

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Anthony J. DePaula :
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 :
Quarters Ended 2/28/78, 5/31/78, 2/28/79, 5/31/79 :
& 8/31/79. :

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 29th day of April, 1985, he served the within notice of Decision by certified mail upon Anthony J. DePaula, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Anthony J. DePaula
974 Gloucester Pl.
Schenectady, NY 12309

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
29th day of April, 1985.

David Parchuck

Conrad A. Bagdikian
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Anthony J. DePaula :
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 :
Quarters Ended 2/28/78, 5/31/78, 2/28/79, 5/31/79 :
& 8/31/79. :

AFFIDAVIT OF MAILING

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 29th day of April, 1985, he served the within notice of Decision by certified mail upon Theodore Reinhard, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Theodore Reinhard
Lombardi, Reinhard, Walsh & Harrison
433 State St.
Schenectady, NY 12305

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
29th day of April, 1985.

David Parchuck

James J. O'Connell
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 29, 1985

Anthony J. DePaula
974 Gloucester Pl.
Schenectady, NY 12309

Dear Mr. DePaula:

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
Theodore Reinhard
Lombardi, Reinhard, Walsh & Harrison
433 State St.
Schenectady, NY 12305
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ANTHONY J. DePAULA	:	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 Quarters Ended	:	
February 28, 1978, May 31, 1978, February 28,	:	
1979, May 31, 1979 and August 31, 1979.	:	

Petitioner, Anthony J. DePaula, 974 Gloucester Place, Schenectady, New York 12309, 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 quarters ended February 28, 1978, May 31, 1978, February 28, 1979, May 31, 1979 and August 31, 1979 (File No. 34462).

A 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 October 18, 1983 at 9:15 A.M., with all briefs to be submitted by January 24, 1984. Petitioner appeared by Lombardi, Reinhard, Walsh & Harrison, P.C. (Theodore Reinhard, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the State Tax Commission has jurisdiction to hold a hearing and make a determination based upon the facts adduced thereat concerning petitioner's personal liability for sales tax due from petitioner's former corporate employer for the periods at issue.

II. Whether the Audit Division is estopped from reissuing an assessment against petitioner based upon its cancellation of a previously issued assessment covering identical periods and assessing identical amounts.

III. Whether any or all of the assessment against petitioner is barred by operation of the statute of limitations.

IV. Whether the portion of the assessment against petitioner covering periods where sales tax returns were not signed by petitioner should be summarily cancelled.

V. Whether petitioner was a person required to collect tax on behalf of Mohawk Chevrolet Co., Inc. and is therefore personally liable for sales taxes unpaid by that corporation.

FINDINGS OF FACT

1. On October 27, 1980, the Audit Division issued to petitioner, Anthony J. DePaula, a Notice and Demand for Payment of Sales and Use Taxes Due in the amount of \$169,621.17, plus penalty and interest. This assessment, numbered S801031001A, was premised upon the assertion that petitioner was personally liable pursuant to sections 1131(1) and 1133(a) of the Tax Law as an officer of Mohawk Chevrolet Co., Inc. ("Mohawk") for unpaid sales tax (plus penalty and interest accrued thereon) due from Mohawk. This assessment pertained to the period December 1, 1977 through August 31, 1979 and is more specifically detailed as follows:

<u>PERIOD ENDING</u>	<u>TAX DUE</u>	<u>PENALTY DUE</u>	<u>INTEREST DUE</u>
2/28/78	\$62,451.44	\$12,548.62	\$19,736.56
5/31/78	58,583.77	18,132.69	17,890.24
2/28/79	21,339.12	6,232.03	4,287.56
5/31/79	-0-	1,216.38	175.63
8/31/79	27,246.84	6,826.48	4,457.23

2. The foregoing assessment against petitioner was based upon assessments issued against Mohawk resulting from its filing of returns with either no remittance or only partial remittance of the tax shown as due thereon, more specifically detailed as follows:

<u>QUARTER ENDED</u>	<u>RETURN FILED</u>	<u>AMOUNT SHOWN DUE PER RETURN</u>	<u>REMITTANCE WITH RETURN</u>	<u>SUBSEQUENT REMITTANCE(S)</u>	<u>AMOUNT UNPAID</u>
2/28/78	Yes	\$ 62,451.44	\$ -0-	\$ -0-	\$62,451.44
5/31/78	Yes	122,778.77*	49,241.25	15,000.00	58,583.77
2/28/79	Yes	43,551.68*	22,213.00	-0-	21,339.12
5/31/79	Yes; <u>estimated</u> return for month of March, 1979	28,000.00	-0-	28,000.00	1,216.47**
8/31/79	Yes	51,166.73	-0-	23,919.89	27,246.84

3. By a letter dated May 5, 1981, pertaining to assessment number S801031001A (the assessment against petitioner detailed in Finding of Fact "1", supra), the Audit Division advised petitioner, through his representatives, as follows:

"Based on the information submitted, we have determined that Anthony J. DePaula is not a person required to collect tax as defined by Section 1131(1) of the New York Tax Law. Accordingly, we are cancelling the above-mentioned assessment."

4. On August 20, 1981, the Audit Division issued to petitioner a Notice and Demand for Payment of Sales and Use Taxes Due (assessment number S810811451C) in the same amounts and for the same periods as were covered by previously cancelled assessment number S801031001A, plus penalty and interest updated to the August 20, 1981 date of issuance. This renewed assessment, also premised

* Due to minor mathematical errors in the computation of tax due per Mohawk's returns, the correct amount of tax due should have been \$122,825.02 for the quarter ended 5/31/78 and \$43,552.12 for the quarter ended 2/28/79, respectively. The noted partial remittances have been subtracted from the corrected amounts due and thus the amounts unpaid reflect corrected figures.

** The unpaid amount for the quarter ended 5/31/79 (\$1,216.47) reflects penalty (only) assessed for Mohawk's failure to timely remit the estimated taxes shown as due on its sales tax return filed for the month of March, 1979.

upon the assertion of petitioner's liability as an officer of Mohawk, was explained per the Notice and Demand as follows:

"You are personally liable as officer of Mohawk Chevrolet Co., Inc. under Sections 1131(1) and 1133(a) of the Tax Law for the following taxes determined to be due in accordance with Section 1137 of the Tax Law.

This renewed assessment was issued following the Audit Division's receipt of additional information regarding alleged responsibilities and actions undertaken by petitioner as an officer and employee of Mohawk (see Finding of Fact "24", infra).

5. Mohawk was, until it ceased its operations, a Chevrolet automobile dealership located in Schenectady, New York.¹ Mohawk was a family-owned corporation whose president was Mr. Joseph A. Haraden.

6. Petitioner commenced employment with Mohawk in or about late 1975. He had previous experience in operating his own wholesale used car business, was recommended to Mohawk by Schenectady Trust Company (with whom petitioner's previous business banking had been transacted), and was hired by Mr. Haraden to be Mohawk's used car sales manager. His duties for Mohawk included purchasing and selling used cars, appraising trade-in vehicles and working with Mohawk's sales force, with the overall aim of increasing the volume of used car sales. Petitioner was to coordinate the used car portion of Mohawk's business with its new car sales operation, in conjunction with Mohawk's new car sales manager.

7. Mohawk's physical layout consisted of two buildings, located at 740 State Street and at 756 State Street, respectively, separated by approximately

¹ Mohawk Chevrolet Co., Inc. ("Mohawk") ceased its operations as a Chevrolet dealership sometime after August, 1979. There was, however, no dissolution and Mohawk remained an existing corporate entity.

400 feet of vacant property owned by Mohawk and used as a parking lot for its vehicles. Mohawk's sales offices, including petitioner's office, were located in the 740 State Street building, while its administrative and bookkeeping offices, including Mr. Haraden's office, were located in the 756 State Street building. Mohawk employed an office manager to oversee the operation of the dealership. Mohawk's office manager, whose office was located among the administrative and bookkeeping offices at 756 State Street, reported and was directly responsible to Mr. Haraden.

8. Sometime in 1976, petitioner was made an authorized signatory on Mohawk's checking accounts and was named, at the same time, to the office of vice-president of Mohawk. Petitioner testified that he was given only the authority to sign checks, as vice-president, but was given no other authority over the corporation. He never asked for nor was he told of any specific duties or authority attached to the office of vice-president. He never attended any meetings as a corporate officer. He was advised of his authority to sign checks, as vice-president, via notification from the banks that they would accept his signature on Mohawk's checks. One signature only was required to issue a valid check on behalf of Mohawk.

9. Petitioner was made a signatory because Mr. Haraden, who owned a second home in Lake George, New York, was spending considerable amounts of time away from Mohawk and needed someone there to sign the many checks commonly issued each day in the course of Mohawk's business. Mohawk's office manager was in charge of preparing the checks (i.e. determining the payees and amounts of the checks) and, after doing so, would present the checks, in Mr. Haraden's absence, to petitioner at petitioner's office for signature. Petitioner

Manufacturer's Hanover. Unable to locate Mr. Haraden, Manufacturer's Hanover called in its loan and, in the process, utilized a setoff privilege against other funds of Mohawk. This setoff caused a number of Mohawk's outstanding checks, including checks to Marine Midland for vehicle floor planning and to the Audit Division for sales tax, to be dishonored. This also caused Mohawk's various suppliers to refuse to extend credit and to deal with Mohawk only on the basis of immediate payment in cash or by check, thus in turn increasing the number of checks needed to be issued daily by Mohawk. Petitioner testified that Mr. Haraden was spending a substantial amount of time away from the dealership during this period.

13. Immediately after the aforementioned setoff, Marine Midland took over active control of Mohawk's funds. Petitioner was still an authorized signatory but noted that Marine Midland had direct control over the disposition of funds and gave first priority to payroll and floor planning payments, with all other payments, including sales tax, considered secondary.

14. In early 1979, during a strike by Mohawk's personnel, Mr. Haraden was continuously absent from Mohawk's premises for a period of approximately two months.

15. In July or August of 1979, petitioner's employment with Mohawk was terminated by Marine Midland which, at that point, took over complete control of the dealership's operation.

16. Petitioner's Wage and Tax Statements reflect petitioner's compensation as \$29,400.00 for 1977, \$42,300.00 for 1978 and \$25,500.00 for 1979, respectively, with the higher amount for 1978 attributable to an increase in automobile sales

(in general) in that year with a concomitant increase in sales commissions earned by petitioner.²

17. Petitioner spent, on average, approximately 50 to 55 hours per week working at Mohawk.

18. Petitioner was not involved with processing, depositing or otherwise handling the funds and finances of Mohawk other than to turn in to the cashier any checks received by him on the sales of cars, and to sign those checks presented to him by Mohawk's office manager. Petitioner noted that he, but not Mohawk's office manager, was given check-signing authority. As explained to petitioner by Mr. Haraden, a previous office manager with both check preparation and signing authority had caused Mr. Haraden some trouble, presumably by issuing checks beyond the scope of his authority.

19. Petitioner attended weekly sales meetings at Mr. Haraden's office in Mohawk's administrative building. Petitioner rarely went there otherwise since his own office was located in Mohawk's separate sales building where the nature of his job as sales manager required his constant presence. Checks and sales tax returns signed by petitioner were brought to his office in the sales building by personnel from the administrative building. Petitioner did not review Mohawk's books and records and had no authority to order the payment of one creditor as a priority over another. He was given information from the administrative office regarding general cash flow and the manner in which sales and purchases of used cars should be handled (i.e. a direction that more cash was needed would indicate the necessity to sell or liquidate more used cars).

² Mohawk's Corporation Franchise Tax Report for 1978 erroneously listed petitioner's compensation, as an officer, at over \$60,000.00, caused by the mathematical error of combining and reporting two years' compensation on the franchise tax report.

Petitioner was in almost daily communication with the office manager regarding the latter type of situation, including requests by petitioner for checks to purchase used cars.

20. Petitioner testified that his check signing was as an accommodation to Mr. Haraden and that petitioner was never given the indication that he was in charge of the business in Mr. Haraden's absence. Mr. Haraden's daughter worked in Mohawk's administrative offices and his son worked in the service department in order that they could "learn the business".

21. Petitioner was given free reign to conduct Mohawk's used car business, subject to the described administrative directions regarding cash flow and to Mr. Haraden's review (on an end-of-the-month basis) of the used car department's performance.

22. Petitioner, in conjunction with Mohawk's senior sales manager, handled the hiring and firing of personnel in the sales department, but had no authority to hire or fire any administrative personnel. Petitioner did not use the title of vice-president as an indication of authority relating to sales. He felt this title was redundant in view of his title of general sales manager, which latter title Mr. Haraden used when introducing petitioner to business associates and other persons.

23. Petitioner had knowledge that Mohawk's sales tax liabilities were not being met, but did not direct their payment. Petitioner noted such direction by him would have had no effect, in light of the restraints on his conduct of the used car department due to the cash flow problems as described, coupled with his lack of authority to effect payment of sales tax in the first place.

24. On August 5, 1981, the Audit Division received a letter from Mr. Haraden in support of his request for a deferred payment plan on sales tax due from

Mohawk, together with a request for waiver of penalty and reduction of interest charges to simple interest on said tax. The second, third and fourth paragraphs of this letter provided as follows:

"In 1976, at the request of my bankers, The Schenectady Trust Company, who insisted that I hire an overall manager, I hired Anthony DePaula to operate the business of Mohawk Chevrolet Co., Inc. I was compelled to do this because at that time I was ill with Tuberculosis, which presently is cured. Mr. DePaula took complete control of the business after I hired him and thereafter, he irritated the Teamsters Union so that a strike was called and remained in effect for some six months, which hurt Mohawk Chevrolet Co., Inc. substantially.

During the period that the sales tax liability arose, I asked Mr. DePaula if our bills were being paid and he indicated to me that everything was under control and that he would run the business satisfactorily and for me not to worry. As a result, I did not keep close scrutiny on the business of Mohawk Chevrolet Co., Inc., particularly because I did not feel up to it and I did not feel capable of risking the wrath of Mr. DePaula. I had no knowledge of the extent of the mismanagement of the company until the Marine Midland Bank came in and closed the company, at which time I found many instances of mismanagement on the part of Mr. DePaula including the failure to pay the sales tax due your Bureau. During the period of time that Mr. DePaula was running the company, from his employment in 1976 until we were closed in August 1979, he was responsible for all the financial matters and the general management of the Mohawk Chevrolet Co., Inc. including the payment of sales taxes.

I am operating Mohawk Honda, a Honda dealership in Schenectady, and am on the job every day from 9 a.m. to 8 p.m. and am now on top of everything (sic) that is being done. I am paying all my obligations and taxes promptly and I know I will be able to do so in the future."

It was the Audit Division's receipt and review of this letter, coupled with the signed returns under the title of vice-president and the check-signing authority which caused the Audit Division to issue the August 20, 1981 Notice and Demand against petitioner subsequent to cancellation of the October 27, 1980 Notice and Demand issued in the same dollar amount and for the same periods.

25. After termination of his employment with Mohawk, petitioner, together with General Motors, opened DePaula Chevrolet, Inc., a franchised dealership

testified that he did not involve himself in the administrative or bookkeeping aspects of Mohawk's business, spend time in the administrative or bookkeeping offices, become involved with why or to whom checks were being issued or the amounts of the checks. Rather, petitioner signed the checks as a convenience to allow Mr. Haraden to be away from the dealership and to enable continuation of Mohawk's daily operations.

10. Mohawk's financing was handled by Mr. Haraden through three banks, specifically Schenectady Trust, Manufacturer's Hanover and Marine Midland, and petitioner was not involved in arranging financing for Mohawk.

11. Petitioner owned none of Mohawk's stock. He was not involved in the preparation of sales tax returns or other tax returns of Mohawk, which were prepared by Mohawk's office manager(s). Petitioner did, however, sign several sales tax returns in instances when Mr. Haraden was away from the dealership. Petitioner testified that on at least one occasion when Mr. Haraden was not present at the dealership, Mohawk's office manager presented a sales tax return to petitioner seeking both his signature and his advice on how to proceed since there was no money in the checking account to pay the sales tax shown as due on the return. Petitioner sought and followed advice from Mohawk's accountants to the effect that he should sign and file the return. Petitioner signed the sales tax return for the periods ended May 31, 1978 and May 31, 1979 and did not sign the returns for the periods ended February 28, 1978, August 31, 1978, February 28, 1979 and August 31, 1979. He also signed returns for certain periods both prior to and after the periods at issue. Other returns filed on behalf of Mohawk were signed by Mr. Haraden. Petitioner was unsure if he had actual authority to sign returns, but did sign some returns in Mr. Haraden's absence.

12. In early 1978, Mohawk, which had a history of financial problems prior to petitioner's employment there, was faced with the calling in of a loan by

located at the same premises as were formerly used by Mohawk. DePaula Chevrolet, Inc. pays rent on these premises to Mohawk (the remaining corporate entity now inactive as a dealership, but owning the premises). In June, 1981, DePaula Chevrolet, Inc. received an Audit Division levy on the rent it was paying to Mohawk. DePaula Chevrolet, Inc. placed the rent payments in escrow thereafter until July, 1981 when, following cancellation of the October 27, 1980 assessment against petitioner, DePaula Chevrolet, Inc., received a release on this levy. In September, 1981, petitioner (and DePaula Chevrolet, Inc.) was advised that Mohawk had assigned the noted rent payments to Marine Midland. According to petitioner's testimony, the assignment to Marine Midland occurred prior to the time that the new (second) Notice and Demand dated August 20, 1981 was served upon petitioner.

26. Petitioner testified, in response to the letter from Mr. Haraden (Finding of Fact "24", supra), that he was not involved with the negotiations concerning the strike at Mohawk other than being present at such negotiations as "moral support" for Mr. Haraden and that Mr. Haraden, personally, was the only one with whom the striking workers would negotiate. Petitioner also testified that Mr. Haraden told him his illness (tuberculosis) was cured and that Mr. Haraden's absences from Mohawk during the period at issue were not due to illness. Finally, petitioner testified that Mr. Haraden was not, in contrast to his claim, present at his current dealership (Mohawk Honda; refer letter of August 5, 1981; Finding of Fact "24", supra) daily from 9:00 a.m. to 8:00 p.m. Petitioner noted in this regard that he sought to locate Mr. Haraden for a period of two months to straighten out the rent payments assigned to Marine Midland, but was unable to locate Mr. Haraden even though Mr. Haraden's current dealership (Mohawk Honda) is located next door to DePaula Chevrolet, Inc.

27. Petitioner asserts several grounds upon which the instant assessment should be cancelled commencing with the assertion that the August 20, 1981 assessment was issued after cancellation of an identical prior assessment with no evidence to support the subsequent issuance. Petitioner also maintains he was not a person responsible for collecting sales tax on behalf of Mohawk. Furthermore, petitioner asserts that since correct returns were filed, the State Tax Commission has no jurisdiction to hold a hearing and administratively determine petitioner's liability for the unremitted tax shown as due on such returns. Finally, petitioner asserts that any portion of the August 20, 1980 assessment relating to returns filed more than three years before August 20, 1980 is precluded by operation of the statute of limitations, and that any assessments stemming from periods for which petitioner did not execute the related return should be summarily dismissed.

28. Prior to the hearing, petitioner commenced an action for declaratory judgment alleging that the State Tax Commission lacked authority to administratively determine petitioner's responsibility for Mohawk's tax liability after timely and correct returns were filed, without remittance of tax shown as due, by Mohawk. In conjunction therewith, petitioner sought a preliminary injunction to prevent the Commission from holding the instant hearing. The Court denied petitioner's application for preliminary injunction, holding that petitioner has the absolute right to a hearing under paragraph twenty-first of section 171 of the Tax Law during which he may challenge the Commission's authority to hold him responsible administratively.

29. In accordance with section 307(1) of the New York State Administrative Procedure Act, petitioner submitted proposed findings of fact numbered "1" through "20", each of which has been, in substance, adopted herein.

CONCLUSIONS OF LAW

A. That neither petitioner nor the Audit Division contests the sufficiency or correctness (notwithstanding the minor mathematical errors noted in Finding of Fact "2") of the sales tax returns filed on behalf of Mohawk during the periods at issue. Rather, it is the collection of such sales tax liability, through the assertion of petitioner's liability therefor as a person required to collect and remit the same, which is at issue herein.

B. That petitioner maintains that this Commission lacks jurisdiction to hold a hearing and proceed administratively with respect to his personal liability for sales taxes due from and unpaid by Mohawk, relying upon the decision of the Court of Appeals in Matter of Parsons v. State Tax Commission, 34 N.Y.2d 190 (1974).

Parsons held that the State Tax Commission exceeded its statutory authority in serving officers and directors of a corporation, which had filed returns containing correct computations of tax liability, with notices of determination and demands under jeopardy for payment of sales and use taxes due, and conducting hearings pursuant to such notices. Section 1138 of the Tax Law authorizes the Commission to determine the amount of tax due, notify the persons it deems liable and conduct hearings, upon request, only in two specified circumstances: (1) if a required return is not filed or if a return when filed is incorrect or insufficient; and (2) if the Commission believes that collection of the tax will be jeopardized by delay (provided the Commission determines and assesses the tax prior to the filing of the return and prior to the date the return is required to be filed).

C. That the document issued to petitioner on August 20, 1981 was not an assessment against petitioner issued pursuant to section 1138 (a Notice of

Determination and Demand), but rather was a Notice and Demand for Payment, a bill demanding that petitioner, assertedly a responsible officer of Mohawk, pay the taxes due with respect to Mohawk for the periods at issue.

D. That the decision in Parsons was rendered prior to the enactment of paragraph twenty-first of section 171 of the Tax Law (L. 1979, Ch. 714, eff. January 1, 1980) which provides, in pertinent part:

"The state tax commission shall:

* * *

"Provide a hearing, as a matter of right, to any taxpayer upon such taxpayer's request, pursuant to such rules, regulations, forms and instructions as the tax commission may prescribe, unless a right to a hearing is specifically provided for, modified or denied by another provision of this chapter. Where the request for a hearing is made by a person seeking review of any taxes determined or claimed to be due under this chapter, the liability of such person shall become finally and irrevocably fixed unless such person, within ninety days from the time such liability is assessed, shall petition the tax commission for a hearing to review such liability." (Emphasis added.)

No provision of Article 28 specifically provides for, modifies or denies petitioner's right to a hearing in this instance. This Commission thus has jurisdiction under paragraph twenty-first of section 171 of the Tax Law to grant and conduct a hearing, as requested by petitioner in his petition, and as mandated by the above-quoted provision of the Tax Law. Moreover, in light of Conclusion of Law "C", this Commission is not acting beyond the scope of its jurisdictional authority in conducting such hearing and rendering a decision concerning petitioner's personal liability based upon the facts adduced thereat.

E. That section 1133(a) of the Tax Law places personal liability for the taxes imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" imposed by said article. Section

1131, subdivision (1) furnishes the following definition for the term "persons required to collect tax":

"Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

F. That the Audit Division's letter of May 5, 1981 cancelling the October 27, 1980 Notice issued against petitioner (Notice No. S801031001A; refer Findings of Fact "1" and "3"), did not preclude or estop the Audit Division from the later issuance on August 20, 1981 of the (renewed) Notice at issue herein covering periods and indicating amounts identical to those reflected on the October 27, 1980 Notice. No hearing was held nor was any decision made by this Commission concerning the earlier document.

G. That the instant bill issued to petitioner does not seek the collection of additional tax, but rather seeks only the payment of that tax reflected as due and owing on Mohawk's returns, but remaining unpaid. Accordingly, the provisions of Tax Law section 1147(b) which limit the assessment of additional tax to a period of no more than three years from the date of the filing of a return are inapplicable and the Notice issued against petitioner is not barred by operation of the statute of limitations (see Cadalso v. State Tax Commission, Sup. Ct., Albany County, November 27, 1978).

H. That finally, resolution of the issue of personal liability for sales tax due turns upon a factual determination in each case (Vogel v. Dep't. of Taxation and Finance, 98 Misc.2d 222; Chevlowe v. Koerner, 95 Misc.2d 388). Relevant factors in making such determination include, inter alia, day-to-day responsibilities in the corporation, involvement in and knowledge of the

corporation's financial affairs and its management, the identity of who prepared and signed tax returns and the authority to sign checks [Vogel, supra; see also 20 NYCRR 526.11(b)]. It is noted, in contrast to petitioner's assertion, that the fact that returns for given periods were not signed by an individual does not absolutely absolve that individual of responsibility for those periods.

I. That the Audit Division's August 20, 1981 reissuance of the Notice and Demand was apparently predicated upon the receipt of Mr. Haraden's August 5, 1981 letter and upon certain other indicia of petitioner's responsibility including the title of vice-president, the various signed returns and the authority to sign checks. With regard to the former, Mr. Haraden's letter was written in support of Mr. Haraden's request for a deferred payment plan and other reductions of his liability and is accorded no weight. With regard to the latter "other indicia" of responsibility, petitioner's credible testimony reflects the existence of an arrangement of convenience but not a situation where petitioner had responsibility. Petitioner's sphere of responsibility was in the car sales area, but did not extend to the management of the dealership. Petitioner signed checks and sales tax returns as an accomodation in Mr. Haraden's absence. His title of vice-president was an incident thereto, but conferred no authority on petitioner nor did he use such title to indicate authority. Petitioner owned no stock in Mohawk, does not appear to have received any additional compensation for assuming the title of vice-president, did not hire or fire administrative personnel or become involved in the administrative/financial aspects of the dealership other than to sign checks and certain sales tax returns prepared by others and presented to him solely as an authorized signatory. Finally, we note that in early 1978 Marine Midland took over active control of Mohawk's funds and directed which bills were to be paid and the

order of their payment. In sum, petitioner was not a person under a duty to collect tax on behalf of Mohawk.

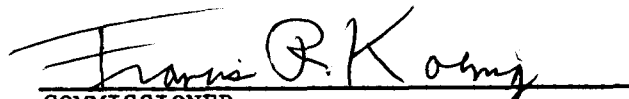
J. That the petition of Anthony J. DePaula is hereby granted and the Notice and Demand dated August 20, 1981 is cancelled.


DATED: Albany, New York

APR 29 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 169 769

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to <i>Anthony J. DePaula</i>	
Street and No. <i>774 Glancosta Rd</i>	
P.O., State and ZIP Code <i>Schenectady NY 12309</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	

P 693 169 770

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to <i>Therese Kunkel</i>	
Street and No. <i>10441 Lehigh Valley Blvd</i>	
P.O., State and ZIP Code <i>435 State St</i>	
Postage	\$ <i>13.105</i>
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	