

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Duncan Petroleum Transport, Inc. :  
: AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Sales & Use Tax :  
under Article 28 & 29 of the Tax Law for the :  
Period 9/1/72 - 5/31/75. :  
\_\_\_\_\_

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 19th day of June, 1981, he served the within notice of Determination by mail upon Duncan Petroleum Transport, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Duncan Petroleum Transport, Inc.  
31-70 College Pt. Causeway  
P.O. Box 783  
Flushing, NY 11354

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  
19th day of June, 1981.

*Connie A. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Duncan Petroleum Transport, Inc. :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
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Period 9/1/72 - 5/31/75.

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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 19th day of June, 1981, he served the within notice of Determination by mail upon Samuel B. Zinder the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Samuel B. Zinder  
The Atrium, 98 Cutter Mill Rd.  
Great Neck, NY 11021

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  
19th day of June, 1981.

*Carrie P. Hageland*

*J. Vredenburg*

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

June 19, 1981

Duncan Petroleum Transport, Inc.  
31-70 College Pt. Causeway  
P.O. Box 783  
Flushing, NY 11354

Gentlemen:

Please take notice of the Determination of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 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 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  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Samuel B. Zinder  
The Atrium, 98 Cutter Mill Rd.  
Great Neck, NY 11021  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application  
of  
DUNCAN PETROLEUM TRANSPORT, INC.  
for Revision of a Determination or for  
Refund of Sales and Use Taxes under  
Articles 28 and 29 of the Tax Law for the  
Period September 1, 1972 through May 31,  
1975.

DETERMINATION

Applicant, Duncan Petroleum Transport, Inc., 31-70 College Point Causeway, P. O. Box 783, Flushing, New York 11354, filed an application for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1972 through May 31, 1975 (File No. 14803).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 19, 1978 and June 19, 1978. Applicant appeared by Samuel B. Zinder, Esq. The Audit Division appeared by Peter Crotty, Esq. (James Morris, Esq., of counsel). Howard Shugerman, Esq., appeared pro se.

ISSUES

I. Whether the arrangement between applicant and owner-operators for the transportation of home fuel within the City of New York constituted the rental of tangible personal property or constituted receipts for transportation service.

II. Whether the test period used on audit with respect to expenses and amounts paid to owner-operators of vehicles used to transport fuel to applicant's customers was unreasonable.

III. Whether Howard Shugerman timely protested the claim of liability as an officer of Duncan Petroleum Transport, Inc.

IV. Whether Howard Shugerman is personally liable as an officer of applicant required to collect and pay sales and use taxes.

FINDINGS OF FACT

1. During the periods in issue, applicant, Duncan Petroleum Transport, Inc., was engaged in the business of transporting home heating fuels, diesel fuels, petroleum products and in the sale of such products.

2. On November 11, 1975, applicant executed a consent extending the period within which to issue an assessment to June 20, 1976 for the tax periods September 1, 1972 through May 31, 1975.

3. On April 23, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Duncan Petroleum Transport, Inc. and W. Wright, Howard Shugerman and E. Miller, individually and as officers for the period September 1, 1972 through May 31, 1975, in the amount of \$75,072.10, plus penalty and interest of \$31,420.76, for a total of \$106,492.86. Applicant, Duncan Petroleum Transports, Inc., timely filed a protest with respect to the aforementioned notice.

4. The notice of determination, supra, was based on a field audit of the books and records of the applicant. The auditor compared sales per books with sales reported on Federal income tax returns and sales reported on New York State sales tax returns and in both instances found that the sales reported in the books were higher than those reported on the aforementioned returns.

5. Fixed assets were examined for the audit period and a finding was made of unpaid sales tax on \$863.10, resulting in \$69.05 of additional tax.

6. The auditor found that applicant did not collect tax on .3167 percent of applicant's retail fuel sales, resulting in additional sales of \$7,516.00

or additional tax due of \$546.28.

7. An expense test was made, using a test quarter ending February 28, 1974. The following was found:

<u>Type of Expense</u>	<u>% Tax Unpaid</u>	<u>Total Expense - Audit Period</u>	<u>Total Additional Tax Due</u>
Terminal Expense	59.9%	\$ 24,077.90	
Parts Expense	13. %	133,181.98	
Public Shop	38.8%	94,515.16	
Tires and Tubes	34.6%	75,185.20	
General Expense	66.3%	7,200.55	
TOTALS		\$334,160.85	\$7,180.50

8. Additional tax of \$67,276.27 was assessed on the ground that applicant leased vehicles from owner-operators for the transport of petroleum and petroleum products. This was based upon an agreement of lease dated December 5, 1971, between applicant as lessee and Kings County Fuel Co. as lessor, of two named vehicles with drivers to be furnished by lessor. The agreement was for a period of thirty days from December 5, 1971 and provided that applicant was to have complete control of the vehicles. Testimony on behalf of applicant indicated that the aforementioned lease did not apply to vehicles used to transport fuel within the City of New York and that the said lease was never in effect.

9. The highest peak of business of applicant was during the months of December, January and February.

10. During the winters of the audit period, the applicant used the services of Kings County Fuel and other truckers with regard to fuel deliveries in New York City. These vehicles were used exclusively within the City of New York. The drivers and the tankers of Kings County and other truckers were under the sole control and direction of their own dispatchers. Applicant had its own dispatchers but they did not dispatch any of the vehicles of Kings County and the other truckers. Applicant would merely instruct the aforementioned truckers

where to deliver to its customers and the truckers determined what route to take. The fuel for trucks was paid by Kings County through an open account of applicant and a deduction was made from the amount due on the invoices because Kings County and the other truckers did not have an account with the diesel fuel stations whereas Duncan had such an account.

11. On August 11, 1977, Howard Shugerman wrote a letter in which he stated that he never received any notice of determination holding him liable as an officer of Duncan Petroleum Transport, Inc. and requested that notice of any formal hearing in this matter be served upon him. No evidence was adduced to show that Howard Shugerman was served with a copy of the notice of determination.

12. Howard Shugerman testified that he was an attorney for the applicant from 1970 to 1973. He acted as secretary for Duncan Petroleum Transport, Inc., from 1970 to April 1972, to certify documents which required the secretary's certification. He was not a signatory to any bank account for applicant. He never signed a check drawn on any account of applicant nor did he ever see any of the books and records of applicant except to the extent that they pertained to a matter in which he was involved as its attorney. Mr. Shugerman was not involved in any way with the internal affairs of the corporation. In 1975 Mr. Shugerman was advised by an attorney to resign as secretary of applicant corporation. Mr. Shugerman had forgotten that he was secretary of applicant corporation. He formally resigned as secretary in 1975.

#### CONCLUSIONS OF LAW

A. That Howard Shugerman's letter of August 11, 1977, constituted a timely protest to the claim of liability as an officer responsible for the collection and payment of sales taxes by Duncan Petroleum Transport, Inc.

B. That Howard Shugerman is not a person required to collect or pay any sales and use tax due from applicant and therefore not personally liable for the tax required to be collected and paid within the intent and meaning of sections 1131 and 1133 of the Tax Law.

C. That the Audit Division is directed to delete the name of Howard Shugerman from the Notice of Determination and Demand for Payment of Sales and Use Taxes Due.

D. That the amounts paid by applicant to owner-operators for transporting fuel oil and petroleum to its customers constituted receipts for the cost of transportation services not subject to sales tax.

E. That the imposition of additional tax in the amount of \$67,276.28 as set forth in Finding of Fact "8", supra, is erroneous.

F. That the use of a test period, namely the quarter ending February 28, 1974 as applied to the entire audit period of September 1, 1972 through May 31, 1975, with respect to expenses and applying a percentage of error in an industry involving home heating fuel, is unreasonable.

G. That the imposition of tax in the amount of \$7,180.50, as set forth in Finding of Fact "7", supra, is erroneous.

H. That the Audit Division is directed to recompute the sales and use tax due in accordance with Conclusions of Law "E" and "G", supra.

I. That the application of Duncan Petroleum Transport, Inc. is granted to the extent indicated in Conclusions of Law "D", "E", "F" and "G" and is denied in all other respects.

DATED: Albany, New York

JUN 19 1981

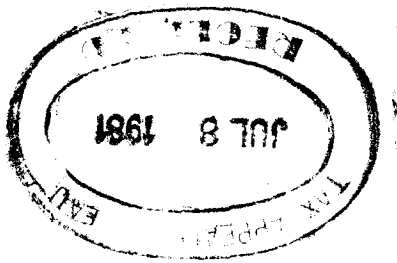
STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER





STATE OF NEW YORK  
STATE TAX COMMISSION  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N.Y. - 12227



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STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N. Y. 12227

Duncan Petroleum Transport, Inc.  
31-70 College Pt. Causeway  
P.O. Box 783  
Flushing, NY 11354

NOT AT EITHER  
LOCATION

~~FILED~~  
~~2-8-81~~  
~~FILED~~  
~~11-10-80~~  
~~11-10-80~~

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

June 19, 1981

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31-70 College Pt. Causeway  
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NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Samuel B. Zinder  
The Atrium, 98 Cutter Mill Rd.  
Great Neck, NY 11021  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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DUNCAN PETROLEUM TRANSPORT, INC.	:	DETERMINATION
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Articles 28 and 29 of the Tax Law for the	:	
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I. That the application of Duncan Petroleum Transport, Inc. is granted to the extent indicated in Conclusions of Law "D", "E", "F" and "G" and is denied in all other respects.

DATED: Albany, New York

**JUN 19 1981**

STATE TAX COMMISSION

*James A. Sweeney*  
PRESIDENT

*James A. Sweeney*  
COMMISSIONER

*Francis R. Koenig*  
COMMISSIONER