

STATE OF NEW YORK

STATE TAX COMMISSION

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|--|---|----------------------|
| In the Matter of the Petition | : | |
| of | : | |
| DeLia Construction Corp. | : | |
| for a Hearing to Review a Determination of Motor | : | AFFIDAVIT OF MAILING |
| Fuel Tax under Article 12-A of the Tax Law for the | : | |
| Years 1976 and 1977 and a Determination of Highway | : | |
| Use Tax under Article 21 of the Tax Law for the | : | |
| Years 1975 through 1977. | : | |

State of New York
County of Albany

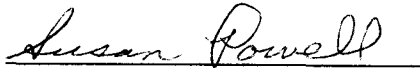

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 30th day of September, 1983, she served the within notice of Decision by certified mail upon DeLia Construction Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

DeLia Construction Corp.
c/o Allied Chemical Corp., Attn: Edward R. Koch
P.O. Box 1057R
Morristown, NJ 07960

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
30th day of September, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

September 30, 1983

DeLia Construction Corp.
c/o Allied Chemical Corp., Attn: Edward R. Koch
P.O. Box 1057R
Morristown, NJ 07960

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 288 & 510 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months under section 288 and 30 days under section 510 from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

In the Matter of the Petition

of

DeLIA CONSTRUCTION CORP.

DECISION

for a Hearing to Review a Determination of
Motor Fuel Tax under Article 12-A of the Tax
Law for the Years 1976 and 1977 and a Deter-
mination of Highway Use Tax under Article 21 of
the Tax Law for the Years 1975 through 1977.

Petitioner, DeLia Construction Corp., c/o Allied Chemical Corp., Attn:
Edward R. Koch, P.O. Box 1057R, Morristown, New Jersey 07960, filed a petition
for a hearing to review a determination of motor fuel tax under Article 12-A of
the Tax Law for the years 1976 and 1977 and a determination of highway use tax
under Article 21 of the Tax Law for the years 1975 through 1977 (File Nos.
25203, 25204, 25205).

A formal hearing was commenced before Frank W. Barrie, Hearing Officer, at
the offices of the State Tax Commission, Two World Trade Center, New York, New
York, on December 1, 1982 at 1:30 P.M. and continued to conclusion at the
offices of the State Tax Commission, Building #9, State Campus, Albany, New
York, on February 8, 1983 at 1:15 P.M., with all briefs to be submitted by
May 11, 1983. Petitioner appeared by Edward R. Koch, Esq. The Audit Division
appeared by Paul B. Coburn, Esq. (James F. Morris, Esq. and Harry Kadish, Esq.,
of counsel).

ISSUES

I. Whether the trucks used by petitioner in its road reconstruction
business were road building machines thereby exempting use of such trucks and
fuel used in them from highway use and motor fuel taxes.

II. Whether the trucks used by petitioner in its road reconstruction business
were used on public highways.

III. Whether the Audit Division's mileage estimates were reasonable.

FINDINGS OF FACT

1. On February 14, 1979, the Audit Division issued an Assessment of Unpaid Fuel Use Tax against petitioner for the period 1975 through 1977 alleging additional tax due of \$2,057.10 plus penalty and interest. Such assessment was based upon a field audit of petitioner's fuel use tax records.

2. On February 14, 1979, the Audit Division also issued an Assessment of Unpaid Truck Mileage Tax against petitioner for the period 1975 through 1977 alleging additional tax due of \$5,184.00 plus penalty and interest and permit fees due of \$85.00 for seventeen trucks. Such assessment was based upon a field audit of petitioner's truck mileage tax records.

3. On February 14, 1979, the Audit Division also issued a Notice of Determination of Tax Due Under Diesel Tax Law against petitioner for the period 1976 through 1977 alleging tax due of \$4,114.28 plus penalty. The Audit Division alleged unreported taxable usage of 41,142.8 gallons of diesel fuel.

4. The auditor testified that he determined, after discussion with petitioner, that seventeen vehicles were being used on various job sites throughout the State of New York without permits.¹ An estimate of one thousand miles per month was assessed against each vehicle. Allowance was made for winter months when the vehicles would not be in operation, resulting in an estimated mileage of 8,000 miles per year on each unit. This mileage estimate was used as a basis for computing the taxes at issue.²

¹ Tax Law §502 requires the obtaining of highway use permits for the operation of motor vehicles, as defined in Tax Law §501, on New York public highways.

² The auditor testified that in estimating the highway use tax, he considered the empty weight of each of the seventeen specific vehicles in determining the tax rate which was applied against the estimated mileage. He computed the motor fuel tax and the fuel use tax after using three and one-half miles per gallon, which was the ratio shown by petitioner's over-the-road equipment, to determine the fuel consumption by each of the seventeen trucks.

5. Petitioner maintained no records concerning the use of the seventeen trucks at issue other than what job site each truck was assigned to.

6. Each of the seventeen trucks was used by petitioner in jobs consisting of the repair or reconstruction of existing highways on which traffic was maintained. Petitioner estimated that the average job length was five miles. Petitioner contended that the trucks sometimes worked on the highway within the construction site and sometimes off the highway within the construction site. However, no evidence was presented to substantiate the mileage driven off the highway.

7. The seventeen trucks at issue were as follows:

| <u>Year</u> | <u>Make</u> | <u>Type</u> | <u>Serial #</u> | <u>1975 Mileage Estimated by Petitioner</u> | <u>1976 Mileage Estimated by Petitioner</u> | <u>1977 Mileage Estimated by Petitioner</u> |
|-------------|---------------|---------------------------------------|-----------------|---|---|---|
| 1969 | Ford | Tank (Fuel and Water) | F70DUD44610 | Not owned by petitioner | 12,000 | 15,000 |
| 1971 | Ford | Truck | F35YCL84097 | -- | -- | -- |
| 1967 | Chevy | Flat Rack Truck | C543TTI36554 | 28,000 | 25,000 | 20,000 |
| 1975 | International | Dump Truck | 10662EHA25772 | Not owned | Not owned | 3,000 |
| 1967 | Chevy | Tank (Fuel) | H671708105677 | Not owned | 10,000 | 12,000 |
| 1956 | Mack | Dump Truck | B45X9079 | 8,820 | 7,056 | 10,080 |
| 1956 | Mack | Dump Truck | B425X12463 | 8,694 | 7,392 | 8,316 |
| 1960 | Mack | Dump Truck | B425X18184 | 7,938 | 7,980 | 9,072 |
| 1957 | Mack | Dump Truck | B425X11187 | 7,392 | 7,350 | RBM ³ |
| 1957 | Mack | Dump Truck | B425X11736 | 7,560 | not used | not used |
| 1956 | Mack | Dump Truck | B425X8308 | 8,400 | 8,400 | 9,072 |
| 1956 | Mack | Dump Truck | B425X10104 | 8,694 | 7,392 | 8,316 |
| 1957 | Mack | Dump Truck | B425X11735 | 8,694 | 7,392 | 8,316 |
| 1948 | International | Tank (service pavers & rollers) | A1625A62021 | 2,016 | 2,352 | 2,545 |
| 1964 | International | Tank (service pavers & rollers) | 5B400186E | Not owned | 3,360 | 1,000 |
| 1962 | Chevy | Tank (Fuel) | 2C653T134784 | Not owned | 5,400 | Idle |
| 1964 | GMC | Tank (Fuel) | F13090 | RBM | -- | RBM |

³ Abbreviation for road building machine.

These mileage estimates were provided by petitioner to the Audit Division on or about November 6, 1978. Petitioner did not introduce any evidence or testimony to show how such estimates were ascertained. In addition, petitioner noted that only two of the seventeen trucks were road building machines at that time.

8. The nine dump trucks were used to move fill and materials within the job site. The six tank trucks were either (i) filled with water and used for dust control and the refilling of water tanks in rollers used for paving or (ii) filled with fuel and used for fueling the heavy equipment. The flat rack truck was used for moving material within the job site. The record is unclear concerning the use of the second truck noted in Finding of Fact "7", supra.

9. The trucks were not licensed by the Department of Motor Vehicles for highway usage. They were transported to the job site on a flat bed trailer or driven under transporter plates. Petitioner could not specify which of the seventeen trucks were driven to the job site.

10. None of the nine dump trucks were overweight, over-width, over-height Euclid dump trucks. Petitioner's dump trucks, if properly licensed, could be used legally on ordinary public highways without a special permit.

11. Each of the seventeen trucks were in running condition. Risley Dixon, petitioner's construction manager during the years at issue, testified that the brakes were good and the signal systems were operable because the trucks were used on highways within the jobsites which were open to the public.⁴

⁴ Mr. Dixon testified that traffic was restricted: "We were required to maintain traffic but it was restricted to stop and go whatever we wanted to do or needed to do to progress the job".

CONCLUSIONS OF LAW

A. That for purposes of Article 12-A of the Tax Law which imposes a tax on distributors⁵ of diesel motor fuel used to operate any motor vehicle, "motor vehicle" means:

"(A)ny vehicle propelled by any power other than muscular, except boats, road building machinery, power shovels, tractor cranes, tractors used exclusively for agricultural purposes and such vehicles as are run only on rails or tracks." Tax Law §282.3.

B. That for purposes of Article 21 which imposes highway use taxes for the privilege of operating a "motor vehicle" upon the public highways of New York, "motor vehicle" means:

"(A)ny automobile, truck, tractor or other self-propelled device, having a gross weight, alone, or in combination with any other motor vehicle, in excess of eighteen thousand pounds... 'motor vehicle' shall not include, however, a road roller, tractor crane, truck crane, power shovel, road building machine, snow plow, road sweeper, sand spreader or well driller...". Tax Law §501.2.

C. 20 NYCRR 471.2 provides as follows:

"(a) Article 21 of the Tax Law specifically excludes certain vehicles from the definition of motor vehicles... The following vehicles if used exclusively for the purposes for which they are designed (emphasis added) are excluded:

* * *

(6) A road building machine.

(b) The vehicles listed above are excluded from the definition of motor vehicles only when they are used for the purposes for which they are designed (emphasis added)...".

D. That petitioner has failed to sustain its burden of proof under 20 NYCRR 601.9(d)(4) to show that the seventeen trucks described in Finding of Fact "7", supra, were "road building machines" exempt from the taxes at issue.

⁵ Tax Law §282-a treats as a distributor "any person who purchases or stores in bulk diesel motor fuel used in whole or in part to operate any motor vehicle owned, leased or operated by him...".

Although the trucks at issue were used by petitioner in its road reconstruction activities, they are not transformed into "road building machinery" as a result of such use. In addition, they are not transformed into "road building machinery" merely because their condition might have been inadequate to permit licensing by the Department of Motor Vehicles. In other words, a truck is a truck and not "road building machinery".

Petitioner cites Corbetta Construction Co. v. The Tax Commission of the State of New York, 4 A.D.2d 554, aff'd, 5 N.Y.2d 806 (1958) in support of its position. However, unlike the trucks in Corbetta, none of the seventeen trucks required a special permit on account of their size for any journey upon a public highway.⁶ The trucks in Corbetta were truly "road building machinery" and not merely trucks used in road building.

"During the progress of the work petitioners used certain Euclid equipment known as Model FD-15 Ton Rear Dump... Their use ordinarily was confined to carrying heavy loads in heavy construction work, such as mining and road moving, and there was testimony which remained undisputed that they were not adaptable for other uses." Corbetta, 4 A.D.2d 554, at 555.

In addition, as noted in Finding of Fact "7", supra, petitioner's own estimate of the mileage for each of the trucks during the years at issue was substantial. Furthermore, a large part of such mileage was on the highway within the particular construction site. In Corbetta, the oversized Euclid trucks only travelled on occasion on the highway within the construction site.

E. That Tax Law §501.6 defines "public highway" as follows:

"'Public highway' shall include any public highway, street, avenue, road, public place, public driveway or any other public way..."

⁶ Vehicle and Traffic Law §385.15 sets forth a special procedure for the obtaining of a permit to operate an overweight vehicle on a public highway.

Although petitioner was repairing and reconstructing the highways within the job sites, as noted in Finding of Fact "6", supra, traffic was maintained on such highways. Petitioner's own witness, as noted in Finding of Fact "11", supra, pointed out that the signal devices on the seventeen trucks at issue were in operating use since they were used on the highways within the job site which were open to traffic. Therefore, we conclude that the trucks used by petitioner in its road reconstruction business were used on public highways.

F. That petitioner has failed to sustain its burden of proof to show that the Audit Division's mileage estimates were unreasonable. We note that petitioner maintained no mileage records, and its own mileage estimates, as noted in Finding of Fact "7", supra, support the conclusion that the Audit Division's estimate of 8,000 miles per year for each truck was reasonable.

G. That the petition of DeLia Construction Corp. is denied.

DATED: Albany, New York

SEP 30 1983

STATE TAX COMMISSION

Rodrick A. Clun
PRESIDENT

Francis R. Kaeng
COMMISSIONER

[Signature]
COMMISSIONER