

STATE TAX COMMISSION

Ernie P. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

David Brehm
& Grand Avenue Shell, Inc.

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
3/1/79-2/4/82.

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon David Brehm & Grand Avenue Shell, Inc., the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Brehm
& Grand Avenue Shell, Inc.
1271 Grand Ave.
Baldwin, NY 11510

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
6th day of February, 1985.

David Parchuck

Annunzio P. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 6, 1985

David Brehm
& Grand Avenue Shell, Inc.
1271 Grand Ave.
Baldwin, NY 11510

Gentlemen:

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
Seymour L. Baldash
49 W. 45th St.
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DAVID BREHM AND	:	DECISION
GRAND AVENUE SHELL, 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 March 1, 1979	:	
through February 4, 1982.	:	

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 Shell¹ 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.

¹ 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.

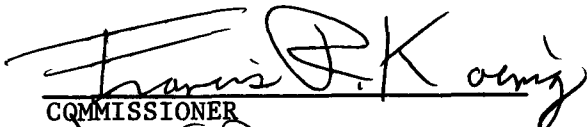
E. That the petition of David Brehm and Grand Avenue Shell, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 10, 1982 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Samuel R. Baldwin</i>	
Street and No. <i>44 W 45th St</i>	
P.O., State and ZIP Code <i>New York NY 10036</i>	
Postage	\$
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	

PS Form 3800, Feb. 1982

P 470 316 478

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Samuel R. Baldwin & Head Acc.</i>	
Street and No. <i>Shell Inc.</i>	
P.O., State and ZIP Code <i>1271 Grand Ave.</i>	
Postage	\$ <i>Baldwin NY 10510</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	

PS Form 3800, Feb. 1982