

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
G.S.B. ENTERPRISES CORP.	:	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, 1976.	:	

Petitioner, G.S.B. Enterprises Corp., 710 Old Willets Path, Hauppauge, New York 11787, 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, 1976 (File No. 36727).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on June 25, 1984 at 11:00 A.M., with all briefs to be submitted by December 5, 1984. Petitioner appeared by Hancock & Estabrook, Esqs. (Joseph H. Murphy and E. Parker Brown, II, Esqs., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner's purchase of certain premises to be used as an industrial facility constituted a bulk sale pursuant to Tax Law section 1141(c).

II. Whether, if so, petitioner gave notice of such bulk sale as required under Tax Law section 1141(c).

III. Whether funds distributed at closing on the subject premises were properly subject to the State Tax Commission's right and lien under Tax Law section 1141(c).

FINDINGS OF FACT

1. On December 8, 1981, the Audit Division mailed to petitioner, G.S.B. Enterprises Corp. ("GSB"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1975 through November 30, 1976 in the amount of \$29,744.96, plus interest.

2. GSB was incorporated in 1969 and is a wholly-owned subsidiary of Charles Ross and Son Company ("Charles Ross") of Hauppauge, New York. Petitioner is a real estate holding company with no other activities of any kind.

3. Charles Ross is a manufacturer of industrial mixing equipment used in the chemical, pharmaceutical and food processing industries. It makes a line of equipment known as double planetary mixers and a line of "ribbon blenders", a type of mixer used for blending solids and solid powders, sometimes with liquids added.

4. Ross Metal Fabricators, a subsidiary of Charles Ross, makes tanks and other components of the ribbon blenders made by its parent.

5. By 1977, Ross Metal Fabricators had outgrown its facility located in Islip, New York, and needed larger quarters. Charles Ross located a parcel of real estate situated at 225 Marcus Boulevard, Deer Park, New York, suitable to the needs of Ross Metal Fabricators. The property at 225 Marcus Boulevard consisted of approximately one acre of land and a concrete and brick one-story building of about 30,000 square feet. This structure was approximately 18,000 square feet larger than the Islip factory, and also had larger manufacturing bays which were considered desirable for Ross Metal Fabricators' operations. This industrial facility also had completed electrical, plumbing, lighting, heating and air conditioning systems.

6. The owner of 225 Marcus Boulevard, Deer Park, New York, was Sanitary Controls, Inc. ("Sanitary"). Sanitary had been incorporated in 1966 as "New York Sani-Can, Inc." to engage in the business of manufacturing and selling sanitary containers for residential and commercial disposal of waste materials. The company manufactured a line of large, "dempster-dumpster" type refuse containers at the 225 Marcus Boulevard premises. In 1968, the company's name was changed from New York Sani-Can, Inc. to Sanitary Controls, Inc.

7. On April 18, 1977, GSB, as real estate holding company for Charles Ross, entered into a contract with Sanitary for the sale of the 225 Marcus Boulevard premises. In conjunction with entering this contract, Charles Ross tendered its check in the amount of \$10,000, made payable to the law firm representing Sanitary, as an earnest money deposit toward the purchase.

8. Two overhead cranes, three air compressors, exhaust fans, lighting fixtures, an intercom system, two individual air conditioning units, a water cooler and other miscellaneous items such as shades, blinds, a sink, cabinets, a stove, a refrigerator, mirrors, prefabricated office partitions and carpeting were included in the transaction. The cranes were mounted on overhead rails, which were affixed to the columns of the building and spanned the main manufacturing bays. The air compressors were connected to a hard piping system in the facility. The compressors could, however, be uncoupled from the piping without resultant damage. Other incidental property passing in the transaction, such as the refrigerator, etc., was insignificant and minimal in value as far as the total transaction was concerned. None of Sanitary's inventory was included in the transaction.

9. Petitioner did not purchase a "going business", inasmuch as petitioner and Sanitary were engaged in different lines of work. More specifically,

petitioner was a real estate holding company for a corporation engaged in the production of industrial mixing equipment, whereas Sanitary was a manufacturer of receptacles for waste material. Sanitary continued making refuse containers subsequent to the sale of the 225 Marcus Boulevard premises in an immediately adjacent building on Marcus Boulevard.

10. The real estate title report on 225 Marcus Boulevard, dated April 14, 1977 and recertified on June 23, 1977, revealed a first mortgage, 29 judgments, three federal tax liens, and one UCC-1 statement filed against Sanitary. Of the noted judgments, number 5 was in favor of the State Tax Commission in the amount of \$5,709.91, docketed in Suffolk County on October 1, 1976; number 26 was in favor of the State Tax Commission in the amount of \$1,024.32, docketed in Suffolk County on January 26, 1977; and number 27 was in favor of the State Tax Commission in the amount of \$7,295.85, docketed in Suffolk County on March 11, 1977.

11. Petitioner and Sanitary attempted to close title on the 225 Marcus Boulevard premises on June 21, 1977, but were unable to do so because additional creditors having judgments against Sanitary had been discovered. A Tax Compliance agent, one John Madlon, was present at the June 21st attempted closing.

12. A final closing of title took place on June 23, 1977. Petitioner paid for the premises at this time (by satisfying the claims of Sanitary's creditors) and took possession. Mr. Madlon was present at the June 23rd closing, as at the attempted closing two days earlier.

13. At the final closing, a State Tax Commission claim against Sanitary for unpaid withholding taxes in the amount of \$2,806.02 was satisfied. No other state tax claims were asserted by Mr. Madlon at the closing.¹

14. No bulk sale Notice of Claim was received by petitioner, nor were the officers of petitioner or of Charles Ross aware of any claims for sales tax that the State Tax Commission might have had against Sanitary. Charles Ross and affiliated companies manufactured industrial production equipment not subject to sales tax, and company officials were unaccustomed to considering the potential for sales tax liability. The Purchase Statement of Closing recites that "all taxes have been paid".

15. Because petitioner and its parent corporation were unaware of any sales tax claim by the State Tax Commission, no consideration was given to any such potential liability therefor in negotiating and arriving at the purchase price, and hence the possibility of such liability did not have a depressive effect on the price paid by petitioner.

16. While sales tax was not considered, the parties did negotiate at closing over certain corporation franchise tax refunds which Sanitary believed it was owed. In order to complete the transaction, petitioner undertook to pay approximately \$52,000 over and above the contract price to satisfy the additional judgments which had been discovered prior to closing. In return, petitioner

1 The State Tax Commission judgments listed in the April 14, 1977 title report, apparently satisfied by the seller prior to closing, were not related to any sales tax liability.

took an assignment from Sanitary for the potential franchise tax refunds.² In 1978, petitioner received franchise tax refunds of approximately \$54,000 as a result of this assignment. Neither petitioner nor its parent corporation had ever agreed that this refund was to be used to offset sales tax liability.

17. At closing, all of petitioner's funds in payment went to pay off Sanitary's first mortgage and to satisfy its various creditors, and no funds were left over for any payment to Sanitary itself. All creditors paid at closing had judgments against Sanitary. There were no State Tax Commission warrants outstanding at the time of closing pertaining to the sales tax liability at issue herein.

18. In July, 1981, petitioner received a letter from the Audit Division asserting that petitioner was liable for sales taxes owed by Sanitary for periods prior to the transfer of the 225 Marcus Boulevard premises. It was this letter which first alerted petitioner to the sales tax claims against Sanitary.

19. The Notice of Determination and Demand at issue is based on taxes determined to be due from Sanitary and represents petitioner's liability as purchaser in accordance with Tax Law section 1141(c). The liability itself represents taxes owed by Sanitary for the quarterly periods ended November 30, 1975 through November 30, 1976.

2 Petitioner also took an assignment from Sanitary of certain unearned insurance premiums and a promissory note from Sanitary's president, one Frank Palopoli. The sum of \$324.00 was eventually refunded to petitioner from the insurance company; however, nothing was realized from the personal promissory note.

20. Upon receipt of the Notice of Determination and Demand, petitioner informed the Audit Division that the apparent successor company to Sanitary, known as "SCI Equipment Corp.", had no certificate of incorporation or application for authority to do business on file with the Secretary of State, and that the principals of Sanitary were also the principals of SCI Equipment.

21. Petitioner did not file a Notice of Bulk Sale in connection with the aforementioned transfer.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides, in summary, that whenever a person required to collect tax shall make a sale of his business assets, otherwise than in the ordinary course of business, the purchaser shall at least ten days before taking possession notify the Tax Commission by registered mail of the proposed sale. Whenever the purchaser shall fail to give notice as required or whenever the Tax Commission shall inform the purchaser that a possible claim for tax exists, any sums of money shall be subject to a first priority right and lien for any such taxes due from the seller. The liability of the purchaser shall be limited to an amount not in excess of the purchase price or fair market value of the business assets sold, whichever is higher.

B. That the criteria of whether a transaction is a "bulk sale" subject to the provisions of section 1141(c) of the Tax Law are that there be a sale, transfer or assignment in bulk of any part or the whole of a person's business assets by a person required to collect the tax and that such transaction be other than in the ordinary course of business.

C. That the instant transfer constituted a bulk sale, with the transferred premises constituting a business asset of Sanitary. Not only were items other than real estate transferred, as described, but the real estate itself was a

business asset of the transferor. [See Matter of Gary E. Slattery (Purchaser) d/b/a Florida Hotel Corp., State Tax Comm., May 27, 1983.] Since petitioner failed to give notice of the transfer, as required pursuant to Tax Law section 1141(c), it was properly subjected to liability for the unpaid sales taxes due from the transferor. Finally, those funds transferred by petitioner at closing were subject to a first priority right and lien by the Tax Commission pursuant to Tax Law section 1141(c) [Matter of Klausner Supply Co., Inc. v. Chemical Bank and The State of New York, Dep't. of Taxation and Finance, Sales Tax Bureau, Misc.2d ____ (Supreme Court, New York County, April 10, 1984, Gammerman, J.)].

D. That the petition of G.S.B. Enterprises Corp. is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due mailed December 8, 1981 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 23 1985

Rodrichaw Chen
PRESIDENT

Francis Q. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER