

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Samuel Valleriani : AFFIDAVIT OF MAILING
Individually as an Officer of :
Vallery Chevrolet/Oldsmobile, Inc. :

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article(s) 28 & 29 of the Tax Law for the :
Period Ended 2/28/83. :
_____:

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 14th day of November, 1986, he/she served the within notice of Decision by certified mail upon Samuel Valleriani, Individually as an Officer of Vallery Chevrolet/Oldsmobile, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samuel Valleriani
Individually as an Officer of
Vallery Chevrolet/Oldsmobile, Inc.
36 Nisa Lane
Rochester, NY 14606

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
14th day of November, 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 :
Samuel Valleriani : AFFIDAVIT OF MAILING
Individually as an Officer of :
Vallery Chevrolet/Oldsmobile, Inc. :

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article(s) 28 & 29 of the Tax Law for the :
Period Ended 2/28/83. :
_____:

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 14th day of November, 1986, he served the within notice of Decision by certified mail upon John R. Parrinello, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John R. Parrinello
Redmond & Parrinello
Suite 315 Executive Office Bldg.
Rochester, NY 14614

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
14th day of November, 1986.

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

Janet M. Snay

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

November 14, 1986

Samuel Valleriani
Individually as an Officer of Vallery Chevrolet/Oldsmobile, Inc.
36 Nisa Lane
Rochester, NY 14606

Dear Mr. Valleriani:

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:
John R. Parrinello
Redmond & Parrinello
Suite 315 Executive Office Bldg.
Rochester, NY 14614

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SAMUEL VALLERIANI,	:	
INDIVIDUALLY AS AN OFFICER OF	:	DECISION
VALLERY CHEVROLET/OLDSMOBILE, INC.	:	
	:	
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 February 28,	:	
1983.	:	

Petitioner, Samuel Valleriani, individually as an officer of Vallery Chevrolet/Oldsmobile, Inc., 36 Nisa Lane, Rochester, New York 14606, 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 February 28, 1983 (File No. 50736).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on June 3, 1986 at 1:15 P.M., with all briefs to be submitted by September 2, 1986. Petitioner appeared by John R. Parrinello, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Notice of Determination and Demand for Payment of Sales and Use Taxes Due herein was issued within the relevant period of limitations.

II. Whether the answer of the Audit Division and an affidavit offered by the Audit Division subsequent to the hearing in this matter were properly received in evidence by the Hearing Officer.

III. Whether the Audit Division's methodology in determining the sales tax due from the corporation was proper.

IV. Whether petitioner was a person required to collect tax on behalf of the corporation and, if so, whether petitioner may be held liable for such tax notwithstanding the termination of his relationship with the corporation prior to the dates upon which the returns for the period at issue herein were due.

V. Whether reasonable cause exists for abatement of the penalty asserted against petitioner.

FINDINGS OF FACT

1. On December 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Samuel Valleriani, as a responsible officer of Vallery Chevrolet/Oldsmobile, Inc., for the period ended February 28, 1983 asserting tax, penalty and interest due in the total amount of \$54,974.65, scheduled as follows:

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
2/28/83	\$44,393.76	\$7,324.95	\$3,255.94

2. The assessment was issued because the corporation had failed to file sales and use tax returns for the period at issue. The Audit Division determined the amount of tax asserted due in the notice by taking the highest amount of sales tax reported due by the corporation for any filing period as revealed by the records of the Audit Division, and multiplying this amount by one hundred twenty-five percent.

3. Prior to the commencement of the hearing in this matter, the Audit Division reduced the amount of tax asserted due to \$7,134.58 per month for the period at issue. This reduction was premised upon the corporation's timely-filed part-quarterly return for the period December 1, 1982 through December 31, 1982.

This return declared \$7,134.58 as the amount of sales tax due from the corporation for the month covered by the return. The corporation remitted the \$7,134.58 along with its return. Consequently, the amount remaining at issue herein is \$7,134.58 in sales tax due per month for the months of January and February, 1983, together with interest and penalty asserted due thereon.

4. Vallery Chevrolet/Oldsmobile, Inc. was incorporated in New York in October of 1980, and began doing business at premises located on Main Street, Attica, New York, in November of 1980. From its inception and continuing through the period at issue, the corporation was engaged in the retail sale and service of motor vehicles. Petitioner became associated with the corporation as its president on November 8, 1980. As president, petitioner actively ran the corporation on a daily basis, and had authority to sign checks on behalf of the corporation, hire and fire employees, to pay creditors and to cause to be filed the various federal and state tax returns and reports. Petitioner signed on the corporation's behalf its part-quarterly sales and use tax return for December 1982. Petitioner did not dispute the Audit Division's contention that he was a responsible officer of the corporation through January 31, 1983.

5. Petitioner was a stockholder of the corporation in addition to being its president. The other principal stockholders of the corporation were Samuel Merlo and Donald Sasso. Mr. Merlo was also vice-president of the corporation and Mr. Sasso held the title of secretary/treasurer.

6. On January 31, 1983, one Richard DiVirgilio demanded that petitioner account for certain corporate funds and accused petitioner of misappropriating said funds. The record does not disclose Mr. DiVirgilio's relationship with the corporation, but it is clear that Mr. DiVirgilio worked with or for Mr. Merlo and Mr. Sasso.

7. On February 1, 1983, petitioner met with Mr. Merlo, Mr. Sasso and Mr. DiVirgilio to discuss the problems surrounding the alleged misappropriation of funds.

8. On February 2, 1983, petitioner met with Mr. Sasso and at that time relinquished his stock in the corporation to Mr. Merlo.

9. On February 6, 1983, petitioner met with Mr. Merlo and Mr. Sasso at the corporation's premises. At that time, petitioner executed a deed to his home transferring title to the property over to Mr. Sasso. Later that same day, petitioner met once again with Mr. Merlo and Mr. Sasso along with Mr. DiVirgilio at Mr. Merlo's offices in Rochester. At that meeting, petitioner was advised that he no longer had any authority to act on behalf of the corporation. Petitioner's relationship with the corporation ceased at that point and he subsequently (approximately two weeks later) gained employment elsewhere.

10. The corporation apparently ceased operations as of February 11, 1983.

11. Petitioner contended that the corporation had done very little business from January 1983 through the time of his sudden departure.

12. Petitioner further contended that both the answer of the Audit Division and the notice of determination were untimely. Said answer was dated and received by petitioner approximately six months subsequent to the filing of his perfected petition.

13. Finally, at hearing petitioner objected to the admission into the record subsequent to the close of the hearing of an affidavit offered by the Audit Division. Petitioner objected on the grounds of surprise and inability to react. At hearing, the Hearing Officer gave petitioner the opportunity to comment upon the affidavit in his brief.

14. During the period at issue, Vallery Chevrolet/Oldsmobile, Inc. was required to file its sales tax returns on a part-quarterly or monthly basis. The return for January 1983 was due on February 20, 1983, and the return for February 1983 was due on March 20, 1983.

CONCLUSIONS OF LAW

A. That inasmuch as no sales tax returns were filed for the period at issue, the notice of determination issued on December 20, 1983 was issued to petitioner within the period of limitations set forth in section 1147(b) of the Tax Law.

B. That the late filing of the Audit Division's answer constituted harmless error to petitioner (see Petition of George Spanos, State Tax Commission, June 15, 1984). It is noted that at no time did petitioner bring a motion to the Commission to default the Audit Division because of the lateness of its answer. The record does not reveal any objection made by petitioner regarding this issue to either the Audit Division's representative or to the Commission prior to hearing.

C. That, with respect to the admission of the Audit Division's affidavit into the hearing record subsequent to the hearing, in view of petitioner's opportunity to respond to the statements made in the affidavit in his brief (Finding of Fact "13"), the affidavit was properly received in evidence.

D. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that "(i)f a return required by [Article 28] is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined... from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges..., number of

employees or other factors." A prior sales and use tax return of a taxpayer is an external index and may properly be used to determine the amount of tax due (see Matter of John Iveli, Officer of Gourmart Amsterdam Corp., State Tax Commission, November 7, 1985). Accordingly, the Audit Division reasonably determined the sales tax liability of Vallery Chevrolet/Oldsmobile, Inc. from such information as was available.

E. That section 1131(1) of the Tax Law, as in effect during the period in issue, defines "persons required to collect tax" under Article 28 as including, inter alia:

"[A]ny 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".

F. That section 1133(a) of the Tax Law imposes personal liability upon such "persons required to collect tax" for "the tax imposed, collected or required to be collected" under Article 28.

G. That in view of Findings of Fact "4" through "9", petitioner was a person required to collect the tax imposed herein until his final contact with the corporation on February 6, 1983. That petitioner was a responsible officer of the corporation until January 31, 1983 was not disputed by petitioner. As to the final week of petitioner's involvement with the corporation, while petitioner relinquished his stock in the corporation on Wednesday, February 2, 1983, he retained his status as president, his authority to sign checks on the corporation's behalf and his authority to run the corporation on a day-to-day basis until Sunday, February 6, 1983 (see Vogel v. New York State Department of Taxation and Finance, 98 Misc 2d 222, 225). The Audit Division therefore properly assessed petitioner for sales taxes found due from January 1, 1983 through February 6, 1983. The Audit Division, though, improperly asserted tax

due from petitioner subsequent to February 6, 1983. The Audit Division is, therefore, hereby directed to modify the notice of determination herein so as to apportion petitioner's liability to reflect his separation from the corporation as of February 6, 1983.

H. That petitioner's liability pursuant to section 1133(a) of the Tax Law is unaffected by the fact that he terminated his relationship with the corporation prior to the due date of the corporation's sales tax returns for January and February of 1983. As a "person required to collect tax" pursuant to section 1131(1) of the Tax Law, petitioner was under an obligation to collect and remit said tax as "trustee for and on account of the state." (Tax Law §1132[a].) As a trustee, petitioner's duty and liability arose at the time the tax was required to be collected, that is, at the time of sale and not at the time the corporation's sales tax return was due (see Matter of H. G. Jensen, State Tax Commission, November 9, 1984 and Matter of the Estate of Leo Katz, State Tax Commission, May 20, 1983 [Commission sustained responsible officer assessments notwithstanding termination of responsible officer's relationship prior to due date of corporation's sales tax returns]; cf. Bolding v. United States, 565 F2d 663, 669; Seaton v. United States, 254 F Supp 161, 162; Long v. Bacon, 239 F Supp 911, 912). Petitioner's contention that his obligation arose upon the due date of the return is erroneous; the due date of the return merely constituted the final date upon which the obligation could have been discharged without penalty or interest being imposed. The language of 20 NYCRR 533.3(b), which provides that the returns in question must be filed "on or before the 20th day of the month following the month for which the tax was due" (emphasis supplied), clearly shows that the duty to pay the tax arose prior to the final date upon

which the returns were to be filed and tax paid (cf. Seaton v. United States, supra, 162).

I. That the evidence presented herein does not warrant cancellation or abatement of the penalty imposed by the Audit Division.


J. That the petition of Samuel Valleriani, individually as an officer of Vallery Chevrolet/Oldsmobile, Inc., is granted to the extent indicated in Conclusion of Law "G", and the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, as amended at hearing (Finding of Fact "3"), in accordance therewith; and except as so granted, the petition is in all respects denied and, except as so modified, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, as amended at hearing, is in all respects sustained.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 14 1986


PRESIDENT


COMMISSIONER


COMMISSIONER