

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ALFRED T. BEHRENS,	:	DECISION
OFFICER OF PAL CHEMICALS AND SUPPLIES, 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 September 1, 1977	:	
through February 29, 1980.	:	

Petitioner, Alfred T. Behrens, Officer of Pal Chemicals and Supplies, Inc., 205 Bay Drive, Massapequa, New York 11758, 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 September 1, 1977 through February 29, 1980 (File No. 32031).

A formal 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 August 24, 1984 at 10:30 A.M., with all briefs to be submitted by November 12, 1984. Petitioner appeared by Sussman & Gottlieb, Esq. (Robert C. Gottlieb, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect and pay sales and use taxes on behalf of Pal Chemicals and Supplies, Inc. for the period September 1, 1977 through February 29, 1980.

FINDINGS OF FACT

1. On October 3, 1980, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use

Taxes Due under Articles 28 and 29 of the Tax Law against the petitioner, Alfred T. Behrens, officer of Pal Chemicals and Supplies, Inc., for taxes due of \$27,983.42, plus penalty of \$6,070.99 and interest of \$5,735.07, for a total amount due of \$39,789.48 for the period September 1, 1977 through February 29, 1980.

2. It is the position of the Audit Division that the petitioner, Alfred T. Behrens, was a person required to collect sales tax on behalf of Pal Chemicals and Supplies, Inc. and is therefore personally liable for the unpaid sales taxes of said corporation pursuant to sections 1131(1) and 1133(a) of the Tax Law.

3. The petitioner timely filed a petition for a hearing to review the notice of determination. The petitioner contends that he was not an officer or employee of Pal Chemicals and Supplies, Inc. who had a duty to act for such corporation in complying with any requirement of Articles 28 or 29 of the Tax Law. The petitioner further claims that Mr. August Zorn was the person responsible for the unpaid sales taxes of Pal Chemicals and Supplies, Inc.

4. In or about 1973, the petitioner, Alfred T. Behrens, a computer consultant, was contacted by Mr. August Zorn and Mr. Albert Stillman, who were the president and secretary-treasurer, respectively, of a group of corporations referred to as "the Pal Companies", i.e. Pal Classics, Inc., Pal Entities, Inc., and Pal Pools, Inc. Mr. Zorn and Mr. Stillman were interested in purchasing a small business computer for the Pal Companies and asked for the petitioner's assistance.

Petitioner was hired on a part-time basis to work with internal people and representatives of the computer company to see that specific projects were finished and installed on the computer and to help organize its accounting

department. The petitioner considered himself a part-time employee and was paid an annual salary of \$20,000.00. The petitioner worked three days a week, sometimes more if the situation dictated it.

5. In or about 1974, the Pal Companies began to experience financial difficulties. In his capacity as a part-time employee, during 1974 to 1977, the petitioner's role in the business, in addition to the operations of the computer, was to assist Mr. Zorn and Mr. Stillman in arranging financial assistance, and representing the Pal Companies in their contacts with suppliers, banks and finance companies. While the petitioner attempted to enhance the companies' financial posture, both Mr. Zorn and Mr. Stillman continued to run the businesses on a day-to-day basis and were responsible for the direction and decision-making processes of the companies.

6. Pal Chemicals and Supplies, Inc. ("Pal Chemicals") was incorporated in New York State on February 25, 1977 as the successor to an identical business previously carried on by Pal Classics, Inc. ("Pal Classics") at the same address and with the same corporate principals as the Pal Companies. Prior to incorporation of Pal Chemicals, Pal Classics had sold, constructed and installed swimming pools and had sold pool chemicals and supplies. Only the selling of swimming pool chemicals and supplies was spun off to Pal Chemicals.

7. By 1977, the Pal Companies had reached an even worse financial position. Major suppliers were refusing to do business with them and the banks were in the process of withdrawing support. As a result, the petitioner was approached by Mr. Zorn to serve as president of Pal Chemicals in a final, desperate attempt to remedy the companies' deteriorating financial position. The petitioner agreed to assume the title of president of Pal Chemicals in May, 1977. Mr. Zorn

assumed the title of secretary and Chairman of the Board, and Mr. Stillman had withdrawn from the company.

8. During the period at issue, September 1, 1977 through February 29, 1980, the petitioner, Alfred T. Behrens, signed checks on behalf of Pal Chemicals and also signed "income tax returns" for 1977 and 1978. The petitioner also had the authority to hire and fire employees of Pal Chemicals, but usually never did so without the approval of Mr. Zorn. The petitioner also signed the only sales tax return filed by Pal Classics for the period June 1 through August 31, 1977.

9. On or about March 4, 1980, Mr. John McLoughlin, the examiner for the Audit Division, initiated an audit of Pal Chemicals. Mr. McLoughlin found that the sales taxes at issue herein were collected by Pal Chemicals and properly posted to a general ledger Account #5000-2250 entitled "N.Y. Sales Tax Payable." Mr. McLoughlin also found that general ledger Account #5000-1023 entitled "Cash-Bank of Suffolk County" reflected monthly postings and, on many occasions, reflected end-of-month balances of high four figures and low five figures, clearly evidencing Pal Chemicals' ability to pay over the sales tax collections.

Mae Rhode, a seasonal bookkeeper, advised Mr. McLoughlin that she prepared the sales tax returns and gave them to the petitioner for signing and filing. Neither Mae Rhode nor Marilyn Behrens, the petitioner's wife and an employee of Pal Chemicals who furnished Mr. McLoughlin with whatever books and records were available, could explain the unfiled sales tax returns that were discovered by Mr. McLoughlin. The explanations provided by these individuals were "you have to talk to Al Behrens" and "Mr. Behrens handles everything."

10. In or about April, 1981, the petitioner executed documents on behalf of the Pal companies relative to the sale of property in Danbury, Connecticut owned by the companies.

11. On July 1, 1981, the sales taxes at issue herein were paid by check drawn from the escrow account of the Pal Companies' legal representative, Tananbaum & Sibener. The check was noted "Payment approved Pal Chemicals & Supplies, Inc. by August Zorn" and was signed by August Zorn. Therefore, the only item at issue remaining in this case is the accumulated interest and penalty still due and owing.

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 and 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 corporate profits. Vogel v. N.Y.S. Dept. of Taxation, 413 N.Y.S.2d 862 (Sup. Ct. Monroe Co. 1979); Chevlowe v. Koerner, 407 N.Y.S.2d 427 (Sup. Ct. Queens Co. 1978).


B. That Alfred T. Behrens was a person required to collect tax on behalf of Pal Chemicals and Supplies, Inc. and was therefore properly held liable for the unpaid sales taxes of said corporation. Since the sales taxes at issue have been paid, the petitioner is liable for the penalty and interest which is due.


C. That the petition of Alfred T. Behrens, officer of Pal Chemicals and Supplies, Inc., is granted to the extent indicated in Conclusion of Law "B", supra; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 3, 1980; and that, except as so granted, the petition is denied.


DATED: Albany, New York

MAY 23 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER