

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	DECISION
	:	
JAVAN W. MARKS	:	
	:	
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 December 1,	:	
1978 through December 18, 1981.	:	

Petitioner, Javan W. Marks, RD 4 Box 546, Montague, New Jersey 07827, 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 December 1, 1978 through December 18, 1981. (File No. 37717.)

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on July 22, 1985 at 1:15 P.M, with all briefs to be submitted by August 1, 1985. Petitioner appeared by Gurda, Gurda & McBride. (Albert Pacione, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq., (William Fox, Esq., of counsel).

ISSUES

I. Whether petitioner, the purchaser in a bulk sale transaction, is liable for sales taxes determined due from the seller in accordance with section 1141(c) of the Tax Law.

II. Whether the Audit Division notified petitioner of a possible claim for taxes due from the seller as provided in section 1141(c) of the Tax Law.

FINDINGS OF FACT

1. On December 10, 1981, the Audit Division received notification from petitioner, Javan W. Marks, of the impending bulk transfer of a restaurant

business known as Karstens Inn and Restaurant that was owned and operated by Frank Celestina. The business was located at Route 6, Port Jervis, New York. The notification indicated that the sale was to take place on December 18, 1981 and that the total purchase price for the real estate and personal property was \$275,000.00.

2. On December 11, 1981, the Audit Division mailed a "Notice of Claim to Purchaser" addressed to petitioner at RD #4, Box 546, Montague, New Jersey (address shown on the above notification of sale). The notice advised petitioner that a possible claim existed for unpaid taxes due from the seller of the business and that he was not to distribute funds or property to the seller before the following conditions had been met:

1. The State Tax Commission determined the seller's liability, if any.
2. Payment of such liability was made to the State.
3. The office authorized the purchaser to release the funds or property.

The Audit Division followed established mailing procedures for notices to purchasers when it mailed the above notice on December 11, 1981. Petitioner denied receipt of such notice.

3. On March 10, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period December 1, 1978 through December 18, 1981 for taxes due of \$5,872.50 plus penalty and interest of \$1,945.14 for a total of \$7,817.64. The notice stated that the taxes were determined due from Frank Celestina, d/b/a Karstens Inn & Restaurant & Catering, Inc. and represented petitioner's liability, as purchaser, in accordance with section 1141(c) of the Tax Law. The notice also indicated that bulk sales tax of \$850.00 was included in the assessment.

4. At a pre-hearing conference held on October 19, 1982, petitioner established that the bulk sales tax of \$850.00 had been paid. As a result thereof, the tax due on the above notice was reduced to \$5,022.50.

5. On December 7, 1981, petitioner's attorney, Sidney Krawitz mailed a notice identical to the notice received by the Audit Division to all known creditors of Mr. Celestina, stating that a transfer of the business would occur on December 18, 1981. During the closing, seller's attorney, John Bonacic, telephoned Michael Campagna of the Department of Taxation and Finance for the purpose of determining the outstanding tax liability of the seller. Mr. Bonacic was advised that the taxes due at that time were \$11,752.29. A certified check for that amount was sent to Mr. Campagna on that day.

6. The accounting for the breakdown of the \$11,752.29 was attached to petitioner's application for a hearing and is detailed below:

<u>ASSESSMENT#</u>	<u>PERIOD</u>	<u>TAX</u>	<u>PENALTY AND INTEREST</u>	<u>PAYMENTS</u>	<u>BALANCE DUE</u>
C7911010691	3-31-79	\$ 250.00	\$ 130.84	-0-	\$ 380.84
W8106044924	12-1-79 to 12-31-79	144.50	79.62	-0-	224.12
W8105062170	1980	836.00	363.27	-0-	1,199.27
S7901191568	5-31-78	2,066.99	1,395.96	-0-	3,462.95
S8001294466	11-30-79	2,187.61	970.59	1,805.96	1,352.24
D8006250914	2-28-80	1,397.90	604.42	500.00	1,502.32
D8009048486	5-31-80	911.40	369.44	-0-	1,280.84
D8012155249	8-31-80	1,057.92	365.11	-0-	1,423.03
S8103112492	11-30-80	686.96	195.92	-0-	882.88
S8111092977	8-31-81	819.36	43.80	819.36	43.80
		<u>\$10,348.64</u>	<u>\$4,518.97</u>	<u>\$3,125.32</u>	<u>\$11,752.29</u>

7. Petitioner took the position that the Audit Division was properly notified of the bulk sale; the Division, through its agent Mr. Campagna, gave notice of the seller's liability and such amount was paid to the State.

Petitioner contended that he had complied with section 1141(c) of the Tax Law and therefore was not liable for any taxes thereafter determined due from the seller.

8. Petitioner, in good faith, made every effort to ensure that the seller's tax liability was paid to the State.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides, in pertinent part, that a purchaser in a bulk sale of business assets must notify the Tax Commission of the proposed sale at least ten days before taking possession of the subject of the sale. Whenever the purchaser fails to give notice to the Tax Commission as required, or whenever the Tax Commission informs the purchaser that a possible claim for taxes exists, any sums of money or other consideration which the purchaser is required to transfer over to the seller shall be subject to a first priority right and lien for any such taxes determined to be due from the seller. Within ninety days of receipt of the notice of the sale from the purchaser, the Tax Commission shall give notice to the purchaser of the total amount of any taxes which the state claims to be due from the seller. For failure to comply with the provisions of section 1141(c) of the Tax Law, the purchaser is personally liable for the payment to the state of any taxes determined to be due from the seller.

B. That section 1147(a) of the Tax Law provides that any notice required under the provisions of Articles 28 and 29 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 or application made. The statute further provides that the mailing of such notice is presumptive evidence of the receipt by the person to whom it is addressed. The Audit Division has established that the "Notice of Claim to Purchaser" was mailed to petitioner in a properly addressed and stamped envelope. Since mailing was

shown, it is presumed that the notice was received by petitioner. The mere denial of receipt does not overcome this presumption (Russell v. State Tax Commission, Sup. Ct., Albany County, November 6, 1981).

C. That the Tax Commission, upon receipt of the notice of bulk sale from petitioner, notified petitioner not to distribute funds or property until it determined whether or not the seller was liable for sales taxes and if so, the extent of such liability. The Tax Commission notified petitioner of the amount of tax due from the seller within 90 days of receipt of petitioner's notice of sale as required by section 1141(c) of the Tax Law; said notice of tax due was in addition to the taxes paid as set forth in Finding of Fact "6".

D. That petitioner transferred funds prior to the expiration of the 90 day period without receiving authorization to release the funds. Accordingly, petitioner is personally liable for the payment of such taxes in accordance with the provisions of section 1141(c) of the Tax Law.

E. That the penalty is remitted pursuant to section 1145(a)(1)(ii) of the Tax Law and interest shall be reduced to the minimum statutory rate.

F. That the petition of Javan W. Marks is granted to the extent indicated in Finding of Fact "4" and Conclusion of Law "E" and except as so granted the petition is in all other respects denied.


DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER