

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

July 15, 1983

Davy Chevrolet, Cadillac, Olds, Inc.
Box D-1
Elizabethtown, NY 12932

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
William L. Owens
Fitzpatrick, Bennett, Trombley & Lennon
48 Court Street, P.O.Box 1009
Plattsburgh, NY 12901
Taxing Bureau's Representative

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

July 15, 1983

E. Philip Davidson
Off. of Davy Chevrolet, Cadillac, Olds, Inc.
c/o Northern Insuring Agency, Inc.
104 Lake George Ave.
Ticonderoga, NY 12883

Dear Mr. Davidson:

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 Law 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.

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STATE TAX COMMISSION

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William L. Owens
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48 Court Street, P.O. Box 1009
Plattsburgh, NY 12901
Taxing Bureau's Representative

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

July 15, 1983

Jack R. Davidson
Off. of Davy Chevrolet, Cadillac, Olds, Inc.
Rt. 11A
Danvers, MA 01923

Dear Mr. Davidson:

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 Law 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.

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Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
William L. Owens
Fitzpatrick, Bennett, Trombley & Lennon
48 Court Steet, P.O. Box 1009
Plattsburgh, NY 12901
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Davy Chevrolet, Cadillac, Olds, Inc. :
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 1, 1976 through :
October 11, 1979. :

In the Matter of the Petition :
of :
E. Phillip Davidson :
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 1, 1976 :
through October 11, 1979. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Jack R. Davidson :
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 1, 1976 through :
October 11, 1979. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Jack R. Davidson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack R. Davidson
Off. of Davy Chevrolet, Cadillac, Olds, Inc.
Rt. 11A
Danvers, MA 01923

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
15th day of July, 1983.

Annice Heyland

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 :
Davy Chevrolet, Cadillac, Olds, Inc. :
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Jack R. Davidson :
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Sales and Use Taxes under Articles 28 and 29 of the :
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October 11, 1979. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Davy Chevrolet, Cadillac, Olds, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Davy Chevrolet, Cadillac, Olds, Inc.
Box D-1
Elizabethtown, NY 12932

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
15th day of July, 1983.

Emile A. Hagelund

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
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SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
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In the Matter of the Petition :
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Jack R. Davidson :
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Sales and Use Taxes under Articles 28 and 29 of the :
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State of New York
County of Albany

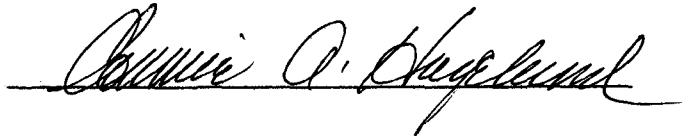
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon E. Philip Davidson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

E. Philip Davidson
Off. of Davy Chevrolet, Cadillac, Olds, Inc.
c/o Northern Insuring Agency, Inc.
104 Lake George Ave.
Ticonderoga, NY 12883

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
15th day of July, 1983.

A handwritten signature in cursive script, reading "Dennis A. Huglund", written over a horizontal line.A handwritten signature in cursive script, reading "Kathy Pflaffenbach", written over a horizontal line.

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Davy Chevrolet, Cadillac, Olds, Inc. :
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 1, 1976 through :
October 11, 1979. :

In the Matter of the Petition :
of :
E. Phillip Davidson :
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 1, 1976 :
through October 11, 1979. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Jack R. Davidson :
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 1, 1976 through :
October 11, 1979. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon William L. Owens the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William L. Owens
Fitzpatrick, Bennett, Trombley & Lennon
48 Court Street, P.O.Box 1009
Plattsburgh, NY 12901

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
15th day of July, 1983.

Annice P. Hopwood

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
DAVY CHEVROLET, CADILLAC, OLDS, INC.
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 1,
1976 through October 11, 1979.

In the Matter of the Petition
of
E. PHILLIP DAVIDSON
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 1,
1976 through October 11, 1979.

In the Matter of the Petition
of
JACK R. DAVIDSON
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 1,
1976 through October 11, 1979.

DECISION

Petitioners, Davy Chevrolet, Cadillac, Olds, Inc., Box D-1 Elizabethtown,
New York 12932, E. Phillip Davidson, c/o Northern Insuring Agency, Inc., 104
Lake George Avenue, Ticonderoga, New York 12883, and Jack R. Davidson, Route
11A Danvers, Massachusetts 01923, 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 September 1, 1976 through October 11, 1979 (File Nos. 29027, 29241, and 29242).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on December 9, 1982, at 1:15 P.M., with all briefs to be submitted by February 15, 1983. Petitioners appeared by Fitzpatrick, Bennett, Trombley & Lennon (William L. Owens, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether a bank which stations employees at a place of business to approve and disapprove the issuance of checks and the finalization of all sales in order to safeguard its security interests in the inventory and equipment of the business, thereby becomes a party required to collect and pay over sales tax.

II. Whether Jack R. Davidson was a person required to collect sales tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.

FINDINGS OF FACT

1. On December 20, 1979, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Davy Chevrolet, Cadillac, Olds, Inc. ("Davy") in the amount of \$42,785.78 plus penalty of \$4,494.94 and interest of \$2,742.48 for a total due of \$50,023.20 for the period September 1, 1976 through October 11, 1979. On the same date the Audit Division issued notices of determination and demand for payment of sales and use taxes due against petitioners E. Phillip Davidson and Jack R. Davidson as officers of Davy Chevrolet, Cadillac, Olds, Inc. in the amount of \$42,649.91 plus penalty of \$4,480.59 and interest of

\$2,734.94 for a total due of \$49,865.44 for the period September 1, 1976 through October 11, 1979.

2. At the hearing the Audit Division produced a revised schedule of additional tax due which resulted from a pre-hearing conference indicating that the original assessment against Davy was reduced to \$17,076.63 plus penalty and interest and the assessments against E. Phillip Davidson and Jack R. Davidson were reduced to \$16,940.76 plus penalty and interest.

3. Petitioner Davy was an automobile dealership which sold and serviced new and used cars. Petitioner E. Phillip Davidson was the president of Davy and his brother, Robert E. Davidson, was the vice president. Petitioners offered testimony indicating that for a short time after Davy's creation one Lucy Roberts was Secretary-Treasurer but this testimony was not supported by any documentation. Sometime during 1978 there was a falling out between E. Phillip Davidson and Robert Davidson and Robert Davidson was forced to resign under a court order dated July 31, 1978.

4. Davy maintained two checking accounts, one at Marine Midland Bank and one at Farmer's National Bank. Davy's practice with respect to payment of sales tax prior to July, 1979 was to deposit all sales proceeds in its main account at Marine Midland. A check for the sales tax due would then be drawn on Marine Midland and deposited in the Farmer's National account which was used exclusively for taxes. When quarterly sales tax payments were due, a check was drawn on the Farmer's National account and sent to the Department of Taxation and Finance.

5. Marine Midland had loans outstanding to Davy which were secured by the new and used automobiles and the furniture and fixtures of Davy. In July, 1979, in order to safeguard its security interests in the loans, Marine Midland

sent two representatives to Davy's premises to oversee the operations to insure that Marine Midland was paid for the value of its security in each automobile sold by Davy. All sales had to be approved by Marine Midland as well as all checks drawn on the Marine Midland account. Petitioners testified that they had no choice but to agree to this arrangement. The Marine Midland representatives would not release the certificate of title on an automobile until the check from the buyer was deposited in the Davy account. Marine Midland would not give approval for any checks drawn for deposit in Davy's Farmer's National account. As a result Davy was unable to continue its former procedure for paying sales tax. During the period that Marine Midland representatives were on Davy's premises, Davy failed to pay more than \$11,000.00 in sales tax to the Department of Taxation and Finance.

6. Each time Davy sold an automobile and deposited the proceeds in the Marine Midland account, the bank's representative made certain that payment was made to the bank for the amount owing to Marine Midland on that automobile. No clear evidence was produced at the hearing to indicate what happened to the sales tax collected on each automobile sold. Petitioners could not satisfactorily explain why a procedure could not have been implemented in order to pay sales tax which would have been compatible with their arrangement with Marine Midland. Petitioners argued that, because Marine Midland would not approve checks for deposit in Davy's tax checking account and checks for payment of sales tax, Marine Midland prevented petitioners from paying sales tax and thus the bank became the party required to collect and pay over sales tax.

7. During the period July, 1979 to October 10, 1979, while Marine Midland's representatives were on Davy's premises, Davy's officers and employees continued to conduct the day-to-day operations of the business. On or about October 10,

1979, Davy ceased business, Marine Midland took possession of Davy's assets and proceeded to liquidate the assets to satisfy its security interests.

8. Petitioner Jack R. Davidson was a stockholder and director of Davy. The Audit Division issued an assessment against him because the auditor thought he saw Jack Davidson's name listed as an officer on a corporate tax return. The New York corporation franchise tax report requires that the filer list the names of all officers along with their titles and salaries and all stockholders owning more than five percent of the corporation's issued stock. An examination of 1976 and 1977 New York State corporation tax returns submitted by the Audit Division revealed that Jack R. Davidson's name was listed on the returns. However, he was not listed as an officer and he had no salary listed from Davy. An affidavit of the accountant who prepared the aforesaid returns indicated that the only reason Jack R. Davidson's name appeared on the return was the fact that he owned more than five percent of Davy's stock and thus was required to be listed.

9. Petitioner Jack R. Davidson owned his own automobile dealership in Danvers, Massachusetts. He invested in Davy only to help his brothers establish their business. Mr. Davidson was a resident of Massachusetts and visited his brothers approximately three times a year. These visits were primarily social in nature but Mr. Davidson would visit Davy's premises during his occasional visits to New York to check on the operation and act as an informal management consultant to his brothers. Jack Davidson never participated in the day-to-day operations of the business and had no authority to hire and fire employees. Except for a brief period in 1978, he was not an authorized signatory on Davy checks and never actually signed a Davy check. Mr. Davidson received annual financial statements but never participated in the day-to-day financial operations

of Davy including payroll, withholding of taxes, and filing of sales and corporate tax returns. Jack Davidson never signed any of Davy's tax returns.

10. At no time during Davy's corporate existence was petitioner Jack R. Davidson an officer or employee of Davy. On August 22, 1978, a meeting of Davy's Board of Directors, which at that time included E. Phillip Davidson and Jack R. Davidson, was conducted by mail pursuant to section 708(b) of the Business Corporation Law. The minutes of the meeting indicated that Jack R. Davidson was elected Secretary-Treasurer. When Mr. Davidson received the notice of the meeting he refused to consent to the election by not signing the consent to the board actions as required by section 708(b) of the Business Corporation Law. He was therefore not elected Secretary-Treasurer and at no other time was he an elected officer of Davy.

11. Petitioner Jack R. Davidson maintained that, because he was neither an officer nor an employee of Davy and did not participate in the day-to-day running of the business, he was not a person required to collect sales tax and should not be held liable for tax remaining unpaid.

CONCLUSIONS OF LAW

A. That petitioners voluntarily entered into and at all times acceded to an arrangement with Marine Midland Bank. They were free to rescind the agreement or devise alternative methods to pay taxes if the agreement involved them in a breach of their duties with respect to sales taxes collected from customers. They were not absolved from responsibility for failure to pay sales taxes by the fact that the bank may have selected which creditors should be paid (Cf. Kalb v. United States, 505 F. 2d 506, 510; Matter of Morton Tillman, State Tax Commission, April 9, 1982). No evidence was produced indicating that, at any

time during the audit period, Marine Midland assumed the responsibility for collecting and remitting sales tax.

B. That section 1133(a) of the Tax Law provides, in part, that every person required to collect the taxes imposed under the Sales Tax Law is also personally liable for the tax imposed, collected, or required to be collected under such law. Section 1131(1) of the Tax Law defines "persons required to collect tax" as used in section 1133(a) to include any officer or employee of a corporation, or a dissolved corporation, who as such officer or employee is under a duty to act for the corporation in complying with any requirement of the Sales Tax Law.

C. That 20 NYCRR 526.11(b)(2) describes an officer or employee under a duty to act as a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management. Other "[i]ndicia of this duty...include factors...such as the officer's day-to-day responsibilities and involvement with the financial affairs and management of the corporation" and "the officer's duties and functions..." (Vogel v. New York State Department of Taxation and Finance, 98 Misc. 2d 222, 225).

D. That inasmuch as Jack R. Davidson was neither an officer nor an employee of Davy, never received a salary from Davy, did not participate in the day-to-day running of the business, did not sign the corporation's checks or tax returns, and was not responsible for maintaining the corporate books and records, he was not a person required to collect tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.


E. That the petitions of Davy Chevrolet, Cadillac, Olds, Inc., E. Phillip Davidson, and Jack R. Davidson are granted to the extent indicated in Finding

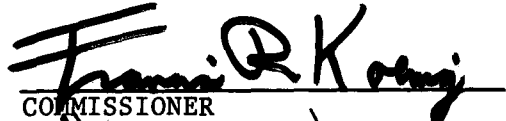
of Fact "2" and Conclusion of Law "D"; that the Audit Division is hereby directed to modify accordingly the notices of determination and demand for payment of sales and use taxes due issued December 20, 1979; and that, except as so granted, the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 208 053

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Jack R. Davidson	
Street and No. Off of Day Chevrolet	
Cadillac Olds Inc	
P.O., State and ZIP Code	
Rt 11A Danvers MA 01923	
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 481 208 054

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Day Chevrolet, Cadillac Olds Inc	
Street and No. Box D-1	
P.O., State and ZIP Code	
Elizabethtown NY 12932	
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 481 208 052

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
William L. Owens	
Street and No. R. 12 Petrick, Bennett, Trumbley	
P.O., State and ZIP Code	
P.O. Box 1009 Pittsburgh Pa 15201	
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 481 208 051

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
E. Philip Davidson	
Off. of Day Chevrolet Cadillac	
Street and No. Olds Inc	
P.O., State and ZIP Code	
104 Lake George Ave NY 12843	
Postage	\$ 12843
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

TA 26 (9-79)

STATE OF NEW YORK

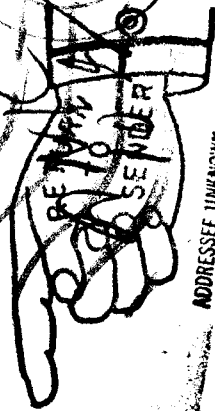
State Tax Commission

TAXPAYER'S BUREAU

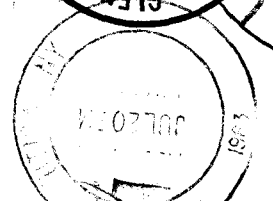
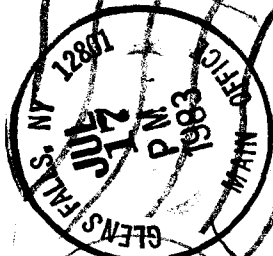
ALBANY

12227

4-11-13



ADDRESSEE UNKNOWN



CERTIFIED

481 208 051

MAIL

E. Philip Davidson
Off. of Davy Chevrolet, Cadillac, Olds, Inc.
c/o Northern Insuring Agency, Inc.
104 Lake George Ave.
Ticonderoga, NY 12883

1209 Park Ave. Apt.
Utica, N.Y. 13501

