STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition of T.I.M.E. - D.C., 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 1/1/73-3/31/75.	:	

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 1st day of May, 1981, he served the within notice of Decision by mail upon T.I.M.E. - D.C., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

T.I.M.E. - D.C., Inc.
PO Box 2787
Lubbock, TX 79408

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
1st day of May, 1981.

Connie A. Hagelund

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition of T.I.M.E. - D.C., Inc.	:	
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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 1st day of May, 1981, he served the within notice of Decision by mail upon C.R. Seaberg, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

C.R. Seaberg
c/o T.I.M.E - D.C., Inc.
P.O. Box 2787
Lubbock, TX 79408

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
1st day of May, 1981.

Janice A. Hagelund

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

May 1, 1981

T.I.M.E. - D.C., Inc.
PO Box 2787
Lubbock, TX 79408

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
C.R. Seaberg
c/o T.I.M.E. - D.C., Inc.
P.O. Box 2787
Lubbock, TX 79408
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of T.I.M.E. - D.C., INC. for Revision of a Determination or for Refund of Fuel Use Tax under Article 21 of the Tax Law for the Period January 1, 1973 through March 31, 1975.	DECISION

Petitioner, T.I.M.E. - D.C., Inc., P.O. Box 2787, Lubbock, Texas 29408, filed a petition for revision of a determination or for refund of fuel use tax under Article 21 of the Tax Law for the period January 1, 1973 through March 31, 1975 (File No. 15992).

A formal hearing was held before Louis Klein, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York 12227, on September 9, 1977 at 9:15 A.M. Petitioner appeared by C. R. Seaberg. The Audit Division appeared by Peter Crotty, Esq. (Andrew Haber, Esq., of counsel).

ISSUE

Whether the assessment of fuel use tax issued to recover over-refunded fuel use tax for the period January 1, 1973 through June 30, 1974 with an offset of audited fuel use tax refund due for the period of July 1, 1974 through March 31, 1975 is actually due and owing.

FINDINGS OF FACT

1. The petitioner timely filed refund claims for fuel use tax refund (MT-906) as follows:

January 1, 1973 through March 31, 1973 - received on August 27, 1973 in the amount of $15,737.20
April 1, 1973 through June 30, 1973 - received on September 10, 1973 in the amount of $11,530.78
July 1, 1973 through September 30, 1973 - received on December 10, 1973 in the amount of $17,093.02
October 1, 1973 through December 31, 1973 - received on March 4, 1974 in the amount of $10,467.88
January 1, 1974 through March 31, 1974 - received on July 2, 1974 in the amount of $12,885.06
April 1, 1974 through June 30, 1974 - received on September 20, 1974 in the amount of $17,930.48
July 1, 1974 through September 30, 1974 - received on November 26, 1974 in the amount of $14,585.52
October 1, 1974 through December 31, 1974 - received on March 10, 1975 in the amount of $12,585.98
January 1, 1975 through March 31, 1975 - received on June 25, 1975 in the amount of $10,934.66

These refund claims were filed to recover tax paid on gallons of motor fuel allegedly purchased in New York State and, allegedly consumed in states other than New York State imposing, under a lawful requirement of those states, taxes similar in effect to the fuel tax component in the tax imposed by section 503(a) of the New York State Tax Law. These refund claims are authorized under section 503(a)(3) of the New York State Tax Law.

All of the above refund claims reflected fuel allegedly purchased in New York and allegedly used in the states of Pennsylvania, Connecticut, Maryland and West Virginia. Copies of the tax returns filed with the states of Pennsylvania, Connecticut, Maryland and West Virginia were properly attached to each refund claim.

2. Upon desk audit of all refund claims filed for the collective period January 1, 1973 through September 30, 1974, all claims were reduced and refunds were paid to petitioner as follows:

January 1 - March 31, 1973 reduced to $12,589.76
April 1 - June 30, 1973 reduced to $9,224.56
July 1 - September 30, 1973 reduced to $13,674.40
October 1 - December 31, 1973 reduced to $8,374.24
January 1 - March 31, 1974 reduced to $10,308.00
April 1 - June 30, 1974 reduced to $14,344.32

These reductions were made as it was determined by the Audit Division that petitioner had over claimed the refund in the amount of $.02 per gallon. Although the rate paid to New York State was $.10 per gallon, petitioner was only required to pay the state of Pennsylvania $.08 per gallon and the refund is limited to the extent of payment to the state (Pennsylvania) imposing, under a lawful requirement, a tax similar in effect to the fuel tax component in the tax imposed by section 503(a) of the New York State Tax Law (Section 503(a)(3) of the New York State Tax Law). As no documentary evidence showing exactly where the fuel purchased in New York State was consumed, the petitioner was reimbursed at the lowest rate per gallon paid to a state having a tax similar in effect to the fuel tax component in the tax imposed by section 503(a) of the New York State Tax Law, which was the rate per gallon paid to Pennsylvania. This adjustment was made in each of the above noted refund claims. Also, a minor adjustment was made in the claim which covered the period April 1, 1974 through June 30, 1974 due to a minor ratio recomputation (MT-900, line 3).

The petitioner did not protest any of the actions taken by the Audit Division cited above.

3. Subsequently, a field audit was performed which covered the fuel use tax returns (MT-900's) and the refund claims (MT-906's) corresponding to the periods covered by the fuel use tax returns for the period January 1, 1973 through March 31, 1975.

4. Upon audit, it was determined by the Audit Division that little or no operation occurred in Maryland and West Virginia using fuel purchased in New York; therefore the fuel use tax refunds for this portion of the operation were denied. The Audit Division also determined that operation within Indiana qualified for refund from New York as some New York fuel was consumed in Indiana. The result of the audit was that the MT-900's were determined to

have been filed correctly, with the exception of the minor error disclosed on desk audit for the period April 1, 1974 through June 30, 1974 (see Finding of Fact 2). However, all of the refund claims filed for the quarters in the period January 1, 1973 through March 31, 1975 were determined to have been overstated beyond the amount originally claimed for the period July 1, 1974 through March 31, 1975 and beyond the amount paid to the petitioner after desk audit for the period January 1, 1973 through June 30, 1974.

5. The Audit Division found it impossible to determine exactly which fuel was consumed in each state based upon the available records. Therefore, based upon records maintained by the petitioner, for the period January 1, 1975 through March 31, 1975, the percentage of purchases in each state was determined and applied to fuel used in each state to compute the amount of New York fuel consumed in each state. These gallons were reduced by the amount of other than New York State fuel consumed in New York State to determine the gallons eligible for refund (gallons where tax was paid to Pennsylvania, Connecticut and Indiana). The allowable refund was computed for the period January 1, 1975 through March 31, 1975 and a percentage was computed which showed what percent the allowable refund bore to the refund applied for. The percentage of 39.836 percent was computed and applied to the refund amounts claimed for the periods October 1, 1974 through December 31, 1974 and January 1, 1975 through March 31, 1975 to determine allowable refunds for these two quarters. A modification in the allowable percentage of applied for refunds was made for all periods prior to the period October 1, 1974 through December 31, 1974 as Pennsylvania increased its diesel fuel tax from $.08 per gallon to $.09 per gallon effective October 1, 1974. This modified allowable refund to claimed refund percentage was determined to be 38.323 percent and was applied to all seven refund claims for the collective period

January 1, 1973 through September 30, 1974 to determine allowable refunds for these periods. Based upon the above calculations, an assessment of unpaid fuel use tax was prepared assessing over-refunded fuel use tax for the six quarterly periods within the collective period of January 1, 1973 through June 30, 1974. An offset of unpaid allowable refunds for the periods July 1, 1974 through September 30, 1974, October 1, 1974 through December 31, 1974, and January 1, 1975 through March 31, 1975, was made on the assessment. The assessment reflected net fuel use tax due for the collective period January 1, 1973 through March 31, 1975 in the amount of $20,734.53, asserted penalty and interest in the amount of $6,833.12, is dated December 18, 1975 and bears assessment number F-10669.

6. Per letter dated May 17, 1976, petitioner submitted an explanation with supporting computations reflecting that as a result of the field audit, an additional refund was due the petitioner in the amount of $863.11 rather than the subject assessment being due. Petitioner sought to show that New York fuel was used in several states other than Pennsylvania, Connecticut and Indiana, and also showed adjustments to the gallons used in Pennsylvania, Connecticut and Indiana. The gallonage figures supplied by the petitioner were accepted with the exception of those reflecting Illinois, New Jersey and Massachusetts usage of New York fuel, as no returns were submitted to substantiate the claims, and Michigan and Missouri usage of New York fuel as the returns did not indicate that the taxes imposed were similar to New York State fuel use tax. Acceptance of the revised gallonages increased the percentage of allowable refund from 39.836 percent to 41.24 percent for the periods October 1, 1974 through December 31, 1974 and January 1, 1975 to March 31, 1975 and from 38.323 percent to 39.76 percent for all periods within the collective period January 1, 1973 through September 30, 1974. The

revised percentages of allowable refund reduced the subject assessment from additional tax due of $20,734.53 to $18,964.08. The petitioner was advised of this reduction by letter of July 6, 1976. The subject assessment was adjusted to reflect the above tax reduction on August 3, 1976 and penalty and interest was revised and computed to date (August 6, 1976); which amounted to $8,114.66.

7. At the hearing, there was no oral testimony or documentation produced to refute the actions taken by the Audit Division.

CONCLUSIONS OF LAW

A. That section 501(a)(3) of the New York State Tax Law provides, in part:

> "If proof satisfactory to the tax commission is submitted showing that a carrier has paid to another state under a lawful requirement of such state a tax, similar in effect to the fuel tax component in the tax imposed by this section, on the use or consumption in such state of motor fuel or diesel motor fuel purchased in this state and on which the taxes imposed by Article 12-a of this chapter have been paid and if a claim for refund is filed within one year from the end of any calendar quarter, such excess for such quarter shall be refunded but only to the extent of such payment to such other state and in no case to exceed the applicable rate per gallon in effect under article twelve-a of this chapter."

B. That in the absence of detailed records reflecting exactly where all fuel purchased in New York State was consumed, the Audit Division determined the allowable refunds due using available records in accordance with generally accepted auditing procedure.

C. That the petitioner has failed to show that the Audit Division's redetermination of the nine refunds due for the collective period January 1, 1973 through March 31, 1975 was improper or mathematically inaccurate.

D. That the petition of T.I.M.E. - D.C., Inc. is denied and the assessment issued on December 18, 1975, as reduced to $18,964.08 plus penalty and interest on August 3, 1976, is sustained.

DATED: Albany, New York

MAY 0 1 1981

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER