

MF 08-8
Tax Type: Motor Fuel Use Tax
Issue: Interstate Fuel Usage (Exemption Claimed)

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

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	No. 06-ST-0000
)	Acc. No. 000000000000
v.)	Notice of Audit Tax Liability
)	Liability Period: 01/04 to 01/06
ABC, INC.,)	
)	Kenneth J. Galvin
TAXPAYER)	Administrative Law Judge
)	

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Daniel K. Touhy, Touhy, Buehler & Williams, LLP, on behalf of ABC, 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, Inc. (hereinafter "ABC") of Notice of Audit Tax Liability, Account Number 000000000000, issued October 30, 2006, covering the audit period January, 2004, to January, 2006, which assessed motor fuel use tax in the amount of \$78,366 plus penalties and interest.

An evidentiary hearing was held in this matter on March 5, 2008 with Mr. Renaldo Tanig, revenue auditor, testifying for the Department and John Doe, owner, and Jim Doe, driver, testifying for ABC. Following a review of the testimony and the evidence, it is recommended that the Notice

of Audit Tax Liability, as revised by the reaudit of May 21, 2007, 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 Notice of Audit Tax Liability, Account Number 000000000000, issued October 30, 2006 showing unpaid motor fuel use tax, penalties and interest, covering the audit period January, 2004, through January, 2006. The Notice of Audit Tax Liability was revised on May 21, 2007, giving taxpayer credit for the purchase of 940 ½ gallons of fuel. Tr. pp. 18-19; Dept. Ex. No. 1.
2. The Department’s auditor and audit supervisor made repeated attempts to contact ABC and its accountant prior to the initial audit, but were unsuccessful. The auditor did not receive any books or records from ABC for the initial audit. The auditor conducted his audit using only the International Fuel Tax Agreement (“IFTA”) quarterly returns filed by ABC with the Department. Tr. pp. 21-27, 59-60.
3. The MFUT-15, “IFTA Quarterly Return,” requests that the taxpayer list the “total miles traveled everywhere” and “total fuel consumed everywhere.” Total miles traveled everywhere is divided by total fuel consumed everywhere to arrive at the “average fleet miles per gallon.” Tr. pp. 31-36, 42, 65-66; Taxpayer’s Ex. No. 4.
4. On ABC’s IFTA Quarterly Returns, ABC claimed the same 5.0 average fleet miles per gallon for all quarters audited in 2004 through 2006. No documents were submitted to the auditor to verify the 5.0 average fleet mpg. Tr. pp. 32, 35, 60-61.
5. The Illinois Motor Fuel Tax Law, 35 ILCS 505 *et seq.*, states that in the absence of adequate records submitted by the motor carrier, “the Department shall presume that one gallon of fuel is

used for each 4.0 miles traveled in this State.” (35 ILCS 505/13a.2) The Illinois “Carrier Compliance Manual” for IFTA, 2006, states under the section entitled “Audits,” that “[I]n the absence of adequate records, the auditor will use a standard of four miles per gallon.” The auditor revised ABC’s Quarterly Returns to reflect a 4.0 average fleet miles per gallon for all reporting periods. In revising ABC’s Quarterly Returns to reflect 4.0 mpg, the auditor also revised the taxable gallons of fuel consumed by ABC for the total miles traveled. Tr. pp. 60-61; Dept. Ex. No. 1.

6. The IFTA Quarterly Returns require taxpayer to report “taxable miles traveled by state” (column G). Taxable miles traveled by state are divided by the average fleet mpg to determine “taxable gallons” (column H). By lowering the mpg from 5.0 to 4.0, the auditor increased ABC’s taxable gallons. In “tax-paid gallons” (column I), the taxpayer is given credit for fuel purchased and the tax paid on the purchase. On the IFTA Quarterly Returns, tax-paid gallons (column I) are subtracted from taxable gallons (column H) to arrive at “net taxable gallons.” Net taxable gallons are multiplied by the individual state tax rate to determine whether the taxpayer owes tax or has a credit due. Dept. Ex. No. 1; Taxpayer’s Ex. No. 4.
7. At a meeting between the auditor and ABC on October 17, 2007, after the completion of the initial audit, it was agreed that ABC would submit records and that the auditor would revise the audit. ABC submitted fuel receipts for the purchase of 940 ½ gallons of fuel, which the auditor gave ABC credit for. The auditor accepted ABC’s reporting of “total miles traveled” on its returns. The auditor did not accept ABC’s reporting of “tax-paid gallons” except for the 940 ½ gallons that ABC had receipts for. ABC did not have receipts for any other fuel purchased. Tr. pp. 37-38, 41-42, 66-67.

8. ABC's IFTA Quarterly Returns showed "tax-paid gallons" of 21,835 for Quarter 1, 33,335 for Q2 and 31,075 for Q3, in 2004, 25,631 for Q1, 24,310 for Q2, 22,200 for Q3 and 13,543 for Q4 in 2005 and 11,305 for Q1 in 2006. Taxpayer's Ex. No. 4.

Conclusions of Law:

The Illinois Motor Fuel Tax Law provides that the Department may enter the International Fuel Tax Agreement ("IFTA") or other cooperative compacts or agreements with other states or jurisdictions to permit base state or base jurisdiction licensing of persons using motor fuel in Illinois. 35 ILCS 505/14a. Since October 1, 1977, Illinois has imposed a motor fuel tax on fuel used by interstate commercial motor vehicles. Illinois Carrier Compliance Manual for IFTA ("ICCM"), 2006, p. 1. Illinois-based carriers operating qualified motor vehicles interstate are subject to IFTA program and reporting requirements. "IFTA is a base jurisdiction motor fuel use tax agreement in which the base jurisdiction (typically a state) administers motor fuel use taxes for all IFTA jurisdictions and apportions payments to those jurisdictions." ICCM, p. 1. Illinois requires the filing of MFUT-15's, "IFTA Quarterly Returns" at least 30 days prior to the due date. ICCM, p. 8. ABC filed quarterly returns for the first, second and third quarter of 2004, all four quarters of 2005, and the first quarter of 2006, which are the subject of this evidentiary hearing.

Section 21 of the Illinois Motor Fuel Tax Law (35 ILCS 505/1 *et seq.*) incorporates by reference section 4 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*) which provides that Notices of Tax Liability issued by the Department are *prima facie* correct and *prima facie* evidence of the correctness of the determination. 35 ILCS 505/21; 35 ILCS 120/4. Once the Department has established its *prima facie* case by submitting the Notice of Audit Tax Liability into evidence, 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 order to overcome the presumption of validity attached to the NTL's, the taxpayer must produce competent evidence, identified with its book and records showing that the NTL's are incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968). Testimony alone is not enough. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991). Documentary proof is required to prevail against an assessment of tax by the Department. Sprague v. Johnson, 195 Ill. App. 3d 798 (4th Dist. 1990). On examination of the record in this case, I find that ABC has failed to demonstrate by testimony, through exhibits or through argument, evidence sufficient to overcome the Department's determination that motor fuel use tax is due for the audit period, January, 2004, to January, 2006.

Department auditor, Renaldo Tanig, received an assignment to audit the taxpayer, ABC, for the period January, 2004, through January, 2006. Mr. Tanig testified that he sent a letter to the taxpayer in May of 2006, but received no response. Mr. Tanig's supervisor called the taxpayer and the taxpayer gave a business address of 1234 Anywhere Avenue in Anywhere. When the auditor and the supervisor went to this location, they were told by a tenant that ABC had moved. The audit supervisor called ABC again and was given the phone number of ABC's certified public accountant. The accountant did not return two phone calls. Tr. pp. 21-25. During this period, the initial phase of the audit, the auditor received no books or records from the taxpayer. Mr. Tanig testified that "[W]e were not able even to discuss what the audit would be." The auditor conducted his audit using only the IFTA Quarterly Returns that the taxpayer had filed in Springfield. Tr. pp. 25-26.

The IFTA Quarterly Return requests that the taxpayer list the “total miles traveled everywhere” and “total fuel consumed everywhere.” Total miles traveled everywhere is divided by total fuel consumed everywhere to arrive at the “average fleet miles per gallon.” The auditor is able to verify total miles traveled everywhere by looking at trip reports that show the vehicle, date of the trip, beginning and ending odometer readings, and origin and destination of the trip. The auditor is able to verify total fuel consumed everywhere by looking at fuel receipts that show the name of the company that purchased the fuel, the number of gallons purchased, the state where the fuel was purchased and the price per gallon. The auditor received no information from the taxpayer to verify total miles traveled everywhere or total fuel consumed everywhere. Tr. pp. 31-36, 42, 65-66; Taxpayer’s Ex. No. 4.

On ABC’s IFTA Quarterly Returns, ABC claimed the same 5.0 average fleet miles per gallon for all quarters audited in 2004 through 2006. No documents were submitted to the auditor to verify the 5.0 average fleet mpg. The auditor characterized the 5.0 mpg for all quarters reported as “very, very unlikely.” Tr. pp. 32, 35, 60-61. The Illinois Motor Fuel Tax Law, 35 ILCS 505 *et seq.*, states that in the absence of adequate records submitted by the motor carrier, “the Department shall presume that one gallon of fuel is used for each 4.0 miles traveled in this State.” 35 ILCS 505/13a.2. The Illinois Carrier Compliance Manual for IFTA, 2006, also states under the section entitled “Audits,” that “[I]n the absence of adequate records, the auditor will use a standard of four miles per gallon.” ICCM, p. 12. The auditor revised ABC’s Quarterly Returns to reflect 4.0 average fleet miles per gallon for all reporting periods. In revising ABC’s Quarterly Returns to reflect 4.0 mpg, the auditor also revised the taxable gallons of fuel consumed by ABC for the total miles traveled. Tr. pp. 60-61; Dept. Ex. No. 1.

The IFTA Quarterly Returns require taxpayer to report “taxable miles traveled by state” (column G). Taxable miles traveled by state are divided by the average fleet mpg, as described in the preceding paragraph, to determine “taxable gallons” (column H). By lowering the mpg from 5.0 to 4.0, the auditor increased ABC’s taxable gallons. In “tax-paid gallons” (column I), the taxpayer is given credit for fuel purchased and the tax paid on the purchase. ABC’s Quarterly Returns showed tax-paid gallons of 21,835 for Quarter 1, 33,335 for Q2 and 31,075 for Q3, in 2004, 25,631 for Q1, 24,310 for Q2, 22,200 for Q3 and 13,543 for Q4 in 2005 and 11,305 for Q1 in 2006. Taxpayer’s Ex. No. 4. On the IFTA Quarterly Returns, tax-paid gallons (column I) are subtracted from taxable gallons (column H) to arrive at “net taxable gallons.” Net taxable gallons are multiplied by the individual state tax rate to determine whether the taxpayer owes tax or has a credit due. Dept. Ex. No. 1; Taxpayer’s Ex. No. 4.

The Illinois Carrier Compliance Manual for IFTA, 2006, states that “[T]he auditor will disallow tax paid fuel entries if tax-paid fuel documentation is unavailable.” ICCM, p. 12. Because ABC submitted no documentation to support the purchases in the tax-paid gallons column, the auditor decreased the tax-paid gallons to zero. The initial “Notice of Audit Tax Liability” assessed \$78,366 in motor fuel use tax plus penalties and interest. Dept. Ex. No. 1. The IFTA Quarterly Returns are used to reimburse other states for miles driven by interstate carriers. Mr. Tanig testified that “[W]e will not be able to determine what we have to credit the other states, because there is no evidence that we can see that they paid Indiana this much and so on, without the fuel receipts.” Tr. p. 48.

At a meeting between the auditor and ABC on October 17, 2007, after the completion of the initial audit, it was agreed that ABC would submit documentation and that the auditor would revise the audit based on the documentation. ABC submitted fuel receipts for the purchase of 940 ½

gallons of fuel, which the auditor gave ABC credit for. The auditor accepted ABC's reporting of total miles traveled on its returns. The auditor did not accept ABC's reporting of tax-paid gallons except for the 940 ½ gallons that ABC had receipts for. ABC did not have receipts for any other fuel purchased. Tr. pp. 37-38, 41-42, 66-67. The revised assessment of motor fuel use tax, after credit for the 940 ½ gallons, was \$61,769 plus penalties and interest. Dept. Ex. No. 1.

In his opening argument, counsel for ABC stated that "we're openly admitting here that we don't have enough documentation to prove what the purchase of fuel was for the trucks being used by ABC." Tr. p. 12. Counsel for ABC stated that, during ABC's "entire history," it owned no trucks and had no employees. ABC "expended no money for fuel." "Because it expended no money for fuel, it owed no money in tax ever." Tr. p. 12. "From the inception of the company in 2002, ABC never purchased any fuel." "The gas was paid for by the individual owner/operators that were self-employed – independent contractors that had their own companies that Mr. Doe hired to drive for ABC." Tr. p. 13. Mr. Doe, owner of ABC, testified that he did not have fuel receipts for the "tax-paid gallons" listed on ABC's IFTA Quarterly Returns because he hired independent contractors to drive for ABC, and these independent contractors purchased their own fuel. Tr. p. 72. According to Mr. Doe's testimony, he entered into "percentage agreements" with ABC's independent contractors, in which he would pay them a percentage, usually 70% to 80% of the gross, for delivering a load. The independent contractors would pay for their own "fuel, taxes, meals, hotel rooms" out of their percentage. Tr. pp. 73, 87-88.

Mr. Jim Doe testified that he and his family drove for ABC during the audit period as "individual contractors." He testified that he was paid 80% of the gross from ABC and he purchased his own fuel. Tr. pp. 131-132. Two IFTA Quarterly Returns were admitted into evidence during Ms. Jim Doe's testimony. The first return, filed for "XXXXXX Jim Doe" for the

fourth quarter of 2005 shows 315 “tax-paid gallons” of fuel purchased in Illinois. Taxpayer’s Ex. No. 3. ABC’s IFTA Quarterly Return for the same time period shows 9,820 “tax paid gallons” of fuel purchased in Illinois. Taxpayer’s Ex. No. 4. An IFTA Quarterly Return for “XXXX Jim Doe” for the third quarter of 2005 shows zero “tax-paid gallons” purchased in Illinois. Taxpayer’s Ex. No. 3. ABC’s IFTA Quarterly Return for the same time period shows 17,140 “tax-paid gallons” of fuel purchased in Illinois. Taxpayer’s Ex. No. 4.

The 315 and zero “tax-paid gallons” claimed as a credit on the Jim Doe returns obviously do not account for the 9,820 and 17,140 “tax-paid gallons” claimed as a credit on ABC’s returns for the same time period. No receipts for fuel purchases were offered into evidence by Mr. Jim Doe or ABC so I am unable to conclude that the “tax-paid gallons” claimed as a credit on the Jim Doe returns were part of the same “tax-paid gallons” claimed as a credit on ABC’s returns. According to Mr. Doe, he had “numerous,” “probably about ten” independent contractors during the audit period. Tr. p. 72. No other independent contractors testified for ABC. No other IFTA Quarterly Returns for ABC’s independent contractors were admitted into evidence. No fuel receipts from independent contractors who drove for ABC were admitted into evidence. I simply cannot conclude from Mr. Jim Doe’s testimony and his IFTA Quarterly Returns that other independent contractors who drove for ABC were purchasing their own fuel, retaining their own receipts and filing their own IFTA Quarterly Returns claiming the fuel purchases as a credit in “tax-paid gallons.” If I could conclude that ABC’s independent contractors purchased their own fuel, retained their own fuel receipts and filed their own IFTA Quarterly Returns, it still does not explain why the credits were also claimed on ABC’s IFTA Quarterly Returns, which were the subject of the Department audit and this evidentiary hearing.

Mr. Tanig testified that “[I]f you put anything in [“tax-paid gallons”] that you didn’t purchase, that is a mistake. That is not allowed.” Tr. p. 156. IF ABC did not purchase fuel, it should not have been using credits for fuel purchases to reduce its motor fuel tax liability. No plausible explanation was offered as to why ABC was claiming credits on its own returns for fuel purchased by its independent contractors. Mr. Doe admitted signing the returns. Tr. pp. 105-106. The attestation at the bottom of the returns states “[U]nder penalties of perjury, I state that I have examined this return and, to the best of my knowledge, it is true, correct and complete.” Taxpayer’s Ex. No. 4. Because of the credits for “tax-paid gallons,” that ABC claimed on its IFTA Quarterly Returns and because of the claim that the vehicles got 5.0 mpg, ABC’s IFTA Quarterly Returns, as filed, showed a total liability for the audit period of approximately \$3,300, as compared to the Department’s initial assessment of \$78,366. The returns that ABC filed were not “true, correct and complete,” as Mr. Doe attested to, if the credits which lowered ABC’s liability for motor fuel use tax belonged to and were claimed by ABC’s independent contractors.

Documentary proof is required to prevail against an assessment of tax by the Department. Sprague v. Johnson, 195 Ill. App. 3d 798 (4th Dist. 1990). At the evidentiary hearing, ABC did not provide documentary proof that the “tax paid gallons” of fuel were purchased by ABC. ABC did not provide documentary proof that the “tax-paid gallons” were purchased by and claimed by ABC’s independent contractors. A taxpayer cannot overcome the Department’s *prima facie* case merely by denying the accuracy of the Department’s assessments. Smith v. Department of Revenue, 143 Ill. App. 3d 607 (5th Dist. 1986). The lack of documentary evidence forces me to conclude that ABC has not prevailed against the Department’s assessment that motor fuel use tax is due.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Audit Tax Liability, issued October 30, 2006, as amended by the reaudit on May 21, 2007, should be finalized.

ENTER:

June 26, 2008

Kenneth J. Galvin
Administrative Law Judge