

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herr's Motor Express, 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 :
Periods 9/1/65 - 3/31/69. :

State of New York
County of Albany

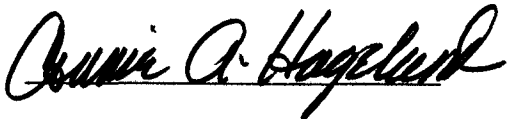
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 30th day of October, 1981, he served the within notice of Decision by certified mail upon Herr's Motor Express, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

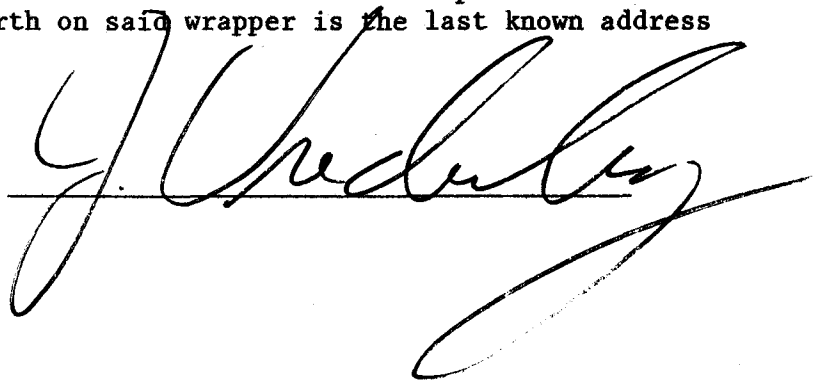
Herr's Motor Express, Inc.
P.O. Box 8
Quarryville, PA 17566

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
30th day of October, 1981.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herr's Motor Express, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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under Article 28 & 29 of the Tax Law for the :
Periods 9/1/65 - 3/31/69.

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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Lawrence S. Burstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence S. Burstein
Zelby, Burnstein, Hartmen & Burstein
One World Trade Ctr., Suite 2373
New York, NY 10048

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
30th day of October, 1981.

Carrie A. Hayek

J. Vredenburg

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

October 30, 1981

Herr's Motor Express, Inc.
P.O. Box 8
Quarryville, PA 17566

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) 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
Lawrence S. Burstein
Zelby, Burnstein, Hartmen & Burstein
One World Trade Ctr., Suite 2373
New York, NY 10048
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
HERR'S MOTOR EXPRESS, INC. : 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 Periods September 1, :
1965 through March 31, 1969.

Petitioner, Herr's Motor Express, Inc., P.O. Box 8, Quarryville, Pennsylvania 17566, 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 periods September 1, 1965 through March 31, 1969 (File No. 01537).

A formal hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on February 5, 1979 at 2:00 P.M. Petitioner appeared by Zelby, Burstein, Hartman & Burstein (Lawrence S. Burstein, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Irving Atkins, Esq., of counsel).

ISSUE

Whether petitioner's payments to tractor owner-operators for hauling trailers owned by petitioner were subject to sales tax as receipts from rentals, or rather constituted charges for transportation services and were thus not subject to tax.

FINDINGS OF FACT

1. Petitioner, Herr's Motor Express, Inc., is a for hire carrier operating in both interstate and intrastate commerce. Its general operating authority is in the northeastern part of the United States. Petitioner is a "truck load" carrier rather than a "less than truck load" carrier. (A less than truck load

carrier assembles small shipments to fill a truck, carries the assembled load to another location then breaks down the load and delivers the small shipments to their final destination.)

2. During the periods at issue, petitioner contracted with fifteen individual tractor owners ("owner-operators"). Each contract was entitled "Agreement and Lease" and provided in part, as follows:

"1. Owner leases to (petitioner) for its exclusive use, possession and control for the duration of this agreement the following motor vehicles: (description of motor vehicle). Owner shall furnish experienced drivers, who must meet and adhere to both the standards set by (petitioner) and those qualifications required by the rules and regulations of the Interstate Commerce Commission and the state regulatory agency having jurisdiction, to operate the above vehicle in transportation of trailers, for delivery of freight, to such points of destination as (petitioner) may designate. Compensation for use of vehicle and driver will be paid as per Schedule A attached.

* * *

3. The equipment shall be operated only by Owner or his employees. Owner is an independent contractor under this agreement and will comply with (sic) all laws, regulations, and rules established by the Federal Government or by any state in which this agreement is performed with respect to workmen's compensation insurance, withholding and payment of taxes on income, and withholding and payment of unemployment, old age pension, and social security taxes for all persons performing this agreement. Owner will furnish (petitioner) with certificates of workmen's compensation insurance for all employees."

3. Contracts with owner-operators were for a term of thirty days, automatically renewable unless cancelled by either party. In some cases, there was a long standing relationship between an owner-operator and petitioner.

4. In addition to furnishing the driver (usually the owner-operator himself), the contract required the owner-operator to furnish and pay for insurance, registrations, permits, fuel and oil. Also, the owner-operator was

completely responsible for all maintenance and repairs to his tractor. Petitioner did not perform maintenance or make repairs to the tractors.

5. The owner-operators were compensated based on the actual movement of freight from one point to another. They received 65 percent of the tariff rate established by the Interstate Commerce Commission or the New York State Department of Transportation (formerly Public Service Commission) and the petitioner received 35 percent. The owner-operators received nothing for a return run "empty".

6. Shipments were typically handled as follows: Petitioner would receive a call from a customer for a shipment. Petitioner then delivered a trailer to the customer's facility where the customer loaded the trailer and prepared the necessary shipping documents. When the shipment was ready, petitioner's dispatcher would send an owner-operator to pick up the trailer - either at the customer's facility or at petitioner's terminal - and take it to its destination. The manner and route in which the load was transported was exclusively the decision of the owner-operator. The owner-operator was responsible for all tolls. When the owner-operator completed the delivery, he called the dispatcher for another assignment.

7. The owner-operators did not use their tractors for anything other than servicing petitioner during the terms of their leases. The owner-operators generally garaged their tractors at their own facilities.

8. Petitioner inspected the tractors as required by the Interstate Commerce Commission and petitioner's name appeared on each of the owner-operators' tractors. Although the contract granted to petitioner the right or exclusive use, possession and control of the vehicles, petitioner in actual practice did not assume physical possession of or direct control over the tractors. The

language in the "Agreement of Lease" does not reflect the actual practice of the parties. The document was a means of complying with the Interstate Commerce Commission and state regulations. The owner-operators operated under petitioner's Interstate Commerce Commission and state "Rights".

9. Petitioner reports to the Interstate Commerce Commission the total amount of monies paid to the owner-operators as "purchased transportation".

10. Petitioner contends that the transactions involving the owner-operators constituted the purchase of transportation services and that the payments to the owner-operators were not subject to sales tax. Petitioner claims that these transactions are clearly distinguishable from other admittedly taxable transactions in which they lease trucks from a large leasing company and supply their owner driver, fuel, etc.

11. Petitioner paid sales tax on the monies paid to the owner-operators for all shipments from one point in New York State to another point in New York State and filed a claim for refund for \$13,180.85, the total amount of said taxes. The claim for refund was denied by the Audit Division and petitioner filed a timely petition for a hearing.

CONCLUSIONS OF LAW

A. That the agreement entered into between petitioner and each of the owner-operators constituted an agreement for rental, lease, transfer of possession or license to use, for a consideration, within the meaning and intent of section 1101(b)(5) of the Tax Law and thus was a sale, the receipts of which were subject to sales tax under section 1105(a) of the Tax Law. (Matter of Concrete Delivery Co., Inc. v. State Tax Commission, 71 A.D.2d 330, motion for leave to appeal denied 49 N.Y.2d 709 (1980); Matter of Ormsby Haulers, Inc. v. Tully, App. Div. 421 N.Y.S.2d 701 (1979)).

B. That subdivision (a) of section 1115 of the Tax Law has been amended to provide that receipts from the following shall be exempt from sales and use tax:

"(22) Trucks, tractors or tractor-trailer combinations, rented or leased by a motor carrier to a motor carrier, pursuant to a contractual agreement, for use in the transportation for hire of tangible personal property, provided the owner of any such vehicle so rented or leased, or any employee of such owner, operates the vehicle."

The amendment adding the exemption:

"shall apply retroactively and be controlling in any action or proceeding to enforce, abate or recover a tax assessment, provided that refund may be claimed as prescribed in section eleven hundred thirty-nine of the tax law, and further provided that liability for the tax had not been finally adjudicated prior to January first, nineteen hundred eighty;" (L. 1981 Ch. 103, sections 69 and 184).

The term "Motor carrier" is defined in subdivision 18 of section 2 of the Transportation Law:

"18. 'Motor carrier' includes both common carriers of property by motor vehicle and contract carriers of property by motor vehicle, as defined respectively in subdivisions fifteen and seventeen of this section. The 'services' and 'transportation' provided by such motor carrier include all vehicles operated by, for, or in the interest of such carrier irrespective of ownership or of contract, express or implied, together with all facilities and property, operated or controlled by such carrier and used in the transportation of property or in the performance of any service in connection therewith."

The term "common carrier of property by motor vehicle" is defined in subdivision 15 of section 2 of the Transportation Law:

"15. 'Common carrier of property by motor vehicle' means a person or corporation undertaking, whether directly or by lease or any other arrangement, to transport property or any class thereof, for the general public by motor vehicles for compensation, whether over regular or irregular routes, or within a defined territory, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies to the extent they are not otherwise included within parts one and two of the interstate commerce act of the United States and the laws of this state."

The term "contract carrier of property by motor vehicle" is defined in subdivision 17 of section 2 of the Transportation Law:

"17. 'Contract carrier of property by motor vehicle, as used in sections one hundred sixty through one hundred eighty-one of this chapter, means any person or corporation, not a common carrier of property by motor vehicle, as defined in subdivision fifteen of this section, transporting property by motor vehicle for compensation under special and individual continuing contracts or agreements with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer, and whether directly or by lease or any other arrangement."

C. That both petitioner and its owner-operators were motor carriers within the meaning of paragraph (22) of subdivision (a) of section 1115 of the Tax Law. Accordingly, receipts attributable to the leases at issue are retroactively exempt from sales and use taxes.

D. That the petition of Herr's Motor Express, Inc. is granted and the claim for refund is approved.

DATED: Albany, New York

OCT 30 1981

STATE TAX COMMISSION

James G. Tuelo
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER