

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ULTIMAT SECURITY, INC.</b>	:	DETERMINATION
	:	DTA NO. 822991
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, 1995 through February 28, 2007.	:	

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Petitioner, Ultimat Security, 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, 1995 through February 28, 2007.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, at 10:30 A.M., with all briefs to be submitted by October 1, 2010, which date began the six-month period for the issuance of this determination. Petitioner appeared by Valerie A. Hawkins, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert Maslyn, Esq.).

***ISSUES***

I. Whether the operation of Ultimat Security, Inc. (petitioner) by its owner Vera Drayton, a company which succeeded Ultimate Security, Inc., formerly operated by Ms. Drayton's son, constituted a transfer in bulk of business assets under Tax Law § 1141(c), such that petitioner as the transferee company became liable for sales tax determined due from the predecessor security company.

II. If a transfer in bulk of business assets occurred, whether the petitioner's assessment should be limited by the fair market value of the assets transferred.

***FINDINGS OF FACT***

1. Ultimat Security, Inc. (petitioner), located in Hempstead, New York, provides security guard services to residential and commercial buildings. Petitioner's owner, Vera Drayton, has been employed by petitioner since June 2007. Prior to June 2007, Ms. Drayton was employed by a similar company, Ultimate Security, Inc. (Ultimate), owned by her son, Tim Butler, from November 2000 through May 2007. Ms. Drayton held the position of office administrator with Mr. Butler's company. Mr. Butler is now employed by petitioner as vice president of sales and marketing.

2. At some time prior to May 2007, Ms. Drayton was looking to open a business of her own, and at that time her son approached her to take over his security business known as Ultimate. During May 2007, petitioner acquired the business assets of Ultimate, comprised of various items of tangible personal property and a customer list. There was no contract for the sale of the security business between the two companies, and there was no money exchanged or debt assumed for the transfer of assets from Ultimate to petitioner.

3. The assets transferred from Ultimate of which petitioner acquired possession included several computers and monitors, a fax machine, file cabinets, office supplies, 20 to 30 uniforms, 10 walkie talkies and a 1992 Ford Taurus. A list of these assets also contained the years that some of the assets were purchased, an estimate of purchase prices provided by Tim Butler, and the condition of the assets in June 2007 at the time of the transfer. The total cost of the assets listed was \$12,250.00. No purchase invoices, appraisals of the assets, or federal income tax returns with depreciation schedules were provided by petitioner.

4. A Notification of Sale, Transfer or Assignment in Bulk was not filed with the Division of Taxation (Division) at the time Ultimate's assets were transferred to petitioner. The Division sent correspondence to petitioner dated December 18, 2007, requesting information concerning the bulk transfer and completion of the notification of sale form. The Division received correspondence dated December 27, 2007 from Vera Drayton, as president of petitioner, denying that a bulk sale had occurred.

5. The Division concluded that a bulk sale occurred and issued a Notice of Claim to Purchaser dated January 3, 2008, advising petitioner of a possible claim by the Division for New York State sales taxes due from Ultimate, and directing that no distribution of funds to the extent of the state's claim be made until Ultimate's liability had been determined and payment made. The Division's conclusion that a bulk sale took place was based upon the following information:

a. The responsible person of Ultimate, Tim Butler, is the son of the responsible person (Vera Drayton) of petitioner, the purchasing entity.

b. The customer base, to the extent of 8 out of Ultimate's 13 clients as of June 2007, was carried over to petitioner's company.

c. Ultimate's withholding tax returns show that nine people who were employed by the seller were also employed by petitioner, including Ms. Drayton.

d. Petitioner failed to provide any documents concerning its acquisition of business assets to commence its business.

e. Petitioner's lease agreement shows that the responsible person of Ultimate, Tim Butler, was authorized to sign for standard services such as keys and locks, and was a person to contact for emergencies.

f. Petitioner's start of business, May 22, 2007, was just prior to Ultimate's inactive date of May 31, 2007.

g. Ultimate and petitioner were engaged in the same business of security guard services.

h. The names of the two companies are virtually identical.

6. According to Ms. Drayton, both Ultimate and petitioner had about the same number of employees (19 or 20), and at least 50% of those employed by Ultimate also worked for petitioner. Ultimate's quarterly wage reporting form for January 1, 2007 through March 31, 2007 indicated it had 18 employees for that quarter, 9 of whom could be found on petitioner's quarterly wage reporting form for the period April 1, 2008 through June 30, 2008, showing wages paid to 30 employees.

7. Petitioner submitted a list of security clients, some of whom were transferred from Ultimate, several that did not become petitioner's clients, and others that were new security clients as of June 2007. In the case of clients transferred from Ultimate to petitioner, Ms. Drayton estimated that the client retention ranged from 2 months to 13 months for half of those transferred, intimating that the customer list had limited worth in her new business.

8. The Division issued a Notice of Determination dated February 11, 2008 against petitioner "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" from Ultimate Security, Inc., the entity owned by Tim Butler, Ms. Drayton's son. This notice referenced the following 20 assessments for the period June 1, 1995 through February 28, 2007:

<b>Tax Period Ended</b>	<b>Assessment No.</b>	<b>Tax Assessed</b>	<b>Payments and credits</b>	<b>Balance Due</b>
02-28-07	L-029713353-1*	\$21,000.00	0	\$21,000.00
11-30-06	L-029713354-9*	\$27,072.51	0	\$27,072.51
08-31-06	L-029713355-8*	\$50,252.85	0	\$50,252.85
05-31-06	L-029713356-7*	\$33,501.90	0	\$33,501.90
11-30-05	L-029713357-6**	\$27,072.53	\$2,075.74	\$24,996.79
02-28-05	L-029713358-5*	\$22,601.43	0	\$22,601.43
11-30-04	L-029713359-4*	\$17,404.88	0	\$17,404.88
08-31-04	L-029713360-4***	\$1,043.98	0	\$1,043.98
05-31-04	L-029713361-3*	\$8,702.44	0	\$8,702.44
02-29-04	L-029713362-2***	\$22,600.11	0	\$22,600.11
11-30-03	L-029713363-1**	\$26,107.34	0	\$26,107.34
05-31-03	L-029713365-8***	\$150.00	0	\$150.00
02-28-03	L-029713364-9*	\$15,379.18	0	\$15,379.18
05-31-02	L-029713366-7**	\$9,965.00	0	\$9,965.00
02-28-02	L-029713368-5**	\$8,398.00	0	\$8,398.00
11-30-01	L-029713369-4**	\$6,482.00	0	\$6,482.00
08-31-01	L-029713370-4**	\$3,359.00	0	\$3,359.00
05-31-01	L-029713367-6**	\$477.00	0	\$477.00
02-28-01	L-029713372-2**	\$6,703.80	\$3,122.72	\$3,581.08
08-31-95 through 02-28-01	L-029713371-3****	\$154,551.49	\$110,827.05	\$43,724.44
<b>Totals</b>		<b>\$462,825.44</b>	<b>\$116,025.51</b>	<b>\$346,799.93</b>

\*Assessment based on a failure to file a return

\*\*Assessment based on a failure to remit the tax reported due

\*\*\*Assessment based on a late filed part paid return

\*\*\*\*Assessment based on a sales tax field audit assessment

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

9. Petitioner argues there was no bulk sale between the companies because petitioner did not purchase business assets from Ultimate, the only assets acquired were of insignificant value and, of the clients that were transferred from Ultimate to petitioner, some were retained for a limited time frame. Alternatively, even if it is determined that a bulk sale took place, the value of the business assets, including the client list, was de minimis.

10. The Division contends that a bulk transfer of assets took place, with petitioner as the purchaser of the business assets of Ultimate Security, Inc., and that petitioner's liability extends to the unpaid sales taxes of Ultimate, since petitioner has not carried its burden of establishing the value of the assets transferred as less than the amount of the sales tax assessments against the seller.

### ***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 of the selling company. The purpose of Tax Law § 1141(c) is to preserve the Division's "indisputable right to collect taxes which could be extinguished by the simple expedient of a taxpayer transferring its assets" (*Harcel Liqs. v. Eysam Parking*, 48 NY2d 503, 423 NYS2d 873, 875 [1979]; *see also Spandau v. United States*, 73 NY2d 832, 537 NYS2d 120, 121 [1988]). 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 that may still be owed by the seller of the business (20 NYCRR 537.0[c][3]. When such notice is provided to the purchaser, the purchaser is advised not only of the existence of such claim for taxes due, but is also informed of its personal liability for such taxes (*see* 20 NYCRR 537.0[c][2]). 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 a seller's unpaid sales tax liabilities. However, if the purchaser fails to withhold funds from the seller or fails to file a proper and timely notice of bulk sale, then such purchaser becomes personally liable for the sales and use taxes determined to be due from the seller (*see* 20 NYCRR 537.4[a][1]). 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 broadly defined at 20 NYCRR 537.1(a) 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” (20 NYCRR 537.1[a][3], Example 4), the sale of assets as part of a liquidation of the seller's business (20 NYCRR 537.1[d][2], Examples 16 and 17), and the sale of business assets regardless of whether the seller was operational when the assets were sold (*see Matter of Gaughan*, Tax Appeals Tribunal, May 14, 1992). 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) applied in the case where the purchaser's assumption of the seller's personal debt on a promissory note constituted the sole consideration]). 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]).

C. Petitioner argues that a bulk sale did not occur in this case because petitioner did not “purchase” business assets from Ultimate. Petitioner’s argument that this transfer of assets did not amount to a bulk sale is simply not supported by the record.

The business assets of Ultimate, including computers, file cabinets, uniforms and a customer list were clearly transferred to and used in petitioner’s security business on or about May 2007. In fact, petitioner provided no evidence that less than all (or most) of the assets were transferred. Petitioner began its own operation of a security business only a few days after Ultimate’s operation ended, with the same services rendered. Although petitioner’s business appeared to operate from a different address, Mr. Butler remained a key contact person in petitioner’s business, merely under a different title. Although there was a change in ownership and management of the security business in 2007, and a one-letter alteration in the corporate name, the record does not disclose any changes in how the business was conducted, and many of the former clients became clients of petitioner.

Here, petitioner was clearly the transferee of the tangible business assets of Ultimate, the transferor, in a transaction that qualifies as a bulk sale where there was a transfer of business assets other than in the ordinary course of the security business. Noncompliance with the notice provisions of Tax Law § 1141(c) rendered petitioner liable for the taxes due from Ultimate as a bulk sale “purchaser.” The only question that remains is whether the sales tax liability in this case is limited to the greater of the actual purchase price of the business assets or the fair market value of the assets so transferred.



D. Petitioner asserts if a determination is made that a bulk sale transfer took place, the only assets acquired were old and of minimal value, including the client list, since many of the clients that were transferred from Ultimate were retained by petitioner only for a limited time frame. According to the record, the transaction at issue was arranged between two related business owners, Vera Drayton and her son, Tim Butler. The actual purchase price was zero, and there is nothing in the record to the contrary. With regard to the fair market value of the transferred assets, petitioner contends that such assets are merely of de minimis value. Petitioner provided a list of the assets transferred as previously described (*see* Finding of Fact 3). The values are characterized as estimates, and not substantiated in any manner. There were no purchase invoices, appraisals, tax return depreciation schedules, or any form of third-party information as to the value of the assets transferred. In an attempt to minimize any value associated with the transfer of Ultimate's customer list, petitioner indicated that not all of Ultimate's clients were transferred to petitioner, and some were only retained for a brief time after they were transferred to petitioner. Minimal value or not, petitioner failed to conclusively establish a reasonable value for the customer list. Although the value of the transferred assets may very well have been far below the amount of the tax due, without substantiation, petitioner simply did not carry its burden of proof that the value of the assets, including that of the client list, was less than the taxes assessed. Accordingly, petitioner's liability is derived from the tax debt of the predecessor company, and not limited by the incomplete and unsubstantiated fair market value estimate of business assets.

E. 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 Appeals Tribunal, August 17, 1995).

Petitioner simply has not met this burden.

F. The petition of Ultimat Security, Inc., is denied, and the Notice of Determination dated February 11, 2008 is sustained.

DATED: Troy, New York  
March 17, 2011

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE