

BEFORE THE HEARING OFFICER  
OF THE TAXATION AND REVENUE DEPARTMENT  
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST  
OF WEST TEXAS EXPRESS  
MTD NO. 36966-0  
HIGHWAY USE AUDIT

No. 99-06

**DECISION AND ORDER**

A formal hearing on the taxpayer's protest was held January 13, 1999 before Margaret B. Alcock, Hearing Officer. West Texas Express ("Taxpayer") was represented by its attorney, Lorri Krehbiel, who is with the law firm Madison, Harbour, Mroz & Brennan, P.A. The Taxation and Revenue Department ("Department") was represented by Javier Lopez, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayer is in the business of delivering general commodities by truck in both Texas and New Mexico.
2. The Taxpayer began business in El Paso, Texas, in April 1980. Initially, most of the Taxpayer's business consisted of deliveries between El Paso and Las Cruces, New Mexico.
3. As the Taxpayer's business grew, it opened another facility in Albuquerque, New Mexico. During the last five years, the Taxpayer has entered into contracts for cross-country deliveries, mainly to Detroit and the east coast.
4. Most of the Taxpayer's deliveries in New Mexico are to small towns where there is no opportunity to pick up a new load for the return trip to the Taxpayer's terminal in El Paso or

Albuquerque. In most cases, the Taxpayer's trucks leave the terminal loaded, unload freight at each designated stop, and make the return trip to the terminal empty.

5. Each trip is carefully plotted so that deliveries are made in the most efficient manner possible. If a driver has five deliveries in one town or area, the deliveries are generally made from the nearest point to the farthest point. The trip plan is designed to avoid criss-crossing routes and retracing miles that would unnecessarily increase the trip time and the fuel used.

6. The Taxpayer maintains a pick up and delivery manifest for each trip that identifies the deliveries by freight bill number, name of customer, time in and out, and odometer reading at each stop. Using the trip manifest and the freight bills, it is possible to determine the exact location at which a truck would complete its deliveries and become empty of all load.

7. The Taxpayer was audited by the Department in 1990. This audit determined an error rate of only 1.61% in the Taxpayer's reporting of highway use taxes to New Mexico. The audit report noted the excellent cooperation of the Taxpayer's owner, Joe Roberts.

8. During the 1990 audit, Mr. Roberts spent a substantial amount of time with the auditor, including time going over trip manifests to show the auditor the route taken by the driver and the point at which the driver made his last delivery and began the return trip to the terminal empty of load.

9. After examining the Taxpayer's records, the auditor told Mr. Roberts the company would qualify for the reduced one-way haul rate set out in Section 7-15A-6(B) of the Weight Distance Tax Act. This section allows truck owners to qualify a truck that is customarily used for one-way hauls and that travels empty of all load for 45 percent or more of its annual miles to pay tax at a rate which is two-thirds the usual tax rate set out in Section 7-15A-6(A).

10. Following the auditor's advice, Mr. Roberts applied to the Department and registered certain of his trucks for the reduced one-way haul rate.

11. In 1995 or early 1996, the Taxpayer received another notice of audit from the Department.

12. At that time, the Taxpayer was experiencing various personnel and administrative problems. Mr. Roberts' general manager retired after being with the company for many years. Two new supervisors were hired and required training in the El Paso office. In addition, Mr. Roberts had recently fired the manager of the Albuquerque office after discovering that consistent records were not being maintained. As part of this problem, Mr. Roberts discovered that after the Taxpayer's regular tax returns were filed, the manager simply threw out the driver trip records and other documentation used to prepare the returns. When he received the Department's audit notice, Mr. Roberts was in the process of instituting new procedures to tighten up and computerize the company's record keeping.

13. Mr. Roberts explained the situation to the Department's auditor and asked him to postpone the audit until Mr. Roberts would be available to explain the company's operations and answer any questions that might come up during the audit. The auditor refused to change the start date of the audit.

14. The audit covered tax periods January 1993 through March 1996. Because the Albuquerque records for 1993 and 1994 had been thrown out by the Taxpayer's former manager, the auditor examined the records for trucks operating out of the Taxpayer's El Paso terminal.

15. When examining the El Paso records, the auditor discovered gaps in the odometer readings, *i.e.*, the mileage reported at the end of one trip did not match the mileage reported for the

beginning of the next trip by the same truck. The audit report refers to these gaps as "breaks in continuity" or "BICs".

16. The BICs noted by the auditor represent local miles the Taxpayer's trucks traveled in Texas. The Taxpayer reported and paid tax on all of these miles to the State of Texas.

17. Since starting business in 1980, the Taxpayer has calculated taxes due to Texas by taking all miles traveled by its trucks, subtracting the miles traveled in other states, such as New Mexico, and reporting all remaining miles to Texas. Based on this method of reporting, Texas does not require the Taxpayer to keep odometer readings on local Texas miles.

18. When the Department's auditor asked Mr. Roberts to provide trip records to prove the BIC miles were traveled in Texas, Mr. Roberts explained that he had no record of these miles because Texas did not require such records to be kept.

19. Mr. Roberts told the auditor that tax on all of these miles had been reported and paid to Texas. Mr. Roberts also told the auditor the Taxpayer had been audited by Texas and Texas had accepted the Taxpayer's reporting of the BIC miles.

20. The auditor refused to accept Mr. Robert's explanation and included a percentage of the BIC miles as unreported miles traveled in New Mexico. The auditor did not ask to see a copy of the Texas audit, nor is there any indication the auditor contacted anyone in Texas to verify Mr. Roberts' reporting of the BIC miles to Texas.

21. Although the audit worksheets state that the percentage of BIC miles apportioned to New Mexico was determined by dividing the total miles traveled in New Mexico over the total miles traveled in all states, this methodology was not consistently applied. The 1993 trip sample states that 42.17% of BIC miles were apportioned to New Mexico. In fact, 100% of several 1993 BIC entries

were apportioned to New Mexico; in other instances no BIC miles were apportioned to New Mexico.

22. The inclusion of BIC miles as unreported miles traveled in New Mexico greatly increased the error rate in the auditor's report. The error rate for each individual year was 55.71% for 1993; 47.24% for 1994; and 14.19% for 1995. No sampling was done for 1996.

23. The auditor combined the test months for the entire three-year audit period to arrive at a 37.37% overall error rate. This combined error rate was then used to calculate the Taxpayer's underpayment of both the weight distance tax and the special fuel tax for the entire three year period.

24. The Audit Assessment Summary in the audit report states that the Taxpayer's underreporting of fuel tax resulting from application of the 37.37% error rate, as shown on supporting Schedule I, is \$13,672.36, and this was the figure used in calculating the final assessment. Schedule I shows a fuel tax liability of only \$11,021.14, with corresponding differences in the calculation of penalty and interest.

25. In addition to determining underreported tax based on the 37.37% error rate, the auditor determined that the Taxpayer had improperly claimed the reduced one-way haul rate provided in Section 7-15A-6(B) of the Weight Distance Tax Act and recomputed the Taxpayer's liability for the weight distance tax using the full tax rate set out in Section 7-15A-6(A).

26. The auditor disallowed the one-way haul rate for 1993 and 1994 based solely on the absence of Albuquerque records for those periods.

27. The Department's audit procedures do not require auditors to make a 100 percent disallowance in the absence of records, but allows auditors to exercise their judgment in determining whether it is possible to use other records and extrapolate the information in those records to the

period for which records are missing. The audit report does not indicate whether the auditor considered using alternative records or what factors led him to conclude that the use of alternative records was not feasible in this case.

28. The auditor disallowed the one-way haul rate for 1995 based on a one-way haul mileage test the auditor conducted using 1995 records.

29. In conducting the test, the auditor determined that 26% of miles traveled during April 1995 were traveled empty. He then conducted a test for the two-month period May-June 1995 and determined that 30.4% of miles traveled during that combined two-month period were traveled empty. The audit report does not explain why the auditor conducted a separate test for April 1995 and a combined test for May-June 1995.

30. The audit narrative states that this one-way haul mileage test "concluded that during the test period West Texas Express was empty 41% of the time, rather than the necessary 45% or greater." The worksheets of the mileage test do not match the finding of 41% in the audit narrative.

31. After reviewing the worksheets of the one-way haul mileage tests, Mr. Roberts determined that the auditor calculated miles traveled empty during each trip by using a chart of map miles between the Taxpayer's terminal and the town where deliveries were made. The auditor treated miles from the terminal to the town as loaded miles. The auditor also treated all miles traveled within the town and the surrounding area making deliveries as loaded miles. The only miles credited as empty miles were the map miles from the delivery area back to the terminal.

32. Mr. Roberts objected to the methodology used on the one-way haul mileage test. Mr. Roberts told the auditor the Taxpayer should be given credit for empty miles traveled within the delivery area after the point at which the Taxpayer's truck made its last delivery and became empty of freight. The auditor declined to make any adjustments to the audit.

33. On September 17, 1996, the Department issued an audit assessment against the Taxpayer for the period January 1993 through March 1996 in the amount of \$47,161.28 tax principal, \$4,716.15 penalty and \$13,858.78 interest.

34. On October 17, 1996, the Taxpayer filed a formal protest to the assessment. The Taxpayer based its protest on the "many inaccuracies in the audit", attached documentation to illustrate a few of the errors, and requested an opportunity to meet with the Department to present further supporting documentation.

35. The protest was assigned to Debbie Martinez, a Tax Accounts Auditor III in the Protest Office. After receiving the protest, Ms. Martinez discussed the audit with the audit supervisor. Ms. Martinez did not speak with the auditor, nor did she contact Mr. Roberts or his attorney to discuss the case or determine what additional documentation the Taxpayer had to support its protest.

36. In December 1996, Ms. Martinez sent a letter to the Taxpayer stating that no adjustments could be made to the audit. Ms. Martinez then forwarded the file to the Department's Legal Services Bureau.

37. On September 30, 1998, the Department's counsel filed a Request for Hearing asking that a formal hearing be scheduled on the Taxpayer's protest.

38. On October 5, 1998, a notice of hearing was mailed to the Taxpayer setting the formal hearing for December 18, 1998. The hearing date was subsequently continued to January 13, 1999 at the Taxpayer's request.

39. On October 30, 1998, the Taxpayer filed a Motion to Dismiss based on the two-year delay between the date the protest was filed and the date a hearing was scheduled on the protest.

The Taxpayer also objected to the Department's failure to provide the Taxpayer with an opportunity to present additional evidence in the context of an informal conference.

40. On November 24, 1998, the Motion to Dismiss was denied.

## **DISCUSSION**

The Taxpayer challenges the Department's method of calculating the 37.37% error rate used to determine the Taxpayer's underreporting of tax during the audit period, as well as the Department's determination that the Taxpayer's trucks do not qualify for the reduced one-way haul rate provided in Section 7-15A-6(B) NMSA 1978. The Taxpayer raised an additional argument concerning certain overpayments of the fuel tax. The parties subsequently agreed to an adjustment that would credit these overpayments against any taxes due for the same reporting period.

Accordingly, this issue is no longer in dispute and is not addressed in this decision.

### **I. CALCULATION OF 37.37 PERCENT ERROR RATE.**

The Department's assessment is based on a field audit report dated September 9, 1996. Although the audit narrative does not clearly identify what tax programs were audited, a review of the worksheets, together with information provided by the Department at the hearing, establish that the tax acts at issue are the Weight Distance Tax Act, Section 7-15A-1, *et seq.* NMSA 1978 and the Special Fuels Supplier Tax Act, Section 7-16A-1, *et. seq.*, NMSA 1978, which was enacted by the New Mexico Legislature in 1992, effective January 1, 1993, the start date of the audit.

There are two parts to the audit. The first part deals with the calculation of underpayments of the weight distance tax and the fuel tax based on the application of a percentage of error. The auditor calculated the error rate by examining the Taxpayer's records for certain test months to determine whether the Taxpayer accurately reported all miles the Taxpayer's trucks traveled in New Mexico during the audit period. The auditor divided what he determined to be unreported miles by



reported miles to obtain the percentage of error for the test months. This percentage of error was then used to determine total unreported miles for all three years of the audit period. The Taxpayer raises several objections to the calculation of the 37.37% error rate used in the audit.

The Taxpayer's primary objection is that the auditor included miles the Taxpayer's trucks traveled in Texas as unreported miles traveled in New Mexico. When examining the Taxpayer's El Paso records for the three test periods, the auditor discovered gaps ("breaks in continuity or "BICs") in the odometer readings. Because the Taxpayer could not provide trip documents for these miles, the auditor included a percentage of the BIC miles as unreported miles traveled in New Mexico. Inclusion of the BIC miles as unreported miles traveled in New Mexico greatly increased the error rate in the auditor's report. For example, the audit report shows that 10,385 miles were unreported during 1993, resulting in an annual error rate of 55.71%. After removing the BIC miles apportioned to New Mexico from the 1993 mileage trip sample, the unreported miles drop to 494 miles, resulting in an annual error rate of only 2.65%.

At the hearing, Joe Roberts, the Taxpayer's owner, testified that the BICs represent local miles the Taxpayer's trucks traveled in Texas and that tax on all BIC miles were reported and paid to Texas. Mr. Roberts explained that he did not have trip records for these miles because Texas did not require him to maintain such records. I found Mr. Roberts to be a completely credible witness. There was nothing inherently implausible in his testimony, nor did the Department present any evidence that would call Mr. Roberts' explanation of the BIC miles into question.

The only apparent basis for the Department's inclusion of BIC miles as unreported New Mexico miles is that the Taxpayer failed to provide trip documents covering those miles. While trip records would have been one way of establishing the source of the BIC miles, there was other evidence available. To start, the Department could have looked at the Taxpayer's Texas audit to

confirm that the BIC miles had been reported to Texas. Debbie Martinez, the reviewing auditor who testified on behalf of the Department, gave her opinion that the Texas audit would have been sufficient to establish the BIC miles as miles traveled in Texas. In this case, the auditor never asked to see the Texas audit. Nor is there any indication the auditor attempted to contact tax officials in Texas to verify Mr. Roberts' reporting of the BIC miles.

Finally, it must be understood that a witness' sworn testimony is evidence. Department counsel argued that the auditor was required to include a portion of the BIC miles in calculating the New Mexico percentage of error because field auditors are not permitted to accept a taxpayer's oral statements in lieu of documentary evidence. The Department's hearing officers are not so constrained. It is part of the hearing officer's function to hear testimony and draw conclusions based on the credibility of witnesses. In this case, Mr. Roberts testified, under penalty of perjury, that the BICs represented local miles traveled in Texas and that tax on those miles was paid to Texas. In the absence of any evidence to the contrary, I find that Mr. Roberts has met his burden of establishing that the Department's treatment of a portion of the BIC miles as unreported miles traveled in New Mexico was incorrect.

## **II. DISALLOWANCE OF ONE-WAY HAUL RATE.**

The first part of the audit involves the determination of the error rate discussed in Part I. The second part of the audit involves the Taxpayer's use of the one-way haul rate provided in Section 7-15A-6(B) of the Weight Distance Tax Act. This section allows truck owners to qualify a truck that is customarily used for one-way hauls and that travels empty of all load for 45 percent or more of its annual miles to pay tax at a rate which is two-thirds the usual tax rate set out in Section 7-15A-6(A). Mr. Roberts first learned of the one-way haul rate when he was audited by the Department in 1990. After examining the Taxpayer's records, the auditor told Mr. Roberts the company would qualify for

the one-way haul rate and advised him to apply to the Department to take advantage of the reduced rate. The auditor for the 1996 audit determined that the Taxpayer's trucks did not meet the 45% requirement set out in Section 7-15A-6(B) and disallowed the Taxpayer's use of the one-way haul rate for the 1993-1996 audit period.

*1993 and 1994 Years.* The disallowance of the one-way haul rate for 1993 and 1994 was based solely on the absence of records for those periods. Debbie Martinez, who has been with the Department for 23 years as a field auditor and a reviewing auditor in the protest office, testified that the Department's audit procedures do not require this blanket disallowance. Ms. Martinez testified that in the absence of taxpayer records, auditors are expected to use their judgment to determine whether it is possible to use alternative records, including records from other time periods, and extrapolate that information to the period for which records are missing. Ms. Martinez said that a blanket disallowance generally occurs when no other records are available or when the auditor has reason to believe the taxpayer has acted fraudulently. When asked how she would have handled the absence of records in this case, Ms. Martinez said she would have used the Taxpayer's 1995 records to determine whether the Taxpayer qualified for the one-way haul rate in 1993 and 1994. Under questioning by the Department's counsel on redirect, Ms. Martinez reiterated her position that use of alternative records would have been possible in this case.

There is nothing in the audit report to indicate whether the field auditor considered using alternative records or what factors led him to conclude that the use of alternative records was not a viable option. In closing, Department counsel argued that because the auditor had discretion to decide how to deal with an absence of records, the 100% disallowance of the Taxpayer's one-way haul rate must be accepted as proper. I cannot agree. The exercise of discretion must be reasonable. Here, it was the opinion of an experienced Department auditor that the facts justified use of

alternative records. It is worth noting that at the time of the 1996 audit, the Taxpayer had established an exemplary reporting history, as evidenced by the 1.61% error rate in the Department's 1990 audit. In addition, there is nothing to indicate that the destruction of records for 1993 and 1994 was done with the intent of concealing improper activity or was in any way sanctioned by the Taxpayer's owner, Mr. Roberts. To the contrary, as soon as he discovered the failure to maintain company records, Mr. Roberts fired the Albuquerque manager and instituted new record keeping procedures.

Given this evidence, the Department had an obligation to provide some rationale for the auditor's decision not to use alternative records to determine whether the Taxpayer qualified for the one-way haul rate. As noted above, there is no explanation given in the audit report itself. The Department did not present testimony from the auditor, the auditor's supervisor, or anyone else who had personal knowledge of the audit. The only evidence the Department did present, in the form of testimony from Ms. Martinez, supports the conclusion that the auditor did not act reasonably in disallowing the Taxpayer's use of the one-way haul rate for the years 1993 and 1994.

**1995 Year.** In order to determine whether the Taxpayer qualified for the one-way haul rate during 1995, the auditor conducted a one-way haul mileage test using the Taxpayer's 1995 records. A review of the audit raises several questions concerning the methodology employed by the auditor.

The audit narrative states that tests were performed "for the months of April-June 1995." A review of the auditor's worksheets shows that one test was conducted for the month of April and a second test was conducted for the months of May and June combined. The weight distance tax is reported on a quarterly basis. All other percentage of error tests performed during the audit were performed by reporting period. In other words, the mileage for all three months of a quarter were combined to determine the error rate for that reporting period. There is no explanation in the audit

report, nor does any logical explanation come to mind, for the auditor's decision to break the test period into one and two-month segments when conducting the one-way haul mileage test.

The worksheets of the one-way mileage tests show that the Taxpayer's trucks traveled 26% of New Mexico miles empty of load during April 1995 and 30.4% of New Mexico miles empty of load during May-June 1995. The audit narrative states: "during the test period West Texas Express was empty 41% of the time, rather than the necessary 45% or greater." The discrepancy between the percentages shown in the auditor's worksheets and the percentage in the audit narrative is a mystery.

At the hearing, the following exchange took place between the Department's counsel and his witness, Debbie Martinez:

Q: So, can anybody tell from his worksheets exactly how he calculated the 41% empty mile rate?

A: No.

Q: Should you be able to tell from this?

A: Yes.

On cross-examination, the Taxpayer's attorney asked Ms. Martinez whether the discrepancy indicated the auditor had relied on other records or information not made part of the audit report. Ms. Martinez was unable to answer this question.

Ms. Martinez was also unable to answer the Taxpayer's questions concerning the auditor's method of calculating empty miles. After reviewing the worksheets of the one-way haul mileage tests, Mr. Roberts determined that the auditor treated the miles from the Taxpayer's terminal to the town where deliveries were made as loaded miles and also treated miles traveled within the delivery area as loaded miles. The only miles credited as empty miles were the map miles from the town back to the terminal. Ms. Martinez confirmed that the Department's auditors generally use map

miles when computing miles traveled for purposes of the weight distance tax. She said she could not determine how the auditor treated miles traveled within a delivery area, but acknowledged that the worksheet entries relating to deliveries between cities such as Albuquerque and Santa Fe seemed to confirm that the auditor consistently limited the number of empty miles credited to the Taxpayer to the standard map miles between the two cities.

The Taxpayer objected to the auditor's failure to credit the Taxpayer with empty miles traveled within the delivery area after the point at which the Taxpayer's truck made its last delivery and became empty of freight. Mr. Roberts testified that the trip manifests were available for every trip the auditor examined. Mr. Roberts maintained that using the trip manifests and other driver records, he could have shown the auditor the exact location where each delivery was made. This was the procedure followed by the auditor in the 1990 audit. Mr. Roberts said the auditor in the 1996 audit showed no interest in working with Mr. Roberts and simply excluded all miles within each delivery area when calculating the number of empty miles traveled by the Taxpayer's trucks.

At the hearing, the Taxpayer's attorney asked Ms. Martinez whether it would have been important for the auditor to use all available information to determine the point at which the Taxpayer's trucks became empty within a delivery area. Ms. Martinez agreed that it would have been important to do this. The following exchange then took place:

Q: If you had been doing the audit of Mr. Roberts and trying to determine the empty haul rate, would you have taken the time to go and see the trip records to determine where the vehicles were unloaded?

A: Personally? Yes.

While far from clear, the evidence indicates that the auditor's method of determining the number of New Mexico miles the Taxpayer's trucks traveled empty was incorrect because it failed to give the Taxpayer credit for empty miles traveled within a delivery area. Even assuming the

auditor's methodology were correct, however, the basis for his conclusion that the Taxpayer's trucks traveled empty only 41% of the time remains a mystery and is in direct conflict with the auditor's own worksheets. Neither the audit report nor the testimony presented at the hearing supports the Department's disallowance of the Taxpayer's use of the one-way haul rate provided in Section 7-15A-6(B).

### **III AUDIT ERRORS AND THE PRESUMPTION OF CORRECTNESS.**

Section 7-1-17(C) NMSA 1978 states that any assessment of taxes by the Department is presumed to be correct. In this case, the Taxpayer easily met its burden of presenting evidence to overcome the presumption of correctness. It was then up to the Department to come forward with evidence to establish the accuracy of the taxes assessed against the Taxpayer. The Department failed to meet its burden.<sup>1</sup>

The audit report supporting the Department's assessment against the Taxpayer is rife with error. In addition to the errors and discrepancies detailed in the preceding sections, I briefly note the following:

***Conflict Between Audit Summary and Worksheet:*** The Audit Assessment Summary in the audit report states that the Taxpayer's underreporting of fuel tax resulting from application of the 37.37% error rate, as shown on supporting Schedule I, is \$13,672.36, and this was the figure used in calculating the final assessment. Schedule I shows a fuel tax liability of only \$11,021.14, with

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<sup>1</sup> This case never should have come to hearing. Had the Department responded to the Taxpayer's request for an informal conference, the problems with the audit would have come to light and appropriate adjustments could have been made. Instead, the Protest Office denied the protest without even attempting to discuss the matter with the Taxpayer. Department counsel's handling of the case was equally slipshod. After waiting almost two years to schedule a hearing, Mr. Lopez failed to call the auditor, his supervisor, or anyone else with personal knowledge of the audit as a witness. Mr. Lopez failed to prepare—or apparently even talk to—the only witness he did call, since Ms. Martinez's testimony directly contradicted several of the positions taken by the Department.

corresponding differences in the calculation of penalty and interest. In effect, the Taxpayer has been assessed \$2,651.22 more tax than the auditor's own worksheets show is due.

***Inconsistent Apportionment of BIC Miles:*** The audit worksheets state that the percentage of BIC miles apportioned to New Mexico was determined by dividing the total miles traveled in New Mexico over the total miles traveled in all states. As Mr. Roberts pointed out in his testimony, this methodology was not consistently applied. The 1993 trip sample states that 42.17% of BIC miles were apportioned to New Mexico. In fact, 100% of several 1993 BIC entries were apportioned to New Mexico; in other instances no BIC miles were apportioned to New Mexico. Although these errors could be seen as irrelevant in light of the determination that all BIC miles must be excluded in determining the percentage of error, I believe they are relevant to illustrate the general unreliability of the auditor's work.

An error in the methodology or mathematical calculations used in an audit is usually subject to correction and not fatal to the assessment. That is not the case here. Given the number and magnitude of errors even a casual review of the audit report reveals, the correctness of the entire audit is in question. In these circumstances, the only remedy that can be fashioned is a full abatement of the Department's assessment against the Taxpayer.

## **CONCLUSIONS OF LAW**

1. West Texas Express filed a timely, written protest to the Department's September 17, 1996 assessment for the period January 1, 1993 through March 31, 1996, and jurisdiction lies over the parties and the subject matter of this protest.



2. The Taxpayer presented sufficient evidence to overcome the presumption of correctness that attaches to the Department's assessment of taxes.

3. The Department failed to come forward with evidence to support its assessment of taxes against the Taxpayer.

For the foregoing reasons, the Taxpayer's protest IS GRANTED. The Department is ordered to abate the 1996 assessment issued against the Taxpayer in full.

Dated February 2, 1999.