STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROCCO P. CALVELLO	:	DECISION DTA No. 808514
for Revision of a Determination or for Refund of Highway Use Taxes under Article 21 of the Tax Law for the Period October 1, 1984 through June 30, 1988	:	
	:	

Petitioner Rocco P. Calvello, 202 56th Street, Niagara Falls, New York 14304 filed an exception to the determination of the Administrative Law Judge issued on January 23, 1992 with respect to his petition for revision of a determination or for refund of highway use taxes under Article 21 of the Tax Law for the period October 1, 1984 through June 30, 1988. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter in lieu of a brief. Oral argument, requested by petitioner, was denied.

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

ISSUE

Whether petitioner has shown errors in the Division of Taxation's assessments of highway use taxes warranting a reduction or cancellation of said assessments.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On January 30, 1989, following an audit, the Division of Taxation (hereinafter the "Division") issued notices of determination to petitioner, Rocco P. Calvello, which assessed

fuel use tax ("FUT") in the amount of $14,236.36, plus penalty and interest, and truck mileage tax ("TMT") in the amount of $13,433.94, plus penalty and interest, for the period October 1, 1984 through June 30, 1988.

Petitioner is in the trucking business. During the period at issue petitioner's operation had two components. Petitioner permanently leased avehicle to an entity called Escrow Transport, Limited, and regularly made hauls for Escrow from Buffalo to Syracuse and Albany, and, occasionally, to New York City and Pennsylvania. Additionally, as a side business, petitioner hauled produce that he purchased from a farm in the Elba, New York area to supermarkets in the Buffalo-Niagara Falls area.

On audit, the Division requested all documentation and information used by petitioner in the preparation of his highway use tax returns. Specifically, the Division requested trip reports, Interstate Commerce Commission ("ICC") logs, toll receipts and fuel purchase receipts. The Division also took odometer readings on petitioner's trucks.

In response to this Division request, petitioner produced some fuel purchase records, toll receipts and ICC logs. The ICC logs referred to the work that petitioner did for Escrow Transport. Petitioner presented no trip reports or any documentation regarding day-to-day activities in respect of his produce transport operation. The fuel receipts which were presented did not cover the entire audit period. Moreover, many of the receipts did not identify the vehicle for which the fuel was being purchased.

Following review of these records, the Division determined that it would be necessary to estimate petitioner's mileage and fuel purchases for TMT and FUT purposes. As the basis for this estimate the Division used the fuel deductions listed on petitioner's 1986 and 1987 Federal income tax returns, schedule C. Specifically, the Division estimated a $1.00 per gallon purchase price for diesel fuel throughout the audit period. This estimate was based upon audit experience. The Division then divided the claimed fuel purchase deductions by this $1.00 per gallon in order to arrive at total gallons purchased. The Division then took the yearly gallonage

figures for 1986 and 1987 and divided each of those amounts by four to compute quarterly gallonage figures for each of those years. The Division then averaged the 1986 and 1987 quarterly figures and applied that average to each of the quarters comprising the balance of the audit period (October 1, 1984 through December 31, 1985 and January 1, 1988 through June 30, 1988). Having thus determined gallons of diesel fuel purchased during the audit period, the Division determined petitioner's FUT liability by applying the applicable rate to the audited gallons purchased in each quarter of the audit period. The Division thus determined petitioner's FUT liability for the period at issue to be $14,236.36. For TMT purposes, the Division took quarterly gallons of fuel purchased during the audit period (determined as noted above), multiplied the gallonage figures by five miles per gallon[1] and thereby determined petitioner's New York miles for TMT purposes. To determine petitioner's TMT liability, the Division applied the applicable tax rates to petitioner's quarterly audited mileage figures. After allowing for TMT previously paid by petitioner, the Division determined a TMT liability of $13,433.94.

Subsequent to the issuance of the notices, the Division determined that the fuel deductions set forth on petitioner's 1986 and 1987 Federal schedule C's included fuel consumed by petitioner in hauling for Escrow Transport. Since Escrow reported petitioner's mileage and fuel purchases for TMT and FUT purposes, the Division adjusted the assessments against petitioner by subtracting from audited mileage and fuel purchase amounts petitioner's Escrow mileage and fuel purchases. To make this adjustment, the Division used records made available by Escrow which detailed petitioner's mileage and fuel purchases in connection with his trucking activities for Escrow. Following this adjustment, the revised TMT assessment totaled $2,284.88, plus penalty and interest, and the revised FUT assessment totaled $5,475.34, plus penalty and interest.

The revised assessments as noted above were set forth in a Conciliation Order dated May 18, 1990.

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[1]At hearing, petitioner conceded that five miles per gallon was a reasonable estimate.

On audit, the Division became aware that Escrow Transport was reporting petitioner's truck mileage and fuel use for purposes of Article 21. Prior to the issuance of the notices of determination, the Division did not delete petitioner's Escrow mileage and fuel use from its audit calculations because petitioner did not respond to a Division inquiry regarding whether his claimed schedule C fuel deductions included fuel consumed in hauling for Escrow. Subsequent to the issuance of the notices, petitioner did establish to the Division's satisfaction that the fuel deductions did include Escrow and made the above-noted adjustments accordingly.

During the period at issue, as noted previously, petitioner leased a tractor to Escrow Transport. Petitioner also owned a second tractor, a Mercedes-Benz diesel truck and two GMC gasoline trucks. Aside from the leased tractor which was used in hauling for Escrow, it is unclear from the record precisely which vehicles were used by petitioner in the produce hauling operation.

During the period at issue, petitioner did not maintain any daily records showing miles traveled in New York with respect to any of his vehicles.

OPINION

In the determination below, the Administrative Law Judge held that given petitioner's clear failure to maintain any daily records showing the New York miles traveled by his vehicles, the Division was authorized to estimate petitioner's highway use tax liability and, further, that the Division's method, based on petitioner's claimed fuel expense deductions on his 1986 and 1987 personal income tax returns, was, under the circumstances, reasonable. The Administrative Law Judge found that petitioner did not take issue with the Division's estimate of a $1.00 per gallon purchase price throughout the audit period, concluding that petitioner failed to establish any errors in the assessments as adjusted. The Administrative Law Judge rejected various contentions made by petitioner due to the absence of any documentation or records in support of said contentions and found that, while petitioner contends he apparently was held personally liable by Escrow with respect to certain highway use tax assessments

against Escrow, petitioner's relationship with Escrow is irrelevant to these proceedings since petitioner and Escrow are separate taxpayers.

On exception, petitioner restates allegations made at the hearing below, attempts to submit into evidence two checks made payable to Escrow Transport Ltd., and argues that petitioner's operation is a "mom and pop" family operation and the assessment should be less than 10% of the revised assessment.

The Division argues that petitioner's exception raises no question of law but merely repeats certain factual allegations. The Division also argues that books and records maintained by petitioner were reviewed, the hearing and resulting decision both show that petitioner failed in his obligation to keep complete and accurate records, and the estimate the Division used was completely justified.

We find no basis in the record before us for modifying in any respect the determination of the Administrative Law Judge, however, we must address petitioner's attempt to place before this Tribunal additional evidence in the form of copies of checks which are not part of the record below.

We reject petitioner's attempt, at this late date, to introduce new evidence after the record has been closed. As we held in Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991):

> "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record" (Matter of Schoonover, supra; see also, Matter of Oggi Rest., Tax Appeals Tribunal, November 30, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories Serv. Corp., Tax Appeals Tribunal, December 15, 1988).

As previously stated, we find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rocco P. Calvello is denied;

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

3. The petition of Rocco P. Calvello is denied; and

4. The notices of determination dated January 30, 1989, as adjusted pursuant to the Conciliation Order dated May 18, 1990, are sustained.

DATED: Troy, New York
August 27, 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