

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NORBERT H. O'BRIEN	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 807505
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1987	:	
through July 26, 1988.	:	

Petitioner Norbert H. O'Brien, 4170 David Road, Williamsville, New York 14221 filed an exception to the determination of the Administrative Law Judge issued on July 3, 1991 with respect to his 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, 1987 through July 26, 1988. Petitioner appeared by Marcus, Knoer & Crawford, Esqs. (Robert E. Knoer, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq. and Peter J. Martinelli, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in reply. Petitioner's request for oral argument was denied.

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

ISSUE

Whether the Division of Taxation properly assessed petitioner, a bulk sale purchaser, for the unpaid sales tax due from the bulk sale seller where, except for a small amount of cash transferred at closing, the consideration paid consisted of payment (and discharge) of existing tax liens, judgments, property tax assessments and assumption or discharge of mortgages.

Amount Paid Down _____ 3,000.00

Village Tax 1988-89 \$665.80

\$1.82 per diem x 56 days = \$101.92

+ late fees 47.17 _____ 149.09

July Rent \$2,500.00 \$80.65 per diem x 5 days _____ 403.25

1987-88 School & County Taxes + late fees _____ 3,121.63

School Tax 1988-89 \$1,845.13 \$5.06 per diem x30 days__ 151.80

Back Water (included in 88-89 Village Tax) _____ 277.64

Village Water Bill to 07/26/88 _____ 499.85

Escrow for Heating Contractor's Judgment _____ 10,000.00

NORSTAR Bank Mortgage \$59,998.44 + interest _____ 60,100.67

NASH Mortgage _____ 53,000.00

Judgments (2) \$1,440.59 \$999.62 _____ 2,440.21

Closing Costs Assumed by Purchaser:

NYS Transfer Tax----- 236.00

Mortgage Discharge----- 8.00

Nash Affidavit----- 8.00

Norstar Legal Fees----- 35.00

TOTAL _____ 287.00

TOTAL-----\$133,431.11

State Tax Liens

	<u>Lien Amount</u>	<u>Settlement Amount</u>
#22104	\$1,617.95	\$1,804.84
#22431	5,957.49	6,170.02
#22430	1,585.59	1,608.85
TOTAL _____		\$9,583.71

FEDERAL TAX LIENS

	<u>Lien Amount</u>	<u>Settlement Amount</u>
#8928	5,491.43	\$ 5,491.43
#16853978	35,105.84	14,019.48
Interest		373.10
TOTAL _____		\$19,884.21

TOTAL TO DISCHARGE TAX LIENS-----\$29,476.92

TOTAL CREDIT TO

PURCHASER _____ \$162,908.03

TOTAL AMOUNT DUE SELLER-----\$165,447.14

TOTAL CREDIT TO PURCHASER-----\$162,908.03

BALANCE DUE ON CLOSING _____ \$
2,539.11"

The Closing Statement accurately reflects that total cash paid to Sellers John M. and Katherine A. Hope following the closing was \$2,539.11.

A Notification of Sale, Transfer, or Assignment in Bulk addressed to the Central Office Audit Bureau, Sales Tax Section was forwarded by regular mail with a post-metered date of July 29, 1988 and received by the Division of Taxation on August 2, 1988.

On August 5, 1988, pursuant to Tax Law § 1141(c), the Division of Taxation sent a Notice of Claim to petitioner as a "Bulk Sale Purchaser". The Notice of Claim informed petitioner of the outstanding liability for unpaid taxes due from the Seller.

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. S881031709C, dated 10/31/88) was issued to petitioner, as a "bulk sale purchaser", asserting sales tax due based upon the seller's unpaid sales tax. The taxes due from the seller resulted from returns filed without remittance for the periods ended 11/30/87, 2/29/88, 5/31/88, and 7/26/88 for a total tax due of \$15,888.18 plus \$2,800.00 in tax due on the sale of tangible personal property transferred in the bulk sale to petitioner.

Pursuant to a Conciliation Order issued on September 1, 1989, by the Bureau of Conciliation and Mediation Services, Notice No. S881031709C was recomputed and reduced to the amount of \$7,761.60 because payments had been made on behalf of the bulk sale seller. [The tax which remains at issue constitutes the seller's unpaid sales tax liability for the periods ended 5/31/88 and 7/26/88.]

Petitioner has previously paid all monies claimed to be due and owing by the Department of Taxation and Finance arising out of Notice No. S881031709C.

Petitioner now seeks reimbursement of the monies paid.

OPINION

The Administrative Law Judge held that petitioner was a bulk sale purchaser who had failed to give timely notice of the sale to the Division of Taxation (hereinafter the "Division"), and who had transferred money and other consideration to the sellers in violation of the provisions of Tax Law § 1141(c). The Administrative Law Judge found that petitioner paid "other consideration" to the sellers consisting of the payment of property taxes, the discharge of tax liens, and the discharge and assumption of mortgages. As a result, the Administrative Law

Judge found that petitioner was liable for the sellers' unpaid sales taxes to the extent assessed in the Notice of Determination issued to petitioner.

On exception, petitioner argues that his liability for payment of taxes owed by the sellers is limited to the amount that the Division could have collected directly from the consideration given to the sellers at the time of the sale. Since the sellers' real property transferred in the bulk sale was encumbered by liens, petitioner argues that the only money which would have been available to the Division for payment of the sellers' outstanding taxes was the cash paid to the sellers at closing. Petitioner argues that the "noncash" consideration paid by petitioner in the form of payment of judgments and liens, and the assumption and payment of mortgages would not have been available to the Division for payment of the sellers' sales tax liability since these claims were superior to the Division's claims. Petitioner asserts that "[t]he purpose of the instant statute was to insure that a party that owes sales tax to the State of New York would not be able to gain financially from the sale of their business until such time as the sales taxes were paid" (petitioner's brief, p. 6), and that the only "gain" achieved by the sellers was the amount paid at closing. Therefore, petitioner argues, petitioner's liability should be limited to that amount.

The Division asserts that petitioner, as a bulk sale purchaser who failed to follow the provisions of Tax Law § 1141(c), is liable for sales taxes owed by the sellers to the extent of the purchase price, or the fair market value of the business assets sold, transferred or assigned to petitioner, whichever is higher. The Division argues that petitioner's liability is not limited by the type of consideration given and, therefore, cannot be avoided by payment of other obligations of the sellers in lieu of direct payments of the purchase price to the sellers.

We uphold the determination of the Administrative Law Judge.

Section 1141(c) of the Tax Law provides, in pertinent part, as follows:

"Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof whether or not the seller,

transferrer or assignor, has represented to, or informed the purchaser, transferee or assignee that he owes any tax pursuant to this article, and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing.

"Whenever the purchaser, transferee or assignee shall fail to give notice to the tax commission as required by the preceding paragraph, or whenever the tax commission shall inform the purchaser, transferee or assignee 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, transferee or assignee is required to transfer over to the seller, transferrer or assignor shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller, transferrer or assignor to the state, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferrer or assignor any such sums of money, property or choses in action to the extent of the amount of the state's claim . . . For failure to comply with the provisions of this subdivision the purchaser, transferee or assignee, in addition to being subject to the liabilities and remedies imposed under the provisions of article six of the uniform commercial code, shall be personally liable for the payment to the state of any such taxes theretofore or thereafter determined to be due to the state from the seller, transferrer or assignor, except that the liability of the purchaser, transferee or assignee shall be limited to an amount not in excess of the purchase price or fair market value of the business assets sold, transferred or assigned to such purchaser, transferee, or assignee, whichever is higher, and such liability may be assessed and enforced in the same manner as the liability for tax under this article" (emphasis added).

In this case, petitioner was a bulk sale purchaser who admittedly did not timely file a notice of the bulk sale with the Division. As the court stated in Harcel Liqs. v. Evsam Parking, "[Tax Law § 1141] provides, in unequivocal terms, that a purchaser who fails to give notice of the proposed sale to the tax commission [now the Division of Taxation] becomes personally liable for the payment of the seller's unpaid sales and use taxes to the extent of the purchase price or the fair market value of the assets sold, whichever is higher" (Harcel Liqs. v. Evsam Parking, 48 NY2d 503, 423 NYS2d 873, 875). Petitioner attempts to limit a purchaser's personal liability by arguing that the Division's first priority right and lien under Tax Law § 1141(c) is secondary to any liens which may exist on real property which is the subject of a bulk sale, and that debts on real property paid by a purchaser are not "other consideration" because the Division could not collect its sales tax from the seller through the mechanism of a foreclosure sale of the seller's property without the payment of these liens. As the Administrative Law Judge correctly noted, the Division's first priority right and lien under Tax Law § 1141(c) is not a lien on the seller's real property but on the consideration paid by the

purchaser to the seller (Harcel Liqs. v. Evsam Parking, *supra*, 423 NYS2d 873, 875). Therefore, the extent to which the real property was encumbered by prior liens does not determine the amount of the Division's lien on the consideration given for the real property. Contrary to petitioner's assertions, there is nothing in the statute which limits the purchaser's liability to the amount the Division would have received had there been a foreclosure sale on the real property. Instead, the purchaser's liability is limited by statute only to the greater of the purchase price or fair market value of the assets sold (Tax Law § 1141[c]).

Petitioner argues further that the liability of a purchaser is limited to amounts actually transferred by the purchaser to the seller, and that the payment by petitioner of outstanding liens and judgments and the assumption or payment of mortgages on the sellers' property was not consideration transferred to the sellers. Petitioner cites the decision of the Appellate Division, Fourth Department in Spandau v. United States (138 AD2d 922, 526 NYS2d 265) in support of his position. In that case, the court determined that the buyer's payment of the seller's debts was not a transfer to the seller of "money, property or choses in action" within the meaning of Tax Law § 1141(c) (Spandau v. United States, *supra*, 526 NYS2d 265, 267). This decision was reversed by the Court of Appeals (Spandau v. United States, 73 NY2d 832, 537 NYS2d 120). However, petitioner argues that the Court of Appeals decision applies only to the type of debt assumed by the purchaser in that case, i.e., the assumption by the purchaser of the seller's personal debt on a promissory note. Petitioner asserts that "other consideration" includes the assumption of the seller's debts only when those debts are "personal" in nature, and not when the debts assumed are business related.²

We do not find the holding in Spandau limited to a situation where the debts paid by the purchaser on behalf of the seller can be labeled "personal" as opposed to being business related. In order for the provisions of Tax Law § 1141(c) to operate meaningfully as a mechanism for the Division to take action to collect a seller's outstanding sales tax debts prior to the transfer of

²While we do not agree with petitioner's argument for the reasons discussed below, we note that, in any case, petitioner has not proven that all the debts here were business debts. The only facts on the nature of the debts in the record are the brief description of each item in the closing statement.

the seller's business assets, the statute's assertion of personal liability on the purchaser for failure to comply with the notice provisions must encompass all consideration that the purchaser is required to transfer as part of the sale regardless of its form. This view is supported by the language used by the court in Spandau. While the particular consideration in Spandau was the assumption by the purchaser of the seller corporation's "personal debt on a promissory note" (Spandau v. United States, supra, 537 NYS2d 120, 121), the court, in holding that this "relief from obligation" constituted consideration under Tax Law § 1141(c), stated that "[t]he Tax Commission'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 facily employed to frustrate the collection, after fair notice, of taxes due and owing" (Spandau v. United States, supra, 537 NYS2d 120, 122; cf., Matter of Peconic Bay Motors, Tax Appeals Tribunal, September 26, 1991 [the petitioner's assumption of the seller's indebtedness to a bank held to be consideration to the seller within the meaning of Tax Law § 1141(c)]).

Here the purchase price of \$165,000.00 was transferred to the sellers by petitioner in various forms which included payment of various debts of the sellers, assumption and payment of mortgages, and cash. As a result, the sellers' consideration consisted of relief from these financial obligations in exchange for the assets of the business. To hold otherwise would narrow a purchaser's personal liability by the form in which a purchaser conveys the purchase price to the seller, and allow the State's right to collect taxes to be "extinguished by the simple expedient of a taxpayer transferring its assets" (Harcel Ligs. v. Evsam Parking, supra, 423 NYS2d 873, 875), and taking payment for the transfer in forms other than cash.

Petitioner is correct that this result makes the purchaser of business assets a source of money to pay the seller's taxes, but this was clearly the result intended by the Legislature when it imposed personal liability on the purchaser. A purchaser who wishes to avoid the imposition of personal liability on it for the seller's sales tax debts need only comply with the provisions of Tax Law § 1141(c).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Norbert H. O'Brien is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Norbert H. O'Brien is denied; and
4. The notice of determination issued to petitioner Norbert H. O'Brien, as modified by the conciliation order issued September 1, 1989, is upheld.

DATED: Troy, New York
March 19, 1992

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

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

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