

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nicholas Villano : AFFIDAVIT OF MAILING
Officer of Nicky's Auto Sales, 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 12/1/80-2/29/84. :

State of New York :

ss.:

County of Albany :

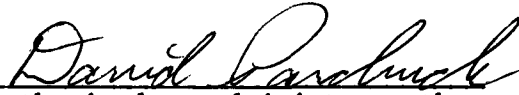
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 17th day of April, 1987, he/she served the within notice of Decision by certified mail upon Nicholas Villano, Officer of Nicky's Auto Sales, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

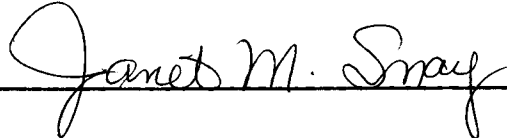
Nicholas Villano
Officer of Nicky's Auto Sales, Inc.
381 Ocean Avenue
Islip, NY 11751

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
17th day of April, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nicholas Villano : AFFIDAVIT OF MAILING
Officer of Nicky's Auto Sales, Inc. :
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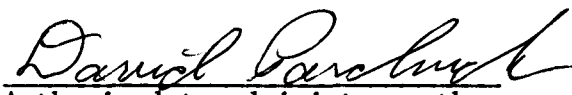
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 17th day of April, 1987, he served the within notice of Decision by certified mail upon Barry M. Tuminello, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

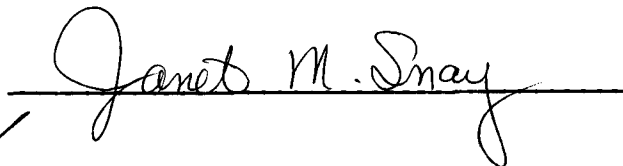
Barry M. Tuminello
Long, Tuminello, Besso, Seligman & Quinlan
120 Fourth Ave. - P.O. Box 591P
Bay Shore, NY 11706

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
17th 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 17, 1987

Nicholas Villano
Officer of Nicky's Auto Sales, Inc.
381 Ocean Avenue
Islip, NY 11751

Dear Mr. Villano:

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. Tuminello
Long, Tuminello, Besso, Seligman & Quinlan
120 Fourth Ave. - P.O. Box 591P
Bay Shore, NY 11706

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
NICHOLAS VILLANO	:	DECISION
OFFICER OF NICKY'S AUTO SALES, 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 December 1, 1980	:	
through February 29, 1984.	:	

Petitioner, Nicholas Villano, Officer of Nicky's Auto Sales, Inc., 381 Ocean Avenue, Islip, New York 11751, 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 1, 1980 through February 29, 1984 (File No. 55456).

On January 20, 1987, petitioner waived his right to a hearing and requested that a decision be rendered based on the entire record contained in the Audit Division's file. After due consideration of the record, the State Tax Commission hereby renders the following decision.

ISSUE

Whether petitioner, Nicholas Villano, was a person required to collect and pay over sales tax on behalf of Nicky's Auto Sales, Inc. within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the period at issue herein.

FINDINGS OF FACT

1. On May 23, 1984, the Audit Division issued to petitioner, Nicholas Villano, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a tax due of \$256,918.47, plus a 50 percent fraud penalty of \$128,459.19 and interest of \$47,525.51, for a total amount due of \$432,903.17

for the period December 1, 1980 through February 29, 1984. The aforementioned taxes were found to be due as the result of a field audit of the books and records of Nicky's Auto Sales, Inc. ("Nicky's") and were assessed against petitioner when the Audit Division determined him to be a responsible officer of said corporation. On the same date, the Audit Division issued similar notices to Nicky's and to Frederic Villano who was also determined to be a responsible officer.

2. Prior to 1980, petitioner, Nicholas Villano, was the president of Nicky's, a corporation doing business as a used car dealer at 2311 Sunrise Highway in Islip, New York. Petitioner also served as a director and was a shareholder of said corporation with his brother, Frederic Villano. In or about January 1980, petitioner resigned as an officer and director of Nicky's and transferred his shares to his brother. Subsequent to these actions, petitioner had no involvement with Nicky's in any capacity. His brother became the sole officer, director and shareholder.

3. During the audit period the business was known as Fred Villano Cadillacs. The New York State and local sales and use tax returns filed on behalf of Nicky's for this period were signed by Frederic Villano, as president. On audit, the examiner for the Audit Division dealt with said individual. Finally, Frederic Villano executed a Consent Extending the Period of Limitations for Assessment of Sales and Use Taxes on behalf of Nicky's wherein he indicated his title as president.

4. According to the audit report, Frederic Villano and petitioner, Nicholas Villano, were assessed as officers of Nicky's because their names were on record with the Department of Motor Vehicles as motor vehicle dealers and

"picked up" MV-50 books. However, there was no indication as to the period covered by said actions or whether said actions were connected to Nicky's. No specific evidence was presented to show that petitioner was connected to Nicky's during the period at issue.

CONCLUSIONS OF LAW

A. That section 1133(a) of Article 28 of the Tax Law imposes on any person required to collect sales tax personal liability for the tax imposed, collected or required to be collected. Section 1131(1), in defining persons required to collect tax, includes corporate officers who are under a duty to act for the corporation in complying with any requirement of Article 28. The resolution of whether an officer was under such a duty turns upon a factual determination in each instance. The relevant factors in the determination include, but are not limited to, the following: the officer's day-to-day responsibilities in the corporation; the officer's involvement in and knowledge of the financial affairs of the corporation; the identity of the person who prepared and signed the sales and use tax returns; the officer's authority to sign checks on the corporation's accounts; and, in the case of a closely-held corporation, the benefits the officer received from the corporate profits.

(Vogel v. New York State Dept. of Taxation and Finance, 98 Misc 2d 222;
Chevlowe v. Koerner, 95 Misc 2d 388.)

B. That, in view of the fact that petitioner, Nicholas Villano, resigned as an officer and director of Nicky's in January 1980, and had no further involvement with said corporation subsequent to that time, he was not a person required to collect tax on behalf of Nicky's Auto Sales, Inc. during the period at issue within the meaning of section 1131(1) of the Tax Law.

C. That the petition of Nicholas Villano, Officer of Nicky's Auto Sales, Inc., is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 23, 1984 is hereby cancelled.

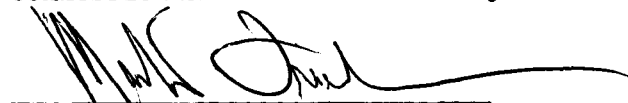
DATED: Albany, New York

STATE TAX COMMISSION

APR 17 1987


PRESIDENT


COMMISSIONER


COMMISSIONER