

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Staff Sergeant Eduardo Ojeda, Jr. : 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 1982. :

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 10th day of July, 1985, he served the within notice of decision by certified mail upon Staff Sergeant Eduardo Ojeda, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Staff Sergeant Eduardo Ojeda, Jr.
U.S. Marine Corps Recruiting Station
445 Broadway, Rm. 516
Albany, NY 12207

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
10th day of July, 1985.

David Parchuck

James A. Hagedorn

Authorized to administer oaths
pursuant to Tax Law section 174

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

July 10, 1985

Staff Sergeant Eduardo Ojeda, Jr.
U.S. Marine Corps Recruiting Station
445 Broadway, Rm. 516
Albany, NY 12207

Dear Sgt. Ojeda:

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

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|---|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| STAFF SERGEANT EDUARDO OJEDA, JR. | : | 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 June 22, 1982. | : | |

Petitioner, Staff Sergeant Eduardo Ojeda, Jr., U.S. Marine Corps Recruiting Station, 445 Broadway, Room 516, Albany, New York 12207, 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 June 22, 1982. (File No. 51242).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on March 12, 1985 at 1:15 p.m. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq. of Counsel).

ISSUE

Whether the petitioner is liable for sales tax on the purchase of an automobile.

FINDINGS OF FACT

1. On October 24, 1983, the petitioner, Staff Sergeant Eduardo Ojeda, Jr. filed an Application for Refund and/or Credit of Sales or Use Tax Paid on Casual Sale of Motor Vehicle claiming a refund of \$258.00 in sales tax paid on the purchase of an automobile.

2. By letter dated March 8, 1984 the Audit Division denied petitioner's claim in full because he did not maintain living quarters on a government base or live in government housing.

3. On April 13, 1984, the petitioner filed a timely petition for a hearing to review the denial. Petitioner claims that section 1117 of the Tax Law makes no mention nor attempts to make any differentiation relative to military personnel in government quarters on a federal military base or reservation and military personnel without such quarters. Petitioner maintains that the Audit Division's position regarding purchases by military personnel, as specified in 20 NYCRR 526.15(d), is unsupported by section 1117 of the Tax Law.

Petitioner further claims that the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. App. § 574) provides that no change in a serviceman's State of legal residence/domicile shall occur solely as a result of his assignment to another State as a result of military orders and, therefore, the action of the Audit Division deeming him a resident of the State of New York is in violation of said Act.

4. In or about May, 1982, the petitioner, a Staff Sergeant in the U.S. Marine Corps, was assigned to the U.S. Naval Station, Roosevelt Rhodes, Puerto Rico. The petitioner's permanent legal residence was located at Carmen Street, J-5, Royal Gardens, Bayamon, Puerto Rico. The petitioner also maintained a valid Puerto Rico Drivers License.

On May 26, 1982, the petitioner received Permanent Change of Station Orders assigning him to the U.S. Marine Corps Recruiting Station in Albany, New York, and on June 17, 1982 the petitioner reported to this station. Government quarters and messing facilities were not available in Albany and, therefore, the petitioner received a monthly Basic Allowance for Quarters (BAQ) allowance

of \$303.00 and a Variable Housing Allowance (VHA) of \$84.92 to defray increased living expenses as a result of his assignment to this area.

5. On June 22, 1982, the petitioner purchased from Adams Chevrolet, Inc., East Greenbush, New York a 1979 Ford Granada for \$4,300.00 on which he paid sales tax of \$258.00. At that time, the petitioner was living in a rented apartment at 504 Horizon View Drive, East Greenbush, New York. The petitioner used the automobile in New York State while assigned to Albany.

6. Military personnel assigned to New York State with the Recruiting Service, as petitioner, normally are at a station for three years. Therefore, on or about June 17, 1985, the petitioner anticipates receiving Change of Station Orders.

CONCLUSIONS OF LAW

A. That section 1117(a) of the Tax Law provides, in part, that the purchase of a motor vehicle will not be subject to sales tax, despite the taking of physical possession in this State, provided that, at the time of taking delivery, the purchaser:

- "(1) is a nonresident of this state,
- (2) has no permanent place of abode in this state,
- (3) is not engaged in carrying on in this state any employment, trade, business or profession in which the motor vehicle will be used in this state, and
- (4) prior to taking delivery, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the tax commission may require to assure proper administration of the tax imposed under subdivision (a) of section eleven hundred five."

B. That regulation section 20 NYCRR 526.15 defines the term "resident" with respect to military personnel as:

"(d) Military personnel. Any person, serving in the Armed Forces in the United States, whose place of abode is situated on a Federal military base or reservation is not a resident of New York, unless he was a resident of New York immediately prior to his entry into service. Any person serving in the armed forces of the United States, whose place of abode is situated off a Federal military base or reservation is deemed a resident of New York."

C. That, in accordance with section 1117(a) of the Tax Law and regulation section 20 NYCRR 526.15(d), the petitioner was liable for sales tax on the purchase of an automobile.

D. That section 1142 of the Tax Law provides, in pertinent part, that:

"In addition to the powers granted to the tax commission in (Article 28), it is hereby authorized and empowered:

1. To make, adopt and amend rules and regulations appropriate to carrying out (Article 28) and the purposes thereof..."

Thus, regulation section 20 NYCRR526.15(d) was properly authorized by statute.

E. That the Soldiers' and Sailors' Civil Relief Act does not prohibit a state from imposing its sales tax on servicemen stationed therein who are residents or domiciliaries of other states (Sullivan v. United States, 395 U.S. 169, 23 L. Ed.2d 182, 89 S. Ct. 1648). Likewise, the New York State Soldiers' and Sailors' Civil Relief Act contains no such prohibition (Military Law, Article 13).


F. That the petition of Staff Sergeant Eduardo Ojeda, Jr. is hereby denied.


DATED: Albany, New York

JUL 10 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 169 952

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

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| ★ U.S.G.P.O. 1983-7-517 PS Form 3800, Feb. 1982 | Sent to | <i>Supervisory Edmund J. Gede</i> | |
| | Street and No. | <i>U.S. Marine Corp Station</i> | |
| | P.O., State and ZIP Code | <i>445 Broadway Am 572</i> | |
| | Postage | <i>Certified 241209</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 | | | |