

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
LLARGO OF LOCKPORT, INC. : DECISION
 : DTA NO. 821974
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 December 1, 2002 through August 31, 2006. :

Petitioner, Llargo of Lockport, Inc., and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on July 9, 2009. Petitioner appeared by Duke, Holzman, Yaeger and Photiadis, LLP (Gary M. Kanaley, Esq.). The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioner filed a brief in support of its exception and a brief in opposition to the Division of Taxation's (Division's) exception. The Division filed a brief in support of its exception and a brief in opposition to petitioner's exception. Petitioner and the Division each filed a reply brief. Oral argument, at the request of both parties, was heard on February 24, 2010 in Troy, New York.

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

ISSUE

Whether petitioner's use of property, including tables, chairs, bar stools, and tableware, left behind on the premises of its restaurant, as well as its conduct of business under the same restaurant name as its predecessor, with the same menu and cooking staff, constituted the transfer

in bulk of business assets under Tax Law § 1141(c) so that petitioner, as the transferee, became liable for sales tax determined due from the predecessor restaurant.

FINDINGS OF FACT

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

Michael J. Long, petitioner's principal, with his wife, operate a fine dining restaurant, known as Garlock's Restaurant, in historic Lockport in Niagara County. Garlock's Restaurant was started in Lockport in 1946 by Harold Garlock, who moved the restaurant to its current location, close to the old Erie Canal, in 1968 at the street location of 35 South Transit Street. Since taking over the restaurant operation in the summer of 2006, Mr. Long and his wife have been working 60-70 hour weeks trying to establish petitioner as a financially successful restaurant operation. Although there was a change in restaurant ownership and management in 2006, the record does not disclose any changes in menu, decor, or in the tradition of fine dining at that time. Open seven days a week for dinner only, as it was in the past, a review of the most recent menu, included in the administrative record, shows "roast prime ribs of beef, au jus (28 oz.)" as the most expensive entree at \$28.95 and "deep fried breaded shrimp or scallops" as the least expensive entree at \$10.95. In a listing of restaurants in the Lockport area, Garlock's Restaurant is categorized as a "Fine Dining" restaurant with an A rating: "Garlock's still offers the best steaks in town. There is a *sic* adequate variety of fish, fowl, and 'specials' on the menu and all meals are of high quality and tasteful presentation."

In 1990, Mr. Long, with his mother, Nancy Long, and his father, Robert Long, purchased the building at 35 South Transit Street in Lockport where Garlock's Restaurant was located.

Each of the Longs held a one-third ownership interest in the building. Though they owned the

real property as individuals, the Longs established a corporation known as Garlock's Restaurant, Inc., to operate the restaurant. Initially, each of the Longs also owned stock in the operating corporation, but in 1992, Mr. Long and his father, Robert Long, sold their stock interest to Nancy Long.

Prior to petitioner's operation of Garlock's Restaurant in 2006, Mr. Long's mother, Nancy Long, had been responsible for the operation of the restaurant at the same location and with the same name, Garlock's Restaurant. She oversaw the collapse of the business when expenses overwhelmed declining restaurant revenues, partly explained by the severe economic decline of the manufacturer of car radiators, Delphi Harrison, which is the major employer in Lockport, where it has its world headquarters. The failure of the restaurant operated by her would eventually result in Nancy Long's personal bankruptcy in the fall of 2007.

Robert Long was never involved in the day-to-day running of the restaurant, which was operated by his wife, Nancy Long, from 1990 to 2006. Nancy Long had started at Garlock's Restaurant in 1962 as a waitress, and 28 years later, in 1990, she became an equal owner, with her husband and son, of the building where the restaurant was located, as well as the operator of the restaurant business. In contrast, Robert Long was a long-term employee of a government contractor in Buffalo, where he was the department head for quality control related to the construction of electrical systems. During the course of divorce proceedings, Nancy Long would obtain Robert Long's one-third ownership interest in the building housing Garlock's Restaurant in exchange for her share in the marital residence. As a result, at the time of Michael Long's purchase of the building housing Garlock's Restaurant, Nancy Long had a two-thirds ownership interest and Michael Long had a one-third ownership interest in the corporation that held title to the building.

Michael J. Long, in contrast with his father, Robert Long, worked in the restaurant operated by his mother, Nancy Long. In 1994, he initially started working for his mother as a cleaning person, and a couple of years later he shared the role of “host” with his mother, meeting and greeting customers three or four days per week. Mr. Long also was responsible for marketing the restaurant by “dealing with all the people who called for advertising.” Mr. Long was employed at the restaurant in September of 2001 when the business “went south because of the plane crashes.” As noted above, Lockport is the world headquarters of Delphi Harrison, and “there was no business during the week” since business travel collapsed, according to Mr. Long. Because his mother, Nancy Long, refused to “lay anybody off,” Michael J. Long explained that the restaurant’s expenses were not adjusted to account for declining revenues, and as noted above, the restaurant business as operated by Nancy Long failed in 2006.

On a closing date of August 18, 2006,¹ petitioner became the sole owner of the building at 35 South Transit Street in Lockport, which housed Garlock’s Restaurant. The purchase was financed by petitioner taking out a mortgage in the amount of \$150,000.00. At that time, the mother of petitioner’s principal, Nancy Long, had a two-thirds ownership interest in the building, with Mr. Long owning the remaining one-third. Since Nancy Long held a two-thirds interest in the building, \$100,000.00 of the \$150,000.00 is reasonably allocable to her two-thirds interest in

¹ The closing was pursuant to a contract of sale dated May 15, 2006, which specified a purchase price for the real property of \$140,000.00. However, petitioner provided little clarity concerning the sale of the building by Nancy Long to her son, Michael Long (petitioner’s principal), which suggests the lack of an arm’s-length negotiation in settling upon a selling price for the real property. Notably, the sales contract dated May 15, 2006, which describes Mr. Long as the “purchaser” and Nancy Long as the “seller,” failed to take into consideration that Mr. Long held a one-third interest in the building. Mr. Long’s testimony was not forthcoming and quite confusing on this point: “Llargo of Lockport bought the building from my mother, okay. And so I got paid - - I own part of the building, Llargo of Lockport paid me nothing.” Further, a close review of Petitioner’s Exhibit 4, an “appraisal report of a mixed-use commercial building” noted the following as the “last transfer”: “A Quitclaim Deed on April 26th, 2006 for One and no more Dollars, Robert G. Long to Nancy L. Long. This is not considered an arms length sale.” Petitioner did not offer any evidence to clarify these inconsistencies.

the building since a detailed appraisal of the “restaurant building” by an experienced appraiser dated January 27, 2006 established “that the ‘as is’ market value of the fee simple estate, as of the date of valuation, January 27, 2006, is: \$150,000.00.” The remaining \$50,000.00 is reasonably allocable to petitioner’s establishing under its management the new Garlock’s Restaurant operation, i.e., to finance the business assets necessary to conduct the actual restaurant business, including the goodwill value of the well-established Lockport restaurant, with its tradition of fine dining going back six or seven decades, and the various tangible business assets left behind at 35 South Transit Street when petitioner took over operation of the restaurant with little if any change to the business. The lack of change in the operation is vividly reflected by the fact that the cooking crew and the menu remained the same.

The Division issued a Notice of Determination dated December 11, 2006 against petitioner “because you are liable as a bulk sale purchaser for taxes determined to be due” from Garlock’s Restaurant, Inc., the entity owned by Nancy Long that operated the restaurant that petitioner took over during the summer of 2006. This notice referenced three assessments: (1) L-028014872, (2) L-028014873 and (3) L-028014874 and asserted corresponding amounts of sales tax due for (1) the period December 1, 2002 through May 31, 2006 of \$161,000.00, (2) the period June 1, 2006 through August 31, 2006 of \$9,284.08, and (3) the period March 1, 2006 through May 31, 2006 of \$6,750.00. The total of these three amounts is \$177,034.08, against which the Division credited payments of \$34,417.85, which resulted in a “current balance” asserted due of \$142,616.23.

The Division determined taxes due from Garlock’s Restaurant, Inc., by estimating tax due as the result of the failure by Garlock’s Restaurant, Inc., to provide guest checks, cash register tapes or any source documents of sales. According to the taxpayer, the restaurant’s records were

lost in a flood. As a result, the Division determined taxable sales by utilizing the restaurant's cost of goods sold, as shown on the federal corporate income tax returns of Garlock's Restaurant, Inc.,² in conjunction with financial ratios from the 2003 Restaurant Industry Operations Report published by Deloitte & Touche. Based on this report, the Division determined that the applicable markup for a full service restaurant where the average check per person was \$25.00 or more was 31.15%, which it lowered to 29% because the Division determined that since Garlock's Restaurant was primarily a steak restaurant, the markup would be somewhat lower based on prior experience of the auditors. After audit, the Division more than doubled the reported taxable sales of Garlock's Restaurant, Inc., from \$1,455,023.00 to \$3,400,324.62 for the period December 1, 2002 through May 31, 2006, resulting in additional tax due of \$161,000.00. The record does not provide a clear explanation for the basis of the two smaller amounts asserted due of \$9,284.08 and \$6,750.00, with the latter amount of \$6,750.00 seemingly included in the \$161,000.00.

Although in the summer of 2006 the operation of Garlock's Restaurant had shifted from the corporation, Garlock's Restaurant, Inc., to petitioner, there was no filing of a Notification of Sale, Transfer or Assignment in Bulk. Petitioner believed it was not required to file such notification because it paid no consideration to Garlock's Restaurant, Inc., for the assets of the restaurant and only paid consideration to Nancy Long for the real property housing the restaurant. Nonetheless, petitioner in late August of 2006 began its own operation of Garlock's Restaurant only a few days after Nancy Long's operation ended, without changing a single table, chair or

² For 2003, 2004 and 2005, amounts for the cost of goods sold were taken from the federal income tax returns of Garlock's Restaurant, Inc. Since at the time of the audit, a return had not been filed for the year 2006, the auditor utilized purchase invoices provided by Garlock's Restaurant, Inc., to determine cost of goods sold for that partial year.

restaurant sign and utilizing the coolers, freezers and ovens on the premises. The administrative record, in fact, does not disclose any changes to the actual restaurant operation in the building located at 35 South Transit Street in Lockport in terms of decor, menu, equipment, tableware or cooking staff when petitioner took over the operation.

DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that there was a bulk sale and that petitioner, as purchaser of the business, is responsible for the sales tax obligations of the seller when, as occurred here, timely notice had not been filed (*see*, Tax Law § 1141[c]). The Administrative Law Judge determined that the seller received \$150,000.00 for transferring her interest in the real property in which the business is located, which was worth \$100,000.00, and that \$50,000.00 should be attributed to the value of goodwill received by the purchaser and that petitioner's obligation is limited to the \$50,000.00 thus paid to the seller (*see*, 20 NYCRR 537.4[c]). The Administrative Law Judge refers to the definition of goodwill as an intangible asset that attaches to a business due to such factors as location, reputation and managerial skill.

However, the Administrative Law Judge found that penalty and interest may not be assessed against petitioner as the bulk sale purchaser (*Matter of Velez v. Department of Taxation and Fin.*, 152 AD2d 87 [1989]).

ARGUMENTS ON EXCEPTION

Both the petitioner and the Division filed exceptions to the Administrative Law Judge's determination. The Division's argument is that the well-settled principle that any notice issued by the Division, such as the assessments herein, is presumed to be correct and that the taxpayer has the burden of proving otherwise, that petitioner has not offered any evidence whatsoever to challenge the assessments, which included penalties and interest. Therefore, the Division claims

that petitioner, as the purchaser of the seller's business, is responsible for the taxes, penalties and interest assessed against the seller, Garlock's Restaurant, Inc.

The Division argues that there is no doubt that petitioner acquired the assets of Garlock's Restaurant and, therefore, pursuant to Tax Law § 1141(c), the assessment was properly issued to Llargo of Lockport as a transferee in a bulk sale of the assets of Garlock's Restaurant, Inc. The Division points out that there was no filing of a notification of a bulk sale transfer and, thus, that petitioner is liable for the taxes assessed against Garlock's, as well as the penalties and interest.

Petitioner's position is that there was no bulk sale transfer because there was no transfer of assets. Petitioner states that even if there were a bulk sale, the amount paid by petitioner for goodwill was \$6,000.00, based on calculating the 2/3 value of the building of \$134,000.00 as against the alleged \$140,000.00 received by the seller; thus, only \$6,000.00 could be attributed to goodwill. Further, petitioner, Llargo of Lockport, Inc., states that it should get credit for that part of the assessment that was taken by the Division for Garlock's outstanding tax liability; thus, it argues that Llargo of Lockport is actually owed a refund.

OPINION

We affirm the determination of the Administrative Law Judge. We find that the Administrative Law Judge correctly and completely addressed all of the issues raised by the parties. After reviewing the entire record in this matter, we conclude that petitioner has not directed us to any authority that would provide us with a basis for modifying the Administrative Law Judge's determination in any respect. As a result, we affirm the determination based upon the reasoning stated therein.

Accordingly, it ORDERED, ADJUDGED and DECREED that:

1. The exception of Llargo of Lockport, Inc. is granted to the extent indicated in conclusion of law “E” of the Administrative Law Judge’s determination, but otherwise is denied;
2. The exception of the Division of Taxation is denied;
3. The determination of the Administrative Law Judge is affirmed;
4. The petition of Llargo of Lockport, Inc. is granted in accordance with paragraph “1” above, but otherwise is denied; and
5. The Notice of Determination dated December 11, 2006, as modified in accordance with paragraph “1” above, is sustained.

DATED: Troy, New York
August 23, 2010

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner