

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

BEST TAXI MANAGEMENT, INC. :

for Revision of a Determination or for Refund of Sales :
and Use Taxes under Articles 28 and 29 and the Special :
Tax on Passenger Car Rentals under Article 28-A :
of the Tax Law for the Period June 1, 1992 through :
May 26, 1994. :

In the Matter of the Petition :

of :

GEORGE STATHAROS, OFFICER :

for Revision of a Determination or for Refund of Sales :
and Use Taxes under Articles 28 and 29 and the Special :
Tax on Passenger Car Rentals under Article 28-A :
of the Tax Law for the Period June 1, 1992 through :
May 26, 1994. :

DECISION
DTA NOS. 817189
AND 817603

Petitioners Best Taxi Management, Inc. and George Statharos, Officer, 54-18 Broadway, Woodside, New York 11377, filed an exception to the determination of the Administrative Law Judge issued on December 14, 2000. Petitioners appeared by James H. Tully, Jr., Esq. and Stewart Buxbaum, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation did not file a brief in opposition. Oral argument, at petitioners' request, was heard on July 26, 2001 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the corporate petitioner's assignment of yellow taxi cabs with medallions to drivers for a consideration of \$80.00 per shift paid by the drivers to the corporate petitioner, represented the rental of passenger cars subject to sales tax and the special tax on passenger car rentals.

II. Whether the Division of Taxation properly allocated \$24.00 of the total charge of \$80.00 per shift received by the corporate petitioner from a driver to whom it had assigned a yellow taxi cab with a medallion, as the portion of the total charge allocable to the taxable rental of a passenger car.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "5," "8," "9," "10," "12," "13" and "14" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Best Taxi Management, Inc. ("the corporate petitioner" or "Best Taxi") operated a yellow medallion taxicab dispatch business out of the Astoria section of Queens in New York City,

seven days a week, twenty-four hours a day up until May 26, 1994¹ when it sold the business. Best Taxi did not own taxicab medallions but rather leased approximately 100 medallions from the respective owners of the medallions at a per medallion cost of approximately \$1,500.00 per month or \$18,000.00 on an annualized basis. Consequently, its total expenditure on a yearly basis to lease the approximately 100 medallions utilized in its operation amounted to approximately \$1,800,000.00. On a regular basis in the course of its operation, Best Taxi also purchased new and used cars which it then “hacked-up” so they could serve as yellow medallion taxicabs on the streets of New York City, which represented the corporate petitioner’s other major expenditure. The corporate petitioner, for a fee of approximately \$80.00 per 12-hour shift, provided a yellow medallion taxicab to a driver, who had the required taxicab driver’s license to operate a medallion taxicab. Rather than working on a commission basis, the driver, in exchange for this payment of approximately \$80.00, retained all fares collected from passengers less the cost of gasoline used during the 12-hour shift.

It was not until 1979 that the New York City Taxi and Limousine Commission allowed the leasing of medallions, and, in response, fleets which owned medallion taxicabs began to convert from paying commissions to drivers, typically just under 50% of the fares collected, to leasing their medallion taxicabs where drivers paid a set fee and kept all fares above that amount less the cost of gasoline. Entities like the corporate petitioner, which leased medallions from the owners

¹The record does not clearly specify a starting date for the corporate petitioner’s operation of its yellow medallion taxicab dispatch business. However, as noted below, the first sales tax quarter for which tax was asserted due by the Division of Taxation was the quarter ended August 31, 1992. Presumably, Best Taxi started operations sometime during the summer of 1992. This presumption is based on the fact that since Best Taxi filed no sales tax returns, there was no running of the period of limitations for asserting tax due. Presumably, the Division of Taxation would have asserted tax due for the earliest period possible. A backup schedule, included in the audit report, calculates tax due from a starting date of July 7, 1992, which confirms this presumption that Best Taxi commenced its operations sometime during the summer of 1992.

of the medallions, also came into existence and assumed the daily operating responsibilities from the individual and minifleet owners who wanted to remain owners of the medallions but did not want daily operating responsibilities. Entities like the corporate petitioner would then, in turn, lease medallion taxicabs to drivers.

Best Taxi's business was part of the highly-regulated New York City taxi industry, which, according to the New York City Taxicab Fact Book dated February 1993 issued by the New York City Taxi and Limousine Commission, consists of 11,787 yellow medallion taxicabs and 40,000 licensed taxi drivers, who serve 200 million passengers a year producing revenues totaling nearly \$1 billion annually. These yellow medallion taxicabs are distinct from the 30,000 for-hire vehicles commonly called car services, liveries, black cars and limousines, which are permitted to serve passengers by prearrangement only, generally through telephone calls for service. Within Manhattan, yellow medallion taxicabs transport 30% of those boarding buses, subways, taxis or for-hire vehicles for trips. Within the industry, entities like the corporate petitioner are considered management companies which run yellow medallion taxicabs on behalf of owners.

The Division of Taxation ("Division") issued a Notice of Determination dated February 4, 1997 against the corporate petitioner asserting sales and use taxes and the special tax on passenger car rentals due of \$335,201.66, plus penalty and interest, for the period June 1, 1992 through May 26, 1994, with the tax asserted due allocated over a period consisting of eight² sales tax quarters, as follows:

²As noted above, the corporate petitioner's business was sold on May 26, 1994 so that tax of \$46,870.63 was asserted due for the period of March 1, 1994 until May 26, 1994, which was a few days short of the entire sales tax quarter ending May 31, 1994.

Sales Tax Quarter Ended	Tax Asserted Due
August 31, 1992	\$ 24,367.75
November 30, 1992	38,654.80
February 28, 1993	39,628.68
May 31, 1993	43,368.80
August 31, 1993	44,798.54
November 30, 1993	49,025.60
February 28, 1994	48,486.86
May 26, 1994	46,870.63
Total	\$335,201.66

A corresponding Notice of Determination dated February 14, 1997 was issued against George Statharos, as officer or responsible person of Best Taxi, and asserted the same amounts shown above, plus interest and penalty.

The Audit

We modify finding of fact “5” of the Administrative Law Judge’s determination to read as follows:

5. The issuance of the Notice of Determination dated February 4, 1997 against the corporate petitioner and the corresponding Notice of Determination dated February 14, 1997 issued against Mr. Statharos represented the culmination of “a taxi dispatch or taxi industry audit” of Best Taxi. The auditor commenced his audit of Best Taxi by the issuance of a letter dated October 13, 1995, which scheduled a field audit of the corporate petitioner at its office on October 27, 1995. The auditor’s letter set forth the following request for records:

All books and records pertaining to your sales and use tax liability for the period under audit are to be

available on the appointment date. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates.

The auditor's initial letter to Best Taxi also included an attachment which specified on a checklist of 18 types of records, the following 14 types of records to be presented for audit:

1. General ledger for entire audit period;
2. Cash Receipts Journal for entire audit period. (Also Sales Journal if applicable.);
3. Cash Disbursements Journal for entire audit period. (Also Purchase Journal if applicable.);
4. Federal Income Tax Returns (1120's or 1065's or 1040's) for entire audit period;
5. Sales Tax Returns, Worksheets and canceled checks for entire audit period;
6. Merchandise purchase invoices for entire audit period;
7. Sales invoices for entire audit period;
8. Expense purchase invoices for entire audit period;
9. Fixed asset purchase/sales invoices for entire audit period;
10. Bank statements, canceled checks and deposit slips for all accounts for entire audit period;
11. All exemption documents supporting non-taxable sales for entire audit period;
12. General Journal and/or Closing Entries that affect sales, sales tax, merchandise purchases or fixed asset accounts;
13. Power of Attorney properly executed (if a representative will handle the audit);
14. Other: Request for additional information on Taxi Companies.

A second attachment specified the following nine additional "records," which the auditor noted were routinely requested in an audit of a taxi dispatch business and which correspond to the item described as "other" on the checklist listed as "14" above:

1. Canvas project for taxable portion of taxi lease;

2. Lease list prices for the audit period;
3. List of medallions managed for the audit period;
4. AM/PM Dispatch sheets for the audit period;
5. Trip cards for the audit period;
6. Shifts worked records for the audit period;
7. Lease contracts with drivers for the audit period;
8. Commission operated cab records for the audit period;
9. Extra copies of Federal Returns for the audit period.

In response to this lengthy request for records, the auditor received very few books and records, other than the “dispatch book” for one year. In particular, no books and records were received concerning Best Taxi’s purchase, maintenance, insurance or depreciation costs for its vehicles. Cash receipts, purchase invoices, purchase journals and sales journals were not provided (Tr., pp. 41-42).³

The auditor was provided with Best Taxi’s “dispatch book” for approximately one year of the two years in issue. The dispatch book is known as a taxi company’s bible because all the data concerning the dispatch of a taxicab is theoretically recorded in it. However, the use of the term “book” is a misnomer since the dispatch book consists of unbound large-sized sheets, approximately 26 inches by 15 inches, with pre-printed rows and columns. Each sheet has on the front and back 10 columns, with 8 columns consisting of the same 4 column headings on the left side and the right side of the sheet for the AM and PM 12-hour shifts, respectively. One of the two remaining columns runs down the center of each sheet, with the heading shown as “#”. This column has the numbers “1” through “100” pre-printed below this heading. The other column running down the center of each sheet is headed “Med.,” an abbreviation for

³We modified finding of fact “5” of the Administrative Law Judge’s determination to more clearly reflect the record.

“medallion,” and the specific medallion number of the cab assigned to a particular driver in the AM and PM shifts is noted. For example, on the dispatch sheet for June 30, 1992, the information on the line numbered 53 shows the following information for the 53rd taxicab of the 82 taxicabs dispatched by Best Taxi on this date:

Name	Hack #	Shift	Balance	#	Med.	Name	Hack #	Shift	Balance
Gill	450627	78		53	6H53	Singh	462658		83

This representative sample provides the following information. A cabdriver named Gill, with a hack license number of 450627, was assigned a taxicab with a medallion number of 6H53 for the AM 12-hour shift in exchange for \$78.00, as noted under the column incorrectly preprinted with the heading “shift.” For the PM 12-hour shift, a cabdriver named Singh, with a hack license number of 462658, was assigned the same taxicab, with a medallion number of 6H53 for the PM 12-hour shift in exchange for \$83.00. On this sheet for June 30, 1992, as well as the other sheets introduced into evidence, the names of cabdrivers and their hack numbers were written in pencil, with a considerable number of the listings lacking hack numbers. In addition, although most of the listings note the fee paid by the respective drivers for the use of the particular taxicab and medallion for the 12-hour shift, some entries are difficult to decipher and some merely note “weekly” without a specific amount shown. At the bottom of each sheet are the following preprinted spaces on the left side of the sheet for the AM shift and repeated on the right side of the sheet for the PM shift:

SCHEDULE \$ _____ + REPAIRS \$ _____
+ DEPOSITS \$ _____ - EXPENSES \$ _____
= GRAND TOTAL \$ _____

On the sample sheet for June 30, 1992, the amount of \$7,128.00 is shown in the space for “SCHEDULE \$” on the right side of the sheet, which the auditor suggested represented the “footing” of the amounts shown (or the *total* of the amounts shown) as fees received from the drivers. This total amount is on the right side of the sheet and represents a total for the PM shift. No total amount is shown on the left side of the sheet for the 12-hour AM shift. In addition, in the space for PM deposits is the amount of \$6,587.00, and in the space for expenses is the amount of \$541.00, with no explanation of the type of expenses. Since the amount shown in the space for “Schedule \$” less the expenses of \$541.00 equals the amount shown in the space for deposits of \$6,586.00, it is unclear why the preprinted spaces show the amount for “Schedule \$” *added* to the amount for “Repairs” and why such amount would then be *added* to Deposits and expenses then *subtracted*. Adding to the confusion and the lack of reliability of the dispatch book is the lack of information concerning totals, expenses, and deposits on many of the sheets of the representative sample for the month of July 1992 introduced into the hearing record. Furthermore, the auditor attempted to “foot” many of the sheets, and the amounts he totaled did not correspond to the amounts shown at the bottom of the sheets. In addition, the auditor was unable to calculate Best Taxi’s income and expenses from the dispatch sheets. He tested almost the entire month of July 1992 and discovered that “only PM was filled out in most cases and footed pages show this is about ½ of true income” and expenses were frequently not accounted for on the dispatch sheets. Moreover, invoices to support expenses or repairs were not provided by petitioners.

Consequently, the auditor estimated Best Taxi’s revenues subject to tax by first calculating the total number of shifts worked by cabdrivers who were assigned taxicabs by Best Taxi. The

auditor determined that Best Taxi had cabdrivers work 117,121.48 shifts, during the audit period

calculated as follows:

Sales Tax Quarter	Total Shifts Available Per Cab	Total Cabs Shown As Dispatched	Driver Owned Vehicles Claimed	Total Cabs Available	Total Available Shifts	Shifts Worked 90.50%
7/7/92-8/31/92	112	84	-0-	84	9,408	8,514.24
Ending Nov. 30, 1992	182	82	-0-	82	14,924	13,506.22
Ending Feb. 28, 1993	180	85	-0-	85	15,300	13,846.50
Ending May 31, 1993	184	91	-0-	91	16,744	15,153.32
Ending Aug. 31, 1993	184	94	-0-	94	17,296	15,652.88
Ending Nov. 30, 1993	182	110	6	104	18,928	17,129.84
Ending February 28, 1994	180	110	6	104	18,720	16,941.60
Mar. 1- May 26, 1994	174	110	6	104	18,096	16,378.88
Total Shifts Worked By Drivers						117,121.48

The auditor calculated “total shifts available per cab” by multiplying the days in each month by two. For example, December 1992 has 31 days, January 1993 has 31 days, and February 1993 has 28 days for a total of 90 days in the sales tax quarter ending February 28, 1993. The 90 days in the quarter multiplied by 2 equals the 180 “total shifts available per cab” shown in the table above for this particular quarter. The numbers shown in the table for “total cabs shown as dispatched” were determined by the auditor from his review of the dispatch book provided by petitioners for one of the two years at issue as noted in Finding of Fact “6”, and certain unidentified records obtained from the New York City Taxi and Limousine Commission, which apparently also disclosed the number of taxicabs dispatched by Best Taxi. For the last three sales tax quarters at issue the auditor allowed a credit of six for “driver owned vehicles” because such drivers rented only medallions from Best Taxi and not vehicles. The auditor then determined “shifts worked” by reviewing the dispatch book and calculating that Best Taxi’s vehicles were on the road only 90.5% of the time. He applied this percentage to the numbers in each sales tax quarter for “total available shifts,” which was an arithmetic calculation of “total cabs available” multiplied by “total shifts available per cab” for the particular sales tax quarter.

We modify finding of fact “8” of the Administrative Law Judge’s determination to read as follows:

As noted earlier, the cabdrivers who operated Best Taxi’s vehicles did not work on a commission basis nor were they employees.⁴ Rather, in exchange for the payment of approximately \$80.00, they obtained the right to operate a medallion yellow taxicab on the streets of New York City for 12 hours and to retain all fares collected from passengers less their cost for gasoline. Included in this \$80.00, an amount not contested by petitioners,

⁴Finding of fact “1” of the Administrative Law Judge’s determination.

was compensation to Best Taxi for providing the use of a medallion, the use of a yellow taxicab and some profit to the corporate petitioner. Taxing authorities regarded Best Taxi's drivers as independent contractors, even though the corporate petitioner was required to maintain worker's compensation insurance for the drivers. The auditor determined that \$24.00 of the \$80.00 was reasonably allocable to what he considered to be the rental of a vehicle, i.e., the yellow taxicab. This \$24.00 figure was the amount agreed to in the summer of 1994 by the New York State Department of Taxation and Finance and accountants representing the Metropolitan Taxicab Board of Trade and a large majority of the fleet members of this trade association as well as many medallion taxicab fleets that were not members of this association. In an earlier letter dated June 20, 1986, which supplemented an advisory opinion that had been issued to the Metropolitan Taxicab Board of Trade, John P. Dugan, then Deputy Commissioner and Counsel of the New York State Department of Taxation and Finance, noted, in relevant part, as follows:

[I]f a taxicab medallion is rented with a taxicab, two distinct transactions are entered into and only the portion of the rental price properly allocable to the rental of the taxicab is subject to tax. In such a case, the relative value of each asset should be established and the rental price of the medallion and the rental price of the taxicab should be separately stated in the rental contract.

This supplemental advisory opinion then went on to approve the suggestion by the representative of the Metropolitan Taxicab Board of Trade that the average rental charge for the rental of similar motor vehicles in New York City would be an acceptable measure, as long as the rental charges referenced were "those of recognized rental agencies (e.g. Hertz or Avis) and not Rent-a-Wreck and must be for comparable cars." Six years later, in the summer of 1994, as noted above, \$24.00 was agreed to by the representative of the Metropolitan Taxicab Board of Trade and the Department of Taxation and Finance.⁵

⁵We modified finding of fact "8" of the Administrative Law Judge's determination to more clearly reflect the record.

We modify finding of fact “9” of the Administrative Law Judge’s determination to read as

follows:

The auditor, utilizing \$24.00 as the portion of the \$80.00 allocable to the rental of the yellow taxicab, calculated tax due from Best Taxi totaling \$335,201.68, as follows:

Shifts Worked	Multiplied by \$24.00 per shift	Taxable Rental @ 90.00%	Sales Tax @ 8.25%	Special Tax on Passenger Car Rentals @ 5.00%	Total Tax
8,514.24	\$ 204,341.76	\$ 183,907.58	\$ 15,172.38	\$ 9,195.38	\$ 24,367.75
13,506.22	324,149.28	291,734.35	24,068.08	14,586.72	38,654.80
13,846.50	332,316.00	299,084.40	24,674.46	14,954.22	39,628.68
15,153.32	363,679.68	327,311.71	27,003.22	16,365.59	43,368.80
15,652.88	375,669.12	338,102.21	27,893.43	16,905.11	44,798.54
17,129.84	411,116.16	370,004.54	30,525.37	18,500.23	49,025.60
16,941.60	406,598.40	365,938.56	30,189.93	18,296.93	48,486.86
16,376.88	393,045.12	353,740.61	29,183.60	17,697.03	46,870.63
Totals: 117,121.48 ⁶	\$2,810,915.52 ⁷	\$2,529,823.97	\$208,710.48	\$126,491.20	\$335,201.68

As noted in the third column of the above table, the auditor treated as taxable only 90% of the total amount obtained by multiplying the number of shifts by \$24.00. This was an error in favor of petitioners made by the auditor. In the past, a compliant taxicab dispatch business, which utilized the rental rates of the rental car industry in calculating tax due, was allowed a 10% discount of such rates. Since such rates were substantially higher than the \$24.00 utilized in the above calculation, this 10% discount was

⁶The Administrative Law Judge inadvertently transposed the number in this column to \$171,121.48, but it did not impact the tax computation.

⁷The total fee of \$80.00 multiplied by total shifts of 117,121.48 results in driver payments to Best Taxi totaling \$9,369,718.40 for the audit period.

incorrectly provided to petitioners according to the auditor. A canvass of car rental daily rates for New York City conducted in 1993 by the Division resulted in a “weighted average” of \$106.32 per day, and if Hertz and Avis rates were excluded from this weighted average, the average was \$85.61 per day or \$42.80 per 12-hour shift.⁸

We modify finding of fact “10” of the Administrative Law Judge’s determination to read as follows:

A publication dated March 31, 1994 of the New York City Taxi and Limousine Commission entitled *Should the Taxi Fare Go Up?* provides various findings and recommendations concerning financial and service issues involving the New York City taxi industry. According to this publication, the average annual operating costs paid by a fleet operation like the type represented by the Metropolitan Taxicab Board of Trade, which negotiated the \$24.00 taxicab rental figure⁹ was, in 1993, \$34,455.00 per cab as compared to \$32,102.00 per cab for “other shift lessors” like Best Taxi. A comparison of the 1993 costs for these two types of operations was as follows:

	Average Operating Costs Paid By Fleets of the Type Represented by the Metropolitan Taxicab Board of Trade	Average Operating Costs Paid By Other Shift Lessors Like Best Taxi
Vehicle Depr./Int.	\$ 7,199.00	\$ 3,533.00
Vehicle Maintenance	8,929.00	8,929.00
Liability Insurance	4,900.00	6,214.00
Workers’ Comp.	3,077.00	3,077.00
General & Admn.	8,605.00	8,605.00

⁸We modified finding of fact “9” of the Administrative Law Judge’s determination to correct a transposed number.

⁹As noted in finding of fact “8” of the Administrative Law Judge’s determination.

Licenses & Fees	744.00	744.00
Motor Vehicle Tax	1,000.00	1,000.00
Total Fleet Costs	\$34,455.00	\$32,102.00

Dividing total fleet costs of \$32,102.00 shown in the table above for shift lessors like Best Taxi by 610, the number of shifts worked in an average year, the auditor pointed out the per shift cost is \$53.00, substantially higher than the \$24.00 used in his calculation of tax due. The auditor conceded that the total fleet costs would have to be adjusted for costs that are attributed to the medallion, an intangible asset. He did not specify such costs but apparently costs attributed to the intangible medallion do not amount to any substantial portion of the total fleet costs of \$32,102.00.¹⁰

Best Taxi's annual vehicle maintenance costs per vehicle during 1993, according to Andy Fradelakis, the corporation's accountant, were approximately \$350.00 per month or on an annual basis, \$4,200.00, an amount substantially less than the \$8,929.00 shown in the table above. Best Taxi used in-house mechanics for maintenance of its vehicles which would explain this lesser amount. In addition, Best Taxi's general administrative expenses per vehicle on an annual basis, according to the corporation's accountant, were \$2,200.00, substantially less than the \$8,605.00 shown in the table above. Further, New York City taxicab medallions have sold for as much as \$180,000.00 during the audit period as compared to Best Taxi's average purchase price for a vehicle of \$10,000.00. The corporate petitioner purchased both new and used vehicles to be used in its operations. A new car invoice dated July 7, 1994 from HB Chevrolet shows the purchase of a "taxi" for \$14,450.00, with no sales tax paid on the purchase. A used

¹⁰We modified finding of fact "10" of the Administrative Law Judge's determination to more clearly set forth the record.

car invoice dated June 9, 1993 from Winners Motor Corp. shows the purchase of a 1991 “Chevy Cap.” with an odometer reading of 56,869 miles for \$6,312.60.

We modify finding of fact “12” of the Administrative Law Judge’s determination to read as follows:

The cabdrivers who operated Best Taxi’s vehicles in exchange for the payment of approximately \$80.00 obtained the right to operate a medallion yellow taxicab on the streets of New York City for 12 hours.¹¹ The record does not clearly resolve whether Best Taxi and an individual cabdriver entered into any written agreement concerning their relationship. The testimony of Mr. Fradelakis, Best Taxi’s accountant, on this point exhibited some hesitancy about committing himself:

Attorney Matthews: When a driver rents - - gets a vehicle from your company, is there some sort of lease agreement that is long term that covers that?

Andy Fradelakis: No.

Attorney Matthews: Is there some sort of document that changes hands? When he picks up a cab you put an entry in the large ledger book?

Andy Fradelakis: Book original entry.

Attorney Matthews: Does he get some sort of paperwork?

Andy Fradelakis: No.

Attorney Matthews: How does he know what the price is? It is just verbal you tell him it is \$80.00?

Andy Fradelakis: There is a schedule posted.

¹¹As noted in finding of fact “8” of the Administrative Law Judge’s determination.

Attorney Matthews: There is no document that changes hands that shows the driver what the arrangement is, how much money?

Andy Fradelakis: *Not to my knowledge.*

Attorney Matthews: Is there any sort of document which would show a breakdown to the driver saying or maybe something on the wall which says this \$80 is composed of X dollars for the car, Y dollars for the medallion and C dollars for miscellaneous?

Andy Fradelakis: *Not to my knowledge.* [Tr, pp. 120-121 (emphasis added).]

Mr. Fradelakis testified he keeps the books and records of Best Taxi in his office (Tr., p. 113). However, he didn't have copies of records showing yearly or monthly maintenance costs per vehicle (Tr., p. 114). Mr Fradelakis prepares the tax returns for the corporate petitioner, but does not know if Best Taxi pays sales tax on its purchases of supply materials like oil and tires or the vehicles themselves (Tr., pp. 115-117). Mr. Fradelakis does not file withholding tax returns for the taxi cab drivers that use Best Taxi's vehicles, since State and Federal tax authorities regard such drivers as independent contractors (Tr., p. 119).¹²

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

Petitioner, George Statharos, has not contested his status as an officer of Best Taxi responsible for the corporation's collection of tax. During his brief testimony, Mr. Statharos testified that to cover all of Best Taxi's costs to maintain and operate a taxicab averaged approximately \$6,000.00 per year per vehicle, an amount significantly lower than the \$32,102.00 referred to by the auditor.¹³

¹²We finding of fact "12" of the Administrative Law Judge to more completely set forth the record.

¹³As shown in the table in finding of fact "10" of the Administrative Law Judge's determination.

In fact, Mr. Statharos's estimated figure was not much more than the \$4,200.00 amount¹⁴ for Best Taxi's annual per vehicle maintenance costs derived from the testimony of petitioners' accountant, Andy Fradelakis. Neither of the two amounts proffered by petitioners' witnesses were supported by source documentation for the audit period.¹⁵

We modify finding of fact "14" of the Administrative Law Judge's determination to read as follows:

By a conciliation order issued by the Bureau of Conciliation and Mediation Services ("BCMS") dated May 29, 1999, tax asserted due against Best Taxi was reduced from \$355,201.68 to \$233,067.24. As noted earlier, the auditor had originally calculated that Best Taxi had cabdrivers work 117,121.48 shifts. The reduction pursuant to the conciliation order was based upon a reduction of approximately 30% in the number of shifts worked by Best Taxi's drivers from 117,121.48 to 81,435. This reduction resulted from the auditor's increasing the number of driver-owned vehicles used in his calculations to 18 in each of the sales tax quarters at issue as compared to his allowing only 6 in each of the last 3 sales tax quarters only.¹⁶ Further, this reduction also resulted from the auditor's applying a percentage of 83.40% against the maximum number of shifts possible, instead of the higher percentage of 90.50%, as indicated above, to calculate the number of shifts actually worked. The lesser amount of tax due of \$233,067.24 was then calculated based upon this smaller number of shifts worked of 81,435 as follows:¹⁷

¹⁴Noted in finding of fact "11" of the Administrative Law Judge's determination.

¹⁵We modified finding of fact "13" of the Administrative Law Judge's determination to more clearly reflect the record.

¹⁶As shown in finding of fact "7" of the Administrative Law Judge's determination.

¹⁷We modified finding of fact "14" of the Administrative Law Judge's determination to more concisely state the record.

Shifts Worked	Multiplied by \$24.00 per shift	Taxable Rental @ 90.00%	Sales Tax @ 8.25%	Special Tax on Passenger Car Rentals @ 5.00%	Total Tax
6,165	\$ 147,958.27	\$ 133,162.44	\$ 10,985.90	\$ 6,658.12	\$ 17,644.02
9,714	223,146.37	209,831.73	17,311.12	10,491.59	27,802.70
10,056	241,392.96	217,923.43	17,923.43	10,862.68	28,786.11
11,202	268,854.91	241,969.42	19,962.48	12,098.47	32,060.95
11,663	279,903.74	251,913.37	20,782.85	12,595.67	33,378.52
11,081	265,932.58	239,339.32	19,745.49	11,966.97	31,712.46
10,959	263,010.24	236,709.22	19,528.51	11,835.46	31,363.97
10,593	254,243.23	228,818.91	18,877.56	11,440.95	30,318.51
TOTALS 81,435	\$1,954,486.30	\$1,758,998.97	\$145,117.42	\$87,949.95	\$233,067.24

In addition, pursuant to the conciliation order dated May 29, 1999, penalty was canceled.

Six months earlier, by a letter dated December 1, 1998, one of petitioners' representatives provided the following basis for petitioners' request that penalty be abated:

The taxpayer . . . was of the belief that rental of a taxi was primarily the rental of a medallion (license) to do business in New York City, and that the cab was incidental to this rental since the value of the medallion is more than eleven times the value of the cab

* * *

The taxpayer was of the belief that he was not required to register for Sales tax since the rental of a medallion, as an intangible, is not subject to Sales tax.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Tax Law § 1105(a)¹⁸ imposes a sales tax on “[t]he receipts from every retail *sale* of tangible personal property, except as otherwise provided in this article,” and all receipts for property or services of any type mentioned in Tax Law § 1105 (a), (b), (c), and (d) are subject to tax “until the contrary is established” (Tax Law § 1132[c]) (emphasis added).

The Administrative Law Judge noted that the terminology “sale, selling or purchase” is defined expansively in the Tax Law at section 1101(b)(5) to include any transaction in which there is a transfer of title *or possession* or both of tangible personal property for a consideration including the “exchange or barter, *rental*, lease or license to use or consume, *conditional* or otherwise, *in any manner* or by any means whatsoever [emphasis added].”

The Administrative Law Judge found that Best Taxi, in exchange for some part of a total fee of \$80.00, transferred possession of a yellow taxicab to a driver who had the right to use the vehicle on the streets of New York City for a 12-hour shift. The Administrative Law Judge agreed with petitioners that the driver’s use of the vehicle was *conditioned* by the regulatory limitations imposed by the New York City Taxi and Limousine Commission. Nonetheless, the Administrative Law Judge concluded, the driver’s independent use and possession of the cab to earn personal income from the transportation of passengers during a 12-hour shift, in exchange for the payment of a fee to Best Taxi, constituted the “sale” of tangible personal property under the expansive definition cited above. The Administrative Law Judge rejected petitioners’ argument that the driver must have “dominion and control” over the vehicle in order to conclude

¹⁸Pursuant to Tax Law § 1165, the special tax of five percent imposed on passenger car rentals under Tax Law § 1160(a) “shall be administered and collected in a like manner as and jointly with the taxes imposed by [Tax Law § 1105].”

that the transaction is subject to tax. It is not necessary, under the Tax Law's expansive definition of "sale, selling or purchase," that the driver have supreme authority or absolute ownership over the vehicle. Rather, the Administrative Law Judge noted, the driver need merely have "the license to use . . . in any manner" the yellow taxicab, a standard easily met in this matter.

The Administrative Law Judge found the regulations and cases cited by petitioners in support of their position are taken out of context and are not persuasive. For example, 20 NYCRR 541.2 includes an Example 6, cited by petitioners. This example is included in a section of the tax regulations which provides guidance concerning the taxability of a transaction where a vendor provides a vehicle *and* the services of a driver or operator to a customer. Best Taxi is *not* providing a taxi and a driver to a particular customer who has an agreement directly with it, as in the situation illustrated by this example. The Administrative Law Judge found this regulation and example irrelevant to petitioners' facts.

Turning to the validity of the audit, the Administrative Law Judge concluded that the auditor properly conducted an estimated audit. Best Taxi did not produce books and records adequate for a detailed audit which therefore justified estimating the corporate petitioner's tax liability (Tax Law § 1138[a]). Further, as noted above,¹⁹ Best Taxi's dispatch sheets were available for only a portion of the audit period at issue. Moreover, information concerning expenses and deposits were missing on many of the sheets.

Having concluded that it was reasonable to conduct an estimated audit, the Administrative Law Judge next addressed the issue of whether the Division selected a method of audit

¹⁹And in finding of fact "6" of the Administrative Law Judge's determination.

reasonably calculated to reflect tax due (*Matter of Grecian Sq. v. State Tax Commn*, 119 AD2d 948, 501 NYS2d 219). The Administrative Law Judge found it was reasonable for the Division to utilize Best Taxi's dispatch sheets and records of the Taxi and Limousine Commission to determine the number of cabs dispatched by the corporate petitioner during the audit period, and petitioners do not appear to contest such numbers. The Administrative Law Judge also found that the Division's use of \$24.00 or 30% of the total fee of \$80.00 paid by a driver to obtain the use of a yellow taxi cab *and* a medallion was reasonable. As noted by the Administrative Law Judge, the \$24.00 represented a negotiated amount between the Division and representatives of the Metropolitan Taxicab Board of Trade. This negotiated amount was to serve as a "safe harbor" for calculating tax due on the assignment or rental of cabs to drivers. This "safe harbor" amount of \$24.00 (when agreed upon) was substantially less than actual daily rental car rates in New York City.

For example, the Administrative Law Judge noted that in a canvass of rental car rates it was determined that \$42.80 for a 12-hour shift would be reasonable based upon a weighted average for daily rental car rates in New York City of \$85.61 per day. If rates charged by Hertz and Avis were included, the weighted average would have been even higher at \$106.32 per day, or \$53.16 per 12-hour shift. Furthermore, the Administrative Law Judge found that Best Taxi and the fleet owners represented by the Metropolitan Taxicab Board of Trade were sufficiently alike for purposes of using the \$24.00 amount. The publication of the New York City Taxi and Limousine Commission, *Should the Taxi Fare Go Up?*, indicated that the average operating cost per cab for fleet operations like the type represented by the Metropolitan Taxicab Board of Trade

was \$34,455.00 and for “other shift lessors” like Best Taxi was \$32,102.00, only seven percent lower.²⁰

Since the Administrative Law Judge concluded that the Division’s estimate of tax due was reasonable in the first instance, the burden shifted to petitioners to establish by clear and convincing evidence that both the method used to arrive at the tax assessment and the assessment itself are erroneous (*Matter of Sol Wahba, Inc. v. New York State Tax Commn*, 127 AD2d 943, 512 NYS2d 542). The Administrative Law Judge found that petitioners failed to meet their burden of proof. The Administrative Law Judge found most damaging to petitioners’ case, their failure to introduce any evidence concerning the fee charged for Best Taxi’s rental of medallions to drivers who owned their own vehicles. Petitioners were allowed a reduction in the number of shifts used to calculate tax due for driver-owned vehicles since only medallions, an intangible not subject to tax, would have been rented by drivers who owned their own vehicles.²¹ In the initial audit, 6 driver-owned vehicles were allowed in each of the last 3 sales tax quarters only, while at BCMS this number was increased to 18 in each of the sales tax quarters at issue. There is a question of what Best Taxi charged for the rental of a medallion only. The Administrative Law Judge noted that petitioners offered no proof on this pivotal matter, which was further compounded by the testimony of Best Taxi’s accountant, Andy Fradelakis, who exhibited hesitancy about committing himself on the equally crucial issue whether Best Taxi and individual cabdrivers entered into any written agreement concerning their relationship. The Administrative Law Judge found it hard to believe that a taxi dispatch operation of Best Taxi’s

²⁰As noted in finding of fact “10” of the Administrative Law Judge’s determination.

²¹Findings of fact “7” and “14” of the Administrative Law Judge’s determination.

size, with receipts from the fees charged its drivers over the audit period of approximately \$9,000,000.00 would have no written agreements of any sort with its drivers. In any event, the Administrative Law Judge found that this failure by petitioners to introduce vitally important evidence must be held against them (*citing, Matter of Meixsell v. Commissioner of Taxation*, 240 AD2d 860, 659 NYS2d 325, *lv denied* 91 NY2d 811, 671 NYS2d 714).

Furthermore, the Administrative Law Judge rejected as fallacious Best Taxi's estimation of the portion of the \$80.00 charge allocable to the rental of the taxicab which was based upon the proposition that medallions, with market values of \$180,000.00, were substantially more valuable than vehicles for purposes of the allocation between the rental of the taxicab and the rental of the medallion. As noted by the Administrative Law Judge, Best Taxi rents the medallions which it, in turn, assigns to drivers, for approximately \$18,000.00 on an annualized basis; this belies its use of the \$180,000.00 market value for medallions. Therefore, the Administrative Law Judge found, petitioners' proposed estimate that the value for the rental of the taxicab should be \$4.17 per shift and the medallion rental \$75.83 (\$80.00 less \$4.17) is without merit. Instead, the Administrative Law Judge proffered, dividing Best Taxi's expense to rent a medallion for a year (\$18,000.00) by the maximum number of shifts in the course of a year which the medallion could be rented to a driver of 730 (365 days multiplied by 2) equals \$24.66. Although, the Administrative Law Judge continued, this \$24.66 amount should be increased in some measure to account for the fact that a particular medallion would not have been assigned to a driver for every possible shift in the course of a year, Best Taxi's calculations greatly exaggerated that portion of the \$80.00 per shift fee to be allocated to the medallion. Consequently, Best Taxi greatly underestimated the portion of the per shift fee to be allocated to

the taxicab rental. In sum, the Administrative Law Judge concluded that petitioners failed to establish that the auditor's methodology and the assessment were erroneous.

The Administrative Law Judge denied the petitions and the Notice of Determination dated February 4, 1997 issued to Best Taxi Management, Inc. and the Notice of Determination dated February 14, 1997 issued to George Statharos, Officer, as modified by the conciliation order dated May 29, 1999, were sustained.

ARGUMENTS ON EXCEPTION

Petitioners argue, as they did below, that:

Best Taxi's assignment of cabs with medallions to drivers may not be viewed as a transaction which includes the leasing of a vehicle, because there is no such transfer of control to the drivers as would be required for a rental of a vehicle. In particular, petitioners point to the fact that Best Taxi, as owner, is accountable to the Taxi and Limousine Commission ("TLC") for the service provided by their cabs. According to petitioners, the cab drivers who obtain cabs from Best Taxi do not have dominion and control of the vehicle.

Rather, petitioners urge, it is either the TLC which has control over this part of the New York City transportation system, or the passenger, who tells the driver where he wants to go (which by regulation must be the "shortest reasonable route"), or the owner of the cab itself.

In sum, petitioners maintain that Best Taxi did not lease vehicles to its drivers, but rather Best Taxi and its drivers are participants in the New York City transportation system.

In the alternative, if it is held that Best Taxi's assignment of cabs to its drivers constituted the taxable rental of vehicles, petitioners urge that the audit itself was defective. According to petitioners' witnesses, the auditor used an arbitrary \$24.00 as the value for the rental of a vehicle

for a 12- hour shift and ignored Best Taxi's books of original entry. Petitioners argue the testimony of their witnesses showed that 94.79% of the rental should be allocated to the medallion and 5.21% to the vehicle, which would result in a vehicle rental of \$4.17 per shift. This alternative calculation is based upon a medallion's value of \$180,000.00 and the average vehicle purchase price of \$10,000.00.

The Division, in its brief below, countered that each driver rents his vehicle from Best Taxi and operates it as he chooses without any control by Best Taxi. The Division's position is based on the following factors: (i) each driver pays a set rental charge in exchange for the unlimited use of a vehicle for a 12-hour period, (ii) each driver retains all fares collected, and (iii) the driver is not instructed by Best Taxi where or when to drive.

The Division defends the auditor's estimated audit as reasonable. The Division rejects petitioners' contention that the dispatch sheets for half of an audit period could be used to conduct a detailed audit. Rather, the \$24.00 amount used by the auditor as the taxable portion of the \$80.00 fee paid by a driver to Best Taxi was reasonable. The \$24.00 amount represented a "safe harbor," substantially lower than other justifiable amounts based upon an analysis of rental car charges or cost figures for operating cabs contained in the TLC's publication, "*Should the Taxi Fare Go Up?*"

Petitioners suggest that the auditor should have conducted a test period audit utilizing the dispatch sheets which were available for 13 months of the approximately 24 months at issue. Further, petitioners' own method for estimating the portion of the \$80.00 charge allocable to the rental of a vehicle, they argue, was perhaps not perfect, but certainly more defensible than agreed amounts negotiated between the Department and the taxi industry in New York City.

OPINION

The record is sufficient to establish that petitioners, in exchange for a fee, transferred use and possession of a yellow taxicab and medallion to a driver who had the *right or license to use the cab* and medallion on the streets of New York City to transport passengers for a 12-hour shift. This transfer of use and possession of the yellow taxicab for a fee is sufficient to constitute a taxable “sale” of tangible personal property (Tax Law §§ 1101[b][5]; 1105[a]; 1132[c]). The fact that the drivers were subject to regulatory limitations of the TLC is irrelevant to this issue.

We deal next with petitioners' assertion that the Administrative Law Judge erred in sustaining the audit methodology used by the Division in this case.

The law is clear that, "[t]he honest and conscientious taxpayer who maintains comprehensive records as required has a right to expect that they will be used in any audit to determine his ultimate tax liability" (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43).

To determine the adequacy of a taxpayer's records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, 102 AD2d 352, 477 NYS2d 858) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978) 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, *lv denied* 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through *verification drawn independently from within these records* (*Matter of Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255; *Matter of Urban Ligs. v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *see also*,

Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is "virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit" (*Matter of Chartair, Inc. v. State Tax Commn.*, *supra*, 411 NYS2d 41, 43; *Matter of Christ Cella, Inc. v. State Tax Commn.*, *supra*, 477 NYS2d 858, 859), "from which the exact amount of tax due can be determined" (*Matter of Mohawk Airlines v. Tully*, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records of the taxpayer are insufficient or inadequate to permit an exact computation of the sales and use tax due, the Division is authorized to resort to an estimate of a taxpayer's tax liability (Tax Law § 1138[a][1]; *see, Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348, 478 NYS2d 91). The methodology selected must be reasonably calculated to reflect the taxes due (*Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75; *Matter of Ristorante Puglia, Ltd. v. Chu*, *supra*), but exactness in the outcome is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454).

It is clear from the record that after making a request for the corporate taxpayer's books and records, the auditor reviewed the limited books and records presented by petitioners. The auditor then properly concluded that the books and records provided for the audit period were incomplete, lacking in source documentation, unverifiable and, therefore, inadequate to conduct a detailed audit (*see, Matter of Vebol Edibles v. State of New York Tax Appeals Tribunal*, 162 AD2d 765, 557 NYS2d 678, *lv denied* 77 NY2d 803, 567 NYS2d 643). Therefore, the Administrative Law Judge properly concluded that the Division was authorized to resort to an

estimate of petitioners' sales and use tax liability using the records available. Even so, however, the Division was required to select a method of audit reasonably calculated to reflect tax due (*Matter of Grecian Sq. v. State Tax Commn, supra*). Based on this record, we conclude it was reasonable for the Division to utilize Best Taxi's dispatch sheets and records of the TLC to determine the number of cabs dispatched by the corporate petitioner during the audit period. We also agree with the Administrative Law Judge that the Division's use of \$24.00 or 30% of the total fee of \$80.00 paid by a driver to obtain the use of a yellow taxi cab *and* a medallion was reasonable. The \$24.00 represented a negotiated amount between the Division and representatives of the Metropolitan Taxicab Board of Trade. This negotiated amount was to serve as a "safe harbor" for calculating tax due on the assignment or rental of cabs to drivers. This "safe harbor" amount of \$24.00 (when agreed upon) was substantially less than actual daily rental car rates in New York City.

Petitioners urge that the auditor should have used another, better, audit method. In furtherance of this claim, petitioners' accountant, Andy Fradelakis, performed his own allocations and calculations and arrived at a much lower dollar figure for amounts allocated to the rental of yellow taxi cabs. Petitioners would have us adopt Mr. Fradelakis' figures. However, the audit method used by the Division to estimate tax need not be exact (*Matter of Markowitz v. State Tax Commn., supra*), it need only be reasonable (*Matter of Ristorante Puglia, Ltd. v. Chu, supra*), and we find that it was. Petitioners have failed to come forward with clear and convincing evidence to show that the audit method was unreasonable or that the amount arrived at was incorrect. Petitioners' accountant, Andy Fradelakis, testified that he maintained Best Taxi's books and records in his office, including purchase invoices and other

records that might have been used in verifying petitioners' sales figures. However, these documents were not placed in evidence by petitioners. Nor are we persuaded by petitioners' argument that the auditor erred in allocating \$24.00 of the \$80.00 per shift fee to rental of a vehicle. In the summer of 1994, as noted above in the facts, \$24.00 was agreed to by the representative of the Metropolitan Taxicab Board of Trade and the Department of Taxation and Finance as a "safe harbor" amount to be allocated to rental of taxicabs in these situations.²² Petitioners argue, but have not come forward with clear and convincing evidence to show, that they do not come within the parameters of this agreement. We note it was petitioners who had, or should have had, the books and records to show their actual allocation for the per shift vehicle rentals, if it was different than the "safe harbor" amount. Not having produced such records at audit, or at the hearing in this matter, we can find no basis for substituting petitioners' estimates for the auditor's.

We have reviewed and considered petitioners' remaining claims and find them to be without merit. We affirm the determination of the Administrative Law Judge for the reasons stated therein. Petitioners have offered no evidence at hearing, or arguments on appeal, that would justify our modifying the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Best Taxi Management, Inc. and George Statharos, Officer, is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Best Taxi Management, Inc. and George Statharos, Officer, are denied;

and

²²Presumably, it now being eight years later, the actual amounts for cab rentals would have increased, but there is no indication that the Division has negotiated an increase in this "safe harbor" amount.

4. The Notice of Determination dated February 4, 1997 issued to Best Taxi Management, Inc. and the Notice of Determination dated February 14, 1997 issued to George Statharos, Officer, as modified by the conciliation order dated May 29, 1999, are sustained.

DATED: Troy, New York
January 24, 2002

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner