

MF 14-01

Tax Type: Motor Fuel

Tax Issue: Whether Purchase of Fuel Was A Taxable Transaction

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

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

v.

ABC BUSINESS

Taxpayer

**Docket # XXXX
Acct # XXXX**

RECOMMENDATION FOR DISPOSITION

Appearances: Matthew Crain, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; John R. Simpson of Sorling Northrup for ABC Business

Synopsis:

Between August 10, 2010 and January 18, 2011, the Department of Revenue (“Department”) issued 46 Notices of Tax Liability for Motor Fuel Tax (“NTLs”) to ABC Business (“taxpayer”) for motor fuel tax, penalty, and interest covering the time periods of January 2010 through August 2010. The NTLs were issued based on information the Department received from one of the taxpayer’s suppliers and not based on an audit performed by the Department.¹ The taxpayer timely protested 45 of the NTLs. For the first NTL that was issued, #01-525289 K, the taxpayer requested and received a late discretionary hearing, and that NTL was added to this case. On the day of the evidentiary hearing, the taxpayer filed a Motion

¹ After the NTLs were issued and while this case was pending with the Office of Administrative Hearings, the Department conducted an audit of the taxpayer’s account. The audit, however, is not at issue in this case.

for Partial Summary Judgment and a Memorandum in support of its Motion with attached exhibits. During the hearing, the Department indicated that it was going to withdraw 43 of the NTLs, and the remaining 3 NTLs (#01-525289 K, #01-528079 K, and #01-529092 K) were the only NTLs at issue during the hearing. After the hearing, the Department filed a Stipulation in which it withdrew the 43 NTLs and stipulated to certain facts that were at issue during the hearing.² Based on the evidence presented by both parties, it is recommended that the 3 NTLs at issue be dismissed, the taxpayer's Motion for Partial Summary Judgment be granted, and this matter be resolved in favor of the taxpayer.

FINDINGS OF FACT:

1. The taxpayer was licensed as a distributor and receiver of motor fuel. (Dept. Group Ex. #1; Tr. p. 15)
2. On August 10, 2010, the Department issued a Notice of Tax Liability for Motor Fuel Tax, #XXXX K, to the taxpayer that indicates tax due in the amount of \$XXXX, plus interest and penalty, for the time period of March 2010. A copy of the NTL was admitted into evidence under the certificate of the Director of the Department. (Dept. Group Ex. #1)
3. On November 4, 2010, the Department issued a Notice of Tax Liability for Motor Fuel Tax, #XXXX K, to the taxpayer that indicates tax due in the amount of \$XXXX, plus interest and penalty, for the time period of June 2010. A copy of the NTL was admitted into evidence under the certificate of the Director of the Department. (Dept. Group Ex. #1)
4. On December 9, 2010, the Department issued a Notice of Tax Liability for Motor Fuel Tax, #XXXX K, to the taxpayer that indicates tax due in the amount of \$XXXX, plus

² The Department's Stipulation also indicates that it agrees to abate the penalties and interest in the following five assessments: #XXXX A, #XXXX A, #XXXX A, #XXXX A, #XXXX A. These five assessments, however, were not included in the present case. (Tr. p. 10)

interest and penalty, for the time period of July 2010. A copy of the NTL was admitted into evidence under the certificate of the Director of the Department. (Dept. Group Ex. #1)

5. These 3 NTLs were issued based on information that the Department received from one of the taxpayer's suppliers. The NTLs allege that the gallons of fuel that the taxpayer purchased on a tax-free basis from its supplier do not match the gallons reported on the taxpayer's motor fuel tax returns. (Taxpayer Ex. C9, C17; Tr. pp. 18-19, 29)
6. All of the gallons that the taxpayer purchased that resulted in the issuance of these 3 NTLs were denaturant. (Dept. Stip. ¶8)
7. Denaturant is commonly referred to as "natural gasoline" or "drip gas." (Affidavit of Charles W. Corr, ¶6)
8. The taxpayer used the denaturant in the production of commercial denatured fuel ethanol. (Affidavit of Charles W. Corr, ¶9, 11)
9. The Department agreed that the taxpayer's use of denaturant is not subject to motor fuel taxation. (Dept. Stip. ¶10; Tr. p. 46)
10. The taxpayer did not remit to the Department the tax relating to the 3 NTLs at issue in this case. (Tr. pp. 25, 31)
11. On January 21, 2011, the Department issued a Notice of Applied Credit of Motor Fuel Tax to the taxpayer that indicates that the Department applied credit number XXXX in the amount of \$XXXX to assessment number XXXX in the amount of \$XXXX.³ The Department re-issued the balance of \$XXXX as credit number XXXX. (Taxpayer Ex. D1)

³ This assessment number is the same number of the NTL issued on August 10, 2010 (see Fact #2).

CONCLUSIONS OF LAW:

Section 5 of the Motor Fuel Tax Act (“Act”) (35 ILCS 505/1 *et seq.*) requires a person who holds a distributor’s license to file a monthly return with the Department “showing an itemized statement of the number of invoiced gallons of motor fuel of the types specified in this Section which were purchased, acquired, received, or exported during the preceding calendar month; ...” 35 ILCS 505/5. The types of motor fuel specified in Section 5 include the following: “All products commonly or commercially known or sold as gasoline (including casing-head and absorption or natural gasoline)....” *Id.* The denaturant that the taxpayer purchased was a natural gasoline that, pursuant to Section 5, was required to be reported on the taxpayer’s monthly motor fuel tax return.

Section 5 of the Act further provides, in relevant part, as follows:

If the Department has reason to believe and does believe that the amount shown on the return as purchased, acquired, received, exported, sold, used, lost or destroyed is incorrect, or that an amount of motor fuel of the types required by the second paragraph of this Section to be reported to the Department has not been correctly reported the Department shall fix an amount for such receipt, sales, export, use, loss or destruction according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct. *Id.*

Under this provision, if a taxpayer fails to report gallons purchased, the Department will issue an NTL alleging that tax is owed on the gallons purchased. (Tr. pp. 28-29)

In addition to Section 5, Section 21 of the Act incorporates by reference section 4 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the Department shall determine the amount of tax due “according to its best judgment and information.” 35 ILCS 505/21; 120/4. A certified copy of the Department’s determination of the amount of tax due “shall, without further proof, be admitted into evidence... and shall be prima facie proof of the correctness of the amount of tax due, as shown therein.” *Id.* Once the Department has

established its *prima facie* case by submitting the certified copy of the Department's determination into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. Clark Oil & Refining Corp. v. Johnson, 154 Ill. App. 3d 773, 783 (1st Dist. 1987); Balla v. Department of Revenue, 96 Ill. App. 3d 293, 295 (1st Dist. 1981); Lakeland Construction Co., Inc. v. Department of Revenue, 62 Ill. App. 3d 1036, 1039 (2nd Dist. 1978).

The Department's *prima facie* case was established when the Department's certified copy of the 3 NTLs was admitted into evidence. After the *prima facie* case was established, the parties agreed that the use of the denaturant was not subject to motor fuel taxation. (Dept. Stip. ¶10; Tr. p. 46) Because the use was not subject to taxation, the taxpayer has overcome the Department's *prima facie* case. The NTLs, therefore, should be dismissed.

During the hearing, the parties indicated that when the taxpayer realized that it had inadvertently omitted gallons purchased or otherwise incorrectly filed its motor fuel tax returns, the taxpayer began to file amended returns, Form RMFT-5-X, Amended Return/Claim for Credit Motor Fuel Tax for Distributor/Suppliers (example at Taxpayer Ex. A5-A17). Form RMFT-5-X allows the taxpayer to correct the number of gallons reported on its original returns and remit to the Department any tax due for those gallons. The taxpayer then filed claims, Form RMFT-11-A, Illinois Motor Fuel Tax Refund Claim (for tax paid on or after January 1, 2001), that requested refunds of any amounts that were paid with the RMFT-5-X for which the use of the gallons was for purposes that were not subject to motor fuel taxation.⁴ (Taxpayer Ex. A1-A4) The parties stated that the taxpayer did not file any claims (Form RMFT-11-A) for the amounts at issue in the 3 NTLs that are the subject of dispute in this case. (Tr. pp. 6, 19, 22, 29-30, 32-34)

⁴ The parties indicated that the taxpayer had filed several claim forms (Tr. pp. 5-8), but only one form was provided as an example. (Taxpayer Ex. A1-A4)

The parties indicated that as a result of the taxpayer filing various amended returns and claims regarding the other NTLs, the taxpayer was entitled to a refund or credit from the Department. The Department applied a portion of the taxpayer's credit memoranda to the 3 NTLs at issue in this case. (Tr. pp. 22-25, 31; Taxpayer Ex. D1) During the hearing, the arguments of the parties indicated that the reason for the hearing was to determine whether the taxpayer is entitled to a "refund" of the credit memoranda that the Department applied to the NTLs in this case. The parties indicated that the issue is "whether [the taxpayer] is prohibited from obtaining a refund of that money that was held for the other claims since no claim was filed for that money that the Department was holding." (Tr. p. 33)

Generally a claim must be filed in order to request a refund (see 35 ILCS 505/13), and if the Department determines (after reviewing the claim) that the claim should be denied, then the Department will issue a Notice to the taxpayer denying the claim (35 ILCS 505/21; 120/6, 6b), for which the taxpayer may then request a hearing by timely filing a protest. Because no claims were filed for the amounts at issue in this case, the Department did not issue any denials of the claims, and this case does not concern denials of claims. This case only concerns NTLs that should be dismissed.

The Department now argues that the taxpayer cannot receive a "refund" of the credit memoranda that the Department applied to the NTLs in this case because the taxpayer failed to file the appropriate paperwork. The parties agreed that the taxpayer did not remit to the Department the tax relating to the 3 NTLs at issue. (Tr. pp. 25, 31) The taxpayer also timely protested 2 of the NTLs and was granted the right to a late discretionary hearing on the third NTL. The Department contends, however, that the taxpayer did not file the proper returns, and

the time period for filing a claim for a credit or refund of the money that the Department applied to the NTLs is barred by the statute of limitations. See 35 ILCS 505/13.

The Department's argument concerning the statute of limitations would be an appropriate argument if this case concerned claim denials, but it does not. Because this case concerns NTLs that must be dismissed, the Department must make the proper adjustments to the taxpayer's account. The Department's employee admitted that after a credit memorandum has been applied, if the taxpayer "resolve[s] the issue of the assessment, then an adjustment can be made." (Tr. p. 25) Now that it has been determined that the NTLs should be dismissed, and an adjustment must be made to credit those amounts to the taxpayer.

Recommendation:

For the foregoing reasons, it is recommended that the following 3 Notices of Tax Liability be dismissed: #XXXX, #XXXX, and #XXXX. The taxpayer's account should be credited accordingly. The Department has withdrawn the remaining 43 NTLs in this matter.

Linda Olivero
Administrative Law Judge

Enter: July 18, 2014