

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SUFFOLK CENTER CORP.	:	DECISION
	:	DTA NO. 822414
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, 2005	:	
through May 31, 2007.	:	

Petitioner, Suffolk Center Corp., filed an exception to the determination of the Administrative Law Judge issued on April 7, 2011. Petitioner appeared by Paul Kalker, Esq. The Division of Taxation appeared by Mark Volk, 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 lieu of a formal brief in opposition. Oral argument was not requested.

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

ISSUES

I. Whether the assignment of a lease by 2101 Diner Corp. d/b/a/ Suffolk Diner to petitioner constituted a bulk sale under Tax Law § 1141(c), subjecting petitioner to liability for the payment of sales and use taxes due from the seller.

II. Whether the Division of Taxation's use of the Risk Management Association's annual statement studies to determine a fair market value of the diner was reasonable under the circumstances presented.

FINDINGS OF FACT

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

On March 2, 2006, 2101 Diner Corp. entered into a lease agreement with 3A Realty LLC for the rental of the property located at 2101 Middle Country Road in Centereach, New York, which was utilized as a diner.¹ An audit of 2101 Diner Corp. for the period September 1, 2005 through May 31, 2007 resulted in the issuance of a Notice of Determination for additional sales and use taxes due of \$245,095.31. The notice was upheld by the Tax Appeals Tribunal in ***Matter of 2101 Diner Corp.*** (October 21, 2010). It is this liability that the Division of Taxation (Division) asserts is properly due and owing from petitioner herein, Suffolk Center Corp. (Suffolk).

In February 2007, 2101 Diner Corp. transferred and assigned its lease of the premises at 2101 Middle Country Road in Centereach, New York, to Suffolk. Pursuant to the Transfer of Lease Agreement, dated January 13, 2007, the lease included the rental and use of the diner, business fixtures and equipment, which were stated to be owned by the landlord, 3A Realty LLC. Although a listing of the fixtures and equipment was said to be attached to the agreement, it was not attached to the document in evidence. The agreement recited that petitioner would execute a promissory note for \$15,000.00 and deliver the same to 2101 Diner Corp.

The Division's Bulk Sales Unit received a communication from the auditor performing

¹ It is noted that the same premises were utilized as a diner for many years and had been audited several times. Two corporations operated diners at the address, Cronos Enterprises and Parnasos, Inc. The latter corporation was audited for the period March 1, 2004 through November 30, 2005, which immediately preceded the audit of 2101 Diner Corp., which produced the liability at issue herein. Mr. George Rekkas was an officer in Cronos and also in 2101 Diner Corp. and an employee of Suffolk Center Corp.

the sales and use tax audit of 2101 Diner Corp., indicating that there may have been a bulk sale between 2101 Diner Corp. and petitioner, since he was told on a site visit to the diner that the business had been purchased in March 2007. The Bulk Sales Unit had no information of any sale and, therefore, sent a letter to petitioner, dated May 25, 2007, requesting information on the sale and a completed bulk sale notification form. No response to this request was received and a second request for information was sent on June 25, 2007. Likewise, there was no response.

On July 9, 2007, Ms. Phyllis Jacobson, an auditor in the Suffolk District Office, informed the Bulk Sales Unit that she was going to subpoena the lease agreement from the landlord to help in the bulk sale investigation.

On July 13, 2007, the attorney for petitioner at that time, Mr. William Yanaros, contacted the Bulk Sales Unit and denied that a bulk sale had occurred, stating that there had only been an assignment of a lease. Once again, the Division requested a copy of the lease agreement.

On July 31, 2007, the Division issued a Notice of Claim to Purchaser to petitioner, requesting that the entire purchase price be escrowed in order to satisfy any sales tax liabilities assessed against the seller.

After the Bulk Sales Unit informed Mr. Yanaros in a telephone conversation on August 1, 2007 that the assignment of lease was considered the transfer of a business asset qualifying as a bulk sale, Mr. Yanaros submitted a Notification of Sale, Transfer, or Assignment in Bulk on August 13, 2007. The notification indicated a sale of the business assets on March 26, 2007 for the consideration of \$15,000.00. The only asset transferred was stated to be the lease, which was listed as intangible property. The notification listed no tangible assets that were transferred. Since the notification was not filed ten days prior to the sale date, it was not timely filed.

The Bulk Sales Unit requested a copy of the lease again on August 14, 2007, but only received a copy of the Transfer of Lease Agreement. With no further information forthcoming, the Division issued a Notice of Determination to petitioner, dated November 5, 2007, for the period September 1, 2005 through May 31, 2007, asserting additional sales and use taxes due in the sum of \$245,095.31. The notice explained that petitioner was liable as a bulk sale purchaser for taxes determined to be due from 2101 Diner Corp. in accordance with Tax Law § 1141(c) and § 1138(a)(3).

The Bulk Sales Unit was able to obtain an Application for Liquidator's Permit filed by 2101 Diner Corp. with the State Liquor Authority, which stated that it was selling its business and wished to dispose of its stock of alcoholic beverages. The form was signed by the presidents of 2101 Diner Corp. and petitioner on February 13, 2007. A supplemental form filed with the State Liquor Authority on August 14, 2007 listed the inventory that was transferred. No value for the liquor stock was listed on the form.

Although it is not certain when the Division received a copy of the lease and from whom, the auditor did not see the lease agreement until the Bureau of Conciliation and Mediation Services conference in April 2008. The lease agreement was executed by 3A Realty LLC and 2101 Diner Corp. on or about March 2, 2006. There were two modifications made to the agreement, which were initialed by the parties on an undisclosed date: the first was an addition to the description of the leased property in section 1 that added the "fixtures and equipment set forth in Schedule 'D'," and the second was a deletion of a paragraph in section 8 that eliminated the requirement for the tenant to place a two-month rental fee with the landlord. Schedule "D" was an undated, handwritten list of fixtures and equipment.

On its U.S. Income Tax Return, form 1120S, filed for tax year 2005, 2101 Diner Corp. reported that it was incorporated on January 21, 2005 and had been doing business as Suffolk Diner at 2101 Middle Country Road, Centereach, New York, since September 2005.

The landlord, 3A Realty LLC, initially filed with the New York State Department of State as a domestic limited liability company on January 9, 2006, listing its address as 2101 Middle Country Road, Centereach, New York, the same address as the diner and 2101 Diner Corp. Thus, 3A Realty LLC was not in existence at the time 2101 Diner Corp. began operating the diner in September 2005.

In conjunction with the Bulk Sales Unit, the auditor undertook an analysis to determine the fair market value of the business assets of 2101 Diner Corp. in order to establish a purchase price from which a limit on petitioner's liability for unpaid taxes owed by 2101 Diner Corp. could be determined.

Utilizing sales figures from his audit of 2101 Diner Corp. and information from the 2007-2008 Annual Statement Studies - Financial Ratio Benchmarks published by the Risk Management Association (RMA), the auditor attempted to discern a value of the business that was sold by 2101 Diner Corp. to petitioner on or about March 26, 2007. RMA is a not-for-profit, member-driven professional association whose sole purpose is to advance the use of sound risk principles in the financial services industry.

The auditor chose to use the RMA financial ratio benchmarks because they were derived from financial statements filed with RMA for credit purposes by restaurants similar to the diner, lending to their credibility. Further, he knew that it was a tool frequently used by the Bulk Sales Unit to determine asset value when none was provided.

From the audit of 2101 Diner Corp., the auditor knew that audited taxable sales had been determined to be \$4,662,222.46 for the audit period, September 1, 2005 through May 31, 2007. From this, the auditor was able to calculate monthly sales and then annual sales of \$2,664,127.12.

By looking at various ratios that would utilize the information the auditor was able to determine from information at hand, he tried to determine if the consideration paid by petitioner was representative of the fair market value of the business. Since he had determined the sales figures from his audit of 2101 Diner Corp., he utilized the sales to total assets ratio from the RMA study, .5, and divided it into audited taxable sales. The result was a fair market value for the business of \$5,328,254.23. The RMA ratio used was derived from comparative historical data submitted to RMA between April 1, 2003 and March 31, 2004 and represented a median and “most reliable” ratio by RMA.

The auditor sought to narrow his analysis and looked at current data sorted by assets for businesses having between \$0 and \$500,000.00 in assets, since he had very little information on the assets owned by petitioner. The median sales to assets ratio listed by RMA for a business similar to petitioner, a full service restaurant, was 3.2. Dividing sales by this ratio resulted in a fair market value for the business of \$832,539.72. Therefore, based on the RMA sales to total assets ratios, the auditor determined that the fair market value of the business was between \$832,539.72 and \$5,328,254.23.

To support his estimate of the fair market value, the auditor utilized the inventory values he had acquired in the audit of 2101 Diner Corp., which he believed were very reliable values and not likely to have been understated or overstated, since there was no incentive to do so.

Inventory values from the federal income tax returns were averaged and resulted in average inventory of \$6,910.00. Using the inventory to total assets percentage reported in the RMA for businesses having assets between \$0 and \$500,000.00, or 2.4%, and dividing average inventory of \$6,910.00 by this percentage, he determined the fair market value of the business assets to be \$287,916.67.

Using the average inventory again, the auditor applied a comparative historical data percentage from the RMA study for assets to inventory of 1%, which resulted in a fair market value of total assets of \$691,000.00. The auditor noted that both values determined using the average inventory figure from the federal tax returns yielded fair market values for the business assets that were in excess of the liability determined to be due from petitioner as a bulk sale purchaser. He concluded that the liability asserted by the Division, \$245,095.31, was not in excess of the value of the business assets he had determined and that petitioner was responsible for the entire amount of the deficiency asserted.

The Bulk Sales Unit routinely uses a Risk Management Association - Financial Ratio Benchmark computation worksheet to estimate the fair market value of business assets when the Division has not been provided a contract agreed to by both the buyer and seller. In her affidavit sworn to May 10, 2010, Susan Lyons, a sales tax technician III in the Bulk Sales Unit, independently calculated the estimated value of Suffolk Center Corp.'s business assets in the manner described in the Finding of Fact above, resulting in a value of \$832,539.69.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed the relevant sections of the Tax Law and regulations. The Administrative Law Judge found that petitioner engaged in a bulk sale

transaction with 2101 Diner Corp. on or about March 26, 2007. The Administrative Law Judge also found that petitioner did not timely notify the Division of the sale and became liable for the payment of any sales and use taxes determined to be owed by the seller, 2101 Diner Corp., to the extent of the greater of the purchase price or fair market value of the business assets sold, transferred or assigned to the purchaser. The Administrative Law Judge held that petitioner was liable for the fair market value of the transferred assets.

In so holding, the Administrative Law Judge rejected the argument that petitioner should be liable only for the amount of the consideration, because the consideration paid did not even approach the fair market value of the transferred assets. The Administrative Law Judge also rejected petitioner's challenges to the audit method for calculating the value of the transferred assets because petitioner failed to introduce clear and convincing evidence that either the methodology was unreasonable or the amount was erroneous. Therefore, the Administrative Law Judge affirmed the Notice of Determination issued to petitioner.

ARGUMENTS ON EXCEPTION

Petitioner has submitted no new arguments or issues on exception, but instead relies upon the same arguments submitted to the Administrative Law Judge below. To wit, petitioner argues that it did not engage in a bulk sale transaction. Petitioner contends that if it is found liable for the seller's sales tax, it should only be liable for the consideration paid of \$15,000.00, as opposed to the fair market value of the diner. Petitioner provides various attacks on the valuation of the transferred assets, including *ad hominem* critiques of the auditor's knowledge and general attacks on the employed methodology.

The Division argues that the Administrative Law Judge properly determined that

petitioner was a bulk sale purchaser and is properly liable for the seller's sales tax due. The Division submits that petitioner is properly liable for the fair market value of the transferred assets because that amount far exceeds the value of the consideration paid. The Division submits that petitioner provided no new issue or argument that would merit reconsideration of the Administrative Law Judge's determination.

OPINION

We affirm the determination of the Administrative Law Judge.

We find that the Administrative Law Judge properly concluded that petitioner was a bulk sale purchaser under Tax Law § 1141(c). For Tax Law purposes, the term "bulk sale" is defined at 20 NYCRR 537.1(a) to mean:

any sale, transfer or assignment in bulk of any part or the whole of business assets, other than in the ordinary course of business, by a person required to collect tax and pay the same over to the Department of Taxation and Finance.

The record reveals that petitioner entered into a lease agreement with 2101 Diner Corp. for rental of a property, utilized as a diner, located at 2101 Middle Country Road in Centereach, New York. While the assignment of the lease alone would be sufficient to find a bulk sale (*Matter of Acres Stor. Co. v. Chu*, 120 AD2d 854 [1986], *lv dismissed* 68 NY2d 807 [1986]), the record shows that petitioner also received other items from the seller, including liquor stock and other inventory. As such, we conclude that the Administrative Law Judge properly determined that petitioner was a purchaser in a bulk sale transaction.

Tax Law § 1141(c) provides, in relevant 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

Upon the timely filing of a notification of a bulk sale, the Division is obligated to inform the purchaser of the existence of a possible claim for sales and use taxes owed by the seller (20 NYCRR 53.6[a][3]). 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 [sic] or assignor [subject to certain price limitations] . . .” (Tax Law § 1141[c]).

Our review of the record confirms the finding that petitioner failed to comply with the requirements imposed by Tax Law § 1141(c). Petitioner did not provide the Division with any notice of the sale until prompted by the Division. The notice was filed on August 10, 2007, almost five months after the sale. This date is far after the expiration of the statutory 10-day period prior to the sale. As correctly determined by the Administrative Law Judge, petitioner became liable for the payment of any sales and use taxes owed to New York State by 2101 Diner Corp. to the extent of either the purchase price or the fair market value of the business assets sold, transferred or assigned to the purchaser, whichever amount is greater (Tax Law § 1141[c]).

We also conclude that the Administrative Law Judge properly determined that petitioner is liable to the extent of the fair market value of the transferred assets. Contrary to petitioner’s position, this Tribunal has confirmed that RMA ratios may be used in determining the value of a business (*Matter of Clifton Liquor Corp.*, Tax Appeals Tribunal, June 18, 2009). In reviewing the record below, we find that the Division identified and explained its use of the external indicies, the RMA study, and the role that these items provided in estimating the value of the assets transferred under the bulk sale. Petitioner failed to meet its burden of producing clear and convincing evidence that the methodology was unreasonable or erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842 [1986]; *Matter of Surface Line Operators Fraternal Org.*

v. Tully, 85 AD2d 858 [1981])). Accordingly, we affirm the Administrative Law Judge's conclusion that petitioner is liable to the extent of the estimated fair market value of the transferred assets found on audit.

We reject petitioner's remaining arguments for the reasons set forth in the determination. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Suffolk Center Corp., is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Suffolk Center Corp. is denied; and
4. The Notice of Determination dated November 5, 2007, is sustained.

DATED: Troy, New York
November 23, 2011

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

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