

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

July 15, 1983

Scherz Porsche-Audi, Ltd.
5996 E. Molloy Rd.
Syracuse, NY 13211

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
Jan Scott Kublick
Davoli, McMahon & Kublick
500 South Salina St., Suite 816
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Scherz Porsche-Audi, Ltd. :
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 Ended 8/31/79. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

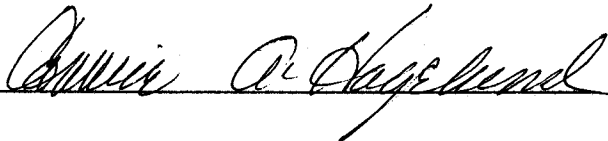
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Scherz Porsche-Audi, Ltd., the petitioner in the within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

Scherz Porsche-Audi, Ltd.
5996 E. Molloy Rd.
Syracuse, NY 13211

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.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Scherz Porsche-Audi, Ltd. :
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 :
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_____:

State of New York
County of Albany

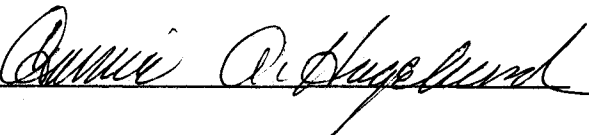
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Jan Scott Kublick the representative of the petitioner in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

Jan Scott Kublick
Davoli, McMahon & Kublick
500 South Salina St., Suite 816
Syracuse, NY 13202

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.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SCHERZ PORSCHE-AUDI, LTD.	:	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 Ended August 31,	:	
1979.	:	

Petitioner, Scherz Porsche-Audi, Ltd., c/o Jan Scott Kublick, Esq., 500 South Salina Street, Syracuse, New York 13202, 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 ended August 31, 1979 (File No. 29677).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 28, 1982 at 1:15 P.M., with all briefs to be submitted by January 15, 1983. Petitioner appeared by Jan S. Kublick, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether petitioner, the purchaser in a bulk sales transaction, is liable for sales taxes determined to be due from the seller in accordance with section 1141(c) of the Tax Law.

FINDINGS OF FACT

1. Competition Porsche-Audi, Ltd. ("Competition") operated an automobile dealership on East Malloy Road in Syracuse, New York. On May 3, 1979, Competition entered into a Purchase and Sale Agreement which provided for the sale of certain assets of Competition to Herbert W. Scherz. Herbert W. Scherz later

assigned all his interest in that agreement to Scherz Porsche-Audi, Ltd. ("Scherz"). The total sales price was \$81,300.00, subject to adjustment based on a physical inventory of parts.

The sale closed on July 12, 1979 and the entire purchase price was paid over to Richard S. Scolaro, Esq. and Robert Kashdin, Esq., escrow agents. Subsequent to the closing, the escrow agents returned \$13,521.44 to Scherz to reflect the adjustment for inventory as indicated above, making the actual sales price \$67,778.56.

2. On July 25, 1979, David A. Holstein, attorney for Competition, hand delivered a letter to the Department of Taxation and Finance in Syracuse which advised that the assets of Competition had recently been sold and requested a lien be filed against the escrow account for any unpaid sales taxes.

On July 31, 1979, the Department of Taxation and Finance prepared a Notification of Sale, Transfer or Assignment in Bulk (ST-274) from information provided by Mr. Holstein. Such information included the names of the seller, purchaser and escrow agent and the scheduled date of sale. The terms and conditions of the sale were not disclosed.

3. On August 3, 1979, the Audit Division sent Competition a Notice to the Seller (AU-196.3) advising Competition that it had been notified that Competition was the seller in the bulk sale of business assets and that it would be contacted in order to make arrangements for an audit.

4. Following the audit of Competition, the Audit Division assessed additional sales and use taxes due against Guy H. Easter, as officer of Competition, amounting to \$140,220.29.

5. On March 5, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for taxes

due of \$83,800.00, plus interest of \$94.15, for a total of \$83,894.15. Petitioner was held liable for the taxes determined due from Competition limited to the known sales price at the time of \$81,350.00 pursuant to section 1141(c) of the Tax Law.

A bulk sales tax of \$2,450.00 was also part of the above assessment. At the hearing, petitioner conceded liability for this amount.

6. On July 12, 1979, the Internal Revenue Service ("IRS") filed a notice of federal tax lien with the Onondaga County Clerk in the amount of \$33,233.03 for federal taxes assessed against Competition. On July 17, 1979, an IRS Notice of Levy for \$33,577.22 was served upon Richard S. Scolaro as escrow agent. On September 10, 1979, an additional IRS Notice of Levy of \$57,634.93 was served on the escrow agent. On January 7, 1980, checks in the amount of \$56,600.00 were mailed to the IRS by the escrow agent pursuant to the aforementioned notices of levy in compromised payment of the federal taxes due.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law requires that when a bulk sale occurs, the purchaser notify the tax commission of the proposed sale by registered mail at least ten days before taking possession of the subject of said sale and give the price, terms and conditions of the sale. The Audit Division is required to notify the purchaser of the amount of the State's claim, if any, against the seller within ninety days of receipt of the notice of the sale. If the Audit Division fails to give such notice to the purchaser within the ninety day period, the purchaser is released from any further obligations. However, if the purchaser fails to comply with the provisions of section 1141(c) of the Tax Law, it is personally liable for payment of any tax liability due from the seller.

B. That although the notification of the bulk sale was not received at least ten days prior to the sale, the Audit Division was nevertheless required to notify petitioner of the amount of its claim against the seller within ninety days from receipt of the notice.

That the Audit Division received notice of the sale on July 25, 1979 and did not notify petitioner of the taxes due from Competition until March 5, 1980, more than ninety days after receipt of the notice of the sale. Accordingly, petitioner is relieved from such liability within the meaning and intent of section 1141(c) of the Tax Law. (Matter of John S. Wade, State Tax Commission, March 6, 1981; Matter of Robert H. Millard, Gerald Stahurski and William F. Melanso, State Tax Commission, January 30, 1981.)

C. That in accordance with Finding of Fact "5", petitioner is liable for bulk sales tax of \$2,450.00 on the furniture and fixtures transferred in the sale.

D. That the petition of Scherz Porsche-Audi, Ltd. is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 5, 1980; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983

Rodwin A. Clem
PRESIDENT

Francis R. Koehn
COMMISSIONER

William F. Melanso
COMMISSIONER

P 481 208 074

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Schertz Porsche-Audi Ltd	
Street and No. 5996 E Molloy Rd	
P.O., State and ZIP Code Syracuse NY 13211	
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 481 208 075

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to JAN Scott Kubicki	
DAVALI, Mc Mahout Kubicki	
Street and No. Suite 500 South Salina St 810	
P.O., State and ZIP Code Syracuse NY 13202	
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