

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**LLARGO OF LOCKPORT, INC.** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NO. 821974  
and Use Taxes under Articles 28 and 29 of the Tax Law for :  
the Period December 1, 2002 through August 31, 2006. :

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Petitioner, Llargo of Lockport, Inc., 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 December 1, 2002 through August 31, 2006.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 130 West Main Street, Rochester, New York, on September 5, 2008, at 10:00 A.M., with all briefs to be submitted by January 30, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared by Gary M. Kanaley, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq.).

***ISSUE***

Whether petitioner's use of property, including tables, chairs, bar stools, and tableware, left behind on the premises of its restaurant as well as its conduct of business under the same restaurant name as its predecessor, with the same menu and cooking staff, constituted the transfer in bulk of business assets under Tax Law § 1141(c) so that petitioner as the transferee became liable for sales tax determined due from the predecessor restaurant.

***FINDINGS OF FACT***

1. Michael J. Long, petitioner's principal, with his wife, operate a fine dining restaurant, known as Garlock's Restaurant, in historic Lockport in Niagara County. Garlock's Restaurant was started in Lockport in 1946 by Harold Garlock, who moved the restaurant to its current location, close to the old Erie Canal, in 1968 at the street location of 35 South Transit Street. Since taking over the restaurant operation in the summer of 2006, Mr. Long and his wife have been working 60-70 hour weeks trying to establish petitioner as a financially successful restaurant operation. Although there was a change in restaurant ownership and management in 2006, the record does not disclose any changes in menu, decor, or in the tradition of fine dining at that time. Open seven days a week for dinner only, as it was in the past, a review of the most recent menu included in the administrative record, shows "roast prime ribs of beef, au jus (28 oz.)" as the most expensive entree at \$28.95 and "deep fried breaded shrimp or scallops" as the least expensive entree at \$10.95. In a listing of restaurants in the Lockport area, Garlock's Restaurant is categorized as a "Fine Dining" restaurant with an A rating: "Garlock's still offers the best steaks in town. There is a [*sic*] adequate variety of fish, fowl, and 'specials' on the menu and all meals are of high quality and tasteful presentation."

2. In 1990, Mr. Long, with his mother, Nancy Long, and his father, Robert Long, purchased the building at 35 South Transit Street in Lockport where Garlock's Restaurant was located. Each of the Longs held a one-third ownership interest in the building. Though they owned the real property as individuals, the Longs established a corporation known as Garlock's Restaurant, Inc., to operate the restaurant. Initially, each of the Longs also owned stock in the operating corporation, but in 1992, Mr. Long and his father, Robert Long, sold their stock interest to Nancy Long.

3. Prior to petitioner's operation of Garlock's Restaurant in 2006, Mr. Long's mother, Nancy Long, had been responsible for the operation of the restaurant at the same location and with the same name, Garlock's Restaurant. She oversaw the collapse of the business when expenses overwhelmed declining restaurant revenues, partly explained by the severe economic decline of the manufacturer of car radiators, Delphi Harrison, which is the major employer in Lockport, where it has its world headquarters. The failure of the restaurant operated by her would eventually result in Nancy Long's personal bankruptcy in the fall of 2007.

4. Robert Long was never involved in the day-to-day running of the restaurant, which was operated by his wife, Nancy Long, from 1990 to 2006. Nancy Long had started at Garlock's Restaurant in 1962 as a waitress, and 28 years later, in 1990, she became an equal owner, with her husband and son, of the building where the restaurant was located as well as the operator of the restaurant business. In contrast, Robert Long was a long-term employee of a government contractor in Buffalo, where he was the department head for quality control related to the construction of electrical systems. During the course of divorce proceedings, Nancy Long would obtain Robert Long's one-third ownership interest in the building housing Garlock's Restaurant in exchange for her share in the marital residence. As a result, at the time of Michael Long's purchase of the building housing Garlock's Restaurant, Nancy Long had a two-thirds ownership interest and Michael Long had a one-third ownership interest in the corporation that held title to the building.

5. Michael J. Long, in contrast with his father, Robert Long, worked in the restaurant operated by his mother, Nancy Long. In 1994, he initially started working for his mother as a cleaning person, and a couple of years later he shared the role of "host" with his mother, meeting and greeting customers three or four days per week. Mr. Long also was responsible for

marketing the restaurant by “dealing with all the people who called for advertising.” Mr. Long was employed at the restaurant in September of 2001 when the business “went south because of the plane crashes.” As noted in Finding of Fact 3, Lockport is the world headquarters of Delphi Harrison, and “there was no business during the week” since business travel collapsed according to Mr. Long. Because his mother, Nancy Long, refused to “lay anybody off,” Michael J. Long explained that the restaurant’s expenses were not adjusted to account for declining revenues, and as noted in Finding of Fact 3, the restaurant business as operated by Nancy Long failed in 2006.

6. On a closing date of August 18, 2006,<sup>1</sup> petitioner became the sole owner of the building at 35 South Transit Street in Lockport, which housed Garlock’s Restaurant. The purchase was financed by petitioner taking out a mortgage in the amount of \$150,000.00. At that time, as noted in Finding of Fact 4, the mother of petitioner’s principal, Nancy Long, had a two-thirds ownership interest in the building, with Mr. Long owning the remaining one-third. Since Nancy Long held a two-thirds interest in the building, \$100,000.00 of the \$150,000.00 is reasonably allocable to her two-thirds interest in the building since a detailed appraisal of the “restaurant building” by an experienced appraiser dated January 27, 2006 established “that the ‘as is’ market value of the fee simple estate, as of the date of valuation, January 27, 2006, is: \$150,000.00.” The remaining \$50,000.00 is reasonably allocable to petitioner’s establishing under its

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<sup>1</sup> The closing was pursuant to a contract of sale dated May 15, 2006, which specified a purchase price for the real property of \$140,000.00. However, petitioner provided little clarity concerning the sale of the building by Nancy Long to her son, Michael Long (petitioner’s principal), which suggests the lack of an arm’s-length negotiation in settling upon a selling price for the real property. Notably, the sales contract dated May 15, 2006, which describes Mr. Long as the “purchaser” and Nancy Long as the “seller,” failed to take into consideration that Mr. Long held a one-third interest in the building as noted in Finding of Fact 4. Mr. Long’s testimony was not forthcoming and quite confusing on this point: “Llargo of Lockport bought the building from my mother, okay. And so I got paid - - I own part of the building, Llargo of Lockport paid me nothing.” Further, a close review of Petitioner’s Exhibit 4, an “appraisal report of a mixed-use commercial building” noted the following as the “last transfer”: “A Quitclaim Deed on April 26<sup>th</sup>, 2006 for One and no more Dollars, Robert G. Long to Nancy L. Long. This is not considered an arms length sale.” Petitioner did not offer any evidence to clarify these inconsistencies.

management the new Garlock's Restaurant operation, i.e., to finance the business assets necessary to conduct the actual restaurant business, including the goodwill value of the well-established Lockport restaurant, with its tradition of fine dining going back six or seven decades, and the various tangible business assets left behind at 35 South Transit Street when petitioner took over operation of the restaurant with little if any change to the business. The lack of change in the operation is vividly reflected by the fact that the cooking crew and the menu remained the same.

7. The Division of Taxation (Division) issued a Notice of Determination dated December 11, 2006 against petitioner "because you are liable as a bulk sale purchaser for taxes determined to be due" from Garlock's Restaurant, Inc., the entity owned by Nancy Long that operated the restaurant that petitioner took over during the summer of 2006. This notice referenced three assessments: (1) L-028014872, (2) L-028014873 and (3) L-02814874 and asserted corresponding amounts of sales tax due for (1) the period December 1, 2002 through May 31, 2006 of \$161,000.00, (2) the period June 1, 2006 through August 31, 2006 of \$9,284.08, and (3) the period March 1, 2006 through May 31, 2006 of \$6,750.00. The total of these three amounts is \$177,034.08, against which the Division credited payments of \$34,417.85, which resulted in a "current balance" asserted due of \$142,616.23.

8. The Division determined taxes due from Garlock's Restaurant, Inc., by estimating tax due as the result of the failure by Garlock's Restaurant, Inc., to provide guest checks, cash register tapes or any source documents of sales. According to the taxpayer, the restaurant's records were lost in a flood. As a result, the Division determined taxable sales by utilizing the restaurant's cost of goods sold, as shown on the federal corporate income tax returns of

Garlock's Restaurant, Inc.,<sup>2</sup> in conjunction with financial ratios from the 2003 Restaurant Industry Operations Report published by Deloitte & Touche. Based on this report, the Division determined that the applicable markup for a full service restaurant where the average check per person was \$25.00 or more was 31.15%, which it lowered to 29% because the Division determined that since Garlock's Restaurant was primarily a steak restaurant, the markup would be somewhat lower based on prior experience of the auditors. After audit, the Division more than doubled the reported taxable sales of Garlock's Restaurant, Inc., from \$1,455,023.00 to \$3,400,324.62 for the period December 1, 2002 through May 31, 2006, resulting in additional tax due of \$161,000.00. The record does not provide a clear explanation for the basis of the two smaller amounts asserted due of \$9,284.08 and \$6,750.00, with the latter amount of \$6,750.00 seemingly included in the \$161,000.00.

9. Although in the summer of 2006, the operation of Garlock's Restaurant had shifted from the corporation, Garlock's Restaurant, Inc., to petitioner, there was no filing of a Notification of Sale, Transfer or Assignment in Bulk. Petitioner believed it was not required to file such notification because it paid no consideration to Garlock's Restaurant, Inc., for the assets of the restaurant and only paid consideration to Nancy Long for the real property housing the restaurant. Nonetheless, petitioner in late August of 2006 began its own operation of Garlock's Restaurant only a few days after Nancy Long's operation ended, without changing a single table, chair or restaurant sign and utilizing the coolers, freezers and ovens on the premises. The administrative record, in fact, does not disclose any changes to the actual restaurant operation in

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<sup>2</sup> For 2003, 2004 and 2005, amounts for the cost of goods sold were taken from the federal income tax returns of Garlock's Restaurant, Inc. Since at the time of the audit, a return had not been filed for the year 2006, the auditor utilized purchase invoices provided by Garlock's Restaurant, Inc., to determine cost of goods sold for that partial year.

the building located at 35 South Transit Street in Lockport in terms of decor, menu,<sup>3</sup> equipment, tableware or cooking staff when petitioner took over the operation.

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

10. Petitioner makes two main points: There was no bulk purchase because petitioner did not purchase business assets from Garlock's Restaurant, Inc., and even if this was a bulk purchase, the business had no value and petitioner no liability for any unpaid sales tax that might have been due from Garlock's Restaurant, Inc. Petitioner maintains that "Because of Nancy Long's bankruptcy and the Corporation's insolvency, the business had a fair market value of zero," and "In fact, if it had any value it was a negative value." Petitioner emphasizes that petitioner is *not* Garlock's Restaurant, Inc.: "Corporate entities cannot be disregarded . . . . Michael [Long] did not receive any type of ownership interest in Garlock's [Restaurant, Inc.]."

11. The Division contends that, "Garlock's Restaurant, Inc. transferred assets to Llargo in an attempt to prevent the Division from collecting the proper amount of tax due from Garlock's." The Division maintains that, "It is unclear what Llargo of Lockport, Inc. received from Garlock's Restaurant, Inc., for the \$140,000.00 which was exchanged at closing" and does not accept that it was for the building housing the restaurant. In sum, the Division's position is that petitioner has not proven its assertions since it rejects the credibility of Mr. Long's testimony at hearing: "Mr. Long's testimony is so inconsistent that it is worthless."

***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

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<sup>3</sup> As its operation has gone forward in time, petitioner has made changes in the menu to offer more seafood items, which are more profitable for a restaurant operation than steak dishes.

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 or transferred (*see* 20 NYCRR 537.4[c]).

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. (Emphasis added.)

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 [“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 [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]). Here, as noted in Finding of Fact 6, petitioner became the owner and operator of Garlock’s Restaurant upon the financial collapse of the restaurant business as operated by Nancy Long, the mother of petitioner’s principal. By petitioner’s purchase



of the building from its principal's mother, Nancy Long, it also became the transferee of the tangible business assets of Garlock's Restaurant, Inc., as well as a valuable intangible: the goodwill of the decades-old Lockport restaurant known as Garlock's Restaurant.

Such *transfer*, resulting from petitioner's purchase of the building, is encompassed by the *expansive* regulatory definition of "bulk sale" noted above. Consequently, petitioner, as a bulk sale "purchaser," is properly held to be secondarily responsible for the unpaid sales tax of Garlock's Restaurant, Inc. (*see Matter of North Shore Cadillac-Oldsmobile, Inc. v. Tax Appeals Tribunal*, 13 AD3d 994, 787 NYS2d 463 [2004], *lv denied* 5 NY3d 704 [2005]). It is undeniable that in order for petitioner to operate the new incarnation of Garlock's Restaurant, the assets of Nancy Long's restaurant operation were utilized. As noted in Finding of Fact 9, petitioner's initial operation of the restaurant was nearly the same as Nancy Long's operation of Garlock's Restaurant.

D. The business assets transferred to petitioner by its taking possession of the building housing such assets cannot be said to be of merely *de minimis* value as petitioner contends. Rather, as noted in Finding of Fact 6, it is reasonable to place a value of \$50,000.00 on such business assets including, most importantly, the goodwill value of the name Garlock's Restaurant, a name which represents a long-term dining tradition in Lockport (*see Matter of Velez v. Division of Taxation of the Dept. Of Taxation & Finance*, 152 AD2d 87, 547 NYS2d 444 [1989] [which 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 (which here is zero given the way the family members structured the transaction) or the fair market value of the business assets transferred (which here is reasonably estimated as

\$50,000.00])). Goodwill “is an intangible asset that attaches to a business as a result of such favorable factors as location, product superiority, reputation, and managerial skill” (Fess and Niswonger, *Accounting Principles*, at 263 [13<sup>th</sup> Ed 1981]). Although the managerial skills of Nancy Long have been questioned, the location, product superiority, and reputation of Garlock’s Restaurant has been reasonably established in the administrative record as noted in Finding of Fact 6. Petitioner is nearing success in establishing its own profitable restaurant operation under such historic name. Moreover, petitioner’s contention that it paid “no consideration to Garlock’s Restaurant, Inc. for any assets whatsoever” is simply unproven by petitioner, since as noted in footnote 1, the transactions between family members Nancy Long and her son Michael Long (with Robert Long having transferred ownership to his wife, Nancy Long, a couple of months earlier for one dollar) do not appear to be strictly at arm’s length and raise unanswered questions on what really transpired.

E. As noted in Finding of Fact 8, the Division has established a reasonable basis, given the lack of cash register tapes, guest checks, or original source documents, for its calculation of additional tax due from petitioner’s predecessor, Garlock’s Restaurant, Inc., in the amount of \$161,000.00 (*see Matter of Burbacki*, Tax Appeals Tribunal, February 9, 1995). However, given the statutory limitation noted above, petitioner may be held liable only for \$50,000.00 of the tax asserted due against the transferor, Garlock’s Restaurant, Inc., i.e., the reasonable fair market value of the business assets transferred, which included the goodwill value of the name Garlock’s Restaurant. Furthermore, penalty and interest may *not* be assessed against petitioner, as the bulk sale purchaser (*Matter of Velez*).

F. The petition of Llargo of Lockport, Inc. is granted to the extent indicated in Conclusion of Law E, and the Notice of Determination dated December 11, 2006 is to be modified to so conform.

DATED: Troy, New York  
July 9, 2009

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE