THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court
The Honorable Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2014-001170

South Carolina Department of Motor Vehicles . . . . . Appellant,

v.

Russo Dumpster, Inc. . . . . Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Respondent is a motor carrier operating qualified vehicles in its business across state lines. Particularly, it hauls construction debris in various locations in South and North Carolina (R. p. 89, lines 13-20; R. p. 168). On April 9, 2011, Respondent was notified by the Appellant South Carolina Department of Motor Vehicles ("Department") that it was to be scheduled for an audit of records for the International Fuel Tax Agreement ("IFTA") for the period of January 1, 2008 through December 31, 2009, as well as for the International Registration Plan ("IRP") for the period of December 1, 2010 through November 30, 2011, involving mileage reported from July 1, 2009 through June 30, 2010 (R. p. 243). The auditor made arrangements with Respondent, and an opening conference was held at the Respondent's offices in Fort Mill, South Carolina on November 14, 2011, with the actual compliance review commenced March 5, 2012 (R. p. 168). As a result of the audit, the Department of Motor Vehicles Motor Carrier Services

IFTA Unit ("Motor Carrier Services") determined that the Respondent had not maintained sufficient records under applicable IFTA requirements to justify claimed tax credits. Motor Carrier Services notified Respondent the audit had resulted in additional tax liability of $49,667.05 and sent a billing for that amount on April 24, 2012 (R. p. 160). On May 25, 2012, Motor Carrier Services notified Respondent that its IFTA license was to be suspended for failure to pay the assessment. Respondent requested a hearing to contest the assessment and suspension, and a hearing was set for September 4, 2012 (R. pp. 465-468).

The hearing was held on September 4, 2012 in Columbia, South Carolina. On March 14, 2013, the Office of Motor Vehicle Hearings ("OMVH") Hearing Officer issued a Final Order and Decision ("FOD") rescinding the suspension on the ground that there was no evidence that Motor Carrier Services had advised Respondent before January 6, 2011, of what records Respondent was required to maintain and produce for an audit (R. pp. 133-138).

The Department filed a Notice and Motion for Reconsideration of the FOD of March 14, 2013 on March 21, 2013 (R. pp. 129-130). This Motion was denied by Order of April 22, 2013 (R. pp. 141-142).

The Department appealed this ruling to the Administrative Law Court ("ALC"). By Order of March 24, 2014, the Honorable Shirley C. Robinson upheld the OMVH Order, holding that the Hearing Officer had erroneously discounted testimony the testimony of the Motor Carrier Services Audit Supervisor that in each application for renewal of an IFTA license the licensee must confirm that it is aware of and will comply with the law and IFTA agreement. The Court held that even though such signed

applications established a duty on the part of the licensee to maintain records, that duty was subservient to the IFTA Articles of Agreement requirement that the Department disclose IFTA record keeping obligations to carriers, and the Department had not proven that it had made such obligations known to the Respondent (ALC Order of March 24, 2014; R. pp. 2-13).

On April 4, 2014, the Department filed a Notice and Motion for Reconsideration and a Notice and Motion to Present Additional Evidence under *S.C. Code Ann.* §1-23-380 (3), proffering affidavits attempting to show that it had in fact produced and maintained an IFTA Manual at all times relevant to the matter, that the Manual detailed the necessary records that need to be preserved, that it had been available on the Department's webpage and that its regular business practice is to provide a copy to all licensees upon licensure. The record retention policies, however, prevented the Department from identifying exactly how and when it was given to Respondent or what employee would have given it to Respondent (R. pp. 15-66). The Department's Motions were denied in a one page Order issued April 30, 2014, stating there was no need for consideration of further evidence (R. p. 14). This appeal follows.

BACKGROUND

This dispute arises out of the requirements of South Carolina's Statutes on Road Taxes for Motor Carriers, *S.C. Code Ann.* §§ 56-11-10 *et seq.* and the International Fuel Tax Agreement, or "IFTA." IFTA is an interstate compact between the contiguous forty eight States and certain Provinces in Canada. It was devised in the 1990s as a means of simplifying fuel tax payment for those carriers which do interstate business. It allows a carrier to file in its "base jurisdiction" or home state, motor fuel taxes for each state it

owes such taxes to, thus enabling the carrier taxpayer to file taxes in only one state rather than multiple states. The base jurisdiction then forwards taxes owed by the carrier taxpayer to those other states by means of a clearinghouse. *See, generally, May Trucking Company, Inc. v. Department of Transportation*, 203 Or. App. 564, 566 -67, 126 P. 3d 695, 697-98 (2006); *Anderson Excavating Co. v. Neth*, 275 Neb. 986, 990, 751 N.W. 2d 595, 597 (2008). For ordinary fuel use, a carrier that does not cross state lines need not and cannot get an IFTA license, since there is no need to apportion tax payment to various states at various tax rates. For carriers that do cross state borders, however, it is necessary to determine what fuel must be taxed at what state's tax rates. For that reason, IFTA requires fairly precise recordkeeping of its licensees, requiring motor carriers to document fuel purchased by type, date, location, amount of fuel, odometer reading at fueling and by the particular qualifying vehicle within the fleet that was fueled at the time. Motor Carriers must also document their routes of travel and odometer readings as of each time they cross state boundaries. For bulk fuel, they must keep records that prove such fuel is tax paid fuel, and not use untaxed fuel such as dyed fuel meant for governmental, agricultural or other off road purposes. *See, Comptroller of the Treasury v. Clise Coal*, 173 Md. App. 689, 692-93, 920 A. 2d 561, 563-64 (2003). This means that records must be kept for the purchase of the taxed fuel, the amount put in bulk storage tanks, and the dates, odometer readings and metered numbers of gallons put in each qualifying vehicle when withdrawals from bulk storage are made. If, for example, a carrier illegally uses untaxed fuel from bulk storage tanks and it is discovered (for example by law enforcement checking the fuel on the highway and finding that it is untaxed dyed fuel) the carrier may be subject to various penalties. Even if a carrier has

paid taxes at the pump in the various states, IFTA requirements specify that if records are not kept properly by the carrier and the records later audited, the carrier loses the benefit of tax credits and the fuel used will be deemed taxable under an IFTA formula.

ARGUMENTS

1. THE ALC ERRED IN UPHOLDING THE HEARING OFFICER'S RESCISSION OF RESPONDENT TAXPAYER'S IFTA AUDIT ASSESSMENT SUSPENSION ON THE GROUND THAT THE DEPARTMENT ALLEGEDLY HAD NOT ADVISED THE TAXPAYER OF THE NECESSARY RECORDS TO MAINTAIN.

    a. THE IFTA INSTRUCTION TO BASE JURISDICTIONS TO INFORM MOTOR CARRIERS OF IFTA RECORD KEEPING REQUIREMENTS IS NO ELEMENT IN A TAX AUDIT ASSESSMENT CONTESTED CASE.

This matter is at base a tax liability case. The single question, which has different facets, involves whether a taxpayer may, by alleging that the governmental did not sufficiently inform the taxpayer how to maintain records, escape tax liability. As far as the Department can determine, should this Court uphold the rulings of the Administrative Law Court, and the OMVH, it would be the first holding of its kind by a reported court in the nation.

The elements in issue in a contested case concerning an audit assessment in an IFTA case are whether the taxpayer is given proper notice of the audit, whether the audit is performed according to IFTA formulas based on the records made available *at the time of the audit*, whether the results of the audit and any resulting underpayment is made known to the taxpayer, and whether the taxpayer is properly advised of the right to contest them. *See* IFTA Articles of Agreement Art. XII, R. 1210-1240; Art. XIV, R. 1400-1440; IFTA Audit Manual A. 610-690 [Reference to the various IFTA, Inc.

materials referenced to in this brief may be found at http://www.iftach.org/manuals]. Since the burden of proof is on the taxpayer, the taxpayer must prove that any of these elements is lacking. If at hearing, the taxpayer fails to prove any of these elements is lacking, or that the assessment is improper or excessive, the inquiry is ended and the assessment must be sustained (IFTA Art. XII, R. 1210.300).

The Administrative Law Court pointed out the requirements for the disclosure of IFTA recordkeeping requirements but then went on with minimal analysis of why the alleged failure trumps clear audit liability. One searches in vain for a suggestion in the IFTA Agreement that this failure to document compliance with IFTA Art. III, R. 360 was intended by IFTA drafters to *negate* tax liability determined by a properly conducted audit. The Court actually confirmed that it searched the IFTA Articles of Agreement without finding such a provision (R. pp. 11-12). A reader will search the other IFTA Manuals in vain for a suggestion that the alleged failure to disclose by the base state was intended to excuse audited tax liability. One also searches in vain for an example of IFTA case law where the defense of "the state did not tell me what records to keep" has even been seriously asserted as a defense to liability, much less used as a successful defense.

To the contrary, case law appears to confirm that compliance with IFTA rules is mandatory upon registering mileage in another state. *In re Fagan*, 465 B.R. 472, 476 (2012) ("Once a motor carrier travels across state boundaries, the tax is imposed whether the motor carrier agrees to accept it or not"); *see also*, *Senex Explosives, Inc. v. Commonwealth of Pa.*, 58 A. 3d 131, 139 (Pa. Commw. Ct. 2012) ["Taxpayer is not entitled to tax paid fuel credits without the requisite records, *Proper recordkeeping is the taxpayer's burden. The Department lacks the authority to offer credits for*

unsubstantiated fuel use." (emphasis added)]. IFTA governing documents are clearly binding on the licensees (IFTA Articles of Agreement, Art. I, R.120).

In addition, the case law is uniform in holding that the failure to maintain records sufficient to prove under IFTA guidelines that the fuel is tax paid results in additional tax liability. There is no hint in them that the notion of blaming the government would be entertained. *See, generally* IFTA cases cited at pages 14 and 15 below.

Logically, had the IFTA drafters determined that the requirements of Art. III, R. 360 were sufficiently in conflict with the assessment and collection procedures [*See, e.g.* Art. XII, R.1200-1240] as to be incompatible, the drafters would have so stated explicitly. Yet the ALC not only found this alleged conflict but also determined that the only means by which such a conflict can be resolved is by rescinding the suspension, essentially exacting a *forfeiture* of audit liability which is by now otherwise deemed correct and incontestable. This fashioned remedy is not to be found in the IFTA Articles of Agreement themselves, nor in its Audit Manual nor the Procedures Manual, nor in the South Carolina Road Tax statutes imposing state taxes and authorizing IFTA membership. The IFTA Articles of Agreement do make provisions for state membership compliance problems (Art. XV, R.1555). It provides for a dispute resolution process between member jurisdictions and between member jurisdictions and IFTA licensees for disputes *other than* disputes involving the imposition, assessment and collection of jurisdictional motor fuel use taxes collected pursuant to IFTA (*Id.* at R. 1555.100.005 and .010). Respondent, in any case, did not seek any such remedy. In cases of extreme non-compliance, the IFTA membership may vote on a resolution requested by the Board of Trustees for expulsion of a member, which may result in expulsion of the member

jurisdiction and notification of the Governor or chief executive officer of the jurisdiction (*Id.* at R. 1555.400). The IFTA Procedures Manual provides for Program Compliance Reviews or peer reviews to be made to assure compliance with the Agreement. IFTA Procedures Manual at P. 1210 through 1230. In case of expulsion federal highway funds may be withheld from the non-compliant state. These are the remedies listed for non-compliant member jurisdictions, and forfeiture of audited tax liability is clearly not one of the remedies, either against the base state or the other IFTA states depending on the collection of their road fuel taxes. South Carolina has never been subject to any IFTA action for non-compliance.

The OMVH's FOD of March 14, 2013 and the Order Denying Reconsideration of April 22, 2013, show a fundamental lack of understanding of motor carrier tax issues on several levels. First, while the ALC Order relied, albeit incorrectly, on a provision of the IFTA Articles, the OMVH's justification for enforcing a forfeiture of tax liability was cut out of whole cloth, without a shred of legal justification. There was no reliance on IFTA requirements, contract law, statutory law or the like. There was merely a conclusion that the Department should not be allowed to impose the audit assessment if it did not show at hearing that Respondent had signed an acknowledgement predating the time period the audit covered, without apparent consideration of the underlying requirements of qualifying for an IFTA license itself. There was no discussion of how the education of the taxpayer had become an element that the Department was called upon to prove to support an audit assessment, after dozens if not hundreds of OMVH IFTA cases where it was not. There was no discussion of why the penalty imposed was appropriate for the alleged failing.

The Hearing Officer acknowledged that Ms. Parnell had testified that each license renewal application contained an affirmation that the licensee was aware of IFTA requirements, including record keeping requirements, but illogically concluded that "she offered no evidence either through testimony or documents to show specifically whether Ms. Russo was made aware of the requirements at the time (sic) renewal. There was no document signed by Ms. Russo in evidence" (R. p. 137). Ms. Parnell's testimony actually stated:

> Yes, at the time of renewal for IFTA, *all* carriers are required to, when they renew, to sign a documentation during the renewal. And that—in that particular document, there is a statement that requires them to acknowledge that they are aware of the requirements for record keeping.
>
> (R. p. 86, line 23-p. 87, line 4; emphasis added)

It appears undisputed that Respondent was an IFTA licensee in 2008 and 2009, the very years for which it seeks to avoid tax liability. Ms. Russo testified to the various jobs the company had done in North Carolina (R. 118, lines 13-20). Logically, since Ms. Parnell's testimony indicated that *all* applicants for renewal sign such a statement, the Respondent must be included within the set of all renewal applicants. As for the suggestion that Ms. Parnell's testimony did not clarify that the Department made Respondent aware of the requirements, the applications and reapplications were clearly statements someone made on behalf of the Respondent that had to be answered in the affirmative in order to either get a license or a renewal of a license. It also had to be either answered truthfully or untruthfully. Either way the applicant has notice that IFTA has record keeping requirements. The notice Ms. Parnell referred to is mandated by IFTA Articles of Agreement, Art. III, R. 315 and IFTA Procedures Manual P. 100-160. People are generally presumed to have read and understood the contracts they have signed [*Sims v.*

Tyler, 276 S.C. 640, 281 S.E. 2d 229 (1981)], and citizens are presumed to know the law and are charged with exercising reasonable care to protect their interests [*Morgan v. S.C. Budget and Control Bd.*, 377 S.C. 313, 320, 659 S. E. 2d 263, 267 (Ct. App. 2008); *see also, Harvey, Nobel & Beaverbrook, Inc. v. Dir., N.J. Div. of Motor Vehicles*, 19 N.J. Tax 153, 162 (2000)].

The Department now understands the ALC's ruling that the Respondent had the burden of proof (R. p. 13) to be the law of the case, since the Respondent put forward no evidence of the incorrectness of the audit assessment. Even if the Department had the burden of proof, neither the degree to which the Department had educated the taxpayer nor the state of mind of the taxpayer would have been an element.

Even if the requirement to inform the taxpayer of the record keeping requirements were an element to be proven (which the Department steadfastly asserts is not the case), the OMVH's alleged factual underpinnings are misconstrued and incorrect. The FOD points out that there is no evidence Ms. Russo had ever been given IRP and IFTA manuals previously (R. p. 155). This is simply not true. The Internal Control Questionnaire, documenting the initial interview of the audit, question 3. requests: "Does the company have current copies of the laws, rules, IRP/IFTA regulations or copies of the instructional manuals to be knowledgeable of the various laws and regulations?" to which the auditor checked off "yes" (R. p. 253). Not only is this *some* evidence of exactly what it indicates, but by implication, shows there is a reason to believe there *should be* copies of IFTA requirements in the possession of the licensee. In other words, it is an indication that the Department at some point provides the materials or a means to get them. The FOD states that the audit report states that Ms. Russo was given manuals during the

opening conference (R. p. 155). It is true that he wrote such a statement, but it is noteworthy that the statement was not placed under the heading "opening conference" as it would logically be, but under the report for the "closing conference" (R. pp. 168-169). This suggests that the reference to "opening" conference may have been confused and "opening" was used when "closing" was intended, and the auditor intended to convey that he routinely gives the licensee the most current copy of the manuals at the end of an audit to assist with future compliance. Even if that were not the case, there is no reason not to take the documentation of the Internal Control Questionnaire at its literal purport. To accept that question 3. really means that the manuals were provided only at the beginning of the audit would mean that question 3. *alone* of all the questions on the Internal Control Questionnaire would have no bearing on the state of the taxpayer's records and systems to be audited. In fact, there would be no reason to ask question 3. if the question sought to determine whether the auditor had just given the taxpayer the manuals, because if it were true, giving the taxpayer the manuals at that time would have no bearing on and no relationship to what was to be audited. It could only impact future audits or compliance issues. As the Auditor James Vaughn testified concerning the Internal Control Questionnaire:

> Q: Did you do a document that is labeled internal control questionnaire?
>
> A: Yes, I did.
>
> Q: Is that something you ask the carrier or you—
>
> A: No, that's something I observe when I'm there.
>
> (R. p. 94, lines 8 – 13).

The FOD states "[a]t the time of the audit, Russo was correctly preparing and maintaining records" (R. p. 155). This is not at all clear from the record, and potentially misled the ALC (R. p. 12). By Ms. Russo's own admission, the bulk tank meter was not installed until January of 2012 (R. p. 114, line 24-p. 115, line 1). She likewise testified that her drivers started taking the more detailed records in 2010 (R. p. 115, lines 1-6), further disproving the underlying premise accepted by the Court, that all record keeping problems of the Respondent stemmed from the Department's alleged failure to inform Respondent of the requirements, and that immediately after or shortly after Ms. Russo signed the Agreement to Prepare/Maintain Records on January 6, 2011 (R. p. 245), the Respondent rectified all such problems. Instead, by her own admission, the bulk tank was not metered until January of 2012, and the improvements in distance reporting came about when she prevailed on drivers to keep more detailed reports in 2010, likewise having no relationship to the Agreement to Prepare/Maintain Records signed in 2011.

When presented with the Department's Motion for Reconsideration, pointing out, as it had in closing argument, that the duty to inform the taxpayer of how to keep records was not an element in a contested case to establish audit assessment liability, the Hearing Officer responded with additional circular argument that the Department did not show Respondent was aware of the documents it would require. This of course was wrong because of the Hearing Officer's erroneous assumption that the Department bore the burden of proof, as the ALC later determined. The Order Denying the Motion for Reconsideration went on to say: "The testimony was unrefuted that at least three times during the audit period, Russo went to the Blythewood office of the Petitioner and discussed her liability and how to fill out the forms properly to indicate that" (R. p. 141).

While it is not entirely clear what this sentence is intended to show, logically in a paragraph dealing with the Department's alleged failure to inform Respondent, the sentence would seem to be intended to show that Ms. Russo did not know the requirements or that by the fact that Ms. Russo asserted she had gone to Blythewood on three occasions, the Department was somehow derelict in not making the requirements known to her at those times. Again, this shows a misunderstanding of the nature of the issue. Ms. Russo did testify that she went to Blythewood on three occasions in connection with the IFTA returns (R. p. 109, lines 3-16; R. p. 113, line 23-p. 114, line 14). She did not state the nature of her inquiries, however. All she said was that she or a clerk who was later fired sent returns with checks and that they had been returned and she went to Blythewood to get them straightened out. There was no question that the returns were later accepted and filed. Ms. Russo did not identify the customer service representative or representatives she spoke with, or what they talked about. More pointedly, there is no suggestion, nor any reason to suspect that any part of the conversations were or should have been about record keeping requirements. As likely as not, if the returns were sent back, it was because of something that needed correction. The counter representative at Blythewood would have no knowledge of or reason to question mileage as reported on the return. The adequacy or inadequacy of the underlying record keeping could not be discovered until an audit, whether Respondent was aware of requirements or not. At best an assertion about Ms. Russo's visits is an irrelevancy.

The next to last paragraph in the Order Denying Motion for Reconsideration reads in pertinent part as follows:

> The Final Order and Decision was not saying that Russo did not have any IFTA liability. However, the burden of proof for a

> suspension of the license is on the Petitioner to show what the assessment should be If it maintains that it could not determine what the exact amount was because the Respondent did not prepare and maintain and maintain the records as required, the Petitioner must show that the Respondent knew that she was required to do.
>
> (R. pp. 142, 146).

As for the first sentence, that Ms. Russo does not have any liability is *exactly* what the FOD is saying, at least in effect. The second sentence, above, is simply wrong, as later acknowledged by the ALC (R. p. 13), and the Department would submit this is now the law of the case. The OMVH has now adjusted its procedures to regard the motor carrier in IFTA cases as the moving party with the burden of proof.

The ALC correctly ruled on the burden of proof issue but misconstrued the significance of that ruling and read into the IFTA provision a disqualifier or exemption from tax liability that is not to be found in the statute or IFTA. This is inconsistent with South Carolina case law as it relates to exemptions from tax generally [*Home Medical Systems, Inc. v. S. C. Dep't. of Revenue*, 382 S.C. 556, 564, 677 S.E. 2d 582, 587 (2009) ("as a general rule, tax exemption statutes are strictly construed against the taxpayer")] as well as the various jurisdictions construing IFTA or statutes enacted pursuant to it on the issues of burden of proof, tax exemption, or otherwise challenging the agency's taxing procedures [*US Express Leasing, Inc. v. Dep't. of Revenue,* 385 Ill. App. 3d 378, 381, 894 N.E.2d 890, 893 (2008) (Taxpayer must prove exemption clear and convincingly. "In analyzing an exemption, all facts are to be construed and all debatable questions resolved in favor of taxation."); *Adway Properties, Inc. v. State ex rel. Okla. Tax Comm'n.*, 130 P. 3d 302, 304 (Okla. App. 2006) (Tax protestant bears the burden of proof); *May Trucking Company, Inc.*, *supra*, at 572, 126 P. 3d at 701 (Burden is on the taxpayer challenging the

state's adoption of IFTA to produce evidence); *Senex Explosives, Inc. supra.* 58 A. 3d at 139 (Taxpayer has the burden of showing that tax exemption applies); *Southern Pines Trucking v. Commonwealth of Pa.*, 42 A.3d 1222, 1229 (Commnw. Ct. 2012) (Taxpayer has the burden of showing the tax was improperly assessed); *R&R Express v. Commonwealth of Pa.*, 37 A. 3d 46, 51 (Commnw. Ct. 2012) (Taxpayer has the burden of showing the tax was improperly assessed).

As for the third sentence in the FOD excerpt above, IFTA requirements, which Respondent had to agree to adhere to in order to receive a license, require that liability be calculated on the basis of the records made available *at audit*, not on the basis of what the carrier may claim it has or has not been told. If there are inadequate records, liability is determined by IFTA formulas. In essence, however, because Respondent did not maintain adequate records, and since it bore the burden of proof, Respondent was not able to show that the liability was not properly assessed. *Southern Pines Trucking supra*, 42 A.3d at 1229. The FOD has it essentially backward.

The record nevertheless reveals that the Department consented to the submission of records for consideration during the hearing and even after the close of the hearing, and likewise chose a calculation of liability more favorable to Respondent than the four mile per gallon standard authorized by IFTA (R. p. 96, line 12-p. 97, line 9).

b. THE HOLDING NOT SUSTAINABLE AS AN ISSUE OF TAX LAW.

The purpose of a tax statute is to raise revenue. *Fraternal Order of Police v. S.C. Department of Revenue*, 352 S.C. 420, 574 S.E.2d 717 (2002). By extension, because IFTA is effectively mandated by federal law [a portion of the Intermodal Surface Transportation Efficiency Act, 49 U.S.C. §§ 31701-31707] its purpose may also be said

to be to facilitate the payment of multi-jurisdictional road fuel taxes. *Roehl Transport, Inc. v. Wisc. Div. of Hearings and Appeals,* 213 Wis. 2d 452, 463-64, 570 N.W. 2d 864, 869 and n. 7 thereto (1997). A court cannot lightly presume that a multiparty contract to *facilitate* the collection of interstate taxes must be construed to negate tax liability, not only for the base jurisdiction, South Carolina, but also to all other jurisdictions to which the carrier owes tax.

South Carolina's Road Tax on Motor Carriers statute, *S.C. Code Ann.* §§ 56-11-10 *et seq.* contains not a single sentence that suggests failure to adequately disclose recordkeeping on the part of the State constitutes a defense to tax liability. The statute authorizes the Department's entrance into IFTA [Section 56-11-20] and allows IFTA penalties and interest to control in lieu of other statutory remedies [Section 56-11-60]. Thus, in order to arrive at the conclusion accepted by the ALC, it is necessary to assume that IFTA drafters intended for the IFTA Articles of Agreement, Art. III, R. 360 to work essentially as an exclusionary rule to prevent the collection of audit assessed liability:

1.) despite the lack of a single reference in the Articles or accompanying manuals suggesting that proof of compliance with that provision was an element in an assessment case;

2.) despite the sole reference listed in IFTA manuals for alleged non-compliance with IFTA requirements being limited primarily to discipline within the organization;

3.) despite the apparent effect of such a reading to nullify the tax liability when the fundamental purpose of IFTA is to facilitate the collection of interstate fuel taxes, and

4.) Despite the absence in the applicable South Carolina law of any provision suggesting such a defense.

The International Fuel Tax Agreement is a "multi-jurisdictional agreement that is intended to 'encourage cooperation in the administration and collection of motor fuel use tax.' " *Hi–Way Dispatch, Inc. v. Ind. Dep't of State Revenue,* 756 N.E.2d 587, 594 (Ind. T.C.2001) (quoting *Owner–Operator Indep. Drivers Ass'n v. State,* 725 N.E.2d 891, 892 (Ind.Ct.App.2000)).

Read in conjunction with the case law regarding burden of proof generally as well as burden of proving tax exemption, in subheading a., above (pp. 14-15), the ALC's Order is clearly incompatible with IFTA and South Carolina tax law.

c. THE HOLDING IS NOT SUSTAINABLE AS AN EQUITABLE ESTOPPEL AGAINST THE STATE.

The ALC does not set forth more detailed justification sustaining FOD than to cite the provisions of IFTA Articles of Agreement Art. III, R. 360. The doctrine of equitable estoppel should not provide any means of sustaining the Order either. First, equitable estoppel cannot generally be found in the absence of some sort of overt conduct. *Grant v. City of Folly Beach*, 346 S.C. 74, 82, 551 S.E.2d 229, 233 (2001) (no evidence of a statement or conduct that led homeowner to believe a first floor apartment was permitted). Nothing in the record can be reasonably construed to suggest that the Department discouraged Respondent from maintaining the necessary records or overtly misled the Respondent in any way. The premise of the FOD was simply that the Department could not produce a signed acknowledgement or other proof that the Department had given Respondent information on how to maintain records, and that therefore the Respondent had no duty to pay taxes.

Second, as a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart application of public policy. *Grant, supra.* at 80, 551 S.E.2d at 232. This has been held to include matters affecting revenue. *State v. Southern Farm Bureau Life Insurance Co.*, 265 S.C. 402, 219 S.E.2d 80 (1975). In those cases in which parties may seek to prove estoppel against the government, the party must prove (1) the lack of knowledge and the means of knowledge of the truth of the matters in question, (2) justifiable reliance on the government's conduct and (3) a prejudicial change in position. *Grant, supra.* at 81, 82, 551 S.E. 2d at 232.

It is not possible for Respondent to prove the lack of means of knowledge. IFTA requirements were available from public sources, such as the Department, its website, or from the website at IFTA Inc. at any time during the audit period. In addition, as pointed out above, Respondent has raised no issue of affirmative conduct by the Department to mislead or delay the Respondent's efforts in acquiring information on how to maintain records. There is no evidence Respondent changed its position to its detriment prior to the audit.

CONCLUSION

For all of the above cited reasons and grounds, the Department requests that this Court issue its Order reversing the Order of March 24, 2014. Since the Respondent has not produced any evidence questioning the accuracy of the audit assessment, the audit assessment and resulting Order of Suspension should be reinstated.

Respectfully submitted,

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Blythewood, South Carolina

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The Honorable Shirley C. Robinson, Administrative Law Judge

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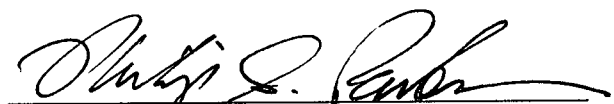
CERTIFICATE OF COUNSEL

The Undersigned Counsel certifies that the attached Final Brief of Appellant is in compliance with SCACR 211(b).



Philip S. Porter, SC Bar # 4526
Deputy General Counsel
South Carolina Department of Motor Vehicles

December 4, 2014
Blythewood, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court
The Honorable Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2014-001170

South Carolina Department of Motor Vehicles . . . . . Appellant,

vs.

Russo Dumpster, Inc. . . . . Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Appellant's Final Brief complies with South Carolina Supreme Court Order 2007-08-13-02 Amended by Order 2014-04-15-02, filed April 15, 2104.

Philip S. Porter, SC Bar # 4526
Deputy General Counsel
South Carolina Department of Motor Vehicles

December 4, 2014
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