DEPARTMENT OF STATE REVENUE

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Letter of Findings Number: 09-0142, 09-0143
International Fuel Tax Agreement (IFTA) and
International Registration Plan (IRP)
Tax Years: 2003-2005

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ISSUES

I. IFTA – Sampling Methodology.

Authority: IC § 6-6-4.1-4(a); IC § 6-6-4.1-14(a); IC § 6-6-4.1-20; IC § 6-6-4.1-24(b); IC § 6-8.1-3-12; IC § 6-8.1-3-14; IC § 6-8.1-5-4(a); IFTA Articles of Agreement § R209 (2008); IFTA Audit Manual § A530 (2007).

Taxpayer protests the sampling methodology used in the Audit.

II. IFTA – Failure to Provide Tax-Paid Credit.

Authority: IFTA Articles of Agreement § R1000.100 (2007); IFTA Audit Manual § A550.200 (2008); IFTA Procedures Manual § P1070 (2008).

Taxpayer protests that tax-paid credit was not applied even though documentation was provided to the Department.

III. IRP – Assessment.

Authority: IC § 6-6-4.1-14; IC § 6-8.1-3-14; IC § 9-28-4-6.

Taxpayer protests the assessment, which was based on the same information that produced the IFTA assessment.

IV. Tax Administration – Ten Percent Negligence Penalty.

Authority: IC § 6-6-4.1-23(a); 45 IAC 15-11-2.

Taxpayer protests the imposition of the negligence penalty.

V. Tax Administration – Interest.

Authority: IC § 6-6-4.1-22; IC § 6-8.1-10-1; Ball v. Ind. Dep't of Revenue, 563 NE2d 522 (Ind. 1990); State v. Sproles, 672 NE2d 1353 (Ind. 1996); IFTA Articles of Agreement § R1230 (2008); IFTA Articles of Agreement § R1260 (2008); Black's Law Dictionary 891 (8th ed. 2004).

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer is a motor carrier whose fleet is comprised of independent owner-operators, who either have one vehicle leased to Taxpayer or fleets of vehicles that are leased to Taxpayer. The size of the fleet in the audit period was somewhere between 280 and 380 trucks. Taxpayer apparently does not own any of its own trucks. These different fleets are organized as divisions of Taxpayer. Each division had its own three letter name in order to easily differentiate amongst them (which have been renamed for the purposes of this Letter of Findings).

Taxpayer chose Indiana as its base jurisdiction for purposes of the International Fuel Tax Association ("IFTA") and the International Registration Plan ("IRP"). The Department of Revenue ("Department") conducted an IFTA and IRP audit, which resulted in the assessment of additional IFTA taxes and IRP fees. Taxpayer protested the proposed assessment and supplied further documents to the Department, which conducted a supplemental audit. After the Department issued its assessment following the supplemental audit, Taxpayer again took issue with the proposed amount and protested the assessment. A hearing followed. This Letter of Findings results.

I. IFTA – Sampling Methodology.

DISCUSSION

IFTA is an agreement between various United States jurisdictions and Canada allowing for the equitable apportionment of previously collected motor carrier fuel taxes. The agreement's goal is to simplify the tax, licensing, and reporting requirements of interstate motor carriers such as Taxpayer. The agreement itself is not a statute but was implemented in Indiana pursuant to the authority specifically granted under IC § 6-6-4.1-14(a) and IC § 6-8.1-3-14.

Taxpayer operated trucks in Indiana. As such, it operated on Indiana highways and consumed motor fuel. Therefore, Taxpayer was subject to motor carrier fuel IFTA taxes. IC § 6-6-4.1-4(a).

The Department conducted an IFTA audit on Taxpayer. An "audit," in section R209.300 of the IFTA Articles of Agreement, is defined as:

> The accumulation of sufficient competent evidential matter to afford a reasonable basis for determining whether or not there are any material differences between actual and reported operations for each affected jurisdiction in accordance with the provisions of the International Fuel Tax Agreement and all affected

jurisdictions' fuel use tax laws.

IC § 6-6-4.1-24(b) states that "[t]he notice of proposed [IFTA] assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." The taxpayer has a duty to maintain books and records and present those to the Department for review upon the Department's request. IC § 6-6-4.1-20; IC § 6-8.1-5-4(a).

The Department conducted an audit and determined that Taxpayer owed additional IFTA fuel taxes for multiple tax years. The Department audited three tax years: 2003, 2004, and 2005. A sample quarter was chosen from each of these tax years: the third quarter of 2003 ("3Q2003"); the fourth quarter of 2004 ("4Q2004"); and the third quarter of 2005 ("3Q2005"). These quarters were selected after "[t]he average quarterly miles and gallons for each year of the audit period were calculated and the quarters in each year with reported totals closest to the averages were selected," as stated in page seven of the Records Evaluation portion of the Supplemental Audit Summary ("Records Evaluation"). Section A530.100 of the IFTA Audit Manual provides that "[s]ample period(s) must be representative of the licensee's operations."

After the sample quarters were chosen, the Records Evaluation goes on to state on page seven that "[t]he unit summary jurisdiction mileage totals were entered into a spreadsheet and the miles were totaled by jurisdiction for each sample quarter." Each truck (or "unit") was then assigned a number.

Next, a computer program called RAT-STATSVI.0(2) ("RAT-STATS") was used in randomly selecting numbers. The random numbers chosen from RAT-STATS were then matched with the specific trucks to which those numbers had been assigned. According to the Records Evaluation, on page seven it states that "[t]he jurisdiction miles were totaled for those units in each sample quarter and representative tests were completed to insure that representative sample units were selected." If the tests revealed that the output did not result in a jurisdictionally representative sample, RAT-STATS also provided "spares," or additional random numbers. Additional "units" were also randomly selected with mileage activity in the jurisdictions where representation was needed. The purpose of this selection was to make the sample more jurisdictionally representative.

Some changes were made to the "units" that were randomly selected. It states on page seven of the Records Evaluation that:

> Some changes were made to the sample units audited in the sample quarters once the audit was in progress. Some of the sample units could not be audited because auditable records were not maintained. In some cases other units were added to the sample to get a more representative sample.

Taxpayer claims that this method of random sampling within a sample period "can produce a reasonably accurate tax calculation only if the units selected are statistically representative of the total population." Taxpayer argues that there is evidence that the "units" were not randomly selected, because "units" that were selected produced a greater error factor. Such a result, goes Taxpayer's argument, would invalidate the final result of the audit. Taxpayer presented four "areas of concern" at the hearing, which are discussed below.

As a preliminary matter, Taxpayer also argued that the overall methodology employed by the Department, that of sampling "units" within a sample quarter, is prone to "produce mathematically unreliable estimates with resulting confidence intervals frequently crossing zero." Taxpayer presented reasons as to why "block sampling" produces better results and is more appropriate for the audit than sampling "units" within a sample quarter. However, Taxpayer has not provided any evidence that these alternate methods would not have produced a similar result to that which was determined by the Department using its sampling methodology. Taxpayer's substitute analysis may be well reasoned and thoughtful but there is nothing in that analysis which – on its face – leads to a conclusion that the audit's methodology is so inherently flawed that the Legal Division, by means of this Letter of Findings, should substitute its own judgment for that of the audit. Without further evidence to the contrary, the Department has no choice but to conclude that a reasonable method to estimate Taxpayer's IFTA and IRP liabilities was used by the Department.

The Department used a sampling method because that is the method that IFTA requires each member jurisdiction to use. Under § A530 of the IFTA Audit Manual, "[u]nless a specific situation dictates, all audits will be conducted on a **sampling** basis" (**emphasis added**). Section R209.100 of the IFTA Article of Agreement defines an "audit" as "[t]he physical examination of the source documentation of the licensee's operations either in detail or on a **representative sample** basis" (**emphasis added**). Furthermore, the Indiana legislature has recently passed an amendment to IC § 6-8.1-3-12, which provides that "[t]he department may audit any returns with respect to the listed taxes using statistical sampling." IC § 6-8.1-3-12(b). Although this was not a written law at the time of the Audit, the amendment merely clarifies and formalizes a power that the Department already possessed.

Taxpayer further argued that when the Department presented the AD-10A, the "Agreement for Projecting Audit Results," the "Description of Projection Computation" contained language that indicated (to Taxpayer) that block sampling was being used instead of the method of sampling "units" within a sample period. Taxpayer also stated that it was not permitted an opportunity to protest or provide input on the sampling methodology that the Department used. Taxpayer refers to section A530.200 of the IFTA Audit Manual, which states that a "licensee should be allowed input into sample selection if legitimate reasons exist." However, section A530.200 states that a Taxpayer "should" be allowed input. Since Taxpayer was aware that the Department was using the sampling

methodology of sampling "units" within a sample period throughout the audit and never informed the Department that they had a problem with the sampling procedure while the audit was being completed, it seems disingenuous of Taxpayer to complain about being unable to provide input when ample opportunity had been provided prior to the final conference when the AD-10A was presented.

Finally, Taxpayer did not sign the AD-10A, and points this out as another example of the Department not following proper procedures. However, section A530.400 of the IFTA Audit Manual only states that "[a]n agreement that the sampling methodology is appropriate **should** be signed by the licensee and the auditor" (**emphasis added**). Therefore, the fact that it is not a requirement that the AD-10A be signed does not invalidate the methodology that was used or the audit as a whole.

A. Modification of Samples

Taxpayer has repeatedly claimed that "units" were removed from the sample selected and other "units" were added back in to the sample. The Department has not denied this. In fact, these instances are noted quite clearly in the Audit Reports that was supplied to Taxpayer, and Taxpayer was apparently aware of this during the audit. Contrary to Taxpayer's assertion, the "units" were not "arbitrarily deleted." The reason the Department removed sample "units" and added other "units" was to produce a jurisdictionally representative sample for each quarter as required by IFTA (See Section A530.100 of the IFTA Audit Manual).

For instance, four "units" were deleted from the 4Q2004 sample. This included one "unit" from the ABC fleet and three "units" from the XYZ fleet. They were deleted because the miles could not be audited. In fact, the miles could not be audited for the ABC "unit" because the sum of the "unit" summaries that were provided by Taxpayer to select the sample "units" for 4Q2004 did not equal the reported ABC fleet jurisdictional mileage and fuel totals on the IFTA 101 returns. Moreover, when Taxpayer generated a pay report for the ABC "units," the mileage totals changed every time. Therefore, the Department did not know what was actually reported for any of the ABC "units." Taxpayer was unable to explain and document the reasons for the variances in the "unit" summaries provided.

Additionally, the miles could not be audited for the three "units" from the XYZ fleet because the miles could not be generated for these "units" by Taxpayer due to inadequate recordkeeping. Taxpayer used "PC Miler" to generate reported jurisdiction miles for their IFTA 101 returns from the load origins and destinations recorded on the "Pros" for most of their fleet. The XYZ terminal provided the main office with a quarterly summary listing monthly miles and gallons. Taxpayer said that the terminal used odometer readings to determine reported miles but no odometer readings were provided for the audit. No trip reports with origins and destinations were provided to document the vehicle movements. There were therefore no mileage records provided that could be audited. Since the miles could not be audited, these "units" were pulled from the sample as well.

The "units" that were added back in to the 4Q2004 sample were three "units" from the ABC fleet. Taxpayer has noted that the auditor was previously aware that the three "units" were problematic, but that was representative of the problems with the ABC fleet as a whole. As the Records Evaluation states on page seven "[i]t was because of the problems with the [ABC] fleet... that additional [ABC] units were added to the sample."

The ABC fleet used a different computer system than those of the other fleets to generate the totals they reported. ABC fleet summaries were provided to the Gary or Valparaiso, Indiana office whose totals were added to the other generated totals to determine reported miles and fuel. However, ABC "unit" summaries were not provided when the fuel taxes were reported. Taxpayer did give the auditor "unit" summaries in order for sample "units" to be selected for the audit in the manner described above. However, the Records Evaluation makes clear on page eight that "the sum of the [ABC] unit jurisdiction mileage totals the taxpayer generated for the audit varied significantly from the reported [ABC] fleet jurisdiction mileage totals." When Pay Reports were generated for the ABC "units" so that the miles could be audited, the daily trip activity and summarized jurisdiction miles did not always equal the totals from the "unit" summaries that Taxpayer provided. In fact, when Pay Reports were generated again for some of the sample "units," the jurisdiction miles changed each time. This discrepancy was never explained, and Taxpayer was not able to provide source documentation that traced actual vehicle movements. Since these variances remained unexplained and unresolved, it was impossible for Taxpayer to show that they were reporting the correct amounts. Therefore, without justification for a reduction in miles or gallons, the greater of the ABC reported fleet Tractor Deduction Summary and sum of the ABC "unit" summary mileage and fuel totals were determined for the audit.

While additional ABC "units" were added to the sample because of the problems in the ABC fleet's reporting, with the exception of first and second quarters of 2003, the ABC error factors were only projected to ABC reported totals and the ABC fleet was audited separately from the remaining Non-ABC fleet. Therefore, the size of the ABC sample did not have any effect on the Non-ABC fleet totals. The Department took the greater of jurisdiction mileage and fuel summary totals for the ABC "units." This is because the Department did not know which if any of the summaries was correct, and without justification to reduce, the Department cannot reduce jurisdiction miles or gallons. For that reason the greater of jurisdiction miles or gallons as recorded on the ABC fleet or the sum of the "unit" jurisdiction mileage and fuel summaries was used in the audit, and the error factors were projected to those totals in every quarter of the audit period for the ABC "units" except as noted above in the first and second quarters of 2003. The Records Evaluation explains on page seven that "[i]t was not possible to separate the

[ABC] and the Non-[ABC] fleet in the 1st quarter of 2003 and only the miles could be separate [sic] for the two fleets in the 2nd quarter 2003." However, as explained above and on page ten of the Records Evaluation, for 4Q2004, "[t]he [ABC] units were audited separately from the remaining units of the fleet (Non-[ABC] units). The [ABC] fleet was audited separately from the rest of the fleet [in this quarter] because of the significant unexplained variances found between the sum of the unit summary totals and reported [ABC] fleet totals and because reported sample unit totals could not be determined."

In 3Q2005, after 25 "units" were originally selected, nine "units" were added to the sample fleet. These nine "units" were again all ABC "units," but they were added because of the reporting problems with the ABC fleet as a whole in order to obtain a more jurisdictionally representative sample. However, as in 4Q2004, the ABC "units" were audited separately from the non-ABC "units" in the 3Q2005.

Taxpayer has protested how sample "units" were removed and other sample "units" were added in a sample quarter to produce a jurisdictionally representative sample. The only reason given for protesting this practice was that it "destroy[ed] the random nature of the selection process." However, there is nothing that says that the Department cannot add and remove "units" in order to produce a more jurisdictionally representative sample. Furthermore, Taxpayer has not demonstrated that this method produced a jurisdictionally unrepresentative sample, or that it produced an incorrect assessment. As is stated in IC § 6-6-4.1-24(b), the burden of proof is on Taxpayer, and therefore Taxpayer must show more than merely alleging that this method invalidated the audit.

B. Repeat Selection of "Units" in Multiple Quarters

Taxpayer notes that three "units" were sampled in both the 4Q2004 period and the 3Q2005 period. Taxpayer claims that it is highly improbable that these "units" would be selected in two different periods. Taxpayer argues that this is further proof that the "units" were not selected randomly. However, all three of these sample "units" appear to have been selected in the random manner explained above, and were not ABC "units" that were added in after the sample "units" had been generated. While the probability that three "units" were selected in multiple quarters is certainly low, it is certainly not improbable, and it certainly does not invalidate the audit results.

Furthermore, Taxpayer's argument with regards to the duplication between the two periods fails to take into account a basic point. To analyze whether two samples had a potentially impermissible level of duplication, the **entire** population of Taxpayer's 4Q2004 vehicles potentially part of the 3Q2005 audit must be analyzed rather than narrowly focusing on the three particular vehicles that ultimately constituted the vehicles that were audited in both periods.

Using Taxpayer's calculation method stated in footnote 1 of Taxpayer's April 21, 2009, Memorandum, the proper calculation is C(28,X)*C(340,28-X)/C(368,28), where twenty-eight is the maximum number of vehicles that could potentially overlap both periods. The possibility of exactly three vehicles being a part of both audit samples is 20.7474 percent. The probability of three or more vehicles appearing in both audit periods is 36.0366 percent–better than one in three. Even using nineteen vehicles–as indicated by Taxpayer in its brief–the probability of three or more vehicles being selected in both samples is still 6.683 percent–better than one in fifteen. The probability of three vehicles being incorporated into both samples is not as low as asserted by Taxpayer.

C. Oversampling/Undersampling of Divisions

Taxpayer argues that the sampling methodology resulted in pronounced oversampling and undersampling of certain fleets. Taxpayer claims that eight of their fourteen divisions were either oversampled or undersampled in at least two quarters. Taxpayer further explains that the largest divisions were consistently undersampled, and their smaller divisions were oversampled. This discrepancy, Taxpayer concludes, is even more obvious when one compares the total mileage that each of the smaller division represents to the total mileage of the larger divisions.

Again, the sampling was done randomly in the manner explained above. Even if certain divisions were oversampled or undersampled, the samples were chosen randomly, and the Department determined that the samples were jurisdictionally representative. Taxpayer has not sufficiently proven otherwise.

D. Selection of "Units" Known to Have Reporting Problems

Taxpayer alleges that the Department picked "units" that were known to have reporting problems. Taxpayer points out that many of the "units" selected were "units" where the driver did not use a Comdata fleet card, and thus there was less reliable information for reporting purposes. Taxpayer also points out that the Department had information provided by Taxpayer which would have given the Department enough information to categorize and sort Taxpayer's "units" so that the Department could "cherry-pick" problem "units."

Taxpayer's allegations are unfounded, especially in light of the fact that the Department has provided ample evidence that "units" were selected in a random manner as described in the previous sections. Taxpayer has not sufficiently proven, beyond merely pointing to what they believe to be anomalies of over-sampling of problem "units," that the sampling was not done randomly. Taxpayer has therefore not met its burden of proof.

FINDING

Taxpayer's protest is respectfully denied.

II. IFTA – Failure to Provide Tax-Paid Credit.

DISCUSSION

Taxpayer argues that the Department's audit did not credit Taxpayer for taxes Taxpayer paid when fuel was

purchased. Taxpayer states that it provided the Department with spreadsheets prepared by Taxpayer that documents their calculations of credit for taxes paid on fuel that Taxpayer purchased and that should have been taken into consideration to decrease Taxpayer's overall liability. Taxpayer has requested that the liability at issue be revised to reflect the tax that has already been paid, thus reducing the assessment.

However, a supplemental audit was performed which did take into consideration the spreadsheets and readjusted the liability accordingly (although, apparently not in the amount that Taxpayer expected). The Records Evaluation provided to Taxpayer is quite clear in explaining that the Department totaled by jurisdiction the gallons from Comdata reports that were entered in the spreadsheets provided by Taxpayer, as seen in pages 18 and 19:

The taxpayer provided Comdata transaction listings in all quarters of the audit period and Comdata Express Cash transaction listings in some quarters of the audit period. They also provided on-road cash fuel purchase invoices for Non-[ABC] divisions in all quarters of the audit period.

Sample Quarters – 3Q2003, 4Q2004 & 3Q2005 (see audit pages 200-233)

As in the original audit, jurisdiction tax paid gallons were determined on a [ABC] and Non-[ABC] fleet basis and not on a sample unit basis for the sample quarters.

[ABC] - No adjustments were made to audited [ABC] jurisdiction tax paid gallons in the sample quarters. The taxpayer did not provide any on-road cash fuel purchase invoices for [ABC] units and the audited [ABC] jurisdiction gallons were greater than the [ABC] Comdata totals per the taxpayer's protest fuel analysis in the sample quarters.

Non-[ABC] –

Reported Non-[ABC] jurisdiction tax paid gallons - In the 3Q2003, reported jurisdiction gallons were adjusted because reported AR, GA and TN gallons were double reported for units 34266, 820212 and 820213 (see audit page 209). The adjustments made to reported Non-[ABC] jurisdiction gallons in the 4Q2004 and 3Q2005 remained the same as in the original audit with one exception (see audit pages 219, 220, 229 & 230). In the protest documentation provided unit 740002 was identified as a CCA unit. Since unit 740002 gallons should have been reported they were eliminated from the reporting error adjustment in the 3Q2005 (see audit pages 229-230).

Audited Non-[ABC] Jurisdiction tax paid gallons - Audited jurisdiction tax paid gallons were determined in the same manner as discussed in the original audit by adding the audited fleet Comdata, Non-[ABC] reported cash gallons and subtracting the audited [ABC] Comdata gallons (see audit pages 207, 208, 217, 218, 227 & 228). The protest fuel purchases were compared to the Comdata and the on-road cash fuel purchases already included in audited totals by division and unit. Audited fleet jurisdiction totals were increased to include any additional fuel purchases provided for the Non-[ABC] divisions for both sample and non-sample units.

The Non-[ABC] reported cash jurisdiction gallons were determined by comparing the reported jurisdiction gallons to the revised Comdata/on-road jurisdiction gallons for all units identified in the original audit. In the original audit, this comparison was only made on a total gallon basis and the resulting gallons were apportioned based on reported jurisdiction percentages. The taxpayer provided Non-[ABC] reported unit jurisdiction gallon totals in the protest spreadsheets. Because this information was available, the actual Non-[ABC] reported cash jurisdiction gallons were totaled and carried to audit pages 207, 208, 217, 218, 227 & 228. These are reported cash gallons for which no fuel receipt was provided for the audit or for the protest. The Non-[ABC] unit total gallon comparisons were eliminated from audit pages 211, 221 & 231. As discussed in the original audit adjustment, discovery sampling was completed to justify tax paid credit for these reported cash gallons.

Audited jurisdiction tax paid gallons were determined in the sample quarters by summing the audited [ABC] and Non-[ABC] audited jurisdiction tax paid gallons (see audit pages 204-205, 214-215 & 224-225). Additionally, to insure the taxpayer received all of the jurisdiction tax paid credit to which they were entitled in the sample quarters, the audited jurisdiction tax paid gallons were compared to the sum of the Comdata, Comdata Express and on-road cash receipt gallons provided for the protest. Audited jurisdiction tax paid credit gallons exceeded the sum of the jurisdiction gallons provided for the protest. The audited jurisdiction tax paid gallons were carried to the IFTA 54s (see audit pages 28-77).

Non-[ABC] and [ABC] jurisdiction tax paid gallon error factors were determined in the sample quarters by dividing audited jurisdiction tax paid gallons by adjusted jurisdiction gallons (see audit pages 202-203, 212-213 & 222-223). If a jurisdiction's error factor was unreasonable and not consistent with the error factors in the other sample quarters, combined sample quarter error factors were determined (see audit pages 232 & 233). These jurisdiction tax paid gallon error factors were used to determine projected jurisdiction gallons in the non-sample quarters for each year as appropriate with the exception of the 1Q2003 and 2Q2003 as discussed in the original audit adjustment. For the 1Q2003 and 2Q2003, combined Non-[ABC] and [ABC] jurisdiction tax paid gallon error factors were determined from the combined audited and adjusted jurisdiction gallons for the Non-[ABC] and [ABC] fleets from the 3Q2003 sample quarter (see audit pages 200-201).

Non-Sample Quarters – (see audit pages 168 - 199)

The jurisdiction tax paid gallon error factors from the sample quarters were multiplied times the reported or

adjusted jurisdiction tax paid gallons in the non-sample quarters to determine projected jurisdiction gallons. New audit pages 168 – 171 were created for the 1Q2003 and 2Q2003 and the original audit page 166 was eliminated. The combined Non-[ABC] and [ABC] jurisdiction tax paid gallon error factors from the 3Q2003 sample quarter were multiplied times reported jurisdiction tax paid gallons to determine projected jurisdiction gallons for the 1Q2003 and 2Q2003 (see audit pages 168 - 171). As determined in the original audit the [ABC] jurisdiction tax paid gallon error factors from the sample quarters were multiplied times the greater of [ABC] summary jurisdiction tax paid gallons in the remaining non-sample quarters as appropriate to determine projected [ABC] jurisdiction tax paid gallons (see audit pages 172-173, 176-177, 180-181, 184-185, 188-189, 192-193 & 196 & 197). The Non-[ABC] jurisdiction tax paid gallon error factors from the sample quarters were multiplied times reported or adjusted jurisdiction tax paid gallons in the remaining non-sample quarters as appropriate to determine projected Non-[ABC] jurisdiction tax paid gallons (see audit pages 174-175, 178-179, 182-183, 186-187, 190-191, 194-195 & 198-199). In the 1Q2005 and 4Q2005 reported jurisdiction gallons were adjusted for double reporting errors for units 956072 and 956074 discovered in the protest spreadsheets provided by the taxpayer (see audit page 190, 191, 198 & 199). The projected Non-[ABC] and [ABC] jurisdiction tax paid gallons were combined to determine projected fleet jurisdiction tax paid gallons in the non-sample quarters with the exception of the 1Q2003 and 2Q2003 which were already on a fleet basis (see audit pages 172-173, 176-177, 180-181, 184-185, 188-189, 192-193 & 196-197).

To insure the taxpayer received all of the jurisdiction tax paid credit to which they were entitled, the projected fleet jurisdiction tax paid gallons were compared to the sum of the Comdata, Comdata Express and cash receipt jurisdiction gallons provided for the protest in all non-sampled quarters. Audited jurisdiction tax paid gallons for the fleet were the greater of the projected jurisdiction tax paid gallons or the sum of the Comdata, Comdata Express and cash receipt jurisdiction gallons in the non-sample quarters (see audit pages 168-169, 170-171, 172- 173, 176-177, 180-181, 184-185, 188-189, 192-193 & 196-197). The audited jurisdiction tax paid gallons were carried to the IFTA 54s (see audit pages 28-77).

The Department totaled by jurisdiction the gallons from Comdata reports that were entered in the spreadsheets provided by Taxpayer. Also totaled were any cash receipts that were provided by jurisdiction. These figures were then compared to the projected jurisdiction tax paid gallons.

In every quarter of the audit, Taxpayer received jurisdiction tax paid credit for the greater of the sum of (a) the Comdata and cash receipts that were provided or (b) the projected jurisdiction gallons, to Taxpayer's advantage. The IFTA Procedures Manual states in § P1070 that:

Each jurisdiction will allow full credit for tax paid purchases, and any excess of tax paid over tax liability in any member jurisdiction will be credited in full to the licensee's tax liability in other member jurisdictions or to the licensee's account ledger as appropriate (see IFTA Agreement Manual Section R1000 and R1100).

Taxpayer provided spreadsheet summaries reflecting what they believed the credits should be, and provided Comdata reports and cash receipts to substantiate that taxes were paid; however, Taxpayer did not provide documentation to support all of the credits it claimed it should have received. Section A550.200 of the IFTA Audit Manual states that "[w]hen tax paid fuel documentation is unavailable, all claims for tax paid fuel will be disallowed." Since further documentation could not be provided to substantiate that tax was paid, Taxpayer was therefore not entitled to all of the jurisdiction tax paid credit for these gallons.

Furthermore, section R1000.100 of the IFTA Articles of Agreement states that:

To obtain credit for tax paid purchases, the licensee must retain a receipt, invoice, credit card receipt, or automated vendor generated invoice or transaction listing, showing evidence of such purchases and taxes paid. These records may be kept on microfilm, microfiche or other computerized or condensed record storage system which meets the legal requirement of the base jurisdiction. Licensees are not required to submit proof of tax paid purchases with their tax returns.

Taxpayer also argues that "[w]hile the audit did use Comdata information to determine the tax-paid fuel for the units in the sample, it did not use that information to adjust the tax-paid fuel figure for the non-sampled units." However, the Department could not perform a census audit of jurisdiction tax paid gallons because Taxpayer did not provide all of the cash receipts for the audit.

While it may be a "logical" assumption that fuel could not have been purchased without taxes being paid, without documentation to substantiate the assumption, the IFTA regulations are quite clear that credit cannot be given. Without receipts or other documents to substantiate the unverified information on the spreadsheets, the Department could only adjust for tax paid credit to the extent permitted by IFTA. However, the Department gave Taxpayer jurisdiction tax paid credit for the greater of the projected jurisdiction tax paid gallons or the sum of the Comdata reports and cash receipts that were provided in each quarter, as required by § P1070 of the IFTA Procedures Manual. Therefore, the final liability figure is a reasonable assessment considering Taxpayer's lack of documentation.

FINDING

Taxpayer's protest is respectfully denied.

III. IRP – Assessment.

DISCUSSION

Taxpayer protests the imposition of IRP fees for the tax year 2005. The IRP is a program for registering commercial vehicles that operate within member jurisdictions, including Indiana. The agreement's goal is to promote the fullest possible use of the highway system by authorizing apportioned registration of fleets of vehicles. The Indiana Code permits Indiana to join the IRP agreement via IC § 6-6-4.1-14 and IC § 9-28-4-6. IC § 6-6-4.1-14(b) states in relevant part:

> The commissioner or, with the commissioner's approval, the reciprocity commission created by IC 9-28-4 may enter into the International Registration Plan, the International Fuel Tax Agreement, or other reciprocal agreements with the appropriate official or officials of any other state or jurisdiction to exempt commercial motor vehicles licensed in the other state or jurisdiction from any of the requirements that would otherwise be imposed by this chapter....

IC § 9-28-4-6(a) states in relevant part:

> The department of state revenue, on behalf of the state, may enter into reciprocal agreements providing for the registration of vehicles on an apportionment or allocation basis with the proper authority of any state, any commonwealth, the District of Columbia, a state or province of a foreign country, or a territory or possession of either the United States or of a foreign country.

Taxpayer operated "units" in Indiana and other states, but Taxpayer selected Indiana as its base jurisdiction, pursuant to Article IV of the International Registration Plan document (2006). In conjunction with the IFTA audit, the Department conducted an IRP audit under the terms of Articles XV and XVI of the International Registration Plan document (2006) and the International Registration Plans Audit Procedures Manual.

The Department selected 2005 as the registration year to audit. The Department determined that taxpayer owed additional IRP fees based upon the same documentation that was provided to calculate the IFTA assessment. Taxpayer again argues that the audit was not performed in a statistically valid manner, reiterates that there were anomalies, and states that the AD-10A was not signed. These issues are discussed in detail above.

FINDING

Taxpayer's protest is respectfully denied.

IV. Tax Administration – Ten Percent Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty.

The Department refers to IC § 6-6-4.4-23(a), which states in relevant part:

> If a person:
>
> ...
>
> (3) incurs, upon examination by the department, a deficiency that is due to negligence;
>
> ...
>
> the person is subject to a penalty.

The Department refers to 45 IAC 15-11-2(b), which states:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, Taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and was subject to a penalty under IC § 6-6-4.1-23(a). Taxpayer has not affirmatively established that its failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c). The negligence penalty shall not be waived.

FINDING

Taxpayer's protest is respectfully denied.

V. Tax Administration – Interest.

DISCUSSION

Taxpayer protests the interest assessed. A Taxpayer who "incurs a deficiency upon a determination by the department" is subject to interest on the nonpayment. IC § 6-6-4.1-22 and IC § 6-8.1-10-1(a). The interest for

incurring such a deficiency "is the rate of interest calculated under the interest provisions of the International Fuel Tax Agreement entered into by the department under IC 6-8.1-3-14." IC § 6-6-4.1-22(b). Since Taxpayer is based in a US jurisdiction "interest... accrue[s] at a rate of one percent per month." IFTA Articles of Agreement § R1230.100.

Interest continues to accrue until final payment is made. IFTA Articles of Agreement § R1230.300.010. IC § 6-8.1-10-1(e) does not allow the waiver of interest, and section R1260.100 of the IFTA Articles of Agreement state that to waive the interest for any other jurisdiction, "the base jurisdiction must receive written approval from the other jurisdiction."

Taxpayer acknowledges that the Department cannot waive the interest on the tax liability, but argues on principles of equity (under the doctrine of laches) and constitutionality (under the Due Process Clause of the United States Constitution) that the statute should be overridden in this case.

With regards to the argument for the application of the "doctrine of laches," Taxpayer believes that the lengthy delays in completing the audit and the subsequent review by the Special Tax Appeals Section have resulted in an interest payment that is unreasonable. Black's Legal Dictionary defines the laches as an "unreasonable delay in pursuing a right or claim – almost always an equitable one – in a way that prejudices the party against whom relief is sought," and is also referred to as "sleeping on rights." Black's Law Dictionary 891 (8th ed. 2004). However, the so-called lengthy delays in this audit were caused by Taxpayer, and therefore the Department has not "slept on its rights" in this matter. The Indiana Supreme Court has addressed the doctrine of laches as it applies to the Indiana Department of Revenue in Ball v. Ind. Dep't of Revenue, 563 NE2d 522 (Ind. 1990). In that case the Court stated that laches would bar collection by the Indiana Department of Revenue only if the Department attempted to collect the taxes "in an unusually dilatory manner." Id. at 525. In Taxpayer's situation, despite its protestation that there were delays in the completion of the audit, Taxpayer presented no evidence that the department acted in an unusually dilatory manner in this case. Therefore the doctrine of laches does not prevent the Department from assessing interest in this case.

As for argument that the Due Process Clause of the United States Constitution should prohibit the assessment of interest, the Indiana Supreme Court has held that a constitutional analysis is beyond the Department's administrative purview. State v. Sproles, 672 NE2d 1353, 1360 (Ind. 1996). Therefore, an administrative hearing with the Indiana Department of Revenue is not the proper forum to raise a Due Process Clause challenge of the interest assessed in the instant matter.

Taxpayer has not provided documentation in support of its protest of the imposition of interest, but more importantly, the Department is not authorized to waive interest under IC § 6-8.1-10-1(e) and § R1260.100 of the IFTA Articles of Agreement. As such, the Department finds the assessment of interest appropriate and denies the interest protest.

FINDING

Taxpayer's protest is respectfully denied.

CONCLUSION

Taxpayer's protest is denied on all issues.

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