

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 180-5-20 Wncv

KEITH STERN,
Appellant,

v.

STATE OF VERMONT AGENCY OF
TRANSPORTATION,
Appellee

RULING ON THE MERITS

This is an appeal under V.R.C.P. 75 from a decision of the Vermont Agency of Transportation assessing the appellant, Keith Stern d/b/a “Stern’s Quality Produce,” \$8,501.74 in additional diesel fuel taxes, penalties and interest for the period January 1, 2014, through December 31, 2016. This Court’s review on appeal is “de novo.” 23 V.S.A. § 3023(a). Hearings on the merits were held on December 7, 2021, and February 22, 2022. Appellant Keith Stern attended the hearings, testified and represented himself. Marie C. Horbar, Esquire, Assistant Attorney General, represented the Appellee Agency of Transportation, and Bruce Bierbaum, MV Audit Supervisor for the Department of Motor Vehicles, testified on behalf of the Agency. Based upon the credible evidence, the Court makes the following findings, conclusions and orders.

Appellant Keith Stern and his wife owned and operated a retail produce market called “Stern’s Quality Produce” in White River Junction, Vermont, until they closed the business in December of 2018. The Sterns owned a 33,000-lb box truck, which they used to pick up and deliver fruit and vegetables for their market. Three times a week, Stern drove the truck from his residence in Springfield, Vermont, to produce vendors in Chelsea, Massachusetts, and back to his retail store in White River Junction. He followed the same route from Vermont, through New Hampshire, to Massachusetts, and back again, each time. Keith Stern drove the truck himself 98% of the time; if he was sick or otherwise unavailable, his wife drove it.

The truck operated on diesel fuel. When the truck needed fuel, Stern would stop and fill it up at the Circle K station in Newport, New Hampshire, where he had

a Circle K Fleet card/account. The diesel tax that was due for the fuel that he purchased was always included in the price that he was charged at the pump. Thus, he paid the diesel tax that was due each time that he filled up. Stern did not keep records of his fuel purchases because he understood that he could access the computerized records that Circle K maintained for each of his purchase when needed.

Although Stern purchased all his diesel fuel at a station in New Hampshire, he was still liable to pay a diesel fuel tax to the State of Vermont for each gallon of diesel fuel “used” in Vermont. *See* 23 V.S.A. § 3003(a)(2) and 3014 (b). Each quarter of each year, therefore, Stern filed an “IFTA Fuel Report – Vermont (Base Jurisdiction)” form with the Vermont Department of Motor Vehicles, listing the number of miles his truck had travelled for his produce business, the number of gallons of diesel fuel he had purchased, the amount of diesel fuel tax he had paid to the State of New Hampshire, and the amount of diesel fuel use tax that he computed was due to the State of Vermont. In compiling his quarterly reports, Stern estimated that his truck had averaged 8.0, 8.5 or 9.0 miles-per-gallon of diesel fuel; he based his averages on test runs that he and his wife had done with the truck in the past.

In early 2017, the Vermont Department of Motor Vehicles informed Stern that it would be conducting an “IFTA” audit of his quarterly diesel fuel reports for the three-year period January 1, 2014, through December 31, 2016. “IFTA” stands for the International Fuel Tax Agreement to which Vermont and nearly every other jurisdiction of the United States and Canada belong.¹ Pursuant to the Agreement, the audit would be performed for the benefit of all three of the jurisdictions through which Stern had operated his truck during those three years (i.e., Vermont, New Hampshire and Massachusetts).

The auditors asked Stern to provide them with his records of miles traveled, gallons of diesel fuel purchased, and diesel fuel taxes paid during a six-month sample period (i.e., July through December of 2016).² Although Stern’s records of miles traveled were rather minimal, the auditors concluded that they were sufficient to establish that the miles he had reported in his quarterly reports were reasonably accurate (Exhibit 6, p. 2).

The request for Stern’s fuel purchase records, however, proved more problematic. When Stern learned in 2017 that his returns for the previous three

¹ DMV performed not only an IFTA audit but also an International Registration Plan (“IRP”) audit of Stern’s Quality Market. Because the IRP audit resulted in a refund to Stern, he did not appeal the results of that audit. Therefore, only the results of the IFTA audit are at issue in this appeal.

² MV Audit Supervisor Bierbaum explained that It is a general practice of DMV’s audit staff to use a six-month “sample period” upon which to “base an opinion for the whole [three-year] audit period” (Affidavit of Bruce Bierbaum, filed 1/31/22, at ¶9).

years were going to be audited, he contacted Circle K to request copies of his computerized diesel fuel purchase records, only to learn that Circle K had changed computer systems and no longer had them. Therefore, he could not provide the auditors with documents of fuel purchased prior to July of 2016. However, he was able to provide documentation of fuel purchases made from July through December of 2016 (i.e., during the six-month sample period). Those records consisted of “Fleet Manager Statements Fuel Reports” covering the period July 11, 2016, through January 25, 2017 (Exhibit 12), plus receipts for fuel purchases made in December 2016 and mid-January through March of 2017 (Exhibit 10).

The auditors concluded that, because Stern could not produce diesel fuel purchase receipts for any month of the audit period other than December of 2016, he was not entitled to credit for any diesel fuel taxes paid for any month other than December of 2016. The auditors rejected his “Fleet Manager” fuel reports because, although those reports documented his fuel purchases during the sample period, they did not specify the type of fuel that had been purchased (i.e., gasoline versus off-road diesel versus taxed-at-the-pump diesel fuel), the station location, or the amount of fuel purchased. Then, because Stern could not document the amount of fuel he had purchased, the auditors rejected his claim that his truck got 8.0-9.0 miles per gallon, even though they acknowledged that the receipts he had provided in Exhibit 10 supported a conclusion that the truck got 7.8 miles per gallon from December of 2016 through March of 2017 (see Exhibit 6, at p. 2). Therefore, the auditors concluded that they were forced to apply instead a 4 mile per gallon default rate to compute the amount of diesel fuel tax Stern should have paid during the audit period. As a result of these conclusions, Stern was denied any credit for the diesel fuel taxes he had paid to the State of New Hampshire, and he was assessed a total of \$8,501.74 in diesel fuel use taxes, penalties and interest. The breakdown by state was \$946.20 for Massachusetts, \$5,945.32 for New Hampshire, and \$1,610.22 for Vermont. Stern appealed that assessment to this Court.

By statute, the Commissioner of Motor Vehicles is authorized to “enter into agreement with other states, the District of Columbia, and Canadian provinces, providing for the reciprocal enforcement of the fuel use tax laws...” 23 V.S.A. § 3021(b)(3). Pursuant to that authority, Vermont became a party to the International Fuel Tax Agreement (“IFTA”). IFTA provides that “[a] licensee may claim a tax-paid credit ... for fuel purchased at retail only when the fuel is placed into the fuel tank of a qualified motor vehicle and the purchase price includes fuel tax paid to a member jurisdiction” (IFTA, § R1010.100). Here, Stern purchased diesel fuel for his truck, and he paid a diesel fuel tax to the State of New Hampshire as part of the price that he paid at the pump for every purchase. Therefore, he is entitled to a credit for those tax payments. However, in order to claim that credit he must satisfy IFTA’s documentation requirements.

IFTA provides:

To obtain credit for tax paid purchases, the licensee must retain a receipt, invoice, credit card receipt, or automated vendor generated invoice or transaction listing, showing evidence of such purchases and taxes paid. These records may be kept on microfilm, microfiche or other computerized or condensed record storage system which meets the legal requirement of the base jurisdiction.

(Id., § R1000.100). IFTA further provides that “[t]he receipt must show evidence of tax paid directly to the applicable jurisdiction or at the pump” (Id., § R1010.200). Furthermore, “[w]hen tax paid fuel documentation is unavailable, all claims for tax paid fuel will be disallowed” (IFTA Audit Manual, § A550.200). Unfortunately for Stern, he relied on Circle K to provide him with his fuel purchase records, if he ever needed them, but Circle K lost them when it switched to a new computer system.

However, the IFTA Audit Manual contains an exception under which the fuel use may be estimated when purchase receipts are unavailable. It provides:

If the licensee’s records are lacking or inadequate to support any tax return filed by the licensee or to determine the licensee’s tax liability, the base jurisdiction shall have authority to estimate the fuel use upon (but is not limited to) factors such as the following:

- .005 Prior experience of the licensee;
- .010 Licensees with similar operations;
- .015 Industry averages;
- .020 Records available from fuel distributors; and
- .025 Other pertinent information the auditor may obtain or examine

Unless the auditor finds substantial evidence to the contrary by reviewing the above, in the absence of adequate records, a standard of 4 MPG/1.7KPL will be used.

(Id., § A550.100).

The exception applies here because, although Stern could not produce actual fuel receipts, he did produce “[o]ther pertinent information” by which his fuel use could be estimated, namely his “Fleet Manager” fuel reports covering the auditors’ sample period of July through December of 2016, plus the documents in Exhibit 10. As noted earlier, the auditors rejected Stern’s “Fleet Manager” fuel reports because they did not specify the type of fuel purchased, the station location or the amount of fuel purchased. However, the type of fuel he purchased cannot be disputed; the fuel was for a diesel truck, and the additional tax that the auditors assessed was for

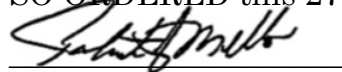
diesel fuel use. Moreover, it is undisputed that Stern never purchased off-road diesel; all his purchases included the diesel tax in the price paid at the pump.³ In addition, Stern's testimony, that he purchased all his diesel in New Hampshire, is not only uncontradicted, but is also confirmed by the numerous references to Circle K in the "Fleet Manager" fuel reports and by the documents in Exhibit 10 showing fuel purchases at the Irving station in Hookset, New Hampshire during the sample period.

In addition, the documents that Stern provided in Exhibit 10 confirm that his truck got 7.8 gallons per mile from December 2016 through March 2017. That figure is very close to the 8.0-9.0 mile per gallon figure that Stern used in his quarterly reports to the Vermont Department of Motor Vehicles. Those Exhibit 10 records support Stern's use of 8.0-9.0 mpg on his quarterly returns and serve as a reasonably reliable basis for computing his fuel use in each of the three jurisdictions through which he drove his truck. Therefore, there was no need for the auditors to use the 4-mpg default rate, and it would be unreasonable for this Court to do so in light of Exhibit 10.

Because Stern provided "other pertinent information" demonstrating that all of his fuel purchases during the sample period were diesel fuel for his truck at stations in New Hampshire where the price at the pump included the required diesel fuel tax, he is entitled to claim his credit for the audit period. In addition, because he also provided "other pertinent information" of the number of gallons used in each state (i.e, mileage figures that the auditors accepted multiplied by miles-per-gallon rates shown by Exhibit 10 to have been reasonable), his use tax liability in each state, as reported on his quarterly reports, can be computed and confirmed without having to resort to IFTA's "default rate" of 4 mpg.

For the foregoing reasons, the Agency of Transportation's determination is *reversed*, and its assessment of \$8,501.74 in additional taxes, penalties and interest is *vacated*.

SO ORDERED this 27th day of February, 2022.



Robert A. Mello
Superior Judge

³ MV Audit Supervisor Beirbaum confirmed that, when the fuel is purchased from a retail station, "it is our practice to presume that the tax was incorporated into the price" (Affidavit of Bruce Bierbaum, filed 1/31/22, ¶4). Bierbaum added, "Moreover, our standard practice is to check that the entity selling the fuel is licensed to sell fuel in the jurisdiction and remits taxes to the jurisdiction in which the entity operates" (Id.).