

MF 01-11

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**

"ADIRONDACK LANDSCAPING)	Docket No.	00-ST-0000
CONTRACTORS, INC.",)	FEIN:	00-00000000
Taxpayer)		
v.)		
THE DEPARTMENT OF REVENUE)	John E. White,	
OF THE STATE OF ILLINOIS)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: "John Doe", appeared, pro se, for taxpayer; Gary Stutland appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose when "Adirondack Landscaping Contractors, Inc." ("Adirondack" or "taxpayer") protested the Illinois Department of Revenue's ("Department") denial of its claim for refund. Taxpayer filed its claim to request a refund of motor fuel tax it paid on fuel purchased for use in excavating vehicles that were not used on Illinois highways.

A hearing on "Adirondack's" protest was held at the Department's offices in Chicago. I have reviewed the evidence offered at hearing, and I am including in this recommendation findings of fact and conclusions of law. I recommend that "Adirondack's" claim be denied.

Findings of Fact:

1. Taxpayer is a landscaping contractor that operates in the western suburbs of Chicago. Department Ex. 1, p. 1; Hearing Transcript ("Tr.") pp. 8-9 (testimony of "John Doe" ("Doe")).

2. Taxpayer purchases special (i.e., diesel) fuel for use in excavating equipment, which it uses off highway. Department Ex. 1, p. 1; Taxpayer Ex. 2.
3. Taxpayer filed a claim for refund for the tax it paid when purchasing special fuel during the period beginning 1/1/00 through 6/30/00. Department Ex. 1.
4. Taxpayer did not purchase dyed diesel fuel during that period. Department Ex. 1, pp. 2-3. Instead, it purchased undyed diesel fuel at a nearby gas station. *Id.*; Tr. pp. 17-18 ("Doe").
5. "Adirondack" unsuccessfully attempted to receive permission from the Village of (Someplace) to place a tank to store dyed diesel fuel on its facility. Tr. pp. 7-8, 18-19 ("Doe").

Public Act 91-173's Amendment to the Illinois Motor Fuel Tax Act Re: Dyed Fuel

6. Public Act 91-173, which became effective January 1, 2000 (*see* P.A. 91-173, § 99), added a new section 4d to the Illinois Motor Fuel Tax Act ("IMFTA" or "the Act"). Public Act 91-173, § 5.

7. Section 4d provides:

All special fuel sold or used for non-highway purposes must contain only the dye Solvent Red 164 at a concentration spectrally equivalent to at least 3.9 pounds of the solid dye standard Solvent Red 26 per thousand barrels of special fuel except kerosene-type jet fuel sold for the propulsion of any aircraft. The dye must be added prior to removal from a terminal rack. The Department may also require all special fuel sold for non-highway use to have a marker added.

P.A. 91-173 § 5; 35 ILCS 505/4d (2000).

8. Section 5 of Public Act 91-173 also amended § 13 of the IMFTA to provide, in pertinent part:

Any person other than a distributor or supplier, who

loses motor fuel through any cause or uses motor fuel (upon which he has paid the amount required to be collected under Section 2 of this Act) for any purpose other than operating a motor vehicle upon the public highways or waters, shall be reimbursed and repaid the amount so paid. Any person who purchases motor fuel in Illinois and uses that motor fuel in another state and that other state imposes a tax on the use of such motor fuel shall be reimbursed and repaid the amount of Illinois tax paid under Section 2 of this Act on the motor fuel used in such other state.

Reimbursement and repayment shall be made by the Department upon receipt of adequate proof of taxes paid to another state and the amount of motor fuel used in that state.

Claims for such reimbursement must be made to the Department of Revenue, duly verified by the claimant (or by the claimant's legal representative if the claimant has died or become a person under legal disability), upon forms prescribed by the Department. The claim must state such facts relating to the purchase, importation, manufacture or production of the motor fuel by the claimant as the Department may deem necessary, and the time when, and the circumstances of its loss or the specific purpose for which it was used (as the case may be), together with such other information as the Department may reasonably require. No claim based upon idle time shall be allowed. Claims for full reimbursement must be filed not later than one year after the date on which the tax was paid by the claimant.

If, however, a claim for such reimbursement otherwise meeting the requirements of this Section is filed more than one year but less than 2 years after that date, the claimant shall be reimbursed at the rate of 80% of the amount to which he would have been entitled if his claim had been timely filed.

The Department may make such investigation of the correctness of the facts stated in such claims as it deems necessary. When the Department has approved any such claim, it shall pay to the claimant (or to the claimant's legal representative, as such if the claimant has died or become a person under legal disability) the reimbursement provided in this Section, out of any moneys appropriated to it for that purpose.

Any credit or refund that is allowed under this Section shall bear interest at the rate and in the manner

specified in the Uniform Penalty and Interest Act.

No claim based upon the use of undyed diesel fuel shall be allowed except for undyed diesel fuel used by a commercial vehicle, as that term is defined in Section 1-111.8 of the Illinois Vehicle Code, for any purpose other than operating the commercial vehicle upon the public highways and unlicensed commercial vehicles operating on private property. Claims shall be limited to commercial vehicles that are operated for both highway purposes and any purposes other than operating such vehicles upon the public highways. The Department shall promulgate regulations establishing specific limits on the amount of undyed diesel fuel that may be claimed for refund.

For purposes of claims for refund, “loss” means the reduction of motor fuel resulting from fire, theft, spillage, spoilage, leakage, or any other provable cause, but does not include a reduction resulting from evaporation or shrinkage due to temperature variations.

P.A. 91-173, § 5; 35 ILCS 505/13 (2000) (emphasis added).

9. The excavating equipment in which "Adirondack" used undyed special fuel and which were identified on its claim are not commercial vehicles, as that term is defined in Section 1-111.8 of the Illinois Vehicle Code.¹ Department Ex. 1, p. 3; Taxpayer Ex. 2.

Conclusions of Law:

Section 2 of the IMFTA imposes a tax on “... the privilege of operating motor vehicles upon the public highways and recreational-type watercraft upon the waters of this State.” 35 ILCS 505/2. Tax is measured by the cost price of fuel, per gallon (35 ILCS 505/2), and is to be collected by licensed receivers, distributors or suppliers, or

¹ Section 1-111.8 of the Illinois Vehicle Code defines a commercial vehicle as “[a]ny vehicle operated for the transportation of persons or property in the furtherance of any commercial or industrial enterprise, For-Hire or Not-For-Hire, but not including a commuter van, a vehicle used in a ridesharing arrangement when being used for that purpose, or a recreational vehicle not being used commercially. 625 ILCS 5/1-111.8.

paid directly by others. 35 ILCS 505/5, 6, 6a, 7, 7b.

Section 21 of the IMFTA incorporates various sections of the Retailers' Occupation Tax Act ("ROTA"). 35 ILCS 505/21. Among those sections is § 6b, which provides:

As soon as practicable after a claim for credit or refund is filed, the Department shall examine the same and determine the amount of credit or refund to which the claimant or the taxpayer's legal representative ... is entitled and shall, by its Notice of Tentative Determination of Claim, notify the claimant or his legal representative of such determination, which determination shall be prima facie correct. Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy of the Department's record relating thereto, in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the Department's determination, as shown therein. ****

35 ILCS 120/6b. Here, the Department introduced its partial denial of "Adirondack's" claim under the certificate of the Director. Department Ex. 1, p. 4. Pursuant to § 21 of the IMFTA, that determination is prima facie correct. 35 ILCS 505/21.

The Department's prima facie case is a rebuttable presumption. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157, 242 N.E.2d 205, 207 (1968); DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276, 279, 48 N.E.2d 926, 927 (1943). A taxpayer cannot overcome the presumption merely by denying the accuracy of the Department's determination. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988). Instead, a taxpayer has the burden to present evidence that is consistent, probable and closely identified with its books and records, to

show that the determination is not correct. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 333, 155 N.E.2d 3, 7 (1958); A.R. Barnes & Co., 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053. I conclude that "Adirondack" has not borne its burden in this case.

First of all, "Adirondack" did not even establish that it purchased taxable fuel in the amounts reported in its claim. "Adirondack's" claim asked for a refund for motor fuel tax paid regarding its purchases of 3,750 gallons of fuel. Department Ex. 1, p. 2. At hearing, however, it introduced just one receipt showing that it purchased 89.25 gallons of special fuel on 1/13/01, a date which is not even in the claim period. Taxpayer Ex. 1. While taxpayer's witness testified that its accountant had copies of all of its receipts for the claim period (*see* Tr. pp. 10-11 ("Doe")), it did not submit such evidence at hearing.

Taxpayer's primary argument at hearing was that the Department had, for a long time, accepted its refund claims in the same manner as the one it filed for this claim period. *See* Tr. pp. 7-9, 20 ("Doe"). Taxpayer argued that it was not economically feasible for it to purchase dyed fuel for its business, because no dealer close to it sold dyed fuel (*see* Tr. p. 18 ("Doe")), and because the cost of arranging for daily deliveries in small amounts would cost more than any tax savings. Tr. pp. 23-24 ("Doe"). Because of those compliance costs, taxpayer argued that the Department should continue to grant its refund claims as it had in the past. *See* Tr. pp. 7-9, 20.

Public Act 91-173, however, significantly changed the IMFTA, and the effective date of that amendatory act coincides with the beginning of the claim period at issue here. *Compare* Public Act 91-173, § 99 *with* Department Ex. 1. Perhaps the most significant changes involved the legislature's addition of § 4d, which provided that "[a]ll special fuel sold or used for non-highway purposes must contain only the dye Solvent Red 164 ." (35

ILCS 505/4d), and its amendment to § 13, which now provides that “[n]o claim based upon the use of undyed diesel fuel shall be allowed except for undyed diesel fuel used by a commercial vehicle, as that term is defined in Section 1-111.8 of the Illinois Vehicle Code” 35 **ILCS 505/13**.

The text used in those two sections requires no interpretation; it is clear. Beginning on January 1, 2000, all special fuel to be sold or used tax free in Illinois by non-commercial vehicles for off-highway purposes had to be dyed fuel. 35 **ILCS 505/4d, 13**. The part of taxpayer’s claim that is at issue here involves taxpayer’s purchase of undyed special fuel that it used in non-commercial vehicles. Department Ex. 1, pp. 1 (Step 4, question 10), 4 (denial); Taxpayer Ex. 2. The Department is obliged to administer and enforce the IMFTA’s provisions, not ignore them. 20 **ILCS 2505/2505-20** (2000). Because §§ 4d and 13 of the IMFTA are clear, taxpayer’s claim must be denied.

Conclusion:

I conclude that "Adirondack" has not shown entitlement to the refund sought. 35 **ILCS 505/13**. I recommend, therefore, that the Director finalize the Department’s denial of taxpayer’s claim.

April 24, 2001
Date

Administrative Law Judge