STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PECONIC BAY MOTORS, INC.	:	DECISION DTA No. 805833
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, 1986 through February 28, 1987.	:	

Petitioner Peconic Bay Motors, Inc., Route 58, Riverhead, New York 11901 filed an exception to the determination of the Administrative Law Judge issued on January 10, 1991 with respect to its 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, 1986 through February 28, 1987. Petitioner appeared by Gatz, Arnoff & Czygier (John M. Czygier, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Both parties filed briefs on exception.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation complied with the notice requirements of Tax Law § 1141(c) with respect to an assessment issued to petitioner as purchaser of the assets of Don Wald Motors, Inc.

II. Whether the transaction at issue constituted a sale, transfer or assignment in bulk under Tax Law § 1141(c).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "13" which has been modified. We have also made an additional finding of fact. The

Administrative Law Judge's findings of fact, the modified finding of fact and the additional finding of fact are set forth below.

On April 6, 1987, petitioner, Peconic Bay Motors, Inc., by its attorneys, Gatz, Arnoff & Czygier, mailed a Notification of Sale, Transfer or Assignment in Bulk to the Sales Tax Section of the Central Office Audit Bureau in Albany, New York, by certified mail, return receipt requested.

The aforesaid notification stated that petitioner was the purchaser from Don Wald Motors, Inc. ("seller") of the following assets:

Asset	Selling Price
Furniture, fixtures, equipment & supplies	$175,000.00
Motor vehicles	125,000.00
Merchandise inventory for sale	240,000.00
Real estate	-0-
Good will and other assets	60,000.00
Total selling price	$600,000.00

The terms and conditions of said sale were stated to be as follows:

> "Purchaser obtaining bank financing in the amount of $600,000.00.
>
> Contract conditioned on Purchaser obtaining approval to assume franchises from automobile manufacturers."

The scheduled date of sale was April 20, 1987. The notice was received by the Division of Taxation, Audit Services Bureau, on April 9, 1987 and by the Central Office Audit Bureau, Sales Tax Section, on April 10, 1987.

On April 15, 1987, the Division of Taxation issued a Notice of Claim to Purchaser to petitioner at Route 58, Riverhead, New York 11901, the mailing address shown on the notification which had been mailed by petitioner's attorneys. The notice stated, in pertinent part, as follows:

> "You are hereby notified that, in spite of any provisions contained in the sales contract, except as indicated in condition number two listed below, no distribution of funds or property, to the extent of the amount of the State's claim, may be made before the following conditions have been met:

> 1 The State Tax Commission has determined the seller's liability, if any.
>
> 2 Payment of such liability has been made to the State (payment may be made from the funds being withheld in accordance with Section 1141[c] of the Tax Law).
>
> 3 This office has authorized you to release the funds or property."

On May 4, 1987, the Division of Taxation issued a Notice to Seller to Don Wald Motors, Inc., at the address, Route 58 and Ostrander Avenue, Riverhead, New York 11901. This notice requested the following:

(a) Copy of the sales contract
(b) Final sales tax return for the period March 1, 1987 to the date of sale.
(c) Sales tax return for the period ending February 28, 1987.
(d) Payment of bulk sales tax of $13,125.00 ($175,000.00 at 7.5%).
(e) Payment of the following assessments:
S0090784296, S8704200865, S8605271228.

The seller did not respond to this notice.

The seller had previously submitted a sales tax return for the period ending February 28, 1987 showing $13,584.10 in tax due, together with its check dated March 19, 1987 in the amount of $13,584.10. The check was returned unpaid due to insufficient funds.

On July 8, 1987, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner in the amount of $13,584.10 in tax, $7,859.77 in penalty and $825.04 in interest, for a total due of $22,268.91. The notice stated that the taxes had been determined to be due from the seller and represented petitioner's liability, as purchaser, in accordance with Tax Law § 1141(c). The breakdown showed no tax due for the period ending "11/30/86-287", but $6,093.84 in penalty and $324.87 in interest due. It also showed $13,584.10 in tax, $1,765.93 in penalty and $500.17 in interest due for the period ending "02/28/87-387".

On September 24, 1985, the seller had entered into a pledge agreement with The North Fork Bank and Trust Company, Mattituck, New York ("bank"), giving said bank a security interest in virtually all of the seller's assets. A Form UCC-1 financing statement was executed by

the bank and the seller and was filed with respect to said assets. At the time of the transaction between petitioner and the seller, the seller owed the bank in excess of $600,000.00.

Petitioner agreed to purchase the assets of the seller for $600,000.00. The seller and the bank agreed that the seller's assets would be transferred to petitioner for $600,000.00 and that the seller and its principal would remain liable for the balance over $600,000.00. Petitioner did not make a cash payment for the assets, but assumed the $600,000.00 obligation owed by the seller to the bank. No funds were paid to the seller and the seller and its principal executed a confession of judgment for the amount of seller's indebtedness exceeding $600,000.00.

Although petitioner's attorney did not believe that the transaction technically constituted a bulk sale within the meaning of the Uniform Commercial Code or the New York Tax Law, he treated it as such to give notice to creditors in order to dissuade them from attempting to block or delay the sale. In fact, when a number of the seller's creditors called in response to the notice, the transaction was explained to them and the sale was not tied up in litigation.

The Division of Taxation submitted affidavits and mailing documentation which showed that the Notice of Claim to Purchaser was mailed to petitioner on April 15, 1987. Petitioner has pointed out the inconsistencies between the statement in the affidavit of Susan Rohrwasser that she would deliver notices of claim to the Division of Taxation's mailroom, but would usually not wait for the sealing and stamping of the envelopes, and the statement on the mailing record that Ms. Rohrwasser had witnessed the sealing and stamping of the envelopes in which the notices of claim had been enclosed.

In addition to the facts found by the Administrative Law Judge, we find the following:

> The Division of Taxation also submitted an affidavit from Charles Brennan, the Division of Taxation mailroom clerk, who stated that he delivered these envelopes to the Post Office for mailing.

We modify the Administrative Law Judge's finding of fact "13" to read as follows:

The Division of Taxation has withdrawn its claim against petitioner for the penalty and all interest asserted against the seller.[1]

OPINION

In the determination below, the Administrative Law Judge held that the Division of Taxation (hereinafter the "Division") issued a Notice of Claim to Purchaser to petitioner within five business days of receiving notice of the purchase from petitioner, finding that petitioner had not met its burden of proof on this issue. Additionally, it was held that the transaction constituted a "bulk sale," the assumption of the seller's personal debt on a promissory note constituted "consideration," and the transaction was, therefore, subject to the Division's tax lien under Tax Law § 1141(c).

On exception, petitioner argues that the Division's failure to provide proof of compliance with regard to proper and timely service of the Notice of Claim to Purchaser relieves petitioner from any liability for taxes due from the seller. As to the second issue, petitioner argues that Tax Law § 1141(c) is designed to make the consideration derived by a seller subject to a lien so that the Division can enforce the lien by attaching the consideration. It argues that because the assumption of indebtedness is not consideration to the seller which can be subject to a lien, it was improper to classify this as "consideration" under the statute.

In response, the Division states that because petitioner did not meet its burden of proving that the Division failed to give petitioner timely notice, petitioner is not relieved from liability for sales taxes due from the seller. The Division also argues that case law has clearly established

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[1]Finding of fact "13" of the Administrative Law Judge read as follows:

> "The Division of Taxation has withdrawn its claim for the penalty and all interest above the minimum rate."*

We have modified this fact to comport with the Division's brief which stated, "[t]he Division is not seeking to hold petitioner, the bulk sale purchaser, liable for the penalty and interest asserted against the seller" (Division's Memorandum of Law dated May 7, 1990, p. 2).

*The following is a footnote contained in finding of fact "13": "Memorandum of Law for Division of Taxation, p. 2."

that the assumption of indebtedness constitutes "consideration" under Tax Law § 1141(c), and petitioner's attempt to distinguish the transaction at issue from this holding is without merit.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law § 1141(c) provides that whenever a person required to collect tax shall make a sale, transfer or assignment in bulk of any part or all of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall, at least ten days prior to taking possession of said assets or paying therefor, notify the Division of the proposed sale and provide certain information concerning the transaction. The regulations promulgated under this statute outline the responsibilities of both the purchaser and the Division in this process.

The regulation at 20 NYCRR 537.6(a) states that once the purchaser, transferee or assignee has given proper notice, the Division has five business days in which to mail a notice of possible claim to the purchaser, transferee or assignee.

The regulation at 20 NYCRR 537.6(b) states that if the Division fails to issue said notice within five business days, the purchaser is relieved from his obligation to withhold funds from the seller and is also relieved from liability for taxes due by the seller, except for sales tax due on the sale of the tangible personal property and for outstanding warrants and judgements.

Petitioner argues that the Division offered no evidence that a Notice of Claim to Purchaser was ever given to petitioner in a proper and timely manner as prescribed by law. It further argues that none of the documents submitted by the Division contain any allegations concerning the delivery of such notice to the purchaser or when the alleged delivery was made. However, we find that such allegations confuse the Division's obligation in this case. It is clear that the burden of establishing notice in accordance with the pertinent statutory requirements rests with the Division (see, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111). A presumption of receipt arises upon the establishment of actual mailing (Tax Law § 1147[a][1]; see also, Matter of Ruggerite, Inc. v. State Tax Commn., 97 AD2d 634, 468 NYS2d 945, affd 64

NY2d 688, 485 NYS2d 517). The Division submitted affidavits from Susan Rohrwasser, who stated that she personally delivered to the Division mailroom a Notice of Claim to Purchaser addressed to petitioner, and from Charles Brennan, who stated that he delivered such notice to the Post Office for mailing. These statements were further substantiated by copies of the pertinent mailing record, which was signed by both employees. In our opinion, this evidence is sufficient to prove that the Division properly mailed the notice to petitioner within the required five-day period.[2]

We will now address the issue of whether Tax Law § 1141(c) applies in the case where the sole consideration received by the seller takes the form of debt relief.

Tax Law § 1141(c) states in relevant part:

> "Whenever the purchaser [of business assets in bulk] . . . shall fail to give notice to the [Division of Taxation] . . . or whenever the [Division] shall inform the purchaser . . . that a possible claim for such tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser. . . is required to transfer over to the seller . . . shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller. . . to the state, and the purchaser. . . is forbidden to transfer to the seller. . . . any such sums of money, property or choses in action to the extent of the amount of the state's claim."

The term "bulk sale" is defined at 20 NYCRR 537.1(a)(1), which provides in relevant part:

> "[t]he 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 Tax Commission."

20 NYCRR 537.1(a)(4)(i) provides that the term "bulk sale" does not include:

> "sales, transfers or assignments of business assets in settlement or realization of a valid lien, mortgage or other security interest."

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[2]The inconsistency between Ms. Rohrwasser's affidavit and her signed statement on the mailing record regarding her failure to witness the sealing of the notice envelope does not compel an opposite result. The government's failure to comply precisely with each aspect of its normal mailing procedure is irrelevant, if the evidence adduced is sufficient to prove mailing (see, Keado v. United States, 853 F2d 1209, 88-2 USTC ¶ 9489).

Petitioner appears to argue that Tax Law § 1141(c) is intended to apply only to those transactions where assets are received by the seller in exchange for the business assets transferred to the purchaser. In this case, the seller received no assets in return for the sale of its business assets. Rather, the sole value received by the seller was relief from its obligation to the bank. Petitioner claims that because a lien may not attach to such a contractual benefit, it does not constitute "consideration" within the meaning of this Article.

This very issue was raised in Spandau v. United States (73 NY2d 832, 537 NYS2d 120). In Spandau, the New York Court of Appeals held that a transferee's assumption of a transferor's personal debt on a promissory note constituted "other consideration" within the meaning of Tax Law § 1141(c). In so holding, the Court stated:

> "[t]he [Division's] first priority lien over all statutorily designated kinds of consideration must be given effect under the statute lest the structuring of transactions and creative financing be facilely employed to frustrate the collection, after fair notice, of taxes due and owing" (Spandau v. United States, supra, 537 NYS2d 120, 122).

Petitioner seeks to distinguish this case from Spandau by noting that, unlike Spandau, the principal of the seller, Don Wald, was not relieved of all personal indebtedness according to the terms of the contract of sale. Thus, petitioner appears to argue that section 1141(c) contains an implicit condition whereby a purchaser must assume all of the seller's personal obligations before personal liability may be imposed upon the purchaser for the amount of the tax. We find this argument to be without merit. To acknowledge such a requirement under Tax Law § 1141(c) would require us to read into the statute something that is not there, and which the Legislature could have easily included if it so desired (Statutes § 73; Noel Assocs. v. Merrill, 184 Misc 646, 53 NYS2d 143). Thus, we reject the position advocated by petitioner, and hold that the transaction at issue constituted a bulk sale under Tax Law § 1141(c).

Petitioner also cites American Metal Finishers v. Palleschi (55 AD2d 499, 391 NYS2d 170) in support of its position. In American Metal, the Appellate Division, Second Department held that the transfer of business assets by a debtor to a designee of its secured creditor

constitutes a transfer "in settlement or realization of a lien or other security interest" pursuant to Uniform Commercial Code § 6-103. The transfer was, thus, excluded from the definition of "bulk sale" under that statutory scheme.

To interpret the exclusion from the bulk sales tax provision, set forth at 20 NYCRR 537.1(a)(4)(i), in a manner similar to the approach taken in American Metal would run in direct conflict with the holding in Spandau v. United States (supra). In Spandau, it was held that a transferee who assumed the transferor's personal debt on a promissory note was subject to tax under Tax Law § 1141(c). The same facts are present here. In the face of Spandau, a decision of our highest court which decided the identical issue, petitioner's argument that American Metal should govern in this case must fail.

Even if it were decided that the interpretation applied by American Metal to section 6-103 of the Uniform Commercial Code should apply here, it has been held that such an exclusion is applicable only where a default has occurred (Stone's Pharmacy v. Pharmacy Accounting Mgt., 812 F2d 1063, citing American Metal Finishers v. Palleschi, supra). Since we have no evidence of a default here, American Metal would not be controlling in any case. To apply American Metal without requiring evidence of a default would confer upon the parties the ability to shield the purchaser from tax liability simply by making the relief from an obligation serve as the consideration, and would drastically limit the application of the bulk sales provisions and the protection afforded to the State to ensure the collection of tax. Clearly, it was not the intention of the Legislature to allow such a "structuring of transactions and creative financing . . . facilely employed" to circumvent the requirements of section 1141(c) (Spandau v. United States, supra, 537 NYS2d 120, 122).

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of petitioner Peconic Bay Motors, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Peconic Bay Motors is denied; and

4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 8, 1987 is sustained except that penalty and interest asserted because they were due from the seller, Don Wald Motors, Inc., are cancelled.

DATED: Troy, New York
September 26, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner