New Mexico Public Decision No. 19-27

STATE OF NEW MEXICO

ADMINISTRATIVE HEARINGS OFFICE

TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF UNITED PARCEL SERVICE INC. (OHIO) & AFFILIATES TO ASSESSMENT ISSUED UNDER LETTER ID NO. L1388538320 v. NEW MEXICO TAXATION AND REVENUE DEPARTMENT

D&O No. 19-27

DECISION AND ORDER

On June 5 and June 6, 2018, Chief Hearing Officer Brian VanDenzen, Esq., conducted a merits administrative hearing in the matter of the tax protest of the United Parcel Service, Inc. (Ohio) & Affiliates (Taxpayer) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Attorney J. Edward Goff, appearing *pro hac vice,* and Attorney Joe Lennihan, appeared representing Taxpayer. Taxpayer employee Melissa Mackay also observed the hearing. Staff Attorney Peter Breen appeared, representing the opposing party in the protest, the Taxation and Revenue Department (Department).

Taxpayer employees Mr. Rick Bishop and Mr. Anthony Estrada appeared as Taxpayer witnesses. Taxpayer also called former Department employee Andrick Tsabetsaye and Department employee Tamara Smith as witnesses. Department protest auditor Danny Pogan appeared as a witness for the Department. Taxpayer Exhibits #1-83 were admitted into the record. The parties submitted the transcript of the proceeding on October 29, 2018. The parties submitted their respective written closing arguments, proposed findings of fact, and proposed conclusions of law on December 10, 2018, making this matter ripe for a decision as of that date.

In quick summary, this protest involves a Multistate Tax Commission (MTC) audit of Taxpayer for tax years 2007, 2008, and 2009 that resulted in the Department's assessment of additional corporate income tax, penalty, and interest for those years. Taxpayer argues in protest that the special trucking apportionment method under Regulation 3.5.19.15 NMAC that the MTC and the Department relied upon in the audit and subsequent assessment of additional tax distorts Taxpayer's true business activities in New Mexico. Therefore, Taxpayer contends that it is entitled to an equitable adjustment to the apportionment method in the form of the state-to-state volume method it has used since tax year 1988, a method that the Department twice previously accepted in resolving two other earlier audits. Ultimately, after making findings of fact and discussing the issue in more detail throughout this decision, the Hearing Officer finds that Taxpayer did establish by clear and cogent evidence that the special trucking company regulatory method for apportionment results in distortion of Taxpayer's true New Mexico business activities in violation of external consistency requirements and that Taxpayer established the state-to-state volume method was reasonable, entitling Taxpayer to that equitable adjustment of the apportionment formula. Therefore, Taxpayer's protest must be granted. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Jurisdictional Findings.

1. On September 30, 2013, under letter id. no. L1388538320, the Department issued a Notice Assessment for $3,024,065.00 in corporate income tax, $604,813.00 in penalty, and $455,008.63 in interest for a then-total assessment of $4,083,886.63 for the corporate income tax reporting period of December 31, 2007 through December 31, 2009. [Administrative File; Hearing Request Packet, Taxpayer Ex. #25].

2. On December 23, 2013, Taxpayer filed a formal protest of the assessment. [Administrative File; Hearing Request Packet].

3. On January 13, 2014, the Department acknowledged receipt of a valid protest. [Administrative File; Hearing Request Packet].

4. On February 13, 2014, the Taxation and Revenue Department requested a hearing with the Hearings Bureau[1] . [Administrative File; Hearing Request Packet].

5. On February 14, 2014, the Hearings Bureau set this matter for a scheduling hearing on March 3, 2014. [Administrative File].

6. On March 3, 2014, a scheduling hearing occurred in this matter. Neither party objected that conducting the scheduling hearing satisfied the statutory 90-day hearing requirement. [Administrative File].

7. The merits hearing in this matter occurred on June 5 and June 6, 2018.

8. Near the conclusion of the merits hearing, and without objection, the Department was directed to provide an updated spreadsheet of alleged liabilities as of the conclusion of the hearing, given the concessions that the Department made in this matter. [Tr. 531-532].

9. The Department has never filed an updated spreadsheet of liabilities as it agreed to do at the conclusion of the hearing.

10. At the request of Taxpayer, the Hearing Officer ordered written closing arguments and proposed findings of facts be submitted after conclusion of the evidentiary hearing within 90-days of submission of the final completed transcript of the hearing. [Tr. 541:23-544:19].

11. On October 29, 2018, Taxpayer submitted a copy of the final transcripts of the two-day hearing, along with notice of errata and corrected certification from the reporting service. [Administrative Record].

12. On December 10, 2018, Taxpayer submitted its written closing argument and proposed findings of fact and conclusions of law. [Administrative Record].

13. On December 10, 2018, the Department filed its written closing argument and proposed findings of fact. [Administrative Record].

Substantive Findings

Witness Background

14. Anthony Estrada is employed by Taxpayer as an operations manager, on road supervisor, in New

Mexico. He has been employed with Taxpayer for approximately 18-19 years, working for the last 14-years in management. [Tr. 140; 201].

15. Rick Bishop is the state and local tax director for Taxpayer. Mr. Bishop has a bachelor's degree and a master's degree in accounting from the University of Georgia. [Tr. 256].

16. Tamara Smith is a staff manager of the Department's Commercial Vehicle Bureau. She has a bachelor's degree and 10-years work experience at the Department [Tr. 60].

17. Andrick Tsabetsaye is a retired Department employee who originally was assigned to this protest when he was a Department protest auditor. [Tr. 85-86].

18. Danny Pogan is the Department's protest auditor assigned to this case after the retirement of Mr. Tsabetsaye. Mr. Pogan has a bachelor's degree in accounting from New Mexico State University. Mr. Pogan has been employed by the Department since 1991 as an auditor, whose duties included conducting corporate income tax audits. [Tr. 507-509].

Taxpayer's Business and Corporate Structure.

19. Taxpayer, United Parcel Service, Inc. (Ohio) and affiliates, is one of the worldwide leaders in the shipping, delivery, distribution, freight, supply chain management, and logistics business. [Taxpayer Ex. #81; Taxpayer. Ex. #82; Taxpayer Ex. #83; Administrative Notice[2]].

20. Taxpayer is an entity within the broader United Parcel Service Organization. [Taxpayer Ex. #52].

21. At the top of the corporate structure is United Parcel Services, Inc. (Delaware), an entity that went public in 1999. [Taxpayer Ex. #52; Tr. 262].

22. Underneath United Parcel Services, Inc. (Delaware) is a holding company, United Parcel Service of America, Inc. (Delaware). [Taxpayer Ex. #52; Tr. 263].

23. Underneath the holding company United Parcel Services, Inc. (Delaware) are numerous other entities. [Taxpayer Ex. #52].

24. Underneath the holding company United Parcel Services, Inc. (Delaware) is United Parcel Service Company (Delaware), an airline company used for expedited shipping of packages. [Taxpayer Ex. #52; Tr. 263-265].

25. Underneath the holding company United Parcel Services, Inc. (Delaware) is Overnite Corporation (Virginia), which is a holding company above UPS Ground Freight Inc. (Virginia), a company doing business as UPS Ground Freight. [Taxpayer Ex. #52; Tr. 266].

26. Underneath the holding company United Parcel Services, Inc. (Delaware) is UPS Worldwide Forwarding, Inc. (Delaware), a freight forwarding company. [Taxpayer Ex. #52; Tr. 265].

27. Underneath UPS Worldwide Forwarding, Inc. (Delaware) are United Parcel Service Inc. (Ohio), the Taxpayer in this protest, and United Parcel Service, Inc. (New York), which merged into Taxpayer on January 1, 2009. [Taxpayer Ex. #52; Tr. 265-269].

28. In 2007 and 2008, United Parcel Service Inc. (Ohio) provided package delivery services in *37 states*. [Tr. 266].

29. In 2007 and 2008, United Parcel Service Inc. (New York) provided package delivery services in 13 northeastern states plus the District of Columbia. [Tr. 266].

30. In 2009, United Parcel Service Inc. (New York) merged with United Parcel Service Inc. (Ohio). [Tr. 311-312].

Taxpayer's Operations

31. In 2007, over its 252 operating days, Taxpayer had an average daily package volume of 13,857, 000 packages in the United States, which translates to approximately 3.49 billion packages handled domestically. [Taxpayer Ex. #81.2344; Tr. 390].

32. In 2008, over its 252 operating days, Taxpayer had an average daily package volume of 13,576,00 packages in the United States, which translates to approximately 3.42 billion packages handled domestically. [Taxpayer Ex. #82.2454; Tr. 393-394].

33. In 2009, over its 253 operating days, Taxpayer had an average daily package volume of 13,050,00 packages in the United States, which translates to approximately 3.30 billion packages handled domestically. [Taxpayer Ex. #83.2545; Tr. 394-395].

34. Taxpayer relies on a hub and spoke system for package delivery. [Tr. 272-273].

35. Taxpayer's employees use package cars to pick up and deliver packages to and from their residential and commercial destinations.

36. Package cars are the familiar, ubiquitous brown delivery vehicles/trucks/vans used by Taxpayer to deliver packages to their final delivery destinations. These package cars usually have two large sliding doors (often left propped open while the vehicle is in motion) in the driver's compartment, and a large rear package cargo area with a rolling, vertical door where packages are stored. [Taxpayer Ex. #53; Tr. 142-145; Administrative Notice].

37. Package cars are vehicles custom made for Taxpayer by various manufacturers. [Tr. 145].

38. Package cars have a gross vehicle weight of approximately 18,000 pounds, under New Mexico's 26,000-pound threshold for registration for weight distance tax. [Tr. 144:18-25].

39. The package cars are systematically loaded with packages for ease of delivery using a meticulous UPS system that prioritizes the type of delivery (business vs. residential), route, identification, bulk stops, and time commitments. [Tr. 145; Tr. 158-159].

40. Taxpayer uses internal operations employees to sort, organize, and preload the package cars according to its unique loading system. [Tr. 159].

41. A package car driver does not have a Commercial Driver's License (CDL). [Tr. 203].

42. The package car driver drives the packages to their destination, unloads them from the package car and delivers the packages to their destination using hand carts/trucks or by carrying the packages. [Tr. 146; Administrative Notice].

43. On average, a typical Taxpayer package car driver will make between 160-170 stops per day per package car. [Tr. 194].

44. An average package car drove 60.9 miles per day in 2009. [Taxpayer Ex. #68.1540; Tr. 197].

45. Taxpayer also employs package feeder trucks and attached trailers to move packages between Taxpayer's centers/hubs. [Taxpayer Ex. #54; Tr. 146-148].

46. Package feeder truck drivers have CDLs. [Tr. 203].

47. The packages are systematically loaded into the feeder truck's attached trailers using a special UPS method that does not involve pallets. [Tr. 149].

48. An average feeder truck will make *3-4* stops on average per day. [Tr. 194-195].

49. An average feeder truck drove 266.7 miles per day in 2009. [Taxpayer Ex. #68.1540; Tr. 197].

50. Taxpayer uses internal operations employees to sort, organize, preload, load and unload the feeder trailers according to its unique loading system. [Tr. 173-176].

51. Taxpayer also uses rail flatcars to transport its trailers, which is referred to as trailer-owned flatcars or TOFC. [Taxpayer Ex. #56; Tr. 151-152].

52. In this scenario, Taxpayer's feeder drivers go to a rail facility where a crane lifts the loaded trailer to or from the flat rail car to or from Taxpayer's tractor truck [Taxpayer Ex. #56; Tr. 152-154].

53. Taxpayer owns the trailers involved in the TOFC but does not own the flat rail cars. [Tr. 155].

54. Taxpayer also uses jet airplanes, called browntails by Taxpayer, to transport packages to package cars and package feeder trucks. [Taxpayer Ex. #57; Tr. 154-155].

55. The browntails are loaded with packages using a similar system as package cars and package feeder trucks. [Tr. 155-156].

56. Taxpayer's employees use a handheld device called a DIAD extensively as a method of communication for delivery and pick up information. [Tr. 161-162].

57. The DIAD is a small handheld computer device (similar in size and shape to a large, wired telephone or early brick-style cellphones) with a small screen, a mini alphanumeric keyboard, and an optical scanner. [Taxpayer Ex. #61; Administrative Notice].

58. Package drivers use the DIAD to capture delivery confirmation for customers, to find packages within the package car loadout through UPS packing system, organize deliveries, and to communicate with headquarters. [Tr. 161-163].

59. Taxpayer's workforce spends approximately 13% of their time driving motor vehicles. [Tr. 384-385].

60. In 2007, Taxpayer as a company (not including UPS New York which had not yet merged) had a total of package and tractor miles of 1,983,985,780. [Taxpayer Ex. 68.1537].

61. In 2007, Taxpayer as a company (not including UPS New York which had not yet merged) billed $22,115,770,234.00 in sales. [Taxpayer Ex. 71.1548].

62. Using Taxpayer's 2007 billed sales of $22,115,770,234.00 and the combined feeder and tractor mileage total of 1,983,985,780 Taxpayer generated $11.15 of sales per feeder and tractor mile driven

as a corporation (not including UPS New York which had not yet merged) in 2007. [Taxpayer Ex. 68.1540; Taxpayer Ex. 71.1548].

63. In 2008, Taxpayer as a company (not including UPS New York which had not yet merged with Taxpayer) had a total of package and tractor miles of 1,996,328,575. [Taxpayer Ex. 68.1539].

64. In 2008, Taxpayer as a company (not including UPS New York which had not yet merged) billed $20,682,752,645.00 in sales. [Taxpayer Ex. 71.1550].

65. Using Taxpayer's 2008 billed everywhere sales of $20,682,752,645.00 and the combined feeder and tractor mileage total of 1,996,328,575 Taxpayer generated $10.36 of sales per feeder and tractor mile driven as a corporation (not including UPS New York which had not yet merged) in 2008. [Taxpayer Ex. 68.1539; Taxpayer Ex. 71.1550].

66. In 2009, Taxpayer as a company had a total of package and tractor miles of 1,996,328,575. [Taxpayer Ex. 68.1539].

67. In 2009, Taxpayer as a company billed $25,684,403,456.00 in sales. [Taxpayer Ex. 71.1552].

68. Using Taxpayer's 2009 billed everywhere sales of $25,684,403,456.00 and the combined feeder and tractor mileage total of 2,434,718,308 Taxpayer generated $10.55 of sales per feeder and tractor mile driven as a corporation in 2009. [Taxpayer Ex. 68.1540; Taxpayer Ex. 71.1552].

69. A comparison of the mileage numbers by state on Taxpayer Exhibit #68 with the billed revenue numbers by state on Taxpayer Exhibit #71 allows the calculation of sales per feeder and tractor mile driven by various states in 2009 as follows:

a. Montana, $2.53 of sales per feeder and tractor mile driven in 2009.

b. Texas, $9.16 of sales per feeder and tractor mile driven in 2009.

c. Tennessee, $10.18 of sales per feeder and tractor mile driven in 2009.

d. Indiana, $8.73 of sales per feeder and tractor mile driven in 2009.

[Taxpayer Ex. 68.1540; Taxpayer Ex. 71.1551-52].

70. Taxpayer does not handle palletized cargo. [Tr. 226].

UPS Ground Freight.

71. UPS Ground Freight, a distinct entity from Taxpayer, also employs tractors and trailers to conduct its freight shipping business. However, UPS Ground Freight is not used in the UPS package delivery system. [Tr. 149-150; 187].

72. UPS Ground Freight is a separate business from Taxpayer. [Tr. 276].

73. UPS Ground Freight is the LTL trucking company. [Tr. 277].

74. UPS Ground Freight uses a different loading warehouse system to load its freight into UPS Freight trucks. [Tr. 165-166].

75. UPS Ground Freight and Taxpayer do not share trucks, trailers, tractors, packages cars, or drivers.

[Tr. 187; 230].

76. UPS Ground Freight trucks and trailers are never intermingled with Taxpayer's parcel business. [Tr. 275-276].

77. UPS Ground Freight does not deliver packages to Taxpayer for the purposes of sorting for subsequent delivery to a consignee (end receiver). [Tr. 225-226].

78. The only time Taxpayer receives packages from UPS Ground Freight is when Taxpayer itself is the final consignee (end receiver) of the shipped item, for instance when Taxpayer receives an engine for vehicle maintenance. [Tr. 225-226].

79. For operational and administrative efficiency, UPS Ground Freight registers all of its vehicles not only in the state in which a vehicle is stationed, but in all states in which a vehicle travels. [Tr. 276-281].

80. Department's counsel asked Ms. Tamara Smith, Weight Distance Tax Bureau Chief, to research Taxpayer's vehicles registered under New Mexico's Weight Distance Tax Act.

81. Ms. Smith apparently was provided the wrong entity information and instead researched the number of vehicles UPS Ground Freight had registered in New Mexico under the Weight Distance Tax Program and its payments under the program for the first quarter of 2017 (a year not relevant to the audit period). [Taxpayer Ex. #78; Tr. 64-74; 276-281].

82. UPS Ground Freight apportions and pays its taxes based on the Department's special reporting method for trucking companies by using a mileage method. [Tr. 276-277; Tr. 436].

83. The MTC made no audit adjustments to UPS Ground Freight's reporting method in New Mexico during the relevant audit years. [Tr. 274-275].

Taxpayer's New Mexico Operations

84. Taxpayer's operations in New Mexico are part of Taxpayer's Desert Mountain District, which includes Arizona and New Mexico. [Taxpayer Ex. #70; Tr. 185; Tr. 223; Tr. 380-383].

85. Using a three-year average of 2007, 2008, and 2009, Taxpayer employed on average 5,963 people annually in the Desert Mountain District (New Mexico and Arizona).

a. On average, 2,448 (41.1%) of those annual employees were hub and sort union employees.

b. On average, 2,171 (36.4%) of those annual employees were union drivers, including both package car and feeder truck drivers.

i. 1,904 (31.9%) of those employees were package car drivers.

ii. 266 (4.5%) were feeder truck drivers.

c. On average, 67 (1.1%) of those annual employees were union auto mechanics.

d. On average, 808 (13.6%) of those annual employees were in management.

e. On average, 469 (7.9%) of those annual employees were clerical.

[Taxpayer Ex. #70; Tr. 185-187; Tr. 380-385].

86. New Mexico has 19 centers/hubs throughout the state in places like Albuquerque, Santa Fe, Grants, Gallup, Farmington, Las Vegas, Springer, Taos, Hobbs, Carlsbad, and Roswell. [Tr. 148; Tr. 171].

87. At the Albuquerque Taxpayer hub facility, there are 82 bays for package cars and 32 doors for package feeder semi-trucks. [Tr. 204-206].

88. In New Mexico, there is a TOFC loading and unloading facility in Albuquerque called the Woodward facility. [Taxpayer Ex. #56; Tr. 154].

89. Taxpayer has approximately 70 employees stationed at the Albuquerque International Sunport who load and unload Taxpayer's browntail aircrafts according to Taxpayer's package system. [Tr. 166-167].

90. Depending on the time of year, Taxpayer's vehicle count will vary. [Tr. 187-193].

91. In 2007, Taxpayer owned or rented 556 package cars and 87 feeder tractors in New Mexico. [Taxpayer Ex. #69.1541; Tr. 193].

92. In 2007, package cars made up 86.5% of Taxpayer's New Mexico 643 vehicle fleet. [Taxpayer Ex. #69.1541; Tr. 193].

93. New Mexico's vehicle fleet constituted .6% of Taxpayer's national fleet in 2007, which consisted of 89,760 package cars and 16,272 feeder tractors outside of New Mexico. [Taxpayer Ex. #69.1541; Tr. 194; Tr. 379].

94. In 2008, Taxpayer owned or rented 574 package cars and 58 feeder tractors in New Mexico. [Taxpayer Ex. #69.1542; Tr. 377-380].

95. In 2008, package cars constituted 90.8% of Taxpayer's New Mexico 632 vehicle fleet. [Taxpayer Ex. #69.1542].

96. New Mexico's vehicle fleet constituted .6% of Taxpayer's national fleet in 2008. [Taxpayer Ex. #69.1542].

97. In 2009, Taxpayer owned or rented 550 package cars and 81 feeder tractors in New Mexico. [Taxpayer Ex. #69.1544; Tr. 380].

98. In 2009, package cars constituted 87.2% of Taxpayer's New Mexico 631 vehicle fleet. [Taxpayer Ex. #69.1544].

99. New Mexico's vehicle fleet constituted .59% of Taxpayer's national fleet in 2009. [Taxpayer Ex. #69.1544].

100. In 2007, Taxpayer (not including UPS, New York, which had not yet merged with Taxpayer) had 10,104,618 package car miles and 11,492,288 tractor truck miles in New Mexico for a combined total mileage of 21,596,906. [Taxpayer Ex. 68.1537].

101. Using Taxpayer's 2007 billed New Mexico sales of $56,178,891.00 and the combined New Mexico feeder and tractor mileage total of 21,596,906, Taxpayer generated $2.60 of sales per feeder

and tractor mile driven in New Mexico in 2007. [Taxpayer Ex. 68.1537; Taxpayer Ex. 71.1548].

102. In 2008, Taxpayer (not including UPS, New York, which had not yet merged with Taxpayer) had 10,249,517 package car miles and 11,109,112 tractor truck miles in New Mexico for a combined total mileage of 21,358,629. [Taxpayer Ex. 68.1539].

103. Using Taxpayer's 2008 billed New Mexico sales of $53,621,784.00 and the combined New Mexico feeder and tractor mileage total of 21,358,629, Taxpayer generated $2.51 of sales per feeder and tractor mile driven in New Mexico in 2008. [Taxpayer Ex. 68.1539; Taxpayer Ex. 71.1549].

104. In 2009, Taxpayer (post-merger with UPS, New York) had 9,864,559 package car miles and 10, 699,290 tractor truck miles in New Mexico for a combined total mileage of 20,563,849. [Taxpayer Ex. 68.1540].

105. Using Taxpayer's 2009 billed New Mexico sales of $50,634,404.00 and the combined New Mexico feeder and tractor mileage total of 20,563,849, Taxpayer generated $2.46 of sales per feeder and tractor mile driven in New Mexico in 2009. [Taxpayer Ex. 68.1539; Taxpayer Ex. 71.1549].

Taxpayer's New Mexico Corporate Income Tax Returns.

106. For tax year 2007, Taxpayer filed its original CIT-1 New Mexico Corporate Income and Franchise Tax Return on November 4, 2008. [Taxpayer Ex. #28; Tr. 281].

107. Taxpayer determined its 2007 average New Mexico factor of 0.4618% for purposes of apportionment as follows:

a. Property: $205,980,361.00 in New Mexico divided by everywhere property of $22,405,358,018.00 for a property factor of 0.6166%.

b. Payroll: $71,544,430.00 in New Mexico divided by everywhere payroll of $15,239,818,248.00 for a payroll factor of 0.4695%.

c. Sales: $131,569,232.00 in New Mexico divided by everywhere sales of $43,965,730,714.00 for a sales factor of 0.2993%.

[Taxpayer Ex. #28.1049; Tr. 282].

108. The average apportionment factor of 0.4618% in 2007 was cited in the MTC audit. [Taxpayer Ex. #46.1418; Tr. 282-283].

109. The average apportionment factor of 0.4618% in 2007 did not change after Taxpayer filed an amended 2007 CIT-1 return in 2014 as a result of federal audit changes. [Taxpayer Ex. #31; Tr. 286-287].

110. Taxpayer prepared a *pro forma* federal 1120 return for 2007. [Taxpayer Ex. #34; Tr. 292].

111. Taxpayer's 2007 *pro forma* 1120 return showed it had $22,115,770,234.00 in receipts, reduced by expenses totaling $24,497,919,599.00 constituting $8,666,675,893.00 in salaries and wages, $7, 231,529,960.00 in pensions and profit sharing, $1,885,516,140.00 in employee benefits, and various other expenses totaling the remaining approximate $5-billion. [Taxpayer Ex. #34.1177; Tr. 292-294].

112. Of the total $24,497,919,599.00 in expenses under the 2007 pro forma 1120 return, employee

expenses totaling $17,783,721,993.00 predominate. [Taxpayer Ex. #34.1177; Tr. 294].

113. In 2007, Taxpayer's 1120 pro forma return showed $785,390,541 as an expense for TOFC, which amounts to 3.2% of Taxpayer's total reported expenses that year. [Taxpayer Ex. #34.1191; Tr. 295].

114. Taxpayer paid less for fuel for its vehicles in 2007 than it did for professional services. [Tr. 295-296].

115. In 2007, the MTC reversed Taxpayer's categorization of $20,734,638 as non-business income. [Taxpayer Ex. #34.1190; Taxpayer Ex. #46.1414; Tr. 296-301].

116. For tax year 2008, Taxpayer filed its original CIT-1 New Mexico Corporate Income and Franchise Tax Return on October 27, 2009. [Taxpayer Ex. #29; Tr. 283-285].

117. Taxpayer determined its 2008 average New Mexico factor of 0.4610% for purposes of apportionment as follows:

a. Property: $210,380,232.00 in New Mexico divided by everywhere property of $34,660,019,017.00 for a property factor of 0.6070%.

b. Payroll: $71,656,854.00 in New Mexico divided by everywhere payroll of $15,277,843,987.00 for a payroll factor of 0.4690%.

c. Sales: $141,401,281.00 in New Mexico divided by everywhere sales of $46,038,171,370.00 for a sales factor of 0.3071%.

[Taxpayer Ex. #29.1056; Tr. 284].

118. The average apportionment factor of 0.4610% in 2008 was cited in the MTC audit. [Taxpayer Ex. #46.1405; Tr. 284-285].

119. The average apportionment factor of 0.4610% in 2008 did not change after Taxpayer filed an amended 2008 CIT-1 return in 2014 as a result of federal audit changes. [Taxpayer Ex. #32; Tr. 288-291].

120. Of the total $20,682,752,644.00 in expenses under the 2008 pro forma 1120 return, some 60% of that amount was attributable to employee expenses. [Taxpayer Ex. #35.1204; Tr. 301-302].

121. In 2008, Taxpayer's 1120 pro forma return showed $832,584,642.00 as an expense for TOFC, which constituted approximately 4% of Taxpayer's total reported expenses that year. [Taxpayer Ex. #35.1223; Tr. 303].

122. 4.75% of Taxpayer's expenses in 2008 were for fuel for its vehicles. [Tr. 303-305].

123. For tax year 2009, Taxpayer filed its original CIT-1 New Mexico Corporate Income and Franchise Tax Return on November 11, 2010. [Taxpayer Ex. #30; Tr. 285-286].

124. In 2009, Taxpayer merged with UPS (New York), resulting in a significant increase in gross receipts compared to 2007 and 2008. [Tr. 311-312].

125. Taxpayer determined its 2009 average New Mexico factor of 0.4666% for purposes of apportionment as follows:

a. Property: $207,863,823.00 in New Mexico divided by everywhere property of $34,992,045,033.00 for a property factor of 0.5940%.

b. Payroll: $72,216,796.00 in New Mexico divided by everywhere payroll of $15,256,522,954.00 for a payroll factor of 0.4734%.

c. Sales: $134,257,577.00 in New Mexico divided by everywhere sales of $40,391,290,285.00 for a sales factor of 0.3324%.

[Taxpayer Ex. #30.1063; Tr. 286].

126. The average apportionment factor of 0.4666% in 2009 did not change after Taxpayer filed an amended 2009 CIT-1 return in 2014 as a result of federal audit changes. [Taxpayer Ex. #33; Tr. 288-291].

127. Of the total $20,682,752,644.00 in expenses under the 2009 pro forma 1120 return, some 60% of that amount was attributable to employee expenses. [Taxpayer Ex. #35.1204; Tr. 301-302].

128. In 2009, Taxpayer's 1120 pro forma return showed $834,271,550.00 as an expense for TOFC, which amounts to approximately 3.5-4% of Taxpayer's total reported expenses that year. [Taxpayer Ex. #36.1256; Tr. 312].

129. Taxpayer paid $768-million in fuel expenses in 2009, less than the $1.6 billion in business service fees that year [Taxpayer Ex. #36.1257; Tr. 312].

The State-to-State Volume Method and its Origins.

130. Under this state-to-state volume method, Taxpayer used a hybrid sourcing method: assigning 50% of the sale to the originating state and 50% to the destination state. [Tr. 492].

131. Under the state-to-state volume method, Taxpayer uses the actual volume of shipped packages, then looks to the highest possible charge for shipment of those packages (without applying any potential rack discount rates taxpayer actually applied to its customers) from the two furthest possible zones within the origin and destination states. [Tr. 322-325; 334-337; 461-468].

132. Taxpayer has used the state-to-state volume method since 1988 because it believed it was a reasonable method that Taxpayer and the Department have agreed to use even though a billed revenue method would result in lower taxation for Taxpayer. [Tr. 470].

133. Taxpayer had utilized the state-to-state volume method in large geographic states with lower populations, including Montana and New Mexico, for corporate tax years beginning in the late 1980s. [Tr. 342].

134. The MTC accepted the state-to-state volume method during an audit from 1988 to 1990. [Tr. 343-344; Tr. 469].

135. New Mexico previously accepted the state-to-state volume method during two previous audits. [Tr. 344-345; Tr. 469-470].

136. During a previous audit of tax years 1988, 1989, and 1990, the MTC auditor agreed with Taxpayer that using a mileage method would distort Taxpayer business presence in New Mexico. The Department accepted the MTC auditor's conclusion and did not use miles to calculate the revenue

factor. The Department and Taxpayer entered into a closing agreement in 1997 to resolve a previous assessment. [Taxpayer Ex. #44.1348-1349; Taxpayer Ex. 75.1947-1950; Tr. 348-351].

137. On November 12, 2003, Taxpayer submitted a letter to the Department's Audit & Compliance Division Bureau Chief seeking permission to continue to use the state-to-state volume method it had employed in previous years with approval. [Taxpayer Ex. #44.1353-1355; Tr. 351-356].

138. The Department never responded to Taxpayer's Letter of November 12, 2003, seeking permission to continue to use the state-to-state volume method and the Department did not issue an assessment for the period discussed in that letter where Taxpayer did use the state-to-state volume method. [Tr. 356, TR 388-389].

The MTC Audit, Adjustments, and Changes to Taxpayer's Sales under the State-to-State Method.

139. The MTC conducted an audit of Taxpayer for tax years 2007, 2008, and 2009 on behalf of various states, including New Mexico. [Taxpayer Ex. #37; Tr. 313-314].

140. Taxpayer agreed to extend the statute of limitations on the audit through September 30, 2012 and then again through September 30, 2013. [Taxpayer Ex. #37.1272; Taxpayer Ex. #38.1276; Tr. 313-315].

141. The MTC audit information document requests did not seek any information about Taxpayer's intrastate revenue. [Taxpayer Ex. #39; Taxpayer Ex. #40; Taxpayer Ex. #43; Taxpayer Ex. #44; TR. 314-317; 347-348].

142. Taxpayer mistakenly failed to provide MTC package car mileage traveled by state, but presented that information at the hearing. Taxpayer contends that package car mileage must be included in any calculation under the trucking regulation that the Department claims applies to Taxpayer. [Taxpayer Ex. #68; Tr. 376; 415-416].

143. The biggest change under the MTC's audit adjustments resulted from a substantial increase in the denominator of the sales/receipts apportionment factor related to using mileage under the special apportionment method for trucking companies, including feeder miles over TOFC miles. [Taxpayer Ex. #46.1418; #46.1432; Tr. 101-104:12; Tr. 110-117].

144. The MTC auditor disallowed all of Taxpayer's claimed nonbusiness income in 2007 ($20,734, 638.00), 2008 ($52,168,439.00), and 2009 ($47,295,835). [Taxpayer Ex. #46.1414; Tr. 117-118:18].

145. Taxpayer employed this state-to-state volume method as its starting point in 2007, 2008, and 2009 and disclosed this method to the MTC as part of the audit. [Taxpayer Ex. #63; Taxpayer Ex. #64; Taxpayer Ex. #64; Tr. 329-332].

146. In 2007, Taxpayer handled 15,812,462 packages that were delivered in New Mexico, which resulted in an estimated[3] $67,410,956 in revenue. [Taxpayer Ex. 42.1300; Tr. 325-328].

147. In 2007, Taxpayer handled 4,685,557 packages originating from New Mexico, which resulted in $19,878,083.00 in estimated revenue. [Taxpayer Ex. 42.1300; Tr. 328].

148. In 2007, Taxpayer shipped 902,312 packages intrastate from a New Mexico source to a New Mexico destination, with an estimated revenue of $6,051,346.00. [Taxpayer Ex. 42.1300; Tr. 323-326].

149. In 2007, as part of the state-to-state volume method, Taxpayer had an estimated $87,289,039.00 in revenue for 20,498,019 packages delivered either to or from New Mexico. [Taxpayer Ex. 42.1300; Tr. 323-328].

150. In 2007, Taxpayer had $22,115,770,234 in revenue for packages delivered everywhere, which compared to its $87,289,039 in New Mexico, resulting in a ratio of .3947, which is then multiplied against intercompany eliminations to result in $86,009,161.00 in New Mexico revenue after eliminations under the state-to-state volume method. [Taxpayer Ex. 42.1299; Taxpayer Ex. #46.1432; Tr. 328-329].

151. That state-to-state volume method in 2008 resulted in $88,214,706.00 in New Mexico sales. [Taxpayer Ex. #42.1311-12; Taxpayer Ex. #46.1432; Tr. 331].

152. That state-to-state volume method in 2009 resulted in $90,205,556.00 in New Mexico sales. [Taxpayer Ex. #42.1323-24; Taxpayer Ex. #46.1432; Tr. 331-332].

153. After accounting for volume shipping discounts given to customers, Taxpayer's actual revenue in New Mexico in 2007 was $56,178,891.00 rather than the $86,009,161.00 allocated amount in 2007 under the state-to-state volume method. [Taxpayer Ex. #66.1530; Taxpayer Ex. #34.1177; Tr. 338-342].

154. For 2007, the MTC audit adjusted the reported New Mexico in state sales from $86,009,161.00 (as determined by the state-by state volume method) to $681,827,729.00, an increase of $595,818, 568.00 or 692%[4] . [Taxpayer Ex. #46.1432; Taxpayer. Ex. #71.1548; Tr. 398-400].

155. Taxpayer's actual 2007 New Mexico billings only totaled $56,178,891.00, meaning that the MTC's adjustment to $681,827,729.00 in New Mexico increased Taxpayer's New Mexico revenue 1113% above its actual revenue in the state. [Taxpayer Ex. #71; Tr. 401-406, 410].

156. For 2008, the MTC audit adjusted the reported New Mexico in state sales from $88,214,706.00 as reported under the state-to-state volume method to $634,817,086.00, a difference of $546,602, 380.00 and an increase of 619%. [Taxpayer Ex. #46.1432; Taxpayer. Ex. #71.1550; Tr. 398-400].

157. Taxpayer's actual 2008 New Mexico billings only totaled $53,621,784.00, meaning that the MTC's adjustment to $634,817,086.00 in New Mexico increased Taxpayer's New Mexico revenue 1083% above its actual revenue in the state. [Taxpayer Ex. #71.1549; Tr. 401-412].

158. For 2009, the MTC audit adjusted the reported New Mexico in-state sales from $90,205,556.00 as reported under the state-to-state volume method to $723,523,285.00, a difference of $633,317, 719.00 and an increase of 702%. [Taxpayer Ex. #46.1432; Taxpayer. Ex. #71.1552; Tr. 398-400].

159. Taxpayer's actual 2009 New Mexico billings only totaled $50,634,404.00, meaning that the MTC's adjustment of sales to $723,523,285.00 in New Mexico increased Taxpayer's New Mexico sales 1328% above its actual sales in the state. [Taxpayer Ex. #71.1552; Tr. 401-415].

Party Stipulations and Concessions at Hearing

160. The parties stipulated that there is a positive correlation between an increase in volume of packages and revenue. And there is a negative correlation between a decrease in the volume of packages and revenue. [Tr. 485-488].

161. Taxpayer conceded that there was no internal consistency issue with the apportionment in this case. [Tr. 398:6-12; Taxpayer's Written Summation, p. 16].

162. The Department conceded at the hearing that Taxpayer had non-business income of $14 million in 2007, $18-million in 2008, and $16-million in 2009 that was incorrectly disallowed by the MTC auditor, amounting to a reduction in the assessed tax amount of $48,300.00 plus associated penalty and interest. [Tr. 307-309; Tr. 508].

163. The final adjustment to the MTC report reduced the assessed tax principal from $3,024,065.00 to $2,421,979.00 and, at the hearing, the Department accepted this downward MTC adjustment to the assessed liability, conceding that portion of the assessment. [Taxpayer Ex. #46.1402; Tr. 119: 17-120:6; Tr. 132:22-135; Tr. 508].

164. Although Taxpayer did not provide the MTC the intrastate mileage during the audit, Department Protest Auditor Danny Pogan agreed a recalculation under the Department's trucking regulation was necessary, which would result in a downward adjustment in the assessed tax. [Tr. 562-567].

165. The Department never provided its recalculation of this downward adjustment that Mr. Pogan indicated was supported, or any of the updated liabilities, after the conclusion of the hearing, failing to reestablish the correctness of its assessment after its concessions.

Other Procedural Findings

166. On March 4, 2014, the Hearings Bureau issued a scheduling order, setting this matter for a merits hearing on August 19 and 20, 2015. [Administrative File].

167. On September 26, 2014, Taxpayer moved to amend the scheduling order and continue the scheduled August 2015 hearing dates. [Administrative File].

168. On September 29, 2014, the Hearings Bureau issued a continuance order, vacating the previous scheduling order and hearing in favor of a new scheduling order and new merits hearing date of February 17 and 18, 2016. [Administrative File].

169. On March 25, 2015, Taxpayer again moved to amend the scheduling order. [Administrative File].

170. On March 31, 2015, the Hearings Bureau issued a second continuance order and amended scheduling order, vacating the previous scheduling order and merits hearing dates in favor of a new scheduling order and merits hearing date on August 9 and 10, 2016. [Administrative File].

171. On October 27, 2015, Taxpayer again moved to amend the controlling scheduling order and vacate the hearing date. [Administrative File].

172. On October 29, 2015, the Administrative Hearings Office issued a third continuance and amended scheduling order, vacating the previous scheduling order and merits hearing dates in favor of a new amended scheduling order and merits hearing date on April 5, 6, and 7, 2017. [Administrative File].

173. On December 15, 2016, the parties jointly moved to amend the scheduling order. [Administrative File].

174. On December 19, 2016, the Administrative Hearings Office issued its fourth continuance order

and amended scheduling order, vacating the previous controlling scheduling order and hearing date as well as resetting the merits hearing for November 15 and 16, 2017. [Administrative File].

175. On August 9, 2017, the parties jointly moved again to amend the scheduling order. [Administrative File].

176. On August 16, 2017, the Administrative Hearings Office issued its fifth continuance order and amended notice of administrative hearing, vacating the previous scheduling order and scheduling this matter for a merits hearing on June 5, 6, and 7, 2018. [Administrative File].

177. On April 10, 2018, Taxpayer filed a motion to admit evidence under Rule 902(11) NMRA, along with a memorandum in support. [Administrative File].

178. On April 14, 2018, Taxpayer filed a motion for summary judgment, along with a memorandum in support. [Administrative File].

179. On April 19, 2018, Taxpayer moved to amend the scheduling order in this matter. [Administrative File].

180. On April 26, 2018, the Department filed its opposition to Taxpayer's motion for summary judgment. [Administrative File].

181. On May 15, 2018, the Administrative Hearings Office denied Taxpayer's motion for summary judgement and denied Taxpayer's motion to amend the scheduling order. The Administrative Hearings Office partially granted Taxpayer's motion for admission of documents, finding that the documents were self-authenticating. [Administrative File].

182. On May 21, 2018, the parties filed their joint prehearing statement. [Administrative File].

183. Taxpayer has spent more than $50,000.00 in attorney's fees and related expenses in the preparation and defense of its protest. [Tr. 418].

DISCUSSION

This protest involves the Department's assessment of additional corporate income tax, penalty, and interest for tax years 2007, 2008, and 2009 after the MTC conducted an audit of Taxpayer's business. At dispute in this protest is the calculation of the sales factor under the apportionment formula, and specifically how, either the regulatory special trucking apportionment method (which relies on mileage) or the state-to-state volume method, attributes revenue under the sales factor to New Mexico. Taxpayer originally used the state-to-state volume method to calculate its sales in New Mexico for purposes of apportionment. Under the state-to-state volume method, 50% of all interstate deliveries originating from or delivered to New Mexico and 100% of Taxpayer's New Mexico intrastate pick up and deliveries are attributed to New Mexico sales. The Department argues that Taxpayer is required to follow the regulatory special trucking mileage method to determine New Mexico sales. Taxpayer contends that the special method of apportionment for trucking companies is inapplicable to its business and that, even if it is applicable, it violates external consistency because its application distorts Taxpayer's true New Mexico business activities. Moreover, given its history of previous acceptance, Taxpayer claims that the state-to-state volume method is a reasonable method to calculate its sales factor.

Presumption of Correctness

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. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, §7-1-3(X) (2013). 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-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Accordingly, it is 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. When a taxpayer presents sufficient evidence to rebut the presumption of correctness of the assessment, the burden shifts to the Department to reestablish the correctness of the assessment.

Corporate Income and Franchise Tax Act, UDITPA, and Apportionment.

Subject to the limitations of the United States Constitution's Due Process and Commerce Clause, under NMSA 1978, Section 7-2A-3, New Mexico levies an income tax on "the net income of every domestic corporation and upon the net income of every foreign corporation employed or engaged in the transaction of business in, into or from this state or deriving any income from any property or employment within this state." As used under the Corporate Income and Franchise Tax Act, the term "corporations" includes corporations, joint stock corporations, certain real estate trusts, financial corporations, banks, other business associations, limited liability companies, and partnerships taxed as corporations under the Internal Revenue Code. *See* NMSA 1978, § 7-2A-2(D). Taxpayer is an out-of-state corporation engaged in transaction of business into and from New Mexico, subjecting Taxpayer to New Mexico's corporate income tax during the relevant years, 2007, 2008, and 2009.

Generally, states may not impose an income tax on the value earned outside of its border under the Due Process and Commerce Clauses of the United States Constitution. *See ASARCO Inc. v. Idaho State Tax Commission,* 458 U.S. 307, 314 (1982). Specifically, the Commerce and Due Process Clauses of the United States Constitution impose distinct but parallel limitations on New Mexico's power to tax value earned from out-of-state business activities. *See Mobil Oil Corp. v. Comm'r of Taxes,* 445 U.S. 425, 454 (1980); *Norfolk & Western R. Co. v. Missouri Tax Comm'n.,* 390 U.S. 317, 325, n.5 (1969). However, states may tax a fairly apportioned share of a multistate entity's business income. *See Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458-462 (1959). In *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977), the United States Supreme Court held that a state tax on corporations performing exclusively interstate business will not violate the protections of the Commerce Clause if the tax meets the following four-part test: (1) a sufficient nexus exists between the activity being taxed and the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to services provided by the state.

New Mexico, like many states, has adopted the Uniform Division of Income for Tax Purposes Act ("UDITPA") to address fair apportionment and allocation of income earned by multistate or multinational entities for their New Mexico activities. *See* NMSA 1978, §§7-4-1 through 7-4-21; *see also ASARCO Inc. v. Idaho State Tax Commission,* 458 U.S. 307, 311 fn.3 (1982) (short discussion of history of UDITPA); *see also J. Hellerstein & W. Hellerstein, State Taxation*, ¶9.01 (3rd ed. 2001-2015) (discussion of history of adoption of UDITPA, or similar statutory regimes, by numerous states).

UDITPA distinguishes between business income (apportionable to any state where a multistate taxpayer is subject to corporate income tax) and nonbusiness income (allocated only to a single location, usually a taxpayer's domicile). *See* NMSA 1978, §7-4-10(A) (2013) (". . . all business income shall be apportioned. . ."). Under UDITPA, business income is apportioned according to a three-factor formula based on the amount of a corporation's respective property, payroll, and sales everywhere (the denominators) against the respective amount of its property, payroll, and sales within a state (the numerators). Using the denominator and numerator in each category of property, payroll, and sales, a percentage is calculated for each of the three factors, and the average percentage of the three is then applied against the corporation's total income to determine the percentage amount of apportioned income subject to New Mexico's corporate income tax. *See* NMSA 1978, §§ 7-4-10 through 7-4-18.

The general idea behind UDITPA, amongst others, is to ensure that each state only taxes an apportioned share of a taxpayer's income, a share under the formula roughly commensurate with the portion of the income attributable to the business activities conducted within that respective state. *See e.g. Kmart Props., Inc. v. Taxation & Revenue Dep't,* 2006-NMCA-026, ¶ 46, 139 N.M. 177, 131 P.3d 27 (New Mexico Court of Appeals provides a brief overview of the apportionment process under UDITPA and describes that process as "an effort at fair and uniform allocation of taxable income among the states."). UDITPA has two basic goals: "(1) fair apportionment of income among the taxing jurisdictions; and (2) uniformity of application of the statutes. *Twentieth Century-Fox Film Corp. v. Dep't of Revenue,* 299 Or. 220, 227, 700 P.2d 1035 (1985). If all states applied the UDITPA formula in a uniform manner, then 100% of a multistate taxpayer's income, and "no more or no less," would be subject to tax. W.J. Pierce, *The Uniform Division of Income for State Tax Purposes,* 35 Taxes 747, 748 (1957), (as cited in *Twentieth Century-Fox,* 299 Or. 220, 226-27).

Although not the only permissible method of apportionment, UDITPA's standard three-factor formulary apportionment has become the "benchmark" for fair apportionment. *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 170 (1983). As the United States Supreme Court noted, the reason UDITPA's standard three-factor apportionment has become the approved standard is that "payroll, property, and sales appear in combination to reflect a very large share of the activities by which value is generated." *Container Corp. of Am. v. Franchise Tax Bd.,* 463 U.S. 159, 183 (1983). While there is expected variance between the three factors, the average of the three factors is designed in most cases to arrive at a reasonably reliable determination of a taxpayer's activities in a state. Thus, the three-factor apportionment, even if such formula is "necessarily imperfect," is generally able to avoid the "sort of distortions" that raise constitutional issues with state taxation of multistate businesses. *Id.*

While *Container Corp.* embraced the standard three-factor formulary apportionment, the Supreme Court also established in that decision that any apportionment formula used must be both internally and externally consistent. *See Container Corp.,* 463 U.S. 159, 169-170. By internal consistency, the Court meant that "the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed." *id.,* 463 U.S. 159, 169. At hearing, Taxpayer conceded that there was no internal consistency issue in this case. *See* Tr. 398:6-12; *see also* Taxpayer's Written Summation p. 16.

In light of its concession to the internal consistency issue, at the hearing and again in its written closing argument, Taxpayer instead argued that the assessment at issue in this case violated the external consistency requirement[5] . *See* Taxpayer's Written Summation, p. 9. The Supreme Court identified external consistency as a much more difficult concept: "the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *id.* As the New Jersey Supreme Court, in synthesizing various United Supreme Court cases addressing external consistency, summarized

[e]xternal consistency looks "to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." [*Okla. Tax Comm'n v. Jefferson Lines,* 514 U.S. 175, 185 (1995)] Stated simply, the question is whether the state's tax law reasonably reflects the activity within its jurisdiction. The external consistency test requires a "practical inquiry" into the inter-state activity taxed in relation to the activity in the taxing jurisdiction. *Goldberg v. Sweet,* 488 U.S. 252, 264-65, 109 S. Ct. 582, 590-91, 102 L. Ed. 2d 607, 618-19 (1989).

Whirlpool Props., Inc. v. Dir., Div. of Taxation, 208 N.J. 141, 165, 26 A3D 446 (2011).

The United States Supreme Court had indicated that an apportionment formula is not invalidated simply because it may result in the taxation of income earned beyond the taxing state. *See Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 272 (1978). Because apportionment involves "slicing a shadow," reasonable imprecision under an apportionment formula is permitted. *Container Corp.,* 463 U.S. 159, 192-93. An apportionment formula generally only fails when a taxpayer can show by clear and cogent evidence that the income attributed to the state is "out of all appropriate proportions to the business transacted . . . in that state." *Hans Rees Sons, Inc. v. North Carolina,* 283 U.S. 123, 135 (1931). While the apportionment formula need not be exact, when a taxpayer shows that an application of a formula for apportionment results in gross distortion, a modification to the application of that formula is required in that particular instance. *See Norfolk & W. R. Co. v. Mo. State Tax Comm'n,* 390 U.S. 317, 329 (1968).

Equitable Adjustments to Apportionment Under UDITPA

UDITPA itself contains a provision that allows for equitable adjustment to the standard three factor apportionment when the three-factor formula does not fairly capture the business activity of a multistate taxpayer. UDITPA was designed primarily to address manufacturing and merchandising. *See Twentieth Century-Fox,* 299 Or. 220, 227. The drafters of UDITPA created this equitable apportionment provision to provide flexibility to tax administrators and taxpayers when the standard three-factor apportionment would reach an "unreasonable result." W.J. Pierce, *The Uniform Division of Income for State Tax Purposes,* 35 Taxes 747, 781 (1957), (as cited in *Twentieth Century-Fox,* 299 Or. 220, 226-227). As Professor Pierce, the drafter of UDITPA expounded, the equitable apportionment provision of UDITPA allows for

some latitude for showing that for the particular business activity, some more equitable method of allocation and apportionment could be achieved. Of course, departures from the basic formula should be avoided except where reasonableness requires. Nonetheless, some alternative method must be available to handle the constitutional problem as well as the unusual cases, because no statutory pattern could ever resolve satisfactorily the problem for the multitude of taxpayers with individual business characteristics.

Id.

This equitable adjustment provision of UDITPA has been adopted in New Mexico and codified as NMSA 1978, Section 7-4-19. Section 7-4-19 (emphasis added) reads:

If the allocation and apportionment provisions of the Uniform Division of Income for Tax Purposes Act [7-4-1 NMSA 1978] **do not fairly represent the extent of the taxpayer's business activity in this state,** the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's business activity, **if reasonable:**

A. separate accounting;

B. the exclusion of any one or more of the factors;

C. the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

D. **the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.**

The party seeking to depart from the standard apportionment formula under UDITPA carries the burden of persuasion as to why the modification is necessary. *See Kmart Props., Inc. v. Taxation & Revenue Dep't (KPI),* 2006-NMCA-026, ¶¶ 50-51, 139 N.M. 177 (reversed on other grounds; certiorari as to corporate income tax issues quashed). In order to meet this burden of departure, the party seeking the departure must prove two things: first, that statutory formula as a whole does not fairly represent the extent of the taxpayer's business activity in the state and second that the alternative method of apportionment employed is reasonable. *See Twentieth Century-Fox,* 299 Or. 220, 233. When there is substantial evidence that the standard formula distorts the reality of the taxpayer's state activity, it is appropriate to depart from the standard three factor formula. *See KPI,* ¶51.

Application of the Special Apportionment for Trucking Companies.

The Department has promulgated a series of regulations interpreting UDITPA's equitable adjustment provision. *See* 3.5.19.6 NMAC. The accepted practice is that when a state promulgates special rules on apportionment pursuant to UDITPA's equitable adjustment provisions to a particular industry, those special rules for apportionment become the standard requirement for apportionment for any company within that industry. *See J. Hellerstein & W. Hellerstein, State Taxation*, ¶9.20[4] (3rd ed. 2001-2015).

At issue in this protest is the special rules for apportionment of trucking companies found at Regulation 3.5.19.15 NMAC, which the MTC audit determined applied and the Department relied upon in issuing the assessment. Under Regulation 3.5.19.15(B) NMAC, "the term ‘trucking company' means a motor common carrier, a motor contract carrier or an express carrier which primarily transports tangible personal property of others by motor vehicle for compensation."

Taxpayer contends that it is not a trucking company for the purposes of the special apportionment regulation because it claims transporting property by motor vehicle for compensation is not primarily what it does. Instead, Taxpayer contends it is a package delivery company, with only 13% of its activities by time involving transportation by motor vehicle compared to 87% of time involving other activities "like hub and sorting operations, loading and unloading airplanes and trailer and package cars, hand-carrying and hand-truck carrying of packages, and using the electronic devices.[6] "

However, the argument that Taxpayer presents attempts to reduce the analysis to a mathematical equation that is too simplistic to resolve the question of whether the trucking special apportionment regulation applies to Taxpayer. Taxpayer embraces that it is a package delivery company: the core of delivering packages involves the transportation of those packages from one location to another. While

Taxpayer cleverly attempts to distinguish on road mileage time from other activities, those other activities (while all important) are ancillary to the transportation needed to deliver a package from point A to point B. It is this transportation of packages from origin to the destination that is the predominate source of Taxpayer's income generation, even if as part of that process Taxpayer spends most of its resources on the ancillary services needed to deliver the packages timely.

Nor is the Department's argument much help. Without any much analysis, reasoning, justification, or support from the factual record, the Department asserted in closing argument that Taxpayer must follow Regulation 3.5.19.15 NMAC simply because that regulation applies to "express delivery companies" as well as trucking companies.[7] However, the Department's conclusory argument misquotes the regulation: the regulation itself does not use the language "express delivery companies" but instead uses the phrase "express carrier." Those terms may be similar, but the Department simply presumes that similarity without trying through analysis or citation to establish that similarity. Nor does the Department make any effort to tie its argument related to express delivery companies to the evidentiary record in this case.

Neither the regulation, nor the Department's argument which misquotes the regulatory language, define the term "express carrier." Under federal law, 19 C.F.R. §128.1 defines an express carrier as "an entity operating in any mode or intermodally moving cargo by special express commercial service under closely integrated administrative control. Its services are offered to the public under advertised, reliable timely delivery on a door-to-door basis."

As the record in this case makes clear, Taxpayer transports packages through various modes of transportation for delivery under a closely integrated control system, ensuring timely delivery from door to door. As part of the delivery of packages, the average feeder truck drove 266.7 miles per day in 2009, making *3-4* stops per day at Taxpayer's hubs and centers, including airports and rail stations. The average package delivery driver drives 60.9 miles per day, making 160-170 stops per day to deliver packages. Although there are many logistical and support activities along the way that facilitate timely delivery, transportation by motor vehicle is the unifying, essential component of Taxpayer's package delivery service in 2007, 2008, 2009: not all packages were transported by airline or by TOFC over rail car, but every delivered package was transported by motor vehicle at some point under the hub system described in testimony. Without transportation by motor vehicle (at least during the audit period of 2007, 2008, 2009), Taxpayer would not be able to get the packages from initial origin to destination.

Considering this federal definition of the term "express carrier," the regulatory reference to that phrase, and the evidentiary record, the Hearing Officer finds that Taxpayer is an express carrier for the purposes of Regulation 3.5.19.15 NMAC. Under the language of Regulation 3.5.19.15(B) NMAC, Taxpayer primarily transports the tangible personal property of others by motor vehicle for compensation. Although Taxpayer performs activities other than transporting the property, those activities are all in support of ensuring timely delivery of the transported tangible personal property. Therefore, Taxpayer is generally subject to the special apportionment method for trucking companies under Regulation 3.5.19.15 NMAC.

Equitable Adjustments Apply to Special Regulatory Apportionment Method

While Taxpayer is generally subject to the special apportionment method for trucking companies under Regulation 3.5.19.15 NMAC, that does not end the analysis in this protest. Although no express equitable apportionment relief provision is contained under Regulation 3.5.19.15 NMAC, such equitable apportionment relief is still available by statute, by general regulation, and by virtue of the case law previously cited discussing distortion and equitable relief to an apportionment formula. Regulation 3.5.19.9(C) NMAC, entitled "Adjustment of Formula," acknowledges that the industry specific apportionment regulations contained within that section of regulations including the trucking apportionment at issue here, may not be appropriate for determining the apportionment formula and may require further adjustment. More importantly, by statute UDITPA expressly allows for equitable apportionment relief with the default apportionment formula does not fairly represent the full business activity of a taxpayer. *See* § 7-4-19.

As Hellerstein and Hellerstein indicate in their preeminent state tax treatise, equitable adjustment relief remains viable even under a special apportionment method specifically designed for the industry in question. *See* J. Hellerstein & W. Hellerstein, *State Taxation*, ¶19.20[7][o] & 10.08[4][b] (3rd ed. 2001-2015). Once it is clear that the conditions of the special regulation apply, the special regulation becomes the default apportionment unless the party seeking the departure from the special regulation apportionment formula can show by clear and cogent evidence that the regulation "does not fairly represent the extent of the taxpayer's activities" in the state. *Id.,* (citing *Matter of the Appeal of Fluor Corporation, 1995 WL 799363* (Cal.St.Bd.Eq.)). Moreover, allowing for equitable apportionment relief is also consistent with relevant case law, which prohibits an apportionment method that results in gross distortion out of all appropriate proportion to the business activity in the state. *See Hans Rees,* 283 U.S. 123, 135; *see also Norfolk,* 390 U.S. 317, 329.

In order to deviate from the special trucking regulatory apportionment method, Taxpayer must establish by clear and cogent grounds the special trucking apportionment method does not fairly represent its business activity in this state. *See KPI,* 2006-NMCA-026, ¶ 50-51, 139 N.M. 177; *see also Twentieth Century-Fox,* 299 Or. 220, 233. When there is substantial evidence that the standard formula distorts the reality of the taxpayer's state business activity, it is appropriate for either a taxpayer or the Department to depart from the standard apportionment formula. *See KPI,* ¶51; *see also Pub. Serv. Co. v. N.M. Taxation & Revenue Dep't,* 2007-NMCA-050, ¶ 33, 141 N.M. 520 (Court of Appeals continues to cite *KPI* for the proposition that either the taxpayer or the Department may seek adjustment from apportionment formula when formula does not reflect extent of business activity in the state even after *KPI* case was reversed on other grounds). Thus, although subject to the special trucking apportionment method under Regulation 3.5.19.15 NMAC, Taxpayer may still be entitled to apportionment relief if Taxpayer can establish by clear and cogent evidence that the special regulatory apportionment does not fairly represent Taxpayer's business activities in this state.

Taxpayer Presented Clear and Cogent Evidence Requiring Adjustment to Apportionment

Here, Taxpayer presented clear and cogent evidence that the application of the special trucking apportionment method under Regulation 3.5.19.15 NMAC grossly distorts its economic activity in New Mexico out of all appropriate proportion to its actual receipts. Moreover, in addition to the specific evidence of distortion in 2007 through 2009, Taxpayer also presented evidence that the MTC and the Department have previously agreed that the special trucking apportionment method as applied to Taxpayer's business model was distortive of Taxpayer's actual business activities in New Mexico, resulting in express or implicit endorsement of the alternative apportionment method (the state-to-state volume method) that Taxpayer has used in New Mexico since corporate income tax year 1988. As such, Taxpayer overcame the presumption of correctness of the assessment by showing by clear and cogent evidence that the special regulatory apportionment does not fairly represent Taxpayer's business activities in this state.

Taxpayer's actual New Mexico revenue numbers in 2007, 2008, and 2009 in comparison to the apportioned income under the special trucking method shows that the special trucking method substantially distorts Taxpayer's actual New Mexico revenue and business activity. In 2007, Taxpayer's actually generated $56,178,891.00 in New Mexico revenue. The state-to-state volume method that Taxpayer has used since tax year 1988 to apportion its revenue results in an attributed 2007 New Mexico sales revenue of $86,009,161.00, which is $29,830,270.00 or 53% more than its actual revenue. The MTC audit adjustment, which applied the special trucking apportionment regulation under Regulation 3.5.19.15 NMAC, resulted in an increase of Taxpayer's New Mexico sales to $681,827,729.00, which is $595,818,568.00 or 692% above the state-to-state volume method sales figure and $625,648,838.00 or 1113% above Taxpayer's actual documented 2007 New Mexico revenue.

In 2008, Taxpayer's actually generated $53,621,784.00 in New Mexico sales. The state-to-state volume method that Taxpayer used since tax year 1988 results in an attributed New Mexico revenue of $88,214,706.00, which is $34,592,922.00 or 64% above Taxpayer's actual 2008 revenue. The MTC audit adjustment, which applied the special trucking apportionment regulation under Regulation 3.5.19.15 NMAC, resulted in an increase of Taxpayer's New Mexico sales to $634,817,086.00, which is $546,602,380.00 or 619% above the state-to-state volume method sales figure and $581,195, 302.00 or 1083% above Taxpayer's actual documented 2007 New Mexico revenue.

In 2009, Taxpayer's actually generated $50,634,404.00 in New Mexico sales. The state-to-state volume method that Taxpayer has used since 1988 results in an attributed 2009 New Mexico sales of $90,205,556.00, which results in the attribution of an additional $39,571,152.00 in revenue to New Mexico than Taxpayer's actual 2009 sales, a 78% increase. The MTC audit adjustment, which applied the special trucking apportionment regulation under Regulation 3.5.19.15 NMAC, resulted in an increase of Taxpayer's New Mexico sales to $723,523,285.00, which is $633,317,729.00 or 702% above the state-to-state volume method sales figure and $672,888,881.00 or 1328% above Taxpayer's actual documented 2007 New Mexico revenue.

Again, the requirement for external consistency requires a practical inquiry into whether the state's tax reaches beyond the value fairly attributed to the state. *See Jefferson Line,* 514 US 175, 185; *see also Whirlpool Props.,* 208 N.J. 141, 165. The respective 2007, 2008, and 2009 increases of 1113%, 1083%, and 1328% to attributed sales in New Mexico under Regulation 3.5.19.15 NMAC's special trucking regulation above Taxpayer's actual known New Mexico revenue in those years bears no rational relationship to Taxpayer's demonstrated revenue generation and business activity in the state and is highly distortive.

Taxpayer's exhibits #68 and #71 are instructive as part of the required practical inquiry, as they show how the special trucking apportionment method mileage method attributes far more income to New Mexico than Taxpayer actually generated here. Looking at 2009, which encompasses all 50-states after the merger of Taxpayer and UPS-New York, Taxpayer had total national billed revenue of $25, 684,403,456.00. *See* Taxpayer Ex. #71.1552. Taxpayer's $50,634,404.00 of New Mexico billed revenue in 2009 constituted 0.19714% of Taxpayer's national billed revenue, which ranked 45th among the states. *See* Taxpayer Ex. #71.1551-52. Applying the special trucking apportionment method under Regulation 3.5.19.15 NMAC increases the revenue attributable to New Mexico by 1328% to $723,523,285.00, which in turn moves New Mexico from the 45th highest revenue to the 12th highest revenue state for Taxpayer in 2009. *See* Taxpayer Ex. #71.1551-52.

Rather than its actual ranking of 45th in revenue, Taxpayer's revenue in New Mexico under the special trucking apportionment method shares company with many states with far greater population and often somewhat similar geographic sizes[8] : 1. California (substantially larger population and similar geographic size), 2. Texas (substantially larger population and similar geographic size), 3. Illinois (substantially larger population but smaller geographic size), 4. New York (substantially larger population but smaller geographic size), 5. Pennsylvania (substantially larger population but smaller geographic size), 6. Ohio (substantially larger population but smaller geographic size), 7. New Jersey (substantially larger population but smaller geographic size), 8. Florida (substantially larger population but smaller geographic size), 9. Kentucky (slightly larger population but smaller geographic size), 10. Georgia (substantially larger population but smaller geographic size), 11. Tennessee (slightly larger population but smaller geographic size), 12. New Mexico, and 13. Indiana (larger population but smaller geographic size). *See* Taxpayer Ex. #71.1551-52.

Relatedly, as the Montana Supreme Court has found, using a mileage method in a large geographic state with a lower population in Taxpayer's line of business can lead to distortion of the actual business activity in that state. *See Mont. Dep't of Revenue v. United Parcel Serv.,* 252 Mont. 476, 830 P.2d 1259, 1262-1263 (1992). In that case, UPS put forward substantial evidence showing that its drivers drove more miles to deliver fewer packages than in other states. *See id.*; *see also J. Hellerstein & W. Hellerstein, State Taxation*, ¶10.03[iv] (3rd ed. 2001-2015). As such, the *Montana Supreme Court found* that a sales factor based on mileage was distortive of UPS's business activities in Montana, a large geographic state with a smaller population. *See id.* Montana and New Mexico are similar in geographic size and both have relatively lower populations given that size (though New Mexico has about double the population of Montana).

Taxpayer in New Mexico and Montana generates very little revenue per mile driven compared to other states and compared to its corporate-wide total generation. As the evidence showed in this protest[9] , particularly the total mileage and billed revenue figures contained respectively in Taxpayer's Exhibits #68 and #71, in 2009 Taxpayer generated $2.46 in New Mexico and $2.53 in Montana of sales per total tractor and package car miles driven. In 2009, Taxpayer's operations everywhere generated $10.55 of sales per total tractor and package car miles driven, which is more than four times the average of what it generated respectively in Montana and New Mexico that year. Similarly, Taxpayer in New Mexico generated far less sales per mile driven than Texas ($9.16), Tennessee ($10.18), and Indiana ($8.73)[10] in 2009. As the *Montana Supreme Court found, relying* on mileage to determine the sales factor of apportionment can significantly distort the extent of Taxpayer's activities in a low population, large geographic state. And like Montana Supreme Court similarly concluded, the evidence presented in this case illustrates how the application of the mileage method distorts the extent of Taxpayer's business activities in New Mexico.

To achieve the new attribution of sales resulting from the application of Regulation 3.5.19.15 NMAC, Exhibit #71 shows that California's actual revenue sales are reduced by $77,415,802.00, Texas' by $40,925,038.00, Illinois' by $37,983,005, New York's by $34,835,508.00, Pennsylvania's by $33,353, 682.00, Ohio's by $32,866,691.00, New Jersey's by $30,530,884, Florida's by $25,608,506.00, Kentucky's by $25,563,445.00, Georgia's by $22,018,366.00, Tennessee's by $20,298884.00, and all remaining states after New Mexico by decreasing amounts. *See id.* While these large numbers can seem abstract, considering that these are reductions in actual revenues in these states as a result of the application of the special trucking apportionment formula, the distortion of Taxpayer's actual business activity in New Mexico and other states under this method is readily apparent. Indeed, as Taxpayer testified, in previous MTC audits, the MTC auditor agreed that the special apportionment method for trucking companies resulted in a distortion of Taxpayer's actual New Mexico business activity.

In *Hans Rees,* the Supreme Court rejected an apportionment formula as disproportionate that resulted in a tax on 83% of that taxpayer's income despite the fact that the taxpayer in that case only generated 17% of its income in that state. *See Hans Rees,* 283 U.S. 123; *see also Moorman,* 437 U.S. 267, 274. In *Norfolk,* the Supreme Court considered the mechanical application of a statutory formula that resulted in the attribution of 8.2824% of rolling stock in Missouri to that taxpayer when that taxpayer demonstrated its actual in state rolling stock accounted for only 2.71%. *See Norfolk,* 390 U.S. 317, 327 . The difference between the assessed value and the actual value was "too great" under the facts of that case for the Supreme Court to accept the application of that relevant statute. **Id.** at 328. In rejecting that mechanical statutory application, the *Norfolk* Supreme Court noted

. . . that it is not necessary that a State demonstrate that its use of the mileage formula has resulted in an exact measure of value. But when a taxpayer comes forward with strong evidence tending to prove that the mileage formula will yield a grossly distorted result in its particular case, the State is obliged to counter that evidence or to make the accommodations necessary to assure that its taxing power is confined to its constitutional limits. If it fails to do so and if the record shows that the taxpayer has sustained the burden of proof to show that the tax is so excessive as to burden interstate commerce, the taxpayer must prevail.

Id. at 329.

By demonstrating with clear and cogent evidence that the special trucking apportionment formula increases revenue attribution to New Mexico by 1113%, 1083%, and 1328% respectively above actual known revenues generated in this state in 2007, 2008, and 2009, resulting in a huge shift of actual revenue collected in other states to New Mexico well beyond Taxpayer's actual revenue generation in this state, and showing that Taxpayer's revenue generation per mile driven was far less than average and on par with Montana, Taxpayer has established disproportionate distortion of economic reality contrary to the external consistency requirement and necessitating an equitable adjustment to the formula. *See KPI,* 2006-NMCA-026, ¶ 50-51, 139 N.M. 177; *see also Twentieth Century-Fox,* 299 Or. 220, 233.

Taxpayer Established that the Alternative Method is Reasonable

In addition to showing by clear and cogent evidence that the special trucking company apportionment method under Regulation 3.5.19.15 NMAC does not fairly represent Taxpayer's business activities in this state, Taxpayer must also establish that the proposed alternative method of apportionment employed is reasonable. *See Twentieth Century-Fox,* 299 Or. 220, 233. In this case, Taxpayer filed its 2007, 2008, and 2009 corporate income tax using the state-to-state volume method as the method to determine the sales factor under the apportionment formula, an action that Taxpayer maintains is reasonable given its history of using that method dating back to tax year 1988 and the Department's previous acceptance of that method in prior audits.

Despite that history, the Department challenges the reasonableness of Taxpayer's use of the state-to-state volume method because the Department argues that Taxpayer is not allowed to "make up" an apportionment method it likes better than a method supported by regulation or statute. The Hearing Officer generally agrees that a taxpayer may not devise their own apportionment method and file using that alternative method without first consulting with the Department about the need to deviate from the default apportionment and the reasonableness of the alternative method. But that is not the facts in this protest, where Taxpayer has shown a long history of using the state-to-state volume method after acceptance by the MTC and the Department.

The Department's argument is premised on an incorrect factual assertion that Taxpayer simply made up the state-to-state volume method and an incorrect blanket assumption that alternative apportionment is not supported by statute or regulations. As to the argument that Taxpayer is not allowed to make up an apportionment method not provided for in statute, as had already been discussed extensively above, the UDITPA statute, the regulations interpreting the statute, and the case law make clear that when a prescribed apportionment method does not accurately reflect a taxpayer's true business activity in the state, a reasonable alternative method that more accurately reflects the true extent of business activities may be employed. Therefore, contrary to the Department's argument that Taxpayer's method is unsupported in the law, if the state-to-state volume method reasonably reflects Taxpayer's true business activities in New Mexico, it would be a permissible method consistent with the equitable apportionment provision of Section 7-4-19.

Nor is the Department's argument that Taxpayer simply made up its more preferred apportionment under the state-to-state volume method accurate. As Mr. Bishop credibly explained, the use of the state-to-state volume method started in the late 1980s in a series of audits involving Taxpayer, the MTC, and a couple of large geographic territory but lower population states, including two audits in New Mexico. Taxpayer in this case used a reporting method previously approved by the MTC and the Department dating back to an audit of tax years 1988 through 1990. After the Department issued an assessment against Taxpayer for tax year 1988 through 1990, an assessment also premised on a MTC audit of Taxpayer, Taxpayer and the Department entered a closing agreement resolving that dispute[11] . As part of the closing agreement, the parties recognized that the MTC auditor determined that using a mileage method to compute revenues sourced to New Mexico, which the special trucking apportionment does, was distortive of Taxpayer's business activity in New Mexico and that the Department accepted the MTC's conclusions to not rely on miles to determine the revenue factor.

Similar to the 1988 through 1990 audit, the Department also proposed to assess Taxpayer additional tax in tax years 1997-2000 because the Department apparently considered rejecting the state-to-state volume method in favor of a mileage method like the special trucking regulatory method. *See* Taxpayer Ex. 75.1952-1954. However, the Department again accepted Taxpayer's use of the state-to-state volume method in tax years 1997-2000. After this resolution of the 1997-2000 tax years, Taxpayer wrote a letter to the Department explaining that the state-to-state volume continued to be a more accurate reflection of Taxpayer's business activities in New Mexico compared to a distortive mileage method, and seeking permission to continue to use that method in future reporting years. *See id.* The Department failed to respond to Taxpayer's letter seeking continuing permission to use the state-to-state volume method that the Department had twice previously accepted for the tax years 1988-1990 and 1997-2000. Given the previous approvals of the state-to-state volume, the Department's lack of response upon written inquiry could reasonably be seen as acquiescence to that method, especially considering the subsequent acceptance of another seven years of returns based on the state-to-state volume method.

In addition to this New Mexico history, Mr. Bishop also referenced a case out of Montana that predated the audits in New Mexico, where Taxpayer's use of the state-to-state volume method was approved. In 1992, the Montana Supreme Court agreed that use of Taxpayer's mileage to calculate revenue (like the special trucking apportionment at issue in this protest requires) in a large geographic state with a smaller population distorted Taxpayer's business activities in Montana. *See Mont. Dep't of Revenue v. United Parcel Serv.,* 252 Mont. 476, 830 P.2d 1259 (1992). In light of that distortion, the Montana Supreme Court affirmed that Taxpayer was entitled under UDITPA's equitable adjustment provision to use the more reasonable state-to-state volume method to determine revenue under the apportionment method. *See id.*

The reason why there is distortion using a mileage method in a large geographic state with a smaller population is that Taxpayer needs to drive many more miles to get to fewer customers; thus, although Taxpayer's mileage activity suggests it is conducting substantial business in that state, in reality it has less sales per mile than a smaller geographic state with many more customers. *See id.* at 1262-1263. Montana and New Mexico are very similar in population and geographic size, making the Montana Supreme Court's decision particularly insightful in establishing distortion in using a mileage method in a large-geographic, low population state and the reasonableness of the state-to-state volume method in New Mexico.

Based on this history, it quite clear that the state-to-state volume method does fairly and reasonably represent the extent of Taxpayer's business activities in New Mexico. In fact, the MTC and the Department previously accepted this method over the distortive mileage method for the periods of 1988-1990, the Department again agreed to that method in 1997-2000, and the Department was silent in response to Taxpayer's letter notifying the Department that it sought continuing permission to use the state-to-state volume method twice previously approved by the Department. The Montana Supreme Court likewise agreed that the state-to-state volume method reasonably reflected Taxpayer's business activity in a large-geographic but lower population state, more so than a distortive mileage method.

And even beyond these previous instances of usage of the state-to-state volume method, as previously discussed, the evidence in this case also clearly and convincingly shows that the state-to-state volume method is reasonable reflection of Taxpayer's actual business income in this state during the audit period. To reiterate, for 2007, the state-to-state reporting method resulted in an estimated 2007 New Mexico revenue of $86,009,161.00, which is far closer to $56,178,891.00 in Taxpayer's actual New Mexico revenue in that year than the Department's distortive mileage approach. For 2008, the state-to-state reporting method resulted in an estimated 2008 New Mexico revenue of $88,214, 706.00, which again is much closer to Taxpayer's actual New Mexico revenue that year totaling $53, 621,784.00. The same is true for 2009, where the state-to-state reporting method results in estimated 2009 New Mexico revenue of $90,205,556.00 compared to 2009 actual revenues of $50,634,404.00. While the state-to-state volume method results in more revenue being attributed to New Mexico than Taxpayer's preferred approach at hearing of using actual revenues, and thus increases Taxpayer's New Mexico corporate income tax liability under the apportionment formula, the slight increases above actual revenue under the state-to-state volume method are much closer in line with the approximate, reasonable precision of an apportionment formula accepted by the case law (where some variance is permitted) than the gross distortion that results from the Department's use of the mileage method under the special trucking method regulation. The fact that the state-to-state volume method actually increases the revenue attributable to New Mexico, and thereby increases Taxpayer's corporate income tax in this state, under the apportionment method strongly undermines the Department's argument that Taxpayer is not free to make up a filing method it likes better. If that were the case, as Mr. Bishop testified, Taxpayer would have preferred the originating revenue method. *See* Tr. 345:1-8. However, Taxpayer used the state-to-state volume method because it was a reasonable approximation of sales in New Mexico that had previously been accepted in New Mexico. *See* Tr. 345:1-18.

For these reasons, the Hearing Officer finds that Taxpayer established the reasonableness of the state-to-state volume method as a method to attribute income generated in New Mexico to calculate sales under the apportionment factor. Therefore, in light of the distortion under Regulation 3.5.19.15 NMAC's method for trucking companies, Taxpayer is entitled to an equitable adjustment pursuant to Section 7-4-19 of the apportionment method using the state-to-state volume method. *See* Regulation 3.5.19.9(C) NMAC; *see also KPI,* ¶51; *see also Twentieth Century-Fox Film Corp.,* 299 Or. 220, 233.

Admission of the Closing Agreement Over the Department's Objection.

Regarding the closing agreement, the Department made an untimely *motion in limine* at the beginning of the hearing seeking to exclude the closing agreement from evidence. Under the applicable August 16, 2017 scheduling order in place in this matter, the Department was required to file all motions 45-days before the scheduled hearing. The Department did not move to exclude that document by that deadline. While it is certainly true that a *motion in limine* generally may be made at the time of the hearing, in this instance the Department was apparently aware for some time of its intent to move to exclude perhaps Taxpayer's most important piece of evidence. Rather than file a *motion in limine* by the motion deadline, or even along with the prehearing statement where it first noted its intent to raise the issue, a motion where Taxpayer would have had a full and fair opportunity to research the issue and respond, the Department instead chose to wait to address the issue on the most critical piece of evidence until the beginning of the hearing.

The Department wants it both ways on the closing agreement: on the one hand, the Department's counsel both at hearing and in written closing argument accused Taxpayer of making up an unsupported apportionment method. Yet on the other hand the Department objected to the admission of evidence—the closing agreement—that demonstrates the Department's assertion that Taxpayer made up the apportionment method is incorrect. Under NMSA 1978, Section 7-1B-6(D)(2), the Hearing Officer is required to conduct a hearing in a manner that "allow[s] the ample and fair presentation of complaints and defenses." The Department's approach to argue that Taxpayer made up the apportionment method while also simultaneously untimely moving to exclude Taxpayer's timely disclosed, probative, relevant, and material exhibit disproving of the Department's theory is inconsistent with the Hearing Officer's obligation to ensure fair presentation of cases to both parties. Taxpayer's most important exhibit, which is unquestionably relevant and material, should not be disregarded lightly, particularly given the Department's lack of diligence on the *motion in limine.*

Nevertheless, even beyond the timeliness of the *motion in limine* concern, there is no statutory justification in this case to exclude the closing agreement. The basis of the Department's *motion in limine* to exclude the closing agreement as an exhibit is a contractual term of that agreement contained in paragraph 7: "[n]o part of this agreement shall be used by either party for any purpose unrelated to the enforcement of this agreement." This term of the closing agreement is not a statutory requirement. Under the Tax Administration Act (TAA), closing agreements are governed by NMSA 1978, Section 7-1-20 (1995). Nothing in that statute prohibits the admission of a closing agreement as an exhibit at a subsequent administrative tax protest hearing involving the same parties. Nor does the Department's own regulation interpreting Section 7-1-20 establish that such agreements are confidential and may not be used at administrative proceeding under the TAA involving the same parties.

Section 7-1-20(B) does make a closing agreement entered into after a court acquires jurisdiction part of that court's order disposing of the case (and thus presumably enforceable in that court). Setting aside the question of whether the Administrative Hearings Office qualifies as "court" for the purposes of Section 7-1-20(B) does make a closing agreement entered into after a court acquires jurisdiction part of that court's order disposing of the case (and thus presumably enforceable in that court). Setting aside the question of whether the Administrative Hearings Office qualifies as "court" for the purposes of Section 7-1-20(B)[12] , there is insufficient evidence that the matter addressed in the closing agreement was ever before a hearing officer of the Administrative Hearings Office or its predecessor, the Hearing Bureau or that a hearing officer signed the closing agreement and adopted it as part of the Hearing Bureau's final order. Only the parties signed this closing agreement; it was not signed or adopted by a hearing officer, meaning that the parties have not demonstrated that Section 7-1-20(B) applies to this closing agreement.icient evidence that the matter addressed in the closing agreement was ever before a hearing officer of the Administrative Hearings Office or its predecessor, the Hearing Bureau or that a hearing officer signed the closing agreement and adopted it as part of the Hearing Bureau's final order. Only the parties signed this closing agreement; it was not signed or adopted by a hearing officer, meaning that the parties have not demonstrated that Section 7-1-20(B) applies to this closing agreement.

Rather than a requirement of the TAA, the confidential term at issue simply appears to be a contractual agreement of the parties. An administrative tax protest hearing before the Administrative Hearings Office under the Tax Administration Act is not the appropriate venue to litigate a contractual dispute in a matter where the Administrative Hearings Office never had apparent jurisdiction. It is the nature of administrative law that the quasi-judicial powers of the Administrative Hearings Office are reasonably limited to those powers expressly or implicitly contained in statute, the Administrative Hearings Office Act, NMSA 1978, Section 7-1B-1 through 9. Nothing in the Administrative Hearings Office Act gives the Hearing Officer any direct or implied statutory authority to enforce a contractual term of a closing agreement never adopted as an order before the Administrative Hearings Office, particularly a contractual confidentiality provision that is beyond the requirements of the TAA. If the Department was concerned that the contractual terms of the agreement were being violated by Taxpayer, it should have sought relief before a court with appropriate jurisdiction over a contractual dispute, perhaps in the form of seeking an injunction from a district court against disclosing the closing agreement.

The Department threatened that if Taxpayer proceeded with presentation of the closing agreement at this hearing, it would reopen and pursue the assessment of 1988 through 1990 corporate income tax addressed in the closing agreement. However, there is no basis for the Department's threat. The Department may not annul, modify, set aside, or disregard a closing agreement under the plain language of Section 7-1-20(D) in the absence of fraud, malfeasance, misrepresentation or concealment of material fact. Presentation of a material, relevant closing agreement at a subsequent confidential administrative proceeding under the Tax Administration Act involving the same taxpayer with the same substantive issues does not rise to the level of fraud, malfeasance, misrepresentation or concealment of material fact. This is particularly true because the Department assessed civil negligence penalty in this case, meaning that the previous closing agreement establishing the legal grounds on which Taxpayer relied on in using the state-to-state volume method are directly relevant to determining whether Taxpayer made a mistake of law in good faith and on reasonable grounds under NMSA 1978, Section 7-1-69(B) (2007). Taxpayer also asserts that the closing agreement is relevant related to its administrative gloss argument under *High Ridge Hinkle J.V. v. Albuquerque,* 1998-NMSC-050, 126 N.M. 413 (1998), an argument that the Hearing Officer does not address in light of the previous analysis and conclusion that Taxpayer established it was entitled to an alternative method of apportionment. Even assuming that the Department could prove that the violation of the confidentiality contractual language by the presentation of material and relevant evidence at a subsequent proceeding amounted to fraud, malfeasance, misrepresentation or concealment of material fact, the Department would be prohibited from pursuing an assessment more than ten years old under NMSA 1978, Section 7-1-19. Quite simply, threat or not, the Department has no authority or ability at this point to disregard the closing agreement that authorized Taxpayer to use that method for tax years 1988 through 1990 just because it is unhappy that the Taxpayer sought the closing agreement's admission.

As a question of admission into the record of a tax protest proceeding under the TAA, nothing in the TAA prohibits its consideration and the closing agreement was relevant and material to the disputed facts. The closing agreement is not dispositive of any issues other than for the period of which it applies. *See* § 7-1-20(D) (closing agreement is conclusive to the period for which it applied). Nevertheless, the closing agreement is material, relevant, and pertinent to this protest in showing the origins of Taxpayer's use of the state-to-state volume method and in considering the question of the appropriateness of the assessed civil negligence penalty. To prohibit its admission in this proceeding would be akin to disregarding the facts of the closing agreement, which is not permitted, that show that the Department had previously approved Taxpayer's use of the state-to-state volume method. Therefore, the closing agreement was admitted into the record over the Department's objection.

Addressing Other Arguments of the Parties.

In this case, the Department also argued that Taxpayer was not allowed to present evidence of distortion and the reasonableness of its alternative method because it did not present an expert witness to validate its analysis. The Department argues that such validation is required under *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (199), yet the Department also acknowledges that New Mexico has rejected the *Kumho Tire* standard and the formal rules of evidence do not strictly apply to this administrative proceeding. For those precise reasons that the Department itself cites, and others, the Hearing Officer is unpersuaded by the Department's argument. Taxpayer presented detailed exhibits and evidence, including extensive spreadsheets that tied into the MTC audit and the returns, along with explanatory testimony of a CPA. This evidence established by clear and cogent evidence that the Department's method distorted Taxpayer's business activities in New Mexico (as previously recognized by the MTC and the Department) and that Taxpayer's alternative approach, twice previously permitted by the Department, was reasonable. The *Montana Supreme Court reached* a similar conclusion about using a mileage method in a large-geographic but low population state (similar to New Mexico) and the need for the alternative state-to-state volume method. The evidence that Taxpayer presented was sufficiently detailed, reliable, and compelling for Taxpayer to overcome the presumption of correctness on the assessment.

The Department attacked the method in which Taxpayer calculated the state-to-state volume, suggesting that substituting sales numbers without discounted rack rates for real revenues violates UDITPA. However, the Department's arguments seem premised on a misunderstanding of how Taxpayer calculates rates under the state-to-state volume method, which Mr. Bishop explained credibly using various exhibits. The Taxpayer in fact uses the maximum possible charge for the shipment and delivery of packages without including any actual rack rate discounts provided to its bulk customers. That means that Taxpayer state-to-state method reflects higher sales than Taxpayer actually billed. Taxpayer also used a method that calculates shipment from a package in the further zone from each state, so even if the package in fact traveled between two shorter zones at a lesser cost, the state-to-state volume method still booked the maximum possible shipping charge between the states. Therefore, if there is an error in the method, it is an error that results in sales numbers in New Mexico above actual numbers. Indeed, this is illustrated by the fact that the state-to-state volume attributed sales numbers exceeded Taxpayer's actual revenues in each of the three years.

Taxpayer is using the same method that *Montana Supreme Court reviewed* and affirmed in *Mont. Dep't of Revenue v. United Parcel Serv.,* 252 Mont. 476, 481 (discussing the sales factor calculated using the number of packages at an average shipped from the furthest zone in each state). And Taxpayer is using the same method previously accepted by the MTC and the Department in previous audits. As the United States Supreme Court has indicated, requiring perfect precision when slicing the shadow of apportionment is simply too much to ask. *See Container Corp.,* 463 U.S. 159, 183. Instead of perfect precision, which seems to be the Department's attack on the calculation of sales, an apportionment method needs only to be reasonable. Taxpayer's state-to-state volume method, which does rely on using maximum possible shipping charges before discount rack rates, was previously deemed reasonable by the Montana Supreme Court, the MTC, and the Department. The Hearing Officer now agrees, even with its potential to error of over-attribution of sales to New Mexico, the state-to-state volume method is a reasonable method to determine sales for purposes of apportionment.

Under *MPC Ltd., 2003-NMCA-21*, ¶13, once the Taxpayer has rebutted the presumption of correctness, the Department may still demonstrate the correctness of its assessment. Here, Taxpayer overcame that presumption of correctness by presenting convincing evidence and legal argument that the Department's application of the special trucking mileage rules distorted the true extent of Taxpayer's New Mexico business activities. The Department was free to present its own evidence, witness, or expert testimony to reestablish the correctness of the assessment, especially to the extent that the Department believed Taxpayer's data was invalid. Instead of presenting such evidence, the Department relied on the testimony of a witness who, through no fault of her own, was instructed to research the weight distance tax filings of another corporate entity during the wrong, irrelevant time period. The Department also briefly presented Protest Auditor Danny Pogan as a witness in this case, but Mr. Pogan's testimony, through no fault of his own, was insufficient to reestablish the correctness of the Department's assessment. The Department did not call the MTC auditor as a witness in this case, did not call Dan Armer, the Department's Corporate Income Tax Bureau Chief and Department resident expert on corporate income tax, or any other witness that could reestablish the correctness of the assessment. Illustrative of the Department's failure to reestablish the correctness of its assessment, the Department was given many months to submit an updated total alleged liability to the assessed tax, penalty, and interest considering the numerous concessions it made it hearing, but the Department failed to do so.

Reserved or Moot Issues.

Although not included in its original protest letter, Taxpayer sought the award of costs and fees pursuant to NMSA 1978, Section 7-1-29.1 (2015) in its portion of the joint prehearing statement. Taxpayer presented evidence that its costs and fees exceeded $50,000.00. However, neither party expressly addressed this issue as part of their written closing arguments and since the filing of those closing arguments, the New Mexico Court of Appeals issued a very instructive appellate decision, *Helmerich Payne Int'l Drilling Co. v. N.M. Taxation & Revenue Dep't,* 2019-NMCA-054, 448 P.3d 1126, that needs to be addressed by the parties in the context of Taxpayer's claim in this case. As such, no ruling will be made on the costs and fees issue under Section 7-1-29.1 unless and until Taxpayer files a written motion seeking such costs and fees and the Department has an opportunity to respond to said motion.

Taxpayer argued a series of items related to the potential application of the special apportionment method for trucking companies, should it be found liable to report using that method under Regulation 3.5.19.15 NMAC. To the extent that Taxpayer was required to abide by Regulation 3.5.19.15 NMAC, it argued that only those portions of receipts related to hauling revenue should be subject to the regulation. Taxpayer further argued that the TOFC miles do not qualify as purchased transportation for the purposes of Regulation 3.5.19.15(D)(2)(b)(vi) NMAC because they are not motor vehicle miles under that regulation or under NMSA 1978, Section 66-1-4.11(H). These arguments are moot since the Hearing Officer found that Taxpayer is entitled to an adjustment away from the apportionment method found under Regulation 3.5.19.15 NMAC in light of Taxpayer's broader distortion and external consistency challenge.

Taxpayer argued that the Department violated its due process in this case in the assessment of penalty because the Department failed to detail the basis of alleged negligence in light of Taxpayer's reliance on previous acceptance of the state-to-state volume method. This issue is moot because, as this decision makes clear, Taxpayer is entitled to prevail.

Conclusion

Violations of the external consistency requirement in case law are rare, perhaps to the point of raising a question about whether that phrase from *Container Corp.* has any independent meaning beyond requiring a fair apportionment reasonably related to a taxpayer's activities in that state. *See J. Hellerstein & W. Hellerstein,* State Taxation, ¶4.16[2] (3rd ed. 2001-2015). This formulation of external consistency, as meaning only that there is a fair apportionment reasonably related to a taxpayer's business activities in the state, coincides closely with UDITPA's equitable apportionment provision, which requires an adjustment to apportionment when the apportionment does not fairly represent the extent of taxpayer's business activities in the state. *See* § 7-4-19. To that extent, this decision should be read narrowly to the facts of this protest, particularly in relation to the UDITPA equitable apportionment relief provisions, rather than as a broad assertion about the application or power of the external consistency test. Although the Hearing Officer does find that external consistency was violated in this case, that finding is largely tied to Taxpayer's demonstration in the record of significant distortion above actual revenues, which triggered Section 7-4-19's relief provision, in conjunction with the history of both the MTC and the Department previously recognizing that distortion as well as accepting Taxpayer's returns—which used the reasonable state-to-state volume to determine sales—since tax year 1988. On the facts of this case, Taxpayer presented clear and cogent evidence that the Department's mechanical application of the special trucking method of apportionment resulted in an apportionment with no reasonable relation to Taxpayer's true New Mexico business activities, entitling Taxpayer to an equitable apportionment adjustment under UDITPA, Section 7-4-19, in the form of the reasonable state-to-state volume method to determine sales. For the foregoing reasons, Taxpayer's protest **IS GRANTED.**

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the Department's assessment and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing was timely set and held within 90-days of protest under Section 7-1B-8.

C. Taxpayer, as an out of state corporation engaged in the transaction of business into and from New Mexico, was subject to New Mexico's corporate income tax under Section 7-2A-3.

D. The Department conceded at hearing that its assessment of tax principal needed to be reduced from $3,024,065.00 to $2,421,979.00 in light of an MTC adjustment to the audit, meaning that the Taxpayer overcame the presumption of correctness on that portion of the assessment and related penalty and interest.

E. The Department further conceded at hearing that its assessment needed to be adjusted downward by $48,300.00 in light of its recognition of non-business income of $14-million in 2007, $18-million in 2008, and $16-million in 2009, meaning that the Taxpayer overcame the presumption of correctness on that portion of the assessment and related penalty and interest.

F. Under UDITPA, as a company engaged primarily in the transport of tangible personal property of others by motor vehicle, Taxpayer is subject to the special rules for apportionment of trucking companies found at Regulation 3.5.19.15 NMAC.

G. An applicable special regulatory method of apportionment nevertheless may require further equitable adjustments in a similar manner to permitted equitable adjustments under Section 7-4-19 (1986) when the party seeking a departure proves by clear and cogent evidence that that the formula as a whole does not fairly represent the extent of the taxpayer's business activity in the state and the alternative method of apportionment employed is reasonable. *See* J. Hellerstein & W. Hellerstein, *State Taxation*, ¶9.20[4] (3rd ed. 2001-2015), (quoting *Matter of the Appeal of Fluor Corporation, 1995 WL 799363* (Cal.St.Bd.Eq.)); *Cf. Kmart Props., Inc. v. Taxation & Revenue Dep't (KPI),* 2006-NMCA-026, ¶ 50-51, 139 N.M. 177; *Cf. also Twentieth Century-Fox Film Corp. v. Dep't of Revenue,* 299 Or. 220, 233, 700 P.2d 1035 (1985).

H. Taxpayer established by clear and cogent evidence that the application of the special rules for apportionment of trucking companies resulted in gross distortion, in violation of the external consistency requirement for fair apportionment, and that application of the special rules for apportionment of trucking companies did not fairly represent the true extent of Taxpayer's New Mexico business activities, thereby entitling Taxpayer to an equitable adjustment to the apportionment method under Section 7-4-19. *See Hans Rees Sons, Inc. v. North Carolina,* 283 U.S. 123, 135 (1931); *see also Norfolk & W. R. Co. v. Mo. State Tax Comm'n,* 390 U.S. 317, 329 (1968); *see also Okla. Tax Comm'n v. Jefferson Lines,* 514 U.S. 175, 185 (1995); *see also Goldberg v. Sweet,* 488 U.S. 252, 264-65, 109 S. Ct. 582, 590-91, 102 L. Ed. 2d 607, 618-19 (1989); *see also Whirlpool Props., Inc. v. Dir., Div. of Taxation,* 208 N.J. 141, 165, 26 A3D 446 (2011); *see also Kmart Props., Inc. v. Taxation & Revenue Dep't (KPI),* 2006-NMCA-026, ¶ 50-51, 139 N.M. 177; *see also Pub. Serv. Co. v. N.M. Taxation & Revenue Dep't,* 2007-NMCA-050, ¶ 33, 141 N.M. 520; *see also Twentieth Century-Fox Film Corp. v. Dep't of Revenue,* 299 Or. 220, 233, 700 P.2d 1035 (1985).

I. Taxpayer's use of the state-to-state volume method for purposes of apportioning sales in New Mexico was reasonable. *See Mont. Dep't of Revenue v. United Parcel Serv.,* 252 Mont. 476.

J. The closing agreement is relevant and material and nothing in the Tax Administration Act or the Administrative Hearings Office Act prohibits its use in a subsequent administrative tax protest hearing before the Administrative Hearings Office involving the same parties and substantive issue.

K. Taxpayer overcame the presumption of correctness on the remaining assessed tax, penalty, and interest, entitling Taxpayer to a full abatement of the assessment.

L. The Department did not reestablish the correctness of the assessment. *See MPC Ltd., 2003-NMCA-*

21, ¶13.

For the foregoing reasons, the Taxpayer's protest **IS GRANTED. IT IS ORDERED** that the assessment in this case be abated in full. If Taxpayer still seeks costs and fees, **IT IS FURTHER ORDERED** that it must do so upon written motion within 10-days of this decision. **IT IS FINALLY ORDERED** that the Department shall have 10-days from the filing of Taxpayer's motion to file a written response.

DATED: October 25, 2019.

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Brian VanDenzen
Chief Hearing Officer
Administrative Hearings Office
P.O. 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 October 25, 2019, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail

Interdepartmental Mail

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John Griego
Legal Assistant
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

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[1] On July 1, 2015, pursuant to the Administrative Hearings Office Act, the Hearings Bureau left the Taxation and Revenue Department and became the independent Administrative Hearings Office ("AHO"). For events before July 1, 2015, the Hearings Bureau will be used even though this decision is issued under AHO's caption. AHO will be used for events after

July 1, 2015.

2 The Hearing Officer will take administrative note of common knowledge and observation of UPS known to virtually everyone through shared experience.

3 Taxpayer used the actual volume of shipped packages, but instead of using the actual billed rate for the individual shipped packages, Taxpayer used the largest amount it could possibly charge for the shipping of a package under its zone-by-zone rate charts by the average rate of the packages. [Tr. 322-325; 334-337; 461-468].

4 In order to be conservative, all percentage increases have been rounded down to the closest whole number. For instance, the result of the calculation of this percentage increase, which is (681,827,729-86,009,161)/86,009,161*100", is actually 692.738%, which has been rounded down to 692% for ease of reference and subsequent discussion. The Hearing Officer relied on an Excel spreadsheet to verify calculations, a copy of which is added to the administrative record.

5 Yet, despite Taxpayer's on-the-record concession on the internal consistency issue and presentation of evidence focused on external consistency, the Department's closing argument begins with the incorrect premise that internal consistency is the core of Taxpayer's argument—"the Taxpayer here challenges the internal consistency of the assessment"—and goes on to brief the internal consistency standard and case law. See Department Post Hearing Memorandum, p.1. In focusing on the wrong issue, an issue that Taxpayer had in fact conceded, the Department's closing argument is not particularly pertinent or helpful in resolving this protest.

6 Taxpayer's Written Summation, p. 6-7.

7 Department's Post-Hearing Memorandum, p. 6.

8 The Hearing Officer takes administrative notice of basic geographical facts not subject to reasonable dispute. The Hearing Officer relies mostly on his own knowledge of basic population and geographical facts. However, out of an abundance of caution, the Hearing Officer also verified the information by consulting the online World Atlas. See Sawe, Benjamin Elisha. (2019, October 21). The 50 US States Ranked By Population. Retrieved from https://www.worldatlas.com/articles/us-states-by-population.html and https://www.worldatlas.com/aatlas/infopage/usabysiz.htm.

9 In the interest of efficiency and consistency, this portion of the discussion regarding sales per mile driven will focus on 2009, which is after Taxpayer merged with UPS, New York, in order to ensure the comparisons are equal. However, the Hearing Officer did review 2007 and 2008 as well, and the numbers are generally consistent with 2009.

10 Texas is used in the comparison because it is a large geographic state but unlike Montana has a larger population base. Tennessee and Indiana are used in the comparison because those states are ranked immediately before and after New Mexico in revenue generation upon application of the mileage method under the special apportionment method for trucking companies, as referenced two paragraphs earlier in this discussion section. See Taxpayer Ex. #71.1551-1552.

11 The Department strenuously objected to the admission of the closing agreement into the record, an objection that was overruled on the record. That objection and ruling is addressed in greater detail later in this decision.

12 While in many respects, the Administrative Hearings Office serves as a tax court for the state, as an administrative agency with limited statutory authority it lacks the traditionally enforcement powers of the judiciary to enforce a settlement agreement or contract, such as an ability to issue an injunction or contempt powers for disregarding an order.