STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KENNETH SCHUCK TRUCKING, INC.	:	DETERMINATION DTA NO. 816129
for Revision of a Determination or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period April 1, 1990 through June 30, 1995.[1]	:	

Petitioner, Kenneth Schuck Trucking, Inc., 1030 Blue Barn Road, Allentown, Pennsylvania 18104, 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 April 1, 1990 through June 30, 1995.

A hearing was commenced before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 15, 1998 at A.M., June 16, 1998 at 9:15 A.M., and June 17, 1999 at 10:15 A.M.; with a continuation at the offices of the Division of Tax Appeals at 641 Lexington Avenue, New York, New York on September 16, 1998 at 10:15 A.M., September 17, 1998 at 9:30 A.M., and continued to its conclusion on January 8, 1999 at 10:30 A.M., with all briefs to be submitted by July 17, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by Joseph T. Bambrick, Jr. & Associates, P.C. (Joseph T. Bambrick, Esq.). The Division of Taxation appeared by Terrence M. Boyle, Esq. (John Matthews, Esq., of counsel).

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[1] Post-hearing it was determined by the Division of Taxation that petitioner was not advised of an extension of the audit period beyond June 30, 1994, nor were records requested for such extended period. Pursuant to ***Adamides v. Chu*** (134 AD2d 776, 521 NYS2d 826), the tax assessed by the Division based upon an asserted lack of books and records, for the four quarters between July 1, 1994 and June 30, 1995, is canceled.

ISSUES

I. Whether the Division of Taxation conducted a proper test period audit of petitioner's business operations.

II. Whether an assessment of truck mileage tax and fuel use tax is a violation of the Commerce Clause of the United States Constitution.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued two notices of determination to petitioner, Kenneth Schuck Trucking, Inc., ("Schuck"), dated January 29, 1996. The first is an assessment of highway use tax, specifically truck mileage tax ("TMT"), in the amount of $263,906.57, plus interest and penalty in the amounts of $60,297.46 and $71,093.46, respectively, totaling $395,297.49, for the period April 1, 1990 through June 30, 1995. The original amount of TMT assessed ($263,906.00) has two components: $187,646.00 computed from the self-assessment of mileage reported on petitioner's tax returns for fuel use purposes, where no amount was paid for TMT on such miles; and secondly, $76,260.00 for additional miles based upon the test period audit conducted. The latter amount was reduced by recorded mileage adjustments and other corrections amounting to $6,674.00 during the hearing, and $15,058.00 for tax assessed after June 30, 1994, since the Division determined petitioner had not received proper notification of the audit period beyond that point (***see,*** Footnote 1), for the resulting field audit portion of $54,528.00. The amount of TMT thus in issue for purposes of this determination is $242,174.00, plus penalty and interest.

The second notice assessed highway use tax, specifically fuel use tax ("FUT"), in the amount of $93,019.35, plus interest and penalty in the amount of $21,967.44 and $25,310.47, respectively, for the period April 1, 1990 to June 30, 1995. The FUT assessed has two

components: $72,993.00 in FUT assessed for the additional miles resulting from the test period audit, and $20,026.00 in FUT from mileage per gallon ("MPG") adjustments (described *infra*). Collectively ($93,019.00), these amounts were reduced by two items: recorded mileage and other adjustments in petitioner's favor in the amount of $5,785.00, and $23,578.00 for tax assessed after June 30, 1994, since the Division determined petitioner had not received proper notification of the audit period beyond that point (***see,*** Footnote 1). This resulted in FUT in issue in the amount of $63,656.00 (represented by $49,970.00 from the assessment of additional miles and $13,686.00 from MPG adjustments), plus penalty and interest.

2. Several consents extending the statute of limitations were executed during the audit, with the latest being executed on August 9, 1995, extending the time during which TMT and FUT could be assessed until March 31, 1996, for the period April 1, 1990 through March 31, 1994.[2]

3. Petitioner, a Pennsylvania corporation located in Allentown, Pennsylvania, was a motor carrier with operating authority from the Interstate Commerce Commission during the periods in issue. As pertinent to this matter, petitioner transported shipments to and from points in New York State primarily from its facilities in Allentown.

4. The notices sent to petitioner were issued as a result of an audit of petitioner's operations for the period in question, which was commenced in August 1994. Initially the auditors assigned to this matter were Robert Stewart and Dennis Williams, with the former being

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[2] Although the two notices of determination issued in this matter were within the time frame set forth by the consent extending the statute of limitations, the period for which tax was to be assessed was misstated as ending March 31, 1994, rather than June 30, 1994, as defined by the Division's appointment letter. The assessment for the period April 1, 1994 to June 30, 1994 will not be rendered invalid, however, since the statute of limitations is an affirmative defense which is deemed waived if not raised. In this case, neither party raised the mistake as an issue, and have continued to contest the assessment as though it extended to June 30, 1994 (***see***, ***Matter of Richards***, Tax Appeals Tribunal, December 3, 1991).

the principal auditor until he became ill, and subsequently retired. Mr. Stewart did not testify at the hearing.

The audit was commenced by the mailing of an appointment letter dated August 10, 1994, from Mr. Stewart to petitioner. The correspondence described the nature of the field audit which the Division was to conduct, i.e., a field audit of petitioner's New York State truck mileage and fuel use taxes (in addition to corporation franchise taxes, which are not the subject of this determination). The letter explained:

> Our audits are usually performed on a test period basis. Normally, the test period selected is a month or quarter within the last twelve months of the audit period. Although test period audits are usually conducted to facilitate the audit process, all books, records, worksheets, and other documents pertinent to the preparation of your tax returns, as well as all information requested on the attached sheet, are to be made available for the entire audit period.

The attached sheet indicated that the following books and records pertinent to the TMT and FUT examination should be available at the commencement of the audit:

> Truck Mileage and Fuel Use Taxes
> Tax Returns (MT-903's)
> Mileage records (I.C.C. logs, odometer readings, trip sheets)
> Fueling records (bulk fuelings, retail fuel receipts)
> Thruway receipts and statements

5. Petitioner's records were substantially available for the audit period, with the exception of some Interstate Commerce Commission ("ICC") logs, required by Federal regulations to be retained for a period of six months, and generally used to record mileage and other details about the trips taken by the truckers. Petitioner complied with the Federal requirement that logs be maintained for six months, but did not retain logs prior to that time. Although trip sheets, also called daily trip reports ("DTRs") were provided to the Division, in most cases there is additional detail contained in the logs which is not duplicated in the DTRs, such as intermediate destination

points, which is useful in the context of an audit of TMT and FUT where trips are replicated. Since the ICC logs are often referred to, periods where the logs no longer existed, and were not replaced with other detailed trip records, were unlikely candidates for audit. The Federal mandated logs for the test period which later became the subject of this audit, were available for the Division's review.[3]

6. In the early stage of the audit, which took approximately one week of field audit work, Mr. Stewart concluded that petitioner did not maintain complete records for the entire audit period, given the absence of logs or other similar detailed records of daily trips for most of the audit period, and a test period audit should be conducted. Once a decision is made to perform a test period audit, in the context of doing so, the Division does not review a taxpayer's records for the entire audit period. In this case, petitioner was not asked to consent to the test period audit; nor did petitioner execute any document which indicated such consent, such as Form AU 377.15, an audit method election form. The reasoning provided for not obtaining petitioner's consent to the test period was that it was unnecessary because petitioner's records for the entire audit period were not available.

7. When the Division chooses a test period, it attempts to choose a period which is representative of a typical time frame and within six months of the commencement of the audit when the driver's logs are more likely to be available. In this case, the test period April 1, 1994 through June 30, 1994 was chosen because all the records were available. Mr. Williams was not aware of any additional reason that was used in choosing the second quarter of 1994, whether such choice had any assurance of being a random selection, or whether it, in fact, represented a

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[3] During the hearing, there was some confusion as to whether the ICC or the Federal Highway Administration required the logs to be maintained. However, it was established that it was an arm of the Federal government which required the same, not New York State.

typical period. When a test period audit is performed, the Division concentrates on the test period. Accordingly, the auditor did not check actual trips for any period outside the test period. No error rate was calculated for other quarters in the audit period to determine whether the quarter chosen bore a similar error rate.

8. During the test period the Division does not audit all the units that operated during that time frame. Regarding the selection of unit trucks within the test period, the Division's auditor established that the trucks are chosen randomly, for example, every third or fifth unit is examined from a list provided a taxpayer. In general, there are no specific criteria, special standards or predetermined selection samples used in making the random selection. In this case, Mr. Stewart chose the random sample and Mr. Williams was not privy to the factors used by Mr. Stewart in making the random selection. The instructions provided Mr. Williams were to begin at one end of the list and Mr. Stewart would begin at the other, until the random selection led them to the middle of the list. In all, eight units were chosen to be audited.

9. In addition to owning its own vehicles, petitioner also had a relationship with two other trucking operations. Happiness Trucking, also owned by Mr. Schuck, operated its own vehicles which, for part of the audit period, were leased to petitioner. T&A Enterprises was a separate company with owners which did not include Kenneth Schuck. In the case of T&A, owner-operators leased their trucks to petitioner or carried loads for Mr. Schuck under a lease agreement. A sample lease agreement was contained in the audit file; however, Mr. Williams was not entirely familiar with its provisions.

Although Mr. Williams could not identify the number of vehicles that petitioner operated during any one quarter during the audit period, he was informed by petitioner that there were approximately 110 vehicles regularly at petitioner's place of business throughout the audit

period. Notes contained in the audit file indicated that petitioner had 55 company-owned units and 50 to 60 owner-operators. If an owner-operator purchases his own highway use permit from New York State, he may also be reporting miles for TMT and FUT purposes on his own company's returns. However, an owner-operator may also report such miles under the name of the company to whom he leased his truck, i.e., petitioner. In the early stages of the audit, there was no attempt by the Division to determine how the owner-operators handled the reporting of miles or which owners had their own permits. However, at some point later in the audit, admitting the importance of this information, the Division determined that some drivers had their own permits and others did not. Some time after the Division had completed its field audit work, the Division identified some of the owner-operators and further reviewed their records.

10. With respect to the entities Happiness and T&A, the Division could tie the miles driven into the returns filed. However, as to the trips run by owner-operators, the Division was unable to independently verify that the miles driven by the owner-operators were, in fact, reported on petitioner's returns.

11. During the audit, the Division would inform petitioner if additional records were needed to support petitioner's position. For example, when petitioner indicated that additional substantiation was available, petitioner was asked, at conferences held between the parties, to provide such documentation, i.e., additional Thruway receipts for trips. When the Division believed such documentation supported adjustments in petitioner's favor, such were made.

12. After the selection of the test period, the auditor randomly selected a unit (a particular truck cab) and using the corresponding driver logs, trip sheets, Thruway receipts, fuel receipts, and computer report, duplicated the trip. The sample of units to be tested was provided to Mr. Williams by Mr. Stewart. Mr. Williams was not provided any guidance as to the number of

vehicles that should be audited based on the size of the fleet, and did not refer to any information to define a valid random sample for the test period. The Division did not determine an error factor in the selection of the random fleet. Mr. Williams merely defined a "random sample" as one in which there is no systematic manner of being chosen, and was unaware whether a method was employed in the audit to insure randomness.

13. Mr. Williams performed the mapping of the trips and prepared Trip Summary 1 ("TS1"). In doing so, Mr. Williams used the Rand McNally Mile Maker computer software package ("Mile Maker") to compute the miles. The Division commonly uses software similar to Mile Maker to estimate mileage if proper records have not been maintained by a taxpayer. Using a AAA New York State map and Mile Maker, Mr. Williams verified the recording of the mileage of five units which were involved in transport during the test period. The mileage of the units examined pursuant to petitioner's mileage and fuel usage report for the test period was compared to the mileage of the units as computed by the auditor. The difference of the two amounts, divided by the miles reported by petitioner is referred to as the error rate, and in this case, was originally determined to be 38.41%. This error rate was then used to project additional miles for TMT and FUT for the audit period. The Division did not assign any type of variance factor to the error rate. Pursuant to discussions between petitioner and the Division, and in accordance with documentation provided by petitioner, adjustments to the TMT and FUT assessed eventually resulted in an error rate of 35.18%.

Mr. Stewart prepared Trip Summary 2 ("TS2"), concerning the mileage of three units, which set forth the origin of a trip, its destinations, toll receipts, and reported miles per the summary. In preparation of TS2, information obtained from petitioner's records was input directly into a computer, and no backup documentation was maintained in the audit file. Mr.

Williams continued the audit work performed by Mr. Stewart, and did not review the work Mr. Stewart had already performed. However, Mr. Williams was fully aware that Mr. Stewart prepared TS2 from the same type of documents used by Mr. Williams, even though he did not witness the preparation of each and every segment of the report.

A total of 8 units of 110 were initially examined in the two trip summaries prepared by the Division.[4] For six of these units, the Division could trace the mileage from petitioner's trip sheet to the computer summary used to prepare filed returns. In TS2, for unit #2600, the trip sheets showed 3,436 miles as summarized by the Division's auditor, compared to petitioner's computer record of 6,707. Likewise, also in TS2, for unit #578, the trip sheets resulted in 2,325 miles for the test period, compared to 3,564 miles on petitioner's computer summary. To petitioner's advantage, the Division used the lesser figures in its tax computation.

14. There is no particular State authority for determining miles in an audit of this type. Neither the AAA map nor the Mile Maker are official State approved means for measuring mileage, but in Mr. Williams's experience, they are commonly referred to in audits of this type. In this case these sources, in addition to petitioner's records, were referenced to compute mileage.

Concerning the calculations of the Mile Maker program, the Division was uncertain whether trailer height restrictions are programmed into Mile Maker so as to effect routing, and possibly the ultimate calculation of miles.

15. During the audit, it is not common for the auditor to question drivers, and likewise, Mr. Williams did not do so in this case. If the information the auditor obtains from the taxpayer

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[4] It was disclosed during the hearing that two vehicles were ultimately deleted from the test period audit. Such trucks were leased to petitioner and driven by George Kester and Elmer Kennedy as owner-operators.

is absent significant detail, the auditor will use a source such as Mile Maker, and not generally contact a driver to ascertain the route of a particular trip. He generally does not check another period for a similar trip, or check another truck driven in the same period. However, if a toll receipt is presented as part of a taxpayer's records, the auditor would attempt to force the trip through the tunnel or over the road represented by the toll receipt. Although each toll receipt is not photocopied so as to become a part of the auditor's file, the auditor takes the information from the receipt and incorporates it into his findings pertinent to the route taken.

16. James Hamersly, an employee of petitioner who provided testimony at the hearing, established that he was clearly able to drive petitioner's tractor trailers through New York City tunnels, and regularly went to Long Island City through the Holland Tunnel. This was contrary to the route used by Mr. Williams to calculate the mileage using the Mile Maker program which does not generally route through tunnels.

Mr. Hamersly also provided an explanation of the trucking documentation and described how a truck driver was compensated for his runs. Ultimately, as a result of the testimony presented by Mr. Hamersly, the Division agreed to reduce the overall additional mileage it had estimated, and the resulting additional taxes.

17. The Division was unable to identify any published guideline, State statute or regulation that describes the criteria for choosing a typical audit period or sample from such period. Although petitioner claims there were 60 owner-operators, the Division was aware of approximately 26 from a list prepared during the audit. The Division chose to spot check the records and reviewed the records of eight owner-operators, to determine if they paid TMT. There was no statistical reason provided as to why the TMT of only eight drivers was verified.

Concerning the sample of vehicles, the auditor could not verify that 8 units out of approximately 110 vehicles or the number of audited miles represented a valid sample, or when a sample might be deemed too large. There was no attempt to verify whether the sample was representative of a fleet which made some long trips and some short trips. The Division did not verify whether the runs went from petitioner's New Jersey terminal to points in New York. The Division was unaware of what percentage of the trucks based in Allentown traveled into upstate New York, and what percentage traveled into New York City. Mr. Williams does not believe that the sample chosen for the quarter was necessarily representative of the entire fleet for that quarter, and he does not believe the error rate, as originally calculated was 100% accurate. There was no additional testing of such accuracy and no additional error rates were calculated.

18. Dr. Craig Moore, an economistician, whose academic strengths are in the fields of economics and statistics, provided expert testimony concerning random samples, and their significance, in support of petitioner's position. He established that underlying the theory of sampling accuracy is randomness, i.e., that each unit in the population about which estimates are being made must have an equal chance of being selected. He established that the method chosen by the Division to audit the vehicles was not a random sample, but rather represented a systematic sample which, by definition, means a sample where the population does not have an equal chance of being selected. Dr. Moore concluded that the sample of vehicles used was not a reasonably accurate sample, and that the error factor, if calculated, would be so large as to render the estimate unreliable.

In addition, Dr. Moore determined that the selection method (the test period) used for the audit was unreliable and not a professionally acceptable practice. He claims that in order to choose one quarter and draw an inference from that quarter and apply it to 19 or 20 additional

quarters, the latter would have to be very similar to the chosen quarter. He stated that a person cannot go back in time three years or project into the future without creating a statistical problem. If a person is not using data that is associated with the time period for which a projection is being made, forecasting into a future area without data runs a high risk of invalidity. He concluded by stating that, in this case, data existed over the 20 quarters of the audit period, and if there had been an adequate sample of that data, done in a proper way and with an appropriate sample size, the Division could have drawn an accurate inference. However, that is not what was done in this case.

19. Although the Division was aware of Dr. Moore's testimony, and did not believe it to be incorrect, the Division was not inclined to make any changes to the audit on the basis of such testimony, and maintained that the test period audit was adequate to properly project the liability of other quarters.

20. TMT payment information pertaining to the quarters in issue, for which petitioner was given credit, was acquired by the Division from the Highway Use Tax Returns (Forms MT-903) for each of the three entities: petitioner, Happiness and T&A. FUT mileage information and FUT payment information were also acquired by the Division from the Highway Use Tax Returns (Forms MT-903) for each of the three entities: petitioner, Happiness and T&A.

Although some owner-operators had filed returns, initially petitioner was given no credit for such taxes because it was unclear whether the Division was assessing for trips that had also been reported by the owner-operators. During the hearing, two owner-operators (Mr. Kester and Mr. Kennedy) provided testimony which resulted in positive adjustments for petitioner. Although the Division did not initiate an attempt to reconcile all owner-operated returns with trips reported by petitioner, petitioner was given credit where any duplication could be shown.

21. In computing the TMT due, the Division started with petitioner's tax returns for the quarters in issue. Pursuant to Mr. Williams's testimony, mileage information for the 4th quarter of 1990 was unavailable, so an interpolation of the four quarters on either side of that quarter was done to estimate the mileage for that quarter. The Division did not attempt to determine if petitioner was traveling more or fewer miles in New York State for such quarters.

22. Petitioner's mileage and fuel usage report for the test period, which the Division reviewed for the recording of petitioner's truck mileage, showed MPG (miles per gallon) at 5.66 for each truck. It is unclear why this internal report had the same mileage listed for each vehicle. However, when petitioner filed its returns, it showed MPG calculated out to two decimal places, ranging from 3.62 MPG to 7.59 MPG. Archer Knight, an employee and truck driver for petitioner established that in 1994 his truck, new to him April 1, 1994, obtained between 6.6 and 6.8 MPG, higher than his previous vehicle, which was estimated at 5.4 to 5.5 MPG. He cited better fuel efficiency in the newer vehicle.

23. One portion of the FUT assessment is based upon an adjustment concerning miles per gallon. On its FUT returns, petitioner reported MPG factors over the audit period that ranged from 3.62 to 7.59 MPG, based on its business records. During the audit, for any factor over 5.00 MPG, the auditor reduced it to 5.00 and asserted additional FUT for the period, without any apparent consultation with petitioner. For any MPG factor under 5.00, the Division accepted petitioner's records. The reason provided by the Division for the adjustment of MPG's over 5.00, was that such MPG's were large variances over petitioner's normal MPG's, and the adjustment was intended to cure such lack of consistency. In making such adjustment, no consideration was given to current engine manufacturers' information on MPG, the model, make or year of the trucks comprising petitioner's fleet for any portion of the audit period, and whether

the recorded mileage was within a predicted range suggested by the manufacturer as appropriate to that vehicle. The Division did not discern whether there was a difference between the T&A fleet and petitioner's fleet, and whether the composition of any of these fleets had changed during the audit period, or between certain quarters. Mr. Williams did not consider the effect of truck load weight differentials on MPG, or that weather conditions and the time of year could have an effect on the MPG. The auditor did not place any significance upon, or question the fact that from the first quarter to the second quarter during each of the years 1992, 1993 and 1994, there was a significant increase in the overall miles recorded by petitioner (between 67,000 and 127,000 additional miles). Although agreeing that certain of the MPG's over 5.00 were reasonable, Mr. Williams still believed that only 5.00 MPG should be allowed.

24. Rita Tatasciore, petitioner's bookkeeper, provided testimony on petitioner's behalf concerning how information is transmitted from the truck drivers to form the basis for reporting purposes. When a driver returned from a trip, he gave the paperwork for the trip to an employee named Bonnie in petitioner's office. Such paperwork included the driver's delivery receipt, his logs, any mileage reports, and any fuel, toll or other receipts he accumulated during the trip. Bonnie entered the information into the computer for the driver's payroll and for billing purposes, then forwarded the documents to Karen Reeve who checked the logs, and made any corrections before returning them to the drivers. Additionally, Ms. Reeve took the information provided by the drivers and entered the mileage amounts into the computer on the basis of the route traveled and the milage recorded in each state. The drivers based their milage on the direction and route traveled to get to their assigned destination. In the event a driver was on the road for an extended period or not able to drop off his paperwork in the office, petitioner would hold open the reporting for a particular month until approximately the 15th day of the following

month in order to associate the milage recorded by the drivers with the month in which the work was performed, even though sometimes the miles were included in a subsequent period. The gallons of fuel purchased were entered into the computer from fuel purchase receipts.

25. Petitioner's mileage and fuel usage report, a computerized compilation of driver data, for the period April 1, 1994 to June 30, 1994 showed 1,552.83 gallons of fuel purchased in New York. Petitioner's filed form MT-903, combined Truck Mileage and Fuel Use Tax Return shows 717 gallons for the same quarter. Ms. Tatasciore was unable to provide an explanation as to why there was a discrepancy in the reported difference. However, petitioner believes it is entitled to a credit for such difference.

26. Petitioner and the Division met to discuss this case and review documents on three occasions: May 16, 1995, June 20, 1995 and August 9, 1995. Additional file boxes of petitioner's records were presented; however, the auditor did not review them, stating that he was informed that the content was substantially the same as records shown to the auditors on previous occasions.

Throughout the hearing, there was a contradiction in the testimony concerning whether the Division was willing to revise audit amounts as petitioner supported its position with documents and explanations. Ms. Tatasciore indicated that, on several occasions during the audit, she met with John Butkins (Mr. Williams's superior) and Mr. Williams in their Syracuse office to offer petitioner's paperwork for their review. Although he reviewed a few envelopes of petitioner's paperwork, Mr. Butkins was unwilling to go through the six file boxes of petitioner's documentation, even though Ms. Tatasciore offered to stay several days to tend to the audit. The boxes contained fuel receipts and the drivers' paperwork sorted by trip, and were delivered to the Division by petitioner in response to the Division's request for more information. However, at

the hearing Mr. Williams made numerous adjustments requiring lengthy calculations when provided with documentation and testimony which contradicted the Division's findings, or clarified petitioner's position.

27. A conciliation conference was conducted in this matter on June 2, 1997. Conciliation Order No.155515, dated September 12, 1997, sustained the statutory notices. A timely petition was filed with the Division of Tax Appeals protesting the notices of determination in issue.

28. Petitioner submitted 260 proposed findings of fact. Pertinent facts have been accepted as supported by the record and incorporated into this determination. However, the following facts have been omitted in whole or part for the following reasons:

* Finding of Facts #3, 9, 37, 219, 221, and 258 were not incorporated into this determination as they were not found to be a proper reflection of the record.

*Findings of Facts #7, 12, 49, 50, 87, 117, 130, 182, 211, 213, 222, 234, and 235 were modified in form or content and incorporated into this determination as properly reflected by the record.

*Findings of Facts #27, 31-36, 140-143, 147, 151-152, 156-158, 165-169, 178-181, 183, 200, 204, 207, 210, 217, 224-227, 229-232, 241, 244, 256, 259 are deemed extraneous information.

*Findings of Facts #40, 42, 85, 107, 110, 154, 160, 163, 164, and 176 are deemed redundant and incorporated into the determination in another form.

*Findings of Fact #51, 75, 78, 184, 185, 190, 192, 193, 206, and 214 are deemed irrelevant information.

*Findings of Fact #80 and 106 are deemed to be facts derived from statements taken out of context and distorted in a way that they do not accurately represent the record.

*Findings of Fact #233, 245 and 246 are deemed conclusory.

SUMMARY OF THE PARTIES' POSITIONS

29. In challenging the propriety of the test period audit, petitioner maintains the following positions:

a) Petitioner asserts that the test period audit was inappropriate, particularly since petitioner did not consent, and had available for review by the Division its books and records for the audit period;

b) Petitioner maintains that it was error to project the results of the test period over all the quarters of the audit period, since it is statistically unreliable;

c) Petitioner argues that an audit of 6 vehicles of 110 is an invalid sample upon which to project the liability in the case;

d) Petitioner asserts that the test quarter chosen does not represent a random selection of the periods which comprised the audit period;

e) Petitioner believes it was improper on the part of the Division to refuse to review petitioner's boxes of records at the numerous courtesy conferences.

Petitioner lastly argues that the assessment of TMT and FUT is a violation of the Commerce Clause of the United States Constitution, because the tax is an unlawful burden on interstate commerce, and the State has already met its revenue needs by the collection of Thruway tolls.

30. The Division maintains that the bulk of the TMT assessment in issue is based on petitioner's own self-assessment from the filing of its FUT returns. The remaining TMT assessed was attributable to additional miles calculated from the test period audit, which was a proper method, inasmuch as petitioner did not have complete records for the entire audit period, thereby permitting the Division to resort to an estimation. The greatest portion of FUT assessed is also based upon the additional miles calculated from the test period audit. The remaining FUT was assessed as the result of a miles-per-gallon adjustment calculated during the audit. With

respect to each of the calculations, the Division asserts that the estimation method employed in this matter was in all respects proper.

Finally, the Division argues that the Division of Tax Appeals has no jurisdiction to rule on the facial constitutionality of a taxing statute.

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 State 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. The statute provides for a credit on fuel purchased in New York State but used outside the State (Tax Law § 503-a[3]).

B. 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 (emphasis supplied).

Additionally, regulations promulgated pursuant to Tax Law § 507 further delineate records required under this section (***see***, 20 NYCRR parts 483, 493). In particular, 20 NYCRR 483.4 states in pertinent part:

> Every carrier reporting either under the gross weight or unloaded weight method shall keep available odometer, hubometer and any similar readings, fuel consumption records, map mileage from the point of origin to the point of destination, or tariff schedules or record of mileage used for billing purposes and used to compute the actual taxable mileage which is taxable under article 21 of the Tax Law. The mileage shown in the daily mileage, manifest or trip records, or any other more accurate record for each vehicle, must be the actual mileage traveled and shall be totaled at the end of each month.

C. The court in ***Lionel Leasing Industries Co., Inc. v. State Tax Commn.*** (105 AD2d 581, 481 NYS2d 520, 523) provided the following guidance concerning the audit standards that must be met:

> Where the taxpayer's records [as required under Article 21] contain substantial discrepancies and there are inadequate or no records, it is impossible to determine petitioner's tax liability without resort to outside indices. The department is required to then select a method of audit reasonably calculated to reflect the taxes due. Petitioner must by clear and convincing evidence demonstrate that the method or the tax was erroneous (***Matter of Urban Liquors v. State Tax Comm.***, 90 AD2d 576, 577, 456 NYS2d 138). Where the taxpayer's recordkeeping is faulty, exactness is not required of the audit, nor is an item by item analysis necessary (***Matter of Korba v. New York State Tax Comm.,*** 84 AD2d 655, 656, 444 NYS2d 312, [***lv denied*** 56 NY2d 502, 450 NYS2d 1023]). The legislative intent in imposing the highway use tax was to equitably spread the cost of highway maintenance in proportion to the wear and damage caused by the weighted vehicle (***Matter of Consolidated Freightways Corp. Of Del. V. Tully***, 89 AD2d 270, 272, 456 NYS2d 457, ***affd*** 59 NY2d 897, 466 NYS2d 317).

D. Pursuant to the court's decision in ***Lionel Leasing (supra)***, the Division is required to determine a taxpayer's highway use tax liability based upon the taxpayer's records unless those records are inadequate. The court thus applied sales tax audit principles to audits conducted under Article 21, as evidenced by the sales tax cases***, Korba*** and ***Urban Liquors***, cited by the court in ***Lionel Leasing***. It is appropriate, therefore, to apply the principles governing sales tax audit procedures to the instant matter.

In ***Matter of Chartair v. State Tax Commn.*** (65 AD2d 44, 411 NYS2d 41), the court stated:

> Although there is statutory authority for the use of a 'test period' to determine the amount of tax due when a filed return is incorrect or insufficient (Tax Law § 1138, subd. [a]), resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit (citations omitted). However, if records are available from which the exact amount of tax can be determined, the estimate procedures adopted by the respondent become arbitrary and capricious and lack a rational basis (citation omitted). (***Id.***, 411 NYS2d at 43).

Because the statutory authority to determine a taxpayer's (sales tax) liability by estimate procedures rests upon a finding that the taxpayer's books and records are inadequate to conduct a complete audit, the Division is required to first request (***Matter of Christ Cella v. State Tax Commn.***, 102 AD2d 352, 477 NYS2d 858, 859) and thoroughly examine (***Matter of King Crab Rest. v. State Tax Commn.***, 134 AD2d 51, 522 NYS2d 978, 979-980) the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, 828, ***lv denied*** 71 NY2d 806, 530 NYS2d 109), in order to determine from verification drawn independently from within these records whether they are sufficient to support a complete audit (***Matter of Meyer v. State Tax Commn.***, 61 AD2d 223, 402 NYS2d 74, 76, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025). If the Division's examination establishes that the taxpayer's records are adequate and complete, the taxpayer is entitled to have its assessment calculated based upon a detailed audit of those records (***Matter of James G. Kennedy & Co. v. Chu,*** 125 AD2D 773, 509 NYS2d 199; ***Matter of Allied New York Services v. Tully***, 83 AD2d 727, 442 NYS2d 624; ***Matter of Names in the News v. State Tax Commn.,*** 75 AD2d 145, 429 NYS2d 755, 756; ***Matter of Chartair v. State Tax Commn., supra***). When the taxpayer's records are incomplete and unreliable for determining accurate sales, the Division may resort to a test-period audit using external indices (***Matter of Skiadas v. State Tax Commn.,*** 95 AD2d 971, 464 NYS2d 304, 305; ***Matter of Urban Liqs. v. State Tax Commn***., 90 AD2d 576, 456 NYS2d

138, 139; ***Matter of Hanratty's/732 Amsterdam Tavern v. New York State Tax Commn.***, 88 AD2d 1028, 451 NYS2d 900, 902, ***appeal dismissed*** 57 NY2d 954, 457 NYS2d 1028; ***Matter of Korba v. New York State Tax Commn.***, ***supra***).

A petitioner challenging a validly issued notice of determination bears the burden of demonstrating error in either the audit method or audit results (***Matter of A & J Gifts Shop v. Chu,*** 145 AD2d 877, 536 NYS2d 209, ***lv denied*** 74 NY2d 603, 542 NYS2d 518). Where the petitioner carries this burden by showing the audit method adopted by the Division lacks a rational basis, the petitioner need not prove the exact amount of the over assessment ***(e.g., Matter of Adamides v. Chu, supra*** [where a portion of the assessment was canceled because the Division did not request records for that period of the audit]; ***Matter of King Crab Rest. v. State Tax Commn., supra*** [where the court canceled an entire assessment on the ground that the auditor had not made a sufficient investigation of the records to justify his conclusion that the records were inadequate to support a complete audit]; ***Matter of Mohawk Airlines v. Tully***, 75 AD2d 249, 429 NYS2d 759 [where the court held that in the face of complete and adequate records the use of estimating procedures to calculate the assessment is arbitrary and capricious]; ***see also, Matter of Spallina***, Tax Appeals Tribunal, February 27, 1992 [where the Tribunal stated that a taxpayer who demonstrates a fundamental error in the audit methodology has carried her burden of proof and need not prove the exact amount of the over assessment]). Under the rule first enunciated in ***Chartair***, a taxpayer may prove that an audit method was not "reasonably calculated to reflect the tax due" (***Matter of W.T. Grant v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869) by showing that records were made available from which the exact amount of tax could have been determined and the Division nonetheless resorted to an indirect audit method (***Matter of Chartair v. State Tax Commn., supra***, 411 NYS2d at 43).

E. The TMT assessed herein is made up of two primary components: the first is a self-assessed portion which resulted from petitioner's failure to properly complete its TMT and FUT returns, where the mileage which was used in the calculation of TMT was reported for purposes of FUT, but not the former. Although petitioner asserts that the TMT was paid at the time of the filing of the returns, a review of the combined truck mileage and fuel use tax returns covering the audit period and filed by petitioner show either an incomplete calculation of TMT that petitioner neglected to add to the separate calculation of FUT, or a nonexistent calculation of TMT. Petitioner has not carried its burden of proving it made such payments, or that such payments were made on its behalf. Thus, this portion of the assessment ($187,646.00) stands. The second component of the TMT assessed is $54,528.00 resulting from the audit results of the test period audit, after adjustments referred to in Finding of Fact "1". A discussion of the issues concerning the test period audit follow.

In this case, the audit was commenced by the mailing of an appointment letter which set forth specifically the records which petitioner needed to produce for review by the Division. One of the critical items needed in an audit of this type was daily records of mileage traveled within the State. This information was not contained in the daily trip reports in enough detail for the Division to calculate the TMT and FUT which petitioner was obligated to pay. Thus, the Division requested a record which it knows must be maintained under Federal regulations, petitioner's ICC travel logs. According to representations made by petitioner and its representatives, the logs were available only for approximately 6 months prior to the commencement of the audit in August 1994, which meets the Federal requirements. There is no statute or regulation of New York State that requires the ICC logs be kept by a taxpayer. However, Tax Law § 507 states specifically that records which show miles traveled by a motor

carrier on a daily basis must be maintained by such company for four years. A taxpayer operating as a motor carrier must be prepared to calculate actual miles traveled. 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 (***see, Lionel Leasing Industries Co., Inc. v. State Tax Commn., supra*** at 523). Thus, the Division correctly determined that without the logs or other record of the mileage details that form the basis of the tax in this case, the Division could not have computed the tax due. Given such information, it was not necessary for the Division to conduct a further examination of every component of petitioner's books and records for the entire audit period, only to then reach the same conclusion: petitioner's records were not sufficiently maintained to conduct a complete audit and compute the proper TMT and FUT due.

The Division cannot simply ignore a taxpayer's records and use an indirect method of estimating tax due if the taxpayer's records are readily available and provide an adequate basis on which to determine the amount of tax due (***Matter of Christ Cella, Inc. v. State Tax Commn., supra***; ***Matter of Chartair, Inc. v. State Tax Commn., supra***). However, in this case, the Division was justified in resorting to a test period audit, and given the insufficiency of records for the entire audit period, was not required to obtain petitioner's consent to do so. The Division simply chose to exercise its statutory authority to conduct a test period audit, well accepted under sales tax guidelines. Despite its authority to resort to an estimated method to compute the tax, the Division has a duty which requires it to select an audit method reasonably calculated to reflect tax due. There is no presumption of correctness that attaches to the audit unless there is an initial showing that the methodology selected was reasonably calculated to reflect the tax due (***Matter of Fashana,*** Tax Appeals Tribunal, September 21, 1989). "[C]onsiderable latitude is

given an auditor's method of estimating sales under such circumstances as exist" in each case; however, certain limitations have been placed on this principle (***Matter of Basileo,*** Tax Appeals Tribunal, May 9, 1991, ***quoting Matter of Grecian Sq. v. New York State Tax Commn***., 119 AD2d 948, 501 NYS2d 219, 221). Although exactness in the outcome of the audit method is not required (***Matter of Markowitz v. State Tax Commn***., 54 AD2d 1023, 388 NYS2d 176, 177, ***affd*** 44 NY2d 684, 405 NYS2d 454; ***Matter of Lefkowitz***, Tax Appeals Tribunal, May 3, 1990; ***see, Matter of Pizza Works***, Tax Appeals Tribunal, March 21, 1991), the record nonetheless must contain sufficient evidence to allow the trier of fact to determine whether the audit had a rational basis (***Matter of Basileo, supra, citing, Matter of Grecian Sq. v. New York State Tax Commn., supra; see, Matter of Fokos Lounge***, Tax Appeals Tribunal, March 7, 1991; ***Matter of Fortunato***, Tax Appeals Tribunal, February 22, 1990); that is, the record must contain certain specific information identifying the external index if one is employed by the Division in estimating the taxpayer's liability (***Matter of Fashana, supra***). Once this threshold determination is made, the burden then rests upon petitioner to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (***Matter of Meskouris Bros. v. Chu,*** 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451, 452).

The Division purposefully chose a quarter within the audit period for which petitioner had complete records, including its logs, so that the audit results would have as its basis petitioner's own records. Tax quarters further into the past did not have the same available information. Petitioner argues that from a statistical perspective, the Division's methodology is unreliable and invalid. In support of petitioner's position, it introduced the testimony of Dr. Moore, whose view was expressed on a pure statistical analysis. Dr. Moore concluded that the method used by the

Division would produce an unreliable result. However, petitioner did not offer what result should be reached in the absence of its own retention of proper records. The primary difference between a test period audit and a statistical sampling audit is that the test period audit generally involves the testing of all records within a portion of an abbreviated audit period, while the statistical method samples randomly-selected items from the entire audit period (***see, Matter of Marine Midland***, Tax Appeals Tribunal, May 13, 1993). Since there were critical records missing from prior quarters pertaining to mileage calculations, a statistical sampling in this particular case would clearly leave the door open for inconsistency and a potentially less reliable result. Had petitioner's records been complete, then the two methods begin from an equal position. However, such was not the case. Furthermore, the factors which are relied upon by Dr. Moore as an economistician are not necessarily significant in the analysis of tax matters and audit principles. Thus, it is concluded that the test period chosen was the best available choice to project the tax liability over the audit period, absent proof by petitioner that it was not representative of a typical period.

Within the test period a random number of vehicles was chosen to be reviewed in detail. Petitioner maintains that the number of vehicles tested was too small, and that the result is therefore invalid. Where record keeping is inadequate, exactness is not required in the audit result. Petitioner has the difficult burden of proving error in the assessment (***see, Lionel Leasing, supra***) and must advance more than mere criticism of the Division's audit methodology to prevail on this point.

Although petitioner advanced the argument that the test period results should be reduced by a credit due to Schuck for an underreporting of fuel purchases, petitioner was unable to explain the discrepancy between its records and the lower reported amount. Absent substantiation of

entitlement to the credit, petitioner's argument in this regard is without merit. In all cases, where petitioner was able to show the Division that mileage should be adjusted in petitioner's favor due to facts which differed from the Division's assumptions, such adjustments were made. Accordingly, the additional TMT in the amount of $54,528.00, and FUT in the amount of $49,970.00 resulting from the test period audit, after adjustments described in Finding of Fact "1", are upheld.

F. The FUT assessment is made up two components: $49,970.00 resulting from the test period audit adjustment and $13,686.00 from MPG adjustments (which decreased MPGs, thereby increasing the amount of fuel required to be used for the same number of miles, resulting in additional FUT). The Division adjusted petitioner's calculation of MPG as reported on its returns if the MPG was over 5.00, claiming reliance on Tax Law § 503-a(2) and 20 NYCRR former 491.3, which state in relevant part:

> Where the records of any carrier are inadequate or incomplete the vehicular units of a carrier filing returns shall be deemed to have consumed, on the average, one gallon of diesel motor fuel for every four miles traveled or one gallon of motor fuel for every three miles traveled unless substantial evidence discloses that a different amount was consumed.

Petitioner takes issue with the Division's estimate of MPGs for numerous reasons (***see***, Findings of Fact "22 " and "23"), all of which are valid, especially in light of three facts: though claiming to rely upon Tax Law § 503-a(2) and 20 NYCRR former 491.3, the Division does not follow the statutory or regulatory provision and arbitrarily chose 5.00 as the MPG; secondly, the Division chose to adjust petitioner's records, claiming inadequacy, only if the MPG was over 5.00, and accepted petitioner's records as valid if under 5.00; and lastly, the credible testimony of Mr. Knight established that with newer, more fuel economical trucks, the mileage was in fact greater, and more in line with petitioner's reporting. The Division could not respond in a

meaningful way to the numerous issues raised by petitioner concerning how the 5.00 MPG was determined, or whether certain factors had been considered, in order to assess whether it had a meaningful basis. The Division did not uniformly make such adjustment. Additionally, the testimony presented a basis to consider the reported MPGs valid amounts. If the Division, through witnesses or documents, is unable to respond meaningfully to inquiries concerning the nature of the audit performed, it may be found that a taxpayer has been deprived of an opportunity to meet his or her burden of proving that the audit methodology is unreasonable (***Matter of Basileo, supra, citing Matter of Fokos Lounge, supra***). I believe such is the case here, and, thus, it is determined that the portion of the FUT assessed due to MPG adjustments in the amount of $13,686.00 is canceled.

G. Petitioner's final argument is that an assessment of TMT and FUT is a violation of the Commerce Clause of United States Constitution, as an unlawful burden on interstate commerce, since the State already has the revenue it needs through tolls imposed on vehicles using its roads.

The Division of Tax Appeals does not have the jurisdiction to address petitioner's constitutional claims. At the administrative level, it is presumed that statutes are constitutional (***Matter of Bucherer, Inc.,*** Tax Appeals Tribunal, June 28, 1990). Although the Division of Tax Appeals may determine whether tax law statutes are constitutional as applied (***see, Matter of David Hazan, Inc.,*** Tax Appeals Tribunal, April 21, 1988, ***confirmed***, 152 AD2d 765, 543 NYS2d 545, ***affd*** 75 NY2d 989, 557 NYS2d 306), its scope of review does not extend to determining the facial constitutionality of the statutes (***Matter of J.C. Penney Co., Inc.***, Tax Appeals Tribunal, April 27, 1989; ***Matter of Fourth Day Enterprises***, Tax Appeals Tribunal, October 27, 1988). Here, petitioner frames its argument in terms of the statute itself being

unconstitutional. Clearly, the Division of Tax Appeals has no jurisdiction to address petitioner's constitutional claim.

H. The petition of Kenneth Schuck Trucking, Inc. is granted to the extent indicated in Conclusion of Law "F". In accordance therewith, the Division is directed to cancel the assessments of FUT based upon the MPG adjustments for the period April 1, 1990 through June 30, 1994. The petition is in all other respects denied. The assessments dated January 29, 1996 are otherwise hereby sustained with respect to the period April 1, 1990 through June 30, 1994, respecting the adjustments noted in Finding of Fact "1".

DATED: Troy, New York
January 13, 2000

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE