

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>JOYCE GAUGHAN</b>	:	DECISION
	:	DTA No. 808196
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, 1984 through November 30, 1986.	:	

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Petitioner Joyce Gaughan, 14 Landfield Avenue, Monticello, New York 12701 filed an exception to the determination of the Administrative Law Judge issued on August 29, 1991 with respect to her 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, 1984 through November 30, 1986. Petitioner appeared by James J. DeLuca, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a brief in response to petitioner's exception. Petitioner's request for oral argument was denied.

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

***ISSUES***

I. Whether the sale of a building in conjunction with the sale of the assets of a defunct restaurant and tavern business constituted a "bulk sale," triggering the notice requirements of Tax Law § 1141(c).

II. Whether, if, in fact, taxes are due, the amount of penalty and interest assessed should accrue from the issuance date of the notice of determination until full payment.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for finding of fact "6" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

In March 1987, petitioner, Joyce Gaughan, entered into an agreement to purchase real and tangible personal property and other assets from Anthony Cellini. The real property consisted of a parcel of land upon which was situated a three-story building. On the first floor of that building was a tavern and restaurant formerly operated by Mr. Cellini, called Roark's Tavern.

The terms of the purchase agreement executed by petitioner and Mr. Cellini included the "Sale of Real Property" and the "Conveyance of Assets of Roark's Tavern". Those assets were enumerated in the purchase agreement and included: furniture, fixtures and equipment; existing inventories of food, liquor and supplies; the exclusive right to use the name Roark's Tavern and any and all variances of that name; and the right to use the phone number 794-9742. In addition, the seller agreed not to engage in the business of owning or operating a restaurant or bar within Sullivan County for a period of five years. The purchase price was \$185,000.00, of which \$184,000.00 was allocated to the real property. The actual transfer of assets took place on June 17, 1987. Petitioner never notified the Division of Taxation ("Division") of this sale.

The Division began an audit of Anthony Cellini d/b/a Roark's Tavern early in 1987. At the time of the audit, the Division was informed that Roark's Tavern was no longer operating, and a visit to the premises by an auditor confirmed this fact. Since the last sales tax return filed by Mr. Cellini was for the quarter ended November 30, 1986, the Division concluded that Roark's Tavern was not operating after that date. As a result of the audit, the Division determined additional tax due from Mr. Cellini in the amount of \$12,838.57 plus penalty and interest. A notice of determination was issued to Mr. Cellini. In February or March 1988, a similar notice of determination was issued to Roarks of Monticello, Inc., a corporation which was then thought to be the purchaser of Roark's Tavern. The audit report indicates that the

Division identified the purchaser by referencing the vendor registration number of the tavern's new operator, but this fact is not clearly established by the record. In December 1987, an auditor visited the premises of Roark's Tavern and found it being operated by petitioner and her son.

Following a conference with Mr. Cellini, the Division agreed to reduce the amount of tax due to \$8,331.13, plus penalty and interest.

In February 1989, a conciliation conference was held regarding the notice of determination issued to Roark's of Monticello, Inc. At that conference, the taxpayer established that the actual purchaser of the property owned by Mr. Cellini was Joyce Gaughan, the president of Roark's of Monticello, Inc.; therefore, the Division cancelled the notice issued to the corporation.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

The Division determined that it had not been notified by Ms. Gaughan of her purchase of Mr. Cellini's assets, i.e., no Bulk Sale forms were ever filed with the Albany Bulk Sales Tax Unit.<sup>1</sup>

The Division issued to petitioner, Joyce Gaughan, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated March 2, 1989, for the period March 1, 1984 through November 30, 1986, assessing sales tax of \$8,331.13 plus penalty in the amount of \$2,291.37 and interest of \$4,462.72 for a total amount due of \$15,085.22.

Following a conference, the Division issued to petitioner a Conciliation Order dated March 9, 1990, upholding the determination of tax due but adjusting the penalty and interest as follows: "Penalty and interest assessed under section 1141(c), i.e., the seller's penalty and interest, have been cancelled. Penalty and interest, however, apply to the unpaid tax deficiency from the date

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The Administrative Law Judge's finding of fact "6" read as follows:

"The Division reviewed its records and determined that Ms. Gaughan had not notified the Division of her purchase of the assets of Mr. Cellini."

This fact was modified to reflect that the record does not disclose how the Division determined that Ms. Gaughan had not notified the Division of the purchase.

of the determination on March 2, 1989 until full payment.

### ***OPINION***

The Administrative Law Judge determined that Mr. Cellini had sold the business assets of Roark's Tavern to petitioner. Thus, the Administrative Law Judge concluded that the transaction involving these assets was a bulk sale which triggered the notification requirements of Tax Law § 1141(c).

Accordingly, the Administrative Law Judge determined that petitioner's noncompliance with the notice provisions of section 1141(c) of the Tax Law rendered her personally liable for the taxes due New York State from Mr. Cellini. However, the Administrative Law Judge upheld the adjustment of penalty and interest as per the Conciliation Order, namely, that the penalty and interest assessed up to the date of the issuance of the notice to petitioner be cancelled, but that penalty and interest on the unpaid deficiency accrue from the issuance date of the notice of determination (March 2, 1989) until the deficiency is paid in full.

On exception, petitioner maintains that the transaction between Mr. Cellini and herself was not subject to the notice provisions of Tax Law § 1141(c) because that section contemplates the transfer of assets of an on-going operation, whereas the assets transferred here were those from a defunct business. Petitioner asserts that the Administrative Law Judge had no legal basis for her decision to treat the transfer of assets from a defunct business as if such a transfer involved the "business assets" covered by the statute.

In addition, petitioner argues that if, in fact, tax is due, the penalties and interest imposed should apply only up to the issuance date of the notice of determination, rather than from that point onwards, as petitioner "should not be penalized as a result of the time consumed in the appeal process that [she] is entitled to exercise" (Petitioner's exception, p. 1).

In response, the Division asks that the Administrative Law Judge's determination be upheld on the issue of bulk sales, maintaining that although Mr. Cellini's business was no longer in operation at the time of the transfer of the assets to petitioner, the assets were properly held to be "business assets" within the meaning and intent of Tax Law § 1141(c).

As for the imposition of penalty and interest upon petitioner, the Division offers to reduce the amount determined due by the Administrative Law Judge. While the Division agrees with the Administrative Law Judge's determination that the penalty and interest should run from petitioner's receipt of the notice, the Division concedes that its policy is to consider "receipt" as occurring five days after the issuance date of the notice. Therefore, the Division advocates that the interest and penalty run from March 7, 1989 instead of the issuance date of March 2, 1989, as the Administrative Law Judge had held.

We affirm the determination of the Administrative Law Judge on the issue of bulk assets, and modify the determination regarding the accrual date for penalties and interest.

We turn first to the bulk sale issue. Section 1141(c) of the Tax Law provides, in pertinent part:

"[w]henever 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 . . . notify the tax commission by registered mail of the proposed sale . . . ."

If the purchaser does not comply with this notice requirement, the purchaser will be held "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 [subject to certain price limitations] . . . " (Tax Law § 1141[c]).

We note that petitioner does not take exception to the Administrative Law Judge's conclusion that had the sale occurred while Mr. Cellini's business was in operation, the sale would be one involving "business assets." Thus, petitioner has conceded that the inherent nature of the assets themselves is such that they are at least susceptible to coverage by the statute.

However, petitioner does take exception to the Administrative Law Judge's conclusion that "[t]o accept [petitioner's] argument [that since the business was no longer in operation when the assets were transferred, the assets were not 'business assets' and were, therefore, not covered by the statute] would defeat the purpose of the legislation" (Determination, p. 5). Petitioner claims

that the Administrative Law Judge had no legal basis for this conclusion. We disagree.

The purpose of the legislation (Tax Law § 1141[c]) was "to ensure that the State's interest in a taxpayer's unsatisfied sales tax liability would not be extinguished or impaired when the taxpayer transferred its business assets in bulk" (Matter of Velez v. Division of Taxation, 152 AD2d 87, 547 NYS2d 444, 446, citing Harcel Ligs. v. Evsam Parking, 48 NY2d 503, 423 NYS2d 873, 875).

The core of petitioner's argument is that the Legislature intended that the State's interest against the purchaser of such assets depends on whether the business of the seller was operational when the assets were sold. We find no basis for this result in the language of the statute, nor has petitioner pointed us to any other support for her interpretation. Section 1141(c) is clear that its application is triggered by the sale of business assets "otherwise than in the ordinary course of business." In short, the critical question is whether the sale was other than in the ordinary course of business, not whether the seller's business was operational. This is consistent with the examples in the Commissioner's regulations which indicate that sale of assets as part of a liquidation of the seller's business is considered to be within the purview of section 1141(c) (20 NYCRR 537.1[2], examples 16 and 17; see also, Matter of Motion Picture Enters., TSB-H-82[136]S [sale of business assets after the seller ceased operations was a sale "otherwise than in the ordinary course of business"]; Matter of Neptune Corp. (Purchaser), TSB-H-82[137]S [sale of a business asset approximately two months before cessation of business determined to be a sale "otherwise than in the ordinary course of business"]]). Since the instant sale of assets was not in the ordinary course of the seller's business, it was a bulk sale under section 1141(c) of the Tax Law.

For these reasons, we reject petitioner's contention that the Administrative Law Judge's interpretation of section 1141(c) of the Tax Law had no legal basis.

We turn next to the issue of when penalty and interest began to accrue against petitioner. We reject, for two reasons, petitioner's request that she be held liable for penalty and interest only up to the issuance date of the notice of determination.

First, we cannot properly hold petitioner liable for the penalties and interest which accrued against Mr. Cellini prior to the time that petitioner was notified of her derivative obligation under the statute (see, Matter of Velez v. Division of Taxation, supra, 547 NYS2d 444, 447 [where the Third Department determined that "the Legislature did not intend that a bulk sale purchaser be liable for the penalties and interest assessed against the seller" pursuant to Tax Law § 1141(c)]). Therefore, any penalty and interest imposed against petitioner cannot have accrued prior to the date the notice was issued to petitioner.

Secondly, while petitioner argues that to hold her liable for penalty and interest from the date of the notice would be to penalize her for the time expended in the appeals process, we remind petitioner that at the bottom of the notice she received is a statement informing her that her "prompt payment" of the sum assessed "will avoid additional interest and/or penalty" from accruing. Thus, petitioner had the option and opportunity to pay the tax when she filed her petition, or at any time thereafter, which would have prevented the accrual of additional penalty and interest (Exhibit "E").

In light of these facts, we agree with the Administrative Law Judge that the penalty and interest due began to accrue from the point at which petitioner received the notice of determination. However, according to the Division's concession in its brief on appeal, it is the policy of the Division to consider the date of receipt of a notice to be the date five days after the date the notice is issued, rather than the issuance date itself (Division's brief, p. 8, citing Matter of Harron's Elec. Serv., Tax Appeals Tribunal, February 19, 1988). In accordance with the Division's concession, we deem the accrual date of the penalty and interest imposed against petitioner to be March 7, 1989.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Joyce Gaughan is denied;
2. The determination of the Administrative Law Judge is affirmed except that the amount of penalty and interest due has been modified as indicated in "3" below;

3. The petition of Joyce Gaughan is granted to the extent that penalty and interest accrue from March 7, 1989, but is otherwise denied; and

4. The Division of Taxation is ordered to recalculate the amount of penalty and interest due in accordance with "3" above, but the notice of determination dated March 2, 1989 is otherwise sustained.

DATED: Troy, New York  
May 14, 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