

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
C.B. Norton & Sons 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 :
4/73 - 8/76.

State of New York
County of Albany

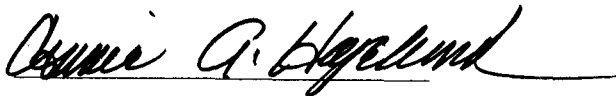
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of December, 1981, he served the within notice of Decision by certified mail upon C.B. Norton & Sons Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

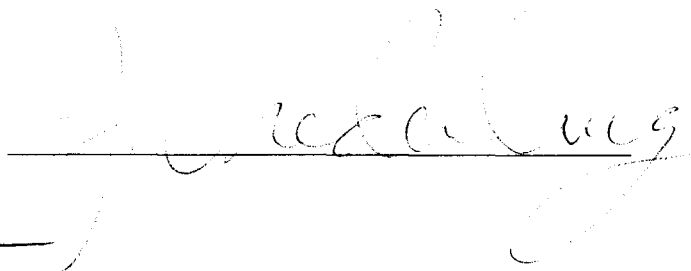
C.B. Norton & Sons Inc.
Peth Rd.
Great Valley, NY 14741

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
4th day of December, 1981.


Dennis G. Haglund


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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AFFIDAVIT OF MAILING

State of New York
County of Albany

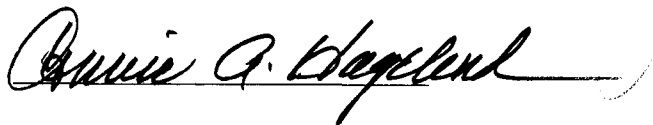
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of December, 1981, he served the within notice of Decision by certified mail upon Bert R. Dohl the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

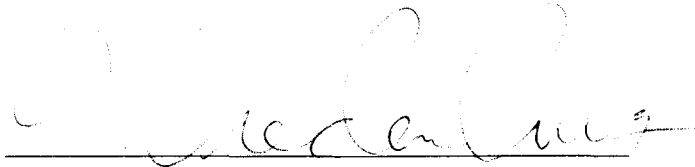
Bert R. Dohl
Congdon, Perreault, Dohl & Wixson, Esqs.
107 Main St.
Salamanca, NY 14779

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
4th day of December, 1981.





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

December 4, 1981

C.B. Norton & Sons Inc.
Peth Rd.
Great Valley, NY 14741

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
Bert R. Dohl
Congdon, Perreault, Dohl & Wixson, Esqs.
107 Main St.
Salamanca, NY 14779
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application

of

C. B. NORTON & SON, INC.

for a Hearing to Review a Determination of
Highway Use Tax under Article 21 of the Tax Law :
for the Period April, 1973 through August, 1976.

DECISION

Petitioner, C. B. Norton & Son, Inc., Peth Road, Great Valley, New York 14741, filed a petition for a hearing to review a determination of highway use tax under Article 21 of the Tax Law for the period April, 1973 through August, 1976 (File No. 21344).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on July 8, 1981 at 10:45 A.M. Petitioner appeared by Congdon, Perreault & Dohl, Esqs. (Bert R. Dohl, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division properly asserted additional highway use taxes against petitioner, based upon an upward adjustment to the weight of the tractor in a tractor-trailer combination.

FINDINGS OF FACT

1. On June 20, 1977, the Audit Division issued to petitioner, C. B. Norton & Son, Inc., an Assessment of Unpaid Truck Mileage Tax (subsequently adjusted on March 3, 1978), asserting additional taxes due under Article 21 of

the Tax Law for the period April, 1973 through August, 1976, plus penalties and interest, as follows:

	<u>TAX</u>	<u>PENALTY & INTEREST</u>
Unloaded weight adjustment	\$ 62.78	\$ 12.30
Maximum gross weight adjustment	312.64	100.47
	<u>\$375.42</u>	<u>\$112.47</u>
Tax		\$375.42
Penalty and interest		112.77
Accrued interest to 3/20/78		26.21
Total due		<u>\$514.40</u>
Payment applied		96.51
Balance		<u>\$417.89</u>

2. During the period at issue, petitioner owned one 1970 Mack tractor and a number of trailers which, in combination, petitioner used to haul wood products. For purposes of Article 21 of the Tax Law, petitioner chose to calculate its tax based upon the weight of the tractor plus the gross weight of the heaviest trailer. The assessment resulted from an upward adjustment to the weight of the tractor by the Audit Division.

3. When petitioner purchased the tractor from Mack Trucks, Inc., the seller completed on petitioner's behalf a temporary certificate of registration for submission to the Department of Motor Vehicles, which certificate reflected a weight of 12,500 pounds for said tractor. Petitioner did not have the tractor weighed until the Audit Division requested that it do so during the course of the audit.

The Chassis Delivery Receipt given to petitioner by the seller showed the various items with which the tractor was equipped, including two auxiliary fuel tanks with capacities of 55 and 85 gallons, respectively.

4. On or about January 12, 1973, petitioner filed an Application for Highway Use Permits for the Mack tractor and for seven trailers, the loaded and unloaded weight of which were given as follows:

<u>TYPE</u>	<u>MAKE AND MODEL OF VEHICLE</u>	<u>UNLOADED WEIGHT OF VEHICLE</u>	<u>MAXIMUM GROSS WEIGHT</u>
Tractor	Mack	12,500	--
Semi-trailer	Fruehauf	13,000	60,000
Semi-trailer	Theile	13,500	60,000
Semi-trailer	Rodger	9,500	39,500
Semi-trailer	Trailmobile	13,000	60,000
Semi-trailer	Trailmobile	13,000	60,000
Semi-trailer	Gindy	13,000	60,000
Semi-trailer	Gindy	13,000	60,000

Petitioner calculated the maximum gross weight of the trailers by subtracting the weight of the Mack tractor (12,500 pounds) from the maximum load permitted under the Vehicle and Traffic Law (at that time 71,000 pounds plus a 3 percent allowance).

On or about July 24, 1973, petitioner filed a supplementary application for two Fruehauf trailers; and on or about September 13, 1974, petitioner filed a further supplementary application for a Trailco trailer. Petitioner calculated the weights of the three additional trailers by the same method described supra.

5. In December, 1976, at the Audit Division's request, petitioner had the tractor weighed with a full load of diesel fuel. The weight slip of Donelson Trucking & Storage reflected a weight for the tractor of 14,620 pounds.

6. Diesel fuel weighs approximately 7.7 pounds per gallon. Thus, the weight of the diesel fuel in the two tanks would account for approximately 1,078 pounds of the discrepancy between the weight of the tractor as shown on the weight slip and the weight as reported by petitioner on its application for permit.

7. During the period in question, petitioner was never charged with a violation of the weight provisions of the Vehicle and Traffic Law.

8. For the reporting period subsequent to the audit, petitioner modified the weight of the heaviest trailer as well as the weight of the tractor on its truck mileage tax returns, so as to reflect the weight of the tractor with diesel fuel but also so as to maintain the total weight of the tractor-trailer combination as reported on its audited returns.

CONCLUSIONS OF LAW

A. That subdivision (2) of section 503 of the Tax Law allows a carrier to calculate its highway use taxes using the "combination weight" of tractor and trailer. Said subdivision defines combination weight as "the gross weight of the trailer if operated with a load, or the actual weight of the trailer if operated without any load whatsoever, plus the actual weight of the heaviest tractor for which a permit is required under section five hundred two...".

B. That subdivision (7) of section 501 sets forth the definition of unloaded weight as follows:

"'Unloaded weight' shall mean the actual weight of the motor vehicle, which includes all equipment necessary for the performance of the function of the vehicle as a vehicle, necessary for the safety of the vehicle, permanently attached to the vehicle, used exclusively for the protection of the load carried by the vehicle or used exclusively for the loading or unloading of the vehicle."

This Commission has held that the language "...all equipment necessary for the performance of the function of the vehicle as a vehicle..." includes a full tank of diesel fuel. Matter of Consolidated Freightways Corporation of Delaware, July 3, 1981. Therefore, the Audit Division properly required petitioner to weigh its Mack tractor with the fuel tanks filled.

C. That petitioner has not demonstrated that the increase in weight of the tractor (with full fuel tanks) did not result in a corresponding increase in the weight of the combination tractor-trailer and that the weight of the combination tractor-trailer remained constant. Petitioner's assertion that it

was never charged with an overweight violation during the period under consideration is unpersuasive, without proof that the tractor-trailer was weighed during the period or proof of the gross weight of the heaviest trailer.

A permit may be issued under Article 21 for a vehicle, the weight of which is in excess of the limitations imposed by the Vehicle and Traffic Law; mileage traveled by such vehicle is taxable under Article 21. Tax Law section 502.4; 20 NYCRR 472.5. Moreover, the Vehicle and Traffic Law provides for the issuance of a special permit to operate a vehicle, the weight of which exceeds the limitations imposed. Vehicle and Traffic Law section 385.15.

D. That a carrier may make application to the Commission for a corrected permit, founded upon a decrease in the gross or unloaded weight of a motor vehicle, but such application must be filed in the month of January. Tax Law section 502.1(a); 20 NYCRR 473.5.


E. That the petition of C. B. Norton & Son, Inc. is hereby denied and the assessment of unpaid truck mileage tax, as adjusted on March 3, 1978, is sustained, together with such minimum interest as is lawfully due.

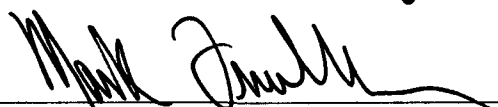
DATED: Albany, New York

DEC 04 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER