

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Michael L. Buonocore :
: 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 9/78. :

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 21st day of August, 1981, he served the within notice of Decision by certified mail upon Michael L. Buonocore, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael L. Buonocore
40 Drewry Lane
Tappan, NY 10983

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
21st day of August, 1981.

Bonnie P. Hagelund

J. Vredenburg

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

August 21, 1981

Michael L. Buonocore
40 Drewry Lane
Tappan, NY 10983

Dear Mr. Buonocore:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1139 & 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

,
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Michael L. Buonocore :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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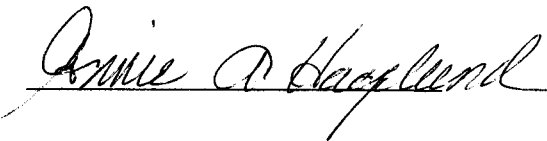
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of August, 1981, he served the within notice of Decision by mail upon Michael L. Buonocore, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

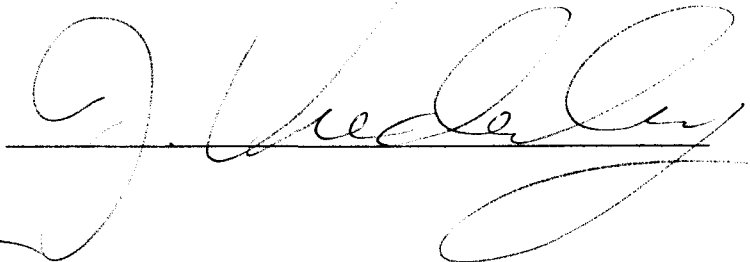
Michael L. Buonocore
40 Drewry Lane
Tappan, NY 10983

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
14th day of August, 1981.


Annie D. Haglund


Jay Vredenburg

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

August 14, 1981

Michael L. Buonocore
40 Drewry Lane
Tappan, NY 10983

Dear Mr. Buonocore:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1139 & 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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
MICHAEL L. BUONOCORE
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 1978.

DECISION

Petitioner, Michael L. Buonocore, 40 Drewry Lane, Tappan, New York, 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 1978 (File No. 25759).

On November 26, 1980, petitioner informed the State Tax Commission, in writing, that he desired to waive a small claims hearing and to submit the case to the State Tax Commission, based on the entire record contained in the file. After due consideration of the record, the Commission renders the following decision.

ISSUES

I. Whether petitioner is entitled to a refund of sales tax paid by him on the purchase of a new car proportionate in amount to the sales price of his old vehicle sold in a separate and unrelated transaction.

II. Whether the Sales Tax Law is discriminatory and unconstitutional as applied to petitioner.

FINDINGS OF FACT

1. On September 28, 1978, petitioner purchased a 1979 Cadillac-Sedan DeVille for \$11,532.00, plus sales tax of \$461.28, for a total of \$11,993.28. The petitioner did not trade in his old car, but rather on the same date and in

a separate transaction petitioner sold his 1977 Cadillac-Sedan DeVille for \$7,200.00, on which the Sales Tax Bureau collected sales tax of \$576.00.

2. On September 28, 1978, petitioner filed a claim for refund of sales tax in the amount of \$288.00. Petitioner computed his refund on the basis that monies received from the sale of his car should be offset against the cost of his new car and only the net amount thereon should be subject to sales tax.

3. On March 28, 1979, the Audit Division rejected petitioner's claim for refund on the basis that the sales or exchanges of motor vehicles between two individuals who are not dealers or vendors are taxable exchanges. Since the seller in a casual transaction is not a registered vendor, the buyer is required to pay the tax due on the purchase of the car when registering the vehicle.

4. Petitioner contended that if, in lieu of selling his old car independently, he had instead traded it in to the vendor from whom he purchased his new car, it would have reduced the cost of his new car and a fortiori reduced the sales tax due thereon. Petitioner also argued that to deny him said reduced sales tax because he consummated the sale of his old car independently is a denial of equal protection under the Federal Constitution.

CONCLUSIONS OF LAW

A. That the purchase of a new car by the petitioner constituted a retail sale pursuant to section 1101(b)(4) of the Tax Law and that such retail purchase is subject to the imposition of sales tax within the meaning and intent of section 1105(a) of the Tax Law.

B. That 20 NYCRR 526.5(f) provides in relevant part:

"Any allowance or credit for any tangible personal property accepted in part payment by a vendor on the purchase of tangible personal property... and intended for resale by such vendor shall be excluded when arriving at the receipt subject to tax..."

That petitioner's motor vehicle was not accepted in part payment by a vendor but rather petitioner sold his vehicle in a separate transaction; therefore, there shall be no allowance or credit when arriving at the receipt subject to tax.

C. That an administrative hearing is not the proper forum to challenge the jurisdiction of the State Tax Commission on the ground that a statute is unconstitutional. The constitutionality of the laws of the State of New York is presumed at the administrative level of the New York State Tax Commission. There is not jurisdiction at the administrative level to decide the constitutionality of a law (Tully v. Griffin, Inc., 429 U.S. 68 (1976); Hospital Television Systems, Inc. v. New York State Tax Commission, 63 Misc.2d 705, 311 N.Y.S.2d 568).

D. That the petition of Michael L. Buonocore is denied and the refund denial issued March 28, 1979 is sustained.


DATED: Albany, New York

~~AUG 14 1981~~

AUG 21 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER