

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
EARL STEWART PADDOCK : DETERMINATION
for Revision of a Determination or for Refund : DTA NO. 807040
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 a 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.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on February 8, 1991 at 9:00 A.M. Petitioner filed a brief on March 28, 1991. The Division of Taxation filed a brief on April 26, 1991. Petitioner filed a reply brief on May 30, 1991. Petitioner appeared by John L. Trigilio, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Peter J. Martinelli, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

On August 28, 1987, following an audit, the Division of Taxation 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 the period 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 Leaside Equipment ("Leaside"). Throughout the period at issue Leaside's operations were dedicated almost exclusively to hauling for an entity referred to in the record as International Iron and Metal or Intermetco. Leaside leased vehicles to Intermetco. Petitioner's other business, referred to in the record as Earl Paddock Leasing (or Trucking) ("Paddock"), was, like Leaside, 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 Leaside 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. Leaside had a larger fleet than Paddock. No evidence was presented as to the size of Paddock's fleet during subsequent years. Leaside 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 of Taxation 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 of Taxation 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 Leaside 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 Leaside hauled under a leasing agreement, reported Leaside'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

¹It 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.

with respect to his Paddock operation.

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.

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

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 Finding of Fact "12"), 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.

CONCLUSIONS OF LAW

A. Article 21 of the Tax Law imposes two highway use taxes upon commercial carriers with respect to motor vehicles operated on New York public highways. The first, commonly referred to as the truck mileage tax, is imposed pursuant to Tax Law § 503. This tax is based on the mileage of the vehicle on New York public highways and the weight of the vehicle (20 NYCRR 481.1[a]). The other tax authorized by Article 21 is known as the fuel use tax and is imposed pursuant to Tax Law § 503-a. The FUT is based upon the amount of motor fuel and diesel motor fuel used in New York.

B. Every motor vehicle which operates on the public highways of New York must have a highway use permit (Tax Law § 502). Proper permits must be obtained regardless of the number of trips the vehicle makes or the number of miles the vehicle travels in New York (see Tax Law § 502[1][a], [d]).

C. Tax Law § 507 imposes the following recordkeeping requirements upon carriers subject to tax under Article 21:

"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 traveled 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."

Additionally, regulations promulgated pursuant to Tax Law § 507 further delineate records

required under this section (see, 20 NYCRR parts 483, 493).

D. Petitioner contended that the record herein established that he did not operate in New York. Consequently, he was not required to obtain permits pursuant to Tax Law § 502 or to maintain records pursuant to Tax Law § 507. The record, however, establishes the contrary. Petitioner conceded that he operated vehicles in New York on the seven occasions his vehicles were issued citations. Moreover, petitioner conceded that his vehicles were in New York at other times during the November 1979 through October 1984 period. Although his recollection may be characterized as vague and imprecise, petitioner did indicate that his vehicles made hauls to Otis Elevator's Yonkers, New York and Harrison, New Jersey facilities, albeit on a limited basis, possibly as late as 1981. Further, when asked to estimate the number of trips his vehicles made to New York during this period, petitioner indicated that, while he did not deny his trucks were in New York at this time, "[t]he frequency was way down...,they [petitioner's trucks] weren't in there with near the frequency that's indicated [by the audit]." (Hearing Transcript p. 86.)

Inasmuch as petitioner operated his trucks in New York during the October 1979 through September 1984 period, he was clearly required to obtain permits for his vehicles and was clearly subject to the recordkeeping requirements of Tax Law § 507.

E. Tax Law § 510 provides that if a return filed under Article 21 is:

"insufficient or unsatisfactory...or if no return is made for any period, the commissioner of taxation and finance shall determine the amount of tax due from such information as is available to the commissioner."

F. Where a taxpayer fails to maintain or make available records required under Article 21, the Division is authorized to estimate the taxpayer's highway use tax liability. The Division is required to select an audit method reasonably calculated to reflect tax due. Where recordkeeping is inadequate, exactness is not required in the audit result. Petitioner has the burden of proving error in the assessment. (See, Lionel Leasing Industries Co., Inc. v. State Tax Commn., 105 AD2d 581, 481 NYS2d 520, 523.)

G. As to the audit method employed with respect to the October 1979 through September

1984 period, inasmuch as said method was premised upon petitioner's reported truck mileage and fuel use for the months before and months after the period in question and since petitioner produced no records whatever to document his New York mileage and fuel use during this period or even his overall mileage and fuel use during this period, it must be concluded that the audit method was, under these circumstances, reasonable.

H. It is further concluded that petitioner has failed to prove error in the Division's assessment. As noted, petitioner contended that his Paddock operations in New York were far less frequent than the mileage and fuel use indicated by the results of the Division's audit. To establish this contention petitioner testified that Paddock's hauls through New York for Otis Elevator became less frequent and eventually stopped. As noted previously, however, petitioner could not testify with any precision as to when these changes occurred. Nor was any documentation submitted as to when such changes occurred. Moreover, as also noted previously, petitioner could not state how frequently his Paddock vehicles went into New York during the November 1979 through October 1984 period. Petitioner presented no documentary evidence to indicate his New York mileage or fuel use or his overall mileage or fuel use. Nor did petitioner present any other documentation indicating how his vehicles were used during the audit period. Accordingly, under such circumstances, the audit result must be sustained.

I. Petitioner contended that he made an internal decision, following cancellation of his permits and the loss of business with Otis Elevator, to keep Paddock vehicles out of New York. Any New York hauls were to be handled by Leaside. Petitioner contended that since Leaside and Paddock occupied the same premises, Paddock hauls into New York could easily have been transferred to Leaside vehicles. Petitioner further contended that given his long experience in the trucking business and his familiarity with New York tax requirements that it would have been illogical for him to risk sending unpermitted Paddock trucks into New York.

The foregoing contentions create a plausible scenario as to what may have occurred during the October 1979 through September 1984 period. Such a scenario is not a substitute, however, for proof of petitioner's New York mileage and fuel use during the period in question.

As discussed previously, the evidence presented as to petitioner's New York activity during the period is insufficient to establish error in the Division's assessment. It is upon this insufficient evidence that petitioner's scenario rests.

Additionally, it should be noted that little weight can be attached to the summary income statements presented by petitioner. These statements list revenue earned by petitioner from hauling, but provide no breakdown between total revenue and revenue derived from hauling in New York. Nor is there any evidence in the record of the correlation between revenue and mileage. Further, the statements provide no information regarding total mileage and gallons of fuel used or New York fuel used and New York mileage. The summary statements thus provide little support for petitioner's position.

J. Petitioner raised no objections to the portions of the assessment pertaining to the periods October 1, 1977 through September 30, 1978 and October 1, 1984 through December 31, 1986. These portions of the assessment are thus sustained.

K. The petition of Earl Stewart Paddock is denied and the assessments of unpaid truck mileage tax and fuel use tax, dated August 28, 1987, are sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE