

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ANTHONY MAMMANO

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 Yarch 1, 1983
through May 31, 1983.

DECISION

In the Matter of the Petition

of

JOHN GIULIANO

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 March 1, 1983
through Hay 31, 1983.

Petitioner, Anthony Mammano, 93 Adrian Road, Rochester, New York 14622,
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 March 1, 1983
through Nay 31, 1983 (File No. 57323).

Petitioner, John Giuliano, 8 Norran Drive, Rochester, New York 14609,
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 March 1, 1983
through May 31, 1983 (File No. 57324).

A consolidated hearing was held before Timothy J. Alston, Hearing Officer,
at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New
York, on September 17, 1986 at 1:15 P.M. Petitioners appeared by Edward J.

Massare, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined that petitioners purchased certain assets located at 146 Point Pleasant Road, Irondequoit, New York in a "bulk sale" within the meaning of section 1141(c) of the Tax Law.

11. Whether, assuming a bulk sale did occur, the Audit Division's valuation of the tangible personal property transferred in said bulk sale was proper.

FINDINGS OF FACT

1. On September 18, 1984, the Audit Division issued to petitioner Anthony Mammano a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1981 through May 31, 1983 asserting tax due of \$1,424.12, together with interest of \$179.63, for a total amount due of \$1,603.75.

2. On September 20, 1984, the Audit Division issued to petitioner John Guiliano a notice of determination and demand for the identical period and asserting identical amounts of tax and interest due as the notice issued to petitioner Anthony Mammano.

3. The notices at issue were premised upon the Audit Division's assertion that petitioners had jointly purchased in a bulk sale the business assets of one Betty Taylor d/b/a Lodge Grill on or about June 1, 1983 and were therefore liable as purchasers pursuant to the provisions of section 1141(c) of the Tax Law.

4. The tax asserted herein by the Audit Division consisted of two components: bulk sales tax on the tangible personal property transferred in the sale and unpaid sales tax due from the seller in the bulk sale. The Audit Division determined the value of the tangible personal property transferred to

be \$6,000.00 and asserted tax due thereon in the amount of \$420.00. Additionally, the seller in the transaction, Betty Taylor, did not file a final sales tax return for the period ended May 31, 1983. An audit of Betty Taylor's records for said period revealed sales tax due for that period in the amount of \$1,004.13.

5. Petitioners purchased a parcel of real property from Betty Taylor on or about June 1, 1983. Said property, located at 146 Point Pleasant Road, Irondequoit, New York, was improved by a frame building consisting of two two-bedroom apartments upstairs and a bar and restaurant and a storefront downstairs. The bar was known as the Lodge Grill and was operated by Betty Taylor.

6. In addition to the real property which was transferred, certain tangible personal property used in the operation of the bar was also transferred. The book value of this property as listed in the records of Betty Taylor amounted to \$6,000.00. The Audit Division used this book value to determine the bulk sales tax asserted against petitioners herein.

7. The total purchase price of the property sold was \$115,000.00. No allocation of the purchase price was made among any of the assets sold.

8. At no time did either of the petitioners file a notification of sale with the Tax Commission in connection with this transfer.

9. Upon their purchase of the bar, petitioners leased the premises formerly occupied by the Lodge Grill to Tee Jay's Lodge, Inc., a corporation formed and controlled by petitioners for the purpose of operating a bar on the same premises.

10. As to the tangible personal property which came into petitioners' possession subsequent to the sale, the auditor, in his field audit report, indicated that he had "observed equipment, it is very old [sic] would not

appear to be worth much". Among the tangible personal property which was transferred to petitioners was the bar itself. This structure needed to be completely rebuilt by petitioners subsequent to the purchase. Additionally, approximately six tables, fifteen chairs and ten bar stools were transferred. Petitioners purchased all new tables, chairs and bar stools subsequent to the sale and threw the existing tables, chairs and bar stools away because of their poor condition. Also, petitioners came into possession of a broken refrigerator. This refrigerator needed to be repaired and a new compressor installed in order to be made operational. No other furniture or equipment was transferred to petitioners, as the seller removed any furniture or equipment of value prior to sale. In light of the foregoing, it is determined that the value of the tangible personal property transferred in the sale was \$500.00.

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, transferrer 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, transferrer 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 20 NYCRR 537.1(a)(1) sets forth the following definition of the term "bulk sale":

"[A]ny sale, transfer or assignment in bulk of any part or the whole of business assets, other than in the ordinary course of business, by a person required to collect tax and pay the same over to the Tax Commission."

C. That 20 NYCRR 537.1(b) defines, in relevant part, the term "business assets" as:

"[A]ny assets of a business pertaining directly to the conduct of the business, whether such assets are intangible, tangible or real property".

D. That in light of the aforecited statute and regulations, petitioners' purchase of the assets herein constituted a purchase of business assets in a bulk sale. Real property used in the conduct of a business constitutes a business asset (Higgins & McLaughlin, Inc. v. State Tax Commission, 109 AD2d 1029, 1031. ~~See also~~ Allied Stores Corporation v. State Tax Commission, 109 AD2d 1029, 1031). Consequently, given petitioners' failure to notify the Tax Commission of the sale pursuant to section 1141(c) of the Tax Law, the Audit Division properly asserted against petitioners the sales taxes found due from Betty Taylor d/b/a Lodge Grill for the period ended May 31, 1933. It is noted that although no allocation was made of the total purchase price paid by petitioners to the business and other assets transferred, petitioners did not deny that the value of the business' assets exceeded the sales tax and interest owed by the seller at the time of sale. Indeed, in view of the difference between the total purchase price and the amount of the seller's liability, it is reasonable to conclude that the value of the real property used in the conduct of the business greatly exceeded the seller's liability.

E. That petitioners have established that the value of the tangible personal property transferred in the bulk sale was \$500.00. In this regard, it is noted


that petitioners' characterization of the condition of such property was corroborated by the auditor's characterization of said property. The Audit Division *is* therefore directed to adjust the notices herein accordingly.

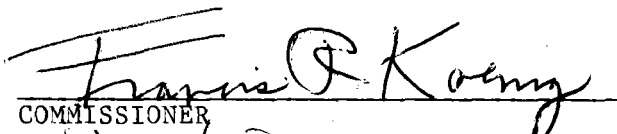
F. That the petitions of Anthony Mammano and John Guiliano are granted to the extent indicated in Conclusion of Law "E"; the Audit Division is directed to modify the respective notices of determination and demands for payment of sales and use taxes due issued September 18, 1984 and September 20, 1984 in accordance therewith; and that, except as *so* granted, the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1987


PRESIDENT


COMMISSIONER


COMMISSIONER