IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RENZENBERGER, INC.

Appellant/Plaintiff,

v. **No. A-0001-CA-2015-34999**

STATE OF NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Appellees/Defendant.

APPELLANT'S BRIEF IN CHIEF

Appeal from the First Judicial District
County of Santa Fe
Honorable David K. Thomson

ORAL ARGUMENT REQUESTED

Benjamin C. Roybal
Betzer, Roybal & Eisenberg, P.C.
4900 Lang Ave., NE, Suite 202
Albuquerque, NM 87109
Telephone: (505) 797-0105
Attorney for Plaintiff/Appellant

Robert J. Desiderio
Sanchez, Mowrer & Desiderio, P.C.
PO Box 1966
Albuquerque, NM 87103
Telephone: (505) 247-4321
Attorney for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

Federal Cases

Cases in Other States

State Statutory Provisions

State Rules

Federal Constitutional and Statutory Provisions

Other

SUMMARY OF PROCEEDINGS

A. Nature of the Case

This is an appeal by Renzenberger, Inc. ("Taxpayer") from a decision of the district court granting summary judgment to the New Mexico Taxation and Revenue Department ("Department") and denying summary judgment to Taxpayer. That order of the district court dismissed Taxpayer's refund claim – a refund for which Taxpayer asserts it was entitled under NMSA 1978, § 7-9-55(A) (1993) and 49 U.S.C. § 14505 (1995), and recognized under New Mexico law. *See* NMSA 1978, § 7-9-55(A); 3.2.213.10 (E) NMAC.

B. Course of Proceedings and Disposition

On April 4, 2012, the Department assessed Taxpayer for gross receipts taxes in the amount of $767,212.97, plus interest of $168,981.88 and civil penalties of $153,442.60 for a total assessment of $1,089,637.45. **[RP 8]** Taxpayer paid the full amount of the assessment on June 18, 2012. **[RP 10, 12, 160 ¶ 5]** On or about May 9, 2013, Taxpayer filed an Application for Refund, seeking a refund of all the amounts it paid, **[RP 14-18, 160 ¶ 7]**, which the Department denied on May 17, 2013. **[RP 20, 161 ¶ 8]** Taxpayer then filed a Compliant for Tax Refund in the First Judicial District Court on June 24, 2013. **[RP 1]**

On April 1, 2014, the Department pursuant to Rule 1-056 NMRA moved for summary judgment. **[RP 45]** Taxpayer responded to the Department's Motion for

Summary Judgment on April 16, 2014. **[RP 67]** On April 16, 2014, Taxpayer also filed its Motion for Summary Judgment and memorandum in support of its motion. **[RP 85]** The Department did not respond to Taxpayer's Motion for Summary Judgment. Furthermore, at the direction of the district court, Taxpayer and the Department filed supplemental briefs on October 1 2014. **[RP 127, 140]**

A hearing on both the Department's and the Taxpayer's Motions was held on January 8, 2015. **[RP 155]** On August 8, 2015, the district court, by written order and opinion, granted the Department's Motion for Summary Judgment and denied Taxpayer's Motion for Summary Judgment. **[RP 159-169]**

C. The Undisputed Relevant Facts

Taxpayer does not disagree with the district court's Undisputed Material Procedural Facts, **[RP 160]** and Additional Undisputed Material Facts, **[RP 161-162]** although the Additional Undisputed Material Facts are incomplete. Since the Department did not respond to Taxpayer's Motion for Summary Judgment and Supporting Memorandum, Taxpayer's Undisputed Material Facts are deemed admitted, *see* Rule 1-056(D)(2). Moreover, the Department does not dispute Taxpayer's Undisputed Material Facts. **[See RP 128 ¶ 1]**

The following description of the facts particularly relevant to the issue presented here is properly derived from the district court's Undisputed Material

Procedural Facts and Additional Undisputed Material Facts as supplemented with Taxpayer's Undisputed Material Facts:

1. Taxpayer contracted with the Burlington Northern Santa Fe Railroad and the Union Pacific Railroad (the "Railroads") to provide the Railroads on-demand transportation services. **[RP 90 ¶ 4; see RP 161 ¶ 4, 162 ¶ 9]**

2. The Railroads carried freight throughout the United States. **[RP 89 ¶ 2]**

3. Because federal law and union rules limited the number of consecutive hours railroad train crews may work, the Railroads contracted with motor carriers, like Taxpayer, to provide relief services so that the Railroads could continue to operate the trains without delay. **[RP 90 ¶ 4]**

4. Pursuant to its contracts with the Railroads, Taxpayer transported the Railroads' relief crews to replace the relieved crews and transported those relieved crews from the trains to a railroad terminal or to overnight accommodations. **[RP 90 ¶ 5]**

5. In doing so, Taxpayer transported the Railroads' crews from locations outside New Mexico to locations in New Mexico, from locations in New Mexico to locations outside New Mexico and between locations in New Mexico. **[RP 90 ¶ 6]**

6. The instant case deals with the gross receipts taxes Taxpayer paid in relation to its transportation of the Railroads' crews between locations in New Mexico. **[RP 91 ¶ 12, 161 ¶ 3]**

7. The Department did not assess Taxpayer for gross receipts taxes attributable to transportation of the Railroads' crews between New Mexico and another state. **[RP 161 ¶ 3]**

8. Taxpayer also provided the Railroads other services, including the transportation of crews along the rail line to assist train movements, transportation of engineers to and from manually operated switch points, transportation of crews to connect trains that had disconnected, and the transportation of crews to and from trains to terminals and to and from points along a train. **[RP 90 ¶ 7; see RP 161 ¶ 2]**

9. Once the Railroad train crews were changed, and other necessary refueling or maintenance operations were completed, the trains, operated by the relief crews, continued their journeys. **[RP 90 ¶ 8]**

10. Taxpayer provided its services in New Mexico exclusively under contracts with the Railroads, **[RP 91 ¶ 9],** which contracts governed all aspects of Taxpayer's services, including when and where to pick up the Railroads' crews. **[RP 91 ¶ 10, 161 ¶ 4]**

11. Taxpayer did not operate on predefined routes or solicit business from the public. **[RP 91 ¶ 11]**

D. The Relevant Law and the Ruling of the Trial Court

All agree that the controlling law at issue in this case is 49 U.S.C. § 14505 (1995) ("Section 14505"), which, in relevant part, provides as follows:

> A. State or political subdivision thereof may not collect or levy a tax, fee head charge, or other charge on
>
> > (2) the transportation of a passenger traveling in interstate commerce by motor carrier; or . . .
> >
> > (4) the gross receipts derived from such transportation.

The concomitant New Mexico tax statute states that "[r]eceipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States constitution." NMSA 1978, § 7-9-55 (1993). The applicable administrative regulation acknowledges that the preemptive effect of Section 14505 is to preclude the State from collecting a tax that meets the qualifications of that federal law. 3.2.213.10 (E) NMAC.

Accepting the undisputed, relevant facts propounded by both the Taxpayer and the Department, the district court found in the State's favor and against the Taxpayer as a matter of law, rendering a dual holding:

First, the district court ruled that Section 14505 (2) and (4) is clear and unambiguous; that the section only applies to "passengers" and "motor carriers" traveling "in interstate commerce;" and, as such, Section 14505 (2) and (4) did not preempt the imposition of the gross receipts taxes in this case. Refusing to give the words "passenger" and "motor carrier" their ordinary meaning, *see CSX Transp., Inc. v. Dept. of Rev.,* 562 U.S. 277, 284-287 (2011) (where a federal preemption statute did not define "tax," the word was given its ordinary meaning, and where "discrimination" was not defined by the statute, the word was given its dictionary meaning.); *Marbob Energy Corp. v. New Mexico Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135 (internal quotation omitted) ("we first look to the plain language of the statute giving the words their ordinary meaning, unless the Legislature indicates a different one was intended."), the district court concluded that the employees being transported were not "passengers" and the vans used to move them were not "motor carriers" within the meaning of Section 14505 (2) and (4). **[RP 164-166]** The district court then held that, although not present in the words of Section 14505 (2) and (4), the phrase "in interstate commerce" required travel "from one state to another." **[RP 164-165** ("from one state to another" and "there must at the very least be trips across a state line by a motor carrier.")**]**

The district court's conclusion with respect to the plain meaning of the words "passenger" and "motor carrier," however, could not have been the basis for a principled ruling. The Department has forthrightly acknowledged that the Taxpayer is entitled to the Section 7-9-55 deduction with respect to the transportation of the same employees, carried by the same vans, in all instances where they are taken to locations outside New Mexico or from locations outside New Mexico into New Mexico. **[RP 161 ¶ 6]** Thus, the district court's ruling on the plain meaning of Section 14505 (2) and (4) could not have been premised on its interpretation of "passengers" or "motor carrier," but must have been based on the district court's equating the phrase "in interstate commerce" to mean only "travel from state to state."

Second, and alternatively, in the event its plain meaning ruling was in error, the district court also held that, consistent with legislative intent, Section 14505 applies only to taxing schemes "on bus travelers between States," because Congress' animating concern was to overrule *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995). *Jefferson Lines* permitted states to tax the full ticket fare paid by bus travelers moving between states. **[RP 167-168]**

E. Proceedings in this Court

Taxpayer timely filed its Notice of Appeal on August 21, 2015, **[RP 171]**, followed by a Docketing Statement on September 21, 2015.**[RP 175]** This matter

is now before the Court on the merits of Taxpayer's appeal, challenging the legal validity of the district court's Order Granting Summary Judgment in favor of the Department and denying Taxpayer's Motion for Summary Judgment. **[RP 159]**

APPLICABLE STANDARD OF REVIEW

An order granting summary judgment is subject to the *de novo* review by this Court. *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971. In addition, the underlying issues in this matter involve statutory interpretation, which mandates *de novo* review. *Albuquerque Police Officers Assoc. v. City of Albuquerque,* 2013-NMCA-110, ¶ 7, 314 P.3d 677, *cert. denied*, 2013-NMCERT-011, 314 P.3d 962.

INTRODUCTION TO THE ARGUMENT

Taxpayer contends that summary judgment cannot stand in favor of the Department and that the district court erred in denying Taxpayer's motion for summary judgment because the district court misread and misapplied Section 14505 (2) and (4). Under established commerce clause jurisprudence, Section 14505 (2) and (4) applies to exempt Taxpayer's conduct in this case from the imposition of New Mexico's Gross Receipts Tax. Taxpayer makes the following three arguments:

First, contrary to the decision of the district court, this case is not about the definition of the words "passenger" and "motor vehicle" *See* Argument, Point A, *infra.*

Second, accepted commerce clause jurisprudence establishes that the statutory language "in interstate commerce" applies to all activities that have a substantial affect on interstate commerce, including activities that are solely intrastate. *See* Argument, Point B, *infra.*

Third, while reversal of *Jefferson Lines* may have been Congress's animating concern leading to passage of Section 14505, Section 14505 is not limited in application to commercial bus travel between states. *See* Argument, Point C, *infra.*

ARGUMENT

THE DISTRICT COURT MISREAD AND MISAPPLIED SECTION 14505 (2) AND (4), WHICH UNDER ESTABLISHED COMMERCE CLAUSE JURISPRUDENCE, APPLIES TO EXEMPT THE CONDUCT OF THE TAXPAYER IN THIS CASE FROM THE IMPOSITION OF NEW MEXICO'S GROSS RECEIPTS TAX

A. This case is not about the definition of the words "passenger" and "motor carrier."

The instant case involves the Department's imposition of gross receipts taxes on Taxpayer's transportation of the Railroads' crews solely within New Mexico. The Department did not assess Taxpayer for gross receipts taxes for the

exact same transportation of the same Railroads' crews in precisely the same vans between New Mexico and another state. **[See RP 161 ¶ 3]** Thus by not assessing Taxpayer on its identical transportation of railroad employees in the very same vans that happened to cross state lines, the Department acknowledged that the Railroads' crews were "passengers" who were being driven "by motor carrier" within the plain meaning of Section 14505 (2) and (4). **[See RP 50 ¶ 22, 161 ¶ 3]** Indeed, the district court recognizes that Taxpayer transported the Railroads' crews by van or bus, which, of course, are motor carriers. **[See RP 165 ¶ 2]**

Similarly, under the usual and ordinary meaning of "passengers," the Railroads' crews were passengers when they were being transported by Taxpayer. Passengers are persons who are "traveling from one place to another in a car, bus, train, ship, airplane, etc., and who [are] not driving or working on it." *Merriam-Webster Dictionary*, "Passenger," httn://www.meriam-webster.com/dictionary/passenger (last visited March 30, 2016).

Thus, the only basis for the district court's ruling, that allowed the deduction of gross receipts tax on the transportation of railroad workers only when the transportation happened to cross a state line, must have derived from its reading the phrase "in interstate commerce" to mean only "travel from state to state." Under these circumstances, the district court's discussion of the terms "passengers" and "motor carrier" is not central to its ruling, or determinative of this case. It is,

rather, a red herring that serves only to divert attention from the real issue presented here.

B. Accepted commerce clause jurisprudence establishes that the statutory language "in interstate commerce" applies to all activities that have a substantial affect on interstate commerce, including activities solely intrastate.

The district court incorrectly held that the statutory language "in interstate commerce," contained in Section 14505 (2) and (4), means that the transportation of passengers had to be "across state lines." **[RP 164-165; see RP 168-169]** From early judicial articulations of federal commerce power, however, the use of the term "in interstate commerce" has always encompassed much more than the district court's view that such term only covers transportation or movement "from one state to another." **[RP 164 ¶ 3]** Rather, it is axiomatic throughout the entire gambit of commerce clause jurisprudence that "in interstate commerce" captures any activity, whether it crosses state lines or not, that affects or is an integral part or provides necessary support to interstate commerce. *See, e.g., United States v. Darby*, 312 U.S. 100, 118 (1941) ("power of Congress over interstate commerce... extends to those activities intrastate which... affect interstate commerce"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (intrastate activities may be interstate in character if they have a "close and substantial relation to interstate commerce."). That well established principle applies just as forcefully to matters

involving state taxation, *cf. Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (local delivery of General Motor automobiles was in interstate commerce) as it does in regulatory matters, including anti-trust, consumer protection, and the like.

As the Supreme Court made clear in *United States v. Yellow Cab Co.*, 332 U.S. 218, 231 (1947), *overruled on other grounds in Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business," providing the basis for that Court to uphold a Sherman Act anti-trust violation for a non-compete agreement that extended only to transportation between stations *located solely in Chicago. See id.* at 228 (emphasis added). Indeed, in cases markedly similar to the present case, the tribunals have addressed whether a motor carrier's intrastate transportation of railroad crews for interstate railroads constituted "interstate commerce" and concluded that such transportation does. See *Brown's Crew Car of Wyoming, LLC v. Nevada Transp. Authority*, 208-CV-00777-RLH-LRL, 2009 WL 1240458 (D. Nev. May 1, 2009) (unpublished opinion); *Application of Renzenberger, Inc.*, Doc. No. A-00116249F.3, Declaratory Order, 33 PA.B 1023 (2003). In both cases, the tribunals held that the motor carrier's intrastate transport of railroad crews was "in interstate commerce." *See also Pennsylvania Pub. Util. Comm'n v. United States*, 812 F. 2d 8, 10-11.

(D.C. Cir 1987) (same result with respect to the transportation of airline passengers).

Similar to the instant case, the company in *Brown's Crew Car* offered rail-crew transportation services to help large railroads comply with federal law and union rules that limit the number of hours rail-crews may work. 2009 WL 1240458 at *1. Brown's motor carriers transported relief crews to replace "exhausted" crews, and transported the exhausted crews from the rail line to a railroad office facility or to overnight accommodations. *Id.* Such transport allowed the railroads to continue operating without undue delay. *Id.* Brown also transported rail crews along the rail line to assist in train movements and to reconnect trains. *Id.* If needed, Brown transported engineers from the train to upcoming switch points and then back after the train passed. *Id.* In other instances, railroads requested assistance at rail yards, and Brown transported crews back and forth from the train to the station and from one part of the train to another. *Id.* While some of Brown's trips crossed state lines, some activities were wholly intrastate. *Id.* at *11. Brown provided its services solely to the railroad companies under contract with them. *Id* at *2. It did not operate on predefined routes, or solicit business from the public. *Id.*

The court found that Brown's rail-crew transportation services performed only in Nevada were "in interstate commerce" for two reasons. First,

> [a]ll Brown's transportation services performed for the railroads are *an integral part of the overall operation of the trains' interstate journey*. Whether it is assisting at a rail yard, moving crews along a rail line or transporting crews to stations or temporary accommodations, the railroads request Brown's services for the same purpose: to keep the trains operating within the requirements of federal law and union rules without undue delay.

Id. at *13. (emphasis added) Second, "Brown operates only under contract with an interstate rail carrier. It only transports rail crew at the request of the railroad on a prearranged basis; it does not provide taxi services to the public." *Id.*

This two-prong analysis for determining whether an intrastate motor carrier is part of interstate commerce was also the basis of the decision in *Application of Renzenberger, Inc.*, Doc. No. A-00116249F.3, Declaratory Order, 33 PA.B 1023 (2003), *cited by Brown's Crew Car of Wyoming, LLC*, 208-CV-00777-RLH-LRL, 2009 WL 1240458 at *13 (D. Nev. May 1, 2009). (Taxpayer in the instant case is the same company that was a party in the Pennsylvania Public Utility Commission proceeding.) In *Application of Renzenberger, Inc.*, the Pennsylvania Public Utility Commission (the "PUC") resolved that Renzenberger's wholly intrastate activities of transporting railroad crews were part of interstate commerce. Relying on criteria similar to that articulated by *Brown's Crew Car of Wyoming*, the PUC issued a declaratory order, stating that Renzenberger's services were part of interstate commerce. *Id.* at 1025. Specifically, the PUC found that (1) there was an explicit

"common arrangement" between motor carrier and interstate carrier (which provides for continuous passage and interchange of the crew of the interstate carrier); and (2) the arrangement specified that the ground transportation being provided by the motor carrier had been arranged and paid for by the interstate carrier exclusively. *Id.* at 1024-25.

In the present case, Taxpayer fulfills the two-prong test articulated in both *Brown's Crew Car of Wyoming* and *Application of Renzenberger, Inc.* First, Taxpayer's services provided continuous passage and interchange of the crew of the interstate rail carriers. Taxpayer transported relief crews to the Railroads' trains to replace relieved crews and transports relieved crews from the trains to a railroad terminal or to overnight accommodations. **[See RP 90 ¶ 5]** Once crews were changed, and any other necessary refueling or maintenance operations were performed, the trains, operated by the relief crews, continued their journeys. **[See RP 90 ¶ 8]** Taxpayer's services therefore affected commerce in a substantial way by allowing interstate rail carriers to keep the trains operating within the requirements of federal law and union rules without undue delay. **[See RP 90 ¶ 4]** Taxpayer's transportation of the Railroads' crews was critical to the trains being able to move in interstate commerce.

Second, Taxpayer entered into contracts with the Railroads to provide on demand transportation services to each Railroad. **[See RP 90 ¶ 3]** Those contracts

governed all aspects of Taxpayer's services for the Railroads. **[See RP 91 ¶ 10]** Taxpayer provided its services in New Mexico exclusively under the contracts. **[See RP 91 ¶ 9]** Taxpayer only transported rail crew at the request of the Railroads on a prearranged basis, and Taxpayer did not provide taxi services to the public. **[See RP 91 ¶ 11]**

Also relevant here is *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983). In *Aloha Airlines*, the United States Supreme Court evaluated whether a state statute, which imposed a gross receipts tax on air commerce, was preempted by Section 7(a) of the Airport Development Acceleration Act of 1973 ("ADAA") (now codified at 49 U.S.C. § 40116(b)). The ADAA prohibits states from levying a tax on the transportation of an individual traveling in "air commerce." The United States Supreme Court held that the Hawaii statute, which imposed a gross receipts tax on Aloha Airlines's transportation of passengers solely within Hawaii, was preempted by the ADAA because of the plain language of the statute. 464 U.S. at 14-15. The Court stated that when a federal statute "unambiguously forbids the States to impose a particular kind of tax on an industry *affecting commerce*, courts need not look beyond the plain language of the federal statute..." *Id.* at 12. (emphasis added)

The limitation on state taxation of airlines as outlined in the ADAA is similar to the limitation on state taxation of motor carriers in Section 14505 (2) and

(4), and has a similar purpose (i.e. to prevent a state from taxing the transport of passengers). Like the ADAA's prohibition on taxation of the transport of passengers within Hawaii, Section 14505 bans the gross receipts taxation of transportation of the Railroads' crews solely in New Mexico because that transportation is an "industry affecting commerce."

In adopting Section 14505, Congress chose the language "in interstate commerce," language that the U.S. Supreme Court has continuously held includes solely intrastate activity that is integral to or substantially affects interstate commerce. "When Congress codifies a judicially defined concept, it is presumed, without an express statement to the contrary, that Congress intended to adopt the interpretation placed on the concept by the courts." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 813 (1989). (emphasis added). Not only has Congress not expressly stated to the contrary, but in Section 14505 (2) and (4) it chose the language "in interstate commerce," and not "from a state to another state," as the district court would have us believe.

Thus, the well established commerce clause jurisprudence, in the regulatory and tax fields, and with respect to precisely identical situations as presented here, belie the narrow interpretation of the district court that "in interstate commerce" can only cover movement "from state to state." The decision of the district court

based on that misreading of the statute cannot stand, and cannot deprive Taxpayer of the deduction mandated by the statute Congress has written.

C. While reversal of *Jefferson Lines* may have been the animating concern leading to passage of Section 14505, Section 14505 is not limited in application to commercial bus travel between states

Assuming that its plain meaning argument failed, as surely it must, *see* Argument, Point B, *supra,* the district court then fell back on a secondary position, based on its reading of Section 14505's legislative history. **[RP 166-167]** According to the district court, because the animating concern leading to passage of Section 14505 was to reverse *Jefferson Lines,* which permitted the state taxation of commercial bus travel between states, that statute must be read as only applying to such travel. **[See RP 166 ¶ 2** ("The intent [of Congress] is clear; to restrict burdensome taxation schemes . . . on bus travelers traveling between States. That is not what is occurring in this case.")**]**

That argument is woefully off-base and fails to understand the difference between the particular problem that may animate the Congress to act, and the proper interpretation of the more general statute that Congress ultimately enacts. So, for example, even though the clear motivating factor behind the Civil Rights Act of 1866 was to protect the recently freed African slaves, the statute spoke more generally—granting citizenship and the same rights enjoyed by white citizens to all male persons in the United States "without distinction of race or color, or previous

condition of slavery or involuntary servitude." 14 Stat. 27-30 (April 9, 1866). Similarly, while motivated to provide further protection to the recently freed slaves, the 14th Amendment to the Constitution, drafted by Congress and approved by the states, speaks more generally granting citizenship to "all persons born or naturalized in the United States," and forbids the states from denying "to any person . . . the equal protection of the laws." Although both laws were directly aimed at the recently freed African slaves, no one would suggest, nor has the Court ever held—as the district court in this case insists with respect to Section 14505—that those Congressional actions can only apply to the subject that animated Congressional action in the first place. Indeed, in the first Civil War Amendments case, which included the 14th Amendment, to reach the Supreme Court, *The Slaughter-House Cases,* 83 U.S. 36 (1872), the Court was explicit in acknowledging the African slave-based purpose of the amendments, but that when "other rights are assailed by the States, which properly and necessarily fall within the protection of those articles, that protection will apply, though the party interested may not be of African descent" *Id.* at 72.

Moreover, the district court's reliance on scant legislative history is simply contrary to general principles of statutory construction. The Supreme Court has been emphatic that legislative history cannot be used to vary the language and actual meaning of a statute. *Chamber of Commerce v. Whiting,* 563 U.S. 582, ___,

131 S.Ct. 1968, 1980 (2011) (internal quotation omitted). ("And, as we have said before, Congress's authoritative statement is the statutory text, not the legislative history.")

Furthermore, the district court's reliance on *Tri-State Coach Lines, Inc. v. Metro Pier & Exposition Auth.,* 315 Ill. App. 3d 179, 732 N.E.2d at 1137, *appeal denied,* 732 N.E.2d 1137 (Ill. (2000), *cert denied,* 532 U.S. 884 (2001) is wholly misplaced. No doubt, the court in *Tri-State Coach Lines* found that "the 'particular evil' that Section 14505 was intended to remedy was a State's imposition of a sales tax on the whole price of an interstate bus ticket where the contact of the interstate bus trip with the taxing state was minor." *Id.* at 192, 732 N.E.2d at 1147. But the district court fails to even mention that the holding in *Tri-State* was focused entirely on the subject of the tax as a departure tax being applied to every taxicab that left local airports, and that the tax had an inconsequential relationship to interstate commerce. *Id.* at 195, 732 N.E.2d at 1149-1150.

Tri-State rightly concluded that Section 14505 was inapplicable for the very reasons that make it directly applicable to shield the Taxpayer here from the gross receipts taxes being imposed by the Department. The tax in *Tri-State Coach Lines* was not a tax on the transportation of passengers as required by Section 14505, but rather a tax on the departure of buses or taxis from airports. The tax in the instant case, on the other hand, is not a departure tax, but a gross receipts tax *on the*

revenue derived from the transportation of passengers. See *Jalbert Leasing, Inc. v. Massachusetts Port Auth.*, 449 F.3d 1 (1st Cir. 2006) (holding that a Massachusetts tax similar to the tax in *Tri-State* was a departure tax, not a tax on transportation of passengers). Furthermore, unlike *Tri-State Coach Lines*, where the Tri-State ground transportation was incidental to airline interstate transport of passengers, Taxpayer's transportation of the Railroads' crews was essential and integral to the trains' ability to continue their journey through New Mexico without delay. Without Taxpayer's transportation of the crews, the Railroads would not have been able to expeditiously move the freight they were carrying across state lines. That would have caused a severe burden on interstate commerce. Thus, the district court's reliance on *Tri-State* is not only misplaced; that case compellingly supports the application of Section 14505 to require the deduction sought by Taxpayer in this case.

CONCLUSION

For the forgoing reasons this Court should reverse both the district court's grant of summary judgment and its denial of summary judgment to the Taxpayer. The result should therefore be an award of summary judgment to the Taxpayer.

REQUEST FOR ORAL ARGUMENT

Taxpayer requests oral argument because the issues on appeal involve important matters dealing with the federal prohibition of the Department's imposition of New Mexico taxes.

Respectfully submitted,

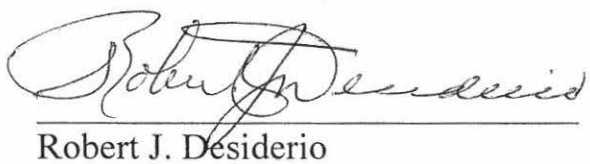
Benjamin Roybal
Betzer, Roybal & Eisenberg, P.C.
4900 Lang Avenue NE, Suite 202
Albuquerque, NM 87109
Telephone: (505) 797-0105

Robert J. Desiderio
Sanchez, Mowrer & Desiderio, P.C.
PO Box 1966
Albuquerque, NM 87103
Telephone: (505) 247-4321

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Chief was mailed on the 1st day of April, 2016 to the following counsel of record:

Elena P. Morgan
Special Assistant Attorney General
P.O. Box 630
Santa Fe, New Mexico 87504-0734
Telephone: (505) 827-0734
Elena.Morgan@state.nm.us



Robert J. Desiderio