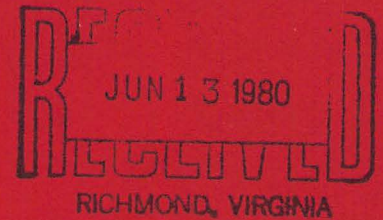


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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

CLERK
SUPREME COURT OF VIRGINIA



RECORD 791768

VERN L. HILL, COMMISSIONER,
DIVISION OF MOTOR VEHICLES,
COMMONWEALTH OF VIRGINIA

Appellant,

v.

BLACK & WHITE CARS, INC.

Appellee.

APPENDIX

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Attorney General

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Petition of Appeal, filed on October 4, 1978.

PETITION OF APPEAL.

Now comes the petitioner, Black & White Cars, Inc., and as and for its petition of appeal pursuant to Section 58-689, Code of Virginia (1950), as amended, represents the following:

1. That petitioner is a Virginia corporation which maintains a registered office in the City of Norfolk, Virginia.
2. That petitioner is engaged in the business of operating taxicab services in the City of Norfolk, Virginia, holds a certificate of authority from the State Corporation Commission of Virginia, and in the ordinary course of its business purchases motor fuel that is consumed in motor vehicles owned and operated by petitioner in the operation of urban or suburban taxicab services as defined in Section 58-757.01, Code of Virginia (1950), as amended.
3. That petitioner filed timely applications with defendant in accordance with Section 58-757.01, Code of Virginia (1950), as amended, for refund of taxes paid pursuant to the Motor Fuel Tax Act of Virginia, Section 58-686 et seq., Code of Virginia (1950), as amended, on account of motor fuel purchased by petitioner and used by petitioner's taxicabs during the month of July in 1974, the whole of the year 1977, and the months of January, February and March of 1978.

5. That on July 6, 1978, defendant disallowed all refunds previously paid for the periods alleged in paragraph 3 and rendered an assessment against petitioner in the amount of \$37,006.20.

6. That the aforesaid assessment by defendant is incorrect and contrary to law and that petitioner is fully entitled to the sum of \$37,006.20 paid by defendant pursuant to petitioner's applications for refund for the periods alleged in paragraph 3.

7. That this petition is filed within ninety days of the date of assessment.

WHEREFORE, Petitioner prays this honorable court to overrule the assessment by defendant against petitioner in the amount of \$37,006.20 and to enter an order that petitioner is fully entitled to the refunds previously claimed and paid by defendant for the month of July in 1974, the whole of the year 1977, and the months of January, February and March of 1978.

BLACK & WHITE CARS, INC., Petitioner

By John F. Smith
Of Counsel

COMMONWEALTH OF VIRGINIA,

Defendant.

FILE NO- C1493-79

JUDGMENT ORDER

THIS CAUSE came on this day upon a trial of this cause, and upon the evidence heard ore tenus on August 28 and August 29, 1979, and upon the Court finding, without a jury, as more particularly set forth in the Court's findings as dictated into the record, that upon the facts adduced at trial that the Petitioner, Black & White Cars, Inc., was entitled to the refund of taxes paid to it pursuant to the Motor Fuel Tax Act of Virginia, Section 58-757.01, of the 1950 Code of Virginia, as amended as of 1978, on account of motor fuel purchased by Petitioner and used by Petitioner during the whole of the year 1977 and the months of January through March, 1978, it is accordingly,

ADJUDGED, ORDERED and DECREED that the Petition of Appeal of Black & White Cars, Inc. is hereby granted, and the subject assessment of the Commissioner of the Division of Motor Vehicles is accordingly overruled. The Defendant, by counsel, notes its exception to the findings and Judgment of this Court.

ENTERED:

Wm. Moultrie Guerry, Judge

JUDGE

DATED: SEP 10 1979

ASKED FOR:

[Signature] p.q.

SEEN:

[Signature] p.d.

A COPY, TESTE: HUGH L. STOVAN, CLERK
BY: *[Signature]* D.C.

ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that former § 58-757.01 permitted the use of fuel tax refunds to pay the cab company's owner-officers for alleged inadequate compensation in previous years, including years prior to enactment of the refund program.

2. The trial court erred in placing on the Commonwealth the burden of proving the salaries of the owner-officers excessive.

3. The trial court erred in ruling that the fuel tax refunds were necessary to the continued operation of the cab company and in the public interest.

1 THE COURT: All right. Are you ready to call
2 your first witness, or you want to proceed with the
3 deposition first?

4 MR. LUSTIG: I would like to call as our first
5 witness Senator Harry Michael, and if I could, I would
6 like to read the deposition of Senator Michael which
7 was taken in Richmond, if Your Honor please.

8 MR. FAHY: Your Honor, we would object to the
9 admission in evidence of this deposition on two grounds.
10 One, that it is not relevant; and one, the legislature,
11 we submit, cannot testify, cannot establish the
12 legislative intent of a 140 member body. We submit that
13 the testimony of one individual is not relevant and,
14 secondly, to the extent --

15 THE COURT: Isn't this often approved from the
16 debates and committee reports, legislative intent?

17 MR. FAHY: That is true. That is an element
18 of legislative history, but we are not concerned with
19 that at this point. We are concerned with a deposition
20 responsive to matters several years ago, and we submit
21 that that one single individual legislator, his
22 testimony is not relevant to --

23 THE COURT: Do you have any law on that, any
24 cases on it?

25 MR. FAHY: I have one Lawyer's Edition Annotation

1 and that would be at 56 L. Ed. 2d. 918, which is
2 entitled Supreme Court's Views on Weight to be
3 Accorded to Pronouncements of Legislature or Numbers
4 of Legislature Respecting a Meaningful Intent on a
5 Previously Enacted Statute.

6 We submit that cases are annotated there at
7 56 L. Ed. 2d. 918, which would indicate that the
8 United States Supreme Court gives no weight to the
9 testimony of an individual legislator.

10 THE COURT: Gives no weight to it, or do they
11 say it's inadmissible?

12 MR. FAHY: They say there's no weight to be
13 given to it.

14 THE COURT: I see. Well, I am going to let it
15 come in for what it's worth, and we will give it what
16 probative value it's entitled to. I submit it's the
17 opinion of one legislator, but I think you submitted
18 he was the Chief Patron.

19 MR. LUSTIG: He was.

20 THE COURT: We will view it from that angle.

21 MR. LUSTIG: Judge, also I think so that the
22 Court doesn't think that this was done willy-nilly,
23 there is a statutory procedure for consideration of
24 this by the Court in Virginia, Section 18.01386
25 concerning --

1 THE COURT: For the consideration of what?

2 MR. LUSTIG: Of this type of testimony by the
3 Court.

4 THE COURT: What's that section?

5 MR. LUSTIG: 8.01386 paragraph b says, and
6 this is a statute concerning judicial matters of law,
7 "The Court in taking such notice may consult any book,
8 record, register, journal or other official document
9 or publication purporting to contain, state or explain
10 such law," and then the keywords "and may consider
11 any evidence or other information or argument that is
12 offered on the subject."

13 THE COURT: All right. Objection overruled.
14 I will hear it for what it's worth.

15 Now, you want to have your colleague read the
16 other portion or --

17 MR. LUSTIG: I can read both of it, Your Honor,
18 if I may.

19
20 (Whereupon, the deposition of Senator James H.
21 Michael, Jr., was read, during which the following
22 colloquy was had:)

23
24 THE COURT: Okay. Let's take that out of the
25 report.

Exhibit 1?

MR. LUSTIG: If you would, please.

THE COURT: All right, sir. Are you ready
to call your next witness?

MR. LUSTIG: Yes, sir.

(Whereupon, the aforementioned
deposition was received in evidence
and marked as Petitioner's Exhibit
Number 1.)

CARRINGTON WILLIAMS, called as a witness,
having been first duly sworn, was examined and testified
as follows:

DIRECT EXAMINATION

BY MR. LUSTIG:

Q Mr. Williams, would you for the record state
your full name and address, please.

A My name is Carrington Williams. I live at
3543 Half Moon Circle, Falls Church, Virginia 22044. My office
address is the law firm of Booth, Pritchard & Dudley, 4103
Chainbridge Road, Fairfax, Virginia.

Q Mr. Williams, you have previously been a
member of the House of Delegates of the Commonwealth of Virginia?

1 A. Yes, sir, for ten years.

2 Q. All right.

3 MR. FAHY: Your Honor, if I may, just for
4 the record, I would like to inject before we get
5 deep into the testimony I have the same objection as
6 we had with the deposition.

7 THE COURT: All right. And the objection is
8 overruled for the same reason, and I will permit him
9 to testify from his recollections for what it's worth
10 as to the legislative intent.

11

12 BY MR. LUSTIG:

13 Q. Now, Mr. Williams, in 1974 in the House of
14 Delegates what committees were you on?

15 A. I was on the House Finance Committee, the
16 Privileges and Elections Committee, and I forgot my third
17 committee at the moment.

18 Q. Now, did there occur in 1974 or before that
19 your involvement in the question of mass transportation and
20 taxicab companies in general?

21 A. Yes, sir. I had been involved in transportation
22 problems ever since I had gone to the General Assembly in 1966.

23 Q. Was this a primary area of concern for you?

24 A. Yes, sir. It was very much so because we have
25 had such a large and continuing transportation problem in Northern

1 Virginia, and my concern was that both in terms of the tax
2 problems, the cost problems that we simply had to get a better
3 handle on the whole transportation problem than we had.

4 I might add, Mr. Lustig, that I was not only
5 interested in so-called mass transit, buses and the subway system,
6 that was to be built in Northern Virginia, Washington and Maryland,
7 but also in aviation, buses, railroads, shipping. The whole thing
8 I thought had to get a more comprehensive economical look than
9 we had given it previously.

10 Q Now, within that area of concern did the
11 question of the viability of private taxicab service companies
12 in Virginia come to your attention vis-a-vis the Gas Refund Tax
13 Statute that then existed for bus companies?

14 A Yes, sir, it did.

15 Q All right. Would you explain to the Court how
16 this whole thing arose? You were the chief patron on this statute
17 that you have heard us discuss?

18 A Yes, sir. The way it came about was simply
19 that I was approached one day by a spokesman, a lawyer from
20 Alexandria for the taxicab industry, Curtis Sewell, and he handed
21 me this analysis of the taxicab industry in Virginia. He said,
22 "I wish you would read this. I know your interest in transportation.
23 We would like for you to introduce legislation to give the same
24 kind of a rebate on the gasoline tax, the fuel tax, to the
25 taxicabs that we have already given to the bus company, the private

1 companies," and I will be frank to say that I was rather skeptical
2 about this when it was given to me. I had no enthusiasm for it,
3 but I said, all right, I would read the report, and I did read
4 the report. The more I studied it, the more I became convinced
5 that the taxicab industry in Virginia was truly a sick industry,
6 not only here, I should say, but all over the country based on
7 this analysis and based upon that study and the information which
8 was given in this report comparing, for instance, the Virginia
9 taxicab industry with that in other parts of the country.

10 I introduced the bill. I might add for the
11 report that this report, which was by a firm in Richmond, indicated
12 that not only was the national taxicab industry sick, but Virginia's
13 was worse than the national average. They compared the taxicab
14 business with manufacturers, all United States manufacturing
15 corporations and electric utilities, and it showed, for instance,
16 for a three-year period that it had a minus margin of profit,
17 minus 3.85 percent as compared to 14.75 percent, for example, with
18 electric utilities and manufacturing businesses in general 4.25.
19 I became convinced on the basis of this and much other information
20 that this was, indeed, a sick industry and we had to do something
21 about it.

22 Q What was your legislative concern about it
23 being sick or not appearing to be too viable?

24 A Well, Mr. Lustig, my legislative concern was
25 as a tax lawyer and a delegate who had to go back to face the voters

1 every two years, I did not want to have to raise taxes. As a
2 matter of fact, I became known in the General Assembly as something
3 of a tightwad with the public purse, and I was convinced on the
4 basis of our experience in Northern Virginia if we did not do
5 something about the one private part of the transportation
6 industry in Virginia that was in the greatest trouble, we would
7 be in far deeper trouble.

8 We had, or I had, I recall very vividly when
9 the Virginia Transit Corporation announced it was going out of
10 business in Norfolk and Richmond I made calls, and made calls here
11 to Mayor Martin in Norfolk and calls to the mayor in Richmond and
12 all over trying to get people stirred up because I said this is
13 going to cost you a fortune if we don't keep these private
14 companies going. Perhaps it was too late for the bus companies,
15 but I was determined not to let the taxicab companies go the way
16 of all the private bus companies.

17 May I add this also, I was not trying to
18 subsidize taxicab companies. That was not my main motivation.
19 My motivation was to save the public money, and we had to do it.
20 This was the most feasible way I could see to do it.

21 Q As a form of subsidy?

22 A As a form of subsidy only. I had no particular
23 feeling to the taxicab companies. I was just convinced on the
24 basis of my investigation, thought of with some skepticism unless
25 we did we were going to be in much deeper soup than if we granted

1 this kind of a limited subsidy.

2 Q Now, in presenting this legislation did you
3 work with Senator Michael on the Senate side?

4 A Yes, sir, I did.

5 Q Now, you have heard his testimony given here
6 today by deposition. Do you agree with his testimony so far?

7 A Yes, sir, in general I do. I don't recall
8 any specific substances of this agreement.

9 Q Now, the bill, if I recall correctly, originally
10 was established for one year.

11 A Correct.

12 Q And a six-month reporting period; that is, a
13 report for a six-month period was put into the bill to establish
14 a prima facie evidence of necessity of refund; is that correct?

15 A Yes, sir.

16 Q All right. I think the original bill, as a
17 matter of fact, spoke about 1973, '74 and 5, that it had to be a
18 report within any of those two years, a six-month report, but that
19 the legislation in '75 when it was made permanent then just used
20 a phrase "Any two-year period of time"?

21 A That's correct, sir. The first bill, House
22 Bill 517, I have a copy of it in front of me, provided for a
23 one-year period only. It was on an experimental basis. I might
24 add that I was the chief patron. There were about ten co-patrons
25 of whom there were several from Northern Virginia and several

1 from Norfolk, Delegates White, Leafe, Moss, Delegate Mickey
2 from Charlottesville and others.

3 Q All right. Now --

4 A And then, Mr. Lustig, the bill, which was
5 House Bill 1061, was introduced in the 1975 session. The purpose
6 of that was to do away with the one-year limitation and make it
7 permanent legislation and to do away with the reference to
8 specific years as showing the operating deficit prima facie. It
9 was to establish the two-year period as for the prima facie
10 purposes.

11 Q If you met the qualification, you then had a
12 refund coming to you for two years?

13 A That was the general idea. My recollection
14 is, I don't recall a specific discussion on that point in the
15 floor debates, but I can tell you that I think I was asked every
16 other question under the sun about this legislation because it
17 received a very close scrutiny. There were a lot of skeptics
18 about this bill the first time around. I had a lot of opposition,
19 and I barely got it through the House because of this opposition.

20 It's not like many bills that go through the
21 General Assembly where not a voice of opposition is raised. This
22 received a lot of very critical attention including on the Senate
23 side when I appeared over there for the Senate Finance Committee
24 on which Senator Michael served then and still does.

25 However, a year later when I put in House Bill

1 1061 to make it permanent legislation some of my severest critics
2 from the previous year before had become converts and became some
3 of my strong supporters because on the basis of even one year's
4 experience they were satisfied that this was the cheapest way to
5 provide and continue an essential form of public transportation.

6 Q Why was the six-month period ending? You know,
7 during the intermediate two-year period why was the six-month
8 operating statement utilized, say, instead of a one-year operating
9 statement?

10 A We were afraid that if we waited for the
11 one-year operating statement, that a lot of these cab companies
12 would bleed to death frankly. I find in my notes here the word
13 transfusion used. That's what I used on the floor debate. They
14 needed a shot in the arm to keep them going because they were
15 dropping like flies.

16 I find on my folder here a notation. It says,
17 "180 cab companies of 280 in Norfolk have quit," and this pattern
18 was almost as bad in Richmond. It was a faltering industry all
19 over the state.

20 Q All right. Now --

21 A And, therefore, we felt that the six-month
22 operating statement was the quickest way based upon the safeguards
23 that are written into the legislation to satisfy the Division of
24 Motor Vehicles that this cab company has got to have some immediate
25 help.

1 Q Now, I take it, one of the safeguards written
2 in was the fact that you had the operating deficit statement as
3 prima facie evidence of necessity?

4 A Yes, sir.

5 Q Did you intend to have the Division of Motor
6 Vehicles review it when it came in?

7 A Yes, sir. As a matter of fact, I discussed
8 these procedures with representatives of the Division of Motor
9 Vehicles. I wanted to get all the help from the State agencies
10 that I could at that time to get their views as to the proper
11 safeguards to put in the legislation. I recall talking to Mr.
12 Vincendiver (phonetics) from the Division of Motor Vehicles and
13 I think others, perhaps to Mr. Vern Hill, and I talked to the
14 Corporation Commission, everybody I could who could throw any
15 light on the subject.

16 MR. LUSTIG: There's a document I want
17 to show counsel, if I may, Your Honor.

18 THE COURT: Yes, sir.

19 THE WITNESS: I would like to add one point
20 here to my testimony about the cab fatalities. I
21 mentioned Norfolk. I think fifty were lost out when
22 Red Top went out of business, twenty when Broadway
23 went out. In Richmond the number of cabs dropped from
24 200 down to 75. This was at the time of the energy
25 crisis, the first one in 1973 and '74. This was another

1 major motivating factor in trying to do something about
2 more efficient use of energy. Of course, the cab
3 companies were faced with rising prices of gasoline
4 then, just as they have been since.

5
6 BY MR. LUSTIG:

7 Q You indicated to His Honor that you spoke to,
8 among those at the Division of Motor Vehicles, Mr. Vern Hill.

9 A Yes, sir.

10 Q I show you this letter dated April 29th, 1974,
11 addressed to you. Is this a letter or a copy of a letter you
12 received from Mr. Hill?

13 A Yes, sir, it is.

14 MR. LUSTIG: All right. Your Honor, we would
15 ask this be marked as Exhibit Number 1, Your Honor.

16 THE COURT: Have you seen this, Mr. Fahy?

17 MR. FAHY: Yes, I have, Your Honor.

18 THE COURT: All right. Any objection?

19 MR. FAHY: No, sir, Your Honor.

20 THE COURT: All right. Exhibit P-2 received.

21
22 (Whereupon, the aforementioned letter
23 was received in evidence and marked
24 as Petitioner's Exhibit Number P-2.)
25

1 BY MR. LUSTIG:

2 Q I note in this that P-2, that he has indicated
3 that "as pursuant to the statute that a showing of an operating
4 deficit for any continuous six-month period ending in '73, '74,
5 '75 shall be deemed prima facie evidence of the necessity of such
6 refund."

7 A Yes, sir.

8 Q All right. And as a matter of fact, on the
9 second page did not Mr. Hill indicate to you that as a suggestion
10 for future legislation back in 1974 that there should be an
11 elimination of the provision that requires the Division of Motor
12 Vehicles to be in a position of determining the financial need
13 of any applicant?

14 A That is correct, sir.

15 Q All right.

16 A By way of explanation, Mr. Lustig, may I add
17 that I had made the commitment to Senator Wiley, the chairman of
18 the Senate Finance Committee, when I explained the bill which had
19 passed the House and gone over to the Senate and was before the
20 Senate Finance Committee. He said to me, "Mr. Williams, what do
21 you intend to do about helping these cab companies which are not
22 regulated by the Corporation Commission?" I said, "Well, Senator,
23 I have no objection to that. As a matter of fact, if they are
24 regulated now by the local governments and if you want that done,
25 I will make the commitment to you now to bring in a bill next year

1 providing for a regulation by the Corporation Commission."

2 He said, "Well, I would like to see that."

3 So I said, "Very well, sir." Therefore, this correspondence with
4 Mr. Hill and with the Corporation Commission ensued, in which I
5 suggested that very thing, and the response of the Corporation
6 Commission was: "We don't want to regulate the cab companies. We
7 think that ought to be left to the local governments," and so that
8 bill was not introduced.

9 Q All right. Was there at any time any consideration
10 given legislatively to a point of view that cab companies should
11 not become profitable within the two years that they are receiving
12 their refund?

13 A I don't recall a specific discussion on that
14 point. The statute was designed to give them that transfusion
15 in that two-year period. It was a shot in the arm that they
16 desperately needed, and if they could become profitable, great.
17 That's exactly what we want them to do. We want them to be
18 healthy because the profit picture was one of great instability,
19 you know, instability, bankruptcy, insolvency, and we knew that
20 without that kind of encouragement -- when they were receiving
21 what they thought was unfair compensation from heavily subsidized
22 bus companies, and airlines and everything, well, not airlines,
23 but bus companies, and railroads and the private automobile, with
24 that kind of subsidized competition the best thing we could do
25 to keep them in business as a private enterprise was to give them

1 this gas rebate when they could show within that two-year period
2 this deficit.

3 MR. LUSTIG: I have no further questions.

4 Thank you.

5 MR. FAHY: I have no questions.

6
7 BY THE COURT:

8 Q Mr. Williams, you were not in the legislature
9 when they passed this 1979 legislation that apparently has even
10 extended this help further so that they don't even have to show
11 the deficit, don't have to file the operating statements?

12 A That's correct, sir. I was not in the General
13 Assembly. 1977 was my last session.

14 Q Are you familiar with this new legislation?

15 A Mainly from what I have heard just recently,
16 Your Honor. I have not consulted about it, naturally, not being
17 in the Assembly. Apparently it did not encounter the kind of
18 opposition that my initial legislation did in 1974.

19 Q Well, it appears your views back in the early
20 days has been carried on even further and that the need has been
21 shown to exist.

22 A There's no question in my mind that that is the
23 case. I don't know what was presented to the General Assembly
24 in this session, but the transportation industry is still a sick
25 industry and the public is learning the tremendously heavy cost

1 of public ownership and operation as compared to private ownership,
2 which I prefer.

3 Q Do the studies find that the bus companies that
4 are becoming publicly operated are more expensive?

5 A Oh, absolutely, Your Honor.

6 Q I haven't seen the figures.

7 A Horrendously so. I am just appalled, in my
8 years of struggle in the General Assembly for some kind of
9 financial planning for the bus system that's publicly owned and
10 operated now in Northern Virginia and for the subway and so forth,
11 too much of that has been swept under the rug in my humble
12 judgment. The feeling seems to be Uncle Sam will pick it up,
13 don't worry about it. Uncle Sam is not going to pick it all up.
14 I think that's perfectly clear, and the same pattern is developing
15 all over the country.

16 The BOCK system in San Francisco is tremendously
17 expensive. The system in New York is a heavily deficit situation.
18 The same thing is true in Boston. It's nationwide.

19 Q How about the Metro Bus System in Norfolk, have
20 you seen any figures on that?

21 A I have not seen any figures, Your Honor. I am
22 told the subsidy is around \$8.00 per passenger on that thing, and
23 incidentally, again, to explain my thinking at the time, we
24 computed or there was computed in this analysis what this subsidy
25 would amount to for the taxicab companies and providing its public

1 service, and it was computed out to come to 4.1 cents per
2 passenger. We were at that time operating in Fairfax City a
3 little system called Dial-A-Ride whereby it was subsidized and
4 the subsidy there for passengers for public transportation way
5 back in 1974 was \$1.90 per passenger, \$1.90 for public subsidy
6 versus 4.1 cents for the cab companies. To me the figures were
7 just so clear.

8 Q Light dollars for the buses. You mean \$8.00
9 per person per ride?

10 A I have heard that figure given to me, Your
11 Honor, by a source I think is reliable. I don't vouch for it,
12 but I just know that the costs are escalating horrendously.

13 THE COURT: We thank you for that testimony.

14 Any other questions, gentlemen?

15 MR. LUSTIG: No, sir.

16 MR. FAHY: No, sir.

17 MR. LUSTIG: May this witness be excused,
18 Your Honor.

19 THE COURT: Yes, sir. Thank you for coming.

20 MR. LUSTIG: Thank you, Mr. Williams.

21
22 (Witness excused.)

23
24 THE COURT: All right, sir. You want to take
25 a recess at this point or do you want to take another

1 court reporter.)

2
3 B. J. FLASKAS, called as a witness, having been
4 first duly sworn, was examined and testified as follows:

5
6 DIRECT EXAMINATION

7 BY MR. LUSTIG:

8 Q Mr. Flaskas, would you please state your full
9 name and address, please.

10 A My name is B. Flaskas, and I live at --

11 THE COURT: How do you spell that, sir?

12 THE WITNESS: F-L-A-S-K-A-S. 2643 Radford
13 Avenue, Richmond, Virginia.

14
15 BY MR. LUSTIG:

16 Q And by whom are you currently employed?

17 A I am employed by the Division of Motor
18 Vehicles, Commonwealth of Virginia.

19 Q For how long have you been employed by DMV?

20 A Nine years.

21 Q What position have you held during the year
22 1978, '79?

23 A I was a state tax auditor.

24 Q Would you describe to the Judge what a state
25 tax auditor's job is within the Division of Motor Vehicles?

1 A. State tax auditor audited the fuel taxes of
2 major and minor oil companies throughout the State of Virginia,
3 and in some cases I travel beyond the State of Virginia, wherever
4 the records might be.

5 Q. For how long have you been doing that?

6 A. I have been doing it for seven years.

7 Q. I take it, auditing means going through the
8 books and records and looking at the figures and reports that
9 people have filed incident to, in this case, gas tax refunds?

10 A. That's right. I am verifying that nine cents
11 tax that is paid to the State of Virginia for fuel, for motor
12 fuel and also special fuel.

13 Q. What is your background and training in
14 accounting?

15 A. Well, the background I have gotten from the
16 nine years with the state and I lack about eight hours of having
17 a degree in Business Administration.

18 Q. For how long --

19 A. I have had twelve hours of accounting.

20 Q. You have had twelve hours of accounting?

21 A. Twelve semester hours, yes.

22 Q. Other than that, I take it, yours has been the
23 practical experience of on-the-job and you are not a CPA or
24 an accountant as such?

25 A. No.

Q All right, sir. Now, you were the auditor who did the audit in 1978 on Black and White Cars, Inc. on their 1976 operating statement for the last six months of 1976?

A Yes, sir.

Q Okay. Now, if I understand correctly, that operating deficit report for the last six months of 1976, when did you start to review that and audit it?

A I started to review it in, I would say, sometime in February.

Q Of 1978?

A Yes, sir.

Q All right. That would have been a little more than a year after it had been submitted, that is, that operating deficit statement?

A Well, I don't know exactly the date that it was submitted, but sometime we have to write and ask them to submit these statements. They submit them much later. As a matter of fact, to get the 1976 I don't think the accounting firm gets it out until sometime in '77 for 1976.

Q All right. Well, if the operating deficit statement was filed, say, sometime in early 1977 for Black and White Cars, I take it, then, that you did not get to at least start the audit until February of 1978; is that correct?

A Well, we have these audits assigned to us, and in the meantime we are doing other audits of fuel companies so we

1 work these in the best way we can.

2 Q I understand. And actually when you were
3 undertaking the audit, they had already received their tax refund
4 on gasoline for the entire year of 1977; is that correct?

5 A Yes, sir.

6 Q And when did you complete that audit?

7 A I completed the audit sometime in May, I
8 believe, May of 1978.

9 Q All right. So it was not completed until May,
10 you say, of 1978?

11 A I believe that's the date. I am a little hazy
12 on it.

13 Q Okay. And that audit, as a matter of fact,
14 resulted in a report that you made?

15 A That's right.

16 Q And that report, as a matter of fact, was not
17 dated until when, do you know; do you know the date of that
18 report? I believe it was sometime around June, wasn't it, June
19 of '78?

20 A June of '78.

21 Q Okay. And, of course, it was on the basis of
22 that report that you filed that there then arose the question of
23 the eligibility of Black and White to have received its refunds
24 in '77 and the first three months of '78 based upon their 1976
25 report; is that correct?

1 A Yes, sir.

2 Q All right. And in actuality when you go in
3 and make the audit and the Division of Motor Vehicles makes the
4 determination, you make the determination based solely upon your
5 review of whether they were qualified pursuant to the last
6 six-month operating statement that they put in for 1976?

7 A No. We also look into the whole year because
8 if you use just the six months, then it's very easy in a business
9 to delay some payments and pay them in the six months you desire.

10 Q Okay. So you look at both the last six-month
11 statement and then you look at the whole 1976; is that correct?

12 A That's right.

13 Q And in determining qualification you do not
14 look at what their actual business was in 1977 or what their
15 business was, say, in the first six months of 1978; isn't that
16 true?

17 A You certainly do. One year is related to the
18 other. In that I mean if they are getting refunds in one period
19 and you go into the other period, they are being qualified for
20 two years on the one year. So if you can have a lot of expenses
21 in one year, then you go into the other years where you don't
22 have to prove any prima facie evidence then you could make a
23 tremendous amount of profit in those years. Then you don't have
24 to worry about it until two years later.

25 Q Well, can you tell me on the basis of what

1 ~~statutory language under this section you look at more than the~~
2 last six months of 1976 or the whole 1976 and look ahead at what
3 they did in 1977 and 1978 with reference to their qualification
4 period as a result of their statement for the last six months
5 of '76?

6 A. Well, there's no statutory reason, just common
7 sense I guess.

8 Q. All right. Now, are you familiar with this
9 document? I believe it's a copy of a document that you sent to
10 a Mr. Pertz dated July 24th, 1978?

11 A. Yes, I am familiar with it.

12 Q. Did you so write that document?

13 A. Yes.

14 MR. LUSTIG: I would like to have that marked,
15 if Your Honor please.

16 THE COURT: Marked P-3.

17 Any objection, Mr. Fahy?

18 MR. FAHY: No, sir.

19 THE COURT: Received.

20 (Whereupon, the aforementioned letter
21 was received in evidence and marked
22 as Petitioner's Exhibit Number P-3.)
23
24
25

1 BY MR. LUSTIG:

2 Q This is July of '78 entitled Bill to Amend
3 and Re-enact, and then the code section is cited relating to
4 refund to taxicabs of motor fuel; is that correct?

5 A Yes.

6 Q Were you asked by anyone to make these
7 suggestions and recommendations?

8 A I don't believe so. We had discussed the
9 problems of the taxicab company audits, and I thought it would be
10 a good idea to put some thoughts together on that because at the
11 time they were talking about amending the legislature that was
12 existing.

13 Q Okay. Now, if I understand correctly from
14 this document --

15 THE COURT: What's the date of that letter?

16 MR. LUSTIG: July 24th, 1978.

17
18 BY MR. LUSTIG:

19 Q This was written during the same period of
20 time that you had finished your audit of Black and White but were
21 dealing back and forth with Black and White concerning that audit
22 and concerning qualification; isn't that true?

23 A Yes.

24 Q All right. You had not yet at that time, that
25 is you, DMV had not made its assessment back against Black and

1 White?

2 A. No.

3 Q. Is that true?

4 Q. I think it came a little after that.

5 Q. Came after that. All right. And, as a matter
6 of fact, you found, did you not, that the code section involved
7 as far as you are concerned was ambiguous?

8 A. Yes.

9 Q. All right. You also found that so far as the
10 code section involved that it encourages distortions of revenues
11 and expenses in order to, it says, quantity, but I assume
12 qualify for refunds?

13 A. Yes.

14 Q. You felt that way, did you not?

15 A. Yes.

16 Q. And I think you also indicated here that you
17 felt that this borders on becoming a tax loophole for taxicab
18 owners?

19 A. Yes.

20 Q. All right. Now, you then went on in here and
21 you said "Because of this the auditing of the refunds are made
22 difficult requiring an auditor." Now, you are talking about the
23 auditing by DMV?

24 A. I don't know. Would you read a little further?

25 Q. All right. It says, "Because of this the

1 auditing of the refunds are made difficult, requiring an auditor
2 with special corporate and tax accounting."

3 A I took into consideration the type of audits
4 we had been doing up to then with the type of audits we had to
5 do with the taxicab companies.

6 Q And the auditor you are talking about is an
7 auditor from DMV, the auditing by DMV; isn't that right?

8 A Yes.

9 Q And you felt, then, it requires an auditor
10 with special knowledge of corporate and tax accounting?

11 A If that's what I said, yes..

12 Q Isn't that what you said?

13 A Yes.

14 Q All right. Are you an auditor with special
15 knowledge of corporate and tax accounting?

16 A I have done some reading and research along
17 those lines.

18 Q Would you consider yourself one who possesses
19 special knowledge of corporate and tax accounting?

20 A No.

21 Q Now, you also indicate in here that the wording
22 of the statute, to quote you, "The wording also establishes a
23 qualifying period of 29 months for a six-month period of loss";
24 is that correct?

25 A Yes, at the time we had discussed that. That

1 changed a little later.

2 Q But as of this time --

3 A Yes.

4 Q And also as of when Black and White filed its
5 report in 1976?

6 A Yes.

7 Q If they were found qualified, that gave them
8 a qualification period of 29 months?

9 A Yes.

10 Q Isn't that correct?

11 A Correct.

12 Q Regardless of what --

13 A That was my interpretation, though.

14 Q Well, I understand that.

15 A I hadn't at that time gotten an opinion from
16 the Attorney General's office. That was my opinion at the time
17 that that's what the statute stated. That was one of the
18 ambiguities I was talking about.

19 Q At that point in time is it not true that the
20 Division of Motor Vehicles had for some period of time been
21 operating on the basis that if you qualified, you qualified for
22 a 29-month period ahead?

23 A On prima facie evidence, yes.

24 Q On your prima facie evidence, okay. So that
25 actually whether or not the company once they qualified, if they

1 qualified, once they had maybe a great profit during that
2 29-month period, that didn't disqualify them from their previous
3 qualification; isn't that true?

4 A. Would you mind stating that again?

5 Q. All right. That once you qualified them, if
6 they were qualified, all right, and the Division of Motor
7 Vehicles found them qualified, for a 29-month period they were
8 entitled to receive those refunds for 29 months regardless of
9 what their profitability picture was.

10 A. But that qualification doesn't come until the
11 final audit, subject to final audit. It's prima facie evidence
12 that they can get the 29-month refund.

13 Q. But you would agree once qualified or if
14 qualified, they are entitled to a refund for 29 months?

15 A. After an audit, yes.

16 Q. After an audit, all right. Tell me something.
17 To the best of your knowledge did the Division of Motor Vehicles
18 ever at any time during 1976 or 1977 put out rules and regulations
19 to the taxicab owners about how to handle accounting-wise expenses,
20 income and matters of that type?

21 A. There was some bulletins sent out by the
22 manager of the Fuel Tax Department. I have read them from time
23 to time. Right now I can't state anything specifically.

24 Q. Do you recall or know of any such bulletin
25 which ever laid out any fact the rules and regulations the taxicab

1 companies were going to operate under so far as how they were
2 to handle their accounting and how they were to handle their
3 six-month operating deficit statements?

4 A. There were some bulletins.

5 Q All right. Let me show you some. I show you
6 several bulletins, instructions and ask are these the type of
7 bulletins you are referring to that the Division of Motor Vehicles
8 sent out to the taxicab companies?

9 A. Yes.

10 MR. LUSTIG: I would like to ask that these
11 be marked as a group, if Your Honor please. I think
12 it would be easier for the Court.

13 THE COURT: Want me to staple them?

14 MR. LUSTIG: Yes, sir.

15 THE COURT: All right. Marked P-4.

16 Any objection, Mr. Fahy?

17 MR. FAHY: No objection.

18
19 (Whereupon, a group of bulletins were
20 received in evidence and marked as
21 Petitioner's Exhibit Number P-4.)

22
23 BY MR. LUSTIG:

24 Q I ask you, Mr. Flaskas, if you will look
25 through each page of that package of bulletins and tell me whether

1 anywhere in that package of Bulletins there is anyplace where the
2 Division of Motor Vehicles tells the taxicab companies how you
3 are supposed to set up your operating deficit statement or how
4 you are supposed to include or handle income or handle expenses
5 or items like that so far as concerns the future audit that the
6 Division of Motor Vehicles will undertake of that report?

7 A. Well, the first one here states that you are
8 to show to the Division of Motor Vehicles that the refund is
9 necessary to the continued operation of the taxicab service and
10 that the taxicab company is under honest, economical and efficient
11 management.

12 "Evidence of an operating deficit for any
13 continuous six-month period ending during the immediate preceding
14 two-year period prior to the date of application shall be deemed
15 prima facie evidence as evidence for such refunds." I interpret
16 this to mean they are to submit some document showing they have
17 a loss for the six-month period.

18 Q. I understand that, Mr. Flaskas, but what I
19 am saying is is there anywhere in that document or any other
20 document that was sent by the Division of Motor Vehicles to say
21 what kind of accounting methods you are supposed to use, what
22 kind of, for example, formula the Division of Motor Vehicles uses
23 in determining rate of return on investment? Is there anything
24 in there that tells the taxicab owner, or his CPA or his
25 bookkeeper how these things are to be handled accounting-wise?

1 A. No. We leave that to them. I mean, we want
2 a show of deficit, a show of need. I mean, we don't give them
3 a step-by-step of what they are supposed to report or how they
4 are supposed to report it.

5 Q. Well, you say you leave it up to them, but
6 then, I take it, that when you got this report you decided that
7 you didn't think that certain things were handled according to
8 generally accepted accounting principles; is that right?

9 A. That's right.

10 Q. All right. How were the auditors or the
11 Black and White Cab, the auditors for Black and White Cab or
12 Black and White Cab itself supposed to know what accounting
13 procedures would or would not be acceptable to the Division of
14 Motor Vehicles if you never told them?

15 A. Well, as a CPA firm they should know what
16 is expected from the way the law reads.

17 Q. By virtue of their being CPAs?

18 A. By virtue of their taking care of the firm's
19 accounts.

20 Q. Yet in this case you did not accept the CPA's
21 figures, did you?

22 A. I accepted a lot of their figures. Some of
23 them I questioned. I accept their figures. They disclaim that
24 they even audited any of the records, that the records came
25 direct from the taxicab firm, that they are not responsible for

1 the auditing of those records.

2 Q They gave you an unaudited report done by a
3 CPA firm; is that correct?

4 A Yes, disclaiming any responsibility for the
5 accounting of those records.

6 Q Well, you never went behind those records, did
7 you?

8 A Yes. I looked at those records.

9 Q I didn't say looked at those records. You
10 didn't go behind them as an auditor would go behind them on an
11 audited report, did you?

12 A I asked them about some of these figures, about
13 the figures I found.

14 Q All right. You asked them about them. Now,
15 as a matter of fact, is it not true that, taking into consideration
16 your entire audit, the Division of Motor Vehicles did not make an
17 exact determination of Black and White's operating gain or loss
18 for the last six months of 1976?

19 A What do you mean by exact determination?

20 Q That you did not make an exact determination of
21 what amount of money they gained or lost according to your
22 determination.

23 A Well, they had a figure there for profit and
24 then they had a figure there for executive compensation, and when
25 I put those two together I assumed that they made a lot more than

1 the accounting records indicated.

2 Q Because of the executive compensation?

3 A Yes, sir. That was one of the chief points
4 that was brought out in us doing these audits.

5 Q Okay. Let's talk about that for a moment.
6 You made a determination that you thought there was excessive
7 executive compensation paid to Leonard Oden; isn't that correct?

8 A Yes, sir.

9 Q Okay. And you just said that was one of the
10 chief points in your audit?

11 A Yes.

12 Q First of all, you used some tables, did you
13 not, to make that determination?

14 A Well, no, I didn't use tables. I think common
15 sense told me they were excessively paid.

16 Q Common sense told you that?

17 A Common sense, yes. I used tables later when
18 they rebutted this, but when a salary goes from \$24,000 to \$77,000
19 in a matter of three years, I think that's --

20 Q Wait a minute, now. Seventy-seven? That was
21 the salary in '77, not '76; isn't that right?

22 A No.

23 Q Isn't that correct?

24 A Yes.

25 Q All right. Let's stick with the salary you found

1 excessive for 1976.

2 A. All right. The salary I found excessive was
3 \$56,000 for Leonard and \$60,000 for the other gentleman.

4 THE COURT: Louis?

5 THE WITNESS: Louis, and my original auditing
6 with each of them \$5,000 less and then when we got
7 together on another occasion I found out suddenly they
8 had \$5,000 more than I had accounted for.

9
10 BY MR. LUSTIG:

11 Q. They presented this information to you?

12 A. We are talking about '76, and when I go back
13 to '74 I find that they earned, I don't remember the exact
14 figures, I think when you go back to '73, which was a year before
15 the loss, they earned twenty-four and it moved on up to fifty-six.
16 Then the other one was twenty-eight and they moved on up to sixty.
17 Now, according to any index you might use this is an awful lot of
18 increase in salary.

19 Q. So you felt based upon your quote common sense
20 end quote this was excessive?

21 A. And also because we were specifically told to
22 definitely investigate excessive compensations, particularly if
23 it's a closely held corporation where the stockholders own it.

24 Q. Who were you told that by? Who told you to
25 investigate that?

1 A. Mr. VanBurren, manager of our department.

2 Q. All right. Now, let's in your report -- let's
3 show you that after your counsel looks at it.

4 THE COURT: I don't know whether it would be
5 of any help or not, but I am looking at a chart that
6 is in the file apparently filed by Mr. Fahy, Defendant's
7 Request for Admissions. I am not sure who filed this.
8 It looks like it's the tax chart.

9 MR. LUSTIG: We have a chart right in here,
10 Your Honor, in this one that gets to the question.

11
12 BY MR. LUSTIG:

13 Q. You recognize this as your report, or the
14 results of your report?

15 A. Yes, this is my report.

16 MR. LUSTIG: All right. I ask this be placed
17 into evidence, Your Honor. This is Mr. Flaskas' report.

18 MR. FAHY: No objection, Your Honor.

19 THE COURT: You want to mark this entire bundle
20 together? You say there's no objection?

21 MR. FAHY: No objection.

22 THE COURT: All right. It will be filed P-5
23 received.

(Whereupon, Mr. Flaskas' report was received in evidence and marked as Petitioner's Exhibit Number P-5.)

BY MR. LUSTIG:

Q Actually Mr. Leonard Oden's salary for 1976 was \$50,050, was it not?

A Yes, I believe it was.

Q Isn't that correct?

A Yes.

Q Okay. And in your report where you talk about what you felt by common sense was too great a salary, you quoted from the Research Institute of America, isn't that correct, certain figures concerning CPI?

A Can I look at it?

Q Sure. Take a look at that page and the next page.

CPI being Consumer Price Index, Your Honor.

A Yes. This document has since been slightly revised, I think.

Q Okay. But that's the one you were using at that time?

A Yes.

Q In addition to your common sense you used that document concerning Consumer Price Index to show what you felt

1 would be normal increases?

2 A. My common sense and various indexes I studied
3 after that.

4 Q. Okay. The very chart that you used indicates,
5 does it not, and I will show you and I quote, "if the IRS has
6 accepted as reasonable a salary for, say, 1974, the 1977
7 equivalent would require a salary equal to 123 percent of the
8 '74 one."

9 A. Well, that's a document that the taxicab
10 accounting firm gave me. I was just trying to apply that to be
11 fair about the whole thing.

12 Q. You put this into your report?

13 A. Yes. I put it in there just to be fair
14 because they gave it to me. I put that as well as other things.

15 Q. Now, are you aware that Internal Revenue Service
16 in fact audited the 1976 salary of Leonard Oden, the very salary
17 we are concerned with here?

18 A. I didn't know it.

19 Q. You didn't know it?

20 A. I knew it later, but not at that time.

21 Q. You did learn later they audited that?

22 A. I learned later they originally assessed them
23 for \$48,000.

24 Q. Right. And are you further aware that after
25 the assessment they went to the appellate level on Mr. Oden's 1976

1 salary and the Internal Revenue assessed them zero dollars?

2 A. I didn't know that.

3 Q. You didn't know that. Would that make a
4 difference to you now concerning whether or not Leonard Oden's
5 salary was excessive for 1976 if it --

6 A. It all --

7 Q. Let me finish my question, if I may, please.
8 -- if the Internal Revenue has, in fact, found that that salary
9 for Dr. Leonard Oden was not excessive executive compensation?

10 A. It all depends on what salary you are talking
11 about.

12 Q. The salary of \$50,050 for 1976, the year of
13 which you audited and you said by common sense you found to be
14 unreasonably excessive for that year. I want to know, if you can
15 tell me, whether or not the fact the Internal Revenue has now found
16 that it was not excessive and made no assessment whether it would
17 make a difference to your opinion about the excessiveness of
18 your salary?

19 A. I would want to look at how they determined that.
20 I would like to know how.

21 Q. In other words, the fact Internal Revenue has
22 found that it's not excessive, all right, still wouldn't matter
23 to you; is that correct?

24 A. It would matter. I want to know how they
25 determined that a full time orthodontist deserves a salary of

1 77 and \$50,000 and also as a salary working in a taxicab company.

2 Q Do you know he's a full time orthodontist?

3 A I'm assuming he was. A man doesn't become
4 a dentist to run a taxicab company unless something goes wrong.

5 Q Do you have any reasons to deny the answers
6 to interrogatories filed by Dr. Leonard Oden as to the amount of
7 time and the capacities in which he has served for this company
8 as their chief executive officer?

9 A No.

10 Q Do you have any facts to contradict that?

11 A No.

12 Q Do I take it, then, Mr. Flaskas, that as far
13 as you are concerned on the question of excessive compensation
14 you put your audit and your, as you say, common sense ahead of
15 a determination by the Internal Revenue that there was no excessive
16 compensation for 1976 for Dr. Leonard Oden?

17 A I would say that I want to know how they
18 determined this.

19 Q Are you aware in Virginia laws a section of
20 the Code under Title 58, as a matter of fact, 58-135 which says
21 that the State of Virginia for the purposes of income tax will
22 tax on the same basis as far as items are concerned as the Federal
23 Government does?

24 A Yes.

25 Q You are aware of that --

1 A Yes.

2 Q -- normally, I think, called the Virginia
3 Equalization Tax Statute. You are aware of that?

4 A Yes, but this has to do with a subsidy. It
5 doesn't have to do with income and what you pay income tax.

6 Q Well, so far as --

7 A This was a subsidy matter.

8 Q So as far as concerns a salary, the so-called
9 excessive salary of Leonard Oden is concerned, you recognize, do
10 you not, that once Internal Revenue has determined that it was
11 not excessive, which they have done I will tell you and there will
12 be evidence to that, that once Internal Revenue has done that,
13 that by law in Virginia that's accepted by the Commonwealth of
14 Virginia?

15 A Yes, but some of the salary that he got is part
16 of the refunds that we gave him. His salary would have been lower
17 if he hadn't gotten these refunds.

18 Q How do you know that; how do you know what
19 dollars he took out and what dollars he put in? How do you know
20 whether it came out of the income or whether it came out of the
21 refunds?

22 A Well, because if he hadn't gotten the refund,
23 it wouldn't have been there for him to get, and if you are receiving
24 \$30,000 in refunds, then he's got \$30,000 more at the bottom line.

25 Q He received \$30,000 worth of refunds in 1977.

1 What are you talking about? We are talking about salary in 1976.

2 A. He received probably at least that much in
3 '76.

4 Q. Well, the Division of Motor Vehicles hasn't
5 come back and asked for a refund on the 1976 money, have they?

6 A. I recommended that they did.

7 Q. Did they?

8 A. We decided not to, yes, gave them the benefit
9 of doubt.

10 THE COURT: You decided not to what?

11 THE WITNESS: Well, they had some ambiguous
12 things in earlier years. They paid themselves a
13 \$40,000 bonus in 1974, in the last period of 1974,
14 so when I confronted the CPA, Mr. McPhillips, about
15 this he said, "Well, that was for the whole year so
16 we have to back out \$20,000 of that." So when he backed
17 out the \$20,000, it left only \$20,000 in the six-month
18 period. So when I reported all these things in my
19 report, the Department decided to go ahead and let the
20 \$69,000 that they received for 1974, '75 and '76 stand
21 and to assess them for the period after that.

22 THE COURT: All right.

23 BY MR. LUSTIG:

24 Q. I show you this. This appears to be a copy of
25 a note to Mr. Fahy bearing a signature. It appears to be your

1 signature. Did you write that note taken from the files of
2 Division of Motor Vehicles?

3 A. Well, if I remember correctly, this is for
4 another cab company. It's not for this one at all.

5 Q I didn't ask you that. I just want to know
6 is that your handwriting and is that your document?

7 A. Yes, it is.

8 MR. LUSTIG: I would like to have that marked
9 if Your Honor please.

10 THE COURT: Any objection?

11 MR. FAHY: I think I do object, Your Honor. It
12 apparently applies to another company.

13 THE COURT: Which side of this?

14 MR. LUSTIG: That's the front of it right
15 there, talking about the way they handle these --

16 THE COURT: This is Norview Cars?

17 MR. LUSTIG: Yes, sir. It's a question of
18 about how they handle these tax refunds and the
19 principles that they are operating under.

20 THE COURT: All right. I am going to receive
21 it, P-6.

22 MR. FAHY: If I may, Your Honor, for the record
23 and an additional basis for the record and that would
24 be that it is a privileged document between attorney
25 and client.

1 MR. LUSTIG: Your Honor, we didn't take it.

2 It was given to us, and I assume the privilege was
3 waived when it was given to us.

4 THE COURT: How did you get it?

5 MR. LUSTIG: We requested to receive all certain
6 documents from the Division of Motor Vehicles, and we
7 were supplied with these documents.

8 THE WITNESS: That's not exactly true.

9 MR. FAHY: Your Honor, if that is, in fact, the
10 case, I would have to submit if the document was
11 released by the agency, that the privilege would have
12 been waived. The agency, as I understand it, has the
13 benefit of privilege and if they seek to waive it, that's
14 up to you.

15 THE COURT: Well, it's received. Go ahead.

16
17 (Whereupon, the aforementioned document
18 was received in evidence and marked
19 as Petitioner's Exhibit Number P-6.)
20

21 BY MR. LUSTIG:

22 Q Now, this was a note from you to Mr. Fahy
23 actually concerning Norview Cabs, right?

24 A Um-hum.

25 Q But the same type of refund situation that

1 you-all were investigating and auditing; is that not true?

2 A Yes, sir.

3 Q And did you not in this refer to a certain
4 bonus and then say, and I quote and will show it to you, "The
5 \$3,500 deferred bonus is a legal IRS loophole." Did you so refer
6 to that?

7 A Yes.

8 Q And that "the \$3,500 is expensed against the
9 company in '76, but paid to the recipient in 1977. A beautiful
10 way to reduce net profit. Should not be acceptable by DMV
11 relative gas tax refund". Is that what you said?

12 A Yes, sir.

13 Q So, I take it, then, that during your audit
14 you were of the opinion that a perfectly valid application of
15 a Federal IRS regulation is not to be accepted by the Division of
16 Motor Vehicles?

17 A In the subsidy, yes, and in giving back
18 subsidies, not in figuring income tax. We accept it in giving
19 income tax, but not to give back tax money.

20 Q Did you-all ever issue any regulations to
21 these cab people that legitimate Internal Revenue deductions under
22 certain circumstances will not be acceptable to the Division of
23 Motor Vehicles when you file your reports?

24 A Well, I felt that if they get a benefit from
25 the Internal Revenue, they shouldn't get a benefit also from the

1 tax subsidy.

2 Q My question isn't how you felt. My question
3 was did the Division of Motor Vehicles ever tell these cab
4 companies and their auditors that there may be circumstances under
5 which you report legal acceptable Internal Revenue deductions,
6 but there may be circumstances, that the Division of Motor Vehicles
7 notwithstanding their legality will not accept them?

8 A In telling them they should show a need I
9 think we have told them that indirectly.

10 Q Indirectly. All right. Now, with reference
11 to this situation, going back to it, why didn't the Division of
12 Motor Vehicles look into the compensation of Leonard Oden, look
13 into the other aspects that you looked into later on in 1978?
14 Why didn't you look into them in the first six months of 1977?

15 A I don't quite follow your question. I looked
16 at 1977.

17 Q No. Six months operating deficit statement
18 was filed within the first three months of 1977.

19 A Yes.

20 Q All right. Why didn't the Division of Motor
21 Vehicles do an audit on it upon its receipt or a reasonable time
22 thereafter, two, three, four, five months thereafter?

23 A Well, because by the time we get these refunds
24 it's usually a year, year-and-a-half later, so I explained that
25 a little earlier. If I am doing 1976 in the early part of 1978,

1 it seems to me that's a reasonable time because as far as the
2 Internal Revenue when you submit your financial statements for
3 1976 you have got until -- I mean, you have until April the 15th
4 to get them in or May the 1st, I don't remember, for corporations,
5 so --

6 Q Four months, right?

7 A What's that?

8 Q Four months to get your income tax statements
9 in, right?

10 A Yes. That's the 1977 April, so then he gets
11 it to us.

12 Q But you-all waited over a year before you
13 reviewed this operating statement?

14 A If he got it to us, say, in June --

15 Q I am not saying he got it to you in June. I
16 am saying suppose he got it to you in March of 1977.

17 A I don't know the date that he got it to us.

18 Q I am just saying assume that for a moment,
19 Mr. Flaskas. Why did it take you better than a year to get an
20 audit completed on it?

21 A Well, I think at the time we were discussing
22 how to do these audits, and how to go about them and what to look
23 for and so on. We were getting guidelines, and all of them were
24 backed up quite a bit and we went out and started doing them after
25 that.

1 Q All right. Well, when did you get your
2 guidelines on the question of using your approach and overpayment
3 of officer's salaries?

4 A I think it was early in 1977.

5 Q Early in 1977?

6 A Yes. I think we had a special meeting on it.

7 Q Let me show you a piece of interdepartmental
8 correspondence from Mr. Conner to a Mr. Beverly and Guthrie. Who
9 are they, Beverly and Guthrie?

10 A Mr. Beverly used to be the supervisor of the
11 Field Audit, and Mr. Guthrie is the manager of investigators.

12 Q Okay. So would Beverly be above you?

13 A Yes.

14 Q Okay. Were you ever apprised of this
15 memorandum or the contents of that memorandum by Mr. Conner, or
16 Mr. Beverly or anybody within your auditing department?

17 A I think it was one after this. I remember this
18 one, but it was one after this that I think I was referring to.

19 Q You do remember that one, though?

20 A Yes.

21 MR. LUSTIG: All right. I would like to have
22 that marked, if Your Honor please.

23 THE COURT: Any objection?

24 MR. FAHY: No objections, Your Honor.

25 THE COURT: Received.

(Whereupon, the aforementioned document was received in evidence and marked as Petitioner's Exhibit Number P-7.)

BY MR. LUSTIG:

Q. All right. This document, P-7, dated May 14th, 1976, is that correct --

A. Yes.

Q. -- and there the auditors were reminded upon examination of financial statements, Federal and/or State income tax, secure a breakdown of salaries as follows, and then they have the breakdown. Then the note said, "Overstatement of salaries, especially to officers of a corporation or owners could result in the company showing a deficit and thereby qualifying for the taxicab refund. If such occurs, assessment is to be made for any claims incorrectly paid, May 1976;" isn't that right?

A. Yes.

Q. So that at the time of the six-month operating deficit in 1977, be it March, April, whenever, the Division of Motor Vehicles was already supposed to be looking at those items; isn't that correct?

A. Yes.

Q. All right. Now, one last question, then, in this area. Do you know of any writing that was communicated to

1 the taxicab companies in 1976 that told the taxicab companies
2 that an overstatement of income by principals may be considered
3 grounds for disqualification of your statement?

4 A. No.

5 Q. Is that correct?

6 A. Yes.

7 Q. Now, Mr. Flaskas, did you attend a meeting on
8 August 31st, 1978 with the Odens and the auditors, Mr. McPhillips?

9 A. Was that in Norfolk?

10 Q. The one in Norfolk.

11 A. I attended quite a few meetings with them.

12 Q. Do you recall attending a meeting with them
13 in or about August in which you told them that of the 41 cab
14 companies that you had audited, theirs, being Black and White and
15 Norview, appeared to be the most efficient?

16 A. No, I didn't make that statement.

17 Q. You did not make that statement?

18 A. No. I made a statement similar to that. I
19 didn't audit 41 companies. It was only 41 companies putting in
20 refunds out of 1500.

21 Q. Okay. You said you made a statement like it.
22 What was the statement you made to them?

23 A. I told them out of the companies that I had
24 audited theirs was the most efficiently run.

25 Q. Most efficiently run?

1 A. From my viewpoint. That was my opinion.

2 Q. All right. I appreciate your candor in that
3 regard, and I ask you of all the others that you had audited
4 did any of those get charged with assessments?

5 A. I had an assessment against three or four
6 companies, yes.

7 Q. That was kept or withdrawn?

8 A. One of them was kept.

9 Q. One of them was kept?

10 A. Yes.

11 Q. How many were withdrawn after the assessments
12 were made?

13 A. To my knowledge three.

14 Q. Yellow and Manhattan in Richmond?

15 A. Yes.

16 Q. All right. Let me ask you, because I really
17 don't quite understand. Why was Yellow Cab and Manhattan, excuse
18 me, in Richmond assessed and then that assessment withdrawn and
19 the assessment --

20 MR. FAHY: Your Honor --

21 MR. LUSTIG: Let me finish my question, please.

22 -- and an assessment made against Black and White and
23 the assessment not withdrawn?

24 MR. FAHY: Your Honor, I would object. The
25 question clearly has to do with other cab companies.

1 This particular assessment stands on its own feet. It
2 is either a valid assessment or an invalid assessment,
3 and what transpired with some other company in some
4 other jurisdiction is just not relevant to this case.

5 THE COURT: Well, it might have no bearing.
6 On the other hand, it may give us some insight to
7 policy and I am going to let him enter it for what it's
8 worth.

9 MR. LUSTIG: I would also point out he's the
10 auditor who made the assessment, and, therefore, we are
11 also looking at his assessment here and the credibility
12 of his assessment, Your Honor.

13 THE COURT: It may be pertinent and may not,
14 but I will let him answer it.
15

16 BY MR. LUSTIG:

17 Q Why?

18 A Do you want both of those assessments in
19 Richmond or which one?

20 Q Give one at a time.

21 A The Manhattan Company was selling gasoline to
22 the drivers with the tax included and then putting in a refund.
23 The Yellow Cab was doing the same thing. They had an item there
24 where they were charging the gas to the taxicab drivers. They
25 were leasing the cabs to them.

1 Q And they were assessed?

2 A They were assessed.

3 Q All right. Based upon pulling out that from
4 their operating statement in part?

5 A No. The way we looked at that was that even
6 though they received the tax twice, once from us and once when
7 they sold the gas to the drivers, they really were not getting
8 money from the State of Virginia in excess of what they were
9 entitled to. They were actually getting it from the State of
10 Virginia and they were entitled to it, but they were getting it
11 from their drivers, too, which they were really doing their drivers
12 wrong, not the State of Virginia.

13 THE COURT: That really doesn't have much
14 bearing on this case, does it?

15 THE WITNESS: I wouldn't think so. I mean,
16 the assessment was for an entirely different reason.

17 THE COURT: All right. It didn't have anything
18 to do with earnings of a company or compensation of
19 officers?

20 THE WITNESS: No. They had very small
21 compensations.

22 THE COURT: All right.

23

24 BY MR. LUSTIG:

25 Q Those were two companies, however, you felt in

1 your own mind and in your candor were run less efficiently than
2 Black and White?

3 A In spite of the fact that I thought they needed
4 the money and were having problems I still had to assess them
5 because I saw them as getting the tax twice back from --

6 Q And at that same meeting, or at a meeting did
7 you indicate or not that after certain concessions for the sake
8 of argument have been made about allocation, that it appeared that
9 Black and White was entitled to the refund? Did you take that
10 position at a meeting?

11 A What years are you talking about?

12 Q A meeting in August of 1978 with the accountants
13 and with the Odens with Mr. Perks present, I believe, and that
14 after you got an explanation of certain allocations of monies,
15 accounting-wise, from Mr. McPhillips that you looked back at it
16 and said, "Well, yes, I think maybe you-all did have an operating
17 deficit."

18 A I don't believe I ever said that.

19 Q Now, and this is my last question, Your Honor,
20 and last document. Do you recognize this document concerning
21 Norview Cars, Inc. in a similar audit, similar to the one against
22 Black and White here, or is that in your handwriting?

23 A Yes, this is my handwriting.

24 Q That is your handwriting?

25 A Um-hum.

AFTERNOON SESSION

(Whereupon, court reconvened at 2:30 p.m.)

MR. LUSTIG: Mr. McCarthy, please.

THOMAS V. MCCARTHEY, called as a witness on
behalf of the petitioner, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LUSTIG:

Q Mr. McCarthy, would you state your full name
and address, please.

A Thomas V. McCarthy. My home address is Old
Windy Bush Road, New Hope, Pennsylvania 18938. My business
address Hay Associates, 229 South 18th Street, Brittenhouse Square,
Philadelphia, Pennsylvania 19103.

Q And what position do you hold with Hay Associates?

A I am a senior principal with Hay Associates.

Q How long have you been associated with Hay
Associates?

A I have been with Hay for four years.

Q And prior to that --

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THE COURT: What kind of business is it?

THE WITNESS: Management consulting firm.

THE COURT: Is it an accounting firm?

THE WITNESS: No, sir.

BY MR. LUSTIG:

Q What is your principal work that you consult on?

A I am a general compensation consultant and I specialize in excessive employee compensation, excessive compensation, management and incentive sales programs.

MR. LUSTIG: Judge, to save time we have a resume fact sheet on Hay Associates.

THE COURT: All right.

BY MR. LUSTIG:

Q This resume, is this the resume of your firm?

A I believe it's the most recent one, yes, sir.

THE COURT: You want to put that in evidence, submit it as a copy or --

MR. LUSTIG: We just think it's referable to his expert qualifications, if Your Honor please, as to what the firm does.

THE COURT: If it goes to his qualification as an expert, it probably ought to be in evidence unless

1 Mr. Fahy has an objection.

2 MR. FAHY: I have no great objection. I don't
3 think it says anything about Mr. McCarthy, though.
4 It's directed to the firm.

5 THE WITNESS: I could perhaps identify some of
6 my clients whose names you might be familiar with.

7 THE COURT: Well, I will do this. I will mark
8 it as P-9 and receive it for what it's worth and you
9 can go ahead with your qualifications.

10
11 (Whereupon, the fact sheet on Hay
12 Associates was received in evidence
13 and marked as Petitioner's Exhibit
14 Number P-9.)

15
16 BY MR. LUSTIG:

17 Q Now, in excessive compensation you say you are
18 an expert or you work in that field?

19 A Yes, sir.

20 Q Just what kind of work is it that you do
21 vis-a-vis executive compensation?

22 A Well, executive compensation would be to
23 develop and implement a total remuneration program for not only the
24 executive level in a corporation but all levels of an organization,
25 including cash and non-cash components of such.

1 Q All right. Do you make a survey to determine
2 what are appropriate levels of salaries?

3 A Yes, sir. The Hay discipline is found in two
4 general areas, first of which is the ability or the technology
5 with which to measure job contents for various level jobs along
6 a series of variables or job content dimensions to arrive at a
7 relative weight of jobs in any organization. The second discipline
8 is in the ability to translate that job content into an appropriate
9 pay practice for the jobs based on surveys which we do with
10 clients, all of whom are using the same method of measuring jobs.
11 So we are taking apples to apples comparison on what the market
12 price is paying for jobs with different job content.

13 Q And among the clients that are listed for
14 Hay Associates, for which ones have you worked on management
15 consultant with executive compensation?

16 A Okay. Currently I am working with Honeywell
17 Corporation, ARCO Chemical, A.H. Robbins, Levino Shipping, and
18 over the last several years I have worked with, to mention names
19 that you may be familiar, ITT, Sears Roebuck, Duke Power and then
20 a host of much smaller organizations.

21 Among the Hay clients in this vicinity are
22 Old Dominion University, Virginia National Bank, United Virginia
23 Bank Shares, Norfolk & Western Railroad and just in addition I
24 recently learned that several motor vehicle departments, and I
25 can't be specific because I just learned it the other day, are

1 clients of Ray.

2 Q Not the Virginia DMV, I take it?

3 A I don't know.

4 Q Now, incident to your work were you contacted
5 by Leonard Oden to do some management consulting on executive
6 compensation --

7 A I was, yes.

8 Q --- for Black and White?

9 A In his role with Black and White Cars, yes.

10 Q For his position?

11 A For his position, yes.

12 Q Was that incident to any specific matter or
13 a general retention?

14 A Well, the evolution of it, the call came in
15 to a partner of the firm who is my boss, and I believe Leonard
16 Oden saw a reference to our firm and the work it does in an
17 industry magazine, contacted us. At that point I was not aware
18 of the purpose of it other than a general compensation audit.

19 Q And did you then meet with Leonard Oden and
20 thereafter undertake a general compensation audit with reference
21 to his salary at Black and White?

22 A Yes, sir. I spent two days in Norfolk discussing
23 Black and White Cars, discussing Leonard Oden's role in that
24 organization and observing the company and some of its activities.
25 Then following that I did an analysis in Philadelphia.

1 Q All right. How much total time would you say
2 that you spent on this analysis of his compensation for Black
3 and White?

4 A On the front end about 32, perhaps 32 to 40
5 hours.

6 Q All right. This would be both in the field
7 and at the desk?

8 A Correct.

9 Q Now, what is it that you were analyzing?

10 A Most of Hay clients in the compensation area
11 seek our assistance for two reasons. First of all, to establish
12 equity of a pay program within the organization; and, secondly,
13 to determine what the competitive level of the pay should be
14 relative to the external marketplace, and in this situation
15 recognizing that we were doing one individual it was to determine
16 the proper competitive level of pay for Leonard Oden.

17 Q All right. Now, what did you then measure in
18 order to reach some ultimate conclusion?

19 A First of all, there was the understanding of
20 the job and documenting the job, and that was what took the
21 initial two days. Then the Hay technology, and it's often referred
22 to in the business community as the Hay System measures job
23 content using a factor comparison method. Saying that if I look
24 at an accountant's job versus a salesman's job and try to make the
25 comparison of which is a heavier and more valuable job, it's

1 difficult to make that determination unless I can break those
2 jobs down into basic components which are kind of to both.

3 The Hay guide charts is the measuring tool
4 which measures eight variables of job content. They are broken
5 down into three general elements of a job which are common,
6 although to different degrees in all executive positions in the
7 business communities. The first one is know-how, second one is
8 problem-solving and the third one accountability. Each of those
9 has sub-components which we measure. Shall I go through those?

10 Q No. But let me ask you, if I may, what is the
11 basis for this Hay system?

12 A The factor comparison evolution. It started
13 way back when organizations had a requirement to say which jobs
14 were more important than another. It started certainly with
15 ranking jobs, and they encountered the problem of cross-functional
16 comparisons which I just represented.

17 The government in, I believe, 1941 for the
18 purpose of classifying positions within the government arrived at
19 a factor comparison method which incorporated multitudinous
20 factors, such as level of education, experience, how much
21 decision-making, how much judgment and broke all of those down
22 into very fine components. The person who started Hay Associates
23 tried to refine that system. I don't have the name of the system
24 with me right now, but I can furnish that. The person that
25 started our firm refined the system along with other business

1 organizations to a point where in 1951 they eventually arrived
2 at the eight factors which we use today in measuring job content.

3 Q Those factors in measuring job content have
4 been used by you or your firm with these multitude of clients
5 since 1951?

6 A Yes. I have probably evaluated personally
7 several thousand jobs using the measuring tool.

8 Q Several thousand?

9 A Yes.

10 Q Does that include jobs both in industry and
11 in government?

12 A Yes, sir. I have worked in the industrial
13 sector, the insurance sector, the municipal sector. I evaluated,
14 let's see, about 400 jobs with the State of Florida as an example
15 of government involvement.

16 THE COURT: Have you ever worked with the
17 judiciary, judges?

18 THE WITNESS: No, sir, not with the judiciary.
19 That was part of the State of Florida job. I did not
20 personally work on that aspect of it. I worked with
21 law firms.

22 MR. LUSTIG: They wouldn't dare rank judges
23 except very high for salary purposes, Judge.
24
25

1 BY MR. LUSTIG:

2 Q Let me ask you, then. Going and having gone
3 through, then, the Hay system did you then reach a job content
4 factor on Leonard Oden's job?

5 A Yes. The Hay guide charts, again, which is
6 the measuring tool, quantifies each element of job content, and
7 the sum of those individual elements is a quantification of the
8 total job content. From there we can apply that figure to annual
9 surveys we do with our clients and determine what the low to
10 high pay practice is for jobs with similar content. It is not a
11 title comparison.

12 Q All right. You are actually comparing, are
13 you, apples to apples, then?

14 A Yes, sir.

15 Q And, I take it, that as far as the eight
16 elements of job content, you are looking at terms of amount of
17 time spent as only a part of one element?

18 A Amount of time spent may be one. We don't look
19 at it specifically in those terms, especially at the managerial
20 level in an organization. The results are more important than
21 the time put in. The management process, recognition and
22 understanding an application of the management process is what
23 gives content to management jobs, not how many hours they spend
24 in tactical activity.

25 Q All right. Well, upon reaching, then, a job

1 content or point evaluation under your system, on Leonard Oden's
2 position did you then compare it for the purposes of determining
3 a range of salary?

4 A I would like to mention what event took place
5 prior to making that comparison.

6 Q Yes, please do.

7 A Following my evaluation of the job it was
8 reviewed by my boss, who is a partner of the firm, and a general
9 partner of Hay Associates, who was one of the original architects
10 of the guide charts, so I tried to avoid any risks in misinterpreti
11 the measurement.

12 Q All right. And after you got back the results
13 of his review, you then did your comparison?

14 A Yes, sir.

15 Q And I think you have indicated why, but again,
16 previously what is the validity of that comparison in terms of
17 management consultant?

18 A Every year Hay Associates surveys its clientele
19 in various sectors of the business community. For example, here
20 I have a book which is published annually which reflects the pay
21 practices for, in 1979, 517 industrial organizations. We do
22 separate surveys for the financial sector, and for the service
23 sector and for the government sector. Our clients submit
24 information about their salary administration programs and about
25 their pay practices from several different angles, and we publish

1 charts which allow us to look at what amount of dollars are being
2 paid relative to increase in job content. So from the validity
3 of the comparison is that these are 517 companies, industrial
4 organizations, using the same method of job evaluation, all using
5 the same method of job evaluation.

6 Q And did you then reach a conclusion as to the
7 appropriate recommended salary range level for Leonard Oden in
8 his capacity with Black and White for the years 1975 and 1976?

9 A Yes, sir, I did.

10 Q All right. And what was the amount of salary
11 that you found to be the range or the appropriate level of
12 salary for 1975?

13 A If we assume that the average performing
14 taxi company should be at about average in our survey charts and
15 the fact that the performance, the revenue performance of Black
16 and White Cars justified a salary slightly above average in 1975
17 of \$44,200 and in 1976 \$50,050 was a reasonable justifiable and
18 warranted level of total cash compensation.

19 Q For Leonard Oden?

20 A For Leonard Oden.

21 Q And so that if he had received, in fact, that
22 very same amount of \$50,000, he would have been right on line?

23 A Yes, sir. Well --

24 Q With your recommended level of salary based
25 upon your study?

1 A. Those years again? For 1975 was \$44,200,
2 1976 \$50,050.

3 Following the measurement of the job I was
4 advised what the salary was, and based on the performance level
5 of the organization it was determined that those levels were,
6 again, reasonable and justified.

7 Q. All right. And now I ask you with reference
8 to the '75 and '76 study and investigation that you did, did you
9 participate in a claim, participate to the extent of providing
10 information, the same information on a claim made by the Internal
11 Revenue Service concerning salary level of Leonard Oden for 1976
12 as well as 1974 and '75; too?

13 A. Yes, sir. My report was used as, I am not
14 certain of the term, evidence in that presentation by Leonard Oden
15 to the IRS.

16 Q. And did you, in fact, appear at the appellate
17 level conference in order, if necessary, to testify upon your
18 report?

19 A. Yes, sir.

20 Q. And were you, in fact, called to testify upon
21 your report?

22 A. I was not called to testify on my report. The
23 report, however, was submitted to the reviewing officer.

24 MR. LUSTIG: I have no further questions, Your
25 Honor.

1 THE COURT: Did you mention Louis Oden? I
2 only caught the name Leonard.

3 MR. LUSTIG: Leonard Oden.

4 THE COURT: Is Louis Oden a factor in this,
5 or is he going to testify to an amount to that?

6 MR. LUSTIG: We have some testimony concerning
7 his level as used by the Internal Revenue with the
8 next witness, but the big argument with the Division of
9 Motor Vehicles was, as I think Mr. Flaskas indicated,
10 Leonard Oden's position.

11 THE COURT: I didn't realize that. Well, if
12 this gentleman doesn't have an opinion as to Louis,
13 but I didn't know if he said it and I just didn't hear
14 it.

15 MR. LUSTIG: No, because I know he didn't do
16 the study on Louis.

17 THE COURT: Sometimes I look for the obvious
18 and I think maybe it just got by me.

19 All right, sir.

20
21 CROSS-EXAMINATION

22
23 BY MR. FAHY:

24 Q Mr. McCarthy, when did you say you performed
25 your study?

1 A. I can't give you a specific number of hours.
2 All I can say is based on the voluminous amount of work that I
3 saw produced, it would appear to me to be fairly substantial.

4 Q. All right. The work that you saw produced,
5 would you describe in some detail?

6 A. Okay. A financial analysis of insurance premium
7 against loss experience, and how do you optimize your deductible,
8 how much should we absorb ourselves and how much should we insure
9 so we are optimizing the risk with the expenditures.

10 Q. All right. Was this the type of work that was
11 of a repetitive nature for Leonard Oden, or was this more of a
12 one shot or annual type activity?

13 A. It was an issue present at the time, as was the
14 financial analysis of should we invest \$180,000 into an improved
15 radio communication system. Those were, you know, issues at
16 different times.

17 Q. Well, is it a fact that basically you took what
18 he told you at face value?

19 A. Well, I believe the nice simple answer to
20 your question is yes. We do some probing on how difficult, how
21 challenging are some of these issues that confront a manager, but
22 we don't question whether or not they exist. The regulatory
23 environment of the taxi industry is considered in our evaluation
24 of his job. The finiteness of the user population of his services
25 is a factor. You know, we do some probing like that, but we don't

1 taxi industry and relative to his company's performance against
2 those obstacles or considering those obstacles that an above
3 average salary was justified.

4 Q If you can, would you explain the actual nuts
5 and bolts going into the \$44,200? That is to say, I take it you
6 broke his job down into elements or components, and the question
7 is how did you come to place a dollar amount, or value or any
8 one of those components; how did you do that?

9 A We do not attach dollar values to each component.
10 What we do is have a number that measures each of the know-how,
11 problem-solving, accountability, and we add up those numbers. It
12 gives us a number of points, 500 points, 1,000 points, 10,000
13 points. Then we calibrate that, and that's when I mentioned
14 earlier with Mr. Lustig about the partner, and the general partner
15 and I getting together and determining how properly did I interpret
16 Hay guide charts relative to their intended interpretation and
17 we arrived from there to a correlation factor. I call it calibration
18 because correlation implies the arithmetic, small r, and we arrive
19 at a certain number of common Hay points for Leonard Oden's job.

20 I then go to a chart for 1975 of total
21 compensation and see that the range of pay or range of total cash
22 compensation for jobs of that size in 1975 was, and this was in
23 May of 1975 and we are looking at actual compensation for Leonard
24 Oden as of December 31st for '75, so there's a lag, which my
25 numbers right now won't include, but we have a low of \$25,500 to a

1 high of about \$85,000.

2 Q All right. Now, does that reference material
3 you just referred to, how many taxicab operations went into the
4 making of that reference guide?

5 A I don't believe that we have a taxicab client,
6 so there are probably zero. There are many transportation services
7 or transportation companies in there, but there are a full range
8 of clients included in those lists of industries, excuse me.

9 Q But no taxicab companies?

10 A I don't believe so.

11
12 BY THE COURT:

13 Q Let me ask you this. When you talk about a
14 range from twenty-five to \$85,000, do you mean cab company
15 executives nationally or are you talking about for this particular
16 job for this particular company in this city?

17 A This particular job size in American industry,
18 regardless of where it would arise.

19 Q Well, aren't there regional differences?
20 We know that everybody in Philadelphia makes more money than we do
21 in Norfolk or Virginia. Is that figure taking that into consideration?

22 A No, sir. This is on a country-wide basis. So
23 if evidence shows that the middle Atlantic or the lower middle
24 Atlantic lower states in 1979 was as much as seven percent below
25 the northeast section of the country --

1 question, and you have before you of what he called
2 unreasonable compensation for 1976.

3 THE COURT: But '77 is the year for which the
4 refund was made.

5 MR. LUSTIG: Oh, yes, based on the qualification.

6 THE COURT: You want to go into 1977 salaries?

7 MR. FAHY: That's correct.

8 THE COURT: On the more general question of
9 need to continue operation, I suppose.

10 MR. FAHY: That's correct, Your Honor. It's
11 essential to our contention --

12 THE COURT: It may be a different yardstick,
13 but it's --

14 MR. FAHY: Essential to our contention is that
15 in 1977 as in 1976 Mr. Leonard Oden was overcompensated.

16 THE COURT: All right. Overruled. You can go
17 on into it.

18
19 BY MR. FAHY:

20 Q All right. What figures did you arrive at
21 for 1977?

22 A Assuming that the same pay philosophy was
23 maintained and performance was at a competent level my recommendation
24 was a range between \$48,000 and \$55,125.

25 Q All right. How about 1978?

1 MR. LUSTIG: Same objection, if Your Honor
2 please, to 1978.

3 THE COURT: Overruled.

4 THE WITNESS: The range of competent performance
5 assuming the maintenance of the same pay posture would
6 be \$51,500 to \$58,500.

7
8 BY MR. FAHY:

9 Q All right. In going back to 1977 do you know
10 what Leonard Oden received from Black and White in the nature of
11 salary and bonus for the year 1977?

12 A I learned yesterday.

13 Q And what did you learn?

14 A I believe it was \$77,000.

15 Q All right. Does that exceed what you determined
16 to be the range for his job?

17 A I can't answer that unless I understand what
18 the performance of the company was.

19 Q You would agree, wouldn't you, it certainly
20 raises a question?

21 A It certainly is not even approaching the high
22 salary relative to jobs of that size in overall industry, so if
23 performance of the company merited that level of compensation,
24 then in no way would I say it was excessive. I can't answer that
25 question. It's far below a high total cash compensation level.

1 BY MR. FAHY:

2 Q You performed your study in 1978?

3 A That's correct, early 1978 before 1977 results
4 were in.

5 Q All right. Now, the activities that Mr. Oden
6 indicated to you were the type that he engaged in, were there any
7 activities that he was currently performing at that time?

8 A Would you repeat the question?

9 Q I think you have testified that Leonard Oden
10 indicated to you some of the types of things that he did for
11 Black and White and he made these statements to you in 1978.
12 Did you understand him to say that's what he was doing at that
13 time?

14 A Yes, sir.

15 Q Okay. You understood, then, that was the type
16 of activity he did in 1978 for Black and White?

17 A Are you asking was it only at that point in
18 time he was doing them? I am not certain of the question.

19 Q No. What I want to address is the description
20 of activity that he gave you. Did he say this is what I did in
21 1976, or did he represent this is what I do for Black and White?

22 A Whether the question was asked or not it was
23 implied that this is a continuing requirement of his role in the
24 organization and that whatever point in time you look at these
25 would be representative of activities he's accountable for.

MR. FAHY: All right. That's all I have.

REDIRECT EXAMINATION

BY MR. LUSTIG:

Q Mr. McCarthy, you did this study and completed it in early '78?

A Yes, sir. The date of the report in front of me is January of '78, so I may have come down just before the holidays in '77, I am not positive.

Q 'Seventy-seven. All right. So you undertook this study and completed this study approximately seven months before the Division of Motor Vehicles ever made a determination that they were going to contest Leonard Oden's salary as of July, 1978 when they made their assessment or June when they finished their audit; isn't that correct?

A I am not aware of the date they --

Q Assuming that that date is true. You were actually hired and completed your work before any of this question arose, if it arose, in July of 1978?

A That's correct.

Q Isn't that true?

A That's correct.

Q So you weren't hired with reference to the question of the reasonableness of the salary of Leonard Oden so

1 far as concerned Division of Motor Vehicles; isn't that true?

2 A. That's correct, yes.

3 MR. LUSTIG: That's all I have, Your Honor.

4 THE COURT: Let's go back to that again. You
5 came here when? When did you make this study? I
6 wasn't thinking it was important.

7 MR. LUSTIG: December of '77.

8

9 BY THE COURT:

10 Q. At the end of '77 you came to Norfolk?

11 A. The report is dated January of '78, which is
12 the date the report was written so --

13 Q. What day?

14 A. January of 1978.

15 Q. January of '78. You think you came to Norfolk
16 in December of '77; is that what you are saying?

17 A. It was either that or very early in the month
18 of January.

19 THE COURT: All right. Anything else?

20 MR. LUSTIG: That's all I have, Your Honor.

21 MR. FAHY: No further questions.

22 MR. LUSTIG: May this witness be excused, Your
23 Honor?

24 THE COURT: Any objection?

25 MR. FAHY: No, sir.

1 THE COURT: Thank you. You may be excused.

2
3 (Witness excused.)

4
5 (Whereupon, a recess was taken at 3:31 p.m.,
6 after which court reconvened at 3:45 p.m.)

7
8 MR. LUSTIG: Mr. Dolph, if Your Honor please.

9
10 CYRUS DOLPH, IV, called as a witness on behalf
11 of the Petitioner, having been first duly sworn, was
12 examined and testified as follows:

13
14 DIRECT EXAMINATION

15 BY MR. LUSTIG:

16 Q Mr. Dolph, would you please state your full
17 name and business and home address, please.

18 A Yes, sir. Cyrus Dolph, IV. I reside in
19 Gloucester Courthouse, Gloucester, Virginia, am employed by Coopers
20 and Lybrand at 227 27th Street, Newport News, Virginia 23607.

21 Q And what is the business of Coopers and Lybrand?

22 A A national accounting firm.

23 Q And what is your educational background?

24 A I received a B.A. degree from the Virginia
25 Military Institute in 1970. I received a degree of Juris Doctorate

1 from the T.C. Williams School of Law in 1973. I received a
2 degree in Master of Law and Taxation from the Marshall Whitt
3 School of Law in 1977.

4 Q. And for how long have you been associated with
5 Coopers and Lybrand?

6 A. About two years.

7 Q. In that capacity what essentially is your
8 position with them?

9 A. I am a supervising tax specialist. My primary
10 duties -- well, I deal strictly in federal taxation and estate
11 taxation, primarily in the corporate area. I have a direct
12 responsibility for the pension and profit sharing practice. I
13 am involved in executive compensation within our local office,
14 and review of tax returns and so forth.

15 Q. All right. Now, did you have occasion in your
16 capacity, as you have indicated, with Coopers and Lybrand to become
17 involved with Black and White Cars, Inc. as a client concerning
18 income tax problems as assessed by Internal Revenue for the years,
19 say, '74, '75 and '76?

20 A. Yes, sir, I did.

21 Q. And were one of those issues that was raised
22 as to Black and White for those years of '74, '75 and '76 the
23 question of compensation to Leonard Oden?

24 A. That's correct.

25 Q. All right. And what issue, if any, did Internal

1 Revenue Service raise concerning Dr. Oden's compensation from
2 Black and White?

3 A The Internal Revenue Service took the position
4 that Dr. or Leonard Oden's compensation was unreasonable.

5 Q For each of those years?

6 A For '74, '75 and '76.

7 Q And did they make an assessment?

8 A Yes, they did. The actual compensation
9 claimed by Dr. Oden on the tax return in 1974 was \$27,325, and
10 Internal Revenue Service proposed to allow a salary of \$12,165
11 in that year. In 1975 Dr. Oden's salary was \$44,200. It was
12 proposed to allow \$18,599. In 1976 compensation was \$50,050 and
13 it was proposed to allow \$20,623.

14 Q Did Black and White take issue by this proposal
15 by Internal Revenue, to say the least?

16 A Yes, sir.

17 Q And did the matter then go to the appellate
18 division or appellate level?

19 A That's correct.

20 Q And --

21 A That's correct. We filed a protest, formal
22 protest with the Appeals Division of the Internal Revenue Service
23 in the Regional Commissioner's office, counsel's office.

24 THE COURT: Where was that?

25 THE WITNESS: In the Richmond district, Your

1 Honor. The appeal was held, the hearing in Norfolk,
2 I believe, on January 30th of this year.
3

4 BY MR. LUSTIG:

5 Q Of this year?

6 A That's correct.

7 Q And as part of the material which Black and
8 White provided in this appeal, was part of that the Hay report
9 as prepared by Mr. McCarthy, whose testimony you have just heard?

10 A That's correct, a very important part of our
11 protest.

12 Q Was his report?

13 A That's correct. I would consider that report
14 to be the keystone of our protest.

15 THE COURT: What was the assessment, what was
16 the amount of it?

17 THE WITNESS: Well, the amount of the proposed
18 adjustment to the salary, Your Honor, in 1974 was
19 a disallowance of \$15,160; in '75 a disallowance of
20 \$25,601; 1976 a disallowance of \$29,427.

21
22 BY MR. LUSTIG:

23 Q Salary of Leonard Oden?

24 A Salary.

25 THE COURT: About \$70,000?

1 THE WITNESS: Yes, sir.

2 THE COURT: Somebody said earlier an assessment
3 of Internal Revenue of \$48,000. Is that what it was?

4 MR. LUSTIG: I don't think we ever used a
5 figure of the Internal Revenue. We said they made an
6 assessment --

7 THE COURT: I thought Mr. Flaskas said \$48,000.
8 Anyway --

9 MR. LUSTIG: That may have been what he thought.

10 THE COURT: So anyway, what it amounts to is
11 a disallowance of about \$70,000?

12 THE WITNESS: Yes, over those three years.

13 THE COURT: Which was then charged to the
14 company as a taxable income?

15 THE WITNESS: Yes, sir. The Internal Revenue
16 Service's concern is in a closely held company that
17 the stockholders will overstate salary to get income
18 out of the corporation because the corporation gets
19 a tax deduction for the compensation and the compensation
20 is taxed at a maximum rate of fifty percent. If some of
21 the salary is, in fact, unreasonable, the government
22 will recharacterize the difference as a dividend, which
23 is nondeductible to the corporation, thereby increasing
24 the corporation's income tax and, of course, that
25 dividend tax is in the taxpayer's highest bracket, which

1 could be seventy percent.

2
3 BY MR. LUSTIG:

4 Q After the appellate hearing and conference
5 was a final determination of this issue made with Internal
6 Revenue?

7 A Yes, sir.

8 Q All right. Now, Dr. Oden made a claim or the
9 corporation made a claim for Leonard Oden for how much income
10 for 1974?

11 A For compensation in 1974, \$27,325.

12 Q And how much did Internal Revenue finally
13 agree to as proper compensation?

14 A The entire amount.

15 Q All right. What amount for 1975, or let me
16 ask you this. For 1975 to 1976 did they allow the entire amount
17 you have just testified to?

18 A Yes, sir. There was no adjustment made.

19 Q No adjustment made whatsoever?

20 A On the compensation.

21 Q On the compensation, all right. No taxes had
22 to be paid on it?

23 A On the compensation, no.

24 Q And are you aware further as to whether or not
25 the State of Virginia pursuant to the Virginia Equalization Tax

1 Law has accepted the actions of the Internal Revenue Service so
2 far as concerns Virginia income tax?

3 A. Yes. I have just seen the copy of the Virginia
4 assessment.

5 Q. And Virginia did not assess for any excess
6 compensation --

7 A. No.

8 Q. -- they allegedly paid by the corporation to
9 Leonard Oden; is that correct?

10 A. That's correct.

11 Q. In addition to the Hay study did Internal
12 Revenue look to any level of payment of anyone else in Black and
13 White as a springboard in looking at Dr. Oden's salary?

14 A. Yes. The government took the position that
15 Louis Oden's salary was entirely correct in all three years and
16 that that salary level was, in fact, the benchmark upon which
17 Leonard Oden's salary was to be measured.

18 MR. LUSTIG: You may inquire.

19
20 CROSS-EXAMINATION

21 BY MR. FAHY:

22 Q. Do I understand correctly, then, that your
23 matter with the IRS had nothing to do with the year 1977?

24 A. That's correct.

25 Q. Okay. Was it considered, knowing this IRS

1 matter, was any attention ever given to the fact in previous years,
2 for example, 1970, 1971, the salary of Leonard Oden from Black
3 and White was reduced?

4 A. Yes. The government took a fairly typical
5 approach in compensation cases of going down, in effect, a shopping
6 list of matters that are considered in a compensation case or
7 have been considered, one of which is consideration for past
8 services. The government noted that in earlier years, and I don't
9 recall the precise years, that there was nominal compensation
10 made, but the government took the position that even though that
11 compensation was nominal, that that was adequate to compensate
12 Leonard Oden in those years and the government's position was
13 that it saw no evidence of under-compensation in the prior years.

14 Q. All right. Was there any consideration given
15 to the thought that the salary for Leonard Oden of \$50,050 in
16 1976 was in part justifiable in view of the lower salaries for
17 the years 1970, 1971?

18 A. As rebuttal of the government's argument that
19 there was little evidence of prior under-compensation various
20 cost of living factors were applied, and I believe the one that
21 was finally used was six percent, which was applied to the -- I
22 believe the government used the 1965 base year as a starting
23 point and we applied six percent increases to those years and
24 brought it up, and based on just a normal cost of living increase
25 Dr. Oden was under-compensated, so although no specific amount of

1 that \$50,000 was identified for past services, the argument was
2 made if he had gotten normal cost of living increases, his
3 compensation for the same period would have been much higher.

4 Q. Was that Dr. Oden's contention or one of his
5 contentions with the IRS?

6 A. It was a very small, very minimal part of this
7 whole argument, frankly.

8 MR. FAHY: No further questions.
9

10 BY THE COURT:

11 Q. What was very minimal?

12 A. This business about cost of living increases
13 from 1965, Your Honor, that there was a specific element of
14 prior years that had not been compensated for that was being made
15 up..

16 Q. Well, you are talking about two things there.
17 You are talking about cost of living after '75 and you are talking
18 about under-compensation in prior years. Now, which is it?

19 A. Well, Your Honor, the government, as part of
20 its arguments, looked at the issue of whether or not past services
21 had been adequately compensated for. We applied a cost of living
22 factor to the base year they looked at, and our argument was if
23 he had gotten the cost of living increase, he would have been paid
24 a great deal more over that same period. So we were arguing that,
25 in effect, there was some under-compensation for the prior years,

1 although there was no specific amount identifiable.

2 Q Now, did I understand your testimony a few
3 moments ago to be the Internal Revenue does exercise extra
4 compensation for under-compensation in previous years, that they
5 do recognize that principle?

6 A Yes, sir.

7 Q But they didn't apply it in this case because
8 they felt the past compensation had been sufficient?

9 A That's correct.

10 Q It was within a broad range of what was
11 acceptable?

12 A That's correct.

13 Q Referring to the range between the highs and
14 the lows the range is very broad?

15 A Yes, sir. Each of these cases, of course, they
16 are all factual matters with the government so that the government
17 itself has no guideline or standard.

18 Q Well, I am getting the impression, and I am
19 just wondering if it's true, before they are going to say, and
20 they meaning Internal Revenue, is going to say there's
21 under-compensation it's got to be awful low.

22 A Oh, yes.

23 Q And before they are going to say it's
24 over-compensation it's got to be awful high?

25 A Yes, sir.

1 Q. The range of what was acceptable is very broad?

2 A. I think that's correct, Your Honor. The cases
3 I have looked at the ranges really were all over the place.

4 Q. Well, as we said here, it came along in three
5 years. There was an over-compensation of \$70,000, the salary
6 they were going to disallow. Before you got through with them
7 they threw in the towel and made no adjustment at all.

8 A. That's correct, Your Honor.

9 Q. And the main reason for this, do I understand,
10 was the cost of living increases?

11 A. Your Honor, I think the main reason was
12 recognition. Well, the Hay report, I think, was one of the
13 primary --

14 Q. That's right. You said that was a big factor.
15 What was the other thing?

16 A. This cost of living thing was really just a
17 matter of argument. I don't think it was given much weight at
18 all. I think the recognition that -- our position was if Leonard
19 Oden had accomplished his duties in only one hour, he would be
20 entitled to the same amount of compensation. The government was
21 trying to quantify, say he had to put in an x number of hours.

22 Q. They were after him because of the fact he
23 was a dentist and he had another business, and that took a great
24 deal of his time and he wasn't spending the hours. That's the
25 gist of their claim, and with your expertise you were able to

1 convince them that wasn't important?

2 A. That's correct, Your Honor.

3 Q. It's a question of how he performed his duties
4 and whether the business was successful?

5 A. Quality versus quantity is exactly what it is,
6 yes, sir.

7 THE COURT: All right.

8 MR. FAHY: No further questions.

9 THE COURT: Anything else?

10 MR. LUSTIG: No, sir.

11 THE COURT: All right. If I am misstating it,
12 these experts are throwing things at me so fast, I am
13 just trying to sum up their testimony in simple words
14 I can understand.

15 MR. LUSTIG: I know Your Honor knows this area
16 of law.

17 THE COURT: I don't know, but I try to put it
18 in understandable terms. If I am asking an unfair
19 question or if a witness doesn't understand me, you-all
20 just stop me or say so.

21
22 (Witness excused.)

23
24 MR. LUSTIG: I would like to now call Dr. Johnston,
25 please, and while Dr. Johnston is approaching the Bench

1 I have shown to counsel his curriculum vita. Actually,
2 Mr. Johnston he prefers to be called.

3 THE COURT: Have you shown it to counsel?

4 MR. FAHY: Yes, sir.

5 THE COURT: Any objection?

6 MR. FAHY: No objection.

7 THE COURT: I will mark this as an exhibit.

8 This will be 10.

9
10 (Whereupon, the curriculum vita was
11 received in evidence and marked as
12 Petitioner's Exhibit Number P-10.)
13

14 LEE ROBERT JOHNSTON, called as a witness on
15 behalf of the Petitioner, having been first duly sworn,
16 was examined and testified as follows:

17
18 DIRECT EXAMINATION

19 BY MR. LUSTIG:

20 Q Mr. Johnston, would you state your full name
21 and address, please.

22 A Yes. My name is Lee Robert Johnston. My home
23 address is 8 Georgetown Green, Charlottesville, Virginia 29021.
24 My office address is Colgate Darden School of Business Administration
25 University of Virginia, P. O. Box 65, Charlottesville, Virginia 22904

1 Q Now, you hold a Doctorate degree, do you not?

2 A Yes, sir.

3 Q That is a Doctorate degree in what?

4 A It's a Doctors degree in business from Harvard
5 University and a Masters degree from Harvard University.

6 Q But as I understand from our conversation, you
7 prefer that I address you as Mr. Johnston?

8 A Yes. In this country that is a custom.

9 Q All right. And how long have you been at the
10 Darden Graduate School of Business?

11 A Twenty-five years this coming February 9th.

12 Q All right, fine. Now, Mr. Johnston, you were
13 employed in this case, were you not, by Black and White Cars to
14 consider two factors. One, the question of the use by the Division
15 of Motor Vehicles of a certain formula to arrive at a return rate
16 on investment.

17 A Yes.

18 Q And then secondly, the question about the
19 Division of Motor Vehicles assuming that formula was all right,
20 nine percent rate of return as a quote reasonable rate of return
21 end quote for this kind of company?

22 A Yes.

23 Q All right. Let us first turn to the issue of
24 the method by which the Division of Motor Vehicles tries to
25 determine, as it does in this case, what they call a reasonable

1 rate of return. If I understand correctly, they employ a certain
2 formula and that formula is profits after tax plus interest
3 divided by average net assets; is that correct?

4 A. That is my understanding, sir.

5 Q. Right. Now, when you first looked at this
6 question about this formula, what was your first step in determining
7 how you were going to look at the validity of this formula by
8 DMV?

9 A. Well, the formula both from an academic point
10 of view and a practitioner point of view is a variation of a basic
11 approach to economic valuation. That is, the value of a firm is
12 equal to the earning power divided by or capitalized by some rate
13 of return, so it's a very commonly used formulation. It's one of
14 two basic approaches that are employed.

15 Q. Well, did you first consider the type of
16 value concepts you were looking at?

17 A. Yes. My assumption here is that that very
18 broad sense is a background to my thinking that always on issues
19 of this kind we have different value systems. We are talking
20 about religious values or culture values. Here we are talking
21 about economic values, and it's important to start at this
22 starting point, so to speak, simply to remind ourselves that
23 economic value has a distinguishing characteristic compared to our
24 other value systems in that it is a relative concept.

25 Let us say what is the value of something from

1 an economic point of view. You are saying what is the value
2 compared to what. There is an alternative choice, and this
3 becomes directly relevant then to your second question that you
4 raised with me, your rate of return that was used by the Division
5 of Motor Vehicles.

6 Q Right.

7 A So it's important that we start, as I say,
8 with economic value. Secondly, within the framework of economic
9 value again we have different purposes as to why we would be
10 concerned with the economic value of an enterprise. We have the
11 so-called liquidation value for bankrupt situations. We have a
12 value for tax purposes, estate taxes, real property tax, personal
13 property taxes, et cetera, and then we have the idea of going
14 concern value, which I assume that is economic value we are talking
15 about here.

16 Q In this case we are concerned with going concern
17 value.

18 A What is the value of B&W Motors as a going
19 concern.

20 Q Okay.

21 A They do not contemplate liquidating it,
22 et cetera.

23 Q All right. Now, when you have got a formula
24 such as the DMV has to produce a measure of going concern, is it
25 necessary that you must be clear as to what you are defining and

1 measuring by way of going concern?

2 A Yes. It's necessary to specify going concern
3 value to whom or at what level. Basically we would be talking
4 about the going concern value to the owners. The formula used
5 by DMV, the variation they are using of this basic approach which
6 we call the accounting method approach to valuation because it
7 uses inputs from the income statement and the balance sheet prepared
8 according to generally accepted accounting principles, et cetera,
9 so we simply in this case name it the accounting method of
10 valuation. The variation DMV is using is an attempt to define and
11 measure a rate of return on total assets, total net assets,
12 irrespective of how those assets are financed. Therefore, it
13 does not represent the rate of return to the stockholders.

14 Q All right. Now, in your opinion is the
15 application of this accounting method of valuation adequate to
16 this going concern business?

17 A Well, let me start it by saying first the basic
18 method itself, the accounting method for determining value is
19 very widely used in practice. It's a variation of this method that
20 is used on Wall Street. When you talk about earnings per share
21 and price earnings ratios and multipliers, this is the accounting
22 method of valuation. Variations are used quite widely to my
23 knowledge in the utility industry for rate regulation purposes
24 in various forms. However, it is generally regarded by more
25 sophisticated practitioners in the financial world to be these days

1 it's relatively naive, obsolete as a basic method of valuation.

2 We have much more sophisticated approaches
3 than this, and where it is used because of its limitations it must
4 be used with extreme care; that is to say, the rules and the
5 regulations or the prescriptions as to how you are going to define
6 profits after tax plus interest. This is a measure of earnings.
7 The accounting procedures to follow to define that must be
8 prescribed in advance.

9 Also in the denominator of the equation if you
10 are looking for the rate of return, you are talking about the
11 average, the total assets of the beginning of accounting period
12 and the end of the accounting period. All right. The definition
13 and the rules for defining and measuring those assets must be
14 spelled out so that the method can be used in a sense. As I have
15 often said in the past, you can play any ball game you like if you
16 know the rules of the game. This method can be used if you know
17 the rules, and in the utility industry under the Federal Power
18 Commission, the SCC Regulations, they have tremendous and very
19 complex accounting rules and procedures so that both sides, the
20 jurisdiction of the controlling rates as well as company management
21 have a very thorough understanding before the fact as to what the
22 accounting procedures and rules will be for defining these rates
23 of return by the accounting method. They very rarely argue
24 methodology. They may argue the appropriateness of the magnitude
25 of the rate, but not how did you get the rate. This they know

1 very well. They have bookshelves of regulations.

2 Q And if in this instance the only thing that
3 the Division of Motor Vehicles told Black and White or any other
4 cab company is that follow the statute and file a --

5 A Return.

6 Q -- operating report, which if it shows a deficit
7 will give you prima facie evidence, and if that's all they are
8 advising them to file, are they giving them the score card or the
9 equipment to play the game?

10 A Well, no, they wouldn't be giving them the
11 score card or the equipment to play the game to define the rate of
12 return.

13 Q Right.

14 A I interpret the Code as having these two parts.
15 One, if you have an operating deficit, as you have been discussing
16 earlier, that prima facie evidence; but, however, if you did not
17 have an operating deficit, then you would be entitled to a refund
18 if your business were not financially healthy to continue in the
19 public interest. Here is where I think the DMV is applying the
20 formula and the rate of return, as I understand it, or in effect
21 saying if you earned less than nine percent in a defined period,
22 as they define and measure it, you qualify for a refund. If you
23 earn over nine percent, you do not.

24 My position is that here unless you very carefully
25 spell out the accounting procedure and the rules, you cannot

adequately define and measure the rate of return by this method. It becomes a capricious method in the sense that it would not discriminate between a number of cab companies which were otherwise operating in a public interest. For example, if you gave me ten cab companies' financial information on ten cab companies and said tell me which of these ten cab companies for this period had an operating return of less than nine percent or over nine percent, unless suppose for illustration I came out and said, well, I have these four companies, less than nine, these six companies over nine. Now, if you took those same ten companies and gave them to another knowledgeable analyst and asked him to do the same thing, then the test is would he come up with the same division four and six. My point is no, he would not, only by chance. It's a chance method the way they were applying it to these types of situations.

If I may, if you like I will give you four examples taken from Black and White Cars.

Q Yes, sir.

A For example, Black and White Cars leases or rents their real property. Consequently the value of their real property is not shown on the balance sheet as an asset. Now, if you had two cab companies that were identical to each other, number of cabs owned, operating revenues, et cetera, except for the fact that one owns its real estate and one leases its real estate, that was the only difference, they would not come up with

1 the same rate of return, although in terms of their financial
2 health and welfare public interest, et cetera, they do have.
3 Now, therefore, it is the burden of the regulatory authority in
4 my opinion to have issued a regulation saying that if you lease
5 your real estate, you will make such and such an accounting
6 adjustment to make you comparable to companies which own their
7 real estate, otherwise the method is capricious. It will not
8 discriminate between like situations as it should.

9 Secondly, my offhand impression looking at the
10 data you sent me on B&W Cars --

11 Q You read the balance sheets for '76 through
12 '78?

13 A The last six months, et cetera, balance sheets,
14 and it was quite apparent to me that the accounting procedure in
15 Black and White Motor Cars is closely held, privately held, a
16 closely owned corporation; that their accounting procedures are
17 largely oriented for tax as what I would call a tax accounting
18 system, not a financial accounting system. It's not the type of
19 accounting you would do to apply the valuation method that DMV,
20 as I understand it, is using.

21 Q Anything wrong with that method of accounting?

22 A No. It's quite legal, too, as is my understanding
23 to minimize your taxes and, in fact, as I think about it, just as
24 Blachman in his opinion on the Thorr Power Tool versus IRS, which
25 was in the Wall Street Journal within the last couple of weeks,

1 stated financial accounting and tax accounting have substantially
2 different objectives and should not be confused with each other.
3 So in this instance, for example, Black and White Motor Cars
4 uses accelerated depreciation on their cabs.

5 On a throw through method they do not normalize
6 depreciation and consequently do not normalize their tax. Now,
7 again, two companies otherwise identical, each with fifty cabs
8 and so forth, one using normal depreciation and the other one
9 using a form of accelerated depreciation will not come out with
10 the same rate of return on investment and yet they should. So
11 again, it's up to the regulatory authority to make explicit, as
12 they do in the utility industry, you will account for your assets
13 these ways. You will amortize, set up deferred tax accounts and
14 so forth so when we come down to profits after tax we will all
15 agree what they are according to the rules. If they don't, you
16 have no comparability so you have a method that will not treat
17 comparable situations fairly from period to period. You have a
18 method which will not treat the same situation fairly from year
19 to year or from period to period.

20 Then you have a method in the absence of
21 accounting specifications upon which DMV auditors and the company
22 auditors will not agree as to what profits were and were not.
23 Then that should not be so.

24 Q Considering this formula which DMV has used and
25 is using, well, was using, is it true, in fact, that the financial

1 accounting system is more adapted to their formula than the tax
2 accounting system?

3 A. Yes.

4 Q. All right.

5 A. Very much so because in a sense the financial
6 accounting system for publicly owned companies is where you come
7 into contact with the rulings and the regulations of the SCC
8 governing corporate accounting and the Financial Accounting
9 Standards Board. These pertain to financial accounting rules and
10 procedures, and balance sheet measures return on investment and
11 so forth, the accounting methodologies are designed for that type
12 of accounting procedure. You would capitalize leases. You would
13 normalize depreciation, and so forth.

14 Q. Is it of any import with reference to a closely
15 held firm that it would appear to me a closely held firm has a
16 little more flexibility as to how the owners handle their
17 perspective net worth? Is that of any importance with reference
18 to the type of formula that Division of Motor Vehicles is using?

19 A. Well, it makes the application of a formula
20 an administrative nightmare because in a closely held firm or
21 management, and by this, management and the stockholders are
22 essentially one in the same, as they are in B&W Cars. We see it
23 all the time. It's perfectly legal and proper and, in fact, I
24 would say it is an earmark of efficient economical role management
25 that they minimize their total tax purpose, and in a closely held

1 firm the question of minimizing the tax burden and as a result
2 design of the tax accounting system and approaches must take into
3 consideration the personal tax situation of the owner, his other
4 sources of income, and his net worth, and so on and so on as
5 compared to the publicly owned situation. You do not divorce the
6 two in determining tax policy or accounting policy. They are
7 combined.

8 The corporation is only a separate entity from
9 a legal standpoint and so forth, but not here, not to minimize
10 tax. Therefore, the owner as part of his management decision-making
11 process must determine to maximize his after tax net worth as an
12 objective what is the best combination of, shall we say,
13 prerequisites, or what is the best combination of ways in which
14 he should compensate himself for his endeavors, risk taking and
15 so forth. Part of this may be salary, part may be dividends, part
16 may be prerequisites. He may lend the corporation money and
17 receive assets. He may lease it as lessor, so he is in many
18 rules, and if he's doing this judicially, economically and
19 properly, he will minimize his total tax position, tax obligation
20 and maximize his net worth.

21 It's an important thing for publicly owned
22 corporations. These things we are talking about are generalized
23 in the publicly owned sense. They will distinguish these things.
24 They can't distinguish these things that privately owned companies --

25 Q If they could be distinguished in a privately

1 owned company, would they not have to be distinguished by
2 somebody putting out regulations saying how they want to distinguish
3 them?

4 A Exactly. That's why one of the things the
5 regulations would have to come out, as here, the DMV would have
6 to specify what they mean to be reasonable management compensation,
7 irrespective of the tax law or anything else. They would have to
8 say for returnable tax return compensation will be, amount of
9 sales or whatever, but it must be spelled out.

10 Then you leave management to make his choice.
11 If he has to trade off between taxes and refund or state taxes,
12 that's his decision, but you have to spell out the rules. The IRS
13 spells out the rules. DMV has to spell out the rules, and with
14 this method it will only work if you spell out the rules.

15 Q Can it work otherwise, other than an arbitrary
16 and capricious manner?

17 A Only an arbitrary and capricious manner, and
18 otherwise it will get you into court.

19 Q Apparently --

20
21 BY THE COURT:

22 Q When you get into court which method is the
23 Judge supposed to follow, or is that just a hit and miss proposition
24 like it is for accountants?

25 A It is, sir, if this were accepted, and you say

1 this is an acceptable method for this type of problem without
2 spelling out the guidelines.

3 Q You are telling me all accountants can use
4 different methods and procedures. What's the Court supposed to
5 do if there's no regulations?

6 MR. LUSTIG: That's the ultimate question.

7
8 BY THE COURT:

9 Q You follow the accountant if you like his
10 looks, or do you take the average between the two?

11 A It has been done. Can I say kind of take an
12 average, but not in this sense, Your Honor. The thing I don't
13 understand that I haven't heard testimony by anyone to that
14 effect, and my client and his attorney certainly know since I was
15 retained by letter, by telephone call in three different occasions.
16 Yesterday in a briefing meeting I raised the question and I said
17 where did DMV get this formula and make this decision that nine
18 percent was the acceptable rate of return by this basis because
19 frankly when I first learned about the situation I was surprised
20 that at this late date, let's say in the middle 1970's when there
21 had been years and years of work in this area and when we know all
22 the problems of utility industries and so forth, with respect to
23 this valuation method why did they ever pick it up? It was
24 obsolete when they picked it up, so why did they. Now, they put
25 you in the box, and I can't answer that question because nobody has

1 answered my question and said where did you dig this out twenty
2 years after the fact.

3 Q In other words, is what you are telling me
4 there are different accounting methods, and you come up with
5 different answers by which method you use?

6 A That's right.

7 Q And there's no exact answer?

8 A No, but this is one of the worst answers. If
9 you had to choose your methods, this is the last one I would
10 choose.

11 Q I was always taught mathematics was an exact
12 science. That's the beauty of it.

13 A In mathematic science they have the k factor
14 which we call the proprietary consonant which gives you any answer
15 you want. Two plus two equals the k factor which means maybe
16 five-and-a-half.

17
18 BY MR. LUSTIG:

19 Q Mr. Johnston, turning from these opinions you
20 have given us and the reasons referable to this formula, let's
21 assume for a moment this is not the worst of formulas.

22 A If you tell me what the rules are as to how to
23 define the enumerator and denominator, I will play with you on the
24 formula.

25 Q All right. Let's assume the formula is in

1 existence but now we are going to talk about the rate of return --

2 A Yes.

3 Q -- as to what is a reasonable rate of return --

4 A All right.

5 Q -- pegged at nine percent as we know by the

6 Division of Motor Vehicles from whatever source of knowledge that

7 was gleaned from. Now, did you at our request look into the

8 question of what would be a fair and reasonable rate of return

9 on investment for a closely owned company such as Black and White

10 or, that is, for someone who wanted to invest in Black and White

11 to buy out Black and White? Did you look into that?

12 A Yes.

13 Q All right. Tell the Court how you started to

14 approach this question on whether this nine percent is a realistic

15 reasonable figure.

16 A Well, first of all we have to bear in mind now

17 what the rate is defining. This is a rate of return defined by

18 profits after tax plus interest, so it's an attempt to get an

19 overall rate of return on the capital structure, really, without

20 adjusting for equity or debt. It's not a rate of return to

21 stockholders. It's a rate of return on the permanent capital

22 before you take into account the financial leverage of the debt.

23 So what I tried to do first ordinarily in situations of this kind

24 was say is this a reasonable rate.

25 As I mentioned earlier, the importance of

~~recognizing we are dealing with economic value is that it has an~~
alternative. There's always a tradeoff, so from an analytical approach we would start saying all right, what was the alternative available during this period, 1976, '77, '78. If it were an investor and I had freedom to invest my money among alternative investments, would nine percent be a reasonable rate of return.

Now, this approach would be consistent with the regulatory intent because if a company cannot raise capital at the rates allowed by regulatory authorities, it will not remain a viable going concern. Therefore, again, can the regulated company attract capital as we defined it at that rate from the market, bearing in mind the market has its alternatives. So what I first tried to do, but I first went to our library at the Graduate Business School where we carry all of the 10-k reports, and annual reports and so forth of all companies listed on the New York Stock Exchange, American Stock Exchange, and most of them over the counter and the like, and I tried to find myself some cab companies. I said what are their rates of return, what are they worth. Well, I didn't find any. To my knowledge there are no publicly owned cab companies in the United States with stock outstanding so that I could do any analysis of what their rates of return might be.

Next I said to myself, well, if I were an investor living in the Norfolk area and I had a million dollars to invest, what might I go about and invest in. So I had a copy of

1 the 1978 Industrial Directory of Virginia. I looked under Norfolk,
2 Chesapeake, Portsmouth, Virginia Beach for some company names that
3 I recognized, and I found in there, for example, Bendix Corporation,
4 Borden, Incorporated, Ford Motor Company, Standard Brands,
5 Tenneco, each of these having some kind of operations in this
6 area, like the Newport News Shipyard is a subsidiary of Tenneco.
7 So I said all right, for the years 1976, '77 and '78 according to
8 the accounting information presented in standard pure stock
9 reports what was the rate of return on investment in these five
10 companies calculated in the manner that DMV defined their formula
11 to the extent I knew how they were doing it, profits after tax
12 plus interest divided by average assets, and I made those
13 calculations on those five companies for the three years. I
14 then averaged for each year, and then I averaged the three years.

15 The very, very coincidence I stumbled on and
16 simplified my tasks considerably, in fact I have fifteen rates of
17 return for the three-year period. The average of those fifteen
18 rates is nine percent, to one decimal point is nine percent. So
19 I said all right. It's identical to the rate of return which the
20 DMV is talking about, defined by the same method of calculation.
21 Then the question I would ask myself is would I as an investor
22 rather put a million dollars into B&W Cars at nine percent or into
23 a portfolio of these five companies. I would say two hundred
24 thousand each for a return of nine percent, and to me the answer
25 was obvious in terms of liquidity, safety, stability of income and

1 so forth that I would buy a portfolio of Bendix Corporation, Borden
2 Incorporated, Ford Motor Company, Standard Brands and Tenneco for
3 a weighted average of nine percent return as defined by DMV
4 before I would touch the Black and White Cab Company.

5 Q Did you then look at the more localized but
6 publicly held company, Allegheny?

7 A I did the same thing for Allegheny Beverage
8 Corporation, which is the local distributor for Pepsi Cola. I
9 also traded over the counter as publicly owned company. Allegheny
10 Beverage Corporation for these three years, 1976 by the method
11 defined by DMV had a rate of return of fifteen percent; 1977,
12 14.3 percent; 1978, 11.5 percent.

13 Again, Allegheny Beverage is no blue chip stock
14 by any means, maybe a high grade cat or dog, but still substantial.
15 more attractive than an investment in B&W Motors.

16 Q In your opinion?

17 A In my opinion, risk adjusted.

18 Q Risk adjusted?

19 A Sure. You have to equivocate the terms on a
20 risk basis. You are asking me would I rather have nine percent in
21 B&W Motors or eleven or fifteen percent in Allegheny Beverage. I
22 would ask myself are people more likely to drink Pepsi Cola or
23 ride in taxicabs.

24 Q In Norfolk, Virginia?

25 A In Norfolk, Virginia. I think they would rather

1 drink Pepsi Cola, and therefore, I would buy Allegheny Beverage.

2 Q Then your rate of return would be higher?

3 A Certainly and at lesser risk.

4 Q Taking into consideration, then, your study
5 and your knowledge and background in financial management and
6 planning, do you have an opinion as to what would be, assuming
7 the formula used by DMV is a quote reasonable rate of return,
8 maximum or floor?

9 A Well, as I said, for reasons that it is a
10 closely held corporation and has great flexibility in terms of
11 its accounting, measurements and quite legal flexibilities for
12 these different purposes it's very hard, as you recall as I wrote
13 you in my letter and mentioned on the telephone if you wanted me
14 to, I would try to say what would be a reasonable rate of return
15 for an investment in B&W Cars, and that would take a great deal
16 more data and analytical time than I had available. What I did
17 do, however, again looking at alternatives, in a broader frame
18 during this period, for example, the Dow Jones averaged a yearly
19 yield of 1976 by quarters 13.7 percent, 13.7, 12.8, 12.5; 1974
20 13.7, 13.13, 2.12, 8 and so on.

21 In other words, Dow Jones has between twelve
22 and fourteen percent for that period on a quarterly basis. I
23 would say to myself again would it be risk adjusted rate of return.
24 Would I rather own the Dow Jones utility average or B&W Motors or
25 B&W Cars, and I would have to say as a knowledgeable professional

investor I would rather own utility average, and so I tried to work my way up, in effect. I discovered, for example, that the Public Utility preferred stock yield, dividend yield during this period ranged from 9.2 percent to 9.8 percent. So again if I could earn from 9.2 to 9.8 percent on Public Utility preferred stock in the dividend alone during this period, I would not take as an alternative investment in B&W Cars at nine.

Now, at this same period then I related, I said all right, I made one or two investments for my own account over the counter companies at that time. I said all right. How would those relate in risks to my assessment of the risk of B&W Cars based on the information I had. I said, well, the situations I invested in were less risky from a marketability standpoint and so forth. I said how well have I done in the two-and-a-half, approximately two-and-a-half years that I have owned those stocks as compared to nine percent allowable rate of return, as goes for B&W Cars. Well, I very roughly without going into any complex analysis on it, on these stocks, my yield, dividend yields approximately seven percent a year, seven, seven-and-a-half percent capital gains, appreciation has been twenty-five percent a year, so here on a situation publicly owned off the counter companies I am running about thirty, probably thirty-two percent a year return on equity.

Now, that is not completely comparable with B&W because in the capital structure B&W at this time were carrying

1 about forty percent debt and sixty percent equity on the reported
2 assets. I am leaving out the lease because I know nothing about
3 that except it exists. On the reported assets capital structure
4 of forty percent debt, sixty percent equity, so to be in a
5 comparable position rate-wise to the nine percent on the total
6 capital structure that DMV is talking about I said if I put
7 sixty percent of my money into these stocks I purchased in '76
8 and forty percent of my money in treasury bills at roughly six
9 percent, the rates then were running five-and-a-half to
10 five-and-three-quarters to six, what would have been my rate of
11 return comparable to the nine percent as defined by DMV. That's
12 about twenty-two percent.

13 Q. Twenty-two percent?

14 A. Twenty-two, and so I would say, as I said to
15 you yesterday afternoon, you asked me this question what did I
16 think would be a comparable rate of return on assets for investing
17 B&W to buy the whole company and to assume that's the lease, the
18 stock, everything, and I said something no less than twenty, and
19 I would think closer to thirty. There must be something between
20 twenty and thirty percent against the alternatives available in
21 the marketplace at that time.

22 Q. Now, in your opinion, then, finally, Mr.
23 Johnston, would your approaches be any different than any normal
24 prudent investor in the market? Would they be looking at the
25 same factors you were looking at and looking at the same questions

1 of rate of return on investment?

2 A. Yes, except in level of sophistication that
3 I mentioned earlier.

4 Q. Right.

5 A. They will start with the accounting method or
6 variation of it as advocated by DMV and then would advance into
7 more sophisticated and currently used valuation approaches
8 employing present value, discounted cash flows and so forth, but
9 a knowledgeable prudent investor would go through essentially the
10 same process that I am talking about, as I have worked with the
11 street and teaching in this area for twenty some years.

12 Q. Then finally, taking into consideration that
13 we know DMV is using a certain formula that we have discussed and
14 furthermore is saying that if you exceed nine percent as a rate
15 of return, you are then not entitled to these gas refund provisions
16 of the statute in your opinion, is this entire situation at all
17 realistic with reference to the actual goings on of the live
18 economy of a company such as Black and White Cars in terms of
19 saying that that is a reasonable rate of return that should be
20 expected by an investor?

21 A. I have a feeling you are asking me a very
22 complex question, and my answer seems too simple, but the answer
23 is no.

24 Q. Thank you.

25 A. I am not sure I understand the question, but

1 my answer is no.

2 THE COURT: I am not sure I do either, the
3 question was so long.

4 THE WITNESS: Would you run it by me again?
5

6 BY MR. LUSTIG:

7 Q Let me try to refine it because I could never
8 restate it. What I am saying, in the final analysis, Mr. Johnston,
9 in your opinion.

10 A Yes. Right.

11 Q Is it a proper reflection of the real world
12 for DMV to set nine percent as a limit above which it is said
13 that you are receiving too much rate of return and showing a
14 profitability in order to obtain revenues?

15 A Oh, well, no, if the intent is, you see, to
16 say that nine percent is kind of the hurdle rate or no-go rate.
17 In other words, if you are earning at least nine percent or more,
18 then you are in a healthy situation and able to raise money in
19 a capital market and so forth, whereas if you are earning less than
20 nine percent as they define it, you are not healthy because you
21 would not be able to earn money in the capital market and borrow
22 and sustain your operations financially.

23 In that sense in my professional and personal
24 opinion in the market conditions that have existed since 1976 or
25 since DMV adopted this approach, as I understand, there's no way

1 in the world any company whether it's a cab company or Dupont or
2 VEPCO, for example, can exist in today's capital markets on a
3 rate allowance of nine percent, saying this is a fair and
4 reasonable rate of return or you're healthy if you are at nine
5 percent, no way. Short term borrowing rates the prime rate today
6 is twelve-and-a-half percent.

7 THE COURT: Mr. Lustig, you keep talking about
8 this formula, this DMV formula, and this nine percent.

9 MR. LUSTIG: Yes.

10 THE COURT: Now, you have never shown me a
11 document. There's been no evidence today that's the
12 going rate. There was a document --

13 MR. LUSTIG: No, that is what is in Flaskas'
14 report, one of the items upon which they turn down.

15 THE COURT: Show it to me.

16 MR. LUSTIG: Yes, sir.

17 THE COURT: I know you-all talked about the
18 Pulaski case.

19 MR. LUSTIG: Pulaski is maybe where they got it
20 from. Right here, if Your Honor please, one of the
21 issues that they took was the question of allowable
22 profit and here you will see, it's in my writing by
23 the way in ink on there, but there you would see Mr.
24 Flaskas' handwriting. You will see in here they used
25 the formula, then used nine percent and said since they

1 stockholders and before we take into account the leverage that
2 the debt brought in, the capital structure in common.

3 Now, in Virginia, as I understand it, when they
4 are regulating the utilities such as VEPCO, they start with a
5 rate of return to the common stockholder. VEPCO is currently
6 allowed thirteen-and-a-half percent rate of return on equity.
7 Then they add back to that, adjust a proportion of the capital
8 structure that is in debt and the interest rate VEPCO is paying
9 on that debt and they get a weighted average which comes back
10 to the rate of return that you would get from the formula as
11 just given you, so that's how they are saying, and my guess is
12 that DMV simply borrowed that from the State Corporation Commission
13 as an approach for handling regulated industries because the cab
14 company is regulated.

15 Q Let's go into closed companies. This may not
16 make much sense, but isn't a closely held family company worth a
17 great deal to the people in that company, family, if they are able
18 to own it or operate it, maybe a restaurant or maybe a family
19 delicatessen? The company may actually regulate little or no
20 profit.

21 A That's correct.

22 Q But if it provides jobs for everybody in the
23 family and very good salaries, it might be worthwhile to keep that
24 business.

25 A Oh, yes.

1 Q The business would be a value to those owners,
2 although it may have very little value in the open market?

3 A One of the real problems of evaluating it in
4 the open market, of course, it's very difficult to be a minority
5 stockholder in a situation of that kind. You avoid that like
6 the plague. I feel this is the reason why people who are in demand
7 who know how to run the business dies, the real principle, and he
8 dies, whether he's a car dealer or a head chef at a restaurant,
9 when he dies, the other members of the family don't know how to
10 run it and they are very shocked sometimes when they can't sell
11 the business for anything, they can't give it away.

12 Q Yes.

13 A They have very difficult problems.

14 Q You can get that situation?

15 A When they ask me, see, what is a reasonable
16 rate of return in these types of situations, again, I say it's
17 like a bag of worms because maybe the reason the person runs his
18 own company is the satisfaction and the joy of being his own boss.

19 Q And pays himself a good salary?

20 A He may pay himself a good salary, he may not
21 pay himself much salary at all.

22 Q On the other hand, I know some businessmen who
23 pay themselves practically no salary and plow it all back into
24 the business, and your business grows in leaps and bounds.

25 A Right. That's the tradeoff I mentioned earlier.

1 Q The flexibility?

2 A The flexibility.

3 Q So when you really get down to it, it's almost
4 impossible to come up with any real such or perfect or standard
5 rate of return in a family-owned business where the officers who
6 are drawing the top salaries are also the owners?

7 A That's right, unless you define precisely
8 each step of that calculation what would be allowable for that
9 purpose.

10 Q Now, I think from what I have heard the
11 complaint here is that the two Oden brothers paid themselves
12 total salaries in 1977 according to this chart that is in the
13 file \$167,000, and the year before it was \$111,000.

14 A Right.

15 Q Now, we can have a lot of testimony about what
16 proper salaries are and we get the impression it's a very broad
17 range, \$25,000 to \$85,000?

18 A Yes, sir.

19 Q But wouldn't the company constitute a very
20 valuable asset when through skilled operation of it by people
21 who apparently know what they are doing, they can produce that
22 kind of salary? It would be valuable to them, but not too
23 valuable to other people?

24 A That's correct.

25 Q In other words, let's just say --

1 A. The Odens' intuitive skill and experience is
2 a large factor in the profitability of the company.

3 Q Exactly. I am just trying to simplify all
4 this. Suppose the Oden brothers were to die, both of them, and
5 their families, or widow or whoever it is tried to take over this
6 business and they may not know a thing in the world about it.
7 The business wouldn't really be very valuable to them?

8 A The probability would be from my experience
9 the business would go bankrupt.

10 Q Or would be sold at sixty cents on the dollar?

11 A Right.

12 Q So the real value of the business to these
13 people and the profitability is that we have two men that know
14 how to run it efficiently and are able to make what appears to be,
15 DMV disagrees, but appear to be able to make a very good income
16 in the form of salary, perhaps not in dividends, but in the form
17 of salary.

18 A Well --

19 Q Isn't that what we are talking about?

20 A Yes. My position would be it's not unreasonable
21 or necessarily reasonable. As you say, this is a situation, which
22 I think, Your Honor, is what you are saying. After all they are
23 constrained by the IRS in their tax accounting approaches. If they
24 left the money in the company, for example, say, all right, we
25 will take out a lower amount of salary and we will have a greater

1 retained earnings and we will build up the net worth of the
2 company. At some point in time IRS will come in and say, "Look,
3 you have unreasonable accumulation of surplus." That has a
4 hellish tax rate, seventy-seven or eighty percent, whatever. They
5 are saying you are not taking out enough.

6 Q It sounds like Internal Revenue is running the
7 business.

8 A They get it one way or the other.

9 Q They tell you how much you can pay in salaries
10 and tell you how much you can accumulate?

11 A That's right. So you have the ranges, and it's
12 a real juggling act to manage it.

13 Q Have you analyzed the financial health of this
14 business in 1977?

15 A No, sir.

16 Q You have been giving me a lot of theory, but
17 you are not really in a position to tell me whether this business
18 is about to liquidate or go out of business.

19 A Oh, no, I can't tell you that.

20 Q In other words, the test is here, and I know
21 Mr. Lustig has been building these things here a step at a time,
22 but the issue is what is necessary to the continued provision of
23 the services?

24 A Right.

25 Q In other words, the continued operation of the

1 company. You are in no position to tell me whether this company
2 is going to continue.

3 A. No. I can give my professional opinion that
4 if nine percent, as they define it, is implied to me that they
5 are doing well, if they make nine percent or more --

6 Q. According to these figures here in this thing
7 you show a value of only \$308,000, so nine percent on this chart
8 doesn't come out but to \$27,000. That's not very much.

9 A. I am not familiar with the figures you are
10 looking at.

11 Q. This is one of the exhibits that show a
12 valuation.

13 MR. LUSTIG: That's DMV's exhibit, Your Honor.

14 THE COURT: I understand.

15 THE WITNESS: All right.

16
17 BY THE COURT:

18 Q. Of \$308,000 at nine percent is \$27,000.

19 Well, actually, let's see, this is '76. The salaries paid were
20 over \$110,000.

21 A. Yes, sir. Well, what I was hoping to explain
22 earlier, this is one of the difficulties with their method and
23 definition of rate that they arrived at and the magnitude of the
24 rate. Notice in the denominator of your formula there, the
25 denominators are the book assets. Now, the book assets actually

1 at work in this company are far in excess of the assets reported
2 on the balance sheet, so if you define their income by the book
3 assets, you are going to get an inflated rate of return. You
4 have got a large numerator divided by a large denominator. Now,
5 what is the real denominator?

6 My point earlier, to make the method work you
7 must add back the real estate that's committed to this business.
8 That's not on that balance sheet. There's no real estate on
9 there. That's an asset in the business.

10 Q Well, I don't know that we have got that
11 problem here, but what I am saying is this. If you just look at
12 this one little chart, it shows a, what is it, a valuation, net
13 assets or what have you?

14 MR. LUSTIG: No, sir. That's DMV's figuring
15 on what the rate of return was for this company in
16 1976 when they found that the rate of return for this
17 company for 1976 was \$30,476. They found that nine
18 percent as the rate of return, which is the figure
19 they were using, was \$27,777. They, therefore, said
20 you have exceeded nine percent by some \$3,000 or
21 in percentage point you have exceeded the nine percent
22 that will allow you --

23 THE COURT: By one percent?

24 MR. LUSTIG: By less than one percent, and,
25 therefore, you are not qualified to get the refund. If

1 the figure had come out to \$27,777 or less by our
2 formula, you would have been entitled to the refund
3 because we are talking here only about entitlement to
4 a refund based upon their principle that you're
5 entitled to a nine percent return. They are saying
6 that's a reasonable rate of return.

7 THE COURT: That doesn't take into consideration
8 salaries?

9 MR. LUSTIG: Well, no. By their own principles
10 they do not take into consideration a salary. They
11 have a formula which they have established.

12 THE WITNESS: This is after salaries.

13 MR. LUSTIG: This is after salaries, a rate
14 of return.

15 THE COURT: I understand.

16 MR. LUSTIG: One which they have established in
17 principle and said you have got nine percent. What we
18 have done with Mr. Johnston is, number one, said that
19 that formula is obsolete, out of date and inaccurate
20 and not applicable to this situation, and that even if
21 it was, to use nine percent as a figure is totally
22 unrealistic in terms of rate of return. It has nothing
23 to do with salaries. It has only to do with rate of
24 return; is that not your understanding?

25 THE WITNESS: Yes, and because of the nature of

1 this situation by professional opinion, sir, this is
2 nonsense, garbage.

3 THE COURT: Well, all right. Anything else?

4 MR. LUSTIG: No, sir.

5 THE COURT: All right. You may step down, sir.
6 You are excused.

7
8 (Witness excused.)
9

10 THE COURT: All right. Now, I think it's time
11 to adjourn for the evening, gentlemen. Come on up.

12
13 (Whereupon, counsel approached the Bench and
14 conferred with the Court out of the hearing of the
15 court reporter.)
16

17 THE COURT: All right. We are going to try to
18 start a little earlier in the morning. Hopefully we
19 can try to finish this case tomorrow. We seem to be
20 right at that point where it could possibly go a third
21 day, but you really would like to finish it tomorrow.
22 For that reason we are going to start at nine-fifteen.
23 No need to recognize anybody, but the witnesses who
24 are going to testify, or at least the first one, Mr.
25 Lustig, should be here at nine-fifteen. I don't think

(Whereupon, court reconvened at 9:30 a.m.)

THE COURT: Good morning, gentlemen. We have before us the continuation of the case of Black and White Cars, Inc. versus Commissioner of the Division of Motor Vehicles. I have up here in case any of you gentlemen need them the deposition and all the other exhibits.

Are there any other witnesses to be sworn?

MR. LUSTIG: I don't believe so, Your Honor.

THE COURT: All right. Are you ready to proceed then, with your next witness?

MR. LUSTIG: Yes, sir.

THE COURT: All right, sir.

MR. LUSTIG: I would like to call Mr. Burrell adversely, please.

JOSEPH B. BURRELL, called as an adverse witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (Adverse)

BY MR. LUSTIG:

Q Mr. Burrell, would you state your full name and address, please.

1 A My name is Joseph B. Burrell, Route 2, Box
2 215, Powhatan, Virginia 23139.

3 Q All right. And what is your occupation?

4 A I am the manager of Support Services Department,
5 Division of Motor Vehicles.

6 Q What is the manager of Support Services
7 Department, what does that entail?

8 A Well, Support Services Department is a
9 department concerned with the support functions of the Division
10 such as decal production, mail room, word processing, teletype
11 operation, security, et cetera, and the management entails the
12 running, if you will, of those functions.

13 Q All right. What does that job have to do
14 with gas tax refunds for taxicab companies?

15 A The job I am presently in has nothing to do
16 with that.

17 Q Were you in a previous position that had
18 something to do with that?

19 A Yes, I was.

20 Q And was that back in '78?

21 A Yes.

22 Q What job was that?

23 A That was as an assistant manager of the Field
24 Tax Department.

25 Q Did that give you supervisory authority, say,

1 over auditors such as Mr. Flaskas?

2 A Yes, general supervisory authority over the
3 entire Field Tax Department.

4 Q All right. What is your background in terms
5 of accounting, financial management or anything like that?

6 A I graduated from the University of Richmond
7 in 1966 with a B.S. in accounting and I went to work for the
8 Division of Motor Vehicles in the Accounting Department in 1966
9 and worked in accounts receivable section until 1972, at which
10 time I was promoted to Assistant Department of Accounting and
11 worked in that capacity until 1977.

12 Q Now, you were involved, were you not, in certain
13 decisions by the DMV concerning how you, that is DMV, was going
14 to audit taxicab company reports concerning their eligibility for
15 gas tax refund?

16 A I was involved in certain aspects of that, yes.

17 Q All right. I show you a document dated
18 February 13, 1978, and ask you if you recognize that as a copy of
19 a memorandum you wrote to Mr. Conner?

20 A Yes, sir, I did.

21 MR. LUSTIG: I would like to ask that that be
22 marked, if Your Honor please.

23 THE COURT: All right. Marked P-11.

24

25

(Whereupon, the aforementioned document was marked as Petitioner's Exhibit Number P-11 for identification.)

BY MR. LUSTIG:

Q In this document it's entitled Administrative Decisions Relating to the Taxicab Audits and Refund Eligibility, and you indicated, did you not, that there was a need, of course, to effectively administer this Code Section and that you felt it was necessary that certain terms be defined; is that correct?

A. That's correct.

Q And as a matter of fact, you indicated here that you thought that there was a need to define certain terms that weren't defined in the Code or by precedent to quote your words; isn't that true?

A. Yes.

Q All right. Now, apparently you then said "It is proposed the following terms be addressed," and one you said was investment and return on investment; is that correct?

A. Yes, sir.

Q And then you indicated that a previous court case, Black and White Taxicab Company established the fact that a company is entitled to do a nine percent return on investment. You indicated that, did you not?

1 A. Yes. That's the statement I made in the letter.

2 Q All right. Isn't it a fact that the Black and
3 White Taxicab Company case that you are talking about here was
4 a case that had been pending in Pulaski County in the Circuit
5 Court?

6 A That is what I was told, yes, sir.

7 Q And isn't it further true and your understanding
8 that that nine percent return on investment was no ruling by the
9 Circuit Court of Pulaski County because, in fact, that case was
10 settled out of court; isn't that true?

11 A It's my understanding that that nine percent
12 figure was mentioned in proceedings, not in court.

13 Q Not in court?

14 A That's correct.

15 Q So that it was outside of the court case
16 because, in fact, you are aware or have been advised that that
17 case was settled out of court?

18 A That's correct.

19 Q Isn't that true?

20 A Yes.

21 Q All right. Now, you indicated also that --
22 you said the Court did not define investment and then you said the
23 following definition is proposed, and then you have this formula,
24 do you not, which says: "Net income after taxes plus interest
25 expense divided by investment would equal return;" is that correct?

1 A. That's correct.

2 Q All right. Where did you come up with that
3 formula?

4 A That formula is a standard formula that has
5 been used for many years in accounting practices which is an
6 indicator of certain things.

7 Q Isn't it a fact that this actually came from
8 the SCC, or your understanding of a formula used by the SCC with
9 reference to utilities?

10 A No, sir. I did not obtain that formula from
11 the SCC.

12 Q Were you aware at the time you used this
13 formula that that formula is principally used with utilities and
14 not with private companies or public companies?

15 A I don't recall that I was aware of that fact,
16 no, sir.

17 Q Now, I take it, then, that actually this
18 formula was one that its beginning came from your suggestion?

19 A I believe I recall that's correct.

20 Q And it was, in fact, accepted; isn't that true?

21 A That's correct.

22 Q And, in fact, you are familiar it's the formula
23 used by Mr. Flaskas in this case in determining whether or not
24 for 1976 what the rate of return of investment was, whether it was
25 above or below nine percent?

1 A. That's correct.

2 Q. Is that correct?

3 A. Yes, sir.

4 Q. All right. Now, you then speak to terms of
5 reasonable salaries and you say, and I will quote you if I may,
6 "In order to determine the propriety of net income or loss one of
7 the factors to consider would be the salaries paid to company
8 employees, et cetera," right?

9 A. That's correct.

10 Q. I take it from that, when you were talking
11 about reasonable salaries, you were talking about how you would
12 consider the figure of reasonable salaries in the equation so far
13 as it concerned net income?

14 A. That's correct.

15 Q. Is that correct?

16 A. Yes, sir.

17 Q. All right. So that the question of reasonableness
18 of salaries relates here in this instance to the question of how
19 it fits into the formula that you suggested, all of which leads to
20 the question of whether or not there is a reasonable rate of
21 return; is that true?

22 A. That's correct.

23 Q. And you happened to peg reasonable rate of
24 return at nine percent; is that correct?

25 A. That is correct.

1 Q And, I take it, the only reason you pegged it
2 at nine percent was because you had heard that that figure had
3 been used somewhere outside of court incident to a court case in
4 Pulaski; is that true?

5 A Yes, that's correct.

6 Q No other basis for using the nine percent rule?

7 A No.

8 Q The only one. All right. Now, I think you
9 indicated, did you not, in this letter also, and I will quote,
10 "Sidney Andrews researched the matter." This is concerning,
11 excuse me, reasonable salaries.

12 A Yes.

13 Q "Sidney Andrews researched the matter at some
14 length and found that apparently no guidelines exist as to
15 reasonable salaries for taxicab operations", and then further you
16 say "Sid could not even find a source of average salaries." Is
17 that true?

18 A Yes. I made that statement, that's correct.

19 Q Did you make that statement?

20 A That was the case at that particular time.

21 Q At that particular time?

22 A His research took place in the Richmond Public
23 Library. He was unable to find any sources at that time.

24 Q All right. Who is Mr. Sidney Andrews?

25 A He's an auditor in the audit staff of the Field

1 Tax Department.

2 Q Do you know what his background is?

3 A I am not familiar with his background.

4 Q All right.

5 A I have some general knowledge of his background.
6 He has some accounting background.

7 Q Does he hold a college degree, do you know?

8 A I am not certain.

9 Q You are not certain. Okay. Now, is it fair
10 to say that prior to this February 13th, 1978 letter Division of
11 Motor Vehicles had not within its own internal structure promulgated
12 any kind of formula concerning reasonable rate of return or even
13 an amount of reasonable rate of return?

14 A To my knowledge they had not.

15 Q They had not. So, I take it, that they were
16 administering during the entire period of 1977 all the way up
17 until February, 1978 this program without any type of internal
18 regulation as to a reasonable rate of return amount or formula;
19 is that true?

20 A Well, I must clarify my answer in terms of
21 time frame. I came in the Department in June of '77 and to my
22 knowledge there had not been any audit activity in detail until
23 early 1978, so, again, to my knowledge there was not a formula
24 and it had been --

25 THE COURT: Who came into it in '77?

1 THE WITNESS: I did, sir.

2 THE COURT: Oh, you did?

3 THE WITNESS: Yes, sir.

4 THE COURT: Where had you been prior to that?

5 THE WITNESS: I had been in the Physical Services
6 Accounting Department up until 1977.

7 THE COURT: Another branch of DMV?

8 THE WITNESS: Yes, sir.

9 THE COURT: You didn't go into this department
10 until '77?

11 THE WITNESS: That's right, June of 1977.

12

13 BY MR. LUSTIG:

14 Q So as far as you know, from June 1st, 1977
15 all the way up through '78 there was no formula, there was no
16 figure on rate of return; is that true?

17 A To my knowledge that is true, yes.

18 Q And during this period of time the program was
19 going on for gas tax refund to taxicab companies?

20 A Refunds were being made, yes.

21 Q Do I further understand you to tell me during
22 this period of time they weren't even making any audits?

23 A As far as I have knowledge there had been no
24 detailed audits made, but I must also say that I had no direct
25 workings with the audit section as such on those particular audits,

1 but to my knowledge they were not.

2 Q All right. I take it further, then, certainly
3 if the Division of Motor Vehicles didn't have any internal rules
4 or regulations concerning this formula and this percentage of
5 rate of return as it concerned eligibility for gas tax refund,
6 then certainly no such information could have been communicated
7 to the taxicab companies, more particularly to Black and White?

8 A Well, yes.

9 Q That would be true, obviously?

10 A Yes.

11 Q Now, let me show you also now a letter dated
12 February 14, 1978, and ask you if you can identify that as your
13 letter?

14 A Yes, that is my letter, a copy of my letter.

15 MR. LUSTIG: I ask that that be marked, Your
16 Honor.

17 MR. FAHY: May I see it?

18 MR. LUSTIG: I'm sorry. Excuse me.

19 If Your Honor please, I ask that be marked as
20 Exhibit 12.

21 THE COURT: Marked P-12.

22 Have you offered P-11 yet?

23 MR. LUSTIG: Yes, sir.

24 THE COURT: Any objection?

25 MR. FAHY: No objection to either, Your Honor.

1 THE COURT: Received.

2
3 (Whereupon, Petitioner's Exhibit
4 Number P-11 was received in evidence.)

5
6 THE COURT: How about P-12?

7 MR. LUSTIG: I have shown it to him.

8 THE COURT: You have. Any objection to this?

9 MR. FAHY: No.

10 THE COURT: Received.

11
12 (Whereupon, the letter was received
13 in evidence and marked as Petitioner's
14 Exhibit Number P-12.)

15
16 BY MR. LUSTIG:

17 Q Among other matters discussed in this letter
18 I want you to take a look, and that letter indicated, did it not,
19 that so far as concerned an application for refund, say, for the
20 last six months of 1976 based upon an audit report or an operating
21 deficit statement for the last six months of 1976, it was
22 established in the Division of Motor Vehicles that when eligibility,
23 once it was accepted, that that granted the person the right to
24 the refund for some 29 months thereafter?

25 A That is correct.

1 Q Is that correct?

2 A Yes.

3 Q All right. And then --

4 THE COURT: You know you have been using that
5 term 29 months all along and I have been scratching my
6 head to see where you got it, but I suppose you filed
7 one month late so it's six months and then the succeeding
8 two years, and I think the Code says the six months
9 has to terminate within the two-month period, so that
10 comes out to two-and-a-half years less one month. Is
11 that it, is that how you arrived at it?

12
13 BY MR. LUSTIG:

14 Q Mr. Burrell, is that correct?

15 A Basically that's correct. I will have to
16 refresh my memory. It becomes quite complex, but basically that's
17 correct.

18 THE COURT: Mr. Lustig has been using this term
19 29 months, so my question --

20 MR. LUSTIG: I said their term.

21 THE COURT: That is right. I didn't know where
22 you got it from.

23 MR. LUSTIG: I just said they created an
24 eligibility period for 29 months.

25 THE COURT: You said 29 months, so --

1 MR. LUSTIG: That's what the letter said.

2 THE COURT: I haven't seen the letter yet, so
3 the 29 months is a term your department has used?

4 THE WITNESS: That is correct.

5 THE COURT: The idea is the six months must
6 end within a two-month period, so I suppose you go into
7 the two-year period by one month and you end with
8 thirty months less one month?

9 THE WITNESS: In effect, it perhaps could be
10 30 months less one day.

11 THE COURT: Probably could. I just want to see
12 if we are all talking about the same thing.

13
14 BY MR. LUSTIG:

15 Q Now, you also indicated, did you not, in this
16 memorandum that either in the event where somebody filed a
17 six-month operating deficit statement under the statute or if
18 they should file a twelve-month statement, and you refer to
19 instances where they might file a twelve-month loss statement,
20 and I will show you the second page of your letter, that in both
21 cases it was the principle of the DMV in administering this program
22 that you would apply the nine percent return on investment allowance
23 so that even a gain may not make the applicant ineligible for
24 refund; is that not true?

25 A That's correct.

1 Q Is that correct?

2 A (Witness nodded head affirmatively.)

3 Q If I understand, then, that that is correct,
4 then you established, did you not, as a test for eligibility
5 because you indicate on your letter the test for eligibility and
6 entry into the register must be applied in two parts, and I think
7 you said you then talk about the six-month statement and you talk
8 about a twelve-month statement; is that correct?

9 A (Witness nodded head affirmatively.)

10 Q And apparently, then, the nine percent return
11 doesn't necessarily have to be on the one-year statement, but
12 can be viewed just as to the six-month statement; is that not true?

13 A Let me, if I may, refresh my memory.

14 Q Sure.

15 A Yes, that's correct.

16 Q Because when you indicate in both cases you
17 are talking about either if it's a case of a six-month statement
18 or in the case of a one-year statement?

19 A Yes.

20 Q All right. And then finally, Mr. Burrell,
21 referring to Exhibit P-4, which are various instructions that
22 were sent out to Black and White by the Division of Motor Vehicles
23 during the course of this program, and I show you one of the
24 pages in that exhibit, the next to the last page as well as the
25 last page, and ask you whether or not it was your understanding

1 that the Division of Motor Vehicles pursuant to these instructions
2 was administering the program, more particularly I want you to
3 take a look at Paragraph 8.

4 THE COURT: What exhibit is that?

5 MR. LUSTIG: P-4, the last two pages of it,
6 Your Honor.

7 THE COURT: All right.

8
9 BY MR. LUSTIG:

10 Q The next to the last page is Paragraph 8 that
11 I would like you to look at particularly, and the last page I
12 would like you to look at also Paragraph 8, was DMV administering
13 the program during 1976, 1977 and 1978 in accordance with those
14 instructions so far as you know?

15 A These are the instructions that are contained
16 on the back of refund applications.

17 Q Right.

18 A And they were administering them as far as I
19 know in accordance with those instructions.

20 Q Okay. Now, you recognize, do you not, in both
21 of those instruction forms, and you say this is on the back of
22 the application, that the Paragraph 8 reads as follows:

23 "Refunds are granted only to those taxicab
24 services which can demonstrate that the refund is necessary for
25 the continued operation of their business. You must attach any

1 records which demonstrate either of the following: That this
2 refund is necessary for the continued operation of your business
3 under honest, economical and efficient management, or that your
4 business has shown an operating deficit for any continuous
5 six-month period within the last two years".

6 A That's correct.

7 Q Is that correct?

8 A (Witness nodded head affirmatively.)

9 Q So you instructed the taxicab companies that
10 they could file either of these articles in order to seek
11 eligibility?

12 A Those instructions were on the back of the
13 refund application.

14 THE COURT: And what date was that, or what
15 date did you start using those instructions?

16 THE WITNESS: I am not certain of that, Your
17 Honor.

18 THE COURT: Would it have been before or after
19 these letters?

20 THE WITNESS: It would have been before.

21 THE COURT: Before. Shortly before? You went
22 there in June of '77.

23 THE WITNESS: As far as I know, Your Honor, that
24 would have been on the instructions perhaps several
25 years prior to that.

1 BY MR. LUSTIG:

2 Q I said you don't find it in the statute, do
3 you?

4 A No.

5 Q All right, number one; and, number two, by
6 your own writing of February the 14th, 1978, you have indicated,
7 have you not, once you were eligible you were eligible for 29
8 months; isn't that correct?

9 A That is a portion of the statute which relates
10 to prima facie evidence, that's correct.

11 Q Well, in your letter of February the 14th --

12 THE COURT: Why did you have two letters a
13 day apart? I notice that P-11 is February 13th, and
14 P-12 is the next day, February 14.

15 THE WITNESS: I suppose the February 14 letter
16 would have been additional comments written after the
17 February 13 letter.

18 THE COURT: In a follow-up to the February 13
19 letter?

20 A THE WITNESS: Yes, sir.

21
22 BY MR. LUSTIG:

23 Q Did you not state in your February 14 letter,
24 and I will quote, the test for eligibility and entry into the
25 register must be applied in two parts. One, if six-month P&L

1 statements are available, a loss shown thereon would make the
2 applicant eligible, and I will repeat those words, would make an
3 applicant eligible for a period of 29 months.

4 A Yes.

5 Q Isn't that correct?

6 A Yes, that's correct.

7 Q So that if you are eligible and become eligible
8 based upon a six-month operating deficit statement and become
9 eligible, you become eligible for a period, we will say, of
10 29 months or perspective a period of two years; isn't that true?

11 A Yes, pending audit of the records.

12 Q Pending audit of the records? Now, where in
13 the statute did you-all come up with the idea pending audit of
14 the records?

15 A My interpretation of that statute is that,
16 again, that the statute is in two parts, and that the prima facie
17 evidence is shown by a deficit over a six-month period, but that
18 the need for the refund subsidy is determined by the indication of
19 a success or non-success of the business as determined during
20 audit.

21 Q Is that what you took the statute to mean by
22 your understanding perhaps of its legislative intent?

23 A No, sir.

24 Q Were you in court yesterday when Mr. Williams
25 testified and the testimony of Senator Michael was given concerning

1 intent?

2 A Yes, sir, I was.

3 Q Did you hear them indicate that the one thing
4 they were intending was for a rapid processing of these
5 applications and that's why the whole scheme was established?
6 Did you hear that?

7 A Yes, sir. I heard him make that statement,
8 yes.

9 Q But you feel the statute ought to be and was,
10 in fact, administered differently, that it's pending an audit,
11 depending on whatever time DMV gets to that audit?

12 A No. In fact, the way the statute was
13 administered was that the refund was made immediately upon a
14 presentation of a six-month prima facie evidence of loss and the
15 refund was, in fact, processed expeditiously. At a later time
16 when audit was made, the facts revealed in effect it was not a
17 loss, then that would call for further action.

18 Q Well, let me ask you this. You say you see
19 the statute in a two-step perspective, right?

20 A That's correct.

21 Q All right. Why, and I take it that was the
22 view of DMV in 1978 and '77 also?

23 A I cannot speak for the 1977. I can only say
24 from an early 1978.

25 Q All right. If that were the prevailing view

1 and the view that is brought to us here to court today, then why
2 did DMV in their instructions on the application say to the
3 person who is applying for the refund that you may do either of
4 the following in order to be granted a refund, either you show us
5 documents that show it's necessary for the continued operation of
6 your business and/or they use or that your business has shown an
7 operating deficit for any continuous six-month period. Can you
8 tell me why the Division of Motor Vehicles never advised the
9 taxicab companies of this two-step procedure?

10 A. No, sir. I do not know the reason for that.

11 MR. LUSTIG: I have no further questions.

12 MR. FAHY: Your Honor, I have no questions at
13 this time. We reserve the right to call Mr. Burrell
14 during the presentation of our case.

15 THE COURT: All right. Let me ask Mr. Burrell
16 something about this formula.

17
18 BY THE COURT:

19 Q Now, I hope I am not too thick, and I raised
20 this question yesterday, but looking at the formula on the letter
21 of February 13, "the following formula for determining return on
22 investment is proposed: Return equals net income after taxes
23 plus interest expense divided by investment as defined."

24 Now, what's troubling me is this interest
25 expense. I would think that you would have to take the interest

1 selected that figure because it was used in the Pulaski County
2 case, but that Mr. Sidney Andrews was unable after some research
3 to find any information about average salaries or reasonable
4 salaries in the taxicab business?

5 A. That's correct.

6 Q. Well, if a business was a risky type of
7 business and was heavily regulated and was part of a sick industry
8 statewide, wouldn't you expect that the return would be higher
9 than the normal investment would yield?

10 A. I would hope that it would be, yes, as a
11 potential investor.

12 Q. I mean, you can go out here and buy U.S.
13 Government Treasury Bonds for nine-and-a-half percent. Wouldn't
14 he expect to get more than that from the operation of a small
15 local business?

16 A. Yes, as an investor, that's correct.

17 Q. As an investor. Well, isn't that the way we
18 are supposed to look at this?

19 A. No, sir. The formula in my opinion is designed
20 to give an indicator of the need for the infusion of the subsidy
21 fund for the continued operation of business, and that is not
22 necessarily designed to measure the relative success or the loss
23 of success of the business.

24 Q. I see. One witness questioned, I think it was
25 Mr. McCarthy, indicated that a business of this type ought to

1 Q Now, of course, there are factors such as
2 satisfaction of running your own business, which means an awful
3 lot to a lot of people, satisfaction of being a figure in the
4 community, community service, employing other members of the
5 family in the business, but you don't expect a person to operate
6 a cab company on those factors or those philosophies, would you?

7 A It is possible, very possible that they would
8 be very strong factors in the decision, but from an investment
9 standpoint I would say that would not be the case.

10 Q But this formula doesn't say anything about
11 these other factors?

12 A No, it doesn't.

13 Q This is just a cold accounting formula that
14 the company is entitled to make a return of nine percent?

15 A Yes.

16 Q Then the next paragraph goes into reasonable
17 salaries, and you write "In order to determine the propriety of
18 net income," and, of course, this is the heart of the case
19 apparently, "or loss, one of the factors to consider would be the
20 salaries paid to company employees, or more particularly salaries
21 paid to owners or stockholders."

22 Now, how are you going to determine reasonableness
23 of salaries?

24 A Well, reasonableness to some extent is a
25 judgmental decision and perhaps it's based on a number of factors,

1 including salaries in previous years, et cetera.

2 Q Well, you say that you have got to exercise
3 this with -- sound and reasonable judgment must prevail. Now,
4 this was the first time that there had been instructions or
5 regulations of this type, and this is February of 1978. Now,
6 do you think that you could take these instructions or these
7 guidelines and go back two years to 1976 for money that's already
8 been paid?

9 A Yes, I think so. Those guidelines in our
10 opinion would be helpful in analyzing their statement to determine
11 eligibility.

12 Q Well, you said we will develop a chart of
13 salaries paid to officers through review of statements judicially
14 and taxfully, of course, to determine good average figures. Well,
15 this is February, 1978 we are going to do this, and yet these
16 profit and loss statements and the years of operation that we
17 are talking about are prior to that time.

18 A Yes, that's correct.

19 Q Now, I think that these average good figures
20 would be helpful in the future, but how did you develop a chart
21 to be used in the future and then apply it back to operations in
22 '76?

23 A You could not. In the particular case of
24 Black and White Cars, Inc. the salaries in my opinion appeared to
25 be excessive to the point that they would not meet standards in

1 my judgment.

2 Q For what year?

3 A Particularly 1977.

4 Q 'Seventy-seven?

5 A Yes.

6 Q Well, actually the salaries were fairly modest.

7 They were fairly modest up until '76 or '77 and then they went
8 up, didn't they?

9 A Yes.

10 Q As a matter of fact, they were modest, rather
11 modest through 1974 really, and then proceeded to rise in '75
12 and '76.

13 A That's right.

14 THE COURT: All right. Anything else?

15 MR. FAHY: No further questions at this time,
16 Your Honor.

17 THE COURT: All right. You may step down.

18 Call your next witness, Mr. Lustig.

19
20 (Witness excused.)

21
22 MR. SMITH: Your Honor, we call Mr. McPhillips,
23 and, Your Honor, at this time I would like to submit
24 a statement of personal data on Mr. McPhillips as to
25 his expertise and ask that it be submitted as an exhibit

THE COURT: All right. P-13. You may proceed.

(Whereupon, the qualification sheet on Mr. McPhillips was received in evidence and marked as Petitioner's Exhibit Number P-13.)

J. VINCENT McPHILLIPS, called as a witness on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q Mr. McPhillips, will you please state your full name, home and business address.

A My name is J. Vincent McPhillips. I live at 1349 Brunswick Avenue, Norfolk, Virginia 23508. My business office is at 740 Duke Street, Norfolk, Virginia 23510.

Q Mr. McPhillips, in accordance with Exhibit P-13 it indicates you are an accountant. What connection do you and your firm have with Black and White Cars?

A We provide accounting and tax service to Black and White Cars, Incorporated. My deceased partner had provided this service in his individual practice for several years prior to the time he came with our firm in 1973.

1 Q So approximately how long had either predecessor
2 to your firm or your firm been providing these services for
3 Black and White Cars?

4 A I would say at least fifteen years, maybe more.

5 Q Now, this period of time did include 1976,
6 did it not?

7 A Yes.

8 Q And did you have occasion to prepare a financial
9 report for the last six months of 1976?

10 A Yes.

11 Q Do you have a copy of it?

12 A Yes, sir.

13 MR. SMITH: I would like to have this document
14 entered as an exhibit.

15 THE COURT: All right. P-14?

16 MR. SMITH: Yes, sir.

17

18 (Whereupon, the six-month financial
19 statement was received in evidence
20 and marked as Petitioner's Exhibit
21 Number P-14.)

22

23 BY MR. SMITH:

24 Q Mr. McPhillips, I return to you P-14. What
25 period does that report cover?

1 A For the six months ended December 31st, 1976.

2 Q All right. What's the general annual
3 accounting period for Black and White Cars?

4 A The accounting period is the calendar year.

5 Q By annual accounting period, would that be for
6 tax purposes? For how many years had your firm been preparing
7 something like that six-month statement as opposed to just an
8 annual statement?

9 A I believe it was continuous probably fifteen
10 years.

11 Q And this would be prior to, say, 1972 or 1974?

12 A Yes.

13 Q That particular statement, P-14, are there
14 any changes in the methodology in the preparation of it, say,
15 compared to prior to 1974 and after 1974?

16 A No.

17 Q Now, do you know when this statement was
18 delivered to your client?

19 A Our office records indicated it was delivered
20 on April 1st, 1977.

21 Q To your knowledge, Mr. McPhillips, did this
22 statement become a part of an application for the Division of Motor
23 Vehicles?

24 A I believe it was forwarded to the Division of
25 Motor Vehicles by Mr. Louis Oden, yes, sir.

1 Q Now, I would like to direct your attention to
2 the refund of motor fuel tax's provisions, and to your knowledge
3 was Black and White Cars applying for these and receiving these?

4 A Yes.

5 Q Did there come a time when Division of Motor
6 Vehicles conducted an audit of Black and White Cars?

7 A Oh, yes.

8 Q And approximately when was that to the best of
9 your memory?

10 A Probably February of 1978 it was initiated.

11 Q And did you have any personal involvement at
12 the initial audit?

13 A Oh, yes.

14 Q Just briefly, what kind of involvement did you
15 have?

16 MR. LUSTIG: Can you speak up a little bit,
17 Mr. McPhillips?

18 THE WITNESS: Mr. Flaskas, the DMV auditor,
19 came to our office and we made available all the
20 books and records of Black and White Cars, Incorporated,
21 including our working papers for the period beginning
22 1974 up through '77. They spent several days at our
23 office examining these records off and on various weeks
24 for several weeks.
25

1 BY MR. SMITH:

2 Q Now, did there come a time when there was
3 some indication to you that DMV proposed to as a result of this
4 audit make some changes or take other action in regards to the
5 motor fuel tax refund?

6 A In discussions with Mr. Flaskas it is an
7 indication there might be a problem involved with certain
8 allocations of expenses between accounting periods. However, we
9 were not really sure of just what his position was until an
10 assessment was made for the repayment of refunds.

11 Q Well, you mentioned allocation of items for
12 accounting period. What particular periods did Mr. Flaskas
13 indicate a concern?

14 A For 1976 it was a concern of whether certain
15 expenses belonged in either the last six months or the first
16 six months and how much.

17 Q Mr. McPhillips, did you have occasion to
18 receive a copy of any document or report that outlined a statement
19 of Mr. Flaskas' problems with these things with Black and White?

20 A Yes. After the assessment for the recovery
21 of the refund was made by the Division of Motor Vehicles at a
22 meeting with Mr. Flaskas in Richmond, I received the copy of his
23 report at that time.

24 Q Mr. McPhillips, I would like to show you what's
25 been marked and entered into evidence as P-5. Can you identify

1 this document?

2 A Yes.

3 Q And what is the document?

4 A It's exhibits prepared by Mr. Flaskas with
5 respect to his audit of Black and White Cars of the last six
6 months of 1976.

7 Q All right. Now, did he give to you or provide
8 for you any other documents supporting the grounds for the
9 assessment?

10 A During the course of his audit this formula
11 that DMV uses, nine percent return on assets, he made that
12 available to me.

13 Q I show you Exhibit P-12. Can you identify
14 this document?

15 A I have seen it before, yes.

16 Q And what is it?

17 A It's a memorandum written by Joe B. Burrell
18 with reference to refunds of taxicab companies under Section
19 58-757.01.

20 Q Is this the other letter you were given
21 concerning the nine percent formula?

22 A I don't believe it is the same thing.

23 Q I'm sorry. I would like to show you P-11.
24 What is P-11?

25 A This is another memorandum from Mr. Burrell

1 dated February 13th, 1976.

2 Q Have you seen it before?

3 A Yes.

4 Q And does it concern itself with the nine
5 percent formula?

6 A Yes.

7 Q Was this document provided you?

8 A Yes. I believe Mr. Flaskas --

9 THE COURT: Mr. McPhillips, I am going to ask
10 you to speak up a little bit louder so those people
11 on the back row and over here on the right side of
12 the courtroom can hear you.

13 THE WITNESS: I will try.

14 THE COURT: You are not just talking to Mr.
15 Smith. You are talking to all of us.

16 THE WITNESS: This is a document Mr. Flaskas
17 made available to me.

18
19 BY MR. SMITH:

20 Q Mr. McPhillips, I would like to turn your
21 attention to several items in P-5, which I believe you still have.
22 I ask you to look at the second page, Exhibit A, executive
23 compensation. Would you please explain your understanding of
24 what the DMV was telling you in that concerning the executive
25 compensation problem?

1 A. It indicates that executive compensation was
2 excessive for the year 1976 and with respect to the salaries paid
3 to Louis and Leonard Oden, and that this exhibit itself would
4 disqualify the period on its own for the refund.

5 Q. All right. Did DMV through this document and
6 other indications to you state a yardstick under which they are
7 judging this salary?

8 A. No.

9 Q. Did they compare it with any other salaries?

10 A. Mr. Flaskas applied the cost of living index,
11 Consumer Price Index, CPI, which I furnished them from the
12 Research Institute of America, as a measure of what salary increases
13 might be because of inflation, if for no other reason at all, and
14 I think he applied that criteria as to determining what the salary
15 might possibly should be.

16 Q. What year did he start with?

17 A. Well, this Consumer Price Index starts with the
18 year 1967. Mr. Flaskas thought the base year should start at
19 1972, I think.

20 Q. I would like to turn to the next item Exhibit
21 B in P-5. I believe it's the seventh page of it. Mr. McPhillips,
22 generally, what sort of concern was expressed here as to accounting
23 principles?

24 A. This involves an analysis of insurance and fleet
25 safety expense of Black and White Cars for the year 1976 and in

1 particular the last six months of 1976.

2 Q All right. And does it deal with other
3 accounting items?

4 A No.

5 Q I direct your attention to the next page. It's
6 marked Exhibit B-2 on P-5.

7 A This exhibit deals with administrative expenses
8 during the six-month period, the last six months for 1976, that is,
9 and it compares the expenses in that last six months to the
10 expenses to the year as a whole.

11 Q Mr. McPhillips, could you explain from in
12 terms of accounting what this report on those two pages is doing?

13 A What Mr. Flaskas is doing, I believe, is
14 indicating his belief that the expenses for the last six months
15 as stated in the financial statements for the last six months
16 of 1976 are not correct.

17 Q In terms of not being correct, not right as
18 figures, money wasn't spent, or was it a question of proper
19 accrual?

20 A I don't believe Mr. Flaskas ever questioned
21 the fact the money was spent. His question was whether it was
22 properly allocated to the correct period.

23 Q In terms of allocating to a correct period,
24 what kind of rules would apply here?

25 A Basically generally accepted accounting

1 principles, expenses are recorded when they are incurred.

2 Q Now, I would call your attention to the start
3 of Exhibit B, again, and I believe it's the sixth page of that
4 document. I call your attention to the language. It states
5 "Some expense items do not appear to conform to generally accepted
6 accounting principles related to the matching of revenues with
7 expenses."

8 Now, this is Mr. Flaskas' statement, is it not?

9 A Yes.

10 Q I guess the threshold question would be is there
11 an absolute requirement under generally accepted accounting
12 principles that revenues match with expenses?

13 A Well, certain expenses directly related to
14 revenues is desirable to match those expenses with the revenue,
15 certainly.

16 Q Now, in terms of the adjustments made on the
17 following two pages, three pages of this exhibit made by Mr.
18 Flaskas -- well, first of all, were all these adjustments, first
19 off, in accordance with generally accepted accounting principles?

20 A The adjustments by Mr. Flaskas where he would
21 allocate fifty percent of the total year's expenses to the first
22 six months and last six months?

23 Q Yes, sir.

24 A It would not be.

25 Q How do they deal with the concept of matching

1 of revenues with expenses?

2 A To explain that I think you have to look back
3 and see, well, revenue is recorded in a time period for a
4 six-month period, twelve-month period or a year's period, then
5 expenses that are incurred during that period are deducted from that
6 revenue arriving at income.

7 Q Would it be accurate to say, then, the proper
8 accrual of expenses is time of accrual rather than attempting to
9 match with revenue?

10 A Sure.

11 Q Mr. McPhillips, based upon this information you
12 received, did you become involved in another meeting after this
13 Richmond meeting with officials of the Division of Motor Vehicles?

14 A Yes. At the meeting in Richmond with the
15 officials it was arranged that another meeting would be held, which
16 was held in our office in Norfolk. Mr. Flaskas and Mr. Perks
17 attended along with Dr. Oden and Mr. Louis Oden and my partner,
18 too, Lieland.

19 Q Mr. McPhillips, did you at that meeting respond
20 to the statements and the computations in Mr. Flaskas' report?

21 A Yes, we did.

22 Q All right. And did you discuss the accounting
23 adjustments?

24 A Yes, we did.

25 THE COURT: Before we go any further, I have

1 not seen the accounting. What was the profit or loss
2 in the first and second halves of 1976? I don't know
3 if I have ever been shown this before.

4 MR. LUSTIG: You have the last six months'
5 statement in evidence, which shows an operating deficit
6 of some \$24,000, I believe.

7 THE COURT: I do? Where is it?

8 MR. SMITH: Yes. It's just been put into
9 evidence.

10 MR. LUSTIG: Here it is.

11 MR. SMITH: I'm sorry. I believe it's page
12 three of P-14.

13 THE COURT: Where is it?

14 MR. SMITH: Page three of P-14.

15 THE COURT: All right.

16 MR. SMITH: It's the statement of profit and
17 loss for the last six months.

18
19 BY THE COURT:

20 Q Net loss \$20,084 in the second half of '76;
21 is that right?

22 A Yes.

23 Q What was the profit for the first half?
24 Do you have that handy?

25 A Yes, sir, \$46,284.29.

1 prices went up?

2 A They have had several increases in the last
3 recent years.

4 Q Well, I see. Have they had an increase since
5 that big loss in the second half of '76?

6 A I am sure they have.

7 Q All right. But this accounting is only for
8 the second half of this year?

9 A Right.

10 Q All right. Go ahead.

11

12 BY MR. SMITH:

13 Q I would like to show you a document, Mr. McPhillip
14 and ask if you can identify it.

15 A This document presents our understanding of
16 what DMV proposed as adjustments to the income statement for the
17 last six months of 1976.

18 Q All right. As a result of their audit, and
19 did you draw this from that report?

20 A Yes.

21 Q Did your office prepare that report?

22 A Yes.

23 MR. SMITH: I would like to offer this
24 document into evidence, Your Honor.

25 THE COURT: All right. Have you seen this,

1 Mr. Fahy?

2 MR. FAHY: Yes, I have.

3 THE COURT: Any objection?

4 MR. FAHY: No objection.

5 THE COURT: All right. Marked P-15 received.

6
7 (Whereupon, the aforementioned report
8 was received in evidence and marked
9 as Petitioner's Exhibit Number P-15.)

10
11 THE COURT: Who made these proposed adjustments?

12 THE WITNESS: DMV.

13 THE COURT: DMV made them?

14 MR. SMITH: Your Honor, that is Mr. McPhillips'
15 understanding of the effect of what the proposed DMV
16 adjustments are based upon their reports. That is not
17 a document or table DMV actually prepared.

18 THE COURT: In other words, this is your
19 suggestion based upon what Mr. Flaskas found and stated
20 after his audit?

21 THE WITNESS: That's true.

22 THE COURT: And this is your proposal to the
23 petitioners, Black and White?

24 MR. LUSTIG: No, sir.

25 THE WITNESS: No. That's my understanding of

1 DMV's findings in audit.

2 MR. SMITH: Your Honor, based upon P-5 of the
3 report of Mr. Flaskas trying to find out exactly what
4 the DMV's position was --

5 THE COURT: Let me ask it to you this way.
6 Who is this from and to?

7 MR. SMITH: That is a piece of demonstrative
8 evidence prepared for trial by Mr. McPhillips.

9 THE COURT: All right. Proposed adjustments for
10 DMV. Proposed to who?

11 MR. SMITH: Proposed by Mr. Flaskas' report.
12 That is drawn from Mr. Flaskas' report and then taking
13 a couple steps which Mr. Flaskas' report did not do.
14 If I can see P-5 --

15 MR. LUSTIG: Judge, what it is, is Mr. McPhillips
16 is indicating from Mr. Flaskas' report the basis upon
17 which they have said our operating deficit wasn't an
18 operating deficit for the last six months of 1976
19 because he wants to make these certain adjustments.

20 MR. SMITH: It just takes the adjustment proposed
21 by Mr. Flaskas in P-5 and takes a further step to count
22 them up, see how they effect --

23 THE COURT: Of course, I haven't read all of
24 P-5. It's rather lengthy, about a dozen papers. Some
25 of it is not too good a copy. I can't even read it, but

1 what I am trying to determine is P-5 is Mr. Flaskas'
2 report and from that Mr. McPhillips has written up
3 P-15 which contains certain proposed adjustments?

4 MR. SMITH: Yes, sir, and then applies them.

5 THE COURT: He's proposing this to whom, Black
6 and White, his client?

7 MR. SMITH: No, sir. It's a piece of
8 demonstrative evidence to try to explain the effect of
9 these proposed adjustments. In other words, they must
10 have made a proposed adjustment. Mr. Flaskas wanted
11 to disallow some salary, so that would have an effect
12 on the profit loss. He wants to change around some
13 items of expense and not deduct them in one period and
14 deduct them in another. That would of course, effect
15 the profit loss.

16 THE COURT: What this is saying apparently,
17 instead of having a loss of \$20,000, they would have a
18 profit of \$20,000.

19 MR. SMITH: Exactly. That's the gravamen
20 of Mr. Flaskas' report.

21 THE COURT: This is just a summary?

22 MR. SMITH: Yes, sir, a summary prepared for
23 today.

24 THE COURT: The effect of it is to convert a
25 \$20,000 loss to a \$20,000 profit; isn't that about what

1 it says?

2 MR. SMITH: Yes, sir.

3 THE COURT: All right.

4
5 BY MR. SMITH:

6 Q Going back to the proposed accounting
7 adjustments, the Judge has asked a couple questions why the
8 difference between the last six months and the first six months
9 and you have indicated one dramatic point, the cost of gasoline.
10 Was there another particularly large and higher expense for that
11 period?

12 A Oh, yes. The liability insurance that Black
13 and White Cars carried at that time was on a policy year beginning
14 in November through the following November, and that had a
15 dramatic increase in the premiums that were charged for that
16 liability policy from the previous year to the year 1970 --
17 it started in 1976, really.

18 Q So that was the beginning of the policy year
19 for the jump?

20 A Oh, yes.

21 Q And under generally accepted accounting
22 principles is there anyway you can apply this increased premium
23 starting for the insurance year beginning November, 1976, to the
24 first six months of 1976?

25 A Well, in part, to the extent that it covered

1 part of that period.

2 Q All right. To what extent would it cover part
3 of that period? How would that happen?

4 A Well, the policy here was November '75 through
5 November '76, so the first six months of 1976 would have included
6 the premium for that policy's year.

7 Q I see. And how would you include part of that
8 policy into the first six months?

9 A We will prorate it on a monthly basis.

10 Q All right. And then you would prorate a new
11 figure beginning in November of 1976 on the new policy, new
12 premium year; is that correct?

13 A Right.

14 Q Mr. McPhillips, did you later attend a meeting
15 with members of the representatives from the Division of Motor
16 Vehicles to discuss these proposed adjustments?

17 A Yes. We previously referred to that meeting
18 in August at our office.

19 Q All right. And did you at this meeting discuss
20 in terms of trying to reach some sort of agreement with
21 representatives of DMV?

22 A Yes, we did.

23 Q And in terms of that agreement did you make
24 some concessions as to the statement of the profit and loss
25 contained in the statement originally issued to the Division of

1 Motor Vehicles for at least the purpose of argument?

2 A. That's true.

3 Q. I would like to show you a document and ask
4 if you can identify this document?

5 A. Yes.

6 Q. And what is this document?

7 A. This is a statement that was prepared by our
8 office which indicates certain agreed adjustments to the six-month
9 financial statement for the purpose of trying to come to some
10 reasonable satisfactory solution or response to the problems that
11 were presented by Mr. Flaskas.

12 Q. All right. In terms of this agreement there
13 are several items on there that would be adjusted from your
14 profit and loss statement to the six months originally submitted.
15 Can you identify these items?

16 A. Yes. Without conceding but just for the
17 purposes of trying to reach an agreement we would agree that insurance
18 expense should be adjusted between the first six months and the
19 last six months.

20 Q. And in what amount?

21 A. Ten thousand two hundred sixty-five dollars.

22 Q. And what was, very briefly, the basis for
23 conceding any adjustment in this regard?

24 A. It was correct allocation of the insurance
25 premiums that were paid covering a period for the whole year of

1 1976.

2 Q When you say correct, do you mean one-half of
3 the first six months and one-half for the second six months?

4 A No. Their proper allocation based on allocation
5 of the monthly premiums for the liability policy, workmen's
6 compensation policies, and so forth.

7 Q Thank you. The next item on this proposed
8 adjustment?

9 A The next involved \$6,500 for pension expense,
10 which was paid, represents half of the year's pension expense
11 which was not determined actually until December of 1976.

12 Q So the first six-month balance sheet contained
13 no pension expense?

14 A That's true.

15 Q And what's the next item?

16 A The next item is with respect to administrative
17 salaries for \$7,125, which would allocate those expenses over
18 equal period first six months and the last six months.

19 Q In this regard when did you get that particular
20 figure?

21 A This was the difference between administrative
22 salaries. They were paid in the last six months as opposed to the
23 first six months and primarily was based on like year-end bonuses
24 to employees and so forth.

25 Q In short, did you get that figure from Mr.

1 Flaskas' proposed adjustments?

2 A Yes.

3 Q Let me ask you this, Mr. McPhillips. Did
4 generally accepted accounting principles require that adjustment?

5 A Well, you always have the benefit of hindsight
6 when you do these statements, and if these expenses had been
7 known at the time when the first six-month statement had been
8 prepared, they would have been accrued at that time also.

9 Q Which portion of them, all of them or what
10 portion?

11 A Not all of them, but the rateable portion to
12 the best estimate that would be available.

13 Q And the next item, Mr. McPhillips?

14 A The next item involves \$818 for group insurance
15 expenses.

16 Q All right. And was that also drawn from,
17 conceding, Mr. Flaskas' adjustment?

18 A Yes.

19 Q All right. Does the end result on that
20 document show -- well, does it show a loss or a gain?

21 A Shows a loss of \$24,995 for the six months
22 ended in December 31st.

23 Q Other adjustments in there, did you make any
24 adjustments on the gas tax?

25 A Yes. We eliminated gas tax refunds that were

1 included in the income for this period.

2 THE COURT: Which period?

3 THE WITNESS: For the six months ending
4 December, 1976.

5 THE COURT: The second half of the year?

6 THE WITNESS: Yes, sir.

7
8 BY MR. SMITH:

9 Q These are gas tax refunds that had actually
10 been paid?

11 A Paid or accrued.

12 Q All right, sir. During the course of this
13 meeting did you feel you had come to an agreement with the
14 representatives of the Division of Motor Vehicles?

15 A It was my feeling that we had responded to the
16 problems that were presented by Mr. Flaskas and that he was
17 satisfied with our responses.

18 Q What told you he was satisfied with your
19 responses?

20 A Just a general attitude at the meeting when he
21 left.

22 Q Did he indicate disagreement or agreement with
23 the proposed adjustments that you were making?

24 A I believe he indicated agreement. At least,
25 he did not indicate disagreement.

1 MR. SMITH: Your Honor, I would like to offer
2 this into evidence. Again, it's a summary prepared
3 for today and it was not in existence at the time
4 we have been discussing. It's demonstrative evidence.

5 THE COURT: Okay. Any objection?

6 MR. FAHY: No, Your Honor.

7 THE COURT: P-16 received.

8
9 (Whereupon, the aforementioned
10 document was received in evidence
11 and marked as Petitioner's Exhibit
12 Number P-16.)

13
14 BY THE COURT:

15 Q Well now, according to this, then, you still
16 end up with a loss. It was a loss of \$32,000 and some dollars,
17 but after these adjustments or these four or five items you
18 mentioned, it reduces the loss to \$24,000?

19 A Yes, sir.

20 Q Well, how would you treat the gas tax refund?
21 It would seem to me if you were talking about operations, that
22 your profit or loss would have to be determined prior to the refund
23 because the refund is predicated on there being a loss in a way.

24 A That's a question we had several times with
25 conversations with Mr. Flaskas, is which comes first, the chicken

1 or the egg.

2 Q Exactly. And did you-all ever resolve that?

3 A To my satisfaction I think we did, but not
4 to Mr. Flaskas'.

5 Q Well, according to these things, then, P-16,
6 as I read it, even if you counted the gas tax refund as an income
7 item you would still have a loss of about \$10,000.

8 A That's true.

9 Q Isn't that right? You remember now, I am no
10 accountant. I am just trying to follow. That's your specialty,
11 Mr. McPhillips, and I am just trying to follow you and Mr. Smith
12 as best I can.

13 A Yes, sir.

14
15 BY MR. SMITH:

16 Q Mr. McPhillips, in regard to whether or not for
17 the purposes of determining a refund the actual refunds paid
18 should be taken into account, what is your opinion in that regard?

19 A I believe that whatever loss before we perceive
20 a refund on the gas tax, that's an indication the refund is
21 needed for the operation of the business.

22 Q Finally, Mr. McPhillips, I would like to show
23 you again Exhibit P-5, and I turned it to the third, second and
24 last page, or third from the last, the following page and the last
25 page. It's marked Defense Exhibit and those three pages of Mr.

1 Flaskas' report, could you to the best of your ability identify
2 what is said by Mr. Flaskas in those three pages?

3 A Well, it's composed of Mr. Flaskas' computations
4 with respect to average assets employed by Black and White Cars
5 for 1976, and it applies a nine percent allowable profit to those
6 average assets which produces an allowable amount of profit
7 before interest of \$27,777. Mr. Flaskas compares this to the net
8 income reported for the whole year of 1976 of \$26,200, and adding
9 back interest expense of \$4,276 the profit actually earned of
10 Black and White exceeded the nine percent allowable profit.

11 Q In summary, then, this is an application of
12 that nine percent formula; is that correct?

13 A Right.

14 Q To the best of your ability from what you are
15 able to determine there, what year does that appear to apply to?

16 A Nineteen seventy-six.

17 Q I would like to show you a document, Mr.
18 McPhillips. Can you identify this?

19 A Yes.

20 Q And what is that?

21 A This is the statement prepared by us in which
22 we applied the nine percent formula to the year 1976 with certain
23 adjustments for insurance expense.

24 Q All right. And under the nine percent formula
25 what is the cutoff income, what income from that would equal nine

1 percent?

2 A Twenty-seven thousand eighty-one dollars.

3 Q And based upon the adjustments agreed with,
4 well, the necessary adjustments, what would be the income of
5 Black and White Cars after taxes and in accordance with the nine
6 percent formula?

7 A Seventeen thousand five seventy-five.

8 THE COURT: That's for the year?

9 THE WITNESS: Yes, sir.

10 THE COURT: Nineteen seventy-six, the whole
11 year?

12 THE WITNESS: The whole year.

13 MR. LUSTIG: I offer this document into evidence
14 Your Honor.

15 THE COURT: Where did I see a document that
16 showed a net income for '76 for \$30,000 which was
17 between nine and ten percent? Where was that? Was
18 that Flaskas' figures, P-5?

19 MR. SMITH: A net income for 1976?

20 THE COURT: Well, we saw it here somewhere.

21 MR. SMITH: I believe you asked Mr. McPhillips
22 about it and he gave you that figure.

23 THE COURT: No, it was on one of these accountin
24 but I don't know whose accounting that was or whose
25 opinion that was.

1 MR. LUSTIG: That's a notation just on the
2 Flaskas report, Your Honor, just to show what a ten
3 percent figure would be, that's all. It just took
4 ten percent --

5 THE COURT: Well, let me have that, Mr. Smith.

6 MR. SMITH: Yes, sir.

7
8 BY THE COURT:

9 Q Is this what you and Mr. Flaskas agreed to,
10 or is this what you worked up after your conference with him
11 that you thought was agreed to?

12 A I worked it up after our conference.

13 Q I see. That figure there is Mr. Flaskas'
14 report. Let me take a look at that. I have seen so many
15 accounting sheets here. Yes, this is the one, next to the last
16 page of Exhibit P-5.

17 Now, that showed a nine percent allowable profit
18 at \$27,777.

19 A That was prepared prior to our meeting.

20 Q I see. You came up with a figure at nine
21 percent or \$27,081, about \$700 difference, but your conclusion
22 as the corrected net income was \$17,000 which would be --

23 MR. SMITH: Approximately \$10,000 below nine
24 percent, Your Honor.

25 THE COURT: Somewhere probably around five percent

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THE WITNESS: Right.

THE COURT: Certainly less than nine percent.

All right. Do you offer this as an exhibit?

MR. SMITH: Yes, I do.

THE COURT: All right. P-17.

(Whereupon, the aforementioned
document was received in evidence and
marked as Petitioner's Exhibit Number
P-17)

BY MR. SMITH:

Q Mr. McPhillips, one final point. We have
gotten into a lot of little details right now. I would like to
ask you a question in terms of something a little bit more
overriding here. At the time you prepared the last six-month
statement for 1976 which has been put into evidence here, did you
prepare that statement in accordance with generally accepted
accounting principles?

A Yes.

MR. SMITH: Okay. Thank you.

THE COURT: Read that last question back.

(Whereupon, the foregoing question and answer
was read back by the court reporter as previously recorded)

1 A Yes. I believe Dr. Oden had even prior to
2 that meeting submitted a lot of information concerning reasonableness
3 of this salary to Mr. Flaskas or other people with DMV at that
4 meeting also.

5 Q What was that method that was suggested?

6 A Dr. Oden presented information about his duties
7 with Black and White and why he thought his compensation was a
8 reasonable amount.

9 Q All right. Did he suggest an actual method
10 by which you could compute in dollars and cents a reasonable
11 figure for the year 1976?

12 A I believe he had the benefit of the Hay report
13 at that time which indicated that the salary was reasonable.

14 Q All right. Are you familiar with the term
15 Gibson? Does that mean anything to you?

16 A Gibson or Sibson, I am not sure.

17 Q Gibson, all right.

18 A I am not sure which it is.

19 Q What does that signify to you?

20 A It's an index similar to the CPI.

21 Q All right. Well, did not Dr. Oden advance to
22 DMV the argument that you could use this Gibson or Sibson Index,
23 apply it to a base year and come up with a dollar and cents figure
24 for compensation in a subsequent year?

25 A I believe he did.

1 A NO.

2 MR. FAHY: I think I have one further question,
3 if I may, Your Honor.

4 THE COURT: Go ahead.

5
6 BY MR. FAHY:

7 Q That would simply be this: With reference
8 to this particular item that you have just mentioned, was it your
9 understanding that that adjustment to compensation for the year
10 1976 was intended to account for problems in prorating between
11 the first six months and the second six months, or did it address
12 the matter of whether the salaries for the whole year were
13 excessive?

14 A It's my understanding it addressed the matter
15 to whether the salaries were excessive for the whole year.

16 MR. FAHY: I have no further questions.

17 THE COURT: All right. Anything else?

18
19 REDIRECT EXAMINATION

20 BY MR. SMITH:

21 Q Mr. McPhillips, the Judge asked you if you
22 thought the salaries, I believe, of Leonard and Louis Oden were
23 excessive for 1976, and you indicated you didn't think so. Why?
24 What was the basis of your opinion they should not be so adjusted
25 as not excessive?

1 A Well, we received the financial statements and
2 records of a whole lot of business, local and out-of-town as
3 well, and just comparing the salaries that were paid by Black and
4 White this year and what we see in other businesses, it appears
5 to me to be reasonable.

6 MR. SMITH: Thank you. No further questions.

7 THE COURT: Read that last question and answer.

8
9 (Whereupon, the foregoing question and answer
10 was read back by the court reporter as previously
11 recorded.)

12
13 BY THE COURT:

14 Q Now, Mr. McPhillips, on that last point there
15 that Mr. Smith raised, do you advise them on appropriate salaries
16 considering the size of the company and the --

17 A Black and White specifically?

18 Q Yes. Did you consult with them on that?

19 A No, sir.

20 Q There had been a dramatic increase in salaries
21 from 1974 until '76, over two years.

22 A Right.

23 Q Do you think that was justified?

24 A I believe so. I think the salaries in those
25 prior years were very modest.

1 Q Was the company not able to pay high salaries,
2 was it not making enough money?

3 A Well, the company has had a record as far as
4 I can see of certain instability in earnings where they would have
5 good years and bad years. There's no even trend of increase.

6 Q Would you consider it a healthy business?

7 A Well, the trend is good, sure. From prior
8 years it indicates a continued trend of increased earnings,
9 but the stability between those years is terrible. It's up and
10 down like this instead of a straight line.

11 Q Well, is it seasonal business, or a cycle or
12 is it because of the increases that are necessary in cab fares or
13 regulation, or what is the reason for this up and down?

14 A Well, I think one of the reasons is a local
15 reason. A lot of the fares that Black and White had is depending
16 on the fleet, being the Navy, being in port. If they are out of
17 port, their fares are directly affected.

18 Q Would you consider it a risky business as small
19 local businesses go?

20 A Yes, sir, I would.

21 Q Do you have any opinion as to the type of return
22 that the owners ought to get on their investment in this type of
23 business?

24 A I have heard other people indicate twenty, maybe
25 thirty percent. I think that's a reasonable figure.

1 Q How about the nine percent figure that was
2 adopted by the Division of Motor Vehicles, what do you think of
3 that?

4 A I think that's asinine.

5 Q Why?

6 A Because you can invest in a risk-free U.S.
7 Government Note or Certificate and get at least that much with
8 no risk, with no problems, not worrying about whether you have
9 enough gasoline to operate your cars or whether you paid
10 the bills. All you do is check the coupons.

11 Q You have represented this company or done work
12 for several years?

13 A Our firm has, yes.

14 Q Going back how far?

15 A One of our partners died in 1974. He came in
16 our firm in 1973, and I expect that he had handled Black and White's
17 account for the time he was in individual practice, several years.

18 Q Let me ask you this: Would you say that the
19 financial stability or health of this company is substantially
20 better in 1977 and '78 than it was, say, back when you first
21 started working for it, 1973?

22 A I don't think it's that much different from
23 1973, but looking back towards maybe ten years it's a dramatic
24 change.

25 Q For the better?

1 A. Yes.

2 Q. But the salaries paid have increased tremendously

3 A. Sure.

4 Q. You feel that that's justified?

5 A. Oh, absolutely.

6 Q. I see. From the type of business, the earnings
7 of the business, the size of the operation and so forth?

8 A. Yes, sir.

9 Q. And I am sure you discussed all of this with
10 Mr. Flaskas in those meetings?

11 A. I am sure we did.

12 Q. Well, when you had those meetings with Mr.
13 Flaskas that you referred to, you came up with these suggested
14 adjustments shown in Exhibit P-15, 16 and 17. Did he seem to
15 emphasize the executive compensation? Was that a big point with
16 him, or do you -- I gather that he was more interested in allocation
17 of expenses from the second half -- from the first half of the
18 year, excuse me, or the other way around, from the second half of
19 the year to the first half of the year.

20 A. No. I think I would have the feeling that he
21 would put equal importance to both of those problems.

22 Q. Well, after you discussed the matter of
23 executive salaries, did he seem to be in agreement?

24 A. Well, we thought so at the August meeting at
25 our office. At least when he and Mr. Perks left our office, it

1 was the general feeling of all of us concerned that those
2 problems had been resolved to the satisfaction of he and Mr. Perks.

3 Q Well, did he propose an adjustment reduction of
4 the salaries by \$13,000 as you have on P-15; is that his figure?

5 A Well, it's my understanding of his figure.

6 Q The reason I ask that is the chart in the file
7 shows that executive salaries of 1976 was approximately \$112,000,
8 so a reduction of \$13,000 really wouldn't be very much. It
9 wouldn't be more than about ten percent of the total.

10 A Thirteen thousand was really for a six-month
11 period. The whole year would be \$26,000.

12 Q I see. That was for a six-month period, so
13 then what he would be suggesting for the yearly annualized would
14 be \$26,000; is that it?

15 A That's true.

16 Q You did not agree with this?

17 A No, sir.

18 Q But this is what you put down as his proposed
19 adjustment?

20 A Yes, and the way I got that figure was from
21 a document that DMV had sent with the letter stating what allowable
22 salaries would be in accordance with the CPI reached of these
23 two individuals.

24 ~~THE COURT: All right. Anything else?~~

25 ~~MR. FAHY: No, Your Honor.~~

(Whereupon, the list of Mr. Lieland's qualifications was received in evidence and marked as Petitioner's Exhibit Number P-18.)

EDWARD L. LIELAND, JR., called as a witness on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LUSTIG:

Q Now, Mr. Lieland, state your full name and address, please.

A Edward L. Lieland, Jr. I live at 1233 Linwood Drive in Virginia Beach, Virginia 23452.

Q All right. And what is your occupation?

A I am a Certified Public Accountant, a partner in the firm of McPhillips, Lieland and Miller.

Q Your personal data qualifications have been presented to the Court, and they were prepared by you?

A Yes, that's correct.

Q Now, Mr. Lieland, for how long have you been involved as a CPA working on the financial books and records of Black and White Cars, Inc.?

A Mr. Grayson Miller, the partner that was doing

1 that, died in 1974, and I took over for him.

2 THE COURT: Who?

3 THE WITNESS: Mr. Miller.

4
5 BY MR. LUSTIG:

6 Q And have you since 1974 worked with Mr.
7 McPhillips, your partner, on this account?

8 A Yes.

9 Q And have you since 1974 had full access to the
10 books and records, financial records, of Black and White Cars
11 going all the way back to, say, 1967?

12 A Yes, I have.

13 Q And have you over the course of time reviewed
14 all of these books and records and financial statements and income
15 statements over the years?

16 A Yes, I have.

17 Q All right. Did you at my request draft up this
18 chart?

19 A Yes, I did.

20 Q All right. I will show that to counsel.

21 Can the Court see that from here?

22 THE COURT: Yes, sir. You want me to mark
23 that as an exhibit? You want it in evidence?

24 MR. LUSTIG: Yes, sir.

25 THE COURT: It might be good to mark it if you

1 are going to refer to it.

2 MR. LUSTIG: Yes, sir.

3 THE COURT: All right. This would be P-19.

4 MR. LUSTIG: All right. Your Honor, we would
5 like to have this marked and entered into evidence,
6 please.

7 THE COURT: All right. Received.

8
9 (Whereupon, the aforementioned chart
10 was received in evidence and marked
11 as Petitioner's Exhibit Number P-19.)

12
13 BY MR. LUSTIG:

14 Q Maybe you could step over here so we could get
15 a little closer to His Honor. The black line that you have drawn
16 indicates what from the years ending December '67 through ending
17 December '78, eleven-year period of time?

18 A The black line is a representation of the net
19 income after taxes for Black and White for the years '67 through
20 '78. Each of these points represents the amounts shown on the
21 published financial statements.

22 THE COURT: All right.

23
24 BY MR. LUSTIG:

25 Q Now, you say net income after taxes. Does that

1 have a figure such as in the formula of DMV that adds interest
2 expense?

3 A Yes. This has interest expense included in it.

4 THE COURT: Would you explain that?

5 THE WITNESS: Well, the net income has the
6 interest deducted in arriving at the figure related to
7 here.

8 THE COURT: So, in other words, that's net
9 income after payment of interest?

10 THE WITNESS: Interest and income tax, yes, sir.

11 THE COURT: That's the way it ought to be done.

12 THE WITNESS: Yes, sir.

13
14 BY MR. LUSTIG:

15 Q All right. Now, did you then also draw a line
16 with the beginning of December 1975 for the year '76, '77 and '78
17 to show what the income would be for Black and White if it had
18 not received the gas tax refund?

19 A Yes. The blue line here indicates what the net
20 income of the company would be after elimination of the gas tax
21 refund and after income tax based on that figure.

22
23 BY THE COURT:

24 Q Do you consider the gas tax refund as an income
25 item?

1 A Yes, sir.

2 Q Mr. McPhillips says what comes first, the
3 chicken or the egg? How do you look at it?

4 A That's always my opinion, sir. What this tries
5 to depict is if they did not get the gas tax refund, this would
6 have been their condition.

7 Q All right. But where you show the black line,
8 the heavy black line, that is net income including the gas tax
9 refund?

10 A Including the gas tax refund, that's right.

11 THE COURT: I see. The law started in 1975,
12 didn't it, or 1974 legislation?

13 MR. LUSTIG: Right.

14
15 BY MR. LUSTIG:

16 Q Now, did you at my request using the Division
17 of Motor Vehicle formula, such as it is, use their formula for
18 nine percent rate of return on investment?

19 A Yes. The green line here represents what the
20 nine percent figure would be based on the average net assets, or
21 not average, average total assets of the corporation times the
22 figure nine percent. What we did, we took the total assets for
23 the beginning of the year and the total assets for the end of the
24 year and added the two together and averaged it and multiplied it
25 by nine percent, and this green line represents that calculation.

1 THE COURT: I see. That's what the net income
2 would be figuring a nine percent return?

3 THE WITNESS: That would be the allowable income
4 per DMV based on their formula.

5 MR. LUSTIG: Based on their formula.

6 THE COURT: Right.

7
8 BY MR. LUSTIG:

9 Q Did you also using the very same DMV formula
10 use a rate of return using fourteen percent?

11 A Yes, I did. The orange line here represents
12 the same calculation. Instead of using the nine percent figure,
13 we used the fourteen percent figure and this is represented by
14 the orange line.

15 Q All right. Now, do you find, then, from a
16 review of this chart that for the years in which they were receiving
17 the tax refund, gasoline tax refund, that if you took out that gasoline
18 tax refund, the rate of return would in all instances be less than
19 the nine percent?

20 A Yes, it would be.

21 Q All right. And otherwise in other years where
22 it would be under the nine percent would be wherever the year
23 ended, such as year ending 1978; is that correct?

24 A Yes.

25 Q That's under nine percent?

1 A. That's correct.

2 Q For the whole year now, not six months?

3 A. Yes.

4 Q But the whole year, that for year ending 1977
5 it would have been at approximately fourteen percent; is that
6 correct?

7 A. Yes.

8 Q That for year ending 1976 it would have been
9 and was, in fact, by the DMV standard, now, just slightly more
10 than nine percent?

11 A. Yes.

12 Q And for the previous year under?

13 A. Yes, that's correct.

14 Q And then going back, of course, we see the
15 other years before the refund tax situation came in. Now, are
16 all of these figures taken from the financial books and records
17 of the company?

18 A. Yes, they are.

19 MR. LUSTIG: All right. You may inquire.

20 MR. FAHY: May I borrow the exhibit?

21 THE COURT: Yes, sir.

22

23

24

25

CROSS-EXAMINATION

1
2 BY MR. FAHY:

3 Q Mr. Lieland, have you anywhere on this exhibit
4 drawn a line to represent net income plus interest?

5 A No, I have not.

6 Q In preparing any of these lines on the
7 exhibit did you make any adjustment for the compensations of
8 either of the Odens?

9 A No, sir. The information was taken directly
10 from the published financial statements.

11 Q So then when you have drawn a line, or drawn
12 the various lines that intersect through the line for December,
13 1977, the net income line and what the net income would be
14 excluding gas tax refund, then reflects exactly what they were
15 paid for that year?

16 A That's correct.

17 MR. FAHY: I have no further questions.

18 THE COURT: What was that last question and
19 answer?

20
21 (Whereupon, the court reporter read back the
22 foregoing question and answer as previously recorded.)
23

24 BY THE COURT:

25 Q All right. Now, Mr. Lieland, when you are

1 talking about the financial health of a corporation and its net
2 earnings or income, how should you consider a tax refund that is
3 in reality a subsidy from the State?

4 A It is treated as an income, Your Honor.

5 Q But in looking at whether the company is
6 earning, you really should not consider it, shouldn't you get
7 your net income before you look at the -- before you get the
8 refund?

9 A Well, this is a refund of an expense that has
10 been in a prior month or could be conceivably in a prior year,
11 like the December could be received in January.

12 Q I see.

13 A This reflects a deduction of an expense, so,
14 therefore, it has to be shown as an income item. Of course, this
15 is a taxable item and a financial reporting item as income, so
16 it would have to be reflected in the financial records as an income.

17 Q But if the refund is then cancelled or returned,
18 then it dramatically changes your earnings picture, doesn't it?

19 A That's correct. The assessment, as I understand,
20 was made in 1978. The Division disclosure was made in 1978,
21 financial statement of some \$37,000 which would have made a drastic
22 effect on the 1978 statement had it been shown there. However,
23 because of the circumstances that it was being contested, it was
24 not shown, but it probably would have shown a loss in 1978, I
25 believe.

Q Why did the company show such a drastic drop in net income at the end of '68 and '69; do you have an opinion on that?

A No, sir. I did not review the '67 and '68 return, financial statement, in that department, sir. I just reviewed it to get the amount of net income.

Q Those two years seem to be completely out of line with the rest of the history of the company.

A I think their revenue dropped in those particular years, Your Honor, but I am not absolutely certain.

Q Well, the chart here that's been filed with the interrogatories did show there was a \$50,000 drop in gross income in '68, but then it came back up pretty well in '69. Well now, Mr. Lieland, maybe you can explain to me in simple terms when you figured this return, you mentioned to me a moment ago you take out the interest paid as an expense?

A Yes, sir.

Q To arrive at your net income?

A Yes, sir.

Q Then, why would you put your interest paid back in order to determine return?

A Well, in my opinion a return on an investment is not necessarily how that asset is financed, be it financed through a stockholder contribution of capital or whether it be through borrowed capital. Therefore, in figuring the rate of

1 return you would normally add back the interest expense. You
2 do this in several methods of valuing a company. You consider
3 interest expense as if it were a capital item and not an expense
4 item.

5 Q So, in other words, a company which shows
6 some return even though they earned nothing in excess of interest
7 paid? In other words, the company might have actually done
8 nothing more than break even. They might have earned enough to
9 pay their expenses and interest and actually have no profit at
10 all above interest paid, and yet by this accounting method interest
11 paid would be shown as an income, or as a net income item which
12 would show as a return on investment?

13 A All right. It would show an adjustment in
14 there which could conceivably show your return with actually a
15 loss.

16 Q Well, I have trouble with that concept.

17 A We all do sometimes.

18 Q If you are in business, it seems to me you ought
19 to make more profit than to pay interest?

20 A You get into an area of leverage, which leverage
21 is the use of other people's capitals, other people's funds to
22 finance your operation. So they consider this to get the total
23 return as if you, yourself, had contributed all the investment
24 versus using the leverage of other suppliers of funds.

25 Q Do you have an opinion as to the financial

1 health of this company?

2 A Rather unstable, sir.

3 Q Well, how was it '76 and '77 as compared to
4 prior years?

5 A It's good compared to some of the prior years,
6 yes, sir, better. The total amount of assets employed are
7 relatively close.

8 Q Would you consider it a risky business or
9 cyclical business?

10 A Yes, sir, it is both.

11 Q Do you have any idea as to the kind of returns
12 people should get in this type business, which I guess you would
13 call it a service type business; is that what you call it?

14 A Well, it's a transportation type which involves
15 a lot of personal service, yes, sir. In fact, it's principally
16 drivers and vehicles.

17 Q Well, what kind of return should the owners or
18 investors obtain on this type business?

19 A Well, I think I would go along with the earlier
20 figure somewhere around twenty or thirty percent.

21 Q Well, what do you think about the nine percent
22 figure as laid down in the instructions from DMV?

23 A I think it's certainly not enough. It's very
24 low, too low, as a matter of fact, for the risk involved in it.
25 Any time you can put your money in things that have no risk

1 whatsoever and return a yield equal to with just a little bit less
2 than, it certainly would be a high risky business.

3 Q Do you have any opinion as to the kind of work
4 of the management provided by Dr. Leonard Oden and Mr. Louis Oden?
5 Have you worked with them over the years?

6 A I have worked principally with Louis Oden
7 because he handles the financial records, you know, day-to-day
8 operation. I have been working more closely with him. I know he
9 spends an inordinate amount of time working on this. I haven't
10 had that much actual dealings with Dr. Oden in the actual operation
11 of the company because his is more on the management side and
12 some of the decision side of it, and I get on the after effect
13 side of it principally with Louis.

14 Q Do you feel it's an efficiently run business?

15 A Yes, sir.

16 THE COURT: All right. I somewhat went beyond
17 the scope of the examination, gentlemen, but I figured
18 while we had this witness here we might as well get
19 his views on this. I guess it's all tied in with his
20 chart.

21 Anything else? I mean, I have opened up a
22 couple areas if either one of you have any questions.

23 MR. FAHY: No questions, Your Honor.

24 MR. LUSTIG: None, Your Honor.

25 THE COURT: All right. You may step down.

1 Q All right. What does it do?

2 A It consisted of setting up each item that I
3 thought had some bearing on the assessment.

4 Q Did you make any reference in there to the
5 year 1977?

6 A Yes, sir.

7 Q Did you, in fact, in the course of your audit
8 consider the year 1977?

9 A Yes, sir.

10 Q And you have previously said in the comment
11 section there is no reference to 1977. Why is that?

12 A Well, I was doing audits through '77 and into
13 '78 and the bearing of 1976 would have qualified the period
14 through 1978, but being that I disqualified 1976 as, you know,
15 acceptable, I looked at '77 to see if '77 could be used as a
16 basis for allowing some of these refunds and I found that it was
17 not.

18 Q All right. Why didn't you mention that
19 conclusion of yours in the comment section of the assessment?

20 A Well, 1977 and beyond, questioned their
21 discretion to go back and scrutinize those years if they could
22 find any six-month period no matter when it started or ended and
23 they could come forward with a loss for that period. It would
24 justify refunds into '77 and '78, which was some of the refunds
25 that I had objected to being refunded, and I gave them the option

1 to go back and do it. I was asked to give them some time to
2 look over my findings and so on, so that's about where it stood.
3 They never came forward with any figures for 1977 to qualify
4 any of the periods that I had disqualified.

5 Q All right. Mr. Flaskas, can you identify this
6 three-page document?

7 A Yes, sir.

8 Q And what is that?

9 A This is the official assessment that was mailed
10 out by certified mail dated July 6th, 1978.

11 MR. FAHY: All right. I ask that that be
12 marked and received as D-6.

13 THE COURT: D-6. Any objection?

14 MR. LUSTIG: No, sir.

15 THE COURT: Received.

16
17 (Whereupon, the official assessment
18 was received in evidence and marked
19 as Defendant's Exhibit Number D-6.)
20

21 BY MR. FAHY:

22 Q Mr. Flaskas, on or about August 31, 1978, did
23 you go to Norfolk and meet with Louis and Leonard Oden and others
24 in reference to Black and White Cars?

25 A Yes, sir.

(Whereupon, the aforementioned
document was received in evidence and
marked as Defendant's Exhibit
Number D-7.)

BY MR. FAHY:

Q I will pass you another document and ask you
if you can identify that.

A Yes, sir. This was a document that we prepared
at the office using the inflator of the Gibson Company for both
Louis Oden and Leonard Oden.

Q All right. If you would, explain exactly how
you put that -- well, let me ask you. Did you put that together?

A Yes, sir.

Q Explain exactly how you went about putting it
together.

A Well, I had originally picked 1972 as being a
base year because I thought that that was the year when there was
no discussion about refunds and so on, so I was going to use that
as the base year. They requested that we should go back to 1967,
so using their Gibson Inflator and going back to 1967 we projected
what the salaries were and what the salaries should be and it
came out a little different than the other one.

Q All right. Directing your attention to the
column entitled Amount of Acceptable Increase under the name Louis

1 H. Oden. There's a figure there of \$1633.

2 A. Okay.

3 Q. How was that figure calculated?

4 A. That figure was seven percent of the year.

5 I mean, first of all, that was for the year 1968, so we used 1967
6 as the base year. We took seven percent of the salary in 1967
7 and that came out to the \$1638, which was the adjustment for the
8 Gibson Inflator.

9 Q. And then directing your attention to the next
10 column Allowable Salary, the second figure there \$25,038. How
11 did you arrive at that figure?

12 A. I added that figure to what they actually paid
13 themselves.

14 Q. You added what figure?

15 A. I added the \$1630, which was the inflator,
16 inflated amount to what they had actually paid themselves in 1978.

17 Q. Nineteen seventy-eight?

18 A. Yes.

19 Q. Well --

20 A. Wait a minute, I'm sorry. Yes, to the 1978.

21 Q. Well, would you check your --

22 A. I'm sorry, to the 1967.

23 Q. All right. Are you saying that the \$23,416.38
24 results in \$25,03 --

25 A. Right. I got a little confused.

1 Q Is that the process you followed throughout
2 this calculation?

3 A Yes.

4 Q Now, the percentage figures, the third column,
5 where did you get those percentage figures?

6 A The third column?

7 Q The third column.

8 A They were the Gibson figures that Mr. Oden had
9 furnished us in his Schedule A.

10 Q Now, directing your attention to the table you
11 prepared for Louis Oden and the year 1974, tell me what you
12 understood to be the salary actually reported.

13 A The salary actually reported for Louis in 1974
14 was \$36,495.

15 Q All right. And what was the allowable salary
16 using your inflator calculations?

17 A Thirty-eight thousand six hundred and
18 thirty-five dollars.

19 Q All right. And then skipping down to the
20 year 1977, what did you understand to be the salary reported and
21 then what was the allowable salary?

22 A The salary reported was \$90,296 and the allowable
23 salary was \$50,956.

24 Q Now, for the year 1977 there was an asterisk
25 beside the ten percent figure. Can you explain what that's all

(Whereupon, a recess was taken for the luncheon hour at 1:55 p.m.)

AFTERNOON SESSION

(Whereupon, court reconvened at 2:05 p.m.)

THE COURT: All right, gentlemen. Are you ready to proceed?

MR. LUSTIG: Mr. Flaskas was on the stand.

THE COURT: That's right. We had next the cross-examination.

CROSS-EXAMINATION

BY MR. LUSTIG:

Q Mr. Flaskas, I believe you testified on direct testimony that you had done a total of or had responsibility to totally audit twenty cab companies in this area?

A I was assigned twenty.

Q You were assigned twenty, and that was beginning in 1976?

A Sometime in '76, I believe I got those assignments.

Q Of those which was the largest?

A What, the largest company I am going to --

Q The largest cab company you were assigned to

1 audit for gas tax refunds.

2 A According to the information I had, the
3 largest one was the Yellow Cab of Norfolk.

4 Q Yellow Cab of Norfolk. And the second largest?

5 A One of the Yellow Cabs. I think there's two
6 of them in Norfolk.

7 Q All right. The one that's operated by Mr.
8 Langley Land being the largest one?

9 A I believe so. I didn't look into that one too
10 far.

11 Q The second largest?

12 A Second largest Yellow Cab of Richmond.

13 Q That was in your group?

14 A Yes.

15 Q All right. And where did Black and White come
16 in?

17 A I believe they were either third or maybe
18 fourth. They were right in there.

19 Q All right. And the largest one of the whole lot
20 was Yellow Cab down here in Norfolk?

21 A Yes.

22 Q You didn't audit them, did you?

23 A No.

24 Q If I understand correctly, from 1976 all the
25 way up until the present date you have not audited the largest cab

1 company in your group and have been accepting their prima facie
2 statements ever since 1976 up until the present time; is that
3 true?

4 A Well, when we were assigned these we were in
5 the process of discussing how to do them and so on. There hadn't
6 been many of them done, and I was setting up pre-audits on all
7 of them before I went out.

8 Q But my question is: Is it not fair to say that
9 in three years since 1976, middle of 1976, up until the present
10 date the largest one of the cab companies, it being right here
11 in Norfolk, Yellow Cab Company, has yet to be audited?

12 MR. FAHY: Your Honor, I object. There is
13 no relevance of these other companies to this case. It's
14 just an irrelevant matter.

15 THE COURT: What's the relevancy of it?

16 MR. LUSTIG: If Your Honor please, it goes to
17 the question of the timeliness of these audits. He
18 testified on direct examination to the number of
19 companies that he had audited perhaps to indicate his
20 experience in auditing, but the fact of the matter goes
21 to show in effect that the procedures utilized by the
22 Division of Motor Vehicles are absolutely haphazard
23 in this industry in terms of auditing cab companies and
24 whether they do or do not accept the prima facie statement
25 and in one case apparently Yellow Cab, had been accepting

1 them for three years now without an audit.

2 THE COURT: I will permit it. Overruled, but
3 there's a limit to this.

4 MR. LUSTIG: That's the point I am trying to
5 make.

6 THE WITNESS: Do you want me to give you an
7 answer why I went to --

8 THE COURT: No. Just answer Mr. Lustig's next
9 question.

10 Go ahead, Mr. Lustig.

11
12 BY MR. LUSTIG:

13 Q Now, I want to try to get some perspective for
14 myself and the Court just these time periods, then. You were
15 first assigned Black and White Cabs and the others in 1976; is
16 that right?

17 A Yes.

18 Q Between 1976 and February of 1978 how many
19 audits did you do on gas tax refunds for taxicab companies?

20 A With taxicab companies I think I did about
21 eight or ten of them.

22 Q Eight or ten of them between the middle of
23 '76 all the way up to February --

24 A I am doing other audits all the time, the fuel
25 tax audits.

1 Q I understand. I am talking about these kinds
2 of audits we are involved with in this case. You didn't start
3 the Black and White audit until February of '78?

4 A February or March.

5 Q February or March, and you finished it, I
6 take it, around June of '78?

7 A Well, I finished what I consider an audit in
8 two weeks.

9 Q In two weeks. All right. And you made your
10 recommendations, then, to whom?

11 A I made my recommendations to Mr. Perks.

12 Q Mr. Perks. All right. And as a result of your
13 recommendations, the assessment was issued in July; is that correct?

14 A Well, we have given Black and White time to
15 rebut just about everything we said.

16 Q I understand that, but I wish you would be
17 responsive to my question. My question was you made as a result
18 of your audit, and we will add the discussions in between the
19 audit, it resulted in your assessment or DMV's assessment in July
20 of 1978; is that correct?

21 A Yes, sir.

22 Q All right. Now, if I may see P-5, Your Honor,
23 which is the assessment.

24 Actually the input for that tax assessment, that
25 was the input from your audit; is that not correct?

1 A Yes, sir.

2 Q And I believe you said in answer to direct
3 testimony that so far as the comments, that would be the reason
4 for the assessment; is that right?

5 A Yes, sir.

6 Q All right. That that was all inclusive of
7 your audit?

8 A That was a general statement of what I had
9 done and what I had found. That was not detailed.

10 Q I understand that, but this was the basis of the
11 reason for the assessment as communicated by DMV to Black and
12 White Cars?

13 A Yes, sir.

14 Q And you did not mention anything in there about
15 1977?

16 A No.

17 Q All right. Now, that was in July, July the
18 6th, 1978. That's the very assessment that is in question here
19 today, as you understand it; is that not correct?

20 A That's right.

21 Q All right. Now, did you then make up this
22 report that is P-5 after the assessment or before the assessment?

23 A That was after the assessment.

24 Q After the assessment. And if I understand
25 correctly, you made up this report of yours pursuant to a request

1 of Mr. Fahy?

2 A. That's right.

3 Q. That was after the assessment?

4 A. Yes.

5 Q. All right. In other words, DMV made the
6 assessment based upon what you told them. You put the comments
7 in there to notify the taxpayer, in this case Black and White,
8 the basis of the assessment and then, in effect, you made up a
9 report to then justify the assessment?

10 A. No. That was a report to inform the lawyer,
11 I mean, the Attorney General of everything I had done and had
12 stated in the assessment to give him a better picture of it.

13 Q. To give the Attorney General a better picture
14 of it?

15 A. Yes.

16 Q. All right. This type of report never went in,
17 obviously, since it was done after the assessment to Black and
18 White so that they could know exactly what it was you did?

19 A. That was a direct result of them rebutting this
20 particular assessment. I couldn't possibly have prepared that
21 before.

22 Q. Well, when you were making a determination
23 about whether or not there should be an assessment you found no
24 necessity of giving them anything in writing before you made the
25 assessment?

1 A. I had all my work papers of the audit backing
2 up what I said in the assessment.

3 Q Now, in this report that you made up for
4 Mr. Fahy did you not say, "Attached are certain exhibits summarizing
5 discrepancies found in your audit," and then you said, and I
6 quote, the assessment was for that period after December 31, '76
7 forward and was a result of disqualifying the six-month prima
8 facie period of the calendar fiscal year that ended December 31,
9 '76?

10 A That's right.

11 Q You said that. So in other words, the
12 disqualification was on their six-month statement for December 31
13 so far as it went to that point?

14 A No.

15 Q Well, isn't that what you just said?

16 A Well, that was part of it.

17 Q All right. And then you said, did you not,
18 "It was further found that the annual report also disqualified
19 because it was a profitable year," and I assume you are talking
20 about 1976; is that right?

21 A Yes.

22 Q In excess of the nine percent allowed; isn't
23 that right?

24 A (Witness nodded head affirmatively.)

25 Q Those were the two bases of disqualification?

1 A No. It also included getting a general view
2 of whether the company needs this money in order to exist, to
3 keep going.

4 Q Did you say anywhere in here in this report to
5 your own attorney or to Mr. Fahy the disqualifications was other
6 than as you put in here based, one, on the six-month statement
7 or otherwise because they didn't meet the nine percent allowed?

8 A I wrote that to Mr. Fahy and I didn't know it
9 was going to be used in court.

10 Q I understand.

11 A I just let you people have that because I
12 requested it. We gave you all our papers.

13 Q But this was the basis upon which the
14 disqualifications you reported were made?

15 A No. The disqualification is what is in the
16 assessment.

17 Q Well, fine. Then in the assessment your comment
18 is, and I point out to you, is it not, and you can read it, "that
19 the disqualification was based upon discrepancies concerning such
20 expense items as insurance, license and payroll taxes and other
21 items as well as small expense items that do not conform to
22 generally accepted accounting principles, and then also officers
23 compensation consisting of salary and/or bonuses in the fiscal
24 years '75 to '76 are in excess of what is considered to be
25 reasonable." That's what you put in there, isn't it?

1 A That plus whatever papers support that
2 statement.

3 Q Any mention of the nine percent in here or
4 their failure to meet nine percent?

5 A We are supposed to keep those as concise as
6 we can. The working papers support what was there.

7 Q I ask you the question again. Is there any
8 place in here their failure to meet the nine percent formula is
9 stated as a basis?

10 A No.

11 Q Now, you said in your direct testimony that
12 the principal discrepancies that you found were in executive
13 compensation and in insurance so far as allocations?

14 A Yes. They were the principals.

15 Q Those were the principals, were they not?

16 A (Witness nodded head affirmatively.)

17 Q Now, so far as the insurance, after the
18 assessment was made, long after, do you recall being at a meeting
19 in which there was discussion about Black and White agreeing, for
20 just the sake of argument, to certain adjustments; do you recall
21 that?

22 A Oh, we had to have a lot of adjustments
23 because there were two taxicab companies on the same policy, so
24 we had to make adjustments of that.

25 Q Mr. Flaskas, I would ask you, please, to listen

1 to my question and try to answer it responsively and then if you
2 have some explanation, fine. My question was: Did you attend
3 a meeting at which Black and White met with you and others from
4 DMV and discussed their agreeing, their being Black and White,
5 to certain adjustments in the six-month statement for 1976, for
6 the purpose of argument?

7 A I don't remember agreeing to anything at that
8 meeting.

9 Q Do you remember any discussions about
10 adjustments?

11 A I remember I might have said, "Well, this is
12 okay, but let's go on to something else." I don't remember
13 agreeing to anything.

14 Q Do you deny that you agreed to anything?

15 A Yes, I deny that I agreed to it.

16 Q Do you deny saying "This was all right with me,
17 but it will have to be all right with Mr. Perks"?

18 A Well, Mr. Perks was sitting there.

19 Q Right. Did you turn to him then and say, "Is
20 it all right with you?"

21 A No, I don't remember doing that.

22 Q You don't remember. Do you deny doing that?

23 A At this point I would.

24 Q All right. Now, I show you Exhibit P-16.

25 Do you recall a suggested adjustment on insurance of some \$10,265,

1 a pension expense of \$6,500 and those being about your figures
2 that you wanted?

3 A No. I don't recall that \$10,000 figure at all.
4 I do recall the sixty-five because they were allocating a thirteen
5 thousand into two periods.

6 Q Nineteen sixty-five or sixty-five thousand?

7 A Well, the sixty-five thousand is one-half of
8 the thirteen thousand for the pension fund; isn't it?

9 Q Sixty-five hundred, not sixty-five thousand.

10 A I meant sixty-five hundred.

11 Q You recall that?

12 A Yes.

13 Q Do you recall the insurance adjustment of
14 \$22,542.88?

15 A No, I don't recall that. I remember he had an
16 insurance figure, but I didn't agree this was right because it
17 was not right.

18 Q Well, how much did you want to adjust insurance
19 by for 1976?

20 A You want to go into a detailed explanation of
21 that?

22 Q Well, let's take a look at your P-5 for a
23 moment. All right. That's your explanation of it. Do you see a
24 figure there on insurance and fleet safety?

25 A Yes, I do.

1 Q All right. There was a yearly amount of
2 \$81,000.

3 A Um-hum.

4 Q And then you just arbitrarily said fifty
5 percent of that; is that correct?

6 A I only used this as a guide. These are not
7 figures that I wanted to adjust to what I have there. The figures
8 there are you-all's figures, not mine. I am using your figures
9 and I am using the fifty percent as a reasonable amount to put
10 half of it in one six-month period and half in the other.

11 Q And you believe that is to be able to just
12 automatically attribute fifty percent to expenses regardless of
13 when they are incurred as a generally accepted accounting method?

14 A No, I do not. I just used this as an example
15 that if they had done this, the figure was way off. As for the
16 total figure, I went back and questioned the whole figure,
17 especially when I found out that the policy had two insurance
18 companies on it.

19 Q Well, here are your papers and I ask you, sir,
20 how much did you figure they had overestimated in expenses in the
21 last six months of 1976 for insurance and fleet safety?

22 A Well, I have got a figure here that the
23 difference is \$22,542.88.

24 Q Is that the figure you figure they overestimated
25 or overstated their expenses for that item?

1 A On the prima facie evidence, yes. This is
2 not my audit figure.

3 Q Well, what is your audited figure?

4 A My audited figure is the amount of the -- as
5 far as the insurance is concerned, we had two policies. One of
6 them ended in November, I believe the 5th or 6th, and the other
7 one started, and one of them was a big premium and the other one
8 was a small premium.

9 Q In dollars and cents what was your audited
10 figure?

11 A It was higher than this.

12 Q In dollars and cents how much was it?

13 A I don't have a dollar figure right now, but
14 somewhere in my working papers there are.

15 Q As a matter of fact, isn't it true that you
16 never even reached an audited figure on those expenses?

17 A Yes, I did. I reached an exact figure.

18 Q You used as a basis for figuring they had
19 overstated expenses this fifty percent figure, did you not, in
20 a statement of \$39,260 overstated?

21 A This was just a general thing to show him how
22 lopsided the figures were. I know that you don't take fifty
23 percent. I know that you might add other cabs in one period that
24 would drive their premium up, as well as take cabs off that will
25 drive their premium down.

Q I take it, then, that today you are not prepared to give us an audited figure on how much according to your view they overstated expenses in the last six months; is that true?

A If I can go into my audit papers, I can, but not right at this moment.

Q You are not prepared to give us a figure?

A I can give you a ballpark figure.

Q Now, let's take a look at D-7 and D-8, if we may for a moment, Your Honor. Well, more particularly look at D-8. Now, D-8, this is a computation on salary differentials according to this Gibson or Sibson Inflator. This was also made up, was it not, after the assessment?

A It was made up as a result of some figures that Black and White gave us.

Q I didn't ask you what it was the result of. I asked you when. It was made up after the assessment, was it not?

A Yes.

Q As a matter of fact, it was made up after August 28th, 1978, when you got the Gibson Inflator factors; isn't that true?

A Yes.

Q So in terms of timeframe this D-8 was made up not only after the assessment was given in July of 1978, but also

after you had had your meeting in late August of 1978.

A. That's right.

Q. Now, you had not had any reference to that Gibson Inflator before?

A. No.

Q. Isn't that true?

A. (Witness shook head negatively.)

Q. And as I recall your testimony from yesterday, your basis for putting into the assessment that went out in July, 1978 that officer compensation was too high was what you called your common sense.

A. No. I was trying to reflect the figures they gave me and my way of thinking.

Q. Well, you didn't have the Gibson Survey, did you?

A. I knew about what the Consumer Price Index was doing.

Q. Other than the Consumer Price Index you testified, did you not, yesterday that the basis for your determination that the compensation was reasonably excessive was your common sense; isn't that true?

A. Yes.

Q. Now, in fact, concerning this Gibson Survey, that was just one item among a whole bunch of items that Mr. Leonard Oden brought to your attention, is it not, in his letter

1 of August the 28th, and I ask you to take a look at it before you
2 answer.

3 A. Yes, that's right.

4 Q As a matter of fact, at the time he gave you
5 the Gibson Survey he also told you-all -- this is all after the
6 assessment, now, right?

7 A. Yes.

8 Q -- he also told you-all about the Hay Associates
9 report, did he not?

10 A. Yes.

11 Q He also told you about the Hay Associates
12 determinations of reasonable salary?

13 A. Yes.

14 Q And he also told you, did he not, about the
15 fact that Internal Revenue, according to his paragraph in this
16 report, two previous audits had not contested salaries, told you
17 that, too, didn't he?

18 A. No.

19 Q Didn't he? What did he tell you right there
20 in that paragraph?

21 A. Well, that proved to be a false statement,
22 didn't it?

23 Q Not ultimately, sir. Did he tell you that at
24 that time? Is it there?

25 A. Yes.

1 later disclosed that statement was not true?

2 THE WITNESS: According to information I found,
3 yes.

4 THE COURT: According to your information, all
5 right.

6
7 BY MR. LUSTIG:

8 Q You have since learned, in fact in this
9 courtroom, IRS did not assess on those salaries?

10 A I think I was led to believe there was an
11 assessment still pending, but I found out in this court it wasn't.

12 Q You found out that it was not?

13 A Right.

14 THE COURT: I think we have a question of
15 semantics, gentlemen.

16 MR. LUSTIG: I think so.

17 THE COURT: There's been a question raised that's
18 been under discussion, but it's apparently been
19 resolved. Is that what the evidence was?

20 MR. LUSTIG: Yes, and the evidence was Internal
21 Revenue found they were reasonable salaries and not
22 excessive for the '75-'76 year.

23 THE COURT: And it did not make an adjustment?

24 MR. LUSTIG: Right.

25 THE COURT: You told me that happened how long

1 ago, very recently?

2 MR. LUSTIG: January. Yes, it was in '79.

3 THE COURT: You said something yesterday when
4 the trial started, you said something had happened
5 Monday, but I have forgotten what it was.

6 MR. LUSTIG: That's where Virginia accepted
7 the Internal Revenue ruling.

8 THE COURT: For income tax purposes?

9 MR. LUSTIG: Yes.

10 THE COURT: They accepted what Internal Revenue
11 did back in January?.

12 MR. LUSTIG: Yes.

13 THE COURT: All right.

14
15 BY MR. LUSTIG:

16 Q Now, I further understand from testimony that
17 we have had that it was not until February of 1973 that you, as
18 an auditor, were first given the formula for rate of return that
19 was going to be used and the percentage of rate of return that
20 was going to be used by DMV in these cases; is that true?

21 A. I believe so.

22 Q You believe so. All right. Now, I would like
23 to know between the middle of 1976 up until February of 1978 what
24 formula was DMV using and what rate of return was DMV using in
25 auditing these taxicab companies?

1 A. Most of the people that were submitting for
2 refunds were showing deficits and when I went out and did the
3 audits, the deficits were found to be as they were stated and
4 the question of the nine percent didn't come up on any other of
5 the companies. They were all showing deficits.

6 Q. You would agree this whole formula and everything
7 else came up not until 1978?

8 A. It came up in 1976, didn't it?

9 Q. Well, the formula, you didn't use a formula
10 you said until it came to your attention to use one in 1978.

11 A. I had no occasion to use it up to that time.

12 Q. As a matter of fact, the DMV didn't even have
13 a formula, did they?

14 A. It was in the file of Blue and White, the
15 Pulaski file.

16 Q. That's not my question. Did they have a
17 formula to use?

18 A. Yes. We were using that nine percent formula,
19 but it just wasn't necessary to use it. This was the first time
20 it came up so, therefore, we dug into the Blue and White and
21 came up with a formula again. Everybody was showing a deficit.

22 Q. That's where you came up with it. You have
23 learned, have you not, the formula was actually not a court
24 formula, but it was just something that was mentioned in a
25 out-of-court settlement?

1 A. Well, it was a formula that had been requested
2 from the State Corporation Commission, too.

3 Q The State Corporation Commission had requested
4 it?

5 A. No. We requested it from them. We were looking
6 for a guideline.

7 Q Well, you were here in this courtroom previously.
8 Did you hear Mr. Perks say he didn't get that formula from the
9 State Corporation Commission?

10 A. No, Mr. Perks didn't say that. You are
11 questioning me did I hear Mr. Perks say that? .

12 Q Excuse me. Not Mr. Perks, Mr. Burrell. Did
13 you hear Mr. Burrell say he's the one who made up this formula
14 in February of '78 and he didn't get it from the State Corporation
15 Commission?

16 A. Well, we did make the formula we are using
17 now, but we used as a guide a formula that we had previously had
18 in the other one, the Blue and White case.

19 Q Mr. Flaskas, do I understand that in your
20 opinion, considering your experience and background, that you do
21 not believe that the last six-month statement for the last six
22 months in 1976 filed by Black and White was done in accordance
23 with generally accepted accounting principles, as has been testified
24 to by Mr. McPhillips?

25 A. From my findings I would say no.

1 1976, that that's not the whole problem, there's more than that,
2 and that Mr. McPhillips' financial examination was not with the
3 benefit of an audit; is that what you are saying?

4 A. That's right.

5 Q. Well, how much are the differences between you
6 and Mr. McPhillips?

7 A. Well, Mr. McPhillips has no figures. He's
8 accepting the figures of Black and White. On the items I did, I
9 have figures.

10 MR. LUSTIG: Your Honor might want to inquire
11 whether he contested the figures Black and White put
12 in for the year, too, because I think the Court will
13 find that he did not.

14 THE COURT: That's what I am driving at.

15 MR. LUSTIG: Right.

16
17 BY THE COURT:

18 Q. Now, let's take this item here, P-16, which is
19 the six months, second half of 1976. Now, Mr. McPhillips, if
20 I understand him correctly, that if he agreed with your adjustments
21 to divide the pension expense, salaries and group insurance, gas
22 tax refund and all that on a fifty-fifty basis, that's half in
23 the first half of the year and the other half in the second half
24 of the year, that he would still come up with an operating deficit
25 of \$10,000, and that if he took off the gas tax refund, it gave

1 him an operating deficit or loss, I suppose, of \$24,995. Now,
2 have you seen this accounting?

3 A Yes, sir.

4 Q Would you agree with this or not?

5 A Not with the insurance figure. I agreed with
6 the --

7 THE COURT: Gentlemen, it seems to me we have
8 got several issues in this case. There are about four
9 or five different issues, but one of them is was there
10 an operating loss in the second half of 1976.

11 MR. LUSTIG: Yes.

12 THE COURT: Do we agree on that?

13 MR. LUSTIG: Yes, sir.

14 MR. FAHY: That's one of the several issues.

15
16 BY THE COURT:

17 Q One of the several issues.

18 Now, even if they make the adjustments as you
19 suggested, do you contend that there was not a loss in the second
20 half, that there was a profit; is that your position?

21 A When we take into consideration the salaries,
22 yes.

23 Q Oh, you mean excessiveness of the salaries?

24 A Yes.

25 Q Oh, I see. Well, let's leave that aside. The

1 salaries were paid, I assume, and let's don't get into the question
2 of reasonableness. Let's just talk about the question of allocation.

3 A Okay.

4 Q The allocating whatever it was, salaries,
5 pension, insurance, gas tax refund, so forth. If we accept the
6 salaries as they were, even making these allocations as Mr.
7 Phillips has worked up on P-16 you have still got a loss, haven't
8 you?

9 A Perhaps. At this point I can't say.

10 Q Let's take this chicken and the egg question
11 which has been discussed by several people. If you are not
12 entitled to a gas tax refund because you can't show any necessity
13 for it, should it be shown as an income item? In other words,
14 when we look at the statute the question of whether there was an
15 operating deficit for six months, do you determine that deficit
16 before or after the company received the gas tax refund? This is
17 a little confusing to me.

18 A We allow the gas tax refund to be taken in as
19 income or to be deducted from the gasoline expense. Now, I was
20 told that it was deducted from gasoline expense and that the net
21 figure for gasoline expense was compensating for any refunds that
22 they are due.

23 Q Well, it's a little confusing to me if you have
24 got -- let's assume that you have got a loss, operating deficit,
25 but then you put the gas tax money, which is a subsidy, in and

1 that converts your loss into a profit. Have you had a profitable
2 year or have you had a losing period?

3 A Well, I think that this whole system when the
4 idea is you go into a bad period and you are due the refunds, then
5 you are getting the refunds at a later date than the bad period
6 you had. Now, you are in a bad period but you are getting the
7 refunds, so because of these refunds you have a profit. If you
8 have a profit, then you are not due for the refund at a later date,
9 so this thing just goes on like that.

10 Q So what you are saying is if the refund pulls
11 you out of a deficit and pulls you up to a profitable situation,
12 then you are not entitled to the refund next time, for the next
13 two years or what have you over the next 29 months?

14 A Providing everything else is okay, yes.

15 Q Now, what is the basis, and I am looking at
16 P-15 which Mr. McPhillips prepared after his conference with you,
17 DMV proposed adjustments, excessive salaries \$13,000 for six
18 months. Now, did you ever agree with him or discuss with him the
19 salaries should be reduced to about \$26,000 for the year '76?

20 A No. I don't recall that figure at all.

21 Q Now, what's your answer to this chart? Have
22 you had a chance to examine the chart?

23 A No, sir.

24 Q Take a look at it. You heard the testimony.
25 It's got some figures on there, and he endeavors to prove the

1 operating income which fluctuated a great deal and that the rate
2 of return was well under nine percent most of the time, and that
3 it was actually under fourteen percent in all except one point
4 there where it hit it. Then if you leave out the gas tax refund,
5 it's even further below the nine percent level.

6 Am I stating it right, Mr. Lustig?

7 MR. LUSTIG: Yes, sir.

8 THE WITNESS: I would have to study this chart
9 before I could give you any answer.

10 THE COURT: Well, take a look at it. That's
11 Mr. Lieland's chart.

12 THE WITNESS: Well, to begin with I would want
13 to know what he --

14 THE COURT: I just want to know if you have any
15 criticism of it, or if you can accept it or if you
16 believe it.

17 THE WITNESS: I would want to know what he calls
18 return on investment.

19 MR. LUSTIG: That's the DMV formula. It says
20 so right there, using your formula.

21 THE WITNESS: The DMV formula has been discussed
22 a lot today, but it's the most liberal you can possibly
23 find anywhere. It shows a return on assets where the
24 way I understand it if you are going to use this as
25 one of your main arguments, that the return should be

1 on stockholders' equity.

2 MR. LUSTIG: We are using DMV's formula, the
3 very formula that you qualify or disqualify --

4 THE COURT: Who are?

5 MR. LUSTIG: People are.

6 THE COURT: I am examining him right now. You
7 can sit down. You can come back if you want to.

8 MR. LUSTIG: Yes, sir.

9
10 BY THE COURT:

11 Q Just take a look at this chart, Mr. Flaskas,
12 and tell me if you can agree with it, or where you don't agree
13 with it or where he's in error.

14 A Well, if we are going to talk about nine
15 percent, I think it's in error because you are using, even though
16 it's the DMV formula, this DMV formula was taken into consideration
17 of a company that is losing money and they are entitled to make
18 nine percent before we give them back tax funds that they collected
19 from other people in the form of taxi fares, so in reality what
20 they are doing is they have an investment in this company and
21 that fact hasn't been brought out what that investment was, but
22 a return on that investment, let's assume that it's \$10,000,
23 then you have got an item up here you made \$19,000. What was the
24 return on \$10,000, \$19,000 on a \$10,000 investment. In the
25 meantime --

1 Q How about retained earnings? I noticed in
2 these financial statements very substantial earnings. Suppose
3 the owners keep plowing back into it retained earnings to buy
4 more taxicabs, to expand their operation. Doesn't that become
5 more of the investment?

6 A Then he doesn't need tax money to keep going,
7 because those are undistributed profits. They are talking
8 about bad years. Well, where did all these retained earnings come
9 from? I mean, you have got a \$10,000 investment. You have got
10 \$155,000 worth of retained earnings. They came from somewhere.
11 This is a struggling company that needs to get their tax back
12 in order to survive?

13 Q Let me ask you this. Let me ask the
14 question this way, and I am just groping around here for some
15 help. Senator Michael in his testimony talks about the
16 legislative intent to meet these transportation problems, the
17 need for mass transportation. He says that looking ahead from
18 projections that cab companies would be in trouble and they
19 wanted to alleviate the burden. Mr. Williams talks about it
20 as a transfusion to avoid bankruptcies of cab companies and
21 describes it as a sick industry or a faltering
22 industry.

23 Now, you have had the occasion to deal with
24 these cab companies. Is this cab company different than other
25 ones throughout the state?

1 A. I found it to be in very healthy condition,
2 that the owners of the company were reaping very good returns on
3 their investment as well as in the work that they were doing.

4 Q. How about the other cab companies throughout
5 the state, were they about the same, or worse off or better off?

6 A. Collectively they were much worse off.

7 Q. Well, would you say that this was one of the
8 most financially sound cab companies in the State of Virginia?

9 A. From those I looked at, yes.

10 Q. Do you agree with the accountants who testified
11 that this business is a fluctuating business, an unstable business?

12 A. I believe that like any other business, that
13 the cab company if it's well managed, well run and funds are
14 utilized as they should be utilized, that it would be a viable
15 business.

16 Q. Let me ask you this. From your studies and
17 your audits would you say that the taxicab companies of Norfolk
18 are subject to more fluctuation because of the Navy and the
19 Atlantic Fleet being in or not and so forth, that it's in any
20 more of a fluctuating situation than the cab companies in other
21 parts of the state where the population is more stable?

22 A. I would say this would be a plus.

23 Q. A plus?

24 A. Because you have a population here that uses
25 the taxicab service and any other people that are here, and I

1 understand that the military is not considered as part of the
2 population of Norfolk.

3 Q Well, I don't know whether they are or not,
4 but they ride cabs an awful lot.

5 A Yes.

6 Q But the point was made earlier when the fleet
7 is in and when the fleet is out, whether we are having a war or
8 not, or police action that affects the presence of Navy personnel
9 in the area, which probably affects the profits and the revenues
10 of the cab companies. Now, what I am asking is does this make
11 the Norfolk companies different from the companies in a place,
12 say, like Richmond where there's a much more stable population?

13 A Yes, definitely.

14 THE COURT: All right. Anything else?

15 MR. LUSTIG: Yes, sir.
16

17 BY MR. LUSTIG:

18 Q You stated, did you not, in your report, P-5,
19 "It was further found that the annual report also disqualified
20 because it was a profitable year in excess of nine percent
21 allowed." Did you not say that?

22 A Is that for '77?

23 Q For '76.

24 A Yes.

25 Q Isn't that correct?

1 A. (Witness nodded head affirmatively.)

2 Q. For 1976?

3 A. (Witness nodded head affirmatively.)

4 Q. The nine percent you are referring to, I take
5 it, is the nine percent we have been talking about under the DMV
6 formula; isn't that correct?

7 A. Yes.

8 Q. That is the formula that you used, is it not?

9 A. It was one point in determining this.

10 Q. In determining the question of nine percent
11 did you use any formula other than the DMV formula?

12 A. No. That's the only formula I used.

13 Q. That's the only formula you used to get to the
14 nine percent? All right. Now, with reference to the Judge's
15 questions concerning this chart you see a line here that says
16 return on investment. Using the DMV nine percent formula, you
17 see a return on investment on the DMV formula only looking at
18 fourteen percent, okay?

19 A. Um-hum.

20 Q. Do you not acknowledge that if you took out the
21 tax refunds that were paid for the years '75, or for '76, or for
22 '77 or for a part of '78, that if you took those out, using your
23 own DMV formula, the only one that you use, that the rate of return
24 would in all instances be less than nine percent? Do you disagree
25 with that figure?

1 A. That one isolated thing, yes.

2 Q. You disagree with that figure?

3 A. No, that one isolated --

4 Q. That is the question.

5 A. Exhibit --

6 Q. That is the question I am asking you and the
7 only question I am asking you.

8 A. Would it be below the nine percent always, you
9 mean?

10 Q. In Black and White's case, in this case, if
11 you took away what you are in effect seeking to take away, the
12 1977 refund that was paid, all right, or if you took away the
13 1976 refund that was paid, that the rate of return using DMV's
14 formula would be less than nine percent. You agree with that?

15 A. I wouldn't take it away from the net profit.

16 Q. I didn't ask you whether you would. I said
17 do you find that if it was taken away, and assume now it has
18 been taken away, that it results in net profit or loss less than
19 nine percent using the DMV formula?

20 A. No.

21 Q. You don't argue that?

22 A. We still haven't resolved the other --

23 Q. I have not asked you anything else about that,
24 Mr. Flaskas. All I am trying to do is get you to give me a
25 responsive answer.

1 A. Ask me one more time, okay?

2 THE COURT: Don't fuss at Mr. Flaskas. I am
3 not sure I understand you either. Just make your
4 question simple, then Mr. Flaskas can answer it and
5 I can understand him.

6 MR. LUSTIG: Okay.

7
8 BY MR. LUSTIG:

9 Q. They had a certain net income upon which you
10 figured whether they paid nine percent or not for 1976.

11 A. You are talking about personal income or
12 corporation income?

13 Q. We are talking about corporation income, Mr.
14 Flaskas. Let's look at your chart on P-5. You took nine percent,
15 did you not, using the DMV formula?

16 A. Yes.

17 Q. And you found the amount allowed before interest
18 was \$27,777.

19 A. That's right.

20 Q. Isn't that right?

21 A. Um-hum.

22 Q. You then looked at their own reports and you
23 found that instead they had made slightly more than \$2800 above
24 that figure; isn't that right?

25 A. Yes.

1 Q And then they had made \$2800 above the figure
2 of nine percent, which would make it somewhere around 9.6 percent.
3 You said they are not qualified; isn't that right?

4 A Yes.

5 Q Now, if you take that very same year, all
6 right, and you take out the gas tax of the income which is where
7 it's put in, and you take out and then you figure out what their
8 rate of return is, you come up with something of necessity less
9 than nine percent, don't you?

10 A Yes.

11 MR. LUSTIG: That's what I thought. Thank you.

12 THE COURT: Mr. Lustig, you don't have to yell
13 at Mr. Flaskas.

14 THE WITNESS: I wear a hearing aid sometimes.

15

16 BY THE COURT:

17 Q Oh, then maybe you don't mind. You are only
18 three feet from him.

19 Mr. Flaskas, let me ask you another question.
20 Maybe you can explain to me in simple terms why when you figured
21 your return you add in interest paid. Now, I can see that interest
22 paid is an expense of doing business.

23 A Yes, sir.

24 Q And you deduct it from your earnings to get a
25 net income, right?

Anything else?

BY MR. LUSTIG:

Q Mr. Flaskas, and I will try to speak in a more dorsal tone, did I understand you to say the DMV formula for the nine percent is a formula for companies earning money by your philosophy?

A No, I don't think I said it exactly that way.

Q I think you did. If you did, would you be in error?

A Would I be in error?

Q Yes, if you had just said to the Judge before that this formula was a formula for a company earning money. Would that have been in error?

A Yes.

MR. LUSTIG: I have no further questions.

MR. FAHY: I have no further questions for Mr. Flaskas.

THE COURT: All right. You may step down.

(Witness excused.)

JOSEPH B. BURRELL, recalled as a witness on behalf of the defendant, being previously sworn, was re-examined and testified further as follows:

1 BY MR. FAHY:

2 Q. What was the purpose of the comment section?

3 A. The purpose of the comment section is to
4 highlight pertinent points concerning the assessment that the
5 auditor wished to bring out to his discretion.

6 Q. Well, in your administration of that Fuels
7 Tax Department was it the procedure of your department to, in
8 fact, set forth in detail every pertinent piece of information
9 in that comment section?

10 A. No.

11 Q. All right. Directing your attention to the
12 nine percent, so-called nine percent return on investment guideline,
13 I think you have already defined or someone has defined the
14 actual components of that formula. What was the purpose of that
15 guideline?

16 A. The purpose of that guideline was to be used
17 in the determination of the necessity for the payment of the
18 refund subsidy for continued operation of a taxicab company. In
19 attempting to determine that need I developed a formula as a
20 tool.

21 THE COURT: Which guideline are you talking
22 about, the formula?

23 MR. FAHY: This is the formula, nine percent.
24
25

1 BY MR. FAHY:

2 Q Now, in your development of that formula did
3 you consider any other formulas that might be used?

4 A Yes, I did.

5 Q And why did you settle on the one that you did
6 settle on?

7 A I settled on the formula that we ultimately
8 decided upon because it is an established measure. Return on
9 investment has proven to be useful over the years, and I found
10 it to be pertinent to the needs of a particular determination.

11 Q All right. Are you familiar with the term
12 return on stockholders' equity?

13 A Yes, sir.

14 Q What does that signify?

15 A That's a measure of the return on a portion of
16 a capital provided by stockholders and through retained earnings.

17 Q Does that translate into a formula?

18 A Yes.

19 Q All right. What are the components of that
20 formula?

21 MR. LUSTIG: If Your Honor please, I would
22 object on the relevancy. I don't know where he's
23 going with this new formula, and as we only have one
24 formula being used by DMV I don't know the relevancy
25 of a new formula that he's talking about.

1 THE COURT: I don't know. Go ahead.

2 Overruled.

3 THE WITNESS: Would you please repeat the
4 question?

5
6 BY MR. FAHY:

7 Q I am not sure I remember what it was, but let
8 me ask you what the components of that formula are.

9 A The components would be net income divided by
10 stockholders' equity.

11
12 BY THE COURT:

13 Q What is stockholders' equity? Is that what
14 they originally paid for the business when it was founded, or is
15 that what it's worth today?

16 A That's comprised of what the original stockholders
17 originally put into the company plus retained earnings.

18 Q What if market value has gone up through
19 retained earnings?

20 A That would not be reflected. It's ordinarily
21 not reflected.

22 Q Don't you have to look at the investment and
23 what the stockholders' interest is worth today regardless of
24 how you got to that point? When you look at a return, you can't
25 look at what they paid ten, twenty, thirty years ago. You have got

MR. LUSTIG: Thank you.

BY MR. FAHY:

Q All right. Mr. Burrell have you ever seen the documents I just handed you?

A Yes, sir.

Q All right. What are they?

A They are worksheets that I prepared myself.

Q All right. Directing your attention to the first of those sheets, if you would, go through it and explain what you have done.

A The first worksheet is the computation of return on assets and return on stockholders' equity for each of the two years respectively ending in December 31st, '76, December 31st, '77.

Q All right. And what figure did you arrive at for return on assets for Black and White Cars for the year 1976?

A Ten point one percent.

Q All right. And stockholders' equity return for that year?

A Twenty point eight percent.

THE COURT: What's that last question?

MR. FAHY: Pardon me?

THE COURT: What was the last question?

MR. FAHY: The last question was what figure

1 he arrived at for return of stockholders' equity for
2 the year 1976.

3 THE COURT: 'Seventy-six. Well, haven't we
4 defined stockholders' equity?

5 MR. FAHY: He has, Your Honor.

6 THE COURT: Is that when he said it was original
7 investment plus retained earnings?

8 MR. FAHY: That's correct.

9 THE COURT: All right.

10
11 BY MR. FAHY:

12 Q All right. What figure did you get for that?

13 A Twenty point eight percent.

14 Q And, I take it, on the bottom half of that
15 sheet you indicated the figures for 1977; is that correct?

16 A That's correct.

17 Q All right. Now, have you calculated the same
18 returns, that is, return on assets and return on stockholders'
19 equity for the same years, but using certain assumptions?

20 A Yes.

21 Q All right. And what were those assumptions?

22 A Those assumptions were basically two, the
23 removal of the amount of refund for the fuels tax refund, deleting
24 that and adding into the calculation a differential between the
25 amount paid to Mr. Leonard Oden and Mr. Louis Oden as salaries,

1 the differential between the figure actually paid and that amount
2 liable with the assumptions of the Gibson Inflator factor.

3 Q All right. Let me see if I may restate that,
4 but you correct me if I am wrong. Are you saying that you backed
5 out of this set of figures on page one not only the refund money
6 that was actually paid, but also an amount of compensation
7 determined to be excessive by Mr. Flaskas' exhibit; is that
8 correct?

9 A Yes.

10 Q Okay. And with those assumptions what figures
11 did you come up with for return on assets for the year 1976?

12 A Those assumptions I came up with a 10.0.

13 Q All right. Then the next year, 1977 return
14 on assets?

15 A Twenty-six point nine percent.

16 THE COURT: That's figuring it what way, now?

17 MR. FAHY: That's backing out two things.

18 Back out the money that was paid to Black and White by
19 DMV as refund money, and we have as an exhibit the
20 dollar and cents figure for that. Then we make another
21 adjustment --

22 THE COURT: Back out the refund, and what was
23 the other adjustment?

24 MR. FAHY: The other adjustment is reducing the
25 amount of money paid as compensation to Leonard and

1 much better job also defining those specifications, and to my
2 way of thinking generally it is much better legislation.

3 Q Well, you realize the only difference between
4 the '79 and '78 law is that it took out the requirement of showing
5 financial necessity; isn't that true?

6 A That's basically correct.

7 Q That's the only change you have made, so it,
8 in effect, said to all the cab companies regardless of your
9 financial condition or your need for it, you are going to get
10 this return; isn't that what it said?

11 A That's correct.

12 Q And you think that that is better, obviously,
13 because you think that's more in line with the intent of the
14 legislation as stated by the testimony you heard; isn't that what
15 you said?

16 A I stated yesterday that's correct.

17 Q Yes, sir, good. Take a look at this chart,
18 P-19, if you would. You have heard us talk about it with Mr.
19 Flaskas and everything. You see the figure showing and
20 representing net income taken from the reports of the company?

21 A Yes, sir.

22 Q You wouldn't find any fault with that, would
23 you, if taken from the report of the company and so testified to?

24 A No.

25 Q All right. You see this figure here which shows

1 what the net income would be if you just took out of net income,
2 and that's the blue line, the gas tax refund?

3 A. Yes.

4 Q. You wouldn't find any fault with that, would
5 you?

6 A. Not with those assumptions, no.

7 Q. With those assumptions, all right. You also
8 see the nine percent line, rate of return on your DMV Burrell
9 formula?

10 A. Yes, sir.

11 Q. You wouldn't find any fault with that if that
12 had been properly done according to your formula; is that correct?

13 A. That's correct.

14 Q. And, I take it, you would not have any fault
15 with the fact that taking out the gas tax refunds in these various
16 years would in all instances for all these various years bring it,
17 it being the rate of return, below the nine percent under the
18 DMV formula?

19 A. That's correct, with those set of assumptions.

20 Q. With those set of assumptions, correct.

21
22 BY THE COURT:

23 Q. Do you have any trouble with that chart?

24 A. Yes, sir, I do.

25 Q. What was your disagreement with it?

1 A. My disagreement is there should be a line
2 for adjustment of salaries added back in.

3 Q. How is that again?

4 A. There should be a line indicating what equity
5 on the net income was the adjustment for salaries that are
6 contested.

7 Q. I see. So you are contesting the salaries are
8 too high?

9 A. Yes, sir.

10 Q. And if those salaries were reduced 20 or
11 \$30,000 a year apiece and you put that back into earnings, it
12 would put those lines well up above the nine and fourteen percent;
13 is that what you are saying?

14 A. Yes, sir, that's correct.

15 Q. Now, assuming that the salaries are not
16 excessive and are proper, then would you have any objection to it?

17 A. No, sir.

18 Q. I see. So that's really what it boils down to.
19 It really boils down to in your mind the question of whether these
20 salaries are completely out of line and are excessive?

21 A. I think in my opinion, sir, that's the major
22 issue.

23 THE COURT: Thank you. Anything else?

24 MR. LUSTIG: No, sir.

25 THE COURT: All right. You may step down.

1 mind.

2 We have been in the case now two full days and
3 we have had two or three hearings previously on
4 discovery and prima facie issues, so we have all spent
5 a lot of time in this case. I know that the parties
6 on both sides would like a decision, so we are going
7 to try to conclude it today.

8 Now, first, the legislative intent is quite
9 clear. It was to extend the same assistance to the
10 taxicab companies that had previously been given to the
11 privately owned bus companies, as Mr. Carrington
12 Williams stated, who was in the legislature at the
13 time. This legislation was passed. He described it
14 as a transfusion or a subsidy to a faltering industry.
15 It was described, the taxicab business was described
16 as a sick business throughout the country and
17 particularly in Virginia, and as Senator Michael said,
18 they had looked ahead and saw that these problems of
19 mass transportation were coming and that perhaps our
20 state was not ready for it and that they had to do
21 whatever they could to help the bus companies and the
22 taxicab companies. With that very helpful testimony
23 as to the legislative background, I feel that the
24 legislation must be liberally construed.

25 Now, to indicate further the legislative intent

1 at the time it was passed in 1974 we see that the
2 legislature subsequently extended the legislation.
3 It was first for only one year, and then they removed
4 that limitation and made it permanent. Then in 1979
5 they eliminated this proviso that's giving us the
6 trouble today and the law now provides that the refund
7 is automatic, assuming the company can prove they have
8 used the fuel, and the legislature eliminated the
9 requirement that the refund must be shown to be
10 necessary to the continued operation of the company.

11 Mr. Burrell stated quite candidly that the
12 former law had given his department a lot of trouble.
13 It's perfectly obvious it's cost a lot of money to
14 the state both in its audits and in litigation such as
15 this case and that he approved of the change, which now
16 makes it somewhat simpler and the refund of the fuel
17 tax is more or less automatic. The legislature acted
18 wisely to remove this proviso and perhaps this will
19 eliminate further litigation such as we have here.

20 Now, the burden imposed upon the Court is very
21 difficult to determine, first, the economic health of
22 a company and whether it is after continuing in business
23 and whether the refund is necessary, and also whether
24 the salaries are in excess of what is reasonable and
25 proper and then the further question of whether there

1 was an operating deficit for the second half of
2 1976. So it seems to me the Court has really three
3 questions, each one bearing somewhat on the other.

4 Now, first, the burden of proof is on the
5 petitioner. The assessment is prima facie correct,
6 and not only is that the general law, but it's in
7 this legislation. The burden is upon the petitioner
8 to prove that it is not in accordance with law, or
9 to put it another way the burden is on the taxpayer,
10 petitioner in this case, to show the assessment is
11 erroneous.

12 Now, my first decision I am satisfied there's
13 a lot of evidence both ways, and there's a great deal
14 here of proper rate of return, semantics and meaning
15 of terms, but I am satisfied that this company operated
16 at a deficit the second half of 1976. Even if there
17 is an adjustment of salaries and even if there is not
18 to the extent suggested by DMV, but even if the
19 allocations are changed there's still a deficit, and
20 I am impressed by the chart and the testimony of
21 Mr. Lieland. I think it's most helpful and shows the
22 level of return both with and without the fuel tax
23 refund, so with that finding there is a prima facie
24 evidence of necessity.

25 Now, I believe that the nine percent figure is

1 one point of dispute, and I think that it is
2 unrealistic and is entirely too low for a small local
3 firm of this type. There's some evidence DMV plucked
4 the nine percent figure out of the air, but regardless
5 of where it came from everybody knows in this day and
6 time of inflationary figures and high interest rates,
7 and people can buy government bonds or high quality
8 bonds and stocks that will pay, that will return that
9 kind of figure or higher, and in a risky business, a
10 fluctuating business you certainly expect to get a
11 much higher return. Now, I can't say whether it's
12 twenty percent, twenty-five percent or thirty percent,
13 but I was impressed with the testimony of Dr.
14 Johnston along that line.

15 This is a cyclical business. It is fluctuated
16 with the presence of the U.S. Navy in Norfolk. Whether
17 the fleet is in or out, or whether the military has
18 expanded or retracted affects the whole economy of
19 Norfolk and particularly the taxicab business. I
20 think this is obvious.

21 Mr. Lieland's chart is very interesting. Some
22 of the defendant's witnesses disagree with it, but it's
23 more or less accurate and I have to accept it. Mr.
24 Burrell says that he's forced to accept it aside from
25 the issue that the salaries were too high.

1 Now, the Division of Motor Vehicles has
2 obviously had its hands full with these audits and
3 all these taxicab companies, and I am not going to
4 criticize them. I know that they have to operate within
5 a tight budget and perhaps they haven't had the
6 personnel and the resources to follow up on these things
7 but it does bother me somewhat that they come back with
8 an audit, and regulations and instructions a
9 year-and-a-half after the -- well, over a year after
10 the second half of 1976.

11 The instructions prior to that time were very
12 skimpy, and, of course, Mr. Lustig has argued that the
13 instructions which we have here, paragraph eight of
14 Exhibit P-4, says that you either prove necessity or
15 the cab company must prove a deficit for six months.
16 The inference is that if you prove one or the other,
17 that that's sufficient. Well, I am not so sure that
18 it is sufficient, but that certainly would be the
19 impression that those instructions would give.

20 In any event, the law is broad. It might even
21 be described as very loosely drawn legislation that
22 leaves much to the imagination and interpretation, and
23 the Division of Motor Vehicles has had to struggle with
24 it and I have had to struggle with it today. I am
25 pleased, and I think we are all pleased that the proviso

1 has been eliminated and in the future we will not have
2 to deal with these issues, that the refund of the
3 fuel tax is going to be automatic.

4 One thing that interested me, as shown in this
5 letter, Exhibit P-11. Mr. Burrell admits that Andrews
6 had researched the matter and he could not find any
7 guidelines as to reasonable salaries for taxicab
8 operations, and apparently they were pretty much in the
9 dark as to what was a reasonable salary. Now, that
10 brings us to an issue of salaries. Mr. Burrell admits
11 that that is the real objection that he had, that the
12 salaries paid to Louis Oden and Leonard Oden are
13 simply too high under the circumstances and that if
14 those salaries were cut back to some more realistic
15 figure, that the earnings of the company would be
16 healthy. Well, the Court is not in the position to
17 say under this evidence that those salaries are
18 excessive. Now, they seem a little high to me. Maybe
19 I don't shock as easily as Mr. Flaskas, but under the
20 evidence before me I cannot say that they are excessive.

21 Now, it is interesting that the Internal Revenue
22 Service and the Commonwealth of Virginia for income
23 tax purposes have accepted those salaries, having
24 objected to them originally and having audits, and
25 conferences and investigation and they have now dropped

1 their investigations, or their objections, but that
2 is not binding on this court in this matter, of course,
3 but it is persuasive.

4 I was very impressed by the testimony of
5 Mr. McCarthy from Hay Associates. I recognize that
6 he is talking about the national scene and salaries
7 probably tend to be much higher in Philadelphia and
8 large cities than they are in Norfolk, but still his
9 studies were very interesting and these salaries for
10 a company of this size of a community like Norfolk
11 according to his testimony were not unduly high or
12 out of line. Now, he did give a figure that Mr. Fahy
13 mentioned, but he also said that the range was, I
14 think he said, twenty-five to eighty-five thousand
15 dollars a year. Let me get that right. The witnesses
16 for the Division of Motor Vehicles simply have a
17 gut feeling or an off-the-cuff opinion that the salaries
18 are too high, but they have no real basis for this,
19 admitting that their research did not help them any on
20 this and admitted that they were not able to obtain
21 any average salaries, and I feel that I must give some
22 weight to testimony of Mr. McCarthy, although I don't
23 agree with all his figures either.

24 The company has been successful. It is
25 efficiently operated. It is the third or fourth largest

1 that has been audited, and although it has had a
2 shaky past and the salaries were quite low five or
3 six years ago, that company does seem to be doing very
4 well now and perhaps that salary range in view of the
5 history of the company and the difficult times they
6 have had in the past, perhaps those salaries are
7 justified. Anyway, as I said a moment ago, I am not
8 in a position to say the salaries are excessive.

9 The only issue in this case is the refund
10 necessary for the continued provision of services, and
11 the petitioner is entitled to a prima facie evidence
12 of such a necessity. In summary, I reiterate that
13 the legislation is broad and to be liberally construed.
14 Its objectives are obvious. The refunds are intended
15 to be promptly paid through a simple procedure, which
16 was done. The petitioner is entitled to a presumption
17 of necessity or prima facie evidence of necessity
18 because of the deficit for the second half of 1976,
19 and I find the refund is necessary to the economic
20 health of the company which may very well determine the
21 continued existence of service and is in the public
22 interest, so, therefore, I will grant the petition and
23 overrule the assessment and order that the petitioner
24 is entitled to the refund.

25 ~~All right. Any questions, gentlemen?~~

1 MR. LUSTIG: This deposition is taken
2 pursuant to agreement and all objections are waived
3 except as to form.

4 MR. FAHY: That's correct. We may have
5 some objections as to the relevancy and that sort
6 of thing. We have agreed to appear here though.

7 -----oOo-----

8
9 SENATOR JAMES H. MICHAEL, JR., called as a witness
10 on discovery, having been previously duly sworn, was
11 examined and testified as follows:

12
13 DIRECT EXAMINATION

14
15 BY MR. LUSTIG:

16 Q Would you state your name?

17 A Senator James H. Michael, Jr. My address is
18 900 Rugby Road, Charlottesville, Virginia 22903.

19 Q You are Senator Michael, a member of the
20 Legislature of the Commonwealth of Virginia?

21 A I am.

22 Q Are you a member of the Senate of Virginia?

23 A Yes.

24 Q And for how long have you been such?

25 A I am presently a member of the State Senate.

J. H. Michael, Jr. - Direct

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1 I was elected in 1967. I took my seat on opening day of the
2 1968 session and have remained in that body to this day.

3 Q In 1974 were you a member of any of the
4 committees of the State Senate of Virginia?

5 A I was, sir.

6 Q What committees were you a member of and
7 did you hold any ranking position in any of them?

8 A Well, in order of what we class important
9 among the Senate committees I was a member of the Senate
10 Committee of Finance, the Senate Committee of Courts and
11 Justice, and the Senate Committee of Commerce and Labor.
12 I was also a member of the Senate Committee of Education
13 and Public Health in 1974.

14 In those committees I had upper half seniority.
15 I do not remember precisely where I was, but I was above
16 the mid point in each of those committees in seniority. I
17 was not chairman.

18 Q Now, are you now and were you in 1974
19 familiar with what is generally referred to as a portion
20 of the Motor Fuel Tax Act of Virginia or more particularly
21 Title 58 concerning refunding to certain users of the
22 gasoline refund state tax?

23 A I am generally familiar with that section
24 and the subsequent sections.

25 Q Now, prior to 1974 that legislation was not

J. H. Michael, Jr. - Direct

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1 applicable, was it, to urban and suburban taxicab companies?

2 A It is my recollection that it was not
3 applicable to any cab companies. It was applicable to bus
4 companies, Intra bus companies, but not to any cab companies.

5 I am not sure that totally is responsive.
6 Did I miss part of the question? I think that's right.

7 Q Now, did there come a time in the 1974
8 legislative session when the question arose as to the
9 advisability of placing taxicab companies of the Commonwealth
10 within the purview of this tax refund section?

11 A There did, yes. Delegate Carrington
12 Williams of the House of Delegates and I were, we worked
13 fairly closely together over the years of his tenure in
14 the House of Delegates and mine in the Senate in dealing
15 with matters relating to state taxes.

16 I believe he introduced a bill which would
17 include cab companies within the refund statute, which
18 then applied only to intrastate bus companies. He discussed
19 this with me. We had several conversations and consultations
20 concerning it because in our normal pattern, legislation
21 introduced by him the House and passed by the House would
22 be handled by me in the Senate. Just as in return he
23 handled my Senate legislation when it went over to the
24 House.

25 This was pretty carefully explored by both

J. H. Michael, Jr. - Direct

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1 of us at the time. Do you wish me to go ahead with this?

2 Q Well, I want to first to further ascertain,
3 was he, in fact, the chief patron of the bill which
4 ultimately became amended, 58-757.01, the Refund Bill?

5 A My best recollection is that he was the
6 chief patron. I do not recall if there were other copatrons.
7 If there were copatrons on the bill, but he was chief
8 patron.

9 Q When that bill passed the House of Delegates,
10 did it then come within your purview as indicated on the
11 Senate side?

12 A In the informal sense that Mr. Williams and
13 I had the arrangement that I would handle his tax bills on
14 the Senate side and he would handle my tax bills on the
15 House side. In that informal sense it did. It did come
16 within my purview.

17 Q When the bill came over to the Senate, would
18 you explain to the Court what the legislative thinking was
19 that you recall? For making this tax refund bill
20 applicable to the taxicab companies operating in the
21 Commonwealth of Virginia.

22 A It may seem a bit difficult to comprehend,
23 but as early as 1974, a year or so earlier, those of us in
24 the Assembly who had any connection with energy projects
25 and with transportation became aware that any reasonable

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1 action that would benefit mass transit was an action that
2 ought to be looked at very carefully. We were concerned
3 about what we had seen in relationship to intrastate bus
4 systems in regard to the, a number of years before, in
5 regard to the rebate provisions that were then in the Code.

6 We were shown projections of earnings by
7 various cab companies, some urban and some suburban companies.
8 Also, some small town companies ranging from fleets of
9 three or four cabs up to fleets of 20 to 40 and perhaps
10 larger. I don't remember. Those projections indicated a
11 severe problem for the cab companies.

12 I cannot say they were extremist at that
13 point but certainly extrapolating the data that was given
14 to us, that would indicate that a very severe problem would
15 come about if we did not take what steps we could to
16 assist this form of mass transit.

17 The bill as it was presented to me, and as
18 Mr. Williams presented it on the House side, was presented
19 as a way to benefit, to the degree that it would benefit
20 cab companies. Those companies, in an effort to make their
21 continued private operations a more likely possibility.
22 We were told at that time that there were cab companies
23 that were at that point in time, surrendering franchises
24 and letting the community operate them.

25 I don't think anybody actually was that close

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1 to financial chaos, but I think it was something, and the
2 data shown to us, it was pretty conclusively thought that
3 that would come about if we didn't do what we could to
4 alleviate some burdens.

5 It was against that background that the
6 bill was presented. With that as an explanation, coupled
7 with the fact that such relief meant a great deal to the
8 individual cab companies, but did not mean a tremendous
9 amount to the community in terms of revenues. That's
10 also a balancing act you have to undertake.

11 In this case the conclusion was that the
12 cost in revenues to the community and the Commonwealth was
13 slight enough to permit giving the relief to the cab
14 companies that the bill envisioned. It was on that basis
15 that it was passed.

16 Q Was any consideration given to the nature
17 of the immediacy of the giving of the relief?

18 A Yes.

19 Q And how the program would then work?

20 A There was consideration given to the speed
21 with which the relief could come to the individual company
22 applicants, and we worked on, Mr. Williams particularly,
23 worked to construct a statutory pattern that would bring
24 about a relatively speedy relief to the cab companies.

25 We knew that it would be administered by the

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1 Department of Motor Vehicles. We provided in the bill, I
2 say we, I'm speaking sort of generically with Mr. Williams
3 and me. We provided in the bill for the submission of an
4 operating statement for particular periods of the cab
5 company's operation. If that showed a loss, there was a
6 prima facie conclusion to be reached that the cab company
7 would be entitled to relief, which its application sought.
8 We believed that would bring as quick a response from the
9 Department of Motor Vehicles or from the Commonwealth as
10 could reasonably be expected.

11 Q Legislatively speaking, was it contemplated
12 that the Department of Motor Vehicles would be reviewing
13 these operating deficit statements if there were such,
14 at the time of the application in order to make a
15 determination of qualification?

16 A Yes.

17 Q Or within a reasonable period of their
18 submission of the application?

19 A That certainly was in our contemplation
20 because we were, we provided the presumption that we did
21 not want to foreclose the possibility of, for instance,
22 fraud. But we did want an expeditious resolution of any
23 such question as could be made within reason, and that's
24 why we provided the prima facie aspect to the bill.

25 Q Could you say there was any legislative

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1 thought to the concept of the application being approved
2 and then being reviewed, postoperatively if you would,
3 a year or two after the application had been approved?

4 A I can't say that we considered that as a
5 possibility. It had been our thought in constructing the
6 statute that the use of the presumption and submission of
7 the operating statement would lead to a relatively quick
8 resolution of the question of whether the cab companies
9 were entitled to the refund or not, and if it was entitled
10 to it, then a relatively speedy repayment to the cab
11 companies, and that would be the end of it.

12 Q Do you recall, as between yourself and
13 Mr. Williams, the legislative thinking with reference to it
14 being a showing of operating deficit for a continuous
15 six month period ending immediately preceding a two year
16 period prior to the date of the application? Why was the
17 two years placed within the statute?

18 A This was less discussed than the other aspects
19 of the bill, but it was our feeling that there ought to be
20 some base period within which the determination of the
21 operating loss would be determined, and it was set as I
22 recall it. As I say, this was not as closely discussed as
23 the other things. As I recall, it was set at two years
24 because it was felt that would give a reasonable period of
25 time within which to determine the profitability or lack of

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1 profitability in a six month period for that cab company.
2 I don't know that that is as full an answer as I've given
3 to some of the other matters, but I frankly don't think it
4 had that much discussion in the course of the legislative
5 passage.

6 Q Now, with reference to the operation of
7 this legislation, that is the way that it was administered
8 thereafter, did there come a time, more particularly in
9 1979, when there was a legislative reaction to this concept
10 of having the operating deficit at all as the basis for
11 providing a refund?

12 A There did, yes. It came in 1979 on the
13 bill that was offered in that year, which is this
14 legislative session. I was the chief patron. Mr. Williams
15 was no longer in the General Assembly, much to my regret.

16 I offered the legislation. There were two
17 factors that conjoined the lead me to do that. One was
18 indications that the increased fuel costs in particular,
19 and inflation generally, had placed an additional burden
20 on this element of mass transit. It was my feeling that
21 the rebate of the fuel tax collected could in some means
22 or least counter against the effect of the increase in
23 fuel prices and the general effect of inflation. The
24 second point, which as I say conjoined with this point I
25 just made, is that it was my understanding that the Division

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1 of Motor Vehicles felt that it would not be a bad idea
2 simply to take this out of the statute. That it was
3 creating a considerable administrative burden and that we
4 would better advised to follow the pattern of the North
5 Carolina statute, which accomplishes essentially the same
6 result but without tendering an operating statement.

7 I consequently offered legislation to
8 permit the refund to cab companies without tendering the
9 operating statement. I explained it very carefully on the
10 Senate floor. I think there was a news article in the
11 Richmond Times Dispatch about it. By saying that it was
12 again an effort to assist in maintaining the viability
13 of one important segment of public transportation.

14 This has been one of my pet projects for
15 the last six or seven years. Not only in the area of
16 motor transportation but public transportation, and rail,
17 and other forms. That was very carefully explained on the
18 Senate floor. It was an assistance in the area or in this
19 important element of public transportation, and that it did
20 not have objection from the Department of Motor Vehicles.
21 It was passed on that basis.

22 Q Now, Senator Michael, would it be fair to
23 say that the general legislative intent in the broadest
24 sense as you just described it, as an impetus for the '79
25 legislation, was pretty much the same general legislative

J. H. Michael, Jr. - Direct

13

1 intent with reference to the original legislation as it
2 applies to taxicab service back in 1974?

3 A Yes, sir. Perhaps a distinction between the
4 two which gave more impetus to the '79 legislation was
5 the inflation factor. The inflation factor was worse in
6 1979 than it had been earlier in 1973 or 1974. That may be
7 a distinction without a difference, but it was pretty
8 severe in 1974 as well. But it was obvious that it was
9 going to get worse in 1979. It was worse and would get
10 worse as time went on.

11 MR. LUSTIG: I thank you for your time.

12 No further questions.

13 MR. FAHY: No questions.

14 THE WITNESS: I waive my signature.

15 (Signature waived by agreement of counsel
16 and the witness.)

17 (The deposition was concluded.)

18 -----oOo-----
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25

COMMONWEALTH OF VIRGINIA



VERN L. HILL
COMMISSIONER

DIVISION OF MOTOR VEHICLES

—RICHMOND 10

P-29
Cell 8

April 29, 1974

Honorable Carrington Williams
4085 University Drive
Fairfax, Virginia 22030

RE: House Bill 575 - Relief From Motor Vehicle
Tax for Taxicabs

Dear Mr. Williams:

The following procedure will be implemented by DMV to provide for the refund of tax on purchases of motor fuel used in operating taxicab services in this State:

1. To qualify for this refund, conditions to be met are:
 - (a) Motor fuel must be consumed in motor vehicles used for operating taxicab services in this State, the majority of whose passengers use the taxicabs for traveling a distance of not exceeding forty miles, measured one way, on the same day between their places of abode and their places of work, shopping areas or schools.
 - (b) The applicant shall demonstrate that the refund is necessary to the continued provision of such services and in the public interest under honest, economical and efficient management. Such demonstration must be evidenced to DMV.
 - (c) The showing of an operating deficit for any continuous six month period ending in 1973, 1974 or 1975 shall be deemed prima facie evidence of the necessity for such refund.

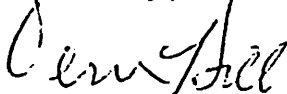
2. Any consumer entitled to this refund shall:
 - (a) File application with the Commissioner (Form VGT 32 T) along with required statements set forth in items A, B and C on the application.
 - (b) Complete application in accordance with instructions on reverse side of form.
 - (c) Submit financial statement(s) with the application to evidence an operating deficit for any continuous six month period ending in 1973, 1974 or 1975.
 - (d) Maintain records and books showing the quantity and cost of fuel purchased, date of purchase, dealer or retailer from whom such fuel was purchased and how fuel was used.
 - (e) Make all records and books available for inspection by the Commissioner and for audit purposes.
3. No refund is applicable on motor fuel used in taxicabs for:
 - (a) Charter service
 - (b) Personal use
 - (c) Trips exceeding forty miles measured one way on the same day.
4. Invoices supporting refund claim must be filed with DMV within three months from date of sale or invoice and show the name and address of the seller, the name of the purchaser, date of sale, gallons sold, amount of purchase and marked paid. The date of postmark will govern the date of filing.

These suggestions are offered as an improvement to the current legislation:

- (1) Elimination of the provision that requires DMV to be in a position of determining the financial need of any applicant.
- (2) Another alternative would be to establish a maximum amount of refunds that would be payable to any taxicab service in a fiscal year. Such legislation would be similar to the refund provision set forth in Section 58-715, subsection (4) of Chapter 13, Title 58, Code of Virginia 1950 as amended.

DMV is offering these suggestions as an improvement to the current legislation and after experience has been received therefrom, additional proposals may result. In view of this, a meeting in October would appear to be more advantageous.

Sincerely,


Commissioner

INTERDEPARTMENTAL CORRESPONDENCE

DATE: July 24, 1978

TO: W. E. Purks

FROM: B. J. Flaskas

SUBJECT: SUGGESTIONS FOR A BILL TO AMEND & REENACT 58-757.01 OF THE CODE OF VA.
RELATING TO TAXICAB REFUNDS OF MOTOR FUEL TAXES.

The portion of the Virginia Code 58-858.01, as amended, that deals with the refund of motor fuel tax to taxicabs, is ambiguous, encourages distortions of revenues and expenses in order to qualify for refunds, and borders on becoming a tax loophole for taxicab owners.

Because of this, the auditing of the refunds are made difficult requiring an auditor with special knowledge of corporate and tax accounting. Even after an audit has been made from a reconciling of documents filed with records available, if an assessment is forthcoming, the assessee has the option of submitting other P & L Statements, any number of times in an effort to qualify his tax refunds. This is expensive and time consuming to the state in that, one or more additional audits must be made to qualify or disqualify the new P & L Statements.

This condition exists because of the wording of the statute. In part, it reads, "the showing of an operating deficit for any continuous six-month period ending during the immediate preceeding two-year period prior to the date of application shall be deemed prima facie evidence of the necessity for such refunds."

This wording not only makes auditing difficult, but encourages accounting principles to be relaxed if not deliberately distorted to reflect a loss in one six-month period at the expense of a gain in the other six-month period.

The wording also established a qualifying period of twenty-nine (29) months for a six-month period of loss. During the period qualified, the profits could be fantastic without affecting the flow of refunds, which in some cases amount to hundreds of thousands of dollars. It is much easier to produce a six-month period of loss within a company's annual fiscal year than to have a legitimate loss for the entire year. One has only to provide for certain expenses to be made in the desired period rather than to expense them in a normal manner.

The remedy for this condition can be substantially corrected by deleting the six-month clause from the statutes and requiring annual statements only, with the provision that they be in conformity with generally accepted accounting principles (GAAP). Also, that U.S. IRS Forms be filed as supporting evidence of a need for the refund, and such forms be on the three listed below which applies to the particular business structure of the applicant. Form 1120-U.S. Corporation Income Tax Return with attached schedules; Form 1165-Partnership Income Tax Return with attached schedules; and Form 1140C-Profit or Loss from Business or Profession and attached schedules.

To remedy further the clarity and effectiveness of the present wording of the statute, certain IRS acceptable alternative methods of accounting for expenses and revenues should be abridged. Such alternatives as deferred executive compensation, accelerated depreciation, bonuses, and others, reduce profits for income tax purposes and should not be used again to return full tax funds.

To accomplish the above, these alternative methods of accounting should be left to the acceptance or rejection of the regulatory agencies administering 58-757,01, as amended.

B. J. Flaskas/nh

B. J. Flaskas

BJF/nh

cc: B. H. Conner
J. B. Burrell

VERN HILL, COMMISSIONER

VEHICLE SERVICES ADMINISTRATOR

J. C. SKELTON

FIELD SERVICES ADMINISTRATOR

R. E. SPRING

DRIVER SERVICES ADMINISTRATOR

R. P. VAN BUREN

MANAGEMENT OPERATIONS ADMINISTRATOR

COMMONWEALTH of VIRGINIA

Division of Motor Vehicles

2220 West Broad Street

MAIL ADDRESS
P. O. BOX 27412
RICHMOND, VIRGINIA 23269

BULLETIN NUMBER 667

DATE: MAY 1975

TO: All Taxicab Services

SUBJECT: Legislation passed by the 1975 General Assembly

1. The 1975 General Assembly passed legislation effective June 1, 1975, that amended the requirement for filing records with application as outlined below:

- (a) Show to the Division of Motor Vehicles that the refund is necessary to the continued operation of the taxicab services and that the taxicab is under honest, economical and efficient management. Evidence of an operating deficit for any continuous six (6) month period ending during the immediately preceding two-year period prior to the date of application shall be deemed prima-facie evidence of the necessity for such refund.

2. A supply of the necessary Form (VGT 32T Rev. 4/75) for application of refund is being furnished for your use to cover purchases of motor fuel made June 1, 1975 and thereafter. Additional forms may be obtained by writing to the Fuels Tax Department of the Division of Motor Vehicles.

B. H. Conner
B. H. Conner, Manager
Fuels Tax Department

REFUND OF FUEL TAXES TO TAXICAB SERVICES

CHAPTER 14.1
SECTION 58-757.01Definition of Taxicab Services

Those services whose majority of passengers use the taxicabs for traveling a distance of not exceeding forty miles measured one way on the same day between their places of abode and their places of work, shopping areas or schools.

Records Required to be Maintained by Applicant

- (1) Quantity and cost of fuel purchased.
- (2) Date of purchase.
- (3) Dealer or retailer from whom fuel was purchased.
- (4) How fuel was used by the applicant.

Consumer Entitled to Refund Shall File Application with Commissioner Accompanied By -

- (1) Paid ticket or invoice from dealer or retailer showing purchase.
 - (a) Application to set forth total amount of fuel purchased and used by such consumer in operation of taxicab services in State.

No Refund will be Granted Unless the Applicant Demonstrates that the Refund is Necessary to the Continued Provision of such Taxicab Services And in the Public Interest Under Honest, Economical And Efficient Management.

- (1) Applicant's financial records or other documents must establish necessity for refund. Example---a loss or profit not exceeding 9% on investment.
 - (a) Federal Tax Returns
 - (b) State Tax Returns
 - (c) Financial Reports
 - (d) Profit and Loss Statement
- (2) Operating deficit for any continuous six month period ending during the immediately two year period to date of application is prima facie evidence of necessity for refund.

Books And Records Shall Be Available For Inspection At All Reasonable Times

- (1) Audits conducted

ARTICLE 1

56-274(2) Excludes taxicabs operating in a city, town or county which has or adopts an ordinance regulating and controlling taxicabs.

Must file insurance or be a self insurer.

ARTICLE 4.1

56-291.1 Requires permit for taxicabs to operate outside corporate limits of incorporated cities or towns except as otherwise provided in 56-274(2).

ARTICLE 4.2

56-291.4 Requires license and payment of license tax from taxicab services.

INSTRUCTIONS--Read Carefully

1. This application must be completed in full.
2. Refunds are granted only for fuel consumed and not for fuel held in storage.
3. You may file an application for refund at any time within three (3) months of the date of purchase, however, no credit will be granted on gallonage carried over from a previous application.
4. Attach invoices to verify the "Total gallons used"--line 1, Table E. Such invoices must show the name of the purchaser, the name of the seller, the number of gallons of fuel purchased, the amount paid, and the date of purchase. Invoices must be filed within three (3) months of the date of purchase.
5. Refunds are granted only to taxicab services who need the refund in order to continue the taxicab service; therefore, you must attach any records that demonstrate that the refund is necessary to the continued provision of such services and in the public interest under honest, economical and efficient management; provided, however, that records showing an operating deficit for any continuous six (6) month period ending during the immediately preceding two-year period prior to the date of application shall be deemed prima facie evidence of the necessity for such refund.
6. The Commissioner may require any additional information at his discretion as indicated in Section 58-757.01 Code of Virginia as amended.

INSTRUCTIONS

1. Print or type your firm's name, address and Employer's Identification Number. (NOTE: If you have not been issued an Employer's Identification Number by the IRS, you may use your social security number. Please use the same number every time you make application for a refund.)
2. Answer questions one through eight (NOTE: Reference question eight; you do not need to be licensed by the Fuels Tax Department to file for a refund).
3. All invoices or tickets supporting your claim must be filed with us **WITHIN THREE MONTHS FROM DATE OF SALE**. The date of postmark will govern the date of filing. The invoices or tickets must show the exact date of purchase and must be marked paid. Invoices or tickets made out to cash are not acceptable for refund. Credit card tickets are acceptable without being marked paid provided they are properly issued and legibly written.
4. Each invoice or ticket should show the date, quantity and amount of each individual delivery. Each invoice should be on the printed billhead of the dealer or if memorandum ticket is issued, it must bear rubber stamp showing name and location of dealer, or be accompanied by tank wagon delivery ticket covering dealer's purchase from his supplier.
5. If you store fuel for both taxi cabs and other vehicles in the same storage tank, attach a detailed statement of each withdrawal for taxi cabs showing the date, gallonage, and the cab in which it was used.
6. Maintain accurate records of all fuel deliveries and disbursements so that they are available at any time for audit by DMV Fuels Tax Department auditors and investigators.
7. Claims supported by altered tickets or invoices will not be paid. Caution: Virginia State Law provides penalties for those who alter invoices/tickets or who otherwise file false or fraudulent applications.
8. Refunds are granted only to those taxi cab services which can demonstrate that the refund is necessary for the continued operation of their business. You must attach any records which demonstrate either of the following:
 - That this refund is necessary for the continued operation of your business under honest, economical and efficient management
 - or
 - That your business has shown an operating deficit for any continuous six-month period within the last two years.
9. Mail this application to:

Division of Motor Vehicles
Fuels Tax Department
P. O. Box 27422
Richmond, Virginia 23269

INSTRUCTIONS

1. Print or type your firm's name, address and Employer's Identification Number. (NOTE: If you have not been issued an Employer's Identification Number by the IRS, you may use your social security number. Please use the same number every time you make application for a refund.)
2. Answer questions one through eight (NOTE: Reference question eight; you do not need to be licensed by the Fuels Tax Department to file for a refund).
3. All invoices or tickets supporting your claim must be filed with us WITHIN THREE MONTHS FROM DATE OF SALE. The date of postmark will govern the date of filing. The invoices or tickets must show the exact date of purchase and must be marked paid. Invoices or tickets made out to cash are not acceptable for refund. Credit card tickets are acceptable without being marked paid provided they are properly issued and legibly written.
4. Each invoice or ticket should show the date, quantity and amount of each individual delivery. Each invoice should be on the printed billhead of the dealer or if memorandum ticket is issued, it must bear rubber stamp showing name and location of dealer, or be accompanied by tank wagon delivery ticket covering dealer's purchase from his supplier.
5. If you store fuel for both taxicabs and other vehicles in the same storage tank, attach a detailed statement of each withdrawal for taxicabs showing the date, gallonage, and the cab in which it was used.
6. Maintain accurate records of all fuel deliveries and disbursements so that they are available at any time for audit by DMV Fuels Tax Department auditors and investigators.
7. Claims supported by altered tickets or invoices will not be paid. Caution: Virginia State Law provides penalties for those who alter invoices/tickets or who otherwise file false or fraudulent applications.
8. Refunds are granted only to those taxicab services which hold a certificate of authority from the State Corporation Commission and which demonstrate that the refund is necessary for the continued operation of their business. You must attach any records which demonstrate either of the following:

That this refund is necessary for the continued operation of your business
under honest, economical and efficient management

or

That your business has shown an operating deficit for any continuous six-month period within the last two years.

9. Mail this application to: Division of Motor Vehicles
Fuels Tax Department
P. O. Box 27422
Richmond, Virginia 23269

FLASKAS REPORT

Filed 8/17/78

L.A.O.

The attached Exhibits A, B, C and D, summarize the discrepancies found during the audit of Black & White Cars, Inc., which was made in the early part of June 1978, and resulted in an assessment dated July 5, 1978 for an amount of \$37,006.20.

The assessment was for that period after December 31, 1976 forward; and was a result of disqualifying the six-month prima facie period of the calendar (fiscal) year that ended December 31, 1976. It was further found that the annual report also disqualified because it was a profitable year in excess of the 9% allowed.

The state auditors also investigated the possibility of qualifying the period by using the fiscal year 1977, but profits of that year were far in excess of that allowed and executive compensation and other items were similar to that found in the fiscal year 1976.

At the end of the various exhibits attached there is a summary statement of net earnings, cash dividends, and stock dividends paid to the owners during the period for which refunds were being filed and paid. In each of these years there was a respectable profit realized.

EXHIBIT "A" EXECUTIVE COMPENSATION

1. SALARIES AND/OR BONUSES OF OWNERS, LEWIS A. ODEN AND LEONARD O. ODEN.
2. COPY 1978 SCHEDULE OF C.P.A. BY THE RESEARCH INSTITUTE OF AMERICA, INC.
3. LETTER FROM McPHILLIPS, LELAND & MILLER, C.P.A. NORFOLK, VA. REFLECTING EXECUTIVE COMPENSATIONS FOR YEAR NOT AUDITED.

NOTE:

This exhibit would disqualify period on its own.

1. SALARIES AND/OR BONUSES OF OWNERS, LEWIS A. ODEN, PRESIDENT AND LEONARD O. ODEN, VICE PRESIDENT FROM 1972 (YEAR PRIOR TO 1973 PRIMA-FI EVIDENCE COULD BE DEMONSTRATED) AND 1976, THE YEAR PROFIT AND LOSS STATEMENTS WERE REJECTED.

	LEWIS M. ODEN	INCREASE %	LEONARD O. ODEN	INCREASE %	C.P. RISE %
					*
1972	25,140	BASE	18,900	BASE	
1973	34,440	+37%	26,500	+40%	9%
1974	36,495	+45%	27,325	+46%	13%
1975	55,343	+120%	44,200	+134%	10%
1976	56,869	+126%	45,050	+138%	6%

* 1978 THE RESEARCH INSTITUTE OF AMERICA, INC.

(A COPY WAS GIVEN TO THE AUDITOR BY MR.

J.V. MCPHILLIPS, CPA FOR BLACK & WHITE CARBON INC.)

NOTE: SALARIES WERE TAKEN FROM BLACK & WHITE ACCOUNTING RECORDS AND VERIFIED WITH C.P.A.

Consumer Price Index may help closely-held corporations show their compensation deductions are "reasonable"

The Internal Revenue Service often disputes the reasonableness of compensation paid by a closely-held corporation to its stockholder-employees. But the company may be able to avoid a disallowance of some of its compensation payments just on the basis of the steady

pace of inflation over the past eleven years. The Consumer Price Index can be of assistance in helping you to make your point.

Suppose, for example, that an Internal Revenue Service agent previously accepted as reasonable a \$60,000 deduction by X company for salary paid to Mr. A in

Copyright 1978 by The Research Institute of America, Inc.

73 But an \$80,000 deduction for salary paid to A in '77 runs into an IRS contention that the 33 1/3% increase is unjustified because A's total salary is too high, his work hasn't increased, X's added profits aren't due to his efforts, etc. It could be helpful to point out that A's increase hasn't done much more than keep pace with inflation. In fact, on the basis of the Consumer Price Index changes indicated in the table at the right, the company would have to increase A's '73 salary by 36% in '77 just to match his before-tax salary in '73.

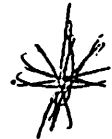
The following chart shows the percentage increase of the Consumer Price Index for '77 over each of the earlier years. Thus, prices increased 74% from '68 to '77, 45% from '72 to '77, 23% from '74 to '77, etc.

Year	% Change from earlier year to '77
'67	81.6
'68	74.0
'69	65.0
'70	56.0
'71	49.7
'72	45.0
'73	36.0
'74	23.0
'75	13.0
'76	6.5
'77	0

970 - 1975 only
1370 - 1974 "
1070 - 1975 "
6.540 - 1974 "

RIA OBSERVATION:

If the IRS has accepted as reasonable a salary for, say, '74, the '77 equivalent would require a salary equal to 123% of the '74 one.



The most common measure of the general price level are the Consumer Price Index (CPI), the Wholesale Price Index (WPI), and the Gross National Product Implicit Price Deflator (GNPIPD). The GNPIPD is the most comprehensive index and is widely accepted as the best measure of general price level.

3, McPHILLIPS, LIELAND & MILLER

CERTIFIED PUBLIC ACCOUNTANTS

740 DUKE STREET

BOX 1180

NORFOLK, VIRGINIA 23501

(804) 623-5870

J. VINCENT McPHILLIPS

EDWARD L. LIELAND, JR.

DENNIS R. DEANE

GRAYSON B. MILLER (DIE-1976)

MEMBERS
AMERICAN INSTITUTE OF CERTIFIED
PUBLIC ACCOUNTANTS
VIRGINIA SOCIETY OF CERTIFIED
PUBLIC ACCOUNTANTS

May 12, 1978

Mr. B. J. Flaskas, Auditor
Fuels Tax Department
Division of Motor Vehicles
P. O. Box 27412
Richmond, Virginia 23269

Dear Mr. Flaskas:

Re: Black & White Cars, Inc.

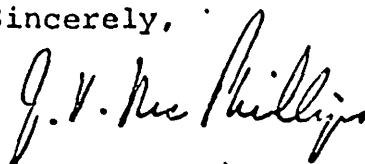
This is responding to your request for information with respect the reasonableness of the executive compensation for 1974 paid to Louis M. Oden, President and Leonard O. Oden, Vice-President.

The compensation paid and reported to the I.R.S. in the Corporation U.S. Income Tax Returns for 1972, 1973, and 1974 was:

	<u>Louis M. Oden</u>	<u>Leonard O. Oden</u>
1972	\$25,140	\$18,900
1973	34,440	26,500
1974	(36,495	27,325

If you need any further information, please get in touch.

Sincerely,



JVM:slw

EXHIBIT "B" EXPENSES.

SOME EXPENSE ITEMS DO NOT
 APPEAR TO CONFORM TO GENERALLY ACCEPTED
ACCOUNTING PRINCIPLES RELATING TO THE
MATCHING OF REVENUES WITH EXPENSES.

1. COST OF TRANSPORTATION EXPENSES.

2. SCHEDULE OF ADMINISTRATIVE
 EXPENSES

3. ALLOCATION OF EXPENSES USING 50%
 OF YEARLY TOTALS FOR EACH 6 MONTH
 PERIOD.

NOTE:

This exhibit would deservably period on its own.

X.B. 1. COST OF TRANSPORTATION EXPENSES DURING THE 6 MONTHS PRIMA-FACIE PERIOD IN COMPARISON WITH THE 6 MONTHS PERIOD THAT WAS NOT USED DURING THE ACCOUNTING YEAR THAT WAS DISQUALIFIED.

	PRIMA FACIE PERCENT JULY/DEC. <u>1976</u>	OF TOTAL <u>YEAR.</u>	OTHER 6 MONTH <u>PERIOD</u>	PERCENT OF TOTAL <u>YEAR</u>
INSURANCE & FLEET SAFETY	\$ 63,516	7890	\$ 17,659	2290

B. 2. SCHEDULE OF ADMINISTRATIVE EXPENSES DURING THE SIX MONTH PRIMA-FACIE PERIOD IN COMPARISON WITH THE SIX MONTH PERIOD THAT WAS NOT USED DURING THE ACCOUNTING YEAR THAT WAS DISQUALIFIED.

	PRIMA-FACIE PERCENT JULY/DEC. <u>1976</u>	OF TOTAL <u>YEAR</u>	OTHER 6 MONTH <u>PERIOD</u>	PERCENT OF TOTAL <u>YEAR</u>
ADVERTISING	3577	65%	1915	35%
DEPRECIATION				
OFFICE FURNITURE	1700	91%	167	9%
GROUP INSURANCE	1635	100%	- 0 -	- 0 -
PENSION FUND	13000	100%	- 0 -	- 0 -
TAXES & LICENSES	1617	77%	480	23%
TRAVEL	1038	72%	396	28%
SALARIES & WAGES	74,508	55%	60,259	45%

THE ABOVE WERE TAKEN FROM THE PROFIT & LOSS STATEMENTS FOR 6 MONTH PERIOD AND ANNUAL PERIOD.

IT IS TO BE NOTED THAT ANNUAL STATEMENTS WERE NOT FILED WITH THE D.M.V., ONLY 6 MONTH STATEMENTS WERE FILED.

B. B-3. ALLOCATION OF EXPENSES USING 50% OF
YEARLY TOTALS FOR EACH 6 MONTH PERIOD

	YEARLY AMOUNTS	50%	PRIMA-FACIE PERIOD OVERSTATE
INSURANCE & FLEET SAFETY	81,175	40,588	22,929
ADVERTISING	5,492	2,746	831
DEPRECIATION } OFFICE FURN. }	1,867	933	767
GROUP INS.	1,635	818	818
PENSION FUND.	13,000	6,500	6,500
TAXES & LIC.	2,097	1,049	569
TRAVEL	1,434	717	321
AD SALARIES } WAGES }	134,767	67,384	71,25
	<u>241,467</u>	<u>120,735</u>	<u>39,260</u>

THE PRIMA-FACIE PERIOD OVERSTATEMENT IS FOR
ITS WEIGHTED DIFFERENCE TO 50% OF ANNUAL FIGURES,

EXHIBIT C

1. JULY 1974 REFUNDS DISSALLOWANCE
EXPLAINED.

1. DMV Refund # 1091999 dated 9/17/74 was disallowed because the invoices of that refund were all dated in July 1974 and the qualifying Prima-facie period was July 1974 to December 1974. Since prima-facie evidence covers periods extending back five months from the end of the period, the month of July is the sixth month back and therefore is not covered.

EXHIBIT D ANNUAL P+L STATEMENT

1. AVERAGE YEAR'S INVESTMENT
2. ALLOWABLE PROFIT

1. AVERAGE YEAR'S INVESTMENT 1976?

BEGINNING OF YEAR 312,205.13

ENDING OF YEAR 305,063.85

617,268.98

AVERAGE 308,634.49

2. ALLOWABLE PROFIT @ 9% .09

ALLOWABLE AMOUNT BEFORE INTEREST \$ 27,777.

10% = 30,863.45

PROFIT REPORTED ON ANNUAL \$ 26,200.10

ADD BACK INTEREST EXPENSE 4,276.27

PROFIT w/ INTEREST 30,476.37

AMOUNT OVER ALLOWABLE PROFIT \$ 2,699

THIS SCHEDULE SHOWS THAT THE YEAR
TAKEN AS A WHOLE WOULD NOT HAVE QUALIFIED
THE PERIOD EITHER.

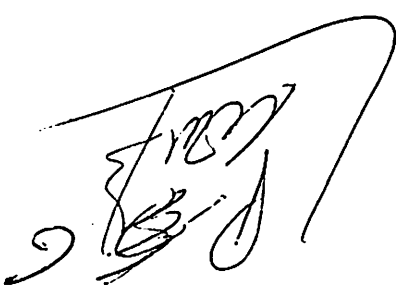
Exhibit P-5

		Net	CASH	STOCK DIV	Retained	
		Earnings	DIV. PAID	OR OTHER	Earnings	EXECUTIVE
				DISPENSING		COMPENSATION
1973	YEARS ENDING DEC. 31				71,781.23	60,940.00
1974	" " "	23,608.90	(4,000.00)	- 0	91,390.13	63,820.00
1975	" " "	16,190.13	0	- 0	107,580.93	99,543.00
1976	" " "	* 26,200.10	(4,400.00)	- 0	129,381.03	101,919.00
* AFTER PAYMENT OF \$ 7,953.42 INCOME TAX AFTER \$1,540.27 REDUCTION FOR INVESTMENT TAX CREDIT						
1977	YEARS ENDING DEC. 31	43,745.06	(5,500.00)	(25,000.00)	142,626.09	?

The above is a summary of years from 1973 to 1977 of the annual results of the Black & White Cars, Inc. As to net earnings and retained earnings. Please note that retained earnings were good enough to declare dividends in 1974, 1976 and 1977 as well as a stock dividend in 1977 that consumed retained earnings.

This Company (Personnel, etc) appears to be
 owned by Edward W. O'Brien. Although Mr. O'Brien
 is V. President, he does not appear to own any of
 the stock. His salary is very modest and
 was told the same the manager. Virginia O'Brien
 is the wife of Edward W. O'Brien. Notice that he
 was receiving salary through 1st half of 1975
 then the stopped out & his wife would in. The
 \$3500 Officer Bonus in a Regal 105 Krophoff, 2600

Mr. Foley



It 3500 is expensed against the company in 1976
-but paid to the recipient in 1977. A beautiful
way to reduce net profit. Should not be
acceptable by Dmv relative gas tax refunds.

Buster Hixson

Exhibit P-7
DIVISION OF MOTOR VEHICLES

INTERDEPARTMENTAL CORRESPONDENCE

DATE: May 14, 1976

To: E. P. Beverley
M. H. Guthrie, Jr.

FROM: B. H. Conner

SUBJECT: AUDIT OF TAXICAB REFUNDS

Upon examination of Financial Statement, Federal and/or State Income Tax Returns, secure a breakdown of salaries as follows:

- (1) Amount paid to employees.
- (2) Amount paid to officers of corporation.
- (3) Amount paid to owners.

Overstatement of salaries, especially to officers of a corporation or owners, could result in the company showing a deficit and thereby qualifying for the taxicab refund. If such occurs, assessment is to be made for any claims incorrectly paid.

B H Conner
B. H. Conner, Manager
Fuels Tax Department

BHC/jm

RFB → All other men have copy!



FACT SHEET

Hay Associates
Management Consultants

1845 Walnut Street, Philadelphia, Pa. 19103 • (215) 561-7000

JANUARY, 1977

Hay Associates has been in continuous operation since its founding in Philadelphia in 1943. The firm has been a member of the Association of Consulting Management Engineers (ACME) since 1951.

Services: Hay functions as a consultant to management in all areas of managing human resources including compensation, incentives and employee benefits; business strategy; corporate organization and planning; manpower appraisal and development; planning and building of personal estates; educational technology; marketing; communications; personnel management information systems; EEO Compliance; general management; and computer technology.

Location: From its headquarters in Philadelphia, the firm offers worldwide service through its network of 37 offices in 17 countries (shown with dates of establishment):

Toronto, Canada (1960)
London, England (1963)
San Francisco, California (1964)
Paris, France (1967)
Melbourne, Australia (1967)
Dallas, Texas (1967)
Mexico City, Mexico (1968)
Chicago, Illinois (1968)
Washington, D.C. (1969)
Montreal, Canada (1969)
Dublin, Ireland (1969)
Boston, Massachusetts (1970)
Milan, Italy (1970)
Frankfurt, Germany (1970)
Pittsburgh, Pennsylvania (1972)
Sydney, Australia (1972)
Madrid, Spain (1972)
Atlanta, Georgia (1972)
Utrecht, The Netherlands (1973)
Los Angeles, California (1973)
Caracas, Venezuela (1974)
New York, New York (1974)
Rio de Janeiro, Brazil (1974)
Helsinki, Finland (1974)
Manchester, England (1974)
Wellington, New Zealand (1974)
Seattle, Washington (1974)
Vancouver, British Columbia (1974)
Edinburgh, Scotland (1975)
Kansas City, Missouri (1975)
São Paulo, Brazil (1975)
Bogotá, Colombia (1975)
Brussels, Belgium (1976)
Barcelona, Spain (1976)
Auckland, New Zealand (1976)
Monterrey, Mexico (1977)

Affiliate:

Huggins & Company, Inc. (1974)

Size: Hay is among the three largest consulting firms in ACME. The staff includes approximately 375 full-time professionals and 275 technical and support employees.

Clients: Hay Associates has counseled approximately 4,500 clients of all sizes and businesses throughout the Western world. The diversity of these industries and institutions is indicated by this representative listing of prominent clients:

Chemical and Drug: Bayer, Chesebrough-Pond's, Inc., Ciba-Geigy, Dow Chemical, E.I. duPont, ICI, Merck, Parke-Davis, Union Carbide, Upjohn.

Construction: Ciments Lafarge, Dragados y Construcciones, Dravo.

Education: Brigham Young University, Delta College, Public Schools of Wellesley, Mass, Rutgers University, School District of Philadelphia, The University of North Carolina, Tufts University, University of Pennsylvania Dental School, University of Toronto, University System of Georgia.

Financial: Banco Central de la Republica Dominicana, Bank of Nova Scotia, Chase Manhattan, First National of Boston, First National of Chicago, First Pennsylvania, Grupo Financiero del Atlantico, Harris Bank, Investors Diversified Services, Mellon Bank, National Bank of Detroit, Royal Bank of Scotland, Seattle-First National, Security Pacific, Society for Savings, Toronto-Dominion Bank.

Foods: CFS Continental, Inc., Coca Cola de Mexico, General Foods, General Mills, Green Giant, H.J. Heinz, Hunt Wesson, International Multifoods, Nestle, Pepsico, Pillsbury, Quaker Oats, Reynolds Industries, Thomas J. Lipton, Wm. Wrigley Jr.

Government: Cities of Boston, Dallas, Palo Alto, Philadelphia; Commonwealth of Pennsylvania; Department of Labor; Dutch State Mines; HEW/HUD; States of Connecticut, Delaware, Illinois, Minnesota, New Jersey, Vermont; U.S. Postal Service; Veterans Administration.

Industrial: A.B. Dick, Alcan Aluminum, Alcoa, Armco Steel, Armstrong Cork, Bethlehem Steel, Borg-Warner, Caterpillar Tractor, Cutler-Hammer, General Electric, Honeywell, IBM, ICI Ltd., Inland Steel, International Harvester, McQuay-Perfex, Inc., NCR, Rockwell International, SCM Corporation, SKF Industries, Sperry Rand, Studebaker-Worthington, Texas Instruments, United States Gypsum, U.S. Steel, Western Electric, Xerox.

Insurance: Blue Cross Association, Massachusetts Mutual Life, Metropolitan Life, Mutual Benefit Life, Northwestern Mutual Life, Ohio National Life, Provident Life and Accident, St. Paul Companies.

Media: American Broadcasting Company, Booth Newspapers, Landmark Communications, Macmillan, McGraw-Hill.

Medicine: Good Samaritan Hospital, Hartford Hospital, Hospital Council of Western Pennsylvania, Mayo Foundation, Miami Valley Hospital, Ontario Hospital Association, The Pennsylvania Medical Society, Presbyterian-University Hospital.

Mining: Anaconda, Broken Hill Proprietary, Falconbridge, International Nickel, Kennecott Copper, LeNickel, Penarroya, Rio Tinto-Zinc.

Hay Locations

Paper: Kimberly-Clark, Mead Corporation, Scott Paper.

Petroleum: Amerada Hess, Ashland Oil, Exxon, Getty Oil, Gulf Oil, Royal Dutch Shell Group, Standard Oil (Indiana), Sun Co., Inc.

Research: Bell Laboratories, M.W. Kellogg, Los Alamos Scientific Laboratories, Sandia Corporation.

Retail: American Retail Federation, Kroger's, May Company, Montgomery Ward, Sears Roebuck & Co., Sperry & Hutchinson, Steinberg's Limited, F.W. Woolworth.

Service: Episcopal Diocese of Pennsylvania, Girl Scouts of the U.S.A., International Wool Secretariat, Southern Baptist Convention, United Methodist Church, United Presbyterian Church in the U.S.A.

Transportation: Air New Zealand, Alitalia, British Rail, Conrail, Consolidated Freightways, Norfolk & Western, Pullman, Qantas, Southern Airways, Southern Railway, Union Pacific.

Utilities: American Telephone & Telegraph, Columbia Gas System, Detroit Edison, Duke Power, Florida Power & Light, Georgia Power, Gulf States Utilities, Northern Natural Gas, Texas Gas Transmission.

A more complete list of Hay worldwide clients appears in the corporate report.

Of the largest corporations as listed in the 1975 Fortune Directory:

- 130 of our clients are among the 500 largest U.S. industrials;
- 18 of our clients are among the 50 largest commercial banks (including three of the first five: Citibank, Chase Manhattan, Manufacturers Hanover);
- 19 of our clients are among the 50 largest life insurance firms.

Hay Associates

1845 Walnut Street • Philadelphia, Pennsylvania 19103
57 Executive Park South, N.E. • Atlanta, Georgia 30329
1621-114th Avenue, S.E., Suite 122 • Bellevue, Washington 98004
One Boston Place • Boston, Massachusetts 02108
One East Wacker Drive • Chicago, Illinois 60601
12700 Park Central Place, Suite 1211 • Dallas, Texas 75251
Crown Center Suite G20 • 2420 Pershing Road • Kansas City, Missouri 64108
3435 Wilshire Boulevard • Los Angeles, California 90010
One Dag Hammarskjold Plaza • New York, New York 10017
3 Gateway Center • Pittsburgh, Pennsylvania 15222
One Maritime Plaza • San Francisco, California 94111
1625 "I" Street, N.W. Suite 512 • Washington, D.C. 20006
Huggins & Company, Inc. • 1401 Walnut Street, Philadelphia, Pa. 19102
Pensurdata, Inc. • 1401 Walnut Street, Philadelphia, Pa. 19102
Research for Management • 1845 Walnut Street, Philadelphia, Pa. 19103

Hay France

37, rue de Courcelles • 75008 Paris, France

Hay Italiana S.p.A.

Corso di Porta Nuova, 13/15 • 20121 Milano, Italy

Hay Iberica, S.A.

Francisco Suarez, 14 • Madrid 16, Spain
Travesera de Gracia, 62-5a-7a • Barcelona 6, Spain

Hay-MSL Limited

1 Great Cumberland Place • London W1H7AL, England
Sunley Buildings, Piccadilly Plaza • Manchester M60 7JT, England
37 George Street • Edinburgh, Scotland EH2 2HN
49 Mount Street • Dublin 2, Ireland

Hay Associates (Belgium)

Avenue Louise 341 • 1050 Brussels, Belgium

Suomen Hay Oy

Ulappasaarentie 4 • 00980 Helsinki 98, Finland

Hay Unternehmensberatung GmbH

Hay Unternehmensberatung GmbH, Liebigstrasse 20 • D-6000 Frankfurt am Main, Germany

Hay Associates (Netherlands Branch)

Winthontlaan 4, Utrecht • The Netherlands

Hay y Asociados, S.A. de C.V.

Insurgentes Sur 1216—7° Piso • Mexico 12, D.F.

Hay do Brasil Consultores, S.A.

Rua do Ouvidor, 75-4° • Caixa Postal 1613, 20.000 Rio de Janeiro, RJ, Brazil
Rua Jerônimo da Veiga, 428-10° andar • Caixa Postal 22229 • 01000 São Paulo, S.P., Brazil

Hay y Asociados Consultores Dirección S.A.

Centro Plaza B, 15G, Los Palos Grandes, Apartado 50-424 • Caracas 105, Venezuela

Hay de Colombia

Avenida 40A, N° 13-09, Edificio UGI, Piso 18 • Bogotá, Colombia

Hay Associates Canada Limited

2 Place Ville Marie, Suite 541 • Montreal, P.Q. H3B 2C9, Canada
P.O. Box 13, Toronto-Dominion Centre • Toronto, Ontario, M5K 1A1, Canada
P.O. Box 49173, The Bentall Centre • Vancouver, B.C., V7X 1K8, Canada

Hay Associates (Australasia) Ltd.

60 Albert Road • South Melbourne, Victoria 3205, Australia
213-219 Miller Street • North Sydney, New South Wales 2060, Australia
175 The Terrace • Wellington 1, New Zealand
41 Pearn Crescent • Northcote, Auckland 9, New Zealand

P10-2211/3

Lee R. Johnston
8 Georgetown Green
Charlottesville, Va. 22901

Born: ~~January 21, 1923~~
Duluth, Minnesota
Married, three children

PROFESSIONAL EXPERIENCE

Higher Education in United States

1955 to present, University of Virginia, Colgate Darden Graduate School of Business Administration. Assistant Professor, Associate Professor, Professor.

Member of founding faculty which initiated, developed, and established the MBA degree program.

Chairman of the Doctoral Program Planning Committee and first Director of the DBA degree program.

Primary teaching areas in MBA degree program; Business Finance, Financial Management, Investment Analysis, Portfolio Management, Management of Small Enterprises.

Primary teaching areas in DBA degree program; Seminars in Higher Education and Pedagogy, Research Methodology (non-quantitative aspects), and Financial Theory (major field seminar).

1953-1955, University of Kansas, School of Business Administration, Assistant Professor.

1952-1953, Harvard University, Harvard Business School, Research Assistant.

Higher Education Abroad

1974-1976, North European Management Institute, Oslo, Norway; Visiting Professor, Chairman of the Faculty (1975-76), and Resident Advisor to the Managing Director. Also, Visiting Professor, Finnish Management Institute, Helsinki, Finland.

1971 (ten weeks), University of Witwatersrand Graduate School of Business Administration, Johannesburg, South Africa. Resident Advisor and Consultant to a newly established graduate business school offering a two year MBA degree program.

Research and Publications

1952 to Present. Teaching materials: Various teaching notes and case studies prepared for courses and published internally by Harvard Business School; School of Business Administration, University of Kansas; Graduate Business School, University of Virginia, and North European Management Institute. Also, various working papers and memoranda prepared for internal use concerning administrative policies and procedures, academic programs and planning, etc. at Graduate Business School, University of Virginia; Graduate Business School, University of Witwatersrand; and North European Management Institute, Oslo, Norway.

Management Training Programs and Consulting

1955 to present, Developed, directed and/or participated in various University, industry, and company sponsored management training programs, short courses, and seminars. Also have been retained on various occasions by business firms, typically of small to medium size, as financial advisor, consultant or director.

Business

1949-1950, Crown Zellerbach Corporation, West Linn, Oregon, Cost and General Accountant.

1947-1948, State Board of Higher Education, Corvallis, Oregon, Cost Accountant (part-time).

1941-1942, Northwestern State Bank, Duluth, Minnesota, Bank Teller.

1940-1941, Brander's Music Store, Duluth, Minnesota, retail store clerk.

Also have held a variety of part-time and seasonal jobs during the periods, 1938-1942 and 1946-1952.

Formal Education

D.C.S. (1966) Harvard University

M.B.A. (1952) Harvard University

B.S. (1949) Oregon State University

Also attended Carleton College, University of Minnesota, and Duluth Junior College.

Military Service

1943-1946, Army of the United States

First Lt. Corps of Engineers

Second Lt. Quartermaster Corps

Overseas service, Hawaii, Leyte, Okinawa, Korea

Military specializations: Platoon Leader, Company Commander, Battalion Motor Pool Officer, Battalion Intelligence Officer Engineer Combat Battalion, Military Government (Korean Civil Service).

February 13, 1978

B.H. Conner

Joe B. Burrell

Administrative Decisions relating to Taxicab's audits and refund eligibility.

In order to effectively administer Section 58-757.01 relating to Taxicab companies, we must define certain terms not heretofore specifically defined in the code or by precedent.

It is proposed that the following terms be addressed in the manner shown:

1. Investment and return on investment.

A previous court case (Blue and White Taxicab Company) established the fact that a company is entitled to a 9% return on investment. A business loss, or a gain resulting in a return on investment of less than 9%, would entitle the company to refund of gasoline taxes on fuel (provided of course that the other requirements were met).

However, the court did not define investment. The following definition is proposed:

Investment is the average of the assets at the beginning of any accounting period and the assets at the end of that accounting period.

The following formula for determining return on investment is proposed:

$$\text{Return} = \frac{\text{Net income (after taxes)} + \text{interest expense}}{\text{investment (as defined)}}$$

2. Reasonable Salaries - In order to determine the propriety of net income (or loss) one of the factors to consider would be the salaries paid to company employees, or more particularly, salaries paid to owners or stockholders.

It would be quite easy, for instance, to drastically inflate the amount paid to oneself as the owner of a business.

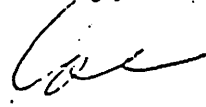
Sidney Andrews researched the matter at some length, and found that apparently no guidelines exist as to reasonable salaries for taxicabs operations, or for that matter any other types of business. Further, Sid could not even find a source of average salaries.

Consequently the following is proposed:

During the course of field audits of taxicab operations, we will develop a chart of salaries paid to officers and others through review of P & L statements, and other records, judiciously and tactfully of course, with the end in mind of determining good average figures.

Obviously, even after the establishment of an average, leeway in both directions must be allowed and sound, reasonable judgement must prevail. Until such a list is developed, we can only use good judgement in particular situations. The tax audit supervisor will be involved in the decision making in questionable cases.

Sincerely,


Joe B. Burrell
Fuels Tax Department

JBB/rhc

cc: William Purks
Duster Flaskas
Sidney Adreus

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P-12
C.M.F.

February 14, 1978

L.H. Conner

Joe E. Burrell

Refunds to Taxicab companies under Section 58-757.01

The proposal has been made to establish a register of Taxicab Companies which would indicate their eligibility for refunds under Section 58-757.01. The procedures could be as follows:

1. Receipt of the initial refund application would cause the audit supervisor to review any Profit and Loss Statements (P&L) or Federal Tax Return submitted with the application. If the P&L or Tax Statement met the test (see below) then the refund would be certified by the tax audit supervisor and an entry in the register would be made indicating the period of eligibility. The refund would be made by the refund section.

2. If the P&L or Tax Statement did not meet the test, then the refund would not be certified and the refund section would write the applicant accordingly.

3. Once the applicant became eligible for a refund (and was placed in our register) then any subsequent claims would be checked against the register by the refund section as those claims come in.

4. The register would be updated by the tax audit supervisor with any subsequent P&L or Tax Statements obtained during annual audit or sent in with refund applications.

The test for eligibility and entry into the register, must be applied in two parts:

1. If six months P&L statements are available, a loss shown thereon would make the applicant eligible for a period of 29 months. For example,
A six month P&L for period January 1, 1978 - June 30, 1978:

February 1, 1978 July 1, 1978 June 30, 1980

2. A twelve month P&L or Federal Tax Statement showing a loss would make the applicant eligible for refund for twelve months following the ending statement date. For example,
A P&L for period June 1, 1977 - June 30, 1978:

July 1, 1978 June 30, 1979

Note that in both cases we must also apply the 9% return on investment allowance, so that even a gain may not necessarily make the applicant ineligible for refund.

Note also that we have the right to examine the records of the Taxicabs companies to determine the propriety of any P&L statement if there are questionable items.

Sincerely,



Joe B. Burrell
Fuels Tax Department

JBB/rhc

cc: William Purks
Sidney Andrews
Buster Flaskas

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P
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P.H.O.
adB

BLACK AND WHITE CARS, INCORPORATED

FINANCIAL STATEMENTS

for the six months ended December 31, 1976

(Unaudited)

McPHILLIPS, LIELAND & MILLER

CERTIFIED PUBLIC ACCOUNTANTS

C O N T E N T S

	<u>Pages</u>
Accountants' Report	1
Financial Statements:	
Balance Sheet	2
Statement of Income and Retained Earnings	3
Statement of Changes in Financial Position	4
Cost of Transportation	5
Schedule of Administrative Expenses	6
Notes to Financial Statements	7

McPHILLIPS, LIELAND & MILLER

CERTIFIED PUBLIC ACCOUNTANTS

740 DUKE STREET

BOX 1180

NORFOLK, VIRGINIA 23501

(804) 623-5870

J. VINCENT McPHILLIPS

EDWARD L. LIELAND, JR.

DENNIS R. DEANS

GRAYSON B. MILLER (1915-1975)

MEMBERS

AMERICAN INSTITUTE OF CERTIFIED
PUBLIC ACCOUNTANTS

VIRGINIA SOCIETY OF CERTIFIED
PUBLIC ACCOUNTANTS

To the Board of Directors of
Black and White Cars, Incorporated:

The interim financial statements for the period July 1, 1976 to December 31, 1976 of Black and White Cars, Incorporated included in this report have been prepared from the books and records of the Corporation without audit and we express no opinion on them.

McPhillips, Lieland & Miller

March 15, 1977

BLACK AND WHITE CARS, INCORPORATED

BALANCE SHEET, December 31, 1976

(Unaudited)

 ASSETS

Current assets:

Cash		\$ 21,274.23
Accounts receivable:		
Trade	\$ 16,103.81	
Employees	<u>2,556.65</u>	18,660.46
Inventory of supplies (Note 1)		7,531.75
Prepaid expenses		<u>108,613.63</u>
Total current assets		156,080.07

Equipment, at cost (Notes 1 and 2):

Taxicabs and service vehicles	260,223.34	
Accessories and equipment	59,666.55	
Shop equipment	2,530.67	
Furniture and fixtures	<u>5,891.49</u>	
	328,312.05	
Less accumulated depreciation	<u>230,780.29</u>	97,531.76

Other assets:

Cash surrender value of officer's life insurance, net of \$4,373.16 policy loan	16,838.78	
Goodwill	4,531.77	
Permits	36,980.00	
Organization costs	<u>242.75</u>	58,593.30
		<u>\$312,205.13</u>

LIABILITIES AND STOCKHOLDERS' EQUITY

Current liabilities:

Note payable - bank		\$ 74,958.17
Notes payable - other		10,304.20
Accounts payable:		
Trade	\$ 51,005.84	
Employees' payroll deductions	<u>13,821.76</u>	64,827.60
Accrued expenses:		
Salaries	19,606.99	
Income taxes (Note 1)	4,373.42	
Payroll taxes	<u>1,253.72</u>	<u>25,234.13</u>
Total current liabilities		175,324.10

Stockholders' equity:

Capital stock, \$25 par value:		
Authorized: 100 shares		
Issued and outstanding: 100 shares	2,500.00	
Paid-in capital	5,000.00	
Retained earnings	<u>129,381.03</u>	136,881.03

\$312,205.13

The accompanying notes are an integral
part of the financial statements.

Exhibit P-14

STATEMENT OF INCOME AND RETAINED EARNINGS

for the six months ended December 31, 1976

(Unaudited)

Revenue - passenger fares		\$727,537.30
Cost of transportation		<u>639,595.47</u>
Gross profit		87,941.83
Administrative expenses		<u>117,464.68</u>
Loss from operations		29,522.85
Other income:		
Sundry	\$ 645.00	
Gain on sale of equipment	<u>300.00</u>	<u>945.00</u>
		28,577.85
Other deductions:		
Interest	1,610.24	
Officer's life insurance expense	<u>1,958.34</u>	<u>3,568.58</u>
Loss before income taxes		<u>32,146.43</u>
Income taxes (reduction)		<u>(12,062.24)</u>
Net loss		20,084.19
Retained earnings, July 1, 1976		<u>153,865.22</u>
		133,781.03
Less: Dividends paid		<u>4,400.00</u>
Retained earnings, December 31, 1976		<u>\$129,381.03</u>
Loss per share of outstanding capital stock		<u>\$200.84</u>
Dividends per share of outstanding capital stock		<u>\$44.00</u>

The accompanying notes are an integral part of the financial statements.

STATEMENT OF CHANGES IN FINANCIAL POSITION

for the six months ended December 31, 1976

(Unaudited)

Financial resources were provided by:

Operations:

Net loss	\$ 20,084.19
Less depreciation expense not requiring outlay of working capital in current period (Note 1)	<u>36,357.20</u>
Total from operations	16,273.01

Other sources:

Decrease in cash surrender value of officer's life insurance	243.86
Book value of equipment disposed of	<u>3,435.02</u>
Total financial resources provided	19,951.89

Financial resources were applied to:

Payment of dividends	\$ 4,400.00
Purchase of equipment	30,410.54
Decrease in long-term debt	<u>1,333.10</u>

Total financial resources applied	<u>36,143.64</u>
-----------------------------------	------------------

Decrease in working capital	<u>\$ 16,191.75</u>
-----------------------------	---------------------

Changes in components of working capital:

Current assets, increase (decrease):

Cash	3,604.34
Accounts receivable	6,016.21
Inventory	385.55
Prepaid expenses	<u>75,568.54</u>
	<u>85,574.64</u>

Current liabilities, increase (decrease):

Current maturities of long-term debt	(16,000.08)
Notes payable - bank	66,788.50
Notes payable - other	10,304.20
Accounts payable	36,390.72
Accrued expenses	<u>4,283.05</u>
	<u>101,766.39</u>

Decrease in working capital	<u>\$ 16,191.75</u>
-----------------------------	---------------------

The accompanying notes are an integral part of the financial statements.

Exhibit P-14

COST OF TRANSPORTATION

for the six months ended December 31, 1976

(Unaudited)

Depreciation (Note 1)	\$ 34,657.35
Gas, oil and grease	70,897.96
Insurance and fleet safety	63,515.92
Licenses and payroll taxes	29,748.52 ✓
Rent	11,236.14
Repair parts and services	40,489.13
Tires and tubes	11,614.10
Uniforms	226.19
Wages	<u>377,210.16</u>
	<u>\$639,595.47</u>

The accompanying notes are an integral
part of the financial statements.

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SCHEDULE OF ADMINISTRATIVE EXPENSES

for the six months ended December 31, 1976

(Unaudited)

Advertising	\$ 3,577.08
Bank charges	11.44 /
Depreciation (Note 1)	1,699.85
Dues and subscriptions	358.38
Freight	20.10 /
Heat, lights and water	3,043.11
Insurance - group	1,635.12 /
Legal and accounting	3,978.87
Maintenance - building and grounds	1,007.14
Miscellaneous	2,920.75
Postage, stationery and printing	2,201.03
Pension fund	13,000.00 /
Promotions	653.58
Salaries	74,508.46
Supplies	1,020.31
Taxes and licenses	1,617.30
Telephone and telegraph	5,173.64
Travel	<u>1,038.52</u>
	<u>\$117,464.68</u>

The accompanying notes are an integral
part of the financial statements.

NOTES TO FINANCIAL STATEMENTS

(Unaudited)

1. Summary of Significant Accounting Policies:

General:

The primary source of revenue is passenger fares from transportation furnished through the operation of a fleet of taxicabs. Revenue is recorded daily as services are furnished and expenses are recorded as incurred.

Inventory:

Supplies are valued at the lower of cost (most recent acquisition cost, which approximates first-in, first-out) or market.

Depreciation:

Depreciation is computed by the straight-line and declining-balance methods based on the estimated useful lives of the plant and equipment.

Income Taxes:

Federal income tax expense has been reduced by \$1,540.27 for investment tax credits applied by the flow-through method.

2. Pension Plan:

The Corporation has adopted a pension plan whereby each employee shall be qualified to become a participant under the plan on the effective date, December 31, 1975, or the first day of the plan year after which he is employed. The contribution for the current year was \$13,000.00.

BLACK AND WHITE CARS, INC.

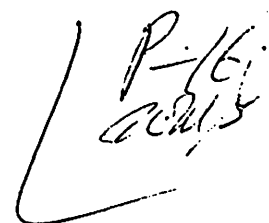
Six months ended December 31, 1976

PROPOSED ADJUSTMENTS PER DMV

Loss, before income taxes (per prime-facie statement)			\$ (32,146)
DMV proposed adjustments:			
(A) Excessive salaries	\$13,257		
(B) Allocation of expenses (50-50)	<u>39,860</u>	<u>53,117</u>	
Adjusted income (to disallow refunds)			<u>\$ 20,971</u>

P-15
C. G. P.

BLACK AND WHITE CARS, INC.

Six months ended December 31, 1976

Loss, before income taxes (per prime-facie statement)

\$(32,146)

Agreed adjustments:

Insurance	\$10,265	
Pension expense - (50-50)	6,500	
Administrative salaries - (50-50)	7,125*	
Group insurance - (50-50)	818	
Gas tax refunds - (50-50)	<u>(2,519)</u>	<u>22,189</u>
Loss including gas tax refunds		(9,957)
Eliminate gas tax refunds		<u>(15,038)</u>
Loss before gas tax refunds		<u><u>\$(24,995)</u></u>

*Includes \$5,000 of bonus

BLACK AND WHITE CARS, INC.

For the year 1976

Income before income tax (as reported)

\$ 34,154

Adjustment:

Insurance expense understated

(15,984)

Interest expense

18,170

4,276

Income tax

22,446

4,871

Corrected net income

17,575

Assets 12/31/76

\$312,205

12/31/75

289,586601,791

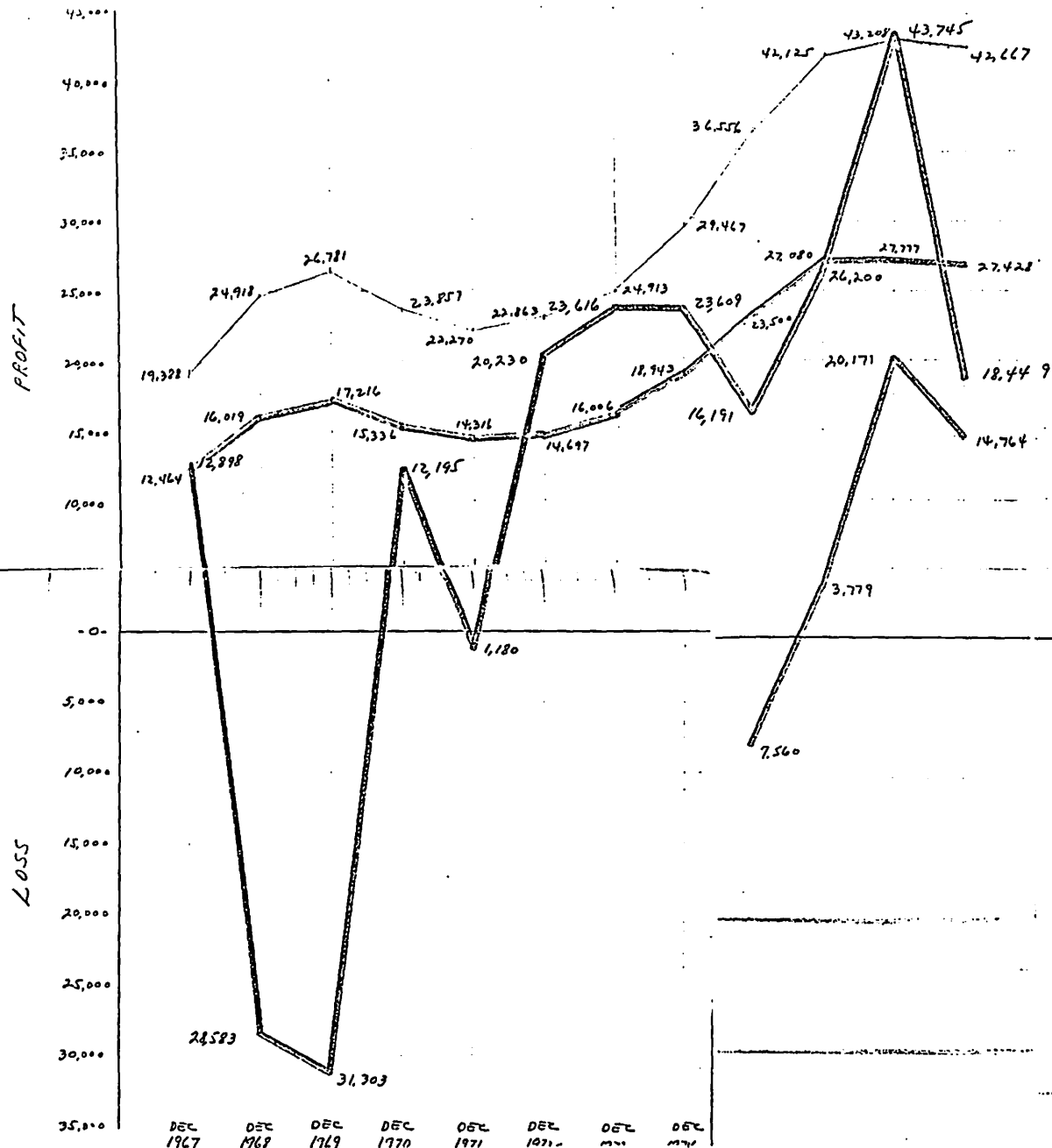
Average

1/2

300,896

@ 9%27,081

Exhibit P-19



DEFENDANT'S REQUEST FOR ADMISSIONS

Pursuant to Part Four. of the Rules of the Virginia Supreme Court Defendant Commissioner, by counsel, hereby requests that Petitioner admit the truth of the following statements. Should Petitioner be unable to admit the truth of any part of any of the following, he is requested to admit as much as possible in each instance.

1. The U.S. Department of Labor's consumer price index for the years 1967-68 and 1973-1978 is as follows:

1967	100
1968	104.2
1973	133.1
1974	147.7
1975	161.2
1976	170.5
1977	181.6
1978	195.4

2. The U.S. Department of Labor's consumer price index measures the price change of a market basket of goods and services over time. One use, therefore, is as an index of price change. During periods of price rise, it is an index of inflation.

3. Each of the figures on the attached table of figures pertaining to Black & White Cars, Inc., is true.

4. Petitioner's stockholders' equity as of December 31, 1973, was \$79,281.23.

5. Petitioner's net income for 1974 was \$23,608.90.

6. Petitioner's stockholders' equity as of December 31, 1974, was \$98,890.13.

7. Petitioner's net income for 1975 was \$16,190.80.

8. Petitioner's stockholders' equity as of December 31,

1975, was \$115,080.93.

9. Petitioner's net income for 1976 was \$26,200.10.

10. Petitioner's stockholders' equity as of December 31, 1976, was \$136,881.03.

11. Petitioner's net income for 1977 was \$43,745.06.

12. Petitioner's stockholders' equity as of December 31, 1977, was \$175,126.09.

13. In 1977 and 1978, Leonard O. Oden owned 52% and Louis M. Oden owned 48% of the stock of Black & White Cars, Inc.

14. The compensation other than dividends or interest and paid by Petitioner to Leonard O. Oden and Louis M. Oden for 1977 1978 was intended in part to compensate for earlier underpayments of employee compensation.

15. The years of such earlier underpayments to Louis M. Oden and Leonard O. Oden for which their 1977 and 1978 salaries were intended, in part, to compensate, are 1968 through 1974.

16. Petitioner paid Leonard O. Oden a bonus for the year 1977.

17. Petitioner paid Leonard O. Oden a bonus for the year 1978.

18. Petitioner paid Louis M. Oden a bonus for the year 1977.

19. Petitioner paid Louis M. Oden a bonus for the year 1978.

20. In 1976-1978, Petitioner made contributions to its pension plan for both Louis M. Oden and Leonard O. Oden.

21. In 1976-1978, Petitioner provided Louis M. Oden with the use of a late model, full-size motor vehicle.

22. In 1976-1978, Petitioner provided Louis M. Oden with

group life insurance coverage.

23. In 1977, Petitioner employed two full-time managers in addition to the Odens.

24. In 1978, Petitioner employed two full-time managers in addition to the Odens.

25. The salaries of said two full-time managers are \$11,436.92 and \$9,780.95, respectively.

26. In 1977 and 1978, Leonard O. Oden was engaged in the practice of dentistry, at which he spent approximately 25 hours per week.

27. In addition, during such years Leonard O. Oden maintained dental laboratories to serve his practice and the practice of other dentists.

28. Leonard O. Oden is President of Norview Cars, Inc., another taxicab company.

29. Leonard O. Oden owns 98 percent of the stock of Norview Cars, Inc.

30. In 1977 and 1978, Leonard O. Oden received no salary dividends, or other compensation from Norview Cars, Inc.

31. During the course of many weeks in 1977 and 1978, Leonard O. Oden spent no time whatsoever exclusively in connection with Norview Cars, Inc., and in some weeks, he spent up to five hours exclusively on the affairs of Norview Cars, Inc.

32. During 1977 and 1978, Petitioner operated approximately 50 taxicabs.

33. In 1977 and 1978, Norview Cars, Inc., operated approximately 20 taxicabs.

<u>Year</u>	<u>Gross Passenger Revenue</u>	<u>Other Income</u>	<u>Gross Income</u>	<u>Total Miles of Operation</u>	<u>Maximum # of Employees</u>	<u>Salary*of Louis M. Oden</u>	<u>Salary*of Leonard O. Oden</u>	<u>Dividends</u>
1967	751,711	2,026	753,737	3,187,316	183	23,400	18,200	0
1968	705,300	1,100	706,400	2,782,658	210	22,700	17,500	0
1969	788,130	4,148	792,278	3,092,714	160	13,300	11,300	0
1970	792,522	7,132	799,654	2,858,116	188	10,400	5,300	0
1971	795,855	3,369	799,224	2,752,542	187	10,140	5,200	0
1972	884,622	2,555	887,177	2,937,660	160	25,140	18,900	0
1973	1,102,706	2,565	1,105,271	3,285,198	160	34,440	26,500	0
1974	1,167,094	512	1,167,606	3,322,670	160	36,495	27,320	4,000
1975	1,285,130	3,443	1,288,573	3,437,767	160	55,798	44,200	0
1976	1,444,324	1,357	1,445,681	3,665,628	160	61,869	50,050	4,400
1977	1,688,537	1,816	1,690,353	3,537,836	160	90,296	77,850	5,500
1978	1,721,006	5,064	1,726,070	3,604,952	160	60,000	48,000	5,500

*And Bonus, if any.

PETITIONER'S RESPONSE TO DEFENDANT'S REQUEST FOR ADMISSIONS

Now comes the Petitioner, Black & White Cars, Inc., by counsel, and for its response to the Defendant's Request for Admissions states as follows:

1. As to the figures for the years 1967 through 1976 these figures are admitted as true but Petitioner reserves the right to object to the relevancy even though admitted. As to the figures for 1977 and 1978, Petitioner objects to the request for admissions incident thereto, upon the grounds that any request for data in these years has no relevancy or materiality to the issues involved in the suit herein, and is otherwise therefore an improper subject of discovery.

2. Petitioner is not in a position to either admit or deny the request.

3. The figures in the attached table are admitted as true so far as concerns the years 1967 through 1976. As to the request vis a vis the years 1977 and 1978, Petitioner objects upon the grounds above cited in Paragraph 1.

4. As to the request for admissions contained in Paragraphs 4 through 10, the same are admitted but Petitioner reserves the right to object to the relevancy thereof.

5. As to the request for admissions contained in Paragraphs 11 through 19, Petitioner objects upon the grounds as set forth in Paragraph 1 above.

6. With reference to the request for admissions contained in Paragraph 20, it is admitted as to 1976 but otherwise objected to as to 1977 and 1978 upon the grounds above cited in Paragraph 1.

7. With reference to Paragraph 21 of the request for admissions, the same is denied as to 1976 and objected to for the other years upon the grounds above noted. Louis M. Oden was provided a three (3) year old Ford as of 1976.

8. As to request for admissions contained in Paragraph 22, the same is admitted as to 1976 and objected to in 1977 and 1978 on the grounds above cited.

9. As to the request for admissions set forth in Paragraphs 23 through 28 and 30 through 33, Petitioner objects to the same upon the grounds above cited in Paragraph 1.

10. As to the request for admissions contained in Paragraph 29, the same is admitted as to 1976 but otherwise objected to for subsequent years upon the grounds above cited.

BLACK & WHITE CARS, INC.

PETITIONER'S SUPPLEMENTAL ANSWERS
TO DEFENDANT'S REQUEST FOR ADMISSIONS

NOW COMES the Petitioner, Black & White Cars, Inc., by counsel, and for its Supplemental Response to the Defendant's Request for Admissions states as follows:

1. The Consumer Prices Index figures for 1977 and 1978 are admitted as true, but Petitioner reserves the right to object to the relevance of the same even though admitted.

2. As to Paragraphs 11, 12 and 13 of the Request for Admissions, Petitioner admits that the same are true, but avers that the same have no relevancy to the issues at hand.

3. With reference to Paragraph 14 of the Request for Admissions the same is admitted to be true, but only to the extent that the compensation referred to, so far as it was "intended in part to compensate", was not a significant "part" or consideration.

4. With reference to Paragraph 15 of the Request for Admissions the same is admitted as true to the same extent as set forth above with response to Paragraph 14.

5. With reference to Paragraphs 16 through 20 and 22 of the Request for Admissions the same are admitted as true, but it is averred that the same has no relevancy to the issues before the Court.

6. With reference to Paragraph 21 of the Request for Admissions the same is denied.

GUY, CROMWELL, BETZ
& LUSTIG
ATTORNEYS AT LAW

7. With reference to Paragraphs 23 and 24 of the Request for Admissions the same are denied to the extent that the employees involved were not in fact "full-time managers".

8. With reference to Paragraph 25 of the Request for Admissions the salaries stated are true as to the employees involved, however the employees were not "full-time managers".

9. With reference to Paragraph 26 of the Request for Admissions the same is true through 1977, but somewhat less hours were involved before 1978.

10. With reference to Paragraphs 27 through 31 of the Request for Admissions the same are admitted as true, but it is avered that the same bears no relevancy to the issues before the Court.

11. With reference to Paragraph 32 of the Request for Admissions the same is admitted as true.

12. With reference to Paragraph 33 of the Request for Admissions the figures for 1977 are admitted as true, but the figures for 1978 are not admitted as true and are denied.

BLACK & WHITE CARS, INC.

PETITIONER'S FURTHER SUPPLEMENTAL ANSWERS
TO DEFENDANT'S REQUEST FOR ADMISSIONS

NOW COMES the Petitioner, Black & White Cars, Inc., by counsel, and further supplements its answers to the Defendant's Request for Admissions.

1. With reference to Paragraph 3 of Defendant's Request for Admissions, as to the figures for 1977 and 1978, the same are admitted as true but, Petitioner reserves the right to object to the relevancy and materiality thereof.

BLACK & WHITE CARS, INC.

BY: 

Of Counsel

Invoice data - Purchases that were refunded

1976 - 326,625 Gals.	=	\$ 30,296.25
1977 - 278,280 "	=	25,045.20
1978 - 107,700 "	=	9,693.00 to 4/1/78

Refund application data - Purchases that were refunded

1976 - 334,176 Gals.	=	\$ 30,075.84
1977 - 278,280 "	=	25,045.20
1978 - 107,700 "	=	9,693.00 to 4/1/78

D-28
JBB

JBB.

Exhibit D-5

BLACK AND WHITE CARS, INCORPORATED

BALANCE SHEET, December 31, 1977

(Unaudited)

ASSETS

Current assets:

Cash		\$ 20,129.20
Accounts receivable:		
Trade	\$ 25,190.18	
Employees	<u>309.08</u>	25,499.26
Inventory of supplies (Note 1)		11,183.75
Prepaid expenses		2,926.43
Insurance deposit account (Note 3)		<u>37,000.00</u>
Total current assets		96,738.64

Equipment, at cost (Notes 1 and 2):

Taxicabs and service vehicles	346,480.00	
Accessories and equipment	62,444.55	
Shop equipment	2,530.67	
Furniture and fixtures	<u>6,046.45</u>	
	417,501.67	
Less accumulated depreciation	<u>270,715.78</u>	146,785.89

Other assets:

Cash surrender value of officer's life insurance, net of \$4,373.16 policy loan	19,064.80	
Goodwill	4,531.77	
Permits	37,700.00	
Organization costs	<u>242.75</u>	<u>61,539.32</u>

\$305,063.85

Assets

Beginning 312,205.13
 Ending — 305,063.85
617,268.98

Average 308,634.49

Income 43,745.06
 add back int. 2,790.77
46,535.83

27,777.10

of a favorable return on investment

has not qualified in
 annual report.

LIABILITIES AND STOCKHOLDERS' EQUITY

Current liabilities:

Notes payable		\$ 36,744.90
Accounts payable - trade		29,404.61
Accrued expenses:		
Salaries	\$ 59,000.00	
Income Taxes (Note 1)	3,168.96	
Payroll Taxes	1,555.79	
Other	<u>63.50</u>	<u>63,788.25</u>
Total current liabilities		129,937.76

Stockholders' equity:

Capital stock, \$25 par value (Note 4):		
Authorized: 1100 shares		
Issued and outstanding: 1100 shares	27,500.00	
Paid-in capital	5,000.00	
Retained earnings (Note 4)	<u>142,626.09</u>	<u>175,126.09</u>

\$305,063.85

The accompanying notes are an integral
part of the financial statements.

Exhibit D-5

STATEMENT OF INCOME AND RETAINED EARNINGS

for the year ended December 31, 1977

(Unaudited)

Revenue - passenger fares		\$1,688,537.16
Cost of transportation		<u>1,375,820.35</u>
Gross profit		312,716.81
Administrative expenses		<u>255,717.61</u>
Income from operations		56,999.20
Other income:		
Sundry		<u>1,816.53</u>
		58,815.73
Other deductions:		
Interest	\$ 2,790.77	
Officer's life insurance expense	<u>1,202.94</u>	<u>3,993.71</u>
Income before income taxes		54,822.02
Income taxes (Note 1)		<u>11,076.96</u>
Net income		43,745.06
Retained earnings, December 31, 1976		<u>129,381.03</u>
		173,126.09
Less:		
Cash dividends paid (\$5.00 per share)	5,500.00	
Stock dividend of 1,000 shares (Note 4)	<u>25,000.00</u>	<u>30,500.00</u>
Retained earnings, December 31, 1977		<u>\$ 142,626.09</u>
Earnings per share of outstanding capital stock		<u>\$39.77</u>
Dividends per share of outstanding capital stock		<u>\$5.00</u>

The accompanying notes are an integral part of the financial statements.

Exhibit D-5

STATEMENT OF CHANGES IN FINANCIAL POSITION

for the year ended December 31, 1977

(Unaudited)

Financial resources were provided by:

Operations:

Net income	\$ 43,745.06
Add depreciation not requiring outlay of working capital in current period (Note 1)	<u>65,340.80</u>
Total from operations	<u>109,085.86</u>
Total financial resources provided	109,085.86

Financial resources were applied to:

Payment of dividends	\$ 5,500.00
Purchase of equipment	114,594.93
Increase in permits	720.00
Increase in cash surrender value of officer's life insurance	<u>2,226.02</u>

Total financial resources applied	<u>123,040.95</u>
Decrease in working capital	<u>\$ (13,955.09)</u>

Changes in components of working capital:

Current assets, increase (decrease):

Cash	(1,145.03)
Accounts receivable	6,838.80
Inventory	3,652.00
Prepaid expenses	(105,687.20)
Insurance deposit account	<u>37,000.00</u>
	<u>(59,341.43)</u>

Current liabilities, increase (decrease):

Notes payable - bank	(74,958.17)
Notes payable - other	26,440.70
Accounts payable	(35,422.99)
Accrued expenses	<u>38,554.12</u>
	<u>(15,386.34)</u>

Decrease in working capital	<u>\$ (13,955.09)</u>
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The accompanying notes are an integral
part of the financial statements.

TAXICAB AUDIT ASSESSMENT \$37,006.20

D-6
CWB

CERTIFIED MAIL

July 6, 1978

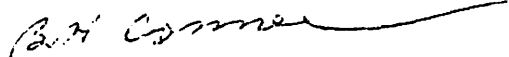
Black & White Cars Inc.
830 West 39th Street
Norfolk, Virginia 23508

Gentlemen:

Attached is copy of the audit report covering your taxicab operation for the period from July 1, 1974 to April 7, 1978.

The audit findings reveal an assessment due in the amount of \$37,006.20, to recover payment made on refunds not in accordance with the provisions of Section 58-757.01 of the Code of Virginia 1950, as amended. Remittance to cover same should be made upon receipt of this letter.

Sincerely,



B. H. Conner, Manager
Fuels Tax Department

BHC/nh

bc: Purks
Kromer

CERTIFIED MAILTAXICAB AUDIT ASSESSMENT

July 6, 1978

Black & White Cars Inc.
 830 West 39th Street
 Norfolk, Virginia 23508

No previous audit conducted. This report covers the period from July 1, 1974 to April 7, 1978.

STATEMENTS

A. Schedule of Disallowed Refunds.

COMMENT

An examination of revenue and expense records reveal that discrepancies concerning such expense items as insurance, licenses and payroll taxes in costs of transportation, and taxes and licenses, as well as other small expense items in administrative costs, do not conform to generally accepted accounting principles relating to the matching of revenues with expenses to their proper accounting periods. Also, officers compensations, consisting of salary and/or bonuses, in the fiscal years 1975 to 1976, are in excess of what is considered to be reasonable in comparison to base years 1972 or 1973.

EXCEPTION

None. Audit conducted by B. J. Flaskas.

ASSESSMENT

Assessment in the amount of \$37,006.20 is hereby made to cover refunds submitted covering July 1974 purchases and all refunds covering purchases after December 31, 1976 as summarized below and shown in detail on Schedule A attached:

Gallons	411,180
Tax	\$37,006.20
Assessment	\$37,006.20

B. H. Conner

B. H. Conner, Manager
 Fuels Tax Department

BHC/nh/WEP

Exhibit D-6
COMMONWEALTH OF VIRGINIA
DIVISION OF MOTOR VEHICLES
FUELS TAX DEPARTMENT
RICHMOND, VA.

Page # 1

- STATEMENT A -
- SCHEDULE OF DIFFERENCES -

DISALLOWED REFUNDS

Audit of BLACK & WHITE CARS

Audit Period: From July 1, 1974 to April 7, 1978

DATE	EXPLANATION	DETAIL		TOTAL	
		DEBITS	CREDITS	DEBITS	CREDITS
1974					
Sept.	DMV Refund #1091999 dated 9/17/74 (disallowed)	25200		25200	
1977					
Feb.	DMV Refund #1111640 dated 2/1/77 (disallowed)	23550		23550	
Mar.	DMV Refund #1112223 dated 3/1/77 (disallowed)	27850		27850	
Apr.	DMV Refund #1112968 dated 4/1/77 (disallowed)	25350		25350	
May	DMV Refund #1113521 dated 5/2/77 (disallowed)	25800		25800	
June	DMV Refund #1114268 dated 6/1/77 (disallowed)	22100		22100	
July	DMV Refund #1114983 dated 7/1/77 (disallowed)	23650		23650	
Aug.	DMV Refund #1115560 dated 8/1/77 (disallowed)	26900		26900	
Sept.	DMV Refund #1116288 dated 9/1/77 (disallowed)	27580		27580	
Oct.	DMV Refund #1116845 dated 10/1/77 (disallowed)	28100		28100	
Nov.	DMV Refund #dated 11/1/77 (disallowed)	22600		22600	
Dec.	DMV Refund dated 12/1/77 (disallowed)	24800		24800	
1978					
Jan.	DMV Refund dated 1/2/78 (disallowed)	27900		27900	
Feb.	DMV Refund dated 2/1/78 (disallowed)	27300		27300	
Mar.	DMV Refund dated 3/1/78 (disallowed)	22900		22900	
Apr.	DMV Refund dated 4/7/78 (disallowed)	29600		29600	
Totals		411180		411180	



BLACK & WHITE CARS, Inc.

TILLER'S CABS

830 W. 39TH STREET

NORFOLK, VA. 23508

August 28, 1978

Mr. B. H. Conner, Manager
Fuels Tax Department
Division of Motor Vehicles
Commonwealth of Virginia
2220 West Broad Street
Richmond, Virginia 23219

Re: Black & White Cars, Inc.
Norfolk, Virginia - Fuel Tax

Dear Mr. Conner:

Mr. Buster Flaskas' audit made in the early part of June 1978 resulted in an assessment dated June 5, 1978 for an amount of \$37,000.20.

Mr. Flaskas should be complimented on a very thorough job, however additional information in support of the taxpayer position that the refunds were correct is hereby submitted.

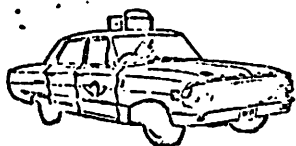
3. Starting with Exhibit "A" Executive Compensation of Mr. Flaskas audit. Mr. Flaskas uses a Base Year of 1972. However, Black & White contents a complete picture of the compensation the Base Year of 1967 should be used to show on accurate history of salaries. Black & White Exhibit "A" attached uses Base Year of 1967.

4. Black & White has used Sibson & Company survey which covers 600,000 Managers and we feel is a more accurate survey, however argument could be for the Research Institution of America study be accepted, however this does not go back to year 1967.

5 Two previous audits have been made by I.R.S. and salaries were not contented.

6 Hay Associates, in a compensation audit performed on L.O. Oden's compensation stated:

7) "Although the general utilization of public transportation facilities in the area served by Black & White has continuously declined for more than a decade, created by a combination of decreasing population, increasing unemployment and overall increasing ownership of private vehicles, the Company has achieved a unique position of annual growth in both passenger miles and gross revenues. The significance of this performance is noted



BLACK & WHITE CARS, Inc.

TILLER'S CABS

830 W. 39TH STREET

NORFOLK, VA. 23508

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as defying trends in public transportation statistics published by the Department of Transportation."

8 Hay Associates, retained to perform the compensation audit, is an International Consultant to Management in all areas of human resources including compensation. The firm has thirty-seven offices in seventeen countries and is the second largest consulting firm of its type in the world.

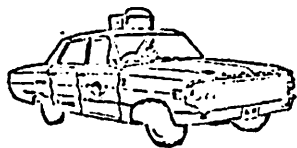
9 In its compensation audit, Hay Associates determined that L. O. Oden's compensation for 1975 was just under the 75th percentile of total compensation for 350 companies surveyed. The study concluded for 1975 that, "although Black & White experienced a drop in net income from the prior year, gross revenues continued to rise and the firm continued to counter the trend in the transportation industry of losing money. Based on this performance, an above average compensation level appears warranted."

10 For 1976, the Hay Associates study again found L. O. Oden's compensation justified, "in a year during which the Company achieved net income results which has not been realized 75th percentile would appear justified!".....

11 The compensation levels for Black & White have been determined primarily under a merit system. The primary exception is the early and middle years when both L. M. Oden and L. O. Oden cut their salaries in times of financial distress. According to a survey of 600,000 business managers prepared by Gibson & Co., Inc., published in Nation's Business, November, 1977 the average increase of manager wages was 6% in 1965 and 1966, 7% in 1967, 1968 and 1969. 9% in 1970, 7% in 1971, 1972 and 1973, 8% in 1974, 10% in 1975, and 9% in 1976. Applying only a 6% rate of increase to L. O. Oden's salary from 1967. Black & White owes him \$52,064.60 in back pay; applying the rates listed in the Gibson survey, he has been undercompensated by \$65,480.60.

12 Black & White has obviously required a great deal of cash and working capital. Although Black & White has done remarkably well, it has had losses in several years. In 1969, the Bank of Virginia refuses to lend additional funds because of the poor balance sheet position. Accordingly, Black & White has been forced to retain earnings to meet demands of creditors and other valid business contingencies. However, Black & White has paid dividends whenever the Company would not be adversely affected.

13 Black & White did not pay a dividend in 1975. The last six months of 1975 showed a loss, therefore a dividend was not paid.



BLACK & WHITE CARS, Inc.

TILLER'S CABS

830 W. 39TH STREET

NORFOLK, VA. 23508

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LAW:

Additional compensation, though made for services rendered in previous years is deductible from the income of the taxable year in which it was allowed and paid. (Lucas, Commissioner V. Ox Fibre Brush Company, 281 U.S. 115 (1930).

In another case the court allowed a high salary, due mainly to the fact that there had been underpayment in earlier years. (Weise-Winckler-Binder, Inc. & 67.259 P. H. Memo T. C. (1967).

EXHIBIT "B"

Exhibit "B" as used by Mr. Flaskas uses the Year 1976. We submit to the figures of cost of transportation expense during the last six months of 1975 as prima facie evidence of gas tax refund for the year of 1976 and 1977.

The six months Financial Report of 1975 is attached as Black & White Exhibit B. Six months statements were filed with D.M.V. This reports shows a loss for last six months of 1975.

Chapter 485 of the 1974 act of assembly is amended and re-enacted as follows:

\$58,257.01

_____, however, that the showing of an operating deficit for any continuous six-month period during the immediately preceding two-year period prior to the date of application shall be deemed prima facie evidence of the necessity for such refund. Copy of bill Black & White Exhibit "C".

CONCLUSION:

The problem now is how to bring to the law to apply to this situation at hand. Our contention is that last six months of 1975 there was a loss and that this loss makes tax refund valid for 1976 and 1977.

SIBSON & COMPANY

THIRTEENTH ANNUAL

MANUSCRIPT COMPENSATION STUDY

Approved by

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LOUIS M. ODEN

<u>YEAR</u>	<u>SALARY REPORTED IRS</u>	<u>(INFLATOR) GIBSON & CO. MANAGERS</u>	<u>AMT. OF ACCEPTABLE INCREASE</u>	<u>ALLOWABLE SALARY</u>
1967	23400	BASE YEAR		23400
1968	22700	7%	1638	25038
1969	13300	7%	1753	26791
1970	10400	9%	2411	29202
1971	10140	7%	2044	31246
1972	25140	7%	2107	33433
1973	34440	7%	2340	35773
1974	36495	8%	2862	38635
1975	55798	10%	3864	42499
1976	61869	9%	3825	46324
1977	90296	10% *	4632	50956

LEONARD O. ODEN

<u>YEAR</u>	<u>SALARY REPORTED IRS</u>	<u>(INFLATOR) GIBSON & CO. MANAGERS</u>	<u>AMT. OF ACCEPTABLE INCREASE</u>	<u>ALLOWABLE SALARY</u>
1967	18200	BASE		18200
1968	17500	7%	1274	19474
1969	11300	7%	1636	20837
1970	5300	9%	1873	22712
1971	5200	7%	1590	24302
1972	18900	7%	1701	26003
1973	26500	7%	1820	27823
1974	27320	8%	2226	30049
1975	44200	10%	3005	33054
1976	50050	9%	2975	36029
1977	77850	10% *	3603	39632

*Estimated or assumed percentage

Actual

Stock & White Lines Inc.

D-9
WMBYear Ending Dec 31, 1976

$$\text{Return on assets} = \frac{26,200.10 + 4276.17}{\frac{257,585.07 + 312,205.13}{2}} = \frac{30,476.27}{300,895.117} = 10.1\%$$

10.1%

$$\text{Return on stockholders' equity} = \frac{26,200.10}{\frac{115,080.93 + 136,881.03}{2}} = \frac{26,200.10}{125,980.98} = 20.8\%$$

Year ending Dec 31, 1977

$$\text{Return on assets} = \frac{43,745.06 + 25,126.29}{\frac{312,205.13 + 305,063.85}{2}} = \frac{46,555.23}{308,634.49} = 15.1\%$$

$$\text{Return on stockholders' equity} = \frac{43,745.06}{\frac{136,881.03 + 125,126.29}{2}} = \frac{43,745.06}{156,003.56} = 28.1\%$$

JBB.

Adjustments To Income

1976	Subtract Fuels Tax Refunds	- \$30,075.89
	Add Differences in Salaries	
	Louis M. Odum	
	Actual	\$61,869.00
	Gibson Inflation	46324.00 + 15,545.00
	Leonard O. Odum	
	Actual	\$50050.00
	Gibson Inflation	36,024.00 + 14,021.00
	Difference	\$ - 509.84
	After Taxes (23% rate)	\$ - 392.58
	Actual Income	26200.10
	Adjusted Income	\$ 25,807.52

1977	Subtract Fuels Tax Refunds	\$ - 25,045.20
	Add Differences in Salaries	
	Louis M. Odum	
	Actual	\$90,296.00
	Gibson Inflation	50,956.00 + 39,340.00
	Leonard O. Odum	
	Actual	\$77,850.00
	Gibson Inflation	39,632.00 + 38,218.00
	Difference	\$ 52,512.80
	After Taxes (20% rate)	42,010.24
	Actual Income	43,745.06
	Adjusted Income	\$ 85,755.30

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✓ Changes in assets
using certain assumptions

1976	Actual 1976	1977
Actual	312,205.13	305,063.85
	- 392.58	+ 42,010.24
	<u>311,812.55</u>	<u>\$ 347,074.09</u>

Changes in stockholder equity
using certain assumptions

Actual	1976	1977
Actual	136,881.03	175,126.09
	- 392.58	+ 42,010.24
	<u>136,488.45</u>	<u>217,136.33</u>

With Assumptions

✓ Year Ending Dec. 31, 1976

$$\text{Return on Assets} = \frac{25,807.52 + 4276.17}{289,585.81 + 311,812.55} = \frac{30,083.69}{300,699.18} = 10\%$$

$$\text{Return on stockholder's equity} = \frac{25,807.52}{115,080.93 + 136,488.45} = \frac{25,807.52}{125,784.69} = 20.5\%$$

Year ending Dec 31, 1977

$$\text{Return on assets} = \frac{85,755.30 + 2790.77}{311,812.55 + 347,074.09} = \frac{88,546.07}{329,443.32} = 26\%$$

$$\text{Return on stockholder's equity} = \frac{85,755.30}{136,488.45 + 217,136.33} = \frac{85,755.30}{176,812.39} = 48.5\%$$

Further Supplemental Answers to Defendant's
Interrogatories, filed on or about August 20,
1979.

FURTHER SUPPLEMENTAL ANSWERS
TO DEFENDANT'S INTERROGATORIES

NOW COMES the Petitioner, by counsel, and supplements its
Answers to Defendant's Interrogatories in the following manner:

2. With reference to any bonuses paid in 1978, the sum of
\$ 10,265.78 was paid to Leonard Oden as a bonus in 1978 and
\$ 11,988.72 to Louis Oden in 1978.