STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STORM ASSET MANAGEMENT, INC.	:	DETERMINATION DTA NO. 821586
for Revision of a Determination or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period December 1, 2001 through June 30, 2005.	:	

Petitioner, Storm Asset Management, Inc., 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 December 1, 2001 through June 30, 2005.

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 February 5, 2008 at 10:00 A.M., with all briefs to be submitted by May 16, 2008, which date began the six-month period for the issuance of this determination (Tax Law § 2010[3]).[1] Petitioner appeared by Frank G. Meanor, Jr., Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michelle W. Milavec, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined additional highway use tax due from petitioner based upon point to point mileage calculations and upon the weights of

[1] Petitioner submitted with its reply brief an affidavit made by John T. Foley. Since such affidavit was provided after the record had been closed to the submission of evidence, the same was not considered and played no part in arriving at the determination rendered herein (***Matter of Saddlemire***, Tax Appeals Tribunal, June 14, 2001).

petitioner's vehicles as reflected on highway use tax permits issued to and held by petitioner during the period in issue.

II. Whether penalty asserted as due pursuant to Tax Law § 512 should be abated.

FINDINGS OF FACT

1. Petitioner, Storm Asset Management, Inc., is engaged in the business of trucking and hauling various types of fuel, construction materials and heavy equipment. Petitioner operates a fleet of tractors and trailers carrying goods throughout the Northeast and beyond, including the public roads of New York State. It is undisputed that petitioner is subject to the highway use tax imposed pursuant to Tax Law Article 21, and is required to file New York State highway use tax returns (Form MT-903).

2. Petitioner elected to file its highway use tax returns using the gross weight method, and filed its returns using such method for the period spanning October 1, 2001 through June 30, 2005. 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. On each of its highway use tax returns for the period spanning October 1, 2001 through June 30, 2005, petitioner reported on a single line that the loaded gross weight of all of its vehicles traveling in New York State was 80,000 pounds and that the unloaded weight of such vehicles was 32,000 pounds.

3. By a letter dated July 1, 2005, the Division of Taxation (Division) notified petitioner that a field audit covering the period October 1, 2001 through June 30, 2005 would commence on August 22, 2005, and requested that petitioner have available for review all books, records,

worksheets, and other documents pertaining to petitioner's tax returns for the entire audit period.[2] As pertinent to this matter, an attached document entitled Books and Records Needed at the Start of the Audit specified that petitioner's truck mileage tax returns mileage records (ICC logs, odometer readings, trip sheets), fueling records (bulk fueling and retail fuel receipts), records pertaining to laden and unladen weight of vehicles, New York State Thruway receipts and statements, and a list of all equipment be made available for the entire period at issue.

4. A number of audit issues were discussed during the August 22, 2005 initial audit meeting, including the accuracy of the mileage reported on petitioner's highway use tax returns, the absence of New York State Thruway miles on such returns, the total number of petitioner's vehicles which held permits allowing travel on New York State highways versus the lesser number of vehicles (13) which were reported as having actually traveled on such highways, the accuracy of the ratio of laden to unladen miles reported, incorrect rate calculations, and the fact that petitioner did not report and pay highway use tax based upon the rates applicable to the permitted weights for its vehicles. Most of the foregoing issues were addressed and resolved during the audit, with the main unresolved issue being that petitioner did not calculate its highway use tax liability based upon the gross weights of its vehicles as listed on its New York State highway use tax permits pertaining to such vehicles.

5. During the period under audit, petitioner held a number of New York State highway use tax permits for its vehicles. Petitioner maintained that only 13 of the permitted vehicles traveled into New York State during the audit period, and furnished the Division's auditor with copies of the 13 permits pertaining to those particular vehicles. These permits reflect, for each vehicle, the

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[2] The audit was to encompass truck mileage and fuel use taxes, bulk diesel, and corporation franchise taxes. This proceeding concerns only highway use tax (also referred to as truck mileage tax).

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 permits also reflected a handwritten number which was an internal unit number assigned by petitioner to its vehicles for tracking purposes. The permitted gross weight for each of the 13 vehicles, by unit number, follows:

UNIT NUMBER	PERMITTED WEIGHT
17012	80,000 pounds
16052	160,000 pounds
16057	160,000 pounds
17017	160,000 pounds
17015	160,000 pounds
17018	160,000 pounds
17009	160,000 pounds
17019	160,000 pounds
17020	160,0000 pounds
17033	165,000 pounds
17029	165,000 pounds
17031	165,000 pounds
17030	165,000 pounds

6. As set forth above, one vehicle had a permitted maximum weight of 80,000 pounds, four vehicles had a permitted maximum weight of 160,000 pounds, and eight vehicles had a permitted maximum weight of 165,000 pounds. Petitioner predominantly hauls and delivers petroleum products but, as noted, also hauls and delivers construction materials and heavy equipment. Petitioner's witness estimated that 95% of its work involved hauling petroleum products, while the remaining 5% of its work involved heavy hauling, i.e., hauling construction materials and

heavy equipment. According to petitioner, approximately 84% of its mileage was driven using tractor-trailer units hauling petroleum products at a weight level of approximately 80,000 to 85,000 pounds, with approximately 16% of its mileage driven using five of its tractor (or head) units which were built specifically to be capable of heavy hauling. Petitioner's witness admitted that all of its tractor units were capable of hauling loads in excess of 80,000 pounds, but alleged that hauling loads much in excess of such weight would have potential negative safety implications. However, notwithstanding this situation, petitioner's witness explained that petitioner chose to apply for highway use tax permits at the heavier weights listed above for all but one of its vehicles as a matter of convenience and flexibility in managing its fleet of vehicles. Obtaining permits in this manner, where numerous vehicles would be permitted at levels sufficient to engage in heavy hauling, allowed petitioner the flexibility of having multiple appropriately permitted heavy hauling vehicles available as the need arose without having to dedicate (or essentially hold in reserve) certain particular vehicles for heavy hauling.

7. The parties, after discussion, agreed that the auditor would undertake a review of the three-month period spanning April, May and June of 2005. Petitioner provided documentation to the Division's auditor for such period consisting of paper copies of the Xatanet satellite information used for tracking petitioner's vehicles, including trip reports for such vehicles, daily driver ICC log reports, delivery sheets and weekly trip sheets indicating where petitioner's vehicles picked up fuel or equipment and where the same was delivered. Petitioner provided the Division with documents labeled Monthly Mileage Report which set forth information for 12 of the 13 vehicles which traveled into New York State during the three-month period, including the

number of miles each vehicle traveled each month by state, by odometer reading, and a segregation of the laden and unladen (empty) miles traveled by each vehicle for each month.[3]

8. The Division's auditor used the foregoing information to determine the routes traveled and locations visited by petitioner's vehicles, and then utilized the same to make a point-to-point calculation of the mileage for such trips.[4] The results of this review revealed that some miles traveled in New York State were not, in fact, reported on petitioner's highway use tax returns. Ultimately, this review and comparison of records to tax returns filed revealed a discrepancy calculated as a 7.47% mileage underreporting error rate. On its highway use tax returns, petitioner reported the ratio of laden to unladen miles traveled in New York State at approximately 50%, and the Division's auditors accepted this ratio as reported.

9. Petitioner did not track the specific weights of its vehicles traveling into and about New York State on a regular basis, did not provide weight slips or other information to indicate when its vehicles were empty or unloaded during the audit period, and did not provide any weight slips for the 13 vehicles with New York State highway use tax permits which traveled into New York State during the audit period. Petitioner's witness explained that, at least with regard to the business of petroleum transport, it is not industry custom to have weight slips on shipments since such shipments are based on volume (gallonage) as opposed to weight.

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[3] While petitioner provided highway use tax permits for 13 vehicles which traveled into New York State during the full audit period, petitioner advised the Division that only 12 of such vehicles traveled into New York State during the three-month review period since one of the vehicles was either being repaired or otherwise did not move during those three months.

[4] Petitioner's GPS (Xatanet) tracking software apparently calculated mileage based on the nearest city. Thus, for example, a trip north from Albany, New York, to a point in Vermont might register almost entirely as Vermont mileage notwithstanding that a portion of such trip actually traversed northward and parallel to Vermont upon Interstate Route 787 or Interstate Route 87 in New York prior to crossing into Vermont. The Division's mileage calculations, in contrast, were made on a point-to-point (or stop-to-stop) basis using the mapping software system known as Rand McNally Intelliroute Deluxe.

10. No adjustments (credits) were given for any Thruway mileage (Thruway miles are treated as nontaxed miles) since petitioner provided no receipts or other documents to establish that any such mileage was traveled during the audit period.

11. The Division's auditor calculated additional tax due from petitioner for the audit period by first using the described 7.47% mileage error rate determined above to increase both the laden and unladen New York miles reported by petitioner. Thereafter, the auditor calculated the amount of tax due by utilizing the higher tax rate applicable to the particular weights listed for petitioner's vehicles on its highway use tax permits for petitioner's laden miles, and the lower tax rate applicable to petitioner's vehicles for petitioner's unladen miles. After allowing credit for the amount of tax paid by petitioner with the filing of its returns, the Division calculated additional tax due for the audit period in the amount of $28,997.55.

12. On January 23, 2006, based on the foregoing audit review and calculations, the Division issued to petitioner a Notice of Determination assessing additional highway use tax due for the period October 1, 2001 through June 30, 2005 in the amount of $28,997.57, plus penalty and interest.

13. The Division submitted with its brief proposed findings of fact numbered 1 through 20. These proposed facts are supported by the record and have been incorporated in the Findings of Fact set forth herein, with the exception of proposed facts numbered 7, and 18 through 20. These proposed facts are not inaccurate, but merely set forth procedural matters not relevant or necessary in arriving at a determination in this matter.

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[3]) upon the public highways of New

York State. This tax is a "weight-distance" tax, imposed and computed at tax rates based upon vehicular unit weight and the mileage traveled on New York State public highways. With the filing of its first return for any calendar year, the taxpayer elects which of the alternative methods it will use to compute its highway use tax liability per Tax Law § 503. Petitioner chose to use the gross weight method throughout the audit period, pursuant to which the tax for each vehicular unit is based upon the gross weight of each such unit and the number of miles it is operated on the public highways in New York. The mileage traveled during any reporting period is divided into laden miles and unladen miles (Tax Law § 501; 20 NYCRR 481.4, 481.6), and the tax is computed by multiplying the number of laden miles and unladen miles by the corresponding tax rates for laden miles and unladen miles, respectively. Highway use tax rates are set forth in Tax Law § 503 and are based upon the gross weight of the vehicle for laden miles and the unloaded weight of the vehicle for unladen miles (Tax Law § 503(1); 20 NYCRR 481.3).

B. Before operating a motor vehicle on New York State's public highways, a carrier must apply for and obtain a highway use tax permit and sticker for each vehicular unit. The application filed by a carrier seeking a highway use tax permit shall set forth the gross and unloaded weight of each vehicle and such other information as the Division may require (Tax Law § 502).

C. Tax Law § 501(4) defines "gross weight" for highway use tax purposes as follows:

> "Gross weight" shall mean the unloaded weight of the motor vehicle plus the unloaded weight of the heaviest motor vehicle, trailer, semi-trailer, dolly or other device to be drawn by such motor vehicle (determined in a manner similar to the method for determining the unloaded weight of a motor vehicle) plus the weight of the *maximum load*, exclusive of the weight of the driver and his helper, to be carried or drawn by such motor vehicle. (Emphasis added.)

D. Regulations of the Commissioner of Taxation at 20 NYCRR 472.1(b), addressing the meaning of the term "maximum gross weight" and the "determination of 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 of Taxation].

20 NYCRR 472.5 further provides with respect to "maximum gross weight in excess of legal limits," as follows:

> In the event that the maximum gross weight set forth in the permit is in excess of the legal limits provided in the Vehicle and Traffic Law, nevertheless the issuance of such a permit does not authorize a vehicle to carry weights in excess of those permitted by the Vehicle and Traffic Law. Accordingly, an operator of a motor vehicle may be guilty of a violation of the weight provisions of the Vehicle and Traffic Law and subject to the penalties therein imposed even though the highway use permit issued for such vehicle sets forth a maximum gross weight in excess of the legal limits.

E. Regulations of the Commissioner of Taxation at 20 NYCRR 481.4, concerning the "gross weight method, tax on laden vehicles" provides, in relevant part, as follows:

> (c) The rate of tax for a tractor-trailer combination is based on the unloaded weight of the tractor plus the maximum gross weight of the trailer *as set forth in its permit.*
>
> (d) The rate of tax on a laden motor vehicle is always based on its maximum gross weight, irrespective of the actual weight of the load it may be carrying at any particular time. Accordingly, a decrease in the weight of the load, for example by deliveries along its route, has no effect on the applicable rate of tax.

> (e) Although the tax is based on maximum gross weight *as set forth in the permit*, nevertheless if the actual weight of the loaded motor vehicle is in excess of that *set forth in the permit*, the tax must be computed at the rate applicable to the actual weight. In such case an amended permit must be obtained.
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> (f) . . . , if a special permit is obtained pursuant to section 385 of the Vehicle and Traffic Law from the State Department of Transportation or from any authority having jurisdiction over a particular highway 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. In such case the tax rate is thereafter based on the higher maximum gross weight for which the Department of Transportation special permit was obtained. (Emphasis added.)

It is noted that the last two quoted regulatory sections are consistent with the decision of the Appellate Division in ***Matter of De Cato Bros., Inc., v. State Tax Commn.*** (90 AD2d 386 [1982]; ***affd*** 59 NY2d 911 [1983]), wherein the Court upheld the Division's assessment of tax based upon the higher tax rate applicable to the actual weights at which the taxpayer's vehicles were found to be operating rather than limiting the applicable tax rate to the lower weights set forth in the taxpayer's highway use tax permits.

F. From the foregoing it is clear that the gross weight of a vehicular unit is the heaviest weight at which such unit is or may be operated on New York State public highways, whether alone or in combination with a trailer or other attached device. The gross weight (as in this case involving tractor and trailer units) consists of and must take into account three elements – the unloaded weight of the truck or tractor, plus the heaviest weight of the trailer or other attached device to be drawn by the truck or tractor, plus the weight of the maximum (i.e., heaviest) load to be carried. Inasmuch as it is the taxpayer who completes and files the application for a highway use tax permit, it is the taxpayer who determines and specifies the weight of the maximum load element of the gross weight which its vehicles will be entitled to carry and, concomitantly, the

rate at which its vehicles will be subjected to highway use tax under the permits it obtains. In this case, with the exception of the one vehicle for which petitioner sought and obtained an 80,000 pound permit, petitioner applied for and obtained highway use tax permits with gross weights of either 160,000 pounds or 165,000 pounds. Inconsistently, however, petitioner filed its highway use tax returns listing 80,000 pounds as the gross weight for each of its permitted vehicles, rather than listing the gross weights for such vehicles as set forth in the permits applied for and obtained by petitioner.

G. Petitioner defends its manner of filing its returns by the claim that the maximum load component of gross weight is not further specifically defined within the statute, and argues that the term maximum load means the heaviest load which the vehicle can physically and legally carry plus the weight of the vehicle itself. In this regard petitioner notes that Vehicle and Traffic Law § 385.10, which provides formulae for computing the allowable weight for vehicles such as those operated by petitioner, provides that "in no case, however, shall the total weight [of the vehicle] exceed eighty thousand pounds." Thus, petitioner maintains that notwithstanding the gross weights listed on its highway use tax permits, it is legally constrained by the terms of the Vehicle and Traffic Law, as well as by safety considerations, to hauling loads not in excess of 80,000 pounds in New York State unless, after meeting requisite safety and other requirements, it obtains a divisible load permit (also known as an overweight permit) from the New York State Department of Transportation (DOT) (***see*** Vehicle and Traffic Law § 385.15). Petitioner acknowledged that while all of its tractors could haul loads in excess of 80,000 pounds, it would generally be unsafe to haul loads significantly in excess of such weight except for 5 of the 13 vehicles in question which were built to specifications qualified for heavy hauling. Apparently, petitioner posits that regardless of the tax permit weight levels it applied for and was granted,

petitioner is constrained by the Vehicle and Traffic Law to the 80,000 pound level and thus may file its tax returns using the tax rate set forth at that weight. The record does not specify whether petitioner had obtained DOT overweight permits for any or all of the 13 vehicles in question, including any of the 5 heavy hauling tractors.[5] Rather, petitioner simply argues that the majority of its hauling involved petroleum products the weight of which was in the 80,000 to 85,000 pound range (or less) and that under these circumstances petitioner could correctly base its highway use tax filings upon listing its vehicles at the 80,000 pound level.

H. Petitioner's request for reduction or cancellation of the assessment is denied. As an initial observation, petitioner's method of filing its returns whereby all of its vehicles were effectively reported at the 80,000 pound level entirely ignores the fact that some of petitioner's hauling concededly involved heavy hauling for which the higher weight permits (for both highway use tax and DOT purposes) are required. More directly, petitioner's filing method and position essentially ignores the impact of the permitting process, at least insofar as the applicant is required to specify the maximum load for which it seeks a permit and then complete and file its returns based thereon. Notwithstanding the clear direction to enter the gross weight shown on the highway use tax permit for each vehicle when completing highway use tax returns (***see*** Form MT-903-I), petitioner chose to enter 80,000 pounds as the weight for all of its vehicles regardless of the permitted weights applied for and granted to petitioner. Petitioner allegedly did not haul many loads in excess of such 80,000 pound weight, and would essentially read the term "actual" into the determination of the weight pursuant to which the applicable tax rate is determined,

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[5] This absence of detail in the record should not be read to cast any negative implication on the manner in which petitioner operated its vehicles for purposes of the Vehicle and Traffic Law. Presumably, petitioner obtained the appropriate overweight permits from the DOT (consistent with having applied for and obtained highway use tax permits at the heavy gross weight amounts set forth in Finding of Fact 5) with respect to the five heavy hauling tractors as well as any other tractors which may have or did in fact haul at gross weights in excess of 80,000 pounds.

rather than basing the tax rate upon the permitted maximum gross weight. However, having applied for and received permits to carry loads at the higher weights, petitioner was required to file its returns and compute, report and pay tax utilizing the higher tax rates for laden miles as specified 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]).

I. Contrary to petitioner's claim, the statutory scheme is not ambiguous or inconsistent either within itself or in concert with the Division's regulations implementing the same. Under the system in place, a taxpayer is allowed to determine the maximum weights at which its vehicles will be permitted to operate and to apply for tax permits at such weights, with the choice of heavier weight highway use tax permits occasioning higher highway use tax rates. Here, petitioner did, in fact, need heavier weight permits for some of its hauling and chose to obtain tax permits for its vehicles in the manner most advantageous to it in carrying out its overall hauling endeavors. In this respect, petitioner chose to apply for highway use tax permits at weights which for all of its vehicles, save one, exceeded the 80,000 pound initial (or base) maximum weight limit set forth in Vehicle and Traffic Law § 385.10. For DOT purposes, however, this base maximum weight can be exceeded upon obtaining overweight permits and complying with attendant safety obligations (***see*** Vehicle and Traffic Law § 385.15). While petitioner's choice to apply for highway use tax permits at weights over 80,000 pounds subjected it to the higher tax rates appurtenant to hauling such heavier loads, it also provided petitioner the flexibility of using all of its vehicles for such hauling as needed.

J. Petitioner's claim of being limited, by legal and physical constraints, to hauling at 80,000 pounds is simply not correct. As to legal constraints petitioner could, and presumably did, obtain

DOT overweight permits for some or all of the vehicles it had chosen to permit (for highway use tax purposes) at heavier hauling levels. In order to haul at such heavier weights, petitioner was required to have tax permits reflecting such weights, or else risk penalties for hauling at weights in excess of those permitted for highway use tax purposes. If, as petitioner has argued, it could not physically (or safely) haul at weights significantly in excess of 80,000 pounds, then there is no apparent reason for petitioner to have applied for permits in excess of 80,000 pounds in the first instance, except for the five vehicles built to specifications capable of heavy hauling. Nonetheless, petitioner applied for and held such permits and thus could utilize any of its vehicles to haul at weights in excess of 80,000 pounds (again, assuming the proper DOT permits were obtained) without risking penalties for doing so if weighed in transit. This, again, suggests petitioner's method of permitting its vehicles reflects a business decision advantageous to petitioner. If petitioner determined at some point that the advantage of fleet management and any other advantages flowing from holding heavier weight permits were outweighed by the detriment of higher tax rates accompanying such permitted weights, petitioner could have filed applications to decrease the gross weight level on some of its permits to reflect the relative weights hauled. Petitioner apparently chose not to do so for the sake of expedience in fleet management, as was and is its prerogative.

K. Turning to the question of penalty abatement, petitioner claims its method of reporting based on the rate applicable to 80,000 pounds was the result of confusion as to the correct manner of completing its returns. Petitioner notes, as set forth above, that the majority of its hauling involved petroleum products, that the loaded weights involved with such transport were consistently in the 80,000 pound range, and that petitioner simply kept filing its returns in the consistent manner whereby the laden weight of all of its vehicles was reported as 80,000 pounds.

Petitioner also claims to have relied upon oral advice concerning the preparation and filing of its returns as received from the Division. However, petitioner admitted such advice was provided by telephone many years (approximately 15 years) prior to the period in question, and the record contains no written memorialization of that advice, or any information as to the person or persons who provided the same.

L. In contrast to petitioner's claims, the fact remains that in applying for and obtaining permits for its vehicles, petitioner made a choice which allowed for flexibility in the management and use of its vehicles, as described. This fact militates in favor of a conclusion that, at best, petitioner's filing and reporting position was simply justified as reflecting its claim that in reality most of its hauling was of petroleum products with loaded weights at or about 80,000 pounds. At the same time, petitioner admits that at least 5% of its hauling (or approximately 16% of its milage) involved heavy hauling, and it appears that at least some of petitioner's petroleum hauling was in fact at weights which did not fall at or below the 80,000 pound level.[6] Moreover, there is no claim or evidence that petitioner inadvertently or otherwise erroneously applied for vehicle permits at the weights listed. To the contrary, petitioner clearly chose the weights at which its vehicles were to be permitted for purposes of convenience in fleet management. Such business choice carries with it the imposition of highway use tax at a higher rate with respect to laden miles. Finally, concerning petitioner's claim of having been confused as to the proper method of filing its returns, there is no shortage of guidance as to the manner in which highway use tax returns are to be completed by those choosing the gross weight method of filing, including specific instruction that the laden weight to be utilized is that set forth on the highway use tax

[6] Verification of actual weights was not possible since weight slips or other actual weight records were not available, allegedly in accord with the industry norm in the hauling of petroleum products pursuant to which weighing of loads is not customarily done.

permit for each vehicle (***see e.g.*** 20 NYCRR 481.4[c], [e]; TSB-M-93 [4]M; Form MT-903-I; Publication 538 "A Guide to Highway Use Tax and Other New York State Taxes for Carriers"). Accordingly, penalty as imposed is appropriate and is sustained.

M. The petition of Storm Asset Management, Inc. is hereby denied and the Notice of Determination dated January 23, 2006 is sustained.

DATED: Troy, New York
November 13, 2008

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE