

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

DAVID P. MC CARTHY, INC.

AFFIDAVIT OF MAILING

For ~~xxRedetermination of xxDeficiencyxx~~ :
a Revision of a Determination or a Refund :
of Highway Use :
Taxes under Article(x) 21 of the :
Tax Law for the ~~xxxx(s)xx~~ Period(x) :
April 1, 1970 through September 30, 1973.

State of New York
County of Albany

Marsina Donnini, 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 30th day of June, 1977, she served the within
Notice of Decision by ~~(certified)~~ mail upon David P. McCarthy, Inc.

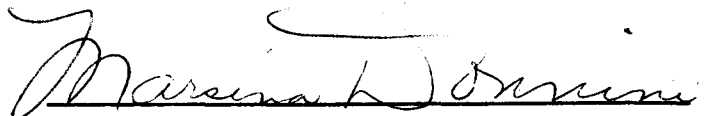
~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows:
David P. McCarthy, Inc.
650 East 12th Street
New York, New York 10009

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 June, 1977.


Marsina Donnini


Janet Mack



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

TAX APPEALS BUREAU

STATE CAMPUS
ALBANY, N.Y. 12227

STATE TAX COMMISSION

ADDRESS YOUR REPLY TO

June 30, 1977

TELEPHONE: (518) **457-1723**

David P. McCarthy, Inc.
650 East 12th Street
New York, New York 10009

Gentlemen:

Please take notice of the **DECISION**
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section(**x**) **510** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **30 days**
from the date of this notice.

Inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned. They
will be referred to the proper party for reply.

Very truly yours,

Paul B. Coburn
Supervising Tax
Hearing Officer

Enc.

cc: ~~Petitioner's Representative:~~

Taxing Bureau's Representative:

STATE TAX COMMISSION

In the Matter of the Application :
of :
DAVID P. MC CARTHY, INC. : DECISION
for Revision of a Determination or for :
Refund of Highway Use Tax under :
Article 21 of the Tax Law for the Period :
April 1, 1970 through September 30, 1973.

Applicant, David P. McCarthy, Inc., 650 East 12th Street, New York, New York 10009, filed an application for revision of a determination or for refund of highway use tax under Article 21 of the Tax Law for the period from April 1, 1970 through September 30, 1973. (File No. 00445).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 17, 1976 at 2:45 P.M. The applicant appeared pro se. The Income Tax Bureau appeared by Peter Crotty, Esq. (James A. Scott, Esq., of counsel).

ISSUE

Whether the audit of the Miscellaneous Tax Bureau provided a proper basis for computation of the highway use tax assessed against the applicant.

FINDINGS OF FACT

1. Applicant, David P. McCarthy, Inc., filed truck mileage tax and fuel use tax returns for the quarters from April 1, 1970 through September 30, 1973.

2. Pursuant to an audit of the applicant's records, the Miscellaneous Tax Bureau issued an Assessment of Unpaid Truck Mileage Tax on June 19, 1974 for the period from April 1, 1970 through September 30, 1973 for \$2,019.27, plus penalty and interest to that date of \$427.31. This assessment was based on the audit findings of unreported taxable mileage, and the absence, in instances, of identification of the gross weight of the trailers used in combination with applicant's tractors.

3. On June 19, 1974, pursuant to the audit of applicant's records, the Miscellaneous Tax Bureau also issued an Assessment of Unpaid Fuel Use Tax for the first three quarters of 1973 in the sum of \$43.74, plus penalty and interest to that date of \$6.57.

4. Applicant, David P. McCarthy, Inc., is engaged in the trucking business and handles distribution of freight, and also does substantial business in the hauling of steamship containers which are picked up at piers. The corporation used no trailers of its own in transporting the steamship containers. The corporation also had five regular trucks and two light trucks.

5. In the first quarter of 1971, applicant, David P. McCarthy, Inc., reported mileage of 4,805 miles. However, an audit of applicant's record for that quarter indicated that the mileage for the quarter was 10,832 miles. The percentage of error was in excess of 125 percent. A similar audit of the third quarter of 1973 indicated that reported mileage of 2,268 miles differed from the 5,529 miles as indicated by applicant's records. The percentage of error here was approximately 144 percent. These two different test periods were used to recompute the truck mileage tax due for that part of the period in question from April 1, 1970 to October 31, 1971, and for the remainder of the period starting with the third quarter of 1971 through the third quarter of 1973. This was done to more accurately reflect a change in the applicant-carrier's operations which in the latter period expanded to include activities in New Jersey. Finally, where applicant's returns and records indicated that the maximum gross weight of applicant's tractor and a trailer in tandem was unknown, the Miscellaneous Tax Bureau, in determining the tax rate to apply to the mileage operated in New York, used the rate on the highest gross weight shown for a trailer during the quarter in combination with the tractors reported.

6. Applicant, David P. McCarthy, Inc.'s records were incomplete and inadequate to clearly indicate mileage traveled. No weight audit was possible from the records kept. No evidence was adduced to indicate that the mileage per gallon utilized by the Miscellaneous Tax Bureau was incorrect.

CONCLUSIONS OF LAW

A. That the assessment of truck mileage tax and fuel use tax against applicant, David P. McCarthy, Inc., was proper.

B. That the application of David P. McCarthy, Inc. is granted to the extent that the penalty included in the assessments for fuel use and truck mileage taxes is waived; that the Miscellaneous Tax Bureau is hereby directed to accordingly modify the two assessments issued June 19, 1974 and in so doing, to compute interest at the minimum rate; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York
June 30, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER