

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of

Everett J. Marshall II

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Highway Use &  
Motor Fuel Tax under Article 21 of the Tax Law for :  
the Period 7/1/74 - 6/30/77.

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State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of June, 1983, she served the within notice of Decision by certified mail upon Everett J. Marshall II, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Everett J. Marshall II  
104 Armitage Drive  
N. Syracuse, NY 13212

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 June, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

June 29, 1983

Everett J. Marshall II  
104 Armitege Drive  
N. Syracuse, NY 13212

Dear Mr. Marshall:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
EVERETT J. MARSHALL II : DECISION  
for Revision of a Determination or for Refund :  
of Highway Use Tax under Article 21 of the Tax :  
Law for the period July 1, 1974 through June 30, :  
1977.

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Petitioner, Everett J. Marshall II, 104 Armitage Drive, North Syracuse, New York 13212, filed a petition for revision of a determination or for refund of highway use under Article 21 of the Tax Law for the period July 1, 1974 through June 30, 1977 (File No. 26279).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York on June 15, 1982 at 1:15 P.M., with all briefs to be submitted by September 30, 1982. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the highway use tax audits provided a proper basis for the Assessment of Unpaid Truck Mileage Tax and the Assessment of Unpaid Fuel Use Tax.

FINDINGS OF FACT

1. On September 13, 1978 the Audit Division issued to petitioner, Everett J. Marshall II, an Assessment of Unpaid Truck Mileage Tax for the period July, 1974 to June, 1977, based upon a field audit which disclosed an understatement of mileage and vehicle weights. The assessment asserted a tax due of \$3,479.67 plus penalty and interest of \$1,304.88 for a total amount due of \$4,784.55.

2. On September 13, 1978 the Audit Division issued an Assessment of Unpaid Fuel Use Tax for the period July, 1974 through June, 1977 based upon an audit which disclosed additional tax liability due to an understating of diesel fuel purchases. The assessment asserted a tax due of \$3,940.40 plus penalty and interest of \$1,486.65 for a total amount due of \$5,427.05.

3. During the audit period petitioner operated a diesel tractor and a dump truck.

4. In order to determine whether additional truck mileage tax was due, the auditor proceeded on the theory that the diesel tractor was used five days a week for eight hours a day. The auditor also utilized a standard that the vehicle traveled an average of forty miles an hour. Based upon the foregoing premise, the auditor determined that during the audit period petitioner's vehicle would have traveled 95,360 miles. The additional truck mileage tax was computed on the basis that the truck was laden ninety percent of the time. Thereafter, the auditor multiplied the laden truck mileage tax rate, which was determined on the basis of the maximum gross weight that the truck could carry on the highway, by the number of laden miles. This resulted in additional truck mileage tax of \$2,865.57.

5. In order to determine whether truck mileage tax was due from petitioner arising from the operation of the dump truck, the auditor utilized a repair bill dated June 30, 1977 which showed that the vehicle had traveled 99,256 miles as of the date of the bill. An adjustment of 3,500 miles was then made to the mileage to take into account a trip to Texas. This resulted in New York State mileage of 95,756. The audit proceeded on the premise that the dump truck was laden fifty percent of the time. The laden rate, which was determined on the basis of available records, was multiplied by the number of laden miles.

This resulted in a tax due of \$1,220.89. Similarly, the unladen ratio was multiplied by the unladen miles resulting in a tax due based upon unladen miles of \$335.15. The foregoing computations were then adjusted because the first month of the audit period was beyond the statute of limitations and to take into account the truck mileage tax already paid. The foregoing computations resulted in additional truck mileage tax due on the dump truck of \$614.10 plus penalty and interest.

6. The additional New York State miles determined in the truck mileage tax audit were then used to determine the amount of fuel used in the State. The required usage of diesel fuel was computed by dividing the number of miles traveled on New York State highways determined in the New York State fuel use tax audit, by a rate of four and one-half miles a gallon for petitioner's tractor and four miles per gallon for petitioner's truck. These computations revealed that petitioner would have been required to utilize 46,005 gallons of diesel fuel. Since petitioner could produce receipts showing that he had paid tax on the purchase of 5,690 gallons, petitioner's deficiency was premised on the remaining gallons at a rate of ten cents per gallon. Inasmuch as one month of the audit period was beyond the statute of limitations, the computed diesel fuel use tax due was reduced accordingly. Consequently, the fuel use tax due was determined to be \$3,964.40 plus penalty and interest.

7. The tractor that was included in petitioner's audit was owned by petitioner's father but operated by and permitted to petitioner.

8. Petitioner's records for the period of 1974 through February, 1976 were lost in a theft. The balance of petitioner's records were inadequate to determine the truck mileage or fuel use tax due. At the time of the audit, the auditor had: six pages of mileage records for the month of September, 1974

showing the ticket numbers, dates, destination, beginning and ending odometer readings, and laden and unladen miles; two pages of mileage records for the month of October, 1976 with the same information; settlement sheets from a company he did business with for November, 1974; Interstate Commerce Commission logs for January and February, 1977; fuel receipts which petitioner was given credit for; weight records from third parties; repair bills with odometer readings; and New York Department of Motor Vehicles records showing vehicle registration and dates.

9. Petitioner objected to the audit on the basis that the number of miles traveled and the number of miles per gallon that the Audit Division determined were excessive.

#### CONCLUSIONS OF LAW

A. That both a carrier and owner are liable for truck mileage tax (Tax Law §501(5); Tax Law §508; 20 NYCRR 481.1). Accordingly, petitioner is liable for the truck mileage tax due as a result of operating a vehicle owned by his father.

B. That 20 NYCRR 483.1, which sets forth the records retention requirements provided for by Tax Law §507, provides, in general, that every carrier subject to the highway use tax "...and every carrier to whom a highway use tax permit was issued for the operation of a motor vehicle, must maintain an accurate daily record of all operations of such vehicle in the State..." with certain exceptions. Moreover, a diesel truck operator "...must keep a full accurate record of all his retail purchases, including a delivery ticket or invoice with reference to each such purchase..." showing certain information (20 NYCRR 420.9).

C. That petitioner failed to produce the records required and offered no other evidence that would reduce the additional miles or the additional fuel used as determined by the Audit Division.

D. That the Assessment of Unpaid Truck Mileage Tax dated September 13, 1978 and the Assessment of Unpaid Fuel Use Tax dated September 13, 1978 are sustained and the petition of Everett J. Marshall II is denied.

DATED: Albany, New York

JUN 29 1983

STATE TAX COMMISSION

*Rodwald Owen*  
PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*Mark J. Smith*  
COMMISSIONER