

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Leo L. Barton :  
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 :  
April 1970 - December 1973. :  
:

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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Leo L. Barton, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leo L. Barton  
R.D. 1, Box 127  
Lee Center, NY 13363

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  
29th day of December, 1982.

  


AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

December 29, 1982

Leo L. Barton  
R.D. 1, Box 127  
Lee Center, NY 13363

Dear Mr. Barton:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
LEO L. BARTON  
for a Hearing to Review a Determination of  
Highway Use Tax under Article 21 of the Tax Law  
for the Period April, 1970 through December,  
1973.

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DECISION

Petitioner, Leo L. Barton, R.D. 1, Box 127, Lee Center, New York 13363, 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, 1970 through December, 1973 (File No. 14026).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 207 Genesee Street, Utica, New York, on March 16, 1982 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division properly assessed additional truck mileage taxes against petitioner based upon an upward adjustment to the reported mileage and unladen truck weight.

FINDINGS OF FACT

1. On June 28, 1974, the Audit Division issued to petitioner, Leo L. Barton, an Assessment of Unpaid Truck Mileage Tax asserting additional tax due under Article 21 of the Tax Law for the period April, 1970 through December, 1973 in the amount of \$1,129.25, plus penalty and interest in the amount of

\$237.10, for a total due of \$1,366.35. The Assessment was issued as the result of a field audit of petitioner's books and records.

2. During the period at issue, petitioner owned several different trucks, including a Diamond-T tractor and Trailmobile trailer, a 1962 Ford dump truck, and a 1959 International dump truck. On September 28, 1970 petitioner filed an Application for Highway Use Permits for the 1962 Ford, giving the unloaded weight as 17,840 pounds. Petitioner filed quarterly Truck Mileage Tax Returns for the audit period basing his tax on the rates for maximum gross weight (maximum gross weight method).

3. On audit, petitioner could produce no trip records, income records or fuel records by which the auditor could determine the taxable mileage for the period. Petitioner also failed to keep several appointments for a supervised weighing of his dump truck. As a result of the lack of records, the auditor estimated additional laden tax based on the highest quarter reported. Credit was given for taxes previously paid. Due to petitioner's failure to weigh his truck, the auditor arbitrarily increased the unladen weight claimed by 1,000 pounds to 18,400 pounds resulting in \$98.85 additional unladen tax due.

4. The auditor gave no credit for taxes paid for the quarter ending December 31, 1972 due to a missing tax return. At the hearing, the Audit Division produced the missing return indicating that tax of \$79.85 had been paid.

5. Petitioner paid no highway use taxes during the second two quarters of 1970. On his returns he stated that during these periods he leased his tractor and trailer to Colonial Highway Express of Buffalo, New York and that Colonial had paid the taxes. At the hearing and thereafter, petitioner could produce no

evidence that Colonial had paid any tax on the tractor and trailer during the period of the lease.

6. For the last quarter of 1970, petitioner paid tax of \$23.19. Petitioner did not produce any evidence demonstrating the use to which his truck was put or the actual mileage travelled during the quarter.

7. Following the hearing, petitioner produced weight slips for his 1962 Ford dump truck for weighings done in 1970 showing a gross weight of 53,800 pounds with a tare weight from an undisclosed source of 17,400 pounds.

8. Petitioner also produced a statement from one Hugh Aikens, contractor, bearing the stamp and signature of a Commissioner of Deeds, stating that he had employed petitioner during the years 1971, 1972 and 1973 on construction site work. The statement also stated that during these years petitioner primarily used his truck for on-site work for Aikens and that petitioner would generally leave his truck at the site and drive his car back and forth to the work site.

9. Petitioner testified that he based his taxable mileage on his speedometer readings at the end of each taxable quarter, recorded that mileage on quarterly returns and filed them. This was petitioner's only record of mileage for the period.

#### CONCLUSIONS OF LAW

A. That the weight slips presented by petitioner are only evidence of the gross weight of the truck on the dates weighed. They are not evidence of the unladen weight of the truck. The unladen weight of the truck includes the actual weight of the vehicle plus all equipment necessary to its operation including a full tank of diesel fuel (Matter of Consolidated Freightways Corporation of Delaware, State Tax Commission, July 3, 1981; Tax Law, section 501, subd. 7). Since petitioner failed to have his unladen truck weighed, the

weight as determined by the auditor was not unreasonable and the additional tax was properly assessed.

B. That, since the Audit Division produced petitioner's December 31, 1972 quarterly Truck Mileage Tax Return at the hearing, petitioner will be allowed a credit against the assessment of \$79.85 as reported on that return.

C. That inasmuch as petitioner demonstrated that his truck was used primarily for on-site construction work during the years 1971 through 1973, the mileage figures reported on his returns for the period January, 1970 through December, 1973 are reasonable and adequate and will not be assessed for mileage higher than reported.

D. That petitioner did not meet his burden of proving that the correct tax was paid for the last three quarters of 1970 and therefore petitioner was properly assessed additional tax due for the second, third and fourth quarters of 1970.

E. That inasmuch as petitioner acted in good faith and there was no intent to evade the tax, penalty and interest as prescribed by subdivision 3 of section 512 of the Tax Law are waived.

F. That the petition of Leo L. Barton is granted to the extent indicated in Conclusions of Law "B", "C" and "E" above; that the Audit Division is hereby directed to modify the Assessment of Unpaid Truck Mileage Tax issued June 28, 1974; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER