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

IN THE MATTER OF THE PROTEST OF
ALAN RITCHEY, INC. **No. 97-23**
ID NO. 02-090340-00 5,
PROTEST TO ASSESSMENT NO. 25444

DECISION AND ORDER

This matter came on for hearing on May 9, 1997, before Ellen Pinnes, Hearing Officer. Alan Ritchey, Inc. ("the Taxpayer") was represented by its chief executive officer, Alan Ritchey, and its tax manager, Dan O'Rear. The Taxation and Revenue Department ("the Department") was represented by Frank D. Katz, Special Assistant Attorney General. The matter was submitted for decision based upon the stipulations and written submissions of the parties and oral argument presented at the hearing. Following the hearing, the record remained open until May 23, 1997 for submission of supplemental stipulations.

Based upon the evidence and arguments presented, IT IS HEREBY DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Assessment No. 25444 was originally issued by the Department on November 15, 1995 for fees due under the Petroleum Products Loading Fee Act ("the Act"), §7-13A-1 *et seq*. NMSA 1978, for January 1993 through July 1995. That assessment contained an error as to the amount of the fee due, and a corrected assessment was issued on November 17, 1995. The total amount of the assessment was $19,174.14, including $14,367.92 in fees, plus penalty in the amount of

$1,414.27 and interest of $3,391.95 to the time of the assessment.

2. By a letter dated November 20, 1995 from Dan O'Rear, the Taxpayer filed a timely protest of the assessment. In that letter, Mr. O'Rear stated that the failure to file returns under the Petroleum Products Loading Fee Act was unintentional and that the Taxpayer was not aware of the Act or that it was subject to the fee imposed by that statute. The Taxpayer acquiesced in imposition of the fee insofar as it applied to gallons of fuel placed into the fuel supply tanks of its trucks and used to propel the vehicles within New Mexico, but contested imposition of the fee on gallons placed into the fuel supply tanks in this state but burned by the vehicles outside the boundaries of New Mexico. Based on this position, the Taxpayer calculated that the amount of the fee due was $1,503.23 and remitted that amount to the Department. The Taxpayer challenged the remainder of the amount assessed, including the balance of the fee, penalty and interest.

3. By a letter dated September 19, 1996 from Mr. O'Rear to Debbie Martinez of the Department's Protest Office, the Taxpayer amended its protest to challenge assessment of the petroleum products loading fee on the grounds that the Taxpayer is an instrumentality of the United States government and therefore exempt from the fee by virtue of §7-13A-4(B) NMSA 1978.

4. Assessment No. 25444 arose in connection with the Taxpayer's business operations as a trucker, transporting mail for the United States Postal Service.

5. In addition to its trucking for the Postal Service, the Taxpayer provides trucking services to other clients. The Taxpayer is also engaged in other lines of business, specifically

farm and dairy operations and manufacturing of animal feed. The Taxpayer derives approximately one-third of its revenues from its trucking business. The proportion of this amount that arises from its contracts with the Postal Service, as opposed to other trucking business, does not appear in the record.

6. The Taxpayer imports special fuel into New Mexico and places that fuel into storage tanks at a facility it owns in Deming. The fuel is then put into the fuel supply tanks of motor vehicles owned and operated by the Taxpayer. These trucks pass through New Mexico as they travel between points outside the state in the course of hauling mail for the Postal Service. The trucks and fuel involved in these proceedings are used only in transporting mail for the Postal Service and not in other parts of the Taxpayer's business operations.

7. The storage tanks at the Taxpayer's Deming facility are located above ground, on concrete pads.

8. The Taxpayer's mail transportation work is performed pursuant to contracts with the Postal Service. By the terms of those contracts, fuel costs incurred by the Taxpayer are a pass-through item that is ultimately paid by the Postal Service.

9. The Taxpayer does not resell special fuel.

10. The Taxpayer does not load special fuel into the cargo tanks of trucks for export from New Mexico.

11. The Taxpayer participates in the International Fuel Tax Agreement (IFTA). See 49 U.S.C. §31701 *et seq*. Pursuant to IFTA, the Taxpayer maintains detailed records regarding its trucks, including the number of miles traveled in each state, the locations at which fuel is loaded into each truck's fuel supply tank, the amount of fuel loaded into the truck, and the mileage per gallon for each vehicle.

12. The miles traveled by the trucks, the vehicles' mileage per gallon, and the fuel used in traveling through New Mexico during the time period at issue here were verified by the New Mexico Fuel Tax Audit.

13. The Taxpayer has submitted, as an attachment to the Stipulation of Facts submitted by the parties, detailed schedules showing gallons used to propel the Taxpayer's vehicles in New Mexico. The parties agree that, if the Taxpayer is ultimately held to be liable for the fee only on gallons used in its trucks while traveling within New Mexico, these schedules accurately reflect the amount of the fee owed by the Taxpayer.

DISCUSSION

The Taxpayer argues, initially, that it is not subject to the petroleum products loading fee because it is an instrumentality of the United States government and therefore exempted from the fee by the express provisions of the Act. If the Taxpayer is liable for the fee, it contends that the amount of the fee must be based on the quantity of fuel actually used to propel its trucks within the state of New Mexico and not on the full amount of fuel loaded into the trucks' fuel supply tanks at the Deming facility.[1]

[1] The Taxpayer's November 20, 1995 protest letter also challenged imposition of penalty and interest on the fees; these issues have not been addressed by the parties in subsequent proceedings but have not been explicitly relinquished by the Taxpayer.

Exemption for instrumentalities of the United States government

The New Mexico Petroleum Products Loading Fee Act, §7-13A-1 *et seq*. NMSA 1978, imposes a fee on the loading of gasoline or special fuel from a rack at a refinery or pipeline terminal in New Mexico into a cargo tank and on the importing of gasoline or special fuel into New Mexico for resale or consumption in this state. §7-13A-3(A),(B) NMSA 1978. Petroleum products sold to the United States government or "any agency or instrumentality thereof" for its exclusive use are expressly exempted from the fee. §7-13A-4(B). The Taxpayer here contends that it is exempt from the fee because it is an instrumentality of the federal government.

The Taxpayer transports mail for the United States Postal Service, pursuant to contracts with that agency. The fuel on which the loading fee was imposed here is used by the Taxpayer for the sole purpose of performing services under those contracts. The cost of the fuel is passed through to the Postal Service, which repays the Taxpayer for those costs.

The United States Supreme Court has held, in *United States v. New Mexico*, 455 U.S. 720 (1982), that the state cannot impose a tax directly on the federal government. However, the Court noted that an entity is not immune from state tax merely because the tax has an effect on the United States or even because the federal government ultimately bears the entire economic burden of the tax. 455 U.S. at 733-34. In order to support immunity from tax, it must be shown that the tax falls either on the United States itself, or on an agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities, at least as to the activity being taxed. *Id*. at 735. A contractor is not an instrumentality of the United States, and thus is not immune from state tax, when its services to the government are performed in connection with its own commercial activities, even if those activities are for the benefit of the government. *Id*. at 739.

Like the contractors in *United States v. New Mexico*, the Taxpayer here is a privately owned corporation, in which the federal government has no ownership interest. The Taxpayer engages in

commercial activities carried on for profit, and the government does not run the Taxpayer's day-to-day operations. The majority of the Taxpayer's revenues are derived from sources other than the federal government. As in *United States v. New Mexico*, the congruence of interests between the Taxpayer and the United States is not complete; rather, the Taxpayer's relationship with the federal government is for limited purposes only. See *U.S. v. New Mexico*, 455 U.S. at 740-41.

The Taxpayer is not an instrumentality of the United States government and therefore is not exempt from imposition of the petroleum products loading fee pursuant to §7-13A-4(B) NMSA 1978.

Quantity of fuel subject to the petroleum products loading fee

Because the Taxpayer is not exempted from the fee as an instrumentality of the federal government, the amount of fuel subject to the fee must be determined.

The Petroleum Products Loading Fee Act provides for imposition of a fee:

> A. For the privilege of loading gasoline or special fuel from a rack at a refinery or pipeline terminal in this state into a cargo tank, ...
>
> B. For the privilege of importing gasoline or special fuel into this state *for resale or consumption in this state* ... .

§7-13A-3(A),(B) NMSA 1978, emphasis added.

The Act exempts fuel exported from New Mexico.

> Petroleum products that are either loaded into cargo tanks in New Mexico and exported for resale and consumption outside New Mexico or are imported into New Mexico and subsequently exported *for resale and consumption outside New Mexico* are exempt from the imposition of the petroleum products loading fee.

§7-13A-4(A) NMSA 1978, emphasis added.

The parties agree that the fee at issue here is that provided in §7-13A-3(B), on fuel imported for resale or consumption. They also stipulate that the Taxpayer does not resell the fuel it brings into New Mexico, so that the fee to which it is subject is that on fuel imported for "consumption in this state". §7-13A-3(B). The Taxpayer contends that the fee is imposed only on the quantity of fuel actually burned to propel its vehicles within the state of New Mexico; the Department argues that the fee is imposed on the full amount of fuel placed into the trucks' fuel supply tanks.

Certain rules of statutory construction guide interpretation of the Act to determine its application. The goal of statutory interpretation is to determine and give effect to legislative intent. *State ex rel. Klineline v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111 (1988); *Junge v. John D. Morgan Construction Co.*, 118 N.M. 457, 463, 882 P.2d 48 (Ct.App. 1994). Determination of the Legislature's intent is based both on the language of the statute and on its history and background. *State ex rel. Klineline*, *supra*. In order to ascertain and effectuate the legislative intent, a statute must be read in its entirety and in conjunction with related statutory provisions. *Quintana v. N.M. Dept. of Corrections*, 100 N.M. 224, 225 (1983). The statute is to be interpreted to mean what the Legislature intended it to mean and to accomplish the ends sought to be accomplished by it. *Westgate Families v. County Clerk of Los Alamos County*, 100 N.M. 146, 148, 667 P.2d 453 (1983).

The Department argues that the proceeds of the petroleum products loading fee go toward cleaning up groundwater polluted by leaking underground storage tanks (LUST), so that the legislative intent was to impose the fee on all fuel placed in storage tanks in New Mexico. The Taxpayer counters that its tanks are located above ground, so that any legislative goals regarding underground tanks do not support imposition of the fee. However, the proceeds of the fee do not go entirely to groundwater remediation. During the time period at issue here, the proceeds were divided between the local governments road fund and the corrective action fund created to fund remediation of groundwater pollution caused by LUST, with the monies split evenly between the two funds.[2] Thus, the legislative goal was not limited to funding of groundwater remediation.

Review of the language of the statute helps to elucidate the intent of the Legislature and the application of the fee. It is true, as the Taxpayer notes, that the Act imposes the fee on fuels imported into New Mexico "for resale or consumption *in this state*". §7-13A-3(B), emphasis added. However, as noted above, this provision cannot be read in isolation, but must be construed along with other provisions of the Act. Thus, this portion of §7-13A-3(B) should be read along with the exemption set out in §7-13A-4(A), for fuel exported from New Mexico. The latter section refers to fuel "exported for resale and consumption outside of New Mexico".

When the Act is read as a whole, it appears that the Legislature intended to provide for all cases. Fuel is either exported from the state for resale and consumption elsewhere and comes under §7-13A-4(A), or it falls within §7-13A-3(B) as fuel imported for resale or consumption in New Mexico. The Taxpayer (which does not claim that it is exempt under subsection A of §7-13A-4) would create a third category by implication -- fuel that is not exempt as exported fuel under §7-13A-4(A) but is not subject to §7-13A-3(B). There is no indication of a legislative intent to do so.

[2] The Act was amended in 1996, to provide that a flat $40 per load goes to the roads fund, with the balance of the fees going into the corrective action fund. The amount of the fee, and thus the portion paid into the latter fund, varies depending on the balance remaining in the corrective action fund.

In enacting §§7-13A-3 and 7-13A-4, the Legislature distinguished between interstate and intrastate transactions. Fuel exported from New Mexico for resale and consumption elsewhere is subject to taxation in other states and therefore is exempt from the New Mexico fee, thus avoiding improper multiple taxation of goods in interstate commerce. Where the final transaction involving the fuel occurs in New Mexico, the fee is imposed on the full quantity involved in the transaction.

This interpretation promotes equal treatment of all persons loading fuel from storage tanks into the fuel supply tanks of vehicles in New Mexico. As the Department points out, the Taxpayer's interpretation would apply the fee differently depending on whether fuel is placed into vehicles owned by the fuel importer or is resold for use in vehicles owned by another party. In the latter instance, the fee would be imposed on the full amount of fuel put into the fuel supply tank (regardless of where it is burned up in propelling the vehicle), while in the former case, the fee would apply only to that part of the fuel used in moving the vehicle within New Mexico. An interpretation such as this, which may superficially comport with the statutory language but would lead to an absurd or unjust result at odds with legislative intent, must be rejected. *Junge v. John D. Morgan Construction Co.*, *supra*, 118 N.M. at 463.

When the Act is read as a whole, the words "resale or consumption in New Mexico" evince a legislative intent to impose the fee in all cases (other than those expressly exempted by the Act) where fuel imported into New Mexico is placed in the fuel supply tanks of vehicles. By including "consumption" as well as "resale", the Legislature expressed its intent to impose

the fee in cases such as this one, where an entity imports fuel for use in its own vehicles, so that no "resale" takes place.

The fee provided by the Petroleum Products Loading Fee Act applies to the full quantities of fuel placed into the Taxpayer's trucks at the Deming facility, and not only to those gallons of fuel actually burned by the vehicles within New Mexico.

Penalty

The Tax Administration Act provides that a penalty will be imposed in certain circumstances when a taxpayer does not pay tax at the time it is due. The penalty is not based simply on failure to make payment on time. Rather, such failure must be due to negligence or disregard of rules and regulations. §7-1-69(A) NMSA 1978. The Taxpayer has the burden of presenting evidence negating the existence of negligence. Regulation TA 69:1.

Here, the Taxpayer presented no evidence specifically addressing the issue of penalty. However, it acknowledged in its protest letter that it had simply been unaware of the existence of the fee and the obligation to pay. (See O'Rear letter dated 11/20/95.)

There is no suggestion here of bad faith on the Taxpayer's part or of any intent to avoid payment of fees to which it was properly subject. No such showing is required to sustain imposition of the penalty provided for by §7-1-69(A). All taxpayers have a reasonable duty to familiarize themselves with the requirements imposed on their operations by the tax laws of this state. See *Tiffany Construction Co., Inc. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155, cert. den. 90 N.M. 255, 561 P.2d 1348 (Ct.App. 1976). The Taxpayer's failure to acquaint itself with the taxes applicable to its operations in New Mexico, including the petroleum products

loading fee, was negligent within the meaning of §7-1-69(A), and the penalty was properly imposed.

Interest

Section 7-1-67 NMSA 1978 provides for the imposition of interest on tax deficiencies:

> A. If any tax imposed is not paid on or before the day on which it becomes due, *interest shall be paid to the state on such amount* from the first day following the day on which the tax becomes due ... until it is paid ... . (Emphasis added.)

It is a well settled rule of statutory construction that the word "shall" is mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). The New Mexico Legislature has expressly reiterated this general rule in §12-2-2(I) NMSA 1978 (in construing statutory provisions, the words "shall" and "must" are to be construed as mandatory unless this would be inconsistent with manifest legislative intent or repugnant to the context of the statute).

Section 7-1-67 requires that interest be imposed on the amount of any unpaid taxes. No exceptions to this rule are provided for. Interest therefore was properly imposed on the tax deficiency here.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely protest of Assessment No. 25444. Jurisdiction thus lies over the parties and the subject matter of this protest.

2. The Taxpayer is subject to the fee provided by the Petroleum Products Loading Fee Act, §7-13A-3(B) NMSA 1978. That fee is imposed based on the full quantity of fuel imported by the Taxpayer into New Mexico and loaded into the fuel supply tanks of its vehicles, and not only on the amount of fuel burned in propelling the trucks within the boundaries of this state.

3. The Taxpayer is not an instrumentality of the United States government and therefore is not exempt from the fee pursuant to §7-13A-4(B) NMSA 1978.

4. The Taxpayer's failure to pay the fees at the time they were due was the result of negligence, and penalties were properly imposed on the unpaid amounts.

5. Because the Taxpayer did not pay the tax owed at the time it was due, interest was properly imposed on the deficiency at the statutory rate.

For the foregoing reasons, the Taxpayer's protest IS HEREBY DENIED.

DONE, this 19th day of June, 1997.