

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
HILL & MITCHELL DELIVERY SERVICE, INC.	:	DECISION
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 September 1,	:	
1979 through May 31, 1983.	:	

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Petitioner, Hill & Mitchell Delivery Service, Inc., 112 South Bay Road, North Syracuse, New York 13212, 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 September 1, 1979 through May 31, 1983 (File No. 53495).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on July 8, 1986 at 10:45 A.M., with all briefs to be submitted by September 19, 1986. Petitioner appeared by Arnold J. Hodes, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether a seven percent charge imposed and collected by petitioner constituted an imposition and collection of sales tax.

FINDINGS OF FACT

1. On March 20, 1984, following an audit, the Audit Division issued to petitioner, Hill & Mitchell Delivery Service, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due asserting additional tax due for the period September 1, 1979 through May 31, 1983 of \$26,983.99, plus interest of \$8,317.99 for a total of \$35,301.98.

2. The assessment set forth in the notice of determination was comprised of four components. Prior to hearing, three of the four components were resolved and the remaining tax in dispute is \$19,504.00, plus interest.

3. At all times during the period at issue, petitioner was in the business of providing limousines, both with and without drivers, to various clients, such as funeral homes and businesses, for a fee. Petitioner also operated a shuttle bus service which is not at issue herein. Petitioner conceded that its transactions with various funeral homes were subject to sales tax, but contended that the balance of its transactions involved the provision of a transportation service and were not subject to sales tax.

4. On audit, the Audit Division examined petitioner's invoices in detail and found an additional seven percent charge added to the amount due from the customer. This charge was not identified on the invoice. Petitioner posted such charges to its general ledger in an account entitled "surcharge account". Petitioner debited this account when it paid sales tax. The balance in said account was considered "other income" by petitioner.

5. The Audit Division contacted twelve of petitioner's customers inquiring as to what the seven percent charge represented. Eight of the customers indicated that at the time they received the invoice they believed the charge was sales tax. Four of the respondents indicated that they understood the charge to be a surcharge.

6. Petitioner did not bill the seven percent charge to customers which were governmental entities.

7. The prevailing sales tax rate in the Syracuse area during the audit period was seven percent.

8. In light of the foregoing, the Audit Division determined that the seven percent charge was sales tax and not a surcharge. The total amount of revenue in petitioner's surcharge account was deemed to be sales tax collected by petitioner. Based upon petitioner's debiting of this account in the amount of sales tax remitted, the Audit Division determined that the balance of said account was sales tax collected and not remitted by petitioner and assessed petitioner in that amount.

9. Petitioner contended that the seven percent charge was a surcharge designed to compensate petitioner for rising fuel costs and that the transactions at issue amounted to the provision of a transportation service and were therefore not properly subject to sales tax. Petitioner offered no rationale for the selection of seven percent as the amount charged.

#### CONCLUSIONS OF LAW

A. That section 1137(a) of the Tax Law provides, in pertinent part:

"Every person required to file a return under the preceding section whose total taxable receipts, amusement charges and rents are subject to the tax imposed pursuant to subdivisions (a), (c), (d), (e) and (f) of section eleven hundred five of this article shall, at the time of filing such return, pay to the tax commission the total of the following:

\* \* \*

(iii) All moneys collected by such person, purportedly as tax imposed by this article or pursuant to article twenty-nine, with respect to any receipt, amusement charge or rent not subject to tax, and all moneys collected with respect to any receipt, amusement charge or rent subject to tax, purportedly in accordance with a schedule prescribed by the tax commission but actually in excess of the amount stated in such schedule as the amount to be collected." (Emphasis supplied.)

B. That in view of Findings of Fact "4" through "7", the seven percent "surcharge" collected by petitioner and deposited in petitioner's surcharge account was collected purportedly as sales tax and not as a surcharge (see Matter of Interrent Transportation, Inc., v. State Tax Commission, August 21, 1985).

Petitioner has failed to establish that such monies were not collected purportedly as sales tax. Accordingly, the Audit Division properly determined that the amounts credited to petitioner's "surcharge account" was sales tax collected by petitioner and therefore properly due and owing by it. Moreover, with respect to the transactions for which the so-called "surcharge" was imposed, petitioner has failed to show wherein such transactions were properly excluded from sales tax. In this regard, it is noted that petitioner failed to establish the number of limousine rentals with drivers and the number of rentals without drivers. With respect to rentals with drivers, petitioner failed to establish the level of direction and control over the drivers exercised by petitioner's customers in each case (see Buckley Funeral Homes, Inc. v. City of New York, 199 Misc 195, 196).


C. That the petition of Hill & Mitchell Delivery Service, Inc., is in all respects denied and the notice of determination dated March 20, 1984, is sustained.

DATED: Albany, New York

DEC 23 1986

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER