

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

March 18, 1983

AuSable Motor Sales, Inc.
Edith Madden & Vernon McDonald
c/o Daniel T. Manning, Jr.
S. Main St.
AuSable Forks, NY 12912

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
Daniel T. Manning, Jr.
S. Main St.
AuSable Forks, NY 12912

AND

Edith Madden
Mirror Lake Dr.
Lake Placid, NY 12946
Taxing Bureau's Representative

AND

Vernon McDonald
RD #1
Jay, NY 12941

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions
of
AUSABLE MOTOR SALES, INC.
EDITH MADDEN AND VERNON McDONALD
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, 1974
through August 31, 1976.

DECISION

Petitioners, AuSable Motor Sales, Inc., Edith Madden and Vernon McDonald, c/o Daniel T. Manning, Jr., South Main St., AuSable Forks, New York 12912, filed petitions 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, 1974 through August 31, 1976 (File No. 20599).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on June 2, 1982 at 1:15 P.M. Petitioners appeared by Daniel T. Manning, Jr., Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales taxes due from petitioner AuSable Motor Sales, Inc. for the period March 1, 1974 through August 31, 1976.

II. Whether petitioners, Vernon McDonald and Edith Madden, were persons required to collect tax on behalf of AuSable Motor Sales, Inc. and thus personally liable for sales taxes unpaid by said corporation.

FINDINGS OF FACT

1. Petitioner, AuSable Motor Sales, Inc. ("AuSable"), was a Chrysler, Plymouth, Dodge automobile dealership engaged in the sale of new and used automobiles. AuSable also operated a parts and service department and sold gasoline.

AuSable ceased business operations on June 24, 1976.

2. On June 15, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioners, AuSable, Dr. Robert F. Madden, as President, Edith Madden as Vice President and Vernon McDonald as general manager. Said Notice was issued for taxes due of \$38,333.01, plus penalty and interest of \$17,306.00, for a total of \$55,639.01 and covered the period March 1, 1974 through August 31, 1976.

3. AuSable's business records were inadvertently destroyed when it discontinued business. Because of the unavailability of books and records, the Audit Division estimated taxes due on the aforesaid notice as follows:

Taxes paid (March 1, 1971 - February 28, 1974)	\$10,215.84
Additional taxes due on prior audit conducted for the period March 1, 1971 - February 28, 1974	48,622.50
Total	<u>\$58,838.34</u>
Average tax due per reporting period *	\$4,903.20

* \$1,274.83 for June 1, 1976 to June 24, 1976

4. Following a pre-hearing conference, the Audit Division, from Department of Motor Vehicles' records (MV-50), prepared a list of automobiles sold by AuSable for the period September, 1975 through August, 1976 (MV-50's for earlier periods were not available). The MV-50's indicated the name of the purchaser, the year and description of the vehicle. The average retail selling price and available options for each automobile were determined from National Automobile Dealers Association (NADA) publications.

The Audit Division also contacted AuSable's supplier of gasoline and was advised that AuSable's gasoline purchases for the audit period amounted to approximately \$22,420.69.

5. The Audit Division recomputed the tax due for the period September, 1975 through August, 1976 based on the above information in two ways. The first method used the average retail selling price not including any options, a 50 percent trade-in allowance, gas sales at cost and estimated parts and service sales of \$1,000.00 per month. The resulting deficiency under this method was \$4,956.39 for said period. AuSable paid taxes of \$1,102.22 for the same period for an underreporting factor of 349.67 percent.

The second method included all available options in determining the automobile selling prices, did not consider trade-ins, gas sales at cost plus one-third and estimated parts and service sales of \$2,000.00 per month. This method resulted in taxes due of \$11,113.84.

6. AuSable sent letters to the purchasers of the automobiles found by the Audit Division requesting for each the sales price and the amount of the trade-in, if any. From the responses received, the attached chart shows comparisons made with respect to selling prices.

7. Petitioner Vernon McDonald acted in the capacity of sales manager. He was an authorized signatory for the business bank account, signed checks and MV-50's. Mr. McDonald also signed the sales tax returns filed for the period at issue and corporation franchise tax reports for 1971, 1972 and 1973 (returns were not filed for 1974, 1975 and 1976).

Petitioner Vernon McDonald did not maintain or control the books and records, he was not a corporate officer or shareholder and was not involved in decision making for the corporation.

8. Petitioner Edith Madden was not an officer or director of AuSable, nor in any manner involved in the conduct of business.

9. AuSable offered no evidence to establish that its failure to pay over the taxes at issue was due to reasonable cause.

CONCLUSIONS OF LAW

A. That since AuSable's books and records were not available for audit, the Audit Division properly estimated the tax due on the basis of external indices as provided in section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44); that the procedures followed by the Audit Division as set forth in Findings of Fact "4" and "5" clearly establish that the sales tax returns filed by AuSable were insufficient.

That under the circumstances herein, exactness in the determination of sales tax liability is not required (Matter of Markowitz v. State Tax Commission, 54 A.D.2d 1023, aff'd. 44 N.Y.2d 684). However, the estimate referred to as Method 1 in Finding of Fact "5" most reasonably and accurately reflects AuSable's actual liability which is confirmed by the selling prices furnished by the purchasers. Moreover, the use of Method 2 results in a deficiency greater than the amount originally assessed. Therefore, the notice asserting additional taxes due of \$38,333.01 is reduced to \$24,723.84 (tax paid for audit period - \$7,070.62 x 349.67 error factor).

B. That section 1131(1) of the Tax Law provides:

"'Persons required to collect tax' or 'persons required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services;... Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

C. That the resolution of whether petitioners, Vernon McDonald and Edith Madden, are persons required to collect tax turns upon a factual determination in each case. (Vogel v. Dept. of Taxation and Finance, 413 N.Y.S.2d 862; Chevlowe v. Koerner, 407 N.Y.S.2d 427.)

That relevant factors in such a determination include, but are not limited to, the following: the day-to-day responsibilities in the corporation, involvement in and knowledge of the financial affairs of the corporation; the identity of who prepared and signed tax returns; authority to sign checks.

D. That petitioner Vernon McDonald was a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and therefore has personal liability for the sales taxes imposed on AuSable in accordance with section 1133(a) of the Tax Law.

E. That petitioner Edith Madden was not under a duty to act for AuSable and thus bears no personal liability for the taxes at issue.

F. That the petitions of AuSable Motor Sales, Inc. and Vernon McDonald are granted to the extent indicated in Conclusion of Law "A"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 15, 1977; and that, except as so granted, the petitions are in all other respects denied.

That the petition of Edith Madden is granted and the foregoing notice as it pertains to Edith Madden is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 18 1983

Richard G. W. Chen
ACTING PRESIDENT

Frank R. Koerner
COMMISSIONER

[Signature]
COMMISSIONER

AUSABLE MOTOR SALES, INC.

	SELLING PRICE FROM PURCHASER	METHOD 1			METHOD 2		
		TRADE-IN	NET SELLING PRICE	NADA SELLING PRICE	TRADE-IN	NET SELLING PRICE	SELLING PRICE
1976 Cordoba	\$6,223.60	\$3,200.00	\$3,423.60	\$5,392.00	\$2,696.00	\$2,696.00	\$7,266.00
1972 Chevrolet	1,800.00	900.00	900.00	2,875.00	1,437.50	1,437.50	3,450.00
1968 Fury II	500.00	--	500.00	625.00	312.50	312.50	1,125.00
1975 Newport	4,500.00	--	4,500.00	4,350.00	2,175.00	2,175.00	5,900.00
1975 Coronet	5,400.00	--	5,400.00	3,900.00	1,950.00	1,950.00	4,750.00
1972 Cricket	900.00	--	900.00	1,175.00	587.50	587.50	1,525.00
1975 Fury	5,845.25	1,101.85	4,743.40	3,200.00	1,600.00	1,600.00	4,825.00
1973 Dart	2,295.00	--	2,295.00	2,250.00	1,125.00	1,125.00	2,625.00
1970 Chevrolet	805.20	--	805.20	200.00	--	200.00	200.00
1971 Dodge	925.00	--	925.00	200.00	--	200.00	200.00

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
AuSable Motor Sales, Inc.
Edith Madden & Vernon McDonald

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
3/1/74-8/31/76.

State of New York
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon AuSable Motor Sales, Inc., Edith Madden & Vernon McDonald, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

AuSable Motor Sales, Inc.
Edith Madden & Vernon McDonald
c/o Daniel T. Manning, Jr.
S. Main St.
AuSable Forks, NY 12912

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
18th day of March, 1983.

David Parchuck

Annice R. Hughes
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
AuSable Motor Sales, Inc.
Edith Madden & Vernon McDonald

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 3/1/74-8/31/76.

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Daniel T. Manning, Jr. the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Daniel T. Manning, Jr.
S. Main St.
AuSable Forks, NY 12912

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
18th day of March, 1983.

David Parchuck

David A. Highland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
AuSable Motor Sales, Inc.
Edith Madden & Vernon McDonald

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
3/1/74-8/31/76.

State of New York
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Edith Madden, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edith Madden
Mirror Lake Dr.
Lake Placid, NY 12946

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
18th day of March, 1983.

David Parchuck

Constance A. Sargent

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

AuSable Motor Sales, Inc.
Edith Madden & Vernon McDonald

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
3/1/74-8/31/76.

State of New York
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Vernon McDonald, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Vernon McDonald
RD #1
Jay, NY 12941

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
18th day of March, 1983.

David Parchuck

Annie G. Haglund
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 389 758 713
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Ausable Motor Sales, Inc.</u>	
Street and No. <u>Edith Madden + Vernon McDonald</u>	
P.O., State and ZIP Code <u>c/o Daniel T. Manning, Jr.</u>	
<u>5. Main St.</u>	
<u>Ausable Forks, NY 12912</u>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 389 758 714
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Edith Madden</u>	
Street and No. <u>Mirror Lake Dr.</u>	
P.O., State and ZIP Code <u>Lake Placid, NY 12946</u>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 389 758 716
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Daniel T. Manning, Jr.</u>	
Street and No. <u>5. Main St.</u>	
P.O., State and ZIP Code <u>Ausable Forks, NY 12912</u>	
Postage	\$
Certified Fee	

PS Form 3800, Feb. 1982

Sent to <u>Vernon McDonald</u>	
Street and No. <u>RD #7</u>	
P.O., State and ZIP Code <u>Jay, NY 12941</u>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

(See Reverse)

P 389 758 715
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL