

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Richard Mickelson :

: 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 :
Year 1983.

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 21st day of October, 1985, he served the within notice of decision by certified mail upon Richard Mickelson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard Mickelson
7 Austin Rd.
Tully, NY 13159

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
21st day of October, 1985.

David Parchuck

Annice P. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 21, 1985

Richard Mickelson
7 Austin Rd.
Tully, NY 13159

Dear Mr. Mickelson:

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	:	
RICHARD MICKELSON	:	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 1983.	:	

Petitioner, Richard Mickelson, 7 Austin Road, Tully, New York 13159, 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 1983 (File No. 46813).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on April 5, 1985 at 10:00 A.M., with all briefs to be submitted by May 1, 1985. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a refund of sales tax upon the repurchase of an automobile by the manufacturer.

FINDINGS OF FACT

1. On December 8, 1981, petitioner, Richard Mickelson purchased a 1982 Chevrolet automobile from a dealership known as Jack McNerney Chevrolet, Inc. The price of the vehicle was \$10,906.76, plus sales tax of \$374.92, for a total cash price of \$11,281.68. The new automobile was financed, in part, through the trade-in of a 1979 automobile which was given a trade-in value of \$5,550.76, less a lien of \$708.63, for a net trade-in value of \$4,842.13.

2. The new automobile was delivered to petitioner in either January or February of 1982. Within three or four months after the delivery of the automobile, it could no longer be operated.

3. In July, 1982, petitioner commenced a lawsuit against the Chevrolet Motor Division of the General Motors Corporation for damages arising from the purchase of the defective automobile. On June 2, 1983, as the result of binding arbitration, the vehicle was repurchased by the Chevrolet Motor Division for \$8,221.68.

4. On July 12, 1983, petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax seeking a refund in the amount of \$575.52 representing seven percent of the \$8,221.68 which he received in accordance with Finding of Fact "3".

5. On September 1, 1983, the Audit Division advised petitioner that his claim for refund was denied since the repurchase of the vehicle did not constitute a cancellation of the original purchase agreement in accordance with 20 NYCRR 525.5.

CONCLUSIONS OF LAW

A. That Tax Law §1132(e) provides, in part:

"The tax commission may provide, by regulation, for the exclusion from taxable receipts, amusement charges or rents of amounts representing sales where the contract of sale has been cancelled, the property returned or the receipt, charge or rent has been ascertained to be uncollectible or, in case the tax has been paid upon such receipt, charge or rent, for refund of or credit for the tax so paid. Where the tax commission provides for a credit for the tax so paid, it shall require an application for credit to be filed, but it may also allow the applicant to immediately take the credit on the return which is due coincident with or immediately subsequent to the time the applicant files his application for credit."

B. That in accordance with Tax Law §1132(e), the State Tax Commission promulgated 20 NYCRR 525.5 which, during the period in issue, provided, in part, as follows:

"Cancelled Sales, Returned Merchandise and Bad Debts. -- (a) Cancelled sales and returned merchandise. (1) Exclusion from return. Where a contract of sale has been cancelled or the property returned within 90 days of the date of delivery to the purchaser, a vendor of tangible personal property or services, a recipient of amusement charges or an operator of a hotel (as defined in section 1101 of the Tax Law) may exclude such receipts, charges or rents from his return.

(2) Credit where tax previously remitted. Where the tax has been paid and reported in a return, an application for refund of or credit for the tax paid upon such receipt, charge or rent shall be filed with the State Tax Commission within three years from the date when the tax was payable by such person to the Tax Commission. The applicant may, as part of the application for credit, take the credit on the return which is due coincident with or immediately subsequent to the time such application is filed. The application for refund or credit shall be subject to the provisions of subdivisions (a), (b) and (c) of section 1139.

(b) Allowance for defective merchandise. (1) Allowability of credit. Where an allowance is made for defective merchandise, the purchaser is required to pay the tax upon the amount due after subtracting the allowance from the sales price. Where the tax has been paid on the full selling price, and the vendor has paid such tax to the Commission, a credit or refund of the tax attributable to the allowance may be taken in accordance with the procedure described in subdivision (a)(2) of this section.

(2) Exchange of merchandise. If a purchaser returns defective merchandise to his vendor, and in connection with such return, new merchandise is furnished, the purchaser is required to pay the tax only on the cost of the new article less the allowance for merchandise returned."

C. That petitioner is not entitled to a refund of sales tax since there is no provision therefor on the facts presented herein. It is noted that the repurchase of the vehicle may not be considered a cancelled sale within the meaning of 20 NYCRR 525.5(a)(1) since the vehicle was not returned within ninety days of its purchase. In addition, the repurchase of the vehicle by the Chevrolet Motor Division was a separate transaction from the original purchase


from Jack McNerney Chevrolet, Inc. Lastly, the repurchase of the vehicle did not constitute an allowance for defective merchandise within the meaning of 20 NYCRR 525.5. Accordingly, petitioner is not entitled to the refund imposed under section 1105(a) of the Tax Law.

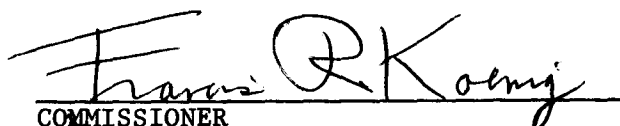
D. That the petition of Richard Mickelson is denied.

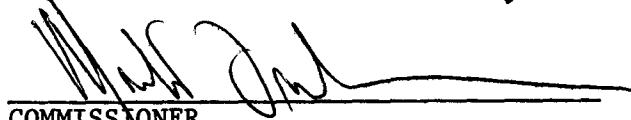
DATED: Albany, New York

STATE TAX COMMISSION

OCT 21 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 153 387 591

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Sent to	<i>Richard Mickelson</i>	
Street and No.	<i>4 Clinton Rd.</i>	
P.O., State and ZIP Code	<i>Tulsa N 413159</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		