

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of :

BLANCHE LIQUOR 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 December 1, 1978  
through August 31, 1982. :

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Petitioner, Blanche Liquor Corp., c/o Blanche Miranda, 1904 LaCombe Avenue, Bronx, New York 10473, 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 August 31, 1982 (File No. 42408).

A formal hearing was commenced before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 25, 1985 at 1:45 P.M. The hearing was continued before the same hearing officer at the same location on November 20, 1985 at 1:50 P.M., and was concluded on November 21, 1985 at 10:00 A.M. Petitioner appeared by Jane Compton Hammett, Esq. and Richard McLaren, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

- I. Whether petitioner was the purchaser in a bulk sale transaction.
- II. Whether the Audit Division's underlying determination of sales and use taxes due from the seller in a bulk sales transaction was proper.
- III. Whether petitioner's liability as purchaser in a bulk sales transaction should be limited to the greater of the purchase price or the fair market value of the business assets sold.

IV. Whether the penalties asserted against petitioner should be abated.

FINDINGS OF FACT

1. On November 9, 1982, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk from petitioner, Blanche Liquor Corp., regarding its purchase of the assets of Felix Acevedo who operated a liquor store known as Felix's Wines & Liquors located at 514 East 14th Street, New York, New York. Said notification indicated August 31, 1982 as the scheduled date of sale and listed the total sales price of the business as \$4,000.00. The sales price of the furniture and fixtures was listed as \$2,000.00 on which the bulk sales tax of \$165.00 has been paid. Said notification also stated that "prior to Buyer taking title the stock was liquidated to pay creditors."

2. On February 4, 1983, the Audit Division issued the following notices of determination and demands for payment of sales and use taxes due against petitioner:

<u>Notice Number</u>	<u>Period</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
S830125716C	12/1/78-5/31/82	\$43,095.98	\$9,729.89	\$12,875.47	\$65,701.34
S830125717C	6/1/82-8/31/82	\$ 3,459.72	\$ 311.38	\$ 175.31	\$ 3,946.41

The aforesaid notices indicated that the taxes were determined to be due from Felix Acevedo d/b/a Felix's Wines & Liquors and represented petitioner's liability, as purchaser, in accordance with section 1141(c) of the Tax Law.

3. The contract of sale, executed December 22, 1981 by petitioner and Felix Acevedo, as "purchaser" and "seller", respectively, stated that the purchase price of the business was \$4,000.00 and contained the following clause:

"3. In addition to the purchase price set forth herein, the Purchaser agrees to buy from the Seller, the stock of merchandise consisting of wine and liquor and other alcoholic beverages of which the Purchaser agrees to pay to the Seller, the market value thereof. (The Market Value to be determined by prices contained in the 'Beverage

Media' as alcoholic publication [sic] for the month during which the closing takes place).

\* \* \*

The parties agree that the Seller will deduct from the moneys derived or resulting from the sale of the merchandise, consisting of wine, liquor and other alcoholic beverages, and use same to pay all debts, taxes, obligations, invoices which may be due at the date of closing and the parties further agree that the Seller shall be entitled to the surplus, if any, of the said proceeds."

4. The value of the seller's inventory at the conclusion of 1981 as set forth in the seller's Federal income tax return, Form 1040, Schedule C, for that year was \$38,075.00. Accordingly, the fair market value of the seller's inventory transferred to petitioner pursuant to the terms of the sale was \$38,075.00. Based on the value of the transferred inventory, the actual total purchase price of the business was \$42,075.00 (\$38,075.00 + \$4,000.00).

5. At the hearing, petitioner argued that the total purchase price for the business was \$4,000.00 and that the inventory had been liquidated by the seller prior to closing in an effort to reduce the indebtedness incurred by the business. Petitioner, however, failed to introduce any credible evidence in support of its position.

6. The closing of sale took place on or about November 2, 1982. At closing, \$4,000.00 was transferred to the seller's attorney to be held in escrow pending determination of the seller's sales tax liability. Said monies remain in said attorney's escrow account.

7. As to the determination of the extent of the sales tax liability of the seller, a field audit was conducted for the period December 1, 1978 through August 31, 1982. Inasmuch as the seller's Federal income and state sales tax returns could not be reconciled to his books and records, such books and records were deemed inadequate by the Audit Division and a test of purchases per paid

bills for the period August, 1981 through November, 1981 was performed. This test revealed purchases of \$38,197.00 during the period. Reducing this amount by purchases reported per books for the same period of \$24,074.00 resulted in \$14,123.00 of unreported purchases for an error rate of 58.66 percent. Applying this rate to total purchases per worksheets for the period December 1, 1978 through November 30, 1981 of \$421,513.00 resulted in adjusted purchases of \$668,773.00.

8. An analysis of purchase bills for the period August, 1981 through November, 1981 revealed \$8,415.00 of wine purchases. This amount divided by the total purchases tested of \$38,197.00 resulted in a ratio of wine to total purchases of 22.03 percent, and a ratio of liquor to total purchases of 77.97 percent. Applying these percentages to total adjusted purchases of \$668,773.00 resulted in total wine purchases of \$147,331.00 and total liquor purchases of \$521,442.00 for the period December 1, 1978 through November 30, 1981. The auditor then determined markups on wine and liquor by performing a markup test. Applying a markup on wine of 56.9 percent resulted in wine sales of \$231,160.00 and a markup on liquor of 20.93 percent resulted in liquor sales of \$630,580.00 or total sales of \$861,740.00 for the period December 1, 1978 through November 30, 1981. Reducing this amount by the total reported sales per sales tax returns for the same period of \$410,577.00 resulted in additional taxable sales of \$451,163.00 or tax due of \$36,121.92.

9. No books were presented for any period in 1982; therefore, sales for the period from December 1, 1981 through August 31, 1982 were estimated. Additional taxable sales for the period ended August 31, 1981 of \$44,988.00 were compared to taxable sales reported per sales tax returns for the same period of \$21,694.00 resulting in a percentage of error of 207.38 percent. Applying this

rate to the taxable sales reported per sales tax returns for the period December 1, 1981 through August 31, 1982 of \$60,985.00 resulted in additional taxable sales of \$126,470.00 or tax due of \$10,433.78.

10. At the hearing, petitioner took issue with the audit methodology and results but introduced insufficient evidence to refute the results of the audit.

11. Upon its purchase of the business, petitioner operated said business until January, 1984, at which time petitioner ceased operations.

#### CONCLUSIONS OF LAW

A. That pursuant to section 1141(c) of the Tax Law, petitioner, Blanche Liquor Corp., was the bulk sale purchaser of the liquor store business, including all inventory, from Felix Acevedo. The contract of sale stated that the market value of the inventory would be paid to the seller by petitioner as part of the contract price. Petitioner introduced insufficient evidence to establish its contention that the inventory had been liquidated at the time of sale. Accordingly, the seller's inventory was properly included as part of the bulk sale price and, in the absence of adequate records, the value of said inventory as set forth in Finding of Fact "4", was properly used to determine the actual price paid for the business (See Matter of WEBR, Inc. v. State Tax Commission, 58 A.D.2d 471; Matter of Joseph C. Endres d/b/a McDonald's of University Plaza, State Tax Commission, May 20, 1983).

B. That section 1141(c) of the Tax Law provides that the liability of a purchaser in a bulk sales transaction shall be limited to an amount not in excess of the purchase price or fair market value of the assets sold to such purchaser, whichever is higher. Accordingly, petitioner's liability herein is limited to

the actual purchase price of the business of \$42,075.00 as set forth in Finding of Fact "4".

C. That the seller in the bulk sales transaction, Felix Acevedo, failed to provide the Audit Division with adequate books and records as requested in order for the Audit Division to make a determination as to the accuracy of the sales tax returns filed. The Audit Division therefore determined Felix Acevedo's taxable sales from external indices and other available information as authorized in section 1138(a) of the Tax Law. The audit methods utilized by the Audit Division in determining Felix Acevedo's sales tax liability were reasonable and petitioner has failed to meet its burden of showing wherein the findings were erroneous (Matter of Meyer v. State Tax Commission, 61 A.D.2d 223).

D. That inasmuch as petitioner's liability has been limited to an amount (\$42,075.00) which is less than the total sales tax liability, exclusive of penalties and interest, of the seller in the bulk sales transaction herein (\$46,455.00), Issue IV is moot.

E. That the petition of Blanche Liquor Corp. is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is directed to modify the notices of determination and demands for payment of sales and use taxes due issued February 4, 1983 in accordance therewith; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 12 1986

Rodrichaw Chue  
PRESIDENT

Francis R. Koeng  
COMMISSIONER

Mark J. Jank  
COMMISSIONER