STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2012-03

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF REVENUE
DIVISION OF TAXATION
ONE CAPITOL HILL
PROVIDENCE, RHODE ISLAND 02908

IN THE MATTER OF:	:	**Fuel Use Tax**
Taxpayer.	:	

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing as the result of a Notice of Hearing and an Appointment of Hearing Officer both dated February 21, 2007 and issued to the above captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division") in response to a request for hearing. An Order Appointing Substitute Hearing Officer was issued on July 25, 2007. A hearing was held on June 5 and October 27, 2008. The parties were represented by counsel. The parties submitted timely briefs and the record closed October 21, 2011.

II. JURISDICTION

The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 31-36-1 *et seq.*, R.I. Gen. Laws § 31-36.1-1 *et seq.*, *Division of Taxation Regulation AHP 97-01 Administrative Hearing Procedures*, and the *Division of Legal Services Regulation 1 Rules of Procedure for Administrative Hearings.*

III. ISSUE

Whether the Taxpayer owes the taxes assessed under the International Fuel Tax Agreement and if so, whether it can be credited for any overpayments to Rhode Island.

IV. MATERIAL FACTS AND TESTIMONY

Revenue Agent II, testified on behalf of the Division. He testified that he conducted an International Fuel Tax Agreement ("IFTA") (known as the fuel use reporting law) audit on the Taxpayer for period of July 1, 2003 through March 31, 2006. He testified that it was determined that prior to the current Taxpayer, being located at its address in Rhode Island, there were two (2) prior companies with in their names and one had an outstanding tax bill.[1] He testified that the Taxpayer was incorporated in Rhode Island in July, 2003 with its principal place of business in Rhode Island and applied for an IFTA license on January 29, 2004. See Division's Exhibits One (1) and Two (2) (Taxpayer's IFTA license application dated January 12, 2004).[2] He testified that the Taxpayer regularly filed and paid the fuel use tax during the audit period except for 2003.

testified that IFTA was designed to create a uniform administration of road use taxation among the agreement's 58 member jurisdictions. He testified that a motor carrier must report all miles traveled and fuel purchased to the base jurisdiction where the carrier is located. He testified that carriers quarterly file in their base state jurisdiction which is where they store their business records and vehicles which in this matter is Rhode Island. See Division's Exhibit 21 (Taxpayer's 2004 4th quarter fuel use tax return). He testified that the data from carriers' returns are entered at a processing center and Rhode Island is responsible for its licensees and their returns. He testified that a netting process is used when taxpayers/carriers file their returns with their base jurisdiction so that a carrier could owe taxes to other states but obtain credit from Rhode

[1] The Taxpayer's counsel represented that there were three (3) related corporations:
Tr1 at 45 (transcript of first day of hearing, June 5, 2008).

[2] Based on a review of the application, it was apparently approved January 29, 2004.

Island for taxes paid to Rhode Island. He testified that under IFTA, the base state jurisdiction is responsible for conducting audits of its licensees and audits are conducted pursuant to specific written guidelines including IFTA's Articles of Agreement, Procedures Manual, and Audit Manual. He testified that in six (6) of seven (7) members' jurisdictions, the Taxpayer was not in compliance with IFTA leading to the assessment of tax liabilities against Taxpayer. See Division's Exhibit Five (5).

testified that he examined Taxpayer's quarterly fuel use tax returns, over-the-road fuel receipts, bulk fuel invoices, bulk fuel withdrawal log, and PC Miler trip recaps. He testified that an over-the-road fuel receipt is a receipt from a purchase at a gasoline station and a bulk fuel invoice is for fuel that is delivered to a storage tank for later use. He testified that PC Miler is a computer program that tracks mileage. He testified that the Taxpayer did not have a complete set of the required business records under IFTA for the entire audit period.

testified that a carrier is to produce a trip sheet every day a qualified vehicle travels and a record must be kept for the travel of origin and destination, including start and end odometer readings, driver's name, and business name. He testified that trip sheet records are to be summarized by vehicle and by quarter at a minimum and the Taxpayer did not have trip sheets. He testified that the Taxpayer used a logbook which is required by the Department of Transportation ("DOT") and is a record of the travel of a vehicle over the preceding 24 hours but is primarily for a driver's use. He testified that DOT only requires logbooks to be kept for six (6) months so that the Taxpayer had discarded the logbooks by the time of the audit and only had computerized print-outs. He testified that the Taxpayer did not have any back-up or

original source documents for the computer mileage print-outs. He testified that for bulk fuel, businesses are required to maintain withdrawal logs for fuel withdrawn from storage tanks that document the date and vehicle number that the fuel was placed in, and the number of gallons placed in the vehicle, etc. but the Taxpayer did not keep complete withdrawal logs for the audit period but only made intermittent entries. He testified that the Taxpayer only had a complete bulk withdrawal log one (1) out of twelve (12) quarters. He testified that under IFTA, if bulk fuel withdrawal records are not kept, tax credit for that fuel can be denied under IFTA.

testified that stopped paying fuel use tax in the first quarter of 2003 and inactivated its account in January, 2004. See Division's Exhibits 27 and 28. He testified that unreported bulk fuel purchases to Taxpayer's storage tank were made from the time of Taxpayer's incorporation in July, 2003 through December, 2003. He testified that the storage capacity of the storage tank is approximately 1,000 gallons and from July, 2003, to December, 2003, there were 33 deliveries of bulk fuel between 200 and 1,000 gallons each made to the tank so the Taxpayer could not have stored that fuel without using it during the period so that the Taxpayer must have used the fuel.

also testified that he examined the records of the Division Registry of Motor Vehicles and determined that three (3) trucks were transferred from . and one (1) trailer was transferred from . to Taxpayer. He testified that the trucks were all transferred from the other corporations to the Taxpayer during the audit period. See Division's Exhibit 26. He testified that on February 11, 2003, purchased ten (10) additional sets of decals for 2003 approximately one (1) month before it stopped filing its fuel use tax returns from which

he concluded they must have been for ten (10) new or an additional ten (10) new trucks. He testified that the Division's 2002 audit of did not show it had acquired an additional ten (10) trucks which is the basis for his determination of a misuse of license by Taxpayer such as purchasing the decals for other trucks or a new company.[3]

testified that since the Taxpayer had inadequate records, he determined Taxpayer's fuel use by examining the Taxpayer's over-the-road fuel purchases, receipts, bulk fuel receipts, and bulk fuel withdrawal logs. He testified that he found that Taxpayer did not did not separate its over-the-road fuel receipts by vehicle or by quarter as required by IFTA so there was a timing difference in Taxpayer's over-the-road fuel receipts and records. He testified that PC Miler is used by entering trip origins, destinations, and returns, into the program, which then displays the miles for each jurisdiction traveled, based on known routes. He testified that all of Taxpayer's PC Miler print-outs of vehicle trips indicated Taxpayer's base location of Rhode Island, as the point of origin and final destination without including where the vehicles went while on their trips and the PC Miler print-outs displayed the vehicles' mileage by jurisdiction in which they traveled, but did not display the exact locations to which the vehicles traveled. He testified that the PC Miler print-outs did not display odometer readings. He testified that IFTA requires the keeping of vehicles' odometer readings.[4] He testified that because Taxpayer did not document its vehicles' odometer mileage readings, the Taxpayer's PC Miler print-outs were not capable of being tested.

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[3] testified that in 2002, the Division had audited He testified that and and Taxpayer are engaged in the same type of hauling business, its telephone numbers were the same, Taxpayer's office contained records for and he interacted with the same employees that the , 2002 auditor interacted with. He testified that records did not show it had acquired an additional ten (10) trucks or trailers during 2003.

[4] He testified that Taxpayer's employee told him that he did not keep records of Taxpayer's vehicles' odometer readings because the Taxpayer's drivers are paid by the mile traveled and PC Miler calculates the shortest practical routes for their vehicles' trip.

testified that because Taxpayer did not adequately maintain mileage documentation under IFTA, the Division accepted Taxpayer's jurisdictional ratios as reported for the first quarter of 2004. He testified that if Taxpayer had adequately maintained the required mileage documentation, the Division would have credited the Taxpayer with any allowable credits but none were given. He testified that since the Taxpayer did not report its bulk fuel use for the last two (2) quarters of 2003, the amount of four (4) miles-per-gallon was assigned (as allowed under IFTA) to determine Taxpayer's fuel usage. He testified that in determining Taxpayer's fuel usage and travel for Taxpayer's two (2) unreported quarters, he averaged the travel amounts, fuel usage amounts, and jurisdictional ratios from Taxpayer's filed reported returns.

testified that his audit report summary includes Taxpayer's total fuel use tax liability by quarter including all adjustments to Taxpayer's fuel use tax liability amounts for each quarter. He testified that the audit report summary shows and compares Taxpayer's reported fuel use tax amounts due with Taxpayer's audited fuel use tax amounts due. See Division's Exhibit 36 (audit summary). He testified that he issued a deficiency determination to Taxpayer on September 21, 2006 that included additional tax owed, interest, and penalties. See Division's Exhibits 19 (Deficiency Notice) and 16 (letter of audit findings). He testified that in the audit, each individual jurisdiction has its own tax rate, and he used those tax rates in determining Taxpayer's fuel use tax liabilities for each jurisdiction and apportioned the tax owed by jurisdiction.

On cross-examination, testified that he averaged the Taxpayer's 2003 fuel use liability by averaging the returns from 2004 through 2006. He testified that while the Taxpayer did not apply for an IFTA license until 2004, it operated in the second half of

2003 since it incorporated in 2003 and filed a 2003 corporate tax return. He testified that the total liability of tax, interest, and penalty was approximately with about of it attributable to the last half of 2003.

In addition to the 2003 taxes, testified that Taxpayer owes approximately in taxes from the years 2004 to 2006 for road usage based on quarterly calculations for each jurisdiction. See Division's Exhibit Seven (7) (audit summary). He testified that he adjusted Taxpayer's vehicle fuel use in the different IFTA jurisdictions. For example, he testified that there were differences in when fuel was purchased and when it was reported so he moved the purchase to the appropriate quarter and allocated Taxpayer's fuel purchases and usage according to when the gallons of fuel were purchased or used. He testified that he credited the Taxpayer with a Maine fuel purchase but could not credit that purchase or the Rhode Island purchase to the other jurisdictions because of the Taxpayer's records. He testified that Rhode Island has not waived the requirement (which it could under IFTA) to maintain odometer readings. He testified that an IFTA's licensee's fuel tax liability is based on the licensee's vehicles total miles traveled and total fuel used. See Division's Exhibit 13 (reported miles per gallon), 17 (audit report), 36 (audit summary), Nine (9) (summary), and 11 (worksheet).

V. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the

words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management*, 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. Fuel Use Tax

Pursuant to R.I. Gen. Laws § 31-36.1-1, the purpose of the fuel use tax is to assure the payment of tax on fuel consumed by motor carriers on the public highways in Rhode Island. R.I. Gen. Laws § 31-36.1-5 states as follows:

> Imposition of tax. – There is levied and imposed upon motor carriers a tax at the rate specified in § 31-36-7 on the use of fuel for the propulsion of qualified motor vehicles on the public highways within this state. The tax, with respect to fuel purchased instate, shall be paid at the time of purchase as provided in chapter 36 of this title. The tax, with respect to fuel purchased outside this state shall be paid when the quarterly returns required in § 31-36.1-11 are filed with the administrator.

Like the sales and use tax, the fuel use tax and motor fuel tax are complementary taxes. The motor fuel use tax is imposed upon motor carriers on their use of fuel for the travel on Rhode Island's public highways. During this time period, pursuant to R.I. Gen. Laws § 31-36-7, the tax rate was set at 30¢ a gallon.[5] Thus, the fuel use tax and motor fuel tax are set at the same rate. R.I. Gen. Laws § 31-36.1-11 requires all motor carriers

[5] R.I. Gen. Laws § 31-36-7 is the current incarnation of 32¢ a gallon. See PL 2002 ch. 65, Art 29 §1 for the 30¢ rate.

subject to the use tax to file quarterly returns with the Division. Pursuant to R.I. Gen. Laws § 31-36.1-15, if during the same quarter, a motor carrier has incurred liability to another state under a comparable use or fuel tax on fuel purchased in Rhode Island, the motor carrier may file for a refund of the excess. At the time of the audit Rhode Island law provided a statutory apportionment formula.[6]

In the absence of records, there is a statutory presumption of four (4) miles-per-gallon to determine a motor carrier's miles traveled into fuel consumed and thus into taxes to be paid. See R.I. Gen. Laws § 31-36.1-14.[7] Pursuant to R.I. Gen. Laws § 31-36.1-8,[8] motor carriers are required to retain records for four (4) years. R.I. Gen. Laws § 31-36.1-12[9] provides for the inspection of motor carriers' records by the Division.

In terms of the Division computing fuel use tax owed, R.I. Gen. Laws § 31-36.1-13 states in part as follows:

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[6] R.I. Gen. Laws § 31-36.1-10 was repealed after the audit period with the repeal being effective June 30, 2006. See PL 2006 ch. 246, Art. 22 § 1.

[7] R.I. Gen. Laws § 31-36.1-14 states in part as follows:

> Average consumption. – In the absence of adequate records or other evidence satisfactory to the administrator, showing the number of miles operated by a motor carrier's qualified motor vehicles per gallon of motor fuel, the motor vehicle shall be deemed to have consumed one gallon of motor fuel for each four (4) miles operated, as prescribed by the International Fuel Tax Agreement.

[8] R.I. Gen. Laws § 31-36.1-8 states as follows:

> Records. – Each motor carrier shall make available in this state and retain for a period of not less than four (4) years, any records that may be prescribed and in the manner required by the administrator or the International Fuel Tax Agreement, as are reasonably necessary to substantiate the quarterly returns required by § 31-36.1-11. The administrator or the administrator's agents may examine the books, papers, records, and equipment of any motor carrier during normal business hours in order to determine whether the motor fuel taxes due under this chapter are properly reported and paid. If the records required by this section are not maintained instate, the motor carrier shall either produce the records at a point instate for audit purposes, or provide transportation and reasonable substance for an auditor to audit the records at that point where the records are maintained by the motor carrier.

[9] R.I. Gen. Laws § 31-36.1-12 states as follows:

> Inspection of books and records by administrator – Agreements with other jurisdictions for cooperative audits. – (a) The tax administrator and the administrator's authorized agents and representatives may, at any reasonable time, inspect the books and records of any motor carrier subject to the tax imposed by this chapter. The administrator may enter into agreements with the appropriate authorities of other jurisdictions having statutes similar to this chapter for the cooperative audit of motor carrier reports and returns.

> Computation of tax by administrator. – (a) If the administrator is not satisfied with any report or return of a motor carrier subject to the tax imposed by this chapter, or with the amount of the tax to be paid by the motor carrier, the administrator may compute and assess the amount of the tax on the basis of facts contained in the report and return or on the basis of any other information available to the administrator. One or more deficiency assessments may be made with respect to any return for the tax imposed by this chapter.
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> (b) The amount of the deficiency assessment, exclusive of penalties, shall bear interest at the annual rate provided by § 44-1-7, as amended, from the last day of the month succeeding the quarterly period for which the amount of any portion of it should have been returned until the date of payment.
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> (c) If any part of the deficiency for which a deficiency assessment is made is due to negligence or intentional disregard of the provisions of this chapter, a penalty of ten percent (10%) of the amount of the deficiency assessment shall be added to it. If any part of the deficiency for which a deficiency assessment is made is due to fraud or intent to evade the provisions of this chapter, a penalty of fifty percent (50%) of the amount of the deficiency assessment shall be added to it.[10]

C. International Fuel Tax Agreement[11]

R.I. Gen. Laws § 31-36.1-16 authorizes the Tax Administrator to join IFTA which is a Federally mandated intrastate compact designed to facilitate reporting, collecting, and assessing of fuel use tax. Instead of motor carriers filing tax returns and refund requests to all jurisdictions in which they travel, they only need to file with their IFTA base jurisdiction which acts as a "clearing house" by computing and netting out tax over and underpayments to jurisdictions in which they traveled. Under IFTA, a motor carrier may claim tax credits, and tax credits for fuel use taxes that are paid to one jurisdiction may be transferred and used to off-set fuel use tax liabilities in other jurisdictions. Each member jurisdiction is responsible for auditing its IFTA licensees and in doing so acts on behalf

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[10] A similar statute exists for the Tax Administrator to compute motor fuel tax owed. See R.I. Gen. Laws § 31-36-9. However, this matter addresses the Division's computation of fuel use tax owed to IFTA jurisdictions.

[11] Administrative Notice was taken of 1) IFTA Articles of Agreement; 2) IFTA Procedures Manual; and 3) IFTA Audit Manual (all effective July 1, 1998, revised January, 2007); and 4) IFTA Best Practices Audit Guide – as of May, 2006.

of all of the member jurisdictions in which that motor carrier operates. See IFTA Articles of Agreement ("AA") § R130 (purpose of IFTA); § R150 (IFTA is one base jurisdiction; one license); § R1120 (credits); and § R1300 (audits). Thus, under IFTA, the base jurisdiction is authorized to collect taxes for other member jurisdictions and IFTA licensees agree by virtue of being licensed to abide by IFTA. AA § R140[12] and AA § R120[13] specifically state that the IFTA Procedures Manual ("PM") and Audit Manual are binding on licensees. In applying for an IFTA license, the applicant signs a certification to abide by IFTA rules. PM § P160.[14]

i. IFTA Record Keeping Requirements

Under IFTA, every licensee is to maintain records to substantiate information reported on its tax returns and operational records are to be available for audit in the base

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[12] § R140 states as follows:

> Cooperative Administration. – It is the purpose of this Agreement to enable participating jurisdictions to act cooperatively and provide mutual assistance in the administration and collection of motor fuels use taxes. By virtue of signing an IFTA license application or a renewal containing the certification set out in P160, a person who applies for and operates under an IFTA license agrees to be bound by the duties and obligations of licensees as set forth in the Agreement currently and as it may be amended. The base jurisdiction must enforce those duties and obligations within its jurisdiction. The member jurisdictions may also enforce those duties and obligations within their jurisdictions. The licensee acknowledges that, in addition to the licensee's duties and obligations under the Agreement, the licensee is also subject to the laws, rules and regulations of all jurisdictions in which it operates.

[13] § R120 states as follows:

> Governing Documents. – The Audit Manual and Procedures Manual authorized by this Agreement are equally expressive of, and constitute evidence of this multijurisdictional agreement. The provisions of all three IFTA documents shall be equally binding upon the member jurisdictions and IFTA licensees and are known as the IFTA governing documents.

[14] In particular, PM § 160 states as follows:

> Certification:
>
> Applicant agrees to comply with tax reporting, payment, recordkeeping, and license display requirements as specified in the International Fuel Tax Agreement. The applicant further agrees that base jurisdiction may withhold any refunds due if applicant is delinquent on payment of fuel taxes due any member jurisdiction. Failure to comply with these provisions shall be grounds for revocation of license in all member jurisdictions; and
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> A statement to the effect that the applicant certifies with his or her signature or electronic submission as deemed acceptable by the base jurisdiction that, to the best of his or her knowledge, the information is true, accurate, and complete and any falsification subjects him or her to appropriate civil and/or criminal sanction of the base jurisdiction. (e.g., perjury).

jurisdiction. PM § P700.[15] These record keeping requirements are specified in detail in the IFTA Procedures Manual. Pursuant to PM § P510, licensees are required to preserve records on which quarterly returns are based for four (4) years from the due date or filing date whichever is later. Pursuant to PM § P530,[16] a licensee's failure to maintain or to make records available may result in an assessment and may be grounds for license revocation. Pursuant to AA § R1200,[17] if a licensee fails to keep records from which the licensee's true liability can be determined, the base jurisdiction shall determine the tax

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[15] § P700 states as follows:

> Records Requirements. – Every licensee shall maintain records to substantiate information reported on the tax returns. Operational records shall be maintained or be made available for audit in the base jurisdiction. Recordkeeping requirements shall be specified in the IFTA Procedures Manual.

[16] § P530 states as follows:

> Non-Compliance
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> .100 Failure to maintain records upon which the licensee's true liability may be determined or to make records available upon proper request may result in an assessment as stated in IFTA Articles of Agreement Section R1200.
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> .200 Non-compliance with any recordkeeping requirement may be cause for revocation of the license. The base jurisdiction may defer license revocation if the licensee shows evidence of compliance for future operations.

[17] § R1200 states as follows:

> R1210 Assessment
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> .100 In the event that any licensee
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> 005 fails, neglects, or refuses to file a tax return when due;
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> .010 fails to make records available upon written request by the base jurisdiction; or
>
> .015 fails to maintain records from which the licensee's true liability may be determined, the base jurisdiction shall proceed in accordance with .200 and .300.
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> .200 On the basis of the best information available to it, the base jurisdiction shall:
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> .005 determine the tax liability of the licensee for each jurisdiction and/or
>
> .010 revoke or suspend the license of any licensee who fails, neglects or refuses to file a tax report with full payment of tax when due, in accordance with the base jurisdiction's laws.
>
> Both .200.005 and .200.010 may be utilized by the base jurisdiction. For purposes of assessment pursuant to .100.010 or .100.015, the base jurisdiction must issue a written request for records giving the licensee thirty (30) days to provide the records or to issue a notice of insufficient records.
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> .300 The base jurisdiction shall, after adding the appropriate penalties and interest, serve an assessment issued pursuant to .200.005 upon the licensee in the same manner as an audit assessment or in accordance with the laws of the base jurisdiction. The assessment made by a base jurisdiction pursuant to this procedure shall be presumed to be correct and, in any case where the validity of the assessment is questioned, the burden shall be on the licensee to establish by a fair preponderance of evidence that the assessment is erroneous or excessive.

liability for each jurisdiction (i.e. no credits given because true liability not determined) and can revoke or suspend license. If an IFTA licensee fails to keep bulk fuel purchase records, such failure results in no credit being allowed. PM § P570 at footnote 19. If a licensee fails to comply with record keeping requirements, such failure results in no credits allowed for overpayments of taxes. PM § P160.

ii. Fuel Documentation

Pursuant to PM § P550,[18] a licensee must maintain complete records of all motor fuel purchased, received, and used in the conduct of its business, with separate accounting for different types of fuel, and separate accounting for bulk and retail fuel purchases including the date of each receipt, name and address from whom purchased, and number of gallons received, etc. Pursuant to PM § P560,[19] for tax paid retail

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[18] PM § P550 states as follows:

> Fuel Records
> .100 The licensee must maintain complete records of all motor fuel purchased, received, and used in the conduct of its business.
> .200 Separate totals must be compiled for each motor fuel type.
> .300 Retail fuel purchases and bulk fuel purchases are to be accounted for separately.
> .400 The fuel records shall contain, but not be limited to:
> .005 The date of each receipt of fuel;
> .010 The name and address of the person from whom purchased or received;
> .015 The number of gallons or liters received;
> .020 The type of fuel; and
> .025 The vehicle or equipment into which the fuel was placed.

[19] PM § P560 states as follows:

> Tax Paid Retail Purchases
> .100 Retail purchases must be supported by a receipt or invoice, credit card receipt, automated vendor generated invoice or transaction listing, or microfilm/microfiche of the receipt or invoice. Receipts that have been altered or indicate erasures are not accepted for tax-paid credits unless the licensee can demonstrate the receipt is valid.
> .200 Receipts for retail fuel purchases must identify the vehicle by the plate or unit number or other licensee identifier, as distance traveled and fuel consumption may be reported only for vehicles identified as part of the licensee's operation.
> .300 An acceptable receipt or invoice must include, but shall not be limited to, the following:
> .005 Date of purchase;
> .010 Seller's name and address;
> .015 Number of gallons or liters purchased;
> .020 Fuel type;

purchases, licensees must produce an unaltered receipt identifying the vehicle receiving the fuel, purchase date, seller's name and address, fuel type, number of gallons purchased, vehicle identification, and purchaser's name, etc. Pursuant to PM § P570,[20] for tax paid bulk fuel purchases, delivery must be made to a storage tank that is owned or controlled by the licensee and unaltered receipts kept and withdrawal records detailing date of withdrawal, number of gallons, fuel type, unit type, and purchase and inventory records must be retained by the licensee to obtain credit for tax paid bulk fuel purchases.

.025 Price per gallon or liter or total amount of sale;
.030 Unit numbers; and
.035 Purchaser's name (See R1010.300 of the IFTA Articles of Agreement).

[20] § P570 states as follows:

Tax Paid Bulk Fuel Purchases

.100 Bulk fuel is delivered into a storage tank owned, leased or controlled by the licensee and not delivered directly by the vendor into the supply tank of the qualified motor vehicle. Fuel tax may or may not be paid by the licensee to the vendor at the time of the bulk fuel delivery. Copies of all delivery tickets and/or receipts must be retained by the licensee.

.200 Receipts that have been altered or indicate erasures are not accepted for tax-paid credits unless the licensee can demonstrate the receipt is valid.

.300 Bulk fuel inventory reconciliations must be maintained. For withdrawals from bulk storage, records must be maintained to distinguish fuel placed in qualified vehicles from other uses.

.400 A licensee may claim a tax-paid credit on the IFTA tax return for bulk fuel only when the bulk storage tank from which the fuel is withdrawn is owned, leased or controlled by the licensee; the fuel is placed into the fuel tank of a qualified motor vehicle; and either the purchase price of the fuel includes tax paid to the member jurisdiction where the bulk fuel storage tank is located or the licensee has paid fuel tax to the member jurisdiction where the bulk fuel storage tank is located. The licensee shall maintain the following records:

.005 Date of withdrawal;
.010 Number of gallons or liters;
.015 Fuel type;
.020 Unit number; and
.025 Purchase and inventory records to substantiate that tax was paid on all bulk purchases.

.500 Upon application by the licensee, the base jurisdiction may waive the requirement of unit numbers for fuel withdrawn from the licensee's own bulk storage and placed in its qualified motor vehicles. The licensee must show that adequate records are maintained to distinguish fuel placed in qualified vs. non-qualified motor vehicles for all member jurisdictions.

iii. Mileage Documentation

Pursuant to PM § P540,[21] licensees must maintain detailed distance records on an individual vehicle basis, distinguishing taxable and non-taxable usage of fuel, and the distance traveled for both taxable and non-taxable use. PM § P540 requires licensees to implement an acceptable distance accounting systems necessary to substantiate the licensees' tax returns, and must include at a minimum, distance data on each individual vehicle for each trip. Information that must be included is the starting and ending date of the trip, the trip origin and destination, the route of travel, beginning and ending odometer readings, total trip miles, miles by jurisdiction, and vehicle VIN.

D. Penalties

AA § R1220 authorizes a base jurisdiction to impose a penalty of $50.00 or 10% on delinquent taxes, whichever is greater and AA § R1330 authorizes the imposition of interest. This corresponds with the penalties permitted under R.I. Gen. Laws § 31-36.1-

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[21] § P540 states as follows:

Distance Records

.100 Licensees shall maintain detailed distance records which show operations on an individual-vehicle basis. The operational records shall contain, but not be limited to:

.005 Taxable and non-taxable usage of fuel;
.010 Distance traveled for taxable and non-taxable use; and
.015 Distance recaps for each vehicle for each jurisdiction in which the vehicle operated.

.200 An acceptable distance accounting system is necessary to substantiate the information reported on the tax return filed quarterly or annually. A licensee's system at a minimum, must include distance data on each individual vehicle for each trip and be recapitulated in monthly fleet summaries. Supporting information should include:

.005 Date of trip (starting and ending);
.010 Trip origin and destination;
.015 Route of travel (may be waived by base jurisdiction);
.020 Beginning and ending odometer or hub odometer reading of the trip (may be waived by base jurisdiction);
.025 Total trip miles/kilometers;
.030 Miles/kilometers by jurisdiction;
.035 Unit number or vehicle identification number;
.040 Vehicle fleet number;
.045 Registrant's name; and
.050 may include additional information at the discretion of the base jurisdiction.

13. AA § R1220 also provides that IFTA does not limit the authority of the base jurisdiction from imposing any other penalties provided by law.

E. Standard of Review for an Administrative Hearing

Pursuant to AA § R1210, an assessment that is made in the base jurisdiction is presumed to be correct, and if challenged, the burden shall be on the taxpayer to establish by a fair preponderance of the evidence that the assessment is erroneous or excessive. See also R.I. Gen. Laws § 8-8-28. This means that for each element to be proven, the fact-finder must believe that the facts asserted by the proponent are more probably true than false. When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87 (R.I. 2006).

F. Arguments

i. The Division

The Division argued that the Taxpayer operated in the second half of 2003 without an IFTA license and should be assessed for fuel use tax for that period for IFTA jurisdictions. In addition, the Division argued that the Taxpayer owes tax for 2004 through 2006 (when IFTA licensed) because while it received credit for Rhode Island purchases and for other jurisdictional purchases, no credit could be given for overpayments because of its non-compliant record keeping.

ii. The Taxpayer

The Taxpayer argued that the Taxpayer did not operate until January, 2004 so that it does not owe the 2003 assessment on the fuel usage. The Taxpayer agrees that fuel deliveries were made in the second half of 2003 but argues that there is no proof that the

Taxpayer is responsible for its taxes and indeed if anyone is liable for that tax it would be which was doing business at the same location as the Taxpayer in 2003. The Taxpayer also argued that it was not IFTA licensed in 2003 and the Division has unclean hands by way of delay in now trying to argue that the Taxpayer owes said tax instead of which is in receivership.

For the 2004-2006 assessment, the Taxpayer apparently agrees in its brief (see page three (3)) that it owes about which is the money attributed after 2004. However, the Taxpayer then argued that the Division violated the US and RI constitution in its policies for collection and credit of taxes imposed by violating due process and the eighth amendment of the US Constitution. The Taxpayer argues that the State's regulations for driving records were foisted on truckers and creates problems for small businesses as drivers could create fraudulent mileage records since they are paid by the mile. The Taxpayer argued that it will unjustly enrich the State to assess said tax.

G. Whether the Taxpayer Owes the Assessment

i. Second Half of 2003

The Taxpayer argued that if the Division had evidence of the latter half of 2003 fuel deliveries, it must have evidence of who was billed and who paid. The evidence was that the second half 2003 deliveries were never reported on any fuel return. See Division's Exhibit 11. The Taxpayer incorporated in July, 2003 and the other similar named companies stopped operating in 2003 and eventually registered their trucks to the Taxpayer. The Taxpayer agreed that fuel was delivered to its location and that it was used in the latter half of 2003 but argued that should be liable for 2003 taxes and the Division is trying to piece the corporate veil by making the Taxpayer liable.

and Taxpayer are two (2) separate entities with going into receivership sometime in 2003.

Contrary to the Taxpayer's argument, the Division is not trying to pierce the corporate veil to make the Taxpayer liable. Instead, the evidence is that and the Taxpayer were both located at the same place but stopped operating and paying its taxes prior to the Taxpayer incorporating in July, 2003. There was also evidence that (which has overlapping employees with Taxpayer) ordered new IFTA decals without obtaining any corresponding trucks. The Taxpayer had access to trucks (that were eventually registered to it) and decals. The Taxpayer also received fuel deliveries during the period. Thus, the evidence is that the Taxpayer was using the fuel as an interstate motor carrier after it incorporated in 2003 but prior to obtaining its IFTA license. IFTA is a system for collecting and assessing use tax owed. The failure of the Taxpayer to obtain its IFTA license when it began operating as an interstate motor carrier does not relieve it of its tax liabilities. R.I. Gen. Laws § 31-36.1-1 *et seq.*

Additionally, there was no evidence of any other company using said fuel. The Taxpayer presented no evidence regarding the 2003 fuel usage. The Taxpayer's audit representative with whom dealt with during the audit (Tr1 at 60) was present at both days of hearing. The "Empty Chair Doctrine" is a rule of jurisprudence that states that if a party in a contested civil proceeding fails to call a readily available witness who would normally be expected to testify to a material issue, the fact-finder may presume (but does not have to) that if the witness did testify, the evidence would have been prejudicial to the party's cause. *Retirement Board of Employees' Retirement System v. DiPrete*, 845 A.2d 270 (RI 2004); *Belanger v. Cross*, 488 A.2d 410 (RI 1985). No one

testified on behalf of the Taxpayer. There were two (2) employees of the Taxpayer's who interacted with (Tr1 at 26). One was available at hearing and it would be expected that he might testify as to the Taxpayers' fuel usage or not in 2003. From this failure to testify, it can be presumed that such testimony from the Taxpayer's witness would not have assisted the Taxpayer's case. However, even without invoking the Empty Chair Doctrine, it is clear from the evidence that the Taxpayer was operating in the second half of 2003.[22]

The Taxpayer also argued that the Division is imposing an unfair burden on it to prove it does not owe this tax and it is inequitable for the Division to try to obtain from Taxpayer tax that may be owed by However, equitable principles are not applicable to an administrative procedure. See *Nickerson v. Reitsma*, 853 A.2d 1202 (RI 2004) (Supreme Court vacated a Superior Court order that had vacated an agency sanction on equitable grounds).

Pursuant to R.I. Gen. Laws § 31-36.1-13, the Division computed and assessed the amount of the tax owed by the Taxpayer for the second half of 2003 on the basis of facts contained in returns and any other information available to the Tax Administrator. The Taxpayer presented no evidence that the Division's calculations were erroneous.

ii. 2004 through 2006 Assessment

IFTA has certain record keeping requirements. AA § P700; PM § P550; § P560; § P570; and § P540. IFTA licensees must comply with such requirements. AA § R120; § R140; and PM § P160. The purpose of the record keeping requirements is so that licensees' tax returns can be substantiated. PM §P700; AA§ R1200. If an IFTA licensee

[22] Pursuant to AA, § R660, a licensee's improper use of a license or decals may result in license revocation. Thus, the Taxpayer's misuse of said decals could result in revocation of its license; however, the Division did not request this sanction.

fails to comply with record keeping requirements, the licensee can be assessed tax and/or have it licensed revoked (PM § P530; AA § R1200) and cannot be credited with any overpayments of taxes. PM § P160; § P570. See also AA § R1200. The IFTA record keeping requirements for travel include start and end destination and keeping odometer readings which the Taxpayer did not do but rather used PC Miler to record mileage. PM § P540. The Taxpayer is required to keep a withdrawal log for its bulk fuel purchases but failed to do so. PM § P570. The Taxpayer did not maintain its over-the-road fuel purchase records as required. PM § P550. The Taxpayer did not keep trip sheets as required. PM § P540.

The Taxpayer presented no evidence that it was compliant with IFTA's records requirements. As discussed above, it would be expected under the "Empty Chair Doctrine" that the Taxpayer's witness might testify as to the Taxpayer's records and why he believed the Taxpayer complied with the IFTA requirements and/or should receive credits for its payments to Rhode Island. From this failure to testify, it can be presumed that such testimony from the Taxpayer's witness would not have assisted the Taxpayer's case. However, even without invoking the Empty Chair Doctrine, it is clear that the Taxpayer's records were not compliant with IFTA.

Instead, the Taxpayer argued that it did not like the applicable regulations as they could lead to fraud among its drivers. The fact that Taxpayer dislikes the regulations is not a basis to ignore statutory and regulatory requirements for record keeping. The Taxpayer also argued that the State was being unjustly enriched despite the fact that the Division apportioned the taxes owed to IFTA jurisdictions. Tr1 at 38. See Division's Exhibit Five (5) (apportionment of taxes). The Division credited what payments could be

credited under the applicable regulations. Additionally, equitable principles are not applicable to an administrative procedure. See *Nickerson v. Reitsma*, 853 A.2d 1202 (RI 2004).

Based on the testimony at hearing, the Taxpayer was not compliant with IFTA's record keeping requirements. The failure by the Taxpayer to maintain its records as required by IFTA resulted in the Division being unable to substantiate the Taxpayer's tax returns. IFTA sets forth very specific record keeping requirements so that tax returns may be substantiated. *Infra.* If tax returns cannot be substantiated without the appropriate records, IFTA provides that an assessment may be made and credits denied when IFTA required records are not kept.[23] *Infra.*

The Taxpayer received credit for purchases within Rhode Island for Rhode Island travel and for Maine. But the Division could not substantiate the Taxpayer's taxes paid because of the Taxpayer's deficient record keeping. The Division accepted the mileage filed by Taxpayer and then allocated the taxes owed the other jurisdictions based on the mileage filed and other available records. This is clearly allowed by R.I. Gen. Laws § 31-36.1-13 which authorizes the Division to compute and assess the amount of the tax on the basis of facts contained in the report and return or on the basis of any other information available to the Tax Administrator. See also AA § R1200. The Taxpayer presented no evidence that the Division's calculations were erroneous.

Thus, the Taxpayer cannot be credited for tax owed to other jurisdictions in which it traveled because of its record keeping was not compliant with IFTA requirements.

[23] Indeed, such non-compliant record keeping is grounds for suspension or revocation of a licensee's license under IFTA. PM § 530; AA § R1200. However, the Division has not sought such a sanction for this licensee.

iii. Penalties and Interest

Pursuant to R.I. Gen. Laws § 31-36.1-13(c), a 10% penalty was imposed on the Taxpayer's deficiency.[24] Pursuant to R.I. Gen. Laws § 31-36.1-13(b), interest was imposed on the Taxpayer's deficiency. Such penalties are also allowed by IFTA. See AA § R1220 (penalty); § R1330 (interest).

iv. Constitutional Arguments

The Taxpayer argued that the collection and crediting of the taxes at issue violate both the US and RI constitutions. However, the determination of unconstitutionality of a statute is a not an issue that is properly before an administrative agency. See *Owners-Operators Independent Drivers Ass'n of America v. State*, 541 A.2d 72-74 (R.I. 1988) (constitutionality of the Tax statute can be addressed in an appeal of a Division decision).

H. Conclusion

Based on the forgoing, the Division properly assessed the Taxpayer for fuel taxes owed for 2003 and for 2004 to 2006 and properly disallowed any tax credits.

VI. FINDINGS OF FACT

1. On or about February 21, 2007, the Division issued both a Notice of Hearing and Appointment of Hearing Officer. An Order Appointing Substitute Hearing Officer was issued on July 27, 2007. A hearing was held on June 5 and October 27, 2008. Briefs were timely filed with the record closing October 21, 2011.

[24] The Division presented testimony that the Taxpayer's audit contact employees had been involved in similar fuel use audits for predecessor companies and were well aware of IFTA's record keeping requirements. See Division's Exhibit 35 (2002 field audit report for . However, an IFTA licensee is obligated to know and follow IFTA requirements as an IFTA licensee. Thus, the failure to maintain records – whether on notice from the Division or not – falls at least under negligence within the penalty statute.

2. The Taxpayer incorporated in Rhode Island in July, 2003 and received its IFTA license in January, 2004. The Taxpayer operated as an interstate motor carrier in the second half of 2003 without an IFTA license. The Taxpayer's records were not compliant with IFTA record requirements.

3. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 31-36-1 *et seq.*, and R.I. Gen. Laws § 31-36.1-1 *et seq.*

2. Pursuant to R.I. Gen. Laws § 31-36.1-1 *et seq.*, the Division properly assessed the Taxpayer additional fuel use tax under IFTA and properly denied any tax credits and also properly assessed interest and a penalty on the tax deficiency.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends as follows:

Pursuant to R.I. Gen. Laws § 31-36.1-1 *et seq.*, the Division properly assessed the Taxpayer additional fuel use tax under IFTA and properly denied any tax credits and properly assessed the Taxpayer interest and a penalty on the tax liability.

Date: October 31, 2011

Catherine R. Warren
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

____X____ ADOPT
_____ REJECT
_____ MODIFY

Date: January 23, 2012

David Sullivan
Tax Administrator

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DIVISION. THIS ORDER MAY BE APPEALED TO THE SIXTH DIVISION DISTRICT COURT PURSUANT TO THE FOLLOWING WHICH STATES AS FOLLOWS:

> **§ 8-8-25 Time for commencement of proceeding against the division of taxation.** – (a) Any taxpayer aggrieved by a final decision of the tax administrator concerning an assessment, deficiency, or otherwise may file a complaint for redetermination of the assessment, deficiency, or otherwise in the court as provided by statute under title 44.
>
> (b) The complaint shall be filed within thirty (30) days after the mailing of notice of the final decision and shall set forth the reasons why the final decision is alleged to be erroneous and praying relief therefrom. The clerk of the court shall thereupon summon the division of taxation to answer the complaint.

CERTIFICATION

I hereby certify that on the 23rd day of January, 2012, a copy of the above Decision and Notice of Appellate Rights were sent by first class mail, postage prepaid to the Taxpayer's authorized representative's address on file with the Division of Taxation and by hand delivery to Bernard J. Lemos, Esquire, Department of Revenue, One Capitol Hill, Providence, Rhode Island, 02908.

Gail Belasco