

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Anrich Oil Co., Inc.	:	
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period October, 1975 through March, 1977,	:	
Glenn Produce, Inc.	:	
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period January, 1975 through March, 1977,	:	
Glenn-Dor Products, Inc.	:	AFFIDAVIT OF MAILING
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period September, 1974 through March, 1977,	:	
Star Dairy, Inc.	:	
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period January, 1976 through March, 1977, and	:	
Star Dairy, Inc.	:	
for a Hearing to Review a Determination of Motor	:	
Fuel Tax under Article 12A of the Tax Law for	:	
the Period January, 1976 through May, 1977.	:	

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Star Dairy, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Star Dairy, Inc.
P.O. Box J
South Fallsburg, NY 12779

Page 2

Affidavit of Mailing

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
10th day of November, 1983.

Maucha L. Sennelle

Armin A. Hagedorn

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

November 10, 1983

Star Dairy, Inc.
P.O. Box J
South Fallsburg, NY 12779

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) 288 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 Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months 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
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Lew Wohl
36 Fraser Ave.
Monticello, NY 12701
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Anrich Oil Co., Inc.	:	
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period October, 1975 through March, 1977,	:	
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Use Tax under Article 21 of the Tax Law for the	:	
Period January, 1975 through March, 1977,	:	
Glenn-Dor Products, Inc.	:	AFFIDAVIT OF MAILING
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period September, 1974 through March, 1977,	:	
Star Dairy, Inc.	:	
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period January, 1976 through March, 1977, and	:	
Star Dairy, Inc.	:	
for a Hearing to Review a Determination of Motor	:	
Fuel Tax under Article 12A of the Tax Law for	:	
the Period January, 1976 through May, 1977.	:	

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Star Dairy, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Star Dairy, Inc.
P.O. Box J
South Fallsburg, NY 12779

Page 2

Affidavit of Mailing

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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
10th day of November, 1983.

Martha L. Sennelle

Anna O'Haghe

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

November 10, 1983

Star Dairy, Inc.
P.O. Box J
South Fallsburg, NY 12779

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 Law 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
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Lew Wohl
36 Fraser Ave.
Monticello, NY 12701
Taxing Bureau's Representative

Page 2
Affidavit of Mailing

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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
10th day of November, 1983.

Amie A. Hagelwood

Martha L. Drunelle

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

November 10, 1983

Glenn Produce, Inc.
P.O. Box J
S. Fallsburg, NY 12779

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 Law 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
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Lew Wohl
36 Fraser Ave.
Monticello, NY 12701
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Anrich Oil Co., Inc. :

for a Hearing to Review a Determination of Highway :
Use Tax under Article 21 of the Tax Law for the :
Period October, 1975 through March, 1977, :

Glenn Produce, Inc. :

for a Hearing to Review a Determination of Highway :
Use Tax under Article 21 of the Tax Law for the :
Period January, 1975 through March, 1977, :

Glenn-Dor Products, Inc. :

AFFIDAVIT OF MAILING

for a Hearing to Review a Determination of Highway :
Use Tax under Article 21 of the Tax Law for the :
Period September, 1974 through March, 1977, :

Star Dairy, Inc. :

for a Hearing to Review a Determination of Highway :
Use Tax under Article 21 of the Tax Law for the :
Period January, 1976 through March, 1977, and :

Star Dairy, Inc. :

for a Hearing to Review a Determination of Motor :
Fuel Tax under Article 12A of the Tax Law for :
the Period January, 1976 through May, 1977. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Glenn-Dor Products, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Glenn-Dor Products, Inc.
P.O. Drawer J
South Fallsburg, NY 12779

Page 2
Affidavit of Mailing

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
10th day of November, 1983.

Martha L. Drunelle

James A. Haggard

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Anrich Oil Co., Inc.	:	
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period October, 1975 through March, 1977,	:	
Glenn Produce, Inc.	:	
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period January, 1975 through March, 1977,	:	
Glenn-Dor Products, Inc.	:	AFFIDAVIT OF MAILING
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period September, 1974 through March, 1977,	:	
Star Dairy, Inc.	:	
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period January, 1976 through March, 1977, and	:	
Star Dairy, Inc.	:	
for a Hearing to Review a Determination of Motor	:	
Fuel Tax under Article 12A of the Tax Law for	:	
the Period January, 1976 through May, 1977.	:	

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Anrich Oil Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Anrich Oil Co., Inc.
P.O. Box J
South Fallsburg, NY 12779

Page 2
Affidavit of Mailing

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
10th day of November, 1983.

Martha L. Sennelle

James A. Haglund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Anrich Oil Co., Inc.	:	
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period October, 1975 through March, 1977,	:	
Glenn Produce, Inc.	:	
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period January, 1975 through March, 1977,	:	
Glenn-Dor Products, Inc.	:	AFFIDAVIT OF MAILING
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period September, 1974 through March, 1977,	:	
Star Dairy, Inc.	:	
for a Hearing to Review a Determination of Highway	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period January, 1976 through March, 1977, and	:	
Star Dairy, Inc.	:	
for a Hearing to Review a Determination of Motor	:	
Fuel Tax under Article 12A of the Tax Law for	:	
the Period January, 1976 through May, 1977.	:	

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Lew Wohl the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lew Wohl
36 Fraser Ave.
Monticello, NY 12701

Page 2
Affidavit of Mailing

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
10th day of November, 1983.

Maucha L. Grunelle

Amie R. Haglund

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

November 10, 1983

Anrich Oil Co., Inc.
P.O. Box J
South Fallsburg, NY 12779

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 Law 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
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Lew Wohl
36 Fraser Ave.
Monticello, NY 12701
Taxing Bureau's Representative

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
ANRICH OIL CO., INC., :
for a Hearing to Review a Determination of :
Highway Use Tax under Article 21 of the Tax Law :
for the Period October, 1975 through March, :
1977, :
GLENN PRODUCE, INC., :
for a Hearing to Review a Determination of :
Highway Use Tax under Article 21 of the Tax Law :
for the Period January, 1975 through March, :
1977, :
GLENN-DOR PRODUCTS, INC., : DECISION
for a Hearing to Review a Determination of :
Highway Use Tax under Article 21 of the Tax Law :
for the Period September, 1974 through March, :
1977, :
STAR DAIRY, INC., :
for a Hearing to Review a Determination of :
Highway Use Tax under Article 21 of the Tax Law :
for the Period January, 1976 through March, :
1977, and :
STAR DAIRY, INC. :
for a Hearing to Review a Determination of :
Motor Fuel Tax under Article 12A of the Tax Law :
for the Period January, 1976 through May, 1977. :

Petitioners, Anrich Oil Co., Inc., Glenn Produce, Inc., Glenn-Dor Products, Inc., and Star Dairy, Inc., Post Office Box J, South Fallsburg, New York 12779, filed petitions for hearings to review determinations of highway use tax under Article 21 of the Tax Law for the periods October, 1975 through March, 1977, January, 1975 through March, 1977, September, 1974 through March 1977, and

January, 1976 through March, 1977, respectively (File Nos. 24353, 24354, 24355, and 24356). Petitioner Star Dairy, Inc., also filed a petition for a hearing to review a determination of Motor Fuel Tax under Article 12-A of the Tax Law for the period January, 1976 through May, 1977 (File No. 24357).

A consolidated formal hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on March 18, 1982 at 2:30 P.M., and was continued to conclusion before the same Hearing Officer at the same location on November 29, 1982 at 2:05 P.M., with all briefs to be submitted by May 1, 1983. Each petitioner appeared, on both hearing dates, by its president, Lew Wohl. The Audit Division appeared on the March 18, 1982 hearing date by Paul B. Coburn, Esq., (Paul A. LeFebvre, Esq., of counsel) and again on the November 29, 1982 hearing date by Paul B. Coburn, Esq., (James Morris, Esq., of counsel).

ISSUES

I. Whether timely petitions contesting the deficiencies asserted were filed.

II. If so, whether the Audit Division properly redetermined each petitioner's tax liability by the use of a field audit.

FINDINGS OF FACT

1. In October, 1977, the Audit Division issued to each of the petitioners listed below various assessments of unpaid truck mileage tax and assessments of unpaid fuel use tax, and a Notice of Determination of Tax Due Under Diesel Tax Law, asserting additional tax due, plus penalty and interest, as follows:

<u>Petitioner</u>	<u>Notice No.</u>	<u>Notice Date</u>	<u>Tax Law Article</u>	<u>Amount of Tax</u>
Anrich Oil Co., Inc.	B-23756	10/29/77	21 (Truck Mileage Tax)	\$ 418.81
Anrich Oil Co., Inc.	F-13327	10/20/77	21 (Fuel Use Tax)	906.90
Glenn Produce, Inc.	B-23755	10/20/77	21 (Truck Mileage Tax)	7,246.84
Glenn Produce, Inc.	F-13325	10/20/77	21 (Fuel Use Tax)	5,165.52
Glenn-Dor Products, Inc.	B-23757	10/20/77	21 (Truck Mileage Tax)	11,901.66
Glenn-Dor Products, Inc.	F-13328	10/20/77	21 (Fuel Use Tax)	12,555.80
Star Dairy, Inc.	B-23754	10/20/77	21 (Truck Mileage Tax)	71,126.57
Star Dairy, Inc.	F-13326	10/20/77	21 (Fuel Use Tax)	53,790.60
Star Dairy, Inc.	6850	10/21/77	12-A (Motor Fuel Tax)	706.00

2. The above-specified notices were issued following a field audit of the various petitioners' books and records.

3. Letters, identical in content except with respect to the name of the particular petitioner, the notice number and the period at issue, protesting the above asserted deficiencies and requesting a hearing were filed with the Audit Division by Lew Wohl, as president (and majority stockholder), on behalf of petitioners Anrich Oil Co., Inc., Glenn-Dor Products, Inc., and Star Dairy, Inc.¹ These letters were not dated by the petitioners, but were each stamped as having been received by the Audit Division in Albany, New York on November 22, 1977. In addition, a manila envelope (registered number 588) attached to the protest letter of petitioner Glenn-Dor Products, Inc., and presumably used to mail together as one group the protest letters of each of the three (3) above-named petitioners, bore the South Fallsburg, New York postmark of November 19, 1977.

4. A similar protest letter was filed by Mr. Wohl on behalf of petitioner Glenn Produce, Inc. This letter was dated November 27, 1978, and was stamped as having been received by the Audit Division on December 1, 1978.

¹ Pertaining to Star Dairy's deficiency asserted under Article 21 of the Tax Law.

5. By a letter dated January 31, 1978, Mr. Wohl, on behalf of Star Dairy, Inc., requested that the Audit Division respond with respect to a letter dated November 10, 1977, pertaining to a "Regulation #D-26606-BU". Attached to the letter of January 31, 1978, was a photocopy of a letter dated November 10, 1977, stating disagreement with an assessment, and requesting a hearing on "...the above regulation number.". No assessment number was specified in the November 10, 1977 letter, but the letter was captioned "RE: D-26606-BU". Notice number 6850 issued to Star Dairy, Inc. (See Finding of Fact "1"), shows on its face "Reg. No. D-26606-BU". A "Withdrawal of Petition and Discontinuance of Case" form, unsigned by petitioner but pertaining to notice number 6850, noted petitioner's employer identification number as D-26606-BU.

6. The Audit Division sought to perform an office audit of each of the petitioners at its White Plains, New York office. However, petitioners requested that a field audit be conducted at petitioners' offices since transporting of records would cause hardship to the petitioners. Accordingly, a field audit of all petitioners was conducted. Petitioners share common office space and all have the same record preparer, but separate books and records were maintained for each petitioner.

7. Petitioner Anrich Oil Co., Inc. ("Anrich"), is a distributor of diesel fuel and fuel oil. In conducting its field audit of Anrich, the Audit Division's auditors reviewed Anrich's sales journal, cash disbursements journal, cancelled checks, tax returns (Anrich's copies), and also physically examined some of Anrich's equipment. Truck mileage records, specifically daily trip records and/or driver's trip records showing odometer readings, were requested so that the auditors could verify mileage reported per tax returns, but were not made available. Vehicle odometers were inoperable at the time of audit. Anrich

filed its returns and paid tax using the unloaded weight method (rate of .027).

8. Since mileage records were not available to the auditors, mileage was determined and truck mileage tax calculated thereon as follows:

- a.) The auditors requested and received from Atlantic Richfield ("Arco") as Anrich's only known supplier a summary of all gallons sold to Anrich. All sales were from Arco's Newark, New Jersey terminal;
- b.) the auditor selected the first three months of 1976 as a test quarter, and divided total gallons purchased by Anrich in this quarter (approximately 192,000 gallons) by the permitted tank capacity of the one tanker involved (3889 gallons) to arrive at the number of round trips² to Newark and back made during the quarter (50 trips);
- c.) the auditors plotted, by map, the route from Anrich's home base in Sullivan County, New York to Arco's terminal in Newark, calculated the total round trip mileage of such route and the New York portion thereof, and multiplied said New York mileage (approximately 120 miles) by the number of round trips previously determined for the test quarter (50) to arrive at total New York mileage for the quarter (6,000 miles);
- d.) New York mileage for the test quarter (6,000 miles) less New York mileage reported per Anrich's tax returns for the quarter (3,947 miles) resulted in 2,053 unreported miles and an error in reporting of fifty-two percent (52%);
- e.) the fifty-two percent error rate was then applied throughout the audit period to tax reported to arrive at the additional truck mileage tax asserted as due.

9. The auditor testified that since no invoices or other records evidencing New York fuel purchases and specifying vendor name and purchaser name, or

² Permitted tanker capacity was taken from tax permits filed by Anrich which provided as follows:

Maximum tanker loaded weight	40,000	pounds
less: tanker tare (empty) weight	(12,000)	pounds
equals: maximum load weight	28,000	pounds
divided by: weight per gallon of #2 oil	7.2	pounds
equals: permitted gallon capacity	3,889	gallons

identifying fuel purchased as diesel fuel were provided, the auditors determined fuel use tax by resort to the error rate determined above, as follows:

Reported mileage for audit period (per tax returns)	29,831
times: percentage of error from truck mileage tax audit	.52
equals: unreported New York mileage for audit period	<u>15,512</u>
plus: reported New York mileage	29,831
equals: audited New York mileage	<u>45,343</u>

Audited New York mileage was divided by the rate of five miles per gallon [20 NYCRR 491.3(c)] to arrive at New York gallonage (9,069) which at the rate of ten cents per gallon equals fuel use tax due of \$906.90. No allowance for claimed New York fuel purchases was made due to the aforementioned lack of records presented as to such purchases.

10. Anrich asserts that the test quarter chosen involved the highest months of sales for fuel oil and that other months could have been chosen. The Audit Division asserts, by contrast, that the error rate of fifty two percent was applied as a constant to reported truck mileage tax due throughout the entire audit period.

11. Anrich further asserts that the legal (over the road) gallon capacity of the one tanker involved was 6,501 gallons, although the actual tanker capacity exceeded this amount. Anrich maintains the auditors' resort to permitted capacity (3,889 gallons) was incorrect, and asserts that all fuel purchase invoices and delivery tickets (bills of lading) showing actual gallons picked up per load were made available to the auditors at the time of audit but were not utilized. A delivery ticket, as well as several invoices supplied by Arco, were introduced in evidence indicating loads picked up which were all slightly in excess of 6,500 gallons. Mr. Wohl testified that all trips to Arco's Newark facility involved pick ups of approximately 6,500 gallons, and that to pick up less than a full load per trip would be economically unreasonable

and a poor business practice. Anrich asserts that loads of 6,500 gallons each reduces the number of round trips, and reduces the miles travelled, thus substantiating both the mileage travelled and tax paid as reported on Anrich's tax returns. No evidence of claimed New York fuel purchases was introduced in evidence at the hearing by Anrich with respect to the fuel use tax deficiency at issue.

12. With respect to the various deficiencies pertaining to petitioners Glenn Produce, Inc. ("Produce"), Glenn-Dor Products, Inc. ("Glenn-Dor"), and Star Dairy, Inc. ("Star"), the field audit method upon which each of the deficiencies is predicated is the same, but differs from the method used to audit Anrich. Said audit method for these petitioners is based on establishing a revenue per mile figure and deriving mileage therefrom. Resort to this audit method was due to a lack of records substantiating the mileage travelled by petitioners' vehicles, such as daily trip records or other records showing vehicles used, routes travelled, trip origins and destinations, and odometer readings. Odometers on the petitioners' tractors were broken or otherwise inoperative. Vehicle interchanges among the various petitioners occurred, although no records detailing such interchanges were supplied.

13. Records examined for Produce included its general ledger, payroll records and cash disbursements journal. Records for Glenn-Dor included cancelled checks, fuel purchase invoices, cash disbursements journal, general ledger, weekly truck billings to Friendship Dairy and payroll records. For Star, a monthly mileage summary was presented, but no backup records in verification of such mileage were produced. Other records for Star included payroll records, fuel records, road block sheets, sales invoices and a sales journal.

14. Produce and Star were engaged in trucking dairy products and other products throughout New York, Connecticut, New Jersey, Pennsylvania and Ohio. Glenn-Dor was engaged in trucking dairy products from Friendship, New York to New York City and New Jersey, and also back-hauling frozen meat to the Albany and Buffalo, New York areas.

15. No deficiency was found for Glenn-Dor after June 30, 1976, although the audit period extends through March, 1977. This is due to the apparent takeover of Glenn-Dor's trucks by Star on or about June 30, 1976. Twenty four tractors were permitted to Glenn-Dor and were carried over to Star, although as many as forty tractors may have been operated and used interchangeably among the three petitioners (Produce, Glenn-Dor and Star).

16. The revenue per mile figure was calculated for Produce for the period July 1976 through December 1976 at .686 cents per mile. This calculation was based on revenue from this period, per Produce's books, from Friendship Dairy (\$68,049.68) divided by total miles reported (99,141 miles) by Produce on Forms MT-900 (New York State Fuel Use Tax Returns). The revenue figure from Friendship Dairy as taken from Produce's general ledger cash account was test checked to Produce's total bank deposits for accuracy. Also test checked was a sampling of trips to determine both mileage and revenue derived therefrom. Total miles travelled were then determined by dividing the revenue per mile figure into total revenue for the audit period. A mileage ratio of New York mileage (.8926) to non-New York mileage (.1074) was determined and truck mileage tax was assessed on the New York portion of total mileage travelled.

17. Truck mileage tax was also assessed on calculated mileage for the period January 1975 through July 1976, by applying the .686 cents per mile rate upon revenue determined for this period from Produce's general ledger cash

account. No tax returns were filed by Produce during this period, and sales journals and cash disbursements journals were not available. It was asserted that Produce was not in operation during this period, with revenues appearing in the general ledger derived only from "brokerage" and outside truckers. No evidence was presented by petitioner with respect to its claim that revenue for this period was from sources other than trucking.

18. Fuel use tax was determined by dividing mileage for the audit period as determined above, by the rate of five miles per gallon. Credit was allowed for New York fuel purchases as reported for the period July 1976 through March 1977, since such purchases were verified from Produce's general records. No such verification was found nor was credit given against fuel use tax for the period January 1975 through July 1976 since no verification of purchases was established.

19. The revenue per mile rate of .686 and the ratio of New York mileage to non-New York mileage, as determined above for Produce, was carried over and used in performing the Glenn-Dor audit, due to the similar nature of the businesses, to the alleged interchange of equipment, and to a lack of mileage records. Trucking revenue from Glenn-Dor's general ledger was divided by .686 to arrive at total miles, with truck mileage tax at the rate of .027 (per the unloaded weight method) assessed on the New York State portion of the mileage. Fuel use tax was computed at the rate of five miles per gallon, with no credit given due to lack of verification of New York fuel purchases.

20. Truck mileage tax and fuel use tax for Star Dairy ("Star") was originally computed on the basis of revenue, utilizing the above .686 factor on revenue of \$1,476,014.00, considered totally as trucking revenue. It was determined, however, that a portion of Star's revenue was derived from dairy sales and that

a revenue method audit would be inappropriate. A re-audit was thus undertaken and, as the result of a pre-hearing conference, the deficiency against Star for truck mileage tax and fuel use tax was reduced. Since Star had apparently taken over Glenn-Dor's trucking operation on or about June 30, 1976, the recomputation reflected a carryover of Glenn-Dor's monthly average truck mileage tax and fuel use tax amounts to the nine month portion of the audit period during which Star operated Glen-Dor's trucking, as follows:

<u>Tax</u>	<u>Glenn-Dor Total</u>	<u>Average Per Month</u>	<u>Star Audit Months</u>	<u>Star's Tax Deficiency</u>
T.M.T.	<u>\$18,070.00</u> Glenn-Dor Audit Mos.: 22	= 821/mo.	x 9 =	\$ 7,389.00
F.U.T.	<u>\$13,386.00</u> Glenn-Dor Audit Mos.: 22	= 608/mo.	x 9 =	\$ 5,472.00
REVISED TOTAL				<u>\$12,861.00</u>

21. The diesel fuel tax assessment against Star is based on diesel fuel purchased as inventory for use by Star, and was computed as follows:

<u>Date</u>	<u>Inventory</u>	<u>Gallons</u>
12/76	Receipts	-0-
5/77	Less: Ending Inventory 537	7,687
	Less: Nontaxable Use 90	(627)
	TAXABLE GALLONS	<u>7,060</u>

In addition to tax and penalty computed on the above taxable gallons, civil penalties at \$100.00 per month for failure to file tax returns were imposed for the seventeen month period of January, 1976 through May, 1977.

22. Star asserts that no storage was maintained until November, 1976, that all returns were filed thereafter, and that the civil penalty should be abated. Star also maintains that only 4,191 gallons and not 7,867 gallons were purchased. No tax returns nor records detailing gallons purchased were submitted in evidence.

23. Petitioners assert that many of the records necessary to refute the foregoing detailed audit findings were destroyed by a fire and a flood. The fire apparently occurred in the basement level of petitioners' premises, while the flood, which occurred on February 12, 1981 allegedly destroyed the Matamoras, Pennsylvania home of petitioners' former comptroller, where certain of the records were asserted to have been stored. No evidence was presented by petitioners as to the type of records stored at its former comptroller's home, or as to the specific records maintained and allegedly destroyed either by fire or flood.

CONCLUSIONS OF LAW

A. That with certain exceptions not relevant herein, subdivision (1) of section 503 of the Tax Law imposes a tax, at specified rates, for the privilege of operating any vehicular unit upon the public highways of the state. Subdivision (1) of section 503-a of the Tax Law imposes an additional tax upon the privilege of operating any vehicular unit upon the public highways of this state computed by multiplying the appropriate rate per gallon by the amount of fuel used by the carrier in its operations in this state.

B. That section 510 of the Tax Law in pertinent part provides:

"Sec. 510. Determination of Tax. - In case any return filed pursuant to [Article 21] shall be insufficient or unsatisfactory to the tax commission, or if no return is made for any period, the tax commission shall determine the amount of tax due from such information as is available to the tax commission. *** Such determination shall finally and conclusively fix the tax, unless the person against whom it is assessed shall, within thirty days after the giving of notice of such determination, apply in writing to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same." (emphasis supplied).

C. That during the periods at issue, sections 282-a, 282-b and 282-c of the Tax Law imposed a cumulative total tax of ten cents per gallon of diesel motor fuel (as defined therein) upon "...any person who purchases or stores in bulk diesel motor fuel used in whole or in part to operate any motor vehicle owned, leased or operated by him,...". Section 283-a of the Tax Law also provides for the imposition of a penalty for failure to file required reports, with such penalty not to exceed one hundred dollars for each such failure. Determinations of tax due made pursuant to section 288 of the Tax Law, in cases of incorrect or insufficient returns, shall become finally and irrevocably fixed unless the distributor against whom it is assessed shall, within ninety days after the giving of notice of such determination, apply to the tax commission for a hearing.

D. That the protest letters submitted on behalf of petitioners Anrich Oil Company, Inc., Glenn-Dor Products, Inc., and Star Dairy, Inc., under postmark of November 19, 1977, (see Finding of Fact "3") were filed within thirty days of the notices of assessment and constitute valid petitions to contest the assessments. That the letter of January 31, 1978 together with the attached photocopy of the letter of November 10, 1977 as detailed in Finding of Fact "5", indicates that a timely and valid petition to contest the diesel fuel tax deficiency issued to petitioner Star Dairy, Inc., was filed. Finally, the protest letter filed on behalf of Glenn Produce, Inc., (see Finding of Fact "4") was dated November 27, 1978 and received December 1, 1978, and thus is not a timely petition to protest the assessments against Glenn Produce, Inc. Accordingly, the assessments against Glenn Produce, Inc. became finally and conclusively fixed on November 20, 1977 (refer to Finding of Fact "1").

E. That section 507 of the Tax Law in pertinent part provides:

"Sec. 507. Records. - [e]very carrier subject to [Article 21] shall keep a complete and accurate daily record which shall show the miles travelled in this state by each vehicular unit and such other information as the tax commission may require."

Regulations promulgated by the tax commission specify more fully the required record keeping with respect to mileage including, inter alia, daily manifests or trip records showing trip dates, permit and vehicle numbers, points of origin and destination, number of round trips, laden and unladen miles travelled, etc. [see 20 NYCRR 483.2 (formerly 20 NYCRR 233.2); 20 NYCRR 483.4 (formerly 20 NYCRR 233.4)]. Also required are records concerning the type and amount of fuel used or purchased, the miles traveled within and without New York and the amount of Thruway mileage incurred [see 20 NYCRR 493.1, 493.2].

Furthermore, "[i]f the records of any carrier are inadequate or incomplete, the vehicular units of such a carrier filing returns shall be deemed to have consumed, on the average, one gallon of motor fuel for every five miles traveled, unless substantial evidence discloses that a different amount was consumed." [20 NYCRR 491.3(c)].

F. That no mileage records were made available either during the course of the field audit or subsequent thereto at post-assessment conferences or at the hearing. While allegations were raised that records were damaged or destroyed due to a fire and a flood, no description of the type of records allegedly destroyed was offered, nor was it alleged that the required mileage records were, in fact, ever maintained. Furthermore, no explanation was offered as to which records were stored at the home of petitioners' former comptroller or as to why any records would have been stored there. Accordingly, the allegations raised with respect to destroyed records are unpersuasive.

G. That in light of the lack of mileage records, the Audit Division's resort to other records and information as a means of determining tax due was warranted. Petitioners Glenn-Dor, Inc., and Star Dairy, Inc., have failed to provide evidence to refute the results of the field audit (and re-audit in the case of Star Dairy) or the method by which it was conducted. Similarly, petitioner Star Dairy, Inc., has provided no evidence to refute the diesel fuel tax deficiency or the penalties added thereto for failure to file reports. Accordingly, the assessments against these petitioners must be upheld. Furthermore, since no timely protest was filed on behalf of Glenn-Produce, Inc., the assessment against said corporation is fixed and may not be reconsidered as a part of this proceeding.

H. That petitioner Anrich Oil Company, Inc., has submitted evidence establishing that the amount of mileage determined by the Audit Division, and hence the additional truck mileage tax assessed thereon, was erroneous (see Finding of Fact "11"), and that mileage reported per Anrich's tax returns (29,831 miles) was correctly stated. However, no evidence in substantiation of New York fuel purchases was submitted. Accordingly, the assessment for truck mileage tax is cancelled, and the assessment for fuel use tax is to be recomputed using New York mileage of 29,831 miles as opposed to the audited mileage figure of 45,343 miles.


I. That the petition of Anrich Oil Company, Inc. is granted to the extent indicated in Conclusion of Law "H", and the Audit Division is directed to recompute assessment number F-13327 in accordance therewith and to cancel assessment number B-23756. The petition of Glenn Produce, Inc. is denied as untimely, and the petitions of Glenn-Dor Products, Inc. and Star Dairy, Inc. are denied in full, with all assessments pertaining to these petitioners as


specified in Finding of Fact "1", but as reduced for Star Dairy on re-audit as specified in Finding of Fact "20", sustained.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983


PRESIDENT


COMMISSIONER


COMMISSIONER