

MF 09-3

Tax Type: Motor Fuel Use Tax

Issue: Failure To Have Motor Fuel Use Tax Decal/Permit

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

ABC TRUCKS, LLC

Taxpayer

Docket # 07-ST-0000

**Acct # 00-00000, 00-00000,
00-00000, 00-00000**

**NTL # 00-000000 0, 00-000000 0,
00-000000 0, 00-000000 0**

RECOMMENDATION FOR DISPOSITION

Appearances: Terry Shafer, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Duane D. Young of LaBarre, Young & Behnke for ABC Trucks, LLC

Synopsis:

On April 10, 2007, the Department of Revenue ("Department") issued four Notices of Tax Liability ("NTLs") to ABC Trucks, LLC ("taxpayer") for motor fuel use tax. The NTLs assess penalties and allege that the taxpayer was XXXed when commercial motor vehicles were found operating in Illinois without the following: (1) valid motor fuel use tax licenses and properly displayed decals; or (2) valid Illinois Single-Trip permits; or (3) valid 30-day International Fuel Tax Agreement ("IFTA") temporary permits. The licenses and permits are required pursuant to section 13a.4 of the Motor Fuel Tax Act (35 ILCS 505/1 *et seq.*). The taxpayer timely protested the NTLs

and requested a hearing. Prior to the hearing, the parties filed stipulations along with an affidavit and documents. At the hearing, additional documents were presented with oral arguments. After reviewing the evidence that was submitted by both parties, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. The taxpayer is a motor vehicle dealer that buys and sells trucks. The taxpayer's only place of business is in the State of Tennessee. (Stip. #1)
2. On March 13, 2007, the taxpayer purchased five Kenworth trucks from XXX Illinois Trucks, Inc. d/b/a XXX Group, Inc. ("seller"), which is located in Springfield, Illinois. (Affidavit, ¶2; Taxpayer Ex. A)
3. The trucks were purchased for resale at the taxpayer's Tennessee dealership. (Stip. #2)
4. On March 22, 2007, the seller provided the trucks with Illinois seven-day permits, which were acquired by the seller, in bulk, from the Illinois Secretary of State. The permits are affixed to any vehicle temporarily licensed for a period of seven days or less. In this case, the permits enabled the trucks to be lawfully operated on the highways of the United States for transport from Springfield, Illinois to the taxpayer's dealership in Tennessee. (Thomas Affidavit, ¶4; Taxpayer Ex. B)
5. On March 22, 2007, four of the taxpayer's trucks were stopped by agents of the Department's Bureau of Criminal Investigations.¹ At the time that they were stopped, the trucks did not have motor fuel use tax licenses and did not display decals. (Stip. #8, 9; Dept. Ex. #2)

¹ Although the taxpayer purchased five trucks, only four of the trucks were stopped on the day in question. (Tr. p. 6)

6. The taxpayer is not a common carrier and is not in the business of transporting persons or property for hire. (Stip. #4)
7. The trucks in question were semi tractors, and none of them were pulling trailers or cargo. Each truck had three axles. (Stip. #6; Tr. p. 5)
8. On April 10, 2007, the Department issued four NTLs to the taxpayer for motor fuel use tax for failure to have valid licenses, decals, or permits while operating the vehicles on March 22, 2007.² The first NTL, number 00-000000 0, shows a penalty due of \$1,000. The other three NTLs, numbers 00-000000 0, 00-000000 0, and 00-000000 0, show penalties due of \$2,000 for a second or subsequent occurrence. The NTLs were admitted into evidence under the certification of the Director of the Department. (Dept. Ex. #1).
9. The Department agreed that each penalty for NTL numbers 00-000000 0, 00-000000 0, and 00-000000 0, should be reduced from \$2,000 to \$1,000 because the stops are considered first time occurrences. (Tr. p. 28)

CONCLUSIONS OF LAW:

The NTLs issued by the Department allege that the taxpayer was cited when commercial motor vehicles were found operating in Illinois without proper licenses, decals, or permits pursuant to section 13a.4 of the Motor Fuel Tax Act (“Act”), which provides in part as follows:

Except as provided in Section 13a.5 of this Act, no motor carrier shall operate in Illinois without first securing a motor fuel use tax license and decals from the Department or a motor fuel use tax license and decals issued under the International Fuel Tax Agreement by any member jurisdiction. (35 ILCS 505/13a.4).

² The NTLs were also issued to the drivers of the trucks, but the penalties in this case may only be imposed against “the person required to obtain” the licenses or permits. 35 ILCS 505/13a.6(b).

Section 13a.5 provides an exception for motor carriers holding a single trip permit and provides as follows:

As to a commercial motor vehicle operated in Illinois in the course of ABC traffic by a motor carrier not holding a motor fuel use tax license issued under this Act, **a single trip permit authorizing operation of such commercial motor vehicle for a single trip through the State of Illinois, or from a point on the border of this State to a point within and return to the border may be issued by the Department or its agents after proper application.** The fee for each single trip permit shall be \$20 and such single trip permit shall be valid for a period of 72 hours. This fee shall be in lieu of the tax required by Section 13a of this Act, all reports required by Section 13a.3 of this Act, and the registration, decal display and furnishing of bond required by Section 13a.4 of this Act.... (emphasis added; 35 ILCS 505/13a.5).

A "motor carrier" is defined as any person who operates or causes to be operated any commercial motor vehicle on any highway in Illinois. 35 ILCS 505/1.17. The Act defines "commercial motor vehicle" as follows:

[A] motor vehicle used, designed or maintained for the transportation of persons or property and either having 2 axles and a gross vehicle weight or registered gross vehicle weight exceeding 26,000 pounds ..., or having 3 or more axles regardless of weight, or that is used in combination, when the weight of the combination exceeds 26,000 pounds ..., except for motor vehicles operated by this State or the United States, recreational vehicles, school buses, **and commercial motor vehicles operated solely within this State for which all motor fuel is purchased within this State.** Vehicles that are exempted from registration, but are required to be registered for operations in other jurisdictions may apply for a motor fuel use tax license and decal under the provisions of the International Fuel Tax Agreement referenced in Section 14a of this Act. (emphasis added; 35 ILCS 505/1.16).

Section 13a.6 of the Act states that if a commercial motor vehicle is found operating in Illinois without registering and securing a valid motor fuel use tax license, then the person required to obtain a license or permit under Section 13a.4 or 13a.5 of the Act must pay a minimum of \$1,000 as a penalty. 35 ILCS 505/13a.6(b). For each subsequent occurrence, the person must pay a minimum of \$2,000 as a penalty. *Id.*

Section 21 of the Act incorporates by reference section 5 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the Department's determination of the amount of tax owed is *prima facie* correct and *prima facie* evidence of the correctness of the amount of tax due. 35 ILCS 505/21; 120/5. Once the Department has established its *prima facie* case, the burden shifts to the taxpayer to prove by sufficient documentary evidence that the assessment is incorrect. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203, 217 (1st Dist. 1991); Lakeland Construction Co., Inc. v. Department of Revenue, 62 Ill.App.3d 1036, 1039 (2nd Dist. 1978).

The taxpayer argues that the Act was not violated in this case because the day before the taxpayer picked up the trucks, the seller fueled the trucks at a gas station in Springfield, Illinois, and paid tax on the fuel. The taxpayer presented three receipts showing the purchase of diesel fuel by the seller, and the taxpayer claims that the seller purchased enough fuel to get the trucks over the border. The taxpayer, therefore, contends that all motor fuel taxes that were required to be paid were actually paid by the seller when the trucks were fueled.

The taxpayer believes the purpose of the Act is to prevent trucks from burning fuel in Illinois that was purchased in another state, and that did not happen. In this case, Illinois trucks were acquired by an out-of-state taxpayer; the trucks were fueled in Illinois and then were taken out of Illinois. The taxpayer claims that because (1) the trucks were fueled in Illinois; (2) retail tax was paid in Illinois; and (3) the trucks exited the State, there is no possibility that these trucks burned fuel in Illinois that was purchased in another state.

The taxpayer asserts that it is not a motor carrier, and its trucks are not commercial motor vehicles. The taxpayer maintains that when the legislature changed the definition of commercial motor vehicle, it was determined “to remove the idea of

dealer and include the idea of carrier.”³ (Tr. p. 31) In the taxpayer’s view, there is no distinction between a motor carrier and a common carrier. The parties stipulated that the taxpayer is not a common carrier and is not in the business of transporting persons or property for hire.

The taxpayer also argues that the Department has to “twist” the notion of commercial motor vehicle to include a truck that is inventory and is being moved from one place to another. (Tr. p. 34) The definition includes an exception for vehicles that are operated solely within the State of Illinois for which all the motor fuel is purchased within Illinois. The taxpayer believes this exception applies because no one brought fuel from another state to get these trucks out of Illinois, and there was no loss to the State of Illinois because it collected taxes on the fuel that was burned here.

According to the taxpayer, the provision for single trip permits also does not apply because the taxpayer did not go from a point on the border to a point within Illinois and then return to the border. The taxpayer claims that the trucks did not come into the State of Illinois and go out from one point, and they did not go through the State of Illinois. They left a point in the State of Illinois from where they were fueled and then exited Illinois. The taxpayer claims that because tax was paid on the fuel that was purchased in Illinois, the State of Illinois was not cheated out of any tax. The taxpayer admits that the State of Illinois “gained” by the amount of fuel that was burned outside of Illinois on the highways of Kentucky and Tennessee (tr. p. 32), but the taxpayer argues that single trip permits were not required, and the stops and citations were unlawful.

The taxpayer notes the following: (1) the Act requires apportionment of the tax among the states; (2) motor carriers involved in ABC commerce fall under the apportionment rules; and (3) motor carriers who purchase fuel in Illinois but use it in

³ Prior to January 1, 1994, the definition of “commercial motor vehicle” in the Act included an exception for “commercial motor vehicles owned by a manufacturer or dealer and held for sale, even though incidentally moved or operated on the highway or used for purposes of testing, demonstrating, or delivery.” 35 ILCS 505/1.16 (1992). Public Act 88-480 removed this exception.

another state may receive a refund or credit. The taxpayer argues that the purpose of apportionment is to make sure that each state gets its fair share and that the Act does not violate the Commerce Clause of the U.S. Constitution. The taxpayer maintains that the apportionment provisions of the Act are corroborative evidence of the fact that the Act does not apply in this case because the fuel was purchased in Illinois and was burned either in or outside Illinois. The taxpayer believes that the Department is trying to double tax it because tax was already paid on the fuel that was used in these trucks and burned in the State of Illinois.

The Department's *prima facie* case was established in this matter when the Department's certified copies of the NTLs were admitted into evidence. The burden of proof then shifted to the taxpayer to prove by sufficient documentary evidence that the NTLs are incorrect. Mel-Park Drugs, *supra*. The taxpayer has failed to meet that burden in this case.

First, the taxpayer's trucks clearly fall within the definition of "commercial motor vehicle." The trucks are motor vehicles that are used, designed or maintained for the transportation of persons or property, and they have 3 axles. The exception in the definition for "commercial motor vehicles operated solely within this State for which all motor fuel is purchased within this State" (35 ILCS 505/1.16) does not apply to the taxpayer's vehicles. The facts are undisputed that the taxpayer drove the trucks to Tennessee, so the trucks were not "operated solely within this State." In addition, as both parties have noted, there previously was an exclusion from the definition for vehicles that were owned by dealers and held for sale even though they incidentally moved or operated on the highway. See 35 ILCS 505/1.16 (1992). Even though that exclusion would have applied in this case, it was removed from the definition effective January 1, 1994 through Public Act 88-480. The taxpayer's trucks, therefore, are commercial motor vehicles.

Because the taxpayer's trucks are commercial motor vehicles, the taxpayer also falls within the definition of "motor carrier." A "motor carrier" is any person who

operates or causes to be operated any commercial motor vehicle on any highway in Illinois. 35 ILCS 505/1.17. The fact that the parties stipulated that the taxpayer is not a common carrier is not relevant to this dispute. Contrary to the taxpayer's contention, there is a difference between the terms "motor carrier" and "common carrier." A common carrier may be one who transports persons or property for hire, but the Act does not include a reference to or a definition of the term "common carrier." The Act does, however, include a reference to and a definition of "motor carrier." The taxpayer falls within that definition because it operated commercial motor vehicles in Illinois on the day in question. Although the taxpayer claims that the legislature was determined "to remove the idea of dealer and include the idea of carrier" (tr. p. 31), the term "motor carrier" has been in the Act since the motor fuel use tax was first added in 1977. See 35 ILCS 505/1.17. The removal of the exception for dealers did not change the term "motor carrier."

Because the taxpayer's trucks are included in the definition of commercial motor vehicle and the taxpayer is a motor carrier as that term is defined in the Act, the taxpayer was required to obtain licenses and decals or single trip permits under sections 13a.4 and 13a.5. Because the taxpayer is a dealer who was transporting inventory with temporary licenses, the circumstances of this case clearly warranted obtaining a single trip permit under section 13a.5. The fee for the single trip permit is "in lieu of the tax required by Section 13a..., all reports required by Section 13a.3..., and the registration, decal display and furnishing of bond required by Section 13a.4." 35 ILCS 505/13a.5.

The taxpayer's claim that the single trip permit provision does not apply is without merit. A single trip permit authorizes operation of a commercial motor vehicle "for a single trip through the State of Illinois, or from a point on the border of this State to a point within and return to the border." *Id.* After the taxpayer purchased the vehicles, it picked them up in Springfield, Illinois and drove them to Tennessee. The trucks, therefore, were used for a single trip through Illinois.

In addition, contrary to the taxpayer's contention, the apportionment provisions are not corroborative evidence of the fact that the Act does not apply. The apportionment rules are "designed to assure fairness by basing the tax upon the number of miles actually traveled on Illinois' roads." Owner-Operator Independent Drivers Association v. Bower, 325 Ill. App. 3d 1045, 1054 (1st Dist. 2001). The taxpayer admitted that Illinois "gained" because the fuel that was allegedly purchased in Illinois was burned in Kentucky and Tennessee. (Tr. p. 32) The apportionment rules are intended to prevent this from happening; the fee that the taxpayer should have paid for the single trip permit is, therefore, in lieu of the tax and reports required by sections 13a and 13a.3.

Notwithstanding the fact that tax may have been paid when the fuel was purchased, although the taxpayer claims that it is being "double taxed," the seller is the one who allegedly paid the tax on the fuel, not the taxpayer. Moreover, each of the 3 receipts that were presented to verify that tax was paid on the purchase of the fuel shows approximately 50 gallons of diesel fuel were purchased from 3 different pumps for a total of 150 gallons. The taxpayer claims this is proof that it put approximately 30 gallons into each of the 5 trucks that it purchased. (Affidavit, ¶5) As the Department has indicated, however, if 30 gallons were put into each of the 5 trucks with fuel from 3 different pumps, then 2 of the trucks would have to have been fueled at two different pumps. Because one vehicle normally is not fueled at two different pumps, this does not seem plausible.

Finally, the taxpayer mentioned in its closing argument that it raised constitutional issues in its protest. (Tr. p. 36) The Department responded by indicating that these issues were not raised at the pretrial conference.⁴ The taxpayer should have raised the constitutional issues at the pretrial conference, the purpose of which is to identify the

⁴ The pretrial order included the following: "The issue in this case is whether the taxpayer is liable for penalties for operating commercial motor vehicles in Illinois without valid motor fuel use tax licenses and without properly displaying decals pursuant to the Motor Fuel Tax Act (35 ILCS 505/1 *et seq.*)." (Pretrial Order 8/27/08) The protest in this case included the following: "The issuance of the citation violates the equal protection and due process clauses of both the United States and Illinois Constitutions."

issues. See 86 Ill. Admin. Code §200.140; S. Ct. Rule 218(c). Even if it is assumed that the taxpayer properly raised the issues, the taxpayer bears the burden of rebutting the strong presumption of constitutionality that the statute carries. See Owner-Operator Independent Drivers Association, at 1049. The taxpayer failed to cite pertinent authority or support its constitutional claims with case law. See Obert v. Saville, 253 Ill. App. 3d 677, 682 (2nd Dist. 1993) (bare contentions in the absence of argument or citation of authority do not merit consideration). It, therefore, cannot be found that the taxpayer has met its burden of showing that the penalties in this case violate the equal protection or due process clauses.

Recommendation:

For the foregoing reasons, it is recommended that Notice of Tax Liability number 00-000000 0 be affirmed. It is further recommended that the remaining three NTLs, numbers 00-000000 0, 00-000000 0, and 00-000000 0, be reduced to \$1,000.

Linda Olivero
Administrative Law Judge

Enter: March 30, 2009