

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
ERIE LINKS MANAGEMENT, INC., : SMALL CLAIMS
ROBERT D. HALL AND THOMAS M. OOT : DETERMINATION
 : DTA NOS. 820998,
 : 820999 AND 821000
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period September 1, 2000 through November 30, 2000. :

Petitioners, Erie Links Management, Inc., 5900 N. Burdick Street, East Syracuse, New York 13059-9462; Robert D. Hall, 4892 Canterbury Drive, Manlius, New York 13104, and Thomas M. Oot, 4968 North Eagle Village Road, Manlius, New York 13104, each 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, 2000 through November 30, 2000.

A consolidated small claims hearing was held before James Hoefler, Presiding Officer, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York on June 15, 2006 at 9:15 A.M. Petitioners Robert D. Hall and Thomas M. Oot appeared *pro se* and also for petitioner Erie Links Management, Inc. The Division of Taxation appeared by Mark F. Volk, Esq. (Bruce C. Van Schaick, CPA, and Laura J. Liberio).

Since the parties herein did not reserve time to submit post-hearing briefs, the three-month period for the issuance of this small claims determination commenced as of the date the hearing was held.

ISSUE

Whether the statute of limitations for assessment expired before the Division of Taxation issued assessments to Erie Links Management, Inc., and Robert D. Hall and Thomas M. Oot as alleged responsible persons, for sales tax due on tangible personal property which Erie Links Management, Inc. acquired as purchaser in a bulk sales transaction.

FINDINGS OF FACT

1. Pursuant to a Bulk Sales Agreement dated April 6, 2000, petitioner Erie Links Management, Inc. (“ELMI”) acquired, *inter alia*, all of the assets of Erie Village Golf Course, Inc. (“the seller”). The Bulk Sales Agreement provided, in pertinent part, that:

It is hereby agreed between the parties that the Transferee [ELMI] shall pay to the Transferor [the seller] the sum of \$120,000.00, in Escrow, on execution of this Agreement and in full compliance with New York State’s Sales Law for the acquisition of all of the inventory, equipment and business accessories set forth on Schedules. . . .

The Transferor shall be responsible for satisfying all of the vendors and creditors set forth within the Bulk Sales Affidavit being delivered by the Transferor to the Transferee, as of this date. The Transferee shall provide notice to the creditors in order to comply with the statutory requirements of a Bulk Sale. . . .

All cash monies paid pursuant to this Agreement shall be held in Escrow by Attorney Vaughn Lang, Esq., pending compliance with New York State’s Bulk Sales Law and proper notice to all creditors.

A Bill of Sale executed by the seller’s president, also dated April 6, 2000, provided that the seller “does further indemnify and hold harmless [ELMI] from any loss, claim or liability pertaining to said transfer.”

2. On or before April 14, 2000, ELMI prepared and mailed to approximately 200 creditors of the seller a document entitled “NOTICE OF BULK SALE.” The notice stated the following:

Please be advised that you are hereby given notice that a bulk transfer is about to be made pertaining to the assets, inventory and equipment presently owned by Erie Village Golf Course, Inc., hereafter referred to as "Transferor", located at 5900 North Burdick Street, East Syracuse, New York 13057, to Erie Links Management, Inc., hereafter referred to as "Transferee", located at 5912 North Burdick Street, East Syracuse, New York 13057.

The Transferee has offered to purchase the remaining assets of the Transferor and honor existing paid memberships and scheduled events for the 2000 Golf Season (in the sum of approximately \$90,000.00) and make a cash payment to the Transferor in the sum of \$120,000.00.

The location of the property to be conveyed pursuant to this bulk transfer is at the Erie Village Golf Course, located at 5900 North Burdick Street, East Syracuse, New York, and the general description of the property is golf course equipment, office equipment, Pro Shop inventory, and other related goods.

The estimated total of the Transferor's debt, as of this date, is the sum of \$1,200,000.00. The assets, inventory and equipment being conveyed to the Transferee as a result of this bulk sale have a fair market value of approximately \$200,000.00. A list of the creditors and the amount claimed due by each of the creditors may be inspected at 5912 North Burdick Street, East Syracuse, New York 13057, Attention: Gretchen Goodfellow, (315) 656-7251 ext. 152.

This transfer is in part for new consideration and the payment of all monies relating thereto shall take place on the 28th day of April, 2000, at 10:00am, at the office of Vaughn D. Lang, Esq., 6883 East Genesee Street, Fayetteville, New York, 13066.

In order to discuss your claim and any monies that may be available to pay your outstanding claim, you should contact James Frank, CPA, 5900 North Burdick Street, East Syracuse, New York 13057, (315) 656-4653 ext. 20.

This notice is intended to comply with Section 6-107 of New York's Uniform Commercial Code.

3. ELMI mailed, by certified mail return receipt requested, a copy of the above described Notice of Bulk Sale to "New York State Dept of Taxation, 333 East Washington Street, Syracuse, NY 13202." The return receipt from the United States Postal Service indicated that

ELMI had a piece of certified mail delivered to the New York State Dept of Taxation, 333 East Washington Street, Syracuse, NY 13202 on April 14, 2000. The first name of the person who signed for certified mail was either Gay or Gary G. and, while the last name is mostly illegible, the first three letters of the last name appear to begin with the letters P-O-S.

4. The New York State Department of Taxation and Finance, Division of Taxation (“Division”), maintains a District Office at 333 East Washington Street, Syracuse, NY 13202. The two individuals who appeared on behalf of the Division at the small claims hearing held herein are both auditors from the Syracuse District Office and their testimony was that in the year 2000 there was no Division employee assigned to the Syracuse District Office by the name of Gay or Gary G. P-O-S. The auditors also testified that a comprehensive search of the Syracuse District Office and the Division’s computer records concerning bulk sales failed to reveal that the Division ever received the Notice of Bulk Sale which was signed for on April 14, 2000.

5. Pursuant to the terms of the Bulk Sales Agreement, Notice of Bulk Sale and Bill of Sale, the \$120,000.00 cash payment ELMI was required to pay the seller was held in escrow until April 28, 2000. ELMI, believing that it had given the Division timely and proper notification of the bulk sale on April 14, 2000, released the \$120,000.00 to the seller on April 28, 2000 since it had not received a notice from the Division within five business days of the Division’s receipt of the Notice of Bulk Sale. There is no dispute in this matter that ELMI took possession and control of the tangible personal property which it acquired in the bulk sale in question on or about April 6, 2000 and payment was made to the seller on April 28, 2000.

6. In May 2003, the Division’s Syracuse District Office initiated a field audit of the seller for the period June 1, 2000 through May 31, 2003. When the auditor learned that the seller had sold the business prior to the proposed audit period, she ceased all audit action with respect to

the seller. Instead, the Division, in September 2003, commenced an audit of ELMI and the audit period stated in the appointment letter was September 1, 2000 to August 31, 2003. ELMI, like the seller, was also a registered vendor. The Tax Field Audit Record indicates that the Division's auditor became aware of the bulk sale in October 2003, at the earliest, or January 2004, at the latest.

7. During the course of the audit, the Division obtained from ELMI two consents extending the period of limitations for assessment. The first consent extended the period of limitations for assessment for the period September 1, 2000 through May 31, 2001 to June 20, 2004. The second consent extended the period of limitations for assessment for the period September 1, 2000 through November 30, 2001 to December 20, 2004. There is no evidence in the record that consents extending the period of limitations for assessment were obtained from petitioner Robert D. Hall or petitioner Thomas M. Oot.

8. Upon completion of the audit, the Division determined that ELMI had properly reported gross and taxable sales and that it collected and remitted the proper tax on sales. The Division, however, concluded that ELMI had not paid the proper sales taxes on all of its taxable purchases. Specifically, the Division determined that ELMI owed \$4,160.13 of tax for the quarter ending November 30, 2000 on the assets, valued at \$59,430.43, it had acquired from the seller in the bulk sales transaction. The Division also concluded that \$230.65 of tax was due for the quarter ending August 31, 2002 for nonrecurring expense purchases. Finally, the Division found that \$201.15 of tax was due on recurring expense purchases for each of the eight quarters ending November 30, 2000 to August 31, 2002. In this proceeding, petitioners do not dispute the Division's calculation of the tax due. Petitioners do, however, argue that the assessments asserting that \$4,160.13 of tax was due on ELMI's acquisition of the seller's assets pursuant to the bulk sale transaction were issued beyond the applicable statute of limitations for assessment.

9. On November 4, 2004, the Division issued a Notice of Determination to ELMI asserting that \$4,361.28 (\$4,160.13 + \$201.15) of tax, plus interest, was due for the quarter ending November 30, 2000. On January 10, 2005, the Division issued separate notices of determination to petitioner Robert D. Hall and petitioner Thomas M. Oot, asserting that they were each personally liable for the \$4,361.28 of tax, plus interest, due from ELMI for the quarter ending November 30, 2000. As noted previously, ELMI concedes that it is liable for the \$201.15 of tax due on recurring expense purchases for the quarter ending November 30, 2000. The tax due on recurring expense purchases for the other seven quarters included in the audit, plus the \$230.65 of tax due on nonrecurring expense purchases, has been paid and is not at issue in this proceeding.

10. The auditor's work papers, specifically Schedule E, detail her computation of the tax due on ELMI's acquisition of the seller's assets in the bulk sale transaction. On Schedule E, the auditor recorded the "Invoice Date" for the bulk sale as "09/01/2000." No invoice number was listed on Schedule E. The record herein contains no explanation why an invoice date of September 1, 2000 was used by the auditor when all of the relevant documents reflect that the bulk sale occurred in April 2000 and that ELMI also took possession and control of the tangible personal property purchased in the bulk sale in April 2000. There is no documentary evidence in the record to support that possession and control of the tangible personal property acquired by ELMI in the bulk sales transaction occurred on September 1, 2000 as asserted by the Division.

11. The seller was a registered vendor for sales tax purposes and it filed a sales and use tax return for the quarter ending May 31, 2000. From its records the Division was unable to verify that the seller collected sales tax from ELMI on the value of the taxable tangible personal property acquired by ELMI in the bulk sales transaction. Petitioners were unable to produce any

documentary evidence to show that the seller charged and collected sales tax on the taxable assets transferred to ELMI in the bulk sale transaction.

12. ELMI was also a registered vendor for sales tax purposes. ELMI filed a sales and use tax return for the quarter ending May 31, 2000 on or about the June 20, 2000 due date. On its sales and use tax return for the quarter ending May 31, 2000, ELMI reported \$142,657.00 in gross sales, \$41,979.00 in taxable sales and that there were no purchases subject to use tax. Since ELMI reported that there were no purchases subject to use tax on its return for the quarter ending May 31, 2000, it is clear that it did not include the sales tax due on the assets acquired from the seller in the bulk sale transaction on said return.

CONCLUSIONS OF LAW

A. It is concluded that the Division did not properly or timely issue assessments to petitioners for the \$4,160.13 of tax due on ELMI's acquisition of the seller's assets in the bulk sale transaction. Initially, it is noted that the Division's assessments incorrectly assert that the \$4,160.13 of tax is due for the quarter ending November 30, 2000. The evidence adduced at hearing clearly shows that the tax on this bulk sales transaction is due for the quarter ending May 31, 2000 and, indeed, there seems to be no dispute between the parties that the bulk sale occurred in April 2000. There is no evidence to support the auditor's conclusion that the bulk sale occurred on September 1, 2000 or that any tax due attributable to the bulk sale belongs in the quarter ending November 30, 2000. Furthermore, the assessments at issue herein do not include the quarter ending May 31, 2000, nor did the Division's request for records and subsequent field audit encompass this period. Likewise, the two waivers to extend the statute of limitations for assessment executed by ELMI do not include the quarter ending May 31, 2000.

B. The seller in the bulk sales transaction at issue was a registered vendor and therefore it was required to collect from ELMI the sales taxes due on the value of the taxable tangible personal property which was transferred via the April 2000 bulk sale. If the seller failed to collect the proper tax due on the bulk sale, then ELMI, as a registered vendor, had to report the tax due on its return. The Division's Form ST-130, Business Purchaser's Report of Sales and Use Tax, advises taxpayers who are registered vendors not to use Form ST-130, but instead to use their periodic sales tax return to report and remit the tax due. In the instant matter, ELMI filed a return for the quarter ending May 31, 2000 on or about June 20, 2000 and therefore the general three-year statute of limitations for assessment (Tax Law § 1147[b]) commenced as of this date. Since the \$4,160.13 of tax due on the bulk sale transaction in question was due for the quarter ending May 31, 2000 and since petitioner filed a return for this quarter on or about June 20, 2000, the Division, because the two waivers to extend the statute of limitations for assessment executed by ELMI did not include the quarter ending May 31, 2000, had until June 20, 2003 to assess this tax due. The Division's assessments dated November 4, 2004 and January 10, 2005 are clearly issued beyond the three-year statute of limitations applicable in this matter.

C. The main thrust of petitioners' argument centered around the assertion that timely and proper notice of the bulk sale in question was given to the Division via the certified mailing of the Notice of Bulk Sale on or before April 14, 2000. Although this issue is rendered moot by the above conclusions, I will nonetheless briefly address this point.

Tax Law § 1141(c) provides that a purchaser in a bulk sale transaction must notify the Division by registered mail of said sale at least 10 days prior to the date of the sale. Regulation 20 NYCRR 537.2(b) specifically provides that notification must be served on "Bulk Sales Unit,

Central Office Audit Bureau, Audit Division, Department of Taxation and Finance, State Campus, Albany, New York 12227.” Although petitioners made a good faith attempt to give the Division notification of the bulk sale, such notification was clearly mailed to the wrong address, and therefore notice of the bulk sale was not given on April 14, 2000 as asserted by petitioners. Petitioners’ argument that they complied with the provisions of Article 6 of the Uniform Commercial Code and should therefore be found to have complied with the notice requirements of Tax Law § 1141(c) is unavailing. Tax Law § 1141(c) and regulation 20 NYCRR 537.0(e) clearly provide that a taxpayer, in addition to complying with the law and regulations, are also subject to the liabilities and remedies imposed under Article 6 of the Uniform Commercial Code. This is a tax matter and the provisions of the Tax Law and regulations govern and must be applied to the facts of this case. There is nothing in the Tax Law to suggest that the provisions of Article 6 of the Uniform Commercial Code supercede or supplant the Tax Law and regulations. In fact, Tax Law § 1141(c) provides that “in addition” to being subject to the Tax Law, a taxpayer is also “subject to the liabilities and remedies imposed under the provisions of article six of the uniform commercial code.”

D. While I have concluded that ELMI’s mailing on or before April 14, 2000 did not comply with the bulk sale notification provisions of Tax Law § 1141(c), I believe it is fair and equitable (Tax Law § 2012) to find that petitioners did give notice of the bulk sale to the Division’s auditor no later than January 2004. Since the Division’s assessments were not issued until November 4, 2004 and January 10, 2005, dates which are clearly more than 90 days from the January 2004 notification date, the assessments must be found as untimely with respect to the \$4,160.13 of tax asserted due on the bulk sale transaction.

E. Finally, it is well settled that consents to extend the statute of limitation signed on behalf of a corporation are not sufficient to extend the statute for the individual officers (*see, Matter of On-Site Petroleum Unlimited*, Tax Appeals Tribunal, February 8, 1996; *Matter of Bleistein*, Tax Appeals Tribunal, July 27, 1995). In each case, the Tribunal found that to bind the officers with a consent signed on behalf of the corporation would be inconsistent with settled law that the liability of an officer is separate and independent from that of the corporation. Accordingly, the assessments issued to petitioner Robert D. Hall and petitioner Thomas M. Oot asserting that \$201.15 of tax was due on recurring expense purchases for the quarter ending November 30, 2000 were issued beyond the applicable statute of limitations for assessment.

F. The petition of Erie Links Management, Inc. is granted to the extent that the \$4,160.13 of tax asserted due on the bulk sale transaction is to be deleted from the Notice of Determination dated November 4, 2004 and, except as so granted, the petition is in all other respects denied.

G. The petitions of Robert D. Hall and Thomas M. Oot are granted and the January 10, 2005 Notice of Determination issued to each petitioner is hereby canceled in full.

DATED: Troy, New York
September 14, 2006

/s/ James Hoefler
PRESIDING OFFICER