

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
McBurrows Transportation, Inc. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 3/1/78-2/28/81. :
:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1985, he served the within notice of Decision by certified mail upon McBurrows Transportation, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

McBurrows Transportation, Inc.
816 Genesee St.
Buffalo, NY 14211

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
14th day of March, 1985.

David Parchuck

James P. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

March 14, 1985

McBurrows Transportation, Inc.
816 Genesee St.
Buffalo, NY 14211

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 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
MCBURROWS TRANSPORTATION, INC.
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, 1978
through February 28, 1981.

DECISION

Petitioner, McBurrows Transportation, Inc., 816 Genesee Street, Buffalo, New York 14211, 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 March 1, 1978 through February 28, 1981 (File No. 35378).

A small claims hearing was held before Richard L. Wickham, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 21, 1984, at 10:30 A.M., with all briefs to be submitted by December 19, 1984. Petitioner appeared at the hearing by Ira McBurrows, president and by Bennett Leader, Esq., on its brief. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether petitioner, McBurrows Transportation, Inc., was engaged in providing exempt transportation services for the period March 1978 through February 1981.

FINDINGS OF FACT

1. On June 19, 1981, the Audit Division, as the result of an audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner assessing \$27,907.08 tax due plus interest for the period March 1, 1978 through February 28, 1981.

2. Petitioner timely filed a petition protesting the aforementioned notice. Said petition stated that the taxpayer was unaware of its requirement to collect and pay tax. Relief was sought, pursuant to section 1132(e) of the Tax Law, on the grounds that petitioner would be unable to collect the tax from its customers. Petitioner did not raise or present evidence on any issue of bad debts at the hearing.

3. On audit, the auditor found that petitioner failed to maintain adequate books and records to verify the amount of business income as well as the source of said income. Based on conversations with petitioner's accountant, the auditor concluded that McBurrows Transportation, Inc. leased taxi cabs to independent operators and that the income therefrom, for the purposes of sales and use tax, was the gross receipts reported on petitioner's U.S. Small Business Corporation Income Tax Returns. The auditor therefore calculated tax due of \$27,907.08 on the \$398,672.46 gross receipts reported.

4. At the hearing, petitioner argued that the receipts shown on its income tax returns represented income derived from furnishing transportation services.

5. Petitioner entered into oral agreements with drivers whereunder a driver operated a company owned taxi cab for 60 percent of the fare income after deducting therefrom for the cost of gasoline. Additionally, the company offered a radio dispatch service to independent drivers operating their own taxi cabs for a "stand fee" of \$25.00 per week. No documentary evidence was presented at or subsequent to the hearing which shows or verifies the apportionment of the company income.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes sales tax on every retail sale of tangible personal property. The word sale means any transaction in which there is a "transfer of title or possession" [20 NYCRR 526.7(a)(1)]. The term transfer of possession means that one of the following attributes of property ownership has been transferred: (i) custody or possession of the tangible personal property, actual or constructive, (ii) the right to custody or possession of the tangible personal property or (iii) the right to use, or control or direct the use of tangible personal property [20 NYCRR 526.7(e)(4)]. Accordingly, the transactions of petitioner, McBurrows Transportation, Inc., wherein vehicles are temporarily transferred to drivers represent sales of tangible personal property.

B. That the portion of receipts representing "stand fees" is subject to tax under section 1105(b) of the Tax Law and 20 NYCRR 527.2(d)(2) as telephony and telegraphy service.


C. That the petition of McBurrows Transportation, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 19, 1981 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 169 641

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982
★ U.S.G.P.O. 1983-403-517

Sent by <i>McBurns Transportation Inc.</i>	
Street and No. <i>816 Seneca St</i>	
P.O., State and ZIP Code <i>Buffalo NY 14211</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	