

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
David H. Wilmot :  
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 :  
10/1/70 - 12/31/73. :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

David Parchuck, 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 27th day of April, 1983, he served the within notice of Decision by certified mail upon David H. Wilmot, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David H. Wilmot  
R.D. 6, Rt. 5  
Auburn, NY 13021

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  
27th day of April, 1983.

David Parchuck

James A. Hagedorn

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

April 27, 1983

David H. Wilmot  
R.D. 6, Rt. 5  
Auburn, NY 13021

Dear Mr. Wilmot:

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 :  
DAVID H. WILMOT : DECISION  
for a Hearing to Review a Determination or for :  
Refund of Fuel Use Tax and Highway Use Tax :  
under Article 21 of the Tax Law for the period :  
October 1, 1970 through December 31, 1973.

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Petitioner, David H. Wilmot, R.D. 6, Route 5, Auburn, New York, 13021, filed a petition for a hearing to review a determination or for refund of fuel use tax and highway use tax under Article 21 of the Tax Law for the period October 1, 1970 through December 31, 1973 (File No. 30685).

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 17, 1982 at 9:15 A.M. 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 conducted by the Audit Division provided proper basis for the Assessment of Unpaid Truck Mileage Tax and the Assessment of Unpaid Fuel Use Tax which were issued to petitioner for the periods in issue.

FINDINGS OF FACT

1. On October 30, 1974, as the result of a field audit, the Audit Division issued an Assessment of Unpaid Fuel Use Tax to petitioner for the fourth quarter of 1970 through the third quarter of 1973 asserting a tax due of \$439.29 plus penalties and interest of \$97.60 for a total due of \$536.89.

2. Also, on October 30, 1974, the Audit Division, as the result of a field audit, issued an Assessment of Unpaid Truck Mileage Tax for the period of the fourth quarter of 1970 through the fourth quarter of 1973 asserting a tax due of \$427.90 plus penalties and interest of \$91.32 for a total amount due of \$519.32.

3. The foregoing truck mileage tax assessment was issued because the field audit disclosed that there were miles traveled during the audit period in excess of the mileage reported by petitioner on his returns. The underreporting of mileage was due to the following: petitioner's trips not being continuous; petitioner's failure to accurately report the distance between two locations; and petitioner's not reporting all trips on the New York State Thruway accurately.

4. The fuel use tax audit revealed an underreporting of fuel use tax based upon the same underreporting of mileage as was evidenced in the truck mileage tax audit. Upon redetermining the miles traveled by petitioner's vehicles, the assessment of fuel use tax was determined utilizing a factor of 4.5 miles per gallon. In addition, the Audit Division disallowed many of petitioner's fuel purchases because the receipts utilized to evidence the fuel purchases were duplicates, undated, or made out to cash.

5. On November 22, 1974 petitioner protested the assessments. On March 3, 1975 and April 29, 1975, post-assessment conferences were held between petitioner and the Audit Division which resulted in the resolution of a series of issues. On May 12, 1975 petitioner was provided with a copy of the revised assessment and was asked to reply to the revised assessment by May 22, 1975. Petitioner's reply was not forthcoming and therefore the Syracuse District Office recommended that the Audit Division reduce the Truck Mileage Tax Assessment to \$107.82 plus applicable penalty and interest based upon the agreements reached at the

post-assessment conferences. The Syracuse District Office further proposed that the Audit Division reduce the Fuel Use Tax assessment to reflect a tax due of \$229.37 plus the applicable penalty and interest. The reduction of the Fuel Use Tax Assessment was also based upon the agreements reached at the post-assessment conferences. Thereafter, the Audit Division reduced the assessments in accordance with the Syracuse District Office's recommendations.

6. On October 23, 1975 the personnel of the Syracuse District Office held a meeting with petitioner concerning the revised assessments. An agreement could not be reached. Following this meeting, the District Office concluded that a reaudit should be conducted. Thereafter, a reaudit of petitioner's records was conducted for the same period. The reaudit disclosed that truck mileage tax was due in the amount of \$579.46 and that fuel use tax was due in the amount of \$996.72. The assessments, however, were never increased from the amounts noted in Findings of Fact "5".

7. During the periods in issue petitioner utilized two diesel tractors, one diesel truck, and five trailers. Petitioner's vehicles were utilized in conjunction with petitioner's business of dismantling railroad track in New York and Pennsylvania. On occasion, petitioner would transport the railroad ties and rails to other locations. Petitioner conducted his business primarily in New York. He occasionally worked in New Jersey and Pennsylvania.

8. On December 7, 1980 there was a conference between petitioner and a representative of the Audit Division at the Syracuse District Office. The documents produced by petitioner at the conference showed truck mileage tax due of \$75.00 and fuel use tax due of \$324.85. The foregoing amounts were not asserted as a deficiency by the Audit Division. Although petitioner does not accept the District Office's conclusion that he owes the fuel use tax found due

as a result of the conference on December 17, 1980 because of motor fuel invoices in his possession, he stated at the hearing that a truck mileage tax of \$75.00 would not be challenged by him.

9. At the hearing petitioner submitted a series of motor fuel invoices and an analysis which purported to establish that the fuel use tax assessment was erroneous.

#### CONCLUSIONS OF LAW

A. That, in general, subdivision 1 of section 503-a of the Tax Law imposes a fuel use tax upon the privilege of operating a motor vehicle upon the public highways of New York. The tax "... is based upon the amount of motor fuel and diesel motor fuel used in this State, including the amount of such fuels used on the New York State Thruway" (20 NYCRR 491.1).

B. That section 507 of the Tax Law provides, in part, that "(e)very carrier subject to this article and every carrier to whom a permit was issued shall keep a complete and accurate daily record which shall show the miles traveled in this state by each vehicular unit and such other information as the tax commission may require."

C. That, in accordance with section 507 of the Tax Law, the State Tax Commission promulgated 20 NYCRR 493.3(b) which, during the period in issue, provided:

"Such invoices shall show the name and address of the vendor, name and address of purchaser or licensee, identification of the power unit of the vehicle by company unit number or state and number of motor vehicle registration, name of product, state tax rate charged, number of gallons, date of sale and signature of purchaser. Sales made out to "cash" will not be accepted."

D. That the documents and analysis relied upon by petitioner to establish that there was an erroneous fuel use tax assessment do not comply with one or

more of the requirements of 20 NYCRR 493.3(b). In addition, the foregoing documents and analysis were directed to the reaudit noted in Finding of Fact "6" rather than to the revised assessment which was the basis for the amounts in issue. Petitioner has failed to sustain the burden of proof to show that the fuel use tax assessment was erroneous for each of the foregoing reasons.

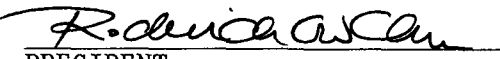
E. That inasmuch as petitioner was able to produce sufficient documentation prior to the hearing to establish that the truck mileage tax due should be reduced to \$75.00 plus interest, as noted in Findings of Fact "8", the assessment of truck mileage tax is reduced accordingly.


F. That the petition of David Wilmont is granted to the extent of Conclusion of Law "E; that the Audit Division is directed to modify the Assessment of Truck Mileage Tax accordingly; and that except as so modified, the Assessment of Unpaid Truck Mileage Tax of \$75.00 plus applicable penalty and interest and the Assessment of Unpaid Fuel Use Tax in the amount of \$229.00 plus applicable penalty and interest is in all other respects sustained.

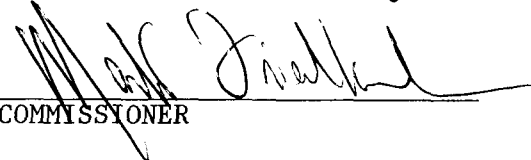
DATED: Albany, New York

STATE TAX COMMISSION

APR 27 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER