

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Decato Bros., Inc. :

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 Period 7/1/71 - 3/31/75. :

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 30th day of January, 1981, he served the within notice of Decision by mail upon Decato Bros., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Decato Bros., Inc.

Heater Road

Lebanon, New Hampshire 03766

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 January, 1981.

Connie R. Haglund

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Decato Bros., Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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Highway Use Tax :
under Article 21 of the Tax Law
for the Period 7/1/71 - 3/31/75. :

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 30th day of January, 1981, he served the within notice of Decision by mail upon R. Peter Decato 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. R. Peter Decato
Decato and Cirone
23 Bank St.
Lebanon, NH 03766

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
30th day of January, 1981.

Connie A. Hugelund

J. Vredenburg

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

January 30, 1981

Decato Bros., Inc.
Heater Road
Lebanon, New Hampshire 03766

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
R. Peter Decato
Decato and Cirone
23 Bank St.
Lebanon, NH 03766
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DECATO BROS., INC.	:	DECISION
for Revision or for Refund of Highway Use	:	
Taxes under Article 21 of the Tax Law for the	:	
Period July 1, 1971 through March 31, 1975.	:	

Petitioner, Decato Bros., Inc., Heater Road, Lebanon, New Hampshire 03766, filed a petition for a revision or for refund of highway use taxes under Article 21 of the Tax Law for the period July 1, 1971 through March 31, 1975 (File No. 14922).

A formal hearing was held before Louis M. Klein, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building No. 9, Room 107, Albany, New York on August 10, 1977 at 1:15 P.M. Petitioner appeared by Decato and Cirone, Esqs. (Peter Decato, Esq., of Counsel). The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of Counsel).

ISSUE

Whether the Audit Division's application of higher tax rates to petitioner's reported laden miles was proper.

FINDINGS OF FACT

1. Petitioner, Decato Bros., Inc., filed monthly truck mileage tax returns for the period July 1, 1971 through March 31, 1975.

2. Following an audit of the petitioner's books and records, the Audit Division on August 5, 1976 issued an Assessment for Unpaid Truck Mileage Tax for taxes due of \$5,894.63, plus interest of \$521.36, for a total of \$6,415.99. A petition protesting this assessment was timely filed.

3. Petitioner owns 106 trailers and 48 tractors and also leases approximately 20 other vehicles to haul lumber and building materials to 28 States and 5 Canadian provinces. On return trips, the petitioner occasionally hauls steel under another carrier's rights. All miles traveled in New York State by petitioner's owned or leased vehicles are reported by the petitioner.

4. In order to simplify its record keeping, the petitioner elected to compute its tax on the basis of the combined maximum gross weight (MGW) of its heaviest tractor and its heaviest trailer. This reported MGW was 73,000 pounds for the entire audit period.

5. On audit, the Audit Division analyzed petitioner's weight information records. Through this review it was determined that petitioner's heaviest combined tractor and trailer exceeded the reported MGW of 73,000 pounds as follows:

1971	-	75,550
1972	-	77,550
1973	-	78,000
1974	-	78,000
1975	-	78,000

The heavier combined weights increased the tax rate per mile traveled and was the sole basis for the assessment.

6. The petitioner offered no evidence that the weights determined by the Audit Division were inaccurate.

CONCLUSIONS OF LAW

A. That the maximum gross weight of a motor vehicle is the unloaded weight of the vehicle plus the maximum load, excluding the weight of the driver and his helper, to be carried or hauled by it on New York public highways. The maximum gross weight as set forth in any application is subject to audit and approval by the Tax Commission (20 NYCRR 472.1(b)).

B. That although the tax is based on maximum gross weight as set forth in the permit, nevertheless if the actual weight of the loaded motor vehicle is in excess of that set forth in the permit, the tax must be computed at the rate applicable to the actual weight. (20 NYCRR 481.4(e))

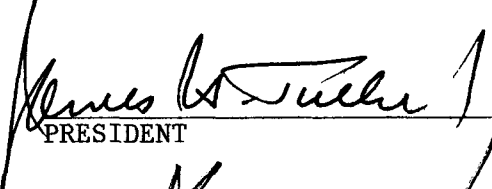
C. Neither the Truck Mileage Tax Law nor the Regulations contain any provision for the method that petitioner used in reporting its taxes.

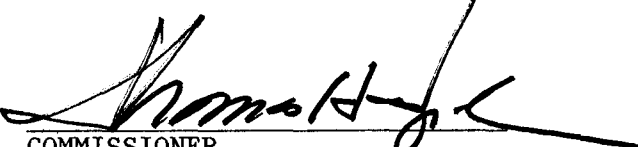
D. That since it was the petitioner's own election to report mileage utilizing its heaviest tractor and trailer, then petitioner is responsible for the consequences of such reporting.

E. That the petition of Decato Bros., Inc. is denied and the Assessment of Unpaid Truck Mileage Tax is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York
JAN 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER