

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Gordon Wagner :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law for the :
Year 1980.
_____ :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 3rd day of July, 1986, he/she served the within notice of Decision by certified mail upon Gene & Gordon Wagner the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gordon Wagner
678 Furman Road
Fairport, New York 14450

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
3rd day of July, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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Gordon Wagner :

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for Redetermination of a Deficiency or Revision :
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under Article(s) 28 & 29 of the Tax Law for the :
Year 1980. :
_____:

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 3rd day of July, 1986, he served the within notice of Decision by certified mail upon John R. Fisk, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John R. Fisk
Fisk and Fisk
47 South Main Street
Fairport, NY 14450

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
3rd day of July, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 3, 1986

Gordon Wagner
678 Furman Road
Fairport, New York 14450

Dear Mr. Wagner:

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) 1139 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
John R. Fisk
Fisk and Fisk
47 South Main Street
Fairport, NY 14450

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GORDON WAGNER	:	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 Year 1980.	:	

Petitioner Gordon Wagner, 678 Furman Road, Fairport, New York 14450, 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 year 1980 (File No. 50482).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on February 26, 1986 at 11:00 A.M. Petitioner appeared by John R. Fisk, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether the Audit Division's denial of petitioner's claim for refund of sales tax paid on the purchase of a motor vehicle, which denial was premised upon the Audit Division's determination that said vehicle was not being used directly and predominantly in the production for sale of tangible personal property by farming, was proper.

FINDINGS OF FACT

1. On February 8, 1980, petitioner, Gordon Wagner, purchased a 1979 GMC truck for use in his farming operations. At the time of purchase, petitioner paid to the truck dealer sales tax of \$1,067.00 which was due on the purchase of said vehicle.

2. On January 24, 1983, petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax claiming a refund of the \$1,067.00 in sales tax paid on the purchase of the vehicle in question. Petitioner's claimed refund was based upon his assertion that the vehicle was used in his farming operations and was therefore exempt from sales tax.

3. On December 15, 1983, the Audit Division denied petitioner's refund application based upon its determination that "the vehicle in question is not being used directly and predominantly in [farm] production."

4. At all times subsequent to the purchase of the vehicle in question, petitioner owned and operated, along with his brother, a dairy and cash crop farm in Fairport, New York.

5. The vehicle in question, a 10,000-pound GMC truck with a 14-foot stake body, 5-foot sides and a dump for hauling purposes, was registered with the Department of Motor Vehicles as an agricultural truck.

6. The vehicle in question is used by petitioner solely for purposes related to his farming operations. It is used approximately ten times per year to pick up fertilizer at a farming supply store and return it to the farm. The truck is then used in the fields in connection with fertilizer spreading operations. The truck is also used in the harvesting of petitioner's crops. Once the crops are harvested, the truck is used to haul the crops to market. The truck is also used to bring hay or other feed to livestock for feeding.

7. The annual mileage for each of the aforementioned uses of the truck is as follows:

<u>Activity</u>	<u>Mileage</u>	<u>% of Total Mileage</u>
Picking up supplies for farm at stores	850	26.6%
Carrying seeds, fertilizer and pesticides to the fields from barns	100	3.1%

Bringing hay or other feed to livestock in fields for feeding	25	0.8%
Delivering crops or livestock to market	2,000	62.5%
Bringing hay or other feed to livestock between farms	25	0.8%
Transporting grains and crops from fields to barns at harvest	200	6.3%
Total Mileage	3,200	100.0%

8. At hearing, petitioner contended that in terms of the overall length of time during which the truck was in use, it was predominantly used in the fields in connection with harvesting and spreading fertilizer. Petitioner did not introduce any documentation to support this contention, nor did he testify with any degree of specificity to substantiate this contention. Petitioner also argued, in the alternative, that the regulations relevant in the determination of this matter are arbitrary and capricious and contrary to the intent of section 1115(a)(6) of the Tax Law.

CONCLUSIONS OF LAW

A. That at all times subsequent to petitioner's purchase of the motor vehicle for which he claims exemption herein, section 1115(a)(6) of the Tax Law provided, in pertinent part, an exemption from sales and compensating use taxes imposed by sections 1105 and 1110 of the Tax Law, respectively, on retail sales of the following:

"Tangible personal property, ...for use or consumption directly and predominantly in the production for sale of tangible personal property by farming, including stock, dairy, poultry, fruit, fur bearing animal, graping and truck farming (emphasis supplied)."

B. That also during the relevant period, 20 NYCRR 528.7(c) classified and defined the activities in farming for purposes of section 1115(a)(6) of the Tax Law in the following manner:

"(c) Production. (1) The activities in farming may be classified as administration, production or distribution.

(i) Administration includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing of raw materials and clerical work in production such as preparation of work production and time records.

(ii) Farm production begins with the preparation of the soil, and in the case of animals, from the beginning of the life cycle. Production ceases when the product is ready for sale in its natural state; for farm products which will be converted into other products, farm production ceases when the normal development of the agricultural product has reached a stage where it will be processed or converted into a related product.

(iii) Distribution includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products.

(2) Production ends for a specific producer (farmer or other person) when the product is in the form in which he will offer it for sale. However, production may again start for a specific purchaser when he gains ownership of the product, and production will continue until the product is in a form in which it, in turn, will be offered for sale."

C. That at all times relevant herein 20 NYCRR 528.7(d) set forth the following definitions of "directly and predominantly" for purposes of section 1115(a)(6):

"(d) Directly and predominantly. (1) 'Directly' means the tangible personal property must, during the production phase of farming:

(i) act upon or effect a change in material to form the product to be sold; or

(ii) have an active casual relationship in the production of the product to be sold;

(iii) be used in the handling, storage or conveyance of materials used in the production of the product to be sold; or

(iv) be used to place the product to be sold in the package in which it will enter the stream of commerce.

(2) 'Predominantly' means that tangible personal property must be used more than 50 percent of the time directly in the production phase of farming."

D. That in view of the aforecited statute and regulations, certain of petitioner's truck's uses, specifically "Picking up supplies for farm at stores" and "Delivering crops or livestock to market", were not uses of the truck in "production for sale of tangible personal property by farming" within the meaning of section 1115(a)(6) of the Tax Law.

E. That inasmuch as 89.1 percent of the yearly mileage of petitioner's truck was derived from activities other than production for sale by farming, the Audit Division properly denied petitioner's claim for refund. Petitioner has failed to show wherein the Audit Division's denial was improper.

F. That with respect to petitioner's contention that the relevant regulations herein are arbitrary and capricious and are violative of the intent of section 1115(a)(6), it is well established that:

"[s]tatutes creating a tax exemption are to be strictly and narrowly construed (Matter of Mobil Oil Corp. v Finance Administrator, 50 NY2d 95, 98; Matter of Grace v New York State Tax Comm., 37 NY2d 193, 195). The burden of proving entitlement to a tax exemption rests with the taxpayer (Matter of Young v Bragalini, 3 NY2d 602, 605). To prevail over the administrative construction, petitioner must establish not only that its interpretation of the law is a plausible one but, also, that its interpretation is the only reasonable construction (see Matter of Lakeland Farms Co. v State Tax Comm., 40 AD2d 15, 18). Thus, unless the Department of Taxation and Finance's regulation is shown to be irrational and inconsistent with the statute (Matter of Slattery Assoc. v Tully, 79 AD2d 761) or erroneous (Matter of Koner v Procaccino, 39 NY2d 258), it should be upheld. (Matter of Blue Spruce Farms v State Tax Comm., 99 AD2d 867, affd. 64 NY2d 682)."

Petitioner has failed to make any such showing in this matter.

G. That the petition of Gordon Wagner is denied and the Audit Division's denial of refund, dated December 15, 1983, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER