

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Day-Line, Inc.

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 6/1/74 - 5/31/77. :

State of New York
County of Albany

Jay Vredenburg, 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 18th day of July, 1980, he served the within notice of Determination by mail upon Day-Line, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

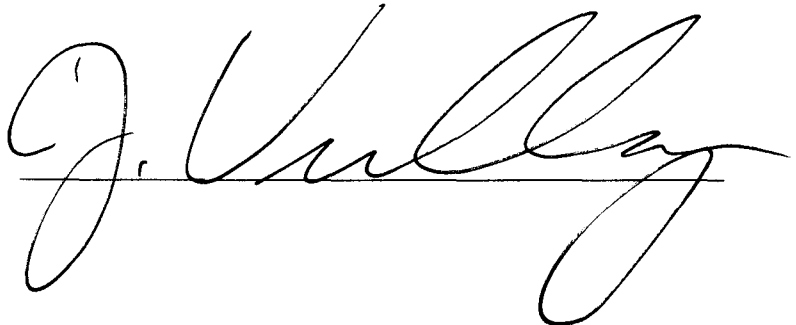
Day-Line, Inc.
Pier 83 West 43rd St.
New York, NY 10036

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
18th day of July, 1980.

Rebecca C. Bank

A large, stylized handwritten signature, likely of Jay Vredenburg, written in dark ink over a horizontal line.

STATE OF NEW YORK
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Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 6/1/74 - 5/31/77. :

State of New York
County of Albany

Jay Vredenburg, 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 18th day of July, 1980, he served the within notice of Determination by mail upon Dennis C. McMahon and Martin McHugh the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

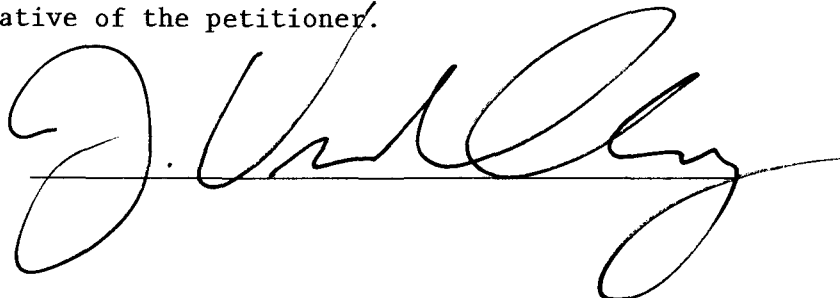
Mr. Dennis C. McMahon and Martin McHugh
McHugh, Heckman, Smith & Leonard
80 Pine St.
New York, NY 10005

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
18th day of July, 1980.

Lutrah A. Bank



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

July 18, 1980

Day-Line, Inc.
Pier 83 West 43rd St.
New York, NY 10036

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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Dennis C. McMahon and Martin McHugh
McHugh, Heckman, Smith & Leonard
80 Pine St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
DAY - LINE, 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 June 1, 1974 through May 31,	:	
1977.	:	

Applicant, Day - Line, Inc., Pier 83, West 43rd Street, New York, New York 10036, filed an application 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, 1974 through May 31, 1977 (File No. 24174).

A formal hearing was held before David L. Evans, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 18, 1979 at 11:00 A.M. Applicant appeared by McHugh, Heckman, Smith & Leonard (Martin McHugh and Dennis C. McMahon, Esqs., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether applicant's vessels are primarily engaged in interstate or foreign commerce.

FINDINGS OF FACT

1. On September 19, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Day - Line, Inc. for the period June 1, 1974 through May 31, 1977 in the amount of \$15,559.15, plus penalty and interest of \$8,087.08, for a total of \$23,646.23.

2. Applicant, Day - Line, Inc., operates the vessel Dayliner. Dayliner is owned by Circle Line - Sightseeing Yachts, Inc. but is chartered to applicant.

3. Dayliner's principle berth is Pier 81 located in New York City. From this pier, applicant offers cruises of the Hudson River on the Dayliner. The cruises begin at Pier 81 from whence Dayliner proceeds across the Hudson to New Jersey waters. The primary purpose of heading to and proceeding as much as possible in New Jersey waters is to attempt to avoid New York State and New York City taxes. The vessel continues up the Hudson stopping in New York at Bear Mountain State Park, United States Military Academy at West Point and Poughkeepsie, then the vessel returns to Pier 81.

4. In addition to the cruises described in Finding of Fact "3", applicant conducts chartered evening cruises on the Dayliner. Applicant failed to establish the nature, frequency or path of these incidental cruises.

5. Applicant has not paid sales or use taxes on fuel used by the vessel Dayliner.

6. Applicant purchased the fuel barge Captain Log without remitting sales or use taxes. The fuel barge Captain Log is used to transport fuel from points in New Jersey to New York. In New York, the Captain Log fuels the vessel Dayliner and other vessels owned by corporations related to applicant. After servicing applicant's vessels, the Captain Log returns to New Jersey to pick up another load of fuel for transportation back to New York. Applicant offered no evidence to show that it was compensated for fueling vessels of related corporations.

CONCLUSIONS OF LAW

A. That the vessel Dayliner is not primarily engaged in interstate or foreign commerce. The vessel's prearranged journey both begins and ends in New York with stops only at points in New York. The mere crossing of state

lines for little more reason than the hope of avoiding state and local taxes does not constitute the primary engagement in interstate commerce required by section 1115(a)(8) of the Tax Law.

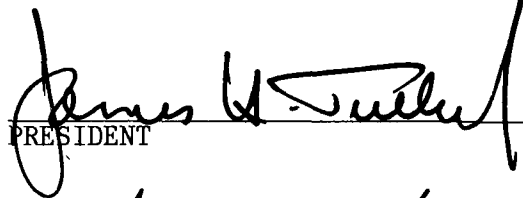
B. That the fuel barge Captain Log is not primarily engaged in interstate or foreign commerce. Pursuant to 20 NYCRR 527.5(b)(5)(ii) a commercial vessel is a vessel engaged in the transportation of cargo or passengers for hire. Pursuant to 20 NYCRR 528.9(a)(5) "engaged in interstate or foreign commerce" means the transportation of persons or property for compensation between states or countries. Applicant failed to prove that the fuel barge Captain Log was transporting fuel for hire or compensation.

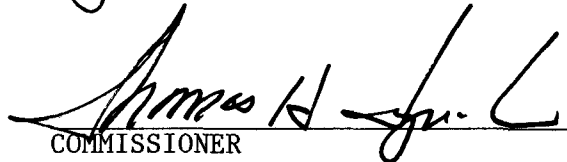
C. That the application of Day - Line, Inc., is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 19, 1977, is sustained.

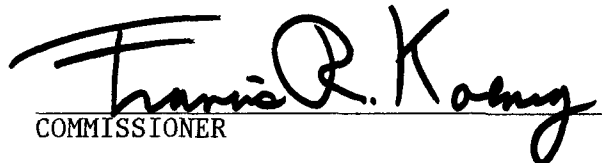
DATED: Albany, New York

JUL 1 8 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

September 10, 1980

Dennis C. McMahon, Esq.
McHugh, Leonard & O'Connor
Eighty Pine Street
New York, NY 10005

RE: Application of Day Line, Inc.
Application of Circle Line
Sightseeing Yachts, Inc.
Application of Circle Line
Statue of Liberty Ferry, Inc.

Dear Mr. McMahon:

This is in response to your letter of August 25, 1980
with reference to the above named applicants.

Please be advised that the State Tax Commission has
agreed to waive the penalty and the interest in excess of
the minimum with reference to the above matters.

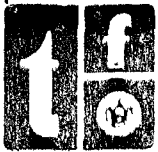
I am this day transmitting the file to Michael
Alexander, Principal Attorney, Law Bureau, Litigation Section,
Building #9, State Campus, Albany, New York 12227, 518-457-2070
for appropriate disposition of the matter.

Sincerely,

PAUL B. COBURN
Secretary to the State Tax Commission

PBC:mac

cc: Michael Alexander, Principal Attorney



New York State Department of
TAXATION and FINANCE

MEMORANDUM

AD-53.1 (4-77)

TO: State Tax Commission

FROM: Paul B. Coburn

SUBJECT: Day Line, Inc.
Circle Line Sightseeing Yachts, Inc.
Circle Line Statue of Liberty Ferry, Inc.

Decisions were issued by the Tax Commission in the above entitled matters on July 18, 1980. The decisions did not consider the question of whether penalties and interest in excess of the minimum should be waived.

On August 25, 1980, the attorney for the petitioners wrote a letter to me, a copy of which is attached, requesting that the Commission reconsider its decision and waive the penalties and interest in excess of the minimum.

While it is generally not the Commission's policy to reconsider a decision after it has been issued, I would recommend that it waive the penalties and interest in excess of the minimum for the following reasons:

- A. The petitioners raised the issue in the record and in their brief, but the hearing officer inadvertently failed to consider it and
- B. During the years in issue it was Commission policy to waive penalties and interest in cases where there were sharp legal questions.

Please indicate below whether you wish to reconsider the case and waive the penalties and interest in excess of the minimum.

12/1/80

PAUL B. COBURN
Secretary to the State Tax Commission

September 3, 1980
Attachments

	Reconsider and Waive	Do Not Reconsider Waive
<i>James T. Tully</i> PRESIDENT	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<i>Shirley H. Tully</i> COMMISSIONER	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<i>Frank R. Koehn</i> COMMISSIONER	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Commissioner Tully--I have no disagreement with the waiver of penalty.

After a discussion with Paul Coburn, I struck out the word "reconsider" and changed it to simply "waive" or "do not waive". The point is the attorneys did not ask us to reconsider the case, simply within our discretion to waive penalty and interest because of a close legal point being involved. I am amenable to this request and do not want a reconsideration of the case and issuance of a new decision.

Mr. Coburn agrees with that procedure.--THL 9/5/80

State Tax Commission

Paul B. Coburn

Day Line, Inc.

Circle Line Sightseeing Yachts, Inc.

Circle Line Statue of Liberty Ferry, Inc.

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Please indicate below whether you wish to reconsider the case and waive the penalties and interest in excess of the minimum.

PAUL B. COBURN
Secretary to the State Tax Commission

September 3, 1980

Attachments

	<u>Reconsider and Waive</u>	<u>Do Not Reconsider and Waive</u>
<u>PRESIDENT</u>	_____	_____
<u>COMMISSIONER</u>	_____	_____
<u>COMMISSIONER</u>	_____	_____

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MCHUGH LEONARD & O'CONOR

EIGHTY PINE STREET
NEW YORK, N. Y. 10005

(212) 422-0222

MARTIN J. MCHUGH
JAMES M. LEONARD
WILLIAM L. O'CONOR, JR.
WILLIAM P. KAIN, JR.
MAURICE F. BESHIAN
JOHN P. CONROY
JAMES M. KENNY
JOSEPH M. CASSIN
STEPHEN J. BUCKLEY
RICHARD E. MEYER
J. M. HAZEN

ROBERT P. WHELAN
ROBERT J. ROVENTINI
DANIEL J. O'CALLAGHAN
JANET D. BAKER
DENNIS C. McMAHON
WILLIAM M. BRODERICK
MARK C. KELLY
DOUGLAS A. FRANKLIN

CHRISTOPHER E. HECKMAN
COUNSEL

CABLE ADDRESS
"WAVELAW"

INTERNATIONAL TELEX
235612 (RCA)

August 25, 1980

Paul B. Koburn, Secretary,
State Tax Commission,
Building 9
State Campus, Albany
New York, 12227

RE: Application of Day Line, Inc.
24174
Application of Circle Line
Sightseeing Yachts, Inc.
24175
Application of Circle Line-
Statue of Liberty Ferry, Inc.
24173

Our File 9520

Dear Mr. Koburn,

We recently received notices of determination
by the State Tax Commission in the above entitled matters.

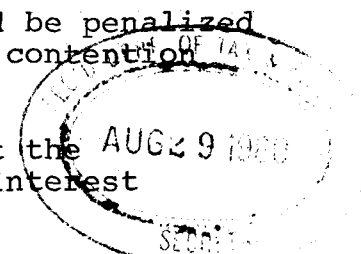
During the course of the proceeding, we moved for
the remission of penalties and the adjustment of interest
pursuant to §1145 of the Tax Law. [Transcript of
Proceeding, Pages 15, 82; Brief of Petitioner, Page
37]

The determinations of the Commission in each of
the above cases was moot with respect to the question
of penalties and interest.

Our client undertook these proceedings in good
faith in belief that it was entitled to the exemption
provided by the Tax Law.

We see no reason why our client should be penalized
for exercising its right to make the legal contention
that it was entitled to the exemption.

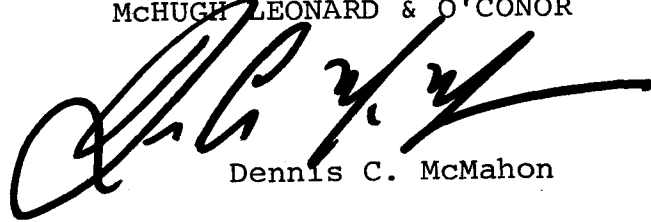
We therefore respectfully request that the
Commission remit the penalties and adjust interest
accordingly.



Our client is anxious to pay the amounts now due with the above-requested adjustment. We would appreciate, therefore, hearing from your office as quickly as possible as to whether or not the Commission will entertain the above request.

Very truly yours,

McHUGH LEONARD & O'CONOR

A handwritten signature in black ink, appearing to read 'D.C. McMahon', with a long horizontal flourish extending to the right.

Dennis C. McMahon

DCM/af