

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

SUPERB TRUCKING LLC,

DOCKET NO. 07-V-137

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF TRANSPORTATION,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

This matter comes before the Commission on a motion for summary judgment filed by respondent, the Wisconsin Department of Transportation (the "Department"). Mr. Ralph Orbeck, a member of Petitioner Superb Trucking LLC, a limited liability company, represents Petitioner in this matter. Attorney Allyn Lepeska represents the Department. Having considered the entire record and the parties' submissions on the Department's motion in this matter, the Commission finds, concludes, rules and orders as follows:

FINDINGS OF FACT

1. On June 25, 2007, Petitioner filed its petition for review with the Commission in this matter by certified mail.
2. On July 3, 2007, the Department filed its answer to the petition.
3. The Commission held four telephone status conferences in this matter with representatives of both parties present. These conferences were held on

October 1, 2007, November 5, 2007, December 3, 2007 and February 1, 2008, respectively.

4. At the February 1, 2008 status conference, the parties agreed to set this matter for a hearing. By order dated February 1, 2008, the Commission set this matter for a hearing to be held on April 23, 2008, with all discovery to be completed by April 9, 2008.

5. On March 6, 2008, the Department mailed to Petitioner the Department's First Request for Admissions and Production of Documents dated March 6, 2008 (the "Request for Admissions"). (Affidavit of Mailing executed by Diane M. Wagner dated March 6, 2008.)

6. The Request for Admissions¹ provided as follows:

You are requested to admit to the truth of the following matters within 30 days of service of this request on you. Failure to respond is deemed an admission. Responses are to be made according to Wisconsin Statutes Section 804.11(1).

Please admit the truth of the following:

- (1) Superb Trucking LLC ("Superb") is an interstate contract motor carrier.
- (2) Superb operated qualified motor vehicles ("QMV's") as defined in Wis. Stat. § 341.45(1)(am).
- (3) Superb's QMV's operated during the period of January 1, 2003 through December 31, 2006 (the "period under review") in the State of Wisconsin.
- (4) Superb purchased motor vehicle fuel ("fuel"), as

¹ Certain non-substantive changes have been made to the Request for Admissions included in these Findings of Fact for purposes of form, clarity and consistency.

defined in Wis. Stat. § 341.45(1)(ag), to operate its QMV's.

- (5) Superb purchased fuel outside the State of Wisconsin to operate its QMV's.
- (6) Superb operated QMV's upon the highways of the State of Wisconsin during the period under review using fuel purchased outside the State of Wisconsin.
- (7) Superb operated its QMV's in a number of jurisdictions during the period under review.
- (8) Superb purchase fuel for its QMV's in a number of jurisdictions during the period under review.
- (9) Superb chose to pay the tax and fees imposed under Wis. Stat. § 341.45(1g) by applying for an International Fuel Tax Agreement ("IFTA") license.
- (10) Superb held an IFTA license from Wisconsin during the period under review.
- (11) An applicant for an IFTA license is required to comply with the reporting, payment and record-keeping requirements specified by the Department.
- (12) An IFTA licensee is required to comply with the IFTA record-keeping requirements.
- (13) The IFTA record-keeping requirements are specified in P 500 of the IFTA Procedures Manual.
- (14) The IFTA requires all licensees to maintain detailed distance records that show operations on an individual QMV basis.
- (15) An acceptable distance accounting record is necessary to substantiate information reported on the quarterly tax return.
- (16) A licensee's system at a minimum must include distance data on each individual QMV for each trip.

- (17) Supporting information must include:
 - a. Date of trip (starting and ending);
 - b. Trip origin and destination;
 - c. Route of travel;
 - d. Beginning and ending odometer (or hubodometer) reading of each trip;
 - e. Total trip miles or kilometers;
 - f. Miles or kilometers by jurisdiction;
 - g. Unit number;
 - h. Registrant's name; and
 - i. Driver's signature or name.

- (18) Superb did not maintain acceptable distance data on each individual QMV for each trip taken during the period under review.

- (19) Superb did not maintain the supporting information itemized in paragraph (17) of the Request for Admissions, above, for each individual QMV for each trip taken during the period under review.

- (20) IFTA requires retail fuel purchases to be supported by a receipt or invoice.

- (21) An acceptable receipt must include the following:
 - a. Date of purchase;
 - b. Seller's name and address;
 - c. Number of gallons (or liters) purchased;
 - d. Fuel type;
 - e. Price per gallon or total amount of sale;
 - f. Unit number; and
 - g. Purchaser's name.

- (22) Superb did not support all of its retail fuel purchases during the period under review with receipts meeting the requirement described in paragraph (21) of the Request for Admissions, above.

- (23) Under R 1200 of the IFTA Articles of Agreement, if any licensee fails to maintain records from which its true liability may be determined, the base jurisdiction shall base its assessment on the best information

available.

- (24) Superb did not maintain records from which its true fuel use tax liability may be determined during the period under review.
- (25) Under R 1220 of the IFTA Articles of Agreement, the Department may assess a penalty of \$50.00 for each quarter or 10% of delinquent taxes, whichever is greater, for underpaying taxes due.
- (26) Superb underpaid the taxes that were due during the period under review.
- (27) Under Wis. Admin. Code § Trans. 152.105, Superb, as an interstate motor carrier, was required to register its apportionable vehicles under the International Registration Plan (“IRP”).
- (28) Under Wis. Admin. Code § Trans. 152.11(1), all registrants shall maintain detailed distance records on an individual vehicle basis. Such records shall contain all of the following:
 - a. Actual distance traveled;
 - b. Distance summaries for each vehicle for each jurisdiction in which the vehicle operated;
 - c. Summaries of the total distance operated in all jurisdictions for each reporting period;
 - d. Supporting information shall include the following information:
 - i. Date of trip, both starting and ending;
 - ii. Trip origin and destination;
 - iii. Route of travel;
 - iv. Beginning and ending odometer or hubodometer reading of the trip;
 - v. Total trip distance;
 - vi. Unit number or vehicle identification number;
 - vii. Vehicle fleet number; and
 - viii. Registrant’s name.
- (29) Under Section 401.1 of the IRP Audit Procedures Manual, a registrant must maintain operational

records that support the total distance traveled in each jurisdiction and total distance traveled.

- (30) Under Wis. Admin. Code § Trans. 152.123, if a person fails to make records available or fails to maintain adequate records, the Department shall impose a penalty of 20% of the total registration fee for the period under review.
- (31) Superb failed to maintain adequate records to determine the required IRP distances.
- (32) In 2006, the Department audited Superb for compliance under the IFTA and International Registration Plan (“IRP”).
- (33) A true and correct copy of the audit results was attached to the Request for Admission as Exhibit A, and is incorporated herein by reference.
- (34) At the request of Superb, the Department issued a redetermination dated May 4, 2007.
- (35) The IFTA and IRP assessment at issue, as redetermined under date of May 4, 2007 for the period under review, was based upon the best information available.
- (36) A true and correct copy of the redetermination was attached to the Request for Admission as Exhibit B, and is incorporated herein by reference.²
- (37) Under R 1200.200 of the IFTA, an assessment made by a base jurisdiction when the licensee fails to maintain records from which the licensee’s liability may be determined based upon the best information available is presumed to be correct.
- (38) The Department provided to Superb the spread sheets used to determine the tax, fees and penalties in electronic format.

² According to Exhibit B, the total assessment at issue was redetermined to be \$23,046.72.

- (39) Superb filed a timely appeal with the Commission by certified mail dated June 25, 2007.
- (40) The IFTA assessment made by a base jurisdiction pursuant to this procedure shall be presumed to be correct and, in any case where the validity of the assessment is questioned, the burden shall be on the licensee to establish by a fair preponderance of evidence that the assessment is erroneous or excessive. (R 1210.300 IFTA Articles of Agreement.)
- (41) Superb does not have any evidence to show that the assessment is erroneous or excessive.

7. As of April 10, 2008, Petitioner had not responded to the Request for Admissions.

8. On April 10, 2008, the Department filed its Notice of Motion and Motion for Summary Judgment in this matter, with supporting exhibits, based on Petitioner's failure to respond to the Request for Admissions.

9. On April 14, 2008, the Commission issued an order canceling the hearing and setting a briefing schedule on the motion. As agreed by the parties, the Commission extended the briefing schedule by order dated May 7, 2008.

10. On June 16, 2008, Petitioner filed its response to the motion. Attached to the Petitioner's response were copies of its IFTA Tax Return Invoices for the last quarter of 2007 and first quarter of 2008, but no documents from the period under review. In its response, Petitioner alleges that the Department's "figures are about seven times higher than they should be" and makes various other arguments against the assessment, but submitted no sworn affidavits or other evidence related to the

period under review to the Commission in support of its position regarding the assessment at issue.

11. Since filing its petition for review in this matter, Petitioner has submitted no sworn affidavits, documents or other evidence related to the period under review to the Commission to support its objections to the assessment at issue.

12. On June 26, 2008, the Department filed its reply.

CONCLUSION OF LAW

There is no genuine issue of material fact in this matter and the Department is entitled to judgment as a matter of law.

DECISION

The Department requests summary judgment based upon Petitioner's deemed admission of various matters due to Petitioner's failure to respond to the Department's Request for Admissions within the 30-day period prescribed by Wis. Stat. §804.11(1)(b). If these matters are admitted, the Department asserts, summary judgment in favor of the Department is warranted.

A summary judgment motion will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). A party moving for summary judgment has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. *Grams v. Boss*, 97 Wis.2d 332, 338-39, 294 N.W.2d 473 (1980). A court may grant summary judgment to a party based upon the

opposing party's failure to respond to a request for admission. *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 334 N.W. 2d 230 (1983).

Regarding requests for admission, Wisconsin Statutes § 804.11(1)(b) provides:

804.11 Requests for admission.

(1) REQUEST FOR ADMISSION.

* * *

(b) . . . The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or attorney

Wisconsin Statutes § 804.11(2) states, in part, “[a]ny matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission.”

The Commission has adopted this rule of procedure pursuant to its administrative rules, which provide that “the practice and procedures before the commission shall substantially follow the practice and procedures before the circuit courts of this state.” Wis. Admin. Code § TA 1.39. More specifically, “Parties may obtain discovery before the commission in the same manner and by the same methods as provided under ch. 804, Stats., unless inconsistent with or prohibited by statute, or as otherwise determined by the commission.” Wis. Admin. Code § TA 1.35(1).

When it has been established that a properly addressed letter or other

communication has been mailed to an addressee with the proper postage affixed thereon, a general presumption of its due receipt arises. *Mueller v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-020 (WTAC May 3, 1982). In this matter, the presumption of due receipt of the Request for Admissions has been established. In addition, Petitioner does not deny that it was properly served with the Request for Admissions, or that it has failed to respond to the Request for Admissions. Finally, Petitioner has failed to provide any explanation for its failure to respond to the Request for Admissions, or to provide even an untimely response.

Petitioner's response demonstrates a lack of any meaningful review of the Request for Admissions, which specifically demanded a response and warned Petitioner that, if no response was provided within thirty days, the matters would be deemed admitted. In this case, the Commission finds that the failure of Petitioner to provide a timely response to the Request for Admissions has resulted in the deemed admission of the statements included in the Request for Admissions, and the admitted matters are considered conclusively established by operation of statute. *See*, Wis. Stat. §§ 804.11(1)(b) and 804.11(2); Wis. Admin. Code §§ TA 1.35(1) and 1.39; *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 631, 334 N.W. 2d 230 (1983); *Runk v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-020 (WTAC June 26, 2007).

Having deemed these matters admitted, there is no genuine issue of material fact remaining for review in this matter, and the Department is entitled to judgment as a matter of law under Wis. Stat. § 802.08(2). Therefore,

IT IS ORDERED

The Department's motion for summary judgment is granted, and its action on the Petitioner's petition for redetermination in this matter is affirmed.

Dated at Madison, Wisconsin, this 23rd day of December, 2008.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"