

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
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C. D. PERRY & SONS, INC. and	:	
JACK E. PERRY and FRANK H. PERRY,	:	DECISION
Individually and as Officers,	:	
	:	
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 June 1, 1969 through May 31, 1972.	:	
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Petitioners, C. D. Perry & Sons, Inc. and Jack E. Perry and Frank H. Perry, individually and as officers, Monroe Street, Troy, New York 12181 (hereinafter "Perry") 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 June 1, 1969 through May 31, 1972. (File No. 01506).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York on May 26, 1976 at 9:15 A.M. The petitioner appeared by DiFabio and Couch, P. C. (Leonard J. Senzon, Esq., of counsel). The Sales Tax Bureau appeared by Peter Crotty, Esq., (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether charges made by operators of "for hire" dump trucks are taxable charges for truck rentals, or are charges for transportation service and, therefore, exempt from sales tax under the New York State Tax Law.

FINDINGS OF FACT

1. The petitioner, Perry, timely filed New York State sales and use tax returns for the period June 1, 1969 through May 31, 1972.

2. On December 1, 1972, after audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Perry, for the period June 1, 1969 through May 31, 1972. The notice indicated additional tax of \$8,957.55, plus penalty and interest of \$2,619.54, for a total allegedly due of \$11,577.09. (Notice No. 90749622).

3. On December 11, 1972, petitioner, Perry timely filed an application for revision of the determination dated December 1, 1972. On September 12, 1972, the petitioner, Perry, had filed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes to and including December 20, 1972.

4. The petitioner, Perry, is a general contractor engaged generally in heavy construction, bridge building, road building, pile driving and anything that would fall under the heading of heavy construction.

5. Petitioner, Perry, owned one or two dump trucks.

6. During the period in issue, petitioner, Perry, hired a number of truckers with their trucks to move gravel or dirt from a gravel pit or burrow to a job site, or to move excavated material to or from a job site. Job sites were anything from a small bridge site to a large industrial site, or a road as much as four or five miles long.

7. Petitioner, Perry, kept lists of persons who had trucks for hire. When a job was obtained, numbers of these truckers sought hiring by the petitioner-contractor, Perry. All hirings were done orally, on a daily basis, paid for at hourly rates. The rate included truck and driver. The truck owner was required to make his own repairs, provide his own maintenance, gas and oil, and show proof of liability insurance coverage. Many trucks were owner-driven. Other dump-truck owners had several vehicles for hire.

8. The superintendent of petitioner, Perry, would tell the hired trucker where to report in the morning and at what time. There were usually several trucks working at a given job site. Some days there would be two trucks, and some days four. A pace truck owned by petitioner, Perry, would go over the route that the excavated material was to be taken from the excavation site to the waste area, or from a gravel pit pick-up to the dumping site of the project being built. Based upon the time consumed by its pace truck, petitioner, Perry, determined the reasonable time each truck trip should take. The number of round trips was recorded by job-site foremen. If the petitioner,

Perry, thought the driver of a hired truck was procrastinating or "dogging it", petitioner notified the truck owner. If there was continued dissatisfaction, petitioner, Perry, ceased to use that trucker. All hiring was done on a daily basis, but petitioner was billed for the actual hours worked at an agreed hourly rate.

9. The owners of the respective trucks hired the drivers. The drivers were told by petitioner, Perry, where to load and unload. All aspects of the actual driving, loading and unloading were controlled by the dump-truck drivers. All records of the drivers were kept by the truck owners.

10. There was no surrender of title or possession of the hired trucks by their owners to petitioner, Perry. There was no retail or other sale of tangible personal property.

#### CONCLUSIONS OF LAW

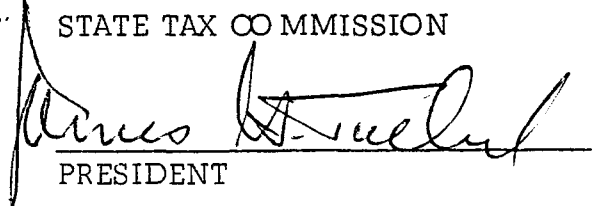
A. That although the dump-truck drivers were told by the petitioner, Perry, where to load and unload, and where to take the material loaded, they were not told how to load and which routes to use; that the owners of the dump trucks had exclusive possession of those trucks and a sufficient degree of control over them while in the hire of petitioner, Perry, as to be furnishing a transportation service exempt from the imposition of sales tax.

B. That in light of there being no additional sales taxes for the period involved, Jack E. Perry and Frank H. Perry were not liable for sales tax, individually and as officers.

C. That the petition of C. D. Perry & Sons, Inc. and Jack E. Perry and Frank H. Perry, individually and as officers, is granted and the determination dated December 1, 1972 is cancelled.

DATED: Albany, New York  
June 24, 1977

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER