

MF 04-7

Tax Type: Motor Fuel Use Tax

Issue: Motor Fuel Distributor – 5 Day Revocation

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

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

v.

**ABC FUEL COMPANY
Taxpayer**

Docket # 03-ST-0027

License # 000000

License # 000000

Permit # 0000000

**Barbara S. Rowe
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Neill Schurter for ABC Fuel Company; Mr. Kent R. Steinkamp Special Assistant Attorney General for the Illinois Department of Revenue.

Synopsis:

The Illinois Department of Revenue's (hereinafter referred to as the "Department") issued a Notice of License Revocation RMFT-48-A (hereinafter referred to as the "Notice") to ABC Fuel Company (hereinafter referred to as "ABC") based upon its failure to file a bond in the amount of \$227,900 and its failure to submit the required RMFT-2 update application information requested by the Department. ABC timely protested the Notice and requested a hearing. The hearing was held pursuant to the request and it is recommended the matter be resolved in favor of the Department. In support thereof I make the following findings of fact and conclusions of law in accordance with the requirements of Section 100/10-50 of the Administrative Procedure Act (5 ILCS 100/10-50)

FINDINGS OF FACT:

1. The Department's *prima facie* case was established by admission into evidence of Department's Exhibit No. 1, the Notice, under the certificate of the Director of the Department. (Tr. p. 6)

2. The Notice states that the Department is revoking the licenses and canceling ABC's permit because ABC failed to file a bond in the amount of \$227,900 and ABC failed to submit the required RMFT-2 update application information that the Department requested. (Dept. Ex. No. 1)

3. ABC was begun in 1978 as a family business. ABC's approximate gross annual sales are \$8,000,000. (Tr. p. 9)

4. ABC is a "jobbershop."¹ It purchases fuel products directly from Amoco and Marathon and sells the product to farmers, home heating customers, industrial accounts and gas stations. The gas stations purchase the main portion of ABC's gas and diesel fuel. (Tr. pp. 9-10)

5. In February 1998, ABC purchased a high volume truck stop that almost doubled its motor fuel tax liability. The truck stop was sold in May 2000. (Tr. pp. 12-13)

6. ABC's liability for motor fuel with the Department for July 2003, payable on or before August 20, 2003, as shown in its "RMFT-5 Motor Fuel Distributor/Supplier Tax Return" was \$52,674.64. (Taxpayer's Ex. No. 2; Tr. p. 18)

7. ABC's liability for motor fuel with the Department for August 2003, payable on or before September 22, 2003 was an overpayment of \$8,711. (Taxpayer's Ex. No. 3; Tr. pp. 17-18)

¹ The transcript has (phonetic) after the word.

8. ABC's liability for September 2003 payable on or before October 20, 2003 was also a negative figure: -\$9,465. (Taxpayer's Ex. No. 4; Tr. pp. 19-20)

9. ABC's tax return for October 2003 due on or before November 20, 2003, shows an overpayment of \$8,331. (Taxpayer's Ex. No. 5; Tr. p. 20)

10. ABC has changed its way of doing business and now pays its main supplier the tax at the time it purchases the motor fuel. ABC began this procedure in August 2003. (Tr. pp. 15, 18-19)

11. ABC has entered into a payment plan with the Department to cover the May and June 2003 taxes. ABC submitted an \$8,000 check pursuant to the plan. ABC has a liability close to \$100,000. (Tr. pp. 11, 22)

12. ABC has also submitted checks to the Department that were returned because there were insufficient funds in ABC's bank account. Part of ABC's \$100,000 liability is due to the returned checks, including one for \$86,000. (Tr. pp. 22-23, 31)

13. ABC was first requested to file a bond in the amount of \$227,900 in the year 2000. ABC has appeared before the administrative hearings division of the Department twice since the initial bond request in 2000. (Tr. pp. 13-14, 28-31)

14. I take administrative notice of the hearing decisions rendered in Docket Nos. 01-ST-0000, wherein ABC's penalties were abated for reasonable cause, and 02-ST-0000 wherein ABC's permit and licenses were not revoked. (Administrative Notice.)

CONCLUSIONS OF LAW:

The Notice issued by the Department states that ABC's distributor and receiver licenses and permit will be revoked pursuant to section 16 of the Motor Fuel Tax Law, 35 ILCS 505/1 *et*

seq. (hereinafter referred to as the “Act”), which provides in relevant part as follows:

The Department may, after 5 days’ notice, revoke the distributor’s, receiver’s, supplier’s or bulk user’s license or permit of any person * * * who violates any provision of this Act or any rule or regulation promulgated by the Department under Section 14 of this Act * * *. 35 ILCS 505/16.

Section 21 of the Act incorporates by reference sections 4 and 5 of the Retailers’ Occupation Tax Act (35 ILCS 120/1 *et seq.*) which provide that the Department’s determination is *prima facie* correct. 35 ILCS 505/21; 120/4, 5. Once the Department establishes its *prima facie* case, the burden shifts to the taxpayer to prove that the Department’s determination 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).

ABC argues that the issues in this matter are first, whether the Department can require ABC to post a bond in this case at all and secondly, if a bond is required, that the requested bond amount of \$227,900 bears no reasonable relation to the tax liability of ABC and in fact violates Section 3 of the Act. (Tr. p. 7) ABC asserts these issues are virtually identical to the issues addressed in Docket No. 02-ST-0031. (Tr. pp. 33-34) ABC has been in business over 25 years and has never, prior to 2000, been required or requested to file a bond.

Section 3 of the Act, which was relied upon in the decision in Docket No. 02-ST-0031, states:

No person shall act as a distributor of motor fuel within this State without first securing a license to act as a distributor of motor fuel from the Department. Application for such license shall be made to the Department upon blanks furnished by it. The application shall be signed and verified, and shall contain such information as the Department deems necessary. A blender shall, in addition to securing a distributor's license, make application to the Department for a blender's permit, setting forth in the application such information as the Department deems necessary. The applicant for a distributor's license shall also file with the Department a bond on

a form to be approved by and with a surety or sureties satisfactory to the Department conditioned upon such applicant paying to the State of Illinois all monies becoming due by reason of the sale or use of motor fuel by the applicant, together with all penalties and interest thereon. The Department shall fix the penalty of such bond in each case taking into consideration the amount of motor fuel expected to be sold, distributed and used by such applicant and the penalty fixed by the Department shall be such, as in its opinion, will protect the State of Illinois against failure to pay the amount hereinafter provided on motor fuel sold, distributed and used, but the amount of the penalty fixed by the Department shall not exceed twice the monthly amount that would be collectable as a tax in the event of a sale on all the motor fuel sold, distributed, and used by the distributor inclusive of tax-free sales, use, or distribution. Upon receipt of the application and bond in proper form, the Department shall issue to the applicant a license to act as a distributor. No person who is in default to the State for monies due under this Act for the sale, distribution or use of motor fuel shall receive a license to act as a distributor. (35 ILCS 505/3).

In Docket No. 02-ST-0031, ABC successfully argued that it already had its license, was not currently applying for a new license, and therefore the bonding requirement of Section 3 does not apply.

The Department, however, in its argument herein does not rely on Section 3. Rather the Department argues that Section 11.5 of the Act is applicable. Section 11.5, entitled “New bond of distributor, supplier, or receiver” states:

In the event that liability upon the bond filed by a distributor, supplier, or receiver with the Department shall be discharged or reduced, whether by judgment rendered, payment made or otherwise, or if in the opinion of the Department the bond of any distributor, supplier, or receiver theretofore given shall become unsatisfactory, then the distributor, supplier, or receiver shall forthwith, upon the written demand of the Department, file a new bond in the same manner and form and in an amount and with sureties satisfactory to the Department, failing which the Department shall forthwith revoke the license of the distributor, supplier, or receiver. 35 ILCS 505/11.5

The Department argues that ABC's initial bond was \$0. Based upon ABC's history, including a check returned for insufficient funds in the amount of \$86,000, and established liabilities of \$100,000 at the time of the hearing, the bond of \$227,900 is reasonable. (Tr. pp. 39-44)

I agree with the Department. ABC has had a troubled financial history since 2000 when the Department issued its first request for a bond. ABC's testimony regarding the timing of the insufficient funds check for \$86,000 was conflicting. At one point ABC, stated in response to questions of the Department:

Q. Ms. Doe, would you say that you are currently in arrearage on some tax to the Department?

A. Yes, we are.

Q. And do you know the amount of that?

A. It's close to \$100,000.

Q. All right. Have you also had -- have you in the past provided checks to the Department for tax that have been returned for nonsufficient funds --

A. Yes.

Q. --on your accounts?

A. Uh-huh.

Q. Has that happened more than once since 2001?

A. Yes.

Q. And is that what you are talking about when you talked about cash flow problems?

A. Uh-huh, yes.

* * *

Q. And is it possible that the amounts of those checks were as high as \$86,000 at the highest?

A. What time period are we talking about?

Q. Well, I'm just saying one of the checks was for \$86,000.

A. Yes, when we would have had our facility our checks would have been that high.

Q. All right. And is the current amount that you are in arrears to the Department partially caused by checks that were returned for insufficient funds?

A. Yes.

Q. And for what months were those?

A. They were for the return months of May and June of this year. (Tr. pp. 22-23)

At another point, the testimony of Ms. Doe, in response to questions of her attorney, was:

Q. All right. Jumping back for a moment. In the history of the business, is it true that ABC Fuel didn't always own gas stations?

A. No, we started in the gas station business six years ago.

Q. All right. And at a time -- at one point ABC Fuel owned a station referred to as the station?

A. Yes, it was a truck stop.

Q. Okay. And tell the Hearing Officer what happened to your total gallons with the acquisition of this truck stop?

A. Being that it was a truck stop, we sold a lot of diesel fuel which has the motor fuel tax with it and a lot of gasoline. It was a high volume site, and so with the acquisition of that gas station, we purchased another station along with that same deal, anyway it was that gas station almost doubled our gallons when we purchased the truck stop.

Q. Okay. If you recall approximately when were those purchases made?

A. In February of 1998. I know it was February when we closed the deal because everything froze.

Q. '97 or '98?

A. '97 or '98 is when we purchased.

Q. And that increased your gallons and therefore your liability?

A. Yeah, it would have almost doubled our motor fuel tax liability.

Q. All right. And then at some point you subsequently sold ?

A. I believe that was in May of 2000. (Tr. pp. 12-13)

ABC admitted that it sold the truck stop in 2000 but that its liabilities for which it was put on a payment plan with the Department were for May and June of 2003. It is therefore unclear when the \$86,000 check was written. However, it is certainly clear that ABC has had and continues to have "cash flow problems." Ms. Doe is the Vice-President of ABC and does all of the accounting work. She is the one responsible for filing the tax returns and has done so for the last six years. (Tr. pp. 8-9)

The Department issued the first request for a bond in 2000, yet only in the latter part of 2003 did ABC change its method of operations so that it did not have "cash flow problems" with the Department. ABC, at the time of the hearing, admittedly owed the Department close to \$100,000 and has annual gross sales in the amount of \$8,000,000. Motor fuel tax liabilities can accrue rapidly. Ms. Doe admitted that it is "easier to pay as we go along as to once a month choking up a huge check for \$50,000." (Tr. p. 15)

The motor fuel use tax, a subsection of the Act, also has licensure and bonding requirements. The Department's rules, promulgated pursuant to the authority found at 35 ILCS 505/14, state:

Bonds are not required for first-time applicants. However, bond[s] may be required for just cause, as determined by the Department.

Bonds may be required when a licensee fails to file timely reports, when he fails to remit the proper tax, when the Department has twice received a Non-Sufficient Funds check as payment, or when an audit indicates problems severe enough that, in the Director's discretion, a bond is required to protect the interests of the Department. If a bond is required, it shall be equal to at least twice the estimated average quarterly tax liability. The average tax liability upon which the bond is based shall be determined by taking into consideration the amount of motor fuel expected to be used in all jurisdictions by such applicant. The penalty fixed by the Department shall be such as, in its opinion, will protect the State of Illinois against the failure to pay the amount hereinafter provided 86 Admin. Code ch. I, Sec. 500.305(b).

As ABC has admitted that it has tendered checks to the Department that have been returned for insufficient funds, the Department, by law, is authorized to require a bond.

ABC also argues that the \$227,900 amount bears no reasonable relation to the tax liability of ABC² and in fact violates Section 3 of the Act. ABC owed the Department \$100,000 at the time of the hearing. ABC gave the Department a check for \$86,000 that it did not have sufficient funds to cover. The Department has attempted to have ABC file a bond since 2000 to no avail. Only after ABC got this latest request to file a bond did it change its method of operations, and that was in the middle of 2003.

There is nothing that mandates that ABC must continue to pre-pay its tax liability to its supplier, as it is currently doing. There is nothing that stops ABC from again buying a truck stop and accruing significant additional liabilities, as it did with the truck stop. The rule states that if a bond is required, it shall be equal to at least twice the estimated average quarterly tax liability. Based upon ABC's past history with the Department, I conclude that a \$227,900 bond is reasonable to expect of ABC.

² One of ABC's exhibits was a listing of its motor fuel liabilities from August 2002 through July 2003. The average monthly liability shown on the document is \$50,057.91. The actual returns were not submitted. The document was obviously prepared in anticipation of litigation.

WHEREFORE, for the reasons, stated above, ABC is not in compliance with various mandates of the Motor Fuel Tax Law. Therefore, it is recommended that ABC Fuel Company's distributor license, 0000000, its receiver license, 0000000 and its permit, 0000000, be revoked.

Respectfully Submitted,

Barbara S. Rowe
Administrative Law Judge
August 18, 2004