

MF 96-6
Tax Type: MOTOR FUEL USE TAX
Issue: Disallowance of Fuel Credits Taken on the Returns

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

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS)	Docket #
)	
v.)	Permit #
)	
TAXPAYER)	
)	Karl W. Betz
)	Administrative Law Judge
Taxpayer)	

RECOMMENDATION FOR DISPOSITION

APPEARANCES

ATTORNEY, FOR TAXPAYER. ATTORNEY APPEARED PURSUANT TO AN ORDER OF THE SANGAMON COUNTY CIRCUIT COURT, HONORABLE JUDGE RICHARD J. CADIGAN, GRANTING HIM AUTHORIZATION TO APPEAR PRO HAC VICE IN THIS CASE.

SYNOPSIS

THIS CASE INVOLVES TAXPAYER (HEREINAFTER "TAXPAYER"), A CORPORATION WHO WAS AUDITED BY THE ILLINOIS DEPARTMENT OF REVENUE (HEREINAFTER "DEPARTMENT") FOR FUEL TAX COMPLIANCE PURPOSES FOR THE PERIOD OF JANUARY, 1987 THROUGH DECEMBER, 1990. DURING THE AUDIT PERIOD TAXPAYER WAS A MOTOR CARRIER AS IT CONDUCTED CARRIER OPERATIONS BY HAULING LOADS OF GOODS IN COMMERCIAL MOTOR VEHICLES UPON THE HIGHWAYS OF ILLINOIS.

ON JUNE 6, 1991, THE DEPARTMENT ISSUED NOTICE OF TAX LIABILITY (NTL) NO. XXXXX FOR ILLINOIS SPECIAL FUEL USE TAX IN THE AMOUNT OF \$423,625.56

INCLUSIVE OF TAX, PENALTY AND INTEREST. THE NTL LIABILITY IS BASED UPON CHANGES THE DEPARTMENT MADE IN THE QUARTERLY FUEL TAX RETURNS (IDR-280'S) FILED BY TAXPAYER. THESE CHANGES RESULT FROM THE DEPARTMENT AUDITOR'S ADJUSTMENT OF THE AMOUNTS OF TOTAL "EVERYWHERE" MILEAGE, ILLINOIS MILES, AND ILLINOIS TAX PAID FUEL REPORTED BY TAXPAYER ON IDR-280 LINES 1, 4 AND 7A. THE ADJUSTMENTS FOR EVERYWHERE AND ILLINOIS MILEAGES RESULTED IN A NET DECREASE IN TAX LIABILITY OF \$1,444.00 WHILE CERTAIN ILLINOIS FUEL CREDITS WERE DISALLOWED IN THE AMOUNT OF \$144,175.00. (DEPT. EX. NO. 2, P. 1). IN ADDITION, THE AUDITOR DISCOVERED TAXPAYER HAD NOT FILED ITS IDR-280S FOR THE QUARTERS OF 90/1 THROUGH 90/4, AND LIABILITY FOR THESE PERIODS WAS ALSO INCLUDED IN THE ASSESSMENT.

THE TAXPAYER HAVING MADE A TIMELY PROTEST OF THE NTL, A HEARING WAS SCHEDULED BY THE DEPARTMENT IN THIS MATTER. BEFORE THE HEARING, TAXPAYER, THROUGH COUNSEL, AND THE DEPARTMENT AGREED TO STIPULATE TO CERTAIN FACTS AND THE STIPULATION WAS FILED IMMEDIATELY PRIOR TO COMMENCEMENT OF THE HEARING.

THE ISSUES IN THIS CASE ARE THE DISALLOWANCE OF THE ILLINOIS FUEL TAX CREDITS AND THE AMOUNT OF PENALTY ASSESSED BY THE DEPARTMENT ON THE LATE 1990 IDR-280 RETURNS. AT HEARING THE TAXPAYER ALSO CONTENDS SOME OF THE TOTAL FUEL IT USED WAS CONSUMED IN A "NON-PROPULSION" MANNER.

AFTER REVIEWING THE COMPLETE TRANSCRIPT OF RECORD INCLUDING ALL DOCUMENTS ADMITTED THEREIN, ALONG WITH ALL ARGUMENTS OF COUNSEL, I RECOMMEND THE ISSUES BE RESOLVED PARTIALLY IN FAVOR OF THE DEPARTMENT AND PARTIALLY IN FAVOR OF THE TAXPAYER.

FINDINGS OF FACT

IN ADDITION TO THE FACTS STIPULATED BETWEEN THE PARTIES, MY REVIEW OF THE RECORD IN THIS MATTER CAUSES ME TO MAKE THE FOLLOWING FACTUAL DETERMINATIONS:

1. PURSUANT TO STATUTORY AUTHORITY, THE DEPARTMENT AUDITOR DID CAUSE TO BE ISSUED A CORRECTION OF RETURNS OR DETERMINATION OF MOTOR FUEL TAX DUE AND THIS SERVED AS THE BASIS FOR THE NOTICE OF TAX LIABILITY CONTESTED HEREIN. (DEPT. EX. NOS. 1 AND 3)
2. ON THE CORRECTED RETURN A 30% DELINQUENCY PENALTY WAS ASSESSED FOR THE FOUR QUARTERS OF 1990 (90/1-90/4) AND THIS TOTALS TO \$52,295.00. (DEPT. EX. NO. 1)
3. THE TAXPAYER SUBMITTED SIGNED RETURNS FOR THE FOUR QUARTERS OF 1990 TO THE AUDITOR WHILE HE WAS AT TAXPAYER'S BUSINESS LOCATION PERFORMING HIS AUDIT WORK AND COPIES ARE INCLUDED IN THE AUDIT FILE. (DEPT. EX. NO. 2, PP. 46-49)
4. THERE ARE NO MOTOR FUEL TAX OR MOTOR FUEL USE TAX REFUND OR CLAIM FORMS IN THE RECORD. (TR. P. 4)
5. THERE ARE NO AMENDED QUARTERLY MOTOR FUEL USE TAX RETURNS (IDR-2805) IN THE RECORD. (TR. P. 4)
6. THE AUDITOR DID NOT EXPLAIN IN HIS AUDIT REPORT AND COMMENTS THE RATIONALE FOR HIS USING ONLY ONE MONTH AS A TEST CHECK PERIOD FOR FUEL CREDIT PURCHASES. (DEPT. EX. NO. 2, PP. 2, 22-25, 27)

CONCLUSIONS OF LAW

SECTION 2 OF THE MOTOR FUEL TAX LAW (MFTL) IMPOSES A TAX UPON THE PRIVILEGE OF OPERATING A MOTOR VEHICLE UPON THE PUBLIC HIGHWAYS OF ILLINOIS.

SEE ILL. REV. STAT., CH. 120, PAR. 417 ET SEQ.¹ DURING THE AUDIT PERIOD, SECTION 13A OF THE MFTL (ILL. REV. STAT. CH 120, PAR. 429A) IMPOSED AN ADDITIONAL AMOUNT OF TAX ON THE USE OF SPECIAL FUEL UPON THE HIGHWAYS OF ILLINOIS BY COMMERCIAL MOTOR VEHICLES OPERATED BY A MOTOR CARRIER SUCH AS TAXPAYER, THIS PART (B) COMPONENT BEING BASED UPON 6 1/4 % OF THE AVERAGE "SELLING PRICE" OF SPECIAL FUEL SOLD IN ILLINOIS DURING THE PRIOR 12 MONTHS.

ILLINOIS CASE LAW AND STATUTORY PROVISIONS HAVE MADE IT CLEAR THAT THE DEPARTMENT'S AUDIT DETERMINATION AS REFLECTED ON THE CORRECTED RETURN IS PRIMA FACIE CORRECT, AS LONG AS THE DEPARTMENT'S PREPARATION OF THE RETURN MEETS A MINIMUM STANDARD OF REASONABLENESS. A.R. BARNES AND CO. V. DEPARTMENT OF REVENUE 173 ILL APP.3D 410 (FIRST DIST. 1988); CLARK OIL AND REFINING CORP. V. JOHNSON 154 ILL. APP.3D 773 (FIRST DIST. 1987), APP. DEN. 116 ILL. 2D 549.

IN THE INSTANT CASE THE DEPARTMENT COMPUTED THE ADDITIONAL TAX LIABILITY PARTIALLY BY DISALLOWING CERTAIN ILLINOIS TAX PAID FUEL PURCHASES TAKEN AS A CREDIT BY TAXPAYER ON ITS IDR-280S PURSUANT TO MFTL SECTION 13A.3'S (ILL. REV. STAT., CH. PAR. 429A3) ALLOWANCE OF A GALLON FOR GALLON CREDIT FOR PURCHASES OF TAX PAID SPECIAL FUEL IN ILLINOIS. THIS WAS ACCOMPLISHED THROUGH A ONE MONTH TEST CHECK OF JANUARY 1990, AND EXTRAPOLATION OF A RESULTING ERROR PERCENTAGE OVER THE 48 MONTH AUDIT PERIOD. THE AUDITOR DID NOT DOCUMENT HIS REASON FOR USING THAT PARTICULAR ONE MONTH SAMPLE, AND HIS TESTIMONY AT THE HEARING ABOUT A PROBLEM WITH THE PRIOR MONTH'S INVOICES EXPLAINS WHY DECEMBER 1989 WAS NOT SAMPLED BUT DOES NOT EXPLAIN WHY ONLY ONE MONTH WAS EXAMINED. BECAUSE IT IS A

¹. THIS AND SUBSEQUENT STATUTORY CITATIONS ARE THOSE IN EFFECT DURING THE AUDIT PERIOD.

PRINCIPLE OF GENERALLY ACCEPTED AUDITING STANDARDS THAT A SAMPLE MUST BE SUCH THAT IT MAY BE REASONABLY RELIED UPON TO BRING TO LIGHT ERRORS IN ABOUT THE SAME PROPORTION AS THAT WHICH WOULD EXIST IN THE WHOLE OF THE POPULATION BEING TESTED, AND BECAUSE THE REASONING FOR THE SELECTION HEREIN WAS NOT DOCUMENTED, I CANNOT CONCLUDE THE ONE MONTH SAMPLE TO BE RELIABLE, AND I RECOMMEND THE TAX ATTRIBUTABLE TO THE EXTRAPOLATION BE DELETED FROM THE FINAL ASSESSMENT. I RECOMMEND FURTHER THE DISALLOWED CREDITS FOR THE PARTICULAR PERIOD THAT WAS EXAMINED REMAIN IN THE FINAL ASSESSMENT, EXCEPT THOSE FOR WHICH TAXPAYER PRODUCED VALID INVOICES AT HEARING.

IN THIS REGARD THE TAXPAYER SUBMITTED SEVERAL INVOICES AT HEARING CONTAINED IN ITS EXHIBIT NOS. 71, 73 AND 74. THE AUDITOR HAD DISALLOWED A TOTAL OF 9,801 GALLONS; 2,034.9 FOR NOT HAVING THE "TOP COPY" OF THE INVOICE, 1,093.3 FOR BEING OVERREPORTED AND 6,672.8 FOR BEING REPORTED AS PURCHASES BY UNITS THAT DID NOT HAVE ANY ILLINOIS MILES REPORTED ON THE IDR-280S. (TR. PP. 75-79; DEPT. EX. NO. 2, P. 2) I FIND THE EVIDENCE ESTABLISHES THAT FOR MANY OF THE SO CALLED "DUPLICATE" OR NON "TOP COPY" INVOICES, THE SUBMITTED "COPY" WAS ACTUALLY THE ONLY COPY OR ORIGINAL DOCUMENT GIVEN TO THE DRIVER.

AFTER REVIEWING THE TESTIMONY AND EXAMINING THE SUBMITTED INVOICES, I FIND ALL OF THEM ARE ACCEPTABLE EXCEPT FOR TICKET #S 126720, 892695, 1195121, 126917, 127078, 1195155, 127217 (TAXPAYER EX. NO. 71, REF. #S 13, 16, 19, 20, 22, 26 AND 29); 5851664, 54033, 1202448 (TAXPAYER EX. NO. 73, REF #S 4, 5 AND 6) AND 10894 (TAXPAYER EX. NO. 74, REF. # 3). THE REASONS I DO NOT ACCEPT THESE ELEVEN ARE THEY EITHER SHOW ANOTHER STATE OF PURCHASE OTHER THAN ILLINOIS, (E.G. #S 1195121 AND 1195155 SHOW TENNESSEE), DO NOT LIST TAXPAYER AS THE PURCHASER (E.G. #S 892695 AND 10894) OR SHOW A DATE OF PURCHASE

AFTER THE PERIOD EXAMINED (E.G. #127217). REGARDING TAXPAYER'S CONTENTION THAT THE GALLONS CLAIMED BY UNITS NOT REPORTING ILLINOIS MILES WAS ONLY DUE TO INADVERTANT LATE REPORTING OF THE MILEAGES ON THE FT-06 REPORT, I DO NOT FIND THAT ARGUMENT PERSUASIVE BECAUSE IT IS SUPPORTED BY THE MERE ORAL TESTIMONY OF THE WITNESS AND NO DOCUMENTARY EVIDENCE WAS SUBMITTED ON THIS. IN ACCEPTING THE AFOREMENTIONED INVOICES TOTALING 3,762.6 GALLONS, I RECOMMEND THE TAXPAYER BE ALLOWED CREDIT FOR THESE ON ITS 90/1 QUARTERLY REPORT AND I ALSO RECOMMEND THE REMAINING 6,038.4 DISALLOWED GALLONS NOT BE ALLOWED AS CREDIT ON THE REPORT AND FINAL ASSESSMENT. THIS LATTER AMOUNT TRANSLATES INTO \$1,545.83 TAX (6,038.4 X .256 RATE).

REGARDING THE FOUR QUARTERLY 1990 IDR-280 REPORTS, I FIND THAT BECAUSE THEY WERE TENDERED TO THE AUDITOR PRIOR TO ISSUANCE OF THE NTL, THE 30% DELINQUENCY PENALTY SHOULD NOT APPLY. I FURTHER FIND THE TAX DUE AS SHOWN ON THESE FOUR QUARTERLY REPORTS IS A VALID LIABILITY THAT SHOULD REMAIN IN THE FINAL ASSESSMENT, ALONG WITH RELATED PENALTY AND INTEREST. ANY PAYMENTS MADE BY TAXPAYER FOR THE LIABILITY DUE ON THE FOUR 1990 QUARTERLY REPORTS PRIOR OR SUBSEQUENT TO HEARING SHOULD BE APPLIED TO THE FINAL ASSESSMENT.

TAXPAYER ALSO CONTENDS THAT BECAUSE A CERTAIN AMOUNT OF ITS TRUCKS BURN FUEL IN A "NON-PROPULSION" MANNER, THE DEPARTMENT SHOULD REDUCE TAXPAYER'S TOTAL EVERYWHERE GALLONS OF FUEL USE BY 11.4 % BEFORE CALCULATION OF THE MILES-PER-GALLON (MPG) RATE USED TO APPORTION FUEL USE TO ILLINOIS (POST-HEARING BRIEF, P. 3).

I CANNOT CONCLUDE THIS ISSUE IS BEFORE ME BECAUSE THE LIABILITY IN THE NOTICE OF TAX LIABILITY THAT WAS PROTESTED AND IS THE SUBJECT OF THIS HEARING WAS BASED UPON DISALLOWANCE OF FUEL CREDITS AND THE DELINQUENT 1990 RETURNS. FURTHERMORE, THE STATUTE SETS OUT SPECIFIC MECHANISMS FOR

OBTAINING A REFUND OR CREDIT AND THE REQUIREMENTS OF THESE ARE NOT IN THIS RECORD. SECTION 13A.3 REQUIRES A MOTOR CARRIER TO REPORT ITS TOTAL EVERYWHERE MILES ON ITS QUARTERLY REPORTS, ALONG WITH TOTAL EVERYWHERE AND ILLINOIS TAX PAID FUEL, SO IF THE LATTER EXCEEDS THE SPECIAL FUEL GALLONAGE USED ON ILLINOIS HIGHWAYS, A CREDIT OR REFUND MAY BE AVAILABLE. THE PROCEDURES RELATED TO FILING THE QUARTERLY REPORTS ALLOW FOR THE FILING OF AN AMENDED REPORT TO SHOW A CORRECTED AMOUNT OF MILEAGE OR FUEL, AND SECTION 13A.7 OF THE MFTL (ILL. REV. STAT., CH. 120, PAR. 429A7) LIMITS THE TIME PERIOD FOR THE OBTAINING OF A CREDIT OR REFUND UNDER SECTION 13A.3 TO NO ". . . MORE THAN ONE YEAR AFTER THE DUE DATE OF SUCH RETURN." THERE ARE NO AMENDED RETURNS IN EVIDENCE THAT CHANGE THE EVERYWHERE GALLONS STATED BY TAXPAYER ON THEIR FILED IDR-280 REPORTS. IN FACT EACH OF THESE REPORTS FILED BY TAXPAYER (TAXPAYER EX. NOS. 3-18) WAS SIGNED AND SUBMITTED BY AN OFFICER OF TAXPAYER UNDER PENALTIES AS PROVIDED BY LAW PURSUANT TO A CERTIFICATION STATEMENT SAYING:

". . . THE UNDERSIGNED CERTIFIES THAT THE INFORMATION SET FORTH IN THIS RETURN² IS TRUE AND ACCURATE TO THE BEST OF HIS KNOWLEDGE AND BELIEF AND IS TAKEN FROM THE BOOKS AND RECORDS OF THE BUSINESS FOR WHICH THIS RETURN IS FILED."

I CANNOT FIND THAT TAXPAYER HAS COMPLIED WITH THE SECTION 13A.3 FILING REQUIREMENTS FOR CHANGING THE AMOUNTS OF REPORTED TOTAL GALLONS OF SPECIAL FUEL CONSUMED IN ALL JURISDICTIONS DURING THE AUDIT PERIOD BECAUSE THERE ARE NO AMENDED IDR-280 REPORTS IN THIS RECORD. I ALSO NOTE THAT THERE ARE NO MFTL SECTION 13 CLAIM OR REFUND APPLICATION FORMS IN THIS RECORD BASED UPON OFF ROAD USAGE OF FUEL.

². THE FIRST THREE 1987 QUARTERLY REPORTS (87/1-87/3) ALSO CONTAIN THE LANGUAGE "AND ACCOMPANYING SCHEDULES AND STATEMENTS" HERE.

WHILE THIS "NON-PROPULSION" ISSUE IS NOT BEFORE ME, BECAUSE THE ISSUE WAS THE SUBJECT OF CONSIDERABLE TESTIMONY AND WAS ARGUED AND BRIEFED BY TAXPAYER, I WILL ADDRESS IT. THE ISSUE OF "NON-PROPULSION" USE OF FUEL IS BASED UPON A STUDY TAXPAYER CONDUCTED THAT IS SUPPOSED TO CAPTURE THE AMOUNT OF FUEL USED BY THE TRACTORS AS THE ENGINE RUNS IN THE IDLE POSITION AND THE HAND BRAKE IS SET. TAXPAYER'S WITNESSES TESTIFIED THEY INSTALLED HOBBS METERS ON VARIOUS TRACTORS AND THESE DEVICES ARE SUPPOSED TO MEASURE THE TIME FLOW OF MOTOR FUEL USED WHEN A TRUCK IS SITTING IN IDLE POSITION WITH THE EMERGENCY BRAKE ON. (TR. PP. 105, 136, 142) THE DATA CAPTURED BY THE METER IS APPLIED TO THAT UNIT'S "BURN RATE" TO ARRIVE AT A PERCENTAGE AMOUNT OF "NON-PROPULSION" FUEL. (TR. PP. 102-112; TAXPAYER EX. NOS. 77-79) THE "BURN RATE" WAS DETERMINED BY PUTTING THE TRACTOR ON A STAND AND OPERATING OPERATING IT FOR AN HOUR TO DETERMINE THE AMOUNT OF FUEL BURNED PER HOUR WHILE RUNNING IN THE IDLE POSITION. (TR. PP. 112-113) THE METERS ARE SUPPOSED TO BE CAPTURING THE "NON-PROPULSION" FUEL BURNED WHILE DRIVERS REST OR EAT ON PRIVATE PROPERTY OFF THE HIGHWAYS AS THE TRACTOR CONTINUES TO RUN FOR HEATING OR AIR CONDITIONING PURPOSES.

IN A CONTESTED CASE BEFORE THE DEPARTMENT, IT IS THE BURDEN OF TAXPAYER TO ESTABLISH THAT MOTOR FUEL IS USED FOR A PURPOSE OTHER THAN OPERATING A MOTOR VEHICLE UPON PUBLIC HIGHWAYS, PASCAL V. LYONS (1958), 15 ILL. 2D 41, 46, AND I FIND ALL OF TAXPAYER'S EVIDENCE ON THIS ISSUE, CONSIDERED IN ITS TOTALITY, TO BE INSUFFICIENT TO MAKE A FINDING IN FAVOR OF TAXPAYER, EVEN ASSUMING THIS "NON-PROPULSION" ISSUE WERE PROPERLY BEFORE ME IN THIS CONTESTED ASSESSMENT CASE.

I DO NOT FIND THE DATA SUBMITTED BY TAXPAYER REGARDING THE BURN RATE CALCULATION AND THE METERS TO BE RELIABLE, AS NEITHER THE DOCUMENTS NOR TAXPAYER'S WITNESSES STATE THE REVOLUTIONS PER MINUTE (RPM) AT WHICH

THE ENGINES WERE SET IN THE BURN RATE TESTS. THERE IS ALSO NO MENTION OF THE AMBIENT TEMPERATURES WHEN THE BURN RATE TESTS WERE CONDUCTED.

THESE FACTORS ARE IMPORTANT BECAUSE DIFFERENCES COULD INFLUENCE THE RATE OF FUEL CONSUMPTION BEING MEASURED IN THE "BURN RATE" HOUR. FOR EXAMPLE, ENGINES WILL BURN A DIFFERENT AMOUNT OF FUEL WITH THE AIR CONDITIONING RUNNING IN JULY OR AUGUST THAN THEY WILL IN DECEMBER OR JANUARY.

FURTHER, TAXPAYER'S ARGUMENT IS PREMISED UPON THEIR DRIVERS TAKING THEIR LONG BREAKS FOR REST OR EATING PURPOSES AT TRUCK STOPS OR RESTAURANTS OFF THE PUBLIC HIGHWAYS, AND NOT AT HIGHWAY REST STOPS. HOWEVER, TAXPAYER DID ACKNOWLEDGE THAT THEIR DRIVERS DO STOP AT HIGHWAY REST STOPS (TR. PP. 145, 160) AND THIS TIME WOULD BE CAPTURED BY THE HOBBS METERS.

WHILE TAXPAYER OFFERED ORAL TESTIMONY THAT THEY KNOW THE DRIVERS TAKE THEIR LONG BREAKS OFF THE PUBLIC HIGHWAYS BECAUSE THEY CAN TELL FROM LOOKING AT THE LOGS, (TR. 146, 147), NOT A SINGLE LOG WAS OFFERED INTO THE RECORD. WITHOUT DOCUMENTARY EVIDENCE AS SUPPORT, I CANNOT FIND THE ORAL TESTIMONY OF TAXPAYER'S WITNESS TO BE SUFFICIENT EVIDENCE TO SUPPORT THE CONTENTION THAT ALL LONG BREAKS WERE TAKEN OFF THE PUBLIC HIGHWAYS. I ALSO NOTE THAT NO DRIVER TESTIFIED FOR TAXPAYER ABOUT THIS. IN SUMMARY, THE CONTENTION THAT ALL THE TRACTORS' FUEL CONSUMPTION IN IDLE POSITION WITH THE HAND BRAKE SET OCCURS OFF THE PUBLIC HIGHWAYS IS NOT PROVED BY THE EVIDENCE IN THIS RECORD.

RECOMMENDATION

BASED UPON MY FINDINGS AND CONCLUSIONS AS STATED ABOVE, I RECOMMEND THE DEPARTMENT REDUCE NTL NO. XXXXX AND ISSUE A FINAL ASSESSMENT.

KARL W. BETZ
ADMINISTRATIVE LAW JUDGE