IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RENZENBERGER, INC.,

Plaintiff-Appellants

vs. No. A-0001-CA-2015-34,999

NEWMEXICO TAXATION AND REVENUE DEPARTMENT,

Defendant-Appellee

DEFENDANT – APPELLEE'S ANSWER BRIEF

Appeal from the District Court of the First Judicial District Court
Santa Fe County
The Honorable David K. Thomson, District Judge

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I. INTRODUCTION

This matter involves an appeal by Renzenberger, Inc., (the "Taxpayer") from a decision of the district court which granted summary judgment to the New Mexico Taxation and Revenue Department (the "Department"). The Taxpayer was issued a gross receipts tax assessment, paid the tax and then applied to the Department for a refund. **(RP 47 ¶ 7)** The Department denied the refund and the Taxpayer filed an appeal to the district court. The district court issued an order and written opinion on August 8, 2015, granting the Department summary judgment and denying the Taxpayer summary judgement. **(RP 159 – 169)**. Taxpayer appealed to this Court.

II. ARGUMENT

A. Applicable Standard of Review

An order granting summary judgment is subject to the *de novo* review by this Court. *Gomez v. Chavarria*, 2009-NMCA-035, 46 N.M. 46, 49, 206 P.3d 157, 160. 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.

B. Taxpayer cannot overcome the bar in disfavor of preemption in the federal supremacy clause and the tenth amendment to the federal constitution because it the services it provided were exclusively and completely within the state borders of New Mexico.

The Department will argue that the Supremacy Clause, and the Tenth Amendment to the federal statutes do not exempt the Taxpayer from assessment of gross receipts tax. The arguments will not include reference to state law because New Mexico[1] law is concomitant with the federal statutes.

1. Supremacy Clause

Taxpayer argued that it is not subject to taxation pursuant to the Supremacy Clause of the Constitution and established commerce clause jurisprudence (BIC 1). Taxpayer asserts on appeal that the district court "misread" and "misapplied" the

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[1] The relevant state law, NMSA 1978, § 7-9-55(A) (1993) states:

A. Receipts 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.

The relevant state regulation 3.2.213(E) NMAC states:

Receipts 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.

applicable law to reach its conclusion that Taxpayer's receipts are subject to state tax. The U.S. Constitution Article VI provides: "This constitution and the Laws of the United States which shall be made in pursuance thereof: and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land." (Art. 6, cl. 2) Under this clause a valid exercise of congressional power preempts any conflicting state legislation. According to Professor Hellerstein[2] there has been relatively little federal legislation restricting state taxing power but with the enactment of a growing number of targeted congressional limitations on the state tax power in recent years; there has been a corresponding increase in the amount of litigation over taxpayers' claims that a state tax or fee is preempted by federal legislation.[3] The areas of federal legislation preemption have generally been to prohibit discrimination against out of state entities being subjected to higher rates of taxation that in-state entities.[4]

In the instant case, there is no comprehensive regulatory scheme. In fact with the enactment of the Interstate Commerce Commission Termination Act (ICCTA) Congress was deregulating certain industries.[5] Congress has preempted

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[2]Walter Hellerstein, State Taxation, 3rd Edition ¶ 4.25

[3] Id.

[4] Id.

[5] In the 1990s there was a congressional initiative to deregulate certain industries. In 1994 Congress deregulated intrastate transportation of property by motor carriers in an effort to level the playing field between air carriers, which were not subject to state regulation and motor carriers which were. The 1995 deregulation

the states from taxing interstate passenger transportation by motor carrier with the enactment of 14505 and with the enactment of an amendment in 2002 which added a definitional section on interstate commerce.

2. Preemption Doctrines

Additionally, the *Tri-State* court (*Tri-State Coach Lines, Inc. v. Metro Pier & Exposition Auth,* 315 Ill. App. 3d 179, 192, 732 NE 2d 1137, 1147) reviewed the preemption doctrine. It reasoned that preemption of state tax law must be narrowly construed under the following principles, among others: (1) there is a presumption existing in every preemption case that Congress did not intend to supplant state law; (2) the presumption against federal preemption applies with special force where a matter of primary state responsibility, like local taxation is at stake; (3) no federal preemption exists concerning a state or local tax unless Congress made its intent to preempt *unmistakably clear in the language of the statute*; and (4) no preemption exists of the goals of the federal and state or local governments are different. *Tri-State*, 315 Ill. App. 3d.

Here, the Taxpayer cannot overcome the presumption against preemption pursuant to the Supremacy Clause or overcome the presumption against preemption

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act was called the Interstate Commerce Commission Termination Act of 1995 (ICCTA) and it included the statute at issue here which was codified as 49 U.S.C. § 14505.

operating with special force when the matter involved is a state responsibility, such as state tax, pursuant to the tenth Amendment. It is also doubtful that the Taxpayer can make a case of preemption given that the Congress has made its intent to preempt unmistakably clear in the language of the statute.

The third principal of the *Tri-State* court that no federal preemption exists concerning a state or local tax unless Congress made its intent to preempt *the state or local tax unmistakably clear in the language of the statute.* A notable example of clear preemption language is in the Employee Retirement Income Security Act (ERISA) in 29 U.S.C ¶ 1144(a) which states preemption with clear language by stating "superseding any and all State taxes in so far as they now or hereafter relate to any employee benefit plan".

Another example of clear preemption is found in *Moskowitz v. Washington Mutual Bank*, F.A., 329 Ill. App. 3d 144, 146-147, 768 N.E.2d 262 (2002). The court was considering a question of the preemption of federal provisions related to federal savings associations. In that case it was necessary to examine the federal materials to determine whether preemption occurred by displacing provisions of state law or by the Congress implementing a comprehensive regulatory scheme (citing authority). In *Moskowitz* the court determined that the federal act had created the Office of Thrift Supervision (OTS) and the regulations explicitly stated that OTC

occupied the entire field of lending regulations for federal savings associates. 12 CFR § 560.2 (2001). (Id 146-47).

3. 49 U.S.C. § 14505 does not apply to Department's Assessment

Section 14505 of Chapter 49 of the United States Code (hereinafter 14505) reads in part as follows:

> A State or political subdivision thereof may not collect or levy a tax, fee, head charge, or other charge on--
> (1)
> (2) the transportation of a passenger traveling in interstate commerce by motor carrier;
> (3)
> (4) the gross receipts derived from such transportation

The purpose of § 14505 was to prohibit states from taxing gross receipts from transportation of a passenger traveling in interstate commerce by motor carrier. The *Tri-State* court's observation was correct in that the Congress did not express an intention to bar state taxation of **intra**state ground transportation, even in conjunction with an airline passenger's overall interstate journey. *Tri-State,* 315 Ill. App. 3d.

The Taxpayer did not call the tribunal's attention to 49 U.S.C. § 14501(d)[6] provision in its brief. In "Interstate Travel" in 2002 Congress enacted 14501 (d) (1) (c) (i) and (ii) (hereinafter "14501") which reads as follows:

> (d) Pre-arranged ground transportation.--
>
> (1) In general.--No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law requiring a license or fee on account of the fact that a motor vehicle is providing pre-arranged ground transportation service if the motor carrier providing such service--
>
> (A) meets all applicable registration requirements under chapter 139 for the interstate transportation of passengers;
>
> (B) meets all applicable vehicle and intrastate passenger licensing requirements of the State or States in which the motor carrier is domiciled or registered to do business; and
>
> (C) is providing such service pursuant to a contract for--
>
> (i) transportation by the motor carrier from one State, including intermediate stops, to a destination in another State; or
>
> (ii) transportation by the motor carrier from one State, including intermediate stops in another State, to a destination in the original State.

Section 14501 is important because, in this instance, the receipts taxed by the state are entirely generated by services Taxpayer provided *within the borders of New Mexico.* Because section 14501 defines interstate travel to be "[p]re-arranged

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[6] Section 2 of Interstate Driver Equity Act of 2000 enacted November 26, 2002 codified at 49 U.S.C. § 14501 (d).

ground transportation... by the motor carrier from one State, including intermediate stops, to a destination in another State; ... or by the motor carrier from one State, including intermediate stops in another State, to a destination in the original State" section 14505 is inapplicable to the Department's assessment. 49 U.S.C. § 14501 and 14505.

The section is important because it clarifies that the intention of the Congress was to preempt any state tax on prearranged interstate ground transportation by motor carrier and does not preempt state tax on prearranged intrastate ground transportation by motor carrier. This is precisely the way the district court interpreted 14505 even though the court was not appraised of 14501. It is precisely the type of services that the Taxpayer provides.

Pursuant to sections 14505 and 14501, Taxpayer's receipts for providing services within the boundaries of New Mexico are intrastate services. Section 14505 does not preempt intrastate transportation services, so those receipts are subject to state taxation. The definitional provision of 14501 clearly provides that it was not the intent to limit the state's authority to tax matters in intrastate commerce. There is no foundation for preemption here where the tax on the Taxpayer cannot demonstrate that its *intrastate* services were preempted from state taxation because there is no interstate

component to its taxed receipts. The Taxpayer is being treated the same as any other business operating in New Mexico.

The Taxpayer only argued that the meaning of "interstate commerce" is at issue. **(BIC 11-18)** If the court finds 49 U.S.C. § 14501 applicable that argument has no application in the present case.

C. Even if 14505 and 14501 are not dispositive, tax assessment on the gross receipts is not preempted based on the District Court's plain language analysis, review of the legislative history, and on a review of case law.

1. The District Court's plain language reading of 14505 indicates it is not ambiguous so Department's tax assessment on Taxpayer is lawful.

The Department is acting lawfully by assessing gross receipts on the Taxpayer. Statutory construction is a question of law according to the court in *State v. Romero*, 2006- NMSC-39 ¶ 6, 140 N.M. 299, 142 P.3d 887. To construe the statute the court undertook an analysis of the plain language of the Act's relevant provisions to determine whether their ordinary meaning results in any ambiguity as discussed in *Marbob Energy Corp. v. New Mexico Oil Conservation Comm'n,* 2009-NMSC-013 ¶ 9, 146 N.M. 24, 206 P.3d 135, 139-40. In *Aloha Airlines Inc., v. Director of Taxation of Hawaii,* 464 US 7, 10-11, 104 S. CT. 291 (1983) the U.S. Supreme 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* p.12 This is the very approach taken by the district court. **(RP 163-164).**

2. Plain meaning of "passenger" and "motor carrier"

Consistent with the rules of statutory construction the district court found that under a plain reading of the language of § 14505 "passenger" and "motor carrier" the statute did not preclude Department from taxing of the Taxpayer's gross receipts. The Taxpayer took issue with the district court's plain reading and dismissed the meaning of "passenger" and "motor vehicle" out of hand. **(BIC 9-11)** This dismissal is based on Taxpayer's misunderstanding the fact that Department has no authority to tax interstate travel. In this regard Taxpayer was also confused by the term "deduction" of receipts from out of state services. **(BIC 7 ¶ 1)** Receipts from out of state services are not at issue. Accordingly any reference to "deduction" by Taxpayer has no application in this case.

The district court ruled that Section 14505 did not apply to passengers of the Taxpayer who were being transported by motor vehicle in intrastate travel. **(BIC 165)** In this case, the district court reasoned that the employees of the train and not the train's fare-paying passengers were being transported to destinations within New Mexico. **(RP 164 ¶ 2; see RP 161 ¶ 1)** The district court stated that contrary to the Plaintiff's argument attaching "employee" to "passenger" the employees of the trains only become passengers of the train when they were on boarded the train. **(RP**

165 ¶ 1) The district court found that the Congress used the terms "person" and "passengers" differently in the "ICCTA. For the plain meaning of "passenger" the court, consistent with statutory construction rules examined the statute as a part of a whole and found that while passenger was not statutorily defined, the plain meaning could be ascertained by comparing the definition of "passenger" with how "person" was referred to in the Act. **(RP 165-166)** The district court found "passenger" was consistent with the purposes of the Act because passengers pay for tickets and are engaged in interstate travel on a train. *Id.* Passengers were generating income for the trains. In addition, the definition of transportation the way that "persons" were defined removed them from the category of "passenger". **(RP 166 ¶ 4; see RP 167 ¶ 1).**

The district court also rejected the Taxpayer's continuity of travel in interstate commerce argument that because the employees are not passengers unless they are on the train. **(RP 165 ¶ 1)** The employees at issue are only crossing state lines when they are on the train, not when they are in Taxpayer's motor carrier. The District Court stated the Taxpayer's argument is not consistent with the facts and law. The Taxpayer transports employees, not passengers, by motor carrier. **(RP 165 ¶ 1)**. When they re-board the train they were no longer being transported by motor carrier. **(RP 168-169)**. Moreover, the district court pointed out its position was supported by the very enactment of 14505 because the Congress was trying to eliminate the

head taxation of bus passengers following the decision in *Jefferson Lines*.[7] **(RP 166 ¶ 2)**.

The Appellant also dismissed the district court's plain language analysis of "passenger" and "motor carrier" and characterized the discussion to serving to divert attention from the "real" issue. **(BIC 10 ¶ 3)**. The real issue presumably being interstate commerce.

3. Plain meaning of "Interstate Commerce"

Taxpayer's intrastate activities were not integral to or a necessary part of interstate commerce. The court found that the Department reasonably interpreted the language in 14505 to mean travel across state lines and not travel in one state exclusively. **(RP 164)**. With respect to intrastate services the district court found that the railroad crews are not traveling in interstate commerce by motor carrier because the entire trip was within the state of New Mexico. **(RP 164-165)** The court correctly stated that for the preemption to apply the transportation would have to include crossing a state line by motor carrier and noted that the only mode of travel which crossed the state lines was the train. *Id.* Part of the Taxpayer's objection was based on its misconception of a "deduction" of receipts from out of state services, as noted earlier. **(BIC 9-10)** The positions of the district court and of the Department

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[7] *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S. Ct. 1331, 131 Led 261, (1995)

are in harmony based on the plain language analysis of 14505, the finding that Taxpayer's services were intrastate.

The Appellant argued that the district court's interpretation of "interstate travel" as meaning travel across state lines is much too narrow. **(BIC 11-17)** According to the Plaintiff throughout the entire gamut of commerce clause jurisprudence[8] "interstate commerce" captures any activity, whether it crosses state lines or not, that *affects or is an integral part of provides necessary support to interstate commerce* citing *United States v. Darby*, 312 U.S. 100, 118 (1941) (emphasis added). If not the District Court's opinion should be considered. The District Court found that case law analysis did not establish that the Taxpayer's services as integral to or a requisite part of interstate travel by the train.

The district court stated that the Appellant was relying on a jurisdictional test for anti-trust litigation to establish a standard to determine the applicability of 14505. By relying on *United States v. Yellow Cab Co.*, 332 US 218, 233, 67 S.Ct. 1560, 1568, 91 L.Ed. 2010 (1947) overruled by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct 273, 81 Led, 628 (1984) in which local taxicabs only convey interstate train passengers between their homes and the railroad state in the

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[8] The Taxpayer only challenged the Department's assessment based on the supremacy clause and not on the entire gamut of commerce clause jurisprudence. This is also consistent with Appellant's previous argument. (RP 77-78) To blur a long-settled distinction between doctrines emanating from different constitutional bases is problematic.

normal course of their independent local service that service is not an integral part of interstate transportation. The court declined to rely on *Yellow Cab* issue was whether the court had jurisdiction in an anti-trust lawsuit. The district court also declined to apply an unreported District of Nevada case, *Brown's Crew Car of Wyoming LLC v. Nevada Transp. Auth.*, 208-CV00777-RLH-LRL, 2009 WL 1240758 at 6 (D. Nev. May 1, 2009). *Brown's* was based on an anti-trust violation. Using the *Yellow Cab* and *Brown* would result in a broader exception of gross receipts tax than was necessary given the clear language of 14505. **(RP 169)**. The court found that the question in instant case was narrow and limited to interpretation of a specific statute and a determination of whether there was an applicable exception. **(RP 168).**

The railroads themselves have the responsibility for continuous interstate transportation. The services provided by the Taxpayer as an independent contractor to the railroads are not unique. Just as the railroads maintain railyards on established routes with employees to service the trains, **(BIC 4 ¶ 8, RP 2 ¶ 3, pp 3 ¶ 4, ¶ 5)** the railroads could provide any necessary transportation for the employees to and from the train. As a practical matter the railroads contracted out for the service from Taxpayer, an independent contractor. The contract did not mean that the Taxpayer's services, which were performed wholly within New Mexico became part of interstate commerce. The Taxpayer had no legal relationship to establish Taxpayer's

services as interstate travel. The District Court properly found that Taxpayer's transportation in New Mexico of railroads employees did not constitute interstate travel based on its plain reading of the language and the cited case law.

D. The District Court's legislative history review did not limit Section 14505 application.

In accordance with rules of statutory construction the tribunal should refer to the legislative history and background for clarification of the Congressional intent in enacting 14505 **(RP 166-8)** The District Court found that the stated intent was to restrict burdensome taxation and multiple taxation on bus traveling between states. **(RP 166)**. The court found that the House report and the conference reports stated that the purpose of 14505 was to prohibit a state or a political subdivision of a state from levying a tax on bus tickets for interstate travel. **(RP 166-167)**. The Taxpayer discounted the district court's opinion by arguing that it was based on scant legislative history and background but again made no reference to 14501. The District Court's reliance on legislative history was proper and was consistent with the statute. **(RP 19 ¶ 2)** The district court also examined the decision in *Tri-State* and determined that the Congress was concerned about interstate city to city bus trips which often passed through multiple states and having minimal contact with the state of their origin. *(Tri-State, 192)* **(RP 167 ¶ 2)** This meant the tax was disproportionate to the benefits received by the originating state. In other words, 14505 was intended to remedy a state's imposition of a sales tax upon the whole

price of an interstate bus ticket where the contact with the taxing state was minor. Id. The district court concluded that 14505 did not apply to intrastate travel which was the travel provided by the Taxpayer within New Mexico.

Taxpayer argued that the district court's opinion is incorrect. That reflects a lack of understanding that Congress can and does address particular problems by enacting a general statute. **(C 18 ¶ 1)** The district court correctly interpreted 14505 as being inapplicable to interstate travel because the activity occurs completely within New Mexico. **(RP 167 ¶ 3)** That opinion did not limit the application of 14505 to bus travel.

E. The Taxpayer's arguments regarding estoppel are not a part of this appeal.

In Taxpayer's motion for summary judgment the Taxpayer argued that the Department is estopped from assessing tax on the Taxpayer based on its interpretation of NMSA 1978, § 7-1-6- (1993). **(RP 100)** but did not include the issue in its docketing statement or brief in chief. If that issue is included in the appeal the following is the Department's position. The basis for the Taxpayer's assertion of estoppel was based on a provision that the Department should be estopped from withholding the relief requested by the Taxpayer if the Taxpayer's action was in accordance with a regulation in effect during the time of the asserted liability. **(RP 100)**.

New Mexico regulation, Regulation 3.2.213(E) NMAC reads as follows:

> Receipts 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.

The District Court correctly ruled that Taxpayer was not exempt from gross receipts tax and the Department was not estopped from levying a tax. **(RP 169).** The Court stated that Taxpayer's reading of the federal and of the state statute was incorrect and under the Court's analysis, the Taxpayer do not fall within the regulation. **(RP 169).** Given the omission of estoppel in documents filed with the court it is presumed that the issue is not part of this appeal. 12-208 (E) NMRA

III. CONCLUSION

1. The Congress through enactment of 14501 and 14505 pre-empted state tax on prearranged ground transportation by motor carrier from one state to another or from one state to another to a destination in the original state.
2. The Department's issuance of an assessment of gross receipts tax was lawful because 14505 does not apply to Department because 14505 only applies to interstate commerce.

3. The assessment was lawful because of the plain meaning discerned from the language of 14505 did not preclude taxation of the Appellant's intrastate services; or
4. Examination of the legislative history of 14505 and case law supported the proposition that Congress did not intend to prohibit state tax on intrastate travel.

WHEREFORE THE Appellee prays that this Honorable Court, affirm the district court's order granting Appellee's motion for summary judgment and denying the Appellant's Motion for summary judgment.

Respectfully submitted,
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CERTIFICATE OF SERVICE:

I hereby certify that on the 13th day of July, 2016, a copy of the foregoing was served to the following by mail to: Benjamin C. Roybal, Betzer, Roybal & Eisenberg, P.C., 4900 Lange Ave NE #202, Albuquerque, NM 87109-9702 and Robert J. Desiderio, Sanchez, Mowrer & Desiderio, P.C., 115 Eighth Street, SW, Albuquerque, NM 87102.

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