

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Brewster Sand & Stone Corp. :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Highway Use Tax :  
under Article 21 of the Tax Law for the Years :  
1975 - 1977.

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of June, 1981, he served the within notice of Decision by mail upon Brewster Sand & Stone Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Brewster Sand & Stone Corp.  
Fields La., PO Box J  
Brewster, NY

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  
5th day of June, 1981.

*Carrie P. Hagelund*

*[Signature]*

STATE OF NEW YORK  
STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Brewster Sand & Stone Corp. :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Highway Use Tax :  
under Article 21 of the Tax Law for the Years :  
1975 - 1977.

---

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of June, 1981, he served the within notice of Decision by mail upon Lee J. Spencer the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

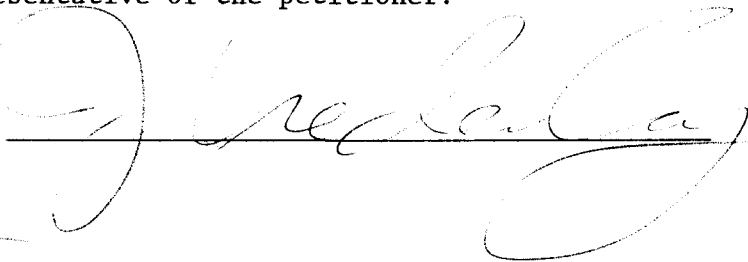
Mr. Lee J. Spencer  
P.O. Box J, Fields La.  
Brewster, NY 10509

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  
5th day of June, 1981.

  
G. A. Hagelund

  
Jay Vredenburg

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

June 5, 1981

Brewster Sand & Stone Corp.  
Fields La., PO Box J  
Brewster, NY

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) 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 Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 30 days 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  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Lee J. Spencer  
P.O. Box J, Fields La.  
Brewster, NY 10509  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
	:	
of	:	
	:	
BREWSTER SAND & STONE CORP.	:	DECISION
	:	
for Revision of a Determination or for	:	
Refund of Highway Use Tax under Article	:	
21 of the Tax Law for the Years 1975,	:	
1976 and 1977.	:	

---

Petitioner, Brewster Sand & Stone Corp., Fields Lane, P.O. Box J, Brewster, New York, filed a petition for revision of a determination or for refund of highway use tax under Article 21 of the Tax Law for the years 1975, 1976 and 1977 (File No. 22301).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 11, 1979 at 10:30 A.M. Petitioner appeared by Lee J. Spencer. The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the assessment for truck mileage tax here in question was properly computed under the "gross weight method" described in section 503 subdivision 1 of the Tax Law or whether it should have been computed under the "unloaded weight" method provided for by section 503 subdivision 3 of the Tax Law.

FINDINGS OF FACT

1. On February 23, 1978, the Audit Division issued an assessment of unpaid truck mileage tax against petitioner, Brewster Sand & Stone Corp., in the amount of \$6,532.06, plus penalty and interest of \$1,698.39, for a total

of \$8,230.40. The taxable mileage reported was accepted by the Audit Division. An examination of records reflecting weights actually carried by the petitioner's vehicles revealed that weights carried were greatly in excess of those allowed per the petitioner's highway use tax permits. Also, an actual weighing of some of the vehicles unloaded revealed that the actual unloaded weights of those vehicles weighed were highly in excess of those unloaded weights set forth in the petitioner's highway use tax permits. As the petitioner reported its tax using the format and style of the maximum gross weight method and used the weights set forth in its highway use permits, the above assessment was issued.

2. The petitioner asserts that the tax should be re-computed using the unloaded weight method of reporting (section 503, subdivision 3 of the Tax Law) rather than the maximum gross weight method of reporting (section 503, subdivision 1 of the Tax Law) as it was never advised by the Audit Division that a selection of the unloaded weight method would result in a lower tax liability.

3. Petitioner's tax returns as filed for the month of January, 1975, January, 1976 and January, 1977 show a checkmark in the box indicating an election of the maximum gross weight method and another checkmark in the box indicating an election of the unloaded weight method. Said returns showed the maximum gross weight of each vehicle and were prepared so as to reflect the format and style of the maximum gross weight method of filing.

4. There is no evidence that Audit Division personnel misled the petitioner in filing its tax returns.

CONCLUSIONS OF LAW

A. That the statute (section 503 subdivision 3 of the Tax Law) clearly provides that the "unloaded weight" method of computing the tax is elective on the part of the taxpayer; that an election is effective only when made "on the first return required to be filed by him in any calendar year"; and that said election "shall be irrevocable" for the calendar year. (See also Regulation 20 NYCRR 481.2). The petitioner has not shown that it made the required election.

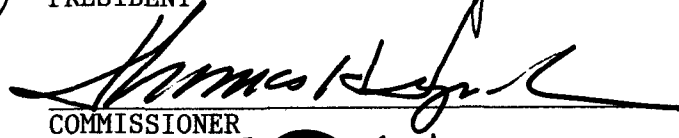
B. That the petition of Brewster Sand & Stone Corp. is denied, and the assessment of unpaid truck mileage tax, together with all penalties and interest due, is sustained.

DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER