

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Irving Braunstein :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 9/1/79-2/28/81. :
:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 13th day of September, 1985, he served the within notice of Decision by certified mail upon Irving Braunstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Irving Braunstein
31 Midline Rd.
Ballston Lake, NY 12019

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
13th day of September, 1985.

David Parchuck

James A. Heggen

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Irving Braunstein :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 9/1/79-2/28/81. :
:

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 13th day of September, 1985, he served the within notice of Decision by certified mail upon Harlan R. Harrison, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harlan R. Harrison
Lombardi, Reinhard, Walsh & Harrison
433 State St.
Schenectady, NY 12301

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
13th day of September, 1985.

David Parchuck

Quinn O'Donoghue

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

September 13, 1985

Irving Braunstein
31 Midline Rd.
Ballston Lake, NY 12019

Dear Mr. Braunstein:

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
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Harlan R. Harrison
Lombardi, Reinhard, Walsh & Harrison
433 State St.
Schenectady, NY 12301
Taxing Bureau's Representative

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.

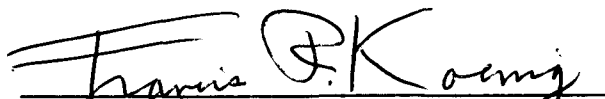
B. That the petition of Irving Braunstein is hereby granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated October 28, 1981 is cancelled.


DATED: Albany, New York

SEP 13 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-448-014

PS Form 3800, Feb. 1982

Sent to <i>Irving Braunstein</i>	
Street and No. <i>31 Middle Rd.</i>	
P.O., State and ZIP Code <i>Ballston Lake NY</i>	
Postage <i>12019</i>	
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

P 153 387 530

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-448-014

PS Form 3800, Feb. 1982

Sent to <i>Harlow R. Harris</i>	
Street and No. <i>Amherst Leonard Walkway</i>	
P.O., State and ZIP Code <i>433 State St</i>	
Postage <i>17412301</i>	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	