

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Rick-Franklin Chevrolet Olds Buick, 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 12/80 - 10/81.

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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 15th day of April, 1987, he/she served the within notice of Decision by certified mail upon Rick-Franklin Chevrolet Olds Buick, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

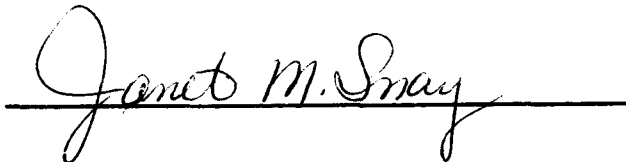
Rick-Franklin Chevrolet Olds Buick, Inc.  
7482 Maple Avenue  
P.O. Box 249  
Pulaski, NY 13142

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  
15th day of April, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

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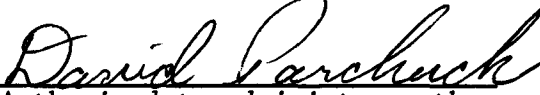
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 15th day of April, 1987, he served the within notice of Decision by certified mail upon Barry M. Shulman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

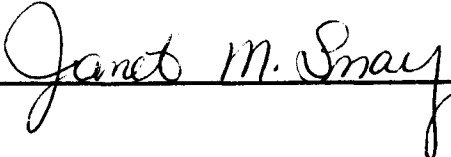
Barry M. Shulman  
Scolaro, Shulman, Cohen, Lawler & Burstein, P.C.  
1064 James St.  
Syracuse, NY 13203

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  
15th day of April, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

April 15, 1987

Rick-Franklin Chevrolet Olds Buick, Inc.  
7482 Maple Avenue  
P.O. Box 249  
Pulaski, NY 13142

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:  
Barry M. Shulman  
Scolaro, Shulman, Cohen, Lawler & Burstein, P.C.  
1064 James St.  
Syracuse, NY 13203

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

RICK-FRANKLIN CHEVROLET OLDS BUICK, INC.

for Revision of a Determination or for Refund  
of Sales & Use Taxes under Articles 28 & 29  
of the Tax Law for the Period December 1980  
through October 1981.

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DECISION

Petitioner, Rick-Franklin Chevrolet Olds Buick, Inc., 7482 Maple Avenue, P.O. Box 249, Pulaski, New York 13142, 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 December 1980 through October 1981 (File No. 61468).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York on October 21, 1986 at 2:45 P.M. Petitioner appeared by Scolaro, Shulman, Cohen, Lawler & Burstein, P.C. (Barry M. Shulman, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether petitioner's application for refund of penalty and interest at issue herein was timely filed.

II. Whether the Audit Division's denial of petitioner's refund claim was proper.

FINDINGS OF FACT

1. On October 4, 1984, petitioner, Rick-Franklin Chevrolet Olds Buick, Inc., filed an Application for Credit or Refund of State and Local Sales or Use Tax seeking refund of penalty and interest of \$17,275.11 paid with respect to the period December 1980 through October 1981.

2. On May 3, 1985 the Audit Division denied petitioner's application for refund, asserting that reasonable cause did not exist to warrant the granting of petitioner's claim.

3. During the period at issue, petitioner operated an automobile dealership. Petitioner timely filed all sales tax returns during the relevant period, but did not remit payment with any of said returns. Petitioner did collect sales tax during the period. Petitioner's failure to remit the sales tax it collected was premised upon certain financial difficulties it was experiencing at the time. The sales tax collected by petitioner was used to pay certain other of petitioner's financial obligations.

4. In view of its failure to remit, petitioner contacted the Audit Division to arrange for payment of its unpaid sales tax obligations. A payment schedule was proposed by the Audit Division and agreed to by petitioner in December 1981. This schedule called for monthly payments of \$3,000.00 until petitioner's tax liability was satisfied.

5. The Audit Division subsequently adjusted the payment schedule in August 1982, with this revised schedule calling for payments of \$2,748.49 per month.

6. In January 1983 the Audit Division again adjusted petitioner's payment schedule, with this schedule calling for payments of \$2,694.85 per month.

7. Petitioner made payments in accordance with each payment schedule and ultimately paid approximately \$77,000.00 in tax, penalty and interest. All payments made by petitioner were applied in part to the tax, interest and penalty outstanding at the time the payments were made.

8. Although it is unclear from the record why the Audit Division adjusted the petitioner's payment schedule, at no time did the Audit Division preclude

petitioner from paying off its tax liability in a lump sum or in larger monthly payments.

9. Petitioner's refund claim was premised, first, upon its assertion that it had acted in good faith in attempting to satisfy its tax obligations. Petitioner also contended that the Audit Division's adjustment of its payment schedule had resulted in its payment of additional penalty and improperly imposed interest. The amount of petitioner's refund claim was based upon the difference between the total amount of tax, penalty and interest which it in fact paid and the total amount it would have paid had it continued to make payments pursuant to the initial deferred payment plan.

#### CONCLUSIONS OF LAW

A. That section 1139(a) of the Tax Law provides, in pertinent part, that an application for refund shall be filed with the Tax Commission "within three years after the date when such amount was payable under this article".

B. That during the period at issue, section 1145(a) of the Tax Law provided, in relevant part, the following with respect to the imposition of penalty and interest:

"(1)(i) Any person failing to file a return or to pay or pay over any tax to the tax commission within the time required by this article shall be subject to a penalty of five percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate; plus interest at the rate of one percent of such tax or one-twelfth of the annual rate of interest set by the tax commission pursuant to section eleven hundred forty-two, whichever is greater, for each month of delay after such return was required to be filed or such tax became due.

(ii) If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all of such penalty and that portion of such interest that exceeds the interest that would be payable if such interest

were computed at the rate set by the tax commission pursuant to section eleven hundred forty-two. The tax commission shall promulgate rules and regulations as to what constitutes reasonable cause."

C. That penalty and interest become "payable" within the meaning of Tax Law § 1139(a) as such amounts accrue. Petitioner's refund claim was therefore untimely with respect to that portion of the penalty and interest which had accrued (pursuant to Tax Law § 1145[a]) more than three years prior to the filing of petitioner's refund claim.

D. That petitioner's financial difficulties did not constitute reasonable cause for abatement of penalty and interest in excess of the minimum imposed pursuant to section 1145(a), petitioner's good faith efforts to comply with payment arrangements notwithstanding (see 20 NYCRR 536.5(a); F & W Oldsmobile, Inc. v. State Tax Commission, 106 AD2d 792).

E. That the Audit Division's adjustments of petitioner's repayment schedule likewise did not constitute reasonable cause for abatement of penalty and interest in excess of the minimum imposed herein. In this regard, it is noted that the adjustments of petitioner's repayment schedule resulted in lower monthly payments. Such an adjustment would appear, on its face, to be of substantial benefit to an entity, such as petitioner, which claimed to be experiencing financial difficulties. It is further noted that petitioner could have paid its tax bill in a lump sum, thereby minimizing interest and penalty.

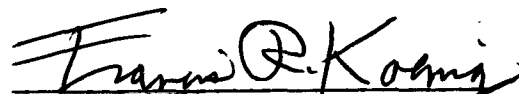
F. That the petition of Rick-Franklin Chevrolet Olds Buick, Inc., is in all respects denied and the Audit Division's denial of refund, dated May 3, 1985, is sustained.

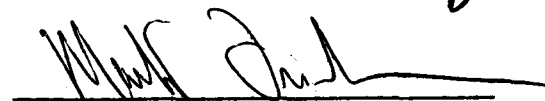
DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER