STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **ADMIRAL MERCHANTS MOTOR FREIGHT, INC.** for Revision of Determinations or Refund of Highway Use Tax under Article 21 of the Tax Law for the Period January 1, 1980 through December 31, 1983.	:	DECISION DTA NO. 801741

Petitioner, Admiral Merchants Motor Freight, Inc., 215 South 11th Street, Minneapolis, Minnesota 55403, filed an exception to the determination of the Administrative Law Judge issued on February 19, 1988 with respect to its petition for revision of a determination or for refund of highway use tax under Article 21 of the Tax Law for the Period January 1, 1980 through December 31, 1983 (File No. 801741). Petitioner appeared by Foster & Jensen (Thomas H. Jensen, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Neither of the parties filed a brief on this exception nor requested oral argument.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

I. Whether a field audit determination of petitioner's New York miles properly took into account mileage reported by owner/operators operating under trip leases.

II.Whether penalty, pursuant to Tax Law section 512, was properly imposed.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. The pertinent facts may be summarized as follows.

Petitioner, Admiral Merchants Motor Freight, Inc., is a general commodities carrier.

During the period at issue, all of petitioner's New York permitted vehicles were leased from owner/operators. The leasedequipment accounted for about 15 percent of petitioner's business and trip leasing accounted for the other 85 percent.

Under a trip lease, petitioner hired an owner/operator for a specific trip and paid the owner/operator a percentage of the gross revenues for the trip. Petitioner did not report any New York trip lease miles, assuming that the owner/operators would report such mileage.

Petitioner's loads came from agents who were on a commission basis per load and who were responsible for securing the freight and the driver to move it.

Petitioner filed tax returns for itself and its divisions, Transcontinental and United, under the maximum gross weight method of reporting 100 percent laden. Jack Cole Dixie Highway Company, another division, filed returns through 1983, although it had ceased operations at the end of 1982.

A truck mileage tax and fuel use tax audit of petitioner's records was commenced in January 1984 covering the period January 1, 1980 through December 31, 1983.

The auditors asked for petitioner's daily trip reports reflecting mileage traveled in New York and the routes followed, but these items were not available. The auditors also requested drivers' Interstate Commerce Commission logs, which were not complete. Accordingly, the auditors decided to use petitioner's dispatch records. These records consisted of entries made by petitioner's dispatcher as to every trip dispatched on a particular day. The dispatcher's office was located in Minnesota during the periods at issue.

The first available dispatch records were for the month of April 1981. Dispatch records were tested for April 1981, September 1981 and July 1982, with the following results:

(1) April 1981 - For this month, the dispatch records indicated 1,106 miles in New York; however, petitioner's tax return for the second quarter of 1981 reported no New York mileage.

(2) September 1981 - For this month, with one day missing, the dispatch records indicated 1,188 New York miles; however, petitioner's return for the third quarter of 1981 showed no New York mileage.

(3) July 1982 - For this month, the dispatch records indicated 4,963 New York miles;

however, petitioner reported only 245 New York miles for the third quarter of 1982.

The auditors found that commencing with June 1981, petitioner started keeping computer records reflecting New York miles (and mileage for other states) by division, by month. Petitioner's computer records also listed trips by trip number and broke down the miles by trip and by state. The trip numbers were assigned based on trip reports. The auditors checked the trips on the computer runs and the dispatch records to try to find the trip report and identify the trip and the run. The auditors found that two or more trips would often have the same trip number.

Petitioner commenced a large New York operation in November 1982 and the auditors examined the first month and one-half of the operation in detail, i.e., from the start through December 1982. The examination showed that petitioner had travelled 57,475 miles in New York during the six weeks, but had reported only 324 New York miles (314 laden).

The auditors attempted to test May 1983 but the records for said month were incomplete. Accordingly, April 1983 was used as a test period. The test showed the following:

Division	Audited Miles	Miles as per Computer
Admiral Merchants	2,945	1,814
Transcontinental	3,147	1,099
United	18,555	18,076

Petitioner's New York return for the second quarter of 1983 showed only 700 total miles travelled in New York.

Trips listed in the dispatch records were compared to map mileage and audited miles were determined for the test periods. Mileage for the test periods was then "straight lined" (projected) in the years for which a test was made for a particular division.

The total audited New York miles of 485,383 were multiplied by the tax rate of $.039 per mile which amounted to audited truck mileage tax due of $18,929.94. After deducting $362.93 in truck mileage tax paid, additional truck mileage tax due was $18,567.01.

Tests of petitioner's records were calculated to establish a miles-per-gallon factor.

Audited total New York miles per quarter were divided by the miles per gallon rates for each quarter resulting in fuel used in New York per quarter. After deducting fuel purchased in New York, the additional fuel deemed needed in New York was multiplied by the tax rate in effect in each quarter resulting in audited tax due. After deducting tax paid, total audited additional tax due was $18,810.27.

On December 28, 1984, the following assessments were issued to petitioner:

(1) Truck mileage tax for the period January 1, 1980 through December 31, 1983 of $18,567.01, plus penalty and interest of $7,333.97, for a total of $25,900.98.

(2) Fuel use tax for the period January 1, 1980 through December 31, 1983 of $18,810.27, plus penalty and interest of $7,430.06, for a total of $26,240.33.

The Miscellaneous Tax Bureau computer records reveal that petitioner first filed with the Bureau for truck mileage tax and fuel use tax on October 12, 1976.

At the hearing, petitioner submitted voluminous computer printed records. The records purport to list trips by date, trip number, unit number, miles and state. Petitioner prepared these records from drivers' reports.

Comparison of petitioner's computer printouts for the month of April 1983 with the detailed audit of the dispatch records for those months was made. Petitioner's computer printouts showed that 7,404 of the 20,989 total miles were reported by owner/operators of vehicles trip leased to petitioner during April 1983, or a percentage of 35.28. The audit showed that 4,976 miles were actually reported by the owner/operators, resulting in a percentage of 23.71.

New York mileage as per petitioner's computer records commencing with the time such records were kept, i.e., June 1981 through December 1983, was 226,479 miles. Total miles travelled in New York State shown on all returns filed by petitioner was 18,894.

OPINION

The petitioner, Admiral Merchants Motor Freight, Inc., takes exception to the calculation of New York mileage determined by the Administrative Law Judge, contending that the calculation fails to take into account that 23.71 percent of the New York mileage was reported by owner/operators

operating under trip leases with petitioner. Petitioner submits an alternative mileage calculation which reduces the calculation of total audited miles (485,383) found by the Administrative Law Judge by 23.71 percent. Our review of the record, including the audit papers, indicates the 485,383 total audited New York miles determined by the Administrative Law Judge does reflect owner/operator reported mileage at a rate of 23.71 percent. Therefore, we see no reason to revise or otherwise modify the Administrative Law Judge's calculation.

With respect to the conduct of the audit itself, Tax Law section 510 provides, in pertinent part, as follows:

> "In case any return filed pursuant to this article shall be insufficient or unsatisfactory to the tax commission, or if no return is made for any period, the tax commission shall determine the amount of tax due from such information as is available to the commission."

Tax Law section 507 provides as follows:

> "Every carrier subject to this article and every carrier to whom a permit was issued shall keep a complete and accurate daily record which shall show the miles travelled in this state by each vehicular unit and such other information as the tax commission may require. Such records shall be kept in this state unless the tax commission consents to their removal and shall be preserved for a period of four years and be open for inspection at any reasonable time upon the demand of the tax commission."

(See also, 20 NYCRR 483.1 et seq. [truck mileage tax regulations] and 20 NYCRR 493.1 et seq. [fuel use tax regulations].)

Petitioner's records were incomplete and inadequate and it was proper for the Division of Taxation to calculate truck mileage tax and fuel use tax by test periods and projections based upon dispatch records (see, Lionel Leasing Industries Company, Inc. v. State Tax Commn., 105 AD2d 581). While petitioner's computer records may be sufficient for its internal controls, absent documentation, they are not the type of records contemplated by Tax Law section 507 and the regulations promulgated thereunder.

We affirm the determination of the Administrative Law Judge imposing penalty. Tax Law section 512 generally prescribes the imposition of penalty for failure to comply with the provisions of

Article 21 dealing with the truck mileage tax and fuel use tax. Where the Division determines that failure or delay in complying with the subject provisions was due to reasonable cause and not due to willful neglect, it shall remit all or part of any penalty imposed (Tax Law §512[1][c]). The regulations promulgated by the Commissioner (20 NYCRR 488.2[c]) with respect to what exemplifies reasonable cause are set forth at 20 NYCRR 488.2(c).

Petitioner argues that it reasonably relied on owner/operators to report mileage. The Administrative Law Judge determined that while the discrepancy in total New York miles was due, in part, to improper reporting by owner/operators, the magnitude of the underreporting was such that petitioner should have been aware of the problem and rectified it. The Administrative Law Judge determined that petitioner did not show reasonable cause for remission of the penalty. We agree with the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Admiral Merchants Motor Freight, Inc. is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Admiral Merchants Motor Freight, Inc. is granted to the extent indicated in conclusion of law "E" of the Administrative Law Judge's determination but except as so granted, the petition is denied and the assessments of truck mileage tax and fuel use tax issued on December 28, 1984 are sustained.

Dated: Albany, New York
October 27, 1988

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner