

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition  
of  
MCBURROWS TRANSPORTATION, INC.  
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 March 1, 1978  
through February 28, 1981.

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DECISION

Petitioner, McBurrows Transportation, Inc., 816 Genesee Street, Buffalo, New York 14211, 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 March 1, 1978 through February 28, 1981 (File No. 35378).

A small claims hearing was held before Richard L. Wickham, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 21, 1984, at 10:30 A.M., with all briefs to be submitted by December 19, 1984. Petitioner appeared at the hearing by Ira McBurrows, president and by Bennett Leader, Esq., on its brief. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether petitioner, McBurrows Transportation, Inc., was engaged in providing exempt transportation services for the period March 1978 through February 1981.

FINDINGS OF FACT

1. On June 19, 1981, the Audit Division, as the result of an audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner assessing \$27,907.08 tax due plus interest for the period March 1, 1978 through February 28, 1981.

2. Petitioner timely filed a petition protesting the aforementioned notice. Said petition stated that the taxpayer was unaware of its requirement to collect and pay tax. Relief was sought, pursuant to section 1132(e) of the Tax Law, on the grounds that petitioner would be unable to collect the tax from its customers. Petitioner did not raise or present evidence on any issue of bad debts at the hearing.

3. On audit, the auditor found that petitioner failed to maintain adequate books and records to verify the amount of business income as well as the source of said income. Based on conversations with petitioner's accountant, the auditor concluded that McBurrows Transportation, Inc. leased taxi cabs to independent operators and that the income therefrom, for the purposes of sales and use tax, was the gross receipts reported on petitioner's U.S. Small Business Corporation Income Tax Returns. The auditor therefore calculated tax due of \$27,907.08 on the \$398,672.46 gross receipts reported.

4. At the hearing, petitioner argued that the receipts shown on its income tax returns represented income derived from furnishing transportation services.

5. Petitioner entered into oral agreements with drivers whereunder a driver operated a company owned taxi cab for 60 percent of the fare income after deducting therefrom for the cost of gasoline. Additionally, the company offered a radio dispatch service to independent drivers operating their own taxi cabs for a "stand fee" of \$25.00 per week. No documentary evidence was presented at or subsequent to the hearing which shows or verifies the apportionment of the company income.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes sales tax on every retail sale of tangible personal property. The word sale means any transaction in which there is a "transfer of title or possession" [20 NYCRR 526.7(a)(1)]. The term transfer of possession means that one of the following attributes of property ownership has been transferred: (i) custody or possession of the tangible personal property, actual or constructive, (ii) the right to custody or possession of the tangible personal property or (iii) the right to use, or control or direct the use of tangible personal property [20 NYCRR 526.7(e)(4)]. Accordingly, the transactions of petitioner, McBurrows Transportation, Inc., wherein vehicles are temporarily transferred to drivers represent sales of tangible personal property.

B. That the portion of receipts representing "stand fees" is subject to tax under section 1105(b) of the Tax Law and 20 NYCRR 527.2(d)(2) as telephony and telegraphy service.

C. That the petition of McBurrows Transportation, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 19, 1981 is sustained.

DATED: Albany, New York

**MAR 14 1985**

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER