

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Everett J. Marshall

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Motor Fuel Tax :
under Article 12-A & 21 of the Tax Law for the :
Period 7/1/74 - 9/30/77.

State of New York
County of Albany

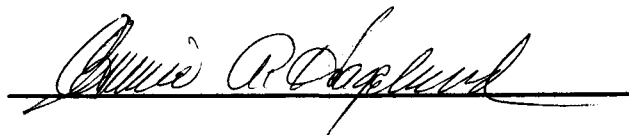
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of June, 1983, she served the within notice of Decision by certified mail upon Everett J. Marshall, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Everett J. Marshall
411 Lake St.
Chittenango, NY 13037

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
29th day of June, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

June 29, 1983

Everett J. Marshall
411 Lake St.
Chittenango, NY 13037

Dear Mr. Marshall:

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 the Article 12-A matter and within 30 days for the Article 21 matter. The time to commence an appeal starts with the filing 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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EVERETT J. MARSHALL	:	DECISION
for Revision of a Determination or for Refund	:	
of Motor Fuel Tax and Highway Use Tax under	:	
Articles 12-A and 21 of the Tax Law for the	:	
Period July 1, 1974 through September 30, 1977.	:	

Petitioner, Everett J. Marshall, 411 Lake Street, Chittenango, New York 13037, filed a petition for revision of a determination or for refund of motor fuel tax and highway use tax under Articles 12-A and 21 of the Tax Law for the period July 1, 1974 through September 30, 1977 (File Nos. 26277 and 26278).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on June 15, 1982 at 1:15 P.M., with all briefs to be submitted by September 30, 1982. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the highway use tax audits conducted by the Audit Division provided a proper basis for the Assessment of Unpaid Truck Mileage Tax and the Assessment of Unpaid Fuel Use Tax.

FINDINGS OF FACT

1. On May 12, 1978 the Audit Division issued to Everett J. Marshall a Notice of Determination of Tax Due Under Diesel Motor Fuel Tax Law for the period July, 1974 through September, 1977. The Notice asserted a tax due of \$10,730.30, plus penalty of \$3,626.30, for a total amount due of \$14,356.60.

Subsequent to the issuance of the Notice, petitioner provided the Audit Division with additional information. This resulted in a reduction of the assessment to the amount of \$5,983.90 plus applicable penalty and interest.

2. On May 24, 1978 the Audit Division issued an Assessment of Unpaid Truck Mileage Tax for the period July, 1974 through September, 1977 which asserted a tax due of \$8,396.06, plus penalty and interest of \$2,015.04, for a total amount due of \$10,411.10. Subsequent to the Assessment, petitioner provided the Audit Division with additional information and, as a result, the assessment of truck mileage tax was reduced to \$4,877.32 plus applicable penalty and interest.

3. During the audit period, petitioner had three dump trucks. The Audit Division determined the number of miles traveled by petitioner's trucks by examining the odometer readings on repair receipts obtained from third parties and from odometer readings prepared by petitioner. On the basis of the odometer readings obtained, the Audit Division determined that petitioner's trucks traveled an average of 132 miles per day. The Audit Division then multiplied the number of days the three vehicles were in operation by the average number of miles traveled to determine the total number of miles that petitioner's vehicles traveled during the audit period. These computations resulted in a total mileage of 351,120 miles. The Audit Division then reduced this figure by giving petitioner credit for miles traveled out of state and for miles traveled off of the state highways. The number of miles remaining, 340,109, were then allocated as fifty percent laden and fifty percent unladen. After giving petitioner credit for the truck mileage tax paid, these computations resulted in additional truck mileage tax due of \$4,877.32.

4. The additional New York State miles determined from the truck mileage tax audit were then used to determine the amount of fuel used in the state. The amount of diesel fuel that petitioner consumed was computed by dividing the number of miles traveled on New York State highways, determined in the truck mileage tax audit, by a rate of four miles per gallon. These computations revealed that petitioner would have been required to utilize 85,027 gallons of diesel fuel during the audit period. Since petitioner could produce receipts showing that he had paid tax on the purchase of 25,188 gallons, petitioner's deficiency was premised on the remaining gallons at a rate of \$.10 per gallon. This resulted in additional diesel fuel use tax due of \$5,983.90.

5. The rate of four miles per gallon was chosen because of the size of petitioner's vehicles, the gear ratio of petitioner's vehicles, and the load that petitioner's vehicles could have carried.

6. Petitioner's records were destroyed in the course of a theft which took place on February 7, 1976. The balance of petitioner's records for the audit period were incomplete. That is, petitioner did not maintain a complete record of the miles his vehicles traveled. Those fuel receipts which petitioner did produce were inadequate, inasmuch as some were duplicates and others did not contain required information, such as the vehicle identification number.

7. At the hearing, petitioner maintained that in September, 1976 he took one of his trucks to a repair shop because of a defective transmission. Petitioner's truck was repaired and returned to him three weeks later. Petitioner claimed that subsequently he did not use this truck for an additional six weeks. Petitioner also maintained that the audit period used was not representative of the mileage over the audit period and that the Audit Division improperly determined the amount of fuel consumed. Petitioner also testified that there

were additional miles traveled out of state. However, no documents substantiating any of the foregoing propositions were presented.

CONCLUSIONS OF LAW

A. That 20 NYCRR 483.1, which sets forth the records retention requirements provided for by Tax Law §507, provides, in general, "...that every carrier to whom a highway use tax permit was issued, for the operation of a motor vehicle, must maintain an accurate daily record of all operations of such vehicle in this State..." with certain exceptions. Moreover, in general, a diesel truck operator "...must keep a full and accurate record of all his retail purchases, including a delivery ticket or invoice with reference to each such purchase..." showing certain information (20 NYCRR 420.9).


B. That petitioner failed to produce the records required and offered no other evidence that would reduce the additional miles or the additional fuel used as determined by the Audit Division.

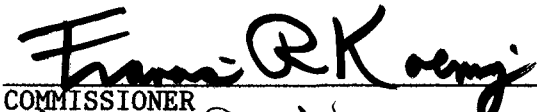
C. That the Assessment of Unpaid Truck Mileage Tax dated May 24, 1978 and Notice of Determination of Tax Under Diesel Motor Fuel Tax Law dated May 12, 1978 are sustained and the petition of Everett J. Marshall is denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 29 1983


PRESIDENT


COMMISSIONER


COMMISSIONER