

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BMW PIZZA, INC.	:	DECISION
D/B/A DOMINO'S PIZZA	:	DTA No. 809687
	:	
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, 1989	:	
through January 1, 1991.	:	

Petitioner BMW Pizza, Inc. d/b/a Domino's Pizza, 56 East 87th Street, New York, New York 10128, filed an exception to the determination of the Administrative Law Judge issued on June 22, 1995. Petitioner appeared by Steven M. Coren, P.C. (Steven M. Coren, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kathleen D. Church, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a brief in opposition. No reply brief was filed by petitioner, which was due on November 28, 1995 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and DeWitt concur.

ISSUES

I. Whether petitioner, the purchaser in a bulk sales transaction, is liable for sales tax due from the seller, Whaley Enterprises, Inc., in accordance with Tax Law § 1141(c).

II. Whether 20 NYCRR former 537.2(c)(6) is within the authority of the Tax Law and consistent with section 1141(c).

III. Whether the Division of Taxation may hold petitioner responsible for penalties and interest.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The parties in this matter stipulated to the following facts.

On December 15, 1990, petitioner, BMW Pizza, Inc. ("BMW"), mailed a Notification of Sale, Transfer or Assignment in Bulk (AU-196.10) to the Division of Taxation ("Division") regarding a certain pending bulk sale of assets (i.e., BMW's intended purchase of all of the assets of a Domino's Pizza franchise) located at 200 East 89th Street, New York, New York from Whaley Enterprises, Inc. ("Whaley").

The Division received the notification from BMW on December 17, 1990.

On December 19, 1990, the Division issued a Notice of Claim to Purchaser, addressed to BMW, and a Notice to Escrow Agent, addressed to Howard S. Eilen, Esq.

On December 31, 1990, the Division issued a Notice to the Seller, addressed to Whaley. On January 29, 1991, the Division wrote to Whaley asking for the submission of certain documents for audit.

The bulk sale of assets took place on January 1, 1991.

The Division mailed two notices of determination to BMW on March 22, 1991. Notice of Determination #S910322712C demanded tax in the amount of \$1,000.00 and Notice of Determination #S910322713C demanded tax in the amount of \$66,886.23.

BMW timely filed an administrative protest and request for conciliation conference on June 24, 1991.

After a conciliation conference, a Conciliation Order was issued on August 21, 1992 which cancelled Notice #S910322712C and reduced the tax asserted on Notice #S910322713C to \$17,077.13. Such amount is the amount shown due on the quarterly return filed late by the

seller, without remittance, for the quarter ending August 31, 1990. A copy of the return is included with documents submitted. The letters NR in handwriting in the upper right hand corner of the return indicate that no remittance was received. There is no stipulation as to the correctness of the figures shown on the return.

BMW filed a petition for hearing with the Division of Tax Appeals on December 7, 1992.

The Division served its answer to the petition on February 9, 1993.

Tax Law § 1141(c) provides, in relevant part:

"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 Within ninety days of receipt of the notice of the sale, transfer or assignment from the purchaser, transferee or assignee, the tax commission shall give notice to the purchaser, transferee or assignee and to the seller, transferor or assignor of the total amount of any tax or taxes which the state claims to be due"

Regulation 20 NYCRR former 537.2(c)(6) provides:

"Every timely notice received more than 10 days prior to the date of taking possession of, or payment for, the business assets shall be deemed to have been received not more than 10 days prior to the date of taking possession of, or payment for the business assets, whichever comes first, regardless of the date when the notice is actually received."

The regulation was promulgated strictly in accordance with statutory procedure. When it was proposed, copies were furnished to the Governor, the Senate, the Assembly, the Administrative Regulation Review Commission and the Office of Business Permits and it was published in the New York State Register of August 4, 1982. The regulation was promulgated on December 16, 1982 filed with the Secretary of State on December 27, 1982 effective December 27, 1982 and published in the New York State Register of January 12, 1983.

The Notice of Claim to Purchaser has the following paragraph:

"Please note that failure to comply with this notice subjects you to personal liability for any sales tax deficiency determined to be due from the seller. The Tax Department has 90 days from the date of receive [sic] of the bulk sale notification to determine the seller's sales tax liability, if any. Every timely notice received more than 10 days

prior to the date of taking possession of or payment for the business assets, shall be considered to have been received not more than 10 days prior to the date of taking possession of, or payment on the business assets, whichever comes first, regardless of the date when the notice is actually received. Should a sales tax liability be established to be due from the seller within this time period, an assessment would be issued to the seller and to you, as purchaser. Failure to pay the liability could subject the seller and the purchaser to the issuance of a warrant and a levy against the business assets to secure payment of the liability."

Petitioner commenced a declaratory judgment action, in Supreme Court, New York County, on the same facts as stated above, seeking to declare the Notice of Determination unenforceable, and to hold the regulation in conflict with the Tax Law. Plaintiff's motion for summary judgment was dismissed by the decision and order of Justice William J. Davis on March 21, 1994.

OPINION

In the determination below the Administrative Law Judge reviewed Tax Law § 1141(c) along with 20 NYCRR former 537.2(c)(6) and its accompanying Example 8. The Administrative Law Judge concluded that the provision of 20 NYCRR former 537.2(c)(6) which deems every timely notice of bulk sale received more than 10 days prior to the bulk sale to have been received no more than 10 days prior to the sale was consistent with Tax Law § 1141(c).

In arriving at this conclusion, the Administrative Law Judge visited this Tribunal's decision in Matter of Great South Bay Delicatessen (Tax Appeals Tribunal, July 5, 1990) pointing out that since the Tribunal decision was in favor of the taxpayer, the validity of 20 NYCRR 537.2(c)(6) was not addressed and "it is necessary to determine whether this regulation contravenes Tax Law § 1141(c)" (Determination, conclusion of law "E").

The Administrative Law Judge discussed case law relative to the construction given statutes and regulations by an agency responsible for their administration, holding that if said construction of a regulation in question is not unreasonable or inconsistent with the governing statute it should be upheld.

The Administrative Law Judge then held that: "this statutory requirement must be read in context"; "[a] literal reading of the 'within ninety days of receipt' requirement out of this context, in certain situations, would lead to the inability of the Division to determine 'the total amount of any tax or taxes which the state claims to be due from the seller"; and "[s]uch a result would be contrary to the requirement in Tax Law § 1141(c) that 'the total amount of any tax' claimed due from the seller be assessed within the 90-day period of limitations" (Determination, conclusion of law "F").

The Administrative Law Judge, citing Matter of Great South Bay Delicatessen (*supra*), referenced this Tribunal's holding that the purpose of Tax Law § 1141(c) is twofold, namely providing the Division with adequate time to determine whether the State is due any taxes from the seller of the business and to preserve the Division's ability to collect any liability of the seller out of the consideration being paid for the assets of the business.

The Administrative Law Judge further held that:

"[i]n sum, 20 NYCRR former 537.2(c)(6) is not unreasonable or inconsistent with Tax Law § 1141(c), the governing statute. Rather, the triggering event for the commencement of the 90-day period in this regulation, 'ten days prior to the date of taking possession of, or payment for, the business assets', is a reasonable interpretation that is consistent with the legislative intent concerning Tax Law § 1141(c) -- to provide the Division with adequate time to determine the seller's tax liability and to preserve the Division's ability to collect this liability from the consideration being paid for the assets of the seller's business without unduly delaying business transactions" (Determination, conclusion of law "F").

The Administrative Law Judge also held that, pursuant to Matter of Velez v. Division of Taxation (152 AD2d 87, 547 NYS2d 444), "penalties and interest must be computed from the date of the issuance of the notice of determination (March 22, 1991) to petitioner" (Determination, conclusion of law "G").

On exception, petitioner argues that the Administrative Law Judge: (1) was wrong in sustaining the modified (by Conciliation Order) Notice of Determination and Demand for Payment of Sales and Use Taxes Due; (2) improperly interpreted Tax Law § 1141(c); (3) erred by concluding that 20 NYCRR former 537.2(c)(6) is not unreasonable or inconsistent with Tax

Law § 1141(c); and (4) misapplied this Tribunal's decision in Matter of Great South Bay Delicatessen (supra).

Petitioner argues, with reference to Tax Law § 1141(c), that:

"[t]he Statute is unequivocal that the failure of the Division to give notice of tax due to a purchaser within ninety (90) days after its receipt of the Notice of Bulk Sale, 'will release the purchaser' from liability for the tax" (Petitioner's brief, p. 5).

Petitioner further argues that the Division's regulation, 20 NYCRR former 537.2(c)(6): "ignores the plain meaning of the phrase 'within ninety days'"; "materially altered the notice requirements of Tax Law § 1141(c)"; and "unilaterally modifies the Legislature's enactment by changing the essential nature of notices given more than ten (10) days prior to proposed sales" (Petitioner's brief, pp. 7-8).

The Division, in reply, argues: (1) petitioner's exception and subsequent brief make the same incorrect arguments made below; (2) the Administrative Law Judge's determination correctly decided all issues and should be affirmed in its entirety; and (3) the Notice of Exception should be dismissed.

We affirm the determination of the Administrative Law Judge.

In the matter at hand, the thrust of petitioner's argument is that 20 NYCRR former 537.2(c)(6) unilaterally modifies the Legislature's enactment by changing the essential nature of a notice given more than 10 days prior to a proposed sale, thus making said regulation inconsistent with Tax Law § 1141(c).

We disagree.

In Matter of Great South Bay Delicatessen (supra), we stated that:

"[t]he purpose of section 1141(c) is twofold: (1) to provide the Division of Taxation with adequate time, prior to the consummation of the sale, to determine whether there are any taxes due the State from the seller of the business and (2) to preserve the Division's ability to collect the seller's liability from the consideration being paid for the assets of the business. The purpose is accomplished by requiring the purchaser to notify the Division of the proposed sale and by requiring the Division to notify the purchaser and the seller of the amount of any outstanding liabilities. This notice secures the Division's first priority right and lien against the consideration for the business" (emphasis added).

We agree with the Administrative Law Judge that 20 NYCRR former 537.2(c)(6) is a correct interpretation consistent with the intent of the Legislature in adopting Tax Law § 1141(c), as said regulation accomplishes the twofold purpose outlined above and, further, as the Administrative Law Judge pointed out, does so without unduly delaying business transactions.

As stated above, we affirm the determination of the Administrative Law Judge. Petitioner has not raised any issues on exception that were not raised before the Administrative Law Judge. The Administrative Law Judge correctly analyzed and weighed all the evidence presented in this case and correctly decided the relevant issues. We uphold the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of BMW Pizza, Inc. d/b/a Domino's Pizza is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of BMW Pizza, Inc. d/b/a Domino's Pizza is denied; and
4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 22, 1991, as modified by the Conciliation Order, is sustained.

DATED: Troy, New York
April 25, 1996

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner