

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
IRVING BRAUNSTEIN	:	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 September 1, 1979	:	
through February 28, 1981.	:	

Petitioner, Irving Braunstein, 31 Midline Road, Ballston Lake, New York, 12019, 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, 1979 through February 28, 1981 (File No. 44763).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on October 30, 1984 at 1:15 P.M., with all briefs to be submitted by December 18, 1984. Petitioner appeared by Lombardi, Reinhard, Walsh & Harrison, P.C. (Harlan R. Harrison, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether the State Tax Commission has jurisdiction to proceed administratively against petitioner, Irving Braunstein, with respect to his personal liability for unpaid sales taxes of Irv's Hideaway Inn, Inc., and, if so, whether petitioner was a person responsible for the payment of such taxes.

FINDINGS OF FACT

1. On October 28, 1981, the Audit Division issued to petitioner, Irving Braunstein, as officer of Irv's Hideaway Inn, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing tax due for the period September 1, 1979 through February 28, 1981 in the amount of \$23,292.64, plus penalty and interest accrued to the date of issuance of the notice.

2. The notice of determination provided on its face the following explanation as the basis for issuance, together with a detailed breakdown of the amounts assessed for each of the quarterly periods at issue:

"[y]ou are personally liable as officer of Irv's Hideaway Inn, Inc. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law.

'THE TAX ASSESSED HEREIN HAS BEEN ESTIMATED AND/OR DETERMINED TO BE DUE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH THE HEARING PROCESS BY THE FILING OF A PETITION WITHIN 90 DAYS.'

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
11/30/79	--	--	37.45
02/29/80	4255.29	1021.26	839.11
05/30/80	2820.44	592.29	470.87
08/31/80	6525.86	1174.65	892.10
11/30/80	5308.06	796.21	566.82
02/28/81	4382.99	525.95	338.37"

3. The above assessment issued to petitioner stems from assessments issued against Irv's Hideaway Inn, Inc., as a result of that entity's filing of sales and use tax returns for the periods at issue, which returns had either no remittance or only a partial remittance of the tax shown as due thereon, more specifically detailed as follows:

<u>Period Ended</u>	<u>Amount Shown Due Per Return</u>	<u>Remittance with Return</u>	<u>Subsequent Remittance</u>
11/30/79	\$5,497.87	\$ -0-	\$7,000.00*
2/29/80	4,255.29	-0-	-0-
5/31/80	6,820.44	4,000.00	-0-
8/31/80	6,525.86	-0-	-0-
11/30/80	5,308.06	-0-	-0-
2/28/81	4,382.99	1,500.00**	-0-

* Interest only remains unpaid.

** The \$1,500.00 remittance check was dishonored
for insufficient funds.

4. Sales and use tax returns filed by Irv's Hideaway Inn, Inc. for the quarterly periods in question¹, as well as the dishonored \$1,500.00 check, bear the signature of petitioner, Irving Braunstein, with the title of president reflected on the returns.

5. The Audit Division asserts that the references to Tax Law section 1138(a) on the face of the notice of determination represent a clerical error and that the document was not issued pursuant to section 1138(a). The nature of the clerical error was not further specified. There is no assertion by the Audit Division that the returns, as filed, were incorrect as to the amount of tax shown as due from Irv's Hideaway Inn, Inc.

6. Petitioner offered no testimony or other evidence in support of the assertions raised in his petition, but rather rests his entire case upon the position that the State Tax Commission lacks jurisdiction to determine petitioner's liability for the taxes at issue via its administrative hearing procedure.

1 The return for the quarterly period ended February 28, 1981 was not introduced in evidence.

CONCLUSIONS OF LAW

A. That where, as here, timely and correct returns are submitted, lacking only the remittance of tax shown as due thereon, the issuance of a Notice of Determination and Demand pursuant to Tax Law section 1138(a) is not statutorily authorized and this Commission is thus not empowered to administratively determine petitioner's liability for the unpaid taxes at issue. [Matter of Parsons v. State Tax Commission, 34 N.Y.2d 190 (1974).] Nothing in the record supports the assertion that the document issued to petitioner was, as indicated on its face, anything other than an assessment issued pursuant to Tax Law section 1138(a) [See Finding of Fact "2"]. Notwithstanding the enactment of Tax Law section 171, paragraph twenty-first (L. 1979, Ch. 714, eff. January 1, 1980), the issuance of an assessment pursuant to Tax Law section 1138(a), under the circumstances presented herein remains jurisdictionally defective [Matter of William R. Hall v. State Tax Commission, __A.D. 2d__, (Third Dep't, June 6, 1985)]. Finally, it is noted that Tax Law Section 1138(a) has been amended, effective April 17, 1985 (L. 1985, Ch. 65), such that under the facts presented herein the issuance of a Notice of Determination and Demand would be authorized and the State Tax Commission would have jurisdiction to determine petitioner's liability.

B. That the petition of Irving Braunstein is hereby granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated October 28, 1981 is cancelled.

DATED: Albany, New York

SEP 13 1985

STATE TAX COMMISSION

Rebecca A. Allen
PRESIDENT

Francis J. Koenig
COMMISSIONER

[Signature]
COMMISSIONER