

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Cleveland General Transport Co., Inc. : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Truck Mileage :  
Tax under Article(s) 21 of the Tax Law for the :  
Periods Ended 12/31/80, 3/31/81 & 3/31/82. :  
\_\_\_\_\_:

State of New York :

ss.:

County of Albany :

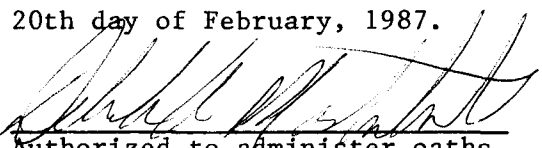
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of February, 1987, he/she served the within notice of Decision by certified mail upon Cleveland General Transport Co., Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

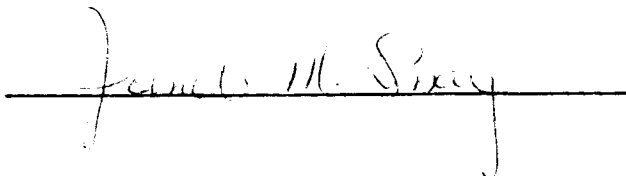
Cleveland General Transport Co., Inc.  
1 Van Street  
Staten Island, NY 10310

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
20th day of February, 1987.

  
\_\_\_\_\_  
Authorized to administer oaths  
pursuant to Tax Law section 174

  
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STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Cleveland General Transport Co., Inc. : AFFIDAVIT OF MAILING  
  
for Redetermination of a Deficiency or Revision :  
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State of New York :  
ss.:  
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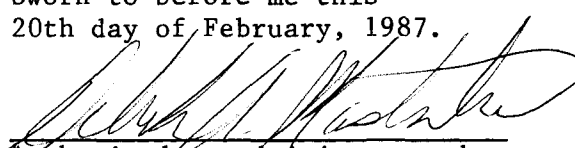
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of February, 1987, he served the within notice of Decision by certified mail upon Edward F. Bowes, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

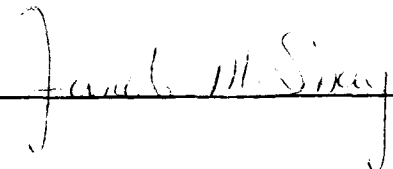
Edward F. Bowes  
7 Becker Farm Rd., P.O. Box Y  
Roseland, NJ 07068

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
20th day of February, 1987.

  
\_\_\_\_\_  
Authorized to administer oaths  
pursuant to Tax Law section 174

  
\_\_\_\_\_

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

February 20, 1987

Cleveland General Transport Co., Inc.  
1 Van Street  
Staten Island, NY 10310

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Edward F. Bowes  
7 Becker Farm Rd., P.O. Box Y  
Roseland, NJ 07068

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
CLEVELAND GENERAL TRANSPORT CO., INC.	:	DECISION
for Revision of a Determination or for Refund	:	
of Highway Use Tax under Article 21 of the Tax	:	
Law for the Periods Ended December 31, 1980,	:	
March 31, 1981 and March 31, 1982.	:	

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Petitioner, Cleveland General Transport Co., Inc., 1 Van Street, Staten Island, New York 10310, filed a petition for revision of a determination or for refund of highway use under Article 21 of the Tax Law for the periods ended December 31, 1980, March 31, 1981 and March 31, 1982 (File No. 47821).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on August 7, 1986 at 10:45 A.M. Petitioner appeared by Edward F. Bowes, Esq. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

#### ISSUE

Whether petitioner timely filed claims for fuel use tax refunds for the quarterly periods ended December 31, 1980, March 31, 1981 and March 31, 1982.

#### FINDINGS OF FACT

1. On July 15, 1983, the Audit Division issued to Cleveland General Transport Co., Inc., a Proposed Audit Adjustment of Tax Due under Article 21 of the Tax Law which explained that a field audit of petitioner's truck mileage tax records for the period October 1, 1979 through March 31, 1983 had disclosed omitted New York State mileage resulting in additional truck mileage tax due in the amount of \$11,060.46, which amount had been reduced by unpaid refunds of

fuel use tax in the amount of \$4,344.37 which were due and owing to petitioner for the periods ended June 30, 1982 and March 31, 1983. Petitioner was further advised that fuel use tax refund claims for the periods ended December 31, 1980, March 31, 1981 and March 31, 1982 had been disallowed due to petitioner's failure to timely file such claims for refund. Accordingly, on November 3, 1983, the Audit Division issued to petitioner an Assessment of Unpaid Truck Mileage Tax for the period October 1, 1979 through March 31, 1983 in the amount of \$11,060.46 plus interest of \$2,129.14 for a total due of \$13,189.60. Unpaid fuel use tax refunds for the second quarter of 1982 and the first quarter of 1983 totalling \$4,344.37 were applied to this assessment, resulting in a net amount due of \$8,845.23.

2. Neither in its petition nor at the hearing held herein did petitioner contest the Audit Division's determination that petitioner owed additional truck mileage tax in the amount of \$11,060.46 for the period October 1, 1979 through March 31, 1983. Petitioner contends, however, that fuel use tax refunds for the periods ended December 31, 1980, March 31, 1981 and March 31, 1982 should have been offset against the amount due pursuant to assessment of unpaid truck mileage tax.

3. On April 21, 1982, the Audit Division received from petitioner a Claim for Fuel Use Tax Refund for the quarter ended March 31, 1981. This claim bore the signature of R. M. Lippa and the date of April 19, 1982. Attached thereto was a copy of a New York State Combined Truck Mileage and Fuel Use Tax Return for the periods January 1, 1981 through March 31, 1981 for fuel use tax and March 1 through March 31, 1981 for truck mileage tax. Also attached were copies of Maryland, Connecticut and New Jersey returns. The total refund claimed was \$4,018.40 for fuel use tax paid on diesel fuel to these states.

4. For the quarters ended December 31, 1980 and March 31, 1982, the Department of Taxation and Finance did not receive a fuel use tax refund claim from petitioner. When petitioner's office manager, Ralph M. Lippa, was advised by the auditors that the Department had no record of receipt of refund claims for these periods, he provided the auditors with copies of the claims which he alleges had been previously filed. For the quarter ended December 31, 1980, Mr. Lippa provided a copy of a Claim for Fuel Use Tax Refund in the amount of \$3,846.12 for fuel use tax paid on diesel fuel to Connecticut, New Jersey and Massachusetts. The said copy bore the signature of Ralph M. Lippa and the date of February 20, 1981. Attached thereto were copies of petitioner's New York State Combined Truck Mileage and Fuel Use Tax Return for the periods October 1, 1980 through December 31, 1980 for fuel use tax and December 1 through 31, 1980 for truck mileage tax. Also attached were copies of Connecticut, New Jersey and Massachusetts returns. For the quarter ended March 31, 1982, Mr. Lippa provided a copy of a Claim for Fuel Use Tax Refund in the amount of \$2,576.80 for fuel use tax paid on diesel fuel to Connecticut and New Jersey. The copy bore the signature of R. M. Lippa and the date of May 20, 1982. Also attached were copies of petitioner's New York State Combined Truck Mileage and Fuel Use Tax Return and returns filed by petitioner with Connecticut and New Jersey.

5. Petitioner's office manager, Ralph M. Lippa, stated that he prepares all of petitioner's fuel use tax refund claims in his office, that he signs all such claims and that he mails all such claims by ordinary mail. Part of his duties are to go to the Post Office and deposit petitioner's daily mail. He does not always mail the refund claims on the same date on which they are prepared. When petitioner did not receive fuel use tax refunds for the

periods at issue herein, Mr. Lippa did not send written inquiries to the Department of Taxation and Finance concerning the whereabouts of such refunds.

CONCLUSIONS OF LAW

A. That 20 NYCRR 494.2 provides as follows:

"If proof satisfactory to the State Tax Commission is submitted showing that a carrier has paid to another state, under a lawful requirement of that state, a tax, similar to the fuel tax component of the fuel use tax, on the use or consumption in such other state of motor fuel or diesel motor fuel purchased in New York State on which the taxes imposed by Article 12-A of the Tax Law have been paid, and if a claim for refund is filed within one year from the end of any calendar quarter, the excess of the fuel tax component for such quarter shall be refunded. Such excess shall be refunded only to the extent of the payment to the other state, and in no case to exceed the applicable State rate per gallon in effect under Article 12-A of the Tax Law. No refund is allowable for any amount of the sales tax component of the fuel use tax. A claim for refund of such excess credits shall be made on form MT-906, claim for fuel use tax refund."

B. That 20 NYCRR 494.3(a) provides, in pertinent part, as follows:

"A claim for refund based upon the fuel use tax component of the fuel use taxes paid other states must be filed within the one-year period commencing on the last day of the calendar quarter from which the excess credit was derived."

C. That, for the period ended March 31, 1981, petitioner's Claim for Refund for Fuel Use Tax Refund was dated April 19, 1982 and received by the Department of Taxation and Finance on April 21, 1982. In order for said refund claim to have been timely filed, it would have to have been filed on or before March 31, 1982. Said claim for refund was, therefore, not timely filed and petitioner is neither entitled to a refund nor entitled to have the amount

claimed as a refund for such period offset against its assessment for unpaid truck mileage tax.


D. That for the periods ended December 31, 1980 and March 31, 1982, the Audit Division did not receive fuel use tax refund claims until petitioner's office manager presented such claims during a field audit which commenced on May 31, 1983. Petitioner has the burden of proving that such refund claims were timely filed and petitioner has failed to sustain its burden of proof. Petitioner is not, therefore, entitled to a refund of fuel use tax for those periods nor is it entitled to have the amounts claimed as refunds for such periods offset against its assessment for unpaid truck mileage tax.

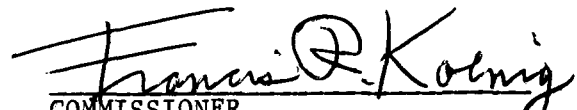
E. That the petition of Cleveland General Transport Co., Inc. is denied and the Assessment of Unpaid Truck Mileage Tax issued on November 3, 1983 is hereby sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 20 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER