

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
Spartan Motors, Ltd., Chariot Motors, Inc. :
& Hushang Golestani, President of :
Chariot Motors, Inc. : AFFIDAVIT OF MAILING
for Revision of Determinations or for Refunds of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Period June 1, 1977 through :
November 30, 1979. :
:

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of March, 1984, he served the within notice of Decision by certified mail upon Spartan Motors, Ltd., Chariot Motors, Inc. & Hushang Golestani, President of Chariot Motors, Inc., the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Spartan Motors, Ltd., Chariot Motors, Inc.
& Hushang Golestani, President of Chariot Motors, Inc.
752 South Rd.
Poughkeepsie, NY 12601

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
9th day of March, 1984.

David Parchuck

James A. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
Spartan Motors, Ltd., Chariot Motors, Inc. :
& Hushang Golestani, President of :
Chariot Motors, Inc. : AFFIDAVIT OF MAILING
for Revision of Determinations or for Refunds of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Period June 1, 1977 through :
November 30, 1979. :

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of March, 1984, he served the within notice of Decision by certified mail upon Howard C. St. John, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

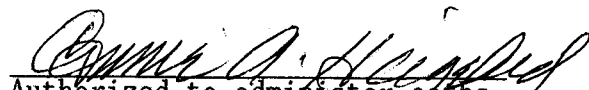
Howard C. St. John
280 Wall St., U.P.O. Box 3458
Kingston, NY 12401

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
9th day of March, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

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

March 9, 1984

Spartan Motors, Ltd., Chariot Motors, Inc.
& Hushang Golestani, President of Chariot Motors, Inc.
752 South Rd.
Poughkeepsie, NY 12601

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Howard C. St. John
280 Wall St., U.P.O. Box 3458
Kingston, NY 12401
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
SPARTAN MOTORS, LTD.,	:	
CHARIOT MOTORS, INC. and	:	DECISION
HUSHANG GOLESTANI, PRESIDENT OF	:	
CHARIOT MOTORS, INC.	:	
	:	
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1977	:	
through November 30, 1979.	:	

Petitioners, Spartan Motors, Ltd., 752 South Road, Poughkeepsie, New York 12601, Chariot Motors, Inc., 752 South Road, Poughkeepsie, New York 12601, and Hushang Golestani, President of Chariot Motors, Inc., 1 Fox Hill Road, Wappingers Falls, New York 12590, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1977 through November 30, 1979 (File Nos. 33121, 33195 and 33122).

A consolidated formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Office Campus, Albany, New York, on May 10, 1983 at 1:15 P.M., with all briefs to be submitted by June 14, 1983. Petitioners appeared by Howard C. St. John, Esq. The Audit Division appeared by John P. Dugan, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether the results of a field audit of petitioner Chariot Motors, Inc., properly reflect additional sales and use taxes due from said petitioner.

II. Whether sales tax was properly assessed upon the transfer of certain assets from petitioner Chariot Motors, Inc. to petitioner Spartan Motors, Ltd.

III. Whether petitioner Spartan Motors, Ltd. was a bulk purchaser of assets from petitioner Chariot Motors, Inc. and failed to comply with the notice requirements of section 1141(c) of the Tax Law, thus becoming liable for sales and use taxes assessed against petitioner Chariot Motors, Inc.

IV. Whether petitioner Hushang Golestani is personally liable for sales tax assessed against petitioner Chariot Motors, Inc.

FINDINGS OF FACT

1. On November 30, 1980, following a field audit of the books and records of Chariot Motors, Inc., the Audit Division issued separate notices of determination and demand for payment of sales and use taxes due to petitioners Chariot Motors, Inc. ("Chariot"), Spartan Motors, Ltd. ("Spartan"), and Hushang Golestani, President of Chariot Motors, Inc. The notices issued to Chariot and Spartan asserted a deficiency in sales and use taxes due from each petitioner in the amount of \$37,970.47, plus interest. The deficiency asserted against Chariot was based on the aforementioned audit of its books and records under section 1138 of the Tax Law. The deficiency asserted against Spartan was based on the audit of Chariot and the allegation that Spartan was liable under section 1141(c) as a bulk purchaser of Chariot's business. The notice issued to Mr. Golestani asserted sales (but not use) tax due in the amount of \$33,932.47, plus interest, and was premised upon the allegation that Mr. Golestani was personally liable under sections 1131 and 1133 of the Tax Law as an officer of Chariot.

2. Chariot, by its president, Mr. Golestani, had executed a consent allowing sales and use taxes for the period June 1, 1977 through September 30, 1979, to be assessed at any time on or before December 20, 1980.

3. As the result of a pre-hearing conference, at which time petitioners' furnished substantiation of certain exempt sales which had previously been disallowed on audit, the aforementioned deficiencies were each reduced by \$10,444.83. Accordingly, the total revised deficiency asserted against each corporation is \$27,525.64, plus interest, while the total revised deficiency asserted against Mr. Golestani is \$23,487.64, plus interest.

4. The above-noted field audit of Chariot's books and records resulted in the assertion of additional sales and use tax due in several areas (other than the previously noted and substantiated exempt sales) as follows:

a) a reconciliation of gross sales for the audit period per Chariot's books and records (\$7,759,469.00) to gross sales per its sales tax returns (\$7,279,407.00) resulted in a difference of \$480,062.00. This difference was reduced by "total items not included in gross" (\$160,824.00), and increased by \$4,870.00 overincluded in gross, thus leaving an unexplained difference of \$324,354.00. This unexplained difference was treated as unreported sales, with sales tax due thereon in the amount of \$16,898.85;

b) sales tax accrued in excess of sales tax remitted in the amount of \$408.08;

c) recurring purchases in the amount of \$10,783.00, resulting in use tax due of \$539.15;

d) sporadic bulk gasoline purchases of \$6,171.00 for Chariot's use, resulting in use tax due of \$208.55;

e) lease of a technicolor mini-theatre for promotional purposes for \$994.00, resulting in use tax due of \$49.70;

f) equipment acquisitions in the amount of \$62,812.00, resulting in use tax due of \$3,140.60;

g) a reorganization, asserted by the Audit Division to have occurred under section 368(a)(1)(C) of the Internal Revenue Code, thereby subjecting tangible personal property transferred from Chariot to Spartan valued at \$123,614.22 as of September 30, 1979, to sales tax in the amount of \$6,180.71.

5. The (reduced) deficiencies asserted against Chariot and Spartan include both sales and use taxes, while the (reduced) deficiency asserted against Mr. Golestani includes only sales tax. Total use tax asserted, as specified both in Finding of Fact "4" above and in the narrative and computational portions of the audit report, equalled \$3,938.00. However, a mathematical error resulted in overassessment of such tax by \$100.00 on the deficiencies asserted against Chariot and Spartan, and thus those deficiencies should be further reduced from \$27,525.64 to \$27,425.64, plus interest.

6. At the hearing, petitioners presented evidence and argument only on the issues of the gross sales differential (see Finding of Fact "4-a"), and their assertion that the type of reorganization involved excepted the Chariot to Spartan transfer from sales tax liability in all regards (see Finding of Fact "4-g"). Neither the perfected petitions nor the presentation at the hearing raised issue with or presented argument or evidence on the overaccrued sales tax or the use tax asserted as due (see Findings of Fact "4-b, c, d, e and f"), or the issue of Mr. Golestani's personal liability as president of Chariot.

7. During the period at issue, Chariot, and subsequently Spartan, operated an automobile dealership located at 752 South Road, Poughkeepsie, New York, selling Mercedes-Benz and other new and used automobiles. Chariot and Spartan were both incorporated under the laws of New York State and, prior to the August 29, 1979 reorganization described hereinafter, each was authorized to issue 200 shares of capital stock, of which 100 shares were issued and outstanding. Chariot was incorporated on September 14, 1976, while Spartan was incorporated on May 19, 1978, and all of the outstanding stock of each corporation was owned, prior to August 29, 1979, by Mr. Golestani.

8. The Audit Division determined, on audit, that Chariot's gross sales per its books and records for the period at issue exceeded gross sales as reported on its sales tax returns (Forms ST-100) for the same period. Gross sales were determined by the auditor by resort to the monthly ending balances shown on Chariot's general ledger sales account. The excess determined, as reduced by amounts per quarter "not included in gross", formed the basis for assessment as follows:

<u>QUARTER ENDED</u>	<u>GROSS SALES PER RECORDS</u>	<u>GROSS SALES PER ST-100's</u>	<u>DIFFERENCE</u>	<u>NOT INCLUDED IN GROSS**</u>	<u>UNEXPLAINED DIFFERENCE</u>
8/77	\$1,038,453	\$ 864,774	\$173,679	\$12,959	\$160,720 (assessed)
11/77	652,000	651,996	4	--	4 --
2/78	614,693	588,352	26,341	19,912	6,429 (assessed)
5/78	715,977	634,503	81,474	17,485	63,989 (assessed)
8/78	860,898	805,641	55,257	22,793	32,464 (assessed)
11/78	739,666	655,047	84,619	32,163	52,456 (assessed)

<u>QUARTER ENDED</u>	<u>GROSS SALES PER RECORDS</u>	<u>GROSS SALES PER ST-100's</u>	<u>DIFFERENCE</u>	<u>NOT INCLUDED IN GROSS**</u>	<u>UNEXPLAINED DIFFERENCE</u>
2/79	714,545	714,974	(429)	--	(429)
			--		
5/79	1,432,898	1,401,096	31,802 (assessed)	23,506	8,296
8/79	809,976	788,970	21,006	25,876	(4,870)
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** No explanation was offered concerning the basis for the reduction allowed for the amounts "not included in gross".

9. Petitioners assert the difference between gross sales per records and gross sales per ST-100's was due, in all quarters for which differences were shown, to "swap" transactions. The term "swap", as used herein, involves the exchange between two automobile dealers of cars of the same or similar value. Petitioners maintain that due to bookkeeping errors and/or inconsistencies by Chariot's personnel, the values of vehicles swapped were sometimes, but not always, included in gross sales in the period-ending balance on Chariot's general ledger sales account. Petitioners maintain that gross sales per Chariot's ST-100's correctly reflected gross sales for all quarters during the period at issue.

10. In support of their position, petitioners introduced a copy of Chariot's general ledger sales account for the quarter ended August 31, 1977. A closing balance of \$1,038,453.00 appears, which amount is the same as was reflected by the auditor as gross sales (per books) for the quarter. The general ledger also reflects an ending balance in account number 400 "sls-new veh-swap" (sales-new vehicles-swap) of \$214,296.93. Petitioners assert that such amount

(\$214,296.93) should have been excluded by the auditor from gross sales as swaps not subject to tax. Such reduction would result in gross sales in the amount of \$824,156.07 (\$1,038,453.00 less \$214,156.93) for this quarter.

11. In further support of their position, petitioners introduced a total of 14 car sales invoices dated during the quarter ended August 31, 1977. These invoices were found among Chariot's records during a review conducted by a former Chariot (and Spartan) employee with regard to the instant audit results. Petitioners stated that these 14 invoices were the only swap invoices found, but that they do not reflect all swaps made by Chariot during the quarter ended August 31, 1977. The invoices reflected Chariot's name and the name of the party (dealer) allegedly swapped with, the year, make, model, and identification number (M.V.I./Serial number) of each car involved and a typewritten price for each car. Some of the invoices reflected the salesman as "house" (presumably Chariot), and stated "dealer to dealer". The total price for all of these cars, according to the typed prices on the invoices, equalled \$164,523.11. Handwritten notations on some of these invoices made no change in the typewritten prices. However, invoice number Z00068, showing a typewritten price of \$17,021.00, also reflected different handwritten price (\$14,900.00) and cost (\$13,589.00) amounts, and noted a breakdown of "cash on delivery" (\$11,200.00) and "trade-in; '76 V.W." (\$3,700.00), while invoice number Z00084 showed a typewritten price of \$16,100.00 but a handwritten cost of \$13,984.99. Elimination of these two invoices results in a total value for alleged swaps per the invoices of \$131,402.11 (\$164,523.11 less \$33,121.00). No explanation was offered with regard to the handwritten items reflected on these two invoices.

12. The auditor testified that in conducting the audit, credit was allowed to Chariot based on invoices which were "obviously swaps that we did not tax".

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Presumably this credit is reflected in the column entitled "not included in gross" (see Finding of Fact "8").

13. Petitioners assert Chariot's lack of adequate and competent bookkeeping help resulted in inconsistent recording of the swap transactions on Chariot's books from period to period. Petitioners maintain that the sales tax returns correctly reflected gross sales throughout the audit period and that any differential between the returns and Chariot's books resulted from swaps improperly reflected as sales on the books. Petitioners note that swaps occurred during the quarter ended November 30, 1977, but that they must have been properly accounted for (i.e. not included as sales on the books) since only a four dollar difference between gross sales per books and gross sales per returns was found.

14. No evidence was presented with regard to the manner in or source(s) from which Chariot determined gross sales as reflected on its sales tax returns, nor was documentary or other evidence introduced with respect to periods other than the quarter ended August 31, 1977.

15. According to testimony by petitioners' representative, Howard St. John, who prepared the documents for and supervised the reorganization, Mr. Golestani's then-accountant, one Sam Gordon, had recommended a reorganization under Internal Revenue Code section 368(a)(1)(D). Mr. St. John stated the reorganization was undertaken solely for the tax benefits to be derived therefrom, and that "...all of the required steps were taken". He testified there was no change in stock ownership or corporate officers, that no stock of Spartan was issued upon its organization to Chariot in exchange for the transfer of Chariot's assets, that Spartan was not a subsidiary of Chariot, that no merger or consolidation pursuant to the Laws of New York or any other jurisdiction occurred, and that

although the plan allowed either party the option of requiring a written ruling by the I.R.S. regarding the effect of the plan, neither party requested such a ruling nor has the I.R.S. ruled on the plan or acted adversely thereon.

16. The terms of the written agreement and plan of reorganization between Chariot and Spartan, signed on behalf of both Chariot and Spartan by Mr. Golestani, provided, inter alia, as follows:

a) Chariot was to transfer its assets and liabilities to Spartan in exchange for one certificate of Spartan's common stock;

b) Chariot then was to distribute to its shareholders one share of Spartan's common stock in exchange for each outstanding share of Chariot's stock, with Chariot thereafter to "...dissolve and wind up its affairs as promptly as practicable...".

17. No dissolution of Chariot was undertaken or effected subsequent to the August 29, 1979 reorganization.

18. Petitioners assert that the reorganization at issue met the requirements of Internal Revenue Code section 368(a)(1)(D), that the transfer of assets from Chariot to Spartan did not constitute a taxable event or a retail sale subject to tax, and that no sales tax is due on this transfer. Petitioners also maintain that Spartan is not liable for the other portions of the deficiency relating to the business operations of Chariot since no sale occurred.

19. The Audit Division asserts, by contrast, that the transfer of Chariot's assets to Spartan constituted a retail sale subject to and resulting in sales tax of \$6,180.71, and that Spartan is liable for this amount as well as for the additional sales and use tax found due upon the audit of Chariot's books and records because a bulk sale occurred and notice was not given pursuant to section 1141(c) of the Tax Law, thus rendering Spartan liable for such taxes as a transferee in bulk.

CONCLUSIONS OF LAW

A. That the evidence and explanation offered by petitioners with regard to Chariot's gross sales differential does not support the conclusion, as asserted by petitioners, that gross sales were properly reported by Chariot on its sales tax returns. The argument offered by petitioners for the quarter ended August 31, 1977 (the only portion of the audit period for which evidence on this issue was presented), suggests swaps of \$214,296.93 were erroneously included in gross sales per books of \$1,038,453.00, and should be removed therefrom. Doing so results in gross sales of \$824,156.07, while Chariot's sales tax returns reflected gross sales of \$864,774.00, or an apparent over-reporting of gross sales (per the returns) of \$40,617.93. Petitioners, at the same time, assert the sales tax returns properly reported gross sales. No explanation was offered as to how the figure reported as gross sales per returns was determined. Petitioners could not produce all of the invoices concerning the alleged swaps (totalling \$214,296.93) for the quarter ended August 31, 1977, and there is doubt cast on at least two of the invoices concerning whether they actually represented swap transactions (see Finding of Fact "11"). In short, petitioners have failed to prove that the gross sales differential was due, as asserted, for the quarter ended August 31, 1977 or for any other quarter, to swap transactions improperly recorded on Chariot's books and records, or that Chariot's ST-100's, as filed, correctly reflected its gross sales totals. Accordingly, no adjustment to this portion of the audit is warranted.

B. That no issue, evidence or argument was offered with regard to those other portions of the audit dealing with the use tax and the excess accrued sales tax, or with regard to Mr. Golestani's personal liability for sales tax

as an officer of Chariot. In fact, it was admitted that Mr. Golestani was the sole shareholder of both Chariot and Spartan. Accordingly, these items are sustained.

C. That section 1101(b)(4)(ii) (now renumbered 1101(b)(4)(iii)) of the Tax Law, in pertinent part, provides:

"[t]he term retail sale does not include:

(A) The transfer of tangible personal property to a corporation, solely in consideration for the issuance of its stock, pursuant to a merger or consolidation effected under the laws of New York or any other jurisdiction.

* * *

(D) The transfer of property to a corporation upon its organization in consideration for the issuance of its stock."

D. That regulations of the State Tax Commission, in pertinent part, provide:

"[w]here a corporation purchases another corporation's assets in consideration of issuance of stock of the purchasing corporation, or the parent of the purchasing corporation, such as under section 368(a)(1)(C) of the Internal Revenue Code, the transaction does not qualify as a merger or consolidation, even if the selling corporation is subsequently liquidated.

Example 9: Corporation A will transfer its assets to Corporation B in consideration for B's issuance of shares of its stock. Corporation A will continue to exist for discharging its expenses, and then will be dissolved. The transfer of tangible personal property will be subject to tax, as it is carried out under a plan or reorganization but is not a statutory merger or consolidation."

[20 NYCRR 526.6(d)(6)(iv)]

E. That the terms of the written agreement and plan of reorganization appear to have contemplated a reorganization under section 368(a)(1)(D) of the Internal Revenue Code. However, there is testimony which conflicts with the terms of the written agreement (refer Findings of Fact "15" and "16"), and thus

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it is difficult to determine if, in reality, Spartan and Chariot complied with the requirements of section 368(a)(1)(D), or if not, to determine which of the other section 368 alternatives they fall under. However, it is clear from the testimony and from the written plan that no statutory merger or consolidation occurred and thus, notwithstanding potential compliance with either section 368(a)(1)(D) or 368(a)(1)(C), the transfer of Chariot's assets to Spartan does not escape inclusion from the type of transaction constituting a retail sale as defined in section 1101(b)(4)(i) of the Tax Law.¹ In this regard, it is further noted that section 1101(b)(4)(ii)(D) of the Tax Law does not apply since the instant transfer was not made upon the organization of either corporation in consideration for the issuance of stock (refer Finding of Fact "7"). Accordingly, the Audit Division properly assessed sales tax upon the transfer of Chariot's assets to Spartan.

F. That the criteria of whether a transaction is a "bulk sale" subject to the provisions of section 1141(c) of the Tax Law are that there be a sale, transfer or assignment in bulk of any part or the whole of one's business assets by a person required to collect the tax and that such transaction be other than in the ordinary course of business.

G. That the instant transfer of Chariot's assets to Spartan constituted a bulk sale. There is no evidence that Spartan complied with the notice require-

¹ Petitioners appear to have believed that compliance with section 368(a)(1)(D) of the Internal Revenue Code, resulting in non-recognition of gain or loss (i.e., a non-taxable event) with regard to income taxes, also resulted in a non-taxable event for sales tax purposes.

ments specified in section 1141(c) of the Tax Law and thus Spartan is liable as assessed for the sales and use tax assessed on audit of Chariot.

H. That the petitions of Spartan Motors, Ltd., Chariot Motors, Inc. and Hushang Golestani, President of Chariot Motors, Inc. are hereby denied and the notices of determination and demand dated November 30, 1980, as reduced in accordance with Findings of Fact "3" and "5", are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 09 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 315 281
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Howard C. St. John</i>	
Street and No. <i>280 Walnut St. URB Box 3458</i>	
P.O., State and ZIP Code <i>Kingston, NY 12401</i>	
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 470 315 278
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Spantax Motors Ltd</i>	
Street and No. <i>752 South Rd.</i>	
P.O., State and ZIP Code <i>Poughkeepsie, NY 12601</i>	
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