STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
PARKVIEW AUTO SALES, INC. DETERMINATION	:
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1988 through November 30, 1991.	: DTA NO. 812504

Petitioner, Parkview Auto Sales, Inc., P.O. Box 6300, Outer Washington Street, Watertown, New York 13601, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1988 through November 30, 1991.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 30, 1994 at 1:15 P.M., with all briefs to be submitted by May 6, 1995. The Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Kathleen D. Church, Esq., of counsel), submitted its brief on April 18, 1995. Petitioner, appearing by David Antonucci, Esq., reserved time but did not file an initial brief or a reply brief. Petitioner's reply brief was due by May 6, 1995, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]).

ISSUES

I. Whether petitioner has established that certain sales of

motor vehicles subjected to sales tax on audit were in fact exempt sales as claimed.

II. Whether petitioner has established that it paid sales tax on certain fixed asset and expense purchases or, alternatively, that some or all of such purchases were not subject to tax.

III. Whether petitioner has established any grounds sufficient to constitute reasonable cause, thereby warranting abatement of penalties assessed.

FINDINGS OF FACT

Petitioner, Parkview Auto Sales, Inc. ("Parkview"), was, during the period at issue, engaged in business as a new and used car dealership. Petitioner also provided automobile repair services, including body shop services.

In late 1991, the Division of Taxation ("Division") commenced an audit of petitioner's business operations. An audit appointment letter was issued to petitioner on November 13, 1991 scheduling a November 15, 1991 audit appointment. Thereafter, a second audit appointment letter, dated January 15, 1992, was issued to petitioner rescheduling the audit appointment to March 2, 1992. Each of these audit appointment letters provided that petitioner should have available for review all of its records pertaining to its sales and use tax liability.

During the initial stages of the audit, petitioner's sales and use tax records were made available and were reviewed. There is no dispute between the parties that all records

requested for review were made available, and that such records were sufficient and adequate to enable the conduct of a detailed audit review. At the outset of proceedings, the parties also noted that the dollar amounts of sales and purchases determined from petitioner's records, and the amounts of tax which would be due thereon, are not in dispute. Rather, the issue in this case is whether certain sales and purchases with respect to which no sales tax was paid or use tax accrued, were properly subject to tax as determined by the Division upon audit.

The audit in this case involved a detailed review of petitioner's records regarding sales and fixed asset acquisitions for the entire audit period, plus a detailed examination of petitioner's purchase records for the year 1990. In turn, with respect to purchases, the amount of tax found due for 1990 upon audit was compared to petitioner's 1990 gross sales, with the resultant percentage multiplied by petitioner's quarterly gross sales over the period under audit to determine the audited amount of tax due on expenses. This test and projection audit method for purchases was agreed to and is memorialized in an Audit Method Election Form executed by petitioner and by the Division on March 6, 1992.

On November 30, 1992, the Division issued to petitioner a Notice of Determination assessing additional sales and use taxes due for the period September 1, 1988 through November 30, 1991 in the aggregate amount of $31,566.08, plus penalty and interest. This notice was based upon the results of the

Division's audit.[1] The particular areas of audit resulting in tax due are described below.

Sales

The auditor examined all of petitioner's vehicle sales in detail, and determined that some 20 vehicle sales claimed as exempt sales by

petitioner were, in fact, subject to tax. Said sales totalled $207,099.00 and resulted in a sales tax liability of $13,830.45. Each of the vehicle sales held subject to tax was made on or after June 1, 1990 and, according to the Division's auditor, represented sales made to military personnel who were residents of New York State for sales tax purposes. Specifically, the auditor noted that his review of petitioner's vehicle sales "deal folders" revealed that each of the purchasers listed a New York address (in many cases a Fort Drum address), with no countervailing evidence that such purchasers were not in fact living in New York (on base or otherwise) at the time of purchase.[2]

At hearing, petitioner provided evidence with regard to 11 of the 20 vehicle sales in question. This evidence includes

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[1]Validated consents with respect to the period of limitations on assessment were executed, the latest of which allowed assessment for the period in question to be made by the Division at any time on or before December 20, 1992.

[2]A "deal folder" consists of a manilla folder for a given vehicle sale, containing documents relating to such sale. Such documents included, inter alia, vehicle cash purchase agreements, vehicle invoices, dealer preparation documents, warranty information, insurance information, etc.

five deal folders relating to purchasers named "Kearney", "Seitsinger", "Kieffer", "Kurtz" and "Foster", and also correspondence between petitioner and the purchasers (or Fort Drum military legal assistance attorneys representing the purchasers). This correspondence related to petitioner's post-sale request for payment of tax on sales made to purchasers named "Kurtz", "Knihnicki", "Kieffer", "Foster", "Fox", "Fields", "Franklin", "Pannell" and "Johnson" (see, Finding of Fact "9").

Petitioner's position with regard to vehicle sales is that each of the purchasers, though perhaps listing a New York address at the time of purchase, also listed or claimed a permanent residence in a jurisdiction

other than New York. Petitioner's president, Renald Dembs, testified that although he was aware of a change in the Division's regulations regarding sales of vehicles to military personnel stationed in New York (see, 20 NYCRR 526.15), he nonetheless believed that since each of the purchasers stated that they had a legal residence out of New York State and in many instances registered the vehicle in another jurisdiction, they should not be subject to tax on the vehicle purchases at issue. Mr. Dembs testified that a purchaser would be allowed to use petitioner's dealership plates, post-sale, to drive a vehicle to another jurisdiction so as to register the vehicle there, and then return the plates (generally by mail). He stated that "in transit" permits were not usually obtained,

since dealership plates could be easily used. He also noted that his past experience included instances where military personnel not stationed at Fort Drum would come to Fort Drum for a short period (e.g., training exercises) and, while there, might purchase an automobile and transport the vehicle back to their home state.

Review of the evidence submitted with respect to vehicle sales for which claimed exemptions were denied is summarized as follows:

PURCHASER	NEW YORK ADDRESS(ES)	OTHER ADDRESS(ES)
(a) Larry Jon Kearney	P.O. Box 169 Fineview, NY 13640	P.O. Box 22087 Juneau, AK and 1013 Victoria Ave. New Kensington, PA 15068 and 1100 Liberty Ave., #303 Pittsburgh, PA 15222

Note: The Fineview, New York address is listed as the "resident address", while the Juneau, Alaska address is listed as the "permanent place of abode" on Form ST-174.[3]

(b) Mark W. Seitsinger	409 Brookside Terrace Fort Drum, NY and P.O. Box 386 Black River, NY 13612	Bldg. 2208 Oklahoma City, OK 73160

Note: The Fort Drum address is listed as the "resident address", while the Oklahoma City address is listed as the "permanent place of abode" on Form ST-174.

(c) William Kieffer	8570 Williamson Loop Fort Drum, NY 13603	19490 W. Artzeim Lane Elmore, OH 43416

Note: The Fort Drum address is listed as the "resident address", while the Ohio address is listed as the "permanent place of abode" on Form ST-174. The Fort Drum address is carried on Mr. Kieffer's New York driver's license and on his auto insurance I.D. card for the vehicle. The deal folder included an "in-transit permit". There is also correspondence from an Army legal assistance attorney alleging that the vehicle was registered/tax was paid in Ohio.

(d) Beth L. Kurtz	170 Bishop St. Watertown, NY 13601 and 207 Wealtha Ave. Watertown, NY 13601	Lakeview Drive P.O. Box 962 Hanover, NH 03755

[3]Form ST-174 is a New York State "Certificate of Purchaser of Motor Vehicle by a Non-Resident of New York State or Non-Resident of Local Taxing Jurisdiction".

Note: The Bishop St. address is listed as the "resident address", while the New Hampshire address is listed as the "permanent place of abode" on Form ST-174. The deal folder included an "in-transit permit", evidence the vehicle was registered in New Hampshire and correspondence from an Army legal assistance attorney alleging that the vehicle was shipped to Wiesbaden, West Germany. The Bishop St. address is carried on Ms. Kurtz's insurance I.D. card for the vehicle, while the New Hampshire address appears on her New Hampshire driver's license.

(e) Mark Foster	134 Keyes Ave., #7 Watertown, NY 13601	173 Madison St. Portsmouth, NH 03801 and 3686 Silverleaf Ave. North Pole, AK 99705

Note: The Watertown address is listed as the "resident address", while the New Hampshire address is listed as the "permanent place of abode" on Form ST-174. The vehicle was registered in New Hampshire.

(f) Terence Knihnicki	Co A 1/22 Inf. 10th Mtn. Div. Fort Drum, NY 13602	None listed

Note: The vehicle was allegedly registered in Massachusetts.

(g) Brice Fox	10th PSC Fort Drum, NY 13602	None listed

Note: Correspondence notes that Mr. Fox was on active duty status and resided in barracks at Fort Drum. The audit workpapers list an invoice date of 6/1/90, while a vehicle cash purchase agreement lists a 5/23/90 date (compare Division's Exhibit "E" to Petitioner's Exhibit "6"). The

sales invoice is not in evidence. The vehicle cash purchase agreement in evidence specifies on its face that it is not binding unless signed by both parties. Said document contains only the purchaser's signature, and also does not appear to be a fully completed document.

(h) Brian Fields	USA Meddac IMO Fort Drum, NY 13602	RR 1 Fillmore, MO 64449

Note: The vehicle was registered in Missouri.

(i) David Franklin	1209 Faichney Drive, #3 HHC 2nd Infantry Div. Watertown, NY 13601	APO, AP 96244

Note: The vehicle was allegedly registered in North Carolina.

(j) Michael Pannell	None listed	3990 Amazon Drive Eugene, OR 97405 and B Co 1/501st AVN Unit #15211 Box #112 APO, AP 96271-0142
(k) Jeffrey Johnson	None listed	W2520 Cedar Road Eau Claire, WI 54701 and 1832 11th St. Eau Claire, WI 54703

Note: Vehicle was registered in Wisconsin.

No evidence was submitted with regard to the balance of the vehicle purchasers. In addition, it is clear that each of the above-named purchasers were military personnel, as evidenced by listings of APO (Army Post Office) addresses, military rank and status information, representation in correspondence by military legal assistance attorneys, etc. Finally, the record includes no evidence as to the nature or duration of any of the

purchasers' stays in New York, save for the admission that Brice Fox was on active duty and resided on post at Fort Drum (see, Finding of Fact "9[g]").

Expense/Recurring Purchases and Fixed Asset Acquisitions

As noted, the Division's auditor reviewed petitioner's purchase records in detail for the year 1990, as agreed, determined those items which were subject to tax during such period, and projected the resulting taxable percentage of purchases over the audit period. This review and calculation resulted in approximately 43% of petitioner's purchases being held subject to tax, with a resulting tax liability of $7,673.71. Included among the items subjected to tax were office supplies, equipment maintenance and repair costs, and promotional items such as key chains, hats, shirts, video tapes, VCRs and the like. With respect to the items reviewed, the Division's auditor imposed tax on those items on which no sales tax was shown to have been paid at the time of purchase and which were not found, upon review, to have been resold to customers. In addition, tax was imposed with respect to items on which no use tax was accrued upon petitioner's disposal (e.g., promotional giveaway) thereof. The auditor noted in testimony that any items purchased and resold to customers (e.g., as a physical component of a repair) were not subjected to tax, but that in contrast items purchased and consumed by petitioner were subjected to tax. Petitioner voiced general disagreement but offered no specific evidence to countermand

this aspect of the audit.

The Division's auditor also reviewed in detail petitioner's fixed asset acquisitions. The auditor imposed tax in the aggregate amount of $10,061.92 on those acquisitions on which no sales tax was shown to have been paid or on which no use tax was accrued. Petitioner offered no specific evidence with regard to such acquisitions, other than to note an explanation through the testimony of its president that fixed asset items were frequently purchased for petitioner with the vendor's bill for payment received after the time of purchase. Petitioner's president noted that, in many instances, the bill was accompanied by an exemption certificate which was signed by petitioner and returned to the vendor along with a check in payment of the invoice amount for the item (i.e., excluding tax). Petitioner's president candidly admitted that certain of petitioner's acquisitions might have been reported or claimed as exempt purchases in error as a matter of oversight in purchasing, especially in view of the volume of business transactions by the dealership (estimated at $10,000,000.00 to $12,000,000.00 in total sales per year). Petitioner also noted that certain items were claimed as exempt because they were purchased for incorporation in capital improvement projects. Finally, petitioner offered no evidence or argument with regard to tax imposed on certain vehicles removed from inventory for general dealership use, which vehicles were capitalized and depreciated on petitioner's books.

With regard to penalties, petitioner argues that its

maintenance of admittedly full and accurate books and records shows its attempt to fully comply with the Tax Law. Petitioner admitted that it was audited previously for sales and use tax purposes, and that a deficiency resulted therefrom in the amount of approximately $700.00 (use tax) and $7,000.00 (sales tax). However, petitioner argues that such amounts are de minimis in comparison to its gross sales volume and, further, that the sales tax portion of the prior audit resulted nearly exclusively from the denial of an exemption claimed on a sale to an (alleged) religious organization. Finally, although admitting that he was fully aware of the fact that military personnel stationed in New York were not entitled to claim a nonresident sales tax exemption on motor vehicle purchases, petitioner's president stated he believed the individual sales here were made to nonresidents.

The Division's position with regard to penalties is that petitioner was admittedly aware of the change to the Division's regulations whereunder personnel stationed at military installations in New York State were not entitled to a nonresident exemption upon the purchase of a motor vehicle. The Division notes that this regulation change was effective June 1, 1990, and that registered vendors such as petitioner were advised of the same through Division informational mailings (see, Division's Exhibit "G"). Furthermore, the Division submitted in evidence two newspaper articles, one of which includes a quote from petitioner's president, specifically relating to the change in the Division's regulations. In

addition, the Division notes that petitioner has submitted no evidence with regard to any of the audit disallowances, except for the described information relating to 11 of the 20 disallowed exempt vehicle sales. In sum, the Division maintains that although petitioner maintained full and adequate records, the errors and audit changes were not the result of complicated legal interpretations, but rather represented less than careful practices by petitioner in complying with the Tax Law.

CONCLUSIONS OF LAW

A. This case presents no question as to the adequacy of petitioner's records vis-a-vis audit review, nor any questions as to the appropriateness of the Division's audit methodologies. Rather, the case simply presents a question of whether petitioner has established that certain of its sales and purchases were not subject to tax as reported.

B. Treating first the issue of tax assessed on purchases and fixed asset acquisitions, petitioner has offered essentially no evidence into the record to countermand the Division's imposition of tax in such areas. More specifically, petitioner offered no evidence to show that any of the particular items purchased were improperly held subject to tax on audit. In this regard, there is no evidence that any of such items were improperly denied resale exemption. Petitioner admitted that many items purchased were in fact given away as promotional items without charge. Such circumstances leave petitioner the ultimate user of such items, and thus clearly responsible for tax thereon (20 NYCRR 526.6[c][4][i]). Furthermore, petitioner

provided no evidence to establish that certain items purchased were incorporated into capital improvements or, more importantly, any legal basis for a conclusion that such incorporation results in tax exemption on the tangible personal property purchased and incorporated. In this regard, Tax Law § 1105(c)(3)(iii) exempts from sales tax the service of installing tangible personal property which, when installed, will constitute a capital improvement. However, there is no exemption for or upon the purchase of tangible personal property by one such as petitioner even though such property is subsequently used in a capital improvement. Testimony also revealed that for certain fixed assets acquired, exemption certificates may have simply been signed and returned to vendors with payment for the item if such exemption certificates were included with the bill. Finally, petitioner offered no evidence or argument establishing that vehicles withdrawn from inventory for general use were not subject to tax, notwithstanding that such vehicles may have been placed back in inventory at some later point in time (Datascope v. Tax Appeals Tribunal, 196 AD2d 35, 608 NYS2d 562).[4] In sum, petitioner has failed to provide evidence which would support any change to the audit results regarding purchases and fixed asset acquisitions.

C. Turning to sales of vehicles, it is well established that tangible personal property purchased in (delivered in) New York, including motor vehicles so purchased, is subject to sales

[4]The vehicles so used were distinguished upon audit from "demonstrator" vehicles (see, TSB-M-87-[2]S).

tax. However, as to the sale of motor vehicles, the Legislature has provided a specific and limited exemption whereby nonresidents who have no permanent place of abode in New York may purchase a motor vehicle without being subjected to tax. Specifically, Tax Law § 1117(a) provides as follows:

"**Certain sales of motor vehicles**

"(a) Receipts from any sale of a motor vehicle shall not be subject to the retail sales tax imposed under subdivision (a) of section eleven hundred five, despite the taking of physical

possession by the purchaser within this state, provided that the purchaser, at the time of taking delivery:

"(1) is a nonresident of this state,

"(2) has no permanent place of abode in this state,

"(3) is not engaged in carrying on in this state any employment, trade, business or profession in which the motor vehicle will be used in this state, and

"(4) prior to taking delivery, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the tax commission may require to assure proper administration of the tax imposed under subdivision (a) of section eleven hundred five.

"(b) A vendor shall not be liable for failure to collect tax on receipts from any sale of a motor vehicle provided that the vendor prior to making delivery obtains and keeps available for inspection by the tax commission any affidavit, statement or additional evidence, documentary or otherwise, as may be required to be furnished under subdivision (a) above; provided that such affidavit, statement or additional evidence is not known by the vendor, prior to making physical delivery of the motor vehicle, to be false.

"(c) For purposes of this section, the term motor vehicle shall include a motor vehicle as defined in section one hundred twenty-five of the vehicle and traffic law and a trailer as defined in section one hundred fifty-six of such law."

D. Regulations promulgated by the Division, effective June 1, 1990, provide as follows:

"20 NYCRR 526.15. **Resident.** -- (a) Individuals. -- (1) Any individual who maintains a permanent place of abode in this State is a resident.

"(2) Permanent place of abode is a dwelling place maintained by a person, or by another for him, whether or not owned by such person, on other than a temporary or transient basis. The dwelling place may be a house, apartment or flat; a room, including a room at a hotel, motel, boarding house or club; a room at a residence hall operated by an educational, charitable or other institution; housing provided by the Armed Forces of the United States, whether such housing is located on or off a military base or reservation; or a trailer, mobile home, houseboat or any other premises.

"Example 1: An individual owns a summer home in New York and leases an apartment in New Jersey. He is a resident of New York for use tax purposes with respect to tangible personal property and services used in New York.

"Example 2: An individual from another state leases a summer cottage in New York for a two-week period. He does not become a resident of New York.

"Example 3: An individual from another state attends a university in New York. Whether he lives in university housing or private housing, he is a resident of New York.

"Example 4: An individual serving in the Armed Forces of the United States occupies housing on a Federal military base within New York State. Such individual is a resident of New York State.

"(b) Others. (1) Any corporation incorporated under the laws of New York, and any corporation, association, partnership or other entity doing business in the State or maintaining a place of business in the State, or operating a hotel, place of amusement or social or athletic club in the State is a resident.

"(2) Any person while engaged in any manner in carrying on in this State any employment, trade, business or profession shall be deemed a resident with respect to the use in this State of tangible personal property or services in such employment, trade, business or profession.

"(c) Local application. The term 'resident' as it applies to sales and use tax imposed by a locality shall be defined in the same manner as resident of the State, with respect to that locality.

"Example: An individual owns a summer home in Warren County and leases an apartment in Schenectady. He is a resident of both localities.

"(d) Military personnel. Any person serving in the Armed Forces of the United States, whose dwelling place is in the State, whether on or off a Federal military base or reservation, is a resident of New York" (emphasis added).[5]

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[5] Prior to June 1, 1990, the Division's regulations differed to the extent that nonresident military personnel having their place of abode on a military base or reservation were not considered residents of New York State for sales tax purposes, while nonresident military personnel with a place of abode off-base or reservation were, as above, considered residents for sales tax purposes. Specifically, 20 NYCRR former 526.15 provided as follows:

"**Resident**. -- (a) Individuals. (1) Any individual who maintains a permanent place of abode in this State is a resident.

"(2) Permanent place of abode is a dwelling place maintained by a person, or by another for him, whether or not owned by such person, on other than a temporary or transient basis. The dwelling may be a home, apartment or flat; a room including a room at a hotel, motel, boarding house or club; or at a residence hall operated by an educational or charitable or other institution, or a trailer, mobile home, houseboat or any other premises.

"Example 1: An individual owns a summer home in New York and leases an apartment in New Jersey. He is a resident of New York for use tax purposes with respect to tangible personal property and services used in New York.

"Example 2: An individual from another State leases a summer cottage in New York for a two week period. He does not become a resident of New York.

"Example 3: An individual from another State attends a university in New York. Whether he lives in university housing or private housing, he is a resident of New York.

"(b) Others. (1) Any corporation incorporated under the laws of New York, and any corporation, association, partnership or other entity doing business in the State or maintaining a place of business in the State, or operating a hotel, place of

E. As an exemption provision, Tax Law § 1117 is construed narrowly and most strongly against the party claiming its benefit, with such party being required to show specific entitlement to the exemption (Matter of Grace v. State Tax Commn., 43 AD2d 263, 360 NYS2d 802, revd 37 NY2d 193, 371 NYS2d 715, rearg denied 37 NY2d 708, 375 NYS2d 1027). In this case, petitioner does not challenge the validity of the Division's regulation regarding sales of vehicles to military personnel, as effective June 1, 1990. Rather, petitioner alleges that the sales in question were made to purchasers who were not residents of New York State. Accordingly, the issue of exemption turns on the proof submitted by petitioner in support of the purchasers'

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amusement or social or athletic club in the State is a resident.

"(2) Any person while engaged in any manner in carrying on in this State any employment, trade, business or profession shall be deemed a resident with respect to the use in this State of tangible personal property or services in such employment, trade, business or profession.

"(c) Local application. The term 'resident' as it applies to sales and use tax imposed by a locality shall be defined in the same manner as resident of the State, with respect to that locality.

"Example: An individual owns a summer house in Warren County and leases an apartment in Schenectady. He is a resident of both localities.

"(d) Military personnel. Any person, serving in the armed forces of the United States, whose place of abode is situated on a Federal military base or reservation is not a resident of New York, unless he was a resident of New York immediately prior to his entry into service. Any person serving in the armed forces of the United States, whose place of abode is situated off a Federal military base or reservation is deemed a resident of New York" (emphasis added).

status.

F. Review of the record reveals that no evidence has been submitted with regard to 9 of the 20 vehicle sales at issue. Accordingly, there is no basis whatsoever upon which to afford exemption for these sales. As to the balance of the vehicle sales, the record reveals a specific New York address for each purchaser except Michael Pannell and Jeffrey Johnson. Further, the auditor testified that his audit review of petitioner's deal folders revealed a specific New York address for all of the purchasers. In contrast, the record also reveals for each purchaser, except Terence Knihnicki and Brice Fox, an out-of-state address (or addresses). In turn, it seems clear from the tenor of the evidence that the purchasers (and petitioner) would take the position that such out-of-state addresses represent the permanent addresses or legal residences of such purchasers.

G. Notwithstanding the listing of out-of-state addresses, the evidence falls short of establishing entitlement to exemption under Tax Law § 1117. Most specifically, there is no affidavit or even any affirmative statement from any of the purchasers, including Michael Pannell and Jeffrey Johnson for whom the record does not list a specific New York address, that at the time of purchase the buyers were both nonresidents of New York and (most importantly) had no permanent place of abode in New York. Thus, even accepting that the out-of-state addresses listed for the purchasers could represent their permanent

residences or domiciles, the balance of evidence does not confirm that such purchasers' New York addresses did not represent a permanent place of abode per Tax Law § 1117 and 20 NYCRR 526.15. Each of the sales in question occurred on or after June 1, 1990.[6] Moreover, each of the purchasers listed a New York address, and there is no evidence describing the purchasers' status in New York at the time of purchase, the duration of their stay in New York, or explaining away their New York address as something other than a place of abode.[7] Accordingly, the

evidence does not suffice to establish that the sales in question were properly entitled to exemption per Tax Law § 1117.

H. It should be noted that the petition also states as an alleged error:

> "The Commissioner of Taxation and Finance wrongfully required the taxpayer and assessed the taxpayer for the collection of Sales Tax whose collection would have violated state and federal law; to wit the solders and

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[6]As noted, the listed invoice date of sale to Brice Fox was June 1, 1990. In comparison, the evidence as to Mr. Fox listing a May 23, 1990 date consists of an apparently incomplete document which is not binding by its own terms because it is not executed by both parties (see, Finding of Fact "9[g]"). Accordingly, the evidence does not establish that the sale to Mr. Fox occurred before June 1, 1990.

[7]While the record does not specify the particular New York addresses for Michael Pannell or Jeffrey Johnson, the auditor testified that the deal folder reviewed on audit for each such purchaser in fact listed a New York address at the time of sale. Moreover, the out-of-state addresses for such two individuals appear only on correspondence dated well after the vehicle sales dates. Specifically, the listed sale date for Mr. Pannell was June 14, 1991, whereas the out-of-state address appears on correspondence dated June 4, 1992. Likewise, the listed sale date for Mr. Johnson was September 16, 1991, with the out-of-state address appearing on correspondence dated May 13, 1992.

sailor's relief acts."

In turn, the petition indicates, as a fact to be proven, "[t]hat the Soldier's and Sailor's relief act is at conflict with and preempts regulations of the Commissioner."

In contrast, the Division's answer provides as follows:

> "AFFIRMATIVELY STATES that 20 NYCRR 526.15 is not preempted by 50 USCS 501, et sec, the 'Soldiers' and Sailors' Civil Relief Act of 1940'
>
> and
>
> "AFFIRMATIVELY STATES that nothing in 50 USCS 501, et sec, prohibits the imposition and collection of sales tax from military personnel on the purchase of motor vehicles in New York State while said military personnel are residents of New York State, pursuant to 20 NYCRR 526.15."

This argument was not further addressed or developed by petitioner on the record save for testimony by the auditor noting: (a) (on direct examination) petitioner alleged at a pre-assessment closing conference that the Soldiers' and Sailors' Civil Relief Act overrides the sales tax and, (b) (on cross examination) indicating the opinion that petitioner's claim in

this regard was a negotiating position rather than a good-faith belief that the collection of sales tax was pre-empted (see, tr., pp. 29-30 and 54-56, respectively.

I. Under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 ("the Act"), military personnel shall not be deemed to have given up their prior domicile and resident status (e.g., non-New York), or to have acquired a new domicile and resident status (e.g., in New York), by virtue of being absent

from the former and present in the latter pursuant to compliance with military or naval orders (see, 50 USC Appx § 574[1]). Thus, under the Act, military personnel who are residents of jurisdictions other than New York but who are present in New York per military orders may avoid payment of New York sales tax on, inter alia, purchases of automobiles in New York, provided that the requisite taxes have been paid in the person's jurisdiction of residence (see, 50 USC Appx § 574[2]).

J. Given that petitioner did not further develop or address its allegation regarding the Act, either at hearing or by brief, it appears that petitioner may have abandoned such allegation. However, even if such allegation remains at issue, the evidence presented in this case does not provide sufficient basis to warrant relief. More specifically, as set out in Conclusions of Law "F" and "G", the evidence does not clearly establish the actual domicile and resident status of any of the purchasers. First, there are no purchasers' affidavits as to resident status, or copies of military orders specifying the nature and duration of the purchasers' stays in New York. Further, not only are there out-of-state addresses as well as in-state addresses but, in some cases, there are multiple addresses. Some of the out-of-state addresses are post-purchase addresses, which could as likely indicate a New York resident moving to another jurisdiction per military orders as indicate and establish such address as the purchaser's jurisdiction of residence at the time of purchase. In the same manner, registration of a vehicle in another jurisdiction alone does not

establish that the purchaser was a resident of such jurisdiction and was not a resident of New York. In sum, the proof presented does not suffice to establish that any of the purchasers were nonresidents of New York entitled to the benefits afforded by the Soldiers' and Sailors' Civil Relief Act of 1940.

K. The imposition of penalty in this case is sustained. In this regard, while petitioner argues that its business records and its compliance record were excellent, the Division's point that none of the items held subject to tax involved particularly complicated or unsettled questions, coupled with the testimony that exemption certificates accompanying vendors' bills were simply signed and returned, do not militate in favor of penalty abatement. In addition, petitioner was aware of the change in regulation regarding vehicle purchases by military personnel. Finally, petitioner has offered no evidence against the tax imposed with regard to purchases and fixed asset acquisitions. Accordingly, petitioner has not established entitlement to abatement of penalty.

L. The petition of Parkview Auto Sales, Inc. is hereby denied and the Notice of Determination dated November 30, 1992 is sustained.

DATED: Troy, New York
November 2, 1995

/s/ Dennis M. Galliher

ADMINISTRATIVE LAW JUDGE