

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CLEMENT A. BOKMAN
OFFICER OF KENMORE FORD, 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 Period June 1, 1979
through November 30, 1979.

Petitioner, Clement A. Bokman, Officer of Kenmore Ford, Inc., 5740 Wynkoop Road, Lockport, New York 14094, 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 June 1, 1979 through November 30, 1979 (File No. 39576).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 18, 1986 at 9:15 A.M. Petitioner appeared by Watson, McGarvey, Hetzelt & Bennett (Emmett McGarvey, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly estimated the tax liability of Kenmore Ford, Inc. on the basis of external indices.

11. Whether petitioner was a person required to collect and pay over sales tax on behalf of Kenmore Ford, Inc. within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the period at issue herein.

FINDINGS OF FACT

1. On May 28, 1982, the Audit Division issued to Clement A. Bokman (hereinafter "petitioner"), as a responsible officer of Kenmore Ford, Inc.

(hereinafter "Kenmore"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1979 through November 30, 1979 in the amount of \$251,520.72, plus penalty and interest, for a total amount due of \$394,256.79. The amount of the assessment was estimated by the Audit Division since no returns were filed for the period at issue.

2. Subsequent to the issuance of the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, the Audit Division received information that Kenmore ceased doing business in June 1979. A representative of Citibank advised that a stop on Kenmore's floor plan, which prevented Kenmore from purchasing new automobiles, occurred in May 1979. On July 3, 1979, Citibank exercised its rights as a secured party against Kenmore by service of a declaration of default, acceleration of indebtedness and notice of intention to foreclose. The representative of Citibank advised that Kenmore did, however, sell some vehicles during June 1979. He estimated that 15 to 20 vehicles were sold by Kenmore during June for which Citibank did not receive payment. The Audit Division thereupon applied an average selling price of \$6,000.00 per vehicle which resulted in estimated sales of \$120,000.00. Tax due for the period in issue was determined to be \$8,400.00 (7 percent of \$120,000.00). At a pre-hearing conference, the Audit Division, therefore, agreed to reduce the assessment to \$8,400.00, plus applicable penalty and interest.

3. It is the position of the petitioner that few, if any, of the vehicles remaining in Kenmore's inventory in June 1979 were sold at retail. Petitioner stated that several vehicles were taken to auctions and sold, at wholesale, to dealers for resale and that, as sales for resale, were exempt from the imposition of sales tax. In addition, petitioner contends that in the case of vehicles sold at retail, trade-in allowances were provided to almost all of the purchasers

and sales tax is imposed only upon the difference between the trade-in allowance and the selling price of the vehicle purchased. Petitioner presented no resale certificates, sales invoices or any other evidence to substantiate his contention that certain vehicles were sold for resale or that any of the retail sales made during the period at issue involved trade-in allowances.

4. Petitioner was the president of Kenmore and, along with his brother, was a fifty percent owner thereof. He had the authority to sign the corporation's checks and tax returns and he exercised this authority on several occasions. Petitioner had the authority to hire and fire employees of Kenmore and he derived substantially all of his business income from Kenmore.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides, in part, that "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected." Section 1131(1) defines "persons required to collect tax" as including any officer or employee who is under a duty to act for a corporation in complying with the provisions of Article 28 of the Tax Law.

B. That within the meaning and intent of sections 1133(a) and 1131(1) of the Tax Law, petitioner was a person required to collect tax on behalf of Kenmore and, as such, was personally liable for the tax imposed, collected or required to be collected by Kenmore.

C. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement. Petitioner failed to maintain books and records as required by section 1135(a) of the Tax Law.

Accordingly, the Audit Division properly estimated the taxes due on the basis of external indices pursuant to the provisions of section 1138(a) of the Tax Law.

D. That the estimate procedures adopted by the Audit Division were reasonable under the circumstances and petitioner failed to sustain its burden to demonstrate by clear and convincing evidence that the Audit Division's method or amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 AD2d 858).

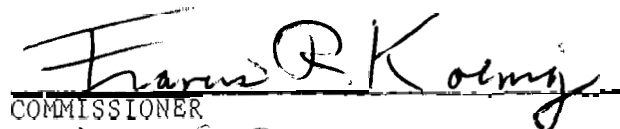
E. That the petition of Clement A. Bokman, Officer of Kenmore Ford, Inc., is granted to the extent indicated in Finding of Fact "2", supra; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 28, 1982; and that, except as so granted, the petition is in all other respects denied.

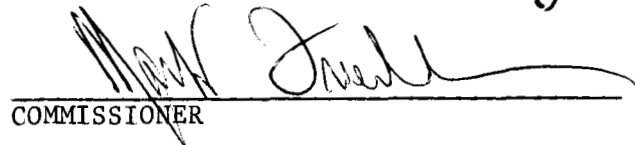
DATED: Albany, New York

STATE TAX COMMISSION

JAN 30 1987


PRESIDENT


COMMISSIONER


COMMISSIONER