

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ROBERT B. HOWE,	:	DECISION
PRESIDENT OF HOWE OLDSMOBILE PONTIAC, INC.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1979	:	
through August 31, 1980.	:	

Petitioner, Robert B. Howe, President of Howe Oldsmobile Pontiac, Inc., 21 Greenwood Drive, Orchard Park, New York 14127, 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 December 1, 1979 through August 31, 1980 (File No. 36242).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on April 27, 1984 at 9:15 A.M., with all briefs to be submitted by July 19, 1984. Petitioner appeared by Joseph J. Renda, P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether tax allegedly owed by Howe Oldsmobile Pontiac, Inc. and assessed as due against petitioner as a person responsible to collect and remit the same pursuant to Tax Law sections 1131(1) and 1133(a) has been paid, thus warranting cancellation of the assessment against petitioner.

II. Whether, assuming the aforementioned tax remains unpaid, the Audit Division must proceed against the corporate entity before attempting to collect from petitioner.

III. Whether penalty and interest may be imposed on unpaid tax owed by a corporate entity and assessed against one of its officers.

FINDINGS OF FACT

1. On November 20, 1981, the Audit Division issued to petitioner, Robert B. Howe, as an officer of Howe Oldsmobile Pontiac, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1979 through August 31, 1980 in the amount of \$14,328.06, plus penalty and interest. The amount of the assessment represents unpaid tax liability reflected on returns filed by Howe Oldsmobile Pontiac, Inc. ("the corporation") for the three quarterly periods ended February 29, 1980 (\$6,384.84), May 31, 1980 (\$4,223.59), and August 31, 1980 (\$3,719.63), plus penalty and interest.

2. The corporation, a car dealership, ceased doing business on September 19, 1980. According to petitioner, the corporation's business activities ceased as the result of action undertaken by the Small Business Administration ("S.B.A."), to which the corporation was overdue on payment(s) due on an S.B.A. note payable. Marine Midland Bank and General Motors Acceptance Corporation ("G.M.A.C.") also became involved, due to vehicles floor planned at the dealership, and seizure of the corporation's assets and its books and records occurred.

3. The Audit Division introduced in evidence the sales tax returns (Forms ST-100) for the three quarterly periods at issue, each of which bears an eight digit number stamped in the lower right hand corner, the third digit of which in each case is a "5". According to testimony by auditor John Cuthbertson, this eight digit number is stamped on the return by the depository bank to which the returns were filed (in this case, Marine Midland Bank), and a "5" as the third digit indicates that no remittance accompanied the return.¹ In

¹ The procedure for filing the tax returns at issue was that petitioner mailed the returns to a post office box number which was the locked box maintained by Marine Midland as the Audit Division's depository bank.

addition, each return contains handwritten notations in red ink, placed on the returns by bank personnel who handled the returns, stating "no funds", "D", "-0-", "rt 1", which also indicates no remittance accompanied the return.

4. In addition to the foregoing, Audit Division computer printouts introduced in evidence and testified to by Mr. Cuthbertson indicate, inter alia, that the corporation was assessed for the unpaid amounts but that the assessment was "uncollectible - out of business". The printouts indicate that the tax was unpaid and that assessments were outstanding against petitioner as a responsible officer of the corporation. These printouts also reflect other assessments issued against the corporation, pertaining to periods other than those in question, which were either purged or closed.

5. Petitioner testified that he was certain the taxes at issue had been paid, but that since the corporation's books and records had been seized, he was unable to prove such payment. As part of a civil action pending in the United States District Court (Western District of New York), the corporation has asserted that Marine Midland's failure to return or allow access to the corporation's books and records has prevented the corporation from reconstructing its business affairs and proving payments to various taxing authorities. Petitioner asserts that such lack of access to the corporation's records prevents him from proving payment of the taxes assessed.

6. In response to the Audit Division's September 8, 1983 Answer to the petitioner's Perfected Petition, petitioner submitted a letter dated September 19, 1983 requesting, under the Freedom of Information Act, the following:

"1. Copies of all tax returns allegedly filed by defendant corporation and received by New York State. The Department of Taxation will certify the receipt of said returns and prepare an acknowledgement for each as to authenticity.

2. Certified copies of any assessments filed against Howe Oldsmobile-Pontiac, Inc. demanding payment of taxes allegedly owed.

3. Any and all other data intended to be used by New York State in the prosecution of this matter."

This request concluded with the following paragraph:

"Further, since it is the states' intent to cover over 10 years of tax matters it is my contention that a 90 minute limit is a violation of my civil rights to a fair trial. Scores of witnesses and expert testimony to refute 10 years of allegations will in my judgement require a great deal of time."

7. By a letter dated September 30, 1983, petitioner was advised that his request was being forwarded to the Audit Division's Records Access Officer, and that petitioner should contact the Tax Appeals Bureau regarding his request for more time for the hearing. The information requested was not furnished to petitioner prior to the hearing. As noted, however, each of the three returns pertaining to the assessment at issue, together with the various computer printouts, were offered in evidence at the hearing. In response to petitioner's assertion that providing these documents at the hearing was inadequate and did not allow petitioner proper time to review and prepare, petitioner was offered a continuance of the hearing for the purpose of review and preparation. Petitioner did not avail himself of such opportunity nor is there evidence that petitioner had made any interim queries between the date of his request and the date of the hearing as to why the items requested had not been supplied.²

8. Petitioner admits and does not contest the fact that he was, as president of the corporation, personally responsible for any tax required to be collected on behalf of the corporation within the meaning and intent of Tax Law sections 1131(1) and 1133(a). Petitioner testified that the corporation's accountants prepared the tax returns, which were then returned to the corporation

² The instant hearing, originally scheduled for Thursday, April 26, 1984 at 1:15 P.M., was rescheduled at petitioner's request to Friday, April 27, 1984 at 9:15 A.M., and was the only case scheduled to be heard on such date.

to be signed by petitioner (or another authorized signatory) and filed with payment. Petitioner noted that he was not always the person who physically signed and filed the returns and payment checks. Petitioner was allowed a period of time after the hearing (until July 19, 1984) to attempt to obtain copies of cancelled checks for the periods and in the amounts at issue, based on reference to such amounts, dates and checking account number. No such cancelled checks were submitted.

9. Petitioner maintains that the tax at issue has been paid. He asserts, further, that even if the tax were unpaid, it is the corporation which must be looked to first for payment. In addition, petitioner maintains that penalty and interest on unpaid taxes may not properly be imposed upon petitioner. Finally, petitioner asserts that the Audit Division's failure to furnish all items sought by petitioner's September 19, 1980 request warrants cancellation of the assessment.

CONCLUSIONS OF LAW

A. That under section 1133(a) of the Tax Law, every person required to collect any tax imposed by Article 28 shall be personally liable for the tax imposed, collected or required to be collected. Under section 1113(1) "(p)ersons required to collect tax" is defined to include any officer or employee of a corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of [Article 28]."

B. That petitioner has conceded that he was a person required to collect tax and was personally responsible for taxes required to be collected by the corporation, within the meaning and intent of Tax Law sections 1131(1) and 1133(a). The evidence submitted established that there has been no payment of tax due for the three quarterly periods at issue, either at the time of filing of the returns or subsequent thereto (see Findings of Fact "3" and "4").

Accordingly, the tax assessed and unpaid remains the personal responsibility of petitioner. Furthermore, there is no requirement that the Audit Division exhaust its avenues of collecting such tax from the corporation prior to proceeding against petitioner as a person responsible therefor (cf. Matter of Keith Pierpont, Officer of Treeman, Inc., State Tax Comm., October 21, 1983).³

C. That the Tax Law does not excuse an officer or employee under a duty to act on behalf of a corporation for penalty and interest due New York State (Matter of Harold Cohen, State Tax Comm., December 14, 1982). Accordingly, it was not improper for the Audit Division to impose penalty and interest against petitioner.

D. That, finally, the failure to provide the items requested by petitioner in his September 19, 1980 request does not warrant cancellation of the assessment. Given the broad nature of the items requested, the fact that there are three quarterly periods are at issue rather than the ten years alluded to in petitioner's request, and the submission at the hearing of the requested documents concerning the three quarterly periods, together with the unacted upon opportunity afforded petitioner for a continuance of the hearing, there is no basis established upon which to cancel the assessment.

E. That the petition of Robert B. Howe, President of Howe Oldsmobile Pontiac, Inc. is hereby denied.

DATED: Albany, New York

FEB 06 1985

STATE TAX COMMISSION

Roderick W. Allen
PRESIDENT

Francis R. Koening
COMMISSIONER

[Signature]
COMMISSIONER

³ - It is noted, in this regard, that the assessment for the amounts at issue against the corporation shown on the computer printouts reflected the legend "uncollectible - out of business".