

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
LAWRENCE KRAMER	:	
d/b/a MILK PLUS SUPERMARKET	:	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, 1974	:	
through March 21, 1977.	:	

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Petitioner, Lawrence Kramer, d/b/a Milk Plus Supermarket, 6409 Bay Parkway, Brooklyn, New York, 11204, 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, 1974 through March 31, 1977 (File No. 38899).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 8, 1985 at 1:15 P.M. Petitioner appeared by Benjamin Hopard, P.A. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq. of counsel).

#### ISSUE

Whether petitioner, as the purchaser in a certain bulk sale transaction, was properly assessed as liable for sales and/or use taxes due and owing by the seller in such transaction.

#### FINDINGS OF FACT

1. On March 15, 1977 the Audit Division received Form ST-274, Notification of Sale, Transfer or Assignment in Bulk, regarding the sale of the business assets of Bay Parkway Milk Farms, Inc. ("Bay Parkway"), a grocery store, to the

petitioner.<sup>1</sup> This notification indicated that on March 21, 1977 Bay Parkway Milk Farms, Inc. would transfer its business operation and assets to the petitioner for consideration alleged by the parties to be in the amount of \$12,000.00, more specifically \$8,000.00 in cash plus \$4,000.00 in notes.

2. On March 17, 1977, the Audit Division and the State Tax Commission notified the petitioner, as purchaser, of a possible claim for New York State and local sales and use taxes due from Bay Parkway Milk Farms, Inc., the seller. On May 27, 1977, the Audit Division and the State Tax Commission sent a similar notice of possible claim to Bay Parkway Milk Farms, Inc., c/o Lawrence Kramer. This latter notice also acknowledged the receipt of \$800.00 in tax from petitioner, which amount had been remitted previously on April 6, 1977 to cover tax due on the furniture and fixtures to be transferred in the bulk sale from Bay Parkway to petitioner.

3. On May 27, 1977, the Audit Division requested and (on July 13, 1977) received information from Bay Parkway regarding its business operations for the period March 1, 1974 through March 31, 1977. Thereafter, on August 11, 1977, the Audit Division requested and (on September 14, 1977) received additional information from petitioner regarding such business.

4. The information submitted by Bay Parkway reflected, inter alia, a selling price of \$7,412.00, consisting of \$3,912.00 for furniture, fixtures, equipment and supplies plus \$3,500.00 for merchandise inventory. The only person listed as an owner and/or corporate officer of Bay Parkway was one Al Parisi.

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1 The Form ST-274, as filed, indicated (at Section I thereof) that the purchaser was Lawrence Kramer, and also indicated (at Section II thereof) that the purchaser's name was Bay Parkway Milk Farms, Inc. This manner of filing by petitioner indicating different purchaser names caused the issuance of double sets of notices as set forth in Findings of Fact "2" and "6".

5. Audit Division examination of the information provided, as aforementioned, together with Bay Parkway's tax returns indicated thirty-one percent of Bay Parkway's sales to be taxable sales. This figure, when applied to Bay Parkway's gross sales per returns, indicated an underreporting and underpayment of sales and use taxes by Bay Parkway during the period at issue.

6. On August 29, 1977, the Audit Division issued separate notices and demands for payment of sales and use taxes due for the period March 1, 1974 through March 21, 1977 to "Bay Parkway Milk Farms, Inc., c/o Lawrence Kramer", and to "Lawrence Kramer (purchaser) d/b/a Milk Plus Supermarket". Each of these notices assessed tax due in the amount of \$14,036.41, plus penalty and interest, and represented assessment against petitioner as purchaser for taxes due from Bay Parkway, as determined above, pursuant to Tax Law section 1141(c). The reason for the issuance of separate but identical assessments stems from the indication on Form ST-274 of both Lawrence Kramer and Bay Parkway as purchaser (see footnote " 1").

7. The bulk transfer in question actually occurred on April 19, 1977, some 35 days after petitioner filed notice of the bulk sale via Form ST-274. On or about April 15, 1981, the Audit Division received \$3,930.43 which had, until such time, been held in escrow in connection with the bulk sale in question.

8. Petitioner asserts that the Audit Division erred in not attempting to collect the instant deficiency from Mr. Parisi as the sole listed owner and/or officer of Bay Parkway prior to seeking collection against petitioner.

9. The Audit Division concedes and does not contest the fact that petitioner's liability herein is limited to the purchase price of the transaction, and asserts, in conjunction therewith, that the purchase price as admitted by petitioner was \$12,000.00 and not \$7,412.00 as reflected in the information submitted by Bay Parkway (see Finding of Fact "4").

#### CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides, in part, that a bulk sale purchaser must notify the Tax Commission of such bulk sale at least ten days prior to taking possession or paying therefor. If the purchaser fails to so notify the Tax Commission, he will be personally liable for any sales taxes determined to be due from the seller to the extent of the amount of the purchase price or fair market value of the assets purchased, whichever is higher. Section 1141(c), as in effect during the period in question, provided that within 180 days of receipt of notice from the purchaser, the Tax Commission was to notify the purchaser, transferee or assignee of the total amount of tax claimed to be due from the seller, transferor, or assignor.<sup>2</sup> It is, in sum, the purchaser's duty to see that the purchase funds are held in escrow until either the Tax Commission releases the purchaser of liability for taxes due or until the noted 180 day period passes without presentation of a claim for taxes due and owing by the seller. Until such time as either of these events occurs, the purchaser, transferee or assignee remains personally liable as noted [Tax Law §1141(c)].

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<sup>2</sup> Section 1141(c) was subsequently amended by L. 1977, Ch. 27, such that effective January 1, 1978, the Tax Commission's notice period was shortened from 180 to 90 days.

B. That it is not disputed that a bulk sale occurred. Petitioner's notification thereof, via Form ST-274, indicates a sale date only six days after the notice was received, hence indicating untimely notice. In fact, however, the sale occurred some 35 days after the notice. Assuming that such notice was in fact timely, petitioner was nonetheless properly notified within the then requisite 180 days of a claim of taxes due from the seller. In fact, notices of possible claims were issued to petitioner well before the 180 day period expired. Accordingly, petitioner, who failed to withhold or escrow the sale price as required, remains personally liable for those taxes claimed due from the seller.

C. That there is no statutory duty or responsibility imposed on the State to first obtain tax due from either the seller or purchaser before seeking to obtain the tax from the other party (see Edward M. Burns d/b/a Studio B, State Tax Commission, December 14, 1982). Therefore, petitioner's argument that the Audit Division must first attempt to obtain taxes due from Mr. Parisi is without merit.

D. That the purchase price, as indicated and admitted by petitioner, was \$12,000.00. The seller's information, as submitted indicating a lesser amount, apparently fails to include the notes constituting a part of the purchase price (compare Findings of Fact "1" and "4"). Accordingly, petitioner's ultimate liability is the amount of the purchase price (\$12,000.00) less the amount received from escrow on or about April 15, 1981 (\$3,930.43), and the assessment is to be reduced accordingly.

E. That the petition of Lawrence Kramer is hereby denied and the notices and demands dated August 29, 1977, as revised in accordance herewith, are sustained.

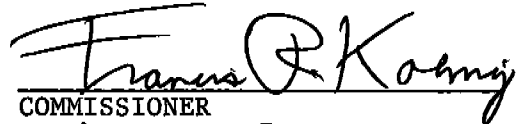
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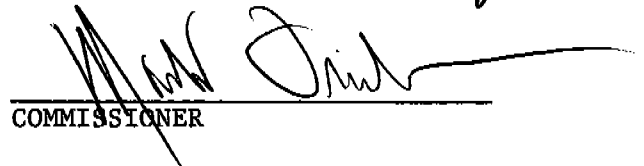
STATE TAX COMMISSION



PRESIDENT



COMMISSIONER



COMMISSIONER