STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JEWELL TRANSPORT, INC.	:	SMALL CLAIMS DETERMINATION DTA NO. 820663
for Revision of a Determination or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period September 1, 1999 through June 30, 2003.	:	

Petitioner, Jewell Transport, Inc., 166 Route 120, Plainfield, New Hampshire 03781, 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 September 1, 1999 through June 30, 2003.

A small claims hearing was held before Dennis M. Galliher, Presiding Officer, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 10, 2006 at 9:15 A.M., which date began the three-month period for the issuance of this determination. Petitioner appeared by Judith Belyea, Vice-President. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Joseph DiGaudio).

ISSUE

Whether the Division of Taxation properly determined additional highway use tax due from petitioner based upon the weights of petitioner's vehicles as reflected on highway use tax permits issued to and held by petitioner during the period in issue.

FINDINGS OF FACT

1. Petitioner, Jewell Transport, Inc. ("Jewell"), was incorporated in 1980 and is engaged in the trucking and hauling business, operating a fleet of tractors and trailers carrying goods throughout the country including over the public roads of New York State. It is undisputed that Jewell is subject to the highway use tax imposed pursuant to Tax Law Article 21, and is required to file a monthly Highway Use Tax Return (Form MT-903). The Instructions for Form MT-903 (Form MT-903-I) specify that in preparing its return, the carrier is to *enter the gross weight shown on the highway use tax permit for each vehicle*.

2. On May 20, 2004, following an audit, the Division of Taxation ("Division") issued to Jewell a Notice of Determination assessing additional highway use tax due for the period September 1, 1999 through June 30, 2003 in the amount of $18,646.67 plus interest. Penalty was not assessed against petitioner.

3. The Division's auditor reviewed each of the highway use tax permits issued to petitioner at the time of the audit. These permits reflected, for each vehicle, the specific permit number, vehicle identification number, vehicle year, type of fuel (gas or diesel), category (truck or tractor), unloaded weight and gross vehicle weight. The auditor calculated petitioner's highway use tax liability utilizing the tax rate determined to be applicable based on the gross vehicle weight for each of the vehicles as set forth on each particular vehicle's permit.

4. In this instance, permit gross vehicle weights for some of petitioner's vehicles exceeded the 80,000 pound gross vehicle weight petitioner had utilized in calculating its liability and filing its highway use tax returns. Specifically, the permit gross vehicle weight for some of petitioner's vehicles was 99,000 pounds, and for other vehicles was 107,000 pounds. Such higher gross vehicle weights carry higher highway use tax rates, and as a result, the Division's

auditor utilized such higher rates in computing the amount of additional highway use tax due as set forth on the Notice of Determination issued to petitioner.[1]

5. In August 2000, petitioner had filed a letter with the Division requesting a change increasing the maximum gross weight on 17 of its vehicles from 80,000 pounds to 99,000 pounds. In September 2000, petitioner filed a second letter with the Division requesting a change increasing the maximum gross weight on 17 of its vehicles from 80,000 pounds to 107,000 pounds.[2] Petitioner explained that these requests were made in order that petitioner could then apply to obtain overweight permits from the New York State Department of Transportation ("DOT"). Petitioner needed DOT overweight permits in order to haul loads in excess of 80,000 pounds for a particular customer in New York State.

6. There is no dispute that the requested weight changes were granted by the Division and that amended highway use tax permits were issued. However, according to petitioner, it only was able to obtain two overweight permits from the DOT. The record includes copies of two DOT "Divisible Load Weight Permits" issued to petitioner. Permit number 75306 pertains to a 1997 Peterbilt tractor and allows a maximum gross weight of 99,000 pounds, while permit number 75307 pertains to a 2000 Kenworth tractor and also allows a maximum gross weight of 99,000 pounds. Petitioner stated that it was unaware there were a limited number of DOT overweight permits available, and alluded to a "lottery" selection system in the awarding of

---

[1] The specific audit method and calculations, and the dollar amount of tax determined therefrom are not in dispute, but rather the only question is whether the Division properly utilized the gross vehicle weights and resulting tax rates based on the highway use tax permits held by petitioner, as described.

[2] The 99,000 pound vehicles apparently involved two-axle trailers, while the 107,000 pound vehicles involved three-axle trailers.

overweight permits by DOT as the reason why it was unable to obtain the permits requested for all of its vehicles.[3]

7. The two DOT permits issued to petitioner and included in the record reflect an expiration date of September 12, 2001. Petitioner explained that the customer for whom it anticipated hauling the larger loads experienced a labor strike and subsequent shutdown in or about April 2001, the result of which was that petitioner did not provide the hauling services it had anticipated for this customer, nor, allegedly, did petitioner provide any overweight (i.e., in excess of 80,000 pounds) hauling for any other customers in New York State during the audit period in issue. Petitioner noted that it did not renew the two permits it received from the DOT upon their expiration in September 2001.

8. Petitioner did not request the Division to change the gross vehicle weights on its highway use tax permits until the audit at issue occurred and resulted in the assessment of additional tax based on the weight amounts set forth on petitioner's highway use tax permits. In response to the audit result, petitioner issued a letter to the Division on December 29, 2003 which provided as follows:

> Please find enclosed a list of Highway Use Permits currently held by this company.
>
> We were told we had to register these vehicles with weight gross of 107,000 lbs. in order to obtain DOT overweight permits. As of this date we were not selected to receive overweight permits.

---

[3] Vehicle and Traffic Law § 385(15)(b) and (f) addresses the issuance of overweight permits by the DOT, the specific total number of such annual permits which may be issued by the DOT, and provides in connection therewith as follows:

> Whenever permit application requests exceed permit availability, the department shall renew annual permits that have been expired for less than four years which meet program requirements, and then shall issue permit applicants having less than three divisible load permits such additional permits as the applicant may request, providing that the total of existing and new permits does not exceed three. Remaining permits shall be allocated by lottery in accordance with procedures established by the commissioner in rules and regulations.

We hereby request that new permits be issued with the correct weights on all permits as follows:

Unload weight 18,000 Gross Weight 80,000

SUMMARY OF PETITIONER'S POSITION

9. Petitioner states that although its highway use tax permits reflect permitted gross vehicle weights in excess of 80,000 pounds, it never in fact carried any overweight loads. In this regard, petitioner points out that it only received the two DOT permits described above and notes the labor strike and shutdown experienced by the particular customer for whom petitioner anticipated carrying such loads. Petitioner acknowledges that it did not change the permit weight amounts until after the audit and issuance of the subject Notice of Determination.

CONCLUSIONS OF LAW

A. Tax Law § 503 imposes a tax, known as the highway use tax, for the privilege of operating any vehicular unit (as defined at Tax Law § 501[1][c][3]) upon the public highways of New York State. This tax is a "weight-distance" tax, imposed and computed based upon the mileage traveled on New York State public highways at a tax rate determined by the gross weight of the vehicular unit.

B. The "gross weight" of a vehicular unit is the heaviest weight at which such unit is or will be operated on New York State public highways, whether alone or in combination with a trailer or other attached device. The gross weight must take into account the unloaded weight of the truck or tractor, and the heaviest combined weight of the trailer or other attached device and the weight of the maximum load to be carried (Tax Law § 501[4]).

C. Before operating a motor vehicle on New York State's public highways, a carrier must obtain a highway use tax permit and sticker for each vehicular unit based on and reflecting the maximum gross weight of each such vehicular unit (Tax Law § 502; 20 NYCRR 472.1[b]).

Regulations of the Commissioner of Taxation at 20 NYCRR 472.1(b), addressing the maximum gross weight of a motor vehicle, provide as follow:

> The *maximum gross weight* of the motor vehicle is the unloaded weight of the vehicle plus the maximum load, exclusive of the weight of the driver and his helper, to be carried or hauled by it on New York public highways. This provision in the statute is designed to provide a constant weight factor for the computation of the tax. Accordingly, a particular motor vehicle will have the same maximum gross weight although it may carry a light bulky cargo on one trip and a heavy metal cargo on the next trip. The maximum load to be carried should be determined by the applicant for the permit. The maximum gross weight as set forth in the application is subject to audit and approval by the [Commissioner].

The required highway use tax permits and stickers, as issued, shall be valid until revoked, suspended or surrendered (***id.***).

D. Tax Law § 502 and the regulations promulgated thereunder address increases and decreases in the maximum gross weight of vehicles. Pursuant to such section and the Commissioner's regulations, if a carrier *increases* the gross or unloaded weight of a motor vehicle from the weight shown on its permit (e.g., due to equipment changes) the carrier *must* apply to obtain a corrected (amended) permit from the Division before operating the motor vehicle at its increased weight (20 NYCRR 473.6). As is specifically relevant to this matter, 20 NYCRR 473.6(b) and 20 NYCRR 481.4(f) provide that "*if a special permit is obtained pursuant to section 385 of the Vehicle and Traffic Law from the State Department of Transportation . . . which authorizes the operation of the motor vehicle with a maximum gross weight in excess of that set forth in the highway use permit issued therefor, an amended highway use permit must be obtained*."

Conversely, if the gross or unloaded weight of a motor vehicle *decreases* from the weight shown on its permit, a carrier *may* apply to obtain a corrected (amended) permit from the Division. However, such application for a corrected permit based on a *decrease* in weight may

only be made during the month of January (20 NYCRR 473.5[a]).[4] As is specifically relevant to this matter, 20 NYCRR 473.4(b) and 20 NYCRR 481.4(g) provide that where a corrected (amended) permit is issued on the basis of a *decrease* in weight, the old permit should not be surrendered until the validated amended permit is received, and that such validated amended permit *will not become effective for tax purposes until the superseded (old) permit is surrendered to the Division*.

E. In view of the foregoing specific regulations, petitioner's request for reduction or cancellation of the assessment must be denied. First, the regulations specify that if a carrier *increases* its vehicular unit weight it *must* apply for and obtain a corrected highway use tax permit, whereas if a carrier *decreases* its vehicular unit weight it *may* apply for a corrected highway use tax permit, but that such corrected permit will not become effective for tax purposes until the prior (higher weight) permit is surrendered to the Division. There is no dispute that in anticipation of obtaining DOT special permits in order to carry heavier loads, but prior to receiving any such permits, petitioner applied to the Division and was granted increases to its highway use tax permit weight levels as would be required in order to carry such loads. Thereafter, petitioner did in fact receive two DOT overweight permits which were valid for a period of at least one year, but did not receive any additional DOT overweight permits. Nonetheless, and notwithstanding the clear statement on the instructions to the highway use tax returns to enter the gross weight shown on the highway use tax permit for each vehicle (***see*** Finding of Fact "1"), petitioner apparently chose to enter the 80,000 pound weight shown on the permits it had previously held. Petitioner allegedly carried no loads in excess of 80,000 pounds. Nonetheless, having applied for and received permits to carry loads at the higher weights,

---

[4] In contrast, an application to *cancel* a permit based on a decrease in weight may be made in any month.

petitioner was required to file its returns and compute, report and pay tax utilizing the higher tax rates determined by the weight amounts shown on its highway use tax permits, regardless of whether petitioner carried all, some or none of its loads at weights in excess of 80,000 pounds (Tax Law § 502; 20 NYCRR 472.1[b]). Petitioner could have filed applications to decrease the gross weight level on its permits upon learning that it would not be receiving any additional DOT overweight permits (20 NYCRR 473.5[a]). Upon receiving such corrected reduced permits, petitioner could then have surrendered its higher weight permits to the Commissioner and reverted to the lower weight based tax rates. Petitioner did not do so, apparently because it was unaware of the need to do so. Unfortunately, without correction and surrender of the higher weight permits until after the period in issue, as is clearly required under the law and regulations, petitioner was obligated to pay the tax computed on the basis of the higher weight determined rates. A conclusion that petitioner's error was inadvertant would militate in favor or reducing or eliminating penalties. However, no penalties were imposed in this case, and thus the reason for the error is irrelevant to adjusting the amount of tax due.

G. The petition of Jewell Transport, Inc. is hereby denied and the Notice of Determination dated May 20, 2004 is sustained.

DATED: Troy, New York
April 6, 2006

/s/ Dennis M. Galliher
PRESIDING OFFICER