

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
G & U, Inc. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Motor Fuel Tax :  
under Article 12A of the Tax Law for the Period :  
1/78 - 12/79. :

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State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of July, 1983, she served the within notice of Decision by certified mail upon G & U, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

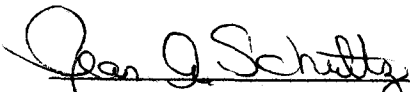
G & U, Inc.  
RD 2  
Goshen, NY 10924

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  
26th day of July, 1983.

  
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AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

G & U, Inc.

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Motor Fuel Tax  
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State of New York  
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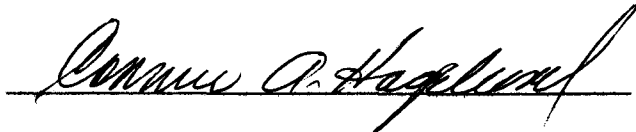
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of July, 1983, she served the within notice of Decision by certified mail upon Robert J. Dickover the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Robert J. Dickover  
Law Offices of John T. Meehan  
Rt. 17M, P.O. Box 391  
Goshen, NY 10924

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
26th day of July, 1983.



  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

July 26, 1983

G & U, Inc.  
RD 2  
Goshen, NY 10924

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 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 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: Petitioner's Representative  
Robert J. Dickover  
Law Offices of John T. Meehan  
Rt. 17M, P.O. Box 391  
Goshen, NY 10924  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
G & U, INC.  
for Revision of a Determination or for Refund  
of Motor Fuel Tax under Article 12-A of the Tax  
Law for the Periods Ended December 31, 1978  
and December 31, 1979.

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DECISION

Petitioner, G & U, Inc., RD 2, Goshen, New York 10924, filed a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the periods ended December 31, 1978 and December 31, 1979 (File No. 31656).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 11, 1983 at 1:15 P.M., with all briefs to be submitted by April 15, 1983. Petitioner appeared by Robert J. Dickover, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division properly disallowed part of petitioner's claimed consumption of motor fuel for uses other than the operation of motor vehicles upon the highways of the State.

FINDINGS OF FACT

1. On May 11, 1979, petitioner, G & U, Inc., filed an amended Motor Fuel Tax Refund Application in the amount of \$4,184.80 for 52,310 gallons of motor fuel purchased during calendar year 1978. Said refund claim was approved and

paid pro forma in the amount claimed. On April 23, 1980, petitioner filed a Motor Fuel Tax Refund Application in the amount of \$4,742.00 for 59,275 gallons of motor fuel purchased during 1979. Said refund claim was not paid.

2. On August 11, 1980, as the result of a field audit, the Audit Division sent a letter to petitioner's office manager advising him that petitioner's refund applications for 1978 and 1979 had been adjusted as follows:

<u>Claim Period</u>	<u>Gallons Claimed</u>	<u>Gallons Allowed</u>	<u>Refund @ \$.08</u>
1/78-12/78	52,310	30,963	\$2,477.03
1/79-12/79	59,275	33,539	2,683.12
Total recommended refund			\$5,160.16
Less: Amount refunded (1978 claims)			4,184.80
Balance - to be refunded			<u>\$ 975.36</u>

On November 7, 1980, a check in the amount of \$975.36 was issued to petitioner. On November 26, 1980, petitioner returned the refund check along with a letter protesting the disallowance of the full refunds as claimed.

3. Petitioner owns and operates 1,200 to 1,500 acres of black dirt farm land and grows various types of produce, including onions, celery, radishes and lettuce. During the busiest season of the year, petitioner employs 400 to 500 persons, primarily migrant workers. During the remainder of the year, petitioner employs approximately 30 persons. There are seven to ten miles of private roads running through petitioner's farm. In connection with the operation of the farm, petitioner utilizes an extensive inventory of equipment and vehicles which are powered by regular leaded gasoline. Included in said inventory are various types of farm equipment (such as farm tractors, pumps, etc.), motor vehicles with farm and agricultural license plates, and motor vehicles with commercial and passenger license plates. Petitioner purchases gasoline and diesel fuel and places such fuel in bulk storage tanks located on the farm. Petitioner pays tax on the motor fuel purchases at the time of purchase and

then files claims for refund of the tax on the fuel used for off-highway purposes on the farm. Petitioner filed claims for refund of tax on regular leaded gasoline only during the years in issue.

4. The farm equipment was of a type not ordinarily used on highways and thus not required to be registered. The vehicles with farm and agricultural registrations consisted of 43 trucks, buses, and station wagons which were 20 to 30 years old and were so registered in case they were ever used on the highways but which, according to testimony, were exclusively used on the private roads of the farm. The buses were used to transport migrant workers from their campsite on the farm to various worksites throughout petitioner's property. The trucks were used to transport crops from the fields to the loading and storage areas. All of the 43 farm and agricultural registered vehicles used regular leaded gas. The passenger and commercial registered vehicles consisted of 19 cars and trucks, 7 of which used regular leaded gas; the remainder used unleaded gas or diesel fuel. The aforesaid 19 vehicles were primarily used on the public highways.

5. Some of petitioner's vehicles were fueled directly from the bulk storage tanks through metered pumps and such fuelings were recorded on individual slips of paper and turned in to petitioner's bookkeeper at the end of the day. For fueling field equipment, a pickup truck containing a 100 gallon tank divided into two 50 gallon compartments was used to deliver fuel to the various pieces of equipment located throughout the farm. The 100 gallon tank was filled from the bulk storage tank and taken out to the field locations. As each piece of equipment was fueled, a slip of paper was prepared by the driver of the pickup truck. The slip noted the amount of fuel placed into each piece of equipment. These slips were turned in to petitioner's bookkeeper. The

bookkeeper prepared a daily log on form MT-390.1, the motor fuel consumption schedule, from the individual slips that were turned in. The bookkeeper then discarded the written slips. At the end of each month the bookkeeper recopied all the figures on to a new form MT-390.1 which forms were accumulated and attached to petitioner's refund application for submission to the Department of Taxation and Finance at the end of the year.

6. On audit, the auditor checked petitioner's supplier's records to verify payment for gasoline purchases and tax due thereon and found that all purchases were correct as reported and that all tax had been paid. Upon examination of petitioner's MT-390.1 forms, the auditor noticed that all daily entries of gasoline usage per vehicle were in multiples of five and the same amounts of daily usage tended to be repeated from day to day. This led the auditor to believe that the gasoline consumption records were mere fabrications or estimates made prior to submission for refund in order to suggest compliance with the record keeping requirements of the motor fuel tax regulations. As a result, the auditor decided to disallow all claimed nontaxable use of gasoline used in petitioner's farm and agricultural registered vehicles. There was a personality clash between the auditor and the office manager and the office manager ordered the auditor to leave. The auditor left and a proper audit was never completed. Petitioner kept the same records for both the equipment and the registered vehicles. The auditor believed the records for the equipment but not the records for the registered vehicles since he only disallowed the usage by the registered vehicles. The auditor also thought that, of the passenger and commercial registered vehicles which were used on the public highways, eight used leaded gas. The auditor made this determination based on the make and year of each vehicle obtained from vehicle registration forms.

The auditor decided that these eight vehicles using leaded gasoline constituted 15 percent of all registered vehicles and, as a result, he disallowed 15 percent of the total claimed nontaxable gasoline usage.

7. At the hearing, petitioner's bookkeeper presented evidence showing that one of the commercial registered trucks did not have a gasoline engine but rather a diesel engine so that the auditor's figure of eight passenger and commercial registered vehicles using leaded gas should have been seven. Thus, the percentage of such vehicles to total registered vehicles using leaded fuel was 14 percent.

8. Petitioner's bookkeeper explained that the reason the gasoline consumption figures were in multiples of five, which tended to be repeated each day, was that there had been a history of theft by siphoning of the gasoline in the vehicles left on the farm premises overnight. In an attempt to curtail such theft, Harold Utter, petitioner's president, ordered that the vehicles and equipment be given fuel in five gallon increments, thereby reducing the amount of fuel subject to theft. The bookkeeper further testified that none of the trucks, buses, and vans with farm and agricultural registrations were used any place except on the private roads on petitioner's farm.

9. It is petitioner's position that it has substantially complied with the record keeping requirements of the motor fuel tax law and that the Audit Division's complete disallowance of all nontaxable gasoline use by farm and agricultural registered vehicles was unwarranted. Moreover, petitioner argued that the 15 percent disallowance for regular fuel use by passenger and commercial registered vehicles was erroneous. The Audit Division's position is that, although petitioner's farm registered vehicles may have operated on private



roads, since records strictly in compliance with the regulations were not kept, all such use should be disallowed.

#### CONCLUSIONS OF LAW

A. That subdivision 3(a) of section 289-c of the Tax Law provides, in part, that:

"any person who shall buy any motor fuel or diesel motor fuel, on which the tax imposed by this article shall have been paid, and shall consume the same in any manner except in the operation of a motor vehicle upon or over the highways of this state, ..., shall be reimbursed the amount of such tax in the manner and subject to the conditions herein provided...".

Subdivision 3(c) of section 289-c provides, in part, that:

"[a]ll claims for reimbursement shall be in such form and contain such information, and be presented within such time as the state tax commission, by rules and regulations, shall prescribe. Every such claim shall include a certificate by or on behalf of the party presenting the same to the effect that it is just, true and correct, that no part thereof has been paid, except as stated therein, and that the balance thereon stated is actually due and owing. The claimant shall satisfy the department of taxation and finance that he has borne the tax and that the motor fuel has been consumed by him in a manner other than the operation of a motor vehicle upon or over the highways of this state,... The department may require such further information or proof as it shall deem necessary for the administration of such claim...".

B. That 20 NYCRR 412.1 provides as follows:

"(a) The law provides for refund of tax paid on motor fuel consumed in any manner other than the operation of a motor vehicle on the highways of this State or the operation of a pleasure or recreational motorboat. Refund of tax paid on motor fuel used in the operation of road building machinery, tractors used exclusively for agricultural purposes, vehicles which run only on rails or tracks, airplanes, stationary engines, industrial purposes, etc. may be obtained by filing a claim therefor as provided in these regulations.

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(f) A claim for refund of tax paid on motor fuel used for nontaxable purposes should be based upon the following records which (including the original records) must be preserved for three years and be produced at any time for audit by the Miscellaneous Tax Bureau:

(1) a record of all purchases of motor fuel by the claimant, and a record of the manner in which all motor fuel was used.

(2) Where a storage tank, drum or other container is used, the claimant shall, in addition, keep a record of the quantity of motor fuel put in to such storage tank, drum or other container and keep a record of all withdrawals therefrom for taxable uses and also of all withdrawals therefrom for nontaxable uses."

C. That, although petitioner's bookkeeper discarded the original slips of paper which were used by the fuel disbursers in the field, there was nothing more official or more accurate about such slips than the forms to which the bookkeeper transferred the information. The Tax Law and regulations require that a record of fuel usage be kept. Petitioner kept a record of all the leaded fuel usage of its farm equipment and farm and agricultural registered vehicles which were used on its private farm roads. The auditor did not claim that petitioner did not use regular gasoline for off-highway purposes; he thought, rather, that the figures supplied were estimates and, therefore, should be disallowed. The theft situation described in the testimony explains the reason that the fuelings were logged in increments of five gallons. Moreover, the fact that petitioner's operation requires the transportation of 400 to 500 migrant workers over 1,200 acres on 7 to 10 miles of road six days a week during the growing season, in addition to the transportation of crops from the fields to the loading and storage areas, supports petitioner's claims with respect to the amount of fuel usage on its private roads by farm and agricultural registered vehicles. Therefore, the fuel usage claimed by petitioner is to be allowed in full for the years 1978 and 1979.

