STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
SALAIZ TRUCKING
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1394560816

v. **Case Number 21.05-031A; D&O #22-15**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On September 23, 2021, Hearing Officer Ignacio V. Gallegos, Esq., conducted an administrative hearing on the merits in the matter of the tax protest of Salaiz Trucking (Taxpayer) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Manuel Salaiz, owner, and Brenda Salaiz, spouse, appeared representing Taxpayer and as Taxpayer's witnesses. An additional Taxpayer witness, Mary Lou Montoya, appeared with Taxpayer. Staff Attorney Kenneth Fladager 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. Taxpayer's multiple-page exhibits 1 and 2 were received at the hearing and admitted, subject to the Department's concerns over the relevancy of certain pages. Department's multiple-page exhibits A, B, and C were pre-filed and admitted, overruling the Taxpayer's concerns over the accuracy of the exhibits. Exhibits are more fully described in the Exhibit Log, which is made part of the Administrative File.

The protest is two-fold. Following an audit, the Department denied application of one-way haul mill rate, which Taxpayer had applied when filing Weight-Distance Tax returns, and now protests. The Department also assessed additional miles based on Taxpayer's statement and audit

findings that he only reported half his miles travelled, which Taxpayer claims is an impossibility and based on a misunderstanding and misstatement of the Taxpayer. Based on the evidence in the record, after making findings of fact, the hearing officer finds that Taxpayer failed to overcome the presumption of correctness or to establish entitlement to the one-way haul classification, and the entire miles driven were properly assessed, therefore, the Taxpayer's protest must be denied. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Procedural findings

1. On June 14, 2018, the Department issued a Notice of Assessment of Taxes and Demand for Payment to Salaiz Trucking for weight distance tax reporting periods beginning January 1, 2011 and ending September 30, 2017. The assessment was for a weight distance tax audit assessment of $8,424.84, civil penalty of $1,666.50, interest of $1,021.26, and weight distance underreporting penalty of $11,100.00 for a total assessment due of $22,212.60. [Letter ID# L1394560816].

2. On August 29, 2018, the Taxpayer submitted a letter of protest alleging that the Department erred in issuing the assessment because the sole operator was a one-way hauler, the miles driven was overestimated by the Department, and estimated miles driven were impossible. The Taxpayer challenged the excessiveness of the underreporting penalty. The Department protest office stamped the protest letter as received on September 4, 2018. [Administrative file].

3. On September 11, 2018, the Department issued a letter acknowledging a timely protest of the Notice of Assessment. [Letter ID# L1646001968].

4. Nine hundred seventy-five days later, on May 13, 2021, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a merits hearing, alleging the amount at protest was $22,212.60. [Administrative file].

5. On May 13, 2021, the Department filed an Answer to Protest challenging the Taxpayer's protest, denying the claim that the Taxpayer qualified as a one-way hauler, and asserting that it is the Taxpayer's duty to maintain records that support its tax compliance. [Administrative file].

6. On May 19, 2021, the Administrative Hearings Office sent a Notice of Videoconference Administrative Hearing, setting the matter for a merits hearing on August 2, 2021. The Notice gave the parties notice that the merits hearing would take place by videoconference and provided a unique URL with which to participate. The notice was sent to all parties by email only. [Administrative file].

7. On August 2, 2021, the undersigned Hearing Officer conducted the scheduled hearing. The Taxpayer did not appear. The Department was represented by staff Attorney Kenneth Fladager, accompanied by protest auditor Elvis Dingha. The hearing was conducted within 90-days of the Department's request for hearing, pursuant to NMSA 1978, Section 7-1B-8 (F). Parties present did not object that the hearing satisfied the deadline. The Hearing Officer preserved an audio recording of the hearing. Because the notice went out only by email, the Hearing Officer reset the matter and provided notice by email and U.S. Postal Service mail. [Administrative file].

8. On August 2, 2021, the Administrative Hearings Office sent a Second Notice of Videoconference Administrative Hearing giving the parties notice that the merits hearing would take place by videoconference on August 19, 2021, providing a unique URL with which to

participate. The notice was sent to all parties by email and was sent to Taxpayer by U.S. Postal Service mail as well. [Administrative file].

9. On August 2, 2021, the Department filed its Prefiled Exhibits A, B, and C with the Administrative Hearings Office. [Administrative file].

10. On August 19, 2021, the undersigned Hearing Officer conducted a second hearing by videoconference, which had to be converted to a scheduling conference because technical issues prevented clear communication, and Taxpayer desired assistance with interpretation from Spanish to English and English to Spanish. Manuel Salaiz and Brenda Salaiz appeared at the hearing on behalf of Taxpayer. Attorney Kenneth Fladager appeared at the hearing on behalf of the Department, accompanied by protest auditor Elvis Dingha, and observer for training purposes Brenda Penser. The Hearing Officer preserved an audio recording of the hearing. [Administrative file].

11. On August 19, 2021, the Administrative Hearings Office sent a Third Notice of Administrative Hearing, giving the parties notice that the merits hearing would take place in person on September 23, 2021, at the Administrative Hearings Office in Albuquerque, New Mexico. The notice was sent to all parties by email, and to Taxpayer by U.S. Postal Service mail. [Administrative file].

12. The undersigned Hearing Officer conducted a hearing on the merits of Taxpayer's protest on September 23, 2021 in person at the Administrative Hearings Office in the Compass Bank Building in Albuquerque, New Mexico. Taxpayer's representatives Manuel Salaiz (owner) and Brenda Salaiz (spouse) appeared at the merits hearing in person. The Department was represented by Staff Attorney Kenneth Fladager, who appeared in person. Witness Elvis Dingha appeared in person. Additional Taxpayer witness Mary Lou Montoya, appeared as well. Voiance

translation service provided five different individuals for confidential interpretive services by telephone. Brenda Salaiz interpreted for Taxpayer during the final portion of the hearing. The Hearing Officer preserved an audio record of the hearing (identified herein as Hearing Record, or H.R.). [Administrative file].

Substantive findings

13. Taxpayer Salaiz Trucking, during the time-frames at issue, was a single owner-driver trucking business providing hauling services in and around the Albuquerque, New Mexico area, and was required to and did file New Mexico weight distance tax returns. [Administrative file; Direct examination of M. Salaiz, H.R. 1:09:30-1:13:40; Taxpayer exhibit 1, 2; Department exhibit A, B].

14. The Department performed an audit of Taxpayer's weight distance tax reporting in 2018. The audit found that Taxpayer had not kept adequate records of loaded and unloaded miles to support a one-way haul mill rate. Due to the disallowance of the one-way hauler designation, and the finding that the miles reported did not match the odometer readings, Taxpayer was deemed to have underreported by more than 25%, and the audit was extended to include the tax years 2012 through 2014. [Administrative file; Direct examination of E. Dingha, H.R. 2:07:45-2:19:50, 2:28:00-2:32:25; Taxpayer exhibits 1, 2; Department exhibit A, B].

15. As a result of the audit findings, after interview and additional documentation from the Taxpayer, the Department issued its assessment, which Taxpayer protested and the Department acknowledged in 2018. [FOF #1, #2, #3; Testimony of B. Salaiz, H.R. 50:30-53:30; Department exhibits A, B].

16. Brenda Salaiz was the person who submitted weight distance tax returns for Taxpayer.

17. After not hearing from the Department for some time, Taxpayer was under the belief that the protest had been closed, because Mrs. Salaiz went to the Department's TAP website and had found the assessment due, then thereafter found repeatedly that their balance was zero.

18. Taxpayer closed the business when the truck broke down in the first quarter of 2020.

19. Taxpayer provided documentation to the original auditor, but after the business closed in early 2020, had no documentation remaining at the time of the protest hearing. Taxpayer records for the tax periods at issue were disposed of prior to the hearing, except for a few. [Administrative file; Direct examination of B. Salaiz, H.R. 52:20-56:15; Cross examination of M. Salaiz, H.R. 1:26:00-1:27:20; Taxpayer exhibit 1, 2].

20. Taxpayer records provided included a document entitled "Driver's Vehicle Inspection Report" dated January 4, 2017, which showed an odometer reading of 448694. The handwritten note shows "No work". [Taxpayer exhibit# 2-10]

21. Taxpayer records provided included a document entitled "Driver's Vehicle Inspection Report" dated January 5, 2017, which showed an odometer reading of 448968. The handwritten note shows "No work". [Taxpayer exhibit# 2-11]

22. At face value, there is a difference between the two consecutive day's reports of 274 miles on the odometer reading. The Taxpayer introduced the records to show that the Taxpayer would sometimes transpose numbers, in this case the 6 and 9, but the documents are

imperfect in this regard. [Taxpayer Exhibits 2-10, 2-11; Examination of B. Salaiz, H.R. 56:15-57:10; Cross examination of Brenda Salaiz, H.R. 1:52:15-1:54:50].

23. Mr. Salaiz testified that if there is no work, or if he gets fuel he does not count those miles. [Direct examination of M. Salaiz, H.R. 1:11:10-1:11:25, 1:13:20-1:13:30].

24. The audit workpapers show the odometer reading from January 2, 2017, was 448,520 and the quarter end mile on March 31, 2017, was 456,107. The reported miles for that quarter were 7,000 but the audited miles, based on odometer documentation, were 7,587, with a difference of 587 miles driven but not reported. [Taxpayer exhibit 1-3, Department exhibit B-8 (lines 102-110)].

25. Based on credible testimony, coupled with existing documentation, the Taxpayer's vehicle was customarily used for one-way hauls. [Direct examination of B. Salaiz, H.R. 59:00-59:15, 1:02:55-1:03:55; Direct examination of M. Salaiz, H.R. 1:09:30-1:12:00; Taxpayer exhibit 2].

26. The Taxpayer made no application for one-way haul classification by the Department. [Testimony of E. Dingha, H.R. 2:29:40-2:30:50].

27. After classification, a Taxpayer qualified as a one-way hauler must maintain records of loaded and unloaded miles. At audit, Taxpayer did not provide records which broke out empty versus loaded miles. The protest auditor also did not find any records which satisfied this requirement. [Testimony of E. Dingha, H.R. 2:30:50-2:33:25; Taxpayer exhibit 1-1 through 1-28; Department exhibit B-1 through B-10].

28. The tax protest auditor reviewed the original auditor's report and Taxpayer's weight distance tax returns and concluded that Taxpayer claimed the reduced one-way haul mill rate without being qualified as a one-way hauler. The one-way haul mill rate is two-thirds of the

tax rate for the weight class. By Taxpayer's paying only two-thirds of the appropriate tax, the tax was underreported by more than 25 percent. [Direct examination of E. Dingha, H.R. 2:33:45-2:36:15; Department exhibit A-1 through A-4].

29. The tax protest auditor reviewed the mileage and determined that the audit had concluded there were miles driven but not reported in each quarter. [Direct examination of E. Dingha, H.R. 2:08:40-2:13:10, 2:17:25-2:20:10, 2:35:30-2:36:05; Taxpayer exhibit 1-1 through 1-28; Department exhibit B-1 through B-10].

30. Department provided an update of outstanding Taxpayer liabilities through August 16, 2021. As of August 16, 2021, the tax liability stood at a total of $23,415.16. Interest alone has continued to accrue since the original assessment. [Administrative file; Direct examination of E. Dingha, H.R. 2:12:30-2:13:30; Department exhibit C-001].

DISCUSSION

Burden of proof.

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

One-way haul.

NMSA 1978, Section 7-15A-6 (2004) sets the tax rates under the Weight Distance Tax Act for all motor vehicles other than some types of buses. Subsection A establishes the base tax rates for all registered vehicles based on the vehicles' declared gross weight and on the mileage traveled on state highways. *See* § 7-15A-6 (A). Under Section 7-15A-6 (A), the tax rate increases as a vehicle's weight classification increases. However, Section 7-15A-6 (B) establishes a reduced one-way haul tax rate:

> All motor vehicles for which the tax is computed under Subsection A of this section shall pay a tax that is two-thirds of the tax computed under Subsection A of this section if:
> (1) the motor vehicle is customarily used for one-way haul;
> (2) forty-five percent or more of the mileage traveled by the motor vehicle for a registration year is mileage that is traveled empty of all load; and
> (3) the registrant, owner or operator of the vehicle attempting to qualify under this subsection has made a sworn application to the department to be classified under this subsection for a registration year and has given whatever information is required by the department to determine the eligibility of the vehicle to be classified under this subsection and the vehicle has been so classified.

If the registrant, owner or operator of the vehicle can satisfy the three one-way haul rate criteria identified under Section 7-15A-6 (B), the Weight Distance Tax (WDT) is calculated at two-

thirds of the base tax rate established under Subsection A (or 33% less than the full tax rate per vehicle weight class).

When the Department audited the Taxpayer, it found no application, and records provided and statements of the Taxpayer were insufficient to establish entitlement to the application of the one-way haul mill rate. The issue in dispute here is whether audited records showed "forty-five percent or more of the mileage traveled…is mileage that is traveled empty of all load." The Department's audit determined that records maintained by the Taxpayer were insufficient to establish that forty-five percent or more of the mileage traveled was empty. Of the three criteria necessary to establish entitlement to the one-way haul designation, the taxpayer only established one. Taxpayer was able to establish through evidence that he was customarily a one-way hauler. However, the records used to support his statements were for a period not subject to the audit and assessment, so this is not determinative of the time-frames at issue.

Several Department regulations address one-way haulers for the purposes of Section 7-15A-6 (B). Regulation 3.12.6.7 NMAC (11/15/01) provides definitions for empty miles, loaded miles, and one-way haulers. Under Regulation 3.12.6.7 (A) NMAC, "empty miles" means the "number of miles traveled on New Mexico roads when the vehicle or vehicle combination is transporting no load whatsoever."

Regulation 3.12.6.8 NMAC (11/15/01) and Regulation 3.12.6.9 NMAC (11/15/01) respectively establish how a registrant can be qualified or disqualified as a one-way hauler. Regulation 3.12.6.11 (11/15/01) provides a list of records required to be kept by a Taxpayer wishing to establish or maintain a one-way hauler status.

> One-way haulers shall maintain the following records on a reporting period basis. All records shall be referenced by vehicle unit number:
> A. Vehicle trip mileage records for each vehicle operated in New Mexico. The mileage records shall reflect the total empty miles and the total loaded miles

traveled on New Mexico roads. Accurate trip mileage records indicating empty and loaded miles may include:

(1) accurate map mileage for each trip;
(2) hubometer or odometer readings; or
(3) vehicle-specific log books.

B. Vehicle itineraries including the origin and destination point of each trip, and the routes taken.

The Taxpayer did not retain any documents after the business closed but said he had provided all documents to the original auditors. In the record of this hearing were the summaries contained in the audit workpapers, the WDT return summaries, and a few original documents. For the time period at issue, there were no vehicle-specific log books which contained vehicle identification and starting and ending odometer readings, a materials supplier name, and a job work site name or distance from the materials supplier to the work site. The trip logs submitted at the hearing (which did not cover the time-frame at issue) show that while the Taxpayer was in the business of customary usage as a one-way hauler for Vulcan Materials Company products, the two days of trip tickets submitted for the year 2018 are in no way adequate to prove that all the miles driven over the previous five years were the only type of haul Taxpayer did. The few logs provided were for a time period outside the assessment. While these logs are helpful in establishing that customarily this Taxpayer was engaged in one-way hauling, there are many more regulatory requirements under Regulation 3.12.6.11 (11/15/01) than simply showing customary activity. The Taxpayer's records are insufficient to establish that Taxpayer was a one-way hauler in the periods in dispute and do not overcome the presumption of correctness of the assessment and audit findings denying the one-way haul designation. The denial of the discounted one-way haul mill rate was proper.

Underreporting miles driven.

Taxpayer claimed that he reported all the miles driven, not just half the miles he had said he reported at another time, during the audit interview. The Department assessed the Taxpayer for underreporting miles, not simply based on his statement, but also using quarterly odometer

readings, which showed a discrepancy in the miles reported and the miles driven. For example, during the first quarter of 2017, there were 7,000 miles reported, yet the odometer showed 7,587 miles had been driven during that time. The Taxpayer attributed extra miles to being unable to properly record numbers by sometimes transposing digits. This did not hold true, as Taxpayer testified that he did not report miles driven when there was no work or when he drove to service stations for refueling.

At the hearing, the Taxpayer's evidence, rather than fortifying his own position, supported the Department's view that Taxpayer's records were inadequate to support the tax returns submitted. Under NMSA 1978, Section 7-15A-16, "[a]ny person required to file a report pursuant to [weight distance tax act] that is determined to have reported less than the mileage actually travelled on New Mexico highways during a tax payment period … shall, in addition to any other applicable fees, penalties and interest, pay an additional penalty." While all miles driven for work were reported, the Taxpayer underreported mileage by omitting miles driven to get fuel, or when driving the vehicle in search of work. The underreporting penalty was properly imposed.

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 audited and found to be an under reporter by 25%, the Department was able to look back from the original audit period in 2017 as far back as January of 2012, under NMSA 1978, Section 7-1-18 (D) ("If a taxpayer in a return understates by more than twenty-five percent the amount of liability for any tax for the period to which the return relates, appropriate assessments

may be made by the department at any time within six years from the end of the calendar year in which payment of the tax was due."). The rationale for doing so was that because the Taxpayer, without first seeking approval by the Department, took the 33% discount allowed from the usual mill rate by claiming the one-way haul mill rate on its original tax returns. And, as stated above, the application of the one-way hauler classification was disallowed. Since the Taxpayer improperly took the 33% discount for one-way haulers and the tax rate is greater than a 25% deviation from the proper tax rate, the Taxpayer understated a tax. Therefore, the assessment made in 2018 for tax years 2012, 2013, 2014, 2015, 2016, and 2017 was timely, within the time limits set forth in Section 7-1-18 (D).

Timeliness of Hearing.

There is an issue of timeliness of the hearing request. The assessment under scrutiny was issued on June 14, 2018. The Taxpayer protested the assessment on August 29, 2018, and the Department acknowledged the protest on September 11, 2018. However, it was not until 975 days later, on May 13, 2021, that the Department filed a Request for Hearing asking the Administrative Hearings Office that the Taxpayer's protest be scheduled for a merits hearing. From the date of the protest, the request for hearing was submitted after 988 days. During the entire time the assessment was accruing interest. In addition, from 2018 until the business closed in 2020, Taxpayer would revisit the TAP website and check the status of the debt, which showed nothing owing. Believing, albeit incorrectly, that this meant the matter had been laid to rest, Taxpayer disposed of most of the documentation Taxpayer kept.

Under the 2019 revision of Section 7-1B-8 (B) (2019), the Department is obliged to request a hearing on a protest within one hundred eighty days of receipt of the protest. The Department argued that the former statute controlled, since this assessment was issued in 2018.

The former version of the Administrative Hearings Office Act was in effect between July 1, 2015 and June 13, 2019. *See* NMSA 1978, Section 7-1B-8 (2015). Under that section of law, the deadline was shorter: "Within forty-five days after receipt of a protest… the taxation and revenue department shall request from the administrative hearings office a hearing…" However, under the 2015 version of the law, there was no remedy available to taxpayers aggrieved by a late-filed request for adjudication. In contrast, under the 2019 enactment, "[i]f the hearing officer finds that the taxation and revenue department failed to comply with the deadlines set forth in Subsections A and B of this section, the hearing officer may order that no further interest may accrue on the protested liability." NMSA 1978, Section 7-1B-8 (E) (2019).

Under the 2015 version of the statute, which provided forty-five days to request a hearing, the Department did not comply with the deadline by filing its request for hearing 943 days after the 45-day deadline had passed. And under the current 2019 version of the statute, which provides the Department one hundred eighty days to request a hearing, the Department did not comply with the deadline by filing its request for hearing 808 days after the 180-day deadline had passed. In either case, the undersigned Hearing Officer has found that the Department failed to comply with deadlines set forth in Subsections A and B of Section 7-1B-8.

When the Hearing Officer posed the question of what impact this may have on the protest, the Department indicated it opposed giving retroactive effect to the amended law, as the assessment had been issued prior to the enactment of the 2019 amendments. Under the holding of *GEA Integrated Cooling Technology v. State Taxation and Revenue Dep't.*, 2012-NMCA-010, 268 P.3d 48, the application of a statutory provision to cases which arose prior to the enactment of the statutory provision is still compatible with the prohibition of retroactivity. In the *GEA* case, the Court was faced with the issue of whether to apply a twenty-percent cap on penalties or

a ten-percent cap on penalties. The taxpayer argued that the Court should follow the law in effect at the time the tax liability arose (a ten-percent cap). The Department argued that the Court should follow the law in effect at the time the assessment was issued (a twenty-percent cap). The Court chose to apply the twenty-percent cap because, first, the plain language of the statute referred to the triggering event as the "assessment," which had been issued after the effective date of the amended law providing for a twenty-percent cap. Secondly, the Court reasoned that this application does not impermissibly give retroactive effect to a statutory amendment because it did not impair vested rights, impose new obligations, or affix new disabilities to past transactions. The Court concluded that "[t]he application of the new statutory penalty to Taxpayer's outstanding tax liability does not affect any right Taxpayer possessed under prior law. Taxpayer's status was already subject to the assessment of the penalty."

In this case, the earlier law and the revised law both imposed time limits to expedite the adjudication of protests. The difference is that the new law allows "[i]f the hearing officer finds that the taxation and revenue department failed to comply with the deadlines set forth in Subsections A and B of this section, the hearing officer may order that no further interest may accrue on the protested liability." NMSA 1978, Section 7-1B-8 (E) (2019). Clearly, the trigger is "if the hearing officer finds the taxation and revenue department failed to comply with the deadlines." I have so found, under both possible scenarios, the Department delayed the filing of the request for hearing and failed to comply with the deadlines for doing so as set forth by the legislature.

To address the Department's concern about retroactivity, "[a] statute or rule operates prospectively only unless the statute or rule expressly provides otherwise or its context requires that it operate retrospectively." NMSA 1978, Section 12-2A-8. There is no provision for

retroactive effect written into the legislation, as has been noted by other decisions of this administrative body. *See In the Matter of PST Services Inc*., Administrative Hearings Office D&O No. 20-10 (5/12/2020) (non-precedential); *see also In the Matter of Ronald Duncan*, Administrative Hearings Office D&O No. 21-17 (6/30/2021). Yet, it bears further discussion whether the provision allowing the Hearing Officer to order no further interest accrue on the protested liability is one which impairs a vested right, imposes a new obligation, a new duty, or affix a new disability to a past transaction, or if the context requires that it operate retrospectively. The previous statute provided time limits, but provided no remedy for violations of the statute. Section 7-1B-8 (A) (2015). The amended statute provides longer time limits and affixes a new remedy, or consequence, for not meeting the time limits. NMSA 1978, Section 7-1B-8 (E) (2019). So, stopping the accrual of interest on the assessment, while certainly justified in this egregious case of mishandling a protest, is not a remedy applicable to the case at hand.

The Taxpayer was clearly prejudiced by the excessive delay between its submission of a protest and the Department's request for hearing, insofar as interest continued accruing and the Taxpayer mistook the matter to have been settled. The Taxpayer's evidence showed that since the matter had been pending so long, and regular checks to the Department's website showed a zero balance, the Taxpayer mistakenly believed the matter to have been closed. The business itself closed after the truck broke down in 2020, and records that might have supported Taxpayer's reconstruction of evidence that might satisfy a finding a one-way haul status were lost or destroyed.

Nevertheless, the revised statute, if allowed to terminate continued interest on an assessment existing before the statute was enacted, would impermissibly affix a new disability to a past transaction. Under the previous law, there was no benefit allowed by statute to taxpayers

harmed by the Department's lack of haste in bringing protests to adjudication. *See Ranchers-Tufco Limestone v. Revenue*, 1983-NMCA-126, ¶13, 100 N.M. 632, 674 P.2d 522. Likewise, estoppel is not an available remedy when the act sought would be contrary to the requirements of statute. *See Rainaldi v. Public Employees Retirement Board,* 1993-NMSC-028, ¶18-19, 115 N.M. 650, 857 P.2d 761. Therefore, to apply the revised statute would result in impermissible retroactivity. Therefore, it is not appropriate in this context to award the Taxpayer the elimination of ongoing interest on the assessment pursuant to NMSA 1978, Section 7-1B-8 (E) (2019). The assessment will be upheld.

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 L1394560816, 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 Department's request for hearing was untimely. *See* NMSA 1978, Section 7-1B-8 (2015); *see also* NMSA 1978, Section 7-1B-8 (2019).

C. 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).

D. 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).

E. "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).

F. The assessment was made within six-year statutory guidelines for tax filers who understated the amount of tax liability. *See* NMSA 1978, Section 7-1-18 (D) (2013, amended 2021).

G. The Taxpayer in this case failed to meet his burden of proof in overcoming the presumption of correctness attached to 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).

H. The termination of future interest on the assessment under the NMSA 1978, Section 7-1B-8 (E) (2019) is inapplicable to this assessment issued before the enactment of the revised statute. The time limits without resulting consequences as expressed in NMSA 1978, Section 7-1B-8 (A) (2015) apply to this protest. *See* NMSA 1978, Section 12-2A-8; *see also* *Ranchers-Tufco Limestone v. Revenue*, 1983-NMCA-126, ¶13, 100 N.M. 632, 674 P.2d 522.

For the foregoing reasons, the Taxpayer's protest is **DENIED**. IT IS ORDERED that Taxpayer is liable for tax principal, penalty, and interest on the assessment.

DATED: June 17, 2022.

Ignacio V. Gallegos
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

On June 17, 2022, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

Email and First-Class Mail *Email and First-Class Mail*

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