

Commonwealth Court to Consider Impact of Failure to Comply with IFTA Documentation Requirements *By Sharon R. Paxton*

The Commonwealth Court has tentatively scheduled oral argument for the week of November 14, 2011, in *R & R Express v. Commonwealth*, No. 533 F.R. 2007. The case deals with the tax impact of a motor carrier's failure to comply with IFTA mileage and fuel documentation requirements.

R & R Express is a brokerage company that uses owner operators to haul steel and other commodities throughout the United States. All fuel used in the company's motor carrier operations is purchased at retail locations. An IFTA audit conducted by the PA Department of Revenue resulted in a liability of over \$300,000 in tax, plus interest. The company's owner/operators did not consistently turn in trip reports and fuel receipts for their activity. Since the company did not maintain adequate mileage and fuel records, the auditor increased the company's reported mileage, imposed the statutory 4.0 m.p.g. factor for at least some vehicles and disallowed credit claimed for reported tax-paid fuel purchases.

R & R Express contends that (1) the audit deficiency should be stricken because the methodology used by the Department of Revenue improperly allows the state to collect tax twice on the same gallons of fuel, first at the time of purchase and again at audit, and (2) in the alternative, the company should be permitted to have its tax for the audit period recomputed based on data from reporting periods subsequent to the audit period. In its brief, the company argues that, since its recordkeeping procedures improved after the audit, the data from later reporting periods represents the "best information available"

to compute its additional tax due for the audit period.

The Commonwealth, on the other hand, asserts that Pennsylvania is not at liberty to compromise the recordkeeping requirements that the IFTA Agreement imposes on member states and licensees and that granting the requested relief would place Pennsylvania out of compliance with the Agreement. The Commonwealth argues that double taxation does not exist because the two taxes imposed on the company apply to different objects – the tax paid at the retail fueling station is imposed on the sale of the fuel and the second tax is imposed on the consumption of the fuel on public highways. Furthermore, the two taxes imposed on a motor carrier might not be imposed by the same taxing jurisdiction since the fuel could be purchased in one jurisdiction and "consumed" in another jurisdiction. With respect to the taxpayer's second argument, the Commonwealth argues that the IFTA Audit Manual requires the base jurisdiction to use a 4.0 m.p.g. factor in the absence of the required documentation.

The decision issued by the court in this case could have far-reaching effects on the resolution of IFTA audit appeals for Pennsylvania-based motor carriers. ■

Sharon R. Paxton is Vice-Chair of the State and Local Tax group.
spaxton@mwn.com / 717.237.5393



Who Will Pay for Necessary Improvements to Pennsylvania's Transportation Infrastructure? *By Sharon R. Paxton*

In April 2011, Governor Tom Corbett established a Transportation Funding Advisory Commission ("Commission") to develop a comprehensive, strategic proposal for addressing Pennsylvania's transportation funding needs. In early August, the Commission released its report, which includes modernization initiatives and a recommended funding package, as well as proposed legislative action and follow-up studies. There is broad support in the business community for the Commission's recommendations. However, as of early September, Governor Corbett has not disclosed which of the Commission's recommendations he will support. The Commission's

recommendations include a fuel tax increase as a primary funding mechanism, and Governor Corbett has to this point opposed any increases in state taxes.

No one can dispute that Pennsylvania's transportation infrastructure is in urgent need of repair and reinvestment. The Commission's report notes that 5,205 bridges in the state are rated as "structurally deficient" and 8,452 miles of Pennsylvania highway are in need of rehabilitation or reconstruction. Public transportation has also experienced serious

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financial challenges. Per the Commission's report, the state's underinvestment in transportation infrastructure is due in large part to rising construction costs and the limitations of tying funding revenues to fuel consumption. The fuel tax, which is a key component of transportation funding, has been generating less revenue per vehicle over time due to advances in vehicle fuel economy.

While Pennsylvania's transportation infrastructure problems and funding challenges have been under evaluation for several years, the state has yet to successfully adopt a short or long term plan for the adequate funding of transportation infrastructure. After Pennsylvania's second application to toll I-80 was rejected by the United States Department of Transportation in April 2010, Governor Rendell called for a Special Session of the Legislature to focus on Pennsylvania's transportation funding needs. As a result, several bills were introduced with various transportation funding options, but none of those bills contained a comprehensive funding plan and none were enacted.

In a 118-page Transportation Study Final Report issued in May 2010, the Pennsylvania State Transportation Advisory Committee ("TAC") discussed a myriad of existing and additional funding sources that could be used to fund the state's transportation system. While the TAC determined that Pennsylvania's current transportation funding structure is neither adequate in revenue yield, nor structurally sustainable over the long term, the TAC stopped short of recommending a specific revenue scenario. Governor Corbett's Commission has built upon the work of the TAC to develop a recommended funding package for sustainable transportation in Pennsylvania.

Governor Corbett's Commission was encouraged to consider all funding options (other than raising the flat gas tax at the pump, leasing or changing the ownership structure of the Pennsylvania Turnpike, and changes in Federal assistance or law) and to develop the best combination of potential funding sources to produce a sustained \$2.5 billion increase to annual transportation funding. The funding package recommended by the Commission would utilize five primary funding sources:

- Capping and/or moving a portion of State Police costs to the General Fund
- Indexing vehicle and driver fees to the Consumer Price Index, with the fee increases for commercial vehicle registrations to be phased in incrementally over four years
- Uncapping the Oil Company Franchise Tax ceiling over five years (This tax is based on application of a fixed millage rate against the variable Average Wholesale Price ("AWP") of gas and diesel, up to an AWP ceiling set in 1983. The actual AWP is now more than double the ceiling.)

- Redirecting certain Act 44 contributions received from the Pennsylvania Turnpike from highway and bridge funding to public transit
- Increasing various fees and fines, as well as implementing various modernization and cost saving initiatives, to benefit the Motor License Fund

The "modernization and cost saving" proposals recommended by the Commission include, among other things, biennial registration, an eight-year driver's license, elimination of registration stickers, optional third party non-CDL driver's license skill testing, automated work zone speed enforcement, advertising within the state right-of-way, moving the point of fuel taxation to the terminal, service patrol advertising, dedication of 2% of existing sales tax revenue to transit, increasing the local transit match, allowing all licensed liquor establishments to operate small games of chance, and the consolidation/regionalization of transit delivery.

Other, more complex, ideas considered by the Commission, which would require enabling legislation, include authorizing local governments to raise revenue to support transportation investment, passing public-private partnership legislation, and amending Act 44 of 2007 to enable tolling authority on Pennsylvania interstates with toll revenue to be dedicated exclusively to the corridor from which it was collected. (Although the Commission did not recommend the tolling of any interstate, it did recommend the enactment of enabling legislation now to take into account the fact that tolling is mileage-based, rather than based on fuel consumption, and that federal laws could change in the future. It further recommended that the tolling operator be unspecified, so that the private sector could participate if the public-private partnership law were passed.)

Finally, the Commission determined that alternative highway funding options and development of a comprehensive Commonwealth Freight Movement Plan for rail freight and trucks merit "detailed investigation through dedicated studies" and may become important factors in future transportation funding scenarios. Alternative highway funding options to be further examined would include energy-based charges and usage-based charges, such as expanded tolling, logistics fee, freight charges and vehicle miles traveled fees.

All motor vehicle operators would share the cost of increased funding for Pennsylvania's transportation infrastructure under the Commission's proposals. The Commission did not recommend tax and fee increases that are targeted exclusively at commercial vehicle operators. It remains to be seen, however, whether any of the recommended "follow-up studies" might result in proposed funding options, such as freight charges, that are specifically directed at commercial vehicle operators. A full copy of the Commission's report is available at <ftp://ftp.dot.state.pa.us/public/pdf/TFAC/TFAC%20Final%20Report%20-%20Spread%20Version.pdf>. ■