

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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. :
: **DETERMINATION**
: **DTA NOS. 817189**
: **AND 817603**

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 :
:

Petitioner, Best Taxi Management, Inc., 23-31 Astoria Boulevard, Long Island City, New York 11102-2942, filed a petition 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.

Petitioner, George Statharos, Officer, 23-31 Astoria Boulevard, Long Island City, New York 11102-2942, filed a petition 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.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 22, 2000 at 10:30 A.M., and continued to conclusion before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on May 23, 2000 at 1:15 P.M., with all briefs to be submitted by July 20, 2000, which date began the six-month period for the issuance of this determination. Petitioners appeared by James H. Tully, Jr., Esq. and Stewart Buxbaum, C.P.A. The Division of Taxation appeared by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel).

ISSUES

I. Whether the corporate petitioner's assignment of yellow taxi cabs with medallions to drivers, to be used during 12-hour shifts on the streets of New York City with the drivers retaining all fares collected from passengers, in consideration of charges of \$80.00 per shift paid by the drivers to petitioner, represented the rental of passenger cars subject to the imposition of 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 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

1. 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.

2. 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 of the medallions, also came into existence and assumed the daily operating

¹ The record does not clearly specify a starting date for the corporate petitioner’s operation of its yellow medallion taxicab dispatch business. However, as noted in Finding of Fact “4”, 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.

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.

3. 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.

4. 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:

² As noted in Finding of Fact "1", 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

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 for audit from petitioners. In particular, no books and records were received concerning Best Taxi's purchase and depreciation costs for its vehicles or its costs to maintain its vehicles.

6. 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 "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:

$$\begin{array}{r} \text{SCHEDULE \$ } \underline{\hspace{2cm}} + \text{REPAIRS \$ } \underline{\hspace{2cm}} \\ + \text{DEPOSITS \$ } \underline{\hspace{2cm}} - \text{EXPENSES \$ } \underline{\hspace{2cm}} \\ = \text{GRAND TOTAL \$ } \underline{\hspace{2cm}} \end{array}$$

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.

7. 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.

8. As noted in Finding of Fact “1”, the cabdrivers who operated Best Taxi’s vehicles did not work on a commission basis nor were they employees.³ 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 petitioner, 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. 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.

³ Taxing authorities regarded Best Taxi’s drivers as independent contractors. However, the corporate petitioner maintained worker’s compensation insurance for the drivers.

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.

9. 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: 171,121.48	\$2,810,915.52 ⁴	\$2,529,823.97	\$208,710.48	\$126,491.20	\$335,201.68

⁴ The total fee of \$80.00 multiplied by total shifts of 171,121.48 results in driver payments to Best Taxi totaling \$13,689,718.40 for the audit period.

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 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.

10. 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 operating costs paid by a fleet operation like the type represented by the Metropolitan Taxicab Board of Trade, which as noted in Finding of Fact “8” negotiated the \$24.00 taxicab rental figure 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
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 \$32,102.10 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 \$32,102.10.

11. 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 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.

12. As noted in Finding of Fact "8", 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. 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.

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).]

13. 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 shown in the table in Finding of Fact "10". In fact, Mr. Statharos's estimated figure was not much more than the \$4,200.00 amount noted in Finding of Fact "11" concerning Best Taxi's annual vehicle maintenance costs per vehicle, which was based upon the testimony of the corporation's accountant, Andy Fradelakis. Neither of these two amounts suggested by petitioners' witnesses were bolstered by any documentation.

14. 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, as detailed in Findings of Fact "4" and "9", to \$233,067.24. As noted in Finding of Fact "7", 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, as shown in Finding of Fact "7". 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 in Finding of Fact "7", 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:

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

15. 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.

SUMMARY OF THE PARTIES' POSITIONS

16. Petitioners argue 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 "the owner is held

to such responsibility for the conduct and operation of [the] vehicle that there is simply not the transfer of such ownership and control as amounts to the rental of a vehicle” (Petitioners’ brief, p. 8). In particular, petitioners point to the fact that Best Taxi, as owner, is accountable to the Taxi and Limousine Commission 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:

[R]ather . . . It is either the [Taxi and Limousine Commission] 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 medallion cab, such as the Petitioner herein, which under the law and regulations [and cases cited] is undeniably held responsible (Petitioners’ brief, p. 12).

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 yellow taxi cab industry, a highly-regulated transportation system.

In the alternative, presuming that Best Taxi’s assignment of cabs to its drivers constituted the taxable rental of vehicles, petitioners maintain that the audit was defective. According to petitioners, 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’ brief, p. 13). Petitioners argue that they 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 allocation was based upon a medallion’s value of \$180,000.00 and the average purchase price for a vehicle of \$10,000.00.

17. The Division counters that “each driver clearly rents his vehicle from Best Taxi and operates it as he chooses without any control by Best Taxi” (Division’s brief, p. 9). The Division

bases its contention 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) each driver is not instructed by Best Taxi where or when to drive. The Division also defends the auditor's estimated audit as reasonable. The Division rejects petitioners' contention that the dispatch sheets 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 Taxi and Limousine Commission's publication, "Should the Taxi Fare Go Up?" The Division rejects petitioners' use of the market value of medallions to allocate the \$80.00 fee paid by a driver because "this matter does not involve the sale of medallioned taxis" (Division's brief, p. 8).

18. In its reply brief, 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' method for estimating the portion of the \$80.00 charge allocable to the rental of a vehicle was "perhaps not perfect, but it is certainly more defensible than values set in an agreement between the Department and companies vastly different from the petitioner, or rentals of luxury cars charged by Hertz and Avis to the general public or, lastly, by trying to justify the \$24.00 by reference to costs [contained in the publication of the Taxi and Limousine Commission] which were shown by testimony to be inaccurate" (Petitioners' reply brief, p. 6).

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1105(a)⁵, sales tax is imposed on “[t]he receipts from every retail *sale* of tangible personal property, except as otherwise provided in this article” (emphasis added). Furthermore, pursuant to Tax Law § 1132(c), 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.”

B. The terminology “sale, selling or purchase” is defined expansively in the Tax Law at section 1105(b)(5) to mean 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].”

C. The record clearly establishes 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. Petitioners are correct 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 driver’s possession of the cab for his use 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. Petitioners’ argument that the driver must have “dominion and control” over the vehicle in order to conclude that the transaction is subject to tax is rejected. It is not necessary, under the expansive definition of “sale, selling or purchase,” that the driver have

⁵ Pursuant 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].”

“supreme authority” or “absolute ownership” over the vehicle, the dictionary definition of “dominion” (Webster’s Ninth New Collegiate Dictionary 374 [1983]). Rather, he must merely have “the license to use . . . in any manner” the yellow taxicab, a standard easily met in this matter.

D. The regulations and cases cited by petitioners in support of their position that the assignment of taxi cabs to its drivers did not constitute a taxable transaction are, in general, taken out of context and are not persuasive. For example, 20 NYCRR 541.2 includes an Example 6, cited by petitioners, which is simply not relevant. 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.

E. Turning to the issue concerning the validity of the audit, it is initially 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]). As noted in Finding of Fact “6”, Best Taxi’s dispatch sheets were available for only a portion of the period at issue. Moreover, information concerning expenses and deposits were missing on many of the sheets.

F. The issue then becomes whether the Division selected a method of audit reasonably calculated to reflect tax due (*Matter of Grecian Square v. State Tax Commn*, 119 AD2d 948, 501 NYS2d 219). It was certainly 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. In addition, 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 in Finding of Fact "8", 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. As noted in Finding of Fact "9", this "safe harbor" amount of \$24.00 was substantially less than daily rental car rates in New York City. 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, 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. As noted in Finding of Fact "10", 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 \$32,102.10, only seven percent lower.

G. Since it has been concluded that the Division's estimate of tax due was reasonable in the first instance, petitioners must shoulder the burden 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. State Tax Commn*, 127 AD2d 943, 512 NYS 2d 542). Petitioners have clearly failed to meet such burden. Most damaging to petitioners' case is their failure to introduce any evidence concerning the fee charged for Best Taxi's rental of medallions to drivers who owned their own vehicles. As noted in Findings of Fact "7" and "14", 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. 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. 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. It conflicts with common sense to conclude that a taxi dispatch operation of Best Taxi's size, with receipts from the fees charged its drivers over the audit period of approximately \$13,000,000.00, as noted in footnote "4", would have absolutely no written agreement of any sort with its drivers. This failure by petitioners to introduce vitally important evidence must be held against them (*see, Meixsell v. Commissioner of Taxation*, 240 AD2d 860, 659 NYS2d 325, *lv denied* 91 NY2d 811, 671 NYS2d 714). Furthermore, Best Taxi's estimation of the portion of the \$80.00 charge allocable to the rental of the taxicab was based upon the fallacious 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 in Finding of Fact "1", Best Taxi rents the medallions it, in turn, assigns to drivers, for approximately \$18,000.00 on an annualized basis, which belies its use of the \$180,000.00 market value for medallions. Therefore, its suggested 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 any merit. Instead, 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 this amount of \$24.66 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, nonetheless, Best Taxi has greatly exaggerated in its own estimate the portion of the \$80.00 fee to be allocated to the medallion. Consequently, it greatly underestimated the portion to be allocated to the taxicab rental. In sum, it is concluded that petitioners have failed to establish that the auditor's methodology and the assessment were erroneous based upon the brief testimony of their two witnesses and this misleading use of the market value of medallions.

H. The petitions of Best Taxi Management, Inc. and George Statharos, Officer, are denied, 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, except to the extent modified by the conciliation order dated May 29, 1999, are sustained.

DATED: Troy, New York
December 14, 2000

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE