

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
BEST PONTIAC-TOYOTA, INC. : DECISION
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Periods Ended May 31, :
1978 and August 31, 1978.

Petitioner, Best Pontiac-Toyota, Inc., 2301 East Main Street, Endicott, New York 13760, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ended May 31, 1978 and August 31, 1978 (File No. 28612).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York on May 16, 1984 at 1:00 P.M., with all briefs to be submitted on or before July 20, 1984. Petitioner appeared by Joel A. Scelsi, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether petitioner filed a timely petition for revision of a determination of sales and use taxes due.

II. Whether petitioner had reasonable cause for failure to remit sales and use taxes due with its returns.

FINDINGS OF FACT

1. Petitioner, Best Pontiac-Toyota, Inc., filed timely New York State and Local Sales and Use Tax Returns for the period March 1, 1978 through May 31, 1978 as follows:

<u>Month</u>	<u>Amount Shown Due</u>	<u>Amount Remitted</u>
March	\$28,261.46	\$ -0-
April	29,681.18	-0-
May	29,609.92	26,552.56

2. Petitioner filed timely New York State and local sales and use tax returns for the period ended August 31, 1978, but did not remit the full amount of tax shown due on the return.

3. On March 23, 1979 the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due for the period ending May 31, 1978 in the amount of \$86,552.56 plus penalty of \$10,578.49 and interest of \$6,497.28 for a total amount due of \$103,628.33. This was reduced by the prior amount paid of \$26,552.56 resulting in a total amount due of \$77,075.77.

4. On July 17, 1978 petitioner paid \$30,000.00 to the Department of Taxation and Finance and on February 1, 1979 petitioner made an additional payment of \$30,000.00.

5. On or about April 7, 1979, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due for the period ended August 31, 1978 in the total amount of \$6,838.80. After the hearing, the Audit Division acknowledged that the amount assessed in the Notice dated April 7, 1979 has been paid.

6. On October 24, 1979 the Audit Division issued a Notice of Assessment Review which stated that the amount of tax asserted to be due by the Audit Division for the period ended May 31, 1978 had been paid. In addition, the amount of penalty and interest assessed for the period ended May 31, 1978 was reduced to \$10,836.59 to reflect the time between the dates when payment was due to the time payment was made. The reduced amount consisted of a penalty of

\$7,278.49 for failure to make a timely payment of sales and use tax and interest of \$3,558.10.

7. On or about November 1, 1979, petitioner, by its comptroller, mailed a letter to the Department of Taxation and Finance requesting that penalties be waived because of corporate financial difficulties, but agreeing to pay the interest due.

8. On or about November 27, 1979 the Audit Division issued a second Notice of Assessment Review which stated that petitioner had not presented reasonable cause warranting a cancellation of penalties but stated that a petition for a formal hearing could be filed.

9. On January 7, 1980 petitioner filed a petition challenging the penalty asserted for the period ended May 31, 1978.

10. In response to a telephone conversation which took place on September 19, 1983, the Audit Division advised petitioner by a letter dated September 21, 1983 that the amount of money due for the period ended September 19, 1983 was \$7,278.49 representing the penalty for failure to pay on time and \$3,558.10 for interest.

11. From 1954 until 1976, Mr. Don Owen and his wife owned all of the outstanding stock in an automobile dealership known as Don Owen Incorporated.

12. In 1976, Mr. Owen entered into an agreement with Mr. Robert Harkness whereby Mr. Harkness would, over time, purchase all of Mr. Owen's interest in Best Pontiac. At the time of this agreement, Mr. Owen planned on going into semi-retirement. In conjunction with this agreement, the name of the automobile dealership was changed to Best Pontiac-Toyota, Inc. and Mr. Harkness became president. Mr. Owen assumed a position on petitioner's board of directors. However, the franchise to operate the dealership remained in Mr. Owen's name.

13. In or about the latter part of 1978, Mr. Robert Harkness, who was the comptroller of petitioner, advised Mr. Owen that the corporation was having financial difficulties. After a series of meetings, Mr. Owen was able to convince Mr. Harkness that he should relinquish control of the corporation and that Mr. Owen should resume control. In or about January, 1979, Mr. Owen took control of the corporation. When Mr. Owen resumed control, he decided that he would try to keep the corporation going rather than file for bankruptcy.

14. In or about October, 1979 Mr. Owen held discussions with an individual at the Binghamton District Office of the Department of Taxation and Finance. In the course of these discussions, Mr. Owen was led to believe that, if the sales tax due was paid, the individual in Binghamton would recommend to someone in Albany that the penalties should be waived.

15. After Mr. Owen resumed control of the corporation, he made an application for a loan to the Small Business Administration. It was a condition of the loan that all outstanding tax liabilities be satisfied. On or about July 17, 1981, petitioner went to the Binghamton District Office to discuss his tax liabilities and was advised at that time that the only outstanding tax liability was for the period ended August 31, 1978. Mr. Owen then paid the amount due for that period.

16. At the hearing, petitioner argued among other things: that all amounts due have been paid; that the assessment dated March 23, 1979 is defective in that it did not state that a petition must be filed within ninety days; that the only deficiency assessed was in the letter dated September 21, 1983, and that it is barred by the statute of limitations; that the Audit Division should have moved to dismiss the petition as untimely rather than have raised the

issue of timeliness at the hearing; and that the delay in conducting the hearing warrants the cancellation of the penalties.

CONCLUSIONS OF LAW

A. That in this instance the Audit Division has argued that by virtue of section 1138(a) of the Tax Law the proceeding was untimely commenced. However, it is clear that the Notice in issue, dated March 23, 1979, was not issued pursuant to section 1138(a) of the Tax Law. Therefore, this section is not controlling and the petition is considered timely.


B. That while the record establishes that Mr. Owen made attempts to pay the sales tax due, the penalty at issue herein was assessed against Best Pontiac-Toyota, Inc. and not Mr. Owen. Petitioner has not presented any evidence to establish that the failure to remit sales and use taxes with its returns was due to reasonable cause and not willful neglect. [Tax Law §1145(a)].

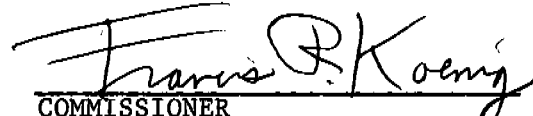
C. That the petition of Best Pontiac-Toyota, Inc. is granted to the extent that the Notice and Demand for Payment of Sales and Use Taxes Due dated April 7, 1979 is cancelled (see Finding of Fact "5"); such notice dated March 23, 1979, as modified by the Notice of Assessment Review dated October 24, 1979, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985


PRESIDENT


COMMISSIONER


COMMISSIONER