JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2004-12-21-03 (Non-Precedential)
ID: MV-04-015-H
DATE: DECEMBER 21, 2004
DISPOSITION: DENIED
TAX TYPE: IRP/IFTA
APPEAL: NONE

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

TRUCKING COMPANY ("Protestant"), appears through REPRESENTATIVE. The IRP/IFTA Section, Audit Division, Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, the Office of General Counsel of the Oklahoma Tax Commission.

A prehearing conference was scheduled in this matter on September 28, 2004. A Notice of Prehearing Conference was mailed to the Protestant at its last known address.[1] The Protestant did not appear at the prehearing conference. Thereafter, on September 29, 2004, notice was served upon the parties that this cause would be closed and the matter submitted for decision upon the filing of a verified response to the protest by the Division. The Division filed its Verified Response to Protest on October 5, 2004, and the record was closed and this case was submitted for decision on October 27, 2004.

## PART I

## FINDINGS OF FACT FOR IRP ASSESSMENT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the Division's Verified Response to Protest, the undersigned finds:

1. The Protestant was a registrant under the International Registration Plan ("IRP") based in the jurisdiction of Oklahoma for the 2001 and 2002 registration years, OK###.[2]

2. On September 4, 2002, the Division mailed the Protestant a notice that an IRP audit for the 2001 and 2002 registration years ("Audit Period") would be conducted, along with an IFTA audit for the 1st Quarter of 2001 through the 2nd Quarter of 2002.[3]

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[1] OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to REPRESENTATIVE, TRUCKING COMPANY, OUT-OF-STATE ADDRESS.

[2] The 2001 registration year included records from July 1, 1999, to June 30, 2000. The 2002 registration year included records from July 1, 2000, to June 30, 2001.

[3] Division's Exhibit B. The letter was mailed to the Protestant at OKLAHOMA AGENT'S ADDRESS. According to records of the Division, the Protestant's agent was AGENT, OKLAHOMA AGENT'S ADDRESS.

3. On July 18, 2003, the Division sent the Protestant a letter that referenced the Division's letter of September 4, 2002, and the Division's attempt to contact the Protestant's agent. The letter requested all of the Protestant's operational mileage records, including DOT logs (if available), trip sheets, and monthly or quarterly mileage statements (including total miles by fleet and total miles by vehicle for each month or quarterly), for the Audit Period.[4]

4. The records received from the Protestant lacked any mileage and fuel summary statements, and the records provided were in no semblance of order. The Division conducted an audit of the Protestant for the 2001 and 2002 registration years based upon the difference between the apportioned fees paid Oklahoma and the full Oklahoma fees due.[5]

5. On April 9, 2004, the Division sent the Protestant Registrant Audit Reports for the 2001 and 2002 registration years.[6]

6. On April 29, 2004, the Division issued assessments for the 2001 and 2002 registration years. The assessment for the 2001 registration year was in the amount of $1,914.08 and the assessment for the 2002 registration year was in the amount of $1,879.09.[7]

7. The Division received a letter dated May 10, 2004, from REPRESENTATIVE, on behalf of the Protestant, protesting the proposed assessments for the 2001 and 2002 registration years.[8]

8. On September 2, 2004, the Office of Administrative Law Judges mailed the parties a Notice of Prehearing Conference, setting the prehearing conference for September 28, 2004, at 1:30 p.m. The Protestant did not appear.

9. On September 29, 2004, the Office of Administrative Law Judges mailed the parties a notice that the record in this matter would be closed and submitted for decision on the merits

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[4] The letter was mailed to the Protestant c/o REPRESENTATIVE, OUT-OF-STATE ADDRESS. The letter also advised the Protestant that, "If you are unable to furnish the records on or before August 18, 2003, an IFTA and IRP assessment may be based upon the penalty provisions as set forth by IFTA and IRP."

[5] Division's Exhibit B.

[6] Division's Exhibit B. The Registrant Audit Reports were sent to Protestant at TRUCKING COMPANY, OUT-OF-STATE ADDRESS.

[7] Division's Exhibit B. The Protestant's Original Schedule B for the 2001 registration year reported 5,945 miles traveled in Oklahoma out of 107,613, or 5.524% of the fees originally paid. The audit increased the total miles traveled in Oklahoma to 100% of the total miles traveled, or full fees in the amount of $2,026.00. The assessment gave the Protestant credit for the 5.524%, or $111.92, leaving a total of $1,914.08.

The Protestant's Original Schedule B for the 2002 registration year reported 14,597 miles traveled in Oklahoma out of 201,322 total miles traveled, or 7.251% of the fees originally paid. The audit increased the total miles traveled in Oklahoma to 100% of the total miles traveled, or full fees in the amount of $2,026.00. The assessment gave the Protestant credit for the 7.251% originally paid, or $146.91, leaving a total due of $1,879.09.

[8] Division's Exhibit D. No basis for the protest is stated in the letter.

upon receipt of the Division filing a verified response to the protest. The Division's verified response was due no later than thirty (30) days from the date of the order.[9]

10. On October 5, 2004, the Division filed its Verified Response to Protest.[10]

11. On October 18, 2004, REPRESENTATIVE contacted the Office of the Administrative Law Judges advising that she wanted to proceed with the protest, but did not understand that she needed to respond to the notice for the prehearing conference. It was requested that REPRESENTATIVE fax a letter stating her desire to proceed with the protest as soon as possible, as this matter was to be submitted for decision. No response was received and this matter was submitted for decision on October 27, 2004.[11]

## CONCLUSIONS OF LAW
## FOR IRP ASSESSMENT

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject of this action.[12]

2. The State of Oklahoma entered into and is a member of the IRP, which provides for the registration and licensing of vehicles engaged in interstate commerce or combined interstate and intrastate commerce on a proportional basis commensurate with the use of Oklahoma highways.[13]

3. The Oklahoma Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of taxes under the IRP and the Oklahoma Motor Vehicle Licensing and Registration Act.[14]

4. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.[15]

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[9] Division's Exhibit A.

[10] ADMINISTRATOR, IRP/IFTA Administrator, Audit Division, Oklahoma Tax Commission, verified the Division's response under oath.

[11] The call was taken by SECRETARY, Secretary to ALJ, Administrative Law Judge. SECRETARY memorialized the call by writing a memo to the file and sending a copy to the Division's representative. No response was received from REPRESENTATIVE and this matter was submitted for decision on October 27, 2004. The Protestant had not requested an oral hearing.

[12] OKLA. STAT. ANN. tit. 68, § 207 (West 2001) and OKLA. STAT. ANN. tit. 47, § 1120 (West 2001).

[13] OKLA. STAT. ANN. tit. 47, § 1120(A) (West 2001).

[14] OKLA. STAT. ANN. tit. 47, § 1101 et seq., which incorporate by reference Articles I through XXII of the IRP (West 2001). OKLA. ADMIN. CODE § 710:60-4-20-(b)(1) (2003).

[15] OKLA. STAT. ANN. tit. 75, § 250 et seq., (West 2001) and OKLA. STAT. ANN. tit. 75, § 308.2 (West 2001).

5. As a registrant under the provisions of the IRP, the Protestant is subject to the audit procedures and policies set forth therein.[16]

6. The Protestant is subject to audit by Oklahoma as its base jurisdiction.[17]

7. Upon completion of the audit of a registrant, the audit findings shall be provided to the registrant and to all member jurisdictions in which the registrant was apportioned or in which it accrued miles.[18]

8. The findings of the audit shall be final as to member jurisdictions and the audited registrant, if they do not act as specified in IRP, Art. XVI, Sections 1608 and 1610, except in conditions of fraud.[19]

9. The provisions of IRP, Art. XVI, Section 1604, concern an action of fraud committed with respect to the audit itself. It provides a mechanism whereby the audit can be thrown out if, and only if, it is determined at some later date that the final audit findings are erroneous due to some fraudulent action, whether such action is the submission of false records by the registrant or collusion between the registrant and the auditor.

10. No allegation has been made by either party that the audit is fraudulent in any manner. The exception to the audit becoming final after thirty (30) days from the date of notification of the findings does not apply.

11. An assessment is presumed correct and the Protestant bears the burden of showing that it is incorrect, and in what respect.[20]

12. The Protestant has failed to meet its burden of proof in this matter. The Protestant has produced no evidence and cited no authority that the assessment issued by the Division is incorrect, or that the sums are not due and owing.

## DISPOSITION
## FOR IRP ASSESSMENT

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest be denied, and that the total amounts

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[16] IRP, Art. XVI and IRP, Appendix F, Art. XVI.

[17] IRP, Art. XVI, Section 1600.

[18] IRP, Art. XVI, Section 1604, Section 1604, amended April 10, 1998, Ballot 1.7.187. Effective October 1, 1999.

[19] IRP, Art. XVI, Section 1614.

[20] OKLA. ADMIN. CODE § 710:1-5-47 (2003). See *Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission*, 1988 OK 91, 768 P.2d 359.

assessed for the 2001 and 2002 registration years be fixed as Protestant's deficiency and that those amounts be determined as due and owing.

## PART II

## FINDINGS OF FACT FOR IFTA ASSESSMENT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the Division's Verified Response to Protest, the undersigned finds:

1. The Protestant was licensee #XXX under the International Fuel Tax Agreement ("IFTA") in the base jurisdiction of the State of Oklahoma for the audit period of the 1st Quarter of 2001 through and including the 2nd Quarter of 2002 ("Audit Period").

2. On September 4, 2002, the Division mailed the Protestant a notice that an IFTA audit would be conducted for 1st Quarter of 2001 through the 2nd Quarter 2002, and an IRP audit would be conducted for the 2001 and 2002 registration years.[21]

3. On July 18, 2003, the Division attempted to contact the Protestant's agent of record by phone, but was unable to reach him.[22]

4. On July 18, 2003, the Division sent the Protestant a letter requesting all of the Protestant's operational mileage records, including DOT logs (if available), trip sheets, and monthly or quarterly mileage statements (including total miles by fleet and total miles by vehicle for each month or quarter), for the IFTA audit period of 1st Quarter of 2001 through the 2nd Quarter of 2002.[23]

5. The Protestant did not provide the records requested by the Division to conduct the audit.[24] The records provided by the Protestant lacked any mileage and fuel summary statements to support the quarterly reports filed during the Audit Period.[25]

6. The Division based the audit upon the best information available, the Protestant's IFTA reports for the Audit Period.[26]

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[21] Division's Exhibit C.

[22] Division's Exhibit C. According to the records of the Division, the Protestant's agent was AGENT, OKLAHOMA AGENT'S ADDRESS. The records of the Division also reflect that the agent's phone number was (XXX) XXX-XXXX.

[23] Division's Exhibit C. The letter also advised the Protestant that, "If you are unable to furnish the records on or before August 18, 2003, an IFTA assessment may be made based upon the penalty provisions as set forth by IFTA." The letter was mailed to the Protestant, Attn: REPRESENTATIVE, OUT-OF-STATE ADDRESS.

[24] Division's Exhibit C.

[25] Division's Exhibit C.

7. On April 23, 2004, the Division mailed the Protestant a Licensee Audit Report ("LAR") simultaneously with the Interjurisdictional Audit Report ("IAR") to the member jurisdictions affected by the audit. The LAR advised the Protestant that the assessment would become final if it was not appealed within thirty (30) days. The LAR proposed assessment for "diesel" fuel tax in the amount of $15,013.71, penalty in the amount of $1,501.37, and interest in the amount of $4,369.95, for a total of $20,885.03.[27]

8. On April 29, 2004, the Division mailed the Protestant a billing statement in the amount of $20,885.03, in accordance with the LAR.[28]

9. The Division received a protest dated May 10, 2004, to the proposed assessment, on behalf of the Protestant, from REPRESENTATIVE.[29] No basis for the protest is stated in the letter.

10. On September 29, 2004, the Office of Administrative Law Judges sent the parties a Prehearing Conference Order that the record in this matter would be closed and the case submitted for a decision on the merits upon receipt from the Division of a verified response to the protest.[30]

## CONCLUSIONS OF LAW FOR IFTA ASSESSMENT

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this action.[31]

2. The State of Oklahoma entered into and is a member of IFTA with other states and provinces "to establish and maintain the concept of one fuel use license and administering base jurisdiction for each licensee and to provide that a licensee's base jurisdiction will have the primary responsibility for administering this Agreement and executing its provisions with respect to such licensee".[32]

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[26] Division's Exhibit C.

[27] Division's Exhibit C. The LAR includes the following paragraph:

"A licensee may appeal an audit finding issued by the commissioner of any member base jurisdiction by making a written request for a hearing within thirty (30) days after the service of notice of the original finding. If the hearing is not requested within thirty (30) days in writing, the original finding is final."

[28] Division's Exhibit C.

[29] Division's Exhibit B.

[30] Division's Exhibit A. See Note 11.

[31] OKLA. STAT. ANN. tit. 68, § 207 (West 2001) and OKLA. STAT. ANN. tit. 68, § 607(E) (West 2001).

[32] IFTA Articles of Agreement Section R150. See also OKLA. STAT. ANN. tit. 68, § 607(E) (West 2001).

3. The provisions of the IFTA Articles of Agreement ("the Agreement"), Audit Manual, and Procedures Manual are binding upon this jurisdiction as a member of the Agreement and the Protestant as a licensee under the Agreement.[33]

4. As a member of the Agreement, the Tax Commission is obligated to audit its licensees on behalf of all member jurisdictions.[34]

5. All audits conducted by members of IFTA must be in compliance with all requirements established in the Agreement, Procedures Manual, and Audit Manual.[35]

6. As a licensee under the Agreement, the Protestant is required to preserve his records upon which the quarterly returns are based.[36] If the records of the licensee are not available, the audit will be completed using the best information available to the base jurisdiction.[37]

7. If the licensee's records are lacking or inadequate to support any report filed by the licensee or to determine the licensee's tax liability, the base jurisdiction shall have the authority to estimate the fuel use upon (but is not limited to) factors such as the following:

- Prior experience of the licensee;
- Licensees with similar operations;
- Industry averages;
- Records available from fuel distributors; and
- Other pertinent information the auditor may obtain or examine.

Unless the auditor finds substantial evidence to the contrary by reviewing the above, in the absence of adequate records, a standard of 4 MPG/1.7KPL will be used.[38]

8. When tax paid fuel documentation is unavailable, all claims for tax paid fuel will be disallowed.[39]

9. The audit will be completed using the best information available to the base jurisdiction.[40] The burden of proof is on the licensee.[41]

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[33] IFTA Articles of Agreement Section R120.

[34] IFTA Articles of Agreement Section R1310.

[35] IFTA Articles of Agreement Section R1330.

[36] IFTA Articles of Agreement Sections R700 and R1210.100.

[37] IFTA Articles of Agreement Section R1210.200. See also IFTA Audit Manual Section A540.200.

[38] IFTA Audit Manual Section A550.100.

[39] IFTA Audit Manual Section A550.200.

[40] IFTA Audit Manual Section A540.200.

10. The base jurisdiction will furnish the licensee with the Licensee Audit Report and its customary notice of assessment, billing, or other notification which would signify the beginning of the licensee's appeal period.[42] Upon completion of the audit of a licensee, the audit findings shall be provided to member jurisdictions in which distance was accrued as to the accuracy of the licensee's IFTA tax returns.[43] The Division sends out the IAR simultaneously with the LAR.[44]

11. The findings of the base jurisdiction's audit as to the amount of fuel taxes due from any licensee shall be presumed to be correct.[45]

12. The Division's audit of the Protestant was conducted in accordance with the Agreement, Audit Manual, and Procedures Manual.[46]

13. The records provided by the Protestant were lacking and inadequate to support any report it filed during the Audit Period or to determine the Protestant's tax liability during the Audit Period. The IFTA reports filed by the Protestant during the Audit Period was the best information available to the Division upon which to base the audit and assessment of the Protestant.

14. The appeal process shall be conducted in accordance with the procedures established by the base jurisdiction.[47]

15. The jurisdiction of Oklahoma has established procedures for the appeal of actions or audit findings.[48]

16. In order for a protest to be considered timely, it must be filed pursuant to Oklahoma Statutes, within sixty (60) days after the date of mailing of the assessment, unless an extension is granted within the sixty (60) day period.[49]

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[41] IFTA Articles of Agreement Section R1210.300. See also IFTA Audit Manual Section A540.200.

[42] IFTA Audit Manual Section A690.100.

[43] IFTA Audit Manual Section A100.

[44] Division's Exhibit C.

[45] IFTA Audit Manual Section A730.

[46] IFTA Articles of Agreement Section R1200.

[47] IFTA Articles of Agreement Section R1400. The appeal procedures in the Agreement (R1410, R1420, and R1430) are only used if the base jurisdiction does not have provisions in its administrative procedures laws for appeals of actions or audit findings.

[48] See OKLA. ADMIN. CODE §§ 710:1-5-20 et. seq. (2003).

[49] OKLA. ADMIN. CODE § 710:1-5-22(a) (2003). See also OKLA. STAT. ANN. tit. 68, § 221(C) (West 2001).

17. The letter of protest dated July 31, 2004, was not received within the sixty (60) day provision provided by Oklahoma Statutes, and the Protestant did not request an extension within the sixty (60) day period.

18. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[50] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[51]

19. The Protestant has failed to meet its burden of proof that the assessment of additional diesel fuel tax to the various jurisdictions, including Oklahoma, was in error.

**DISPOSITION**
**FOR IFTA ASSESSMENT**

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest be denied, and that the total amount assessed for unpaid IFTA diesel fuel tax be fixed as the Protestant's deficiency, and that those amounts be determined as due and owing, including penalty and interest, accrued and accruing.

**OKLAHOMA TAX COMMISSION**

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.

[50] The standard of review in an administrative proceeding is preponderance of the evidence. *Oklahoma Tax Commission Order No. 1999-04-08-003* (citing) *Oklahoma Tax Commission Order No. 1991-10-17-061*. OKLA. ADMIN. CODE § 710:1-1-77(b) (2003) provides in pertinent part that "preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

[51] OKLA. ADMIN. CODE § 710:1-5-47 (2003). See *Enterprise Management Consultants, Inc. v. Oklahoma Tax Comm'n*, 1988 OK 91, 768 P.2d 359.