STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EARL STEWART PADDOCK	:	DECISION DTA No. 807040
for Revision of a Determination or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period October 1, 1977 through December 31, 1986.	:	

Petitioner Earl Stewart Paddock, P.O. Box 9323, 501 Highway #8, Stoney Creek, Ontario, Canada L8G4S1 filed an exception to the determination of the Administrative Law Judge issued on February 13, 1992 with respect to his petition for revision of a determination or for refund of highway use tax under Article 21 of the Tax Law for the period October 1, 1977 through December 31, 1986. Petitioner appeared by Giardino & Schober, Esqs. (John L. Trigilio, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

On exception, petitioner resubmitted the brief previously filed with the Administrative Law Judge. The Division of Taxation filed a letter brief in response. Petitioner responded by resubmitting the reply brief previously filed with the Administrative Law Judge. Oral argument was not requested.

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

ISSUE

Whether, as a result of an audit, the Division of Taxation properly determined additional highway use tax due.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "12" which has been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional finding of fact are set forth below.

On August 28, 1987, following an audit, the Division of Taxation (hereinafter the "Division") issued to petitioner, Earl Stewart Paddock, an Assessment of Unpaid Truck Mileage Tax which assessed $25,150.00 in additional truck mileage tax ("TMT") due, plus penalty and interest, for theperiod December 1, 1977 through December 31, 1986. Also on August 28, 1987 the Division issued to petitioner an Assessment of Unpaid Fuel Use Tax which assessed $55,043.00 in fuel use tax ("FUT") due, plus penalty and interest, for the period October 1, 1977 through December 31, 1986.

Petitioner has a trucking business based in Ontario, Canada. Petitioner has been involved in the trucking industry for about 45 years. During the period at issue petitioner was involved in two separate trucking operations. One of these operations was a business known as Leeside Equipment ("Leeside"). Throughout the period at issue Leeside's operations were dedicated almost exclusively to hauling for an entity referred to in the record as International Iron and Metal or Intermetco. Leeside leased vehicles to Intermetco. Petitioner's other business, referred to in the record as Earl Paddock Leasing (or Trucking) ("Paddock"), was, like Leeside, a lease operator. The Paddock operation had a long-term leasing arrangement with the Otis Elevator Company. Paddock was also engaged in hauling for other entities. Both Paddock and Leeside operated out of the same location.

During the period 1974 through 1980 Paddock had 12 to 14 carrier units and 20 to 25 trailers on the road. Leeside had a larger fleet than Paddock. No evidence was presented as to the size of Paddock's fleet during subsequent years. Leeside occasionally rented trailers from Paddock.

As noted, Paddock had a long-term leasing arrangement with Otis Elevator Company. Paddock had entered into this arrangement in or about 1966. Paddock's vehicles made hauls from Otis Elevator's plant in Hamilton, Ontario to its plants in Yonkers, New York and Harrison, New Jersey. During the mid-1970's, Paddock made about 10 trips per week to Yonkers, New York and/or Harrison, New Jersey. Hauls for Otis Elevator later slowed to about one trip every three or four weeks because of cutbacks and shutdowns at Otis' Yonkers and Harrison facilities. Petitioner estimated that the slowdown in its hauls for Otis Elevator occurred in about 1979. Petitioner was uncertain as to when Paddock stopped making runs to Otis Elevator's New York and New Jersey facilities. Petitioner estimated that such runs could have continued until about 1981.

Petitioner failed to file TMT returns in respect of his Paddock operations for the period December 1, 1977 through October 31, 1978 and FUT returns for the fourth quarter of 1977 through the third quarter of 1978.

As a result of petitioner's failure to file highway use tax returns as noted above, the Division cancelled all highway use tax permits held by petitioner in respect of Paddock vehicles. The Division took this action in 1979.

Petitioner filed TMT returns and remitted tax in respect of the Paddock operation for the period November 1, 1978 through September 30, 1979. Petitioner also filed, on behalf of Paddock, FUT returns for the fourth quarter of 1978 through the third quarter of 1979.

Following the Division's cancellation of Paddock's permits, petitioner did not file any TMT or FUT returns for the period October 1, 1979 through September 30, 1984.

In or about October 1984, petitioner contacted the Division in an effort to once again obtain highway use tax permits for his Paddock vehicles. Petitioner was aware that, in order to obtain such permits, he would necessarily have to pay delinquent taxes owed by him from 1977 and 1978. In or about October 1984, petitioner thus filed TMT returns for the period December 1, 1977 through June 30, 1978 and FUT returns for the fourth quarter of 1977 through

the second quarter of 1978.[1] By check dated October 12, 1984, petitioner remitted $12,243.09 in respect of Paddock's highway use tax liability for this period.

Vehicles hauling for petitioner's Leeside Equipment operation were properly permitted for highway use tax purposes throughout the period at issue. Such permits were issued under Intermetco's name. Intermetco, for whom Leeside hauled under a leasing agreement, reported Leeside's truck mileage and fuel use for highway use tax purposes throughout the audit period. Intermetco did not, at any time during the audit period, report truck mileage or fuel use with respect to any Paddock vehicles.

Subsequent to his payment of delinquent taxes in October 1984, petitioner obtained highway use tax permits with respect to his Paddock vehicles and filed returns and remitted tax with respect to his Paddock operation.

We modify finding of fact "12" of the Administrative Law Judge's determination to read as follows:

> During the period when petitioner was no longer filing returns in New York State for his Paddock vehicles, and throughout the period during which Paddock vehicles had had their permits cancelled, Paddock vehicles were issued citations by the New York State Police on at least six occasions. According to the auditor, an additional citation may have been issued to Intermetco. The specific violations for which the citations were issued are not in the record. The dates upon which the citations were issued were as follows: 8/25/78, 4/29/81, 6/22/82, 6/29/82, 2/14/84, 2/27/84 and 7/12/84.[2]

Petitioner did not dispute that Paddock vehicles received the citations noted above. Petitioner also did not dispute that Paddock vehicles operated in New York during the 1979

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[1]It is unclear from the record why petitioner's delinquency with respect to the period July 1, 1978 through October 30, 1978 was not addressed at this time.

[2]The Administrative Law Judge's finding of fact "12" read as follows:

> "During the period when petitioner's Paddock vehicles had had their permits cancelled, Paddock vehicles were issued citations by the New York State Police on seven occasions. The specific violations for which the citations were issued are not in the record. The dates upon which the citations were issued were as follows: 8/25/78, 4/29/81, 6/22/82, 6/29/82, 2/14/84, 2/27/84 and 7/12/84."

We modified this finding of fact to more accurately reflect the record.

through 1984 period when such vehicles were not properly permitted under the highway use tax Law.

We find an additional finding of fact to read as follows:

> While at one point in Mr. Paddock's testimony he asserted that this occurred solely on an emergency basis, such as when a Leeside truck had a breakdown or smash-up, Mr. Paddock also conceded at a different point in the hearing that he could not deny that his trucks were operating in New York during the subject years, although he claimed that this occurred much less frequently than indicated by the audit.

THE AUDIT

The audit herein was commenced in March 1987. At that time the Division's auditor requested access to records used in the preparation of petitioner's (then) current year TMT and FUT returns. Following this review, the Division selected the month of October 1986 and the fourth quarter of 1986 as test periods for TMT and FUT purposes, respectively. The Division also requested any records pertaining to the period prior to October 1984; that is, during the period when petitioner did not have highway use tax permits for his vehicles. Petitioner advised the Division that no records were available before October 1984.

During the course of the audit, petitioner advised the Division's auditor that Paddock vehicles occasionally operated in New York during the 1979 through 1984 period. Based upon this information and given the Division's knowledge of certain traffic citations received by Paddock vehicles during this period (see, above), the Division determined that petitioner was operating Paddock vehicles in New York during this time.

TRUCK MILEAGE TAX

As noted above, the Division used October 1986 as a test period for TMT purposes. The Division examined in detail records used by petitioner in the preparation of this TMT return. Specifically, the Division reviewed trip envelopes which indicated routes traveled, fuel purchases, bridge tolls and thruway receipts. The Division compared claimed New York miles to map mileage and also compared claimed thruway miles to thruway receipts. Following this review, the Division determined an error rate of 4.467% in petitioner's reported TMT for the test

period. The Division then applied this percentage of error to petitioner's reported TMT for each of the months comprising the period October 1984 through December 1986 and calculated additional TMT due for this period of $652.51.

The Division also applied the 4.467% error rate to petitioner's reported TMT for the period December 1, 1977 through June 30, 1978. (As noted previously, returns for December 1, 1977 through June 30, 1978 were filed by petitioner in October 1984.) This calculation resulted in additional TMT due of $89.97.

For the periods July 1, 1978 through September 30, 1978 and October 1, 1979 through September 30, 1984, as previously noted, petitioner did not file TMT returns. The Division determined petitioner's TMT liability for these periods by calculating petitioner's average monthly reported TMT for the months of November 1978 through September 1979 and October 1984 through August 1985. This amounted to $365.06. The Division then applied the error rate of 4.467% to this monthly average and determined an average monthly TMT due of $381.37. The Division then applied this average monthly TMT liability to each of the 64 months comprising the July 1978 through October 1978 and October 1979 through September 1984 periods. The asserted TMT liability for these periods thus totaled $24,407.68.

FUEL USE TAX

For FUT audit purposes, as noted previously, the Division used the fourth quarter of 1986 as a test period. The Division determined an error rate of 2.536% with respect to petitioner's reported gallons of fuel used in New York. The Division then applied the error rate to petitioner's reported gallons of fuel used in New York for each of the quarters comprising the period October 1, 1984 through December 31, 1986. These calculations resulted in audited gallons of fuel used in New York for each of these quarters. The Division allowed New York fuel purchases as claimed on returns filed for this period. The Division then computed FUT due for the period October 1, 1984 through December 31, 1986 by applying the appropriate tax rate to petitioner's audited taxable gallons of fuel used in New York. The additional FUT due for this period was $939.51.

The Division also assessed $1,463.09 in additional FUT for the period October 1, 1977 through June 30, 1978 based upon a disallowance of New York fuel purchases claimed on the FUT returns filed for this period. As noted previously, petitioner filed FUT returns for this period in October 1984. Petitioner did not, however, submit any supporting documentation in respect of his claimed New York fuel purchases for this period.

With respect to the periods for which petitioner did not file FUT returns (July 1, 1978 through September 30, 1978 and October 1, 1979 through September 30, 1984), the Division determined petitioner's FUT liability by calculating petitioner's average quarterly reported New York mileage for the fourth quarter of 1978 through the third quarter of 1979 and the fourth quarter of 1984 through the third quarter of 1985. This quarterly average was 66,258 New York miles. The Division then applied the error rate of 2.536% to this quarterly average and determined an audited quarterly New York mileage figure of 67,938 miles. The Division then divided this quarterly figure by 5 miles per gallon to reach audited gallons of fuel used in New York per quarter. This amounted to 13,588 gallons per quarter for the periods July 1, 1978 through September 30, 1978 and October 1, 1979 through September 30, 1984. The Division multiplied audited gallons of fuel used in New York per quarter by the applicable tax rate and determined FUT due for these periods of $52,639.91.

The Division introduced into the hearing record petitioner's petition, attached to which were certain unaudited summary statements of income or loss pertaining to certain portions of the audit period. The statements were prepared by petitioner's accountants. The source documents from which the statements were prepared were not presented. Such statements indicated the following with respect to revenue earned by Paddock from its hauling activities:

FYE	Revenue From Hauling
6/30/78	$ 881,495
6/30/79	951,421
6/30/80	1,049,222
6/30/81	1,445,933
6/30/82	1,493,347
6/30/83	1,898,103
6/30/84	2,213,888
6/30/85	3,166,082
6/30/86	4,186,822

Other than the summary statements noted above, petitioner presented no records pertaining to his trucking operations with respect to the period October 1, 1977 through September 30, 1984.

OPINION

The Administrative Law Judge determined that, despite petitioner's assertions to the contrary, the record establishes that petitioner did operate his vehicles in New York during the 1979 through 1984 period when petitioner did not have permits for his vehicles. Consequently, the Administrative Law Judge held that petitioner was required to obtain highway use permits under Tax Law § 502, and to maintain records under Tax Law § 507, for the vehicles during this period.

Further, the Administrative Law Judge concluded that, since the audit method of the Division with respect to the October 1979 through September 1984 period was based on petitioner's reported truck mileage and fuel use for the months prior to and after the period in question, and because petitioner furnished no records of any kind to establish his New York or overall mileage and fuel use during the audit period, the audit method must be deemed reasonable.

In addition, the Administrative Law Judge determined that, as petitioner failed to establish through testimony or documentary evidence that the Division's assessment was erroneous, the assessment must be sustained. In particular, the Administrative Law Judge rejected petitioner's summary income statements, finding them inconclusive regarding: the revenue derived from

hauling in New York, the correlation between revenue and mileage, total or New York mileage, and total or New York fuel usage.

The Administrative Law Judge stressed that petitioner's claims as to what may have occurred with his vehicles during the October 1979 through September 1984 period are insufficient to establish either petitioner's mileage and fuel use during the period in question, or error in the Division's assessment.

Finally, noting that petitioner did not object to the portions of the assessment corresponding to the periods October 1, 1977 through September 30, 1978 and October 1, 1984 through December 31, 1986, the Administrative Law Judge upheld these portions of the assessment as he did the remaining portions of the audit period which petitioner has challenged.

On exception, petitioner asserts that, as he did not operate in New York during the years in question, he was not required to obtain highway use permits for his vehicles pursuant to Tax Law § 502 or to maintain records regarding mileage (and fuel use) pursuant to Tax Law § 507.

Petitioner's main objection to the determination of the Administrative Law Judge is that the "only evidence" on which the Administrative Law Judge based his determination regarding petitioner's New York operations during the years 1979 through 1984 is the so-called informational reports given to the Division by the New York State Police "which purportedly demonstrat[e] that traffic tickets had been issued to Petitioner on seven occasions" (Exception, extension sheet, p. 6). Petitioner claims that in the first instance it is arbitrary and capricious for the Division to attempt to collect mileage and fuel use taxes from him on the basis of these tickets. Secondly, petitioner argues that these informational reports are "mere hearsay," that no foundation was laid for the reports to qualify as business records, and that the reports are not admissible under any of the other hearsay exceptions (Exception, extension sheet, p. 6). Petitioner emphasizes that the tickets themselves were not introduced into evidence, that the auditor testified that he did not contact the officers who had allegedly issued the tickets, that the auditor was not aware of whether or not the tickets had resulted in convictions, and that the

auditor did not know whether the tickets were issued to petitioner as the registered owner of the the vehicles despite the fact that the vehicles may have been leased to Intermetco at the time.

Petitioner claims that the informational reports reveal that one of the tickets was, in fact, issued to Intermetco, a shipper, according to petitioner, to whom petitioner "frequently leased vehicles" during the subject period (Exception, extension sheet, p. 6). Petitioner asserts that since, inter alia, the auditor acknowledged that petitioner was leasing vehicles to Intermetco on a "regular basis" during the subject period, and at least one of the citations issued was issued to Intermetco, it "cannot be concluded that the Informational Reports offered constitute proof of Petitioner's operations" (Exception, extension sheet, p. 7).

Petitioner argues, in addition, that the record establishes that he made an internal business decision to keep Paddock vehicles out of New York during the October 1979 through September 1984 period. Petitioner claims that this was easily accomplished by having all New York hauls handled by Leeside, which shared the business premises with Paddock. Petitioner maintains that it was improper for the Administrative Law Judge to conclude both that this explanation for petitioner's lack of filings between 1979 and 1984 provided a "plausible scenario," and that this "plausible scenario" was insufficient to establish that the Division's assessment was erroneous.

In sum, petitioner avers that, since the Division has failed to offer non-hearsay, conclusive proof of petitioner's operations in New York during the years in question, the Division has failed to establish petitioner's liability. In this vein, petitioner rejects the Division's assertion that Matter of Lionel Leasing Indus. Co. v. State Tax Commn. (105 AD2d 581, 481 NYS2d 520) is controlling here, claiming that Lionel Leasing is factually and legally distinguishable.

Petitioner maintains that even if, arguendo, it is established that petitioner conducted operations in New York during the period in question, the Division applied an erroneous audit methodology to determine the amount of tax due since it derived the assessment applying an average monthly tax due figure which, in turn, had been derived from returns of years when petitioner's revenues were "substantially higher" than in the years in question (Petitioner's brief, p. 2). Petitioner seeks to demonstrate this disparity by pointing to his summary income

statements (see, Exhibit "E," part II[2]). Petitioner contends that it was incorrect for the Administrative Law Judge to determine that these income statements provided "little support" for petitioner's position since the statements "demonstrated a downturn in Petitioner's business during the period in question and the problems associated with the methodology utilized by the Division during its audit" (Exception, extension sheet, p. 3).

Finally, while petitioner acknowledges that the assessment should be sustained against him for the periods October 1, 1977 through September 30, 1978 and October 1, 1984 through December 31, 1986, which he did not challenge, he seeks cancellation of the remainder of the assessment. Petitioner concedes, however, that if the Division wishes to apply the average monthly tax computation to calculate the taxes due for operations in New York only on the seven days on which citations were received, petitioner would be liable to pay these taxes, plus any interest and penalties owing.

In response, the Division argues that petitioner has both failed to understand and meet his burden of proof. Specifically, the Division reiterates the Administrative Law Judge's statement in conclusion of law "B" that highway use permits must be obtained regardless of the number of trips a vehicle makes or the number of miles the vehicle travels in New York State. The Division emphasizes that by petitioner's own admission he was operating in New York at least until 1981, as well as on the specific dates on which the citations were issued and, therefore, even if the trips were infrequent, he was required to obtain permits for his vehicles (under Tax Law § 502) and to keep records regarding the vehicles' mileage and fuel usage in New York State (Tax Law § 507).

Furthermore, the Division maintains that for petitioner to prevail, it is his burden to establish that his vehicles were not in New York during the audit period. By merely asserting that the citations could have been issued to Paddock vehicles while leased to Intermetco, rather than establishing this as a fact by tangible proof (such as proffering a lease to that effect), argues the Division, petitioner has failed to meet his burden of proof. Thus, it was proper, contends the Division, for the Administrative Law Judge to conclude that Paddock vehicles were issued citations and, furthermore, that they were operating in New York during the years in question.

Citing Matter of Atlantic & Hudson Ltd. Partnership (Tax Appeals Tribunal, January 30, 1992), the Division argues that it does not carry the burden of demonstrating the correctness of its assessment to petitioner; rather, "the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (citation omitted)" (Division's letter brief, p. 4). To challenge the assessment, avers the Division, petitioner would have to "refute the evidence of Exhibit I [the record of the traffic citations], and disavow his own testimony" (Division's letter brief, p. 5). This, the Division maintains, petitioner has not done. In view of these arguments, the Division urges that the Administrative Law Judge's determination be upheld in its entirety.

We affirm the determination of the Administrative Law Judge.

Petitioner only raises two issues on exception which differ from the issues raised before the Administrative Law Judge. First, petitioner claims on exception that the "only evidence" on which the Administrative Law Judge based his determination is the informational reports of the State Police regarding the traffic citations allegedly issued to petitioner and that these reports are "mere hearsay" (Exception, extension sheet, p. 6). To the contrary, the Administrative Law Judge based his determination on Mr. Paddock's own testimony regarding these citations (see, Tr., pp. 72-73, 77, 81-82, 88), as well as on Mr. Paddock's testimony that his vehicles were operating in New York at other times throughout the November 1979 through October 1984 audit period (see, Tr., pp. 72, 74, 84-86). In addition, petitioner, in a letter to the auditor, admits that:

> "[w]hile there are no records kept as to the actual number of trips Paddock handled involving pick-ups in, deliveries to, or trips through New York State [during the audit period], Paddock only received approximately ten citations during that entire time period for operating in New York without an appropriate permit" (Exhibit "E," part II, p. 3, letter to John R. Popple, Tax Auditor, from John Trigilio, December 19, 1988).

In view of these admissions, petitioner's claim that the Administrative Law Judge's determination was wholly based on the informational reports regarding the citations is without foundation.

Furthermore, we find meritless petitioner's contention that the informational reports should not have been accepted into evidence because they are hearsay. First, we remind petitioner that relevant hearsay evidence is admissible in an administrative hearing and can be the basis of an administrative determination (see, Matter of Gray v. Adduci, 73 NY2d 741, 536 NYS2d 40; Matter of Kucherov v. Chu, 147 AD2d 877, 538 NYS2d 339; Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; Matter of Mira Oil Co. v. Chu, 114 AD2d 619, 494 NYS2d 458, appeal dismissed 67 NY2d 756, 500 NYS2d 1027) and, therefore, even if the informational reports constitute hearsay evidence, they were properly admitted into evidence and considered by the Administrative Law Judge. Second, if petitioner felt that the testimony of a particular officer or officers who had issued the citations was critical to satisfying his burden of proof on the issue (i.e., that the tickets did not result in convictions or that the tickets were issued to petitioner although the vehicles were leased to another company at the time), he could have subpoenaed any or all of these persons prior to the hearing (see, 20 NYCRR 3000.6[c]; Matter of Anray Serv., Tax Appeals Tribunal, December 1, 1988; Matter of 3 Guys Elec., Tax Appeals Tribunal, September 9, 1988).

The second new point raised by petitioner on exception is that it was improper for the Administrative Law Judge to conclude that petitioner had presented a "plausible scenario" for his lack of filings between 1979 and 1984, and yet, that petitioner was unable, despite this "plausible scenario" to establish that the Division's assessment was erroneous. We disagree. First, the Administrative Law Judge noted that petitioner's contentions "create[d] a plausible scenario as to what may have occurred during the October 1979 through September 1984 period" (Determination, p. 11). Second, as the Administrative Law Judge himself explained, "[s]uch a scenario is not a substitute, however, for proof of petitioner's New York mileage and fuel use during the period in question" (Determination, p. 11). Petitioner at all times carried the burden of proving error in the Division's assessment (see, 20 NYCRR 3000.10[d][4]; Matter of Lionel Leasing Indus. Co. v. State Tax Commn., supra, 481 NYS2d 520, 523). Providing a possible explanation does not suffice to carry this burden.

Because the remaining issues raised by petitioner on appeal are the same issues raised before the Administrative Law Judge, and because we find that the Administrative Law Judge completely and adequately addressed these issues, we deem it unnecessary to analyze them any further. Therefore, we affirm the Administrative Law Judge for the reasons stated in his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Earl Stewart Paddock is denied;

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

3. The petition of Earl Stewart Paddock is denied; and

4. The assessments of unpaid truck mileage tax and fuel use tax, dated August 28, 1987, are sustained.

DATED: Troy, New York
December 17, 1992

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner