STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

AERO MAYFLOWER TRANSIT CO., INC. DECISION

for Revision of aDetermination or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period October 31, 1978 through June 30, 1982.

Petitioner, Aero Mayflower Transit Co., Inc., P. O. Box 107B, Indianapolis, Indiana 46206, 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 31, 1978 through June 30, 1982 (File No. 41364).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. Averell Harriman State Office Campus, Albany, New York, on August 7, 1986 at 10:45 A.M., with all briefs to be submitted by December 1, 1986. Petitioner appeared by O'Connell and Aronowitz, P.C. (Fred B. Wander, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq., (Arnold M. Glass, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly denied exemption from imposition of truck mileage tax for mileage incurred by certain vehicles used by petitioner's electronics division.

II. Whether the Audit Division properly determined that certain of petitioner's shipments, otherwise exempt from truck mileage tax, were "contaminated" by a nonexempt shipment by the same vehicular unit during a particular calendar month thereby rendering such shipments subject to tax.

III. If so, whether the Audit Division's methodology in determining the percentage of contaminated miles travelled by petitioner's new products division was proper.

IV. Whether the Audit Division properly disallowed petitioner credit against fuel use tax for certain purchases made by petitioner's agent, Warners Motor Express, Inc.

FINDINGS OF FACT

1. On November 23, 1982, following an audit, the Audit Division issued assessments of unpaid truck mileage tax and unpaid fuel use tax, plus interest, to petitioner, Aero Mayflower Transit Co., Inc., for the period October 31, 1978 through June 30, 1982. Subsequent to the issuance of the assessments, the Audit Division revised the amount of tax assessed as follows:

Tax	Revised Tax Due
Truck Mileage	$19,161.00
Fuel Use Tax	$10,781.65

2. At all times relevant herein, petitioner was in the business of transporting both household goods and non-household goods, separating its operations into three divisions: household goods, electronics goods, and new products. Petitioner considered its household goods and electronics goods shipments exempt from the imposition of truck mileage tax and therefore reported only the mileage incurred on its new products shipments on its truck mileage tax returns for the period at issue.

3. Petitioner filed quarterly truck mileage tax and fuel use tax returns for the period October 31, 1978 through September 30, 1981. Petitioner subsequently filed monthly.

4. On audit for truck mileage tax purposes, the Audit Division, with petitioner's consent, used the period April 1, 1981 through June 30, 1981 as a

test period to review petitioner's records. This review revealed that petitioner had underreported mileage for this period by 10.8 percent. This error rate was projected over the audit period to arrive at total additional nonexempt miles for petitioner's new products division. Of this error rate, 6.6 percent was based upon a finding of short miles and erroneous routing in petitioner's records; that is, the reported mileage for certain trips was insufficient to cover the point-to-point distance for that trip. This portion of the error rate was conceded at hearing by petitioner.

5. The remaining 4.2 percent of the error rate was premised upon the Audit Division's assertion that petitioner had improperly failed to report total mileage for vehicles which had transported both new products and household goods. Specifically, with respect to such vehicles, petitioner reported only the mileage incurred as a result of the movement of new products. The Audit Division maintained that a vehicle which moved a (taxable) new products shipment was "contaminated" for the calendar month during which the new products shipment occurred, thereby precluding exemption for household goods shipments transported by the same vehicle during the same calendar month.

6. Although the Audit Division took the position that vehicles taking nonexempt loads were "contaminated" for truck mileage tax purposes for one calendar month, the 4.2 percent error rate was calculated on a quarterly basis. Vehicles which hauled nonexempt goods were therefore "contaminated" for audit purposes for three months. No evidence was presented as to the effect of the use of the three month period on the audit results.

7. The Audit Division subsequently reviewed movements of petitioner's electronics products division. Petitioner agreed to the use of May 1981 as a test period. The Audit Division found some 19 electronics products division

movements among those reviewed which it determined to be taxable. These 19 movements resulted in 6,051 nonexempt miles of the 138,461 total New York miles traveled in May 1981 by electronics division vehicles, which, in turn, resulted in the Audit Division's application of a 4.37 percent error rate which was applied to the total New York mileage incurred by electronics products division vehicles throughout the audit period. This calculation resulted in a finding of 334,361 nonexempt electronics division miles throughout the audit period. Additionally, the Audit Division applied the 6.6 percent error rate for short miles and erroneous routing which had been calculated with respect to new products shipments (Finding of Fact "4") to the nonexempt electronic division miles to determine total additional electronics division miles.

8. The Audit Division then totalled the additional nonexempt new products miles and the total additional electronics division miles per reporting period, and calculated the additional truck mileage tax asserted due herein. Petitioner did not take issue with the tax rates applied by the Audit Division in its calculations.

9. The 19 electronic division movements which were determined to be nonexempt by the Audit Division were as follows:

	Shipment No.	Description
(a)	F-0287-4024 H-0287-4025	Cabinets sold by Honeywell, a computer company.
(b)	A-0484-2045	Carpeting used in connection with a trade show.
(c)	A-0484-2047	Control panel for a computer system.

(d)	K-0999-2207 5-0999-2076 H-0999-1953 1-0999-2011 J-0999-1903 D-0999-2081 H-0999-1558	Tables shipped by designer for Wang Laboratories' use in connection with printers also manufactured by Wang.
(e)	K-0999-2194	Custom made stainless steel gallery unit for AMTRAK.
(f)	J-0999-1777	Water flow control panel to be used by Kentucky Power Company. Contains electrical parts.
(g)	K-0287-4179 B-0287-4321 G-0287-4281	Racks for computer systems.
(h)	H-0287-4287	Cabinets for use with a computer system.
(i)	G-0287-4206	Computer cabinet and printer.
(j)	H-0287-4340	Computer racks and printers.

10. Regarding the movements set forth above, the Audit Division acknowledged that the movements described in Findings of Fact "9(i)" and "(j)" would be exempt movements except that such movements were by the same vehicle which transported the movement described in "9(h)", which was determined taxable by the Audit Division. The "9(i)" and "(j)" movements were thus contaminated by the "9(h)" movement.

11. With respect to all movements by petitioner, the shipper determined the type of handling to be accorded each movement. In each movement listed above, the shipper chose specialized handling and the shipment was classified under section 2 of Tariff 404-A of the Interstate Commerce Commission. Petitioner charged a significantly higher rate for specialized handling movements, and in return provided greater care in handling the shipped items.

12. All of the movements discussed above were shipped pursuant to the terms of Tariff No. 404-A, as promulgated by the Interstate Commerce Commission. This tariff set the rates to be charged for the shipments and also set forth the following definition of "household goods'' for purposes of Tariff No. 404-A:

> "[S]pecifying articles which because of their unusual nature or value require specialized handling and equipment usually employed in moving household goods, CONSISTING SOLELY OF-
>
> (1) TABULATING MACHINES, INCLUDING SUCH AUXILIARY MACHINES OR COMPONENT PARTS AS ARE NECESSARY TO THE PERFORMANCE OF A COMPLETE TABULATING PROCESS, INCLUDING PUNCHES, SORTERS, COMPUTERS, VERIFIERS, COLLATORS, REPRODUCERS, INTERPRETERS, MULTIPLIERS, WIRING UNITS, *AND* CONTROL PANELS *AND* SPARE PARTS THEREFOR,...
>
> (2) RADIO AND TELEVISION TRANSMISSION, RECEIVING AND RECORDING EQUIPMENT, ELECTRON MICROSCOPE EQUIPMENT AND COMPONENT PARTS THEREFOR.. .."

13. This definition was also used by the Audit Division in determining the taxability of the various movements.

14. The Audit Division also audited petitioner's fuel use tax returns for the period at issue with the second quarter of 1981 again being the agreed test period. The Audit Division utilized the audited miles determined in the manner set forth in Findings of Fact "4", "7" and "8" and divided this total mileage figure by the miles per gallon amounts supplied by petitioner to determine New York gallons of gasoline purchased. This amount was then reduced by 27.82 percent based upon the disallowance of credit for fuel receipts in the name of Warners Motor Express, Inc. of Red Lion, Pennsylvania. The 27.82 percent reduction was then applied throughout the audit period.

15. Warners was an exclusive agent of petitioner during the period at issue and had no operating authority in New York subsequent to 1979.

16. On audit, the Warners fuel purchase invoices were examined by the Audit Division. The invoices were of the type used for credit card purchases. Petitioner contended that the purchases themselves were made in cash by Warners Motor Express. The Audit Division contended that the purchases at issue were credit card purchases.

17. None of the disputed Warners Motor Express invoices were introduced into the record.

18. Petitioner conceded that the fuel receipts in Warners' name were in error, but contended that the denial of credit for such purchases was nonetheless improper because, petitioner argued, it had compiled with the recordkeeping requirements set forth in the relevant regulations. Alternatively, petitioner contended that the disputed fuel receipts were an isolated occurrence and that it was therefore improper to project this error over the entire audit period.

CONCLUSIONS OF LAW

A. That section 504.5 of the Tax Law exempts from the highway use tax imposed pursuant to section 503 of the Tax Law any vehicular unit:

> "Used exclusively in the transportation of household goods (as defined by the commissioner of transportation of this state or the interstate commerce commission) by a carrier under authority of the commissioner of transportation of this state or of the interstate commerce commission".

B. That the definition of "household goods'' for purposes of Tariff No. 404-A (Finding of Fact "12") is based upon a report of the Interstate Commerce Commission in Practices of Motor Common Carriers of Household Goods (17 MCC 467) and is substantially similar to the definition of household goods set forth in 49 USC § 10102(a)(11)(C). The Interstate Commerce Commission's report, in discussing the proposed "household goods" definition, stated the following:

> "In issuing certificates of public convenience and necessity authorizing the transportation of household goods only, we do not intend to authorize the unrestricted transportation of a wide variety of commodities which do not by their nature require the specialized service rendered by household-goods carriers. It is not intended, for example, to permit the transportation of new furniture from factory to store in competition with common carriers of that commodity. On the other hand, the transportation of objects of art, museum pieces, certain types of displays and exhibits, and other unusual objects, regardless of the identity of the consignee and consignor, is properly a part of the services of these carriers. Such articles, because of their high value, susceptibility to damage, or unique design, do not lend themselves readily to ordinary motor-carrier transportation but require the special care and handling which the household-goods carrier is qualified and equipped to give. In drafting the prescribed definition we have tried to preserve the inherent difference which exists between the household-goods carrier and the common carrier of general or special commodities" (17 MCC 467, *474).*

It is thus clear that in order to qualify for the exemption set forth in section *504.5,* petitioner must show that the shipments in dispute (as set forth in Finding of Fact "9") required the specialized care provided by the mover of household goods.

C. That of the 19 electronic division shipments at issue, petitioner has established its entitlement to exemption for the shipments set forth in Findings of Fact "9(c)" and "9(f)".

D. That as to the remaining electronics division shipments at issue, petitioner has failed to establish its entitlement to exemption. Specifically, petitioner failed to show with any degree of specificity how or why these articles required specialized care.

E. That the use of a one month contamination period to determine whether a vehicular unit was used "exclusively" in the transportation of household goods (Finding of Fact *"5")* was in all respects reasonable and within the meaning and intent of section *504.5* of the Tax Law. It is noted that this

interpretation is consistent with the treatment accorded farm vehicles and vehicles transporting mail (see 20 *NYCRR 471.4, 471.5*). It is further noted that, although the Audit Division utilized a three month period to calculate the "contamination" of petitioner's new products vehicles hauling household goods, such methodology was not improper. In calculating this portion of the error rate, the Audit Division added the miles travelled by contaminated vehicles for the three month period, but it also added the total miles travelled by new products division vehicles for the same quarter. The resulting error rate therefore reasonably reflected the ratio between contaminated and total miles travelled by new products vehicles throughout the audit period.

F. That subdivision 3 of section 503-a of the Tax Law provides for a credit against the tax imposed by subdivision 1 of section 503-a ("fuel use tax"), and further provides:

> "Each carrier claiming such credit components shall furnish to the tax commission such evidence of payment of such taxes as it may require."

G. That 20 NYCRR 493.3 delineates the following fuel purchase records to be maintained by a carrier under Article 21:

> "(a) Fuel purchases shall be evidenced by the original invoice of such purchases, except that charge purchases including credit card purchases, shall be evidenced by duplicate invoices in the name of the person filing the fuel use tax return, together with an original periodic statement of purchases.
>
> (b) Such invoices shall show the name and address of the vendor, name and address of purchaser or licensee, identification of the power unit of the vehicle by company unit number or by state and number of motor vehicle registration, name of product, retail price of each gallon of the product, state of purchase, Federal, State and local excise and sales tax charged, number of gallons, date of sale and signature of purchaser. Invoices for sales made out to 'cash' will not be accepted."

H. That petitioner has failed to establish its entitlement to Tax Law S 503-a(3) credit with respect to the fuel purchases made by Warners Motor Express, Inc. Assuming, arguendo, that cash purchases by Warners would be entitled to the credit, petitioner has failed to establish that the purchases in question were, in fact, made in cash. It is noted that none of the disputed invoices were introduced into the record. Moreover, although it was established that Warners was an exclusive agent of petitioner, no evidence was received as to the nature of the agency relationship between the two. Specifically, while it is apparent that the purchases were made for petitioner's benefit, petitioner has failed to establish that it had paid Warners for the disputed gasoline and the taxes imposed thereon. Absent such proof, petitioner is not entitled to the claimed credit (Tax Law § 503-a[3]). Additionally, petitioner has failed to sustain its burden of proof to show that the Warners purchases were an isolated occurrence and thus improperly projected over the audit period.

I. That the petition of Aero Mayflower Transit Co., Inc., is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is directed to adjust the assessments of unpaid truck mileage tax and fuel use tax in accordance therewith; and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAY 26 1987

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER