

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
LEONARD J. BARTOS	:	DECISION
D/B/A BOBBIE'S RESTAURANT	:	
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, 1980	:	
through March 15, 1983.	:	

Petitioner, Leonard J. Bartos d/b/a Bobbie's Restaurant, 8649 Buffalo Avenue, Niagara Falls, New York 14304, 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, 1980 through March 15, 1983 (File No. 50782).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 19, 1986 at 9:00 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

#### ISSUES

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

II. Whether the Audit Division properly estimated the sales tax liability of the seller.

#### FINDINGS OF FACT

1. On April 5, 1983, the Department of Taxation and Finance received from Leonard J. Bartos (hereinafter "petitioner") a Notification of Sale, Transfer

or Assignment in Bulk bearing the date of March 25, 1983, advising that on March 15, 1983, he had purchased a restaurant known as Roger's Jr. Restaurant from Roger Spears for the total sale price of \$8,000.00. The sale price of the furniture and fixtures was \$4,000.00. There was no escrow fund.

2. On April 7, 1983, the Audit Division issued to petitioner a Notice of Claim to Purchaser which notified him of a possible claim for New York State and local sales and use taxes from the seller. The said Notice of Claim to Purchaser further stated that, in spite of any provisions contained in the sales contract, no distribution of funds or property, to the extent of the amount of the State's claim, may be made before the following conditions have been met:

- a) The State Tax Commission has determined the seller's liability, if any.
- b) Payment of such liability has been made to the State.
- c) The Central Sales Tax Section of the Audit Division has authorized you to release the funds or property.

3. On April 15, 1983, the Audit Division mailed to the seller a bulk sale questionnaire which requested financial data concerning the restaurant's operation. No response to this questionnaire was received by the Audit Division.

4. For the period at issue, the seller filed sales and use tax returns and paid the tax shown to be due on said returns for each sales tax quarter except for the period ending November 30, 1982 and for the period March 1, 1983 through March 15, 1983, the date of sale of the business to petitioner. For the period ending November 30, 1982, the Audit Division estimated taxable sales of \$6,000.00 and for the period March 1, 1983 through March 15, 1983, estimated taxable sales of \$2,000.00. Based upon a review of the returns filed and the

failure by the seller to respond to the bulk sale questionnaire, the Audit Division increased, by twenty-five percent, reported taxable sales for each of the sales tax quarters at issue, including those periods for which the Audit Division estimated reported taxable sales. On July 1, 1983, the Audit Division issued to the seller, Roger Spears, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, bearing Notice Number S830701705C, in the amount of \$1,713.44, plus penalty and interest, for the period December 1, 1980 through March 15, 1983. Included in the amount of tax assessed for the period March 1, 1983 through March 15, 1983 was a bulk sales tax of \$280.00.

5. No evidence was offered by the Audit Division regarding the basis upon which it increased the seller's reported taxable sales by twenty-five percent for each of the sales tax quarters at issue. Petitioner contends that the increase in reported taxable sales was arbitrary since no audit was conducted.

6. Pursuant to the provisions of section 1141(c) of the Tax Law, petitioner was held liable for the taxes determined to be due from the seller. Accordingly, on July 1, 1983, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1980 through March 15, 1983 bearing Notice Number S830701706C. However, the amount of tax assessed pursuant to this notice was \$2,084.13, plus penalty and interest. At the hearing held herein, the Audit Division introduced bulk sale assessment worksheets which formed the basis of the assessments to the seller and to petitioner. The bulk sale assessment worksheet relating to the seller indicated that he had filed a return and paid sales tax in the amount of \$370.69 for the period ending February 28, 1983. The bulk sale assessment worksheet relating to the petitioner's assessment indicated that no tax had been paid for said period and the Audit Division estimated additional tax due of \$463.40 for this period, thereby resulting in a difference of \$370.69 (the amount paid by the seller for

the period ending February 28, 1983) between the assessment issued to the seller and the petitioner. Petitioner paid, prior to the hearing held herein, bulk sales tax in the amount of \$280.00 and the Audit Division conceded that his assessment should, therefore, be reduced to \$1,804.13, plus penalty and interest.

7. On October 24, 1983, the Audit Division mailed to petitioner a letter and a bulk sale questionnaire. The letter advised petitioner that if he had the questionnaire completed by the seller and returned to the Audit Division, consideration would be given to an adjustment of the assessment. Petitioner succeeded in delivering the bulk sale questionnaire to the seller and subsequently attempted to contact him to ascertain whether or not the questionnaire had been completed and returned to the Audit Division. Petitioner attempted, on several occasions, to contact the seller by letter, but all of the letters were returned as undeliverable. Petitioner provided the Audit Division with the address which the seller had provided to him.

#### 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 petitioner did not notify the Tax Commission of the proposed sale at least ten days prior to taking possession of the restaurant. The Tax Commission, upon receipt of the notice of bulk sale from petitioner, timely notified petitioner not to distribute funds or property until it determined if the seller was liable for sales taxes and, if so, the extent of such liability. The Tax Commission thereafter notified petitioner of the amount of taxes 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.

C. That petitioner transferred funds prior to being notified of the State's claim for taxes due from the seller and is, therefore, personally liable for the payment of such taxes in accordance with the provisions of section 1141(c) of the Tax Law.

D. That 20 NYCRR 537.0(c)(2) provides that failure to file a proper and timely notice of bulk sale by a purchaser will result in personal liability of the purchaser for taxes due from the seller. As indicated in Finding of Fact "6", petitioner was assessed tax in an amount which was \$370.69 greater than the amount assessed to the seller. Petitioner's assessment is, therefore, reduced by \$370.69, plus \$280.00 (the amount of bulk sales tax paid by petitioner as also indicated in Finding of Fact "6"), or \$650.69.

E. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that if a return required by Article 28 of the Tax Law is not filed or if a return when filed is incorrect or insufficient, the amount of tax due shall be

determined by the Tax Commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices.

F. That no audit of the seller's business was ever conducted by the Audit Division. Therefore, the twenty-five percent increase in reported taxable sales which was assessed was neither "determined from such information as may be available" nor was it "estimated on the basis of external indices". Accordingly, the assessment for the periods ending February 28, 1981 through August 31, 1982 and for the period ending February 28, 1983 are cancelled.

G. That for the period ending November 30, 1982, the seller filed no sales tax return and paid no tax. For this period, the Audit Division estimated taxable sales to be \$6,000.00 and then increased this estimate by twenty-five percent to \$7,500.00 and assessed tax of \$525.00 (7 percent of \$7,500.00). As indicated in Conclusion of Law "F", the Audit Division's increasing taxable sales by twenty-five percent is improper. Tax due for this period is, therefore, reduced to \$420.00 (7 percent of \$6,000.00).

H. That for the period March 1, 1983 through March 15, 1983, the seller filed no sales tax return and paid no tax. For this period, the Audit Division estimated taxable sales to be \$2,000.00 and then increased this estimate by twenty-five percent to \$2,500.00 and assessed tax of \$175.00 (7 percent of \$2,500.00). For the period ending November 30, 1982, the Audit Division estimated taxable sales to be \$6,000.00, or \$2,000.00 per month. For the period March 1, 1983 through March 15, 1983, the Audit Division estimated taxable sales to be \$2,000.00 for one-half of a month. No evidence was offered by the Audit Division which would sustain an estimate equal to twice the average monthly taxable sales. As indicated in Conclusion of Law "F", the Audit Division's increasing taxable sales by twenty-five percent is improper.


In addition, the Audit Division's estimate of taxable sales for this period is excessive. Therefore, the estimate of taxable sales for the period March 1, 1983 through March 15, 1983 is reduced to \$1,000.00 and tax due for this period is reduced to \$70.00 (7 percent of \$1,000.00).

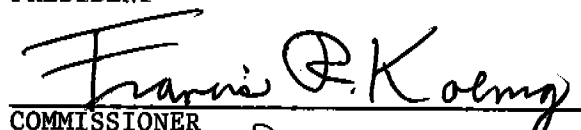
I. That the petition of Leonard J. Bartos d/b/a Bobbie's Restaurant is granted to the extent indicated in Conclusions of Law "D", "F", "G" and "H"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 1, 1983 accordingly; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 05 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER