

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter **of** the Petition

of

RALPH G. MITZEL

DECISION

for Revision of a Determination or for Refund :
of Sales and **Use** Taxes under Articles 28 and
29 of the Tax Law for the Year 1983.

Petitioner, Ralph G. Mitzel, 542 Pavement Road, Lancaster, New York 14086, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the year 1983 (File No. 51446).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York on September 16, 1986 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly denied petitioner's claim for a refund of sales tax paid on his purchase of a motor vehicle which said petitioner claimed to be exempt from tax pursuant to the provisions **of** section 1115(a)(6) by its use or consumption directly and predominantly in the production for sale of tangible personal property by farming.

FINDINGS OF FACT

1. On July 20, 1983, Ralph G. Mitzel (hereinafter "petitioner") purchased a 1983 GMC truck on which he paid State and local sales taxes in the amount of \$1,192.74. The truck is an 18,000 pound gross vehicle weight hydraulic dump truck. On August 18, 1983, the Department of Taxation and Finance received

from petitioner an Application for Credit or Refund of State and Local Sales or Use Tax on which he claimed a refund of the total amount of tax paid on the purchase of the truck upon the basis that the truck is used directly and predominantly in the production for sale of tangible personal property by farming.

2. On December 5, 1983, the Audit Division sent to petitioner a letter which requested that petitioner complete a questionnaire and submit certain information relating to his refund claim. On December 12, 1983, the Audit Division received from petitioner the completed questionnaire and information requested.

3. On February 7, 1984, the Audit Division sent to petitioner a denial of his refund claim, the basis of which was that petitioner's vehicle was not being used directly and predominantly in production, but was being used predominantly for administrative and distribution purposes.

4. In his response to the questionnaire sent to him by the Audit Division, petitioner listed the annual mileage of the vehicle as follows:

Picking up supplies for farm at stores	-	1,500	
Carrying seeds, fertilizer and pesticides to fields from barn	-	100	
Bringing hay or other feed to livestock for feeding	-	50	
Bringing parts, machinery and workers to fields or other barns	-	20	
Traveling between farms to check on workers, crops, livestock and farm buildings	-	150	
Transporting livestock between barns and fields	-	20	
Bringing hay or other feed to livestock between farms	-	150	
Transporting grains and crops from fields to barn at harvest	-	150	
		<u>2,140</u>	Total
Total miles vehicle driven per year	-	2,200	

5. Along with his son, petitioner operates a 450 acre grain and dairy farm. Approximately 150 acres are used for growing corn for grain which is used for feeding cattle and also for silage. Petitioner also grows hay, oats and wheat which are consumed by dairy cattle for production of milk.

6. Petitioner, his son and the farm employees use the truck to haul seed and fertilizer to the field. It is also used to transport freshly shelled corn to the dryer, from the dryer to storage and from storage to the dairy cattle. Hay bails are transported on this truck to the cattle. The truck is also used in harvesting each of the crops grown on the farm. Use of the truck by petitioner and his employees is confined to an area of approximately two and one-half miles. The truck, when loaded, often takes two to three days to unload. Little or no mileage is put on the truck during these periods. During harvesting of corn and grain, the truck stands waiting to be loaded by the combine, a process which often takes up to four hours. It is, therefore, petitioner's contention that, under the circumstances herein, mileage is not a proper basis for determining whether or not the vehicle is used predominately in production activities. On December 5, 1984, petitioner submitted a letter to the Audit Division on which he attempted to clarify his position by converting time to mileage. In his response to the Audit Division's questionnaire of February 7, 1984, petitioner stated that approximately 150 miles per year were devoted to bringing hay or other feed to livestock between farms and 150 miles per year to transporting grains and crops from fields to barns at harvest. In his letter of December 5, 1984, petitioner explained that it takes .5 hours to load the truck with hay or feed and transfer the load to the cattle barn where the cattle are fed and housed. Three loads of feed are used per week. Petitioner calculated that 78 hours per year are devoted to this activity (3 loads x 52

weeks x .5 hours = 78 hours). The actual round trip mileage for this activity is one mile, so actual annual mileage is approximately 150 miles. Petitioner used 35 M.P.H. as an average speed driven and, therefore, in attempting to convert idle time to mileage, multiplied the 78 hours times 35 M.P.H. which results in 2,730 miles. With regard to the transporting of grains and crops from fields to barns at harvest, it takes 2.5 hours to load the truck from the combine grain tank which has a capacity of 50 bushels. The truck has a capacity of 200 bushels. The truck must stand idle while waiting for the combine to again be filled in order that the entire load capacity of the truck can be utilized. Petitioner harvests 50 loads annually. He calculated that 125 hours per year are devoted to this activity (50 loads x 2.5 hours = 125 hours). The actual round trip mileage for this activity is three miles, so annual mileage is approximately 150 miles. Petitioner again used 35 M.P.H. as an average speed driven and by multiplying 125 hours times 35 M.P.H., determined that 4,375 miles annually could be attributed to transporting grains and crops from fields to barns at harvest. Finally, petitioner attempted to show the relevance of these calculations by comparing the total of the mileage attributable to the two activities hereinabove (2,730 + 4,375 = 7,105) with the 1,500 miles attributed to picking up supplies for his farm, an activity which the Audit Division held not to be a production activity. By dividing these 1,500 miles by the same 35 M.P.H. used in petitioner's other calculations, he determined that approximately 43 hours were devoted to this non-production activity, while 203 hours were just spent on bringing hay and other feed to livestock and transporting grains and crops from fields to barns at harvest.

CONCLUSIONS OF LAW

A. That at all times subsequent to petitioner's purchase of the motor vehicle for which he claims exemption herein, section 1115(a)(6) of the Tax

Law provided, in pertinent part, for an exemption from sales and compensating use taxes imposed by sections 1105 and 1110 of the Tax Law, respectively, on retail sales of the following:

"Tangible personal property ...for use or consumption directly and predominantly in the production for sale of tangible personal property by farming, including stock, dairy, poultry, fruit, fur bearing animal, graping and truck farming." (Emphasis supplied.)

B. That also during the relevant period, 20 NYCRR 528.7(c) classified and defined the activities in farming for purposes of section 1115(a)(6) of the Tax Law in the following manner:

"(c) Production. (1) The activities in farming may be classified as administration, production or distribution.

(1) Administration includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing of raw materials and clerical work in production such as preparation of work production and time records.

(1i) Farm production begins with the preparation of the soil, and in the case of animals, from the beginning of the life cycle. Production ceases when the product is ready for sale in its natural state; for farm products which will be converted into other products, farm production ceases when the normal development of the agricultural product has reached a stage where it will be processed or converted into a related product.

* * *

(1ii) Distribution includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products.

(2) Production ends for a specific producer (farmer or other person) when the product **is** in the form in which he will offer it for sale. However, production may again start for a specific purchaser when he gains ownership of the product, and production will continue until the product **is** in a form in which it, in turn, will be offered for sale."

C. That at all times relevant herein 20 NYCRR 528.7(d) set forth the following definitions of "directly and predominantly" for purposes of section 1115(a)(6):

"(d) Directly and predominantly. (1) 'Directly' means the tangible personal property must, during the production phase of farming:

(i) act upon or effect a change in material to form the product to be sold; or

(ii) have an active casual relationship in the production of the product to be sold;

(iii) be used in the handling, storage or conveyance of materials used in the production of the product to be **sold**; or

(iv) be used to place the product to be sold in the package in which it will enter the stream of commerce.

(2) 'Predominantly' means that tangible personal property must be used more than 50 percent of the time directly in the production phase of farming."

D. That the Department of Taxation and Finance's Publication, entitled New York State and Local Sales Tax Information for Farmers, issued in August, 1984, on page 8 thereof, stated, in pertinent part, as follows:

"Examples of direct and predominant use of a motor vehicle in farm production activities which would render the vehicle eligible for exemption are: clearing fields for planting; carrying seeds, fertilizer and pesticides to the fields from the barns; bringing hay or other feed to livestock in the fields for feeding; transporting livestock between barns and fields; bringing hay or other feed to livestock between farms operated by the same individual; transporting grains and crops from fields to barns at harvest.

Examples of motor vehicle use which are not eligible for exemption are: picking up supplies for farm at stores; delivering crops or livestock to market; traveling between farms to check on workers, crops, livestock and farm buildings; transporting fencing, wire, etc., around farm to repair fences. Predominant use in production will generally be determined on a mileage basis. However, determination on other than a mileage basis may be acceptable where proper substantiation is submitted. Use of a daily log book which shows activities and time spent on those activities would be an acceptable substantiation method. Each case will be decided on its individual merit." (Emphasis added.)

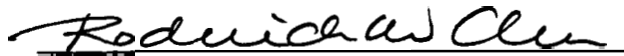
E. That, in the present matter, annual mileage of petitioner's truck is not an accurate basis upon which a determination could properly be made as to whether or not the said truck was predominantly used in production activities. Petitioner's credible testimony along with his calculations submitted to the Audit Division by letter dated December 5, 1984, a summary of which are set forth in Finding of Fact "6", supra, clearly indicate that the 1983 GMC truck, purchased on July 20, 1983, was used directly and predominantly in the production for sale of tangible personal property by farming and, by virtue of the provisions of section 1115(a)(6) of the Tax Law, petitioner's purchase thereof was exempt from the imposition of State and local sales tax.


F. That the petition of Ralph G. Mitzel is granted and the sum of \$1,192.74 is to be refunded, together with such interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 30 1987


PRESIDENT


COMMISSIONER


COMMISSIONER