

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

May 20, 1983

F & W Oldsmobile, Inc.
16 Meadow Lane
Lackawanna, NY 14218

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) 1139 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
James P. Shea
Flaherty & Shea
1000 Western Bldg.
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
F & W Oldsmobile, 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 12/1/79-3/31/80. :
_____ :

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 20th day of May, 1983, he served the within notice of Decision by certified mail upon F & W Oldsmobile, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

F & W Oldsmobile, Inc.
16 Meadow Lane
Lackawanna, NY 14218

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
20th day of May, 1983.

David Parchuck

William 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 :
F & W Oldsmobile, 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 12/1/79-3/31/80. :
_____ :

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 20th day of May, 1983, he served the within notice of Decision by certified mail upon James P. Shea the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James P. Shea
Flaherty & Shea
1000 Western Bldg.
Buffalo, NY 14202

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
20th day of May, 1983.

David Parchuck

William R. [Signature]
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
F & W OLDSMOBILE, 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 December 1, 1979 :
through March 31, 1980. :

Petitioner, F & W Oldsmobile, Inc. c/o James P. Shea, 1000 Western Bldg., Buffalo, New York 14202 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 December 1, 1979 through March 31, 1980. (File No. 34980).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 15, 1982 at 9:15 A.M. Petitioner appeared by James P. Shea, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner should be granted a refund of penalties and interest in excess of the minimum statutory rate which were imposed for the late payment of sales tax.

FINDINGS OF FACT

1. Petitioner, F & W Oldsmobile, Inc. was engaged in the sales and service of new and used automobiles.

2. In January, 1979, petitioner purchased the real estate in which it had conducted an automobile business since 1973. The mortgage loan on the property

called for monthly interest based on the prime rate. During 1979 the rate varied from 9 percent at the time of purchase to a high of 23 percent.

In December, 1979, when the prime rate did not decline, petitioner began negotiations to refinance under a fixed percentage rate of interest instead of the prime rate. In April, 1980, petitioner was advised by the mortgagee that the refinancing was not possible. Petitioner at that time advised the Oldsmobile Division of General Motors Corp. that it was seeking a buyer for the business.

In May, 1980, petitioner entered into an agreement in principal to sell the corporate assets to another automobile dealer. The transaction needed the approval of the Oldsmobile Division. The approval was not granted until the end of July, 1980. The closing took place on October 23, 1980.

3. Petitioner filed monthly sales tax returns for December 1979, January 1980, February 1980 and March 1980 without remitting sales taxes due shown thereon. Said taxes totaled \$108,507.41.

Petitioner filed sales tax returns from April 1980 until the business was sold and paid the tax due on said returns. On the closing date (October 23, 1980), petitioner paid \$110,000.00 which included all of the unpaid tax and a portion of the unpaid penalty and interest due on the returns for December, 1979 through March, 1980. Petitioner subsequently paid additional penalty and interest assessments.

4. On February 25, 1981, petitioner filed an application for refund of \$16,742.47 of the penalty and interest on the basis that there was no intent or attempt to thwart or unnecessarily delay the payment of any taxes due.

5. On July 17, 1981, the Audit Division denied petitioner's refund claim on the grounds that the delay in payment was not due to reasonable cause.

6. Petitioner timely filed all sales tax returns for periods prior to those at issue herein and timely paid all tax due thereon.

CONCLUSIONS OF LAW

A. That section 1145(a)(1)(i) of the Tax Law authorizes the imposition of penalty and interest for failure to file a return or to pay over any tax when due. Subparagraph (ii) of section 1145(a)(1) provides for the remission of penalty and that portion of interest that exceeds the minimum statutory rate if the Tax Commission determines that the failure or delay was due to reasonable cause and not due to willful neglect.

B. That petitioner collected sales taxes as trustee for and on account of the State of New York and failed to pay over the same to the State Tax Commission as required by section 1137 of the Tax Law. Petitioner's financial problems caused by high interest rates, the generally poor economic conditions of the time, as well as the delay in the sale of the business, do not constitute reasonable cause.

C. That the petition of F & W Oldsmobile, Inc. is denied and the refund denial issued July 17, 1981, is sustained.

DATED: Albany, New York

MAY 20 1983

STATE TAX COMMISSION

Rodwin A. Allen
PRESIDENT

Frank P. Koenig
COMMISSIONER

[Signature]
COMMISSIONER

P 481 207 510

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
F + W Oldsmobile, Inc.	
Street and No.	
16 Meadow Lane	
P.O., State and ZIP Code	
Lackawanna, NY 14218	
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 481 207 511

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NO INSURANCE COVERAGE PROVIDED—
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(See Reverse)

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James P. Shea	
Street and No.	
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P.O., State and ZIP Code	
Buffalo, NY 14202	
Postage	\$
Certified Fee	
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PS Form 3800, Feb. 1982