

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CLEVELAND GENERAL TRANSPORT CO., INC.

DECISION

for Revision of a Determination or for Refund
of Highway Use Tax under Article 21 of the Tax :
Law for the Periods Ended December 31, 1980, :
March 31, 1981 and March 31, 1982. :

Petitioner, Cleveland General Transport Co., Inc., 1 Van Street, Staten
Island, New York 10310, filed a petition for revision of a determination or for
refund of highway use under Article 21 of the Tax Law for the periods ended
December 31, 1980, March 31, 1981 and March 31, 1982 (File No. 47821).

A hearing was held before Brian L. Friedman, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New York
on August 7, 1986 at 10:45 A.M. Petitioner appeared by Edward F. Bowes, Esq.
The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of
counsel).

ISSUE

Whether petitioner timely filed claims for fuel use tax refunds for the
quarterly periods ended December 31, 1980, March 31, 1981 and March 31, 1982.

FINDINGS OF FACT

1. On July 15, 1983, the Audit Division issued to Cleveland General
Transport Co., Inc., a Proposed Audit Adjustment of Tax Due under Article 21 of
the Tax Law which explained that a field audit of petitioner's truck mileage
tax records for the period October 1, 1979 through March 31, 1983 had disclosed
omitted New York State mileage resulting in additional truck mileage, tax due in
the amount of \$11,060.46, which amount had been reduced by unpaid refunds of

fuel use tax **in** the amount of \$4,344.37 which were due and owing to petitioner for the periods ended June 30, 1982 and March 31, 1983. Petitioner was further advised that fuel use tax refund claims for the periods ended December 31, 1980, March 31, 1981 and March 31, 1982 had been disallowed due to petitioner's failure to timely file such claims for refund. Accordingly, **on** November 3, 1983, the Audit Division issued to petitioner an Assessment of Unpaid Truck Mileage Tax for the period October 1, 1979 through March 31, 1983 **in** the amount of \$11,060.46 plus interest of \$2,129.14 for a total due of \$13,189.60. Unpaid fuel use tax refunds for the second quarter **of** 1982 and the first quarter of 1983 totalling \$4,344.37 were applied to this assessment, resulting **in** a net amount due of \$8,845.23.

2. Neither **in** its petition nor at the hearing held herein did petitioner contest the Audit Division's determination that petitioner owed additional truck mileage **tax in** the amount **of** \$11,060.46 for the period October 1, 1979 through March 31, 1983. Petitioner contends, however, that fuel use tax refunds for the periods ended December 31, 1980, March 31, 1981 and March 31, 1982 should have been offset against the amount due pursuant to assessment of unpaid truck mileage **tax**.

3. On April 21, 1982, the Audit Division received from petitioner a Claim for Fuel **Use Tax** Refund for the quarter ended March 31, 1981. This claim bore the signature **of** R. X. Lipa and the date of April 19, 1982. Attached thereto was a copy of a New York State Combined Truck Mileage and Fuel **Use** Tax Return for the periods January 1, 1981 through March 31, 1981 for fuel use **tax** and March 1 through March 31, 1981 for truck mileage tax. Also attached were copies of Maryland, Connecticut and **Nw** Jersey returns. The total refund claimed was \$4,018.40 for fuel use **tax** paid on diesel fuel to these states.

4. For the quarters ended December 31, 1980 and March 31, 1982, the Department of Taxation and Finance did not receive a fuel use tax refund claim from petitioner. When petitioner's office manager, Ralph X. Lippa, was advised by the auditors that the Department had no record of receipt of refund claims for these periods, he provided the auditors with copies of the claims which he alleges had been previously filed. For the quarter ended December 31, 1980, Mr. Lippa provided a copy of a Claim for Fuel Use Tax Refund **in** the amount of \$3,846.12 for fuel use tax paid **on** diesel fuel to Connecticut, New Jersey and Massachusetts. The said copy bore the signature of Ralph M. Lippa and the date of February 20, 1981. Attached thereto were copies of petitioner's New York State Combined Truck Mileage and Fuel Use Tax Return for the periods October 1, 1980 through December 31, 1980 for fuel use tax **and** December 1 through 31, 1980 for truck mileage tax. **Also** attached were copies of Connecticut, ~~New~~ Jersey and Massachusetts returns. For the quarter ended March 31, 1982, Mr. Lippa provided a copy of a Claim for Fuel Use Tax Refund **in** the amount of \$2,576.80 for fuel use tax paid **on** diesel fuel to Connecticut and New Jersey. The copy bore the signature of R. **M.** Lippa and the date of **May** 20, 1982. **Also** attached were copies of petitioner's ~~New~~ York State Combined Truck Mileage and Fuel Use Tax Return and returns filed by petitioner with Connecticut and New Jersey.

5. Petitioner's office manager, Ralph X. Lippa, stated that he prepares **all** of petitioner's fuel use tax refund claims **in** his office, that he signs all such claims and that he mails all such claims by ordinary mail. Part of his duties **are** to go to the Post Office and deposit petitioner's daily mail. **He** does **not** always mail the refund claims on the **same** date **on** which they are prepared. When petitioner did not receive fuel use tax refunds for the

periods at issue herein, Mr. Lipa did not send written inquiries to the Department of Taxation and Finance concerning the whereabouts of such refunds.

CONCLUSIONS OF LAW

A. That 20 NYCRR 494.2 provides as follows:

"If proof satisfactory to the State Tax Commission is submitted showing that a carrier has paid to another state, under a lawful requirement of that state, a tax, similar to the fuel tax component of the fuel use tax, on the use or consumption in such other state of motor fuel or diesel motor fuel purchased in New York State on which the taxes imposed by Article 12-A of the Tax Law have been paid, and if a claim for refund is filed within one year from the end of any calendar quarter, the excess of the fuel tax component for such quarter shall be refunded. Such excess shall be refunded only to the extent of the payment to the other state, and in no case to exceed the applicable State rate per gallon in effect under Article 12-A of the Tax Law. No refund is allowable for any amount of the sales tax component of the fuel use tax. A claim for refund of such excess credits shall be made on form MT-906, claim for fuel use tax refund."

B. That 20 NYCRR 494.3(a) provides, in pertinent part, as follows:

"A claim for refund based upon the fuel use tax component of the fuel use taxes paid other states must be filed within the one-year period commencing on the last day of the calendar quarter from which the excess credit was derived."

C. That, for the period ended March 31, 1981, petitioner's Claim for Refund for Fuel Use Tax Refund was dated April 19, 1982 and received by the Department of Taxation and Finance on April 21, 1982. In order for said refund claim to have been timely filed, it would have to have been filed on or before March 31, 1982. Said claim for refund was, therefore, not timely filed and petitioner is neither entitled to a refund nor entitled to have the amount

claimed as a refund for such period offset against its assessment for unpaid truck mileage tax.


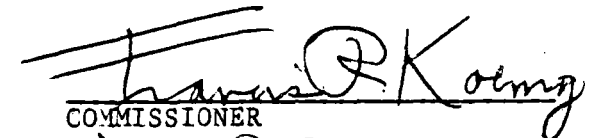
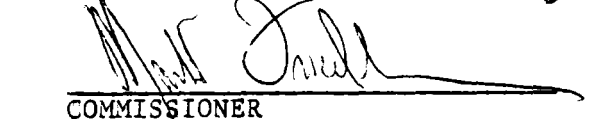
D. That for the periods ended December 31, 1980 and March 31, 1982, the Audit Division did not receive fuel use tax refund claims until petitioner's office manager presented such claims during a field audit which commenced on **May** 31, 1983. Petitioner has the burden of proving that such refund claims were timely filed and petitioner has failed to sustain its burden of proof. Petitioner is not, therefore, entitled to a refund of fuel use tax for those periods **nor is it** entitled to have the amounts claimed as refunds for such periods offset against its assessment for unpaid truck mileage tax.

E. That the petition of Cleveland General Transport **Co., Inc.** **is** denied and the Assessment of Unpaid Truck Mileage Tax issued **on** November 3, 1983 **is** hereby sustained.

DATED: Albany, New York

STATE **TAX** COMMISSION

FEB 20 1987


PRESIDENT

COMMISSIONER

COMMISSIONER