

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

December 29, 1982

Truck Town Sales & Service, Inc.
481 W. Hamilton St.
Geneva, NY 14456

Gentlemen:

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) 1138 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Walter C. Gage
Gage & Gage
33 Seneca St.
Geneva, NY 14456
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
TRUCK TOWN SALES & SERVICE, 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 March 1, 1975 through	:	
February 28, 1978.	:	

Petitioner, Truck Town Sales & Service, Inc., 481 West Hamilton Street, Geneva, New York 14456, 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 March 1, 1975 through February 28, 1978 (File No. 25457).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 1 Marine Midland Plaza, Rochester, New York, on October 23, 1980 at 10:45 A.M. Petitioner appeared by Walter C. Gage, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether petitioner, Truck Town Sales & Service, Inc., is responsible for collection of sales tax on the transfer of a motor vehicle from one party to another.

FINDINGS OF FACT

1. On November 28, 1978, 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, Truck Town Sales & Service, Inc. The Notice assessed a

tax of \$16,846.31, plus penalty and interest of \$6,148.92, for a total due of \$22,995.23, for the period March 1, 1975 through February 28, 1978.

2. Prior to the small claims hearing the Audit Division reduced the additional sales and use tax assessed to \$2,811.29 which is sales tax on a tractor truck which was not paid over to New York State.

3. During the period under review, petitioner operated a retail motor truck sales and service business selling International Harvester Corporation tractor trucks.

4. On June 13, 1977, petitioner, Truck Town Sales & Service, Inc. sold a 1977 International Harvester tractor truck. The purchaser financed the truck with a loan from International Harvester Credit Corporation who took title to the tractor truck. The purchaser subsequently became delinquent in his payments and International Harvester Credit Corporation ordered the purchaser to return the tractor truck to petitioner, Truck Town Sales & Service, Inc.'s lot for safekeeping.

5. International Harvester Credit Corporation found a second purchaser to take over the tractor truck and the installment sale contract. All rights and interest in the tractor truck were transferred to the second purchaser.

6. Petitioner, Truck Town Sales & Service, Inc., did not receive any consideration for this transfer of equity, nor have title to the vehicle after the initial sale on June 13, 1977.

7. Petitioner, Truck Town Sales & Service, Inc., maintained a copy of the MV-50 issued to the second purchaser. A MV-50 (which is a New York State Department of Motor Vehicle form) indicates inter alia that all New York State and local sales taxes have been collected from the purchaser. The MV-50 is required to be signed by the dealer and is then given to the purchaser. The

purchaser upon registering the vehicle turns the MV-50 over to the Department of Motor Vehicles evidencing inter alia that the tax had been paid to the dealer. The petitioner's sales journal showed the transfer from one party to the other as a sale, however, it also showed that sales tax had not in fact been collected.

8. Petitioner received no consideration for the transfer of the tractor truck, its employee both erroneously issued an MV-50 and recorded the transaction in the sales journal. Accordingly, petitioner argued that it is not subject to sales tax since one cannot sell what one does not own.

9. The Audit Division argued that since the transaction was recorded and MV-50 was issued, Truck Town Sales & Service, Inc. were responsible for the sales tax.

CONCLUSIONS OF LAW

A. That section 1101(b)(5) of the Tax Law defines a sale as "any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this Article, for a consideration or any agreement therefor."

B. That the petitioner was not involved in the transfer of title between International Harvester Credit Corp. and the second purchaser nor did petitioner receive any consideration from said transaction. That an employee of petitioner erroneously issued the MV-50 and recorded the transaction in petitioner's sales journal.


C. That the petition of Truck Town Sales & Service, Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 28, 1978 and revised as per Finding of Fact "2" is cancelled.


DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Truck Town Sales & Service, Inc. :
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 3/1/75-2/28/78. :

AFFIDAVIT OF MAILING

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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Truck Town Sales & Service, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Truck Town Sales & Service, Inc.
481 W. Hamilton St.
Geneva, NY 14456

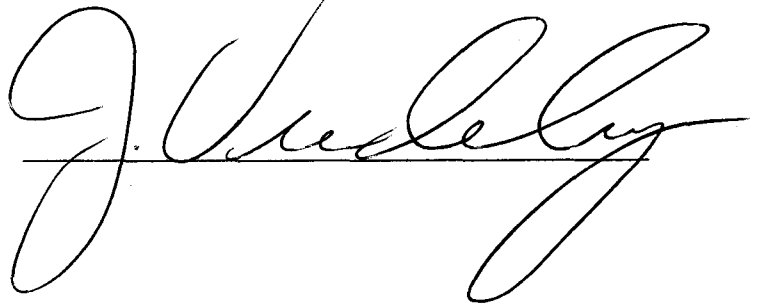
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
29th day of December, 1982.

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Truck Town Sales & Service, Inc. :
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 3/1/75-2/28/78. :

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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Walter C. Gage the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Walter C. Gage
Gage & Gage
33 Seneca St.
Geneva, NY 14456

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
29th day of December, 1982.

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

J. Vredenburg

P 230 844 330
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO		Walter C. Gage	
STREET AND NO.		Gage + Gage	
P.O. STATE AND ZIP CODE		33 Seneca St Geneva N.Y. 14456	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

P 230.844 329
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO		JACK TOWN Select Service	
STREET AND NO.		481 W. Hamilton St	
P.O. STATE AND ZIP CODE		Geneva N.Y. 14456	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976