

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
NEW ASHIYA JAPANESE CUISINE (NY), INC. : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 822030
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period June 1, 2005 through :
May 31, 2006. :
_____ :

Petitioner, New Ashiya Japanese Cuisine (NY), 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 June 1, 2005 through May 31, 2006.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 24, 2008 at 10:30 A.M., with all briefs to be submitted by September 15, 2008, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by its president, Song Chen. The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly assessed petitioner, a bulk sale purchaser, for the sales tax liability owed by the seller at the time of the bulk sale, pursuant to Tax Law § 1141(c).

II. Whether petitioner has established sufficient basis to warrant the cancellation of penalty.

FINDINGS OF FACT

1. On October 26, 2006, pursuant to a Contract for Purchase of Business Assets From a Corporation dated August 23, 2006, petitioner, New Ashiya Japanese Cuisine (NY), Inc., purchased the assets consisting of the goodwill, lease, liquor license, and all furniture, fixtures, inventory and equipment of a restaurant business located at 167 First Avenue, New York, New York 10003. The seller in the transaction was Sandobe Sushi, 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 October 26, 2006 as the date of the sale. The envelope in which the notification was mailed to the Division is addressed to the Division's "Bulk Sales Unit, Sales Tax Desk Audit" and bears the mailing date stamp October 26, 2006. The notification form itself bears a date-stamp indicating that it was received thereafter by the Division on October 31, 2006. The Contract for Purchase and the notification form both list the purchase price as \$30,000.00.

3. The Division issued to petitioner a Notice of Claim to Purchaser, dated November 6, 2006, advising of a possible claim for sales and use taxes owed by 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. On December 29, 2006, the Division issued a Notice of Determination (Notice) to petitioner assessing sales tax due in the aggregate amount of \$19,958.90, comprised of the

following specific amounts of tax for each of the four sales tax quarterly periods encompassed within the period spanning June 1, 2005 through May 31, 2006:

Tax	Assessment ID Number	Sales Tax Quarterly Period
\$6,974.28	L-028045269-1	06/01/05 through 08/31/05
\$ 124.14	L-028045268-2	09/01/05 through 11/30/05
\$6,038.79	L-028045267-3	12/01/05 through 02/28/06
\$6,821.69	L-028045266-4	03/01/06 through 05/31/06

5. The foregoing periods and amounts of tax set forth on the Notice are identical to those set forth via assessments reflected on a December 19, 2006 Consolidated Statement of Tax Liabilities issued by the Division against the seller, Sandobe Sushi, Inc., based upon sales tax returns filed by that entity but not accompanied by payment of the full amount of tax shown due on such returns. The assessments against the respective entities differ, however, in that penalty and interest are shown as assessed against the seller, whereas neither is shown as assessed on the Notice as issued against petitioner. The Explanations and Instructions paragraph of the Notice states “[t]his notice is issued because you are liable as a bulk sale purchaser for taxes determined to be due in accordance with sections 1141(c) and 1138(a)(3) of the New York State Tax Law.”

SUMMARY OF THE PARTIES’ POSITION

6. Petitioner asserts that it was unaware of the taxes owed by the seller at the time of the bulk sale, noting that a Uniform Commercial Code (UCC) search had revealed no outstanding sales tax liens against the seller. Petitioner admits liability for the sales tax due on the transfer of tangible assets only, and maintains it requested that the full \$5,000.00 portion of the purchase price allocated to such assets be held in escrow by the seller’s attorney for such purpose.

Petitioner maintains that the seller is primarily liable for the unpaid sales tax, faults the Division

for its alleged failure to have pursued the seller for such liability, and requests abatement of penalty. Finally, petitioner does not dispute that it failed to file its Notification of Sale, Transfer or Assignment in Bulk at least ten days prior to the transfer, as required, but alleges that it was not aware of when and how to file such notification with the Division.

7. The Division asserts, by contrast, that as a purchaser in a bulk sale transaction petitioner was subject to the provisions of Tax Law § 1141(c), and failed to comply with such provisions. The Division points out that petitioner filed the required Notification of Sale after the transfer rather than ten days in advance. The Division maintains that petitioner was required to withhold transfer of any consideration until the outstanding sales tax was paid, and that the Division has a first priority lien against any consideration transferred or to be transferred, including payments made to a third party (i.e., the seller). The Division also asserts that both the seller and the purchaser in a bulk sale transaction are liable for unpaid taxes and that there is no priority as to which party the Division must pursue for payment. Finally, the Division maintains that petitioner has failed to show reasonable cause sufficient to warrant abatement of penalty.

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 at least 10 days before taking possession of or making payment for the business assets. Compliance with this provision affords the purchaser protection against becoming liable for the seller's unpaid sales tax liabilities. That is, upon the timely filing of a notification of bulk sale, the Division is obligated to inform the purchaser of the existence of a possible claim for sales and use taxes owing by the seller (20 NYCRR 537.6[a][3]). Once this notice of claim is provided to the purchaser, it is then advised of the existence of such claim of taxes due from the seller and of its personal liability for such taxes to the extent of the greater of

the fair market value of the assets transferred or the consideration paid (*see* 20 NYCRR 537.0[c][2]; 537.4[a][1];[c]). Thus, a purchaser may protect itself by placing the consideration to be paid for the transfer in escrow, pending resolution of the Division's claim, so as to be available in the event a liability is determined and upheld. In contrast, if the purchaser fails to file a proper and timely notice of bulk sale, then such purchaser remains personally liable for the sales and use taxes due from the seller. While this liability is limited to the greater of the purchase price or fair market value of the business assets sold (*see* 20 NYCRR 537.0[c][2]), petitioner has lost the measure of protection provided by placing the consideration for the transfer in escrow and having the same available to satisfy the purchaser's liability for the unpaid sales and use taxes.

B. In this case, the record is clear that the transaction between petitioner and Sandobe Sushi, Inc., constituted a bulk sale (*see* 20 NYCRR 537.1[a][1]). It is also 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 occurred on October 26, 2006. The envelope in which the notification was mailed to the Division is date-stamped October 26, 2006, and the notification itself bears an in-date stamp indicating that it was received by the Division on October 31, 2006. Based on this evidence, the notification was clearly not filed at least ten days prior to the transfer, as 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.

C. 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. The evidence bears out that the Division clearly complied with this statutory requirement (*see* Findings of Fact 4 and 5).

D. Given its failure to comply with the notice requirements of Tax Law § 1141(c) (*see* Conclusion of Law B), petitioner is properly liable for the tax assessed against it based on the seller's failure to remit payment of sales tax reported on its returns (*Matter of North Shore Cadillac-Oldsmobile, Inc. v. State Tax Commn*, 13 AD3d 994 [2004], *lv denied* 5 NY3d 704 [2005]).

E. The Division has also claimed, by brief, that petitioner is liable for penalty accruing from the issuance of the Notice of Determination, citing Tax Law § 1141(c); § 1145(a) and 20 NYCRR 537.4(e), and that petitioner has failed to show reasonable cause sufficient to support reduction or abatement of penalty. In *Matter of Gaughan* (Tax Appeals Tribunal, May 14, 1992) penalty against a bulk sale purchaser was assessed on the notice of determination issued to the purchaser, and was sustained by the Tax Appeals Tribunal. In *Gaughan*, however, the Tribunal recognized that a bulk sale purchaser cannot be held liable for penalty or interest which accrued against the bulk sale seller prior to the time the purchaser was notified of its derivative liability for the seller's unpaid tax (Tax Law § 1141[c]; *see Matter of Velez v. Division of Taxation*, 152 AD2d 87 [where the Third Department determined that "the Legislature did not intend that a bulk sale purchaser be liable for the penalties and interest assessed against the seller" pursuant to Tax Law § 1141(c)]). Thus, the Tribunal modified the amount of the penalty assessed in *Gaughan*, in accord with the Division's concession in that case, such that the same would accrue only from the point at which the petitioner received the notice of determination (such date was deemed to be five days after the date of issuance of the notice of determination). While there is support for the imposition of penalty against a bulk sale purchaser, the Division's argument for penalty in

this case appears to be moot, inasmuch as the Notice of Determination issued to petitioner does not reflect the assessment of penalty thereon in any manner, nor is there any other evidence in the record showing that penalty was at any point in time assessed against the petitioner, or that petitioner was ever apprised that it was being subjected to the imposition of penalty.

F. The petition of New Ashiya Japanese Cuisine (NY), Inc. is hereby denied and the Notice of Determination, dated December 29, 2006 and assessing tax in the amount of \$19,958.90 , is sustained.

DATED: Troy, New York
March 5, 2009

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE