

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
MICHIGAN TAX TRIBUNAL

Raycan Transport, Inc,  
Petitioner,

v

MTT Docket No. 341589

Michigan Department of Treasury,  
Respondent.

Tribunal Judge Presiding  
Kimbal R. Smith III

FINAL OPINION AND JUDGMENT

On January 5, 2012, Administrative Law Judge Thomas A. Halick issued a Proposed Opinion and Judgment cancelling Assessment No. L956354 and affirming Assessment No. L956353. The Proposed Opinion and Judgment provided, in pertinent part:

The parties shall have 20 days from date of entry of this Proposed Opinion and Judgment to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the evidence admitted at the hearing. This Proposed Opinion and Judgment, together with any exceptions and written arguments, shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Tax Tribunal Act (MCL 205.726).

On January 25, 2012, Petitioner filed exceptions to the Proposed Opinion stating:

- a. "Petitioner . . . requests this Court not to change in any way its Opinion, but simply to correct the amount awarded as to Assessment No. L956353 as at the time of hearing, the State had not yet appropriately accounted for payments and credits . . . and, subsequent to the hearing, corrected its demand for payment from the original finding of the Court of \$19,112.16 to the appropriate amount of \$2,870.59 as reported by the State of Michigan to Raycan Transport, Inc."

Respondent has not filed exceptions to the Proposed Opinion and Judgment or a response to Petitioner's exceptions.

Having reviewed the Proposed Opinion and Judgment, Petitioner's exceptions, and the case file, the Tribunal finds that Petitioner contends the amount due on Assessment No. L956353 should be reduced to \$2,870.59. In support of its contentions, Petitioner submitted copies of its Monthly Statement of Account and its Final Bill for Taxes Due (Final Assessment) reflecting the reduced amount due. As such, Petitioner has shown through sufficient documentation that the amount due on Assessment No. L956353 should be reduced to \$2,870.59. Petitioner submitted further documentation indicating that the remaining \$2,870.59 may also have been paid; however, this documentation is not conclusive. Further, record of payment in full would be in the possession of Respondent.

Nevertheless, the Tribunal adopts the January 5, 2012 Proposed Opinion and Judgment, corrected to reflect the reduction in Assessment No. L956353 to \$2,870.59, and the possibility of payment in full, as the Tribunal's Final Opinion and Judgment in this case pursuant to MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact, as corrected herein, and Conclusions of Law in the Proposed Opinion and Judgment in this Final Opinion and Judgment.

IT IS ORDERED that the Proposed Opinion and Judgment is adopted as the Final Opinion and Judgment, and that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties, as shown in the Proposed Opinion and Judgment, as modified herein, within 20 days of entry of the Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Order within 28 days of entry of the Final Opinion and Judgment.

This Final Order and Judgment resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: March 6, 2012

By: Kimbal R. Smith III

**STATE OF MICHIGAN  
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM – MICHIGAN TAX TRIBUNAL**

Raycan Transport, Inc.,  
Petitioner,

v

Michigan Department of Treasury,  
Respondent.

Michigan Tax Tribunal  
MTT Docket No. 341589

Administrative Law Judge Presiding  
Thomas A. Halick

PROPOSED OPINION AND JUDGMENT

A hearing was held July 12, 2011, on Petitioner's appeal of an assessment of tax under the Motor Carrier Fuel Tax Act, MCL 207.211, et seq, and the International Fuel Tax Agreement. The parties presented documentary evidence and testimony. Counsel presented legal arguments and filed post hearing briefs. This proceeding is original, independent, and de novo. MCL 205.735(1). The final assessments at issue are as follows:

<b>Assessment No.</b>	<b>Tax</b>	<b>Penalty</b>	<b>Interest<sup>1</sup></b>
L956354	\$203,696.61 <sup>2</sup>	\$0	\$290,032.91

<b>Assessment No.</b>	<b>Tax</b>	<b>Penalty</b>	<b>Interest</b>
L956353	\$19,112.16	\$0	See footnote 1.

<sup>1</sup> Interest continues to accrue per 1941 PA 122. Interest shown above is current as of the date of the assessments.

<sup>2</sup> Amended Decision and Order of Determination, September 28, 2007. R10.

It is determined herein that:

Final assessment L956354 shall be CANCELLED.

Final assessment L956353 shall be AFFIRMED.

### **Findings of Fact**

This section is a “concise, separate, statement of facts” within the meaning of MCL 205.751, and, unless stated otherwise, the matters stated or summarized are “findings of fact.” 1969 PA 306, MCL 24.285.

During the years at issue, Petitioner, Raycan Transport, Inc. (“Petitioner” or “Raycan”) was a Canadian corporation with operations in Wayne, Michigan, with a fleet of approximately 150 trucks that transported auto parts in the United States and Canada. As of the date of the hearing, Raycan had ceased operations. TR 15.

On July 20, 2000, Respondent notified Petitioner that it would conduct an audit for the period July 1, 1996 to March 31, 2000. R1, “Notice of IFTA Audit.” The notice was signed by Audit Supervisor, James R. Leonard, and stated that the audit would begin on or about August 20, 2000. The audit period was later changed to July 1, 1999 to March 31, 2003.

Petitioner’s employee, Peggy Yunk, oversaw IFTA taxes and communicated with Respondent during the audit. Prior to the third quarter of 1999, Ms. Yunk prepared Petitioner’s fuel tax returns. Starting with the third quarter of 1999, a firm known as Comdata Legalization Services (“Comdata”) prepared the returns.

Exhibit R2 is a one-page “IFTA Pre-Audit Questionnaire” signed by Peggy Yunk on August 8, 2000, which indicates that Petitioner’s records were kept with Comdata in Alabama and also at Raycan’s offices in Wayne, Michigan. On September 29, 2000, the auditor, Sharron D. Allen, requested in writing that Petitioner make the following records available:

1. IFTA Tax Reports filed April 1, 1996 and supporting work papers.
2. Fuel tax reports filed in all IFTA and non-IFTA jurisdictions.
3. Monthly or quarterly vehicle mileage and fuel summaries used to accumulate data for fuel tax reports.
4. List of all vehicles used during the audit period.
5. Titles for all vehicles.
6. Rental and lease agreements and lease billings for all vehicles rented or leased during the audit period.
7. Trip reports, in order by vehicle number and date, grouped by calendar quarter for the audit period.
8. Actual, original, fuel receipts or invoices (not copies) to substantiate fuel purchases during the audit period, grouped by state or unit.
9. Records of withdrawals from bulk fuel storage.
10. Other fuel records or summaries.

Ms. Allen first visited Petitioner’s business location on October 12, 2000. There is no documentation with regard to Ms. Allen’s activities at that time, nor is there any documentation, letters, or memoranda directed to Petitioner requesting specific types of information or records, other than the “IFTA Audit Confirmation” letter dated September 29, 2000. R3, page 1. Ms. Allen did not testify at the hearing. It can be inferred that after the commencement of the audit, Ms. Allen requested odometer information, because on April 4, 2001, Ms. Yunk issued a one-page memorandum to Ms. Allen with odometer readings for four trucks. R4. In the memorandum, Ms. Yunk offered to provide additional odometer information upon request. There is no documentation of any such subsequent request.

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On October 1, 2002, Ms. Allen was reassigned to different job duties and was no longer responsible for the Raycan audit. Ms. Allen had made little or no progress on the audit over a two-year period from October 2000 until October 2002. Petitioner had, by that time, provided Respondent with 191 pages of detailed records, with each page captioned “Comdata Network, Inc. Driver Settlement by Unit Number – 5/1/99 – 5/31/99,” R-8, pages 183 – 374. These documents are also referred to as “driver settlements” or “settlement sheets.”

Mr. Plue took over the audit in February of 2003. On May 21, 2003, Mr. Plue prepared a document entitled “Opening Interview Notes (IFTA)” indicating that he and his supervisor attended a meeting with Peggy Yunk. R6.

Mr. Plue took possession of the Raycan records, including the driver settlement sheets from May 1999. “Comdata Network, Inc. Driver Settlement by Unit Number – 5/1/99 – 5/31/99.” TR 239. The settlement sheets contain data that is used to calculate drivers’ compensation and for billing customers, including: truck unit number, date, time, driver name, driver number, city, truck code number, trailer number, trip number, credit card number, **odometer reading, current miles per gallon, and gallons of fuel purchased.** The driver is required to enter an odometer reading as a condition of purchasing fuel with the Comdata credit card. TR 18. Each settlement sheet tracks the route of a particular truck for an entire month. The 183 pages of Driver Settlement records cover every vehicle in Raycan’s fleet as of May 1999. At least 95% of Petitioner’s drivers purchased fuel with a credit card issued by Comdata. At some truck stops, the driver swiped the credit card at the pump then used a keypad on the pump to enter the truck number, driver identification number, and the current odometer reading. If there was no such system at the pump, the driver gave the same information to the vendor at the point of purchase and the vendor

entered it into the Comdata system. TR 20. The driver obtained the odometer reading from a display on the dashboard of the vehicle. TR 23, 24.

On cross-examination, Ms. Yunk testified as follows:

Q. Now, under P640<sup>3</sup>, wouldn't you be required to maintain beginning and ending odometer readings?

A. We do. It's on the fuel purchases.

Q. And that was provided to Mr. Plue when you said you wanted to provide him additional records, latitude/longitude, did you offer him the odometer readings at that point?

A. He already had the fuel purchases, and the fuel purchases have the odometer readings right on them.

Q. Does it have all odometer readings?

A. Yes, they – they have to put in an odometer reading to buy fuel, so yes.

TR 47.

Mr. Max Collins is the IT director for Rush Trucking, which was a sister company to Raycan. He was formerly an independent, owner-operator and also a company driver for Rush Trucking. He was involved in the company's adoption of the computerized dispatch system ("Sabre") that is used to record the address of origin and destination of each trip, along with all stops, including paid and unpaid travel. Mr. Collins testified that the Sabre system is the primary method of measuring distance for fuel tax reporting purposes. The Sabre system determines the distance between the origin and destination via a routing software program called "PC Miler." The Sabre system produces the "dispatch records" that are used to determine miles driven for billing and payroll purposes. TR 40. The Sabre system records loaded miles and empty miles. TR 16. The Sabre system recorded the specific address of the origin and destination of each trip, along with all stops, including both paid and unpaid travel. The Sabre system calculates miles using a

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<sup>3</sup> IFTA Audit Procedures Manual.

routing program that measures the miles between the address of origin and address of destination. The accuracy of the system is important to both drivers, who are paid by the mile, and customers, who are billed by the mile. Obviously, if the miles are under-reported, the driver is underpaid and Raycan does not receive its full compensation from the customer. Conversely, the customer has an incentive to scrutinize the miles to avoid overpaying for the services.

Petitioner reported its miles “from routing the dispatch points” and also “call-ins” and fuelings. TR 169.

In addition, Petitioner used a global satellite positioning (“GPS”) system called Qualcomm, which recorded the locations of trucks and accounts for miles driven using a “routing software” program called Pro Miles. The Qualcomm GPS tracks the location of a vehicle at least hourly by a satellite “ping” which establishes the longitude and latitude of the vehicle. The pings also occur when a driver makes a radio communication (“call in”) with the dispatcher at Raycan. These geographical points are then used with the mileage software program to determine the most likely route that the truck travelled and the software determines miles between those points.

Petitioner used the Comdata fuel purchase records (with odometer readings) and the Qualcomm GPS to verify the miles tracked by the Sabre system. TR 82. Mr. Larry Babins testified that approximately 95% of drivers used the Comdata credit card. All of Petitioner’s drivers were “owner-operators.” Raycan did not own the trucks. The drivers were paid based on the number of miles traveled. TR 40.

Mr. Plue did not examine the mileage records from the Sabre system or the Qualcomm system (GPS). He did examine the Comdata fuel records (Driver Settlements) for May 1999, but not for any month during the audit period. TR 42.

Truck drivers are required by law to prepare “daily trip sheets” detailing their travels. A “trip sheet” (or “trip report”) is a paper form that the driver fills out manually. The trip sheets include the driver’s name, truck number, roads traveled, the date, and odometer readings at each border crossing. TR 54. The sheets are compiled into driver log books. When a state or federal regulatory agency audits the driver logs for compliance with rules pertaining to miles and hours driven, the agency uses the dispatch records (Sabre) to verify the accuracy of the driver logs. TR 65.

Ms. Yunk described how before the Sabre system was implemented, Raycan formerly tracked miles and billed customers based on daily trip sheets. When a driver crossed a state or provincial border, “he would be required to stop and write down an odometer reading” on a trip sheet. TR 53. Drivers are not required by law to record an odometer reading on a trip sheet at fuel stops (although they are required to record an odometer reading on the fuel purchase records as a condition of using the Comdata credit card). Ms. Yunk further testified that Qualcomm and Sabre compile the same data as the trip sheets.

The driver was required to mail copies of the trip reports to Raycan with the bill of lading for each trip. Each load was assigned a specific number for purposes of billing. The bills of lading and copies of trip reports were typically submitted to Raycan weekly and this information was used to bill customers and to pay drivers. That information was provided to the tax department and Ms. Yunk would enter the miles recorded on the trip sheet into the computer system using an Excel spreadsheet for purposes of preparing fuel tax reports. Using information from the trip sheets, Petitioner entered the starting point and ending point by city into a distance computer

program (“PC Miler”), which would measure miles from the center point of each city. The accuracy of this system was limited by the fact that it only recorded city center points and not the address of the stop. The Sabre system was in use for all quarters during the audit period. TR 57.

In practice, the trip reports frequently did not include all the required information. The trip sheets and driver logs are subject to audit by the Federal Motor Carrier Safety Administration, which compares the logs to dispatch records maintained in the Sabre system. TR 65-66. In other words, if a driver under-reports miles and hours driven, this would be discovered by comparing the logs to the dispatch records on the Sabre system. There is potential for drivers to falsify the miles driven in order to avoid penalty for exceeding federal health and safety rules that limit the number of miles and hours that may be traveled. Mr. Collins credibly testified that “drivers’ logs can be notoriously inaccurate to benefit the driver . . . if the driver needs [to drive more than permitted by law] they will fudge their time.” TR 65. Again, the log books are audited by comparing them to the dispatch records. The dispatch records are used to bill the customer and to pay the driver and, therefore, there is no apparent incentive to under-report miles on the dispatch records. In Mr. Collins’ opinion, the dispatch records are more accurate than drivers’ logs. The dispatch records kept by the Sabre program show the location and time when the truck arrives at and departs from a stop. The following is from the direct examination of Mr. Collins:

Q. . . . Mr. Plue walks in and says . . . I find a weakness in [Raycan’s] system. I want to find out . . . where every truck started, where every truck stopped, and how many miles it went. Could you have provided it to him?

A. Yes. In addition, you would also have the Comdata fuel purchases of any stops that were made to fuel up, as well, which would basically give you yet another crumb in your bread crumb trail, if you will. And all that combined together is going – are going to give you the most accurate account of where and when that tractor was at each location. TR 77-78.

The evidence in this record does not prove that odometer readings on daily trip sheets are more reliable than the odometer readings entered at the time of fuel purchases. Both are recorded by the driver. In fact, the testimony of Mr. Collins and Ms. Yunk supports a finding that the Comdata fuel records (driver settlements) are *more* accurate and reliable than daily trip sheets. Odometer readings from the Comdata fuel records were available for the entire audit period. The testimony of Mr. Babins and Mr. Collins establishes that Mr. Plue either had the Comdata fuel records in his possession (TR 47) or that he would have promptly received them if he had requested them. TR 215. Ms. Yunk testified that Mr. Plue had the Comdata odometer readings available to him for the entire audit period but he did not use them. TR 38:21-25. Regardless of whether Mr. Plue had the Comdata records in his possession during the audit, they were *available* at Raycan's offices in Wayne, Michigan, and could have been obtained with minimal effort on Respondent's part. TR 39:25. The department failed to make a reasonably diligent effort to obtain the necessary, available information.

Russell Plue claims to have asked Petitioner to provide odometer readings, but there is no documentation to support this claim. Mr. Plue stated that no odometer readings were provided and "we eventually gave this \$3 million audit out based on 4 mpg. At the end, after all them years, we made an adjustment to that 3 million based on the May [1999 data]." TR 122:7-10. It is evident from Mr. Plue's testimony that when he refers to a request for odometer readings, he means odometer readings recorded on trip sheets. R7, p 2. This would explain why he claimed to have no "odometer readings." In fact, Mr. Plue had odometer readings in his possession in the form of the Comdata Driver Settlement documents for May 1999. He initially determined these records were unreliable and recommended issuance of the "3 million" assessment. Nevertheless,

he ultimately used these same documents to calculate the fleet average MPG of 6.10 that was used for the final, reduced, assessment.

Mr. Plue has conducted approximately 200 audits in his career and has never before used a sample period from outside the audit period. TR 130. Using a one month sample period from May 1999 did not take into account seasonal changes in fuel usage. TR 131:12-15. Neither did it take into account changes in cross-border trucking activities that were impacted by 9/11.

*Summary of the Audit Report – September 9, 2003*

Mr. Plue took over the audit in February of 2003 and issued an audit report dated September 9, 2003. R7. Little progress had occurred with the audit from its inception in 2000 until February 2003. Mr. Plue took information provided to him by his supervisor and started the calculation of tax “from scratch” rather than relying upon work product, if any, of Ms. Allen. Mr. Plue’s report recommended an assessment of tax in the amount of \$2,637,380.40, a 10% negligence penalty of \$263,738.06, and interest of \$742,548.87, for a total of \$3,643,667.33. The audit was initially for the period October 1, 1996 to June 30, 2000, but was changed to July 1, 1999 to March 31, 2003.

According to the audit report, the audit was precipitated by an investigation request made by the Ontario IFTA authority which found that Petitioner’s tax returns “fluctuated from no operation, to refunds, to large deficiencies.” R7, p 9. The report references a document identified as “Aa-1” that is not in evidence. The report does not indicate the date that the Ontario IFTA authority made this request or the periods for which the alleged discrepancies were observed. However, the alleged discrepancies must have involved a period well before issuance of the original Audit Notice on July 20, 2000, such that it is unlikely that the alleged fluctuations in the returns

pertained to more than a few quarters, if any, involved in the actual audit period. Furthermore, this would have pertained to periods prior to the time Comdata took over IFTA reporting.

The auditor reported that there was a disagreement between the “summary mileage and/or fuel totals” with the reported totals. The auditor reported that summary reports did not agree with the reported totals for certain quarters as follows:

<b>Summary Totals</b>	<b>Reported</b>
3Q/99 – 540,948 gallons purchased .....	811,747 total gallons
4Q/99 – 1,836,571 gallons purchased .....	1,659,373 total gallons
1Q/00 – 9,120,385 total miles .....	7,001,672 total miles
1Q/00 – 758,691 gallons purchased .....	1,144,064 total gallons

Note that for the three quarters listed above, the taxpayer over-reported gallons for two of the three quarters, and net gallons reported exceeded the summary totals for the three sample months. This could tend to indicate that either the summaries are incorrect or the returns are incorrect. It cannot be presumed based on the above discrepancies that Petitioner underpaid tax.

The auditor determined that the taxpayer’s records for the 178 vehicles in the fleet listed on the 3Q/99 summary were “unreliable” based on the following:

1. 44 vehicles (25%) had MPGs above 10.
2. 84 vehicles (48%) had MPGs below 10.
3. 31 of vehicles (17%) had miles listed but no gallons.
4. 19 vehicles (11%) had gallons listed but no miles. R7, p 2.

Based on the foregoing, the auditor determined that over 50% of the vehicles had “unreliable fuel or mileage information.” The auditor claimed he was unable to determine “actual total miles” for each vehicle during a quarter because he was not provided with any “actual trip sheets listing odometer readings” and could not compare mileage from trip sheets to summary totals. R7, 2.

The report states as follows:

However, the auditor did have odometer or hub readings for numerous vehicles on the fuel reports for that vehicle. Since many of the vehicles failed to list odometer readings when they purchased fuel or input non-consecutive numbers (R, 1-122), the auditor felt that trying to randomly select vehicles for a test group would result in too many vehicles without a valid odometer reading. As a result, the auditor decided to record the odometer readings for only those vehicles that had odometer readings listed on the fuel reports that appeared to be actual odometer readings (Q, 1-69). For example, the auditor only accepted those odometer readings that appeared to be continuous and increasing in numerical order. The auditor rejected those readings that jumped back and forth or the same numbers were used over and over. R7, p 2.

The auditor’s comments above refer to the Comdata fuel reports for May 1999, which he selected as a test period because he had a mileage summary for that month. The audit report ultimately rejected this data and used 4 MPG to calculate the initial assessment.

Ms. Yunk credibly testified that the sample of trucks from May 1999 was not representative of the audit period and that she never agreed to that sample period. There is no signed document indicating that Petitioner was consulted about or agreed to the choice of the sampling methodology. TR 36:16-25. Mr. Max Collins also provided credible testimony that the single month of May 1999 was not representative of Petitioner’s operations during the audit period. TR 89. This was also supported by expert testimony from Mr. Babins.

The auditor compared the beginning and ending odometer readings for the 51 vehicles on the May 1999 Comdata fuel report and found that 34 vehicles (66%) had an audited mileage

(Comdata fuel report mileage) greater than the mileage listed on the summary report. The auditor determined that he “could not accept the taxpayer’s mileage summary reports.”

*Respondent’s Calculation of Additional Jurisdictional Miles*

The auditor allocated additional miles to those jurisdictions for which the taxpayer reported fuel purchases on the summary but did not list any miles for that jurisdiction.<sup>4</sup> The auditor found fuel purchases (gallons) with no corresponding miles for 3Q/99, 4Q/99, 1Q/00, and 2Q/00. The auditor multiplied the gallons by the 4 MPG default rate to determine the total “missing miles” related to the fuel purchases. The report does not consider that the fuel may have been purchased and reported in one quarter and the corresponding miles may have been reported in a subsequent quarter, as was confirmed by Mr. Babins. Rather, the auditor concluded that the miles must have been driven in that jurisdiction but not reported at all. Had the auditor immediately reported this issue to the taxpayer it would have been possible to determine the reason for the “missing miles” and no additional tax would have been due.

The auditor further assumed that this same pattern that he observed for 3Q/99, 4Q/99, 1Q/00, and 2Q/00 applied to all quarters during the audit period. The auditor determined the average gallons with no miles for the four sample quarters and calculated the average “missing” miles for these quarters, which he added to the mileage totals for all quarters for the following jurisdictions:

Indiana, Kentucky, Michigan, Missouri, New Brunswick, British Columbia, Oklahoma, Ontario,

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<sup>4</sup> For example, for the third quarter of 1999, the fuel summaries showed the following fuel purchases, with no miles reported for these jurisdictions: Georgia (100 gallons), Illinois (211 gallons), Indiana (1,033 gallons), Kentucky (680 gallons), Michigan (3,393 gallons), Missouri (727 gallons), New Mexico (761 gallons), New York (202 gallons), Oklahoma (2,500 gallons), Ontario (30,802 gallons), Quebec (19 gallons), Tennessee (74 gallons) and Texas (101 gallons).

Quebec, and Texas.<sup>5</sup> The auditor used four sample quarters (different quarters from two different calendar years) to extrapolate additional miles to the entire audit period.

*Respondent's Calculation of Additional Fuel Usage*

The audit report concluded as follows:

The auditor found the registrant's fuel records unreliable for the following reasons:

1. The total gallons do not agree with the summary total purchases as listed above.
2. There are to [sic] many vehicles with mileage on the summary but no fuel purchases.
3. There are to [sic] many jurisdictions that have fuel purchases listed on the summary but no corresponding mileage listed for that jurisdiction.

The total fuel was determined by dividing the total audited miles by 4 MPG. R7, p 3. The audit report was issued September 9, 2003, followed by the intent to assess. Upon receipt of the \$3.6 million assessment, Mr. Babins became directly involved in challenging the assessment.

Petitioner requested an informal conference, which was held November 29, 2006. Below is a letter from Mr. Babins to Respondent sent shortly before the informal conference.

*Petitioner's Response to the \$3.6 Million Intent to Assess*

Petitioner's letter to Respondent dated October 8, 2006, is set forth in its entirety below:

The following is our response to the **Primary Cause of Audit Deficiency** submitted on September 9, 2003. In order to determine our response, we have undertaken and completed the following procedures:

1. Identified vehicles that were to be reported under Raycans' IFTA account (Schedule 1).

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<sup>5</sup> It was determined that many jurisdictions reported too few gallons with no miles to warrant increasing the miles for those jurisdictions throughout the audit period, under the belief that they were a one-time error. R7, p 3.

2. Identified vehicles that were to be reported under their own IFTA account (Schedule 2).
3. Identified all vehicles that possessed Satellite Tracking devices (Schedule 3) and those that were to be reported by the Dispatch Program (Schedule 4).
4. Reviewed processed readings on Satellite equipped vehicles to ensure that all Dispatched distances were removed (to ensure distances were not reported more than once).
5. Reviewed processed readings on vehicles whose mileage was generated by the Dispatch system (to ensure duplicate distances were not reported).
6. Validated mileage through the comparison of Paid, Satellite and Dispatch miles on a sample basis (Schedule 5).
7. Reassigned individual vehicle Distances traveled to the appropriate Reporting Period, regardless of when it was originally reported.
8. Obtained from Third Party Fuel Suppliers, fuel purchases by vehicle, by state, by date, with unit of measurement and quantity purchased for the entire audit period (Schedule 15).
9. Obtained from achieves, fuel purchases paid by cash by vehicle, for the entire audit period.
10. Ensured all purchased fuel for vehicles were reported in the appropriate period.
11. Prepared an MPG Report by Quarter by Vehicle (Schedule 6).
12. Determined the MPG for IFTA Reporting purposes by Quarter (Acceptable range 4-7.5 MPG).
13. Recalculated MPG by Quarter utilizing only those vehicles whose MPG fell into the Acceptable Range (Schedule 7).
14. Utilizing the revised Mileage by Quarter (#7), the Revised Fuel Purchases by Quarter (#10) and the redetermined MPG by Quarter (#13) the IFTA Returns were recalculated by Quarter (Schedule 8).
15. Responded to the list of Corrective action needed (page 5 of 11) (Schedule 9).

With the above in mind, we wish to bring the following to your attention:

1. In the section relating to the Mileage Determination (page 2 of 11), the comparison between the **3Q99** breakdown of reported vehicles and the revision is as follows:

	Per Auditor	Per Revision
MPG above 10 MPG	48%	33%
Miles no Fuel	17%	5%
Fuel no Miles	11%	0%

The auditor's conclusion that over 50% of the miles reported had unreliable mileage or fuel information is **not valid**. For the **entire audit period** the Revised Reporting reflects the following:

MPG above 10 MPG	14%
Miles no Fuel	5%

Fuel no Miles

0%

2. In the section relating to the Mileage Determination (page 3 of 11), the auditor claimed that 66% of the selected from May 1999 had an audited mileage greater than that reported.

As per our sample in Schedule 5, after reallocation of distances to the appropriate period, the Paid miles are only marginally less than Reported IFTA miles (as per Schedule 15, the Difference between Revised Mileages and Odometer Readings is **-2.44%**).

3. In the section relating to Allocation of additional jurisdictional miles (page 3 of 11), the auditor claimed that “the taxpayer’s summaries failed to allocate any miles for those jurisdictions that had fuel purchases listed on the summary but no corresponding miles listed for that jurisdiction”.

As per Schedule 6, there [was] **NO Fueling without Reported Miles** in the revised reports.

4. [I]n the section relating to Fuel Usage Determination (page 3 of 11), the auditor stated the following: ‘1: the total gallons do not agree with the summary total purchases.’ As per CD1 all units of measurement have been displayed due to the different units of measurement utilized by Canada vs. USA.
5. [I]n the section relating to Fuel Usage Determination (page 3 of 11), ‘2...to many vehicles with mileage on the summary but no fuel purchases.’ As per Schedule 13, only **2%** of the miles reported had no fuel.
6. In the section relating to Fuel Usage Determination (page 3 of 11), ‘3...to many jurisdictions that have fuel purchases but no corresponding mileage listed for that jurisdiction.’

As per Schedule 6, there were **NO Fueling without Reported Miles** in the revised reports.

7. In the section relating to Tax-paid credits (page 4 of 11), the auditor indicated that the ‘wide range of discrepancies indicates that the fuel records are unreliable.’ Schedule 15 indicates the total fuel purchases per period.

In addition, as per Schedule 15, **66%** of both the fuel invoices and quantity purchased were verified to the applicable third party supporting invoices or statements.

8. Utilizing the revised MPG’s per reporting period (Schedule 7) and the distances per Schedule 7, the revised Tax Due over the entire Audit Period is **\$288,780** plus interest less payments plus refunds.

Finally, since the Test Audit Period was at the start of a new processing process (i.e. Comdata Regulatory Services) commenced Raycans' Fuel Tax Processing in July 1999 and b: over the audit period, the quality of Fuel Tax Reporting improved significantly; we therefore request that the Penalty for Negligence be **nullified**.

Babins Letter, October 8, 2006.

*Audit by Mr. Babins*

Upon receipt of the \$3.6 million Intent to Assess, Petitioner called Mr. Larry Babins of Comdata to review its fuel tax records in order to determine the validity of the assessment. Mr. Babins was not involved in the audit prior to that time.

Mr. Babins examined all fuel and mileage records for all trucks during the entire audit period. Based on his knowledge and expertise, he determined that the fuel records from the single month of May 1999 did not constitute a proper sample. TR 174.

Mr. Babins conducted a detailed review of Petitioner's tax accounting and reporting practices for the entire audit period. First, he determined which trucks were properly included on Petitioner's IFTA returns. (In Canada, independent operators may choose to file their own IFTA returns, and it is important to ensure that the miles and fuel are not reported both by the operator and the trucking company.) He determined that some vehicles should have been reported by the owner-operator under their own IFTA account, but were reported by Raycan. This may have resulted in double payment of tax, once by Raycan and again by the owner-operator, but the evidence is inconclusive on this point.

Mr. Babins determined that for some reporting periods, dispatch information (Sabre) was erroneously co-mingled with satellite (Qualcomm) information, which resulted in over-reporting miles. That is, the same miles that were recorded both by Sabre and Qualcomm were reported twice on some of the returns. Mr. Babins believed that total reportable miles were over-reported by 7%, but the evidence and testimony is determined to be insufficient to form the basis for a finding of fact on this particular quantity.

Mr. Babins then identified the trucks that were equipped with the Qualcomm system and which used the Sabre system. For example, in the fourth quarter of 1999, 153 trucks were equipped with the Qualcomm system and 27 used only the Sabre system. Petitioner's Trial Exhibit C, Schedule 3 and 4. In other quarters approximately 100 to 130 trucks were equipped with Qualcomm. Petitioner's Trial Exhibit C, Schedule 3. The size of the fleet varied from quarter to quarter. Owner-operators frequently left Raycan and new drivers joined. When a new truck joined the fleet, it took up to one month to install the Qualcomm system. Mr. Babins determined which system was operational on each truck during any given period. He determined that in some cases miles from both systems were counted for the same truck; however, the evidence and testimony is insufficient to support a finding of fact on a particular quantity.

Mr. Babins compared the dispatch (Sabre) miles with the GPS (Qualcomm) miles to determine whether they were consistent. The Sabre system measures miles between the address of origin and destination. The GPS measures miles between longitude and latitude points of origin and destination as identified by the satellite. Mr. Babins found that the dispatch miles and the GPS miles were nearly identical. For example, Unit R1166 for the fourth quarter of 1999 showed that the dispatch miles were 425 and the miles reported for IFTA purposes were 427. Mr. Babins'

analysis of the data reveals that the miles reported for fuel tax purposes exceeded the “miles paid” (miles used to bill clients and pay drivers) by approximately 1% to 5%, however the evidence and testimony is insufficient to support finding of fact on a particular quantity.

Mr. Babins then checked the GPS and dispatch miles (Sabre) against two recognized “routing” software programs that measure miles between two points, PC Miler and Pro Miles, which are commonly used in the trucking industry and also used by many state tax agencies. In some cases, the two programs agreed on the shortest distance between two points and in others there was a variance of approximately 1%. He determined the minimum distance but reported the longer distance so that there would be no underreporting of miles. Based on this review, Mr. Babins was satisfied with the integrity of this data.

There were many changes in the transportation patterns and volumes during the audit period. This was, in part, due to the 9/11 attacks, which significantly impacted cross-border trucking. This reduced the number of miles logged by Raycan’s drivers by millions of miles. Also, Petitioner served the automotive industry, which experiences seasonal shutdowns that result in significant variation in the number of miles traveled from quarter to quarter. The standard practice for an IFTA audit is to examine three quarters – for example, the first quarter in year one, the second quarter in year two, and the third quarter in year three, in order to obtain a representative sample between summer and winter operations and other variations between quarters. TR 175. See Audit Manual A520.

Mr. Babins assigned all fuel purchases to the proper quarter in which the fuel was purchased in order to ensure that the fuel usage matched the miles driven for each vehicle. He “reassigned individual vehicles to the appropriate reporting period regardless of when they were originally

reported.” TR 173. In Petitioner’s Trial Exhibit C, Schedule 6, Mr. Babins prepared a list of MPG by quarter for all quarters during the audit period, except 4Q/01 and 1Q/02. He testified that these MPG figures are reasonably accurate based on the information he accumulated. TR 176. Mr. Babins described how he determined fleet average MPG:

Then, to determine the MPG for IFTA reporting purposes by quarter, I looked at a range. What is a reasonable MPG for a vehicle? And the range that was determined was based upon other audits at that period. I’ve done numerous audits. About 7.5 was the upper limit that other jurisdictions accepted. TR 176:8-13.

Petitioner’s fleet consists of “class 8 vehicles” that have a gross vehicle weight between 33,001 to 80,000 pounds. Mr. Babins did not consider MPGs over 7.5 or under 4 to be accurate for class 8 trucks. “. . . I used . . . four as a floor because that was the prescribed penalty under the IFTA agreement.” Babins, TR 177. In Mr. Babin’s experience, 7.5 MPG is the maximum that many states will accept as reasonable. (Mr. Babins did not testify that class 8 trucks cannot actually achieve greater than 7.5 MPG.) After rejecting outlier vehicles with indicated MPGs outside the range of 4 to 7.5, Mr. Babins calculated a fleet average MPG of 6.26. It should be noted that Mr. Plue, when finally calculating the 6.10 MPG figure also eliminated trucks with MPGs that seemed unlikely to him (too high or too low), which is why he eliminated 34 of the 51 trucks in the May 1999 sample. Mr. Plue selected MPGs from 19 trucks that fell within the range of 3.6 to 7.91.

For 3Q/99, Mr. Babins found that 61 of 142 vehicles showed MPGs within the range of 4 to 7.5. The number of vehicles in range increased throughout the audit period, such that by the final quarter, 98 of 116 vehicles were in range. This fact further demonstrates why using May 1999 as a sample for calculation fleet average MPG is not representative of the entire audit period.

When Mr. Babins matched the miles and fuel to the proper period, he determined that there were *no vehicles that reported fuel usage but no miles traveled*. This finding is adopted as true, and undermines Respondent's methodology for increasing miles in those jurisdictions where he found that fuel was purchased in a quarter but no miles were reported for that quarter. Recall that Mr. Plue increased the total miles in certain jurisdictions for the entire audit period based on average fuel purchases in those jurisdictions from a sample from 3Q/99, 4Q/99, 1Q/00, and 2Q/00. R7, p 3, R8, pp 69-78.

Mr. Plue had found that of the 178 trucks on the 3Q/99 summary, 17% reported *miles* with no *fuel*. After Mr. Babins matched the fuel purchases to the miles driven, he determined that only 5% of the vehicles reported miles but no fuel. The fuel related to those miles had been improperly reported in another quarter.

Mr. Plue had reported that over 50% of the miles reported had unreliable mileage or fuel information. R7, p 2. It is this finding that led him to conclude that the taxpayer's records were unreliable. Mr. Babins' review proves that this is incorrect.

Furthermore, Mr. Plue claimed that 66% of the miles reported from the May 1999 sample had an "audited mileage greater than the mileage listed on the taxpayer's summary report." Mr. Babins' study found, after reallocation of distances to the appropriate period, that the "paid miles" (from payroll records) were slightly *less* than miles reported for IFTA purposes, a difference of 2.44%, which Mr. Babins credibly testified is insignificant. (Petitioner's Letter to Respondent, dated October 8, 2006.)

Mr. Babins demonstrated that one reason that total gallons did not agree with the summary total purchases as stated in the Audit Report (R7, p 3) was that some purchases made in Canada in liters were reported as gallons.

*Informal Conference*

The informal conference recommendation states as follows:

...Petitioner's representative presented a large binder containing a substantial amount of additional information for the Department's review. That review ultimately resulted in a determination by the Department that the Petitioner's liability should be adjusted to tax due in the amount of \$387,771.21 and interest in the amount of \$209,032.91. The penalty was also removed. R9, p 1.

The department's hearing referee found that the taxpayer failed to maintain accurate records and that "it would be impossible to determine with any degree of confidence that the Petitioner's approach to determining the MPG was more accurate than the Department's . . . ." R9, p 2.

*The Final Assessment*

As discussed previously, the Final Assessments were issued after the informal conference pursuant to an Amended Decision and Order of Determination (R-10), which resulted in reduction in tax from \$2,637,380.43 to \$290,032.91, as follows:

<u>Assessment</u>	<u>Tax</u>	<u>Interest*</u>	<u>Penalty**</u>
L956354	\$387,771.21	\$290,032.91	\$0
L956353	\$19,112.16	Not specified	\$0

\*Interest to be calculated pursuant to 1941 PA 122.

\*\* The penalty was waived without explanation.

The original intent to assess in L956354 was:

<u>Assessment</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>
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Respondent issued an Amended Decision and Order of Determination on or about April of 2010, which determined that a Final Assessment should be issued in the amount of \$387,771.21 (tax) and interest in the amount of \$290,032.91. With credit for interim payments of tax and interest, the Final Assessment was determined to be \$203,696.61, with interest in the amount of \$290,032.91.

For purposes of the revised assessment, Respondent estimated the fleet average of 6.1 MPG based on an examination of Comdata fuel purchase records from a sample of 51 trucks from May 1999. (This is the same data that Respondent has previously rejected as unreliable.) The crux of this matter is summed up in a letter from Mr. Plue to Mr. Babins dated March 6, 2007:

The only change that was made from your determined returns is the MPG (miles per gallon). When this audit first began I recorded the odometer readings for 51 vehicles listed on the fuel reports (see Ref B). To determine the audited MPG, I eliminated those vehicles that had excessively high or low MPGs. This left me with 19 vehicles that had somewhat reasonable MPGs, based on the odometer readings (see Ref A). The average MPG for those 19 vehicles was 6.09. As a result, I allowed a maximum of 6.10 MPG to determined total gallons. R11.

From the above letter, it can be determined that Respondent accepted the “determined returns” prepared by Mr. Babins, which are in evidence as P8. It is evident that Respondent accepted the total miles and miles per jurisdiction, but used 6.10 MPG rather than the average of 6.26 determined by Petitioner. The 19 trucks from which Respondent estimated the average fleet MPG of 6.10 are set forth on Exhibit R26, p 1 as follows:

Truck No.	Odometer MPG <sup>6</sup> (Actual)	Summary MPG (Actual)
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<sup>6</sup> Also see R11, p 2.

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1	1072	7.73	5.15
2	1073	4.50	5.43
	1087	5.97	8.79
4	1110	5.24	6.12
5	1135	4.27	5.36
6	1143	5.68	9.35
7	1506	7.40	8.48
8	1518	6.68	7.27
9	1562	7.49	5.16
10	1577	6.66	6.64
11	1605	6.48	7.72
12	1614	6.17	6.72
13	2292	7.91	8.81
14	509676	4.48	0.00
15	2301	7.30	18.78
16	2308	6.65	0.00
17	2313	5.40	7.06
18	2314	5.17	7.23
19	2143	3.60	5.33
Total		114.78 / 19 = 6.04 mpg	129.4 / 19 =6.81

The correct sum of Respondent’s “odometer” MPG figures for R11, p 2 is 114.78 for an average of **6.04** MPG, and not 6.09 as indicated in the letter and on R1, p 2. Respondent’s letter states that the auditor calculated **6.09** MPG from the “19 vehicles that had somewhat reasonable MPGs, based on the odometer readings.” R11, p 2. The 6.09 figure was apparently rounded to 6.10.

As demonstrated in the table above, the average “odometer” MPG of the 19 trucks is 6.04, not 6.09. Furthermore, the average of the “summary MPG” indicated in the table above is 6.81, not 6.09 as indicated on R11, p 2.

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If the apparent outlier (vehicle no. 2143) of 3.6 MPG is eliminated (odometer MPG), the resulting indication of average MPG is 6.17.

Mr. Babins' MPG calculations are set forth in the following table. (Petitioner's Exhibit C Tab 6 in the binder of Trial Exhibits.)

Quarter	Entire Fleet	Vehicles Within Range
3/99	8.21	6.3
4/99	7.49	6.39
1/00	7.26	6.31
2/00	6.55	5.91
3/00	7.39	6.44
4/00	7.20	6.34
1/01	6.91	6.27
2/01	6.76	6.37
3/01	7.58	6.50
4/01	6.83	5.78
1/02	6.43	5.84
2/02	6.82	6.34
3/02	7.12	6.46
4/02	6.52	6.41
1/03	6.24	6.10
	$105.31 / 15 = 7.02$	$93.76 / 15 = 6.26$

Petitioner's calculation of the vehicles within range shows 6.26 MPG. Petitioner's Exhibit C (Tab 6 in the binder of Trial Exhibits) consists of MPG statistics from all trucks for the 15 quarters at issue taken from GPS and Sabre. A review of the data for 1Q/2003 finds that the fleet of 116 trucks included 18 trucks with MPG figures that Mr. Babins determined were outliers

(outside the range of 4 to 7.5 MPG). The average MPG for all trucks (including apparent outliers) during the 15 quarters set forth on Exhibit P-6 is 7.02 and after eliminating the apparent outliers per Mr. Babins’ judgment, the result is 6.25066666 MPG, which was rounded to 6.26.

Petitioner’s exhibits include revised IFTA Quarterly Fuel Use Tax Schedules (IFTA 101-MN) for the 15 quarters at issue. (Petitioner’s Trial Exhibits, Tab 8) The above MPGs for “vehicles within range” were used to calculate taxable gallons. The average fleet MPG (6.3) that is set forth in section (E) of the IFTA return for the third quarter of 1999 is not equal to the total miles divided by the total gallons on the revised return (8.21 MPG). The revised average fleet MPG was calculated for each quarter from vehicles that Mr. Babins considered to be “within range” of 4 to 7.5 MPG.

The table below demonstrates the range of estimated average fleet MPGs as calculated by the parties.

A	B	C	D	E	F	G
Plue Odometer 19 Trucks <b>Actual</b>	Plue Summary 19 Trucks	Plue Odometer Audit Report	Babins Revised Returns Range 4 to 7.5 MPG	As-filed Returns	Plue Summary 19 Trucks <b>Actual</b>	Babins Fleet GPS & Sabre
R11, p 2 6.04	R11, p 2 6.09	R7 6.10	P7 6.26	R29 6.59	R11, p 2 6.81	P6 7.02

As noted above, column A is the actual average of the odometer MPGs set forth on R11, p 2, and column B is the *incorrect* average of “summary” MPGs that appears on R11, p 2. It is unclear why 6.10 was selected as the MPG that resulted in the assessment at issue, because Mr. Plue

stated that he relied upon the “odometer readings” from fuel records for the 19 trucks that he believed reported accurate, which would be 6.04 MPG as indicated by column A above. “This left me with 19 vehicles that had somewhat reasonable MPGs, based on the odometer readings . . . . The average MPG for those 19 vehicles was 6.09. As a result, I allowed a maximum of 6.10 MPG to determined total gallons.” R11. It appears, however, that he actually used the incorrectly calculated average MPG for the 19 trucks as appear on the summaries (6.09) not from the odometer readings (6.04). The 6.10 MPG figure has no credibility because it is not the rounded average of the odometer MPG for the 19 trucks selected by Mr. Plue, as demonstrated above. In any event, as discussed above, the sample is fatally flawed because it is not representative of the audit period and therefore cannot be relied upon to estimate an average fleet MPG for the entire audit period, when in fact more relevant data of the same type was available for quarters within the audit period.

On May 23, 2007, Mr. Plue again wrote to Mr. Babins regarding information that Mr. Babins presented to Respondent on October 8, 2006, in support of Babins’ estimated MPG of 6.26. A portion of that letter, with all typographical, grammar, and editing problems unchanged, is set forth below:

IFTA audit procedures require prior written approval from the base jurisdiction before a Global Positioning System can be used as the sole means of determining total and jurisdictional mileage. instead of actual odometer or hubodometer readings to determine total and jurisdictional mileage. Since Raycan Tranport Inc failed to obtain approval the use of A Global Positioning System may only be used as a tool and not as the sole determination of miles driven. require the use of odometer readings to determine MPG. Based on the best information made available to us resulted in a determined 6.10MPG.provided, [sic] we determined a 6.21MPG for the 26 test vehicles. We also determined a 3.4% understatement of total miles. These determinations were applied to the entire audit. R18.

Read literally, the above letter is nonsensical, contrary to fact, and in some instances unintelligible. First, the facts are clear that Petitioner did not rely solely upon a GPS system to determine miles but also used the Sabre system (actual point-to-point addresses with distances measured by a routing program – PC Miler), and actual odometer readings were available for the vast majority of vehicles throughout the entire audit period via the Comdata fuel records. In addition, service records were available for a group of 12 trucks examined by Mr. Babins, which could have provided odometer readings for purposes of estimating the average MPG of that sample. Although the letter dated May 23, 2007, (R18) does not mention trip reports, Respondent has repeatedly argued in this case and in *KC Transportation, supra*, that the trip reports are the gold standard of accuracy and that without them Petitioner’s records cannot be accurately audited. The testimony in this case, however, proves the contrary. Mr. Plue’s letter was written long after issuance of the \$3.6 million “intent to assess tax.” That letter states that the “best available information” was the Comdata fuel records for 19 trucks that resulted in the 6.10 MPG used to calculate the Final Assessments. The auditor determined that the best available information was the taxpayer’s summaries and Comdata fuel records with odometer readings for May 1999, which was *outside the audit period*. To compound the matter, May 1999 was prior to the time when Petitioner retained Comdata to file its IFTA returns. At the time the letter dated May 23, 2007, was written, Respondent knew that the same Comdata fuel records with odometer readings existed for the entire audit period. Even if these Comdata documents for the entire audit period had not been physically delivered to Respondent, it is clear that they were *available* for Mr. Plue to review at Wayne, Michigan. It was within the department’s power to visit Petitioner’s place of business and to order the production of these documents. This is not an unreasonable burden for Respondent. Respondent took over three years to complete the audit.

Respondent ignored this available data and based the assessment on records from a period outside the audit period. This is not the “best available information.”

The IFTA Procedures Manual strongly implies that the auditor has a duty to make a reasonable effort to examine records at the location where the records are stored. Under P530.100 of the Procedures Manual, the taxpayer must make records available for audit “during normal business hours,” which implies that the auditor will generally visit the business. Furthermore, if records are located outside the base jurisdiction, such that “the base jurisdiction must send auditors to the place where the records are kept,” the taxpayer may be charged for travel costs. P530.200.

Under A540.400 of the Audit Manual, the auditor is required to consider “all documentation required to be maintained in accordance with Section P540 of the IFTA procedures manual, and “any other records used by the licensee to substantiate its distance traveled.” The auditor failed to follow this requirement.

Finally, in an ironic and serendipitous moment of carelessness, Mr. Plue’s letter refers to several figures that appear nowhere else in the vast documentary and testimonial evidence presented in this case. However, those same figures – 6.21 MPG and 3.4% mileage error rate – formed the basis for the assessment in the matter of *KC Transportation, Inc v Treasury*, MTT Docket No. 341982 [Proposed Opinion and Judgment by this ALJ, issued November 24, 2010 – Final Opinion and Judgment pending]. It is apparent that the language relating to the 6.21 MPG and 3.4% mileage error rate was an errant leftover from another document, most likely drafted in regard to *KC Transportation*. It is quite clear that there was no sample of “26 test vehicles” in our present case, and there was no 3.4% error rate applied in order to increase the total miles across the board, although this is exactly what occurred in *KC Transportation*.

Another point of interest is that in *KC Transportation*, the auditor increased miles by the error rate of 3.4% and decreased the taxpayer's reported 6.42 MPG to 6.21 MPG, which is a reduction of approximately 3.27% (6.21 is .9672897 of 6.42 – rounded to .97). Also note that in this case, the taxpayer supported a fleet average MPG of 6.26 and Respondent determined 6.10, which is approximately .97 of 6.26.

Respondent's Audit Supervisor, Isaac Harris, issued a memorandum dated April 6, 2010, to Mr. Plue, which states in part, "The auditor recorded odometer readings for 51 vehicles. After applying the fuel purchases for those 51 vehicles (R11, p 3), only 19 vehicles had MPG that the auditor considered within an average range (between 3.60 and 7.91). The auditor totaled those vehicles and arrived at the audited average 6.10MPG." R19. Neither the memorandum nor the audit report describes how the "average range" of 3.6 to 7.91 was determined. Mr. Plue stated only that these 19 trucks appear "somewhat reasonable." On the other hand, Mr. Babins testified, based on his expert knowledge and experience, that an acceptable range is 4 to 7.5 MPG.

However, Mr. Babins selected 7.5 MPG as the high end of the range based on his anecdotal testimony that many states will not accept an average MPG above that amount. This range is not based upon studies or actual MPGs experienced by Petitioner's fleet. Furthermore, it cannot be presumed that trucks in Petitioner's fleet did not achieve less than the statutory 4 MPG figure. Petitioner's choice of that range is arbitrary and not proven to be related to any proof of actual MPG achieved by Petitioner's fleet.

Petitioner presented no evidence specific to assessment L956353. Respondent's audit report states, "The only other Michigan tax examined was the Michigan Supplemental Motor Carrier

report.” R7, p 10. The audit report further states that, “A separate supplemental audit is being submitted for a deficiency of \$13,913.50.” R7, p 10.

### **Conclusions of Law**

The subject assessments arise under the Motor Carrier Fuel Tax Act, 1980 PA 119, MCL 207.211, et seq (“the act”) and the International Fuel Tax Agreement (“IFTA” or the “Agreement”). A motor carrier is subject to a “road tax on the amount of motor fuel consumed in qualified commercial motor vehicles on the public roads or highways within this state.” MCL 207.212(1). In addition, commercial motor vehicles are “subject to the definition of taxable motor fuels and rates as defined by the respective international fuel tax agreement member jurisdictions.” MCL 207.212(1).

“IFTA” is “the interstate agreement on collecting and distributing fuel use taxes paid by motor carriers, developed under the auspices of the National Governors' Association.” 49 USC § 31701(3). Michigan has entered into IFTA by a legislative act. MCL 207.212a(1); 1980 PA 119, amended by 1996 PA 584. IFTA is a “reciprocal agreement providing for the imposition of a motor fuel tax on an apportionment or allocation basis” with other jurisdictions. MCL 207.212a(1).

The primary legal issue is whether Respondent based the assessments on the “best available information.” IFTA Audit Manual, A540.200 and IFTA Articles of Agreement R1210.115. This implicates the section of the IFTA Audit Manual that requires sample periods to be representative of the licensee’s operations. IFTA Audit Manual, A530.100.

The department has authority to determine the tax liability using the best information available.

IFTA Articles of Agreement, R1200.200. The assessment is presumed to be correct and the taxpayer has the burden “to establish by a fair preponderance of the evidence that the assessment is erroneous or excessive.” IFTA Articles of Agreement, R1200.300. The state’s power to issue an estimated assessment based on the “best available information” arises only if the taxpayer:

.005 fails, neglects, or refuses to file a tax return when due;

.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.  
IFTA Articles of Agreement, R1210.100.

The taxpayer filed timely tax returns, and therefore, the condition under subsection 300.005 is not met.

Furthermore, the testimony establishes that the taxpayer made sufficient “records available” to Respondent, notwithstanding that the department generally did not make “written requests” for records, and therefore, the condition under subsection 300.010 is not met.

The evidence does not support a finding that the taxpayer failed to “maintain records from which the licensee’s true liability may be determined.” Therefore, in the absence of these conditions, Respondent’s discretion to issue an estimated assessment is significantly more constrained than in a case where few or no records are available. This is not such a case. Here, Respondent had a duty to make further inquiry into the alleged discrepancies with Petitioner’s summaries and returns. As demonstrated by Mr. Babins’ audit, such an inquiry would have resolved most of the

issues that led Respondent to deem Petitioner's records "unreliable" and which resulted in the subject assessments.

Assuming *arguendo* that Respondent had authority to issue estimated assessments under R1210, Petitioner has met its burden to rebut the presumption of validity and to carry the overall burden of persuasion that the assessments are erroneous and should be cancelled.

### *Trip Sheets*

The issue as to whether the law requires the taxpayer to maintain trip sheets is not dispositive. In another case, this ALJ agreed with Respondent's view that the IFTA Procedures Manual requires the taxpayer to maintain records of daily trip sheets. See the Proposed Opinion and Judgment in *KC Transportation v Treasury*, MTT Docket No. 341982.<sup>7</sup> In that case, in the absence of trip sheets, the department estimated fleet average MPG from a sample of odometer readings that were recorded from vehicles when they were brought in for service. The Proposed Opinion holds that the taxpayer failed to prove that the assessment was excessive or erroneous in that case.

The law does not require that the miles reported on tax returns be compiled from trip reports. The taxpayer may use a GPS system or other method of accounting for miles. However, IFTA requires the taxpayer to maintain "source documents" containing odometer readings for each truck so that the miles reported can be audited using the source documents. See, *KC Transportation, supra*. It is concluded here that the taxpayer's Comdata fuel records are source documents that contain odometer readings.

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<sup>7</sup> A Final Opinion and Judgment has not been entered in that case as of the time of this writing.

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Although the trip sheets and logs are a valuable auditing tool, under the facts of this case, it cannot be concluded that trip sheets are the “best available evidence.” The facts established by the testimony of Ms. Yunk and Mr. Collins are convincing. The driver trip sheets and logs are less accurate than the Comdata fuel purchase records in this case. For both of these records, the driver enters an odometer reading and therefore the records are subject to a similar degree of error or noncompliance. It is true that in some instances drivers entered specious numbers on the fuel purchase records (“123,456” or “111,111”); however, this does not render all the fuel purchase records inaccurate. In many instances, it is possible to disregard these questionable entries and still measure miles travelled. For example, if an odometer entry is 1) 700,000 miles, followed by 2) 111,111, and then 3) 701,000, the total miles traveled from the first fuel stop to the third fuel stop are ascertainable (1,000) notwithstanding that the intervening fuel stop 2 is incorrect.

Although the auditor initially rejected the taxpayer’s May 1999 Comdata fuel records as “unreliable,” the Final Assessment was ultimately based on that same evidence from that single month outside the audit period.

The law requires the taxpayer to keep a record of odometer readings for each truck; however, it is less clear as to whether IFTA requires odometer readings from the “daily trip sheets.” The law states that the taxpayer’s records “should” include “Beginning and ending odometer or hubodometer reading of the trip . . . .” P640. Whether these odometer readings for each trip are recorded on a driver’s daily trip sheet or recorded when fuel is purchased is of little consequence. In both cases, the information is relevant for verifying the accuracy of miles reported using either GPS or by the Sabre system. Whether or not the “trip reports” are required to be kept by law for

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IFTA purposes, the requirement of P640 is satisfied if that same information – beginning and ending odometer readings – is maintained on another document. The only notable difference is that the trip sheets should include odometer readings taken at each jurisdictional border, whereas the Comdata fuel records in this case do not (although Petitioner tracked jurisdictional miles by other methods – R8, p 375). The odometer reading at each jurisdictional border is relevant to the allocation of miles in each jurisdiction, but is not necessary to track total miles and routes traveled by each vehicle between fuel stops. The fuel records are source documents from which fleet average MPG can be audited.

The overwhelming weight of the evidence proves that the Comdata fuel purchase records were available for all 15 quarters involved in the audit period. The fact that these records were not used in this audit is indefensible. The fact that Mr. Plue himself based the Final Assessment on the Comdata fuel records for May 1999 substantiates the conclusion that the fuel records for the entire audit period were sufficiently reliable and should have been examined in the audit.

The IFTA procedures manual and audit manual require that an audit sample should encompass at least three representative quarters throughout the audit period. Furthermore, the quarters should be selected to take into account seasonal variations. For example, MPG tends to decline during the winter months and increases in warmer weather. Also, there are changes in the work load during certain seasons when the auto industry experiences shutdowns. The trucking industry was severely impacted by the 9/11 attacks. Therefore, the single month of May 1999, which is outside the audit period, is not a representative sample and is not the best available information upon which to base an assessment.

The IFTA Audit Manual and the IFTA Procedures Manual are part of the Agreement.

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. IFTA, R120. [Italics added.]

As pointed out by Petitioner, the IFTA Audit Manual requires the auditor to immediately and formally report any serious weaknesses to the licensee, rather than waiting until the completion of the audit. A640. Furthermore, it is important that the auditor document such a report in order to provide proof that the notification was timely. While this requirement is in part intended to allow the taxpayer to make necessary changes in its practices so as to avoid ongoing tax deficiencies, it also provides notice to the taxpayer in the event certain information is required to avoid a flawed, estimated assessment. That is, if certain irregularities are encountered, such as miles without fuel or fuel without miles, the taxpayer should be so notified and given an opportunity to explain or correct the problem. For example, if it appears that fuel was purchased in State A with no miles in that state, the taxpayer may be able to quickly determine that the miles were errantly reported in a different quarter. Or, if a particular unit shows a high MPG figure, the taxpayer must be notified and given an opportunity to demonstrate, for example, that additional fuel was purchased for that unit, but reported in a different month or quarter. In this case, there is no writing from Mr. Plue to Petitioner requesting odometer readings from service records or Comdata fuel records. The only record of a request for trip reports is the September 20, 2000, IFTA Audit Confirmation from Sharon Allen. R3. There was no follow-up letter indicating that regarding the lack of trip sheets or whether that information could be developed from other sources.

The audit report states that the taxpayer must answer a list of 14 questions, “Before any adjustment to this audit determination can be made . . . .” R-7, p 5. These 14 issues were raised at

a meeting at the conclusion of the audit on May 21, 2003, when the taxpayer was notified that it would soon receive a \$3.6 million assessment. There is no document in evidence to show that any of these issues were brought to the taxpayer's attention pursuant to A640.400, which requires that "Any serious weaknesses identified will be formally reported promptly to the licensee rather than at completion of the audit." Either the auditor did not consider the issues to be "serious weaknesses" or, more likely, simply failed to follow the audit manual.

The audit report contains a brief description of the meeting between Mr. Plue and Ms. Yunk on May 21, 2003, which was held to review the audit findings. Mr. Plue also testified about this meeting. TR 146. The meeting occurred at the completion of the audit and therefore does not qualify as an immediate "formal report" of a weakness to the taxpayer as required by A640.400. The auditor indicated that he was provided additional summaries but found "mistakes and things in those" as well. TR 147:25. Mr. Plue claims that he asked Ms. Yunk for odometer readings (presumably from trip sheets) but Ms. Yunk stated they were not available. It is a fact, however, that the Comdata fuel records were available and contained odometer readings.

The letter dated September 29, 2000, from auditor Sharron D. Allen to Ms. Yunk provides evidence that a telephone call took place with regard to the audit for the period of October 1, 1996 through June 30, 2000. The letter outlines the specific documents and types of documents that the taxpayer must have on hand for the audit, but says nothing about "the licensee's operation" as required by the IFTA Audit Manual, Section 630.100. It is important for the auditor to document findings on the business operation to, among other things, enable the auditor to select a valid, representative sample period. This was not done.

Voluminous documentation was available containing relevant information that would be found on a daily trip sheet or driver log book. Specifically, the Comdata fuel reports include odometer readings at fuel stops. Traveling from one fuel stop to another constitutes a “trip” -- the fuel and trip number permits route and miles traveled to be determined.

The Proposed Opinion and Judgment in *KC Transportation* states:

Petitioner failed to “make records available” and “failed to maintain records from which the licensee’s true liability may be determined.” Petitioner claims that it did maintain such records of miles traveled by the Qualcomm system or ECMs, whereas Respondent claims that the law requires Petitioner to maintain “source documents” such as daily trip records with actual odometer readings for all vehicles. *The facts are clear that Petitioner did not present records of actual odometer readings per trip for each vehicle either during the audit or in the course of this proceeding. Id.* (Emphasis added.)

Our present case is distinguishable because Petitioner has demonstrated that “records of actual odometer readings per trip” for at least 95% of the vehicles were available to the auditor and ignored.

When compared to the consistent testimony of Ms. Yunk, Mr. Collins, and Mr. Babins, which establishes that the Comdata fuel records (Settlement documents) were available for the auditor to review, Mr. Plue’s claim that he requested that information and that Petitioner refused to provide it is not credible. It is likely that Mr. Plue asked for trip sheets and that no trip sheets were available. But, as explained above, the lack of trip sheets and driver logs does not mean that no odometer readings were available.

Ms. Yunk, Mr. Babins, and Mr. Collins credibly testified that the sample of trucks from May 1999 was not representative of the audit period. There is no evidence that Petitioner was

“allowed input into sample selection” per the Audit Manual, A530.300. Ms. Yunk never agreed to that sample period. There is no signed agreement between Petitioner and Respondent regarding the choice of the sampling methodology, as required by the Audit Manual, section A530.400. TR 36:16-25. The Audit Manual requires that the “sample periods must be representative of the licensee’s operations.” A530.100. If the sample is not representative, the resulting assessment cannot be accurate.

Mr. Babins credibly testified that fuel records taken from a single month was not a proper sample. TR 174. The standard practice for an IFTA audit is to examine three quarters – for example, the first quarter in year one, the second quarter in year two, and the third quarter in year three, in order to obtain a representative sample between summer and winter operations and other variations between quarters. TR 175. See Audit Manual A520. Although the manual suggests, but does not require, that fleet miles be verified by “source documentation from at least three representative quarters,” this standard should certainly be followed when the data from three quarters is available and where indicated by seasonal variances or other changes during the audit period. Failure to abide by this standard substantially undermines the credibility of Respondent’s audit results in this case.

The Audit Manual, A300, requires the auditor to “make any reasonable attempt to verify information reported on the tax returns.” In this case, a reasonable attempt would be for the auditor to visit Petitioner’s offices in Wayne, Michigan, and review the Comdata fuel records relevant to the audit period, which he knew existed, rather than using irrelevant, non-representative data from outside the audit period. He was also required to document his requests for the fuel records in writing.

Mr. Plue claims to have called Mr. Babins by telephone to request odometer readings while conducting the audit; however, this cannot be accurate because Mr. Babins was not involved in the matter until after the Intent to Assess was issued. Again, there is not a single item of documentary evidence to support this claim. This and numerous other facts outlined in this opinion seriously impair Mr. Plue's credibility as it pertains to this audit.

As a result of the numerous violations of the IFTA Audit Manual, the subject assessment L956354 is unsupported and invalid. Respondent's assumptions and methodology that led to the increase in overall miles are fatally flawed. Petitioner has proven that when fuel usage and miles are matched to the appropriate quarter, Respondent's assumption that there were numerous vehicles that reported gallons purchased but no miles traveled in certain jurisdictions is incorrect. Therefore, there was no sound basis for increasing the total miles reported.

In addition, there is insufficient evidentiary basis to support Respondent's calculation of fleet average MPG of 6.10, which is the major factor that created the nearly \$400,000 tax assessment (as revised after the informal conference). The selection of a sample period outside the audit period is in itself sufficient grounds to cancel the assessments, because more reliable data was available for the quarters within the audit period. The selection of 19 out of 51 trucks based on an unsupported "average range" that appeared "somewhat reasonable" to the auditor did not produce a credible assessment. Furthermore, as demonstrated in the Findings of Fact section, the auditor's statements are inconsistent in that the 6.10 MPG is stated to be based upon odometer records from the 19 trucks selected by the auditor, when in fact the odometer readings indicate 6.04 MPG.

Under these circumstances, the Tribunal has authority to reverse the department's final decision and order. "The tribunal's powers include . . . (a) Affirming, reversing, modifying, or remanding a final decision, finding, ruling, determination, or order of an agency." MCL 205.732(a).

Neither party offered any specific proofs with regard to the secondary assessment in this case (Assessment No. L956354). Therefore, Petitioner has failed in its burden to prove that the assessment is excessive or erroneous.

*Petitioner's Refund Claim*

Petitioner claims that it is entitled to a refund in the amount of \$50,566, if the calculations of Mr. Babins are found to be true. As stated in this Opinion, although Mr. Babins' testimony is sufficient to demonstrate the invalidity of the subject assessment L956354, Petitioner's evidence does not prove its refund claim.

Alternatively, Petitioner asserts that, assuming "the Court accepts the state's findings" with regard to payments made and refunds due, Raycan would owe tax in the amount of \$48,329.

It is concluded herein that the evidentiary basis is lacking to support either of these outcomes. Petitioner's analysis of the amounts paid and credits owed presumes the accuracy of the returns calculated using Mr. Babins' estimate of 6.26 MPG. P8. Petitioner's Supplemental Brief, filed August 5, 2011, p 14. The 6.26 MPG figure has not been proven by a preponderance of the evidence, and therefore, Petitioner's refund claim also is not proven.

Respondent's auditor accepted the revised returns submitted by Mr. Babins (P8), except for Petitioner's calculation of average fleet MPG. R11. It is determined that Mr. Babins' calculation

of 6.26 MPG based on GPS and dispatch records has not been proven by a preponderance of the evidence, and therefore, the resulting tax calculations are not adopted herein. There is insufficient evidentiary basis to accept Mr. Babins' exclusion of MPG figures for outside the range of 4 to 7.5 MPG. Further, there has been no credible, systematic attempt to compare these figures (R6) to MPGs calculated from odometer readings from fuel records.

Based on the evidence presented, Petitioner has met its burden to prove by a "fair preponderance of the evidence" that the estimated assessment No. L956354 is "erroneous or excessive."

For reasons stated herein, it is concluded that the audit was so fatally flawed that the resulting estimated tax in the final assessment L956354 cannot be correct. It is concluded that the most just and reasonable outcome based on this record is to cancel the erroneous assessment.

Petitioner offered no specific proofs with regard to Assessment No. L956354 and therefore has not met its burden of proof on that claim.

### **Judgment**

IT IS ORDERED that assessment No. L956354 is CANCELLED.

IT IS FURTHER ORDERED that Assessment No. L956353 is AFFIRMED.

IT IS FURTHER ORDERED that the parties shall have 20 days from date of entry of this Proposed Opinion and Judgment to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the evidence admitted at the hearing. This Proposed Opinion and Judgment, together with any exceptions and written arguments, shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Tax Tribunal Act (MCL 205.726).

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MICHIGAN TAX TRIBUNAL

Entered: January 5, 2012

By: Thomas A. Halick