

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

CONCRETE DELIVERY CO., INC.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or  
a Revision of a Determination or a Refund  
of Sales and Use  
Taxes under Article(s) 28 & 29 of the  
Tax Law for the ~~Year(s)~~ Period(s)  
March 1, 1967 through February 28, 1970.

State of New York  
County of Albany

John Huhn, being duly sworn, deposes and says that  
~~he~~ is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 5th day of April, 1978, ~~he~~ served the within  
Notice of Determination by ~~(certified)~~ mail upon Concrete Delivery Co., Inc.

(~~representative of~~) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Concrete Delivery Co., Inc.  
7 North Steelawanna Avenue  
Lackawanna, New York 14218

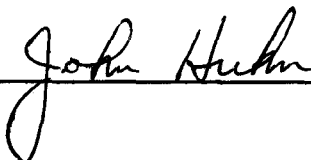
and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the (~~representative of~~  
~~of the~~) petitioner herein and that the address set forth on said wrapper is the  
last known address of the (~~representative of the~~) petitioner.

Sworn to before me this

5th day of April, 1978





STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

CONCRETE DELIVERY CO., INC.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Sales and Use :  
Taxes under Article(s) 28 & 29 of the :  
Tax Law for the ~~XXXXXX~~ Period ~~(X)~~ :  
March 1, 1967 through February 28, 1970.

State of New York  
County of Albany

John Huhn , being duly sworn, deposes and says that  
~~she~~ is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 5th day of April , 1978, ~~she~~ served the within  
Notice of Determination by ~~(certified)~~ mail upon Jack J. Geller

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
Jack J. Geller, Esq.

as follows: Martoche, Collesano, Abramowitz & Geller  
76 Niagara Street  
Buffalo, New York 14202

and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the (representative  
of the) petitioner herein and that the address set forth on said wrapper is the  
last known address of the (representative of the) petitioner.

Sworn to before me this

5th day of April , 1978.

*[Signature]*

*John Huhn*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

CONCRETE DELIVERY CO., INC.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Sales and Use :  
Taxes under Article(s) 28 & 29 of the :  
Tax Law for the ~~Taxable~~ Period (x) :  
March 1, 1967 through February 28, 1970.

State of New York  
County of Albany

John Huhn , being duly sworn, deposes and says that  
~~she~~ is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 5th day of April , 1978, ~~she~~ served the within  
Notice of Determination by (~~registered~~) mail upon Ralph J. Gregg, Esq.


(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Ralph J. Gregg, Esq.  
2110 Main Place Tower  
Buffalo, New York 14202

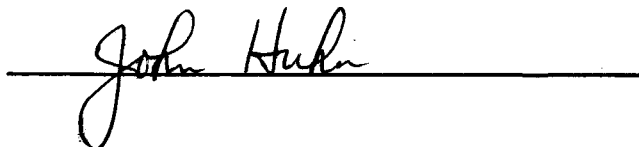
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(post office or official depository) under the exclusive care and custody of  
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the (representative  
of the) petitioner herein and that the address set forth on said wrapper is the  
last known address of the (representative of the) petitioner.

Sworn to before me this

5th day of April , 1978





STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

CONCRETE DELIVERY CO., INC.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Sales and Use :  
Taxes under Article(s) 28 & 29 of the :  
Tax Law for the ~~XXXXXX~~ Period(x) :  
March 1, 1967 through February 28, 1970.

State of New York  
County of Albany

John Huhn , being duly sworn, deposes and says that  
~~he~~ is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 5th day of April , 1978, ~~he~~ served the within  
Notice of Determination by ~~(certified)~~ mail upon William J. Hirsch

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: William J. Hirsch, Esq.  
43 Court Street  
Buffalo, New York 14202

and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the (representative  
of the) petitioner herein and that the address set forth on said wrapper is the  
last known address of the (representative of the) petitioner.

Sworn to before me this

5th day of April , 1978

*[Signature]*

*John Huhn*



STATE OF NEW YORK  
STATE TAX COMMISSION  
TAX APPEALS BUREAU  
ALBANY, NEW YORK 12227

**April 5, 1978**

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

**Concrete Delivery Co., Inc.  
7 North Steelawanna Avenue  
Lackawanna, New York 14218**

**Gentlemen:**

Please take notice of the **DETERMINATION**  
of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) **1138 & 1243** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within **4 months** from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

**Aloysius J. Mendza  
Assistant Director**

cc: Petitioner's Representative  
  
Taxing Bureau's Representative

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Application :  
of :  
CONCRETE DELIVERY CO., INC. : DETERMINATION  
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, 1967 through February 28, :  
1970. :

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Applicant, Concrete Delivery Co., Inc., 7 North Steelawanna Avenue, Lackawanna, New York 14218, applied 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, 1967 through February 28, 1970.

A formal hearing was held at the offices of the State Tax Commission, Buffalo, New York, on December 3, 4, 5 and 6, 1974 and on January 7 and 9, 1975, before L. Robert Leisner, Hearing Officer. The taxpayer appeared by Jack J. Geller, Ralph J. Gregg, and William J. Hirsch, Esqs., and the Sales Tax Bureau appeared by Saul Heckelman, Esq., (Arnold M. Glass and Richard M. Kaufman, Esqs., of counsel).

ISSUES

I. Whether the assessment of additional tax for the period March 1 through either September 30 or October 31, 1967, was made within the limitations of time prescribed by law.

II. Whether amounts paid to tractor owner-operators for hauling cement were subject to sales tax as receipts from rentals, or were charges for transportation services and thus not subject to tax.

III. Whether imposition of sales tax on such receipts violated the United States Constitution or the Constitution of the State of New York.

#### FINDINGS OF FACT

1. The taxpayer, Concrete Delivery Co., Inc., timely filed New York State sales and use tax returns for the period March 1, 1967 through February 28, 1970. By a Consent Extending Period of Limitation for Assessment dated June 8, 1970, the period of limitation for assessment for the taxable period March 1, 1967 through February 28, 1970, was extended to March 20, 1971. A second consent dated January 8, 1971, further extended the period of limitation for the period November 1, 1967 through February 28, 1970, to December 20, 1971, but omitted the period March 1, 1967 through October 31, 1967.

2. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1967 through February 28, 1970, was issued against Concrete Delivery Co., Inc. on May 20, 1971, in the amount of \$118,605.73, including penalty and interest, under Notice No. 90,745,531.

3. The taxpayer timely filed an application for revision of the determination of the deficiencies in sales and use taxes.

4. Initially there was an additional issue, which involved a sales tax deficiency in the amount of \$3,980.29. Counsel for the Sales Tax Bureau and counsel for Concrete Delivery stipulated for the record that a tax in the amount of \$56.35 was due on rentals totaling \$805.00 and that, except for such amount, the balance of the \$3,980.29 deficiency should be cancelled.

#### General Description of Concrete Delivery and Its Operations

5. Concrete Delivery Co., Inc. (hereinafter referred to as "Concrete Delivery") is a New York corporation with its principal place of business at 7 Steelawanna Avenue, Lackawanna, New York.

6. Concrete Delivery is a common motor carrier which is principally engaged in the transportation of cement which it ships in its tank trailers on behalf of various cement producers (hereinafter sometimes referred to as "shippers") from their locations in Buffalo, Rochester, Rome and South Lansing, New York to customers of said shippers located throughout New York State and in Pennsylvania and the New England States. The company also transports cement from points in the province of Ontario, Canada to points in New York and Pennsylvania. All of these activities are conducted under Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission (hereinafter referred to as "ICC"), by the Ontario Highway Transport Board and by the



New York State Department of Transportation (hereinafter referred to as "DOT"). During the assessment period, the functions of the DOT were functions of the New York State Public Service Commission (hereinafter referred to as "PSC". For the purposes of this determination, where certain regulations, requirements or policy of both the DOT and the PSC would be identical, said agencies will be referred to collectively as "DOT/PSC").

7. In providing this service during the assessment period, Concrete Delivery, while hauling its tank-trailers with its own tractors, also hired the services and tractors of independent owner-operators to haul said trailers. The compensation paid the owner-operators was 65- $\frac{1}{2}$ % of the revenue received by Concrete Delivery from cement hauled by the owner-operators. The Sales Tax Bureau has taken the position that the 65- $\frac{1}{2}$ % of the revenue constitutes receipts from rentals within the meaning of section 1101(b)(5) of the Tax Law, and that such receipts are, therefore, subject to sales tax.

8. It is the contention of the taxpayer that the deficiency assessment was not timely as to the period March 1, 1967 through September 30, 1967, and thus was not properly assessed as to said period; that the hiring of owner-operators and their tractors constituted the purchase of transportation services, charges for which are not subject to sales tax; and further, that the imposition of sales tax on the amounts paid the owner-operators was unconstitutional.

9. Concrete Delivery is qualified to do business both as a common motor carrier and as a contract motor carrier. This authority is conferred by separate certificates issued by the DOT/PSC.

10. A minor amount of Concrete Delivery's revenue comes from hauling heavy equipment and such other commodities as dehydrated lime, pearlite, sand and other aggregates.

11. As a common carrier, Concrete Delivery is subject to the control of Federal and State regulatory agencies (i.e., the ICC and the DOT/PSC). Agency regulations control the "rates and charges" it is permitted to charge its customers, the hours of service, the safety of its equipment, the qualifications of the drivers, etc. It is also subject to the rules and regulations that govern the method by which a common carrier may augment its fleet by subcontracting for additional equipment it does not own.

12. Concrete Delivery's tariffs for the hauling of cement are stated in terms of per ton and per mile, as authorized by the DOT/PSC.

13. Some types of hauling, such as the hauling of heavy machinery or construction equipment, cannot be done profitably on a per ton or per mile basis because of the unusual nature of the article and the inability to predetermine the amount of effort required to transport such an article from one point to another. In such cases, Concrete Delivery uses a per hour table of rates authorized by the DOT/PSC. Concrete Delivery also uses hourly

rates for hauling materials of very light density such as pearlite, because a rate per ton would provide inadequate compensation.

14. If Concrete Delivery proposes to change or increase its tariffs, it must submit all proposed rates to the DOT/PSC for review and approval thirty days prior to the proposed effective date. The application for approval must include a computation of the additional anticipated revenues and of the anticipated net profit. Concrete Delivery has found that it is generally the policy of the DOT/PSC to limit the profits of common carriers to 4% of gross receipts. If a rate increase is denied, carriers such as Concrete Delivery have no alternative except to find every possible means of effecting economies and living within the rates and charges then in effect.

15. The equipment used in hauling cement consists of a tank trailer, capable of holding approximately 30 tons of dry cement pulled by a heavy tractor. The tank can be pressurized, usually up to 15 pounds, so that the cement can be unloaded, i.e., blown out through a hose into the bins of the cement companies' customers.

16. Concrete Delivery has two different arrangements under which the equipment is owned and operated. In its operations in and out of Buffalo it uses approximately 18 tractor-trailer combinations. With the exception of one owner-operator who drives his own tractor and hauls a Concrete Delivery trailer, Concrete Delivery owns both the tractors and the tank trailers operating out of Buffalo and employs its own drivers to drive them.

17. In its operations in and out of Rochester and Rome, New York, Concrete Delivery owns all of the tank trailers, but it owns no tractors and employs no drivers. Instead, the tractors are owned by what are described as "owner-operators" who either drive the tractors themselves or employ licensed drivers to drive them.

18. During the audit period, Concrete Delivery had as many as thirty to thirty-five owner-operators during its peak periods in Rochester and approximately eleven at Rome, New York. It provided the owner-operators with approximately 47 tank trailers at Rochester and approximately 17 at Rome.

Reasons for Augmenting Fleet by Subcontracting to Owner-Operators

19. When it was given the hauling service for Rochester Portland Cement Co. in 1958, Concrete Delivery decided, based on its prior experiences at Buffalo, to do what the ICC and the DOT/PSC call "augmenting" its fleet by subcontracting the hauling of its tank trailers to owner-operators.

20. Concrete Delivery had several business reasons for augmenting its fleet through the use of owner-operators:

- (a) The seasonal nature of its business. More than 70% of its annual gross volume of deliveries were made between May 1st and October 30th, and Concrete Delivery believed that keeping full time driver employees and owning sufficient equipment on a full calendar year basis to meet seasonal needs was prohibitively expensive.

(b) The most important factor in retaining delivery work for a particular cement company is the quality and efficiency of the delivery service to its customers. All cement is basically the same and made to certain exact specifications. Therefore, the customer frequently buys it from the cement company that provides the best delivery service. Concrete Delivery, from long experience, believed that the operating performance of independent truckers exceeded the performance of employee drivers.

(c) Concrete Delivery faced competition not only from other motor carriers but also from the cement producers themselves, because the producers could buy their own tractors and trailers and make their own deliveries with their own employees if they found they could do it better and cheaper than by hiring common carriers.

Comparison Between Employing Drivers to Drive Company Owned  
Equipment and using Independent Truckers

21. The owner-operator has no guarantee of compensation. His compensation consists of 65-1/2% of the gross revenues from actual deliveries of cement. He is not paid by the hour and is not paid while waiting to make a trip, or if he does not make a trip. If a trip takes an unusually long period of time, due to a breakdown or a traffic delay, he does not receive additional compensation.

He is not compensated for vacation time. He gets nothing if there is no cement to deliver, if his truck is idle for any reason, or if he or his driver wastes time.

22. On the other hand:

(a) Employee drivers must be guaranteed forty hours of work a week at straight time union rates even though Concrete Delivery has no cement to deliver.

(b) An employee driver is paid even though the tractor is out of service due to his own neglect or even if he makes only one round trip a day when he should have made two or three.

(c) It is difficult to supervise what employees drivers are doing when they are out on the highway. There is nothing to prevent them, for example, from taking a nap in a highway rest area.

(d) Employee drivers are guaranteed time and a half for overtime. This provides an incentive for them to waste time while making deliveries and then claim overtime for late arrival at the plant.

(e) By way of contrast, the owner-operators consider a delivery from Rochester to places near Buffalo a four-hour round trip, whereas the Buffalo employee drivers consider deliveries from Buffalo to places near Rochester a six-hour round trip.

(f) All disciplinary problems with employee drivers have to clear through the union. Disciplinary action or discharge for anything less than being found drinking in a tavern while on duty

(where public safety is involved) has to be cleared through the union local. Concrete Delivery can handle these problems independently with owner-operators.

#### The Jack Bilt Lease

23. In order to comply with ICC and DOT/PSC regulations, which require that common carriers must have full direction and control of, and full responsibility for, vehicles not owned by them but used by them in the transportation of property, Concrete Delivery entered into certain agreements with the independent tractor owners under a form called a "Jack Bilt Lease."

24. The Jack Bilt form is a document entitled "Agreement, Contract and Lease for Interchange of Motor Vehicle Equipment." Concrete Delivery purchases such forms in pads of 50 or 100 from a Missouri company. It started using the form many years ago, because it learned that the form had cleared ICC regulations and was in widespread use throughout the country. The instructions in the upper right-hand corner of the form state that it is to be executed in triplicate with the original to go to the authorized carrier-lessee, one copy to the owner-lessor and the third copy to be carried on the leased vehicle. It purports to be between the owner (in this instance the owner-operator) and the carrier (in this instance Concrete Delivery). It provides, in substance, that the owner-operator, as the lessor, is leasing his tractor or tractor-trailer to the common carrier for a certain period. Among its provisions are the following:

"3. LESSOR will lease to LESSEE the following equipment...

\* \* \*

"5. It is understood that the leased equipment under this agreement is in the exclusive possession, control, and use of the authorized carrier LESSEE and that the LESSEE assumes full responsibility in respect to the equipment it is operating, to the public, the shippers, and the INTERSTATE COMMERCE COMMISSION.

"6. The authorized carrier LESSEE states that before taking possession of this motor vehicle that it was inspected by one of its responsible and competent employees\* and that the said equipment complies with Parts 193 and 196 of the Motor Carrier Safety Regulations (Rev.) pertaining to 'Parts and Accessories Necessary for Safe Operation,' and 'Inspection and Maintenance,' and states further that it inspected the vehicle and it complied with Part 197 of the said regulations pertaining to 'Safe Transportation of Explosives' before transporting explosives or other dangerous articles. And the LESSEE certifies that the attached 'Report of Vehicle Inspection' is signed by its employees or agent making the inspection.

\* \* \*

"13. The LESSOR agrees to deliver to the LESSEE the above equipment in good running order and condition; maintain the same in good working condition, furnishing all necessary oil, gasoline, tires, and repairs for the operation of said equipment and to pay all other expenses incident to such operation.

"14. The LESSOR shall surrender full control, possession, and management of said equipment to the LESSEE during the term of this lease which shall start at delivery of equipment and end with delivery of cargo at destination and the LESSEE shall pay the driver for his services, and shall withhold any withholding or social security tax required by the U.S. government.



\* \* \*

"17. The LESSEE on accepting delivery of the leased equipment shall fill out and submit to the LESSOR this lease for 'Receipt for Possession of Motor Vehicle Equipment,' and the LESSOR on having the equipment returned shall sign the attached 'Receipt for Possession of Motor Vehicle Equipment' and submit it to the LESSEE.

"Notwithstanding any provision contained herein which might be construed otherwise, the lessee shall have the exclusive possession, control, and use of the said equipment when operated by the lessee; and during the period the vehicle is operated in its service, lessee completely assumes full responsibility to the public, the shippers, and to all state and federal regulatory bodies or authorities."

25. Under the agreement, the carrier is also obliged:

(a) To properly and correctly identify the tractor in accordance with ICC requirements and to remove any such identifying device upon termination of the arrangement.

(b) To see to it that no driver is assigned to drive the equipment unless he is familiar with it, and that his employment as a driver will not result in violation of any provisions of certain parts of the "Motor Carrier's Safety Regulations" pertaining to "Driving of Motor Vehicles", "Parts and Accessories Necessary for Safe Operation", "Hours of Service of Drivers" and "Inspection and Maintenance."

(c) To require that such drivers furnish a certificate of physical examination in accordance with the "Motor Carrier's Safety Regulations" pertaining to "Qualifications of Drivers."

(d) To maintain at its principal office a detailed manifest or record covering each trip of such non-owned equipment.

26. The president of Concrete Delivery testified that he believed that the usual term of a lease was 90 days. Some of the leases, however, were clearly for a longer term. For example, the two executed leases which were admitted into evidence: Exhibit "H", which was for the period January 1, 1969, at 7 a.m. to December 31, 1969, at 7 a.m.; and Exhibit "J" which was for the period from August 19, 1969, at 7 p.m. to December 31, 1969, at 7 p.m.

27. A copy of the pertinent "Jack Bilt" agreement is carried in the cab of each tractor, as required by Federal and State regulations.

28. Concrete Delivery regularly inspects the tractors owned by the owner-operators to be sure they comply with ICC and DOT/PSC regulations as far as safety is concerned and checks the drivers' licenses and medical certificates to be sure they are qualified. It also keeps a log of each trip of non-owned equipment available at its office, for inspection by Federal and State agencies.

29. The "Jack Bilt" agreement is contradictory in that it provides in Paragraph 10 that "the services of the driver of said equipment" are included in the 65-1/2% paid to the owner-operator, whereas Paragraph 14 provides that the carrier, Concrete Delivery, shall pay the driver for his services.

30. Although the agreement represents that the tractor is in the exclusive possession, control and use of Concrete Delivery, in actual practice, a certain degree of possession, control and use appears to remain with the tractor owner, i.e.:

(a) Concrete Delivery operates as if its personnel had no right to enter the cab of an owner-operator's tractor, except for purposes of inspection, or to move it in case of an emergency. Concrete Delivery usually does have an extra key to each tractor.

(b) Concrete Delivery maintains that it does not have the right to assign a driver to an owner-operator's tractor.

(c) Some of the owner-operators leave their tractors in the yard at the shipper's plant at night and drive back and forth to work in their automobiles. Others regularly drive the tractors back and forth to work. They are not required to garage their tractors at the plant.

(d) In practice, the ICC and the DOT/PSC have accepted the arrangement between Concrete Delivery and the owner-operators. These agencies make official road safety checks on the highway. The team of inspectors usually consists of a state trooper, field representatives of the ICC and the DOT/PSC and safety investigators from the United States Department of Transportation. They check for any violation of the rules and regulations pertaining to "Parts and Accessories Necessary to Safe Operation", "Inspection and Maintenance", "Driving of Motor Vehicles", "Hours of Service of Drivers" and "Qualifications of Drivers" and if they find any violations or any defective equipment or if the driver doesn't have a copy of

the "Agreement, Contract and Lease for Interchange of Motor Vehicle Equipment" in the cab, they put a red sticker on the windshield and forbid the driver to take it back on the highway until the deficiency is remedied. Putting a sticker on the windshield and forbidding use of the tractor is known as "red lining."

(e) When a field team makes a road check it has no difficulty identifying the owner of the tractor because the owner's name has to appear on the door of the tractor. The tractor must also carry the name of the carrier, usually on a removable plaque. Some of the owner-operators also display a sign saying "Owner-Operator, An Independent American Businessman." This sign is in common use by tractor owner operators throughout the United States.

(f) Concrete Delivery maintains that it cannot exercise any of the rights of ownership of tractors owned by owner-operators.

(g) The tractors are driven by the owner, or if he is sick or on vacation, or owns more than one rig, by a driver hired by the owner-operator for that purpose.

(h) Concrete Delivery cannot hire a man to drive a tractor owned by an owner-operator.

(i) Concrete Delivery cannot tell the owner-operator how much to pay his driver.

(j) The tractors are licensed in the name of the owner-operators and the owner-operators pay the license fees.

(k) The owner-operators pay for the gas, oil, lubrication, tires, repairs, new brake linings, water pumps and all the rest of the accessories and the repairs thereto.

(l) The owner-operators are the named insureds in the policies of insurance covering property loss, fire, theft and public liability on the tractors and pay the premiums therefor.

(m) The owner-operators claim depreciation on their investment in the tractors.

(n) Concrete Delivery pays nothing with reference to the operation or maintenance of the tractors and pays nothing to the owner-operator except 65-1/2% of the tariff. If the Owner-operator keeps his equipment rolling efficiently and gives prompt service, they both benefit, because the more loads he delivers the more money he makes for himself and for Concrete Delivery.

(o) The owner-operator receives nothing for his equipment while it remains idle, while it is pulling an empty trailer or while it is in a garage or otherwise out of service. An inefficient owner-operator receives the same compensation as any other owner-operator for a particular trip, even though it takes him twice as long to get to his destination and return to the point of origin, because compensation is based on tonnage and mileage. The owner-operator who wastes time is penalizing himself, because the man who gets back first gets the next load.

(p) Although Concrete Delivery attempts to direct and control its own employee drivers at Buffalo, so as to require them to take

the shortest and quickest route, it does not try to control and direct the owner-operators and their drivers because "it would be butting into their business." Alternative routes are available for almost all trips. Concrete Delivery leaves the choice of routes up to the owner-operators, because it believes that they will make the choice which will get them back in line for another load as quickly as possible.

(q) No part of the hauling performed by an owner-operator or his driver is under the direct supervision or control of any employee of Concrete Delivery. It has dispatchers at the shipper's cement plant. The dispatchers receive orders from the shipper's order desk, each of which show the quantity of cement to be delivered to one of the shipper's customers. Each order is then transmitted to the owner-operator's waiting room, where it is given to an owner-operator on a first-in, first-out basis. The owner-operator then pulls his rig under a silo where the tanks are filled by one of the shipper's employees, with no employee of Concrete Delivery there to supervise. He then proceeds to the destination by the route he selects and unloads his rig. Concrete Delivery has no employees at the customer's place of business to supervise the unloading. The unloading is done by the owner-operator or his driver who pressurizes the tank so that the dry cement can be blown through a hose into the customer's bin.

Division of Tariff Revenues Between Concrete Delivery and  
its Owner-Operators

31. The sole compensation of the owner-operator is 65-1/2% of the gross revenues derived from the cement hauled by his tractor and Concrete Delivery's tank trailer. Out of this he pays all of his own expenses including the wages of his driver, the license fees, the gas, oil and lubrication, tires, repairs, new brake linings, water pumps and accessories, insurance premiums and all similar expenses. A few of the owner-operators requested that a part of their compensation be put through Concrete Delivery's books as though it were compensation, in order to get union pension benefits. Taxes are withheld by Concrete Delivery for such owner-operators, but are charged against the 65-1/2% of the gross revenues owed to the owner-operator.

32. Concrete Delivery has a substantial capital investment in office and terminal facilities and in its fleet of tank trailers. It is the source of the owner-operators' cement hauling business. It solicits that business and handles the relationships with the shippers. It handles all billings and the collection of rates and charges. It prepares and files tariffs of rates and charges with the DOT/PSC seeking permission for rate increases from time to time. It oversees compliance with ICC and DOT/PSC safety rules and regulations. Concrete Delivery provides dispatchers at the shippers' plants in Rochester and Rome and the personnel at Buffalo to handle billing and collections and such matters as keeping the logs of the owner-operators

for inspection by the regulatory agencies. In order to compensate itself for its investment and for the services which it performs, Concrete Delivery retains 34-1/2% of the gross revenues derived from the hauling of cement.

33. The Sales Tax Bureau has not imposed sales tax on the gross revenues received by Concrete Delivery for the hauling of cement by its own tractors and employees at Buffalo. The Bureau also did not impose sales tax on the 34-1/2% of the gross revenues received by Concrete Delivery from the hauling of cement by owner-operators in and out of Rochester and Rome, New York. The sales tax was imposed upon the 65-1/2% of the gross revenues paid to owner-operators who actually performed the hauling under "Jack Bilt" lease agreements with Concrete Delivery. The sales tax examiner ascertained the amount of the gross revenues paid to the owner-operators during a sample period from Concrete Delivery's transportation journal.

#### CONCLUSIONS OF LAW

A. That since the period March 1, 1967 through October 31, 1967 was not included in the Consent Extending Period of Limitation for Assessment of Sales and Use Taxes dated January 8, 1971, the determination issued May 20, 1971, is not timely as to such period, and the determination, as it applies to such period, should be cancelled.

B. That with certain limited exceptions which are not pertinent hereto, any contract, lease or other arrangement for the use of



non-owned equipment by an authorized common carrier must provide for the exclusive possession, control and use of such equipment by the authorized common carrier, during the term thereof.

(17 NYCRR 845.3(a)(4) (formerly 16 NYCRR 845.3(a)(4); 49 CFR 1057.4(a)(4)).

C. That the form of agreement known as the "Jack Bilt Lease" entered into between Concrete Delivery and each of its owner-operators gives Concrete Delivery the exclusive possession, control and use of the owner-operators' tractors which are required by the aforementioned New York State and Federal regulations.

D. That at all times during the period at issue, Concrete Delivery, under the terms of the aforementioned Jack Bilt Lease agreements, had the sole right to the exclusive possession, control and use of the owner-operators' tractors. The mere fact that it did not fully exercise such right did not operate as a waiver thereof.

E. That the Jack Bilt Lease entered into between Concrete Delivery and each owner-operator constituted an agreement for rental, lease, transfer of possession or license to use, for a consideration, within the meaning and intent of Section 1101(b)(5) of the Tax Law and thus was a sale the receipts of which were subject to sales tax under Section 1105(a) of the Tax Law.

F. That where all registration fees and 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 on 82 percent of the total rental or lease charge, and such method of computation

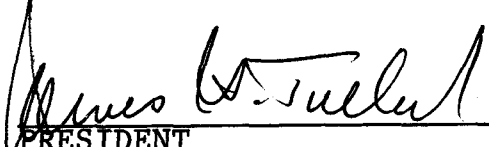
shall be in lieu of separately stating a charge for these or other nontaxable items (20 NYCRR 530.4(b) and its predecessor, the former 20 NYCRR 525.1(b)). Accordingly, the sales tax on the aforementioned receipts is to be computed on 82 percent of the total receipts.

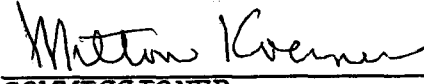
G. That the constitutionality of the laws of the State of New York is presumed at the administrative level of the State Tax Commission.

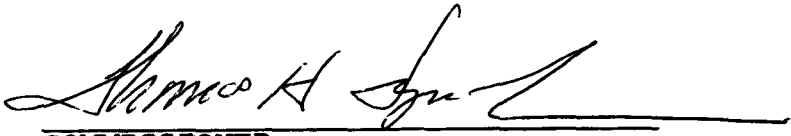
H. That the Sales Tax Bureau is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 20, 1971 pursuant to the stipulations of counsel which reduced part of the deficiency from \$3,980.29 to \$56.35; to eliminate the deficiency for the period March 1, 1967 through October 31, 1967; and in accordance with Conclusion F, above. Except as so modified, the application is in all other respects denied.

DATED: Albany, New York  
April 5, 1978

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER