

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Bronx Towing Line, Inc. :  
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 9/1/73 - 11/30/76. :  
:

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AFFIDAVIT OF MAILING

State of New York  
County of Albany

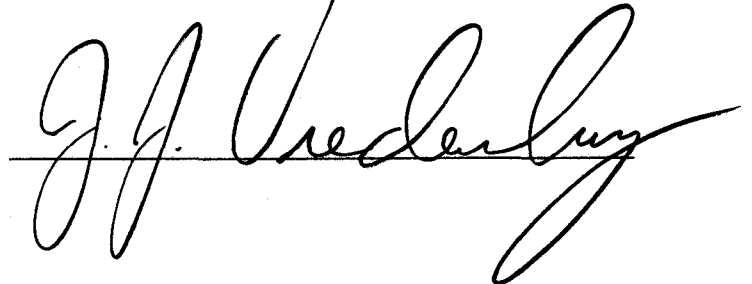
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of September, 1982, he served the within notice of Decision by certified mail upon Bronx Towing Line, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bronx Towing Line, Inc.  
425 Park Ave.  
New York, NY 10022

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  
24th day of September, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Bronx Towing Line, Inc.

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
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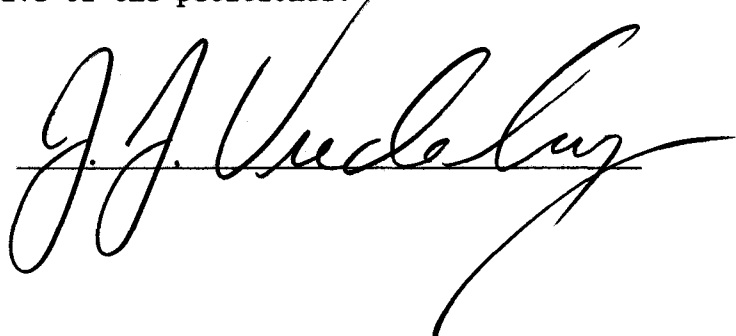
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of September, 1982, he served the within notice of Decision by certified mail upon Stanley A. Ross the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stanley A. Ross  
Edward Isaacs & Company  
380 Madison Ave.  
New York, NY

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  
24th day of September, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

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In the Matter of the Petition :  
of :  
Bronx Towing Line, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
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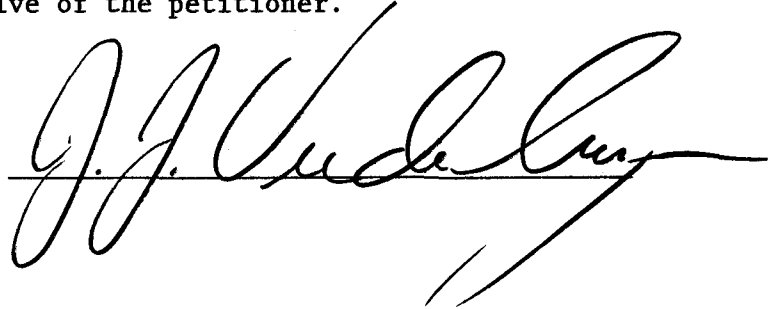
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of September, 1982, he served the within notice of Decision by certified mail upon Arthur Kadish, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur Kadish  
Paul, Weiss, Rifkind, Wharton & Garrison  
345 Park Ave.  
New York, NY 10154

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  
24th day of September, 1982.



NOTED FOR THE RECORD  
OFFICE OF THE CLERK OF THE TAX COMMISSION  
SECTION 171

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

September 24, 1982

Bronx Towing Line, Inc.  
425 Park Ave.  
New York, NY 10022

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Stanley A. Ross  
Edward Isaacs & Company  
380 Madison Ave.  
New York, NY  
and  
Arthur Kadish  
Paul, Weiss, Rifkind, Wharton & Garrison  
345 Park Ave.  
New York, NY 10154  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
BRONX TOWING LINE, 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,  
1973 through November 30, 1976.

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DECISION

Petitioner, Bronx Towing Line, Inc., 425 Park Avenue, New York, New York 10022, 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 September 1, 1973 through November 30, 1976 (File No. 20444).

A formal hearing was held before Edward Goodell, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 2, 1979 at 9:15 A.M. Petitioner appeared by Stanley A. Ross, of the firm of Edward Isaacs & Company, formerly M.S. Scheiber & Company, Certified Public Accountants and by Paul, Weiss, Rifkind, Wharton & Garrison, Esqs., (Arthur Kalish, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Ellen Purcell, Esq., of counsel).

ISSUES

I. Whether vessels leased and operated by petitioner were "primarily" engaged in interstate commerce pursuant to section 1115(a)(8) of the Tax Law.

II. Whether the lease of the vessels and the expenses incurred in their operation for fuel, maintenance and supplies were exempt from sales and use tax.

III. Whether the Audit Division's methods of determining petitioner's sales and use tax liability were proper and correct.

FINDINGS OF FACT

1. Petitioner, Bronx Towing Line, Inc., filed New York State and Local Sales and Use Tax Returns for the taxable periods September 1, 1973 through November 30, 1976.

2. On October 3, 1977, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the taxable periods September 1, 1973 through November 30, 1976 of \$196,245.30, plus penalty and interest of \$95,866.86, for a total of \$292,112.16.

3. The petitioner executed a consent on December 15, 1976 to extend the period within which to issue an assessment for the taxable period September 1, 1973 through August 31, 1976 to December 19, 1977.

4. Petitioner timely filed a petition for a hearing to review the aforesaid notice.

5. Petitioner is engaged in the business of marine transportation by furnishing tugboats to tow barges and scows carrying sand, gravel and cement.

6. Petitioner is a domestic corporation and is a wholly-owned subsidiary of Colonial Sand & Stone Co., Inc., a New York corporation (hereafter referred to as "Colonial").

7. Colonial is engaged in the business of furnishing materials to building contractors (said materials being basically gravel, sand and cement), and is a prime customer of the petitioner.

8. a) The petitioner leases and operates tugboats for the marine transportation of barges and scows carrying gravel, sand and cement, primarily, as aforesaid, for Colonial and, during the periods at issue, also serviced a company named McCormack.

b) In addition to the aforesaid business, the petitioner made sundry sales of fuel and engaged in tug charter rentals and scow charter rentals and maintenance during the periods at issue.

9. Each of the tugboats operated by the petitioner during the taxable periods at issue was leased from a separate corporation, the stock of which was held by Colonial New York.

The operating expenses paid by the petitioner in connection with the operation of the tugboats leased by it as aforesaid consisted of supplies, repairs, fuel oil and the basic charter fees.

10. Petitioner's marine transportation services aforesaid during the periods at issue generally began at the home port of Colonial, located at Kingston, New York, on the west bank of the Hudson River, where barges and scows were loaded with sand, gravel and cement for deliveries south of Kingston to port facilities owned or rented by Colonial in the States of Connecticut, New Jersey or New York.

11. In making deliveries of materials as set forth in paragraph "10" above, petitioner's tugboats proceeded south on the west bank of the Hudson River and traversed New York and New Jersey waters. Upon return with the empty barges and scows to Kingston, petitioner's tugboats followed the east bank or the New York side of the Hudson River.

12. Petitioner also had a shipyard at Port Washington, Long Island, New York, predominantly used as a drydock for the maintenance and repair of the tugboats leased and operated by the petitioner as aforesaid. Said tugboats then proceeded to Kingston, New York, to pick up and deliver materials as aforesaid and, in addition, on occasion, picked up sand at said shipyard for delivery to points in New Jersey and Connecticut.

13. Colonial was engaged during the periods at issue in the mass production of cement and maintained three storage facilities at certain points in New Jersey, Connecticut and New York City. On some occasions the larger tugboats leased and operated by the petitioner as aforesaid would deliver materials from Kingston, New York, to these storage facilities for subsequent shipment by smaller tugboats leased and operated by the petitioner to the final points of destination in Connecticut, New Jersey and New York City.

14. At various times during the period aforesaid, the tugboats leased and operated by the petitioner, refueled at pumping facilities maintained by Colonial at a port in New Jersey or at the Port Washington facility aforesaid.

15. In all instances mentioned in paragraphs numbered "10", "11", "12", "13" and "14" the point of departure and the point of return of the tugboats leased and operated by the petitioner was New York State.

16. a) The Audit Division based its determination herein on a field audit of the petitioner's sales invoices, purchase invoices, general ledger, sales tax returns, Federal tax returns, billing sheets and log books. Billings for the test month of October 1975 were analyzed to determine revenue derived from either interstate or intrastate commerce for each of the tugboats leased and operated by the petitioner as aforesaid. The petitioner then suggested that two additional months, June 1974 and August 1976, be used, and the examiner determined a three month weighted average.

b) That said audit based its findings that the business engaged in by the tugboats operated by the petitioner during the periods at issue was either interstate or intrastate commerce upon the information contained in the petitioner's sales invoices for said periods and upon the billing clerk's source material. Upon cross examination, the examiner testified that consideration



would be given to stops in states other than New York, if he had known of them. On cross examination, the corporation's comptroller was not able to specify on what documentation interim stops were recorded.

17. a) Said field audit made the following findings, in part, with respect to the test months of June 1974, October 1975 and August 1976:

ANALYSIS OF INCOME DERIVATION  
TEST MONTH OCTOBER 1975

<u>Corp.</u>	<u>Tug</u>	<u>Total</u>	<u>Interstate</u>	<u>Intrastate</u>	<u>Percent Intrastate</u>	<u>Total Revenue of tugs in Intrastate Commerce</u>
Edward B.	Colonial	\$ 69,304.79	\$ 13,727.11	\$ 55,577.68	80.19	\$ 69,304.79
Helen B.	Catherine	16,149.52	5,429.20	10,720.32	66.38	16,149.52
P.A.F. #4	Bronx	20,326.82	8,025.35	12,301.47	60.52	20,326.82
Met #1	Bx 1	61,022.75	58,365.42	2,657.33	4.35	
P.A.F. #5	Bx 3	27,706.28	9,823.08	17,883.20	64.55	27,706.28
Met #4	Bx 4	72,018.94	54,784.94	17,234.00	23.93	
B. Sisters	Bx 6	49,736.68	23,573.68	26,163.00	52.60	49,736.68
P.G.	Bx 7	54,708.35	26,176.37	28,531.98	52.15	54,708.35
P.A.F. #2	Twins	6,067.09	4,532.09	1,535.00	25.30	6,067.09
TOTALS		\$377,041.22	\$204,437.24 54.22	\$172,603.98 45.78		\$243,999.53

Percent Revenue of Tugs Deemed in Intrastate  
Commerce to Total Revenue in Test Month

Tugs in Intrastate Commerce	243,999.53
divided by	
Total Tug Revenue for Month	377,044.22

EQUALS 64.71 percent

b) Similar findings were made for the test month of June 1974, namely, that if the ratio of the interstate income of a tugboat operated by the petitioner during said month to the total income earned by said tugboat in said month was less than 75 percent thereof, the total amount of income of such tugboat was allocated to intrastate commerce revenue.

On said basis, said audit found that (i) the total income of the petitioner from all of the eleven tugboats that it operated in the month of June, 1974 was the sum of \$548,605.00 of which said sum (ii) \$222,701.00 constituted income from interstate commerce or 40.59 percent of said total income of \$548,605.00 and (iii) \$314,904.00 constituted income from intrastate commerce or 58.77 percent of said total income of \$548,605.00.

Based on said analysis said audit allocated the sum of \$424,654.00 to "total revenue of tugs in intrastate commerce" for the month June, 1974 or 77.41 percent of the total income of \$548,605.00 of said tugboats for the month June, 1974.

c) Similar findings were made for the test month of August 1976; namely, that if the ratio of the interstate income of a tugboat operated by the petitioner during said month to the total income earned by said tugboat in said month was less than 75 percent thereof, the total amount of income of such tugboat was allocated to intrastate commerce revenue.

On said basis, said audit found that (i) the total income of the petitioner from all of the eight tugboats that it operated in the month of August 1976 was the sum of \$475,338.14 of which said sum (ii) \$310,781.19 constituted income from interstate commerce or 65.38 percent of said total income of \$475,338.14 and (iii) \$164,556.95 constituted income from intrastate commerce or 34.62 percent of said total income of \$475,338.14 of said tugboats for the month of August 1976.

Based on said analysis said audit allocated the sum of \$212,428.60 to "total revenue of tugs in intrastate commerce," for the month of August 1976 or 44.69 percent of the total income of \$475,338.14 of said tugboats for the month of August 1976.

18. Based on the findings set forth in paragraph "17" above, said audit determined that the percentage applicable to operating expenses of the petitioner during the periods at issue; namely, fuel, oil and charter fees was 62.89 percent as follows:

DERIVATION OF % APPLICABLE TO OPERATING EXPENSES, FUEL OIL  
EXPENSES & CHARTER FEES (TAX NOT CHARGED AND PAID)

	<u>Tug Revenue (Excluding Outside Tugs)</u>		<u>Tug Revenue In Intrastate Commerce</u>	<u>Percent Intrastate Commerce</u>	<u>Col. 4 Times Col. 6</u>
June 1974	\$ 548,605	39.16	\$ 424,654	77.41	\$3,031.38
October 1975	377,041	26.91	244,000	64.71	1,741.35
August 1976	475,338	33.93	212,429	44.69	1,516.33
TOTALS	\$1,400,984	100.00	\$ 881,083		\$6,289.06
			$\frac{881083}{1400984} = 62.89$		divided by 100 Equals
Weighted Average 3 Month Test					62.89 percent

Qualifying Percent Must Be At 25 Percent of  
Individual Tug Revenue. Each Tug Stands On  
Its Own Merits.

19. Said audit applied said percentage, namely 62.89 percent to the petitioner's tugboat operating expenses for the periods at issue and, on said basis, determined that the tax due thereon for the audit period was the sum of \$192,629.64 as follows:

<u>ITEM</u>	<u>TAX DUE</u>
Operating Expenses (does not include fuel exp.)	\$ 50,853.75
Fuel Oil Expenses	107,844.09
Charter Fees	33,931.80
TOTAL	<u>\$192,629.64</u>

20. Said audit further determined that during the periods at issue the petitioner had made sundry fuel sales and had also received fees for the charter hire of a tug and fees for scow rental and maintenance totaling \$715,681.00 upon which taxes amounting to \$50,753.22 had not been paid as follows:

<u>ITEM</u>	<u>TAX DUE</u>
Fuel	\$ 28,277.50
Charter, Tug	2,362.50
Scow Charter/Maintenance	<u>\$ 20,113.52</u>
TOTAL	<u>\$ 50,753.22</u>

21. Said audit also found that during the period at issue the petitioner had acquired one fixed asset at a cost of \$2,552.00, upon which no tax was paid, the amount thereof found to be due being the sum of \$204.16.

22. Petitioner concedes its liability for the payment of sales taxes upon the sales made, fees received and purchase made as set forth in paragraphs numbered "20" and "21" above.

23. That the total amount of the sales taxes found by said audit to be payable by the petitioner as aforesaid for the periods at issue is the sum of \$243,587.02, less the sum of \$47,341.72 reported and paid by the petitioner or the sum of \$196,245.30, plus applicable penalties and interest.

CONCLUSIONS OF LAW

A. That section 1115(a)(8) of the Tax Law exempts from sales and use taxes "(c)ommercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs".

B. That "primarily" is defined to mean usage of 75 percent or more as measured by revenue rather than time. This is the expressed policy of the State Tax Commission that has always been consistent and is affirmed in its current regulations, i.e. 20 NYCRR 527.8(h)(4), 528.9(a)(4) and 528.14(b).

C. That section 1115(a)(8) of the Tax Law is an exemption provision. Petitioner has the burden of proving that the vessels (tugboats) it leased were primarily engaged in interstate commerce during the taxable periods at issue. Petitioner failed to sustain such burden.

D. That the leasing by petitioner of vessels which were not "primarily engaged in interstate or foreign commerce" and the expenses incurred in their operation for fuel, maintenance, and supplies, were not exempt from sales and use tax.

E. That the audit method used in testing the usage of each tugboat individually was correct. The exemption is applicable to a vessel primarily engaged in interstate commerce, not to a business engaged in interstate commerce.

F. That the audit method of using a three month test period for determining usage in interstate commerce was correct. The test period was agreed to by petitioner, and represented a fair cross-section of the petitioner's activity as a weighted average was used.

G. That the failure of the petitioner to pay the sales tax on the operating expenses of the tugboats operated by it during the periods at issue was due to reasonable cause and not to wilful neglect. Therefore, the penalty is cancelled and interest is reduced to the minimum statutory rate.

H. That the petition of Bronx Towing Line, Inc. is granted to the extent indicated in Conclusion of Law "G"; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 3, 1977; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 24 1982

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Bronx Towing Line, Inc.

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Sales and Use Tax :  
under Articles 28 & 29 of the Tax Law for the :  
period 9/1/73 - 10/30/76.

State of New York  
County of Albany

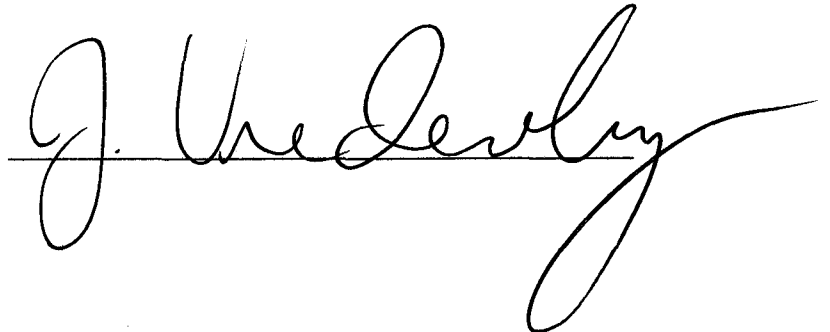
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of September, 1982, he served the within notice of Decision by certified mail upon Bronx, Towing Line, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bronx Towing Line, Inc.  
c/o Stanley A. Ross  
Edward Isaacs & Co.  
380 Madison Avenue  
New York, NY

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Sworn to before me this  
29th day of October, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

TA 26 (9-79)

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

CLAIM CHECK  
NO. 1743

☐ HOLD

DATE

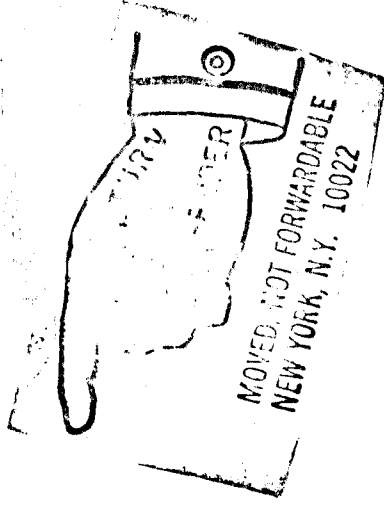
1ST NOTICE

2ND NOTICE

RETURN

Detached from  
PS Form 3849-A  
Oct 1980

Bronx Towing Line, Inc.  
425 Park Ave.  
New York, NY 10022



P 230 842 940



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

~~September 24, 1982~~ *remailed*

OCT 29 1982

Bronx Towing Line, Inc.  
~~425 Park Ave.~~  
~~New York, NY 10022~~

*40 Jesse B. Lecht  
1299 Broadway  
New York, NY 10027*

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.

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NYS Dept. Taxation and Finance  
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Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Stanley A. Ross  
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Taxing Bureau's Representative

TA 26 (9-79)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227

CLAIM CHECK

652143

☐ HOLD

DATE

157.60723

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PSY  
Oca

CERTIFIED

P 230 12 940

NAIL

Bronx Towing Line, Inc.  
425 Park Ave.  
New York, NY 10022

MNFWD  
9-27  
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