

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RONY ENTERPRISE, INC. : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 820329
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period September 1, 2001 through :
June 18, 2004. :
:

Petitioner, Rony Enterprise, Inc., 102 14 81st Street, Ozone Park, New York 11416, 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 September 1, 2001 through June 18, 2004.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 13, 2005 at 10:30 A.M., with all briefs to be submitted by January 19, 2006, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Alexandra C. Siskopoulos, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether the statutory notice must be cancelled because the Division failed to timely issue a Notice of Claim to Purchaser and a Notice of Determination to petitioner, a bulk sale purchaser, in accordance with Tax Law § 1141(c) and the regulations promulgated thereunder.

II. Whether sales tax determined on an estimated audit should be sustained.

FINDINGS OF FACT

1. On June 18, 2004, pursuant to a Sale and Purchase Agreement dated June 9, 2004, petitioner, Rony Enterprise, Inc., purchased a convenience store business located at 185 West End Avenue, Brooklyn, New York 11235. The seller in the transaction was West End Mini Market, Inc.

2. In connection with its purchase of the business, petitioner filed a Notification of Sale, Transfer, or Assignment in Bulk with the Division of Taxation (“Division”). The notification indicates June 18, 2004 as the date of the sale and is also dated June 18, 2004. The envelope in which the notification was mailed to the Division bears a United States Postal Service postmark dated July 23, 2004. The envelope also indicates that the notification was mailed by certified mail, but there is no evidence in the record of any return receipt in connection with such certified mailing. The notification itself bears a date-stamp indicating that it was received by the Division on July 27, 2004. Consistent with the instructions on the bulk sale notification form, the envelope is addressed to the Division’s “Bulk Sales Unit, Sales Tax Desk Audit.” The envelope also bears the return address of petitioner’s representative in the bulk sale transaction. The Division identified and introduced the envelope and date-stamped copy of the bulk sale notice through the affidavit of Donald Amyot, Tax Technician I.

3. The Division issued a Notice of Claim to Purchaser dated August 23, 2004 to petitioner advising of a possible claim for sales and use taxes from the seller. This notice directed petitioner not to distribute funds or property to the seller until the seller’s liability was determined and either payment was made or the Division authorized the release of such funds or property. The notice further advised petitioner that its failure to comply with its terms would subject petitioner to liability for any sales tax deficiency due from the seller.

4. By letter dated August 26, 2004 the Division again advised petitioner of its potential liability for unpaid sales tax liabilities owed by the seller in the bulk sales transaction. The letter further advised petitioner that “at this time there may be a large sales tax liability due” and recommended that petitioner put any note payments due to the seller into an escrow account pending resolution of the matter.

5. By letters dated August 27, 2004 and September 9, 2004 the Division advised the seller, West End Mini Market, Inc., that it had been selected for a desk audit of its sales tax liability and requested that the seller provide copies of business-related books and records for the period September 1, 2001 through June 18, 2004.

6. The seller did not respond to the Division’s requests for records.

7. On August 31, 2004 an investigator for the Division visited the store. The investigator observed the store’s small size, approximately 18 feet by 20 feet in area, and also observed the items on display which consisted of coffee, bagels, cigarettes, beer, soda, candy, snacks, paper goods, pet foods, soaps, and dry grocery items. The investigator concluded, based on his experience, that the taxable ratio of approximately 70 percent as reported by the seller on its filed sales tax returns during the audit period was correct.

8. At the time of the investigator’s visit, petitioner’s owner, Mohammed Masudur Rahman, who operates the store along with his wife, was not present. The investigator spoke with Mr. Rahman by telephone during his visit. The investigator asked Mr. Rahman what his daily sales were. During this conversation the investigator suggested specific dollar amounts, asking whether daily sales were \$300, \$400, \$1,000 or \$1,100. In response, Mr. Rahman, who speaks and understands English with significant difficulty, said that he did not sell \$1,000 a day and he did not provide the investigator with an average daily sales figure.

9. Based on their conversation, the investigator believed, incorrectly, that Mr. Rahman had indicated that petitioner's daily sales were \$1,000 to \$1,100 and indicated the same in his report to the Division's auditor.

10. Given the lack of any records from the seller, the Division chose to estimate the seller's sales tax liability during the period at issue using the information contained in the investigator's report. Specifically, the Division estimated daily sales of \$1,100 based on the investigator's report and thus determined \$99,000 in gross sales per quarter. The Division then applied a taxable ratio of 70 percent to such audited gross sales to reach audited taxable sales of \$69,300 per quarter. The Division then applied the prevailing sales tax rate to the audited taxable sales and, after allowing for payments and credits, determined sales tax liability for the audit period of \$61,230.35.

11. At the time of the sale of the business on June 18, 2004, the seller had outstanding sales tax liabilities for the period at issue totaling \$11,466.45 based on the seller's failure to remit payment on sales tax reported due on the seller's sales tax returns for those periods.

12. On October 14, 2004, the Division issued a Notice of Determination to petitioner asserting \$60,509.97 in additional tax due for the period September 1, 2001 through June 18, 2004.

13. The additional tax asserted due in the Notice of Determination includes the \$11,466.45 in tax reported but not remitted by the seller. The additional sales tax liability as determined by the audit was thus reduced by that amount to \$49,763.90. The additional tax asserted due in the statutory notice also reflects a payment of \$720.40 not previously credited.

14. Petitioner's owner, Mr. Rahman, testified at the hearing.

15. The Division's investigator in this matter did not testify at the hearing. The Division introduced an affidavit made by the investigator which was received in evidence in lieu of oral testimony.

SUMMARY OF PETITIONER'S POSITION

16. Petitioner asserts that the statutory notice must be cancelled because the Division failed to timely issue the Notice of Claim to Purchaser and the Notice of Determination to petitioner.

17. Petitioner also asserts that tax determined on audit was excessive and erroneous.

CONCLUSIONS OF LAW

A. Tax Law § 1141(c) requires the purchaser in a bulk sale transaction to give notice of such sale to the Division of Taxation at least 10 days before taking possession of or making payment for the business assets. If the purchaser fails to file a proper and timely notice of bulk sale then such purchaser becomes personally liable for the sales and use taxes due from the seller, limited to the greater of the purchase price or fair market value of the business assets sold (*see*, 20 NYCRR 537.0[c][2]).

B. In this case, the record is clear that petitioner did not comply with the notice requirements of Tax Law § 1141(c). As indicated by the notification of bulk sale filed by petitioner, the sale of the convenience store occurred on June 18, 2004. The envelope in which the notification was mailed to the Division is postmarked July 23, 2004 and the notification itself bears a stamp indicating that it was received by the Division on July 27, 2004. Based on this evidence it is concluded that the notification was not filed with the Division until July 27, 2004 (*see*, 20 NYCRR 537.2[c][3]), well-beyond the 10-day period mandated by the statute. By this

failure to comply with the notice requirements of Tax Law § 1141(c), petitioner exposed itself to liability for sales and use taxes due from the seller.

Petitioner asserts that the Division failed to introduce competent evidence to show that the notice of bulk sale was not sent to the Division on June 18, 2004. Petitioner seeks to diminish the weight to be accorded the Division's documentary evidence by noting that Mr. Amyot's affidavit, by which the envelope and date-stamped bulk sale notice were introduced, does not state that Mr. Amyot was the custodian of these documents or that he received the unopened envelope on July 27, 2004 and removed the bulk sale notice from the envelope.

Contrary to petitioner's contention, it was petitioner's burden, not the Division's, to establish timely filing of the notice of bulk sale (*see, Matter of Sundown Meat, Fish & Liquor Co.*, Tax Appeals Tribunal, November 3, 1988; 20 NYCRR 3000.15[d][5]). Petitioner has failed to meet its burden, for it has introduced no evidence whatsoever regarding the mailing of the bulk sale notice. Certainly, the fact that the notice of bulk sale is dated June 18, 2004 is not evidence that it was mailed to the Division on that date. Given the absence of any evidence to the contrary or any explanation for the mailing of the envelope from petitioner's representative to the Division's Bulk Sales Unit on July 23, 2004, it is concluded that the Division's documentary evidence is sufficient to establish that the notice of bulk sale was mailed on July 23, 2004 and was received by the Division on July 27, 2004.

C. Generally, upon receipt of a notice of bulk sale, the Division of Taxation is required to issue to the purchaser a notice of possible claim for taxes due from the seller within five business days (*see*, 20 NYCRR 537.6[a]). If the Division fails to meet this requirement the purchaser is relieved of liability for taxes due from the seller (with certain exceptions) (*see*, 20 NYCRR 537.6[b]). This five-day limitations period is applicable, however, only where the purchaser has

given “timely” notice of the bulk sale (*id.*). In the instant matter, as discussed previously, petitioner as the bulk sale purchaser failed to give timely notice of the bulk sale. Accordingly, the five-day limitations period does not apply. Thus, petitioner’s contention that the subject Notice of Determination should be cancelled because the Notice of Claim to Purchaser was untimely is rejected.

D. Tax Law § 1141(c) requires the Division to give notice of the actual amount of taxes due from the seller to both the seller and purchaser within 90 days of the notice of bulk sale. This requirement is statutory and remains in effect whether or not the purchaser timely files the notice of sale. Thus, 20 NYCRR 537.6(d) provides:

If the Division of Taxation fails, within 90 days after receipt of a proper (both as to service and contents) notice of sale, transfer or assignment in bulk of business assets (*whether or not such notice was timely* in accordance with the provisions of subdivision [c] of section 537.2 of this Part), to mail a notice of claim for total taxes due from the seller, . . . the purchaser . . . is relieved from both his obligation to further withhold such funds from the seller . . . and his liability for the taxes due from such seller (Emphasis Added.)

E. Petitioner contends that the Notice of Determination was issued beyond the 90-day limitations period and therefore must be cancelled. In order to establish such a statute of limitations defense:

the taxpayer must go forward with a *prima facie* case showing the date on which the limitations period commences, the expiration of the statutory period and receipt or mailing of the notice after the running of the period (*see, Amesbury Apts. v. Commr.*, 95 TC 227; *Robinson v. Commr.*, 57 TC 735; *Matter of Jencon*, Tax Appeals Tribunal, December 20, 1990). Where the taxpayer has satisfied this initial burden, the burden of going forward with the evidence shifts to the Division to demonstrate that the bar of the statute is not applicable (*see, Amesbury Apts. v. Commr., supra; Adler v. Commr.*, 85 TC 535). The Division must then proceed with countervailing evidence that the statutory notice was timely mailed (*see, Coleman v. Commr.*, 94 TC 82). (*Matter of Kropf*, Tax Appeals Tribunal, March 21, 1991.)

F. Petitioner's statute of limitations defense rests upon its assertion that the notice of bulk sale was filed on June 18, 2004 and that, accordingly, the 90-day period of limitations commenced on that date. As discussed previously, however, petitioner offered no evidence regarding the mailing of the notice of sale and has thus failed to establish a prima facie case that the notice was in fact filed on that date. Having failed to establish a prima facie case that the 90-day period of limitations commenced on June 18, 2004, it follows that petitioner has failed to establish a prima facie case that the subject Notice of Determination, dated October 14, 2004, was issued after the running of the 90 days. Moreover, as also discussed previously, the evidence in the record establishes that the notice of bulk sale was filed on July 27, 2004. Thus, a prima facie review of the evidence indicates that the subject Notice of Determination, dated October 14, 2004, was issued within the 90-day limitations period.

Accordingly, since petitioner has failed to satisfy its initial burden, the burden of going forward with evidence does not shift to the Division and petitioner's statute of limitations defense is rejected.

G. Turning to the audit, the record shows that the seller in the bulk sale transaction did not produce records in response to the Division's requests. Under such circumstances, the Division was authorized to estimate the seller's sales (*see, e.g., Matter of Continental Arms Corp. v. State Tax Commn.*, 72 NY2d 976, 534 NYS2d 362). The Division has considerable latitude in selecting an estimated audit method and need only adopt an audit method reasonably calculated to determine the amount of tax due (*Matter of Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869); exactness is not required (*Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405

NYS2d 454). However, there must be sufficient evidence in the record to allow the trier of fact to determine whether the audit had a rational basis (*see, Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219). Absent a rational basis, the assessment must be cancelled (*see, Matter of Basileo*, Tax Appeals Tribunal, May 9, 1991; *Matter of Shop Rite Wines & Liquors*, Tax Appeals Tribunal, February 22, 1991).

H. The audit method in the instant matter is premised upon the investigator's mistaken belief that Mr. Rahman indicated in their telephone conversation that the store's daily sales were \$1,000 to \$1,100. As noted in Finding of Fact "8," however, Mr. Rahman told the investigator that he did not sell \$1,000 a day and he did not provide the investigator with an average daily sales figure. This finding of fact is based on the credible testimony of Mr. Rahman. It is observed that Mr. Rahman's significant difficulty in speaking and understanding English may have impeded his communication with the investigator. Additionally, it is noted that the investigator's absence from the hearing prevented the opportunity for any further explanation of the circumstances of the investigator's conversation with Mr. Rahman.

The audit is thus based on a miscommunication between the investigator and Mr. Rahman. Such a mistake does not provide a rational basis for the audit and there is no other justification in the record for the Division's use of \$1,100 as the store's average daily sales. Accordingly, that portion of the assessment resulting from the audit, i.e., \$49,763.90 (*see*, Finding of Fact "13"), must be cancelled.

I. Given petitioner's failure to comply with the notice requirements of Tax Law § 1141(c) (*see*, Conclusion of Law "B"), the \$11,466.45 portion of the assessment based on the seller's failure to remit payment on sales tax reported is sustained.

J. The petition of Rony Enterprise, Inc. is granted to the extent indicated in Conclusion of Law “H”; the petition is in all other respects denied. The Division of Taxation is directed to modify the Notice of Determination dated October 14, 2004 in accordance with Conclusion of Law “H” and as modified the notice is sustained.

DATED: Troy, New York
June 22, 2006

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE