

ST 09-9

Tax Type: Sales Tax
Issue: Delivery Charges

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

THE DEPARTMENT OF REVENUE)	Docket No.	07-ST-0000
OF THE STATE OF ILLINOIS)	Reg. No.	0000-0000
)	NTL Nos.	
v.)		
)		
ABC, INC.,)	John E. White,	
Taxpayer)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: James Dahl, Dahl & Bonadies, appeared for ABC, Inc.;
Shepard Smith, Special Assistant Attorney General,
appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose after ABC, Inc. (ABC or Taxpayer) protested three Notices of Tax Liability (NTLs) the Illinois Department of Revenue (Department) issued to it following an audit of its business for the months of January 2001 through and including December 2003. The primary issue is whether ABC owes Illinois Retailers' Occupation Tax (ROT) on the receipts it charged and collected for delivering fuel it sold to purchasers for use and consumption in Illinois, or whether such receipts were properly deducted by ABC on the monthly returns it filed during the audit period.

The hearing was held at the Department offices in Chicago, Illinois. At hearing, ABC presented books and records, as well as the testimony of witnesses. I have considered the evidence adduced at hearing, and I am including as part of this

recommendation findings of fact and conclusions of law. I recommend that the Director revise the NTLs to reflect that some, but not all, of ABC's receipts from delivery charges were deductible under the plain text of 86 Ill. Admin. Code § 130.415, and that he finalize those NTLs as so revised.

Findings of Fact

Facts Regarding ABC's Business

1. ABC sells fuel at retail to purchasers for use in Illinois. Department Ex. 2 (audit workpapers and other documents related to the Department's audit of Taxpayer), pp. 42-55 (copies of print-outs from ABC's web site).
2. At the time of the hearing, John Doe (John), the grandson of the company's founder, was ABC's president. Hearing Transcript (Tr.)¹ pp. 30-31 (John). Jane Doe (Jane) was ABC's vice-president. Tr. pp. 119-20 (Jane).
3. During the audit period (and unless expressly stated, all of these findings of fact relate to the audit period), ABC's headquarters were located in Anywhere, Illinois. Department Ex. 2, pp. 40-55; Tr. p. 32 (John). ABC also had property in Anywhere², Illinois. Department Ex. 2, p. 3; Tr. p. 32 (John).
4. John was personally and primarily involved in sales and operation of ABC's business. Tr. pp. 31, 37-39 (John), 110-14 (testimony of Mr. Smith (Mr. Smith), an employee of XYZ Construction Co., one of ABC's customers during the audit period); Tr. II pp. 5-6 (testimony of Mr. Jones (Mr. Jones), an employee of ZZZ's Finer Foods, one of ABC's customers during the audit period), 15-16 (testimony of Joe Blow (Blow), the owner of Blow Charter Express, one of ABC's customers during the audit period).

¹ The abbreviation "Tr." shall refer to the transcript prepared regarding the first day of hearing, and "Tr. II" refers to the transcript prepared regarding the second day of hearing.

5. In that capacity, John negotiated sales agreements with ABC's customers. Tr. pp. 31, 37-49 (John), 110-14 (Mr. Smith), 6-10 (Mr. Jones), 16-18 (Blow).
6. John negotiated the price at which ABC would sell fuel to the customer, and would then negotiate the price it would charge to deliver fuel to the customer. Tr. pp. 37-47 (John); Tr. II pp. 110-14 (Mr. Smith), 6-10 (Mr. Jones), 16-18 (Blow).
7. The price ABC would charge for fuel was based on the average market price of fuel as reported by the Oil Price Information Service (OPIS). Tr. pp. 39-40 (John), 112-13 (Mr. Smith, referring to OPIS's average as the "rack price"); Tr. II pp. 6 (Mr. Jones), 17 (Blow); *see also, generally*, <http://opisnet.com/benchmark.asp> (OPIS's web site) (last viewed on October 14, 2008).
8. During negotiations with customers, John would begin negotiations over the price of the fuel by asking for four cents above the average OPIS price. Tr. pp. 39-41 (John); *see also* Taxpayer Ex. 6 (letters from ABC to different customers showing different selling prices for fuel for the same week). The price for fuel ultimately agreed upon by ABC and a customer was often two cents above the OPIS average price. Tr. pp. 41 (John), 112 (Mr. Smith); Tr. II pp. 6 (Mr. Jones), 17 (Blow); *see also* Taxpayer Ex. 6.
9. On a weekly basis, ABC would write to the customers with whom it had previously agreed to sell and/or deliver fuel to notify them of its price for fuel, in accord with changes to the average OPIS price. Taxpayer Exs. 6-8 (correspondence from ABC to customers stating the weekly price of fuel, broken down into component parts), 10-12 (copies of ABC invoices); Tr. p. 52 (John).
10. ABC did not enter into written agreements with its customers. Tr. pp. 78-82 (John); Tr. II pp. 14 (Mr. Jones), 21 (Blow).

11. ABC distinguished its customers by type, which types were, in part, based on the nature of the equipment into which ABC deposited fuel at a customer's site. Taxpayer Ex. 16; Tr. pp. 42-55 (John), 125 (Jane); *see also* Department Ex. 2, pp. 8-9 (*quoted infra*, pp. 10-13). Generally, ABC's classified its customers as unit-fill customers, fleet customers, and tank customers. Department Ex. 2, pp. 8-9; Taxpayer Ex. 16; Tr. pp. 33-35, 98-108 (John), 141-42 (Jane).
12. Unit-fill customers are construction businesses that purchase fuel from ABC, and which have ABC deliver the fuel to a construction site and fill different pieces of construction equipment with fuel. Department Ex. 2, pp. 8-9, 42-55; Tr. pp. 33-35 (John).
13. A tank customer is one to whom ABC sells fuel and delivers and dispenses the fuel into a tank that is fixed or situated at the customer's location, as opposed to being dispensed into a motor vehicle or some other piece of moveable equipment. Taxpayer Ex. 16; Tr. pp. 141-42 (Jane); *see also* Taxpayer's Memorandum in Lieu of Closing Argument (Taxpayer's Brief), p. 7 ("ABC's tank customers maintain fixed storage tanks").
14. A fleet customer is one to whom ABC sells fuel and delivers and dispenses the fuel into the customers' motor vehicles (for example, trucks and/or buses) at the customers' sites. Department Ex. 2, pp. 8-9; Tr. pp. 50-51 (John), 110-14 (Kassack); Tr. II pp. 6-10 (Mr. Jones), 16-18 (Blow); *see also* Taxpayer Exs. 6-8.
15. On most of the invoices ABC prepared for its unit-fill customers, ABC did not separately state charges for fuel and for delivery. Tr. pp. 33-35, 98 (John), 165-67 (testimony of Consultant (Consultant), a consultant ABC hired to review its books

and records and to appear as a witness at hearing). As a result, ABC ordinarily did not claim that any portion of its invoice price for fuel sold and delivered to its unit-fill customers was deductible. Taxpayer Exs. 15-16; Tr. pp. 36, 98 (John), 165-66 (Consultant).

16. The only exception to ABC's practice of preparing invoices for its unit-fill customers that stated one price for both fuel and delivery was where it sold a small amount of fuel to such customers. Taxpayer Ex. 16; Tr. pp. 89-92 (John), 137-38, 151 (Jane). For those unit-fill customers, ABC added a separately stated delivery charge on its invoices, which both John and Jane referred to at hearing as a minimum delivery charge, because ABC's cost of delivering a small amount of fuel to the customer was not covered by the total price it charged the customer for fuel. Taxpayer Ex. 16; Tr. pp. 89-92 (John), 137-38, 151 (Jane), 165-66 (Consultant).
17. ABC did not charge or collect tax on its minimum delivery charges to its unit-fill customers, and it reported the receipts it received from such minimum delivery charges as deductions on the returns it filed during the audit period. Taxpayer Ex. 16; Tr. pp. 89-92 (John), 151 (Jane).
18. For its fleet and tank customers, ABC prepared invoices on which it separately stated its charges for fuel, and/or for the delivery services, it sold. Taxpayer Exs. 10-12; *see also* Department Ex. 2, pp. 8-9.
19. On the invoices on which it separately stated fuel and/or delivery charges, ABC included a charge for tax on its selling price for fuel. Taxpayer Exs. 10-12; Tr. pp. 53-54 (John); *see also* 35 **ILCS** 120/1 (definitions of "gross receipts" and "selling price").

20. ABC did not include on its invoices a charge for tax on its separately stated charge for delivering the fuel it sold to customers. Taxpayer Ex. 10 (copies of invoices to different customers showing tax charged on fuel sales and not on delivery charges); Tr. p. 64 (John).
21. ABC priced its delivery charges differently depending on the customer to whom it sold fuel. Taxpayer Exs. 6-8, 10-12, 16; Tr. pp. 42-55 (John).
22. ABC charged some of its fleet customers a price for delivery that was stated as a price per gallon of fuel delivered. Department Ex. 2, p. 9; Taxpayer Ex. 15 (copy of schedule prepared by ABC showing deliveries based on types of customers); Tr. pp. 64-68 (John). However, and depending on the relative bargaining power of ABC versus the particular fleet customer, ABC's delivery charge would be stated as a flat fee per delivery. Taxpayer Exs. 10, 15; Department Ex. 2, p. 9; Tr. p. 51 (John); Tr. II pp. 8-14 (Mr. Jones).
23. ZZZ's was one of ABC's fleet customers that ABC charged a flat fee for each delivery to one of ZZZ's sites, where it dispensed fuel into trucks. Taxpayer Ex. 16; Tr. pp. 92-94 (John); Tr. II pp. 5-6, 11 (Mr. Jones).
24. When negotiating the pricing of its agreements with customers, John calculated ABC's charge for delivering fuel to a given customer based on his estimate of ABC's actual cost to deliver the amount of fuel being sold to the particular customer, and to dispense such fuel into the customer's equipment and/or vehicles. Taxpayer Exs. 6-8 (different delivery charges stated on weekly statements to different customers); Tr. pp. 41-49 (John); *see also* 86 Ill. Admin. Code § 130.415(b) ("charges for transportation and delivery must not exceed the costs of transportation or delivery. If

those charges do exceed the cost of delivery or transportation, the excess amount is subject to tax.”).

25. When determining ABC’s price for delivering fuel to a particular customer, John asked the customer about the number of vehicles and/or equipment to be fueled, the type of business, the layout of the customer’s yard or business site, the size of the customer’s tank or tanks, and the frequency of deliveries. Tr. pp. 40-42 (John).
26. ABC had a yard where its customers could go to purchase fuel at retail, and where ABC’s employee would dispense such fuel into customers’ vehicles. Taxpayer Ex. 11 (copies of invoices showing sales of fuel to different customers at ABC’s yard); Tr. pp. 61-64 (John).
27. When ABC sold fuel to customers at its yard, it did not include a charge for delivery on the invoices it prepared for such sales. Taxpayer Ex. 11; Tr. pp. 61-64 (John).
28. One of ABC’s fleet customers was XYZ Construction, Inc. (XYZ), whose trucking superintendent was Mr. Smith (Mr. Smith). Taxpayer Ex. 17 (copy of ABC invoice to XYZ); Tr. pp. 110-17 (Mr. Smith). Mr. Smith knew that XYZ had the option of going to ABC’s yard to purchase fuel from ABC without incurring a delivery charge. Tr. p. 113 (Mr. Smith).
29. One of ABC’s fleet customers was ZZZ’s Finer Foods (ZZZ’s), and Mr. Jones was ZZZ’s trucking manager. Tr. II pp. 5-6 (Mr. Jones). Mr. Jones knew that ZZZ’s had the option of going to ABC’s yard to purchase fuel from ABC, without incurring a delivery charge. *Id.* pp. 6-7 (Mr. Jones).
30. One of ABC’s fleet customers was Blow Charter Express (CCE), and Blow was CCE’s owner. Tr. II pp. 15-16 (Blow). Blow knew that CCE had the option of going

to ABC's yard to purchase fuel from ABC, without incurring a delivery charge. *Id.* p. 17 (Blow).

31. In addition to selling fuel and delivering it to customers, ABC was also hired by customers to deliver fuel that the customers arranged to purchase from other sellers. Department Ex. 2, p. 4; Taxpayer Ex. 12 (copies of ABC invoices to a customer showing multiple deliveries of fuel to the customer's different locations); Tr. pp. 55-59 (John), 115-17 (Mr. Smith).²
32. On the invoices it prepared for sales of delivery services only, ABC included a charge for delivery, and it did not charge or collect tax from its customer for those deliveries. Taxpayer Ex. 12; Tr. pp. 55-56 (John), 115-17 (Mr. Smith); Department Ex. 2, pp. 8-9.
33. For as long as John worked for ABC, ABC had been separately stating, on the invoices it issued to fleet and tank customers, charges for fuel and for delivery. Tr. pp. 64-68 (John). For the same period of time, ABC had charged tax on such invoices for its charge for fuel, but not for its charge for delivery. *Id.*
34. In 1998, which was prior to the audit period, ABC received a copy of a private letter ruling that the Department had issued to one of ABC's competitors, Competitor Petroleum Company, in 1996. Taxpayer Ex. 5; Tr. pp. 68-73 (John). John received the copy of the private letter ruling from Competitor. Taxpayer Ex. 5 (top of document showing facsimile transmission from Competitor on September 23, 1998); Tr. pp. 69-70 (John). Attached to the private letter ruling the Department issued to

² Mr. Smith recalled that XYZ had previously paid ABC to deliver fuel that XYZ purchased from another retailer, but did not recall when such purchases and deliveries had occurred. Tr. pp. 115-17 (Mr. Smith).

Competitor was a copy of the 1991 version of the Retailers' Occupation Tax regulation (ROTR) § 130.415, titled, Transportation and Delivery Charges. Taxpayer Ex. 5, p. 3.

35. John knew, when he received the private letter ruling from Competitor, that Competitor's method of pricing its fuel and services was different than ABC's practice of separately negotiating, and stating on its invoices, prices for fuel and for delivery. Tr. pp. 72-73 (John); *compare* Taxpayer Ex. 5, pp. 1-2 *with* Taxpayer Exs. 6-8, 10-12.

36. After receiving the private letter ruling from Competitor, John telephoned the Department to inquire about the tax consequences of ABC's own practice of separately negotiating, and separately stating on its invoices, its distinct charges for fuel and delivery. Tr. pp. 73-74, 77-79 (John).

37. After that telephone call, ABC continued its practice of not charging or collecting tax on its invoices' separately stated charges for delivery, and which charges it reported as deductions on its monthly returns. Tr. pp. 73, 77 (John).

Facts Regarding the Department's Audit Determinations

38. The three NTLs reflect two different audits conducted by the Department. *Compare* Department Ex. 2 (audit workpapers prepared during the first audit) *with* Department Ex. 3 (audit workpapers prepared during the second audit).

39. The first audit of ABC's business focused on the period beginning January 2001 through November 2003. Department Ex. 1, pp. 2, 4; Department Ex. 2, *passim*.

40. Initially, the second audit of ABC's business was to focus on the period from December 2003 through June 2006. Department Ex. 3, p. 3. To ensure that the

Department was able to comply with the time period for timely issuing an NTL for the beginning of the second audit period, the second audit was submitted early, and an NTL issued, regarding only the month of December 2003. *Id.*

41. At the conclusion of each audit, the Department determined that ABC owed more tax than it had reported being due on its monthly returns. Department Ex. 2, pp. 6-8; Department Ex. 3, p. 4.
42. For the first audit period, ABC agreed with all of the Department's audit determinations but one — the taxability of delivery charges that ABC reported as deductions on its returns. Department Ex. 1, p. 6 (credit for payment by ABC); Department Ex. 2, pp. 6-8; *see also* Department Ex. 3, p. 5. It paid the amount of tax due as determined by the Department for the issues other than the delivery issue. Department Ex. 1, p. 6; Department Ex. 2, pp. 6-8.
43. The Department's auditors prepared several documents and schedules during the Department's audits of ABC. Department Ex. 2, pp. 1-37; Department Ex. 3, *passim*.
44. The documents most pertinent to the delivery issue include parts of the Auditors' Narratives, and a schedule titled, Taxable Delivery Charge. Department Ex. 2, pp. 8-9, 31; Department Ex. 3, pp. 4, 8.
45. In the pertinent parts of his Audit Narrative, the first auditor wrote:

DEDUCTIONS

Deductions were taken [on ABC's filed returns] for resales, interstate commerce, cash refunds, gasohol, motor fuel tax, delivery charges, tax collections, and sales to exempt organizations. Three test months were selected to check all deductions, 7/01, 6/02, and 7/03. These months represented average line 1 sales from each of the three accounting periods per audit. Resale certificates, sales invoices, credit memos, shipping documentation, the sales invoice register, and other exemption (i.e. E#'s) certificates were examined to verify deductions and

eliminations. No exceptions were noted for all deductions except the delivery charges.

Delivery Charges — Most of the delivery charges were mandatory charges per fuel or other items sold. ABC would bill their customers on a per gallon rate or a flat delivery charge rate on every sale. There was no product picked up. Occasionally the taxpayer would contract to pick up someone else's fuel. These charges were nontaxable. However, the mandatory delivery charges were taxable. This issue will be explained in further detail in this auditor's "Unagreed Audit Issue" supplement.

Exceptions in this area were calculated in detail. From the total delivery charge deduction, subtractions were made for Indiana delivery sales and delivery charges on non-taxable sales, in arriving at taxable sales exceptions. Delivery only charges, where ABC would haul another company's fuel, were included in the delivery charge on non-taxable sales adjustment. These adjustments were estimated based on percentages developed for the three deduction test months. Non-taxable delivery charges were compared to total delivery charges in arriving at these adjustment percentages. Total taxable delivery charges per audit totaled \$399,802.00.

Credit for Underreported Deduction — In examining audit findings the taxpayer discovered that they were incorrectly remitting tax on Sunday delivery charge fees and few other non-taxable fees such as drum deposits. Tax was never collected on these amounts. The amounts were identified for the three deduction test months and projected using the average monthly error calculation. This method was determined to be the most accurate and time efficient for this taxpayer. Total tax credit was \$ - 15,977.00.

Control in this area: Sales Invoice Register

UNAGREED AUDIT ISSUE

DELIVERY CHARGE ISSUE

ABC adds a delivery charge for all products sold. The customer does not have an option to pick up this product. Therefore this is a mandatory charge and is taxable. The taxpayer admitted that no one picks up their product. In fact, Jane Doe (Corp. Officer) even told this auditor that even if they picked up the product, they probably still charge them for delivery, since it would be such a hassle for them to load someone else's truck. Picking up the product could also involve insurance and safety problems. This auditor heard a story from an audit of a similar

type company where a pick up was allowed and an accident occurred. The customer had apparently dropped a lit cigarette and started a fire. A lawsuit occurred and as a result no further pick-ups were allowed for that company. The taxpayer does have a special arrangement with one of its[] customers to purchase fuel to pick up from a pump not owned by ABC. Their customer, Corrugated Sales Co., purchases the fuel from a pump in Chicago, IL owned by a company called Automated Fuels. However, this is a single, special arrangement with one customer. Other customers are not offered this option nor is it probable they would accept it.

The taxpayer described 3 different types of fuel sales:

- 1.) Spot Fueling — Customers get a weekly price quote. Delivery charge is based on a per gallon price. This accounts for approximately 50% of sales.
- 2.) Commercial Delivery — Fuel price is based on an hourly cost per gallon price. The delivery charge is a flat rate. This accounts for about 3-5% of sales.
- 3.) Unit Fill/Excavator — These are deliveries to construction sites for under 80 gallons. The delivery charge is a flat fee. This accounts for 45% of sales.

When this issue was brought up during the course of the audit the taxpayer contacted the Illinois Petroleum Marketers Association (IPMA). The IPMA contacted our legal Department about this issue and submitted ABC, Inc. sales and price quotes, although this auditor is not absolutely certain what specific documentation was presented. While Legal was considering this issue the audit was held up from 10/04 through 7/05. A waiver was even taken for the Department's convenience because Legal was taking so long. Legal finally concurred with this auditor's position that the delivery charges were mandatory. They even went so far as to say that the type of pricing known as "spot Fueling" or as Legal said "Fleet Pricing", where the delivery charge was based on a per gallon basis, would be taxable in any situation. They also said that flat rate type pricing or as Legal said, "Contract Pricing" would only be non-taxable if there was an option to pick up.

The essence of the taxpayer's business is that they supply a delivered product. They even admitted as such when discussing this issue. They claim that the option to pick up or have the product delivered [f]lies in the fact that if customers wanted to pick up the fuel, they could go to their local "BP Amoco" service station and buy it there. Instead, they chose to have it delivered, so they come to ABC. The taxpayer's own website is exclusively devoted to the sale of a delivered product. Printouts from the

website are attached to this report. Note especially the highlighted items such as “ABC delivers where your work is, period.”

The taxpayer did petition ICB. At that time the taxpayer did claim to have evidence of some fuel pick-ups. Only a few examples presented were within the audit period. In each of the examples which noted no delivery charge, the price of the fuel per gallon was higher than invoices with delivery charges during the same period. Which lead this auditor to believe that these were probably not actual pick-ups but instead were deliveries with a price agreement, which included no delivery charge in lieu of a higher price per gallon. Pricing agreements such as this are common in the industry. This assumption was based on the fact that throughout the audit, the taxpayer insisted that no fuel was ever picked up. ICB upheld this auditor’s position.

Department Ex. 2, pp. 8-9.

46. In the comments prepared by the auditor in the second audit, the second auditor quoted statements set forth in the first auditor’s comments, and then compared some of those statements with her observations of ABC’s books and records. Specifically, the second auditor wrote, in pertinent part:

The following is an excerpt from the audit comments of the previous audit:

Delivery Charges — Most of the delivery charges were mandatory charges per fuel or other items sold. ABC would bill their customers on a per gallon rate or a flat delivery charge rate on every sale. There was no product picked up.* Occasionally the taxpayer would contract to pick up someone else’s fuel. These charges were nontaxable. However, the mandatory delivery charges were taxable. This issue will be explained in further detail in this auditor’s “Unagreed Audit Issue” supplement.

This concludes the excerpt from the prior auditor’s comments.

* While reviewing the sales journal for the month of December 2003, I noted approximately 5-6 invoices where the customer picked up the fuel at the ABC yard. There were also two other customers seen who routinely picked up their fuel at the ABC yard.

Department Ex. 1, p. 4.

47. In her comments, the second auditor also quoted in full the first auditor's statements in the Unagreed Audit Issue section of his comments, following which, the second auditor wrote:

The [first] auditor's comments are being included to show what the issues were determined in the prior audit. This audit is a follow-up assignment and an assessment is being made for the same issues. It is believed that the taxpayer will be going to the Hearing section once they receive the NTL. To date, it has not been received, so the issue regarding the delivery charge is being assessed in this audit to protect the statute. Once a decision is reached by the Hearing section, it will impact this audit as well. It should be noted that the [first] auditor is stating that fuel pick-ups are not allowed at the taxpayers location, whereas, I did see a few invoices where customers did pick up the fuel at the vendor's yard. These transactions were few in comparison to the number of sales for the month. I would estimate that the number of pick-ups amounted to less than 1% of the total transactions, even though this is negligible, it should be noted.

Department Ex. 1, p. 8.

48. The auditors' schedules of ABC's returns as filed reflect that ABC reported the following amounts of gross receipts and delivery deductions on the monthly returns it filed with the Department for the audit periods:

	Jan 01-Dec 01	Jan 02-Dec02	Jan 03-Nov 03	Dec 03
Gross Receipts	33,031,157	27,962,555	29,141,250	2,833,944
Total Deductions for Delivery Charges	2,486,611	2,355,169	1,940,206	199,137

Department Ex. 2, pp. 17 (gross receipts reported for January 2001 through November 2003), 31 (delivery deduction reported for the same months); Department Ex. 3, pp. 19-20 (gross receipts and delivery deductions reported for the month of December 2003).

49. For the first audit period, the Department determined that \$6,150,799 of the \$6,781,986 in delivery charges that ABC deducted from its total receipts should be disallowed, and tax assessed on such receipts. Department Ex. 2, p. 31. For the second audit period, the Department determined that \$178,909 of the total \$199,137 in delivery charges that ABC deducted from its total receipts should be disallowed, and tax assessed on such receipts. Department Ex. 3, pp. 9, 19-20.
50. In neither audit did the Department determine that any portion of the receipts that ABC reported as deductions on its returns as delivery charges should be assessed because such portion exceeded ABC's costs of delivering fuel to customers. Department Exs. 2-3; *see also* 86 Ill. Admin. Code § 130.415(b). Nor did the Department assert any such argument in its Brief. Department's Brief 8/29/08 (Department's Brief), *passim*.
51. For the entire two audit periods, the NTLs assessed tax in the following amounts, for the following periods:

Period	Tax Assessed
Jan 01-Jun 02	\$223,249
Jul 02-Nov03	\$209,872
Dec 03	\$12,523
Subtotal	445,644
Less Credit for Tax Paid re: Agreed Issues	49,296
Total Tax Assessed in NTLs	396,348

Department Ex. 1, pp. 2, 4, 6.

52. The Department assessed a late payment penalty against ABC, in the amount of \$2,505, for the month of December 2003. Department Ex. 1, p. 6.
53. The Pre-Hearing Conference order drafted by Department counsel, and signed by both parties, stated that “[d]ue to payments and credits the remaining tax due [is]

\$383,825.” That is the amount of tax that the Department asserts should be finalized against ABC, plus any accrued statutory interest. Department’s Brief, p. 14.

Facts Regarding ABC’s Minimum Delivery Charges and Tank Deliveries

54. After the Department’s audit of ABC, ABC hired a former Department employee, Consultant, to review its books and records, to compare those records with the Department’s audit workpapers, and to appear as a witness at hearing. Tr. pp. 162-69 (Bertletti).

55. After his review of ABC’s invoice journal, Consultant notified ABC, and at hearing Consultant opined, that ABC owed and properly paid tax on its total price at which it sold fuel to its unit-fill customers, since that price ordinarily included both the cost for fuel and the cost for delivery, as expressed on its invoices to such customers. Tr. pp. 165-66 (Consultant).

56. Following Consultant’s review of ABC’s books and records, and at ABC’s counsel’s request, Jane prepared a schedule to detail the receipts that ABC charged and collected from customers for minimum delivery charges, and for deliveries of fuel to tank customers, fleet customers and to ZZZ’s. *Compare* Taxpayer Ex. 16 with Department Exs. 2-3; Tr. pp. 132-52 (Jane). Jane prepared that schedule using the same books and records, i.e., ABC’s invoice journal, and the same methods and test periods that the first auditor used. Department Ex. 2, pp. 8-9; Taxpayer Ex. 16; Tr. pp. 132-52 (Jane). That schedule was admitted without objection. Taxpayer Ex. 16; Tr. p. 152.

57. For both audit periods combined, ABC realized receipts of \$1,533,147.80 from minimum delivery charges to its unit-fill customers. Taxpayer Ex. 16. These charges

were in addition to ABC's unstated charges for delivery to such customers. Tr. pp. 98-99 (John).

58. For both audit periods combined, ABC realized receipts of \$615,087 from delivery charges made to its tank customers. Taxpayer Ex. 16.

Conclusions of Law:

The Department introduced a copy of the NTLs it issued to ABC into evidence under the certificate of the Director. Department Ex. 1, pp. 2, 4, 6. Pursuant to § 4 of the Retailers' Occupation Tax Act (ROTA), those NTLs constitute the Department's prima facie case in this matter. 35 ILCS 120/4, 7. The Department's prima facie case is a rebuttable presumption. 35 ILCS 120/7; Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157, 242 N.E.2d 205, 207 (1968); DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276, 279, 48 N.E.2d 926, 927 (1943).

A taxpayer cannot overcome the statutory presumption merely by denying the accuracy of the Department's assessment. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988). Instead, a taxpayer has the burden to present evidence that is consistent, probable and closely identified with its books and records, to show that the assessment is not correct. Filichio v. Department of Revenue, 15 Ill. 2d 327, 333, 155 N.E.2d 3, 7 (1958); A.R. Barnes & Co., 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053.

Arguments and Analysis

The parties' Pre-Hearing order presented three issues to be resolved at hearing. The primary issue is the deductibility of ABC's delivery charges. The second issue is whether the late payment penalty should be abated for reasonable cause. The final issue

is ABC's objection to the doubling of the applicable interest rate as a result of the Illinois General Assembly's passage of the Tax Delinquency Amnesty Act (TDAA). P.A. 93-0026. I first address the parties' arguments regarding the primary issue.

Taxpayer makes two distinct arguments why the Department's disallowance of a portion of its deductions was incorrect. First, it argues that numerous flaws in the Department's audit should deprive the NTLs of their statutory prima facie correctness. Taxpayer's Brief, pp. 13-16. Second, it contends that its receipts from delivery charges were deductible as per ROTR § 130.415, and Illinois case law. *Id.* pp. 16-23. The Department responds that the NTLs are prima facie correct because the audit met a minimum standard of reasonableness. Department's Brief, pp. 6-8 (*citing, e.g., Elkay Manufacturing Co. v. Sweet*, 202 Ill. App. 3d 466, 559 N.E.2d 1058 (1st Dist. 1990)). It also argues that the disallowed delivery charges should be treated as taxable receipts because ABC's delivery of fuel was inseparable from its sales of fuel to customers. *Id.* pp. 8-10. Finally, it disputes that ABC has shown that its delivery charges were exempt under ROTR § 130.415. *Id.* pp. 10-14.

Were the First Audit's Methods Minimally Reasonable

Regarding the first issue, Illinois law provides that, "at [an] administrative hearing, the Department successfully establishes a prima facie case simply by submitting the corrected return into evidence. [citations omitted] If the corrected return is challenged, the Department must show that its method of preparing the corrected return meets some minimum standard of reasonableness." Central Furniture Mart, Inc. v. Johnson, 157 Ill. App. 3d 907, 910, 510 N.E.2d 937, 939 (1987); *accord* Elkay Manufacturing Co. v. Sweet, 202 Ill. App. 3d 466, 559 N.E.2d 1058 (1st Dist. 1990);

Smith v. Department of Revenue, 143 Ill. App. 3d 607, 611, 493 N.E.2d 653, 656 (5th Dist. 1986).

To begin, ABC does not expressly assert that the auditors used improper methods when preparing the correction of ABC's returns. *See* ABC's Brief, pp. 13-16. More importantly, the evidence does not support such an argument. For example, the evidence shows that, since ABC had such a high number of individual sales for each month in the first audit period, and a correspondingly high number of individual invoices that ABC produced and kept to document each such transaction, the auditor chose three separate months to analyze. Department Ex. 2, pp. 3-4. He then reviewed all of ABC's invoices for each of those three test months, and added up the amounts of delivery charges stated on the invoices that ABC regularly prepared and kept within its invoice journal. *Id.* When performing his review of ABC's invoices for the test months, the auditor noted that ABC had transactions where it sold and delivered fuel to customers in another state. Department Ex. 2, p. 31. The auditor determined that neither the sales of fuel nor ABC's delivery charges on such sales were taxable by Illinois, so he determined the percentage of ABC's receipts from delivery charges to customers outside Illinois versus its total receipts from deliveries to all customers. *Id.* He then used that percentage to make a projection of the portion of ABC's total delivery charges that the auditor determined was improperly deducted from its taxable receipts for those test months. Department Ex. 2, pp. 8, 31. He then projected that same percentage of allowable versus disallowed delivery charges by multiplying that percentage by the total receipts ABC reported as delivery deductions on its monthly returns for the audit period. Department Ex. 2, pp. 8-9, 31.

ABC does not suggest that the auditor's use of test months and a projection overstated the sales transactions that included separately stated delivery charges, and/or which ones did not. Nor does it argue that the auditor's use of test months and a projection caused the Department to overstate the amount of the total delivery charges that ABC reported as deductions on its returns. In other words, ABC does not disagree with the auditors' methods; it disagrees with the auditors' conclusion that all of ABC's receipts from delivery charges were mandatory charges imposed on all of its sales of fuel.

As further evidence that ABC does not challenge the auditor's methods, Jane used the same books and records that the Department's auditor used during the first audit, i.e., ABC's invoice journal, and used the same test months and audit methods when preparing Taxpayer Exs. 15 and 16. The schedules ABC prepared from those books and records, and using the auditor's methods, were offered into evidence and admitted without objection. Tr. pp. 137, 152. Further, Consultant used the same records when opining, based on his review of the documents the first auditor reviewed, that ABC's invoice prices to unit-fill customers were taxable, and that ABC, therefore, properly paid tax on the full price for such invoices. *See* Tr. pp. 165-66 (Consultant). ABC was the proponent of Consultant's testimony, and it was the party that put into evidence its own schedule, created from the same voluminous records that the first auditor reviewed, showing the amount of ABC's minimum delivery charges to its unit-fill customers. Taxpayer Exs. 15-16. Again, those schedules were prepared using precisely the same audit methods the Department's first auditor used. *Compare* Department Ex. 2, pp. 8-9 *with* Taxpayer Ex. 15-16. After reviewing the evidence, I conclude that ABC has failed to show that the Department's audit methods did not meet a minimum standard of reasonableness.

Were ABC's Delivery Charges Inseparable From Its Sales of Fuel

This issue is closely related to the following one, i.e., whether delivery charges were deductible under ROTR § 130.415. I address them separately, however, because the question of inseparability allows a better opportunity to point out how the differences between ABC's customers affect the taxability of some, but not all, of ABC's delivery charges. Simply put, ABC's business sometimes requires it to deliver the fuel it sells to customers, and sometimes does not, depending on the customer. In this way, ABC is not in the same position as a retailer that is in the business of manufacturing ready-mix concrete (*see* Material Service Corp. v. Department of Revenue, 98 Ill. 2d 382, 388, 457 N.E.2d 9, 12-13 (1983); Stark Materials, Inc. v. Illinois Department of Revenue, 349 Ill. App. 3d 316, 322, 812 N.E.2d 362, 367 (4th Dist. 2004)), or catering. Gapers, Inc. v. Department of Revenue, 13 Ill. App. 3d 199, 300 N.E.2d 779 (1st Dist. 1973). In those instances, the retailer's peculiar business necessarily requires it to deliver the product being sold to a customer's location.

The evidence showed that ABC had three general types of customers, unit-fill customers, fleet customers and tank customers. Department Ex. 2, pp. 8-9; Taxpayer Ex. 16; Tr. pp. 42-55, 98-108 (John), 125, 141-42 (Jane); *see also* Tr. pp. 110-14 (Mr. Smith); Tr. II pp. 6-10 (Mr. Jones), 16-18 (Blow). The evidence showed that ABC's unit-fill customers were construction businesses that purchase fuel from ABC, and pay ABC one price to deliver fuel to their construction sites and to fill their different types of construction equipment with fuel. Department Ex. 2, pp. 8-9; Taxpayer Ex. 16; Tr. pp. 42-55, 98-108 (John), 165-66 (Consultant). Tank customers purchase fuel from ABC, and pay ABC extra to deliver the fuel to their site and fill up a fixed tank with fuel.

Taxpayer Ex. 16; Tr. pp. 125, 141-42 (Jane). Finally, ABC's fleet customers purchase fuel from ABC, and pay ABC extra to deliver the fuel to their sites and to fill up their motor vehicles with fuel. Department Ex. 2, pp. 8-9; Taxpayer Ex. 16; Tr. pp. 42-55, 98-108 (John), *see also* Tr. pp. 110-14 (Mr. Smith); Tr. II pp. 6-10 (Mr. Jones), 16-18 (Blow). ABC's fleet customers, therefore, are different from its unit-fill and tank customers in a critical respect — they are practically and legally able to drive their motor vehicles to ABC's yard to purchase fuel and to pick it up, without incurring a delivery charge. Just as a customer cannot go to a ready-mix concrete retailer's location to pick-up already mixed and ready-to-pour concrete, cranes, bull-dozers, front-loaders, and/or fixed tanks cannot be driven on the public way to get to ABC's yard to pick up fuel. *See* 625 **ILCS** 5/1-191 (definition of "special mobile equipment"); 625 **ILCS** 5/3-102 (no certificate of title needed for special mobile equipment), 3-401(c)(c-1) ("A vehicle may not be registered by the Secretary of State unless that vehicle ... was originally manufactured for operation on highways ..."), 3-402 (special mobile equipment excepted from registration with the Illinois Secretary of State).

Here, the first auditor concluded that ABC's customers did not have the option of taking delivery of fuel at ABC's location. As a practical matter, that conclusion is perfectly sound, at least as it applies to ABC's unit-fill and tank customers. That determination, however, is flatly contradicted by the documentary evidence that ABC introduced at hearing regarding its fleet customers. Specifically, the first auditor concluded that "ABC adds a delivery charge for all products sold" (Department Ex. 2, p. 8), whereas ABC's invoices for the audit period show that ABC did not include a delivery charge for all invoices for the audit. Taxpayer Ex. 11. The auditor determined

“[t]he customer does not have the option to pick up the product,’ and that “[n]o one picks up their [ABC’s] product,” (Department Ex. 2, p. 8) whereas ABC’s regularly kept invoices show that customers had the option of picking up fuel at ABC’s yard, and that certain customers regularly did so. Department Ex. 3, p. 8; Taxpayer Ex. 11; Tr. pp. 124-30 (Jane).

While the auditor cited his contact at ABC, Jane, as the source for some of the determinations quoted above, at hearing, Jane expressly denied making the statements attributed to her. Tr. pp. 124-30 (Jane). The documentary evidence, moreover, provides the more probative evidence that the auditor’s determinations were not correct, at least as they apply to ABC’s fleet customers. Taxpayer Ex. 11. In fact, the second auditor specifically noted in her audit narrative that the first auditor’s conclusions could not be reconciled with her review of ABC’s regularly kept books and records. Department Ex. 3, p. 8. Thus, I conclude that ABC has presented documentary evidence, and testimony that is closely identified with those records, to show that ABC’s delivery of fuel to its fleet customers was not inseparable from its sales of fuel to such customers. Taxpayer Ex. 11; Department Ex. 3, p. 8; Tr. pp. 37-49 (John), 110-14 (Mr. Smith); Tr. II pp. 6-10 (Mr. Jones), 16-18 (Blow).

On the other hand, I conclude that the receipts ABC received from delivery charges on invoices prepared regarding its sales to tank customers *were* inseparable from its selling price of fuel to such customers. Because the tanks were fixed at the customer’s place of business, tank customers, as a practical matter, lacked the option to take delivery of the fuel it purchased from ABC at ABC’s yard. *See* Tr. pp. 141-42 (Jane); Taxpayer’s Brief, p. 7. I further conclude that the receipts ABC received from the minimum delivery

charges it collected from its unit-fill customers should also be deemed to be inseparable from its selling price of fuel to such customers. As to these transactions, John conceded that ABC's price for the fuel it sold to such customers already included an unstated charge for delivery. Tr. pp. 98-99 (John). Illinois law is clear that where a sale of tangible personal property requires delivery of the property to the customer, any added delivery charge should be included within the selling price for the product. Material Service Corp., 98 Ill. 2d at 388, 457 N.E.2d at 12-13.

As a result of hiring Consultant to review its books and records and the Department's audit workpapers, ABC prepared its Exhibit 16, using the same invoices and methods used by the auditors. Taxpayer Ex. 16. That schedule sets forth the total amount of receipts that it received from entries on invoices for minimum delivery charges collected from its unit-fill customers, as well as the total receipts it received as delivery charges from sales to its tank customers. *Id.*; Tr. pp. 141-52 (Jane). That exhibit was admitted at hearing without objection. Tr. p. 152. ABC had receipts of \$1,533,147.80 from minimum delivery charges to its unit-fill customers, and \$615,087 from delivery charges made to its tank customers. Taxpayer Ex. 16. Those receipts were included within the amounts that ABC claimed as deductions on its monthly returns. *Id.*; *see also* Department Exs. 2-3. Because such delivery charges were inseparable from ABC's selling prices for fuel to such customers, I conclude that those receipts were properly disallowed as deductible delivery charges. Material Service Corp., 98 Ill. 2d at 388, 457 N.E.2d at 12-13.

**Were ABC's Delivery Charges to Fleet Customers Exempt
Under Retailers' Occupation Tax Regulation (ROTR) § 130.415**

The final issue is whether ABC has demonstrated that the delivery charges it received from making sales to its fleet customers, and which receipts it reported as deductions on its returns, were exempt under the plain text of ROTR § 130.415. For decades, the Department has had a regulation in which it notified all affected persons how it would administer the Retailers' Occupation Tax Act (ROTA) regarding the taxability of transportation and delivery charges. That regulation is codified at ROTR § 130.415, and was in effect during the audit period. That regulation provides, in pertinent part:

Section 130.415 Transportation and Delivery Charges

a) Transportation and delivery charges are considered to be freight, express, mail, truck or other carrier, conveyance or delivery expenses. These charges are also many times designated as shipping and handling charges.

b) The answer to the question of whether or not a seller, in computing his Retailers' Occupation Tax liability, may deduct, from his gross receipts from sales of tangible personal property at retail, amounts charged by him to his customers on account of his payment of transportation or delivery charges in order to secure delivery of the property to such customers, or on account of his incurrance of expense in making such delivery himself, depends not upon the separate billing of such transportation or delivery charges or expense, but upon whether the transportation or delivery charges are included in the selling price of the property which is sold or whether the seller and the buyer contract separately for such transportation or delivery charges by not including such charges in such selling price. In addition, charges for transportation and delivery must not exceed the costs of transportation or delivery. If those charges do exceed the cost of delivery or transportation, the excess amount is subject to tax.

c) If such transportation or delivery charges are included in the selling price of the tangible personal property which is sold, the transportation or delivery expense is an element of cost to the seller within the meaning of Section I of the Retailers' Occupation Tax Act, and may not be deducted by the seller in computing his Retailers' Occupation Tax liability.

d) If the seller and the buyer agree upon the transportation or delivery charges separately from the selling price of the tangible personal property which is sold, then the cost of the transportation

or delivery service is not a part of the “selling price” of the tangible personal property which is sold, but instead is a service charge, separately contracted for, and need not be included in the figure upon which the seller computes his Retailers' Occupation Tax liability. Delivery charges are deemed to be agreed upon separately from the selling price of the tangible personal property being sold so long as the seller requires a separate charge for delivery and so long as the charges designated as transportation or delivery or shipping and handling are actually reflective of the costs of such shipping, transportation or delivery. To the extent that such charges exceed the costs of shipping, transportation or delivery, the charges are subject to tax. The best evidence that transportation or delivery charges were agreed to separately and apart from the selling price, is a separate and distinct contract for transportation or delivery. However, documentation which demonstrates that the purchaser had the option of taking delivery of the property, at the seller's location, for the agreed purchase price, or having delivery made by the seller for the agreed purchase price, plus an ascertained or ascertainable delivery charge, will suffice.

86 Ill. Admin. Code § 130.415(a)-(d).

The Department attempts to mitigate the probative value of the invoices that ABC offered into evidence to show that ABC’s fleet customers had the option to purchase fuel from ABC and take delivery of that fuel at ABC’s place of business without incurring a delivery charge, or having ABC deliver fuel to them, for an additional delivery charge. First, the Department questions whether ABC’s invoices “mean that the Taxpayer[’s customer] only purchased fuel?” Department Brief, p. 8. It then answers that question by saying that “[w]e don’t know”, and that “[a]bsent some corroborating testimony we will never know.” *Id.*, pp. 8-9. This is an odd argument, since Illinois’ tax statutes, and Illinois case law construing those acts, require documentary evidence to be offered to rebut the Department’s prima facie case. Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296-97, 421 N.E.2d 236, 239 (1st Dist. 1981) (uncontroverted testimony that was not

corroborated with documentary evidence was insufficient to show that taxpayer was entitled to claimed exemption).

But if corroborative testimony were required to show that the invoices included within Taxpayer Ex. 11 constitute evidence showing that ABC's fleet customers had the option to pick up fuel at ABC's place of business without incurring a delivery charge, ABC did that, too. ABC presented three separate witnesses at hearing, each of whom either worked for or owned one of ABC's fleet customers during the audit period. Each of those witnesses testified that he was the person who negotiated the agreement to purchase fuel from ABC for his respective employer or business. Tr. pp. 13 (Mr. Smith); Tr. II pp. 6-7 (Mr. Jones), 17 (Blow). Each witness, therefore, had personal knowledge that ABC negotiated the price for fuel, and that ABC then negotiated a separate price for delivery, if delivery was desired. *Id.* Each also testified that he knew that his respective employer or business could go to ABC's yard to pick up fuel in its motor vehicles, for the same price it negotiated to purchase fuel from ABC, without incurring a delivery charge. *Id.* Each witness was competent, each was credible, and their testimony is closely identified with ABC's books and records. At the very least, and taken either individually or collectively, such testimony was not so incredible as to be beyond belief. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 334, 155 N.E.2d 3, 7 (1958). Thus, ABC presented both documentary evidence, as well as credible testimony closely identified with ABC's regularly kept books and records, to show that ABC's fleet customers had the option of picking up the fuel it bought from ABC at ABC's yard without incurring a delivery charge, or having ABC deliver the fuel to the customer's location for an additional delivery charge. 86 Ill. Admin. Code § 130.415(d).

Next, the Department referred to the first auditor's narrative, and his testimony at hearing, to suggest that the invoices that ABC offered into evidence do not necessarily reflect sales of fuel without a delivery charge. Department Brief, pp. 8-9. In his narrative, the first auditor referred to and made the following comments regarding documents ABC submitted to the Department's Informal Conference Board showing sales of fuel that it dispensed to customers at its yard by writing:

*** Only a few examples [of invoices] presented were within the audit period. In each of the examples which noted no delivery charge, the price of the fuel per gallon was higher than invoices with delivery charges during the same period. Which lead this auditor to believe that these were probably not actual pick-ups but instead were deliveries with a price agreement, which included no delivery charge in lieu of a higher price per gallon. Pricing agreements such as this are common in the industry.

Department Ex. 2, p. 9.

I reject the Department's suggestion that the multiple invoices included within Taxpayer Ex. 11 have no probative value on the question whether ABC's fleet customers had the option to pick up fuel at ABC's place of business, and without incurring a delivery charge. First, the invoices themselves provide that the "Delivery Location" for each sale was "ABC YARD." Taxpayer Ex. 11, *passim*. Each, moreover, does not include a charge under the heading "Del. Chg." *Id.* Since the Department trusted ABC's ability to identify on an invoice a delivery location when a delivery charge was included on that invoice (e.g., Taxpayer Exs. 10, 12), I see no reason to distrust ABC's ability to identify when it made a sale of fuel at its yard, or its ability to identify a sale for which it did not make or collect a charge for delivery. Taxpayer Ex. 11.

I also expressly reject the suggestion that ABC's invoices for sales of fuel made at its yard either misstated where a delivery was made, or that, when preparing the invoices

for such sales, ABC included a hidden delivery charge in the price that it charged such customers for the fuel each picked up at ABC's yard. On this point, I note that the auditor does not identify what other invoices he was talking about when he said that ABC charged other customers more for a gallon of fuel. Nor do I know what the auditor meant when he said that he saw invoices on which ABC charged other customers lower selling prices per gallon of fuel during the "same period." Department Ex. 2, p. 9. Recent experience alone teaches that the passage of a couple of weeks can bring with it a significant change in the price of fuel.

More importantly, the documentary evidence clearly establishes that, on any given day, ABC charges different customers different selling prices for each gallon of fuel sold. Taxpayer Ex. 6-8. The first two pages of Taxpayer Ex. 6 perfectly illustrate the point. Page one of that exhibit is a letter in which ABC notified one customer that for the week beginning January 8, 2001, its selling price per gallon of fuel would be \$1.0932, and its price for delivering that fuel to the customer would be 13 cents per gallon. Taxpayer Ex. 6, p. 1. Page two of that exhibit is a letter in which ABC notified a different customer that for the very same week, ABC's selling price per gallon of fuel would be \$1.5572, and its price for delivering that fuel to the customer would be 19 cents per gallon. Taxpayer Ex. 6, p. 2. Those regularly kept books and records provide direct documentary evidence supporting ABC's fundamental position at hearing, which was that it separately negotiated its selling price for fuel with each of its customers, and that it also separately negotiated its charges for delivering such fuel to any given customer, based on ABC's cost to delivering fuel to the particular customer.

Illinois case law, moreover, provides that where a retailer maintains sufficient books and records, the Department is not at liberty to ignore them. In Goldfarb v. Department of Revenue, 411 Ill. 573, 104 N.E.2d 606 (1952), a taxpayer challenged the Department's correction of its returns, where the correction ignored the retailer's books and records showing its actual daily receipts, and where the correction was based on the auditor's opinion that the taxpayer was not ringing up on a cash register all of its sales. *Id.*, at 578, 104 N.E.2d at 608. Here, the situation is much the same, at least for purposes of the probative value of ABC's invoices regarding sales of fuel made at its yard. ABC's invoices provide clear, credible, documentary evidence that, during the audit period, ABC's fleet customers had the option of purchasing fuel from ABC and picking it up at ABC's yard without incurring a delivery charge, or having ABC deliver that fuel to them for an additional delivery charge. Taxpayer Ex. 11; Department Ex. 3, p. 8; 86 Ill. Admin. Code § 130.415(d).

Finally, the Department argues that the third sentence in ROTR § 130.415(d) should be understood to mean that delivery charges are properly deductible only when a retailer creates and maintains a separate, written contract for the separately negotiated delivery charge. Department's Brief, pp. 12-13. This argument, however, ignores the plain text of very next sentence within that paragraph, which provides, "However, documentation which demonstrates that the purchaser had the option of taking delivery of the property, at the seller's location, for the agreed purchase price, or having delivery made by the seller for the agreed purchase price, plus an ascertained or ascertainable delivery charge, will suffice." 86 Ill. Admin. Code § 130.415(d). ABC introduced, without objection, documentary evidence which did just that. Taxpayer Ex. 11.

Moreover, if the Department intended to require a retailer to create a separate written contract between it and every customer to whom it collected receipts from a charge for delivery, and to keep and present such a document as a condition for claiming that such receipts were deductible, it could have done so. *See, e.g.*, 86 Ill. Admin. Code §§ 130.305(m), 130.340(g) (regulations setting forth contents of exemption certificates required to claim deduction for receipts from sales of, respectively, farm machinery and equipment, and rolling stock). The applicable regulation, however, simply does not create such a condition precedent. 86 Ill. Admin. Code § 130.415(d).

Related to this final argument, the Department points out that statements made on ABC's website, which statements were printed out and included as an attachment to Department Ex. 2, stress ABC's ability and willingness to deliver fuel to customers. Department's Brief, pp. 10, 13. It also points out that 99% of taxpayer's sales involve its deliveries of fuel to customers. *Id.* This argument again seeks to mitigate the effect of the invoices included in ABC's exhibit 11, or referred to by the second auditor in her narrative (Department Ex. 3, p. 8), by suggesting that they should be considered probative only to show that those particular customers had the option to pick up fuel at ABC's yard. But I am hesitant to conclude, in the face of the clear, competent, and credible testimony of three unrelated witnesses, that the only fleet customers who had the option of taking delivery of fuel at ABC's yard were those who actually exercised that option.

I conclude that ABC has rebutted the Department's prima facie case on this point. Thereafter, the burden shifted to the Department to show, by a preponderance of the competent evidence, that ABC's fleet customers did not have the option to pick up fuel at

ABC's place of business, without incurring a delivery charge. *See, e.g., Goldfarb v. Department of Revenue*, 411 Ill. 573, 580, 104 N.E.2d 606, 609 (1952). The Department has not done so here.

Was the Late Payment Penalty Properly Assessed

In a footnote of its brief, the Department stated that it “would not make issue with the small ‘reasonable cause’ penalty in the amount of \$2,505 for the month of December 2003.” Department’s Brief, p. 14 n.8. Thus, I conclude that the Department has expressly waived the issue, and that the penalty assessed should be canceled.

The Propriety of the Interest Rate Imposed by the Tax Delinquency Amnesty Act’s Amendment to § 3-2 of the UPIA

ABC did not address this issue in either its initial or its reply brief. At a minimum, therefore, its failure to raise any argument on this point allows me to infer that it has waived the issue. *Arvia v. Madigan*, 209 Ill. 2d 520, 526, 809 N.E.2d 88, 93 (2004).

But even if it has not waived the issue, section 3-2(a) of the UPIA sets forth the interest rate to be applied to any tax due under the various Acts to which the UPIA relates. 35 **ILCS** 735/3-2 (2003). When it passed the TDAA, the Illinois General Assembly amended UPIA § 3-2 by adding paragraph (f) to that section. P.A. 93-0026.

That paragraph provides:

(f) If a taxpayer has a tax liability that is eligible for amnesty under the Tax Delinquency Amnesty Act and the taxpayer fails to satisfy the tax liability during the amnesty period provided for in that Act, then the interest charged by the Department under this Section shall be imposed at a rate that is 200% of the rate that would otherwise be imposed under this Section.

P.A. 93-0026, § 905; 35 **ILCS** 735/3-2(f).

The TDAA applies to tax liabilities arising regarding “any taxable period ending after June 30, 1983 and prior to July 1, 2002 ...” P.A. 93-0026. Thus, it applies to at least some of the tax due regarding the first audit period. Since statutes are presumed constitutional (Geja's Cafe v. Metropolitan Pier & Exposition Authority, 153 Ill. 2d 239, 248, 606 N.E.2d 1212, 1216 (1992)), the interest rate to be imposed on the tax remaining due in this matter shall be as set forth in UPIA § 3-2, taking into account § 3-2(f).

Conclusion

I conclude that ABC has rebutted the Department’s prima facie case regarding the taxability of the receipts it received from delivery charges to its fleet customers. I respectfully recommend that the Director revise the NTLs so as to: eliminate the amounts of tax assessed that were based on the determination that ABC’s fleet customers do not have the option of picking up fuel at ABC’s yard; to assess tax on the receipts ABC received from minimum delivery charges to its unit-fill customers and from delivery charges to its tank customers; and to eliminate the late payment penalty assessed regarding the month of December 2003. I recommend that the Director finalize the NTLs as so revised, with interest to accrue pursuant to statute.

November 18, 2008
Date

John E. White, Administrative Law Judge