

STATE OF NEW YORK

STATE **TAX** COMMISSION

In the Matter of the Petition

of

209 EAST 84TH STREET 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, 1983
through November 30, 1983.

Petitioner, 209 East 84th Street Corp., 209 East 84th Street, New York,
New York 10028, 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, 1983 through November 30, 1983 (File No. 56973).

A hearing was held before Allen Caplowaith, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on October 31, 1986 at 10:45 A.M., with all briefs to be submitted by
March 6, 1987. Petitioner appeared by Robert Callagy, Esq. The Audit Division
appeared by John P. Dugan, Esq. (Herbert M. Kamrass, Esq., of counsel).

ISSUE

Whether a particular transaction with respect to the acquisition of
certain fixtures constituted a "bulk sale" purchase or transfer **of** said fixtures
within the meaning of section 1141(c) of the Tax Law.

FINDINGS OF FACT

1. On August 24, 1984, the Audit Division issued a Notice of Determination
and Demand for Payment **of** Sales and Use Taxes Due to 209 East 84th Street Corp.
in the amount of \$5,412.50. Said notice explained the premise upon which the
Audit Division asserted tax due against petitioner as follows:

"The following taxes are determined to be due from P.G.G. Inc. D/B/A Scotland Yard and represents your liability, as purchaser, in accordance with Section 1141(c) of the Sales Tax Law."

The notice further provided that the Audit Division's assertion of sales tax liability against petitioner is "limited to \$5,000.00 selling price [of the fixtures] plus bulk sales tax".

2. A related second notice of determination and demand was issued to petitioner for the same period just prior to the hearing held herein. This notice, according to the Audit Division, was issued with respect to a payment of \$30,000.00 made by petitioner for termination of a lease. Petitioner objected to the introduction in evidence of this notice on the ground that it was not the subject of the petition **or** answer filed in the instant case. Although the Audit Division urged the inclusion of this notice in the instant proceeding, petitioner's objection to the receipt of such notice in evidence was sustained based on the ground set forth by petitioner. Accordingly, the second notice **is** not at issue. However, although said notice **is** not at issue, both petitioner and the Audit Division addressed the issue raised in such notice since it was an integral part of the bulk sale transaction.

3. In its petition, 209 East 84th Street Corp. argued that:

"Petitioner **is** not liable for any sales or use tax determined to be due from P.G.G. Inc. D/B/A Scotland Yard ("P.G.G. Inc.") under Section 1141(c) of the New York State Tax Law as Petitioner did not acquire any business assets from P.G.G. Inc. in a bulk sale transaction within the meaning of Section 1141(c)."

4. Petitioner **is** the owner of certain premises located at 209 East 84th Street in New York City. On November 20, 1974, petitioner leased said premises to Rich Hen, Inc. The term **of** said lease was nine years and five months. In March 1977, said lease was assigned to Peter Gill and Robert Gill. The premises was used by Messrs. Gill for the operation of a bar, restaurant and cabaret.

known as Scotland Yard Bar & Grill. The business was operated by P.G.G. Inc., of which the Gills were the principals. There is no indication in the record whether the Gills transferred the leasehold to P.G.G. Inc..

5. In 1983, Messrs. Gill defaulted on several rent payments and petitioner sought to repossess the premises. In September 1983, petitioner filed a "Notice of Petition, Non-Payment Business" and a "Petition Non-Payment Business" against Peter Gill and Robert Gill, respondents (tenants).

6. When the tenants became aware of petitioner's attempts to repossess the premises, they became extremely uncooperative and threatened to vandalize the premises and cause personal injury to John P. Heffernan, president of petitioner.

7. Mr. Heffernan alleged that in order to encourage the tenants to leave peaceably without causing any damage to the premises, petitioner dropped the dispossess proceeding and entered into an agreement with the tenants for payment of \$30,000.00 by petitioner in return for surrender of the premises by the tenants. An additional amount of \$5,000.00 was paid to the tenants allegedly for agreeing to leave the premises intact by not removing certain fixtures from the premises and allowing petitioner to dispose of them.

8. Mr. Heffernan claimed that the fixtures on the premises were owned by petitioner and installed on the premises prior to the assignment of the lease to Messrs. Gill. Accordingly, it was contended that a bulk sale could not have taken place since petitioner was the owner of the fixtures at issue.

9. Petitioner alleged that the sole purpose in agreeing to make the aforestated payments was to preserve the value of its premises and not to acquire any business assets, consisting of the unexpired portion of the lease

(approximately six months) and the following fixtures as listed in Schedule A annexed to the "Lease Cancellation Agreement" executed in September 1983:

- "1. 8 ton air conditioner
2. Ice maker
3. 2 beer coolers
4. 4 soda guns
5. 1 wall air conditioner
6. 2 bars and sinks
7. 8 tables
8. 20 chairs
9. 16 bar stools
10. Compressor for walk-in ice box"

10. The Lease Cancellation Agreement provides, ~~inter alia~~, that:

"4. In the event that the Landlord elects to cancel the lease as of October 11, 1983 the Tenants agree to vacate the premises on or before the date of cancellation and to convey and transfer ~~to~~ Landlord the fixtures and other items of personal property set forth in Schedule A hereto, as is and where ~~is~~, as to which fixtures and items of personal property Tenants represent and warrant that they are the sole and exclusive owners, that they own said fixtures and items of personal property free and clear of any liens or other encumbrances and have the legal capacity and authority to convey said items to Landlord."

11. The Lease Cancellation Agreement was executed by John P. Heffernan as president of 209 East 84th Street Corp. and Peter Gill and Robert Gill, individually.

12. Petitioner submitted into evidence the "Surrender Agreement" dated October 11, 1983. The tenant listed thereon is "Peter Gill, Robert Gill by assignment from Rich Hen, Inc.". Said agreement contains the following statement:

"Landlord agrees to pay to tenant the further sum of \$5,000.00 on 10/11/83 by bank, certified or official check to the order of Peter Gill in consideration for the delivery of certain items of personal property."

13. The Surrender Agreement was executed by Jack Heffernan as president of 209 East 84th Street Corp. and Messrs. Gill, individually as tenants.

14. Petitioner submitted a letter dated October 6, 1983. Said letter, which was sent to Messrs. Gill, stated as follows:

"Notice is hereby given pursuant to our cancellation agreement dated September 1983, that we elect to cancel the above [sic] lease on October 11, 1983. As further agreed, we will purchase the 'items on Schedule A' for \$5,000 payable on October 11, 1983."

15. The record contains no information as to whether, and if so to what extent, P.G.G. Inc. or the Gills, individually, had an outstanding sales tax liability which may be transferred to petitioner. No evidence of an assessment or audit with respect to either P.G.G. Inc. or the Gills was presented.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides, in pertinent part:

"Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof whether or not the seller, transferor or assignor, has represented to, or informed the purchaser, transferee or assignee that he owes any tax pursuant to this article, and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing.

* * *

For failure to comply with the provisions of this subdivision the purchaser, transferee or assignee...shall be personally liable for the payment to the state of any such taxes theretofore or thereafter determined to be due to the state from the seller, transferor or assignor, except that the liability of the purchaser, transferee or assignee shall be limited to an amount not in excess of the purchase price or fair market value of the business assets sold, transferred or assigned to such purchaser, transferee or assignee, whichever is higher...."

B. That the transfer of fixtures to petitioner for the price of \$5,000.00, along with the surrender of the leasehold for \$30,000.00, constituted a bulk sale within the meaning and intent of Tax Law § 1141(c). However, the hearing

record does not establish that the Gills or P.G.G. Inc., in fact, owed any sales taxes the liability for which could be transferred to petitioner.

C. That based on Conclusion of Law "B", supra, the \$5,000.00 transferee liability asserted against petitioner is cancelled. However, since the record shows that petitioner did purchase fixtures from Peter Gill and Robert Gill for \$5,000.00, the sales tax asserted of \$412.50 is sustained.

D. That the petition of 209 East 84th Street Corp. is granted to the extent provided in Conclusion of Law "C", supra; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 24, 1984 accordingly; and that, except as so granted, said petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 14 1987

Rodrichas Chen
PRESIDENT

Francis R. Koehn
COMMISSIONER

Mark J. [Signature]
COMMISSIONER