

08-1924  
AUDIT - IFTA & IRP  
TAX YEARS: 2005, 2006, 2007  
SIGNED 10-08-2009  
COMMISSIONERS: R. JOHNSON, D. DIXON, M. CRAGUN  
EXCUSED: M. JOHNSON  
GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,  Petitioner,  vs.  AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</b>  Appeal Nos. 08-1923 08-1924  Tax Type:     IFTA & IRP  Judge:         Phan
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**Presiding:**

R. Bruce Johnson, Commission Chair  
Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner:    PETITIONER REP, Owner, PETITIONER  
For Respondent:   RESPONDENT REP 1, Assistant Attorney General  
                      RESPONDENT REP 2, Auditor  
                      RESPONDENT REP 3, Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on November 23, 2009. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1.       Petitioner (the "Taxpayer") timely filed audit appeals of an IFTA tax audit for the period of October 1, 2005 through September 30, 2007 and an IRP audit for the period of April 1, 2007 through March 31, 2009. The IFTA audit was assigned Appeal Number 08-1923 and the IRP audit Appeal Number 08-1924. These appeals proceeded to the Formal Hearing before the Commission. However, at the Formal Hearing, the Taxpayer stated that the issue he was contesting related to the IFTA tax audit and his contention was limited to

the miles per gallon Respondent (the “Division”) had used in determining its audit assessment. The representative for the Taxpayer did not present information to refute the IRP audit and therefore no adjustment to that audit is considered in this decision.

2. The Taxpayer explained that he was an independent or ‘hot shot’ hauler. He owned a small truck and trailer, which he would use to transport goods from one location to the next. He indicated he may drive through as many as 14 states in a year and had apportioned or IRP registered plates.

3. He explained IFTA required that he file quarterly reports and he did always file the reports. However, he testified that after preparing the reports he did not hold on to the individual receipts because he was not aware that he needed to. Copies of the Taxpayer’s reports were submitted in this matter after the hearing and made part of this record.

4. The Taxpayer explained that the truck he owned and used in this operation was smaller than a regular semi-truck. His truck was a 1994 FL60 Freightliner. He explained that his trips were generally highway miles and typical trips would be from CITY 1, which is his home base, to CITY 2 or from CITY 1 to CITY 3. It was his testimony that the truck when loaded would get 8.5 to over 11 miles per gallon depending on how much of the trip was mountainous. He testified that for the unloaded portion of the trips he would get over the 11 miles per gallon. For this reason he concluded that if using an average, as the Division had in its audit, the average mileage should be 10 miles per gallon. Recorded on each of his IFTA returns was his calculation of the average actual miles per gallon he had obtained from his truck during each of the quarters at issue. The miles per gallon indicated from the returns ranged from 9 to 10.86 miles per gallon. However, for only one quarter, the second quarter of 2006, the average mileage equaled 9 miles per gallon.

5. The Division had concluded that the Taxpayer had failed to retain adequate records and, on that basis, applied the statutory default provision of 4 miles per gallon. The Division provided no evidence that the 4 miles per gallon was an accurate average for the type of vehicle that was used by the Taxpayer. The Division did not dispute that the subject vehicle was smaller than the typical semi-trucks to which the 4 miles per gallon average was typically applied.

6. Although the Taxpayer did not have back up records supporting the miles per gallon he had claimed on his IFTA returns for the audit period at issue, he did submit documentation of miles per gallon for the same vehicle on eleven different trips that he had made recently in 2009. This information was outside the audit period. However, it did support the Taxpayer’s contention that his vehicle did average significantly

higher miles per gallon than the average of 4 used by the Division in its audit. These records actually did show that the average miles per trip were less than the 10 miles per gallon. The trips ranged from 7.63 to 11.7 miles per gallon. However, on only two of these trips did the Taxpayer reach 10 or higher per gallon. The average of the actual miles per gallon from these trips was 9.37.

7. Based on the evidence submitted, the Taxpayer has established that his specific vehicle was smaller than the typical semi-truck. He also established that his vehicle obtained better gas mileage than the 4 miles per gallon average that the Division had applied in its audit. However, because the Taxpayer did not retain adequate back up records and the detailed records presented for a later period indicated a somewhat lower mileage than he had claimed on his returns, for the period at issue, the Commission does not find the evidence strong enough to support the 10 miles per gallon requested by the Taxpayer to be applied as an average for the entire audit period. The evidence does support an average mileage of at least 9 per gallon. The 9 miles per gallon would be a reasonable average to apply across the entire audit period.

APPLICABLE LAW

Users of special fuel in the state of Utah are required to report such use, as provided in Utah Code Ann. §59-13-305 (2007), as follows:

- (1) Unless exempted by Subsection (5), each user shall file with the commission, on or before the last day of the month following the end of a reporting period, a report on forms prescribed by the commission showing:
  - (a) the amount of fuel purchased and the amount of fuel used during the preceding reporting period by that user in the state; and
  - (b) any other information the commission may require to carry out the purposes of this part.

. . .

The Commission is authorized to examine the special fuel reports, as provided in Utah Code §59-13-312 (2007) below:

- (1) Each user, supplier, and any other person importing, manufacturing, refining, dealing in, transporting, or storing fuel shall keep a record, in the form prescribed by the commission, of all deliveries, removals, purchases, receipts, sales, meter readings, inventories, and distribution of special fuel. The records shall include copies of all invoices or bills of all sales, and are subject to inspection by the commission or its authorized representative during regular business hours. All records shall be preserved for a period of three years.
- (2) Any user claiming a refund for taxes paid to a supplier shall retain on file a receipt of invoice, or a microfilm or microfiche of the receipt or invoice, evidencing the purchase of special fuel and the payment of the tax. The commission may require the user to furnish summaries or copies of original documentation substantiating the amount of refund claimed.

The Commission has issued further guidance regarding the maintenance of records in Administrative Rule R865-4D-18 below:

A. The records and documents maintained pursuant to Section 59-13-312 must substantiate the amount of fuel purchased and the amount of fuel used in the state and claimed on the special fuel report required by Section 59-13-305(1).

B. Every user must maintain detailed mileage records and summaries for fleets traveling in Utah, detailed fuel purchaser records, and bulk disbursement records. From this information, an accurate average miles per gallon (mpg) figure can be determined for use in computing fuel tax due. No fuel entering the fuel supply tank of a motor vehicle may be excluded from the mpg computation. Refer to Tax Commission rule R865-4D-2.

. . .  
D. If the user fails to maintain or provide adequate records from which the user's true liability can be determined, the Tax Commission shall, upon giving written notice, estimate the amount of liability due. Such estimate shall taken into consideration any or all of the following:

1. any available records maintained and provided by the user;
2. historical filing information;
3. industry data;
4. a flat or standard average mpg figure.
  - a) The standard average mpg normally applied is four mpg for qualified motor vehicles and six miles per gallon for nonqualified motor vehicles.

#### CONCLUSIONS OF LAW

1. Clearly the law places the burden on the Taxpayer to maintain records including the individual receipts pursuant to Utah Code §59-13-312. These records were to be maintained and available for review if the IFTA returns were audited by the Division. In this matter the Taxpayer failed to comply with these requirements, although he had filed returns for each of the quarters at issue in the audit.

2. Based on the Taxpayer's failure to provide the receipts and other documents that would have verified the accuracy of his IFTA filings, the Division determined it would have to estimate the miles per gallon, rather than rely on the miles per gallon that the Taxpayer had claimed on its IFTA filings. Although Utah Admin Rule R865-4D-18 provides that the miles may be based on a average 4 miles per gallon, it also allows that the miles may be estimated from any available records maintained by the taxpayer, historical filing information, or even industry data. The Division chose to apply the 4 miles per gallon provision, which is generally appropriate, particularly for large fleets with different vehicle types, loads and capacities. In this appeal there is only one truck and the truck is smaller than the average qualified motor vehicle. The Taxpayer was able to present actual mileage records for the truck in question, which, despite not being contemporaneous

to the audit period, support his contention that his actual miles per gallon are more than 4.

3. The Commission concludes from the review of the evidence submitted that this mileage is too low for the Taxpayer's vehicle. The Division did not refute the Taxpayer's contention regarding the higher mileage of this vehicle in particular and the mileage that he obtained. Presumably there would be industry data for the make and model of the subject vehicle on the miles per gallon, which would have been available to the Division, either to use in its estimate or, if the information was contrary to the Taxpayer, to refute the Taxpayer's position as to the mileage. The Taxpayer does have the responsibility to maintain records and he failed to do so. The evidence does not support the miles per gallon claimed on the returns or the 10 mile per gallon average requested by the Taxpayer. However, based on what was presented, the mileage was at least 9 miles per gallon on average and that is the appropriate number to apply as the average mileage for the entire IFTA audit.

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Jane Phan  
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Tax Commission orders the Division to revise its IFTA audit for the period of October 1, 2005 through September 30, 2007 as indicated above. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

R. Bruce Johnson  
Commission Chair

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

Michael J. Cragun  
Commissioner

**Notice of Appeal Rights: failure to pay the deficiency resulting from this order within thirty (30) days from the date hereon could result in a late payment penalty.** You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. Sec. 63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of

Appeal No. 08-1923, 08-1924

law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Sec. 59-1-601 et seq. and 63G-4-401 et seq.

*JKP/08-1924.fof*