

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
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 of :  
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 PHILIP RISI AND JACQUELINE RISI :  
 d/b/a JAKFIL LIMOUSINE SERVICE :  
 :  
 for Revision of a Determination or for Refund :  
 of Sales and Use Taxes under Articles 28 and 29 :  
 of the Tax Law for the period December 1, 1969 :  
 through February 28, 1977. :

DECISION

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In the Matter of the Petition :  
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 of :  
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 PHILIP RISI AND JACQUELINE RISI :  
 d/b/a MIDWAY CADILLAC LIMOUSINE SERVICE :  
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 for Revision of a Determination or for Refund :  
 of Sales and Use Taxes under Articles 28 and 29 :  
 of the Tax Law for the Period December 1, 1970 :  
 through February 28, 1977. :

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Petitioners, Philip Risi and Jacqueline Risi, d/b/a Jakfil Limousine Service, 292 White Plains Road, Eastchester, New York 10709, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1969 through February 28, 1977 (File No. 26227).

Petitioners, Philip Risi and Jacqueline Risi, d/b/a Midway Cadillac Limousine Service, 292 White Plains Road, Eastchester, New York 10709, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1970 through February 28, 1977 (File No. 26230).

A consolidated formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 7, 1984 at 9:15 A.M. Petitioners appeared by Mario A. Procaccino, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irving Atkins, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly calculated additional taxable receipts derived by Mr. Risi from Jakfil Limousine Service during the period December 1, 1969 through February 28, 1977 and from Midway Cadillac Limousine Service for the period December 1, 1970 through February 28, 1977.

II. Whether the Audit Division properly assessed a penalty based upon fraud against Mr. Risi.

III. Whether any portion of the assessments was barred by the statute of limitations.

#### FINDINGS OF FACT

1. On March 20, 1979, as the result of a field audit conducted by the White Plains District Office and a subsequent examination performed by the Special Investigations Bureau, the Audit Division issued to petitioners, Philip Risi and Jacqueline Risi doing business as Jakfil Limousine Service ("Jakfil"), three notices of determination and demands for payment of sales and use taxes due under Articles 28 and 29 of the Tax Law for the period December 1, 1969 through February 28, 1977 in the amount of \$64,691.87, plus penalty of \$32,345.87 and interest of \$35,119.04, for a total of \$132,156.78.

On the same date, as the result of a field audit and a Special Investigations Bureau examination, the Audit Division issued to petitioners, Philip Risi and Jacqueline Risi doing business as Midway Cadillac Limousine Service

("Midway"), two notices of determination and demands for payment of sales and use taxes due under Articles 28 and 29 for the period December 1, 1970 through February 28, 1977 in the amount of \$19,695.05, plus penalty of \$9,847.47 and interest of \$10,900.51, for a total of \$40,443.03.

At the formal hearing, counsel for the Audit Division conceded that the assessments should not have properly been issued against Mrs. Risi and that her name should be removed from the notices of determination above-described.

2. Mr. Risi operated Jakfil and Midway as sole proprietorships from his residence in Eastchester, New York. The business activities consisted of the rental of limousines to funeral directors.

3. For the period December 1, 1972 through February 29, 1976, a sales tax auditor examined Jakfil's cash receipts and disbursements journal, bank statements and sales tax returns, and Mr. Risi's federal income tax returns. Jakfil retained some trip sheets, indicating the name of the funeral director - customer, the rental date and amount, and the name of the deceased, but did not retain copies of sales invoices furnished to customers.

The auditor's examination disclosed that deposits according to the bank statements exceeded gross sales reported. He equated the amount of deposits with gross sales and treated all sales as taxable, and assumed that Jakfil did not own the limousines it leased to customers, since Mr. Risi failed to claim any deduction for depreciation of vehicles on his tax returns. This, taken together with Jakfil's failure to separately state chauffeurs' labor charges on trip sheets and its failure to retain sales invoices, formed the

auditor's basis for disallowing an 18 percent exclusion pursuant to regulation section 530.4(b).<sup>1</sup>

The auditor examined Jakfil's available trip sheets to ascertain the business location of the funeral director - customer and then applied the tax rate effective for that jurisdiction. In sum, the auditor calculated total sales tax allegedly due for the period December 1, 1972 through February 29, 1976 of \$34,817.91, less sales tax paid of \$3,117.50,<sup>2</sup> for additional tax allegedly due of \$31,700.41.

The assessment against Jakfil for the remainder of the audit period was calculated by the Special Investigations Bureau as follows:

- (a) gross sales reported for the period December 1, 1972 through February 29, 1976 were divided by bank deposits for such period to yield an error ratio of 6.7725;
- (b) audited gross sales were computed by applying the error ratio of 6.7725 to gross sales reported for the period December 1, 1970 through November 30, 1972; and
- (c) all sales were considered taxable, and the 18 percent exclusion of regulation section 530.4(b) was not permitted.

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<sup>1</sup> "Except as set forth in subdivision (c) of this section, provided all registration fees and all insurance charges are paid by the lessor, the amount of tax to be collected on charges for the rental or lease of motor vehicles may be computed under article 28 or pursuant to articles 28 and 29 of the Tax Law on 82 percent of the total rental or lease charge, and such method of computation shall be in lieu of separately stating a charge for these or other nontaxable items, such as vehicle parking (including any amounts separately stated on billings, other than charges for chauffeurs and helpers). The appropriate schedules are contained in sections 530.23 through 530.31 of this Part." 20 NYCRR 530.4(b).

<sup>2</sup> Jakfil claims that it reported and paid sales tax in the amount of \$3,317.00. Neither Jakfil nor the Audit Division offered in evidence any of the returns filed by Jakfil for the period under consideration in this proceeding.

4. The sales tax auditor followed substantially similar procedures with respect to Midway. For the period March 1, 1973 through May 30, 1976, he calculated audited gross sales at \$507,556.01, and in this instance, permitted the 18 percent exclusion after concluding that Midway owned the limousines it leased to its customers. Taxable sales allegedly totaled \$416,195.93, which yielded tax due thereon of \$15,555.93 (after crediting Midway with sales tax paid). Presumably, the assessment was augmented as the result of a later Special Investigations Bureau examination. The Audit Division did not produce in evidence the report of the sales tax auditor or the report of the Special Investigations Bureau for Midway.

5. The Audit Division offered in evidence the sales tax returns filed by Midway for each of the quarterly periods at issue with the exception of the quarters ended November 30, 1969, February 28, 1970, May 31, 1970, August 31, 1970, November 30, 1970, August 31, 1975 and November 30, 1975. The returns in evidence reflect taxable sales of \$343,473.00 and sales tax due and remitted of \$16,600.78.

6. Jakfil commenced business on January 27, 1970 and ceased activities as a sole proprietorship in December, 1976. Midway began business on February 8, 1967 and ceased activities as a sole proprietorship on or about December 31, 1976.

7. Contrary to the auditor's assumption, Mr. Risi owned all the limousines leased by Jakfil and by Midway to their respective customers. The limousines were stored at Mr. Risi's residence and were delivered to customers from such location.

8. The accountant for Jakfil and Midway prepared his own analyses of the receipts and expenses of the two businesses, summarized below.

JAKFIL

Gross receipts 3/1/70 - 12/31/76	\$630,634.37
Less: Blue Cross payments	32,220.00
Taxpayer loan	5,000.00
Insurance refunds	3,784.00
	<u>\$589,630.37</u>
Less: Labor	280,803.44
18% exclusion	104,769.00
Sales tax included	9,788.70
Taxable receipts	<u>\$195,774.05</u>
 Tax at 5% (Westchester Co. rate)	 \$ 9,788.70
Tax reported	<u>8,606.23</u>
Tax due	<u>\$ 1,182.47</u>

MIDWAY

Gross receipts 12/1/70 - 11/30/76	\$836,970.29
Less: Taxpayer loans	13,000.00
	<u>\$823,970.29</u>
Less: Labor	332,133.00
10% exclusion	82,397.00
Sales tax included	19,497.00
Taxable receipts	<u>\$389,943.29</u>
 Tax at 5% (Westchester Co. rate)	 \$ 19,497.00
Tax reported	<u>18,123.00</u>
Tax due	<u>\$ 1,374.00</u>

He relied upon the check books and bank statements of each business to arrive at gross receipts. Blue Cross payments and taxpayer loans were denominated as such on deposit tickets. Photocopies of checks to Jakfil from its insurance company comprised the source for the amount of insurance refunds. Jakfil's labor expense for the period March 1, 1970 through November 30, 1972 and Midway's labor expense for the period December 1, 1970 through November 30, 1972 were estimated at one-third of "net receipts" (gross receipts less taxpayer loans); labor expenses incurred thereafter were derived from their respective payroll records. Finally, the accountant subtracted an 18 percent exclusion for Jakfil and a 10 percent exclusion for Midway to cover operational costs.

Petitioners engaged the services of a certified public accountant, Mr. Arnold Blech, to verify the accountant's analyses. Mr. Blech performed test checks of the gross receipts directly to bank statements and/or check books of the companies and discovered no material differences with respect to the accountant's compilation.

9. On or about December 29, 1975, Mr. Risi, doing business as Jakfil, was charged with one count of filing a false return pursuant to Tax Law section 1145(b); on the same date, Mr. Risi, doing business as Midway, was charged with two counts of filing a false return. At his appearance before the Eastchester Town Court on September 13, 1978, the matters were adjourned in contemplation of dismissal, upon the condition that Mr. Risi pay \$1,000.00 on account of any amount of sales tax found due the Audit Division. (Mr. Risi paid this amount plus an additional \$6,000.00.) Subsequently, on March 15, 1978, the matters were dismissed.

10. Based upon the advice of their accountant, Jakfil and Midway reported one-half of their respective gross sales as taxable.

#### CONCLUSIONS OF LAW

A. That in accordance with the concession of the Audit Division (Finding of Fact "1"), the name of petitioner Jacqueline Risi is to be removed from the assessments issued on March 20, 1979.

B. That in light of the failure of Jakfil and Midway to retain sales invoices or other records whereby taxable sales and sales tax collected could be verified, the Audit Division was warranted in its resort to external indices (here, checking account records and estimates drawn from such records) to calculate the businesses' sales tax liability (Tax Law section 1138[a][1]). Petitioners, however, presented their own analyses of the gross receipts of

Jakfil for the period March 1, 1970 through December 31, 1976 and of Midway for the period December 1, 1970 through November 30, 1976 (\$630,634.37 and \$836,970.29, respectively); these analyses, founded solely upon the business checking account records and verified by an independent accountant, more accurately reflect such gross receipts. Petitioners have satisfactorily established the adjustments made to Jakfil's gross receipts for health insurance premiums, a taxpayer loan and insurance refunds and the adjustment to Midway's gross receipts for taxpayer loans in arriving at their respective taxable receipts. The adjustments for labor are impermissible given petitioners' failure to separately state such charges on billings; however, both Jakfil and Midway are entitled to the 18 percent exclusion provided by regulation section 530.4(b). Finally, the appropriate sales tax rate is that applicable in Westchester County where delivery of the limousines occurred.

C. That Jakfil's underreporting of its sales tax liability for the period March 1, 1970 through December 31, 1976 by approximately \$15,079 and Midway's underreporting of its sales tax liability for the period December 1, 1970 through February 28, 1977 by approximately \$14,685 are insufficient by themselves to constitute the foundation for a finding of fraud. The Audit Division has therefore failed to demonstrate, by clear and convincing evidence, that any failure on the part of Mr. Risi to file a return and/or to pay tax within the time limitations prescribed by Articles 28 and 29 was due to fraud. (See Matter of Cardinal Motors, Inc., State Tax Comm., July 8, 1983.) It then follows that the fraud penalties must fall, and in addition that those portions of the assessments embracing periods prior to December 1, 1975 were untimely issued inasmuch as the usual three-year period of limitations is applicable (Tax Law section 1147[b]).



D. That the petition of Philip Risi and Jacqueline Risi, doing business as Jakfil Limousine Service, is granted to the extent indicated in Conclusions of Law "A", "B" and "C", and the notices of determination and demands issued on March 20, 1979 are to be modified accordingly. The petition of Philip Risi and Jacqueline Risi, doing business as Midway Cadillac Limousine Service, is granted to the extent indicated in Conclusions of Law "A", "B" and "C", and the notices of determination and demands issued on March 20, 1979 are to be modified accordingly.

DATED: Albany, New York

MAR 01 1985

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER