

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
RICHARD MICKELSON
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 1983.

DECISION

Petitioner, Richard Mickelson, 7 Austin Road, Tully, New York 13159, 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 1983 (File No. 46813).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on April 5, 1985 at 10:00 A.M., with all briefs to be submitted by May 1, 1985. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a refund of sales tax upon the repurchase of an automobile by the manufacturer.

FINDINGS OF FACT

1. On December 8, 1981, petitioner, Richard Mickelson purchased a 1982 Chevrolet automobile from a dealership known as Jack McNerney Chevrolet, Inc. The price of the vehicle was \$10,906.76, plus sales tax of \$374.92, for a total cash price of \$11,281.68. The new automobile was financed, in part, through the trade-in of a 1979 automobile which was given a trade-in value of \$5,550.76, less a lien of \$708.63, for a net trade-in value of \$4,842.13.

2. The new automobile was delivered to petitioner in either January or February of 1982. Within three or four months after the delivery of the automobile, it could no longer be operated.

3. In July, 1982, petitioner commenced a lawsuit against the Chevrolet Motor Division of the General Motors Corporation for damages arising from the purchase of the defective automobile. On June 2, 1983, as the result of binding arbitration, the vehicle was repurchased by the Chevrolet Motor Division for \$8,221.68.

4. On July 12, 1983, petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax seeking a refund in the amount of \$575.52 representing seven percent of the \$8,221.68 which he received in accordance with Finding of Fact "3".

5. On September 1, 1983, the Audit Division advised petitioner that his claim for refund was denied since the repurchase of the vehicle did not constitute a cancellation of the original purchase agreement in accordance with 20 NYCRR 525.5.

CONCLUSIONS OF LAW

A. That Tax Law §1132(e) provides, in part:

"The tax commission may provide, by regulation, for the exclusion from taxable receipts, amusement charges or rents of amounts representing sales where the contract of sale has been cancelled, the property returned or the receipt, charge or rent has been ascertained to be uncollectible or, in case the tax has been paid upon such receipt, charge or rent, for refund of or credit for the tax so paid. Where the tax commission provides for a credit for the tax so paid, it shall require an application for credit to be filed, but it may also allow the applicant to immediately take the credit on the return which is due coincident with or immediately subsequent to the time the applicant files his application for credit."

B. That in accordance with Tax Law §1132(e), the State Tax Commission promulgated 20 NYCRR 525.5 which, during the period in issue, provided, in part, as follows:

"Cancelled Sales, Returned Merchandise and Bad Debts. -- (a) Cancelled sales and returned merchandise. (1) Exclusion from return. Where a contract of sale has been cancelled or the property returned within 90 days of the date of delivery to the purchaser, a vendor of tangible personal property or services, a recipient of amusement charges or an operator of a hotel (as defined in section 1101 of the Tax Law) may exclude such receipts, charges or rents from his return.

(2) Credit where tax previously remitted. Where the tax has been paid and reported in a return, an application for refund of or credit for the tax paid upon such receipt, charge or rent shall be filed with the State Tax Commission within three years from the date when the tax was payable by such person to the Tax Commission. The applicant may, as part of the application for credit, take the credit on the return which is due coincident with or immediately subsequent to the time such application is filed. The application for refund or credit shall be subject to the provisions of subdivisions (a), (b) and (c) of section 1139.

(b) Allowance for defective merchandise. (1) Allowability of credit. Where an allowance is made for defective merchandise, the purchaser is required to pay the tax upon the amount due after subtracting the allowance from the sales price. Where the tax has been paid on the full selling price, and the vendor has paid such tax to the Commission, a credit or refund of the tax attributable to the allowance may be taken in accordance with the procedure described in subdivision (a)(2) of this section.

(2) Exchange of merchandise. If a purchaser returns defective merchandise to his vendor, and in connection with such return, new merchandise is furnished, the purchaser is required to pay the tax only on the cost of the new article less the allowance for merchandise returned."

C. That petitioner is not entitled to a refund of sales tax since there is no provision therefor on the facts presented herein. It is noted that the repurchase of the vehicle may not be considered a cancelled sale within the meaning of 20 NYCRR 525.5(a)(1) since the vehicle was not returned within ninety days of its purchase. In addition, the repurchase of the vehicle by the Chevrolet Motor Division was a separate transaction from the original purchase

from Jack McNerney Chevrolet, Inc. Lastly, the repurchase of the vehicle did not constitute an allowance for defective merchandise within the meaning of 20 NYCRR 525.5. Accordingly, petitioner is not entitled to the refund imposed under section 1105(a) of the Tax Law.

D. That the petition of Richard Mickelson is denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 21 1985

Roderica W. Allen
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER