

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>CLIFTON LIQUOR CORP.</b>	:	DECISION
	:	DTA NO. 821499
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, 1999 through February 28, 2001.	:	

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Petitioner, Clifton Liquor Corp., filed an exception to the determination of the Administrative Law Judge dated July 10, 2008. Petitioner appeared by Leonard L. Fein, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition and petitioner filed a letter 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 petitioner was a purchaser in a bulk sale transaction of a Brooklyn liquor store so that it became liable under Tax Law § 1141(c) for sales tax determined due from the seller, 1029 Bedford Liquor Corp.

***FINDINGS OF FACT***

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

In the spring of 2001, 1029 Bedford Liquor Corp., which operated the Rand Liquor Store, located at 1029 Bedford Avenue in the Bedford-Stuyvesant section of Brooklyn, filed with the New York State Liquor Authority (Liquor Authority) an application for a liquidator's permit. A licensee, under the Alcoholic Beverage Control Law, "who is selling or liquidating their business and who proposes to dispose of the stock of alcoholic beverages in connection with such sale," is required to obtain a liquidator's permit from the Liquor Authority. The application includes signatures of individuals on behalf of the seller, 1029 Bedford Liquor Corp., and on behalf of the buyer, petitioner, Clifton Liquor Corp. The individual who signed on behalf of petitioner was Jose Cepeda. It is not as easily determined who signed on behalf of 1029 Bedford Liquor Corp., but after a close review of the handwriting on the application, it is reasonable to find that an individual named Rafael Tavaréz<sup>1</sup> signed the application on behalf of the seller, 1029 Bedford Liquor Corp.

A liquor store operated at this Brooklyn location at least from the year 1994, when an investigator for the Division of Taxation (Division) first patronized the business as a private individual. Further, during a visit to the premises in 2005, the investigator was informed, when she made inquiries at neighboring businesses, that the liquor store had "never been closed to either undergo renovation or closed pending some new business to come there." The Division's tax auditor described the premises of Rand Liquor Store, based upon his personal visit, as follows:

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<sup>1</sup> The surname Tavaréz also appears in the evidentiary record as part of the landlord's name, i.e., Tavaréz Enterprises, Inc., which rented the premises where Rand Liquor Store was located to petitioner. In addition, a signature by an individual named Pedro Tavaréz on behalf of Tavaréz Enterprise, Inc., appears on a "To Whom It May Concern" letter introduced by petitioner in support of its claim that it moved into "an empty premises" when it started up its liquor store business.

A corner liquor store, roughly 20 feet by 80, 90 feet back. When you walk in, it's surrounded by bulletproof glass. When you walk down the middle, you can't actually touch any liquor. You walk in, the cash register is all behind the bulletproof glass, you just walk down the middle.

In order to confirm that a transfer of assets from 1029 Bedford Liquor Corp. to petitioner took place, a tax technician on behalf of the Division phoned the Liquor Authority and was informed that a note in the Liquor Authority's file indicated that there was a transfer of the liquor inventory to petitioner and that it "appeared to be paying for the inventory over a year" at the rate of \$1,000.00 per week.

The Division, based upon the information obtained from the Liquor Authority, prepared a "dummy" form AU-196.10, Notification of Sale, Transfer, or Assignment in Bulk, dated June 28, 2004 by the Division's tax technician, which noted the sale of a retail liquor store by 1029 Bedford Liquor Corp. to Clifton Liquor Corp. with a "last day of business" shown of November 1, 2001. The Division then estimated the fair market value of the retail liquor store business, which it treated as having been sold to petitioner. By utilizing Robert Morris studies and the sales tax filing history of 1029 Bedford Liquor Corp., the Division calculated a fair market value for the business of \$237,864.75 as follows. The Division multiplied the "smallest reported gross sales" for a sales tax quarter of 1029 Bedford Liquor Corp. of \$190,291.80<sup>2</sup> by four to calculate annual gross sales of \$761,167.20. The Division then used "a sales to asset ratio of 3.2" based upon the Robert Morris studies for liquor stores to calculate an estimated selling price or fair market value for the retail liquor store's "total business assets" sold or transferred to petitioner of \$237,864.75.

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<sup>2</sup> In fact, the smallest quarterly amount shown for gross sales was \$56,214.00 for the period ending 8/31/01, which was an abbreviated final sales tax quarter for 1029 Bedford Liquor Corp. However, for the nine other sales tax quarters from March 1, 1999 to May 31, 2001 shown on the "schedule of returns filed" by 1029 Bedford Liquor Corp., gross quarterly sales ranged from \$190,172.00 to \$222,657.00.

Petitioner did not respond with any evidence of start-up costs when requested by the Division's tax technician, who maintained that it is easy to verify if a business started from scratch by a review of invoices for inventory, a new sign, and other types of start-up expenses. In this case, petitioner provided to the Division for review only a single invoice for some minor maintenance work and, at the conciliation conference on July 20, 2006, a copy of an invoice for a new cash register, which the Division contends appears to have been doctored since the vendor was not in existence as of the date of the invoice. The invoice for a new cash register was dated May 25, 2001, while the tax technician's "business profile inquiry," run on the Division's computer system, revealed a "create date" for the vendor of September 27, 2001. The Division also viewed as suspicious the information concerning telephone numbers entered on the application for a liquidator's permit filed by 1029 Bedford Liquor Corp. and petitioner. The telephone number noted for 1029 Bedford Liquor Corp. was 718-788-3399 while petitioner's telephone number was shown as 718-783-3399, with the one varying digit. The tax technician's "business profile inquiry" for 1029 Bedford Liquor Corp. disclosed a telephone number of 718-783-3399, which is the same number as shown for petitioner, suggesting that petitioner as purchaser obtained the seller's telephone number in a bulk sale transaction. The Division seems to be suggesting that the varying telephone numbers in the permit application were not the result of a typographical error but an attempt to conceal that petitioner, as purchaser, had the same telephone number as 1029 Bedford Liquor Corp., the seller.

The Division also obtained information about petitioner, as the result of a visit to the premises of the liquor store by its investigator on May 8, 2002, when she spoke with Jose Cepeda. In her contemporaneous e-mail to various Division employees, the investigator noted

that, “Mr. Cepeda stated he purchased the business from the previous owners in June 2001,” and that his then attorney assisted him with “the Bulk Sale.”

In its sales tax audit of 1029 Bedford Liquor Corp., the Division determined that sales tax was due and owing in an amount substantially greater than \$237,864.75, its estimate of the “total business assets” acquired by petitioner in a bulk sale as shown above. The Division issued a Statement of Proposed Audit Change to 1029 Bedford Liquor Corp., dated March 1, 2004, asserting a current balance due of \$1,020,377.72, which includes sales tax due of \$400,486.59 plus penalty of \$366,825.04 and interest of \$253,066.09 for the period March 1, 1999 through February 28, 2001. Two months later, the Division issued a Statement of Proposed Audit Change dated May 12, 2004 for the later period of March 31, 2001 through August 31, 2001 to 1029 Bedford Liquor Corp., asserting a current balance due of \$110,440.56, which includes sales tax due of \$62,356.36 plus penalty of \$24,942.26 and interest of \$23,141.94. Consequently, the Division asserted sales tax due against 1029 Bedford Liquor Corp. after audit of \$462,842.95, an amount substantially greater than the sales tax due of \$237,864.75, which it has asserted against petitioner as a bulk sale purchaser. Accordingly, the Division issued a Notice of Determination dated December 13, 2004 against petitioner as a bulk sale purchaser asserting sales tax due of \$237,864.75, with no interest or penalty added.

The sales tax audit of 1029 Bedford Liquor Corp. was a difficult task for the Division’s auditors, who were not provided with any cooperation and had difficulty even finding out who owned the corporation. According to the audit report, “The company refused to provide responsible person information.” Since no sales records were provided in response to the Division’s written request for records, the auditors obtained sales records from third-party vendors who had supplied liquor to the Brooklyn store. A schedule of “third party

confirmations” of liquor purchases made by 1029 Bedford Liquor Corp., obtained from four different vendors, Paramount, Peerless, Premier and Charmer, shows total purchases of \$5,890,343.00 for the period running from March 1, 1999 through August 31, 2001. Since no sales records were provided by 1029 Bedford Liquor Corp., the Division used a markup percentage of 27.55, based on annual statement studies for 1999-2000 of “RMA, The Association of lending and credit risk professionals.” Accordingly, the auditor calculated estimated sales of \$7,513,132.50 by applying the 27.55 percent markup to total purchases of \$5,890,343.00. After subtracting reported sales of \$1,902,918.00, the auditor computed unreported sales of \$5,610,214.50. Applying the applicable tax rate of 8.25 percent, the auditor calculated additional tax due of \$462,842.70, which provided the basis for its issuance of the statements of proposed audit change noted above.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge discussed the imposition of sales tax on a bulk sale transaction, as well as the definition of a bulk sale as set forth in the regulations. The Administrative Law Judge noted that the Division introduced evidence obtained from the State Liquor Authority that supported the conclusion that petitioner was not merely the *transferee* of the inventory of Rand Liquor Store, which would have been sufficient in itself to find a bulk sale but, in fact, petitioner was the *purchaser* of such inventory by the payment at the rate of \$1,000.00 per week for one year.

The Administrative Law Judge reasoned that since the Division had a reasonable basis upon which to conclude that a bulk sale occurred, the burden of proof then shifted to petitioner to demonstrate that the assessment was incorrect. The Administrative Law Judge concluded that petitioner simply did not bear its burden of proof. Additionally, the Administrative Law Judge

noted that the absence of testimony from Jose Cepeda was a major flaw in petitioner's case and the Administrative Law Judge drew a negative inference from his failure to testify. Further, the Administrative Law Judge emphasized that petitioner failed to offer any evidence of start-up costs other than some questionable documents for which no foundation was provided through the testimony of a knowledgeable witness.

Next, the Administrative Law Judge determined that Clifton Liquor Corp., as a bulk sale purchaser, was properly held to be secondarily responsible for the seller's (i.e., 1029 Bedford Liquor Corp.) unpaid sales tax, since it failed to file a proper and timely notice of bulk sale (*see, Matter of North Shore Cadillac-Oldsmobile, Inc.*, 13 AD3d 994 [2004], *lv denied* 5 NY3d 704 [2005]). The Administrative Law Judge noted that the Division calculated a reasonable estimate of sales tax due from the bulk sale seller, 1029 Bedford Liquor Corp., in light of its failure to cooperate and provide sales records as requested. Nonetheless, the Administrative Law Judge stated that petitioner may be held liable only for *tax* due from the seller and not penalty and interest that might have been asserted due against the seller. Therefore, the Administrative Law Judge concluded that the estimate of "the selling price of business assets" from 1029 Bedford Liquor Corp. to petitioner, as detailed in the findings of fact above, was reasonable.

### ***ARGUMENTS ON EXCEPTION***

On exception, petitioner continues to maintain that a bulk sale did not occur. Petitioner alleges that the Division never established that any payment was made to purchase a business. Moreover, petitioner asserts that the Administrative Law Judge ignored the evidence from third parties, which demonstrated that improvements were made to an empty store and the schedule of purchases made by petitioner, which showed that substantial purchases were made to stock a new store.

Petitioner, once again, argues that the Division's witness was not credible or reliable. Petitioner states that it has proven beyond a doubt that it took over an empty store. Therefore, it asks that the determination be overturned in its entirety.

In opposition, the Division emphasizes that petitioner has raised the same arguments as presented to the Administrative Law Judge below. The Division states that petitioner has failed to prove that a bulk sale never took place and, further, that petitioner is liable for the amount of tax owed by the seller, 1029 Bedford Liquor Corp. The Division respectfully requests that the determination be sustained for the reasons stated therein.

Petitioner argues in reply that, "It was my opinion that no new points were supposed to be raised in the Exception, rather the appeal is based on errors made by the Administrative Law Judge" (Petitioner's reply letter, p. 1). The remainder of petitioner's reply is comprised of belligerent statements and merely address reasons for making certain arguments while not addressing other issues.

### ***OPINION***

Petitioner filed an exception stating that no bulk sale took place. Petitioner did not reference any exhibit, any statute or any case law that would support its argument in any regard. Therefore, we find that the Administrative Law Judge completely and adequately addressed each issue before him and we affirm his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Clifton Liquor Corp. is denied;
2. The determination of the Administrative Law Judge is sustained;



3. The petition of Clifton Liquor Corp. is denied; and
4. The Notice of Determination dated December 13, 2004 is sustained.

DATED: Troy, New York  
June 18, 2009

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
President

/s/ Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner