

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WERNER BOYS, INC., D/B/A : DETERMINATION
WERNER BOYS GLASS & MIRROR : DTA NO. 825530
: :
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, 1998 through February 28, 2009.
:

Petitioner, Werner Boys, Inc., d/b/a Werner Boys Glass & Mirror, 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, 1998 through February 28, 2009.

A hearing was commenced before Barbara J. Russo, Administrative Law Judge, in New York, New York, on June 5, 2014 at 10:30 A.M., with all briefs to be submitted by September 15, 2014, which date began the six-month period for the issuance of this determination.

Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Casey Callanan, Esq., of counsel).

ISSUES

I. Whether the transfer of assets from Werner Glass and Mirror, Inc., to Werner Boys Inc. d/b/a Werner Boys Glass & Mirror (petitioner) constituted a transfer in bulk of business assets under Tax Law § 1141(c), such that petitioner, as the transferee company, became liable for sales tax due from the transferor company.

II. If a transfer in bulk of business assets occurred, whether petitioner met its burden of proof and established the fair market value of all of the assets transferred.

FINDINGS OF FACT

1. Prior to January, 2009, Werner Glass and Mirror, Inc. (Werner Glass), operated a glass and mirror installation business at 405 Lake Avenue, St. James, New York. Werner Glass was incorporated in 1976. Werner Glass leased the business premises from Werner Realty Corp. (Werner Realty). Both Werner Glass and Werner Realty were owned by William O. Werner, Sr. (Werner, Sr.).

2. Prior to January 2009, petitioner, Werner Boys, Inc., operated a glass and mirror installation business at 9 Lupine Lane, Lake Grove, New York, out of the residence of its owner and president, William Werner, Jr., the son of Werner, Sr. Petitioner was incorporated in 1999.

3. From 2000 to 2005, in addition to operating petitioner, William Werner, Jr., was employed by Werner Glass.

4. The sales tax certificate of authority for Werner Glass indicates that the business was discontinued and dissolved on December 31, 2008.

5. Werner Glass filed a final sales tax return for the period December 1, 2008 through February 28, 2009.

6. An audit of Werner Glass by the Division of Taxation (Division) resulted in the issuance of notices of determination to Werner Glass for additional sales and use tax in the amount of \$314,162.82 for the period March 1, 1998 through February 28, 2009. It is this liability that the Division asserts is properly due and owing from petitioner as the purchaser in a bulk sale.

7. In or about January 2009, petitioner moved into the business premises located at 405 Lake Avenue, St. James, New York, the former business location of Werner Glass. Petitioner filed a sales tax return for the period March 1, 2009 through May 31, 2009 reporting its new address at the Lake Avenue location.

8. In February 2009, two vehicles, a 2000 GMC and a 2001 Chevrolet, were transferred from Werner Glass to petitioner.

9. When petitioner moved into the Lake Avenue property, the Werner Glass sign remained on the outside of the building. Petitioner added the name "Boys" to the existing sign.

10. Petitioner's letterhead shows the same telephone number as the telephone number listed for Werner Glass on Werner Glass's S corporation franchise tax returns.

11. Upon moving into the Lake Avenue property, petitioner obtained Werner Glass's customer base and goodwill, resulting in an increase in receipts. Specifically, when petitioner was operating at its former location in Lake Grove, it reported receipts of \$125,747.00 and \$139,707.00 for 2007 and 2008, respectively. Werner Glass reported receipts from its business at the Lake Avenue property of \$631,860.00 and \$562,019.00 for 2007 and 2008, respectively. After moving to the Lake Avenue property, petitioner reported receipts of \$576,721.00 and \$581,126.00 for 2009 and 2010, respectively.

12. After the dissolution of Werner Glass, Werner, Sr., was employed by petitioner. Additional former employees of Werner Glass continued as employees of petitioner when it moved to the Lake Avenue property, including Stephan Werner and Maureen Komorowski.

13. On February 14, 2012, the Division sent correspondence to petitioner stating that it received information indicating that a possible bulk sale transaction had occurred and that it had not received proper notification of the sale. The Division requested that petitioner complete and

submit the notification of bulk sale form. The Division requested that petitioner respond within 20 days.

14. The Division did not receive a response to its initial correspondence, and on March 12, 2012, the Division sent a follow-up letter to petitioner again requesting that petitioner submit a notification of bulk sale form along with a copy of the contract of sale. The Division further advised petitioner that all open sales tax liabilities of the seller could be passed on to petitioner as the purchaser in bulk sale and that funds for the sale should be held in escrow.

15. On March 12, 2012, the Division sent to Werner Glass a Notice to Seller, together with a consolidated statement of tax liabilities. The notice stated that Werner Glass was a seller in the bulk sale of business assets and requested that Werner Glass submit a copy of the sales contract, its books and records, remit tax due on the transfer of tangible personal property and remit payment for open assessments as indicated in the consolidated statement of tax liabilities.

16. On March 13, 2012, the Division sent to petitioner a Notice of Claim to Purchaser stating that the Division received information indicating that petitioner was the purchaser in the bulk sale of Werner Glass's business assets.

17. No Notification of Sale, Transfer, or Assignment in Bulk was filed with the Division.

18. The Division determined that a bulk sale transaction occurred between Werner Glass as the seller and petitioner as the buyer. The Division issued a Notice of Determination, dated April 11, 2012, to petitioner, asserting tax due in the amount of \$314,162.82. The notice informed petitioner that it was issued because petitioner is liable as a bulk sale purchaser for taxes determined to be due in accordance with sections 1141(c) and 1138(a)(3) of the New York State Tax Law.

19. Petitioner sent correspondence, dated April 18, 2012, to the Division stating that no sale had occurred between petitioner and Werner Glass.

20. On April 25, 2012, the Division responded to petitioner's correspondence, stating that the Division's records show that petitioner was associated with the outstanding sales tax liabilities of Werner Glass and enclosed a Notice of Taxpayer Rights.

SUMMARY OF THE PARTIES' POSITIONS

21. Petitioner argues that no bulk sale occurred, contending that the only assets transferred from Werner Glass to petitioner were two vehicles. Petitioner further argues that Werner Glass, rather than petitioner, should be responsible for any outstanding sales tax liabilities. Petitioner also contends that the law is not clear and that it is now out of business and does not have any assets.

22. The Division argues that a bulk sale transaction occurred between Werner Glass as seller and petitioner as purchaser. The Division contends that the transaction was not conducted at arm's length and that the same business operations continued from Werner Glass to petitioner. The Division further argues that petitioner has not met its burden of proof to show that a bulk sale did not occur and has not provided any proof as to the business valuation. The Division contends that, because the transaction was not at arm's length and because petitioner has failed to provide any evidence regarding a valuation, petitioner is liable for the full amount of outstanding sales tax liabilities.

CONCLUSIONS OF LAW

A. Tax Law § 1141(c) requires the purchaser in a bulk sale transaction to give notice of such sale to the Division at least 10 days before taking possession of, or making payment for, the business assets of the selling company. The purpose of Tax Law § 1141(c) is to preserve the

Division's "indisputable right to collect taxes which could otherwise be extinguished by the simple expedient of a taxpayer transferring its assets" (*Harcel Liqs. v Evsam Parking*, 48 NY2d 503, 507 [1979], *affd* 48 NY2d 503 [1979]; *see also Spandau v United States of Am.*, 73 NY2d 832 [1988]).

Upon receipt of a timely notice of sale, the Division is required to inform the purchaser of any potential claims for sales and use taxes that may still be owed by the seller of the business (*see* 20 NYCRR 537.0 [c] [3]). If the purchaser fails to withhold funds from the seller or fails to file a proper and timely notice of bulk sale with the Division, then such purchaser becomes personally liable for the sales and use taxes determined to be due from the seller (*see* 20 NYCRR 537.4 [a] [1]). The liability of the purchaser is limited to the greater of the purchase price or the fair market value of the business assets sold or transferred (*see* 20 NYCRR 537.4 [c]).

B. The term "bulk sale" is defined at 20 NYCRR 537.1 (a) (1), which provides:

"The term *bulk sale* as used in this Part means any sale, transfer or assignment in bulk of any part or the whole of business assets, other than in the ordinary course of business, by a person required to collect tax and pay the same over to the Department of Taxation and Finance."

The hallmark of a bulk sale is the transfer of business assets (*Matter of Shanghai Pavilion, Inc.*, Tax Appeals Tribunal, June 10, 2010). A bulk sale includes not only any sale, transfer or assignment in bulk of any part or the whole of business assets, other than in the ordinary course of business, but it also includes a transfer by gift (20 NYCRR 537.1 [a][3], Example 4), assumption of indebtedness (*Matter of Peconic Bay Motors, Inc.*, Tax Appeals Tribunal, September 26, 1991), the sale of assets as part of a liquidation of the seller's business (20 NYCRR 537.1 [d][2], Examples 16 and 17), and the sale of business assets regardless of

whether the seller was operational when the assets were sold (*see Matter of Gaughan*, Tax Appeals Tribunal, May 14, 1992).

C. The purchaser in a bulk sale includes “any person who, as part of a bulk sale, purchases or is the transferee or assignee of business assets” (20 NYCRR 537.1 [e]). “Business Assets” include “any assets of a business pertaining directly to the conduct of the business, whether such assets are intangible, tangible or real property” and any asset owned by a corporation (20 NYCRR 537.1 [b]).

D. In or about February 2009, certain assets of Werner Glass were transferred to petitioner outside of the ordinary course of business. Petitioner’s assertion that there was no contract of sale or money exchanged for such assets is irrelevant in determining whether a bulk sale took place. The business assets of Werner Glass, including, but not limited to, business vehicles, fixtures and customer lists, were transferred to and used in petitioner’s business. Although petitioner contended during the audit that no assets were transferred, petitioner admitted during the hearing that vehicles were transferred. The evidence also shows that certain fixtures, such as the sign on the outside of the building, as well as the Werner Glass customer base and goodwill, were transferred from Werner Glass to petitioner. Petitioner moved its own operation of a similar glass and mirror business to the location where Werner Glass had been operating within days after Werner Glass’s operations ended, with the same services rendered to many of the same clients. Additionally, petitioner maintained the same telephone number as Werner Glass.

While petitioner now admits that vehicles were transferred and argues that it should only be held liable for the value of those vehicles, petitioner failed to ascribe any value to such assets. There were no purchase invoices, appraisals, tax return depreciation schedules, or any form of third-party information as to the value of the assets transferred. Moreover, petitioner failed to

provide any evidence to dispute that other assets, such as fixtures, customer lists and goodwill, were also transferred. The record shows that the transaction at issue was arranged between two related business owners, William O. Werner, Sr., and his son, William Werner, Jr. Although petitioner's business initially operated from a different address, it moved to the location where Werner Glass had been operating at the time Werner Glass ceased its operations. Additionally, Werner, Sr., the owner and president of Werner Glass, became employed by petitioner once Werner Glass ceased operations. Although in 2009 there was a change in ownership and management of the glass and mirror business, and a one-word alteration in the corporate name, the record does not disclose any changes in how the businesses were conducted, many of the former clients of the transferor became clients of petitioner, and some of the employees remained the same. Consequently, a bulk sale occurred.

E. As the purchaser in this bulk sale, petitioner is liable for any sales tax remaining due and unpaid by the transferor to the extent of the greater of the actual purchase price or the fair market value of the assets transferred as of the date of the sale (Tax Law § 1141 [c]; 20 NYCRR 537.0 [c] [2], 537.4 [c]). The Tax Law and regulations provide for a maximum amount of tax liability that may transfer to the "purchaser" of assets in a bulk sale. It is incumbent upon the taxpayer to establish what this maximum limit is by adequately proving the fair market value of the assets transferred or the purchase price (*Matter of Ultimat Security, Inc.*, Tax Appeals Tribunal, May 31, 2012). In this case, petitioner has failed to establish the fair market value of the assets transferred. Accordingly, it is determined that petitioner failed to establish that the liability asserted exceeded any maximum amount of liability that could transfer with the assets.

Initially, petitioner denied that any transfer of assets had taken place, and submitted no information to the Division concerning the value of the assets transferred, or any contract price

for the transfer or sale. Petitioner later conceded the transfer of vehicles, but provided no information as to the value of the assets. Additionally, contrary to petitioner's argument that no other assets were transferred, the record establishes that at the very least, business fixtures and goodwill were also transferred. It is incumbent upon petitioner to demonstrate the value of the assets transferred. However, petitioner presented no testimony from a witness with direct knowledge of the original acquisition cost or current value of the assets. As noted, petitioner did not provide any purchase invoices or appraisals for the assets.

In addition to the tangible personal property transferred, petitioner also received the transferor's customer base and goodwill. While petitioner asserted that the Division should not be able to attribute any value to the customer lists transferred to it, ultimately, the value of such a list is a basis for determining the extent of the liability of a transferee (*see Matter of Long Is. Reliable Corp. v Tax Commn. of Dept. of Taxation & Fin. of State of N.Y.*, 72 AD2d 826 [1979], *appeal denied* 49 NY2d 707 [1980]). Likewise, petitioner did not account for any of the goodwill or other valuable intangible assets of the transferor that petitioner received (*see Matter of The Talbots, Inc.*, Tax Appeals Tribunal, September 8, 2008).

The subject Notice of Determination is presumptively correct (*Matter of Tivolacci v State Tax Commn.*, 77 AD2d 759 [1980]; *see also Matter of Hammerman*, Tax Appeals Tribunal, August 17, 1995). The burden rests with petitioner to show by clear and convincing evidence that the methodology utilized by the Division was unreasonable or that the amount of tax assessed was erroneous (*Matter of Meskouris Bros. v Chu*, 139 AD2d 813 [1988]; *see also Matter of Surface Line Operators Fraternal Org. v Tully*, 85 AD2d 858 [1981]). Petitioner failed to establish a fair market value for any of the assets transferred to it. In the absence of appropriate substantiation for its position, it failed to meet its burden of proof that the assets were

of minimal value. As such, petitioner has failed to meet its burden of proof challenging the Notice of Determination.

F. The petition of Werner Boys, Inc., d/b/a/ Werner Boys Glass & Mirror is denied and the Notice of Determination dated April 11, 2012 is sustained.

DATED: Albany, New York
February 19, 2015

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE