

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

DAVID BREHM AND  
GRAND AVENUE SHELL, INC.

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, 1979  
through February 4, 1982.

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Petitioners, David Brehm and Grand Avenue Shell, Inc., 1270 Grand Avenue, Baldwin, New York 11510, 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, 1979 through February 4, 1982 (File No. 45721).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 15, 1984 at 1:15 P.M., with all briefs to be submitted by April 15, 1984. Petitioners appeared by Seymour L. Baldash, Esq. The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

#### ISSUES

- I. Whether petitioners timely applied for a hearing.
- II. Whether the Audit Division properly estimated taxes due where no books or records were produced for audit.
- III. Whether the taxes determined due from the seller of business assets were subject to a first priority right and lien.

#### FINDINGS OF FACT

1. On February 9, 1982, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk from petitioner David Brehm regarding the

purchase of a gasoline service station business owned and operated by Charles Muller d/b/a J & J Super Service. Said notification indicated February 4, 1982 as the scheduled date of sale and listed the total sales price of the business as \$35,000.00. The sales price of the furniture and fixtures was \$2,500.00.

2. On February 11, 1982, the Audit Division notified petitioner and the escrow agent of a possible claim for New York State and local sales and use taxes due from seller.

3. On May 10, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against David Brehm d/b/a J & J Super Shell<sup>1</sup> for taxes due of \$47,500.00. The notice was sent by certified mail on May 10, 1982.

The Audit Division determined that the seller had unpaid assessments outstanding amounting to \$26,838.10. In addition, the Division estimated additional taxes due from the seller for the period June 1, 1979 through February 4, 1982 totalling \$23,443.75.

The assessment against petitioner was limited to \$47,500.00, the sales price of the business as shown on a bill of sale furnished to the Audit Division.

4. On August 11, 1982, the Audit Division received a letter from Seymour L. Baldash protesting the above notice. The envelope in which the letter was mailed was postmarked by the United States Post Office on August 10, 1982.

5. The actual sales price of the business assets was \$34,500.00. The original sales price of \$47,500.00 was renegotiated to said amount at the closing.

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<sup>1</sup> J & J Super Shell was an incorrect name for the business. The purchaser used the trade name of the seller when completing the notification of sale.

CONCLUSIONS OF LAW

A. That section 1138(a)(3) of the Tax Law provides, in pertinent part, that the liability of a purchaser of business assets sold in bulk for the payment to the State of taxes determined due from the seller arising under section 1141(c) of the Tax Law shall be finally and irrevocably fixed unless the purchaser within ninety days after the giving of notice by the Tax Commission to the purchaser of the total amount of any taxes which the State claims to be due from the seller, shall apply to the Tax Commission for a hearing or unless the Tax Commission, on its own motion, shall redetermine such liability.

B. That section 1147(a)(1) of the Tax law provides that a notice of determination shall be mailed promptly by registered or certified mail and that any period of time which is determined according to the provisions of Article 28 by the giving of notice shall commence to run from the date of mailing of such notice.

Subsection (2) provides that if any return, claim, statement, application, or other document required to be filed within a prescribed period under Article 28 is delivered after such period, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery.

C. That the Tax Commission notified petitioners of the amount of taxes due from the seller within ninety days of receipt of the notice of sale as required by section 1141(c) of the Tax Law. Such notice was given to petitioners on May 10, 1982. Petitioners' protest to the notice or application for a hearing with respect thereto was postmarked August 10, 1982, which is ninety-one days from the date the Audit Division gave notice of the taxes due. Accordingly, petitioners' liability as purchaser was finally and irrevocably fixed.

D. That Issues II and III are moot.

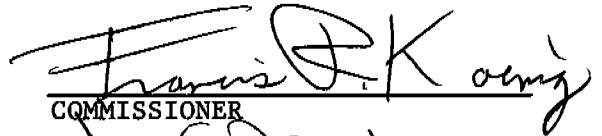
E. That the petition of David Brehm and Grand Avenue Shell, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 10, 1982 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER