

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
OLD COUNTRY TOYOTA CORP.	:	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 March 1, 1980	:	
through November 30, 1980.	:	

Petitioner, Old Country Toyota Corp., 340 West Old Country Road, Hicksville, New York 11801, 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 March 1, 1980 through November 30, 1980 (File No. 41030).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 3, 1986 at 1:45 P.M., with all briefs to be filed by March 14, 1986. Petitioner appeared by Isaac Sternheim & Co. (Isaac Sternheim, C.P.A.) The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner should be granted a refund of penalties and interest in excess of the minimum statutory rate which were imposed for the late payment of sales tax.

FINDINGS OF FACT

1. Petitioner, Old Country Toyota Corp., engaged in the sale and servicing of new and used automobiles, filed sales and use tax returns for the period March 1, 1980 through November 30, 1980, without remitting \$252,985.88 due for

said periods. On April 22, 1981, the petitioner, by signature of its president, John S. Bucalo, executed a "Payment Agreement" whereby it consented to pay the above liability at the rate of \$4,000.00 per week, together with additional penalty and interest as provided by the Tax Law. The payments began on May 1, 1981 and continued until February 23, 1982, at which time the petitioner submitted a check in the amount of \$122,652.85 to pay the unpaid balance in full including the unpaid tax of \$50,166.55 and penalty and interest in the amount of \$72,486.30.

2. On March 16, 1982, the petitioner filed with the Audit Division an Application for Credit or Refund of State and Local Sales or Use Tax whereby it requested a refund of the \$72,486.30 penalty and interest payment. On April 26, 1983, the Audit Division denied petitioner's claim in full. Petitioner timely filed an application for a hearing to review said denial.

3. By letter dated February 25, 1982, Mr. Bucalo explained the predicament which led to petitioner using its sales tax collection as working capital. According to Mr. Bucalo, having had a good relationship with Chase Manhattan Bank ("Chase") for 30 years, he applied for and received a \$350,000 S.B.A. guaranteed loan to purchase this dealership (Old Country Toyota Corp.) on March 17, 1977. He continued to have a good relationship with Chase and both prospered in that relationship, as he acceded to its demands to give Chase all of petitioner's bank accounts, floor plan account and retail installment paper. Unfortunately, however, a high Chase official named Mr. Hummer one day decided to cut back and, finally, to terminate petitioner's floor plan, without any apparent reason. He later put another Chase employee by the name of Mrs. Fox into the job of wiping out petitioner's floor plan account. Chase, in effect, seized petitioner's bank account, returning all checks it wrote unpaid and

using the balance only to pay off floor planned cars. Petitioner was forced to open an account at another bank. Mrs. Fox threatened to seize all of petitioner's floor planned cars unless petitioner turned over all certificates of origin and titles to all the new and used cars which it owned outright as well as those owned by Mr. Bucalo and at his Flemington Toyota dealership in Flemington, New Jersey. Petitioner could only get those C.O.'s or titles when it "paid off" the cars, as it sold them, whether they were on floor plan or not, to reduce, and, finally, to eliminate the entire floor plan balance. In effect, Chase seized the entire working capital of petitioner and Mr. Bucalo's Flemington dealership, endangering both dealerships, their employees and families, their franchises, and the Bucalo family. Regretfully, petitioner was forced into using its sales tax collections as working capital to keep it operating as a constructive, viable, profitable business.

CONCLUSIONS OF LAW

A. That section 1145(a)(1)(i) of the Tax Law provides for the imposition of penalty and interest for failure to file a return or to pay over any tax when due. Subparagraph (iii) of section 1145(a)(1) provides for the remission of penalty and that portion of interest that exceeds the minimum statutory rate if the Tax Commission determines that the failure or delay was due to reasonable cause and not due to willful neglect.

B. That reasonable cause, which is defined in 20 NYCRR 536.1(b), does not include financial inability or the need to use the taxes collected for other pressing obligations.


C. That petitioner collected sales taxes as trustee for and on account of the State of New York and failed to pay over the same to the State Tax Commission as required. Tax Law §§1132 and 1137.


D. That the petition of Old Country Toyota Corp. is denied and the refund denial issued April 26, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 30 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

P 319 372 853

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Old Country Toyota Corp. c/o John S. Bacalo Pres.	
Street and No. 340 W. Old Country Rd.	
R.O., State and ZIP Code Hicksville, N.Y. 11801	
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 319 372 854

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Isaac Sternheim Isaac Sternheim & Co.	
Street and No. 5612 18th Ave.	
State and ZIP Code Brooklyn, N.Y. 11204	
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	

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Olleg Charters, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales and Use Tax
under Article(s) 28 & 29 of the Tax Law :
for the Period 11/30/79.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 26th day of September, 1986, he/she served the within notice of Decision by certified mail upon Olleg Charters, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Olleg Charters, Inc.
c/o Dominick Gallo
144 Cedar Street
Valley Stream, NY 11580

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
26th day of September, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Olleg Charters, Inc.

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales and Use Tax
under Article(s) 28 & 29 of the Tax Law :
for the Period 11/30/79.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 26th day of September, 1986, he served the within notice of Decision by certified mail upon Robert Becht, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Becht
24 North Park Terrace
Congers, NY 10920

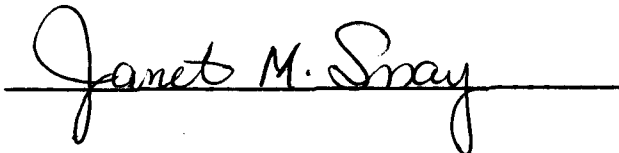
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
26th day of September, 1986.



Authorized to administer oaths
pursuant to Tax Law section 174



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

September 26, 1986

Olleg Charters, Inc.
c/o Dominick Gallo
144 Cedar Street
Valley Stream, NY 11580

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Robert Becht
24 North Park Terrace
Congers, NY 10920

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
OLLAG CHARTERS, INC.	:	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 Ended	:	
November 30, 1979.	:	

Petitioner, Ollag Charters, Inc., c/o Dominick Gallo, 144 Cedar Street, Valley Stream, New York 11580, 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 ended November 30, 1979 (File No. 42508).

On April 17, 1986, petitioner, by its representative, Robert Becht, Esq., waived a hearing before the State Tax Commission and requested the Commission to render its decision, based on the existing file plus additional documentary evidence and briefs to be submitted by May 19, 1986. After due consideration, the State Tax Commission renders the following decision.

ISSUE

Whether tax due on a purchase of a boat occurring on or about August 4, 1978 was properly included on a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period ended November 30, 1979.

FINDINGS OF FACT

1. Petitioner, Ollag Charters, Inc.¹, was incorporated in the State of Delaware prior to the purchase of the vessel, Salley G. III. Dominick Gallo was president of Ollag Charters, Inc. Petitioner's business address is in care of Mr. Gallo, 144 Cedar Street, Valley Stream, New York. There is no evidence that petitioner's incorporation was for any other purpose than to purchase the vessel, Salley G. III. The subsequent sale of the Salley G. III apparently resulted in the termination of the petitioner corporation.

2. The vessel, Salley G. III, a 1978 42-foot Sedan/Cruiser, Hull Number 42-127, was purchased from Anchorage Boat Sales, Inc., Lindenhurst, New York, as consignee of Post Marina Co., Inc., May Landing, New Jersey on or about August 4, 1978.

3. No sales tax was paid and no sales tax return was filed on the purchase of the Salley G. III.

4. In October 1981, the Audit Division observed petitioner's boat in a New York marina. On November 29, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for the period ended November 30, 1979 in the amount of \$7,350.00, plus interest of \$2,759.00 and penalty of \$1,837.00, for a total of \$11,946.00.

5. Petitioner did not present any evidence that the purchase of the Salley G. III took place outside of New York. Information in the record indicates that petitioner took possession of the Salley G. III at Lindenhurst, New York. The vessel was then moored in Freeport, New York until the spring of

1 The Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated November 29, 1982, incorrectly referred to petitioner as Olleg Charters, Inc.

1979, when it was brought to Florida. The vessel returned to Montauk, New York in 1980 and remained there until petitioner sold it.

6. Petitioner contends that the sales tax was remitted by the seller, Anchorage Boat Sales, Inc. Petitioner, however, failed to introduce any evidence indicating that it had paid the sales tax or that the seller had remitted any tax on the sale to the Department of Taxation and Finance.

CONCLUSIONS OF LAW

A. That petitioner purchased tangible personal property, namely a boat, subject to the sales tax imposed by section 1105(a) of the Tax Law, on or about August 4, 1978.

B. That petitioner failed to sustain its burden of proof that the purchase of the Salley G. III took place outside New York (see Findings of Fact "2" and "5"). Therefore, the transaction was subject to the tax imposed under section 1105(a) of the Tax Law.

C. That inasmuch as the purchase of the Salley G. III occurred on or about August 4, 1978, it would properly be included in the sales tax reporting period ended August 31, 1978 and not the period ended November 30, 1979. The tax due on said sale was, therefore, improperly included on the notice of determination issued November 29, 1982.

D. That section 1147(b) of the Tax Law provides, in part, that:

"No assessment of additional tax shall be made after the expiration of more than three years from the date of filing of a return; provided, however, that where no return has been filed as provided by law the tax may be assessed at any time."


Petitioner failed to file a sales tax return. Therefore, the Audit Division may assess the tax at any time and issue a new notice of determination and demand covering the period June 1 through August 31, 1978.

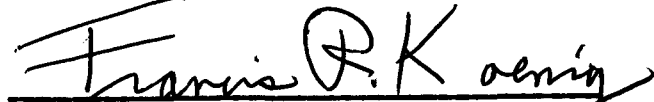
E. That the petition of Ollag Charters, Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 29, 1982 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

P 319 117 318

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Oliver Charters Inc. c/o Dominick Gallo	
Street and No. 144 Cedar St.	
P.O. State and ZIP Code Valley Stream, NY 11580	
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 319 117 319

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NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to Robert Becht	
Street and No. 24 North Park Terrace	
P.O. State and ZIP Code Congers, N.Y. 10926	
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	