STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RELIABLE TRUCKING RENTAL, INC.	:	DETERMINATION DTA NO. 823373
for Revision of a Determination or for Refund of Tax on Fuel Use under Article 21-A of the Tax Law for the Period October 1, 2003 through March 31, 2006.	:	

Petitioner, Reliable Trucking Rental, Inc., filed a petition for revision of a determination or for refund of tax on fuel use under Article 21-A of the Tax Law for the period October 1, 2003 through March 31, 2006.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, One Penn Plaza, New York, New York, on November 23, 2010, at 10:30 A.M., with all briefs to be submitted by May 20, 2011, which date commenced the six-month period for the issuance of this determination. By letter dated November 4, 2011, this six-month period was extended for an additional three months (Tax Law § 2010[3]). Petitioner appeared by Miu & Co. (Louis Miu, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michele M. Milavec, Esq., of counsel).

ISSUE

I. Whether petitioner has established errors in the Division of Taxation's assessment of fuel use tax warranting a reduction or cancellation of said assessment.

II. Whether the penalty imposed against petitioner should be abated.

FINDINGS OF FACT

1. Petitioner, Reliable Trucking Rental Inc., owns and maintains trucks that are rented to an affiliated company that sells food and restaurant supplies. Petitioner's trucks are driven by employees of the affiliated company.

2. Petitioner is registered for fuel use tax to file International Fuel Tax Agreement (IFTA) returns. Its base for IFTA reporting purposes is New York State. Petitioner filed New York State IFTA quarterly fuel use tax returns, Form IFTA-100, for the period October 1, 2003 through March 31, 2006. It also filed New York State highway use tax returns (HUTRs), Form MT-903, for the period October 1, 2003 through March 31, 2006.

3. In August 2006, the Division of Taxation (Division) commenced an audit of petitioner for the period October 1, 2003 through March 31, 2006. On August 4, 2006, the Division sent an appointment letter to petitioner, which stated that the audit of petitioner's IFTA fuel use and truck mileage tax returns would commence on September 7, 2006. The letter requested that petitioner make available "all books, records, worksheets and other documents pertinent to the preparation of [its] tax returns, as well as all information requested on the attached sheet . . . for the entire audit period." The attached sheet requested tax returns (MT-903 and IFTA-100s), mileage records (I.C.C. logs, odometer readings and trip sheets), fueling records (bulk fuelings and retail fuel receipts), records pertaining to the laden and unladen weight of the vehicles, Thruway receipts and statements and a list of all equipment for the audit period. The attached sheet further explained that additional information and records might be required as the audit progressed.

4. In the course of the audit, petitioner provided the following records: a summary of bulk fuel purchases, individual fuel purchases for bulk storage, an equipment list, some vehicle

registration and title documents, E-Z Pass statements, records of purchases made on Mobil and Sunoco credit cards, and certain trip records, including driver logs and odometer readings.

5. The Division reviewed the out-of-state purchases made with the Mobil and Sunoco credit cards and found that it could only ascertain the amounts spent and could not determine what was purchased. The Division considered petitioner's internal controls to be poor because there were trip logs for vehicles that were not on its equipment list and no trip records for vehicles that were on the list. The Division also determined that the odometer readings were not consistently maintained and that the location of the vehicles was not adequately identified. It also ascertained that there were inconsistencies between the individual invoices and petitioner's fuel purchase summary regarding the number of gallons of fuel purchased. In addition, the summary did not identify where the fuel was purchased. Petitioner explained that the fuel was purchased in bulk but it did not keep a record of inventory, timing or volume of each truck's refueling. This lapse was of concern because some of petitioner's vehicles were not IFTA qualified. Although petitioner had E-Z Pass statements, they were not considered useful because the Division was not given any documentation to determine which E-Z Pass statements pertained to which vehicle. Therefore, one could not determine which logged trip corresponded with a particular set of tolls or whether an E-Z Pass was used with IFTA vehicles. As a result, the Division concluded that the records provided by petitioner were not adequate to determine petitioner's fuel use tax liability and that a test period needed to be utilized. The test period selected for a detailed analysis was the first quarter of 2005 based upon the availability of records and the fact that the reported activity for this quarter appeared to be typical for the audit period.

6. Several methods were utilized for determining the total tax due. First, the Division used E-Z Pass statements, equipment list registrations and title documents, trip record reports,

odometer readings and detailed schedules of petitioner's highway use tax (HUT) returns to determine, to the extent possible, which vehicles were being operated subject to IFTA.

7. The Division found that petitioner had: (1) vehicles that were both qualified and registered for IFTA, (2) vehicles that were qualified for IFTA but not registered for IFTA, and (3) vehicles that were neither qualified nor registered for IFTA. Of the 19 IFTA qualified vehicles owned by petitioner during the test period, only 11 vehicles were actually registered for IFTA.

8. The Division used the Rand McNally MileMaker computer program to test the trips that related to the IFTA activity. The MileMaker program calculated the overall mileage for each trip and distributed, as appropriate, the mileage among the states in which petitioner's trucks traveled. For each state, tested mileage from odometer readings and trip testing was compared with the mileage reported by petitioner. The higher amount was attributed to the state as the audited mileage for the test period.

9. An error rate representing the percentage by which the audited miles exceeded the reported mileage was calculated for each state in which petitioner traveled during the test period. For Maryland, an error rate could not be computed because the reported mileage was zero. Therefore, the Division attributed 30 miles for every quarter to Maryland based on the test period activity.

10. The total audited mileage was determined to be 1,941,342 miles, as opposed to the mileage reported by petitioner on its returns of 1,860,125.

11. The Division next reviewed petitioner's fuel records and found, with regard to bulk stored fuel, that the total fuel purchases reflected on the computer records, the total fuel purchases computed from individual entries on a fuel purchase schedule that was provided to the Division and the total of the individual invoices for bulk fuel purchases did not correspond. In

addition, petitioner did not have any record of which vehicle in its fleet received a given amount of fuel. Since petitioner did not keep records of its fuel withdrawals and had both IFTA registered and non-IFTA registered vehicles in its fleet, the Division could not ascertain how much of the fuel purchased by petitioner was used by IFTA registered vehicles.

12. Petitioner reported the following average miles per gallon (mpg) on its IFTA registered vehicles:

Quarter	mpg	Quarter	mpg
4th quarter 2003	7.75	1st quarter 2005	7.70
1st quarter 2004	7.85	2nd quarter 2005	7.70
2nd quarter 2004	7.77	3rd quarter 2005	7.68
3rd quarter 2004	7.70	4th quarter 2005	7.70
4th quarter 2004	7.42	1st quarter 2006	7.70

13. In the course of the audit, petitioner presented the Division with a letter from a truck dealer stating that the type of trucks driven by petitioner typically consume seven to nine miles per gallon. The letter was not given any weight because there are a variety of factors, such as traffic, road conditions, weather conditions, an individual's driving style and how heavily loaded the vehicle is at a particular time, that will make fuel efficiency higher or lower.

14. The Division determined the amount of audited fuel use by applying the standard fuel efficiency of 4.0 mpg as set by statute in Tax Law § 523(b) because it was not possible for the Division's auditor to determine what the actual fuel consumption was for petitioner's registered vehicles. The audited mileage for each state was divided by four to estimate the number of gallons of fuel consumed in each jurisdiction. On the basis of these factors, the amount of total taxable fuel used by petitioner was found to be 485,344 gallons. The Division did not allow a tax

paid fuel credit because petitioner did not provide any documentation regarding how much tax paid fuel was purchased and used by IFTA registered vehicles as opposed to non-IFTA registered vehicles. In order to compute the amount of additional fuel use tax due, the Division multiplied the audited taxable gallons of fuel attributed to each state by each state's tax rate. The Division concluded that petitioner had a total IFTA fuel tax liability of $156,512.96 plus penalty and interest.

15. On February 8, 2008, the Division issued a Notice of Determination, Notice No. L-029709959, to petitioner that asserted that petitioner was liable for $156,512.96 in tax plus penalty and interest for a balance due of $222,613.09 for the period October 1, 2003 through March 31, 2006. Following a conciliation conference, the notice was sustained in a Conciliation Order dated October 30, 2009.

16. In accordance with New York State Administrative Procedure Act § 307(1), the Division's proposed findings of fact have been generally accepted and incorporated herein. Additional findings of fact were also made.

SUMMARY OF THE PARTIES' POSITIONS

17. At and after the hearing, petitioner presented samples of receipts from Exxon and Sunoco to substantiate the credit claimed for tax paid fuel. The Division reviewed the receipts and concluded that they failed to identify who purchased the fuel and which, if any, of petitioner's IFTA registered vehicles received the fuel and, therefore, did not have any probative value.

18. Petitioner agues that, at different times, the Division asserted that three different amounts of tax were due. According to petitioner, the Division initially asserted that the amount of tax due was $203,536.69. This was a preliminary computation that was determined prior to

the calculation of the amount assessed in the Notice of Determination. Petitioner submits that the Division then reduced the assessment to $150,003.00. This was the approximate amount of tax assessed in the Notice of Determination. Lastly, the Division advised petitioner that tax was due in the amount of $67,229.00. This was the amount presented to petitioner at the conciliation conference. However, it was not accepted by petitioner.

19. At the hearing, petitioner presented testimony stating that all mileage is recorded by the driver in a logbook and that these figures are subsequently entered into a computer. The next day, these figures are checked. According to petitioner, it utilized a figure of eight miles per gallon. Petitioner submits that the number of taxable gallons was based upon receipts that were acquired by the drivers upon purchasing the gasoline. The receipts showed the state where the gasoline was purchased. The number of taxable gallons was purportedly derived by dividing the number of miles by eight miles per gallon. According to petitioner's calculations, it does not owe any money and is due a refund. At the hearing, petitioner's fleet manager acknowledged that some of the figures on the returns were estimates.

20. Petitioner asserted that it never transferred fuel that it purchased in bulk from its tanks into IFTA registered vehicles and that all of the fuel used in the IFTA vehicles was purchased on the road. Petitioner's representative further maintains that the purchase receipts, trip records and a logbook were presented to the Division during each appointment scheduled in his office. Petitioner's representative posits that even if the credit card receipts from Mobil and Sunoco do not show what was purchased, the only thing the drivers could have been buying was gasoline. In this regard, petitioner's representative submits that even if the amount spent on credit cards was not 100 percent for gasoline, they were used 99 percent for gasoline. According to petitioner's representative, it is totally unfair to not give petitioner any credit for the fuel used in

the IFTA trucks. Petitioner's representative also contends that he never agreed to the use of a test period.

CONCLUSIONS OF LAW

A. New York fuel use tax is imposed by Tax Law § 523 upon the privilege of operating qualified motor vehicles on New York State public highways. It is based upon the amount of motor fuel and diesel motor fuel used by a carrier in such carrier's operations upon the public highways in New York. Pursuant to Tax Law § 528(a), the procedures governing Article 21 also apply to Article 21-A.

B. In accordance with Tax Law § 528(b), the Division has exercised its authority to enter into a cooperative agreement known as the International Fuel Tax Agreement (IFTA) for the collection of fuel use taxes and for the reporting and payment of tax to a single base state and for a proportional sharing of revenue from taxes among the jurisdictions where a qualified motor vehicle is operated. Here, petitioner was based in New York, and, as a result, New York was responsible, as a participant in the IFTA, to audit petitioner's mileage and fuel use tax in those states where petitioner operated its IFTA qualifying vehicles.

C. As set forth above, the main items in dispute are the miles per gallon figure used by the Division in its calculation of fuel consumed and the amount of the credit for tax paid fuel. In regard to the issue of fuel consumption, the record shows that the Division concluded that petitioner's record keeping was unreliable inasmuch as the total amount of fuel purchases on the schedule provided to the Division for review did not correspond with the total amount of the individual invoices for bulk fuel purchases given to the Division. In addition, petitioner did not have any record of what vehicle received a given amount of fuel. The Division also reviewed petitioner's purchases made on Mobil and Sunoco credit cards. However, these records were not

helpful because the Division was unable to determine what was purchased on the credit cards. The lack of records was problematic because petitioner had vehicles that were qualified and registered for IFTA, vehicles that were qualified but not registered for IFTA and vehicles that were neither qualified nor registered for IFTA. As a result of these deficiencies in record keeping, the Division could not determine how much of the fuel purchased by petitioner was used by IFTA registered vehicles. Moreover, the Division found the total mileage by the IFTA vehicles to be 1,941,342 as opposed to the 1,860,125 miles reported by petitioner on its returns, a difference of 81,217 miles. As noted by the Division, this calculation reveals a substantial discrepancy, which is not in dispute. In view of the deficiency in the records that would permit an accurate calculation of fuel mileage, the Division properly relied upon Tax Law § 523 and used a rate of four miles-per-gallon (***see Matter of Lionel Leasing Industries Co., Inc. v. State Tax Commn.***, 105 AD2d 581 [3d Dept 1984]).

D. Petitioner's reliance upon a letter from a truck dealer stating that the type of trucks driven by petitioner typically consume seven to nine miles per gallon is misplaced. The Division properly declined to give the letter any weight because there are a variety of factors, such as traffic, road conditions, weather conditions, an individual's driving style and how heavily loaded the vehicle is at a particular time, that will make fuel efficiency higher or lower.

E. As pointed out by the Division, Tax Law § 524(c) provides for a credit or refund of fuel use tax premised upon a showing that the taxpayer paid a fuel tax component or a sales tax component upon its purchase of fuel. The record shows that petitioner was not allowed a tax paid fuel credit because it did not provide any documentation regarding how much tax paid fuel was purchased and used by IFTA registered vehicles as opposed to non-IFTA registered vehicles. The record in this matter supports this conclusion.

F. As set forth above, the Division reviewed the out-of-state purchases made with the Mobil and Sunoco credit cards and found that it could only determine the amount spent and could not ascertain what was purchased. The receipts also did not identify who purchased the fuel or which, if any, of petitioner's IFTA registered vehicles received the fuel. The Division also found inconsistencies in the number of gallons purchased between the invoices and the fuel purchase summary. During the audit, petitioner explained that fuel was purchased in bulk but it did not keep a record of inventory, timing or volume of each truck's refueling. Therefore, the Division could not determine which truck received a particular amount of fuel. This failure was of particular concern in this case because petitioner had vehicles that were not qualified or registered for IFTA.

G. After the hearing, petitioner submitted samples of credit card receipts in support of its position that petitioner was entitled to a credit for tax paid fuel. The credit card receipts do not satisfy this burden. First, many of the receipts bear dates outside the audit period and are therefore irrelevant. Second, as was the case with the documents offered during the audit, the documents fail to identify which, if any, of petitioner's IFTA registered vehicles received the fuel.

H. Petitioner also offered into evidence photographs of signs from gasoline stations in order to prove that tax is charged on motor fuel. However, as noted by the Division, this evidence is completely lacking in probative value on the questions of how much fuel was purchased with tax included or whether the fuel was used in IFTA registered vehicles.[1]

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[1] As pointed out by the Division, Tax Law § 524 provides for a credit or refund of fuel use tax premised upon a showing that the taxpayer paid a fuel tax component or a sales tax component upon its purchase of fuel. Section P550 of the IFTA Procedures Manual requires a carrier to maintain a complete record of all fuel purchased. Petitioner's records do not satisfy these requirements.

I. At the hearing, petitioner maintained that it never transferred fuel that it purchased in bulk from its tanks into IFTA registered vehicles. Rather, petitioner submitted that all of the fuel placed into IFTA vehicles was purchased on the road. This argument cannot be accepted because petitioner did not keep any record of which vehicles in its fleet received a given amount of fuel.

J. As set forth above, petitioner's fuel use tax liability was determined, in part, by using a test period of the fourth quarter of 2005. At the hearing, petitioner argued that he did not agree to the use of a test period. This argument lacks merit.

Where a taxpayer fails to maintain or make available required records, the Division is authorized to estimate the taxpayer's fuel use tax liability. The Division is required to select an audit method reasonably calculated to reflect tax due. Where a taxpayer's records are insufficient, unreliable and inadequate to verify, upon audit, the amount of the fuel use tax due for the period under examination, the Division is authorized to use an indirect audit methodology (***see Matter of Lionel Leasing Industries Co.***). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (***id.***). It is clear from Conclusions of Law C and F that petitioner failed to maintain the records that were needed to determine its fuel use tax liability. Consequently, the Division was authorized to use an indirect methodology, and the fact that petitioner did not consent to the use of a test period is irrelevant.

K. Petitioner's representative offered what purported to be three versions of the Division's tax computation as well as its own analysis of what the correct numbers are for taxable gallons, tax paid gallons, net taxable gallons and tax due. Petitioner maintains that the difference among the three amounts evidences the Division's random processes.

L. Petitioner's argument misconstrues the audit process and the procedures that followed. The record shows that one notice of determination was issued on February 8, 2008 assessing tax due in the amount of $156,512.96 plus penalty and interest for a balance due of $228,923.60. The notice bore assessment number L-029709959. This was the notice challenged by the petition. There is no other notice in the record.

It is not disputed that before the Notice of Determination was issued, the Division proposed an adjustment of more than $200,000.00. However, the Division never formally assessed this amount. Further, it is not disputed that petitioner was offered a proposed adjustment during the conciliation process in an attempt to reach a resolution. However, the conciliation conference process is in the nature of a settlement negotiation and, without any evidence that a proposed resolution was accepted by each of the parties, it becomes irrelevant (***see*** 20 NYCRR 4000.5[c][1][i]). Here, as a result of a decision not to accept the proposed modification at BCMS, the statutory notice was ultimately sustained by the conciliation conferee in full.

M. In accordance with Tax Law § 527(b), a penalty was properly imposed upon petitioner for "failing . . . to pay any tax within the time required . . . . " Further, petitioner has not established that its failure to pay fuel use tax "was due to reasonable cause and not due to willful neglect . . . ." As explained by the Tax Appeals Tribunal, in establishing reasonable cause, the taxpayer faces an "onerous task" (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). This task is onerous because:

> By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citation omitted] (***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992).

In this instance, petitioner has not presented any evidence to establish that the failure to report and pay the correct amount of fuel use tax was due to reasonable cause and not due to willful neglect.

N. The petition of Reliable Trucking Rental, Inc. is denied and the Notice of Determination dated February 8, 2008 is sustained together with such penalty and interest as is lawfully due.

DATED: Troy, New York
December 8, 2011

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE