STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PARVINDER SINGH SALH	:	DETERMINATION DTA NO. 822113
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, 2003 through December 27, 2006.	:	

Petitioner, Parvinder Singh Salh, filed a petition 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, 2003 through December 27, 2006.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 183 East Main Street, Suite 1500, Rochester, New York, on April 9, 2009 at 9:30 A.M., with all briefs to be submitted by August 28, 2009, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Justin S. White, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined that petitioner acquired certain assets in a bulk sale transaction from WorldWide Trading, Inc., and as a bulk sale purchaser assumed the outstanding sales tax liabilities of that seller.

II. Whether the Division of Taxation is estopped from imposing a tax assessment greater than $3,000.00 as a result of the Division's representations made in correspondence to petitioner concerning the amount of tax owed by WorldWide Trading, Inc.

FINDINGS OF FACT

1. Pursuant to an agreement dated July 16, 2006, Parvinder Singh Salh (petitioner) purchased a restaurant franchise business known as "Subway®" located in Buffalo, New York. The seller in the transaction was Michael I. Gatas. The agreement indicated that, "As an inducement to Doctor's Associates Inc. (Franchisor) to transfer the SUBWAY® franchise from SELLER to PURCHASER, the SELLER for all dealings with Franchisor is Michael I. Gatas, as an individual." In addition, the seller represented he had good and marketable title to the assets being transferred. The total selling price for the business was $147,500.00. Petitioner continued to operate the franchise at the same location following the purchase.

2. In connection with his purchase of the business on December 27, 2006, petitioner filed a Notification of Sale, Transfer or Assignment in Bulk, dated on that date, with the Division of Taxation (Division). Such notification, received by the Division on January 3, 2007, does not indicate the date or scheduled date of the sale, nor did it list a business or trade name. The seller's name was Michael I. Gatas. There was no mention of WorldWide Trading, Inc. (WorldWide), the company that actually operated the franchise in issue, of which Michael Gatas was an officer.

3. The Division corresponded with petitioner's representative by a letter dated January 11, 2007, referencing the Notification of Sale regarding the sale of WorldWide. The Division determined WorldWide was the seller from the seller's certificate of authority number provided on the form. The letter stated:

> All open sales tax liabilities of the seller, Worldwide Trading Inc. can be transferred to you as the purchaser in a bulk sale, in accordance with Section 1141 (c) of the New York State Sales and Use Tax Law. Currently Worldwide Trading Inc.'s sales tax file shows open sales tax liabilities of approximately $3,000.00. We are asking for prompt payment by Worldwide Trading Inc. or payment from escrow funds which will prevent this liability from being transferred to you.

4. The closing statement that represented the transfer of the Subway Store Franchise #5510 listed Michael I. Gatas as the seller. An escrow agreement between petitioner and Michael I. Gatas stated as follows:

> The seller has guaranteed to deliver all sales tax receipts due to [sic] the sale of products in the ordinary course of business to the New York State Department of Taxation and Finance that have been collected through midnight of December 26, 2006.
>
> * * *
>
> Purchaser requires an amount be held in escrow a the time of the closing to provide for any outstanding taxes due, or other expenses that are obligations of the seller that may encumber the business and its operation.

5. On or about January 16, 2007, petitioner's representative, Justin White, Esq., communicated with the attorney for Michael Gatas, Matthew Weber, Esq., concerning the January 11, 2007 correspondence from the Division and indicated he was working out such matters with the Division.

6. By correspondence dated January 19, 2007, Mr. Weber informed Mr. White that the outstanding liability of approximately $3,000.00 owed by WorldWide related to WorldWide's purchase of Subway Store #24070 from Tailamangus, Inc., in June 2006, a separate and distinct Subway® store from the subject of the sale between petitioner and Mr. Gatas. In addition, in pertinent part, the correspondence indicated that the Division could not provide an exact amount of the New York State tax liability at that time connected to the store that petitioner had

purchased, since the Division was waiting for the results of a current but not completed field audit.

7. The Division requested an amended Notification of Sale, Transfer or Assignment in Bulk and the exact date of sale in correspondence to Mr. White dated February 5, 2007. Mr. White complied and submitted the amended notice on February 16, 2007, with the single change requested, that of the date of sale of the business.

8. In October 2006, the Division had commenced a sales tax field audit of WorldWide for the period September 1, 2003 through December 27, 2006. A written request for books and records was sent to WorldWide on October 2, 2006, at the address of its corporate principal, Michael Gatas.

9. On November 2, 2006, the scheduled day of appointment, Rocco D'Aloise, a Division tax auditor assigned to the WorldWide audit, went to the Subway® premises, and located Mr. Gatas. When Mr. Gatas indicated he had not received the appointment letter, Mr. D'Aloise provided him with a copy of the letter and the records requested list and agreed to reschedule the appointment on December 5, 2006 at the business address. This meeting was canceled due to illness in Mr. Gatas's family. Thereafter, for the next couple of months, the parties exchanged phone calls but never met for the audit.

10. On March 13, 2007, the auditor and his team leader met with Michael Gatas and his brother Tony Gatas at the Buffalo District Office. The Division was provided with a Sales Quarterly Ledger Report, a report generated by Subway Headquarters, the franchisor, which listed the sales reported by WorldWide to the franchisor for the audit period. No other records were produced, but the parties discussed the business operations, and the Division reviewed the bulk sale information.

11. When the Division's auditor compared the information he received from Subway Headquarters to the sales reported by Mr. Gatas on the sales tax return, he determined there were unreported sales of $404,121.57, resulting in additional tax due of $33,949.04, plus applicable penalty and interest. Mr. Gatas was unable to explain the discrepancy, though he indicated he was still attempting to gather information for the auditor. The auditor proposed assessment in the amount of $53,502.08, which included the tax due of $33,949.04, plus penalties and interest, and requested that WorldWide agree or disagree with the proposed adjustment by March 30, 2007. In mid April 2007 the case was assessed as one without consent and with no payment, with WorldWide not stating a specific reason for disagreement. A Notice of Determination was issued to WorldWide dated April 30, 2007.

12. The Division issued to petitioner a Notice of Determination (Assessment No. L-028624750-4) dated May 25, 2007, which assessed $33,949.04 in tax due, representing the tax (only) assessed against WorldWide. The notice identified the period at issue as September 1, 2003 through December 27, 2006, and explained the assessment as follows: "This 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."

13. At some point after the issuance of the notice assessing the tax to WorldWide on the basis of the audit, a notice was also issued by the Division dated May 29, 2007 to Michael Gatas (Assessment No. L028631939-3), presumably as a responsible officer of WorldWide, which was the subject of subsequent review by the Bureau of Conciliation and Mediation Services (BCMS). At the conclusion of that process, the tax was reduced to $27,327.55, plus penalty and interest.

Mr. Gatas made a payment to the Division on the bulk sale assessment which inured to petitioner in the amount of $19,482.57. [1]

14. The Division issued to petitioner a second Notice of Determination (Assessment No. L-028624751-3) also dated May 25, 2007, which assessed $2,625.00 in tax due, plus penalties and interest, representing the tax assessed against WorldWide for the purchase of business assets from Tailamangus, Inc., in June 2006. The notice identified the period at issue as the period ended June 29, 2006, and explained the assessment as follows: "This notice is issued because you are liable as a purchaser in accordance with section 1133(b) of the New York State Tax Law, for business assets, taxable under Article 28 of the Tax Law, transferred to you as a purchaser."

15. BCMS granted petitioner a conciliation conference concerning the two notices that are the subject of this matter, and it was held November 15, 2007. Petitioner's representative received correspondence from BCMS, dated December 4, 2007, which referenced the conciliation conference, the two notices in issue, the issue of the Division's letter of January 11, 2007 (the contents in pertinent part which are described in Finding of Fact 3), and its potential limitation on the taxes due from petitioner. The conferee further stated:

> As noted by the Department's advocate at the conference, the January 11, 2007 letter contained an error in that the $3,000 figure did not include the sales taxes due by the seller of $33,949.04; the $3,000 represented only the taxes and interest due on the tangible personal property being transferred by the seller to the purchaser.
>
> By operation of the Sales Tax Law, Parvinder Singh Sahl, as purchaser, is liable for the sales taxes due by the seller in the amount for $33,949.04. It is your argument that the Tax Department's letter dated January 11, 2007 limits the liability to $3,000. This argument is one of equitable estoppel.

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[1] This payment amount differs slightly from the amount shown on the Division accounts receivable system of balances, as it relates to petitioner's assessment herein, L-028624750-4. On the accounts receivable system, the amount paid is $19,499.75. No explanation for the discrepancy was provided.

* * *

> In the instant matter, I must conclude that equitable estoppel is not applicable because detrimental reliance did not exist. The Bulk sale transaction took place on December 27, 2006, and this preceded the January 11, 2007 letter that contained the error. As such, Parvinder Singh Salh did not undertake the sale on December 27, 2006 with reliance on the Department's statement that his exposure for the sales taxed and interest was limited to only $3,000.
>
> Although I must sustain the tax deficiency, penalty is being cancelled.

16. Conciliation Order CMS No. 219730 was issued on January 18, 2008 as to both assessments, cancelling the penalty on both.

SUMMARY OF THE PARTIES' POSITIONS

17. Petitioner asserts that he did not contract with WorldWide Trading, Inc., the taxpayer whose liability is being attributed to him, but rather Michael Gatas as an individual. Thus, he cannot be held liable for the tax liabilities of WorldWide Trading, Inc.

Petitioner further argues that the remedy of equitable estoppel should be granted to petitioner in this case against the Division, since there would be manifest injustice if the principle is not applied.

18. The Division maintains that petitioner purchased the business assets of the seller in a bulk sale under Tax Law § 1141(c) of the Tax Law, and petitioner is liable for the payment of any and all sales and use taxes due from the seller, since petitioner failed to timely notify the Division of the transfer.

The Division further argues that petitioner's argument of equitable estoppel fails, since petitioner did not detrimentally rely upon the Division's representation of tax liabilities of WorldWide at the time of the transfer of business assets.

CONCLUSIONS OF LAW

A. The Division's regulations define the term "bulk sale" for sales and use tax purposes as "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" (20 NYCRR 537.1[a][1]). A purchaser in a bulk sale transaction becomes personally liable for the sales and use taxes that the Division claims to be due from the seller if the purchaser fails to file a proper and timely notice of bulk sale (Tax Law § 1141[c]). The purchaser's liability is limited to the greater of the purchase price or fair market value of the business assets sold (20 NYCRR 537.0[c][2]). In addition to the tax due and owing, petitioner, as a purchaser, is also liable for interest and penalty accruing from the issuance of the notices of determination to the petitioner (Tax Law §§ 1141[c]; 1145[a]; 20 NYCRR 537.4[e]; ***Matter of Velez v. Division of Taxation of the Department of Taxation and Finance***, 152 AD2d 87, 547 NYS2d 444 [1989]), which in this case was May 25, 2007.

B. Where there have been successive bulk sales, each successive purchaser acquires a derivative liability from all previous bulk sales to the seller for which an outstanding liability still exists (20 NYCRR 537.4[j]). Accordingly, assuming petitioner made a bulk sale purchase of the business assets of WorldWide, petitioner acquired a derivative liability from WorldWide with respect to tax claimed by the Division to be due, in the first instance, from WorldWide's purchase of tangible personal property of Tailamangus, Inc., in June 2006, the entity from which WorldWide purchased the subject Subway® franchise.

C. There is no dispute that petitioner bought the subject Subway® franchise in a bulk sale transaction. Petitioner's contention, however, is that he contracted with Michael Gatas, and not WorldWide, for the sale, and consequently should not be held liable for the taxes of an entity with whom he did not have a contractual relationship.

Although all the facts may not have been clairvoyant, petitioner did purchase the business assets of WorldWide even though petitioner dealt only with its owner, Michael Gatas, as an individual. The bulk sale notice which notified the Division of the sale bore WorldWide's certificate of authority number and was identified by the Division as such. Although it is not realistic that petitioner would associate such number with WorldWide, had petitioner timely notified the Division of the proposed sale, he would have been informed by the Division sooner of the corporate identity and the potential existence of unpaid taxes for which he could be held liable, and not deprived himself of the protection afforded by these provisions. The fact that petitioner would have been immediately notified by the Division is evidenced by the correspondence from the Division which estimated the seller's liability at $3,000.00 dated January 11, 2007. Although this seemed to be an error on the part of the Division at first glance, when the ultimate liability resulted in an assessment of some $33,000.00, and one explanation referred to it as such, in fact this was a separate liability precipitated by the earlier bulk sale purchase of the Subway® franchise from Tailamangus, Inc., by WorldWide, which had not been satisfied. The $3,000.00 was an accurate estimate of WorldWide's liability at that time, since the audit of WorldWide for September 1, 2003 through December 27, 2006 had not been completed, despite its commencement in October 2006.

D. Because, as has been determined, petitioner was a purchaser in a bulk sale transaction, he was required under Tax Law § 1141(c) 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. There is no question that petitioner did not give notice to the Division as required under Tax Law § 1141(c). By this failure to comply with the notice requirements of Tax Law § 1141(c), petitioner exposed himself to liability for sales and use taxes due from WorldWide, the bulk seller, and Tailamangus,

the previous bulk seller (20 NYCRR 537.4[j]), limited to the greater of the purchase price or fair market value of the business assets sold (20 NYCRR 537.0[c][2]).

E. Turning to the Division's determination of additional tax due from WorldWide, the company did not produce detailed records in response to the Division's request. What the Division was able to obtain, was a report generated by Subway® Headquarters, the franchisor, which listed the sales reported by WorldWide to the franchisor during the audit period. This amount was significantly more than the amount reported on WorldWide's sales tax returns. The Division concluded the sales were underreported by more than $400,000.00 and assessed sales and use taxes accordingly. The Division was authorized to do so on the basis that it selected an audit method reasonably calculated to reflect the sales and use taxes due (***see Matter of Grant v. Joseph***, 2 NY2d 196, 159 NYS2d 150, [1957], ***cert denied*** 355 US 869 [1957]). Consequently, the burden of proof was on petitioner to show, by clear and convincing evidence, that the result of this estimate of his liability was unreasonably inaccurate or that the amount of tax assessed was erroneous (***see Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003). Petitioner has clearly failed to meet this burden.

It is well established that a presumption of correctness attaches to a Notice of Determination upon its issuance and petitioner bears the burden of overcoming this presumption (***see Matter of Hammerman***, Tax Appeal Tribunal, August 17, 1995). Accordingly the assessment, as adjusted by BCMS and for payments made on the assessment (Finding of Fact 13), carries a presumption of correctness that has not been overcome.

F. Petitioner contends that the Division should be estopped from assessing an amount in excess of $3,000.00 against him, since the Division's correspondence of January 11, 2007 represented that WorldWide's outstanding tax liability was estimated at approximately that

amount. Petitioner alleges he relied upon such representations and did not more aggressively pursue the seller for escrow sufficient funds to protect himself.

As a general proposition, unless there are exceptional facts which require its application to avoid a manifest injustice, the doctrine of estoppel does not apply to governmental acts (***Matter of Consolidated Rail Corp.***, Tax Appeals Tribunal, August 24, 1995, ***confirmed*** 231 AD2d 140, 660 NYS2d 459 [1997], ***appeal dismissed*** 91 NY2d 848, 667 NYS2d 683 [1997]; ***Matter of Harry's Exxon Service Station***, Tax Appeals Tribunal, December 6, 1988). This proposition is considered especially strong where a taxing authority is involved, since public policy supports the enforcement of the Tax Law (***Matter of Glover Bottled Gas Corp.***, Tax Appeals Tribunal, September 27, 1990). The Tax Appeals Tribunal has developed a three-part test in order to determine whether to invoke an estoppel, as follows: (i) whether there was a right to rely on a representation made by the Division, (ii) whether there was such reliance and (iii) whether the reliance was to the detriment of the party who relied upon the representation (***see, Matter of Consolidated Rail Corp.; Matter of Harry's Exxon Service Station***).

G. Petitioner has failed to establish that he relied upon the representations made by the Division and that the reliance was to his detriment. The agreement to purchase the Subway® franchise was signed in July 2006, and on December 27, 2006 the sale took place. At that time, and not before, petitioner filed the bulk sale notice with the Division, after which time he learned of the outstanding liabilities of WorldWide. By January 11, 2007, when the Division corresponded with petitioner regarding the liabilities of WorldWide, the contract and its terms had already been executed. Petitioner could not have relied upon facts in that correspondence, which he did not have in December or before, and certainly did not rely to his detriment as a result. Petitioner's request for equitable relief is denied.

H. The petition of Parvinder Singh Salh is denied and the Notice of Determination dated May 25, 2007, as modified in accordance with Finding of Fact 13, and the Notice of Determination dated May 25, 2006 are sustained.

DATED: Troy, New York
February 25, 2010

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE