STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROCCO P. CALVELLO	:	DETERMINATION DTA NO. 808514
for Revision of a Determination or for Refund of Highway Use Taxes under Article 21 of the Tax Law for the Period October 1, 1984 through June 30, 1988.	:	

Petitioner, Rocco P. Calvello, 202 56th Street, Niagara Falls, New York 14304, filed a petition for revision of a determination or for refund of highway use taxes under Article 21 of the Tax Law for the period October 1, 1984 through June 30, 1988.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 22, 1991 at 1:00 P.M. Neither party filed a brief. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Peter J. Martinelli, Esq., of counsel).

ISSUE

Whether petitioner has shown errors in the Division of Taxation's assessments of highway use taxes warranting a reduction or cancellation of said assessments.

FINDINGS OF FACT

On January 30, 1989, following an audit, the Division of Taxation issued notices of determination to petitioner, Rocco P. Calvello, which assessed fuel use tax ("FUT") in the amount of $14,236.36, plus penalty and interest, and truck mileage tax ("TMT") in the amount of $13,433.94, plus penalty and interest, for the period October 1, 1984 through June 30, 1988.

Petitioner is in the trucking business. During the period at issue petitioner's operation had two components. Petitioner permanently leased a vehicle to an entity called Escrow Transport, Limited, and regularly made hauls for Escrow from Buffalo to Syracuse and Albany, and, occasionally, to New York City and Pennsylvania. Additionally, as a side business,

petitioner hauled produce that he purchased from a farm in the Elba, New York area to supermarkets in the Buffalo-Niagara Falls area.

On audit, the Division requested all documentation and information used by petitioner in the preparation of his highway use tax returns. Specifically, the Division requested trip reports, Interstate Commerce Commission ("ICC") logs, toll receipts and fuel purchase receipts. The Division also took odometer readings on petitioner's trucks.

In response to this Division request, petitioner produced some fuel purchase records, toll receipts and ICC logs. The ICC logs referred to the work that petitioner did for Escrow Transport. Petitioner presented no trip reports or any documentation regarding day-to-day activities in respect of his produce transport operation. The fuel receipts which were presented did not cover the entire audit period. Moreover, many of the receipts did not identify the vehicle for which the fuel was being purchased.

Following review of these records, the Division determined that it would be necessary to estimate petitioner's mileage and fuel purchases for TMT and FUT purposes. As the basis for this estimate the Division used the fuel deductions listed on petitioner's 1986 and 1987 Federal income tax returns, schedule C. Specifically, the Division estimated a $1.00 per gallon purchase price for diesel fuel throughout the audit period. This estimate was based upon audit experience. The Division then divided the claimed fuel purchase deductions by this $1.00 per gallon in order to arrive at total gallons purchased. The Division then took the yearly gallonage figures for 1986 and 1987 and divided each of those amounts by four to compute quarterly gallonage figures for each of those years. The Division then averaged the 1986 and 1987 quarterly figures and applied that average to each of the quarters comprising the balance of the audit period (October 1, 1984 through December 31, 1985 and January 1, 1988 through June 30, 1988). Having thus determined gallons of diesel fuel purchased during the audit period, the Division determined petitioner's FUT liability by applying the applicable rate to the audited gallons purchased in each quarter of the audit period. The Division thus determined petitioner's FUT liability for the period at issue to be $14,236.36. For TMT purposes, the Division took

quarterly gallons of fuel purchased during the audit period (determined as noted above), multiplied the gallonage figures by five miles per gallon[1] and thereby determined petitioner's New York miles for TMT purposes. To determine petitioner's TMT liability, the Division applied the applicable tax rates to petitioner's quarterly audited mileage figures. After allowing for TMT previously paid by petitioner, the Division determined a TMT liability of $13,433.94.

Subsequent to the issuance of the notices, the Division determined that the fuel deductions set forth on petitioner's 1986 and 1987 Federal schedule C's included fuel consumed by petitioner in hauling for Escrow Transport. Since Escrow reported petitioner's mileage and fuel purchases for TMT and FUT purposes, the Division adjusted the assessments against petitioner by subtracting from audited mileage and fuel purchase amounts petitioner's Escrow mileage and fuel purchases. To make this adjustment, the Division used records made available by Escrow which detailed petitioner's mileage and fuel purchases in connection with his trucking activities for Escrow. Following this adjustment, the revised TMT assessment totaled $2,284.88, plus penalty and interest, and the revised FUT assessment totaled $5,475.34, plus penalty and interest.

The revised assessments as noted above were set forth in a Conciliation Order dated May 18, 1990.

On audit, the Division became aware that Escrow Transport was reporting petitioner's truck mileage and fuel use for purposes of Article 21. Prior to the issuance of the notices of determination, the Division did not delete petitioner's Escrow mileage and fuel use from its audit calculations because petitioner did not respond to a Division inquiry regarding whether his claimed schedule C fuel deductions included fuel consumed in hauling for Escrow. Subsequent to the issuance of the notices, petitioner did establish to the Division's satisfaction that the fuel deductions did include Escrow and made the above-noted adjustments accordingly.

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[1]At hearing, petitioner conceded that five miles per gallon was a reasonable estimate.

During the period at issue, as noted previously, petitioner leased a tractor to Escrow Transport. Petitioner also owned a second tractor, a Mercedes-Benz diesel truck and two GMC gasoline trucks. Aside from the leased tractor which was used in hauling for Escrow, it is unclear from the record precisely which vehicles were used by petitioner in the produce hauling operation.

During the period at issue, petitioner did not maintain any daily records showing miles traveled in New York with respect to any of his vehicles.

CONCLUSIONS OF LAW

A. Article 21 of the Tax Law imposes two highway use taxes upon commercial carriers with respect to motor vehicles operated on New York public highways. The first, commonly referred to as the truck mileage tax, is imposed pursuant to Tax Law § 503. This tax is based on the mileage of the vehicle on New York public highways and the weight of the vehicle (20 NYCRR 481.1[a]). The other tax authorized by Article 21 is known as the fuel use tax and is imposed pursuant to Tax Law § 503-a. The FUT is based upon the amount of motor fuel and diesel motor fuel used in New York.

B. Tax Law § 510 provides that if a return filed under Article 21 is:

> "insufficient or unsatisfactory...or if no return is made for any period, the commissioner of taxation and finance shall determine the amount of tax due from such information as is available to the commissioner."

C. Tax Law § 507 imposes the following recordkeeping requirements upon carriers subject to tax under Article 21:

> "Every carrier subject to this article and every carrier to whom a permit was issued shall keep a complete and accurate daily record which shall show the miles traveled in this state by each vehicular unit and such other information as the tax commission may require. Such records shall be kept in this state unless the tax commission consents to their removal and shall be preserved for a period of four years and be open for inspection at any reasonable time upon the demand of the tax commission."

Additionally, regulations promulgated pursuant to Tax Law § 507 further delineate records required under this section (see, 20 NYCRR 483 and 493).

D. Where a taxpayer fails to maintain or make available records required under Article

21, the Division is authorized to estimate the taxpayer's highway use tax liability. The Division is required to select an audit method reasonably calculated to reflect tax due. Where recordkeeping is inadequate, exactness is not required in the audit result. Petitioner has the burden of proving error in the assessment. (See, Lionel Leasing Industries Co., Inc. v. State Tax Commn., 105 AD2d 581, 481 NYS2d 520, 523.)

E. Given petitioner's clear failure to maintain any daily records showing the New York miles traveled by his vehicles, the Division was authorized to estimate petitioner's highway use tax liability. Moreover, the Division's method, based on petitioner's claimed fuel expense deductions on his 1986 and 1987 personal income tax returns, was, under the circumstances, reasonable. Additionally, upon review of petitioner's contentions (discussed below) and the record herein, it is concluded that petitioner has failed to establish any errors in the assessments as adjusted. It is noted that petitioner did not take issue with the Division's estimate of a $1.00 per gallon purchase price throughout the audit period.

F. Petitioner contended that the audited taxable mileage and fuel use as adjusted, still included a portion of his Escrow mileage. Specifically, petitioner contended that the Escrow mileage subtracted by the Division following the issuance of the notices of determination did not include out-of-state miles that petitioner hauled for Escrow. In the absence of any documentation in support of this contention,[2] it must be rejected as unsubstantiated. Petitioner also contended that it would have been impossible for him to have hauled for Escrow and, at the same time, to have incurred the mileage in his produce business as determined on audit. As to this contention, once again, in the absence of records, this contention must be rejected as unsubstantiated. Moreover, as noted previously, in the absence of records exactness is not required in the Division's audit result. Petitioner also contended that

[2]It should be noted that, at hearing, petitioner did have in his possession certain fuel purchase receipts. Petitioner did not offer such records into evidence. However, given the absence of any daily trip records, it is doubtful that such records, even if received in evidence, would have affected the result herein.

certain of his Escrow fuel purchases would have been consumed in his produce operations. This contention is also unsubstantiated and, further, it is unclear what impact it would have on the audit results even if it were proven. Finally, petitioner contended that since he apparently was held personally liable by Escrow with respect to certain highway use tax assessments against Escrow, it was unfair for the Division to seek to impose highway use tax liability against petitioner in the instant matter. Since petitioner and Escrow are separate taxpayers and since petitioner's relationship with Escrow is irrelevant to these proceedings, this contention is without merit.

G. The petition of Rocco P. Calvello is denied and the notices of determination, dated January 30, 1989, as adjusted pursuant to the Conciliation Order, dated May 18, 1990, are sustained.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE