

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MOOSA TRADING CORP.	:	DETERMINATION
	:	DTA NO. 822588
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, 2004 through	:	
May 31, 2007.	:	

Petitioner, Moosa Trading Corp., 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, 2004 through May 31, 2007.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 633 Third Avenue, New York, New York, on June 17, 2009, at 10:30 A.M., with all briefs to be submitted by November 20, 2009, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Leonard Lorin, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Sarah Dasenbrock, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. A greeting card store was operated in New York State by a corporation known as West Hempstead Cards, Inc., during the period September 1, 2004 through May 18, 2007. On May 18, 2007, the business assets of West Hempstead Cards, Inc., were sold to Moosa Trading Corp. (petitioner) for a total consideration of \$70,000.00.

2. On November 8, 2007, the Division of Taxation (Division) received a Notification of Sale, Transfer or Assignment in Bulk from petitioner's escrow agent, Masgood H. Siddiqui, Esq. Such notification reported the bulk sale of assets from West Hempstead Cards, Inc., to petitioner that had occurred six months earlier, for the stated consideration of \$70,000.00.

3. The Division issued a Notice of Claim to Purchaser and a Notice to Escrow Agent, both dated November 16, 2007, which served to notify petitioner and the escrow agent, Masgood Siddiqui, that the entire purchase price of \$70,000.00 should be placed in an escrow account for the purpose of satisfying any open tax liabilities of the seller.

4. The Division also issued correspondence to petitioner, dated November 16, 2007, which explained petitioner's potential liability for West Hempstead Cards Inc.'s sales tax liabilities under Tax Law § 1141(c), requested payment of sales tax in the amount of \$40.63 for the transfer of tangible personal property within the bulk sale and requested a copy of the sales contract for the bulk sale for review by the Division.

5. Petitioner replied to the Division on or about December 21, 2007, with its submission of the sales tax due on the bulk sale tangible personal property in the amount of \$40.63.

6. After reviewing the Notification of Sale, Transfer or Assignment in Bulk, the Division determined that the seller, West Hempstead Cards, Inc., had open sales tax liabilities for the

period September 1, 2004 through May 31, 2007. The total amount of sales tax due from the seller was \$103,880.64.

7. The Division issued five notices of determination to petitioner, dated February 1, 2008, for its derivative liability for sales tax due from the seller, West Hempstead Cards, Inc. The notices assessed total sales tax in the amount of \$103,880.64.

8. By Conciliation Order dated August 1, 2008, the total amount of tax due on the notices of determination was adjusted to \$70,000.00, based on the consideration paid for the assets in the bulk sale.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner asserts that the seller, West Hempstead Cards, Inc., is primarily liable for the unpaid sales tax.

10. 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, because petitioner failed to timely notify the Division of the transfer.

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 it (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 on February 1, 2008.

B. There is no dispute that petitioner bought West Hempstead Cards, Inc., in a bulk sale transaction. Petitioner's contention, however, is that West Hempstead should be the party held responsible for its own tax liability.

The bulk sale provisions of Tax Law § 1141(c) require the purchaser in a bulk sale to give notice of such sale to the Division at least 10 days prior to taking possession of or proffering payment for the business assets. Upon receipt of a timely notice of sale, the Division is required to inform the purchaser of any potential claims for sales and use taxes which may still be owed by the seller of the business. When such notice is provided to the purchaser, the purchaser is also advised not only of the existence of such claim for taxes due, but is also informed 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 (20 NYCRR 537.0[c][2], 537.4[a][1]; [c]). The purchaser may then protect itself by placing the consideration to be paid in escrow pending resolution of any outstanding liabilities claimed to be owed to the Division. In sum, compliance with the bulk sale provisions affords a purchaser protection against becoming liable for the seller's unpaid sales tax liabilities.

C. Because, as has been determined, petitioner was a purchaser in a bulk sale transaction, it was required under Tax Law § 1141(c) to give notice of such sale to the Division at least ten 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 itself to liability

for sales and use taxes due from West Hempstead, the 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]).

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). There is no question that petitioner has failed to meet this burden.

D. The petition of Moosa Trading Corp. is denied and the notices of determination dated February 1, 2008, as modified in accordance with Finding of Fact 8, are sustained.

DATED: Troy, New York
May 13, 2010

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE