

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Capital Cities Leasing :
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 3/1/68-2/28/73 & 9/1/73-8/31/76. :

AFFIDAVIT OF MAILING

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 11th day of June, 1982, he served the within notice of Decision by certified mail upon Capital Cities Leasing, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Capital Cities Leasing
P.O. Box 261
Watervliet, NY

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
11th day of June, 1982.

Annice A. Haglund

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Capital Cities Leasing	: : : : : :	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 3/1/68-2/28/73 & 9/1/73-8/31/76		

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 11th day of June, 1982, he served the within notice of Decision by certified mail upon Richard E. Rowlands the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

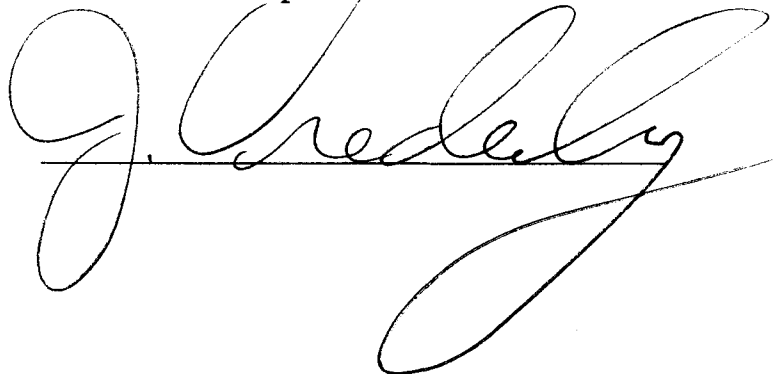
Richard E. Rowlands
McClung, Peters & Simon, Suite 400
41 State St.
Albany, NY 12207

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
11th day of June, 1982.





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

June 11, 1982

Capital Cities Leasing
P.O. Box 261
Watervliet, NY

Gentlemen:

Please take notice of the Decision 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Richard E. Rowlands
McClung, Peters & Simon, Suite 400
41 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
CAPITAL CITIES LEASING CORPORATION

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and
29 of the Tax Law for the Periods March 1, 1968
through February 28, 1973 and September 1, 1973
through August 31, 1976.

DECISION

Petitioner, Capital Cities Leasing Corporation, P.O. Box 261, Watervliet, New York 12189, 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 periods March 1, 1968 through February 28, 1973 and September 1, 1973 through August 31, 1976 (File No. 01426).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Building No. 9, State Campus, Albany, New York, on September 12, 1978 and continued to completion at the same location on May 16, 1979. Petitioner appeared by Mc Clung, Peters & Simon (Richard Rowlands, Esq. of counsel). The Audit Division appeared by Peter Crotty, Esq. (J. Ellen Purcell, Esq., of counsel).

ISSUE

Whether petitioner leased motor vehicles or provided transportation services.

FINDINGS OF FACT

1. Petitioner, Capital Cities Leasing Corporation, filed New York State and Local Sales and Use Tax Returns for the period March 1, 1973 through August 31, 1976.

2. As the result of an audit, of the period March 1, 1968 through February 28, 1973 petitioner was issued a Notice and Demand for Payment of Sales and Use Taxes Due dated September 24, 1974. Said notice assessed \$10,452.26 in tax plus \$4,414.75 in penalty and interest.

3. As the result of an audit of the period September 1, 1973 through August 31, 1976, petitioner was issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 17, 1976. Said notice assessed \$11,005.08 in tax plus \$4,670.58 in penalty and interest.

4. The audits were performed on the premise that petitioner leased vehicles and equipment. On the audit of the period March 1, 1968 through February 28, 1973, petitioner failed to make available a complete set of books and records. Petitioner's income tax returns were utilized in the determination of its sales. The sales were reduced by the amount of purchases for resale on which sales tax had been paid. The audit technique resulted in taxable sales of \$197,268.00 and tax due of \$10,452.26.

On the audit of the period September 1, 1973 through August 31, 1976, sales and use tax returns, a cash receipts journal and a disbursements journal were made available for review. Petitioner's sales were determined from the journal entries and the applicable tax applied. Credit was then allowed for sales tax paid on items purchased for resale. This audit technique resulted in tax due of \$11,005.08.

5. Petitioner, is affiliated with Troy Sand and Gravel, Inc. ("Troy") and Bonded Concrete, Inc. ("Bonded"). Anthony Clemente and Salvatore Clemente are the principal stockholders of said corporations.

6. Petitioner, during the period under review, furnished motor vehicles consisting of trucks and corporate officer cars, and equipment consisting of cement mixers to Troy and Bonded. The trucks were furnished with the appropriate insignia of Troy and Bonded.

7. Petitioner did not employ truck drivers. Drivers employed to operate its vehicles were carried on the payroll of Troy and Bonded. Troy and Bonded withheld social security taxes and other payroll withholding taxes from the employees' wages. The drivers were under the supervision of Troy and Bonded.

8. Petitioner conducted business exclusively with Troy and Bonded. It issued no billing invoices to the affiliated corporations. Charges for use of the vehicles and equipment were in the form of journal entries. Offsetting journal entries were made to reimburse the affiliated corporations for expenses incurred in the operation of the vehicles, such as the purchase of fuel, tires and repairs.

9. Petitioner was created because of a union seniority problem regarding the scheduling of drivers employed by Troy and Bonded. Petitioner was not expected to show a profit.

10. The U.S. Department of Labor issued assessments for unpaid wages against Troy and Bonded. The assessments indicate that the persons named therein were jointly employed by the corporations.

11. Petitioner in August 1968 purchased eleven trucks with cement mixers from Lawrence Concrete Corporation and paid a sales tax thereon of \$562.50. In February 1969, it purchased one cement mixer with accessories from Harold G. Anderson Equipment Corporation and paid a sales tax thereon of \$78.00. Credit was not given on the audit for said purchases.

12. Petitioner on audit was denied the 18 percent exclusion provided on certain motor vehicle rentals and leases pursuant to 20 NYCRR 530.4(b) due to the audit finding that it had not insured the vehicles. Income tax returns introduced into evidence show a deduction from petitioner's total income for insurance for the vehicles.

13. Petitioner, on audit, was not allowed a deduction from the lease charges for the cement mixers exempt from tax pursuant to sections 1115(a)(12) and 1210(a) of the Tax Law on the grounds that this matter would be resolved at hearing. Petitioner has offered no substantial evidence from which an appropriate rate may be determined nor has it offered evidence as to the number of concrete mixers involved herein.

14. Petitioner did not raise as an issue the imposition of penalty and interest.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a sales tax upon every retail sale of tangible personal property. Section 1101(b)(5) defines "sale" to include any transfer of title or possession or both, exchange or barter, rental, lease or license to use for a consideration or any agreement therefore.

B. That the charges by petitioner to its affiliated corporations for the use of petitioner's vehicles constituted "sales" within the meaning of section 1101(b)(5) of the Tax Law.

C. That petitioner's transfer of its motor vehicles and equipment to its affiliated corporations constituted retail sales within the meaning and intent of section 1101(b)(4) and taxable under section 1105(a) of the Tax Law.

D. That the audit of petitioner was conducted in accordance with section 1138(a) of the Tax Law and the burden of proving that an error exists in said audit is upon the petitioner.

E. That petitioner has established through documentary or other substantial evidence that existence of error in the audit. Proper consideration was not given to the fact that \$640.50 in tax was paid in August 1968 and February 1969 on purchases of motor vehicles and equipment. Additionally, consideration was not given to the fact that the insurance on the vehicles was paid by petitioner. Pursuant to 20 NYCRR 530.4(b) where the lessor has paid all registration fees and all insurance charges, the amount of tax on charges for the rental or lease of motor vehicles may be computed on 82 percent of the total rental or lease charge.

F. That petitioner failed to establish through documentary or other substantial evidence a proper rental charge for cement mixers and no evidence was offered as to the number of said units involved herein.

G. That the petition of Capital Cities Leasing Corporation is granted to the extent indicated in Conclusion of Law "E" above. The Audit Division is hereby directed to accordingly modify the notice of demand issued September 24, 1974 and the notice of determination and demand issued December 17, 1976. Except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JUN 11 1982

STATE TAX COMMISSION

James W. Tuley Jr.
PRESIDENT

Frank R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER