

MF 08-3

Tax Type: Motor Fuel Use Tax

Issue: Dyed-Undyed Diesel Fuel (Off Road Usage)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

ABC SERVICE, INC.,

TAXPAYER

No. 05-ST-0000

Acc. No. 00-0000000

Motor Fuel Refund Claims: \$505.90 (issue date
6/30/05); \$40.85, \$239.08, \$476.66, \$347.44,
\$167.70, \$313.90, \$637.91, \$445.70 (issue dates
5/23/06)

Assessment for Motor Fuel Tax: \$5,502.28, plus
penalties and interest (issue date 5/17/06)

Kenneth Galvin

Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Gregory Bird, Scott & Krauss, LLC, on behalf of ABC Service, Inc.; Mr. Gary Stutland, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

Synopsis:

This matter comes on for hearing pursuant to a protest filed by ABC Service, Inc., (hereinafter "ABC") in response to the Illinois Department of Revenue's (hereinafter "Department") denial of ABC's claims for motor fuel tax refunds, captioned above, and the Department's assessment of \$5,502.28, plus penalties and interest, in non-highway motor fuel refunds issued to ABC in error, covering the period January, 2003 through December, 2004. A hearing was held in this matter on June 5, 2007, with testimony provided by Ms. Jane Doe, Fleet Tax Manager, for ABC and subsidiaries. The dollar amounts of the claims and the refund were not

at issue in the hearing. Tr. p. 35. Following submission of all evidence and a review of the record, including Taxpayer's "Post-Hearing Brief," the Department's "Reply," and the Taxpayer's "Response," it is recommended that the nine motor fuel refund claims be denied and that the assessment for refunds issued in error be finalized. In support thereof, the following "Findings of Fact" and "Conclusions of Law" are made.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of the Department's nine denials of taxpayer's claims for motor fuel tax refunds with one claim dated June 30, 2005, in the amount of \$505.90, and eight claims dated May 23, 2006, in the amounts of \$40.85, \$239.08, \$476.66, \$347.44, \$167.70, \$313.90, \$637.91, \$445.70 and "Notice of Assessment for Motor Fuel Tax," dated May 17, 2006, in the amount of \$5,502.28, plus penalties and interest, for refunds of non-highway motor fuel tax paid in error, covering the period January, 2003 through December, 2004. Tr. pp. 10-12; Dept Ex. No. 1.
2. The claims at issue in this proceeding concern undyed diesel fuel used in "straight" trucks. Straight trucks are commercial vehicles with three axles, that contain a truck and an attached refrigeration unit. Undyed diesel fuel, contained in a single tank shared by both the truck and the refrigeration unit, is used both to propel the truck and to refrigerate the unit (called a "reefer") on the back of the truck. The refrigeration unit has its own motor and a separate line that goes into the shared single tank. Tr. pp. 7, 15, 50-53, 63-64; Taxpayer's Ex. B.
3. Straight trucks do not have power take-off equipment. Tr. pp. 64-65.

4. ABC's RMFT-11-A, "Illinois Motor Fuel Tax Refund Claim," states that "we have 15 straight trucks with refrigeration units that run off of a shared fuel tank. Based on industry standards and the weather temperature, the units use between ½ to 1 gallon of fuel per hour." Tr. pp. 54-56; Taxpayer's Ex. F.
5. ABC calculated the fuel consumed by the reefer units at .5 gallon per hour. In a test done in January, 2004, at ABC's Arizona, facility, the reefer units consumed .6 gallons of fuel per hour at 65 degrees Fahrenheit. This study was not submitted to the Department. Tr. pp. 21-24, 58; Taxpayer's Ex. D and J.
6. A Department Informational Bulletin, dated July, 2001, entitled "Motor Fuel Undyed Diesel Fuel Refund Changes" states that, effective July 1, 2001, refunds will be allowed for tax paid on undyed diesel fuel "used by a refrigeration unit that is permanently mounted to a semi-trailer and that refrigeration unit has a solely dedicated supply system." The units at issue in this proceeding do not have solely dedicated supply systems. Tr. pp. 26-28; Taxpayer's Ex. E.

Conclusions of Law:

Section 21 of the Illinois Motor Fuel Tax Law (35 ILCS 505/1 *et seq.*) incorporates by reference section 6(b) of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*) which provides that the Department's determination of a refund claim is *prima facie* correct and *prima facie* evidence of the correctness of the determination. 35 ILCS 505/21; 35 ILCS 120/6(b). Once the Department has established its *prima facie* case, the burden shifts to the taxpayer to prove by sufficient documentary evidence that the determination is incorrect. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991). In the instant case, the Department

denied the taxpayer's claims for refund of motor fuel tax and assessed the taxpayer for motor fuel refunds issued in error. Dept. Ex. No. 1.

ABC's refund claims and the Department's assessment for claims paid in error are for taxes paid after January 1, 2001. Dept. Ex. No. 1. 86 Ill. Adm. Code § 500.235 (k) states that for claims based upon taxes paid on or after January 1, 2001, no claim for the use of undyed diesel fuel shall be allowed except for claims based on the following:

- (6) Undyed diesel fuel used by refrigeration units that are permanently mounted to a semi trailer ... wherein the refrigeration units have a fuel supply system dedicated solely for the operation of the refrigeration units.
- (7) Undyed diesel fuel used by power take-off equipment ...
86 Ill. Adm. Code § 500.235 (k)(6)(7).

In applying the above regulations to ABC's stated use of the diesel fuel, it is clear that the Department correctly denied ABC's claims for refund and correctly assessed ABC for motor fuel refunds issued in error. The claims at issue in this proceeding concern undyed diesel fuel used in "straight" trucks. Straight trucks are commercial vehicles with three axles that contain a truck and an attached refrigeration unit. Undyed diesel fuel, contained in a single tank shared by both the truck and the refrigeration unit, is used both to propel the truck and to refrigerate the unit on the back of the truck. The refrigeration unit has its own motor and a separate line that goes into the shared single tank. Tr. pp. 7, 15, 50-53, 63-64; Taxpayer's Ex. B. ABC's RMFT-11-A, "Illinois Motor Fuel Tax Refund Claim," states that "we have 15 straight trucks with refrigeration units that run off of a shared fuel tank." Tr. pp. 54-56; Taxpayer's Ex. F.

As the testimony and the evidence show, the straight truck engines and the refrigeration units operate from a single fuel tank. Accordingly, the refrigeration units do not have a "fuel system dedicated solely for the operation of the refrigeration units" as required for claims under

section 500.235 (k)(6) of the Administrative Code. The Illinois Motor Fuel Tax Law contains no provision for refunds of tax paid on diesel motor fuel used for refrigeration units using a common tank. In addition, Ms. Doe testified that, “by definition,” the straight trucks at issue do not have power take-off equipment. Tr. pp. 64-65. Accordingly, ABC’s claims for refund are also precluded by section 500.235 (k)(7) of the Administrative Code.

ABC’s “Post Hearing Brief,” refers to Illinois Attorney General’s Opinion No. S-938 issued July 29, 1975, as authority for the granting of their refund claims. (Post-Hearing Brief, pp. 2-3) The Attorney General’s Opinion was issued before the passage of Public Act 92-0030, effective July 1, 2001. 86 Ill. Adm. Code § 500.235 (k)(6) and (7), which preclude ABC’s refund claims, were adopted in response to Section 13 (6) and (7) of Public Act 92-0030, now codified as 35 ILCS 505/13 (6) and (7), respectively. According to the Department, Section 500.235 (k)(6) and (7) were adopted so that the Department could verify the amount of fuel used in the refrigeration process. “When a commercial vehicle uses a single fuel tank to drive the engine and to refrigerate its products, it becomes impossible for the Department to verify the amount of fuel dedicated solely to the refrigeration unit.” (Department’s Reply Brief, p. 5).

86 Ill. Adm. Code § 500.245 entitled “Estimated Claims” states that the Department will approve claims for refund when the refund claim can “as a practical matter, be calculated and itemized.” “When such claims are estimated or calculated, they must be supported by verifiable documentation retained in the claimant’s books and records.” In fact, ABC calculated the fuel consumed by the refrigeration units at .5 gallon per hour. In a test done in January, 2004, at ABC’s Phoenix, Arizona, facility, the refrigeration units consumed .6 gallons of fuel per hour at 65 degrees Fahrenheit. Tr. pp. 21-24, 58; Taxpayer’s Ex. D and J. This study was not conducted in Illinois and was not submitted to the Department for approval. The study was conducted in Arizona where

the average temperature is very different than Illinois' which could have had a profound effect on the results. Assuming, *arguendo*, that the Illinois Motor Fuel Tax Law contained a provision for refund of tax paid on diesel motor fuel used for refrigeration units using a common tank, ABC's claim would still not be approved because it is estimated and not supported by "verifiable documentation."

In issuing the Notice of Assessment to ABC for refunds of motor fuel tax paid in error, the Department relied upon Section 13 of the Illinois Motor Fuel Tax Law (35 ILCS 505/13) which provides that in any case where there has been an erroneous refund of tax, a notice of tax liability may be issued at any time within three years after the making of the refund. 35 ILCS 505/13. ABC argued at the evidentiary hearing that it had received refunds of taxes on undyed fuel in the past. The Department allowed ABC's claims for refunds for tractor trailers that had fuel tanks for the refrigeration units and a separate fuel tank to propel the engine. Tr. pp. 15-16, 58. When the Department realized the difference between straight trucks with a single tank and tractor trailers with separate tanks, the Department issued the Notice of Assessment to ABC. ABC did not argue at the hearing or in its Post-Hearing Brief that the Notice of Assessment was not timely. ABC has failed to show that the Department's determination denying the refund claims was incorrect or that the Notice of Assessment was not properly and timely issued.

WHEREFORE, for the reasons stated above, it is my recommendation that ABC's nine motor fuel refund claims be denied and that the Department's "Notice of Assessment for Motor Fuel Tax," dated May 17, 2006 for refunds issued in error be finalized.

ENTER:

Kenneth J. Galvin

December 3, 2007