

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

STEPHEN BOULET  
D/B/A OTISCO AUTO SALES

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 Period September 1, 1978  
through August 31, 1981.

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Petitioner, Stephen Boulet d/b/a Otisco Auto Sales, 1571 Otisco Valley Road, Marietta, New York 13110, 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, 1978 through August 31, 1981 (File No. 38188).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 18, 1984 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.

#### FINDINGS OF FACT

1. Petitioner, Stephen Boulet d/b/a Otisco Auto Sales, was engaged in the sale of used automobiles.

2. On March 19, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period September 1, 1978 through August 31,

1981 for taxes due of \$3,916.32, plus interest of \$1,161.13, for a total of \$5,077.45.

3. The only records petitioner made available for audit were sales invoices for October 13, 1980 through September 12, 1981 and cancelled checks. The Audit Division obtained copies of MV-50's issued by petitioner from the Department of Motor Vehicles. A list of the vehicles sold was prepared and compared with petitioner's book of registry and available sales invoices. The Audit Division estimated the selling price of each vehicle based on the average retail value shown in a National Automobile Dealers Association (NADA) publication. Based on the available sales invoices, it was determined that petitioner sold his vehicles for 54.52 percent of average retail value. This percentage was applied to the above estimated selling prices and resulted in additional taxes due of \$1,491.84.

The Audit Division also found MV-50's issued for certain vehicles that were not recorded in the book of registry. The additional tax due on these vehicles amounted to \$142.39. There were fourteen transactions which petitioner considered nontaxable as dealer to dealer sales. The Audit Division disallowed these sales because petitioner did not have exemption certificates on file and assessed taxes due of \$1,390.40.

Lastly, the Audit Division found that petitioner advertised automobiles in the local Pennysaver. The ads appeared in the name of Stephen Boulet individually rather than in the business name. The Audit Division reviewed Pennysavers for a nine month period and found five automobiles advertised by Mr. Boulet which were not shown in his book of registry. The sales prices of the five automobiles were estimated (NADA retail value x 54.52%) and the Audit

Division considered that petitioner sold five automobiles in each nine month period covered by the audit. This resulted in additional tax due of \$891.66.

4. Following a pre-hearing conference with the Tax Appeals Bureau, the taxes due were reduced to \$1,112.08. The revision was based on additional sales invoices and exemption certificates submitted by petitioner. Petitioner agreed to a liability of \$606.92 and submitted a check in payment thereof.

The balance of the taxes due (\$505.12) represented the tax due on the following two automobiles advertised in the Pennysaver for which there were no sales invoices and the automobiles did not appear in petitioner's book of registry:

(1) 1976 Volare	\$1,349.00
(2) 1971 Chevrolet	600.00

Based on the above sales for nine months, the Audit Division estimated sales of \$7,216.00 for the audit period and tax due thereon of \$505.12.

5. Petitioner conceded at the hearing that sales tax of \$42.00 was due on the 1971 Chevrolet. The car was sold and an MV-50 was issued; however, the sales tax was not paid over with the sales tax returns filed.

With respect to the 1976 Volare, petitioner argued that he took this vehicle on consignment from another dealer and it was returned to the dealer unsold. Petitioner offered no evidence to support his argument.

6. Petitioner took the position that an MV-50 was issued for every automobile sold and since the Audit Division had a complete list of MV-50's, there was no basis for estimating the additional sales indicated in Finding of Fact "4", supra.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that the amount of tax due shall be determined from such information as may be available but "if necessary, the tax may be estimated on the basis of external indices."

That section 1132(c) of the Tax Law specifically provides, in pertinent part, that it shall be presumed that all receipts for property or services are subject to tax until the contrary is established and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax.

B. That petitioner's books and records were inadequate and incomplete for purposes of verifying taxable sales or substantiating nontaxable sales. When books and records are incomplete, as here, the use of external indices is permissible (Matter of Korba v. N.Y.S. Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division's determination of additional taxable sales and sales taxes due was proper pursuant to section 1138(a) of the Tax Law. Exactness is not required where it is the taxpayer's own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Matter of Markowitz v. State Tax Commission, 54 A.D.2d 1023).

C. That the petition of Stephen Boulet d/b/a Otisco Auto Sales is granted to the extent that the additional taxes due are reduced to \$1,112.08. The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 19, 1982; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

APR 15 1985

STATE TAX COMMISSION

Richard W. Olin  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

[Signature]  
COMMISSIONER