

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Madison Taxi of Buffalo, Inc. :
Charles & Joseph Montana, Individually & as Officers : 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 2/1/76 :
- 8/31/77. :

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 16th day of July, 1982, he served the within notice of Decision by certified mail upon Madison Taxi of Buffalo, Inc., Charles & Joseph Montana, Individually & as Officers the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

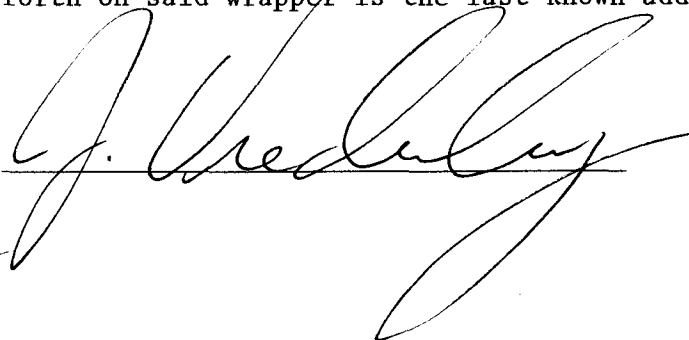
Madison Taxi of Buffalo, Inc.
Charles & Joseph Montana, Individually & as Officers
4430 N. Bailey Ave.
Buffalo, NY 14226

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
16th day of July, 1982.





STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Madison Taxi of Buffalo, Inc. :
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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 16th day of July, 1982, he served the within notice of Decision by certified mail upon Victor T. Fuzak the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Victor T. Fuzak
Hodgson, Ross, Andrews, Woods & Goodyear
1800 One M & T Plaza
Buffalo, NY 14203

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
16th day of July, 1982.

Annice A. Hagedorn

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Yellow Cab Co. of Greater Buffalo, Inc. :
Charles & Joseph Montana, Individually & as Officers : 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 2/1/76 :
- 8/31/77. :

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 16th day of July, 1982, he served the within notice of Decision by certified mail upon Yellow Cab Co. of Greater Buffalo, Inc., Charles & Joseph Montana, Individually & as Officers the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Yellow Cab Co. of Greater Buffalo, Inc.
Charles & Joseph Montana, Individually & as Officers
4430 N. Bailey Ave.
Buffalo, NY 14226

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Sworn to before me this
16th day of July, 1982.

Annice P. Hagelund

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
Yellow Cab Co. of Greater Buffalo, Inc. :
Charles & Joseph Montana, Individually & as Officers : AFFIDAVIT OF MAILING
: :
for Redetermination of a Deficiency or a Revision of :
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State of New York
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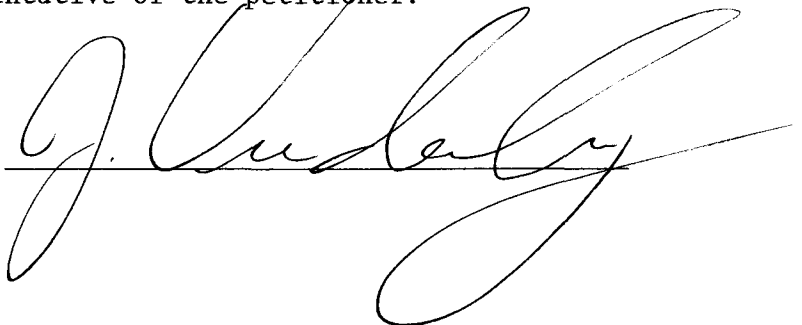
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That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
16th day of July, 1982.


Jennie A. Hagelund


Jay Vredenburg

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

July 16, 1982

Madison Taxi of Buffalo, Inc.
Charles & Joseph Montana, Individually & as Officers
4430 N. Bailey Ave.
Buffalo, NY 14226

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
Victor T. Fuzak
Hodgson, Ross, Andrews, Woods & Goodyear
1800 One M & T Plaza
Buffalo, NY 14203
Taxing Bureau's Representative

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

July 16, 1982

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Charles & Joseph Montana, Individually & as Officers
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Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Victor T. Fuzak
Hodgson, Ross, Andrews, Woods & Goodyear
1800 One M & T Plaza
Buffalo, NY 14203
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
:
of
:
MADISON TAXI OF BUFFALO, INC. and
:
CHARLES AND JOSEPH MONTANA, 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 Periods Ended February
28, 1976 through August 31, 1977. :

DECISION

In the Matter of the Petition
:
of
:
YELLOW CAB CO. OF GREATER BUFFALO, INC. and
:
CHARLES AND JOSEPH MONTANA, 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 Periods Ended
February 28, 1976 through August 31, 1977. :

Petitioners, Madison Taxi of Buffalo, Inc., and Charles and Joseph Montana, individually and as officers, 4430 North Bailey Avenue, Buffalo, New York 14226, filed a petition for revision of a determination or for a refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ended February 28, 1976 through August 31, 1977 (File No. 21336).

Petitioners, Yellow Cab Co. of Greater Buffalo, Inc., and Charles and Joseph Montana, individually and as officers, 4430 North Bailey Avenue, Buffalo, New York 14226, 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 ended February 28, 1976 through August 31, 1977 (File No. 21338).

A consolidated formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on July 7, 1981 at 1:45 P.M. and continued to conclusion on July 8, 1981 at 1:15 P.M. Petitioners appeared by Hodgson, Russ, Andrews, Woods & Goodyear, Esqs. (Robert B. Conklin, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether petitioners properly remitted to the Audit Division, as sales tax collected, 82 percent of the 7 percent charge to taxicab lessees for "tax, miscellaneous and other".

II. Whether the purchase of telephone equipment by petitioner, Yellow Cab Co. of Greater Buffalo, Inc., was a purchase for resale to lessee-drivers, and as such, not subject to sales tax.

FINDINGS OF FACT

1. On December 9, 1977, the Audit Division issued to petitioners, Madison Taxi of Buffalo, Inc. ("Madison Taxi") and Charles and Joseph Montana, individually and as officers of Madison Taxi, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the periods ended February 28, 1976 through August 31, 1977, plus penalties and interest, scheduled as follows:

<u>PERIOD ENDED</u>	<u>TAX</u>	<u>PENALTY & INTEREST</u>	<u>TOTAL</u>
2/28/76	\$ 595.14	\$ 273.76	\$ 868.90
5/31/76	1,407.70	563.08	1,970.78
8/31/76	897.05	305.00	1,202.05
11/30/76	974.57	272.88	1,247.45
2/28/77	844.68	185.83	1,030.51
5/31/77	820.39	131.26	951.65
8/31/77	583.40	58.34	641.74
	<u>\$6,122.93</u>	<u>\$1,790.15</u>	<u>\$7,913.08</u>

2. On December 9, 1977, the Audit Division issued to petitioners, Yellow Cab Co. of Greater Buffalo, Inc. ("Yellow Cab") and Charles and Joseph Montana, individually and as officers of Yellow Cab, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the periods ended February 28, 1976 through August 31, 1977, plus penalties and interest, scheduled as follows:

<u>PERIOD ENDED</u>	<u>TAX</u>	<u>PENALTY & INTEREST</u>	<u>TOTAL</u>
2/28/76	\$ 1,707.27	\$ 785.34	\$ 2,492.61
5/31/76	2,924.88	1,169.95	4,094.83
8/31/76	3,116.18	1,059.50	4,175.68
11/30/76	3,170.15	887.64	4,057.79
2/28/77	2,815.81	619.48	3,435.29
5/31/77	3,214.25	514.28	3,728.53
8/31/77	3,146.35	314.64	3,460.99
	<u>\$20,094.89</u>	<u>\$5,350.83</u>	<u>\$25,445.72</u>

3. Madison Taxi is the wholly-owned subsidiary of Yellow Cab. Both petitioners are fleet taxicab operators. During the period under consideration, petitioners operated 159 licensed taxis, at a fixed rate of fare, in Buffalo, New York and also serviced the surrounding communities of Kenmore, Cheektowaga, Tonawanda and North Tonawanda. Petitioners employ approximately 22 individuals as mechanics, dispatchers and office personnel.

4. Madison Taxi and Yellow Cab each bear the cost of registration and insurance for the vehicles they own. In addition, petitioners perform all necessary repairs and maintenance, including body repair and painting, for their cabs.

5. Prior to January, 1976, petitioners employed taxicab drivers and remunerated them based upon 50 percent of their gross revenue (fares), from which were deducted Federal and State taxes, social security and a charge for gasoline consumed during the particular driver's operation of his cab.

6. Commencing in January, 1976, petitioners leased their cabs to taxi drivers in order to avoid the problem of employee pilferage of fares, among other reasons. The lease agreement which the drivers execute on a daily basis, together with the various charges, may be summarized as follows:

(a) flat fee, based upon the number of hours for which the driver leases the vehicle: \$13.00 for 12 hours, \$12.00 for 10 hours, \$11.00 for 8 hours;

(b) mileage charge: 15¢ per mile, Monday through Friday, 13¢ per mile, Saturdays, Sundays and holidays;

(c) charge for gasoline used in the cab during the lease period: 55¢ per gallon;

(d) charge for dispatch service: 50¢ per hour.

When the driver leases the cab, the vehicle has a tankful of gasoline. When he returns the car, it is refilled, and he is billed the per gallon charge for fuel used.

The driver is charged an additional flat fee and an additional amount for dispatch service if he keeps the cab out for longer than the time for which he contracted.

All of the above amounts are added to arrive at a subtotal, upon which 7 percent "tax, miscellaneous and other" is calculated. The lease agreement form in use early in the audit period contained the printed word "tax" and the handwritten words "miscellaneous and other", at which line the computation was done. Beginning in the middle or latter part of 1976, as the older forms ran out, petitioners began use of a smaller form which contained the printed words "tax, miscellaneous and other", at which line the 7 percent computation was done.

A two dollar per day charge is next made for collision insurance.

Finally, authorized charges, that is, charges to customer accounts approved by Madison Taxi or Yellow Cab prior to the start of the particular trip, are subtracted. Generally, the authorized charges to customer accounts exceed the total amount due petitioners from the driver under the lease.

7. The 7 percent "tax, miscellaneous and other" computed on the lease agreement and collected from lessee-drivers was subsequently divided by petitioners into two portions: 82 percent was reported and remitted to the Audit Division as sales taxes upon the lease agreement; and 18 percent was retained by petitioners and entered upon the corporate books as income. The breakdown was based on petitioners' understanding of former 20 NYCRR 525.1(b), now 20 NYCRR 530.4(b). Petitioners' president, Mr. Charles Montana, attended a statewide meeting of taxicab owners and operators at which said sales tax regulation was discussed. After the meeting, petitioners' employees began to write on the older lease agreements the words "miscellaneous and other" after the printed word "tax"; petitioners thereafter ordered new forms, which contained the printed words "tax, miscellaneous and other". It was, and is, petitioners' position that insofar as they pay all registration fees and insurance charges upon the vehicles they own, sales tax may be computed and collected on 82 percent of the total lease charge to drivers.

8. Each petitioner maintains separate telephone number listings in directories and in advertisements. A customer who prefers Madison Taxi over Yellow Cab (or vice versa) can place a call to that company. A switchboard operation is located at petitioners' 4430 North Bailey Avenue office to receive customer requests for taxis. In addition, petitioners maintain approximately 120 telephone extensions at hospitals, clinics, medical offices, restaurants,

hotels, transportation terminals and office and apartment buildings, which extensions enable customers to make free calls to petitioners' switchboard for taxi service. Approximately 98 percent of petitioners' business is generated by customer phone calls; only 2 percent is the result of customers' hailing cabs on the street or at taxi stands.

9. An incoming customer call is received by the intake operator at the switchboard and is then given to the two-way radio operator, who is seated next to the switchboard. Drivers communicate with the operator via two-way radio to apprise him of their location and availability. The radio operator, thereby apprised of taxi availability, contacts the driver nearest the customer's location. The actual route of the message from radio operator to driver is from the radio console in petitioners' office via telephone line (radio tie line) to a radio tower, which transmits the signal to the cab. (The two-way radio does not provide car-to-car communication.)

10. The dispatch service described above must be specifically requested by the lessee-driver upon executing the rental agreement: he must check a box on the form requesting the service and sign his name beneath the request. If a driver has a pre-arranged trip scheduled for a particular day and does not need dispatch service, he will neither request nor be charged for such service.

11. As stated in Finding of Fact "6", petitioners computed a 7 percent "tax, miscellaneous and other" charge on a subtotal which includes the fee for dispatch service, thereby charging and collecting sales tax on such service.

12. Petitioners did not pay sales taxes to the telephone company on their equipment charges for the direct lines (linking the on-premises, free extensions to the switchboard) and the switchboard. It was, and is, petitioners' position that they purchase said hardware for resale to lessee-drivers in the form of

dispatch services; and that if they did not operate such dispatch service, they would have no need for the telephone lines. Regarding these hardware expenses, Mr. Charles Montana stated that based upon conversations with telephone company representatives during the period March through May, 1976, a resale certificate was given to the telephone company for these equipment charges and consequently no sales tax was paid thereon.

CONCLUSIONS OF LAW

A. That petitioners' rental of taxicabs to lessee-drivers on a daily basis constituted a taxable transaction pursuant to section 1105(a) of the Tax Law and the definition contained in section 1101(b)(5).

B. That 20 NYCRR 530.4(b), effective September 1, 1976, provides in pertinent part:

"[P]rovided all registration fees and all 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 under article 28 or pursuant to articles 28 and 29 of the Tax Law 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 non-taxable items, such as vehicle parking (including any amounts separately stated on billings, other than charges for chauffeurs and helpers)." (The current regulation is substantially identical to former 20 NYCRR 525.1(b), effective for those periods at issue prior to September 1, 1976.)

However, petitioners did not comply with the terms of the above-quoted sales tax regulation. Petitioners collected 7 percent on 100 percent of the rental charge, which included the flat fee and mileage charge and charges for dispatch service and fuel.

Petitioners calculated and collected a 7 percent amount from lessees as "sales, miscellaneous and other". Having utilized the sales tax rate applicable in the jurisdiction, petitioners effectively represented to lessees that these amounts constituted state and local sales taxes. Therefore, all of such amounts should have been paid over to the Audit Division:

"Every person required to file a return...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." Section 1137(a).

Furthermore, petitioners retained 18 percent of the amount collected and entered such amounts on the corporations' books as income. By retaining this portion, petitioners have effectively increased the amount of the consideration received for rental of their cabs and have therefore increased the amount of the "receipt" for rental, as defined by section 1101(b)(3). This factor alone renders petitioners' tax computation erroneous.

C. That subdivision (b) of section 1105 imposes sales tax upon "[t]he receipts from every sale, other than sales for resale...of telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service."

20 NYCRR 527.2(e) addresses the purchase of utility services for resale and states in relevant part:

"Purchases of utility services by a utility for resale as such may be made without payment of sales tax.... When the utility services are resold by the purchaser he must collect the sales tax on the receipts from his sales as imposed under section 1105(b) of the Tax Law." (Emphasis added.)

Petitioners' leasing of switchboard equipment and other hardware from the telephone company did not comprise a purchase for resale as such within the language of the statute and regulation.

D. That penalties and interest in excess of the minimum statutory rate are cancelled.

E. That the petition of Madison Taxi of Buffalo, Inc., and Charles and Joseph Montana, individually and as officers, is denied and the notice of determination and demand issued December 9, 1977 is sustained, together with such minimum interest as may be due; and further, the petition of Yellow Cab Co. of Greater Buffalo, Inc., and Charles and Joseph Montana, individually and as officers, is denied and the notice of determination and demand issued December 9, 1977 is sustained, together with such minimum interest as may be due.

DATED: Albany, New York

JUL 16 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER