

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Antoinette Felicello
d/b/a Marlboro Truck Leasing

:
:
: 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 6/1/71 - 12/31/72.

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 5th day of June, 1981, he served the within notice of Decision by mail upon Antoinette Felicello, d/b/a Marlboro Truck Leasing, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Antoinette Felicello
d/b/a Marlboro Truck Leasing
Bingham Rd.
Marlboro, NY 12542

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
5th day of June, 1981.

Ernie A. Hegelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Antoinette Felicello :
d/b/a Marlboro Truck Leasing :

AFFIDAVIT OF MAILING

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of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 6/1/71 - 12/31/72.

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 5th day of June, 1981, he served the within notice of Decision by mail upon Robert O. Weltzien 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. Robert O. Weltzien
26 West St., P.O. Box 2038
Newburgh, NY 12550

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
5th day of June, 1981.

Annunzio R. Hagedorn

J. Vredenburg

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

June 5, 1981

Antoinette Felicello
d/b/a Marlboro Truck Leasing
Bingham Rd.
Marlboro, NY 12542

Dear Ms. Felicello:

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) 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
Robert O. Weltzien
26 West St., P.O. Box 2038
Newburgh, NY 12550
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ANTOINETTE FELICELLO	:	
d/b/a MARLBORO TRUCK LEASING	:	DECISION
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 June 1, 1971 through	:	
December 31, 1972.	:	

Petitioner, Antoinette Felicello d/b/a Marlboro Truck Leasing, Bingham Road, Marlboro, New York 12542, filed a petition 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 June 1, 1971 through December 31, 1972 (File No. 20641).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on January 10, 1980 at 1:15 P.M. Petitioner appeared by Robert O. Weltzien, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

- I. Whether a use tax is due on vehicles purchased by petitioner.
- II. Whether a use tax is due on diesel fuel purchased by petitioner.

FINDINGS OF FACT

1. On May 3, 1977, as a result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Annette Felicella d/b/a Marlboro Truck Leasing for the period June 1, 1971 through December 31, 1972 in the amount of \$407.25 tax plus penalties and interest. The name of petitioner should be Antoinette Felicello.

2. Petitioner did not file New York State and local sales and use tax returns for the period in issue.

3. On audit, the Division found that petitioner was engaged in an exempt transportation service, hauling produce from orchards in Ulster County. It determined a use tax of \$200.00 on vehicles purchased and on which no sales tax was paid. The Audit Division also found that petitioner purchased diesel fuel for use in vehicles without payment of sales tax. It determined use tax on the diesel fuel in the amount of \$207.25. Taxes due were computed at the combined New York State and Ulster County rate of 5 percent.

4. Petitioner maintained a truck terminal with fuel tanks in Orange County which did not impose a local sales tax. Petitioner maintained an office in Marlboro, Ulster County, for paperwork and all mailing purposes.

5. Petitioner, Antoinette Felicello, contended that the tax due on the motor vehicles would have been paid at the time of registration. She offered no evidence to show that the sales tax was paid. The vehicles were garaged at the terminal located in Orange County, New York; therefore, the petitioner contended that only the New York State rate of 4 percent should apply.

6. Petitioner contended that any sales tax due on the diesel fuel should have been included in the amount billed by the supplier. No evidence was submitted to show that the sales tax was paid to the supplier.

7. Petitioner offered no evidence to show that reasonable cause existed for not paying over any of the tax asserted due.

CONCLUSIONS OF LAW

A. That the vehicles purchased by petitioner, Antoinette Felicello d/b/a Marlboro Truck Leasing, were garaged at a terminal in Orange County; therefore pursuant to section 1101(b)(1) and 1110(A) of the Tax Law there is

due a compensating use tax only at the New York State rate of 4 percent.

Matter of Xerox Corporation v. State Tax Commission, 71 A.D.2d 177; 422 N.Y.S.2d 493.

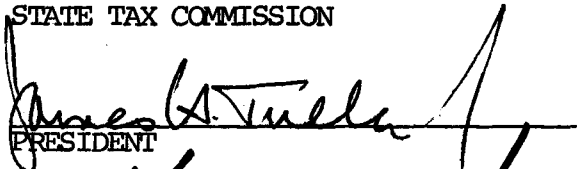
B. That the purchase of diesel fuel delivered to Orange County was a purchase at retail as defined by section 1101(b) (1); that there is due a compensating use tax imposed by section 1110(A) at only the New York State rate of 4 percent.

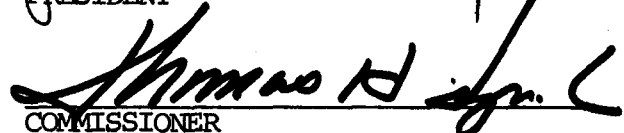
C. That the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 3, 1977 as noted in Conclusions "A" and "B" above, with applicable penalties and interest thereon, and to correct the name of petitioner to Antoinette Felicello. Except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER