

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

NINO A. AND JOAN M. DONATELLI :

DECISION :

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 September 1, 1975
through November 30, 1978. :

Petitioners, Nino A. and Joan M. Donatelli, 432 Center Street, Lewiston, New York 14092, 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 September 1, 1975 through November 30, 1978 (File No. 31380).

A formal hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on February 6, 1985 at 1:15 P.M., with all briefs to be filed by March 22, 1985. Petitioners appeared by Michael V. Maloney. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioners were timely assessed sales and use tax liability as purchasers in a bulk sale.

II. Whether sales tax was properly assessed upon the tangible personal property transferred in the bulk sale.

III. Whether the Audit Division may amend its Answer to conform to the proof.

IV. Whether the Audit Division properly determined the extent of petitioners' liability as bulk sale purchasers.

FINDINGS OF FACT

1. On December 15, 1978, the Audit Division issued to petitioners, Nino A. and Joan M. Donatelli, a Notice and Demand for Payment of Sales and Use Taxes Due Number S781206722C covering the periods ended November 30, 1975 through September 15, 1978 for taxes due of \$14,106.69 plus penalty and interest. Said notice stated, "This notice is in addition to Notice #S781206723C."

On December 15, 1978, the Audit Division also issued to petitioners Nino A. and Joan M. Donatelli a Notice and Demand for Payment of Sales and Use Taxes Due Number S781206723C covering the periods ended August 31, 1976 through February 28, 1978 for taxes due of \$7,569.45 plus penalty and interest. Said notice stated, "This notice is in addition to Notice #S781206722C."

Each of said notices and demands for payment of taxes due stated:

"The following taxes are determined to be due from Milton and Elizabeth Bradshaw d/b/a Schneider's Restaurant and represents your liability, as purchaser, in accordance with Section 1141(c) of the Sales Tax Law."

2. A "Notice of Sale in Bulk" was sent to the Department of Taxation and Finance by certified mail, metered and postmarked the sixteenth of September, 1978. Said notice stated, in part:

"PLEASE TAKE NOTICE, pursuant to Article 6 of the Uniform Commercial Code, you are hereby notified that a transfer in bulk is about to be made between ELIZABETH BRADSHAW AND MILTON BRADSHAW, whose business address is 432 Center Street, Lewiston NY as Transferor, and NINO A. DONATELLI AND JOAN MARIE DONATELLI, whose business address will be 432 Center Street, Lewiston NY as Transferee.

The following business names and addresses have been used by the Transferor in addition to that set forth above, within the past three years so far as the same are known to the Transferee:

SCHNEIDERS RESTAURANT, 432 Center Street, Lewiston NY"

Said "Notice of Sale in Bulk" did not disclose the date of the proposed sale nor an address of the buyer other than that of the business being sold.

3. The Audit Division claims that a notice of possible claim for sales taxes due from the seller was sent to petitioners addressed to the business address provided in the Notice of Sale in Bulk on or about October 3, 1978. The business was closed during said month and petitioners did not receive said notice.

The Audit Division presented no evidence or testimony in support of its claim that said notice was in fact mailed.

4. Petitioners purchased the business on or about September 29, 1978 for a total sales price in excess of \$100,000.00. Included in such total sales price was a mortgage from petitioners to the sellers of some \$32,000.00 to \$33,000.00, of which approximately \$30,000.00 is still owing, petitioners having ceased payments to the sellers after receiving the notices and demands for payment of sales and use taxes due from the Audit Division (Finding of Fact "1") for sales taxes due from petitioners on account of the seller's past liabilities.

5. Pursuant to conferences, additional submissions and/or part payments, the Audit Division had, prior to the hearing, reduced the amount of claimed outstanding liability due by petitioners as bulk sale purchasers. The Audit Division claims that \$4,381.86 tax, together with applicable interest and penalty, is still owing with respect to Notice and Demand Number S781206723C and that \$3,083.08 tax, together with applicable interest and penalty, is still owing with respect to Notice and Demand Number S781206722C.

6. The Notice and Demand for Payment of Sales and Use Tax Number S781206722C is the result of an audit of the records of the "bulk sale" sellers' business, Schneider's Restaurant. Said records were incomplete and the taxes originally

claimed due were determined by applying office experience markups to liquor, beer, wine and food.

Also included was \$700.00 in tax liability premised upon a transfer of \$10,000.00 in tangible personal property upon the sale in bulk of the business assets of Schneider's Restaurant.

7. The consideration paid for the tangible personal property transferred from Schneider's Restaurant to petitioners was \$5,000.00.

8. The Notice and Demand for Payment of Sale and Use Tax Number S781206723C is based upon sales and use tax returns filed by Schneider's Restaurant for which full payment was not received.

9. Paragraph 3 of the Audit Division's Answer to petitioners' perfected petition stated that the Audit Division "Affirmatively states that the amount assessed against petitioner has been reduced from \$5,269.25 to \$3,083.08", and the wherefore clause therein stated that:

"WHEREFORE, the AUDIT DIVISION OF THE DEPARTMENT OF TAXATION AND FINANCE respectfully requests that the Perfected Petition herein be in all respects denied and that the Notice of Determination and Demand issued December 15, 1978 and reduced to \$3,083.08 be sustained, with interest and applicable penalties thereon."

10. Petitioners, in their Power of Attorney, Petition and Perfected Petition, were aware of the two "Notice and Demands" issued against them and the total amount (\$21,676.14) of tax initially asserted against them.

11. The Audit Division asserted at the hearing that the Answer of the Audit Division was in error with respect to the amounts of tax still claimed owing.

12. The Answer of the Audit Division referred only to Notice Number S781206723C which liability had been concededly (by the Audit Division) reduced to \$3,083.08.

13. That the Answer of the Audit Division failed to include the tax assessed and still claimed due with respect to Notice Number S781206722C in the amount of \$4,381.86.

14. The Audit Division, at the hearing, made a motion to amend and conform its Answer and the "wherefore clause" therein to the proof.

15. That "Notices of Assessment Review" were sent to petitioners on April 24, 1980 informing them that adjustments had been made to Assessment Notice Number S781206722C resulting in adjusted tax due of \$10,485.55 and to Assessment Notice Number S781206723C resulting in adjusted tax due of \$4,381.86.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law establishes certain notice requirements that must be met by purchasers of business assets and by the Department. That section also provides relief for the purchaser when the Department fails to give proper notice. The failure of the Audit Division to produce evidence of the mailing of a notice of possible claim or a questionnaire does not in and of itself relieve petitioners from any tax liability.

That during the relevant period, section 1141(c) of the Tax Law provided, in part:

"Within ninety days of receipt of the notice of the sale, transfer, or assignment from the purchaser, transferee, or assignee, the tax commission shall give notice to the purchaser, transferee or assignee and to the seller, transferrer or assignor of the total amount of any tax or taxes which the state claims to be due from the seller, transferrer, or assignor to the state, and whenever the tax commission shall fail to give such notice to the purchaser, transferee or assignee and the seller, transferrer or assignor within ninety days from receipt of notice of the sale, transfer, or assignment, such failure will release the purchaser, transferee or assignee from any further obligation to withhold any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor,...".

B. That section 1147(a)(1) of the Tax Law provides:

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable."

C. That since the Notice and Demand for Payment of Sales and Use Taxes Due, dated December 15, 1978, was mailed within ninety days of the receipt of the notification of the bulk sale, which was no earlier than the sixteenth day of September, 1978, the assessment issued by the Audit Division was timely [Tax Law §§1141(c); 1147(a)(1)].

D. That the amount of tax claimed due on Notice Number S781206723C should be reduced by \$350.00 to reflect the tax on the transfer of \$5,000.00 of tangible personal property rather than the \$700.00 in tax claimed due with respect to that portion of the bulk sale transaction.

E. That section 1141(c) limits the liability of the purchaser in a bulk sale to "an amount not in excess of the purchase price or fair market value of the business assets sold, transferred or assigned." Said section is not limited to "tangible personal property sold" but to the purchase price or fair market value of the "business assets" sold, transferred or assigned and provides the State with a first priority right and lien in such amount [see Klausner Supply Co., Inc. v. Chemical Bank (Supreme Court New York County, Gammerman, J., April 20, 1984) TSB-H-84(122)S].

F. That the Commission's Rules of Practice and Procedure provide, in part, as follows:

"(c) Amended pleadings. Either party may amend a pleading once without leave of the Commission, if the amended pleading is served on the adversary within 30 days after service of the original pleading. After such time, a pleading may be amended only by consent of the Commission or its designee. All such requests for leave to amend must be made prior to the hearing, and must be accompanied by the

proposed amendments or amended pleadings. Where a pleading is amended, the party which must respond to such pleading shall have the full time allowed pursuant to this section. The one exception to the requirement that a pleading be amended prior to a hearing is where a party, at the hearing, requests leave to amend a pleading to conform to the proof. In such an instance, the hearing officer shall determine whether such amendment would work to the prejudice of the adverse party, affect a person not present at the hearing or unduly delay the proceeding.

If none of these problems would result, and good cause exists, leave may be granted to so amend the pleading. No such amended pleading can revive a point of controversy which is barred by the time limitations of the Tax Law, unless the original pleading gave notice of the point of controversy to be proved under the amended pleading."
[20 NYCRR 601.6(c)].

G. That it was proper to allow the Audit Division (Law Bureau) to amend its Answer to include both Notice and Demands issued to petitioners, each of which petitioners timely protested and filed a petition and perfected petition.

H. That penalty and interest in excess of the statutory minimum is cancelled.

I. That except as noted in Conclusion of Law "H" (and taking into account Conclusion of Law "D"), Notice Number S781206723C in the reduced amount of \$2,733.08 (\$3,083.08 less \$350.00) exclusive of interest and Notice Number S781206722C in the amount of \$4,381.86 exclusive of interest are sustained.

J. That the petition of Nino A. and Joan M. Donatelli is granted to the extent of Conclusions of Law "D", "H" and "I" and is in all other respects denied.

DATED: Albany, New York

NOV 07 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER