STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ERSKINE XPRESS INC.	:	DETERMINATION DTA NO. 812915
For Revision of a Determination or for Refund of Highway Use Tax Under Article 21 of the Tax Law for the Period January 1, 1990 through September 30, 1991.	:	
	:	

Petitioner, Erskine Xpress, Inc., c/o Brenda K. Binion, P.O Box 122, Lowellville, Ohio 44436, filed a petition for revision of a determination or for refund of highway use tax under Article 21 of the Tax Law for the period January 1, 1990 through September 30, 1991.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 4, 1995 at 10:00 A.M., with all briefs to be submitted by August 15, 1995. Petitioner appearing by Panara, Fielitz and Goergen, Esqs. (Joseph G. Goergen, Esq, of counsel), submitted certain documents post-hearing on May 17, 1995 (per permission granted), followed by its brief on July 3, 1995. The Division of Taxation appearing by Steven U. Teitelbaum, Esq. (John Matthews, Esq., of counsel), submitted its response to petitioner's post-hearing documents on May 22, 1995, and thereafter filed its brief on July 27, 1995. Petitioner reserved time but did not submit a reply brief. The August 15, 1995 due date for said reply brief commenced the six-month period for issuance of this determination.

ISSUES

I. Whether petitioner has established sufficient basis to warrant abatement of penalty and/or interest.

II. Whether petitioner has established that certain payments should be allowed in reduction of the amount of tax stipulated as due and owing in this matter.

FINDINGS OF FACT

1. Petitioner, Erskine Xpress, Inc. ("Erskine"), an Ohio corporation, is a freight carrier engaged in transporting steel, iron and piping by truck. Petitioner, which owns no trucks of its own, operates by leasing equipment owned and driven by various independent owner-operators. During the period at issue, petitioner operated using approximately 40 to 45 different owner-operators.

2. Petitioner commenced doing business as of January 1, 1990, after purchasing the assets of Erskine Express Trucking, Inc. Petitioner's business is a continuation of the business operated by such predecessor corporation, and its continuation of the name Erskine Express was (and is) for purposes of name recognition. From the outset, petitioner continued to employ the same persons as were formerly employed by Erskine Express Trucking, including its bookkeeping and office staff of approximately eleven persons. Such personnel continued to carry out the accounting and tax compliance functions for petitioner, as they had for petitioner's predecessor Erskine Express Trucking. On this score, petitioner calculates and remits truck mileage tax, while the owner-operators calculate and remit fuel use tax on their own. Petitioner's president and owner, John Swab, has been involved in the trucking industry since 1962, although always on the "safety side" of the business as opposed to accounting or tax compliance.

3. In August 1991, the Division of Taxation ("Division") commenced an audit of petitioner's business operations for the period January 1, 1990 through September 30, 1991. The Division's auditor reviewed petitioner's freight bills for the month of April 1991, and determined that petitioner had underreported trucking mileage by some 43 percent. In turn, the auditor projected this rate of reporting error over the period under audit to calculate additional tax due.

4. On March 15, 1993, the Division issued to petitioner a Notice of Determination assessing additional highway use tax (truck mileage tax) for the period January 1, 1990 through September 30, 1991 in the amount of $29,533.94, plus penalty and interest. This notice was

based on the results of the aforementioned field audit, and reflects petitioner's failure to have completed Schedule "B" on its truck mileage tax returns (Forms MT-903) and remitted the tax due thereon (the "supplemental tax" imposed effective July 1, 1990 on all New York mileage except Thruway mileage per Tax Law § 503[b]), its failure to have accurately recorded and reported return mileage from deliveries in New York State ("deadhead miles"), and its failure to have documents (toll receipts) in substantiation of Thruway mileage.

5. In response to the above notice, petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A conference was held, at which petitioner submitted a recalculation of the audit results for the month of April 1991 and, as projected, for the balance of the audit period. Specifically, petitioner calculated the number of miles driven based on freight bills, driver's logs and a computer driven "P.C. Miler". Petitioner also computed the number of Thruway miles driven based upon Thruway toll receipts obtained by petitioner from its owner-operators for the month of April 1991.

6. Petitioner's recalculation of mileage resulted in a requested reduction to the assessment based on a computed error rate of 1.281 (versus the audit error rate of 1.3873), as well as an allowance for Thruway mileage post-July 1990 (i.e., excluding Thruway mileage from the number of miles subject to the supplemental tax). On March 4, 1994, a conciliation order was issued whereby the amount of the assessment was reduced to $25,173.24 plus penalty and interest. This reduction was premised upon a reduction of the audit error rate to 1.2909, and the allowance of Thruway miles for the month of April 1991 (only), for which period petitioner had provided toll receipts.

7. At the commencement of proceedings herein, the parties reached agreement and stipulated that the dollar amount of tax due for the period under audit totalled $40,815.23, and that the amount of tax paid totals (at least) $20,979.83, thus leaving the amount of unpaid tax due at $19,835.40. The stipulated amount of tax due for the audit period ($40,815.23) is based upon an error rate of 1.281 (see Finding of Fact "6"), and upon recognizing an allowance for

Thruway mileage claimed by petitioner for the portion of the audit period spanning July 1990 through September 1991.

8. While the foregoing stipulation ends petitioner's challenge to the amount of tax due for the audit period, petitioner continues to take issue with the Division's imposition of penalty and interest, and seeks abatement thereof. In addition, petitioner claims that the stipulated amount of tax due but unpaid ($19,835.40), should be reduced based on payments made after the period of audit and allegedly against the truck mileage tax due for the audit period. At hearing, petitioner claimed these payments totalled $2,908.21 which amount would, if accepted, reduce the unpaid liability to $16,927.19. However, petitioner's post-hearing submission claims a lesser credit amount for payments totalling $2,330.46 (in recognition that some of the original amount claimed as paid related to periods outside of the audit period). If accepted, such adjusted claim for credit would reduce the unpaid liability from $19,835.40 to $17,504.94.

9. As noted, when petitioner commenced doing business its bookkeeping functions were performed by hand (manually on paper) by the same employees and in the same manner as had been done by the predecessor company. Petitioner commenced updating its bookkeeping systems to computerization in or about May 1990, with its purchase of computer equipment for use in freight billing. Additional computer equipment was purchased starting in or about June 1992.

10. Petitioner argues that its failure to accurately record and report mileage stemmed from the continuation of errors in prior bookkeeping practices, noting that it did not become aware of any problems in recording and reporting until the subject audit was conducted. Petitioner claims that it was unaware of the existence of the supplemental tax, noting in this regard that since the owner-operators pay their own fuel use tax, petitioner allowed such drivers to retain their Thruway toll receipts. Petitioner thus claims its lack of toll receipts for Thruway miles stemmed directly from its bookkeeping practices coupled with its lack of knowledge of the supplemental tax. Petitioner noted that prior to its purchase of the P.C. Miler, all mileage

calculations were made by reference to a road atlas.[1] Petitioner also claimed that drivers' logs were not attached to freight bills, thus sometimes leaving actual routes taken unknown and causing certain inaccuracies in calculating mileage.

11. With regard to its claim for credit based on additional payments, petitioner submitted an affidavit made by its representative herein, together with certain documents pertaining to the alleged payments sought as credit, per permission granted at the time of hearing. In his affidavit, petitioner's representative claims that the mileage upon which the tax would be based would be associated with periods when the vehicles were driven for Erskine, noting that "for most of these operators, the only mileage accrued by the independent owner/operators would be accrued while the vehicle was being leased by Erskine". Neither the affidavit nor the documents themselves specify any mileage amounts, or link the same to any particular period of time, save for a general listing in a few instances of the period covered by an assessment issued against a particular owner-operator. A summary of the owner-operators, dollar amounts and dates of payment, taken from the evidence offered post-hearing and listed in the order in which it was filed, follows:

NAME	AMOUNT	DATE
a) Willis Westbay	$53.89	05-06-92
b) Raymond DeVite	13.56	05-06-92
c) Frank Nader, Jr.	207.04	05-07-92
d) S.C.D. Rentals	20.82	undated
e) Vivien Morrison	13.89	05-07-92
f) Roseann Winner	79.17	05-07-92
g) Francis Ryser	37.22	undated
h) Chris W. Svenson	43.92	05-07-92
i) John Kozal	4.42	05-06-92

[1]The P.C. Miler is a computer program purchased by petitioner which determines mileage on a point-to-point basis. This program, purchased in response to the audit and used in petitioner's post audit recomputation of mileage, calculates mileage based upon zip code entries which correspond to the pickup and delivery or destination points for any given trip.

j) R & M Trucking	149.01	12-31-92
k) Marc DelSignore	35.50	09-16-92
l) S.C.D. Rentals	212.68	09-08-92
m) Nelson D. Case	143.30	09-16-92
n) Joseph Kuchcinski	192.08	09-16-92
o) see "a" above (same item)	-----	--------
p) R & M Trucking Co.	40.33	05-06-92
q) John Swab	45.44	05-08-92
r) John Kozal	82.91	07-06-92
s) James Pieren	43.00	05-08-92
t) Joseph Kuchcinski	51.98	05-08-92
u) Elijah M. Coley	13.56	05-08-92
v) Willis Westbay	214.76	08-26-92
w) John Swab	142.45	08-26-92
x) Raymond DeVite	133.92	03-10-92
y) Vincent Coletta	115.85	03-06-92
z) S.C.D. Rentals	110.97	07-08-92
aa) Raymond DeVite	74.90	07-06-92

12. The documents from which the above information was taken include "payment documents"[2], some cancelled checks, and some "statements of consolidated tax liabilities". More specifically, with respect to items "a" through "i", "l", "p" through "x", "z" and "aa", there is a Division Payment Document indicating, inter alia, the name of the taxpayer, an assessment number, and handwritten notations as to the amount(s) involved (claimed as paid) and the

[2]A "Payment Document" (Form DTF-968.1) is a form issued by the Division to taxpayers. Such form identifies the taxpayer to whom it is issued, reflects an assessment I.D. number identifying the assessment to which the payment document pertains, and includes a section on which the taxpayer may indicate (via checking a box) disagreement with the validity of the listed assessment based on: (a) disagreement with the amount due, or (b) disagreement upon a claim that the amount due has been paid. The form also includes a following section by which the taxpayer may direct the application of its payment (if any) to: (a) the assessment listed on the form or, (b) against other outstanding liabilities.

date(s) of payment. In addition, with respect to items "a" and "j", there are cancelled checks drawn on the listed taxpayer's account in payment of the amounts shown on the Division's payment documents, while for items "k" through"n", "p" through"r", and "v" through "aa" there are cancelled checks drawn on Erskine's account in payment to the Division. Further, the information with respect to items "j", "k", "m", "n" and "y", is taken from statements of consolidated tax liabilities listing various periods and amounts as well as certain partial payments made against such amounts. Items "j" and "p" each include a cancelled check drawn on the named taxpayer's account showing partial payment as claimed on the statement of consolidated tax liabilities, while for Items "k", "m", "n" and "y" there are cancelled checks drawn on Erskine's account representing partial payments on the various liabilities shown on the related consolidated statements of tax liabilities. There are no checks included with respect to items "b" through "i" and "s" through "u". The documents submitted by petitioner include a cancelled Erskine check for $429.18 with its memo section listing a reference to an "attached letter". However, such letter was not included with petitioner's documents or otherwise submitted as part of the record. Item "o" represents a repeat of the information submitted at item "a" for Willis Westbay. Finally, there is an unexplained Erskine check for $108.54.

13. Careful review of the documents submitted by petitioner, both individually and in conjunction with the above-described affidavit made by petitioner's representative, fails to make apparent any connection specifically linking the persons named and amounts listed with the amount of tax assessed and remaining unpaid in this proceeding.

14. With regard to its request for abatement of penalty, petitioner argues that it was unaware of any problems in recording and reporting mileage because it retained its predecessor's employees in their same functions (bookkeeping) from the outset. In addition, petitioner claims it was unaware of the July 1990 imposition of the supplemental tax on all miles except Thruway miles. Petitioner goes on to argue that the initial amount of the assessment (per audit) was first reduced at conference, and was thereafter reduced again by stipulation prior to hearing, based largely on petitioner's post-audit mileage recalculation efforts.

Petitioner argues that notwithstanding its stipulation to tax liability, such reductions show that the audit was flawed and thus should not support the imposition of penalty. Petitioner also points to its efforts to assure better compliance in the future, noting specifically its purchases of computer equipment including the P.C. Miler as described. Petitioner also argues for abatement or at least a pro-rating of interest. Petitioner's position is apparently premised on the claim that the audit was flawed and that, while petitioner pointed out such flaws, no reductions were agreed to until the conference and thereafter until hearing. Petitioner thus argues that interest should be eliminated, or at least reduced, during the period of time from when such reductions were sought through the time when such reductions were allowed.

CONCLUSIONS OF LAW

A. Pursuant to the parties' stipulation made at the commencement of proceedings, the dollar amount of petitioner's tax liability for the period of the audit ($40,815.23) is not in dispute. This figure, a reduction of the initial amount found due upon audit, is based on petitioner's mileage amounts as recalculated, and also includes the allowance of Thruway miles as a reduction in the calculation of the supplemental tax. Furthermore, the parties are in agreement that $20,979.83 has been paid by petitioner, leaving the maximum amount due and unpaid at $19,835.40. Thus, remaining for determination herein are the issues of: a) whether petitioner has established entitlement to any additional credit against the amount of tax stipulated as due ($19,835.40) based on payments claimed to have been made against such liability and, b) whether penalties and/or interest should be reduced or abated.

B. As to the claim for credit, it appears clear and undisputed that petitioner, and in some instances the individuals named in Finding of Fact "11" have made payments to the Division. However, from the evidence submitted it is not possible to conclude that such payments represent payments against the truck mileage tax liability at issue herein, as opposed to fuel use tax due from and apparently assessed individually against the various owner-operators (see, Findings of Fact "2" and "10"). In this regard, none of the individual assessments or payments make reference to the assessment at issue herein (L007074595), and there is no apparent tie or

link between the individual payments made and mileage driven by or on behalf of petitioner. Without such a link, and notwithstanding the general assertions contained in the affidavit made by petitioner's representative, the evidence simply does not provide sufficient basis for accepting that the payments made relate to and should be allowed as a credit against the amount of tax remaining unpaid.

C. Turning to the issue of penalty and interest abatement, petitioner points to its efforts post-audit to move into better compliance with the recording and reporting requirements, as well as its efforts to gather and present information, again post-audit, in reduction of the amount of tax found due upon audit. Though laudable, these after-the-fact efforts are essentially irrelevant to the issue of underpayment in the first instance (see, Matter of T & T Excavating and Paving Corp., Tax Appeals Tribunal, July 7, 1994). That is, the focus on penalty should center on the reasons for the underpayment at the time it occurred. In this regard, petitioner does not dispute that it failed to record and report "deadhead" miles, and that it did not complete Schedule "B" of its returns and pay the supplemental tax due. Petitioner's claim that it was unaware of such tax and its requirements must be balanced against the fact that the tax return form for the period in question clearly sets out the schedules for computing the tax, and also that the method therefor is clearly specified on the instructions to the return. Reliance on its bookkeeping staff, as carried over from the predecessor company, does not excuse petitioner's failure to comply. In this regard, placing the entire fault on the predecessor and its bookkeeping/tax reporting methods entirely overlooks petitioner's failure to uncover certain ongoing fairly obvious compliance errors. It is also clear that petitioner was under a duty to accurately record Thruway mileage both before and after the advent of the supplemental tax. That is, the truck mileage tax excluded Thruway miles before July 1990 and, while such basic tax included Thruway miles post July 1990 (i.e., was imposed on all miles driven), the supplemental tax excluded Thruway miles. Petitioner was thus required to account for Thruway miles at all times, and its argument as to inaccuracies because the drivers kept the Thruway receipts (see, Finding of Fact "10") simply shows a system open to mileage recording

inaccuracies but does not serve to excuse such inaccuracies. It is also noteworthy that even after conference reductions and further stipulated reductions to the initial audit results, petitioner's underpayment totalled nearly fifty percent of its tax liability. This factor serves to reduce the impact of petitioner's arguments that the audit was flawed to such an extent that its results do not support the imposition of penalty. Finally, in light of the foregoing, and noting that petitioner has pointed to no authority (nor is any apparent) for the proposition that interest may be waived, there is no basis to do so. Likewise, there is no basis for interest pro-rating on the theory that an assessment was not first reduced when a reduction was sought by a taxpayer (i.e., that reductions were not agreed to at some point prior to the BCMS conference, and that further reductions were not agreed to until just prior to the hearing).

D. The petition of Erskine Xpress, Inc. is hereby denied and the Notice of Determination dated March 15, 1993, reduced in amount to $25,173.25 per the BCMS order dated February 28, 1994, and thereafter further reduced as stipulated at the commencement of proceedings herein to $19,835.40, together with penalty and interest, is sustained.

DATED: Troy, New York
February 1, 1996

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE