

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
STARLING FURNITURE CORP. and
PAULINE LEISTNER, as Officer
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, 1978
through December 23, 1981.

DECISION

Petitioners, Starling Furniture Corp. and Pauline Leistner, as officer, 28-53 Steinway Street, Long Island City, New York 11103, 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, 1978 through December 23, 1981 (File Nos. 39939, 41798 and 42122).

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 11, 1985 at 1:25 P.M. Petitioners appeared by Louis Davidowitz, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether on April 12, 1982 and December 20, 1982, the Audit Division properly issued assessments against Starling Furniture Corp., a corporation which had been dissolved during 1979.

II. If so, whether the corporation is liable for additional sales tax as disclosed by the Audit Division's examination of sales invoices maintained.

III. Whether the Audit Division properly issued an assessment against petitioner Pauline Leistner as the purchaser, transferee or assignee of the business assets of Starling Furniture Co.

IV. Whether the Audit Division properly assessed penalties against petitioners pursuant to Tax Law section 1145(a)(1)(i).

FINDINGS OF FACT

1. On or about December 23, 1981, petitioner Pauline Leistner submitted to the Audit Division a Notification of Sale, Transfer or Assignment in Bulk, advising the Audit Division that she purchased on said date from Irving Leistner (her husband) the assets of Starling Furniture Co., a retail furniture store. The selling price totalled \$10.00, with \$9.00 allocated to inventory and \$1.00 to furniture, fixtures, equipment and supplies. The Notification was received by the Audit Division on January 12, 1982.

2. On April 12, 1982, the Audit Division issued to Sterling Furniture Corp. (sic)¹ a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes pursuant to Tax Law Articles 28 and 29 for the period September 1, 1978 through December 23, 1981 in the estimated amount of \$15,716.01, plus penalties and interest. The tax assessed for the period December 1 through December 23, 1981 included sales tax in the estimated amount of \$825.00 on the transfer of the company's assets.

1 For the earlier part of the audit period, the furniture store was operated by Starling Furniture Corp. Mr. Leistner dissolved the corporation sometime in 1979 and operated the store thereafter as a sole proprietorship. Mrs. Leistner continues to operate the store as a sole proprietorship. The Audit Division issued certain relevant documents to the corporation and others to the sole proprietorship (as will appear from the findings, infra), notwithstanding that it had knowledge of the corporation's dissolution. References in this decision to the two entities will be to the company or to the corporation, as appropriate.

On April 12, 1982, the Audit Division issued to petitioner Pauline Leistner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes for the period September 1, 1978 through December 23, 1981 in the estimated amount of \$16,779.61, plus penalties and interest. Again, the tax assessed for the period December 1 through December 23, 1981 included estimated sales tax of \$825.00 on the bulk sale. The notice states, in part, "The...taxes are determined to be due from Starling Furniture Corp. and represent your liability, as purchaser, in accordance with Section 1141(c) of the Tax Law."

On December 20, 1982, after the conduct of a field examination of the company's books and records, the Audit Division issued a second Notice of Determination and Demand to Starling Furniture Corp., assessing additional sales and use taxes in the amount of \$6,338.69, plus penalties and interest, for the period then remaining open under the statute of limitations, September 1, 1979 through November 30, 1981. No further assessment was issued to petitioner Pauline Leistner.

3. On or about January 13, 1982, the Audit Division issued to Mrs. Leistner a Notice of Claim to Purchaser, advising her of a possible claim against her for sales and use taxes due or subsequently determined to be due from the seller, Irving Leistner doing business as Starling Furniture Co. By letter dated February 1, 1982, the Audit Division informed Starling Furniture Corp. that its sales and use tax returns for the period March 1, 1979 through November 30, 1981 were scheduled for examination, beginning on February 17, 1982. Because of various postponements requested by the company, the sales tax examiner was unable to commence his review until May 17, 1982, a date after the expiration of the statutory ninety-day period (section 1141[c]); consequently, estimated

assessments based on information then in the Audit Division's possession were made against petitioners.

4. (a) During the course of the audit, Mr. Leistner furnished for the examiner's review sales invoices for the audit period (with the exception of December 1 through December 23, 1981), monthly bank statements, and a disbursements journal covering the period March, 1979 through December, 1980; the disbursements journal for 1981, general ledgers and cash register tapes were not made available.

(b) According to the sales invoices, furniture sales for September 1, 1978 through November 30, 1981 totalled \$363,148.00. Insofar as invoices were not available for the remainder of the audit period, the examiner assumed that taxable sales for December 1 through December 23, 1981 were in the amount of \$6,500.00, as estimated by the Notice of Determination and Demand of April 12, 1982. The examiner allowed an adjustment for out-of-state sales in the amount of \$1,563.00, resulting in audited taxable sales of \$369,648.00. The examiner also analyzed monthly bank statements and accumulated the deposits made during the audit period. Deposits totalled \$236,066.76, as compared with reported taxable sales of \$107,713.00. (It is not clear from the examiner's workpapers whether he adjusted the deposits for sales tax included therein. If he did not make such an adjustment, deposits net of sales tax would equal \$227,423.02.) Finally, the examiner discovered that purchases as reported on Mr. Leistner's 1980 federal income tax return, schedule C (Profit or [Loss] from Business or Profession) exceeded purchases per the books by \$7,986.56.

(c) Mr. Leistner explained to the examiner that the discrepancy between taxable sales per the sales invoices (\$369,648.48) and per the bank deposits (\$227,423.02) was attributable to exempt sales and to cancelled sales. Many

sales, Mr. Leistner claimed, were for delivery outside the United States. Other than the adjustment of \$1,563.00 (described above), the examiner did not decrease audited taxable sales for claimed exempt sales because Mr. Leistner was unable to substantiate deliveries outside the country by bills of lading, freight bills or similar documentation. Mr. Leistner also maintained that customers often cancelled their orders and were refunded their deposits. The examiner allowed an adjustment of \$1,500.00 for one cancelled sale and an adjustment of \$36.00 for a claim against a trucking firm, but allowed no further reductions for cancelled sales because Mr. Leistner was unable to produce any documentation substantiating the refund of deposits to customers.

(d) It is petitioners' position that the furniture store's taxable sales and the sales tax due thereon were calculated by reference to the sales invoices. However, sales tax charged per the invoices was \$17,349.08, as compared with sales tax remitted of \$8,643.74.

(e) At the conclusion of the audit, the examiner recommended that additional tax be assessed in accordance with the sales invoices rather than the bank deposits; the latter would reflect any expenses paid in cash and would thus not be representative of sales receipts. He further recommended that the assessment be issued against Mr. Leistner doing business as Starling Furniture Co., since Mr. Leistner had advised him that the corporation was dissolved in 1979 and had filed his 1980 federal income tax return reporting income earned from and expenses incurred in the sole proprietorship.

5. On the advice of his accountant, Mr. Leistner filed a certificate of doing business as Starling Furniture Co. subsequent to the dissolution of Starling Furniture Corp. Throughout the period under consideration, Mr. Leistner filed the sales and use tax returns of the business utilizing labelled forms

mailed to him by the Audit Division, which forms bore the corporate name and identification number.

6. In 1981, Mr. Leistner decided to retire. Mrs. Leistner, then employed full time at Bell Yarn Company, urged her husband not to relinquish the furniture store, and consequently, on December 23, 1981, he transferred the assets of the sole proprietorship to her.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of Article 28 of the Tax Law provides that a notice of determination finally and irrevocably fixes the tax unless the person against whom the tax is assessed makes an application for hearing within ninety days after the giving of notice of such determination. The giving of notice is governed by section 1147(a)(1) which, as amended by the Laws of 1981, Chapter 760, provides, "The notice of determination shall be mailed promptly by registered or certified mail." The purpose of such provision is to ensure receipt of the notice by the taxpayer. (See Matter of Ruggerite, Inc. v. State Tax Comm., 97 A.D.2d 634, affd., 64 N.Y.2d 688.) Mr. Leistner does not dispute that he received the assessments issued against Starling Furniture Corp. on April 12, 1982 and December 20, 1982 as the sole proprietor of Starling Furniture Co.; he thus had actual notice of the Audit Division's assertion that additional sales tax was due as a result of the transactions engaged in by the business. Under such circumstances, the naming of the corporation rather than the sole proprietorship on the assessments did not constitute a defect which would warrant cancellation of the assessments.

B. That a comparison of taxable sales as reflected in the sales invoices (\$369,648.48) with bank deposits (\$227,423.02) reveals a discrepancy in excess of \$140,000.00; a comparison of bank deposits with reported taxable sales

(\$107,713.00) reveals a discrepancy of nearly \$120,000.00. Petitioners' explanation that the difference between audited taxable sales and reported taxable sales arose by reason of sales for out-of-state delivery and cancelled sales is unconvincing in view of the magnitude of these discrepancies. Nor have they produced any documentation to support their position. The audit results which were premised on an examination of the sales invoices must therefore be sustained.

C. That subsection (c) of section 1141 provides that whenever a person required to collect tax makes a sale, transfer or assignment in bulk of any part or the whole of his business assets, other than in the ordinary course of business, the purchaser, transferee or assignee shall, at least ten days before taking possession of the asset(s) or paying therefor, notify the Tax Commission of the proposed sale. For failure to comply with the provisions of such subsection, the purchaser, transferee or assignee shall be personally liable for payment to the state of any taxes theretofore or thereafter determined to be due to the state from the seller, transferor or assignor, limited to an amount not in excess of the purchase price or fair market value of the asset(s), whichever is higher. The transfer on December 23, 1981 by Irving Leistner of all the assets of Starling Furniture Co. to petitioner Pauline Leistner, otherwise than in the ordinary course of the company's business, constituted a bulk transfer within section 1141(c); Mrs. Leistner failed to comply with the requirements of said subsection and consequently is personally liable for the taxes due from the transferor, in an amount not to exceed the aggregate fair market value of the assets.

D. That the record does not support a finding of reasonable cause for Starling Furniture Co.'s failure to timely pay the tax due under Article 28.

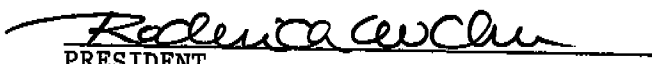
The Audit Division therefore properly imposed penalties upon petitioners, pursuant to section 1145(a)(1)(1).

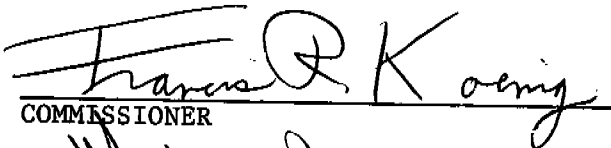
E. That the petition of Starling Furniture Corp. and Pauline Leistner, as officer, is denied, and the assessments issued on April 12, 1982 and December 20, 1982 are sustained.

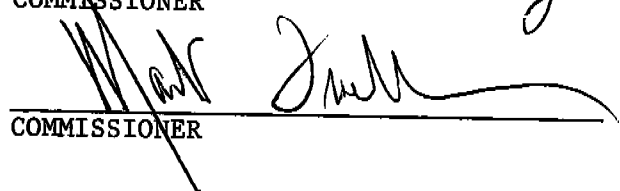
DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985


PRESIDENT


COMMISSIONER


COMMISSIONER