

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>SIEGEL'S KOSHER DELI, INC.</b>	:	SMALL CLAIMS DETERMINATION DTA NO. 819963
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, 2002 through May 31, 2002.	:	

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Petitioner, Siegel's Kosher Deli, Inc., 1646 2<sup>nd</sup> Avenue, New York, New York 10028-3112, filed a 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, 2002 through May 31, 2002.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York on May 5, 2005 at 9:15 A.M. Petitioner appeared by Peter Mertz, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Richard B. Slovacek).

Since neither party herein reserved time to submit a post hearing brief, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

***ISSUE***

Whether the Division of Taxation properly determined that a sale, transfer or assignment in bulk occurred between petitioner and 1646 Kosher Deli Corporation pursuant to Tax Law § 1141(c), thus rendering petitioner liable for payment of the sales and use taxes owed by 1646 Kosher Deli Corporation.

***FINDINGS OF FACT***

1. On May 7, 2003, the Division of Taxation (“Division”) sent a letter to petitioner, Siegel’s Kosher Deli, Inc., indicating that it had received information that a possible bulk sale transaction had occurred between petitioner, as purchaser, and 1646 Kosher Deli Corporation (“1646 Kosher”), as seller. The letter further stated that the Division had not received a Notification of Sale, Transfer or Assignment in Bulk, Form AU-196.10, as required by law. Petitioner was requested to complete and submit a Form AU-196.10 or explain why the transaction in question did not require the filing of a Notification of Sale, Transfer or Assignment in Bulk.

2. By letter dated May 14, 2003, petitioner’s representative corresponded with the Division indicating that:

No bulk sale return was required because there was no bulk sale. The owners of both corporations are the same, and their respective ownership interests did not change. Edward Siegel and Jeffrey Speciner each owns 50% of the above referenced corporations.

The old corporation (1646 Kosher Deli Inc.) was abandoned and a new corporation was formed. No consideration was paid to the old corporation by the new corporation, and there wasn’t any contract of sale executed between the old & new corporation.

3. On August 11, 2003, the Division issued a Notice of Determination (“Notice”) to petitioner asserting that \$2,859.11 of sales and use tax, plus penalty and interest, was due for the period March 1, 2002 through May 31, 2002.<sup>1</sup> In its Notice, the Division advised petitioner that it had determined that 1646 Kosher owed the Division \$2,859.11 in sales and use taxes and that

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<sup>1</sup> The petition apparently contains a typographical error as it references the period at issue as “3/3/01 - 5/31/02.” For purposes of this determination, I will assume that the Notice of Determination correctly identifies that period in question as the “Tax Period Ended 05-31-02.”

petitioner was personally liable, as a bulk sale purchaser under Tax Law § 1141(c), for the taxes, due from the seller, together with penalty and interest.

4. Edward Siegel and Jeffrey Speciner were the only officers, directors and shareholders of both petitioner and 1646 Kosher. Both 1646 Kosher, until it ceased operations, and petitioner, as the successor to 1646 Kosher, operated a delicatessen located at 1642 2<sup>nd</sup> Avenue, New York, New York. Pursuant to a special meeting of the directors of 1646 Kosher held on May 15, 2002, it was resolved that 1646 Kosher was to cease all operations and distribute all assets as a liquidating dividend to the shareholders. Edward Siegel and Jeffrey Speciner thereafter transferred the assets they had received as a liquidating dividend from 1646 Kosher to petitioner upon its organization in consideration for the issuance of its stock.

5. In the instant matter, there is no dispute that the \$2,859.11 of sales and use taxes asserted due by the Notice dated August 11, 2003 represents unpaid tax which was reported as due and owing by 1646 Kosher on its sales and use tax return for the period ending May 31, 2002. This amount does not represent tax due computed on the value of the business assets which were sold, transferred or assigned in bulk by 1642 Kosher to Edward Siegel and Jeffrey Speciner or their subsequent transfer of these same business assets to petitioner.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

6. Petitioner asserts that the term retail sale does not include the distribution of property by 1646 Kosher to its stockholders as a liquidating distribution (Tax Law § 1101[b][4][iv][B]) and that the transfer by Edward Siegel and Jeffrey Speciner of the property they received as a liquidating distribution to petitioner upon its organization in consideration for the issuance of its stock is also not considered a retail sale (Tax Law § 1101[b][4][iv][D]). Petitioner argues that there was no bulk sale, transfer or assignment of business assets directly from 1646 Kosher to

petitioner and, as such, the bulk sale provisions of Tax Law § 1141(c) are not applicable. Since no bulk sale occurred between 1646 Kosher and petitioner, it maintains that it cannot be held personally liable as purchaser for any taxes due and owing by 1646 Kosher.

7. The Division concedes that the transfer of business assets by 1646 Kosher to Edward Siegel and Jeffrey Speciner as a liquidating distribution is not a retail sale and it also concedes that the subsequent transfer by Edward Siegel and Jeffrey Speciner of the property they received as a liquidating distribution to petitioner upon its organization in consideration for the issuance of its stock is also not a retail sale. The Division notes, however, that it has not asserted any tax due computed on the value of the business assets transferred, either by 1646 Kosher to Edward Siegel and Jeffrey Speciner or their subsequent transfer of the business assets to petitioner, but instead argues that a bulk sale occurred between petitioner and 1646 Kosher within the meaning and intent of Tax Law § 1141(c) and that petitioner is therefore personally liable for the unpaid past due taxes admittedly due and owing from 1646 Kosher.

### ***CONCLUSIONS OF LAW***

A. Section 1141(c) of the Tax Law provides, in pertinent part, as follows:

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 and of the price, terms and conditions thereof. . . .

Whenever the purchaser, transferee or assignee shall fail to give notice to the tax commission as required by the preceding paragraph, or whenever the tax commission shall inform the purchaser, transferee or assignee that a possible claim for such tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller, transferrer or assignor to the state, and the purchaser, transferee or

assignee is forbidden to transfer to the seller, transferrer or assignor any such sums of money, property or choses in action to the extent of the amount of the state's claim. . . . For failure to comply with the provisions of this subdivision the purchaser, transferee or assignee, in addition to being subject to the liabilities and remedies imposed under the provisions of article six of the uniform commercial code, shall be 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, except that the liability of the purchaser, transferee or assignee shall be limited to an amount not in excess of the purchase price or fair market value of the business assets sold, transferred or assigned to such purchaser, transferee, or assignee, whichever is higher, and such liability may be assessed and enforced in the same manner as the liability for tax under this article.

B. 20 NYCRR 537.1(a)(1) defines "bulk sale" 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.”

C. Petitioner’s contention that no bulk sale occurred between it and 1646 Kosher is rejected. While 1646 Kosher and petitioner structured the transfer of the business assets in such a manner that it was not considered a retail sale, thus receiving the benefit of exemption from payment of sales tax on the value of the business assets transferred in accordance with Tax Law § 1101(b)(4)(iv)(B) and (D), this exemption from tax is of no consequence when determining if a bulk sale has occurred. In fact, 20 NYCRR 537.1(a)(2) specifically provides that “[T]he fact that a sale is or is not a retail sale does not determine whether such sale is a bulk sale.”

In the instant matter, business assets were in fact transferred from 1646 Kosher to petitioner. While the method used to accomplish the transfer was structured in such a manner as to avoid payment of sales tax on the value of the assets transferred, this in no way alters the fact that business assets were transferred from 1646 Kosher to petitioner, thus resulting in a bulk sale. It is noted that both petitioner and 1646 Kosher had the same two officers and shareholders who

conducted the same business from the same address using the same business assets. To accept petitioner's position in this matter would, in my view, produce a result which is exactly opposite that sought by the Legislature. The bulk sales provision of Tax Law § 1141(c) which holds that a purchaser, transferee or assignee is "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 . . ." is clear and unambiguous and is designed to prevent exactly what petitioner is proposing herein. Since a bulk sale has occurred between 1646 Kosher and petitioner, the Division has properly determined that petitioner is personally liable for payment of the taxes due and owing from 1646 Kosher.

Finally, since no consideration was exchanged between petitioner and 1646 Kosher with respect to the transfer of the business assets, petitioner's liability as purchaser is limited to the fair market value of the assets transferred. In the instant matter, petitioner has failed to present any evidence to establish the fair market value of the assets transferred and therefore there is no dollar limitation with respect to its liability as purchaser.

D. The petition of Siegel's Kosher Deli, Inc. is denied and the Notice of Determination dated August 11, 2003 is sustained.

DATED: Troy, New York  
August 4, 2005

/s/ James Hoefler  
PRESIDING OFFICER