

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

April 15, 1983

Ray Ellis Ford, Inc.
c/o Michael J. Cunningham
90 State Street
Albany, NY 12207

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
Michael J. Cunningham
DeGraff, Foy, Conway, Holt-Harris & Mealey
90 State Street
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Ray Ellis Ford, Inc.	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 3/1/75-3/28/78.	:	

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 15th day of April, 1983, he served the within notice of Decision by certified mail upon Ray Ellis Ford, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ray Ellis Ford, Inc.
c/o Michael J. Cunningham
90 State Street
Albany, NY 12207

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 April, 1983.

David Parchuck

James P. Cunningham

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ray Ellis Ford, 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 3/1/75-3/28/78. :
_____ :

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 15th day of April, 1983, he served the within notice of Decision by certified mail upon Michael J. Cunningham the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

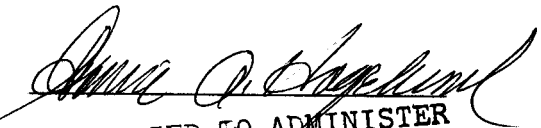
Michael J. Cunningham
DeGraff, Foy, Conway, Holt-Harris & Mealey
90 State Street
Albany, NY 12207

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 April, 1983.

David Parchuck


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
RAY ELLIS FORD, 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, Ray Ellis Ford, Inc., c/o Michael J. Cunningham, 90 State Street, Albany, New York 12207, 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. 24465).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on March 24, 1982, at 1:15 P.M. Petitioner appeared by Michael J. Cunningham, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Kevin Cahill, Esq., of counsel).

ISSUES

I. Whether the petitioner, a transferee in bulk of the business assets of Mohawk Ford, Inc., is liable for the taxes determined due from the transferrer under the provisions of section 1141(c) of the Tax Law.

II. Whether all the time requirements specified under section 1141(c) of the Tax Law were met, both by the petitioner and the Department of Taxation and Finance.

III. Whether the field audit conducted by the Audit Division on the books and records of Mohawk Ford, Inc. was properly based on the use of a one-year test period.

FINDINGS OF FACT

1. On January 26, 1978, by receipted certified mail, Ray Ellis Ford, Inc. notified the State Tax Commission of its intent to acquire the business assets of Mohawk Ford, Inc. The transaction was to take place on or about February 7, 1978 for a consideration of \$305,500.00. The notification was received by the Audit Division on January 31, 1978.

2. On February 2, 1978, the Audit Division issued a Notice of Claim to Purchaser advising Ray Ellis Ford, Inc. of a possible existing claim for sales and use taxes due from the transferrer, Mohawk Ford, Inc.

3. On April 20, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Ray Ellis Ford, Inc. covering the period March 1, 1975 through February 28, 1978. The Notice asserted additional tax due of \$35,225.77 plus penalties and interest of \$14,774.64 for a total due of \$50,000.41. The Notice was issued as a result of a field audit conducted on the books and records of Mohawk Ford, Inc. and represented the additional tax liability as of the completion of the audit but prior to the final conference held where additional substantiation was submitted by the transferrer.

4. On May 24, 1978, petitioner filed an application for a hearing to review the aforesaid Notice seeking relief on the grounds that no tax was due because it did not purchase the business until February 8, 1978.

5. On July 17, 1978, the Audit Division issued a corrected Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Ray Ellis

Ford, Inc. It redetermined the additional tax due to \$33,586.38 plus penalty and interest of \$15,021.19 for a total of \$48,607.57. This Notice corrected the additional tax due to reflect the additional substantiation submitted by Mohawk Ford, Inc. subsequent to the issuance of the first Notice.

6. On September 19, 1978, petitioner submitted an additional request for hearing to review the corrected Notice.

7. On audit, the Audit Division found that the books and records of Mohawk Ford, Inc. ("Mohawk") were generally in good condition. All records, however, for 1975 were inadvertently destroyed by the new owner.

The Audit Division compared the sales tax account in Mohawk's general ledger for the period January 1, 1976 through February 28, 1978 with the sales tax reported on sales and use tax returns filed for that same period. It found that Mohawk collected but did not remit sales tax in the amount of \$24,265.54.

The Audit Division reviewed sales made by Mohawk for the calendar year 1977. It found that sales were made where no tax was collected and no resale or exemption certificates were on file. The Audit Division also examined miscellaneous expense purchases for the year 1977 and found certain purchases where no sales tax had been paid. It determined additional sales and use taxes due for 1977 and determined error rate percentages using sales tax recorded in the books as a denominator. It then applied the error rate percentages to the period January, 1976 through February, 1978 as follows:

Tax due on car sales - 1977	\$ 1,112.49
Sales tax recorded from car sales - 1977	\$ 80,493.30
Error Rate Percentage	1.38%
Sales tax recorded - 1/76 - 2/78	X 172,151.25
Tax due on car sales - 1/76 - 2/78	<u>\$ 2,375.68</u>

Tax due - Repairs & Services - 1977	\$ 318.71
Sales tax recorded from repairs & service - 1977	\$ 9,837.76
Error Rate Percentage	3.24%
Sales tax recorded - 1/76 - 2/78	X 20,751.37
Tax due on repairs & services - 1/76 - 2/78	<u>\$ 672.32</u>
Tax due - Miscellaneous purchases - 1977	\$ 665.28
Sales tax recorded from repairs & service - 1977	\$ 9,837.76
Error Rate Percentage	6.76%
Sales tax recorded - 1/76 - 2/78	X 20,751.37
Tax due on purchases - 1/76 - 2/78	<u>\$ 1,402.79</u>

The Audit Division found that Mohawk overpaid use tax on its demonstrators in the amount of \$2,048.27 for the period December, 1975¹ through January, 1978. The Audit Division determined a net total additional sales and use tax due for the period January, 1976 through February, 1978 of \$26,668.06. Mohawk remitted tax with returns filed of \$175,694.00 for the same period. The Audit Division determined an error rate of 15.179 percent and applied this error rate percentage to the sales tax paid on sales and use tax returns filed for the period March 1, 1975 through November 30, 1975 to determine additional tax due of \$6,918.53 for the period for which no records were available. The Audit Division thereby determined the total sales and use tax deficiency of \$33,586.38² for which the corrected Notice was issued on July 17, 1978.

8. Petitioner argued that the original Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 20, 1978 was defective in that it claimed taxes due from Ray Ellis Ford, Inc. under section 1138 of the Tax Law; therefore, it was ineffective under section 1141(c) of the Tax Law. Said Notice contained the following explanation:

¹ December, 1975 was apparently obtained from balance carried forward to January, 1976.

² Mathematically should be \$33,586.59.

"The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records."

The second Notice dated July 17, 1978 contained the following explanation:

"The following taxes are determined to be due from Mohawk Ford, Inc. and represents your liability, as purchaser, in accordance with section 1141(c) of the Sales Tax Law."

Petitioner argued that the second Notice was not timely issued under section 1141(c) of the Tax Law.

9. Petitioner further argued that the Audit Division failed to examine all the books and records of Mohawk Ford, Inc. and had improperly approximated tax due for part of the audit by reference to other years. That while no records were available for inspection for the period March, 1975 through December, 1975, petitioner did have available books and records for the period January, 1976 through February, 1978 from which the actual tax liability for the entire said period could have been determined.

10. Petitioner did not show reasonable cause for the seller, Mohawk Ford, Inc., to withhold remittance of the sales tax collected.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides, in part:

"Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof...

Whenever the tax commission shall inform the purchaser, transferee or assignee that a possible claim for such tax or taxes exists, any sums of money, ...shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller, transferrer or assignor to the state...Within ninety days of receipt of the notice of the sale, transfer, or assignment

from the purchaser, transferee, or assignee, the tax commission shall give notice to the purchaser, transferee, or assignee and to the seller, transferrer or assignor of the total amount of any tax or taxes which the state claims to be due from the seller, transferrer, or assignor to the state..."

B. That petitioner timely notified the Tax Commission on January 26, 1978 of the proposed transfer on or about February 7, 1978. That the Tax Commission properly notified petitioner on February 2, 1978 that a possible claim for taxes existed prior to the scheduled transfer. That the Audit Division issued its first Notice to petitioner on April 20, 1978, well within the ninety-day period set forth in section 1141(c) of the Tax Law.

That petitioner's argument that the first notice issued was defective is without merit in that section 1138(a) of the Tax Law, as it read during the time the Notice was issued, stated that where a return required by Article 28 is not filed or incorrectly filed, the State Tax Commission may issue a notice of determination to the "person liable for the collection or payment of the tax (emphasis added). Since Mohawk Ford, Inc. filed incorrect sales tax returns for the period in question, section 1138 became available to assess and enforce the liability for the tax against petitioner. Petitioner became the "person liable for the payment of the tax" under section 1141(c) of the Tax Law.

(Arthur Treacher's Fish & Chips v. State Tax Commission, 69 A.D.2d 550, 419 N.Y.S.2d 768.) Moreover, section 1138(a) as amended by Chapter 714, Laws 1979 and effective January 1, 1980 now guarantees certain rights to purchasers in a bulk sale transaction which were not specifically granted previously.

In addition, petitioner was aware that said Notice resulted from its purchase of Mohawk Ford, Inc. as evidenced by the application for hearing filed May 24, 1978; therefore, petitioner was not misled (Matter of Wayfarer Ketch Corp., State Tax Commission, June 11, 1982; Noyes v. United States, 55 F.2d 870).

C. That petitioner, as transferee of the business assets of Mohawk Ford, Inc., is liable under section 1141(c) of the Tax Law for any taxes determined due from Mohawk Ford, Inc.

D. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41).

That Mohawk Ford, Inc. maintained adequate records for the period January 1, 1976 through February, 1978 which could have been used in their entirety for the determination of any sales and use tax liability for that period. That petitioner's liability during that period is therefore limited to the actual amount found due in the test period of 1977 and the sales tax found to have been collected but not remitted in 1976 through 1978.

That the records for the year 1975 were not available for audit; therefore, the Audit Division properly used external indices to determine any tax due for that period. That in view of the above limitations to the test period findings, the error rate must be redetermined for application to this period.

E. That the petition of Ray Ellis Ford, Inc. is granted to the extent indicated in Conclusion "D" above; that the Audit Division is directed to further modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on April 20, 1978 and subsequently revised on July 17,

1978 with applicable penalty and interest thereon; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

APR 15 1983

STATE TAX COMMISSION

ACTING Robert T. Bunkel
PRESIDENT

Francis R. Koehn
COMMISSIONER

Mark J. Jank
COMMISSIONER

P 389 758 799
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Ray Ellis Ford, Inc.	
c/o Michael J. Cunningham	
Street and No.	
90 State Street	
P.O., State and ZIP Code	
Albany, NY 12207	
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 389 758 800
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Michael J. Cunningham	
DeGraff, Foy, Conway, Holt-Harris & Mealey	
Street and No.	
90 State Street	
P.O., State and ZIP Code	
Albany, NY 12207	
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