

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Donald DeManno :  
d/b/a Midtown Auto Sales : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of :  
Sales & Use Tax :  
under Article 28 & 29 of the Tax Law :  
for the Period 6/1/71-5/31/74. :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of May, 1980, he served the within notice of Determination by mail upon Donald DeManno, d/b/a Midtown Auto Sales, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald DeManno  
d/b/a Midtown Auto Sales  
287 Lyell Ave.  
Rochester, NY 14606

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Donald DeManno :  
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State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of May, 1980, he served the within notice of Determination by mail upon Robert M. Tyle the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Robert M. Tyle  
Tantalo, Bianchi & Gould  
45 Exchange St.  
Rochester, NY 14614

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

May 16, 1980

Donald DeManno  
d/b/a Midtown Auto Sales  
287 Lyell Ave.  
Rochester, NY 14606

Dear Mr. DeManno:

Please take notice of the Determination of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Robert M. Tyle  
Tantalo, Bianchi & Gould  
45 Exchange St.  
Rochester, NY 14614  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
of	:	
DONALD DeMANNO	:	DETERMINATION
d/b/a MIDTOWN AUTO SALES	:	
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, 1971 through May 31, 1974.	:	

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Applicant, Donald DeManno d/b/a Midtown Auto Sales, 287 Lyell Avenue, Rochester, New York 14606, filed an application 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, 1971 through May 31, 1974 (File No. 11101).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on August 13, 1979 at 1:15 P.M. Applicant appeared by Robert M. Tyle, Esq. and Frank Tantalo, P.A. The Audit Division appeared by Peter Crotty, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the Sales Tax Bureau, in the absence of books and records, properly used external indices to determine applicant's sales tax liability.

FINDINGS OF FACT

1. On December 13, 1974, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for the period June 1, 1971 through May 31, 1974 for \$20,328.87, plus penalty and interest of \$5,887.47, for a total of \$26,216.34. Applicant timely filed an application for a hearing to review the determination.

2. During the period at issue, applicant operated a retail and wholesale used car sales lot.

3. A Consent Extending Period of Limitation for Assessment of Sales and Use Taxes to December 20, 1974 was executed by applicant.

4. The Sales Tax Bureau found applicant's books and records either non-existent or inadequate. The Sales Tax Bureau used the Department of Motor Vehicle records to obtain information regarding applicant's sales of motor vehicles. A detailed listing of sales was prepared from the Motor Vehicle Book of Registry (MV-50) for the period June 1, 1971 through February 28, 1974. Said registry contained the name and address of the purchaser, as well as the year, make and description of each motor vehicle.

A value was established for each vehicle sold for the above period by using the Schedule of Valuation Norms-Casual Sale of Motor Vehicle (Form ST-170.7). The auditor did not establish values for vehicles listed as wholesale nor were these sales held taxable.

5. The period of March 1, 1974 through May 31, 1974 was the only period where sales invoices were available to substantiate the totals recorded in the sales ledger. The examination of this period revealed: the total sales made for the period were not all recorded in the sales ledger; the sales that were recorded in the sales ledger were understated; and the total recorded sales in the sales ledgers were underreported on the quarterly Sales Tax Return (ST-100).

A value was established for each vehicle sold at retail for the period March 1, 1974 through May 31, 1974 by using the sales price as shown on the sales invoice and, where no invoice was available, the value shown on the Schedule of Valuation Norms-Casual Sale of Motor Vehicle.

6. The value of all taxable vehicles sold during the period at issue totaled \$443,416.00 with tax due thereon of \$31,039.38. Tax of \$10,710.51 paid by applicant was deducted from the tax due leaving additional tax due of \$20,328.87.

7. Applicant contended that the vehicles sold were not in good condition; thus, the selling prices for vehicles sold as determined by the Sales Tax Bureau were inaccurate.

8. Applicant further contended that his records were in possession of his estranged wife, who would not release them for audit.

9. Applicant submitted the following evidence to show that the values established by the Sales Tax Bureau were incorrect.

- a. Photos of cars being sold at retail, with price in window, by other car dealers on November 18, 1974. Based on these prices, applicant contended these cars were sold at 65 percent of the average retail price published in the Eastern Edition of NADA, the Official Used Car Guide.
- b. Newspaper advertisements of automobiles for sale by other dealerships during November, 1974 which applicant contended were being sold at 60.5 percent of the average retail price published in the Official Used Car Guide.

However, applicant failed to submit any documentary evidence to show the price of the cars sold by him during the period at issue was less than the amount established by the Sales Tax Bureau.

#### CONCLUSIONS OF LAW

A. That the audit procedures used by the Sales Tax Bureau to determine applicant's sales in the absence of books and records, were proper pursuant to section 1138(a) of the Tax Law. The resulting findings of additional sales tax for the period June 1, 1971 through May 31, 1974 were supported by substantial documentary evidence.

B. That the application of Donald DeManno d/b/a Midtown Auto Sales is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 13, 1974 is sustained.

DATED: Albany, New York

MAY 16 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER