STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of ALLIED STORES CORP. D/B/A DEY BROTHERS CO. 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 March 1, 1976 through November 30, 1978.	DECISION

Petitioner, Allied Stores Corp. d/b/a Dey Brothers Co., c/o Donald LaCourse, Vice President, 401 South Salina Street, Syracuse, New York 13202, 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 March 1, 1976 through November 30, 1978 (File No. 28541).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building 9, Albany, New York, on September 14, 1982 at 2:45 P.M., with all briefs to be submitted by January 1, 1983. Petitioner appeared by Bond, Schoeneck & King (Joseph R. Cook, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUES

I. Whether a purchase and sale agreement entered into by petitioner constituted a bulk sale subject to tax within the meaning and intent of section 1141(c) of the Tax Law.

II. Whether, if such sale was a bulk sale, petitioner's liability is limited to the amount of the sales price or fair market value of the business assets transferred, whichever is higher.

III. Whether penalties and interest in excess of the statutory minimum should be waived.

FINDINGS OF FACT

1. On September 20, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Allied Stores Corp. d/b/a Dey Brothers Co., in the amount of $22,506.26, plus penalty of $4,680.49 and interest of $4,470.81, for a total due of $31,657.56. Said tax was determined to be due as the result of an alleged sale of the assets of John F. Davis Co., Inc. ("Davis") to petitioner. The liability consisted of $1,944.44 tax due on the sale of the assets and the remainder represented unpaid sales and use taxes due from Davis, which liability extended to petitioner pursuant to section 1141(c) of the Tax Law.

2. Allied Stores Corporation has divisions throughout the United States. Two of these divisions are petitioner and Allied Stores of Penn-Ohio, Inc. ("Penn-Ohio"). Petitioner operates a Dey Brothers department store in downtown Syracuse, New York and a Dey Brothers store in Shoppingtown Mall, DeWitt, New York. Penn-Ohio operates department stores at seven locations in Pennsylvania and New Jersey. Petitioner and Penn-Ohio entered into license agreements with Davis authorizing Davis to operate restaurants in the aforementioned stores.

3. The downtown Syracuse store had originally been built in the 1920's. On November 1, 1950, petitioner entered into a license agreement with Davis authorizing Davis to operate a restaurant in the downtown store. Under the terms of the agreement, all fixtures and equipment were to be supplied by Davis and would be the property of Davis, except that built-in fixtures would become the property of petitioner upon termination of the agreement. The term of the original license agreement was November 1, 1950 to November 1, 1960. By a

series of letter agreements, the original license was extended to December 31, 1969. After December 31, 1969, petitioner and Davis continued to operate under the terms of the original agreement, but without a formal writing. According to the testimony of petitioner's witness, Davis supplied the original equipment but added very little of substance to said equipment during the period it operated the restaurant in the downtown store.

4. The DeWitt store was built in the late 1960's. On November 15, 1970, petitioner entered into a license agreement with Davis authorizing Davis to operate a restaurant in the DeWitt store. Under the terms of this agreement, petitioner agreed to supply all the fixtures, equipment and appliances for the restaurant. Davis paid petitioner for this equipment by means of annual rental payments. Upon completion of the fixture rental payments, title to trade fixtures was to pass to Davis. The fixture rental payments were to end at such time as the fixtures were fully depreciated. The term of the DeWitt store agreement was for an indefinite period. During the time Davis operated the DeWitt restaurant, the equipment was not fully depreciated, therefore title remained in petitioner.

5. Davis had similar license agreements with Penn-Ohio in seven department stores in Pennsylvania and New Jersey. At some unspecified date, prior to termination of the license agreements, petitioner began receiving numerous complaints from its customers concerning the quality of the food being served by Davis in the restaurants in the Syracuse and DeWitt stores. Fixtures and equipment in the restaurants were not being properly maintained by Davis and were quickly deteriorating. Creditors not being paid by Davis in a timely manner were making complaints to petitioner. Such problems were damaging the reputation of petitioner's stores. Upon informing the corporate office of

Allied Stores Corporation of these problems, petitioner learned that Penn-Ohio was having similar problems with the Davis restaurants in its stores. Allied Stores Corporation decided, as a result of these problems, that a termination of all license agreements with Davis was necessary.

6. On August 14, 1978, petitioner and Penn-Ohio entered into a Purchase and Sale Agreement with Davis involving the Syracuse and DeWitt stores, as well as the seven Penn-Ohio stores where Davis had restaurants. Under the terms of the agreement, all license agreements between petitioner and Penn-Ohio and Davis were to terminate on September 4, 1978 and Davis was to convey to petitioner and Penn-Ohio all equipment on the restaurant premises at all nine stores other than that equipment which was owned by petitioner and Penn-Ohio as of the date of the agreement. In return, petitioner and Penn-Ohio paid Davis $125,000.00. Neither petitioner nor Davis notified the Department of Taxation and Finance of the sale, nor did either remit any sales tax due on the sale.

7. The restaurant in the downtown Syracuse store was in total disrepair upon Davis' departure. The deterioration of the fixtures and equipment was such that virtually all of the equipment had to be repaired or replaced at a cost in excess of $60,000.00. The restaurant in the DeWitt store was closed by petitioner upon termination of the license agreement with Davis and remained closed as of the hearing date.

8. On audit, the Audit Division determined that Davis had not reported taxable sales as recorded on its monthly sales statement. Said underreporting resulted in additional tax due of $20,240.16. The Audit Division also determined that an additional $321.66 in use tax was also due from Davis. The auditor further determined that the sale which terminated the Davis license agreements and transferred to petitioner all equipment not already owned by it was a bulk

sale of the assets of Davis. An examination of the purchase and sale agreement between petitioner and Penn-Ohio and Davis revealed that the $125,000.00 sales price was not allocated among the different store locations. To determine the portion of the sales price allocable to New York, the auditor divided the number of New York locations involved, two, by the total number of locations, nine, and multiplied this amount times the total sales price. Thus, the sales price allocable to New York was determined to be $27,777.78, resulting in sales tax due on the sale of $1,944.44. In determining the tax due on the sale, no consideration was given to the fact that, with respect to the DeWitt store, all the equipment was already owned by petitioner and there was no transfer of tangible personal property.

9. Since neither purchaser nor seller had notified the Department of Taxation and Finance of the sale, the Audit Division assessed petitioner for the same amount as it assessed Davis representing petitioner's liability as purchaser pursuant to section 1141(c) of the Tax Law.

10. Petitioner argued that, because it already owned the equipment in the DeWitt store and the equipment in the Syracuse store was so deteriorated as to be valueless, there was no transfer of business assets and therefore no bulk sale which would subject petitioner to sales tax liability. Petitioner maintained that the purchase and sale agreement merely represented a release from the license agreements with Davis, not a bulk transfer of assets. Petitioner also argued that the amount of the sales price allocated to New York was inaccurate because the auditor failed to allow for differences in amount and value of equipment among the nine locations. Petitioner, however, produced no evidence indicating what valuation for the New York locations was intended by the parties to the sale.

11. Petitioner alternatively argued that, even if there was a bulk sale, the amount assessed was excessive since the amount of a purchaser's liability is limited to the purchase price or fair market value of the assets sold, whichever is higher and, therefore, petitioner's liability should be limited to $27,777.78. Petitioner argued, moreover, that penalties and interest in excess of the statutory minimum should be waived because failure to pay the taxes was due to reasonable cause and not willful neglect. Petitioner's testimony indicated that when it was discovered that Davis was falling behind in its sales tax payments, petitioner began making the payments directly to the Department of Taxation and Finance to insure that all taxes were paid.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides, in pertinent part, that:

> "Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale...notify the tax commission by registered mail of the proposed sale.
>
> * * *
>
> For failure to comply with the provisions of this subdivision, the purchaser...shall be personally liable for the payment to the state of any such taxes...determined to be due to the state from the seller...".

B. That, with respect to the downtown Syracuse store, there was clearly a bulk transfer of assets. The original lease agreement and the testimony presented by petitioner itself indicate that Davis, not petitioner, supplied all the fixtures, equipment and appliances for the Syracuse store. Moreover, it seems highly unlikely that Davis never added a single piece of equipment to the restaurant during the 28 years it operated at the Syracuse location. Title to the equipment remained with Davis until petitioner took possession pursuant

to the purchase and sale agreement. In view of the fact that the purchase and sale agreement failed to allocate a specific amount to the equipment located in New York, the auditor was justified in utilizing the formula discussed in Finding of Fact "8" in order to determine the New York allocation for sales tax purposes. There was, therefore, a bulk sale of the assets of the Syracuse store at a sales price of $13,888.89 subject to tax in the amount of $972.22.

Since petitioner failed to comply with the notification requirements of section 1141(c), it is liable for the sales and use tax determined to be due from Davis, as well as the $972.22 tax due on the sale of the assets of the Syracuse store.

C. That, with respect to the DeWitt store, since all fixtures and equipment had been supplied by petitioner and petitioner retained title to said equipment up to the date of the sale, there was no transfer of tangible personal property of Davis to petitioner. Since there was no transfer of tangible personal property, the $972.22 tax assessed on the $13,888.89 sales price allocable to the DeWitt store is hereby cancelled.

D. That section 1141(c) of the Tax Law further provides that the purchaser's liability for failure to comply with the provisions of the statute will be limited to "an amount not in excess of the purchase price or fair market value of the business assets sold...whichever is higher...". Since both of the New York stores, of the total of nine stores involved in the purchase and sale transaction, contained business assets which were transferred, petitioner's liability for tax for which Davis is liable is limited to the sales price of the New York stores which was two-ninths of the total sales price of $125,000.00 or $27,777.78 as established by the Audit Division.

E. That petitioner's failure to file a return or pay over the tax was due to reasonable cause and not to willful neglect and penalties and interest in excess of the statutory minimum are hereby waived.

F. That the petition of Allied Stores Corp. d/b/a Dey Brothers Co. is granted to the extent indicated in Conclusions of Law "C", "D" and "E" above; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1979 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
MAR 09 1984

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER