

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stephen Boulet :
d/b/a Otisco Auto Sales : AFFIDAVIT OF MAILING
:
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the Period :
9/1/78-8/31/81. :

State of New York :

ss.:

County of Albany :

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 15th day of April, 1985, he served the within notice of Decision by certified mail upon Stephen Boulet d/b/a Otisco Auto Sales, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stephen Boulet
d/b/a Otisco Auto Sales
1571 Otisco Valley Rd.
Marietta, NY 13110

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
15th day of April, 1985.

David Parchuck

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

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

April 15, 1985

Stephen Boulet
d/b/a Otisco Auto Sales
1571 Otisco Valley Rd.
Marietta, NY 13110

Dear Mr. Boulet:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
STEPHEN BOULET	:	DECISION
D/B/A OTISCO AUTO SALES	:	
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, 1978	:	
through August 31, 1981.	:	

Petitioner, Stephen Boulet d/b/a Otisco Auto Sales, 1571 Otisco Valley Road, Marietta, New York 13110, 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 September 1, 1978 through August 31, 1981 (File No. 38188).

A small claims 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 18, 1984 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioner, Stephen Boulet d/b/a Otisco Auto Sales, was engaged in the sale of used automobiles.

2. On March 19, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period September 1, 1978 through August 31,

1981 for taxes due of \$3,916.32, plus interest of \$1,161.13, for a total of \$5,077.45.

3. The only records petitioner made available for audit were sales invoices for October 13, 1980 through September 12, 1981 and cancelled checks. The Audit Division obtained copies of MV-50's issued by petitioner from the Department of Motor Vehicles. A list of the vehicles sold was prepared and compared with petitioner's book of registry and available sales invoices. The Audit Division estimated the selling price of each vehicle based on the average retail value shown in a National Automobile Dealers Association (NADA) publication. Based on the available sales invoices, it was determined that petitioner sold his vehicles for 54.52 percent of average retail value. This percentage was applied to the above estimated selling prices and resulted in additional taxes due of \$1,491.84.

The Audit Division also found MV-50's issued for certain vehicles that were not recorded in the book of registry. The additional tax due on these vehicles amounted to \$142.39. There were fourteen transactions which petitioner considered nontaxable as dealer to dealer sales. The Audit Division disallowed these sales because petitioner did not have exemption certificates on file and assessed taxes due of \$1,390.40.

Lastly, the Audit Division found that petitioner advertised automobiles in the local Pennysaver. The ads appeared in the name of Stephen Boulet individually rather than in the business name. The Audit Division reviewed Pennysavers for a nine month period and found five automobiles advertised by Mr. Boulet which were not shown in his book of registry. The sales prices of the five automobiles were estimated (NADA retail value x 54.52%) and the Audit

Division considered that petitioner sold five automobiles in each nine month period covered by the audit. This resulted in additional tax due of \$891.66.

4. Following a pre-hearing conference with the Tax Appeals Bureau, the taxes due were reduced to \$1,112.08. The revision was based on additional sales invoices and exemption certificates submitted by petitioner. Petitioner agreed to a liability of \$606.92 and submitted a check in payment thereof.

The balance of the taxes due (\$505.12) represented the tax due on the following two automobiles advertised in the Pennysaver for which there were no sales invoices and the automobiles did not appear in petitioner's book of registry:

(1) 1976 Volare	\$1,349.00
(2) 1971 Chevrolet	600.00

Based on the above sales for nine months, the Audit Division estimated sales of \$7,216.00 for the audit period and tax due thereon of \$505.12.

5. Petitioner conceded at the hearing that sales tax of \$42.00 was due on the 1971 Chevrolet. The car was sold and an MV-50 was issued; however, the sales tax was not paid over with the sales tax returns filed.

With respect to the 1976 Volare, petitioner argued that he took this vehicle on consignment from another dealer and it was returned to the dealer unsold. Petitioner offered no evidence to support his argument.

6. Petitioner took the position that an MV-50 was issued for every automobile sold and since the Audit Division had a complete list of MV-50's, there was no basis for estimating the additional sales indicated in Finding of Fact "4", supra.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that the amount of tax due shall be determined from such information as may be available but "if necessary, the tax may be estimated on the basis of external indices."

That section 1132(c) of the Tax Law specifically provides, in pertinent part, that it shall be presumed that all receipts for property or services are subject to tax until the contrary is established and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax.

B. That petitioner's books and records were inadequate and incomplete for purposes of verifying taxable sales or substantiating nontaxable sales. When books and records are incomplete, as here, the use of external indices is permissible (Matter of Korba v. N.Y.S. Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division's determination of additional taxable sales and sales taxes due was proper pursuant to section 1138(a) of the Tax Law. Exactness is not required where it is the taxpayer's own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Matter of Markowitz v. State Tax Commission, 54 A.D.2d 1023).

C. That the petition of Stephen Boulet d/b/a Otisco Auto Sales is granted to the extent that the additional taxes due are reduced to \$1,112.08. The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 19, 1982; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

APR 15 1985

STATE TAX COMMISSION

Richard W. Olen
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER

CLAIM CHECK
NO. 849201

DATE 4-17-79

1ST NOTICE

2ND NOTICE

4-27

RETURN
5-10

Detached from
PS Form 3848-A
Oct. 1982

NEW YORK
Commission
BUREAU
MPUS
12227

P 693 169 715

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sender's Name <i>Stephen Boulet</i>	
Street and No. <i>1571 Otisco Valley Rd.</i>	
P.O. State and ZIP Code <i>Marlette NY 13110</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	

★ U.S.G.P.O. 1983-463-517

PS Form 3800, Feb. 1982

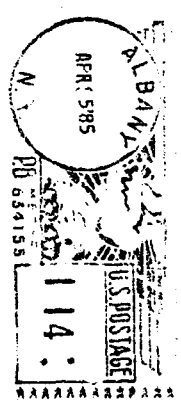
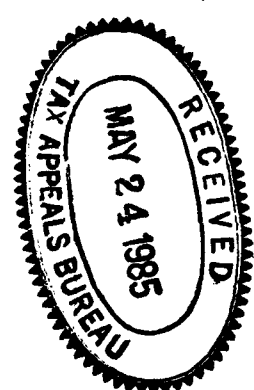
CERTIFIED MAIL
P 693 169 715

CERTIFIED



REASON CHECKED
Unclaimed _____ Refused _____
Addressee unknown _____
Insufficient Address _____
No such street _____ number _____
No such office in state _____
Do not remail in this envelope

Stephen Boulet
d/b/a Otisco Auto Sales
1571 Otisco Valley Rd.
Marlette, NY 13110



CLAIM CHECK
PAGE 1000

840201

NEW YORK

Commission

5 BUREAU

MPUS

12227

TAXPAYER

STATE

DATE PAID

4-27

1ST NOTICE

4-27

PAID NOTICE

RETURN

5-10

DATE PAID

5-10

1ST NOTICE

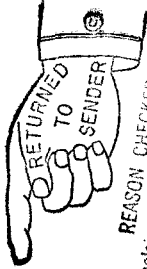
DATE PAID

5-10

CERTIFIED

P 693 169 715

MAIL



REASON CHECKED

Unclaimed _____ Refused _____

Addressee unknown _____

Insufficient Address _____

No such street _____ number _____

No such office in state _____

Do not remail in this envelope

Stephen Boulet

d/b/a Otisco Auto Sales

1571 Otisco Valley Rd.

Marietta, NY 13110





30

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

April 15, 1985

Stephen Boulet
d/b/a Otisco Auto Sales
1571 Otisco Valley Rd.
Marietta, NY 13110

Dear Mr. Boulet:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
STEPHEN BOULET : DECISION
D/B/A OTISCO AUTO SALES :
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, 1978 :
through August 31, 1981. :

Petitioner, Stephen Boulet d/b/a Otisco Auto Sales, 1571 Otisco Valley Road, Marietta, New York 13110, 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 September 1, 1978 through August 31, 1981 (File No. 38188).

A small claims 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 18, 1984 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioner, Stephen Boulet d/b/a Otisco Auto Sales, was engaged in the sale of used automobiles.

2. On March 19, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period September 1, 1978 through August 31,

1981 for taxes due of \$3,916.32, plus interest of \$1,161.13, for a total of \$5,077.45.

3. The only records petitioner made available for audit were sales invoices for October 13, 1980 through September 12, 1981 and cancelled checks. The Audit Division obtained copies of MV-50's issued by petitioner from the Department of Motor Vehicles. A list of the vehicles sold was prepared and compared with petitioner's book of registry and available sales invoices. The Audit Division estimated the selling price of each vehicle based on the average retail value shown in a National Automobile Dealers Association (NADA) publication. Based on the available sales invoices, it was determined that petitioner sold his vehicles for 54.52 percent of average retail value. This percentage was applied to the above estimated selling prices and resulted in additional taxes due of \$1,491.84.

The Audit Division also found MV-50's issued for certain vehicles that were not recorded in the book of registry. The additional tax due on these vehicles amounted to \$142.39. There were fourteen transactions which petitioner considered nontaxable as dealer to dealer sales. The Audit Division disallowed these sales because petitioner did not have exemption certificates on file and assessed taxes due of \$1,390.40.

Lastly, the Audit Division found that petitioner advertised automobiles in the local Pennysaver. The ads appeared in the name of Stephen Boulet individually rather than in the business name. The Audit Division reviewed Pennysavers for a nine month period and found five automobiles advertised by Mr. Boulet which were not shown in his book of registry. The sales prices of the five automobiles were estimated (NADA retail value x 54.52%) and the Audit

Division considered that petitioner sold five automobiles in each nine month period covered by the audit. This resulted in additional tax due of \$891.66.

4. Following a pre-hearing conference with the Tax Appeals Bureau, the taxes due were reduced to \$1,112.08. The revision was based on additional sales invoices and exemption certificates submitted by petitioner. Petitioner agreed to a liability of \$606.92 and submitted a check in payment thereof.

The balance of the taxes due (\$505.12) represented the tax due on the following two automobiles advertised in the Pennysaver for which there were no sales invoices and the automobiles did not appear in petitioner's book of registry:

(1) 1976 Volare	\$1,349.00
(2) 1971 Chevrolet	600.00

Based on the above sales for nine months, the Audit Division estimated sales of \$7,216.00 for the audit period and tax due thereon of \$505.12.

5. Petitioner conceded at the hearing that sales tax of \$42.00 was due on the 1971 Chevrolet. The car was sold and an MV-50 was issued; however, the sales tax was not paid over with the sales tax returns filed.

With respect to the 1976 Volare, petitioner argued that he took this vehicle on consignment from another dealer and it was returned to the dealer unsold. Petitioner offered no evidence to support his argument.

6. Petitioner took the position that an MV-50 was issued for every automobile sold and since the Audit Division had a complete list of MV-50's, there was no basis for estimating the additional sales indicated in Finding of Fact "4", supra.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that the amount of tax due shall be determined from such information as may be available but "if necessary, the tax may be estimated on the basis of external indices."

That section 1132(c) of the Tax Law specifically provides, in pertinent part, that it shall be presumed that all receipts for property or services are subject to tax until the contrary is established and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax.

B. That petitioner's books and records were inadequate and incomplete for purposes of verifying taxable sales or substantiating nontaxable sales. When books and records are incomplete, as here, the use of external indices is permissible (Matter of Korba v. N.Y.S. Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division's determination of additional taxable sales and sales taxes due was proper pursuant to section 1138(a) of the Tax Law. Exactness is not required where it is the taxpayer's own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Matter of Markowitz v. State Tax Commission, 54 A.D.2d 1023).

C. That the petition of Stephen Boulet d/b/a Otisco Auto Sales is granted to the extent that the additional taxes due are reduced to \$1,112.08. The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 19, 1982; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985

Richard A. Clev
PRESIDENT
Francis R. Koenig
COMMISSIONER
Mark J. Jurek
COMMISSIONER