STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CLIFTON LIQUOR CORP.	:	DETERMINATION DTA NO. 821499
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, 1999 through February 28, 2001.	:	

Petitioner, Clifton Liquor Corp., 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, 1999 through February 28, 2001.

A hearing was commenced before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 18, 2007 at 10:30 A.M., and continued to conclusion at the offices of the Division of Tax Appeals, 1740 Broadway, 14th Floor, New York, New York, on December 18, 2007, with all briefs to be submitted by April 25, 2008, which date began the six-month period for the issuance of this determination. Petitioner appeared by Leonard L. Fein, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUE

Whether petitioner was a purchaser in a bulk sale transaction of a Brooklyn liquor store so that it became liable under Tax Law § 1141(c) for sales tax determined due from the seller, 1029 Bedford Liquor Corp.

FINDINGS OF FACT

1. In the spring of 2001, 1029 Bedford Liquor Corp., which operated the Rand Liquor Store, located at 1029 Bedford Avenue in the Bedford-Stuyvesant section of Brooklyn, filed with the New York State Liquor Authority (Liquor Authority) an application for a liquidator's permit. A licensee, under the Alcoholic Beverage Control Law, "who is selling or liquidating their business and who proposes to dispose of the stock of alcoholic beverages in connection with such sale," is required to obtain a liquidator's permit from the Liquor Authority. The application includes signatures of individuals on behalf of the seller, 1029 Bedford Liquor Corp., and on behalf of the buyer, petitioner, Clifton Liquor Corp. The individual who signed on behalf of petitioner was Jose Cepeda. It is not as easily determined who signed on behalf of 1029 Bedford Liquor Corp., but after a close review of the handwriting on the application, it is reasonable to find that an individual named Rafael Tavarez[1] signed the application on behalf of the seller, 1029 Bedford Liquor Corp.

2. A liquor store operated at this Brooklyn location at least from the year 1994, when an investigator for the Division of Taxation (Division) first patronized the business as a private individual. Further, during a visit to the premises in 2005, the investigator was informed, when she made inquiries at neighboring businesses, that the liquor store had "never been closed to either undergo renovation or closed pending some new business to come there." The Division's tax auditor described the premises of Rand Liquor Store, based upon his personal visit, as follows:

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[1] The surname Tavarez also appears in the evidentiary record as part of the landlord's name, i.e., Tavarez Enterprises, Inc., which rented the premises where Rand Liquor Store was located to petitioner. In addition, a signature by an individual named Pedro Tavarez on behalf of Tavarez Enterprise, Inc., appears on a "To Whom It May Concern" letter introduced by petitioner in support of its claim that it moved into "an empty premises" when it started up its liquor store business.

> A corner liquor store, roughly 20 feet by 80, 90 feet back. When you walk in, it's surrounded by bulletproof glass. When you walk down the middle, you can't actually touch any liquor. You walk in, the cash register is all behind the bulletproof glass, you just walk down the middle.

3. In order to confirm that a transfer of assets from 1029 Bedford Liquor Corp. to petitioner took place, a tax technician on behalf of the Division phoned the Liquor Authority and was informed that a note in the Liquor Authority's file indicated that there was a transfer of the liquor inventory to petitioner and that it "appeared to be paying for the inventory over a year" at the rate of $1,000.00 per week.

4. The Division, based upon the information obtained from the Liquor Authority, prepared a "dummy" form AU-196.10, Notification of Sale, Transfer, or Assignment in Bulk, dated June 28, 2004 by the Division's tax technician, which noted the sale of a retail liquor store by 1029 Bedford Liquor Corp. to Clifton Liquor Corp. with a "last day of business" shown of November 1, 2001. The Division then estimated the fair market value of the retail liquor store business which it treated as having been sold to petitioner. By utilizing Robert Morris studies and the sales tax filing history of 1029 Bedford Liquor Corp., the Division calculated a fair market value for the business of $237,864.75 as follows. The Division multiplied the "smallest reported gross sales" for a sales tax quarter of 1029 Bedford Liquor Corp. of $190,291.80[2] by four to calculate annual gross sales of $761,167.20. The Division then used "a sales to asset ratio of 3.2" based upon the Robert Morris studies for liquor stores to calculate an estimated selling price or fair market value for the retail liquor store's "total business assets" sold or transferred to petitioner of $237,864.75.

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[2] In fact, the smallest quarterly amount shown for gross sales was $56,214 for the period ending 8/31/01, which was an abbreviated final sales tax quarter for 1029 Bedford Liquor Corp. However, for the nine other sales tax quarters from March 1, 1999 to May 31, 2001 shown on the "schedule of returns filed" by 1029 Bedford Liquor Corp., gross quarterly sales ranged from $190,172.00 to $222,657.00.

5. Petitioner did not respond with any evidence of start-up costs when requested by the Division's tax technician, who maintained that it is easy to verify if a business started from scratch by a review of invoices for inventory, a new sign, and other types of start-up expenses. In this case, petitioner provided to the Division for review only a single invoice for some minor maintenance work and, at the conciliation conference on July 20, 2006, a copy of an invoice for a new cash register which the Division contends appears to have been doctored since the vendor was not in existence as of the date of the invoice. The invoice for a new cash register was dated May 25, 2001, while the tax technician's "business profile inquiry," run on the Division's computer system, revealed a "create date" for the vendor of September 27, 2001. The Division also viewed as suspicious the information concerning telephone numbers entered on the application for a liquidator's permit filed by 1029 Bedford Liquor Corp. and petitioner. The telephone number noted for 1029 Bedford Liquor Corp. was 718-788-3399 while petitioner's telephone number was shown as 718-783-3399, with the one varying digit. The tax technician's "business profile inquiry" for 1029 Bedford Liquor Corp. disclosed a telephone number of 718-783-3399, which is the same number as shown for petitioner, suggesting that petitioner as purchaser obtained the seller's telephone number in a bulk sale transaction. The Division seems to be suggesting that the varying telephone numbers in the permit application were not the result of a typographical error but an attempt to conceal that petitioner, as purchaser, had the same telephone number as 1029 Bedford Liquor Corp., the seller.

6. The Division also obtained information about petitioner, as noted in Finding of Fact 2, as the result of a visit to the premises of the liquor store by its investigator on May 8, 2002 when she spoke with Jose Cepeda. In her contemporaneous e-mail to various Division employees, the

investigator noted that, "Mr. Cepeda stated he purchased the business from the previous owners in June 2001," and that his then attorney assisted him with "the Bulk Sale."

7. In its sales tax audit of 1029 Bedford Liquor Corp., the Division determined that sales tax was due and owing in an amount substantially greater than $237,864.75, its estimate of the "total business assets" acquired by petitioner in a bulk sale as shown above in Finding of Fact 4. The Division issued a Statement of Proposed Audit Change to 1029 Bedford Liquor Corp., dated March 1, 2004, asserting a current balance due of $1,020,377.72, which includes sales tax due of $400,486.59 plus penalty of $366,825.04 and interest of $253,066.09 for the period March 1, 1999 through February 28, 2001. Two months later, the Division issued a Statement of Proposed Audit Change dated May 12, 2004 for the later period of March 31, 2001 through August 31, 2001 to 1029 Bedford Liquor Corp., asserting a current balance due of $110,440.56, which includes sales tax due of $62,356.36 plus penalty of $24,942.26 and interest of $23,141.94. Consequently, the Division asserted sales tax due against 1029 Bedford Liquor Corp. after audit of $462,842.95, an amount substantially greater than the sales tax due of $237,864.75, which it has asserted against petitioner as a bulk sale purchaser. Accordingly, the Division issued a Notice of Determination dated December 13, 2004 against petitioner as a bulk sale purchaser asserting sales tax due of $237,864.75, with no interest or penalty added.

8. The sales tax audit of 1029 Bedford Liquor Corp. was a difficult task for the Division's auditors, who were not provided with any cooperation and had difficulty even finding out who owned the corporation. According to the audit report, "The company refused to provide responsible person information." Since no sales records were provided in response to the Division's written request for records, the auditors obtained sales records from third-party vendors who had supplied liquor to the Brooklyn store. A schedule of "third party

confirmations" of liquor purchases made by 1029 Bedford Liquor Corp., obtained from four different vendors, Paramount, Peerless, Premier and Charmer, shows total purchases of $5,890,343.00 for the period running from March 1, 1999 through August 31, 2001. Since no sales records were provided by 1029 Bedford Liquor Corp., the Division used a markup percentage of 27.55, based on annual statement studies for 1999-2000 of "RMA, The Association of lending and credit risk professionals." Accordingly, the auditor calculated estimated sales of $7,513,132.50 by applying the 27.55 percent markup to total purchases of $5,890,343.00. After subtracting reported sales of $1,902,918.00, the auditor computed unreported sales of $5,610,214.50. Applying the applicable tax rate of 8.25 percent, the auditor calculated additional tax due of $462,842.70, which provided the basis for its issuance of the statements of proposed audit change noted above.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner maintains that the Division "has presented no credible evidence that a bulk sale took place." In fact, petitioner actually refers to the Division's tax technician as a "blatant liar." Further, it argues that, "Even [if] there was a contemplated sale and a form might have been filed for a proposed sale with the State Liquor Authority, that does not mean that a sales [sic] took place." In addition, petitioner contends that a valid assessment was not issued against the alleged bulk sale seller "as the original assessment was made after the expiration of the statute of limitations." Therefore, there was no liability to be transferred to petitioner.

10. The Division maintains that petitioner's "Failure to comply with the provisions of Tax Law § 1141(c) exposes [petitioner] to personal liability for the seller's taxes." It contends that the Division's "correspondence and telephone conversations with the State Liquor Authority," the information acquired by its investigator during her visits to petitioner's premises, and

evidence that petitioner's telephone number was the same as the bulk sale seller's "clearly support that a bulk sale took place . . . ." The Division emphasizes that "Petitioner presented no evidence to show that it made purchases of new inventory and supplies to start a new liquor store." With regard to the sales tax audit of the bulk sale seller, the Division argues that its audit method was reasonable based on the lack of sales records and that it was justified in relying on external indices to determine additional sales tax due. In short, according to the Division, petitioner failed to produce clear and convincing evidence to warrant any adjustment to the assessment against it as a bulk sale purchaser.

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. The liability of the purchaser is limited to the greater of the purchase price or fair market value of the business assets sold (***see*** 20 NYCRR 537.1[c][2]).

B. The term "bulk sale" is defined at 20 NYCRR 537.1(a) in an *expansive* fashion 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.

This regulatory definition of bulk sale even includes transfers "by way of gift" providing as an example of a bulk sale: "A husband makes a gift of all his business assets to his wife" (20 NYCRR 537.1[a][3], Example 4; ***see also Matter of Gaughan***, Tax Appeals Tribunal, May 14, 1992 [Tribunal noted that "sale of assets as part of a liquidation of the seller's business is considered to be within the purview of section 1141(c)"]).

C. Furthermore, a bulk sale can exist even when the purchaser is not required to transfer over to the seller "any sums of money" (***see Matter of Peconic Bay Motors, Inc.***, Tax Appeals Tribunal, September 26, 1991 [Tribunal noted that Tax Law § 1141(c) applies in the case where the sole consideration received by the seller takes the form of debt relief]). Moreover, the regulatory definition of "purchaser" encompasses "any person who, as part of a bulk sale, purchases *or is the transferee or assignee* of business assets" (20 NYCRR 537.1[e] [emphasis added]).

D. The pivotal issue to be resolved is whether petitioner was a bulk sale purchaser of the Brooklyn retail liquor store known as Rand Liquor Store. Initially it is necessary to determine whether the Division established a reasonable basis for its assessment of petitioner as a bulk sale purchaser (***see Matter of Burbacki***, Tax Appeals Tribunal, February 9, 1995). Here, as noted in Findings of Fact 1 and 3, the Division introduced evidence obtained from the State Liquor Authority that supports the conclusion that petitioner was not merely the *transferee* of the inventory of Rand Liquor Store, which would have been sufficient in itself to find a bulk sale as emphasized above, but, in fact, petitioner was the *purchaser* of such inventory by the payment at the rate of $1,000.00 per week for one year. To the extent that hearsay evidence was relied upon for this conclusion, it is noted that hearsay evidence is admissible in proceedings in the Division of Tax Appeals (***Matter of Flanagan v. New York State Tax Commn***, 154 AD2d 758, 546 NYS2d 205 [1989]; ***Matter of Paddock***, Tax Appeals Tribunal, December 17, 1992). Further, the hearsay evidence relied upon here to establish the rational basis for the Division's assessment included information that was probative: the factual details of the phone conversation which the Division's tax technician had with an unidentified individual at the Liquor Authority was in harmony with the information in the application filed with the Liquor Authority for a permit. In

addition, the hearsay statements of petitioner's principal, Jose Cepeda, described in the course of the testimony of the Division's investigator, who visited petitioner's premises on May 8, 2002 and spoke with Mr. Cepeda, may be given weight. The investigator in her *contemporaneous* e-mail to various Division employees noted that "Mr. Cepeda stated he purchased the business from the previous owners in June 2001," and that his then attorney assisted him with "the Bulk Sale."

E. Consequently, since there was a reasonable basis for the assessment against petitioner based upon a bulk sale transaction, the burden of proof to show error in the assessment shifted to petitioner, which it clearly did not shoulder. Notably, petitioner failed to produce the testimony of its principal, Jose Cepeda, which must be held against it (***cf. Matter of Meixsell v. Commissioner of Taxation***, 240 AD2d 860, 659 NYS2d 325 [1997], ***lv denied*** 91 NY2d 811, 671 NYS2d 714 [1998], ***Matter of Greenwald***, Tax Appeals Tribunal, November 24, 1993). Further, as noted in Finding of Fact 5, petitioner failed to offer any evidence of start-up costs other than some questionable documents for which no foundation was provided through the testimony of a knowledgeable witness. Petitioner cannot shift the burden of proof to the Division by merely arguing that the Division's proof that an application was filed does not necessarily mean that the inventory was liquidated in accordance with the application. Rather, it was for petitioner to introduce evidence to prove otherwise, and petitioner simply never presented any reliable evidence to counter the Division's proof. Similarly, it is not enough for petitioner to complain that the investigator presumed the individual at the premises was Mr. Cepeda because that was how he identified himself to the investigator. Petitioner's complaint that the investigator did not ask for identification from the individual operating the liquor store on the day of her visit, does not provide a basis to reject the investigator's testimony. Rather, it

was for petitioner to present the testimony of Mr. Cepeda and establish contrary facts to those testified to by the investigator, and this failure to present Mr. Cepeda as a witness is properly construed against petitioner as noted above. Further, the introduction into evidence of a "To Whom It May Concern" letter of Pedro Tavarez, stating that Tavarez Enterprises, Inc., the landlord of the liquor store's premises, "delivered an empty premises" to petitioner falls far short of meeting petitioner's burden of proof especially in light of the evidence from the State Liquor Authority introduced by the Division. Indeed, this claim by Pedro Tavarez was not even in the form of an affidavit. In sum, it is a much more substantial task for a taxpayer to sustain its burden of proof than for the Division merely to establish a rational basis for its assessment (***see Matter of Orvis***, Tax Appeals Tribunal, January 14, 1993, ***annulled in part*** 204 AD2d 916, 612 NYS2d 503 [1994], ***modified*** 86 NY2d 165, 630 NYS2d 680 [1995], ***cert denied*** 516 US 989, 133 L Ed 2d 426 [1995] [Tribunal noted that the Division of Taxation does not have the burden of proving the propriety of its assessment, but rather the failure of the petitioner in Orvis to "establish the specific fact" required the Tribunal to "conclude that petitioner has not sustained its burden"]).

F. Clifton Liquor Corp., as a bulk sale purchaser, is properly held to be secondarily responsible for the seller's (i.e., 1029 Bedford Liquor Corp.) unpaid sales tax since it failed to file a proper and timely notice of bulk sale (***see Matter of North Shore Cadillac-Oldsmobile, Inc.***, 13 AD3d 994, 787 NYS2d 463 [2004], ***lv denied*** 5 NY3d 704 [2005]). Furthermore, as detailed in Finding of Fact 8, the Division calculated a reasonable estimate of sales tax due from the bulk sale seller, 1029 Bedford Liquor Corp., in light of its failure to cooperate and provide sales records as requested by the Division (***see Matter of Rincon***, Tax Appeals Tribunal, October 9, 2003). Nonetheless, petitioner's liability is limited to the "fair market value of the business assets sold"

as noted in Conclusion of Law A, and petitioner may be held liable only for *tax* due from the seller and not penalty and interest that might have been asserted due against the seller (***Matter of Gaughan***). With such limitation in mind, it is concluded that the estimate of "the selling price of business assets" from 1029 Bedford Liquor Corp. to petitioner, as detailed in Finding of Fact 4, was reasonable (***see Matter of Velez v. Division of Taxation of the Dept. Of Taxation & Finance***, 152 AD2d 87, 547 NYS2d 444 [1989]). In ***Velez***, the Court confirmed that a bulk sale purchaser's liability under Tax Law § 1141(c) is limited to the amount of tax owed by the seller, with such amount itself limited to the greater of either the purchase price or the fair market value of the business assets purchased (which here was estimated as $237,864.75).

G. Petitioner's contention, first asserted on the continued date of the hearing, that the Division failed to establish that a timely assessment had been issued against the bulk sale seller, 1029 Bedford Liquor Corp., does not change the conclusion that petitioner is liable for "the amount of tax owed by the seller." A defense based upon the expiration of a period of limitation is an affirmative defense that must be proven by the taxpayer (***Matter of Pittman***, Tax Appeals Tribunal, February 20, 1992). The burden of proof is placed upon the Division to establish timely mailing of a statutory notice only when the Division has asserted that the statutory notice has become an unchallengeable assessment because of the filing of an untimely petition (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). Moreover, the statutory provision imposing liability on a bulk sale purchaser references "the amount of tax owed by the seller." Therefore, even presuming that an assessment might have been untimely against the bulk sale seller and not enforceable by the Division against the seller due to the expiration of a period of limitation, the applicable bulk sale provision might well be interpreted to mean that the purchaser would still be liable. Tax is still "owed by the seller" regardless of the expiration of the period of limitation to

assess and collect against the seller. In any event, it is not necessary to resolve this issue of statutory construction in light of petitioner's failure to prove that the assessments against the bulk sale seller were untimely. In addition, petitioner's complaint that it "did not have any chance to contest" the Division's proof concerning the estimate of the bulk seller's sales is baseless. From the very start of this matter, petitioner was well aware that it was being held liable for the unpaid sales tax liability of 1029 Bedford Liquor Corp., and it is the result of its own failure to adequately prepare for hearing that is the basis for its failure to contest the Division's estimate. It was within petitioner's power and knowledge to obtain information from its predecessor, whose identity remains steeped in a mystery only solvable by petitioner. As noted in Finding of Fact 1, the surname of Tavarez, is common to 1029 Bedford Liquor Corp. as well as petitioner's landlord, which adds to this mystery and suggests that petitioner's failure to produce knowledgeable witnesses on its behalf was purposeful.

H. Finally, in light of petitioner's sharp criticism of the Division's employees, it is noted that there is absolutely no basis for such criticism. The Division's employees conducted themselves professionally and courteously in a situation where petitioner was uncooperative and hiding facts, a pattern of behavior that continued up to and through the hearing process, where it failed to introduce probative evidence of any sort. In contrast, the Division based its reasonable assessment upon (i) an investigator's visit to petitioner's premises as well as her personal knowledge, acquired over a period of years, of the liquor store at the Brooklyn location at issue, (ii) information obtained from the State Liquor Authority, (iii) unchallenged Robert Morris economic studies of similar enterprises, and (iv) the sales tax filings of petitioner's predecessor. In short, petitioner has failed to undermine in any fashion the Division's position that it did *not* move into an empty store, but rather acquired its liquor business in a bulk sale transaction.

I. As a final, admittedly speculative note, petitioner's failure to present any reliable evidence in support of its case may well have been a conscious litigation strategy given the lack of any apparent merit to its petition, which presumably was filed for the purpose of delaying the collection of the taxes under review.

J. The petition of Clifton Liquor Corp. is denied, and the Notice of Determination dated December 13, 2004 issued against petitioner is sustained.

DATED: Troy, New York
July 10, 2008

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE