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

KC Transportation, Inc.,
Petitioner,

MTT Docket No. 341982

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

This matter was heard before Administrative Law Judge Thomas A. Halick. A Proposed Opinion and Judgment was issued on November 24, 2010. The Proposed Opinion and Judgment provided, in pertinent part, "[t]he parties have 20 days from the 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]," and "exceptions and written arguments shall be limited to the facts and law at issue in the hearing." In addition, "[t]his 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 Michigan Tax Tribunal Act [MCL 205.726]." Petitioner filed its Exceptions to the Proposed Opinion and Judgment on December 22, 2010. Respondent did not file exceptions or a response to Petitioner's Exceptions.

The Tribunal has made a final decision based on the exhibits and testimony presented at the hearing and incorporates by reference the "Findings of Fact" as the findings of fact in the Final Opinion and Judgment, with the exceptions noted below. The

Tribunal further adopts the "Conclusions of Law" in the Proposed Opinion and Judgment as the conclusions of law in the Final Opinion and Judgment.

DISCUSSION OF PETITIONER'S EXCEPTIONS TO PROPOSED ORDER

Exceptions to Findings of Fact

Petitioner filed numerous exceptions to Judge Halick's Findings of Fact. These exceptions are summarized below, followed by the Tribunal's responses (in italics).

- 3. Petitioner contends that it operated in less than 49 jurisdictions in North America.

  Petitioner failed to answer question two in the IFTA Pre-Audit Questionnaire, asking Petitioner to circle the IFTA jurisdictions it operated in during the audit period. See P-A1 P19. The audit summary indicates that Petitioner operated in 49 jurisdictions in North America. See P-A1, pp 24-43.

- 43. Petitioner contends that the suggestion that owner/operator Mr. Cousino had any propensity of having "missing miles" or "missing gallons" was mere supposition. The auditor gave no evidence that this owner operator or any other had "missing gallons."

  The auditor testified that there is more often a difference in the miles reported using the GPS system as opposed to the odometer for "owner/operator" vehicles partly due to the ability of owner/operators to purchase fuel anywhere. In addition, the Findings of Fact mention that a vehicle owned by Richard M. Cousino Trucking, an "owner/operator," was one vehicle in particular in which the GPS miles were less than the odometer, but there is no mention that this was actually due to "missing miles" or "missing gallons." The Findings of Fact did not directly indicate that this owner/operator had a propensity for "missing miles," but merely utilized this owner/operator as an example where the odometer miles were more than the GPS miles.

- 54. Petitioner contends that the statement that Mr. Masserant's estimates were based on only reported fuel purchases, and did not take into account any unreported fuel purchases, assumes that there were unreported fuel purchases, which is unsupported by evidence.

  Approximately 98% of fuel purchases were made using either a Comdata Card or Pacific Pride Card. TR 23/23:1. Mr. Masserant testified that it would be detrimental for owner/operators to not turn in their receipts; however, the receipts only determine owner/operators' tax liability and are not used to reimburse them for fuel purchased. TR 23/27:9-23; TR 23/28:3-25. Therefore, it could be beneficial for owner/operators to fail to turn in receipts to reduce their tax liability if they are purchasing fuel in a lower tax jurisdiction and driving in a higher tax jurisdiction. Although cash purchases are minimal, cash purchases do account for approximately 2% of total fuel purchases and it

is possible that an owner/operator would fail to turn in a cash receipt to reduce tax liability. The Tribunal agrees, however, that there is no specific evidence on record of an owner/operator failing to turn in a receipt.

- 59. Based on Mr. Masserant's testimony it could be inferred that less than 50% of Petitioner's fleet consisted of trucks that were owned by owner/operators; however, Petitioner contends that this wrongly suggests that close to 50% of Petitioner's fleet consisted of trucks that were owned by owner/operators.

  "Company tractors…represented more than 50% of our fleet at any time." TR 23/27:5-7. The Findings of Fact do not suggest that Petitioner's fleet consisted of close to 50% owner/operator vehicles.

- 60. Petitioner contends that there is no evidence of non-Comdata purchases. In addition, if drivers were to pay cash for fuel, Comdata would keep a record of the transaction because owner/operators were required to turn in their cash receipts for submission to Comdata. There was no evidence of an instance where owner/operators did not submit cash receipts to Petitioner.

  Petitioner had a system in place to keep a record of cash purchases; owner/operators turned in receipts for cash purchases that were attached to a form that was sent to Comdata. TR 23/27:9. Although Mr. Masserant mentioned that it was possible for a cash receipt to get lost in the shuffle, he did not give a specific instance in which that occurred. TR 23/31:22. Mr. Masserant testified that he did not have knowledge of how many cash purchases occurred, which does not mean that the data was unavailable. TR 23/30:20.

- 62. Petitioner contends that Mr. Masserant's testimony that Petitioner's drivers never purchased untaxed fuel should be found as fact.

  Respondent's auditor also testified that he had no evidence that Petitioner was purchasing untaxed fuel. TR 24/157:16. Therefore, the sentence disqualifying this testimony should be deleted.

- 63. Petitioner contends that it did maintain a system for verifying or controlling fuel purchases by owner/operators.

  It is inferable that the large majority of purchases are on Comdata cards or Pacific Pride cards, as opposed to cash receipts, due to the strong incentive to use cards to receive a discount on fuel. TR 23/22:8-25; TR 23/23:1-9. Petitioner states "if an owner/operator were to fail to turn in a cash receipt they would lose the tax credit, and essentially pay the tax twice, once at the pump and again upon [Petitioner] filing the quarterly IFTA return." There is, however, already a stipulated mileage error due to underreported miles and Petitioner does not log owner/operator mileage through by odometer readings. Petitioner utilizes Qualcomm, which has the above-mentioned stipulated error, to calculate mileage for owner/operators. TR 23/30:1-6. Comdata was the system for which

Petitioner verified and controlled fuel purchases, and although cash receipts were turned in as well as purchases made on cards, there was no system for verifying or controlling fuel purchases by owner/operators paying cash. There was also no system in place to verify that there were no untaxed cash fuel purchases.

- 76. Petitioner contends that finding "if [owner/operators] didn't turn in fuel receipts, Petitioner would not know or report the gallons on IFTA returns" is unsupported by evidence that a driver ever failed to turn in a receipt.

  Although the number of cash receipts may be de minimis, it is possible that a driver could fail to turn in a receipt to reduce his tax liability. It is also possible that a driver would fail to turn in a receipt because there is no system in place to control or verify cash purchases aside from receipts, which could possibly get lost prior to being turned in. The Tribunal agrees, however, that there is no evidence on record of a driver failing to turn in a receipt.

- 110. Petitioner contends that there is no evidence anywhere suggesting "that drivers could intentionally purchase fuel and not report it to Petitioner."

  Although there are reasons as to why an owner/operator would intentionally purchase fuel and not report it, the Tribunal agrees that no evidence was presented to support this fact conclusion other than testimony of Mr. Plue that where 1,000 gallons were purchased in a day, "I don't know where that fuel went to. If that trucker had filled up his buddy's truck or whatever, I don't know." TR 24/130:11-14.

- 139. Petitioner contends that the finding summarizing the auditor's background should be supplemented with the dates of training to reflect a lack of formal training in recent years.

  Mr. Plue attended the conferences mentioned in the 3 or 4 years following his date of hire; otherwise, the only training received in the last five years was self-teaching through the audit manual, procedural manuals, and articles of agreement. TR 24/133:8-25; TR 24/134:1-12.

- 159. Petitioner contends that the auditor did not check the internal controls on fuel purchases when using the calculated MPG for the sample and applying it to the fleet. The auditor may have utilized audited or actual fleet miles or fleet gallons to determine MPG, but instead he improperly utilized a sample to calculate MPG. In addition, the auditor utilized the odometer readings to determine miles elapsed, but he was not required to do so by any procedure. Exclusive use of odometer readings as an audit requirement is also a conclusion of law, and not a finding of fact.

  Section A530 of the Audit Manual provides, "unless a specific situation dictates, all audits will be conducted on a sampling basis."

  Section A540.200, Verification of Licensee Records, provides, "[t]he audit will be completed using the best information available to the base jurisdiction. The burden of

proof is on the licensee." Further, Section A540.300 provides, "[t]he auditor will make any reasonable attempt to verify information reported on the tax returns." Under Section A540.400, "[i]f the base jurisdiction utilizes a distance reporting software program to verify the records of the licensee, that software program shall be used as an audit tool. The auditor must use discretion when verifying the licensee's records. 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, must be considered by the auditor(s) in determining an acceptable distance reporting system and the accuracy of reported distance traveled." Overall the auditor has fairly wide discretion in conducting the audit and making their determination and may use "[o]ther pertinent information the auditor may obtain or examine" should they determine Petitioner's records are inadequate, although it is important to note they are not required specifically by any provision of the audit manual to utilize odometer readings. See IFTA Audit Manual, Section A550.100. Here, Mr. Plue specifically said in his testimony "because they did not have all this documentation it became this cumbersome effort to try to do all of this. We always try to go back to the basic IFTA manual, which says odometer readings and fuel." Therefore, the Tribunal finds that the next to last sentence of the Finding of Fact should be revised to say "Mr. Plue stated that he interprets the IFTA manual to require him to use odometer readings and fuel from individual trucks."

- 166. Petitioner contends the finding that the auditor was concerned that significant fuel was missing because of the Mini-tab and that fuel may be unreported because owner/operators are notorious for not turning in their fuel receipts is not supported by the evidence.

  It is possible that owner/operators could fail to turn in cash fuel receipts, but this would account for a very small percentage of fuel purchases and there is no evidence of such an instance other than missing miles. In addition, the taxpayer did not present the Mini-Tab showing that there were some vehicles with miles on them and no reported fuel until after the auditor had already determined that there were 1.5 million gallons missing, so this could not have been the reason that the auditor had the belief that there were missing gallons. See, TR 24/43:13-25; TR 24/44:1-25. Further, this Finding of Facts misstates the testimony of Mr. Plue and should be corrected accordingly. At TR 24/123:22-25, Mr. Plue states "[i]t was the fact that when I went through these vehicles and the other data that Mr. Babins and their eventual Minitab showed that there was significant fuel that was missing." Finally, Petitioner misstates the testimony of Mr. Plue in its exception by eliminating the word "maybe" from Mr. Plue's testimony that "transmission wasn't possibly doing what it should be doing or maybe owner/operators are notorious for not turning in their fuel receipts." TR 24/124:3-6.

- 167. Petitioner contends that the auditor never stated that he did not find any value in the information provided by the taxpayer.

  The testimony by the auditor concerning the inability to consider the taxpayer's information regarding underreported miles did not mean that all information provided by

the taxpayer was of no value due to the lack of source reports as the Findings of Fact suggest. Later testimony shows that information submitted by the taxpayer regarding fuel purchases, to the extent of allowing tax paid credits for those purchases, was taken into consideration. TR 24/150:8-10. However, the auditor's acceptance of fuel receipts to allow a tax credit for those specific receipts is not indicative of the auditor's belief that fuel records were complete. The Tribunal finds that the first sentence of this Finding of Fact should be revised to state: "Mr. Plue stated that he found none of the taxpayer's information relating to miles driven of any value because Mr. Babins was unable to provide source documents."

- 169. Petitioner contends that Respondent provided tax credits without receipts.

  Petitioner submitted Comdata summaries in order to obtain a tax credit from Respondent. This Finding of Fact should be revised accordingly.

- 170. Petitioner contends that additional gallons cannot be calculated by adjustments to MPG; instead, they can only be adjusted based on an error rate found by comparing reported gallons to audited gallons.

  IFTA Audit Manual, Section A550.100, authorizes the auditor to utilize "[o]ther pertinent information the auditor may obtain or examine" should they determine Petitioner's records are inadequate; however, the Tribunal finds no support for this Finding of Fact in the case file and, therefore, this Finding of Fact should be stricken.

Exceptions to Conclusions of Law

Petitioner argues that the Tribunal's conclusions of law were incorrect and that the auditor's assessment was erroneous because:

1. Reliable Fuel Records. Petitioner maintained adequate fuel records to evidence gallons purchased and prove compliance with the act. Further evidence of the adequacy of Petitioner's fuel reporting system is the auditor's failure to examine its reliability; instead, he accepted fuel records presented by Petitioner. Comdata recorded all fuel purchases made utilizing cards issued by Comdata, credit cards of other vendors, and cash purchases for which owner/operators turned in receipts.

   The adequacy of the fuel records submitted is not what is at issue; it is the whether fuel records are complete. Respondent raised the argument that receipts could have gone unaccounted for and Petitioner had no monitoring system in place to ensure owner/operators turned in all receipts; therefore, it is possible that the fuel records were not complete and that additional tax liability should be determined based on mileage calculations.

2. Erroneous Audit Process. The auditor did not follow the audit process as described by the IFTA Best Practices Audit Guide; therefore, the audit process is erroneous. The Guide requires testing of fuel and miles, but the auditor did not do any testing of fuel records or calculate any error rate for fuel records. In addition, the auditor should not have utilized the MPG method of estimation, as it is only available under certain circumstances listed in the IFTA Audit Standards, none of which are present in this case because there were records available for the auditor to utilize in his estimation. The auditor testified that he utilized a hybrid method to calculate Petitioner's tax liability, which is not described by any provision of the IFTA and is not reliable. The auditor departed from the standard method by failing to test gallons and establish an error rate for gallons, and additionally applying a sample MPG to audited miles to find underreported gallons.

   The disclaimer on the front of the IFTA Best Practices Audit Guide states "[m]ember jurisdictions are in no way required to implement the practices contained herein." Petitioner's argument that this guide is legally binding is without merit.

   Larry Babins testified that fuel use estimation, as described by Section A550.100 of the IFTA Procedures Manual, is used "only in severe cases." TR 24/56:11. Larry Babins also states, however, that the auditor may look beyond the licensing guidelines in using his "best judgment." TR 24/57:10.

   The hybrid method utilized to calculate audited gallons involves dividing audited miles/sample MPG; however, the standard method calculates audited gallons by dividing audited miles/audited MPG. Petitioner has failed to provide adequate support that the methodology adopted by the auditor is unlawful.

3. Unsupported Supposition on Fuel Purchases. Hearing Officer concluded that 1.5 million gallons of fuel went unreported due to owner/operators failing to turn in their fuel receipts, unsupported by any facts, evidence of record or logic, or Respondent at the hearing or in their briefs. 1.5 million gallons of fuel is more than the fuel consumption for Petitioner's entire fleet in any given quarter, and is arbitrary and capricious as it is based on no reasonable estimation.

   The Hearing Officer did not conclude that the evidence supported a specific reason for the unreported fuel; instead, he simply concluded that the evidence supported the unreported fuel determined by the auditor. Although the auditor was not required to audit Petitioner's fuel records, the auditor's finding that 1.5 million gallons of fuel went missing is possibly higher than mathematically possible considering that this amount of fuel is more than reported fuel for any given quarter and approximately 98% of fuel purchases are automatically reported as they are accounted for by cards. The Hearing Officer recognized that possibility (Opinion, p. 81) and concluded that while the auditor's determination of underreported gallons of fuel exceeds the average total consumption of Petitioner's entire fleet for an entire quarter,

> *spread over the audit period, it is 75,880 gallons per quarter. This equals 468 gallons per truck per quarter, assuming that Petitioner's fleet averaged 162 trucks during the audit period . . . . A truck's fuel tank holds approximately 300 gallons, according to testimony in this case. Assuming 162 trucks, this is the equivalent of approximately 1.5 tanks of fuel per truck per quarter. Petitioner has not proven that it would be impossible, or even unlikely, for it to have used and failed to report the additional fuel.*

4. Redundant/Cumulative Discussion of Conceded Distance Errors. The Proposed Opinion discussed the auditor's finding of errors in Petitioner's distance accounting, but any discussion was unnecessary because during the audit, in its briefs, and at the hearing Petitioner conceded such errors and accepted the auditor's finding of a 3.4% error rate. Petitioner requests that this conclusion of law be amended to reflect Petitioner's acceptance of the auditor's calculation of unreported miles, and that the trier of fact heard evidence sufficient to sustain this calculation.

   The Tribunal agrees that this conclusion of law should be amended to reflect Petitioner's acceptance of the auditor's calculation of unreported miles; however, the Tribunal rejects Petitioner's contention that if the miles are increased it only means that the fleet average miles per gallon was understated and that taxable gallons stay the same.

5. Citation to Unbriefed Authority. The Proposed Opinion introduced authority that was not presented in either of the parties' briefs or at the hearing. This deprived Petitioner opportunity to distinguish those cases from the case at hand, and therefore use of them is prejudicial and a violation of due process. *Scots Leasing Corp* and *Trivino* are distinguishable because the auditor's use of the extreme 4 MPG estimation in these cases was a result of records that were grossly lacking. *Eckhart* is distinguishable because the auditor did not use the MPG estimation, but used the standard method of determining error rates for both miles and gallons.

   The Tribunal is unaware of any legal principal that prohibits it from researching a specific issue and applying the results of that research in its opinion, even if the cases discovered were not identified by either party in briefs. To contend that a party is prejudiced or that due process is violated because the Tribunal independently discovers appropriate authority is absurd.

   In Eckart Trucking, Incorporated v Department of Transportation of State of Montana, Docket No. Mt-2006-1 (2007), the court did find that the fuel records were incomplete due to inconsistencies, but unlike this case MPG were calculated utilizing the standard method of determining an error rate for both miles and gallons.

   Unlike In the Matter of the Petition of Scots Leasing Corporation, NY Division of State Tax Appeals, No. 818428 (2002) and In the Matter of the Petition of Jose Trivino, NY Division of State Tax Appeals, No. 819027 (2004), Petitioner's records were not grossly lacking. According to the IFTA Procedures Manual, Section P550, Petitioner maintained fuel records that were adequate as to the receipts turned in, but there is realistically the

possibility that miles are missing, which may be attributable to missing receipts rather than better gas mileage.

6. Citation to Spurious Authority. The Proposed Opinion introduces a Department of Treasury Ruling, which was not raised by either party, to support Respondent's position. This letter ruling has no authoritative value as it was withdrawn by the Department and, if anything, its withdrawal supports Petitioner's reliance on GPS and ECM evidence.

   The Tribunal continues to rely on the IFTA Procedures Manual, which requires that the taxpayer "maintain records from which the licensee's true liability may be determined," which is satisfied not by records of miles traveled by the Qualcomm system or ECM's, but by source documents such as daily trip records with actual odometer readings for all vehicles.

Conclusion

Pursuant to MCL 207.212(1), "[a] motor carrier licensed under this act shall pay a road tax calculated on the amount of motor fuel consumed in qualified commercial motor vehicles on the public roads or highways within this state." Under MCL 207.212a(1), "the department shall enter into the international fuel tax agreement." The IFTA Audit Manual and the IFTA Procedures Manual govern the imposition of taxes under the international fuel tax agreement (IFTA). See IFTA, R120.

At issue here is the adequacy of Petitioner's fuel records for use in the audit. Petitioner contends that, pursuant to IFTA, R1210.300, it demonstrated that the assessment was excessive or erroneous by a fair preponderance of the evidence because the company "kept reliable fuel records, and that there was no basis to assume either [Petitioner] or its owner/operators engaged in any activity resulting in unreported or untaxed fuel." The inaccurate mileage records focused on in the Proposed Opinion are not at issue as the parties stipulated to a 3.4% error rate prior to trial; however, Petitioner contends that because its fuel records were accurate this error rate should not have been used to determine taxable gallons. "The amount of motor fuel consumed in the operation of a motor carrier on public roads or highways within this state shall be determined

by dividing the miles traveled within Michigan by the average miles per gallon of motor fuel." MCL 207.212(2). The Proposed Opinion utilized the stipulated error rate to calculate mileage for the determination of total taxable gallons, as opposed to utilizing the company's fuel records to determine total taxable gallons.

Petitioner contends that any "missing fuel" was a result of a higher gas mileage, not inaccurate fuel records. Petitioner further contends that 98% of fuel was paid for using a credit card, and of the 2% that was paid for in cash by owner/operators, it was highly unlikely that the cash receipts were not turned in to account for the fuel purchases as not turning in the receipts would be detrimental to owner/operators. The missing fuel as calculated by the auditor amounts to more than the total fuel consumption for Petitioner's entire fleet for any given quarter; therefore, had Petitioner not accounted for any of the cash receipts, for which there is no evidence on record that a single cash receipt went unaccounted, then this estimate for missing fuel would still be too high. The Proposed Opinion adopted Petitioner's fuel records as accurate for two of the quarters in which it would decrease the MPG, but not for the other two quarters. "The department may examine the books, records, and papers of a motor carrier or fuel supplier which pertain to the motor fuel received, used, purchased, shipped, or delivered to verify the truth and accuracy of any statement, report, or return." MCL 207.219. Under the prior statute, Respondent is not required to audit fuel records. The Proposed Opinion does not cite authority requiring recordation of mileage for each trip from odometer readings, but relies on such a requirement. Although not required to calculate an error rate for fuel, in this case a more equitable outcome would probably arise from such a calculation since the auditor calculated a highly improbable amount of missing gallons. See *Eckart Trucking, Incorporated v Department of Transportation of State of Montana*, Docket No. Mt-2006-1 (2007).

The IFTA Procedures Manual contains standards for "electronic data recording systems" and requires that they may be used, but the device must be able to produce printed reports to "replace the handwritten trip reports" and the printed reports must be retained for audit. This indicates that the electronic device must report the same information as the handwritten reports. Witness Plue testified that the handwritten reports contain mileage recorded from the vehicles' odometers or hub odometers. Also, P640 of the Manual states that if an electronic data system is used, the device must collect and report "beginning and ending odometer or hub odometer reading of the trip." The Tribunal interprets this requirement as support for Respondent's testimony that one cannot merely rely upon the ECMs or GPS system, but whatever system is used, it must record the mechanical odometer reading, such as from the hub, and it must do so for each trip. The Tribunal finds that Petitioner never demonstrated that its distance system complied with this standard.

As discussed above, Petitioner's position is simply that if the miles are increased, it only means that the fleet average miles per gallon were understated and that the taxable gallons remain the same. Obviously, Petitioner's simplistic approach does not account for errors in calculating average miles per gallon. The auditor testified that he found indicia of unreported gallons, because there were some trucks that reported miles per gallon in the range of 25 to 50 mpg, which is not possible. The Hearing Officer accepted the premise that if unreported miles are discovered, it means that there was likely unreported fuel related to those miles. This position is consistent with the statutory default provision under which, when the records are insufficient, the auditor must estimate miles and use 4 mpg to calculate taxable gallons. In this case, the additional miles were admitted rather than estimated. The auditor did not accept the as-reported miles per gallon, again believing or suspecting that additional fuel was used and not

accounted for. To accept Petitioner's position would essentially place the burden of proof on Respondent to explain where the additional, untaxed gallons came from, and the Tribunal does not find that this position is supported by law. The Tribunal does not accept what appears to be Petitioner's contention that because its records show that it paid tax on all gallons purchased, the only purpose of an audit is to ensure that the amount of tax paid is properly allocated among the IFTA jurisdictions.

Although the Tribunal could certainly recalculate the subject assessment in a variety of ways based on portions of the testimony and evidence,[1] the Tribunal finds that Petitioner has failed to provide sufficient testimony, evidence, and argument in support of its contention that Petitioner did not engage "in any activity resulting in unreported or untaxed fuel," and that the assessment should be cancelled. (Petitioner's Exceptions to Proposed Opinion and Judgment, p. 2) The Tribunal adopts the July 15, 2011 Proposed Order 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, to the extent modified, in the Proposed Order in this Final Opinion and Judgment.

Therefore,

IT IS ORDERED that the Administrative Law Judge's Proposed Order is AFFIRMED and adopted by the Tribunal as the Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by this Final Opinion and Judgment within 28 days of the entry of the Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined

[1] For example, the auditor testified at TR 24/158:3 that a liability of $1,300 was determined for one truck. Multiplying that amount by an average truck fleet of 174 yields an assessment of $226,200. Also, simply increasing the total tax by the 3.4% increase in mileage (increase reported gallons by 3.4% times the tax rate) would result in an assessment of approximately of $52,800.

by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 1999, at the rate of 5.49% for calendar year 2000, (ii) after December 31, 2000, at the rate of 6.56% for calendar year 2001, (iii) after December 31, 2001, at the rate of 5.56% for calendar year 2002, (iv) after December 31, 2002 at the rate of 2.78% for calendar year 2003, (v) after December 31, 2003, at the rate of 2.16% for calendar year 2004, (vi) after December 31, 2004, at the rate of 2.07% for calendar year 2005, (vii) after December 31, 2006, at the rate of 3.66% for calendar year 2007, (viii) after December 31, 2007, at the rate of 5.81% for calendar year 2008, (ix) after December 31, 2008, at the rate of 3.31% for calendar year 2009, (x) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (xi) after December 31, 2010 at the rate of 1.12% for calendar year 2011, and after December 31, 2011 at the rate of 1.09% for calendar year 2012.

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

MICHIGAN TAX TRIBUNAL

Entered: April 5, 2012

By: Steven H. Lasher

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

KC Transportation, Inc.,
Petitioner,

MICHIGAN TAX TRIBUNAL
MTT Docket No. 341982

v

Michigan Department of Treasury,
Respondent.

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED OPINION AND JUDGMENT

A hearing was held March 23 and 24, 2010, 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 assessment is affirmed as follows:

Assessment No.	Tax	Penalty	Interest*
O019297	$355,552.29	$33,614.95	$148,867.09

*Interest continues to accrue per 1941 PA 122. Interest shown above is current as of the date of the assessments.

The following Exhibits were admitted into evidence by stipulation of the parties:

Petitioner

P-A1 – Audit File (part 1)

P-A2 – Audit File (part 2)

P-B – Interjurisdictional Report, dated 5/22/06

P-C – Letter of Larry Babins, C.A., dated 10/16/06, with appendices

P-D – Informal Conference Recommendation

P-E – Decision and Determination, dated 8/2/07

P-F – Final Bill for Taxes Due, dated 8/6/07

P-G – Answers to Petitioner's Interrogatories to Respondent

P-H – Response to Petitioner's Request for Production of Documents

P-I – IFTA Best Practices Audit Guide

P-J – IFTA Form 101-MN

P-K – Letter from Russell Plue, dated 4/25/06

P-L – Deposition Transcript of Robert Lovell

Respondent

R1 – Decision and Order of Determination dated August 2, 2007

R2 – Audit Report of Findings

R3 – International Fuel Tax Agreement – Articles of Agreement

R4 – International Fuel Tax Agreement – Audit Manual

R5 – International Fuel Tax Agreement – Procedures Manual

R6 – International Fuel Tax Agreement – Best Practices Audit Guide

Summary of Petitioner's Arguments

Petitioner contends that Respondent used flawed auditing methods to produce an "enormous assessment" that requires this Tribunal to conclude that Petitioner did not report and pay tax on

1,517,599 gallons of fuel, which amount exceeds the average total consumption of Petitioner's entire fleet for an entire three month calendar period.

Petitioner claims that it provided odometer readings, although IFTA documents do not mandate odometer readings as the only reliable method of recording miles. An odometer is an instrument for measuring the distance traveled, and Petitioner's Qualcomm GPS system and Engine Control Modules ("ECMs") meet this definition. Respondent overlooked reliable odometer data by refusing to rely on these devices, and instead relied solely upon wheel odometer readings for a small number of trucks. Petitioner agrees that any GPS system will not be 100% accurate, and agrees that the mileage error rate of 3.4% calculated by Respondent's auditor, for purposes of determining total miles traveled, is fair and reasonable. However, Petitioner disputes that underreporting total miles by 3.4% results in an additional 1,517,599 gallons of untaxed fuel. Petitioner argues that the additional miles simply means that the fleet average MPG is somewhat higher than originally reported, and that if the fleet average MPG is increased based on the additional miles (keeping gallons constant) the formula produces no additional taxable gallons.

Respondent should have established an error rate for fuel purchases and tax paid credit gallons. Both reported miles and reported gallons should have been adjusted. The auditor should have determined the accuracy of fuel purchases and tax paid gallons during a sample period, and applied an error rate to the reported tax paid gallons, if applicable. The audited miles and audited gallons would be used to determine overall fleet average MPG, which is used "to apportion the tax among the involved jurisdictions."

Petitioner argues that the auditor should have tested for both fuel and distance. “Without finding appropriate adjustments for both total distance and fuel, it was not possible for the auditor to correctly determine appropriate audited total MPG.” Petitioner’s Post-Hearing Brief, p 8.

Petitioner argues that Respondent’s claim that Petitioner failed to report 1,517,599 gallons of fuel is unsupported, “based on the rigors of Petitioner’s fuel accounting system, and Petitioner’s lack of access to untaxed fuel and the auditor’s failure to identify any untaxed sources of fuel.” Brief, p 8. Petitioner’s expert witness testified that it was highly unlikely that Petitioner could have underreported 1,517,599 gallons of fuel. TR 24/36:23-25.

Petitioner claims that the auditor failed to verify total “gallons” of fuel used, and therefore, could not determine total average MPG. In other words, the auditor should have used total audited miles, which he adjusted by an error rate of 3.4%, and total gallons as reported. Petitioner claims that the reported gallons are accurate and supported by credit card records. The fleet average MPG should have been adjusted upward in light of the additional miles, where there is no evidence to support underreported gallons.

The small sample used by the auditor to determine average MPG resulted in an unreliable, low estimate of MPG, which was then used to increase taxable gallons, by dividing audited miles by the audited MPG. Petitioner states that the dates used for GPS miles for some vehicles do not correspond to the dates used for odometer readings. P-A1, p 10 (also see P-A1, p 122).

Summary of Respondent's Arguments

Respondent argues that the assessment is presumptively correct and that Petitioner has failed to meet its burden to prove by a preponderance of the evidence that the assessment is erroneous.

Petitioner's claim that the auditor lacked training is without merit, as the evidence establishes that the auditor has a degree in accounting and has received relevant training. The IFTA does not impose a specific amount of training.

The department has a duty under the International Fuel Tax Agreement (IFTA, or the "Agreement") to audit motor carriers licensed in this state. The Agreement, Procedures Manual, and Audit Manual govern audits and record keeping. The Manual requires that audits be conducted on a sampling basis, and require the physical examination of source documents of the licensee's operations, the evaluation of internal controls of the accounting system and operations, and the accumulation of sufficient evidence to afford a reasonable basis for determining whether there are any material differences between actual and reported operations. IFTA, Articles of Agreement R209.

Because the taxpayer failed to maintain adequate records, the department was "allowed to look at other factors to determine liability or impose a 4 MPG across the board. Despite the lack of records, the auditor made every effort to avoid imposing 4 MPG." Respondent's Brief, p 5. To audit miles, the auditor examined odometer readings for a sample of 34 vehicles for which GPS

mileage and odometer readings were available. In addition, the auditor examined fuel summaries for the sample vehicles to determine actual miles per gallon for each vehicle.

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" within the meaning of 1969 PA 306, MCL 24.285.

1. At the time the Pre-Audit Questionnaire was submitted, Petitioner operated 162 trucks using diesel fuel with gross weight each in excess of 26,000 pounds. P-A1, p 19. The Pre-Audit Questionnaire (P-A1, p 19 – 22) provided the information summarized in Findings 1-13.
2. Petitioner did not indicate the specific states or provinces in which its trucks operated on the Pre-Audit Questionnaire.
3. Petitioner answered that it operated in 49 jurisdictions in North America.
4. Petitioner answered that it purchased fuel in Michigan and paid tax at the pump.
5. Petitioner answered that it reviewed fuel receipts or invoices to distinguish between tax-paid and tax-exempt purchases.
6. Petitioner answered that fuel purchases claimed on the returns were supported by "credit card/billing service statements."
7. Petitioner answered that fuel purchase invoices were "filed together unsorted by month."
8. Total miles and jurisdictional miles were reported based on "computer software" called "Lat Longs Promile." The questionnaire asks whether the taxpayer

maintained records of odometer or hubodometer readings, map route distances, standard route distances, or a combination of the above. Petitioner answered that it reported miles based only on the computer software.

9. The questionnaire asks whether "mileage is entered into the reporting system as recorded by: drivers only, drivers reviewed by office staff, computer software, office personnel, or other." Petitioner indicated that mileage was entered by "satellite pings," which refers to a satellite global positioning system which Petitioner refers to as "Qualcomm."

10. Petitioner answered that trip data is stored and accessed by trip number, vehicle number, and month.

11. Petitioner answered that all trips are listed individually on a "computerized trip record."

12. Petitioner answered that trips are listed based on vehicle number and trip number.

13. The questionnaire asks for "samples of trip sheets and other source documents" and Petitioner answered that trips are numbered upon completion of each trip, but Petitioner did not include sample trip sheets.

14. Petitioner is a motor carrier that transported general commodities throughout the continental United States and Canada using a fleet of trucks, which consisted of trucks owned by Petitioner and trucks owned by "owner operators." The number of trucks in the fleet fluctuated during the audit period from approximately 162 to 186 trucks.

15. On or about September 23, 2003, Respondent provided Petitioner a "Notice of IFTA Audit" indicating that a field audit would be conducted for the four-year filing period covering the fourth quarter of 1999 through the third quarter of 2004 (October 1, 1999

through September 30, 2004). That notice stated: The auditor will examine your distance and fuel records, along with other documents necessary to make a determination. Sampling techniques may be employed to limit the scope of the examination test periods, test vehicles, and test documents with results projected as appropriate. P-A1, p 17.

16. Petitioner filled out an "IFTA Pre-Audit Questionnaire" (findings 1-13 above), which was signed by Chris Drabbing, who at that time was Petitioner's agent and an employee of "Comdata" company. Comdata performed services for Petitioner during the years at issue, including preparation and filing of IFTA fuel tax returns. Chris Drabbing did not testify at the hearing and was not employed by "Comdata" as of the date of the hearing.

17. Petitioner's records include a "mileage and fuel summary report" for the second quarter of 2003, which the auditor reviewed. The Audit Report (R-2, p 1) states that the taxpayer's fuel summary report "was rejected as the test period because of overstated mileage due to routing errors with the licensee's Pro Mile software program. The 2Q/03 test period was replaced with a mutually agreed upon testing of 50 randomly selected vehicles." (R-2, p 1).

18. Respondent's auditor reviewed quarterly returns, the daily trip detail report ("DTR"), odometer readings from maintenance reports for 34 vehicles, partial equipment list, and a report of the 5,096 unit MPGs. (R-2, p 1).

19. The auditor rejected the taxpayer's Mini-Tab software system because the system "is eliminating units that are outside the norm, and those are the very vehicles that usually have the missing miles or fuel purchases." P-A1, page 5 (Audit Report, p 2).

20. Petitioner did not present evidence of daily trip sheets prepared by drivers that included odometer readings.

21. Petitioner recorded mileage using the "ProMiles" software program for 8 vehicles that made daily trips from Michigan to Northwood, Ohio.

22. During the audit, it was discovered that there was a "routing error" in the ProMiles system that resulted in miles being overstated by 3,471,847 miles. Exhibit P-A1, p 137. This error was determined by comparing miles reported (using ProMiles) to the mileage indicated by the vehicle odometers that was obtained from service records. The parties resolved this error during the audit.

23. For vehicles other than those referred to in paragraph 22 above, Petitioner determined miles for its vehicles using the Qualcomm Global Positioning System ("GPS"). R-2, p 2 (Audit Report). This data was used for miles per gallon calculated by the "Mini-Tab" software.

24. The parties do not dispute that Petitioner's total fleet miles traveled determined by the Qualcomm GPS were underreported by 3.4%.

25. Respondent increased the miles reported for each jurisdiction by 3.4%, which resulted in a total mileage increase of 4,941,014 miles.

26. The Audit Report states: "Based on the information made available to him, the auditor could not rely on the licensee reporting system to report the correct mileage or fuel usage." P-A1, p 8.

27. Respondent allowed credits for taxes paid on the reported "tax paid gallons" for the entire audit period.

28. Petitioner reported tax paid gallons for fuel purchased in Arizona, Minnesota, Montana, and North Dakota for 4Q/99 and also for California and Idaho in 1Q/00, but reported no miles traveled in those states during the applicable quarters. Respondent allowed tax paid

credits for these purchases. P-A1, p 9 (Audit Report, p 6). The auditor relied upon the licensee's original 4Q/99 summary report. Respondent relied upon these facts to conclude that Petitioner's mileage accounting system did not report all miles traveled and that there were weaknesses in Petitioner's internal controls.

29. Exhibit P-A2, p 17 lists 20 trucks that reported at total of 127,158 miles travelled for various quarters but reported no fuel purchases.

30. Petitioner did not maintain "trip sheets" prepared by drivers and therefore the auditor was unable to determine if the time frame between fuel entries was due to inactivity of the vehicle or if fuel was purchased but not recorded. P-A1, p 6. The auditor was unable to match miles traveled with fuel usage due to the lack of trip sheets. P-A1, p 8 (Audit Report, page 5).

31. The auditor selected 50 vehicles at random using a software program for purposes of auditing miles and gallons. Petitioner provided odometer readings (from maintenance records) and GPS mileage data for 26 of the 50 vehicles. P-A1, p 10.

32. The auditor reviewed an "updated summary listing the fuel usage for these same 50 vehicles so that miles per gallon (MPG) could be determined." P-A1, p 10 (Audit Report, p 7). The 50 vehicles randomly selected included unit M443, which was not used because it was a Ranger pick up truck that is not a qualified commercial motor vehicle. P-A2, p 33.

33. Petitioner presented the auditor with fuel summaries for the 50 vehicles listing fuel usage for each vehicle. Respondent eliminated MPGs that were unrealistic (.28 MPG, 8.80 MPG, and 8.36 MPG) for an average of 6.17 MPG for the entire audit period. The audited odometer readings resulted in 5,142,324 miles and miles reported from the GPS

were 4,806,881, for an understated mileage error rate of 6.98%. As stated in the Audit Report, "The licensee rejected the audit determination using a 6.17 MPG for the entire audit period." Neither the 6.98% mileage error rate nor the 6.17 MPG were used to calculate the final assessment. PA-1, p 10.

34. During the audit, Petitioner presented the auditor with an estimate of 6.84 MPG using the "Mini-Tab" software system that analyzed miles measured by the GPS.

35. The auditor rejected the Minitab estimate of 6.84 MPG because it excluded 2,135 units of MPG from the population of 5,065 units of MPG. P-A1, p 10. The excluded units were determined to be outliers by the program. The Mini-Tab program requires a trained operator. Mr. Babins was not qualified to operate the Mini-Tab, but a person under his supervision was qualified, and operated the program.

36. For the audit period, Petitioner's original fuel tax returns reported an overall average MPG of 6.42. This was based on GPS miles (Qualcomm) and tax paid gallons from Comdata and other fuel purchase records.

37. After a second request, Petitioner produced odometer readings that were available for eight additional vehicles. These eight vehicles were in addition to the 26 vehicles for which records were previously produced -- odometer records were provided for a total of 34 vehicles. P-A1, p 10 (Audit Report, p 7).

38. The auditor reviewed the odometer readings, GPS total miles, and gallons for the 34 vehicles. He eliminated vehicles that had percentage differences in audited miles (per odometer readings) and GPS miles greater than 10%. The auditor excluded data showing variances with absolute values of 27.06%, 22.67%, 26.09%, 60.96%, 21.8%, 14.08%, and 23.62%. The variances were both positive and negative. The goal of this test was to

determine the accuracy of the GPS (reported miles) as compared to odometer miles recorded from the vehicle and therefore it was necessary to determine that the indicated mileage had been accurately recorded for the proper period. The auditor also eliminated vehicles that "had no gallons" or were missing gallons on the fuel summary reports. Exhibit P-A1, p 123, shows that 22 vehicles were used to determine the error rate (which was finally reconciled to 3.4% as used to adjust miles for each quarter). Had these same 22 vehicles been used to calculate MPG, it would have indicated 6.17 MPG.

39. The auditor determined that the average MPG was 6.21. P-A1, p 124, shows that 30 vehicles were considered to calculate the average MPG, but several of those vehicles were excluded. The auditor excluded the 8.8 MPG indicated by unit C7044, where the next highest MPG from the 30 vehicles was 7.09. The auditor credibly testified that in his experience 8.8 MPG is an unlikely or erroneous figure. (The lowest MPG was .28 for unit L7462, which was also excluded as erroneous.) Petitioner's own ECM data does not include any truck recording an MPG of 8.8 -- the highest being 8.6. Exhibit P-C, p 32. Also, the last fuel record for vehicle C7044 was June 2001, but mileage was reported through September 2001, indicating that the data is unreliable. The auditor determined which data was sufficiently reliable for purposes of calculating the 6.21 MPG, using the test vehicles for which odometer records existed. The miles traveled and fuel consumed by specific trucks in Petitioner's fleet for periods throughout the audit period were considered.

40. Exhibit P-A1 (Audit Report) includes "Aud. Detail Return Summary" (page 83), which includes taxable miles as adjusted by the auditor, who increased the reported miles by 3.4% for each jurisdiction. The adjusted miles were divided by 6.21 MPG to determine

the adjusted (increased) taxable gallons. The "tax paid gallons" appear on the "Aud. Detail Return Summary" as reported by Petitioner.

41. Exhibit P-A1, p 101, includes the "Reported Return Summary" with total miles, total gallons, and the average MPG, for each quarter, for each year at issue, as reported by Petitioner.

42. Exhibit P-A1, p 120, includes the "Reported Detailed Return Summary" which shows the miles, taxable gallons, tax paid gallons, and net taxable gallons, for each quarter for each jurisdiction, as reported by Petitioner. This report shows grand total taxable gallons of 22,702,310, tax paid gallons of 22,692,136, with net taxable gallons of 10,174. The total tax and interest for the four-year audit period was $1,554,517.39, as reported by the taxpayer.

43. Exhibit P-A1, p 122 (Audit Report, Ref. B-1) shows the "Percent difference from reported miles with GPS to miles determined with Odometer Readings" for 34 vehicles. The list includes a start date, end date, and open odometer reading, and closed odometer reading. The difference in the odometer readings is listed under "reported" miles (which is actually "odometer miles," not the miles reported by the taxpayer using the GPS). The gallons attributed to that period are stated. The gallons were reported from the taxpayer's "fuel summaries" for each vehicle. Exhibit P-A1, page 122, also shows the MPG for each vehicle for which miles and gallons were available, using odometer miles. P-A1, p 125, the "DTR" (daily trip report), includes data from Detail Reports for the same trucks, with a start date and end date, and miles based on the GPS system. For example, line 1 includes data from "Unit C7044" for dates January 6, 2000 through September 20, 2001, with an *odometer* reading starting at 342,322 and closing at 593,087, indicating that

250,765 miles elapsed. Also set forth is gallons attributed to that period of 28,484, which indicates 8.80 MPG (based on odometer miles). Unit C7044 was an "owner/operator" vehicle, as indicated by P-A2, page 43 (owned by Richard M. Cousino Trucking). Mr. Plue credibly testified that owner/operator vehicles are more prone to have "missing miles" and/or "missing gallons" in part because the owner/operators are free to purchase fuel where they wish. By excluding this vehicle from the mileage error rate calculation, the final mileage error rate (3.4%) was lower than the calculation with that data, which worked to the advantage of the taxpayer with regard to the total audited miles. The mileage error rate calculated before exclusion of outliers was 5.43%, and the final audited mileage error rate was 3.4%. The start date and end date for the GPS data for unit C7044 (January 7, 2000 to June 19, 2001) do not correspond to the dates for the odometer readings. The auditor compared the odometer miles (from January 2000 to September 2001) to the GPS miles (from January 2000 to June 2001) and determined that the taxpayer's reported GPS miles for this truck were understated by 27.06% (250,765 / 197,359 = 1.2706). PA-1, p 125 shows that the time period for the odometer miles and the time period for the GPS miles ("imported data from DTR Detail Reports") do not match. The indicated error rate for this unit has no evidentiary value because the time periods for the miles do not correspond. It means only that this truck traveled more miles from January 2000 to September 2001 than over a shorter period (January 2000 through June 2001). No inference can be drawn from the data for this vehicle as to the accuracy of the GPS system. It was properly excluded from the mileage error rate calculation.

44. The auditor credibly testified that he found evidence that Petitioner used fuel that it failed to report, "I had evidence that [gallons] weren't all reported." TR 24/149:19. He stated

that the taxpayer had presented vehicles with miles and no gallons, and some vehicles reporting 30 and 26 MPG. This amounted to "maybe 30 vehicles," which indicated to him that "the fuel was suspect." TR 24/150:1.

45. The auditor accepted "downloaded information" from the Comdata reports as evidence of fuel purchases where Petitioner paid tax at the pump. The auditor testified that in his professional opinion, "fuel that [the taxpayer] reported that was on that list would be acceptable." The fact that Respondent accepted the Comdata reports to prove that Petitioner actually purchased and paid tax on that fuel does not prove that the Comdata reports are a complete accounting of all fuel purchased. The auditor testified that he had no way of knowing what total fuel usage was because "the records were not what they should be. There's no way to know that that is all the fuel." TR 24/155:10.

46. The sample included 26 trucks that were in the original group of 50 that were chosen at random, and 8 additional vehicles for which Petitioner provided maintenance records with odometer readings and dates. Four of these vehicles lacked records of fuel purchases. For example, unit C7222 traveled 387,378 miles (odometer) and 366,723 miles (GPS) but no fuel data was available and the GPS miles were 5.63% less than the odometer miles. The auditor accepted the odometer readings on the maintenance records from 22 vehicles as accurate and this data was used in the miles error rate calculation. PA-1, p 123.

47. Petitioner provided the auditor with an updated summary that listed fuel usage for each vehicle in the sample group, which Respondent accepted as accurately corresponding to the mileage reported.

48. Phillip Masserant was the controller for Petitioner from September 2002 through December 2009. TR 23/15.

49. Mr. Masserant supplied data to Comdata, which used that data to calculate quarterly IFTA tax returns. TR 23/16.

50. Comdata had a credit card division that Petitioner used for fuel purchases.

51. Comdata compiled records of fuel purchases, including the name of the truck stop, location, date, and number of gallons. These records do not include odometer readings.

52. Comdata obtained information from Petitioner's computer system to compile the quarterly IFTA returns. This information included satellite pings from the Qualcomm system. The pings indicate a vehicle's location at a particular point in time in order to estimate miles traveled using software that matches the pings to probable routes.

53. During the audit, Mr. Masserant provided maintenance records to Comdata that were primarily from vehicles that Petitioner leased from Markare Services and vehicles that owner/operators leased from Markare. Both "company trucks" and "owner/operator trucks" were included in this data. Petitioner did not have access to maintenance records from owner/operators who owned their trucks, as distinguished from those who leased the trucks from Markare. The maintenance records contained the odometer readings that were used to calculate both the mileage error rate (3.4%) and audited feet average MPG (6.21).

54. Mr. Masserant testified that, during the audit period, approximately 90 percent of the fuel that Petitioner purchased was purchased using a Comdata card. Approximately eight to nine percent of fuel was purchased from vendors located adjacent to Petitioner's facility. Pilot was the main vendor. C-Barron and Sons was the second vendor, and Heritage

Petroleum in Indiana was the third vendor. Some of these purchases were made with the Pacific Pride Card, which is similar to the Comdata card. TR 23/26:21. Another source of fuel purchases was "cash fuel receipts that a driver would turn in if they did not use the Comdata card or the Pacific Pride card." TR 23/23:1. Mr. Masserant's estimates are based on fuel purchases that were reported, and do not take into account any fuel purchases by owner/operators or other drivers who may have failed to report the purchases to Petitioner.

55. An owner/operator is an independent contractor who owns his or her own truck (or leases the truck from a third party, such as Markare Services). Petitioner hired owner/operators to perform trucking services and also hired employee drivers. The owner/operator is responsible for his or her own fuel purchases and for payment of fuel tax. Mr. Masserant stated that the "owner/operators fall under KC Transportation IFTA account. KC compiles their data to calculate a fuel tax return and KC submits payment to the State of Michigan for the tax return." TR 23/28:11. Petitioner remitted payment of fuel tax on behalf of the owner/operators, but the owner/operators pay the tax. Petitioner relied upon owner/operators to report fuel purchases, other than Comdata or Pacific Pride credit card purchases, for IFTA reporting purposes. Petitioner filed IFTA returns that included the owner/operator trucks and trucks owned by Petitioner. TR 23/28:12.

56. Owner/operators that contract with Petitioner may use the Comdata card for fuel purchases, which allows them to benefit from discounts. TR 23/23:22. They also purchased fuel by their own means.

57. When asked whether an owner/operator would derive a benefit from failing to submit fuel tax receipts to Petitioner, Mr. Masserant answered: "It would be detrimental to them

because the fuel receipts are used as a credit against the fuel that they use. . . .” TR 23/28:21. He stated that the owner/operator is credited the state’s rate for the gallons purchased in that state and that they would report the purchase because “. . . they would want to minimize their tax burden.”

58. Mr. Masserant testified that “company tractors” represented “more than 50 percent of our fleet at any time” and that fuel for company tractors was purchased using the Comdata or Pacific Pride credit card. TR 23/27:5.

59. Based on Mr. Masserant’s testimony, it can be inferred that less than 50 percent of Petitioner’s fleet consisted of trucks that were owned by owner/operators.

60. Some owner/operators purchased fuel from vendors that did not accept the Comdata card, and they paid for the fuel. Petitioner requires the owner/operator to turn in fuel receipts to Petitioner. TR 23/27:9 and TR 23/30:10. There is no evidence of how Petitioner controls or monitors compliance with this requirement. Petitioner did not keep records of cash purchases by owner/operators, and Mr. Masserant did not know how often drivers paid for fuel with cash (or by means other than the Comdata card).

61. Petitioner gave Comdata weekly invoices of fuel purchases on Pacific Pride credit cards, which were used for fuel tax reporting. There is no evidence that the odometer readings referred to by Mr. Masserant were recorded by drivers from the wheel odometer or hub odometer. If the fuel records included mileage data, it was from the GPS. TR 23/32:9-16.

62. Mr. Masserant testified that Petitioner’s drivers never purchased fuel at locations that don’t collect the IFTA tax and that Petitioner had no source of untaxed fuel. TR 23/33:11-25. While the witness’s sincerity is not questioned, it cannot be found as a fact

that Petitioner's drivers (including employees and owner/operators) never purchased untaxed fuel based on this testimony.

63. Petitioner did not prove that it maintained a system for verifying or controlling fuel purchases by owner/operators so as to know whether they reported all fuel purchases, and whether owner/operators purchased fuel without paying fuel tax at the point of purchase. However, Petitioner placed a limit for purchases made on the Comdata credit card, of $1,500 per week. This limit was imposed to prevent purchases of large quantities, or "theft of fuel." Testimony of Mr. Masserant, TR 23/45-46.

64. The Qualcomm system tracks the position of trucks and calculates miles from the satellite positions that run through a computer routing program to determine the highway that the truck traveled and it records the miles traveled in each state according to that route. TR 23/35.

65. The Qualcomm system reports the location of a truck on an hourly basis, and any time a message is sent to or from the truck. TR 23/51:15.

66. Drivers are required to maintain logs by the US Department of Transportation.

67. Comdata prepared Petitioner's IFTA returns using data obtained from Petitioner's computers (from Qualcomm), including information from a data file containing a satellite position history for each tractor and a log file containing information for a tractor, driver, and total miles. Mr. Masserant testified that the miles were "probably computer miles generated when the order was created. It would not be actual miles a truck traveled." TR 23/39:21.

68. Comdata downloaded the satellite position data into its routing software program to calculate miles. TR 23/40:4.

69. Comdata also received "manual fuel invoices" that were entered into the computer software. Comdata also received cash fuel receipts and weekly invoices from Barron and Heritage that were entered into the software program. Owner operators provided fuel receipts to Petitioner who compiled the receipts and sent the information to Comdata. Comdata used the mileage and fuel data to prepare the IFTA returns. TR 23/40.

70. Mr. Masserant testified, and it is established as a fact that, "…states like Kentucky have a low tax credit on the purchase of fuel. A lot of people buy their fuel down there because there's less tax and it appears to be cheaper." TR 23/47:13.

71. Petitioner's "over the road" trucks have fuel tanks with a 300 gallon capacity. A typical driver will refuel the truck four to five times per week with 150 to 200 gallons of fuel for each transaction. TR 23/49:1.

72. Petitioner pays the owner/operators based on a rate per mile, with mileage computed from origin to destination using a computer program called PC Mileage.

73. "Revenue miles" means the distance traveled while hauling a load for compensation.

74. There are variations from actual mileage that a truck travels and the mileage determined by the Qualcomm system. This may occur if the driver takes a different route than anticipated by the Qualcomm system. TR 23/53:19.

75. Fuel purchase information that Comdata received was transmitted to Comdata electronically through the Comdata credit card.

76. Mr. Masserant testified that approximately 90 percent of "our fuel purchases" were made with the Comdata card, 8 percent with the Pacific Pride card, and about 2 percent were "cash fuel receipts that a driver would turn in." This estimate is based on known fuel purchases and does not address the extent to which drivers may have purchased fuel and

did not turn in receipts. These drivers were "free to purchase the fuel that they want . . . at a truck stop that would not accept Comdata." The owner/operator is responsible for fuel purchases. If they didn't turn in receipts, Petitioner would not know or report the gallons on IFTA returns.

77. Mr. Masserant testified that, "We accepted that there could be a difference in the miles reported because we are using an electronic system and sometimes, you know, you may miss a ping." TR 23/24:17.

78. "The software used to calculate miles . . . takes position points and then puts it on a map to calculate miles. There is going to be a small difference, which we accept, in the actual mileages versus the mileage the computer program is going to calculate." TR 24/25:1-9.

79. Petitioner had no bulk fuel tanks during the audit period. TR 23/29:11.

80. Owner/operators followed the same mileage reporting method as Petitioner's trucks. Both used the Qualcomm system.

81. Dr. Edward Rothman is a professor in the Department of Statistics and Director of the Center for Statistical Consultation and Research at the University of Michigan. He was qualified to testify as an expert in statistics. He is not an expert in IFTA, fuel tax audits, mileage accounting, odometers, or electronic control modules.

82. Petitioner provided Dr. Rothman with 5,056 records describing miles per gallon based on computer records for a group of vehicles for the fourth quarter of 1999 through the third quarter of 2004. TR 23/62:17:5.

83. Dr. Rothman concluded that miles per gallon were lower during January, February, and March than any other time of the year. TR 23/62:17.

84. Dr. Rothman concluded that the records indicated 7.1 MPG in the fourth quarter of 1999 and then dropped so that in the first, second, and third quarter of 2004 the MPG was 6.5.

85. Dr. Rothman's analysis considered estimated miles per gallon data taken from trucks equipped with "electronic control modules with diagnostic capabilities." P-C Letter to Treasury's hearing referee from Larry Babins, October 19, 2006.

86. Markare Services, Inc. leased trucks to Petitioner and provided maintenance services for the trucks. P-C, page 30 [October 18, 2006, Letter from Tom Duvall, Director of Maintenance for Markare Services, Inc., to Larry Babins].

87. Markare Services, Inc. maintained a computer file that tracked miles per gallon of trucks leased to Petitioner that were serviced by Markare. When a tractor was brought to Markare for service a mechanic connected a diagnostic reader to the truck's engine control module ("ECM") that provided an MPG estimate for that truck as determined by the ECM. The mechanic recorded the indicated MPG on the repair order. That information was taken from the repair order and entered by another individual into the computer file (spreadsheet). P-C, page 31. This spreadsheet indicates MPG for various trucks recorded during certain quarters from the fourth quarter of 1999 to the third quarter of 2004.

88. Dr. Rothman's report includes the average miles per gallon for all the vehicles for which ECM data existed for each quarter at issue along with weighted averages using various methods. The weighted averages demonstrated a high degree of agreement with the simple average. A review of the data by this ALJ finds that the data set ranges from approximately 3.8 to 8.6 MPG (unit M123, recorded 8.6 MPG in 4Q99). There are 28 examples of trucks recording MPGs from 8 to 8.6 MPG.

89. According to the ECM data, the average (mean) miles per gallon for the trucks equipped with ECMs for the 20 quarters from 4Q 1999 to 3Q 2004 was 6.7461. The range of average miles per gallon indicated by the ECM units for each quarter was from 6.373 to 6.942.

90. Dr. Rothman compared the 5,056 records (MPG based on ECMs) to a set of data of miles per gallon from a "sample of vehicles where the actual data were obtained." TR 23/68:23. Dr. Rothman testified that he found "no evidence that the data set that he was given was all systematically different from the data that you got from an entirely separate method." TR 23/70:1.

91. Dr. Rothman's testimony does not establish that the sample of vehicles used by Respondent's auditor was not representative of the entire population merely because some of the 50 vehicles lacked necessary data, which reduced the size of the sample. TR 23/73-75. Miles and fuel data from the sample vehicles were from various periods throughout the audit period, not limited to a single quarter.

92. Dr. Rothman testified that it would be improper for the auditor to exclude data points that exceeded the average by more than 10%.

93. Respondent's auditor eliminated vehicles from the sample where the variance between odometer miles and GPS miles was greater than 10%, which included trucks for which the GPS miles were both less than and greater than odometer miles. The auditor did not exclude only MPGs that *exceeded* the average by 10%.

94. Dr. Rothman testified that he excluded some data from the set of 5,056 records because the data was suspect because certain vehicles showed that miles were traveled with no gallons consumed. TR 23/77:23. The weighted averages set forth in Dr. Rothman's report

give less weight in relation to how far the data varies from the mean. Therefore, the highest reported MPG (8.6) would be given less weight than a reported MPG nearer the mean.

95. The sample of 5,056 records included a certain number of units "that had zeros that seemed to be unusual," which Dr. Rothman's included in his analysis but were given very little weight. TR 23/82:2.

96. Dr. Rothman's testimony does not prove that the MPGs reported by the ECMs were accurate.

97. During the years at issue, Mr. Larry Babins was the executive vice president of Permicon Permince, which is the Canadian subsidiary of Comdata Holdings. TR 24/5:23. Mr. Babins is a charter accountant in Quebec and Ontario, Canada.

98. The fuel tank for a typical over the road truck holds up to 300 gallons of fuel and a typical truck travels up to 1,500 miles between fuelings.

99. Mr. Babins testified that some trucking companies account for miles driven through a jurisdiction by GPS and some are "paper based."

100. Mr. Babins described the GPS system used by Petitioner as follows: "Qualcomm . . . passes that latitude and longitude to KC Transport and Comdata every single night. It goes into KC Transport's computer, the computer base, pulls out the latitude and longitudes and uses a routing program to determine the path of that particular vehicle." TR24/21.

101. The latitude and longitude of a truck is determined by communications between the truck and satellites, which are called pings. TR 24/23.

102. If the time between pings is too long, and there are multiple routes between pings, the route determined by the software program may not match the actual route taken, and an error in mileage may occur. TR 24/24. For longer routes, less frequent pings are needed because the practical routing is the most likely path used in order to meet delivery deadlines. Hourly pings are sufficient for trips over 200 miles. Shorter routes require more frequent pings.

103. An engine control module ("ECM") is an electronic processor connected to various sensors in the truck engine and transmission, which collects and provides data that can be accessed by a plug-in interface. The ECM calculated distance traveled from a count of digital pulses from transmission gear rotation, rather than an analog recording of tire rotation. TR 24/25:28.

104. An ECM provides data on fuel "put through" the engine, average speed, miles per gallon, driving time, time in the top gear, second gear, and cruise. The details regarding how the ECM measures or estimates fuel usage are lacking from evidence.

105. Approximately 75% of Petitioner's trucks were equipped with ECMs. All of the "company" trucks and a majority of the owner/operator trucks had ECMs. The facts do not indicate whether the 75% of the fleet with ECMs is representative of the 25% of the trucks that do not have them. The facts do not indicate whether the trucks with ECMs achieved similar fuel economy as those not so equipped. Furthermore, the ECM data was only recorded for trucks that were serviced by Markare. There are insufficient facts to determine whether there is a systematic difference between the trucks serviced by Markare and those that were not. There are no facts to establish on what date during the quarter that the ECM data was recorded, or to what time period that ECM data applies.

106. Mr. Babins testified that a report issued by the Society of Automotive Engineers, "J82, January 1989," indicated that mechanical odometers that measure tire rotation are up to 7% in error. He then stated that an ECM is better than a mechanical odometer by "seven percent." TR 24/29:11-17. This study published in 1989 is not in evidence and cannot be the basis for a finding of fact regarding the accuracy of the odometers on Petitioner's trucks during the audit period. Furthermore, the assertion that odometers are up to 7% in error does not prove that an ECM is 7% more accurate than an odometer. This testimony does not establish that ECMs were involved in the study. Mr. Babins was not qualified to testify as an expert with regard to technical aspects of odometers and ECMs.

107. Mr. Babins testified that the sample of 50 vehicles selected for audit "was very heavily loaded towards owner/operators." TR 24/30:20. Mr. Babins stated that the sample should include both company and owner/operator owned trucks in order to be representative of the fleet. The sample was limited to vehicles for which odometer readings existed. The limits imposed upon the sample selection were due to Petitioner's failure to keep odometer readings for each vehicle.

108. When told that the sample size was 50 vehicles, Mr. Babins stated, ". . .that's one third of the fleet. That's very high." TR 24/31:5.

109. Of the 34 vehicles included in the auditor's sample, 13 of the trucks reported miles for months both within and outside the audit period. (Audit period: October 1, 1999 to Sept 30, 2004). Three trucks reported miles in 2005 only, completely outside the audit period, which reported MPG of 6.78, 6.31, and 5.91. The data includes miles traveled and gallons of fuel for various trucks for periods throughout the audit period. If the trucks with miles and gallons reported for periods outside the audit period (after Sept 30, 2004) were

eliminated it would leave 17 trucks, with an average of 6.197 MPG (rounded to 6.20 MPG). This data does not support Mr. Babins' claim that the fleet fuel economy decreased in 2004.

110. Mr. Babins stated that it was "highly unlikely" and "almost impossible" that Petitioner mislaid fuel records for 1.5 million gallons of fuel, where 99.99 percent of the fuel was purchased through a third-party provider and there were only a few cash purchases. The amount of cash purchases is unknown – there is very little evidence of how drivers reported fuel purchases when the credit cards weren't used. However, this testimony presumes that the only way that fuel could go unreported would be "mislaid" receipts, and does not take into account that drivers could intentionally purchase fuel and not report it to Petitioner.

111. If the sample of 34 vehicles is "heavily weighted in favor of owner/operators" it cannot be concluded that this worked to Petitioner's disadvantage. It is possible that those trucks achieved equivalent or better MPG than the company owned trucks. Petitioner has not proven that owner/operator trucks achieved lower average MPG than the entire fleet.

112. Mr. Babins stated that a change in engine specifications with utilization of a different fueling had an impact on fuel economy, which change occurred "just around 2004" and that fuel economy would have been higher prior to those changes. This is not supported by the data set forth on Exhibit P-A1, page 124. When the trucks that Mr. Babins said should be excluded are excluded from the sample, the average MPG of the remaining trucks is lower. TR 24/41:5. Furthermore, there is no evidence to prove that any of the trucks included in the sample were subject to the engine modifications that Mr. Babins

testified to. Neither is there sufficient evidence to prove that the fuel changes actually resulted in lower fuel economy in Petitioner's fleet starting in 2004.

113. Mr. Babins stated that the sample is not representative because fuel economy is less during winter months when the engine idles continuously. However, the data used to calculate the audited 6.21 MPG includes periods throughout the audit period, including winter months and summer months.

114. When first presented with the auditor's determination of fleet average MPG, Mr. Babins analyzed data from fuel tax reports prepared by Comdata using the data from the Qualcomm system and from third-party providers used for reporting purposes. TR 24/43:25. At this point, Petitioner did not analyze data from the ECMs.

115. A member of Mr. Babin's staff analyzed the average MPG (from GPS data) of Petitioner's fleet using a computer program called Mini-Tab. The program eliminated outliers that did not conform to the statistical model as designed by Mini-Tab. There are little or no facts in evidence to establish the parameters or criteria that the software employed to determine how outliers were eliminated. Mr. Babins stated that "there is an area of reasonableness and you have an occasional outlier . . . for example, a vehicle that is there for only three days or ten days and it will end up having 99 miles to the gallon because of the fact is it didn't have a fuel up." He also explained that a truck could come into the fleet with a full tank and leave the fleet a month later with an empty tank, and that truck would show a very high MPG because it used fuel that came from another period. "When you do your analysis you've got to exclude those vehicles that fall outside of the normal parameters and only include those vehicles that are reflective of ongoing operations." TR 24/48. This principle (exclusion or giving less weight to outliers) was

followed in general by the Mini-Tab analysis, Dr. Rothman's analysis of ECM data, and Mr. Plue's analysis of odometer data.

116. The Minitab analysis indicated an average fleet MPG of 6.84. The miles were measured using the Qualcomm satellite system (GPS) and routing software. The accuracy of this sample depends upon the accuracy of the GPS miles.

117. Dr. Rothman's methods eliminated data that he determined to be unreliable. He also used weighted averages arrived at by various methods, which gave less weight to data points that had greater deviation from the point of central tendency.

118. Based on Mr. Plue's testimony, he did not merely eliminate data where the odometer miles deviated from the reported GPS miles by more than 10%, but he used his judgment to determine that those data points were not reliable.

119. Mr. Babins sought Dr. Rothman's opinion as to whether the "vehicle's MPGs were statistically reflective . . . what were the variances, what vehicles fell within a normal range." TR 24/51. Dr. Rothman did not offer an expert opinion of what the actual fleet average MPG was. Dr. Rothman's report states that "The task of estimation of the mean miles per gallon would be simple if the data were recorded without error." Exhibit P-C, appendix 2, p 17.

120. Mr. Babins testified that some vehicles haul light loads and achieve eight to nine MPG, and that on flat terrain, good drivers will consistently average 8.5, 8.6, or 8.4 MPG. He stated that a vehicle that reported 8.5 MPG should not be excluded if it can be determined that the vehicle achieved this MPG consistently over a period of time encompassing different seasons. TR 24/49. None of this testimony is relevant to prove the accuracy of MPG measured by the GPS. This testimony is not supported by Petitioner's own ECM

data. P-C, appendix 5, p 32, et seq, which shows that there are only five examples of trucks recording 8 MPG or higher for more than one quarter.

121. Dr. Rothman did not examine the data set used in the Mini-Tab analysis, but used ECM readings. TR 24/51:5-6.

122. Mr. Babins opined that the Mini-Tab analysis (using GPS data) is better than the auditor's sample (using vehicle odometers), and that Dr. Rothman's analysis is the best (using ECM data). TR 24/60:4. There is no credible expert testimony to establish that the GPS or ECM provide a more accurate measure of miles traveled than odometer readings. There is no testimony to prove that the ECM accurately measures the quantity of fuel used.

123. Mr. Babins stated that IFTA does not require a specific type of sampling method to be used and that IFTA allows "judgmental sampling." TR 24/67-68. A sample does not have to be random, and a purely random sample may be unrepresentative. The testimony of Dr. Rothman, Mr. Babins, and Mr. Plue all recognizes that outliers, "improbable values," or "suspect data" should be eliminated or given less weight.

124. The IFTA Best Practices Audit Guide states that the sample size for a fleet of 100 units should be 10 to 15 units, and for a fleet of 500, the sample size should be 15 to 20 units. A sample as small as 3 percent of the fleet meets IFTA standards. In this case, Petitioner's fleet was approximately 162 units (at that time). The sample size for the mileage error rate was 22 and the sample size for the 6.21 MPG was 24 units. TR24/71. The sample size for the MPG determination was approximately 15% of the fleet, which meets or exceeds IFTA standards.

125. According to Mr. Babins, most (99.9%) of the trucks used in the trucking industry fall between 4 and 8 MPG. TR 24/74:16.

126. Mr. Babins was involved in making several offers of settlement of different dollar amounts to Respondent. The amount of the tax in each instance was different because "we changed the parameters . . . remember you're dealing with sampling. If you change the parameters you change the conclusion." TR 24/76:21.

127. GPS may fail. TR 24/80:7-12.

128. Mr. Babins is not qualified to run the Mini-Tab program. TR 24/83:11-12.

129. Forty-two percent of the units were eliminated from the Mini-Tab analysis because they "were part of the outliers." TR 24/84:16.

130. Mr. Babins offered no expert testimony or substantial evidence to support the accuracy of the ECM data.

131. When asked whether there were errors that could occur with an ECM (mileage measurement) Mr. Babins testified: "I'm sure there are but – I'm not an expert." TR 24/94:1.

132. Comdata (on behalf of Petitioner) reported total miles on the quarterly returns using "GPS pings" and the routing program. TR 24/98:21.

133. Comdata (on behalf of Petitioner) reported "total gallons" on the quarterly returns based on reports from third-party providers, such as Comdata fuel purchase records, as well as purchases reported to Comdata by Petitioner in cases where the Comdata credit card was not used. TR 24/99:28.

134. Mr. Babins testified that GPS mileage may fail to record miles referred to as "the last mile" which is when a trailer is dropped off and "there is a bit of movement" before the tractor picks up the next trailer. TR 24/101:1.

135. Mr. Babins testified that if the GPS underreported miles by 3.4 percent then the gallons should not change, but rather the indicated MPG should also increase by 3.4 percent, in which case the gallons are the same. TR 24/102:1.

136. Mr. Babins testified that "The only way to get an exact reading [of miles per gallon] is to read every single ECM at the end of the period, the reporting period." TR 24/101:11. This is not accepted as a fact. There is insufficient evidence regarding the accuracy of the ECM calculation of MPG. Even if readings were taken from every vehicle each quarter, it cannot be concluded that the indicated MPGs would be more accurate than MPG calculated using odometer miles.

137. Petitioner's Exhibit L is the transcript of the deposition of Robert Lovell, who is a statistician who has assisted the Michigan Department of Treasury in designing samples for audit purposes. Exhibit P-L.

138. Robert Lovell has an undergraduate degree in mathematics from Colorado College and a master's degree in statistics and probability from Michigan State University, and a doctorate in public administration from Western Michigan University. He has no experience with IFTA audits and was not involved in the audit in this case. His testimony is considered but given very little weight.

139. Russell Plue is a Senior Auditor for the Michigan Department of Treasury who conducted the audit in this case. He has been an auditor for 12 years, and has worked for the Department of Treasury for 16 years. He received training in conducting IFTA audits

when he started as an auditor and also attended three IFTA conferences. His main job duties are to conduct IFTA audits. He also helps train new auditors.

140. Mr. Plue commenced the audit by contacting Kris Drabie, who was then employed by Comdata in Alabama, and who was involved in handling Petitioner's IFTA returns.

141. Mr. Plue asked Ms. Drabie if Petitioner had odometer readings for its trucks. Mr. Plue was told that records of odometer readings, if any, would be kept in driver's logs, which were maintained for six months and that such records were not available as of the time of the audit. TR 24/110:8-19.

142. Mr. Plue stated that he and Ms. Drabie had "selected some vehicles" for audit.

143. Mr. Plue testified that his supervisor told him to postpone work on the audit for approximately one year while the supervisor was involved in discussions with Mr. Babins.

144. After that time, the audit continued, and Mr. Plue communicated with Mr. Babins.

145. Mr. Plue determined that Petitioner's trucks traveled in all jurisdictions during all quarters in the audit period.

146. Petitioner could not produce any records of odometer readings. However, maintenance records were later obtained with odometer readings for some vehicles.

147. Mr. Plue stated that in cases where a smaller or mid-size company fails to maintain odometer readings, he will request any maintenance records for trucks that may be available, which includes the vehicle's odometer reading when the truck is taken in for service, and if the truck goes back for service several months later, another odometer reading will be taken. Mr. Plue uses this data along with fuel records for that vehicle to calculate that vehicle's MPG over that period.

148. Mr. Plue characterized his approach to gathering mileage records during an audit as follows: ". . . I don't care if you've got maintenance records that covers one year or two years or six months, but you get me some records so that I can examine these vehicles and then we'll take the fuel that belongs in that period, whether it's one year or two years or whatever you have, and then we'll, you know, determine what kind of MPG goes along with these vehicles. It was all we had. Normally, we will get one quarter's worth of information and we will make the judgment on that information." TR 24/112:16-25.

149. Mr. Plue stated that the sample was changed in order to accommodate the records that the taxpayer had. "I had a choice of either dropping this whole thing to four MPG because they did not have source documents to work with or I could try to do a hybrid type exam of this and make it work the best for the taxpayer." TR 24/113:3.

150. Mr. Plue testified that, "Once the taxpayer started estimating his miles, because he did not have the documentation, it became an estimation on his part of what he owed and what the MPGs were. When that happened and he didn't have the proper records so that I could make that estimation so that I could determine the true liability of that company then it became an estimation game and it expanded into a three year project. . . ." TR 24/113:9.

151. Mr. Plue discovered that a certain number of vehicles that traveled regularly from Michigan to Northwood, Ohio did not have odometer readings, but used either a Mile Maker or ProMile system and that the wrong ZIP code had been entered, resulting in erroneous mileage measurements. He stated that if the taxpayer had kept odometer readings, it would have known that the mileage reported was incorrect. This resulted in overstated miles for these trucks. This error was corrected during the audit.

152. Mr. Plue stated that a sample of trucks was chosen using a program known as Ratstat, which randomly selected 50 trucks from all of Petitioner's vehicles. The program also takes into account the size of the entire population to be sampled, and determines the sample size. Mr. Plue stated that Mr. Babins agreed to this sample. TR 24/116:1. This sample size exceeds the sample size required by IFTA.

153. Petitioner provided Mr. Plue with odometer readings from maintenance records for 26 of the 50 trucks. This was sent to Mr. Plue by email and on a CD that had "thousands of entries for all these different trucks."

154. Mr. Plue calculated the MPG of each of the 26 vehicles and "came up with a 6.9 differential between the GPS systems and the odometers." After that, Mr. Babins produced maintenance records for an additional eight vehicles. After further analysis, Mr. Plue determined that the appropriate mileage error rate (comparing odometer miles to GPS miles) was 3.4%. The taxpayer does not dispute this as a reasonable error rate for the GPS miles.

155. Mr. Plue testified that Petitioner failed to maintain the required records and that the law requires Petitioner to produce the individual vehicle report, which includes routes of travel, beginning and ending odometers readings of trips, and the odometer readings at each jurisdictional border. The "individual vehicle mileage and fuel report" is required for the international registration plan, and the Secretary of State provides an official form to the taxpayer, which the taxpayer must complete. TR 24/119:7-25. Mr. Plue stated that the individual vehicle report is an "approved mileage source document" that Respondent uses in audits to verify mileage. Each taxpayer is notified that the state requires this information to be kept.

156. Official notice is taken that the "Individual Vehicle Distance and Fuel Report" is an official form issued by the Michigan Secretary of State. It requires the driver's name and signature and must be kept by the driver for each trip. It has entries for "jurisdiction," date, route traveled, odometer reading at the beginning of the trip, odometer reading when exiting a jurisdiction, and odometer reading at the end of the trip. It also requires information on total distance traveled in the jurisdiction, the name and address of each fuel stop, gallons purchased, and fuel invoice number. Petition did not produce any such records during the audit or in this proceeding.

157. Mr. Plue obtained the odometer readings and fuel records for the 34 sample trucks. He first compared the overall odometer readings with the GPS mileage readings and determined that some vehicles were "as much as 25% over, some of them were 25% under. There was very significant differences in the GPS compared to the odometer readings." TR 24/120:10-16.

158. Regarding the mileage error calculation, Mr. Plue stated that ". . . I believe that first time I came with like a 7, 6.9. We took those vehicles out of there that were excessively high, I think 10 percent and over, and we still had, you know, some were over, some were under. It came out where . . . they were under by 3.87, I think it was, so that was the number that I used to say that they were underreporting [miles]." He stated that this indicated that "the GPS systems were off, weren't accurate." TR 24/121:1. (The actual error rate was 3.4%, not 3.87% as testified.)

159. Mr. Plue stated that IFTA audits are "very, very simple" when odometer readings are available. He checks the odometer reading of a truck at the beginning and end of a quarter, and determines the miles elapsed on the odometer, then he checks this against *the*

individual reports for that vehicle. If the mileages match, then he concludes that all miles were reported for that vehicle. He also checks the fuel reports for that truck. If the reported MPG can be confirmed from odometer readings and fuel records, Mr. Plue will not perform additional auditing in order to adjust the MPG as reported by the taxpayer. Mr. Plue stated that the IFTA Manual requires him to use odometer readings and fuel from individual trucks. In this case he calculated average fleet MPG using the only adequate records that were available. TR 24/121.

160. Mr. Plue stated that four of the vehicles from the sample had miles "that were off by 25 and 26 percent" so he excluded these vehicles from the sample and computed the MPG to be 6.11 from the remaining vehicles. He recalculated MPG including the four vehicles that he had previously excluded in the determination of the mileage error rate, which he nevertheless found to be reliable based on the odometer readings and fuel records for purposes of calculating the 6.21 MPG. However, Mr. Plue determined that he could not include one vehicle with an indicated MPG of 8.8 (C7044), which he believed was "very excessive." He also excluded another vehicle with an indicated MPG of .02 (L7462) that was an obvious outlier or improbable value. He stated that "I could have left the other two or three out and left the MPG at 6.11 but I didn't do that." He calculated 6.21 MPG. TR 24/122.

161. Exhibit P-A1, p 122, indicates the following variances between odometer miles and GPS miles for the following eight units: C7044 27.06%, C7163 22.67%, C7430 – 26.09%, L7241 13.04%, L7462 – 60.96%, M172 21.8%, M174 14.08%, P7393 – 23.62%. These vehicles were all excluded for purposes of calculating the mileage error rate (variance between GPS and odometer miles), leaving 22 vehicles indicated on P-A1, p 123.

162. Exhibit P-A1, p 124, shows that the 6.21 MPG was calculated from MPGs of 30 vehicles, with MPGs ranging from 4.95 to 7.09. This included 7 of the vehicles that were excluded in the mileage error rate analysis due to the large variances between odometer miles and GPS miles (that determined the 3.4% mileage error rate). The MPGs indicated for these 7 vehicles (using odometer miles and fuel records) ranged from 5.16 to 6.69, which appear to lie within a reasonable range – none appear to be outliers exceeding the expected MPGs for Petitioner's trucks, based on the testimony and documentary evidence in this case. The sum of the column marked "C" is 185.66. Rounding that figure to 186, the simple average is 6.2. The indicated "audited MPG" is 6.21. Petitioner disputed the exclusion of MPGs over 8. In this data set, there was only one vehicle with MPG over 8, unit C7044, which recorded 8.8 MPG, which was not included in the MPG calculation. If unit C7044 is included, the resulting average MPG of the 31 vehicles is 6.26. Based on the evidence in this case, it cannot be concluded that Respondent's auditor erred by excluding the 8.8 MPG, which was significantly above the average for the sample (6.26, including that vehicle), and which was significantly greater than the next highest MPG (7.09). Even though the 8.8 MPG was based on odometer miles and fuel records, the high MPG is an indicator that fuel was underreported for this vehicle. With the reliability of the figure in doubt, it was proper to exclude it from the sample.

163. An analysis of P-A1, p 124 shows that if trucks with variances greater than 10% are excluded, the average MPG is 6.2 (148.82 / 24 = 6.2008333). This includes units C7133, C7222, C7268, C7323, C7326, C7341, C7344, L7170, L7241, L7257, L7426, M164, M220, M296, M297, M316, M330, M344, M366, M396, M718, M7402, M7433, and P7496.

164. With regard to the audit results, Mr. Plue stated, “I try to do everything I can to enforce the IFTA laws,” but try to avoid “dropping somebody to four [MPG].”

165. The auditor determined that the taxpayer underreported total gallons. There is no “tax paid credit” allowed for the additional gallons for which no fuel records exist.

166. Mr. Plue said that he had reason to believe that “significant fuel was missing” because when the taxpayer presented the Mini-Tab, it showed that there were vehicles that had miles and no gallons. “That all indicates that the fuel wasn’t being reported correctly.” TR 24/124:1-2. He stated that fuel may be underreported because the “transmission [of information] wasn’t possibly doing what it should be doing or maybe owner/operators are notorious for not turning in their fuel receipts.” TR 24/124:3-9.

167. Mr. Plue stated that he found none of the taxpayer’s information of any value because Mr. Babins was unable to provide source documents. “He cannot just give me numbers. Numbers mean nothing. It’s the source documents that tell me those numbers are correct. He never provide[d] any source documents. He just provide[d] a new amount of money that he says they owe.” TR 24/124:15-21.

168. After determining miles using odometer readings, and fuel usage using fuel purchase invoices and other source documents, the auditor checked the miles reported in each jurisdiction.

169. Respondent does not provide a tax paid credit unless there is a receipt for the fuel purchase.

170. In a case where additional gallons are computed due to underreported miles and over-reported MPG, “tax paid gallons” are not increased, because there is no invoice showing tax paid.

171. Mr. Plue stated that he accepted the taxpayer's fuel records ("downloaded transmissions") for purposes of allowing credit for tax-paid gallons. Those records contained all information required by IFTA except that the price was not written on the fuel receipts. However, the records were accepted for purposes of proving that tax was paid on the purchases. There was one truck that reported 1,000 gallons of fuel purchased in one day in Wayne County, Michigan. The taxpayer explained to Mr. Plue that there was a transmission error from that one location and that this represented several fuel purchases during a week. Mr. Plue decided to accept the purchase as a tax paid credit. However, the error in the transmission indicated to Mr. Plue that the "transmission of that fuel is not accurate."

172. Mr. Plue did not accept all of Petitioner's fuel records as accurate. These records indicated that some vehicles reported 20, 25, and 50 MPG. "There were numerous vehicles that had thousands of miles and no fuel…so I knew…the fuel wasn't being recorded properly." TR 24/131:4.

173. Mr. Plue testified that it doesn't diminish the accuracy of the audit if a sample of one quarter is used, rather than three quarters, because the sample tests the internal controls of the company. Even though fuel economy varies seasonally, the sample checks fuel and miles reported by drivers on their daily trip reports against odometer readings. If the reported miles and odometer miles agree for the sample quarter, this indicates that the taxpayer's internal controls are effective.

174. In this case, the auditor was unable to perform the standard audit method for the sample quarter initially selected because there were no source documents for that quarter. TR 24/136:14.

175. Mr. Plue testified that he is required to evaluate the internal controls of the licensee's accounting system, including whether the taxpayer requires the drivers to complete the trip reports with beginning and ending odometer readings and odometer readings at each jurisdictional border. This is necessary in order to determine the correct liability for each jurisdiction. TR 24/140:20. Petitioner failed to keep these records.

176. Mr. Plue testified that he based the audit determination on records provided by the taxpayer. He determined that 6.21 MPG is "quite reasonable" based on his experience. TR 24/142:20.

177. Mr. Plue stated that the IFTA Procedures Manual, P-550.200.20, requires the taxpayer to maintain records of beginning and ending odometer readings. This requirement may be waived by the state, but Michigan has not waived this requirement.

178. Possible sources of untaxed fuel are fuel purchased on Indian reservations, fuel purchased in the District of Columbia, dyed fuel for agricultural use, and "referred fuel." There is no direct evidence that Petitioner acquired fuel from any of these sources. When asked whether it was reasonable to find that Petitioner had failed to account for over 1.5 million gallons of fuel, he answered, "That's what I came up with." TR 24/157:24. Mr. Plue answered, with regard to another audit: "I just had $1,300 liability on one truck, so if you multiply that by three, 400 trucks, the liability could be $400,000. You're asking me is that reasonable? Sure." TR 24/158.

179. Mr. Plue stated that the ECM report that the taxpayer presented is a spreadsheet created by an individual who typed in the numbers and is not the "actual report." A document is created for each vehicle when the ECM information is downloaded and the taxpayer is required to maintain these records for four years. Petitioner failed to do this. TR 24/160.

The ECM spreadsheet is not a "source document" and is less reliable than the printout that was created when the ECM data was recorded by Markare's mechanic.

180. Mr. Plue testified that Mr. Babins and Dr. Rothman "threw out 40 percent of the information because it could not be used because it was miles missing gallons, 42 percent." TR 24/163.

181. Mr. Plue determined that Petitioner's fuel records (downloaded from Comdata) were not very accurate because they reported bulk fuel, when there were no bulk fuel purchases. TR 24/168:8.

182. Mr. Plue testified that odometers are not necessarily correct. However, if the odometer readings support the taxpayer's mileage summary (as reported) then he would not challenge the accuracy of the taxpayer's mileage reporting. TR 24/181:6.

183. When daily trip reports are available, the auditor is able to check whether one trip report ends with an odometer reading at, for example, 1,000 miles and the next daily trip report begins with an odometer reading at 2,000 miles, then it can be determined that there are 1,000 miles missing. TR 24/181:20. Respondent has determined that this type of evidence (daily trip reports) is required to prove miles traveled. GPS or ECM reports do not carry the same reliability.

184. Mr. Plue did not find that any GPS reports agreed with odometer readings for vehicles for which odometer readings were available, and he concluded that the taxpayer underreported miles by using only the GPS. TR 24/182:21.

185. Mr. Plue's audit report states that Petitioner used the Qualcomm Global Positioning System and that he was not "able to verify that the tracking system is tamperproof and does not permit altering of the information collected." Audit Report, R2, page 2. The

report further states that "the licensee did have to file amended returns because of routing problems with the ProMile system" and that the auditor "could not attest to the accuracy of the internal controls regarding the mileage determined."

186. Exhibit P-1A, p 101 through 121, are "Reported Return Summaries" for each quarter, setting forth the total miles, total gallons, average miles per gallon, reported tax due, as reported on Petitioner's as-filed quarterly fuel use tax schedules. Petitioner reported its average miles per gallon per quarter as follows:

Quarter – Year	Average MPG
4 1999	6.44
1 2000	5.93
2 2000	6.66
3 2000	6.42
4 2000	6.32
1 2001	6.29
2 2001	6.68
3 2001	6.80
4 2001	6.49
1 2002	6.25
2 2002	6.60
3 2002	6.65
4 2002	6.43
1 2003	6.09
2 2003	6.56

3 2003	6.47
4 2003	6.25
1 2004	6.00
2 2004	6.42
3 2004	6.66
Total Average	6.42 MPG

187. PA-1, p 101-120, are entitled “Reported Detailed Return Summary,” which set forth for each jurisdiction the quarterly taxable miles, taxable gallons, tax paid gallons, net taxable gallons, tax rate and resulting tax (or credit).

188. “Taxable Miles” are total miles traveled by Petitioner’s trucks in each state or province.

189. “Taxable Gallons” are total gallons consumed by trucks while in each state or province. (This is determined by dividing taxable miles by fleet average miles per gallon.)

190. “Tax Paid Gallons” are total gallons of fuel for which fuel tax was paid to the vendor at the time of purchase in that state or province.

191. “Net Taxable Gallons” are the difference between the “taxable gallons” and “tax paid gallons.” If that number is positive, the taxpayer owes additional tax to that jurisdiction; if the number is negative, the taxpayer “overpaid” tax to that jurisdiction, and is entitled to a credit.

192. The IFTA return (Form IFTA-101-MN) requires the taxpayer to report total miles traveled everywhere (whether in an “IFTA jurisdiction” or not) by all vehicles in the fleet on line C. The return also reports the “total gallons” everywhere on line D (Exhibit P-1A, p 101 through 121, “Reported Return Summaries”). Form IFTA-101-MN instructs the

taxpayer to "Enter the total gallons of fuel placed in the propulsion tank in both IFTA and non-IFTA jurisdictions for all qualified motor vehicles in your fleet using the fuel type indicated." The "propulsion tank" is the tank that contains fuel that is consumed by the truck's engine. The "fuel placed in the propulsion tank" is the number of gallons of fuel purchased or otherwise pumped into all the fuel tanks in the fleet during that quarter.

Conclusions of Law

Introduction and Overview

The assessment of tax in this case arises 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 defined in 49 USC § 31701(3) as "the interstate agreement on collecting and distributing fuel use taxes paid by motor carriers, developed under the auspices of the National Governors' Association." Michigan has entered into IFTA. 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 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.

IFTA is intended to reduce compliance burdens by permitting the taxpayer to file a single return with the "base jurisdiction" rather than requiring separate returns for each member jurisdiction (48 contiguous states and 10 Canadian provinces). The base jurisdiction is responsible for collecting the tax, allocating the taxes and credits to the proper jurisdictions, and refunding overpayments. In general, Michigan is responsible for auditing motor carriers licensed in this state and the taxpayer is not subject to audits by multiple member jurisdictions.

In this case, Respondent audited Petitioner and determined that the mileage records were inadequate and unreliable and that the returns did not report all fuel subject to tax. IFTA and Michigan statutory law require licensed motor carriers to keep records to allow the state to properly audit the tax returns. Petitioner failed to keep mileage records for all trucks as required by law. As such, the scope of the audit was limited to a sample of trucks for which adequate, reliable mileage records (odometer readings) were available. Respondent examined this data and determined that the miles on the returns were underreported by 3.4%. Petitioner does not dispute this error rate (but does dispute Respondent's use of this error rate to increase total gallons of fuel subject to tax).

Respondent further determined that the average fleet miles per gallon ("MPG") was overstated on the returns, based on the average MPG calculated from a sample of trucks for which odometer readings were available. The auditor reduced the average MPG from 6.42 (as reported by the taxpayer for the 20 quarters at issue) to 6.21 MPG. The audited miles and audited average fleet

MPG resulted in greater total taxable gallons than reported on the returns, when the MPG figure was used in the statutory formula (miles / average MPG = taxable gallons). MCL 207.212(2).

The final, audited tax liability is based on an inference that additional, unreported fuel was used in relation to the unreported miles, a proposition that Petitioner strenuously opposes as unreasonable and unlawful. The auditor did not accept the total gallons reported that was used in the taxpayer's fleet average MPG calculation, and did not accept the accuracy of the reported average fleet MPG.

In order to test average MPG, the auditor examined miles traveled and fuel consumed by a sample of vehicles for which odometer readings were available (the odometer readings were recorded at the time the vehicle was taken to a shop for service). This presents one of the crucial issues in this case: whether the law required Petitioner to maintain records of odometer readings taken from each vehicle in a manner determined by Respondent under IFTA. The department has authority to require such records under the act and under IFTA. Such "source documents" (such as "trip sheets" kept by drivers) are the most reliable method of determining distance traveled by each vehicle in each jurisdiction and fuel related to those miles. Petitioner has not proven that its methods – the satellite global positioning system ("GPS") or the vehicle's electronic control modules (ECMs) – are more accurate or reliable, or less subject to tampering, error, or fraud, than the records that Respondent demanded. This conclusion is not merely based on the accuracy of the device or technology that records the miles, but the manner in which the miles are recorded and presented, and other pertinent data related to specific trucks and the miles traveled

(such as dates and routes traveled, which are recorded contemporaneously and verified by the driver's signature).

Respondent applied 6.21 MPG for all quarters at issue, except two for which a lower MPG figure was adopted. Purchase records indicated that the taxpayer purchased more fuel in those quarters than indicated by the formula, using audited miles / 6.21 MPG. Respondent accepted the fuel records as accurate for those quarters and allowed a tax paid credit for that fuel. This effectively resulted in 6.15 MPG and 6.2 MPG for those quarters. Although it may appear inconsistent to apply a lower MPG in these quarters, failing to do so would require the finder of fact to disregard fuel purchase records, which both parties acknowledged as accurate for those quarters. It is more likely that the taxpayer did purchase the fuel actually reported, rather than calculating a lower taxable gallon figure using the audited MPG figure for those two quarters.

The audit increased the gallons subject to tax at the applicable rate in each jurisdiction, resulting in an assessment of $335,552.29 in tax, plus interest and penalty.

Authority for the Audit Method

A motor carrier licensed in Michigan must file a return with this state at the end of each quarter and pay the tax due. The quarterly return requires the taxpayer to report all jurisdictions where its qualified commercial motor vehicles operated. The critical data, which determines the total tax liability and the allocation to each jurisdiction, *is total miles traveled everywhere, total fuel used, and total miles traveled in each jurisdiction*. The return requires a calculation of "average fleet

miles per gallon," which is total miles traveled everywhere by all qualified commercial motor vehicles in the fleet divided by total gallons of fuel used. MCL 207.212(2).

Respondent is charged with the duty to audit the books, records, and papers pertaining to motor fuel used in order to verify the truth and accuracy of the miles and gallons of fuel reported on a tax return. MCL 207.219.

Petitioner has a duty to maintain and keep for a period of four years, "suitable books, records, and accounts of all motor fuel purchased . . . or used, together with all invoices, delivery tickets, bills of lading, and *other pertinent records and papers as may be required by the department* for the administration of this act." MCL 207.220.

The viability of the IFTA system depends upon detailed, accurate, and credible record keeping of total miles traveled, including miles traveled in each jurisdiction. While the taxpayer is permitted to measure miles using various methods, the state has determined that the taxpayer's drivers must record mileage for each state by writing down odometer readings from the vehicle for each trip, along with other pertinent data related to that trip. The taxpayer also must keep records (receipts) of fuel purchases in each state and proof that taxes were paid at the pump in each state.

The department has authority to determine the tax liability using the best information available. IFTA Articles of Agreement Section 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 Section R1200.300. The

Commentary for R1200, states that this provision was amended in 1998 to "allow jurisdictions to either issue an estimated assessment or revoke or suspend a license and was effective July 1, 2000." This presents the issue of whether Petitioner met its burden to rebut the presumption of validity and to carry the overall burden of persuasion.

The fact that Respondent accepted the tax paid fuel purchases (as recorded by the Comdata and other credit card purchasing systems) does mean that there were no additional fuel purchases that were not reported. The taxpayer cannot demand that the state accept its fuel purchase records as a conclusive and complete accounting of all fuel used.

When additional miles are discovered this does necessarily mean that the fleet MPG must be higher than originally reported, such that taxable gallons remains constant, as Petitioner contends. When an audit reveals that the taxpayer traveled more miles than reported, it is not unreasonable to believe that additional fuel was used in relation to the "missing miles." The state is permitted to employ an audit method to test total gallons. In this case, the auditor found that some of Petitioner's vehicles had records showing that miles were traveled, but no fuel was purchased. While this evidence alone does not account for the additional 1.5 million gallons, it does prove that gallons were not reported and reveals a weakness in Petitioner's reporting methods. The additional miles raise doubts as to whether all fuel was reported, and whether the fleet average MPG was actually lower than reported. If the state lacked the ability to audit for total gallons when additional miles are discovered, the taxpayer could always underreport miles, fail to report all fuel purchases, and when "caught" there would be no consequence – the MPG would always be adjusted to match the miles, with no tax consequences. If a taxpayer were to

systematically underreport miles, this could conceal underreported fuel use, because the fleet average MPG would appear reasonable.

The taxpayer's defense is to assiduously comply with the record keeping requirements. Much was made in this case about which mileage and MPG accounting system is most accurate. The taxpayer claims that the internal ECM on each vehicle provided the most accurate data (as included with the Rothman report). Also, the taxpayer relied upon the Qualcomm GPS for mileage accounting on the original returns. Respondent contends that the most accurate method is the standard odometer reading that should be recorded by the driver for each trip, such as the wheel odometer or hub odometer. In the absence of trip records, Respondent accepted odometer readings that were recorded when the vehicles were taken to Markare Services, Inc. for maintenance or repairs.

The law requires the IFTA licensee to maintain the odometer records for all "qualified commercial motor vehicles" as defined by MCL 207.211(1)(i)). The facts establish that there is an element of imprecision in each of these mileage recording methods. However, Petitioner was on notice that Respondent would rely upon standard odometer readings to verify the taxpayer's mileage accounting system, and would not accept GPS or ECM data without the ability to check it against the vehicle's odometer readings as recorded by drivers on each trip. This was made clear by both the license application and IFTA.

On cross examination, counsel asked Mr. Plue whether he had personal knowledge of any driver purchasing fuel with cash or failing to report fuel. He answered that he was sure that some

drivers did so, but he had no specific knowledge of instances where cash purchases were made (or purchases made outside the Comdata system). However, Respondent does not have the burden to police all truck drivers operating throughout all the IFTA jurisdictions in North America and to catch them in the act of underreporting fuel use. The taxpayer has the responsibility to maintain adequate records to prove compliance with the act.

A taxpayer does not comply with the act merely by paying fuel tax at the pump. The taxpayer's total tax liability on the quarterly return may be greater than taxes paid at the pump. For example, if a taxpayer buys fuel in a low tax state and drives miles in a higher tax state, the taxpayer will be credited for tax paid to the low tax state but will owe additional tax imposed at the rate of the state where the miles were driven. Furthermore, the credit for tax paid is only allowed if the taxpayer has adequate documentation to prove the tax was paid, even if it is not disputed that the fuel was purchased and used. MCL 207.214(2). It is no defense for a taxpayer to assert that it had no source of tax-free fuel and that it paid tax at the pump. The records must be adequate for the auditor to determine the total miles traveled for each truck and where the miles were driven, and to determine fuel used in relation to those miles.

It is not unreasonable for Respondent to doubt that all fuel was reported when the taxpayer's mileage records are lacking. Mr. Plue testified that the only knowledge of Petitioner's fuel purchasing and reporting system was based on the Comdata records (credit card records transmitted electronically from the vendor to Comdata) that Mr. Babins gave him. Petitioner asserts that the state must accept these fuel purchase records as conclusive evidence that no other fuel purchases were made. This is not reasonable. Mr. Plue testified that he believed that the

Comdata records showed actual purchases with tax paid, for purposes of allowing credit for tax paid, but he did not accept those records as proof that all fuel consumption was reported. Certainly the purchase records do not indicate where the fuel was consumed and do not prove the number of miles driven. It is not inconsistent to accept the Comdata records to support the credit for taxes paid, but not as conclusive evidence of all fuel purchases.

Petitioner disputes the validity of Respondent's audit method whereby it used audited MPG to increase the total gallons subject to tax. "Please recall that tax liability is calculated by determining total miles and total gallons and determining from that, miles per gallon. Without finding appropriate adjustments for both total distance and fuel, it was not possible for the auditor to correctly determine appropriate audited total MPG." Petitioner's Post-Hearing Brief, p 8. Petitioner argues that Respondent had a duty to determine an error rate for fuel by comparing purchase records to tax paid purchases reported on the returns. If the error rate was zero, no increase in gallons would be warranted. However, if purchase records and reported tax paid purchases match, this does not mean that all gallons used were reported. It merely means that the taxpayer reported a certain number of gallons and presented purchase records to prove tax paid on those gallons. In a clear case, the reported average fleet MPG would be grossly excessive for the types of trucks in the fleet (for example, 10 MPG), which would raise a strong inference that either reported miles were too high or gallons were too low, or a combination of the two. If an audit of trucks in the fleet determined that a more reasonable MPG was 6, that figure could be used in the formula to estimate the gallons that were unreported. The same logic applies in this case, even though the reported MPG is not obviously outside of the MPG that would be feasible for Petitioner's fleet.

The law provides for an audit method of using a statutorily prescribed 4 MPG to calculate total gallons "in the absence of records showing the average number of miles operated per gallon of motor fuel. . . ." MCL 207.212. Both parties stated that method should be used in a case where there is a total lack of records upon which to determine miles and gallons. Given that the evidence shows that Petitioner's trucks tend to achieve 6 to 7 MPG, applying 4 MPG to estimated miles would result a number of taxable gallons that would significantly exceed the amount of fuel that one might believe to be reasonable. Mr. Plue testified that using the 4 MPG for a large company results in "very excessive assessments . . . it gets you into the millions of dollars . . . ." Although the witness characterized such an assessment as "excessive" it is nevertheless authorized and required by law in appropriate cases.

According to statute, the 4 MPG figure is used "in the absence of records showing the average number of miles operated per gallon. . . ." MCL 207.212. This applies when the records of total miles, total, or both gallons are *absent*. While in practice, it may be true that the 4 MPG is used in extreme cases, the statutory authority and IFTA guidelines are not so restrictive. The default MPG may be used when certain required records (such as daily trip sheets) are absent, such as where there are inadequate mileage records in one or more states, or a lack of evidence of fuel purchases, such that total gallons are in question. The statute does not limit the 4 MPG figure only to cases where there are no records whatsoever. In any event, when required records are absent, the "average number of miles per gallon" is *presumed* to be 4.

> (3) In the absence of records showing the average number of miles operated per gallon of motor fuel, it shall be presumed that 1 gallon of motor fuel is consumed for every 4 miles traveled. MCL 207.212(3).

If any required records are lacking, the auditor may estimate miles using available evidence, including miles in prior years (outside the audit period), or another method, for example, based on evidence of routes traveled. IFTA Audit Manual, A550.100. The miles would be estimated for each jurisdiction, and divided by 4 MPG, to determine taxable gallons in each jurisdiction and total taxable gallons. In the absence of fuel records with proof that tax was paid at the pump, the taxpayer would not receive credit for tax paid gallons. MCL 207.214(2).

In this case, there was an "absence" of records because the records required by the state – daily odometer readings recorded by drivers – are absent. They do not exist.

Petitioner cites language from the IFTA Audit Manual that the 4 MPG rate applies only when "the licensee's records are lacking or inadequate to support **any** tax return . . . ." Petitioner's Post Hearing Brief, p 17 (Emphasis added by Petitioner). Petitioner contends that there must be no records whatsoever to support a return before the 4 MPG can be applied. This is a strained interpretation of the Manual that places undue emphasis on the word "any." The IFTA Audit Manual, A550.00, grants discretion to the state to determine when records are "lacking or inadequate" to support a return filed or to determine the tax liability. The auditor may consider evidence of "prior experience" of the taxpayer, taxpayers with similar operations, industry averages, records from fuel distributors, or "other pertinent information." The Manual states that the 4 MPG rate *shall* be used, unless the auditor finds "substantial evidence to the contrary" by reviewing the available evidence. In this case, the auditor determined that sufficient evidence was available to estimate the tax liability, without resorting to 4 MPG.

The auditor has authority to base the assessment upon the best information available, where evidence exists upon which an estimated assessment can be calculated. Maintenance records with odometer readings were available for some vehicles, which provided an adequate basis to estimate the tax due. This sample of vehicles with odometer miles and related fuel use allowed a reasonable estimation of average fleet MPG. Therefore, the statutory presumption of 4 MPG is rebutted by the evidence. The question then becomes whether Petitioner's evidence (GPS miles and ECM information) is more reliable than Respondent's evidence. It is concluded that it is not.

As stated above, the IFTA Articles of Agreement provide that if the taxpayer "fails to maintain records from which the licensee's true liability may be determined" the state may determine the tax liability based on the best information available. IFTA Articles of Agreement, Article XII, R1200. This provides the state discretion as to the method of determining the "true liability." The act states that it is to be administered pursuant to 1941 PA 122 (Revenue Act), which also provides authority to audit taxpayer's books and records, and to estimate tax based on the best available information. MCL 205.21(1). The assessment is presumed to be correct and the taxpayer has the burden to refute the accuracy of the assessment. IFTA Articles of Agreement Section R1200.300. The Commentary for R1200 states that this provision was amended in 1998 to "allow jurisdictions to either issue an estimated assessment or revoke or suspend a license and was effective July 1, 2000."

In this case, Respondent's auditor had reason to believe that the taxpayer's returns did not supply sufficient information for an accurate determination of the amount of tax due. There were facts to support Respondent's belief that the taxpayer failed to report miles traveled and fuel consumed. The auditor considered and rejected the taxpayer's Mini-Tab software system because it "is eliminating units that are outside the norm, and those are the very vehicles that usually have the missing miles or fuel purchases." PA-1, page 5 (Audit Report, p 2).

The department has authority to audit and calculate MPG greater than 4 but less than reported MPG in cases where some records exist but where certain required records are absent. The statutory framework establishes fleet average MPG as a test for the accuracy of fuel reporting. The formula for taxable gallons for each jurisdiction is: miles/fleet average MPG = taxable gallons. The reported MPG is subject to audit. If a sample of the most reliable information that the taxpayer is able to supply indicates a fleet average MPG that is different than reported by the taxpayer, the audited MPG may be used to calculate taxable gallons. The failure to maintain odometer readings standing alone is cause to question the accuracy of the tax return. Tax courts in other states have upheld similar approaches.

The New York Division of Tax Appeals upheld an assessment of fuel tax resulting from an IFTA audit, where the auditor determined that records were inadequate and calculated taxable gallons using the statutory 4 MPG. *In the Matter of The Petition of Sots Leasing Corp, New York Division of State Tax Appeals*, No. 818428 (2002). In that case, the taxpayer had receipts from purchases of fuel, and mileage records and drivers' logs for its vehicles. However, *the taxpayer did not provide records of routes traveled or odometer readings*. The auditor estimated miles based on locations in drivers' logs, using mileage software (Rand McNally Mile Maker). The

auditor was unable to calculate average fleet MPG because fuel receipts often did not indicate gallons purchased or lacked the identification number for the vehicle being fueled. Therefore, the estimated miles were divided by the statutory default rate of 4 MPG to determine total gallons. The taxpayer was allowed a credit for tax paid gallons based on the fuel receipts. However, tax paid gallons were not conclusive of total taxable gallons. The taxpayer in that case operated three trucks. The petitioner argued that evidence from outside the audit period demonstrated that its trucks actually achieved 5.53 to 7 MPG and that the 4 MPG should not be used. The court upheld the assessment. This is not significantly different than our present case, except that in our case, the records were sufficient to estimate a more realistic MPG, greater then 4, but less than reported by the taxpayer.

The Tax Appeal Board for the State of Montana has ruled that the IFTA requires the taxpayer to record "state line odometer readings." *Eckhart Trucking, Inc v Department of Transportation of State of Montana*, Docket No. Mt-2006-1 (2007). In that case, the auditor discovered inconsistency in the records kept to determine mileage. The auditor examined records from three quarters to identify miles traveled and fuel used by the taxpayer's trucks in those quarters. These results were compared to the miles and gallons reported on the returns. It was determined that both miles and gallons were underreported. An error rate for miles and for gallons was calculated and used to increase both miles and gallons reported for each quarter in the audit period, resulting in additional taxes due.

In a case where fuel purchase records and mileage records were grossly lacking, the taxing authority estimated fuel purchases using income tax returns to determine gross trucking revenue

for the years under audit. The auditor estimated mileage by applying a rate of $3.00 of trucking revenue per revenue mile based on the auditor's experience. *In The Matter of the Petition of Jose Trevino, New York Division of Tax Appeals*, No. 819027 (2004). The estimated miles were divided by the statutory rate of 4 MPG to calculate taxable gallons.

The methodology that Respondent used in this case is authorized by law and the resulting assessment carries a presumption of validity. The taxpayer has the burden to prove that the assessment is incorrect. It is concluded that Petitioner has not has met the burden of proof by a preponderance of the evidence. Petitioner has not presented evidence sufficient to establish that its estimate of average fleet MPG, using a sample of ECM records, or the GPS data, is more accurate than Respondent's sample of vehicles using odometer readings. Based on this record, it cannot be concluded that Petitioner's reported 6.42 MPG, estimated MPG of 6.84 (GPS – Mini-Tab) or the 6.75 MPG estimated using the ECMs are more accurate than Respondent's estimate of 6.21 MPG (based on odometer readings).

The Audit Manual also requires the auditor to examine "computations of jurisdiction distance via routes traveled and to assure that all miles/kilometers are reported into the system." This requires the auditor to focus on miles reported in a particular state and to compare that with records that show actual routes traveled to make sure that miles reported to that state are accurate. In order to allow a meaningful audit, the auditor must have access to documentation of "routes traveled" and records of dates and times and miles associated with those routes. The Manual provides that the auditor's examination may find "unreported miles." If the taxpayer failed to report all miles, this is an indication that it may have also underreported fuel purchases. If the "unreported miles" can

be identified to a particular jurisdiction, the miles are added to that jurisdiction, but if not, the unreported miles are "assigned to all jurisdictions on the basis of each jurisdiction's audited percentage of total distance." In this case, the auditor determined that there were unreported miles and assigned those miles to all jurisdictions on a percentage basis.

The Manual states that any adjustment of total fleet miles in a particular jurisdiction will require a recomputation of the licensee's miles per gallon, "and consequently, the fuel tax obligations to various jurisdictions." That is, if the total miles reported for State A were increased by 100 miles, "total miles" reported on line C of the quarterly return would also increase by 100 miles, which would change the "average fleet miles per gallon" used to calculate gallons per jurisdiction. This would increase the taxable gallons attributed to the state to which the miles were added, even though the average MPG would increase slightly due to the additional miles. For example, assume total miles are 60,000 and total gallons everywhere are 10,000, indicating average 6 MPG. If miles in State A are 1,000, and fleet MPG is 6, this means 166.667 gallons would be attributable to State A. If the auditor discovers 100 additional miles traveled in State A, that state's total miles increase to 1,100, and the total miles everywhere also increase by 100 miles to 60,100, which increases total average fleet MPG to 6.01 (60,100 / 10,000 = 6.01 MPG). The result is that the taxable gallons increase from 166.667 to 183.028 in State A for that quarter due to the additional miles (1,100 / 6.01 = 183.028). Assuming no changes to miles in other jurisdictions, the slightly higher MPG number would result in slightly less taxable gallons in those jurisdictions. Those states would be entitled to less revenue than originally reported. The total gallons used in all jurisdictions would not change. This would be an appropriate result in a case where the additional mileage could be specifically identified to a particular trip in a certain

state and where the taxpayer maintained records required by law. For example, assume that a trip sheet was discovered that reported an additional 100 miles in State A. In such case, it may be determined from the taxpayer's records that there was no systematic underreporting of mileage throughout the fleet. It would then be reasonable to increase the miles in State A so that state would receive the appropriate revenue, and to adjust the allocations to other states accordingly.

The Manual states that any adjustment to total fleet miles "will require recomputation of the licensee's miles per gallon . . . and consequently, the fuel tax obligation to various jurisdictions." Audit Manual, A520, p 16. Petitioner cites this section to support its claim that if miles are increased across the board by 3.4%, the average fleet MPG must also increase in all cases, meaning no additional tax will be due. However, this language cannot be interpreted to require a tax neutral outcome in all cases where miles are underreported. As stated above, it is not unreasonable to conclude that fuel use was also underreported when the taxpayer cannot substantiate miles traveled with required source documents. Respondent has authority to allocate the additional miles to each jurisdiction and also adjust the fleet average MPG, as discussed above, under MCL 207.212(3), MCL 205.21(1), and governing IFTA documents.

If this were not true, a taxpayer could disregard a state's record keeping requirements, account for its miles using a method of its own choosing, and the state would be powerless to challenge the taxpayer's calculations of total taxable gallons. Under Petitioner's view, if its mileage accounting system underreports actual miles traveled, this simply means that its actual MPG must have been higher than originally reported, such that no additional gallons were used. In a similar manner, Petitioner argues that if fuel purchase records are produced, the state must accept

these records as conclusive and complete evidence of all fuel purchases. In our present case, where the taxpayer's records do not comply with the act and specific requirements imposed under IFTA, the department has authority to recalculate the taxpayer's total miles and to recalculate total fleet MPG based on a sample of vehicles for which adequate source documents exist (in this case odometer readings taken for maintenance purposes and fuel records corresponding to those miles).

Authority to Require Wheel Odometer or Hub Odometer Records

A "motor carrier" is required to be licensed in order to engage in business in this state. MCL 207.215. Operating as a motor carrier without a license is a misdemeanor. MCL 207.225.

To obtain a license, a motor carrier must submit an application to the state of Michigan on an official form. The form in effect for the 2000 license year was Michigan Department of Treasury form 2823 (Rev. 9-99). By submitting the application, the motor carrier agreed to the following terms:

> The ITFA applicant agrees to comply with the timely reporting and payment of tax, record keeping, license display (copy in cab of each unit) and decal display requirements as specified in the International Fuel Tax Agreement. The applicant agrees to make their records available for audit in Michigan. If the applicant fails to do so, the applicant agrees to pay any costs incurred in obtaining and auditing their records. Michigan Department of Treasury form 2823 (Rev. 9-99).

The application also specifically requires the applicant to acknowledge its duty to "maintain a record of fuel purchased *and miles traveled within each jurisdiction by each vehicle. . . .*" A

licensee must submit an annual renewal application, which includes the same language regarding auditing and record keeping. (Form 3014 – Rev. 9-99).

The act requires the taxpayer to maintain records of motor fuel purchases and "other pertinent records."

> Each motor carrier shall maintain and keep, for a period of at least 4 years, suitable books, records, and accounts of all motor fuel purchased, sold, dispensed, or used, together with all invoices, delivery tickets, bills of lading, and other pertinent records and papers as may be required by the department for the administration of this act. MCL 207.220.

Michigan statutory law requires this state to enter into the International Fuel Tax Agreement, and therefore, this state and licensees under the act are bound by the terms of the Agreement. MCL 207.212a(1). The Agreement states that the IFTA Audit Manual and the IFTA Procedures Manual are "equally expressive of and constitute evidence of" the Agreement. R3, page 8. IFTA, Articles of Agreement, Article XX, R2010.100, provides: "The January 1996 Recodification of the IFTA Articles of Agreement, the IFTA Procedures Manual and the IFTA Audit Manual are adopted as the governing documents of the International Fuel Tax Agreement effective July 1, 1998."

The Agreement defines "Audit" as "The physical examination of the *source documentation* of the licensee's operations either in detail or on a representative sample basis; the evaluation of internal controls of the licensee's accounting system and operations; and the accumulation of sufficient competent evidential matter to afford a reasonable basis for determining whether or not there are any material differences between actual and reported operations for each affected jurisdiction. . . ." IFTA, Article II, R209 [Emphasis added]. Testimony in this case establishes

that "source documentation" includes daily trip reports that are required to be maintained by Petitioner's drivers and owner/operators.

> 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. Agreement, Article VII, R700,

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.

Respondent's Auditor testified that this requirement could have been met by producing daily trip reports that are required to be kept and submitted to the Michigan Secretary of State. The "individual vehicle mileage and fuel report" is required for the international registration plan. The Michigan Secretary of State provides an official form to the taxpayer, which the taxpayer must complete and submit to the state. TR 24/119:7-25. Mr. Plue stated that the individual vehicle report is an "approved mileage source document" that Respondent uses to verify mileage. The individual vehicle report requires the driver to record routes of travel, beginning and ending odometers of trips, and the odometer readings at each jurisdictional border. This information allows the auditor to verify the accuracy of the quarterly returns by examining each vehicle by each trip in the quarter. The actual experience of each vehicle can be studied to determine when

and where it was driven and how much fuel was purchased. Reported odometer miles can be checked against routes driven and mileage indicated by maps or software. Gaps in the record become apparent when this information is available. For example, if a truck is inactive for several weeks during a quarter, this can be determined by the daily reports (no miles would have elapsed on the odometer). Or, the trip reports may provide evidence that a particular truck reported miles but did not report fuel purchases, which is evidence that fuel was not reported. The MPG for that vehicle as reported by miles and known fuel would be too high.

Exhibit P-C, p 50 (appendix 5) is a page from Petitioner's ECM readings used in Dr. Rothman's report. Unit M7482 shows estimated, "engine average" MPG recorded during 10 quarters from "2Q02" to "3Q04" as follows: 6.7, 6.6, 6.5, 6.3, 6.3, 6.5, 8.0, 7.7, 7.2, 6.8, and 7.1. The simple average is 6.94 MPG. Notice that in the third quarter of 2003, an ECM reading of 8.0 MPG was recorded. An atypically high MPG in a single quarter raises questions as to whether all the fuel was reported. If daily trip sheets existed, there would be an evidentiary basis from source documents that the taxpayer could use to explain why that vehicle achieved significantly better fuel economy during that quarter. Perhaps the routes had flatter terrain, the loads were lighter, or a more efficient driver was behind the wheel. Without that detail, an auditor would have reason to doubt the accuracy of that number. A review of actual odometer miles traveled in that quarter and actual fuel purchases corresponding to those miles could support or refute the accuracy of the ECM data. Vehicle unit number M7167 (Exhibit P-C, p 49) exhibits a similar pattern, with one quarter reporting 8.0 MPG, with the next highest being 7.4 MPG, with an average of 6.8 MPG. Other vehicles also showed single quarters with an MPG over 8, such as M7402 (8 quarterly readings ranging from 6.4 to 7.7 MPG, with one quarter showing 8.3). Also see unit

number M294 (Exhibit P-C, p 46). The other major problem with this data is it has not been proven that the MPG estimates indicated by the ECMs are accurate.

The state has a duty to "audit the tax returns and supporting documents of licensees." IFTA Audit Manual A210.

> Under the provisions of IFTA, the jurisdiction administrator shall audit the tax returns and supporting documents of licensees based in that jurisdiction. Upon completion of any such audit, the administrator shall notify the licensee and member jurisdictions in which distance was accrued as to the accuracy of the licensee's IFTA tax returns. IFTA Audit Manual, A100.

The auditor is to conduct a "preaudit analysis" of information reported on the IFTA returns "for any unusual areas or trends that might need further examination" and to evaluate the taxpayer's "internal accounting controls to determine the reliability and the extent to which auditing procedures are to be restricted." *Id.*, A220. In this case, the auditor noted discrepancies early in that audit, in that he discovered trucks with miles but no gallons of fuel reported, and trucks with impossibly high MPGs (exceeding 25 MPG). The IFTA Audit Manual states:

> Audit emphasis should be placed on evaluation of the licensee's distance accounting system, as distance allocation by jurisdiction is the basis for determining the licensee's fuel consumption and tax obligation for each jurisdiction. It is suggested, but not required, that fleet miles/kilometers be verified to *source documentation* for at least three representative quarters. The auditor shall also verify that the total miles/kilometers have been properly distributed to the various jurisdictions. *Id.*, A520. [Emphasis added.]

In this case, Respondent rejected Petitioner's mileage accounting records (GPS and ECM data). The IFTA Procedures Manual states:

.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 hubodometer reading of the trip (may be waived by base jurisdiction);

.025 Total trip miles/kilometers;

.030 Miles/kilometers by jurisdiction;

.040 Vehicle fleet number;

.045 Registrant's name; and

.050 may include additional information at the discretion of the base jurisdiction.

IFTA Procedures Manual, P540.100 and P540.200. (Emphasis added).

Petitioner presented no evidence of mileage records that comply with the above standard.

The acknowledged errors with the ProMile system for the trucks that traveled to Northwood, Ohio, demonstrate the potential for error with routing software systems. That error was corrected by reference to odometer readings available for those eight trucks taken from repair orders (maintenance records).

The records of miles presented in the "Rothman report" were recorded by Markare Services, Inc. (the lessor and maintenance provider for tractors used by Petitioner). When a tractor was brought to Markare Services for maintenance, a diagnostic reader was connected to the ECM and a mechanic made a notation on the repair order of the MPG indicated by the ECM. When the order was processed for billing, a clerk updated a spreadsheet with the MPG reading. P-C, p 30 (Letter from Markare Services to Larry Babins, October 18, 2006.) The spreadsheet (P-C, p 32-51) lists the tractor by number, with an MPG figure for each quarter for which the information was available. The MPG data was only recorded when the truck was taken in for service or maintenance and was not available for all trucks for all quarters. This does not comply with the ITFA standards, which require records to indicate the date of trip (starting and ending), trip origin and destination, route of travel, or beginning and ending odometer or hub odometer reading for *each vehicle* for each trip. The data presented by the taxpayer merely states in summary fashion an MPG estimate measured by the ECM. It is not a "source document" that provides a basis for comparing the stated MPG with the date, and actual routes. The evidence does not establish the time period for which the MPG recorded from the ECM applies. It is not known whether the ECM recorded the vehicle's total experience between service intervals or whether a different time period is covered. The spreadsheet (P-C, p 35) does not indicate the date

on which the data was recorded, but merely indicates that the service occurred during that quarter.

Petitioner has not proven that the MPG recorded by the ECMs is accurate. Mr. Babins testified that the ECM measures transmission gear rotation and measures the amount of fuel passing through the engine. The specific details regarding how the ECM measured or estimated fuel consumption are not in evidence. Mr. Babins is not an expert in this regard. Petitioner has not proven the ECMs are more accurate than standard odometers (such as an odometer located on a wheel hub).

The GPS data is similarly insufficient. Petitioner acknowledged Respondent's error rate calculation for the GPS of 3.4%. The law does not require the state to accept the accuracy of these technologies. In fact, the law specifically demands the taxpayer to keep actual odometer readings for each vehicle.

The IFTA procedures manual cited above applies in all IFTA jurisdictions and is part of the Agreement. The Manual has the force and effect of law. The law requires the taxpayer to maintain "distance data on each individual vehicle for each trip." In addition, the manual states that the taxpayer "should" keep additional supporting data, including "beginning and ending odometer or hubodometer reading of the trip," which may be waived by the base jurisdiction. The wording of this language places the taxpayer on notice that the base state will require beginning and ending odometer readings for each trip, unless that requirement is specifically waived. Petitioner's agent, Comdata, is a sophisticated firm with specific expertise in IFTA

reporting and compliance. Petitioner knew or should have known that the IFTA Procedures Manual authorized the state to require the taxpayer to maintain odometer readings, and not merely GPS or ECM data. Even if the taxpayer believed that the returns could be based on the GPS miles, it should have maintained daily trip records with odometer readings in the event they were called upon to substantiate the accuracy of the GPS.

Petitioner argues that the Manual merely advises that odometer readings "should" be kept, but does not require it. The Manual lists nine items that "should" be kept. However, with regard to routes traveled and odometer readings, it specifically states such records should be kept "unless waived" by the state. This strongly implies that routes and odometer readings must be kept as "supporting information" unless waived. It is true that the Manual would be clearer if it stated that the listed items *shall* rather than "should" include odometer readings. However, the section plainly states that the taxpayer "must include distance data on each individual vehicle for each trip" which "should" include beginning and ending odometer readings, *unless waived by the state*. Taken together, a reasonable taxpayer would obtain a waiver before relying solely on an electronic mileage accounting system. This section must also be read in conjunction with specific provisions pertaining to "Electronic Data Recording Systems." The Procedures Manual permits the use of "Electronic Data Recording Systems" under certain circumstances. The relevant sections are set forth below:

> P610 OPTIONAL USE FOR FUEL TAX REPORTING
>
> On-board recording devices, vehicle tracking systems, or other electronic data recording systems may be used (at the option of the carrier) in lieu of or in addition to handwritten trip reports for tax reporting. Other equipment monitoring devices that transmit data or may be interrogated as to vehicle location or travel may be used to supplement or verify

handwritten or electronically-generated trip reports.

Any device or electronic system used in conjunction with a device shall meet the requirements stated in this Section.

On-board recording or vehicle tracking devices may be used in conjunction with manual systems or in conjunction with computer systems.

P620 DEVICES USED WITH MANUAL SYSTEMS

All recording devices must meet the requirements stated in IFTA Procedures Manual Section P640 and P660.

When the device is to be used alone, printed reports must be produced which replace handwritten trip reports. The printed trip reports shall be retained for audit. Vehicle and fleet summaries which show miles and kilometers by jurisdiction must then be prepared manually.

P630 DEVICES USED WITH COMPUTER SYSTEMS

The entire system must meet the requirements stated in IFTA Procedures Manual Sections P640, P650, and P660.

If the printed trip reports will not be retained for audit, the system must have the capability of producing, upon request, the reports indicated in IFTA Procedures Manual Section P640.

When the computer system is designed to produce printed trip reports, vehicle and fleet summaries which show miles and kilometers by jurisdiction must also be prepared.

P640 DATA COLLECTION REQUIREMENTS

To obtain the information needed to verify fleet distance and to prepare the "Individual Vehicle Distance Record" the device **must** collect the following data on each trip.

.100 Required Trip Data

.005 Date of Trip (starting and ending);

.010 Trip origin and destination (location code is acceptable);

.015 Routes of travel or latitude/longitude positions used in lieu thereof (may be waived by base jurisdiction). If latitude/longitude positions are used, they must be accompanied by the name of the nearest town, intersection or cross street. If latitude/longitude positions are used, jurisdiction crossing

points must be calculated or identified;

.020 Beginning and ending odometer or hubodometer reading of the trip (may be waived by base jurisdiction);

.025 Total trip distance;

.030 Distance by jurisdiction;

.035 Power unit number or vehicle identification number;

.040 Vehicle fleet number; and

.045 Registrant's name.

.200 Optional Trip Data (may be included at the discretion of the base jurisdiction)

.005 Driver ID or name; and

.010 Intermediate trip stops.

.300 Fuel Data

For purposes of fuel tax reporting, the device must collect the following data:

.005 Date of purchase;

.010 Seller's name and address (vendor code acceptable);

.015 Number of gallons or liters purchased;

.020 Fuel type (may be referenced from vehicle file);

.025 Price per gallon or liter or total amount of sale (required only for purchases from vendors);

.030 Unit numbers; and

.035 Purchaser's name (in the case of lessee/lessor agreement, receipts will be accepted in either name, provided a legal connection can be made to reporting party). [Emphasis added.]

Pursuant to the highlighted language above, an approved electronic device *must* record the "Beginning and ending odometer or hubodometer reading of the trip" unless waived by the jurisdiction. Procedures Manual, P640.020. The wording of this section is mandatory – it does not say that the device "should" capture odometer or hubodometer readings, but that it "must" do so. The reference to "odometer readings" cannot be read to mean mileage estimated by GPS satellite pings or an ECM but plainly states a standard wheel or hubodometer on the vehicle. "Odometer" does not refer to GPS or ECMs, which are electronic devices that are subject to the requirements. There is no evidence that Petitioner's GPS or ECM was capable for recording or actually did record odometer readings.

> P650 REPORTING REQUIREMENTS
>
> .500 Calibration Reports
>
> .005 In cases where speed/rpm sensors or odometer/speedometer interface devices are providing pulse inputs to the on-board computer, the system will record the calibration factors used in calculating mileage at time of download from the vehicle to the base computer.
>
> .010 The fleet shall also keep accurate records of all Engine Control Module calibrations.

There is no evidence in this case that Petitioner's system recorded the calibration factors used in calculating mileage at the time of download from the vehicle to the base computer, or that Petitioner kept records of all ECM calibrations. See Audit Procedures Manual, P650, .500, .005 and .010. Dr. Rothman was qualified to testify as an expert in statistics, but is not an expert in the trucking industry or in estimating miles per gallon of trucks. His expert testimony added no credence to the accuracy of the ECM estimates of MPG.

Although not cited by either party, the Department has previously issued a letter ruling on the subject of computer-generated mileage figures. That letter ruling was withdrawn by RAB 2000-6, but was still in effect until August 18, 2000. It expressed a position consistent with that taken by Respondent in this case. The description of a "computer generated mileage system" in the Letter Ruling applies to a GPS system, and the same rationale would apply to the ECMs. In short, the department did not permit electronic mileage accounting systems, unless the taxpayer had sought and received approval in advance. LR 1991-1, Reporting Computer-Generated Mileage Figures on the Motor Carrier Diesel Fuel Tax Report, states:

> You inquire about the use of computer-generated mileage figures for determining your tax liability under the Motor Carrier Fuel Tax Act, MCL 207.211 et seq.; MSA 7.340(1) et seq.
>
> All licensed motor carriers are required to pay a road tax calculated on the amount of motor fuel consumed in this state. [MCL 207.212(1); MSA 7.340(2)(1)]. The calculation requires that miles traveled in Michigan be divided by the fleet average miles (for all states) per gallon of motor fuel. [MCL 207.212(2); MSA 7.340(2)(2)]. The instructions for the motor carrier diesel fuel tax report (form C-3678) require that the total miles traveled in Michigan be used in determining the tax base.
>
> Initially, computer-generated mileage figures were obtained from a computer system in which the distance between destinations had been entered. The computer-generated figures were often based on the shortest distance between destinations and did not take into account side-trips or detours. The result was computer-generated mileage figures often understated the miles actually traveled in Michigan. Consequently, mileage figures generated by such systems were not, and are not acceptable to the Department of Treasury for motor carrier fuel tax purposes.
>
> The introduction of more sophisticated computer software, however, has improved the accuracy of computer-generated mileage figures. *Subject to approval by the Department of Treasury, mileage figures generated by such systems can be used to determine a motor carrier's tax liability. A taxpayer wishing to use computer-generated mileage figures must request permission to use a particular system. The Department of Treasury must review and approve*

> *the system before mileage figures generated by it will be accepted. The review will include an examination of how the system will be utilized by the company, who has the availability of documentation verifying the computer-generated figures.*
>
> The motor carrier fuel tax is based on miles traveled in Michigan. Subject to approval by the department of Treasury, a motor carrier may use computer-generated mileage figures rather than odometer readings to report actual miles traveled.
>
> December 20, 1991
>
> LR 91-1
>
> Thomas M. Hoatlin
>
> Commissioner of Revenue
>
> [Emphasis added.]

While the letter ruling did not have the force of law, it was a public document that announced the department's position, which was fully supported by IFTA, which does have the force of law. In no way does the withdrawal of the letter ruling imply that the department thereafter permitted "computer generated mileage figures." In summary, Petitioner's mileage records were not in compliance with IFTA standards.

The auditor noted discrepancies in the taxpayer's fuel records and mileage records. The taxpayer did not maintain daily records that included beginning and ending odometer readings. This called into question the accuracy of the reported miles and reported gallons. The auditor and the taxpayer agreed to a random sample of 50 vehicles. Maintenance records were located for 34 of these vehicles that included the odometer readings. Even after excluding several of the 34 vehicles, the size of this sample exceeded IFTA guidelines for Petitioner's fleet.

Petitioner presented evidence of fleet average MPG developed from GPS data. The GPS data (miles) has not been proven to be reliable and is not proven to be more accurate than mileage measured using the vehicles' odometers. Forty-two percent of the units were eliminated from the Minitab analysis because they "were part of the outliers." TR 24/84:16.

Petitioner also presented evidence of miles taken from service records that were recorded using the vehicle's internal ECM. For reasons stated above, that data is not found to be credible. The evidence does not establish that the ECM data is more accurate than the miles recorded by the vehicle odometers that Respondent used to estimate fleet average MPG.

Mr. Lovell's testimony regarding "data snooping" is not proven to be relevant or persuasive. He testified in general without knowledge of the facts or issues in this case. He did not affirmatively testify that Petitioner's sample selection was faulty. P-l, p 26. Overall, the testimony of Mr. Lovell is not persuasive because he had nothing to do with the audit at issue.

Had Petitioner maintained daily trip reports, the department could have calculated MPG using odometer readings and actual fuel used. Records from various quarters throughout the audit period could have been selected. Had that been possible, the sampled vehicles may have supported the taxpayer's reported average MPG, in which case there would have been no assessment.

However, due to Petitioner's failure to comply with recordkeeping requirements, the sample was limited to 34 vehicles for which service records existed. Of those 34, data from certain vehicles was eliminated because it was deemed unreliable. The audited 6.21 MPG was based on 24 vehicles for which MPG is reported (column C) indicated on Exhibit P-A1, p 124. Based on the audit report, the following 6 vehicles were eliminated from the 30 listed on P-A1, p 124: C7163, C7430, L7430, L7236, M172, M174, and P7393. The 24 vehicles indicate 6.2008 MPG (which appears to have been rounded, in the taxpayer's favor, to 6.21).

Petitioner mistakenly contends that the final audited MPG figure was based on 23 vehicles shown on P-A1, p 122. If the 22 vehicles on P-A1, p 123 were used, the result would be 6.17 MPG. The MPG for 30 vehicles (with MPGs listed on P-A1, p 124) was 6.19, for the 24 vehicles it was 6.21, and for the 22 vehicles listed on P-A1, p 123 it was 6.17. The sample size of 24 vehicles for a fleet of 162 vehicles is within IFTA standards and Petitioner has not proven that the sample is not representative of the fleet. The audited MPG of 6.21 is supported by the evidence.

Regarding the MPG calculation, Petitioner asserts that the "actual one-for-one correspondence of miles to gallons must be suspect." The Audit Report (P-A1, p 10) states that the fuel set forth on P-A1, p 124 (column B) was taken from summaries for each vehicle for which odometer records existed. The fuel summaries were provided by Petitioner. Petitioner has not demonstrated from the fuel summaries or other evidence that the gallons set forth in column B did not correspond with the miles shown in column A.

In its Post Hearing Brief, Petitioner argues that the dates used for GPS miles for some vehicles do not correspond to the dates used for odometer readings. P-A1 p 10 (also see P-A1, p 122). Petitioner raises this argument in the section of its brief challenging the MPG estimate. The comparison of GPS miles to odometer miles was used to calculate the 3.4% mileage error, and was not directly used in the MPG calculation. The MPG calculation compared gallons reported to odometer miles. The GPS readings were only relevant to the extent that the auditor considered that data to determine that some of the data was unreliable, excluding certain trucks from the MPG calculation, due to large discrepancies between odometer miles and GPS miles. However, Petitioner refers to the error rate calculated on page 122 of Exhibit P-A1 of 5.43%, which was not adopted. Rather, page 123 of P-A1 shows that when several vehicles were excluded the resulting mileage error rate was 3.4%, which Petitioner has stipulated to be accurate: (". . . Mr. Plue in his audit was spot on at 3.4%." TR 24/101:14, Testimony of Mr. Babins.) Based on the evidence and testimony it is found that the auditor compared odometer miles to the fuel used for the proper time periods for those miles. Petitioner has not proven to the contrary.

Dr. Rothman testified that it would result in a non-representative sample if, for example, when determining the average height of five persons in a room, the tallest person was eliminated from the sample (20% of the sample). However, this assumes that the height of the person excluded was accurately measured and was not an obvious error. Clearly, if the data indicated that the tallest person in the room was 10 feet tall, it would be error to include unreliable data in the sample. Dr. Rothman's testimony does not establish that it would be error to exclude data that is suspect. Furthermore, the audit report states that Mr. Plue excluded vehicles "that had percentage differences above 10%" – referring to the difference between odometer miles and GPS miles,

that were both greater than and less than the odometer miles, not only those that exceeded the average MPG by 10%. Excluding these vehicles resulted in a lower error rate than including them, which worked to the taxpayer's advantage.

Petitioner has failed to demonstrate that the vehicles in the sample are not representative of the entire population of vehicles in the fleet. Furthermore, any lack of representativeness would be of Petitioner's own making because the sample was dictated by the availability of proper records. Upon review of the MPGs calculated from the sample, and the time periods involved, it is concluded that the sample is reasonably representative of the fleet and that it constitutes the best available evidence of MPG. It is the only estimate of MPG offered by either party in this case that is based on actual vehicle odometer miles and fuel related to those miles.

Petitioner claims that Mr. Plue "admits his sample was not representative." TR 24/137:22, 24. However, it is clear from the transcript that the witness made no such admission, although he adopted a defensive posture during vigorous cross examination by Petitioner's counsel. Counsel asked, "Do you believe that [sample] was representative of KC's fleet?" Mr. Plue answered with a question: "If you have no records then how would any of it be representative? You have no records. You're telling me that I have to pick a representative sample." Mr. Plue did not state that the sample was not representative. The point of this testimony is that it was futile to expand the sample, because Respondent had requested information on all vehicles with odometer readings, and Petitioner stated that there were no more. Adding more vehicles would accomplish nothing because no additional odometer records existed. The record indicates that Mr. Plue considered the data and selected a sample was determined to be reliable and representative of the population.

The miles and fuel examined in the sample cover various months and seasons throughout the audit period, and are not limited to a single quarter, year, or season.

Petitioner contends it is impossible to have underreported 1,517,599 gallons of fuel, which exceeds the average total consumption of Petitioner's entire fleet for an entire quarter. This is a significant quantity of fuel. However, spread over the audit period, it is 75,880 gallons per quarter. This equals 468 gallons per truck per quarter, assuming that Petitioner's fleet averaged 162 trucks during the audit period. (The evidence indicates that fleet consisted of as many as 186 trucks.) A truck's fuel tank holds approximately 300 gallons, according to testimony in this case. Assuming 162 trucks, this is the equivalent of approximately 1.5 tanks of fuel per truck per quarter. Petitioner has not proven that it would be impossible, or even unlikely, for it to have used and failed to report the additional fuel.

Judgment

IT IS ORDERED that Final Assessment O019297 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 facts and law at issue in 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].

MICHIGAN TAX TRIBUNAL

Entered: November 24, 2010 By: Thomas A. Halick