

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Lionel Leasing Industries Co., Inc. :  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Highway Use Tax :  
under Article 12-A & 21 of the Tax Law for the :  
Period 10/73 - 9/77. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

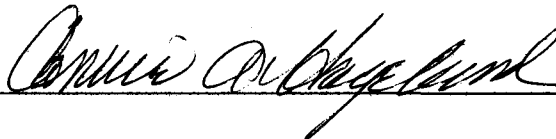
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Lionel Leasing Industries Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Lionel Leasing Industries Co., Inc.  
Attn: Joel Goldberg, President  
Old Route 17, Box A  
Harris, NY 12742

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  
28th day of September, 1983.

  
\_\_\_\_\_

  
\_\_\_\_\_  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

## STATE TAX COMMISSION

# AFFIDAVIT OF MAILING

Susan Powell  
 AUTHORIZED TO ADMINISTER  
 OATHS PURSUANT TO TAX LAW  
 SECTION 174

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

September 28, 1983

Lionel Leasing Industries Co., Inc.  
Attn: Joel Goldberg, President  
Old Route 17, Box A  
Harris, NY 12742

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 for section 288 and within 30 days for 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: Petitioner's Representative  
Irwin R. Gitlin  
Brizel, Berkowitz & Gitlin  
55 S. Main St.  
Liberty, NY 12754  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
LIONEL LEASING INDUSTRIES CO., INC.	:	DECISION
	:	
for a Hearing to Review a Determination of	:	
Highway Use Tax under Articles 12-A and 21 of	:	
the Tax Law for the Period October, 1973 through	:	
September, 1977.	:	

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Petitioner, Lionel Leasing Industries Co., Inc., Attn: Joel Goldberg, President, Old Route 17, Box A, Harris, New York 12742, filed a petition for a hearing to review a determination of highway use tax under Articles 12-A and 21 of the Tax Law for the period October, 1973 through September, 1977 (File No. 22984).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 30, 1982 at 1:30 P.M. Petitioner appeared by Brizel, Berkowitz & Gitlin (Irwin R. Gitlin, C.P.A.). The Audit Division appeared by Paul B. Coburn, Esq. (James F. Morris, Esq., of counsel).

ISSUE

Whether additional highway use tax was properly determined by the Audit Division, based upon upward adjustments to both the total (reported) mileage traveled by petitioner upon New York State roads and the weight of petitioner's tractor-trailer combinations.

FINDINGS OF FACT

1. On April 25, 1978, the Audit Division issued to petitioner, Lionel Leasing Industries Co., Inc. ("Lionel"), an Assessment of Unpaid Truck Mileage Tax in the amount of \$22,964.83 plus penalty and interest, and an Assessment of

Unpaid Fuel Use Tax in the amount of \$14,488.80 plus penalty and interest. These assessments were issued on the basis of a field audit of petitioner's books and records covering the period from October, 1973 through September, 1977.

2. Petitioner, by its president, Joel Goldberg, executed a consent allowing the assessment of diesel and truck mileage taxes for the periods "...10/74 & 10/73 through 11/77 & 10/77..." to be made at any time on or before April 30, 1978.

3. Petitioner is engaged in the business of selling egg cases (corrugated boxes) and egg cartons. Petitioner makes no sales at retail, but rather is engaged in wholesale selling to egg farmers. Petitioner's sales are, in general, made on a regular basis to the same customers, with orders being predominantly in large volume, such as by the tractor-trailer load.

4. Petitioner delivers its products in its own vehicles to the majority of its customers, with only a few customers picking up the product themselves. On occasion petitioner delivers to these latter customers when the customers' own vehicles are not operable or available. In addition, petitioner, on occasion, carries back loads of freight in its trailers for other companies ("backhauling") after petitioner makes a delivery of its own product. According to testimony, backhauling was done to avoid hauling an empty trailer back to petitioner's home base and provided only a small portion (5 or 10 percent) of petitioner's overall activity.

5. During the period at issue, petitioner had eleven tractors operating under valid permits. The heaviest tractor-trailer combination weight, per the permits filed by the petitioner, was 84,548 pounds. Petitioner filed its tax returns under the maximum gross weight filing option and paid tax, per its

returns, on a gross weight of 53,000 pounds for all combinations of its tractors and trailers (tax rate of .019).

6. The Audit Division's auditor inspected petitioner's available weight records, vehicle permits, motor vehicle registration truck scale tickets, loads actually carried and a few bills of lading. In addition, the auditor weighed one of petitioner's tractor-trailer combinations on a truck scale to verify its empty ("tare") weight. The auditor noted that neither petitioner's returns nor its records identified specific tractor-trailer combinations utilized, and further that petitioner hauled trailers registered to other carriers which, in combination with petitioner's tractors, exceeded the 53,000 pound weight reported by petitioner on its returns. Based upon the foregoing information, the auditor concluded that the 53,000 pound weight reported by petitioner was lower than the actual weight carried, but also that the permitted weight of the heaviest combination (84,548 pounds) was higher than the actual weight. The auditor computed tax on a weight factor of approximately 72,000-74,000 pounds (tax rate of .0325).

7. In computing the mileage traveled during the audit period by four of petitioner's eleven permitted tractors, the auditor reviewed sequential odometer readings for these four tractors taken from road block checks, from dealer's records (sales records of dealers from whom petitioner bought the vehicles), and from available fuel and repair bills which indicated odometer readings. In addition to the four tractors, an estimate of mileage for five additional tractors was made. This estimate, based on a rate of 1,000 miles per month for each tractor during the 48-month audit period, resulted in an additional 240,000 miles for the five tractors. These five tractors were older models which were used by

petitioner for local hauling and as standby vehicles. No additional mileage was computed with respect to petitioner's two remaining permitted tractors.

The auditor testified that the foregoing method of arriving at additional mileage (the odometer readings from various sources and the estimation) were utilized because no supporting documents (drivers' logs, trip standards, etc.) specifying tractor-trailer combinations or routes traveled were made available at the time of the audit to verify total mileage as claimed on petitioner's returns, worksheets and summaries.

8. Petitioner's returns for the period of the audit reported 300,088 total miles traveled, of which 205,022 miles were reported as out-of-state miles. The audit resulted in 466,610 additional miles on the four vehicles for which odometer readings were used and 240,000 estimated additional miles for the other five vehicles, for a total of 706,610 additional miles. Using the tax rate of .0325 results in additional tax of \$22,964.83.

9. The above additional mileage was treated by the auditor as mileage traveled entirely within New York State. The auditor testified he did not use petitioner's originally reported ratio of out-of-state miles to total miles (205,022/300,088) as a basis for allowing any portion of the additional mileage (per the audit) as out-of-state mileage, due to the previously noted lack of supporting documents such as drivers' logs and trip standards specifying routes taken and mileage traveled in states other than New York. The auditor did not disallow the out-of-state mileage as originally reported (205,022 miles), and testified that an inspection of petitioner's sales and fuel invoices supported

the claim that out-of-state mileage was being incurred by petitioner, although no attempt was made to reconstruct the amount of this mileage from these records.

10. The fuel use tax portion of the audit was computed by applying a factor of five miles per gallon to the additional mileage and a rate of tax of ten cents per gallon of fuel. No additional credit for fuel purchased out of state (in addition to credit claimed per returns) was allowed, since all additional miles were deemed New York State miles.

11. Petitioner alleged that the additional mileage as reflected by odometer readings pertaining to the four vehicles is inaccurate, in that some of the odometers were broken and were repaired or replaced during the audit period, and further that the estimated mileage for five additional vehicles is unreasonable since these vehicles were older models used only locally or as standby vehicles. Petitioner's president, Joel Goldberg, testified that only about five drivers were employed by petitioner at any one time and thus there was an insufficient number of drivers to drive all of petitioner's permitted vehicles at one time. Other than Mr. Goldberg's testimony, no payroll records showing the number of drivers employed, nor any evidence concerning the repair or replacement of odometers was introduced at the hearing to support petitioner's assertions.

12. Petitioner asserts proper records were maintained, including drivers' daily logs. Mr. Goldberg testified that he believed his sales records and invoices were more important than the drivers' logs, and that he kept the logs in an open warehouse. Mr. Goldberg further testified that the drivers' logs were destroyed by a leak in the warehouse roof and by a fire.

13. A series of drivers' daily logs for one of petitioner's drivers, covering the months of January through June of 1977, and a summary of their information were introduced in evidence at the hearing. These logs (as summarized)



showed the driver's total mileage for the period, which was further segregated into New York State mileage and out-of-state mileage. The 52,411 total miles traveled were apportioned as follows:

New York State Thruway Mileage:	3,603	( 6.87%)
New York State Other Mileage:	6,080	(11.60%)
Total New York State Mileage:	<u>9,683</u>	(18.47%)
Total Other Mileage:	42,728	(81.53%)
Total Mileage Traveled	<u>52,411</u>	(100%)

14. Petitioner asserts the above logs and breakdown of mileage for the one driver is representative of mileage traveled by all of petitioner's vehicles and drivers, and further, that this log was available at the time of the audit. Mr. Goldberg testified that these six months of logs were not destroyed by the leak in the warehouse roof because these logs had been segregated out by petitioner's bookkeeper and kept locked in an office safe. No explanation was given as to why the bookkeeper segregated these particular logs from others, and the bookkeeper was not a witness at the hearing.

15. In addition to the above logs, petitioner also submitted in evidence all of its sales invoices for the same six-month period as the logs, together with a summary of their contents. The invoices indicate that approximately 22 percent of petitioner's business (sales dollar volume) during this six-month period was conducted within New York State, while approximately 78 percent of the business was conducted out of state. Petitioner asserts that this apportionment of business is close to the apportionment of mileage shown from the logs (less than a 4 percent differential), and thus mileage for the entire audit period should be apportioned between New York State and other states in accordance with these percentages. Petitioner further asserts that by utilizing the delivery addresses (locations) and dates shown on each of the sales invoices, it would be possible

to reconstruct and plot truck routes, that total mileage could thereby be determined and the apportionment between New York State mileage and out-of-state mileage could be calculated.

#### CONCLUSIONS OF LAW

A. That with certain specified exceptions not relevant herein, subdivision 1 of section 503 of the Tax Law imposes a tax, at specified rates, for the privilege of operating any vehicular unit upon the public highways of this state based on the gross weight of each vehicular unit and the number of miles it is operated on the public highways. Section 507 of the Tax Law further provides, in pertinent part, that:

"...[e]very carrier...shall keep a complete and accurate daily record which shall show the miles traveled in this state by each vehicular unit and such other information as the tax commission may require."

B. That regulations of the State Tax Commission in pertinent part provide:

"b. This daily record of operations shall be in the form of a manifest or trip record. The record must contain the following information:

1. The date of each trip.
2. The permit and vehicle numbers.
3. The point of origin and destination for each trip.
4. The number of round trips each day.
5. The number of miles traveled laden.
6. The number of miles traveled empty.
7. The name of the owner if operating a leased or interchanged vehicle.

The daily manifest or trip record shall show each trip for the day. If the daily manifest is used to record the operations of more than one vehicle, a monthly summary shall be prepared for each vehicle or vehicular unit at the end of each month. The particular form of daily manifest or trip record is not prescribed. Any form used by the carrier will be acceptable to the Tax Commission providing it reflects the information set forth above."

(20 NYCRR 483.2; formerly 20 NYCRR 233.2. See also 20 NYCRR 483.4; formerly 20 NYCRR 233.4.)

C. That section 503(a) of the Tax Law imposes an additional tax upon the privilege of operating any vehicular unit upon the public highways of this

state, computed by multiplying the appropriate rate per gallon by the amount of fuel used by the carrier in its operations in this state.

D. That regulations of the State Tax Commission in pertinent part provide:

"Section 493.1 Required records. [Tax Law, §507] (a) Every carrier operating a vehicle subject to this tax must keep satisfactory daily records of the miles traveled by such vehicle, the fuel used by each vehicle and the fuel purchased by such carrier. All records shall identify the vehicle to which they pertain as being subject to tax or as not being subject to tax. All records and computations made from such records pertaining to mileage incurred, fuel used or fuel purchased by or for vehicles subject to tax shall clearly identify the fuel to which they pertain as diesel motor fuel or as motor fuel other than diesel fuel.

493.2 Mileage. [Tax Law, §503-a, subd. 8; §507] Daily mileage records must be maintained for miles traveled both within New York State and outside New York State in such a manner that mileage in New York State may be separately computed. Every carrier must maintain the same accurate daily record of Thruway mileage as it does for other mileage traveled within the state." (20 NYCRR 493.1; 20 NYCRR 493.2.)

The regulations of the State Tax Commission further provide: "[i]f the records of any carrier are inadequate or incomplete, the vehicular units of such a carrier filing returns shall be deemed to have consumed, on the average, one gallon of motor fuel for every five miles traveled unless substantial evidence discloses that a different amount was consumed." [20 NYCRR 491.3(c).]

E. That adequate records for purposes of verifying amounts of mileage as reported by petitioner were not made available. Records that were available at the time of the audit, including petitioner's returns, sales invoices, etc., did not specify laden versus unladen mileage, daily mileage incurred, routes traveled or particular tractor-trailer combinations used and load weights carried. No daily trip records or drivers' logs were available except for those logs covering the period January through June of 1977 as submitted at the hearing (see Finding of Fact "13"). No explanation was offered as to why these particular logs were segregated from other logs which were allegedly destroyed by a leak in a warehouse roof and/or by a fire (see Finding of Fact "12").

F. That section 510 of the Tax Law in pertinent part provides:

"[i]n case any return filed...shall be insufficient or unsatisfactory to the tax commission, ..., the tax commission shall determine the amount of tax due from such information as is available to the commission."

The Audit Division's method of determining a weight factor, the amount of asserted additional mileage, (both by odometer readings and by estimation), and the computation of tax due thereon, was acceptable in light of the unavailability of (required) records against which actual total mileage could be verified. Furthermore, no evidence was submitted in support of any specified fuel consumption rate, and thus the additional gallonage computed at the rate of five miles per gallon and the tax assessed thereon is accepted [20 NYCRR 491.3(c)].

G. That it is neither required nor feasible to reconstruct the mileage traveled by petitioner by resort to petitioner's sales invoices (see Finding of Fact "15"). The correlation between total sales dollars (volume) per state to mileage traveled per state is tenuous at best, being based solely on the percentage of sales in and out of New York State as an indication of the mileage necessary to complete those sales. Furthermore, although petitioner's sales invoices contain dates and delivery addresses, neither particular tractor-trailer combinations utilized in making deliveries nor sequences of deliveries are specified to the extent that invoices could be matched to vehicles and trip routes and mileages could be readily ascertained.

H. That the petition of Lionel Leasing Industries Co., Inc. is hereby denied and the assessments of Unpaid Truck Mileage Tax and Unpaid Fuel Use Tax

dated April 25, 1978, together with such penalty and interest as may be lawfully owing, are sustained.

DATED: Albany, New York

SEP 28 1983

STATE TAX COMMISSION

Rodrick G. Cline  
PRESIDENT

Francis P. Koengs  
COMMISSIONER

M. W. J. J. J.  
COMMISSIONER