

MF 01-12

Tax Type: Motor Fuel Use Tax

Issue: County Motor Fuel Tax-Point of Delivery/Purchase Order  
Acceptance

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

THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS,

v.

"HARRISBURG FUEL OIL CO.",  
Taxpayer

No. 99-ST-0000  
IBT# 0000-0000  
NTL CF 1998000000000000  
SF 1998000000000000

Ted Sherrod

Administrative Law  
Judge

**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Special Assistant Attorney General Mark Dyckman on behalf of the Illinois Department of Revenue; James R. Schirott, Esq., Phillip Luetkehans, Esq. and Kenneth E. Johnson, Esq. of Schirott & Luetkehans, P.C. on behalf of "Harrisburg Fuel Oil Co."

**Synopsis:**

This matter is before this office as the result of a protest by "Harrisburg Fuel Oil Co." (hereinafter referred to as the "taxpayer") of an Illinois Department of Revenue assessment of DuPage County Motor Fuel Tax and Retailers' Occupation Tax for the period July 1, 1995 through August 31, 1998. The Department of Revenue ("Department") and the taxpayer have submitted agreed stipulations of fact in lieu of a

formal evidentiary hearing. Therefore, this case is being decided based on the stipulation of facts and the briefs submitted by the parties. Following a review of the documents of record, it is recommended that this matter be resolved in favor of the Department.

**Findings of Fact:**

1. The Department's *prima facie* case, inclusive of all jurisdictional elements was established by the admission into evidence of the Excise Tax Returns Correction or Tax Due Determination covering tax periods July 1, 1995 through August 31, 1998, showing a proposed County Motor Fuel Tax plus penalties totaling \$3,179,610, and the SC-10-K, Audit Correction and/or Determination of Tax Due for the period July 1, 1995 through August 31, 1998 showing a proposed liability for Retailers' Occupation Tax, covering tax periods July 1, 1995 through August 31, 1998 plus penalties totaling \$203,988. Dept. Group Ex. 1.
2. "Harrisburg Fuel Oil Co." is an Illinois corporation engaged in the business of bulk motor fuel sales. Stip. ¶ 1.
3. During the tax periods in controversy, all purchase orders for the purchase of motor fuel from the taxpayer were accepted in DuPage County and all deliveries of fuel purchased from the taxpayer were made to Cook County from Will County. Stip. ¶ 2.
4. In 1989, the Illinois General Assembly passed the County Motor Fuel Tax law which authorizes the counties of DuPage, Kane and McHenry to impose a local tax on the sale of motor fuel; pursuant to this authorization, the DuPage County Board passed a four cent (\$.04) per gallon tax on the sale of motor fuel in 1989. Stip. ¶ 15, 16, 18.
5. During the tax periods in controversy, Cook County had in effect the Cook County Retail Sale of Gasoline and Diesel Fuel Tax Ordinance ("Cook County Motor Fuel

Tax”) which was passed under Cook County’s home rule powers; the taxpayer paid \$3,196,779.92 on both motor fuel and diesel fuel delivered to Cook County. Stip. ¶¶ 19, 20.

6. During the tax periods in controversy, the taxpayer paid all motor fuel taxes based on the tax applicable in the jurisdiction to which the motor fuel was delivered; accordingly, it paid Cook County Motor Fuel Tax on all deliveries made within Cook County. Stip. ¶¶ 21, 23, 24.
7. The Department interprets the DuPage County Motor Fuel Tax to be due to the jurisdiction in which the purchase order for the sale of motor fuel is accepted (“purchase order acceptance”) rather than the jurisdiction to which motor fuel is delivered (“point of delivery”). Stip. ¶ 25.
8. On December 30, 1998, the taxpayer was served by the Department with a Notice of Tax Liability for DuPage County Motor Fuel Tax covering the tax periods July 1, 1995 through August 31, 1998 in the amount of \$3,129,222 which included tax in the amount of \$2,728,948 and interest in the amount of \$400,274. Stip. ¶¶ 3, 5, 6, 7.
9. On or about December 30, 1998, the taxpayer was also served by the Department with a Notice of Tax Liability for Retailers’ Occupation Tax (“ROT”) for the period July 1, 1995 through August 31, 1998 in the amount of \$203,331 which included \$177,381 in tax and \$25,950 in interest. Stip. ¶¶ 8, 9, 10, 11.

**Conclusions of Law:**

### **Analysis of 55 ILCS 1035.1**

The issue in this case is whether DuPage County can lawfully impose its County Motor Fuel Tax (“CMFT”) on a motor fuel retailer accepting orders for motor fuel in DuPage County, but making deliveries of motor fuel exclusively to Cook County. In 1989, the Illinois General Assembly passed Public Act 86-16. The Act addresses statewide transportation needs and provides assistance to the different areas of the state. The County Motor Fuel Tax law (55 ILCS 5/5-1035.1) is part of this Act. It provides in pertinent part as follows:

The county board of the counties of DuPage, Kane and McHenry may, by an ordinance or resolution adopted by an affirmative vote of a majority of the members elected or appointed to the county board, impose a tax upon all persons engaged in the county in the business of selling motor fuel, as now or hereafter defined in the Motor Fuel Tax Law, at retail for the operation of motor vehicles upon public highways or for the operation of recreational watercraft upon waterways. ... The tax may be imposed, in half-cent increments, at a rate not exceeding 4 cents per gallon of motor fuel sold at retail within the county for the purpose of use or consumption and not for the purpose of resale. The proceeds from the tax shall be used by the county solely for the purpose of operating, constructing and improving public highways and waterways and acquiring real property and right-of-ways for public highways and waterways within the county imposing the tax.

#### **55 ILCS 5/5-1035.1**

Pursuant to the authority granted by this statute, the county boards of DuPage, Kane and McHenry counties approved ordinances imposing a fuel tax per gallon on motor fuel sold at retail.

The second paragraph of the County Motor Fuel Tax law provides that the Department of Revenue is charged with certain functions. Specifically, this provision states as follows:

A tax imposed pursuant to this Section, and all civil penalties that may be assessed as an incident thereof, shall be administered, collected and enforced by the Illinois Department of Revenue in the same manner as the tax imposed under the Retailers' Occupation Tax Act, as now or hereafter amended, insofar as may be practicable; except that in the event of a conflict with the provisions of this Section, this Section shall control.

55 ILCS 5/5-1035.1

The Retailers' Occupation Tax statute does not specifically address the rules for determining the proper location of a sale. However, substantial guidance can be found in regulations issued by the Department for determining where sales tax is due under the Home Rule Municipal Retailers' Occupation Tax Act (65 ILCS 5/8-11-1) and the Regional Transportation Authority retailers' occupation tax it administers. (70 ILCS 3615/4.03).<sup>1</sup>

The home rule municipal and RTA retailers' occupation tax regulations state that the Department considers the seller's acceptance of the purchase order or other contracting action in the making of the sales contract the most important single factor in the occupation of selling. 86 Ill. Admin. Code Sec. 320.115, 86 Ill. Admin. Code Sec. 270.115. Accordingly, these regulations provide that if the purchase order which is an acceptance of the seller's complete and unconditional offer to sell is received and accepted by the seller's place of business, the seller incurs liability in that jurisdiction. *Id.*

The Department's use of a "purchase order acceptance" location rather than a "point of delivery" location to determine the local jurisdiction entitled to impose tax is also evidenced by several Department letter rulings, including PLR-81-1566, PLR 82-0405, PLR 83-0579 and PLR 90-0857. While Department letter rulings are not binding

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<sup>1</sup> Administrative regulations have the force of law in Illinois and are construed under the same rules that govern the construction of statutes. Northern Illinois Automobile Wreckers & Rebuilders Association v. Dixon, 75 Ill. 2d 53 (1979), cert. den., 444 U.S. 844 (1979).

precedents, they offer insight into the Department's interpretation of governing statutes and regulations, a role which the courts have recognized. Container Corp. of America v. Wagner, 293 Ill. App. 3d 1089, 1096 (1<sup>st</sup> Dist. 1997), Oscar L. Paris Co. v. Lyons, 8 Ill. 2d 590, 598 (1956), *quoting* Skidmore v. Swift & Co., 323 U.S. 134 (1944) (“We consider the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance”).

Since 55 ILCS 5/5-1035.1 mandates that the CMFT “shall be administered ... in the same manner as tax imposed under the Retailers’ Occupation Tax Act”, the Department’s use of a “purchase order acceptance” test to determine the locality to which CMFT is due, is legally supportable. The taxpayer admittedly failed to determine the jurisdiction to which CMFT is due based on the location of purchase order acceptance. Instead, it determined the locality entitled to motor fuel tax based on the county to which motor fuel was delivered. As a consequence, it failed to pay DuPage CMFT on any of its sales during the tax period in controversy, because all of its sales were to Cook County purchasers. Stip. ¶ 2.

The record shows that the taxpayer accepted orders for motor fuel in DuPage County. Since the Department uses a location of purchase order acceptance test to determine where tax is due, the taxpayer was required to self assess and remit DuPage CMFT. Since the taxpayer did not do so, the Department assessed the taxpayer for unpaid CMFT plus penalties and interest.

The Department has adopted two regulations, 86 Ill. Admin. Code Sec. 130.435(c) and 86 Ill. Admin. Code Sec. 130.2060(c) explaining the impact of the CMFT on the computation of ROT liability. 86 Ill. Admin. Code Sec. 130.435(c) provides as follows:

The Underground Storage Tank Tax imposed under Section 2a of the Motor Fuel Tax Law and the Environmental Impact Fee imposed under the Environmental Impact Fee Law are includable in gross receipts subject to Retailers' Occupation Tax because such taxes are imposed upon receivers of fuel and not upon consumers. In addition, County Motor Fuel Taxes imposed under the County Motor Fuel Tax Law are includable in gross receipts subject to Retailers' Occupation Tax because such taxes are imposed upon retailers of motor fuel and not upon consumers. (emphasis added)  
86 Ill. Admin. Code Sec. 130.435(c)

86 Ill. Admin. Code Sec. 130.2060(c) provides as follows:

In addition, the Cook County Motor Fuel Tax is imposed upon the consumer and is therefore also deductible from gross receipts. However, County Motor Fuel Taxes imposed under the County Motor Fuel Tax Law are includable in gross receipts subject to Retailers' Occupation Tax because such taxes are imposed upon retailers of motor fuel and not upon consumers. (emphasis added)  
86 Ill. Admin. Code Sec. 130.2060(c)

The clear import of these regulations is that the CMFT must be included in the taxpayer's ROT tax base when computing ROT due on sales of motor fuel. The taxpayer did not include the DuPage CMFT in computing sales tax due as required by the Department's regulations. Accordingly, the Department also assessed the taxpayer for unpaid ROT plus penalties and interest.

While the CMFT does not incorporate any sections of the Retailers' Occupation Tax, it clearly authorizes the Department to utilize enforcement powers granted to it by the Retailers' Occupation Tax Act ("ROTA") in administering the CMFT. 55 ILCS 5/5-1035.1. One such enforcement provision, Section 5 of the ROTA (35 ILCS 120/5),

governs the Department's authority to determine the amount of ROT due. This section provides in pertinent part as follows:

In case any person engaged in the business of selling tangible personal property at retail fails to file a return, the Department shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination.  
(35 ILCS 120/5)

Because the Excise Tax Returns Correction or Tax Due Determination assessing CMFT, and the SC-10-K, Audit Correction and/or Determination of Tax Due assessing ROT are part of the record, the Department has established its *prima facie* case for CMFT and ROT liability. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1<sup>st</sup> Dist. 1978). Consequently, the burden shifted to the taxpayer to prove that the Department's determination of tax liability was incorrect by way of competent evidence in the form of books and records. Masini v. Department of Revenue, *supra*; Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); A.R. Barnes and Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1<sup>st</sup> Dist. 1988); Estate of Young v. Department of Revenue, 316 Ill. App. 3d 366 (1<sup>st</sup> Dist. 2000). Until such proof is provided by the taxpayer, the corrected return prepared by the Department of Revenue is presumed to be correct. Copilevitz v. Department of Revenue, *supra*.

The Department's assessment of CMFT in this case is clearly authorized by 55 ILCS 5/5-1035.1, the CMFT enabling legislation discussed above. As discussed, this legislation expressly states that the CMFT "shall be administered ... in the same manner as the tax imposed under the Retailers' Occupation Tax Act". As also pointed out, the Department administers local retailers' occupation taxes that are almost identical to the

CMFT utilizing a “purchase order acceptance” rather than a “point of delivery” test to determine where local taxes are due. Given the foregoing, the Department’s assessment of CMFT, and ROT is completely authorized.

However, the taxpayer contends that 55 **ILCS** 1035.1 contains a major caveat that makes the Department’s interpretation of the CMFT law entirely erroneous. While this law requires the Department to administer the CMFT in the same manner as the Retailers’ Occupation Tax Act, it is required to do so only “insofar as may be practicable”. (emphasis added) *Id.* In its briefs and in voluminous supporting documentation, taxpayer attempts to show that the adoption of a “purchase order acceptance” test for determining the location where CMFT is due is not “practicable” and therefore in contravention of 35 **ILCS** 5/5-1035.1.

The term “practicable” is not defined in the CMFT, the Retailers’ Occupation Tax Act or any of the state statutes authorizing other local retailers’ occupation taxes noted above. However, as pointed out at page 6 of the taxpayer’s brief, the meaning of the term “practicable” has been addressed by the Illinois courts on several occasions. Worthington v. Wilson, 790 F. Supp. 829, 834 (C.D. Ill. 1992); People ex rel. Williams v. Errant, 229 Ill. 56, 66 (1907); Local 1239 v. Allsteel, Inc., 1995 WL 348028, 4 (N.D. Ill. 1995). The term has been construed by reference to dictionary definitions defining the term “practicable” to mean “that which may be done, practiced or accomplished; that which is performable, feasible or possible.” Webster’s Ninth New Collegiate Dictionary, p. 922; Black’s Law Dictionary, Revised Fourth Edition, p. 1335; Taxpayer Brief, p. 6. The term “impracticable” is defined in the dictionary to mean the exact opposite of

“practicable”, as that which is “incapable of being performed or accomplished”. Webster’s Third New International Dictionary, 1993 edition, p. 1136.

The taxpayer points out numerous reasons why the adoption of a “purchase order acceptance” test to determine the location where CMFT is due is ill advised. The most compelling reason presented for this conclusion is that the adoption of a “purchase order acceptance” test creates inconsistent rules for determining where local taxes are due when viewed in the context of neighboring and other counties, resulting in taxpayer confusion and uncertainty. Taxpayer Brief, pp. 4 - 9. The taxpayer also argues that the Department’s adherence to this rule facilitates tax avoidance since the place of purchase order acceptance could easily be moved to a county assessing tax on the purchaser on a “point of delivery” basis, allowing the retailer to avoid tax all together. Taxpayer Brief, pp. 9, 10. These are all legitimate concerns. However, they do not show that the tax is not “practicable” in the sense this term is defined by the dictionary. The fact that the use of a “purchase order acceptance” test might be ill advised does not equate to a finding that implementing this tax scheme is something that is impossible to do or carry out.

Indeed, the Department’s use of a “purchase order acceptance” test arguably is a more “practicable” scheme of taxation than using a “point of delivery” test would be. The record in this case indicates that the “practicability” of administering the CMFT was a major reason a “purchase order acceptance” test was adopted. This is evidenced by the Department’s November 24, 1998 letter to Senate President James “Pate” Phillip, contained in the appendix to the taxpayer’s brief, which states as follows:

As with the local sales taxes, the County Motor Fuel Tax is a “point of sale” tax. As such, it is necessary to determine where the retail sale is made. ... Changing the “point of sale” to location of delivery would

make the County Motor Fuel Taxes inconsistent with all other local taxes administered by the department. In addition, in many cases it would be difficult for the retailer to know whether the delivery site was located in the county imposing the tax. Also, it would be extremely easy for retailers to contract for delivery outside of the county imposing the tax.

This letter indicates that the Department adopted a “purchase order acceptance” test for determining where the CMFT is due because it thought that a “point of delivery” test would be more difficult to administer than a “purchase order acceptance” test.

In sum, 55 ILCS 1035.1 uses the term “practicable” to describe when exceptions to the mandate that the CMFT be administered by the Department “in the same manner as the tax imposed under the Retailers’ Occupation Tax Act” will be permitted. This law does not permit the Department to diverge from the application of its standard procedures based merely upon allegations that the application of a Department rule or practice might be inadvisable. Since the taxpayer has produced no evidence that the use of a “purchase order acceptance” test is not capable of being successfully implemented, it has not shown that the procedures utilized by the Department in this case violated 35 ILCS 5/5-1035.1.

### **Uniformity Clause**

The taxpayer also argues that the CMFT is unconstitutional as applied to it because the Department used a “purchase order acceptance” test to determine where tax was due. The taxpayer’s argument is based upon the stipulated record showing that the taxpayer delivered all of the motor fuel it sold during the tax periods in controversy to customers in Cook County. Stip. ¶ 2. The principal issue raised is whether the impact of the DuPage CMFT on Cook County purchasers violates the state's uniformity clause (Article IX, Sec. 2 of the Illinois Constitution of 1970) and the Equal Protection Clause

of the U.S. Constitution (U.S.C.A. Const. Amend. 14). The uniformity clause of the Illinois constitution provides as follows:

In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.

(Ill. Const. 1970, art. IX, § 2)

The uniformity clause imposes more stringent limitations than the equal protection clause of the United States Constitution (U.S.C.A. Const., Amend. 14) on the legislature's authority to classify subjects and objects of taxation. Geja's Cafe v. Metropolitan Pier & Exposition Authority, 153 Ill. 2d 239, 247 (1992); Searle Pharmaceuticals, Inc. v. Department of Revenue, 117 Ill. 2d 454, 467 (1987). However, although the uniformity clause imposes a more stringent standard than the equal protection clause, the scope of a court's inquiry under the uniformity clause remains relatively low. Geja's Cafe, 153 Ill. 2d at 248.

A state's scheme of taxation is presumed constitutionally valid, and this presumption "may be overcome only by a clear showing that it is arbitrary and unsupported by any set of facts". People ex rel Kutner v. Cullerton, 58 Ill. 2d 266, 273 (1974); Johnson v. Halpin, 413 Ill. 257 (1952); Reif v. Barrett, 355 Ill. 104 (1933). One challenging a non-property tax classification has the burden of showing that it is arbitrary and unreasonable, and if there is any conceivable explanation that can be supported by the facts and that would sustain the classification, it must be upheld. Geja's Cafe, 153 Ill. 2d at 248. The Illinois Supreme Court has held that a non-property tax classification will survive scrutiny under the uniformity clause if the classification: 1) is based on real and

substantial differences between those persons taxed and those not taxed; and 2) bears some reasonable relationship to the object of the legislation or to public policy. Searle Pharmaceuticals, Inc. v. Department of Revenue, *supra*, Northern Home Builders Ass'n v. County of Du Page, 165 Ill. 2d 25, 44-45 (1995); Geja's Cafe v. Metropolitan Pier & Exposition Authority, *supra*, at 247; Federated Distributors, Inc. v. Johnson, 125 Ill. 2d 1, 15 (1988); Allegro Services, Ltd. v. The Metropolitan Pier and Exposition Authority, 172 Ill. 2d 243, 250 (1996). The taxpayer argues that the two prong test established by the foregoing cases is not met by the CMFT as applied to the taxpayer, because there is no real and substantial difference between Cook County motor fuel customers purchasing motor fuel from the taxpayer and other Cook County purchasers purchasing motor fuel. Taxpayer Brief, p. 12. The taxpayer also argues that the second prong of this test is not met because the CMFT bears no reasonable relationship to the object of this legislation, which the taxpayer describes as "the construction and maintenance of highway infrastructure in DuPage County". Taxpayer Brief, p. 13.

As noted above, the taxpayer contends that there is no real and substantial difference between Cook County purchasers of motor fuel from members of the class made subject to the CMFT and other Cook County purchasers of motor fuel during the tax period in controversy. Taxpayer Brief, p. 12. 55 ILCS 5/5-1035.1 provides that the CMFT is applicable to the following class of taxpayers: "all persons engaged in the county in the business of selling motor fuel, as now or hereafter defined in the Motor Fuel Tax Law, at retail for the operation of motor vehicles upon public highways or for the operation of recreational watercraft upon waterways". 55 ILCS 5/5-1035.1. Thus, taxpayer misdirects its constitutional argument, as Cook County motor fuel purchasers

clearly are not enumerated members of the class of persons to which the CMFT applies. The CMFT is applicable only to “persons engaged in the county in the business of selling motor fuel, as now or hereafter defined in the Motor Fuel Tax Law at retail”. Hence, a literal reading of the CMFT supports a conclusion that the uniformity clause is not violated because Cook County purchasers are not members of the class made subject to the tax. Furthermore, every DuPage motor fuel retailer is subject to the tax no matter where the delivery.

In addition, the taxpayer’s position presumes that the CMFT requires that the tax be passed on to Cook County purchasers. Taxpayer Brief, p. 2. However, the only legal authority cited for this assumption is American Oil Co. v. Mahin, 49 Ill. 2d 199 (1971), a case concerning the Illinois Motor Fuel Tax Act. In this case, the court held that the incidence of the Illinois Motor Fuel Tax was upon the customer rather than the retailer. The court’s decision in this case is based on features of the Illinois Motor Fuel Tax that are not contained in the CMFT. Specifically, the court bases its decision on sections of the Illinois Motor Fuel Tax imposing tax on the consumer of motor fuel. American Oil Co. at 202. Under the Illinois Motor Fuel Tax, the purchaser of motor fuel must pay the tax even if it is not collected by the retailer. American Oil Co. at 202 – 203. The CMFT contains nothing comparable to this provision. Moreover, as noted above, 86 Ill. Admin. Code 130.435(c) expressly distinguishes the Illinois Motor Fuel Tax and the CMFT, providing as follows:

The Underground Storage Tank Tax imposed under Section 2a of the Motor Fuel Tax Law and the Environmental Impact Fee imposed under the Environmental Impact Fee Law are includable in gross receipts subject to Retailers’ Occupation Tax because such taxes are imposed upon receivers of fuel and not upon consumers. In addition, County Motor Fuel Taxes imposed under the County Motor Fuel Tax Law are

includable in gross receipts subject to Retailers' Occupation Tax because such taxes are imposed upon retailers of motor fuel and not upon consumers. (emphasis added)  
86 Ill. Admin. Code 130.435(c)

The Department's regulation clearly states that, while the Illinois Motor Fuel Tax is imposed on consumers, the CMFT is not.

Even if the taxpayer's assumption that the CMFT can be passed on to Cook County purchasers was correct, there is no evidence in the record that the taxpayer actually passed on the costs of the CMFT to Cook County consumers in this case. Based on the record before this tribunal, it appears that Cook County customers purchasing from the taxpayer were not taxed any differently than Cook County purchasers purchasing motor fuel from Cook County motor fuel retailers. As noted above, a state's scheme of taxation is presumed to be constitutionally valid, and the taxpayer has the burden of rebutting this presumption. Geja's Cafe, *supra*. Moreover, after the Department established its *prima facie* case, it was incumbent upon the taxpayer to rebut the Department's determination by clear and cogent evidence supported by books and records. Masini v. Department of Revenue, *supra*; Copilevitz v. Department of Revenue, *supra*; A.R. Barnes and Co. v. Department of Revenue, *supra*; Estate of Young v. Department of Revenue, *supra*. Since the record does not support a finding that the cost of the CMFT was passed on to Cook County customers purchasing motor fuel from the taxpayer pursuant to any statutory mandate, there is no factual basis for concluding that the uniformity clause was violated in this case. Consequently, the taxpayer failed to carry its burden of establishing the constitutional invalidity of the CMFT as applied in this case by presenting facts sufficient to find that a violation of the state's uniformity clause occurred as a result of the non-uniform taxation of Cook County motor fuel purchasers.

At best, the taxpayer raises the possibility that applying this tax using a “purchase order acceptance” test creates a risk that the uniformity clause will be violated by taxing Cook County purchasers differently based on the location of the retailer from whom they are making motor fuel purchases. The assumption underlying this argument is that there is no real difference between Cook County motor fuel purchasers purchasing motor fuel from DuPage County retailers and Cook County motor fuel purchasers purchasing motor fuel from retailers from other parts of the state. However, this assumption is clearly incorrect. Purchasers of motor fuel from DuPage, McHenry and Kane County retailers are making purchases from retailers doing business in areas of the state that the legislature has determined have special transportation needs that must be funded by imposing special taxes. The Illinois Supreme Court has upheld the constitutionality of this legislatively created distinction. Cutinello v. Whitley, 161 Ill. 2d 409 (1994). The uniformity clause does not require the uniform taxation of taxpayers that are not similarly situated to the retailer in this case. Berry v. Costello, 62 Ill. 2d 342, 347 (1976).

As to Cook County motor fuel purchasers that are similarly situated, the tax at issue is clearly uniform. To the extent that the cost of this tax is passed on to Cook County consumers by means of a higher price, it applies alike to all Cook County purchasers purchasing motor fuel from DuPage County motor fuel retailers.

The taxpayer also argues that the classification of taxpayers under the CMFT is “underinclusive” and therefore in violation of the uniformity clause. Taxpayer Reply Brief, p. 6. As the taxpayer correctly points out, the uniformity clause may be violated by classifications that are either “underinclusive” or “overinclusive”. Allegro Services Ltd., *supra* at 250. Upon a good faith challenge to uniformity based upon a classification, the

taxing body bears the initial burden of producing a justification for the classification. Geja's Cafe, 153 Ill. 2d at 248. Once the taxing body has produced a sufficient justification, the opponent has the burden of persuading the court that the justification is unsupported by the facts. Geja's Cafe, *supra* at 248 – 249.

Applying these principles, I conclude that the Department has submitted a legally sufficient justification for imposing the CMFT only upon retailers consummating sales of motor fuel at locations in DuPage County. These reasons are explained at page 8 of the Department's brief as follows:

These reasons include: tradition, consistency with other local taxes administered by the Department, ease in determining the location of the sale, and prevention of methods of avoiding taxation through contracting for delivery outside of the county imposing the tax. These are four extremely rational reasons for administering the CMFT in the manner that the Department has chosen, which happens to be the same manner as the ROT.

While the taxpayer contends that this rationale overlooks other concerns, it has failed to show that the Department's position is unsupported by facts or otherwise legally insufficient. Consequently, the taxpayer has failed to meet the burden borne by litigants challenging a tax scheme on uniformity grounds.

The taxpayer also argues that the disparate treatment of Cook County motor fuel customers that purchase motor fuel from various locations around the state, is evidence that the use of a "purchase order acceptance" test to determine where CMFT is due is unconstitutional; that is, the same Cook County motor fuel purchaser could be subject to different taxes on motor fuel transactions taking place on the same day, involving the same fuel, from the same depot, for delivery to the same storage facility for use in the same vehicles on the same Cook County roads. Taxpayer Brief, p. 12. The taxpayer's

argument implies that the uniformity clause contains a requirement that the CMFT be uniform taking into account all other taxes imposed in home rule jurisdictions that use a “point of delivery” test to determine where local tax is due. Stip. ¶¶ 26, 27, 30. However, the uniformity clause contains no such requirement. The tests that have been developed by the courts to determine whether the uniformity requirement of the 1970 Constitution (Ill. Const. 1970, art. IX, sec.2) has been met is required to be applied to a single legislative scheme. The courts have stated that a law imposing a tax will not violate the uniformity clause if the classifications it makes are based on real and substantial differences between the people taxed and those not taxed, and if these classifications bear a reasonable relationship to the object of the law. Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority, *supra* at 250; Searle Pharmaceutical, Inc. v. Department of Revenue, *supra* at 468.

The CMFT authorized by 55 ILCS 5/5-1035.1 and home rule taxes authorized by section 6(a) of article VII of the Constitution of 1970 (Ill. Const. 1970, art. VII, sec. 6(a)) are clearly separate and distinct statutory schemes. Moreover, these taxes are hardly analogous. Unlike home rule motor fuel taxes, the CMFT is in effect an occupation tax administered by the Department, placed upon the privilege of selling motor fuel at retail. Also, the CMFT and home rule taxes are imposed by different jurisdictions. The incidence of the CMFT is upon the retailer, while the incidence of home rule motor fuel taxes is upon the consumer; (see for example, Section 2 of the Cook County Retail Sale of Gasoline and Diesel Fuel Tax Ordinance). The fact that the CMFT and home rule taxes are not uniform when applied in tandem, does not cause these taxes to fail the tests for determining the constitutionality of each of these provisions under the state’s

uniformity clause. These tests need be met only when considering the effect of each of these tax provisions individually.

Admittedly, inconsistencies between standards used to determine the jurisdiction to which tax must be paid may result in increased tax burdens in some cases. However, absolute equality in taxation is not required by Illinois law. Inequalities that may occasionally result incident to the application of a tax system which is not arbitrary in its classification and not applied in a hostile and discriminatory manner are not a sufficient basis for a finding that a tax scheme is unconstitutional. Schreiber v. Cook County, 388 Ill. 297 (1944); Apex Motor Fuel Co. v. Barrett, 20 Ill. 2d 395 (1960); Fiorito v. Jones, 48 Ill. 2d 566 (1971); Grenier & Co. v. Stevenson, 42 Ill. 2d 289 (1969).<sup>2</sup>

The taxpayer also contends that the DuPage CMFT violates the second prong of the two part test established by the Illinois Supreme Court for determining constitutionality under the state constitution's uniformity clause. It contends that there is no reasonable relationship between the persons that bear the burden of this tax and the purpose of this legislation. Taxpayer Brief, pp. 13, 14. As noted above, 55 ILCS 5/5-1035.1 places the legal burden of the CMFT exclusively upon "persons engaged in the county in the business of selling motor fuel". Placing the legal incidence of the CMFT upon fuel sellers doing business in DuPage County clearly has a direct and substantial relationship to the purpose of the CMFT, which is to fund the construction and maintenance of highway infrastructure in DuPage County. The activity of selling motor fuel is directly related to the problem of traffic congestion and road quality in all parts of

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<sup>2</sup> While these cases construe the constitutionality of the uniformity clause of the Constitution of 1870 (Ill. Const. 1870, art. IX, sec. 1), the Constitution of 1970 did not introduce a new higher standard of uniformity

the state, including DuPage County. Moreover, the legislature's decision to levy the CMFT upon this group of taxpayers has been upheld by the Illinois Supreme Court. Cutinello v. Whitley, *supra*.

The gravamen of the taxpayer's claim is that the burden of the CMFT borne by DuPage County motor fuel retailers is wholly disproportionate to the benefits these taxpayers receive from the use of DuPage County roads. Taxpayer Reply Brief, p. 5. There may indeed be no direct correlation between the burdens imposed by the CMFT on DuPage County motor fuel retailers and the benefits they derive from use of the infrastructure of roads and waterways. However, a showing that such burdens and benefits directly and precisely correlate is not required by the uniformity clause of the Illinois constitution. Forsberg v. City of Chicago, 151 Ill. App. 3d 354, 365 (1986); Allegra Services, Ltd. v. The Metropolitan Pier and Exposition Authority, *supra* at 258. As pointed out by the United States Supreme Court in Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981):

In any event, the linchpin of appellants' contention is the incorrect assumption that the amount of state taxes that may be levied ... is limited by the costs incurred by the State on account of that activity. Only then does it make sense to advocate judicial examination of the relationship between taxes paid and benefits provided. But as we have previously noted ... commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct "benefit".  
*Id.* at 628, n. 16.

For the reasons enumerated above, I conclude that the application of the CMFT to the taxpayer in this case does not violate the uniformity clause of the Illinois constitution. The uniformity clause was intended to encompass the equal protection clause and to add

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or mandate any changes in the prior construction of this term. Paper Supply Co. v. City of Chicago, 57 Ill. 2d 553 (1974).

to it even more limitations on government. Searle Pharmaceuticals, Inc., 117 Ill. 2d at 467; Geja's Cafe, 153 Ill. 2d at 247 (“If a tax is constitutional under the uniformity clause, it inherently fulfills the requirements of the equal protection clause”). Consequently, since I have found that the uniformity clause of the Illinois constitution is not violated by the application of the CMFT to the taxpayer, I also conclude that the application of this tax does not breach the equal protection clause of the U.S. Constitution.

### **Due Process Clause**

The taxpayer also contends that the application of the CMFT to it violates the due process clause of the U.S. constitution (U.S.C.A. Const. Amend. 14). Taxpayer Brief, p. 13. This argument is based upon a claim that the CMFT is being applied to transactions taking place outside of DuPage County. However, the legal incidence of the DuPage CMFT is exclusively upon DuPage County motor fuel retailers that consummate sales transactions by accepting orders for motor fuel at places of business in DuPage County. Stip. ¶ 25; 55 ILCS 5/5-1035.1 Moreover, as noted above, the CMFT contains no requirement that the CMFT be collected by the retailer or otherwise passed on to consumers.

The commerce clause (U.S.C.A. Const. Art. 1, § 8, cl. 3), and the due process clause (U.S.C.A. Const. Amend. 14) requirements that must be met for a jurisdiction to impose tax obligations, are satisfied when a retailer has a physical presence in the taxing jurisdiction. Quill Corp. v. North Dakota, 504 U.S. 298 (1992). Although the commerce clause is not implicated by the type of intrastate commerce at issue here, the due process portion of the Supreme Court's analysis is applicable. Since the taxpayer had a physical

presence in DuPage County during the tax years in controversy (Stip. ¶ 2), the imposition of the CMFT upon the taxpayer by DuPage County did not violate the due process clause.

### **Double Taxation**

The taxpayer also argues that imposing the CMFT on its sales in this case constitutes prohibited “double taxation”. As the taxpayer correctly points out at page 12 of its brief, a revenue statute will, if possible, be construed so as not to impose double taxation, since double taxation will never be presumed. People v. Deep Rock Oil Corp., 343 Ill. 388, 394 (1931); New York Central Railroad Co. v. Stevenson, 277 Ill. 474 (1917). Before that effect will be given a statute, it must unmistakably appear that the General Assembly so intended. *Id.* However, Illinois case law does not support a finding of impermissible “double taxation” in this case.

For Illinois tax purposes, “double taxation” exists only when two taxes are imposed for the same period of time, for the same purpose, upon the same property and by the same taxing authority. Clark Oil & Refining Corp. v. Johnson, 154 Ill. App. 3d 773, 781 (1<sup>st</sup> Dist. 1987). In the instant case, the only local motor fuel tax that was actually imposed on Cook County residents was the Cook County Motor Fuel Tax. Even if the taxpayer was correct in asserting that both Cook County and DuPage County motor fuel taxes could have been imposed on the transactions that are in controversy, DuPage County and Cook County are clearly separate taxing authorities. As a consequence, there is no “double taxation” as a result of the imposition of separate taxes by each of these jurisdictions. City of Evanston v. Cook County, 53 Ill. 2d 312 (1972). The fact that the object of each of these separate taxes may be the same property or transaction does not

result in “double taxation” that is impermissible under Illinois law. *Id.* For the foregoing reasons, I conclude that the record in this case does not support a finding of impermissible double taxation.

### **Legislative Intent**

The taxpayer also argues that use of a “purchase order acceptance” test to determine where CMFT is due is inconsistent with the legislative intent of the CMFT. As support for this contention, the taxpayer points to the legislative debates preceding the enactment of the CMFT, and the legislative intent of the CMFT indicated by the Illinois General Assembly and the DuPage County Board. Taxpayer Brief pp. 16, 17.

Illinois Supreme Court decisions addressing rules of statutory construction clearly establish that a resort to legislative history and other extrinsic aids to construe the meaning of a legislative enactment is permissible only when a statutory provision is ambiguous. Village of Carpentersville v. Pollution Control Board, 135 Ill. 2d 463, 469 – 470 (1990); People v. Bole, 155 Ill. 2d 188, 197 (1993); People v. Tucker, 167 Ill. 2d 431, 435 (1995); Branson v. Department of Revenue, 168 Ill. 2d 247, 254 (1995); County of DuPage v. Graham, 109 Ill. 2d 143, 151 (1985). As pointed out above, the “purchase order acceptance” test for determining where CMFT is due was adopted by the Department in accordance with 55 ILCS 5/5-1035.1. With regard to the authority of the Department over such matters, the CMFT states as follows:

A tax imposed pursuant to this Section, and all civil penalties that may be assessed as an incident thereof, shall be administered, collected and enforced by the Illinois Department of Revenue in the same manner as the tax imposed under the Retailers’ Occupation Tax Act, as now or hereafter amended, insofar as may be practicable; except that in the event of a conflict with the provisions of this Section, this Section shall control.

55 ILCS 1035.1

The simplicity and directness of the language used in this provision makes it clearly intelligible and easily understood. For reasons noted above, even the meaning of the term “practicable” as used in this provision is not ambiguous. Consequently, a resort to legislative history and other extrinsic aids is not permitted under rules of statutory construction that the courts have established, and this enactment must be enforced without considering extrinsic evidence of its intent.

**WHEREFORE**, for the reasons stated above, it is my recommendation that NTL CF 1998000000000000, and NTL SF 1998000000000000 for the period July 1, 1995 through August 31, 1998 be affirmed and finalized as issued.

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Ted Sherrod  
Administrative Law Judge

Date: April 20, 2001