

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

September 25, 1981

XLT Service, Inc.
c/o Arthur Liebling
P.O. Box 156
Baldwin, NY 11510

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
XLT SERVICE, INC.
for Revision of a Determination or for
Refund of Highway Use Tax under Article 21
of the Tax Law for the Period October 1,
1973 through December 31, 1974.

In the Matter of the Petition
of
CHAIN ASSEMBLY, INC.
for Revision of a Determination or for
Refund of Highway Use Tax under Article 21
of the Tax Law for the Period July 1, 1971
through December 31, 1974.

In the Matter of the Petition
of
THE ANGEL'S CHARIOT, INC.
for Revision of a Determination or for
Refund of Highway Use Tax under Article 21
of the Tax Law for the Period January 1,
1972 through December 31, 1974.

DECISION

Petitioner, XLT Service, Inc., P.O. Box 156, Baldwin, New York 11510, filed a petition for revision of a determination or for refund of highway use tax under Article 21 of the Tax Law for the period October 1, 1973 through December 31, 1974 (File No. 16126); petitioner, Chain Assembly, Inc., P.O. Box 156, Baldwin, New York 11510, filed a petition for revision of a determination or for refund of highway use tax under Article 21 of the Tax Law for the period July 1, 1971 through December 31, 1974 (File No. 16125); petitioner, The

Angel's Chariot, Inc., P.O. Box 156, Baldwin, New York 11510, filed a petition for revision of a determination or for refund of highway use tax under Article 21 of the Tax Law for the period January 1, 1972 through December 31, 1974 (File No. 16123).

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 March 13, 1978 at 10:45 A.M. Petitioners appeared by Arthur Liebling, president of the three affiliated corporations. The Audit Division appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the lessor of tractors was liable for highway use taxes for mileage accumulated by the lessee operators of said tractors.

II. Whether the lessors of trailers were liable for highway use taxes for mileage accumulated by the owner-operators of tractors hauling said trailers.

III. Whether the Audit Division properly determined the additional highway use taxes assessed against petitioners.

FINDINGS OF FACT

1. (a) On November 6, 1975, the Miscellaneous Tax Bureau issued against petitioner, XLT Service, Inc. ("XLT"), an Assessment of Unpaid Truck Mileage Tax (No. B-16230), asserting additional taxes due in the amount of \$1,904.68, with penalty and interest thereon of \$362.07, for a total of \$2,266.75, for the period October 1, 1973 through December 31, 1974.

On said date the Bureau also issued against XLT an Assessment of Unpaid Fuel Use Tax (No. F-10420), asserting additional taxes due of \$978.64, plus penalty and interest thereon of \$184.05, for a total amount of \$1,162.69, for the period abovementioned.

(b) On October 29, 1975, the Miscellaneous Tax Bureau issued against petitioner, Chain Assembly, Inc. ("Chain"), an Assessment of Unpaid Truck Mileage Tax (No. B-16173) for additional taxes due in the amount of \$1,166.54, plus penalty and interest thereon of \$259.57, for a total sum of \$1,426.11, for the period July 1, 1971 through December 31, 1974.

On said date, the Bureau issued against Chain an Assessment of Unpaid Fuel Use Tax (No. F-10401), showing additional taxes due of \$440.70, plus penalty and interest of \$101.36, for a total of \$542.06, for the aforesaid period.

(c) On November 7, 1975, the Miscellaneous Tax Bureau issued against petitioner, The Angel's Chariot, Inc. ("Chariot"), an Assessment of Unpaid Truck Mileage Tax (No. B-16289) for additional taxes due in the amount of \$1,466.49, plus penalty and interest thereon of \$315.29, for a total of \$1,781.78, for the period January 1, 1972 through December 31, 1974.

2. XLT owns and leases tractors to individual drivers who are independent contractors associated with Chain and Chariot, which entities are affiliates of XLT. During the period at issue, XLT also rented tractors from another tractor rental service.

3. Chain owns and leases trailers which deliver merchandise from sales made by J. C. Penney retail stores. Its trailers are hauled by tractors owned by XLT and by independent owner-operators.

4. Chariot owns and leases trailers which deliver merchandise from catalog sales made by Penney's mail order division. Like Chain, it owns no power equipment but leases tractors from XLT and from owner-operators.

5. Petitioners are New York corporations and are classified as "non-carriers" by the Interstate Commerce Commission. They operate only in the

free zone of the New York City metropolitan area, which includes other portions of New York State and parts of New Jersey. The tractors are garaged at Oceanside, New York, whence the daily delivery trips generally commence. The tractor-trailers haul goods to various points in New Jersey, such as Hoboken, Jersey City and Secaucus.

6. During the course of a field audit, the Audit Division examined XLT's records of gasoline purchases for one 1969 GMC gasoline-powered tractor (acquired by XLT from Chain in August, 1974), mileage for which had not been reported. The records showed that 963 gallons of gasoline had been purchased for said vehicle from August 23, 1974 through December 31, 1974, all purchases having occurred in New Jersey. The auditor computed the mileage for said vehicle at 4,815 (5 miles per gallon of fuel) and assigned 90 percent of the mileage to New York.

The Audit Division similarly examined XLT's records of diesel fuel purchases, all of which were made in New Jersey. At the rate of 8 miles per gallon, agreed upon by XLT and the auditor, XLT diesel equipment accumulated 107,569 miles in the period from October 1, 1973 through December 31, 1974. Again, the auditor estimated that 90 percent of the mileage was amassed in New York.

The ascertainment of additional truck mileage and fuel use taxes owed by XLT was based upon said records of gasoline and diesel fuel purchases.

According to the auditor's report, XLT failed to supply weight certificates for the tractors as requested; consequently, a tax rate of 22 mills per mile was utilized.

7. During the course of the field audit, the Audit Division examined Motor Vehicle Bureau registrations for trucks owned by Chain, which showed the

unloaded weight of each at 10,000 pounds. Chain's application for a highway use permit for one 1969 GMC tractor showed the unloaded weight thereof at 10,000 pounds. On the Report of Equipment Interchanged or Leased, for the fourth quarter of 1973, Chain reported the leasing of three trailers, the unloaded weights of which were 10,200, 10,500, and 10,500 pounds respectively. Chain's seven other leased trailers each had an unloaded weight of 10,000 pounds or less. The audit report stated that additional tax was computed on the unloaded weight basis because reported mileage had apparently been computed by that method.

Audit of Chain's records of leased truck payments revealed that mileage traveled by one lessor during the interval April 1, 1971 through December 31, 1974 had been omitted by Chain in reporting truck mileage tax. This trailer, with an estimated unloaded weight of 12,000 pounds, was reported to have been engaged wholly in intrastate hauling. Over the audit period, mileage for said vehicle averaged 4,624 per quarter. The tax rate applied by the auditor to this vehicle was 8 mills.

The auditor and Chain's president agreed that during the period April 1, 1971 through September 30, 1972, Chain's 1969 GMC tractor averaged 500 miles per week, for a total of 39,000 miles. The auditor allocated 90 percent of said mileage to New York. He utilized an estimated unloaded weight of 11,000 pounds for this vehicle, stating in his report that Chain refused to comply with his request for a weight certificate, and applied a tax rate of 22 mills.

Chain's president and the auditor agreed that Chain had paid truck mileage tax on Hub Rental tractors, but not upon mileage accumulated by owner-operator tractors, to which the auditor applied a tax rate of 27 mills.

During the period July 1, 1971 through September 30, 1972, Chain filed no fuel use tax returns. All fuel purchases were made in New Jersey. The tractors traversed 39,000 miles during the period, consuming gasoline at the rate of 5 miles per gallon.

8. For each of the periods January 1, 1973 through December 31, 1974, Chariot filed truck mileage tax returns, showing no tax due.

Chariot had filed applications for highway use permits for six different trailers, each with an unloaded weight of 10,000 pounds.

Pursuant to a field audit, the Audit Division ascertained from Chariot's records the names and number of days worked by tractor owner-operators, and the number of days Chariot trailers were used in conjunction with XLT tractors. Truck mileage tax on trailers hauled by XLT had been reported and paid by XLT. Chariot had not paid truck mileage tax on trailers hauled by owner-operators.

Based upon Chariot's records of the days worked by owner-operators hauling trailers for which Chariot held permits, and using an estimated figure of 100 miles per day for each such tractor-trailer combination, the auditor calculated that owner-operators had driven a total of 60,350 unreported and untaxed miles. Of this mileage, the auditor estimated that 10 percent had been driven in New Jersey and 90 percent in New York State. Moreover, the auditor applied a rate of 27 mills.

According to the field audit report, Chariot's liability was computed on the unloaded weight method due to use of this method by Chariot's affiliates.

9. There was no statement in the auditor's report nor was there any testimony adduced at the hearing as to the rationale for allocating 90 percent of petitioners' mileage to New York and 10 percent to New Jersey.

10. Petitioner's president, Mr. Liebling, contested the Audit Division's estimation that 90 percent of the equipment's mileage was accumulated in New York. Each truck, he asserted, traveled the same route: it departed the Oceanside terminal, proceeded through the Holland Tunnel to Jersey City, and thereafter made stops at Elizabeth, Edison, Secaucus, North Bergen and Hoboken; it then returned through the Tunnel to the Oceanside terminal. Mr. Liebling calculated that 52 percent of this round trip occurred in New Jersey.

11. Petitioner XLT asserted that its Mercedes-Benz diesel tractors were kept running all day by the drivers. It introduced an estimate as to diesel fuel consumption during idling time of 1 quart per hour, which estimate was supplied by a Mercedes-Benz truck sales and service corporation. XLT estimated that 1.25 gallons of diesel fuel were consumed while in idle condition per day per tractor, assuming that each truck made four deliveries (at one hour idling time per delivery) and four pick-ups (at twenty minutes idling time per pick-up) daily.

12. Petitioners Chain and Chariot contested their liability for highway use taxes unpaid by tractor owner-operators hauling trailers owned by Chain and Chariot.

13. Petitioner XLT introduced at the formal hearing an Order of Suspension of Highway Use Permits (No. A-9510), indicating satisfaction, on January 4, 1977, of highway use tax assessments numbers B-16230, A-26958 and F-10420.

CONCLUSIONS OF LAW

A. That the Order of Suspension of Highway Use Permits issued to XLT and subsequently stamped "satisfied" did not signify that the enumerated assessments had been paid. Said stamp was affixed to indicate that the assessments were under protest and that until such time as XLT's protest was resolved, it would be permitted to register its vehicles with the Motor Vehicle Bureau.

B. That from the testimony of petitioners' president and from maps showing the route traveled by petitioners' tractors, notice of which may properly be taken [Richardson on Evidence, §48 (10th ed. 1973); State Administrative Procedure Act section 306.3], it can reasonably be concluded that half the highway mileage was traveled in each of the states of New York and New Jersey during the periods at issue.

C. That a weight receipt exhibiting the unloaded weight of an unidentified GMC vehicle was offered into evidence by petitioners. However, it is impossible to make any connection between said certificate and any tractor the mileage of which was audited. Moreover, the method of determining unloaded weight for purposes of Article 21 is specifically addressed by the regulations promulgated thereunder. 20 NYCRR 472.6. Petitioners have failed to sustain the burden of proof to demonstrate that the Audit Division's utilization of estimated unloaded weights was erroneous or improper.

D. That there can be no adjustment made for idling time, as petitioners have offered only an estimation of deliveries and pick-ups per truck per day, without testimony or documentation in support thereof.

E. That petitioners bear joint and several liability for highway use taxes due and owing by lessees of their equipment. Subdivision 5 of section 501 defines "carrier" for purposes of Article 21 as "any person having the

lawful use or control, or the right to the use or control of any motor vehicle." Further, sections 503 and 503-a of the Tax Law, which impose the truck mileage and fuel use taxes respectively, provide that in the event a carrier is not the owner of a vehicular unit, liability for the taxes shall be joint and several upon both carrier and owner. See also Matter of Farrell Lines, Inc., State Tax Commission, February 22, 1980.

F. That the petitions of XLT Service, Inc., Chain Assembly, Inc., and The Angel's Chariot, Inc. are granted to the extent indicated in Conclusion of Law "B"; that the Assessments of Unpaid Truck Mileage Tax and Assessments of Fuel Use Tax issued October 29, November 5 and November 6, 1975, are to be modified accordingly; and that except as so modified, the assessments are in all other respects sustained.

DATED: Albany, New York

SEP 25 1981

STATE TAX COMMISSION

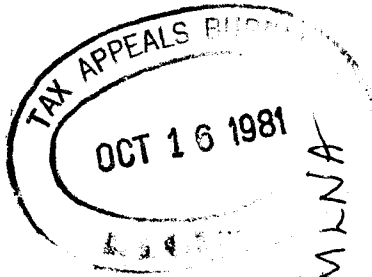

PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

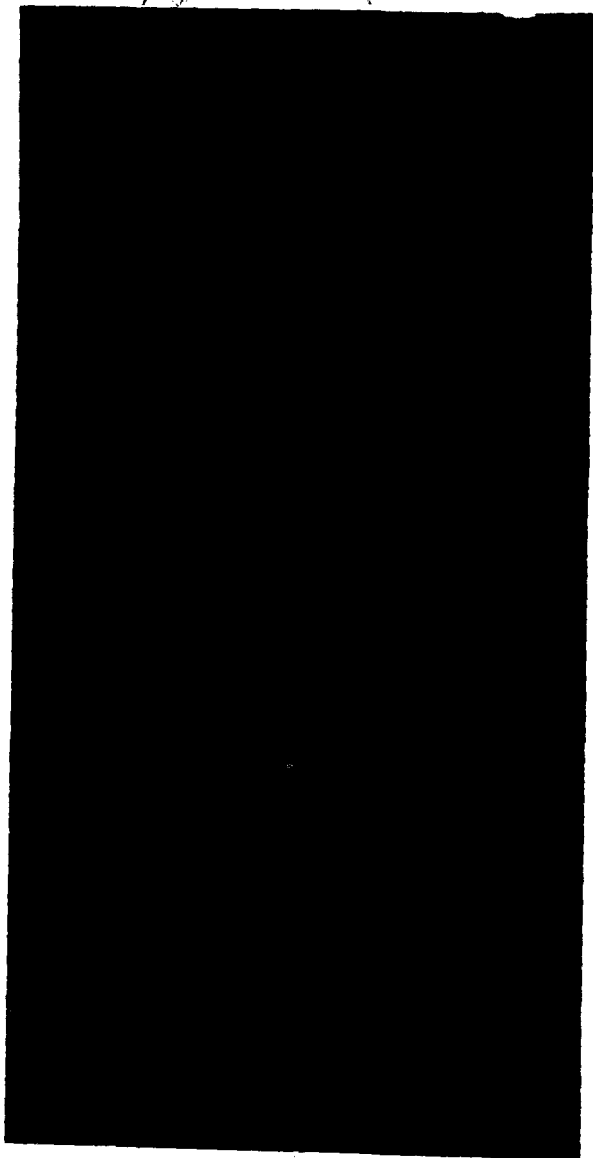


~~XLT Service, Inc.
c/o Arthur Liebling
P.O. Box 156
Baldwin, NY 11510~~

BIA MLNA
DeWitt

SEP 24 1981

WIN. NY



REQUEST FOR BETTER ADDRESS

FD.

Requested by <i>J. Udenling</i>	Unit Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request <i>10-16-81</i>
------------------------------------	--	------------------------------------

Please find most recent address of taxpayer described below; return to person named above.

Social Security Number <i>NC</i>	Date of Petition <i>76-08-02</i>
Name <i>XLT Service Inc.</i>	
<i>% Arthur Liebling</i>	
Address <i>P.O. Bx. 156</i> <i>Baldwin, N.Y.</i> <i>11510</i>	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	<i>0-27-81</i> <i>Arthur Liebling</i>

Searched by <i>G. Lopez</i>	Section <i>10-27-81</i>	Date of Search <i>10-29-81</i>
--------------------------------	----------------------------	-----------------------------------

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER