STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FAIRLAWN DAIRIES, INC.	:	DETERMINATION DTA NO. 817010
for Revision of a Determination or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period April 1, 1990 through December 31, 1995.	:	

Petitioner, Fairlawn Dairies, Inc., 520 Main Avenue, Wallington, New Jersey 07057-0340 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 April 1, 1990 through December 31, 1995.

On December 7, 1999 and December 17, 1999, petitioner, appearing by McDermott, Will & Emery (Arthur R. Rosen, Esq. and Richard A. Leavy, Esq., of counsel) and the Division of Taxation by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), respectively, waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by June 2, 2000, which commenced the six-month period for the issuance of this determination. After review of the stipulation of facts, evidence and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly assessed Fairlawn Dairies, Inc. highway use taxes due from independent contractors, by treating petitioner as a "carrier" or owner under Article 21 of the Tax Law with respect to vehicular units owned and operated by the independent

contractors, based upon the independent contractors' use of petitioner's own semi-trailers in New York State.

II. Whether the Division of Taxation properly assessed Fairlawn Dairies, Inc. highway use taxes due from independent contractors, by treating petitioner as a "carrier" under Article 21 of the Tax Law with respect to the loads being hauled to petitioner's customers.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued four notices of determination to petitioner, Fairlawn Dairies, Inc., dated June 21, 1996. The first (Assessment ID L012262216) is an assessment of highway use tax pursuant to Tax Law Article 21, specifically for truck mileage tax, in the amount of $63,454.81, plus interest and penalty in the amounts of $7,320.23 and $14,899.50, respectively, totaling $85,674.54, for the period April 1, 1994 to December 31, 1995.

The second notice (Assessment ID L012262215) is an assessment of highway use tax pursuant to Tax Law Article 21, specifically for fuel use tax, in the amount of $43,258.24, plus interest and penalty in the amounts of $3,898.04 and $9,053.43, respectively, totaling $56,209.71, for the period October 1, 1994 to December 31, 1995.

The third notice (Assessment ID L012262214) is an assessment of highway use tax pursuant to Tax Law Article 21, specifically for fuel use tax, in the amount of $86,523.98, plus interest and penalty in the amounts of $34,599.35 and $25,920.64, respectively, totaling $147,043.97 for the period April 1, 1990 to September 30, 1994.

The fourth notice (Assessment ID L012262213) is an assessment of highway use tax pursuant to Tax Law Article 21, specifically for truck mileage tax, in the amount of $183,710.52,

plus interest and penalty in the amounts of $80,238.65 and $55,108.43, respectively, totaling $319,057.60 for the period April 1, 1990 to March 31, 1994.

2. Petitioner timely filed its Article 21 tax returns, concerning truck mileage tax and fuel use tax, with respect to tractors owned by petitioner during the audit period and timely paid the amounts indicated thereon. The Division asserts that petitioner has underreported and underpaid its Article 21 liability as a result of petitioner's being jointly and severally liable for the liability of the independent contractors either as a carrier with respect to the vehicular units consisting of the independent contractor's tractors and the semi-trailers owned by petitioner, or in the alternative, as the owner of semi-trailers employed by the owner-operators.

3. Petitioner and the Division have agreed that if it is ultimately determined that petitioner is responsible for the Article 21 liability of the independent contractors, the amount of additional liability under Article 21 arising from the operations of the independent contractors engaged by petitioner to deliver petitioner's products is $429,497.18. This additional liability arises exclusively from the operation of the independent contractors.

Petitioner and the Division have also agreed that petitioner overpaid its liability for Article 21 arising from the operation of tractors owned by petitioner during the audit period, in the amount of $140,723.00, due to a reporting error. If petitioner prevails in this matter, the parties agree that petitioner will be entitled to a refund in the amount of $140,723.00 plus applicable interest.

The net amount of additional liability sought by the Division from petitioner pursuant to Article 21, after crediting the overpayment of liability arising from the operation of tractors owned by petitioner, and crediting the payments made by the independent contractors, is $288,774.18. If the Division prevails in this matter, the parties agree that petitioner will be

obligated to make an additional payment of Article 21 tax in the amount of $288,774.18 plus applicable interest. The Division has agreed to cancel any penalties imposed with respect to the additional liability sought by the Division from petitioner.

4. Petitioner was organized as a wholly-owned operating subsidiary of Farmland Dairies, Inc. and was engaged in the business of procuring, marketing and delivering milk and milk-related products. During the audit period, petitioner maintained its principal place of business in Wallington, New Jersey, where all of its production, distribution and office facilities were located. Petitioner sold its products to customers in New Jersey, New York, Pennsylvania and Connecticut; however, all of the company's deliveries originated at petitioner's Wallington, New Jersey facilities.

All of petitioner's customers in New York were retail stores that generally required deliveries by vendors such as Fairlawn to be made pursuant to specific scheduled delivery time windows. Such delivery time windows, set by petitioner's customers in New York, provided short periods of time, generally one to two hours, during which the store personnel would be available to receive deliveries. The time windows were generally before 11:59 A.M., and petitioner's New York customers would generally refuse deliveries when an appointed delivery time window was missed. The use of delivery time windows, however, allowed some flexibility in establishing the order in which deliveries were made.

Petitioner took customer orders each business day for delivery the next business day, and grouped and loaded customers' orders onto semi-trailers for delivery based upon the geographic area of the customers, the geographic area to which the semi-trailers were assigned, the capacity of the semi-trailers, and the delivery time windows requested by the customers. It was the responsibility of petitioner's dispatcher to supervise the loading of customer orders onto the

semi-trailers, assign delivery locations to petitioner's (employee) drivers, and request that deliveries be made by independent contractors pursuant to the contracts entered into with petitioner.

Petitioner tracked the groupings of customer orders for loading and delivery by the number assigned to the semi-trailers in which they were loaded and not by the tractors used to pull them. Petitioner generally began loading the semi-trailers used to transport customer orders at 11:00 P.M. and the first deliveries would depart at approximately 4:00 A.M. In general, between 7 and 20 customer orders would be loaded by petitioner onto a single semi-trailer for delivery to customers.

5. Petitioner's products were delivered to customers on semi-trailers owned by petitioner displaying the brand name of the products sold by Fairlawn (as opposed to "Fairlawn" or a variant thereof), either drawn by petitioner's tractors operated by petitioner's employees, or drawn by tractors owned and operated by independent contractors retained to make deliveries on behalf of petitioner. Each day, between 65 and 85 tractor and semi-trailer combinations were used to deliver petitioner's products. Approximately 80% of the deliveries to petitioner's customers were made by petitioner's employees with tractors and semi-trailers owned by petitioner. The remaining 20% of the deliveries were made by independent contractors with semi-trailers owned by petitioner and tractors owned by the independent contractors. Petitioner's dispatcher would customarily request that the independent contractors deliver to the same customers on a recurring basis. However, each driver employed by petitioner and each driver for an independent contractor had the right and the opportunity to determine the order in which the semi-trailer he or she was transporting would be loaded to reflect the driver's preferred delivery order and driving route.

6. The diesel fuel supply used to power the refrigeration units used to keep products fresh on petitioner's semi-trailers was separate and apart from the diesel fuel supply used to power the tractors pulling them. The fuel used to power the refrigeration units was supplied by petitioner for all of petitioner's semi-trailers and is not an element of the computation of Article 21 tax liability claimed by the Division.

7. The relationships between petitioner and the independent contractors engaged to deliver petitioner's products were governed in all respects by relevant laws and regulations and the terms of contracts entered into by petitioner and the independent contractors, the form of which was submitted as part of the record. The contracts entered into between petitioner and the independent contractors:

a. specified the terms and conditions upon which petitioner hired the independent contractors and the compensation to be paid to the independent contractors for making deliveries;

b. provided that neither the independent contractors nor the independent contractors' drivers were employees of petitioner, but rather would be treated as independent contractors for all purposes;

c. granted the independent contractors the option to accept or reject any delivery request by petitioner without recourse;

d. permitted the independent contractors to deliver products for companies other than petitioner;

e. did not grant petitioner any control or supervision over the driving of independent contractors or the independent contractors' drivers;

f. did not grant petitioner any authority over the number of hours worked or any of the conditions under which the independent contractors' drivers operated the independent contractors' tractors used to make deliveries for petitioner;

g. did not allow petitioner to select driving routes used by the independent contractors' drivers or the order in which deliveries were to be made;

h. did not make the independent contractors or the independent contractors' drivers accountable to petitioner with respect to the details of the driving routes that they used or the time spent working, driving or unloading;

i. bore delivery requirements which required that deliveries had to be made to the locations specified by petitioner within the time windows specified by the customers and that the refrigeration units on petitioner's semi-trailers were to be used;

j. provided that petitioner had the right, but not the obligation, to make emergency repairs on the independent contractors' tractors solely for the purposes of making such tractors safe and protecting petitioner's products and, in practice, such emergency repairs were undertaken very rarely;

k. provided that the independent contractors would make payment to petitioner for the cost of parts or labor with respect to emergency repairs made by petitioner to the independent contractors' tractors and, in practice, in the very rare instances that such emergency repairs were made, payment was always made to compensate petitioner for the cost of parts or labor with respect to such emergency repairs;

l. provided that the independent contractors were responsible for any damage or loss with respect to petitioner's semi-trailers or products and would secure $1,000,000.00 of liability

insurance to indemnify petitioner against such damage or loss, naming petitioner as an additional insured;

m. provided that petitioner would not provide or maintain the tractors or any of the equipment, tools, materials, or supplies of the independent contractors and petitioner did not provide or maintain such items;

n. provided that petitioner would not provide reimbursement of expenses incurred in the delivery of petitioner's products (except bridge, highway, and tunnel tolls) by the independent contractors and petitioner did not provide such reimbursement;

o. stated that petitioner would not provide the fuel used by the independent contractors to power their tractors in delivering petitioner's products and petitioner did not pay for such fuel;

p. provided that each independent contractor had the obligation to provide his, her or its own tractors over which the independent contractor retained "exclusive possession, control and use" and the independent contractors provided their tractors over which they retained "exclusive possession, control and use";

q. provided that each independent contractor was entitled to hire drivers and assistants at his, her or its own expense and the independent contractors exercised such rights;

r. provided that the drivers operating the tractors of the independent contractors' engaged by petitioner to deliver petitioner's products would not wear Fairlawn employee uniforms and such drivers did not wear Fairlawn employee uniforms;

s. provided that the independent contractors would not display the Fairlawn name on their tractors or on any of their equipment and the independent contractors did not so display the Fairlawn name;

t. provided that the independent contractors would deliver petitioner's products at a fixed rate plus highway, bridge, and tunnel tolls; and

u. provided that the independent contractors would have the responsibility for all environmental liabilities arising from the operation of their tractors.

8. Any profit or loss to the independent contractors under contracts entered into between petitioner and the independent contractors was a result of the independent contractors' own operating expenses and revenues.

9. Neither the independent contractors nor the independent contractors' drivers were employees of petitioner for purposes of all federal, state and local employment taxes, including, but not limited to, federal income tax withholding, state income tax withholding, Federal Insurance Contribution Act taxes, and Federal Unemployment Tax Act taxes, but rather were properly characterized as independent contractors and the employees of independent contractors. Accordingly, petitioner did not withhold any federal, state or local payroll or income taxes from the amounts paid to the independent contractors engaged by petitioner to deliver petitioner's products.

Petitioner did not provide any employee benefits or any workers' compensation coverage to either the independent contractors or employees of the independent contractors. The independent contractors each had the responsibility for filing tax returns and paying their own tax liabilities, including federal and state income taxes. Likewise, as both owners and operators with respect to the tractors they operated, the independent contractors each had the responsibility for paying all tax liabilities under Article 21 from the operation of their tractors (whether the independent contractors' liability for the tax arising under Article 21 is exclusive is the question at issue in this proceeding).

As a courtesy, petitioner prepared the Article 21 returns for a limited number of the independent contractors; however, such returns were prepared in the names of the independent contractors with information provided by such independent contractors and the Article 21 liability reflected on those returns was paid by such independent contractors.

10. Petitioner was not an owner or lessee of the tractors operated by the independent contractors.

11. As both owners and operators with respect to the tractors they operated, the independent contractors each had the responsibility for complying with all motor vehicle and motor carrier safety statutes, ordinances, and regulations, including complying with all federal, state, and local laws and regulations governing the operation of their tractors.

12. Petitioner was not registered with the United States Interstate Commerce Commission ("ICC") and did not have an ICC number, since petitioner was not required to obtain such number. To the extent, however, that the independent contractors delivered petitioner's retail products or delivered goods for other companies, those independent contractors were required to be registered with the ICC. There was no exemption from the ICC requirements allowing single-driver independent contractors to operate under petitioner's exemption from registration with the ICC.

13. Petitioner was not required to be, nor was it, registered with the New York State Department of Transportation and it did not have a New York State Department of Transportation number.

14. Petitioner was registered with the New Jersey Department of Transportation ("NJDOT") and was in possession of a NJDOT number reflecting such registration. Accordingly, petitioner was responsible for complying with all rules and regulations

promulgated by the NJDOT. NJDOT required that petitioner maintain logs and other records detailing all of the deliveries that were made by or on behalf of petitioner, and did not distinguish between deliveries made by petitioner's employees, with tractors owned by petitioner, and those made by independent contractors, with tractors owned by the independent contractors. The contracts entered into between petitioner and the independent contractors provided that the independent contractors would furnish petitioner with logs and other records on a daily basis so that petitioner itself could comply with the NJDOT rules requiring logs and other records, as the party on whose behalf deliveries were made.

15. The parties stipulated to 73 facts, all of which are incorporated in Findings of Fact "2" through "14." By their stipulation, the parties also outlined the issues, which have been further refined based upon their subsequent submission of briefs. Further, the parties agreed to proceed by submission, in lieu of a hearing, and outlined the exhibits which constitute the record in this matter. They include the following: Fairlawn's petition, the Division's answer, revised schedules indicating the amount of tax due, the Governor's Bill Jacket (L 1984, ch 583), a sample of the contract entered into by petitioner and the independent contractors, a dispatch sheet listing of all petitioner's delivery regions indicating frequency of service, and documentation from independent contractors' engagements.

SUMMARY OF THE PARTIES' POSITIONS

16. Petitioner maintains that it is not liable for the Article 21 taxes due from the independent contractors because petitioner was not an owner or carrier with respect to the vehicular units they employed. Petitioner also asserts that it was merely a purchaser of delivery services and did not have the lawful use or control, or the right to the use or control of the

independent contractors' tractors, and thus, was not a carrier with respect to those vehicular units.

17. The Division argues that petitioner is liable for the taxes due from the independent contractor operations because it owned the trailers being hauled. Furthermore, the Division argues that petitioner is liable for the taxes due from independent contractor operations because petitioner is the carrier with respect to the loads being hauled. By controlling the trailers, the Division argues, petitioner effectively controlled the tractors which hauled them.

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 State 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]). Tax Law § 503(1) provides the following, in pertinent part:

> In addition to any other tax or fee imposed by law, there is hereby levied and imposed a highway use tax for the privilege of operating any vehicular unit upon the public highways of this state and for the purpose of recompensing the state for the public expenditures incurred by reason of the operations of such vehicular units on the public highways of this state. Such tax shall be upon the carrier except that where the carrier is not the owner of such vehicular unit, the tax shall be a joint and several liability upon both. Such tax shall be based upon the gross weight of each motor vehicle and the number of miles it is operated on the public highways in this state except as hereinafter provided.

The second tax authorized by Article 21 is known as the fuel use tax ("FUT") 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 and is imposed for the privilege of operating any vehicular unit (other than one not relevant to this matter) upon the public highways of New York State.

The tax is imposed upon the carrier, except where the carrier is not the owner of such vehicular unit, when the tax liability is joint and several upon both (Tax Law § 503-a[1]).

The term "carrier" includes "any person having the lawful use or control, or the right to the use or control of any vehicular unit in this state" (Tax Law § 501[c][5]).

The term "vehicular unit" is defined by Tax Law § 501(3) as "a motor vehicle alone or in combination with any other motor vehicle, trailer, semi-trailer, dolly, or other device drawn thereby" (Tax Law § 501[3]).

The term "motor vehicle" includes, "any automobile, truck, tractor or other self-propelled device [having a specific gross weight not in issue in this matter], which is used upon the public highways otherwise than upon fixed rails or tracks" (Tax Law § 501[2][a]).

B. Petitioner first argues that Fairlawn's ownership of the semi-trailers used by the independent contractors is not a basis for holding petitioner liable for the additional Article 21 tax. The key to petitioner's position references the 1984 amendments to Tax Law § 501, specifically the definition of "motor vehicle," and asserts that by removing the language from the statute that defined drawn devices (e.g., semi-trailers) as motor vehicles, the Legislature removed the Article 21 tax on drawn devices. Petitioner points to the Legislative history surrounding chapter 583 of the Laws of 1984, as indicative of the Legislature's intent to exempt the owners and lessors of drawn devices from any Article 21 tax liability. Any interpretation that such amendments altered the Article 21 liability is completely unsupported by the Governor's Bill Jacket for chapter 583. Specifically, the Budget report of the bill which affected the Tax Law sections in issue indicated its purpose as follows:

> To simplify administration of and compliance with the State highway use tax by eliminating requirements relating to permits and stickers for most trailers, semi-trailers and other drawn devices, and by compensatorily increasing permit fees for tractors and other vehicles.

The bill clearly focused upon an administrative burden and the cost associated therewith on the trucking industry to locate each trailer and semi-trailer in order to have a permit placed in it and sticker affixed to it. There is no reference in the legislative history to support petitioner's position.

Even more critically important in establishing its position, petitioner fails to discuss Tax Law § 503 and § 503-a, governing the imposition of Article 21 highway use taxes, and the role such sections played before and after the 1984 amendments to Article 21. First, as pertinent herein, the provisions read the same before and after the 1984 amendments. Second, clearly, Tax Law § 501 must be read with sections 503 and 503-a, since it is these sections which actually impose the tax that is at the heart of this discussion. One cannot isolate the definitions of Tax Law § 501, and read the imposition of tax, or the inapplicability thereof, on the basis of Tax Law § 501 alone. Both sections 503 and 503-a provide that highway use taxes will be imposed "upon the carrier *except that where the carrier is not the owner of such vehicular unit, the tax shall be a joint and several liability upon both" (*emphasis added*)(**see also, 20 NYCRR 480.1**)*. I agree with petitioner's assertion that it is not a carrier in accordance with Article 21 for purposes of the trips in issue, since petitioner does not have the use, control or right to use or control in this State of the vehicular units in question. Petitioner's semi-trailers alone are not vehicular units (Tax Law § 501[3]). Petitioner's semi-trailers (as drawn devices), when combined with the tractors owned by the independent contractors, are vehicular units (Tax Law § 501[2][a];[3]) . However, there is no evidence that petitioner has any right to use or control the tractors owned and operated by the independent contractors. In fact, the agreement between the parties indicates the contrary. The right to use and control the vehicular units, and control of virtually all aspects of the transport, rests with the independent contractors. Accordingly, under the facts of this case,

only the independent contractors can be deemed carriers pursuant to Article 21. As previously stated, generally the carrier bears responsibility for the Article 21 taxes. However, Tax Law §§ 503 and 503-a impose joint and several liability where the carrier is not the owner of the vehicular unit in question. Petitioner agrees that the independent contractors' use of petitioner's semi-trailers adds to the Article 21 tax liability of the persons operating the motor vehicles in combination with those drawn devices (here the independent contractors). However, petitioner argues that the ownership of its semi-trailers used by the independent contractors does not create a liability which accrues to it. Petitioner's argument in this regard is without merit. As previously stated, sections 503 and 503-a impose joint and several liability where the carrier is not the owner of the vehicular unit in question. In this case the vehicular units upon which tax is imposed, are the tractors owned by the independent contractors in combination with petitioner's semi-trailers. Thus, petitioner shares in the liability by virtue of its ownership of its semi-trailers used in connection with the delivery of petitioner's products.

C. Petitioner raised numerous other issues that given Conclusion of Law "B" are deemed no longer relevant and do not alter the result above. They are mentioned below.

Petitioner asserts that the agreements between petitioner and the independent contractors were not leases. Had petitioner assumed lessor status of the independent contractors' tractors, petitioner may have been held to be a carrier under the Tax Law. This issue is not asserted or addressed by the Division, and is not further addressed herein.

Petitioner maintains that it did not have use or control over the tractors owned by the independent contractors. The Division attempts to refute this by pointing to petitioner's dominion and control over the trailers and, thus, effectively the tractors that hauled them, giving petitioner carrier status. The agreement between petitioner and the independent contractors

supports a finding that the independent contractors remained in control and are the only carriers under these facts.

Petitioner lastly asserts it did not have an employer-employee relationship with the independent contractors that would cause petitioner to be a carrier. This is not disputed by the Division, and is not further addressed.

D. The Division's final argument is that petitioner is liable for the taxes due from independent contractors due to its status as the carrier with respect to the loads being hauled. As established by Conclusion of Law "B," petitioner is not a carrier (Tax Law § 501[c][5]). The law defines a carrier by virtue of its use and control of a vehicular unit, without reference to what, if anything, is hauled thereby. The Division's argument in this regard is unsupported by the Tax Law.

E. The petition of Fairlawn Dairies, Inc. is hereby denied and the four notices of determination dated June 21, 1996 are upheld, as modified and offset by an overpayment, in accordance with Finding of Fact "3".

DATED: Troy, New York
November 9, 2000

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE