department and provided in

evidence by Taxpayer. The spreadsheet itemized Taxpayer's port of entry payments from December 31, 2011 through September 30, 2014. For the period covered by the assessment (January 1, 2014 through September 30, 2014), there were eighteen entries. Each entry contains several columns, identifying, in pertinent part, the Taxpayer, the vehicle license plate number, state of issue of the license plate, make, model year, miles, trip tax, payment, transaction date, amount due, method of payment, and DOT number. During the relevant period, the taxes paid total $642.82, and the miles associated with these payments total 6,556 miles. The tax is called a "trip tax" within the Department's document.

The Trip Tax Act details the goals and the mechanics of this highway use tax. NMSA 1978, Section 7-15-1 through 7-15-6. As part of the Trip Tax Act, the statute indicates that "a use fee, to be known as the "trip tax", is imposed *in lieu of registration fees and the weight distance tax* on the registrant, owner or operator of any foreign-based commercial motor carrier vehicle" which meets the list of requirements. *See* NMSA 1978, Section 7-15-3.1 (A) (emphasis added). Since the tax was assessed and collected at the ports of entry, the Department should have have known that the Taxpayer was not subject to the weight distance tax act. The statute is clear in its plain meaning and must be determinative of the issues at protest. In lieu of means in place of, or instead of. Imposing this trip tax in lieu of a weight distance tax foreclosed application of the weight distance tax and should have prevented the subsequent assessment issued under the weight distance tax act six years after the time the trip tax was paid. The Taxpayer was not required to file weight distance tax returns or pay a weight distance tax, hence the Taxpayer cannot be termed a non-filer when it was not required to file.

The Taxpayer's contention that no return was necessary when it paid at the port of entry is accurate. When the trip tax was imposed "in lieu of" the weight distance tax, no weight distance tax return was required. The Department's extension of the time limit for assessment from

three years to seven years from the end of the calendar year in which payment of the tax was due, based on non-filer status, was improper. *See* Section 7-1-18 (C) (2013). Likewise, The Department's extension of the time limit for assessment from three years to six years from the end of the calendar year in which payment of the tax was due, based on understatement of tax by twenty-five percent, was also improper. *See* Section 7-1-18 (D) (2013). Therefore, the assessment made in 2020 for tax reporting periods ending September 30, 2014 was untimely, outside the time limits set forth in Section 7-1-18 (C) and (D).

It should be noted that the Department had opportunities to present evidence that would contradict the Taxpayer's evidence but did not take the opportunity. No evidence supported the Department's allegation that there was a discrepancy between the miles paid and the miles alleged to be due. There is only evidence of payment of a trip tax, which, imposed in lieu of a weight distance tax, is satisfactory evidence of compliance with the tax laws of New Mexico.

Conclusion.

The Taxpayer paid port-of-entry fees known as the Trip Tax. The trip tax is imposed on out-of-state carriers in lieu of a weight distance tax. Under New Mexico Law, the Taxpayer was not required to file subsequent weight distance tax returns. The Department's assessment was rebutted by its own documents, and no document provided thereafter substantiated the issuance of the assessment. The issuance of the assessment was untimely, and this Taxpayer cannot be considered a non-filer, or under-reporter, as no return was required, since the trip tax was paid. The protest is granted, the assessment must be abated.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Notice of Assessment of Tax and Demand for Payment issued under Letter ID number L0776238768, and jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA 1978, Section 7-1-24 (D) (2019); *see also* NMSA 1978, Section 7-15A-1, *et seq.* ("Weight Distance Tax Act").

B. The hearing was timely set and held within 90-days of the Department's request for hearing under NMSA 1978, Section 7-1B-8 (F) (2019). Parties did not object that the hearing satisfied the 90-day hearing requirement of Section 7-1B-8 (F). *See also* Regulation § 22.600.3.8 (J) NMAC (8/25/20).

C. Any assessment of tax made by the Department is presumed to be correct. Therefore, it is the taxpayer's burden to come forward with evidence and legal argument to establish that the Department's assessment should be abated, in full or in part. *See* NMSA 1978, Section 7-1-17 (C) (2007).

D. "Tax" is defined to include not only the tax program's principal, but also interest and penalty. *See* NMSA 1978, Section 7-1-3 (Z) (2019). Assessments of penalties and interest therefore also receive the benefit of a presumption of correctness. *See* Regulation § 3.1.6.13 NMAC (1/15/01).

E. The Taxpayer paid a trip tax in lieu of the weight distance tax. *See* NMSA 1978, Section 7-15-3.1 (2005).

F. The Taxpayer rebutted the presumption of correctness in the assessment. *See* NMSA 1978, Section 7-1-16 (2019); *see also* Regulation § 22.600.1.22 NMAC (8/25/20); *see also* NMSA 1978, Section 7-1B-8 (H) (2019); *see also* Regulation § 22.600.3.12 NMAC (8/25/20).

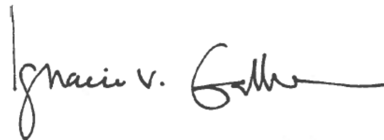
G. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation &*

Revenue Dep't, 2003-NMCA-21, ¶13, 133 N.M. 217, 62 P.3d 308. The Department did not present evidence to reestablish that its assessment was correct.

H. Because Taxpayer was not required to file weight distance tax returns by virtue of having paid the trip tax, the assessment was not timely. The statutory guidelines for non-filers does not apply to this Taxpayer. *See* NMSA 1978, Section 7-1-18 (C) and (D) (2013).

For the foregoing reasons, the Taxpayer's protest **IS GRANTED**. IT IS ORDERED that the Department must abate the underlying tax, penalty, and interest associated with this assessment.

DATED: April 8, 2022.



Ignacio V. Gallegos
Hearing Officer
Administrative Hearings Office
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NOTICE OF RIGHT TO APPEAL

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

copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

On April 8, 2022, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

Email and First Class USPS mail *Email*

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