

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

DONNA LUNEBURG

DECISION

for Revision of a Determination or for Refund  
of Sales and Use Taxes under Articles 28 and 29 :  
the Tax Law for the Period July 23, 1984.

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Petitioner, Donna Luneburg, 757 Foxhurst Road, Baldwin, New York 11510,  
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 July 23, 1984  
(File No. 58247).

A hearing was held before Frank A. Landers, Hearing Officer, at the  
offices of the State Tax Commission, Two World Trade Center, New York, New  
York, on February 25, 1987 at 3:30 P.M. Petitioner appeared by Richard Luneburg.  
The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq.,  
of counsel).

#### ISSUE

Whether the Audit Division *is* required to take action against the bulk  
sale seller prior to seeking to obtain sales taxes due from the bulk sale  
purchaser.

#### FINDINGS OF FACT

1. On July 23, 1984, petitioner, Donna Luneburg, purchased a stationery  
store located at 53-54 Merrick Road, Nassapequa, New York from Jack Rosen for  
\$10,000.00. Pursuant to the sales agreement, the assets transferred included  
"the stock in trade, fixtures, equipment, accounts receivable, contract rights,  
lease, goodwill, licenses, rights under any contract for telephone service or

other rental, maintenance or use of equipment, machinery and fixtures at the said premises, more particularly described in the Schedule herein." Mr. Rosen had operated the store for only a short period of time subsequent to purchasing it from Parkview Stationery Corp. ("Parkview") which was owned by Andrew E. Collins.

2. While it operated the business, Parkview failed to file sales or use tax returns for the quarterly periods ended August 31, 1983, November 30, 1983, February 29, 1984 and May 31, 1984. The Audit Division, accordingly, estimated Parkview's sales tax liability to be \$500.00 per quarter. On October 25, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Jack Rosen assessing a tax due of \$2,165.00 for the period June 15, 1984, presumably the date Mr. Rosen purchased the business from Parkview. The Audit Division assessed a bulk sales tax of \$165.00 based on an estimated value of furniture and fixtures transferred of \$2,000.00. The notice contained the following explanation:

"The following taxes are determined to be due from Parkview Stationery Corp. and represents your liability, as purchaser, in accordance with Section 1141(c) of the Sales Tax Law."

The notice indicated that the purchaser's liability was limited to the selling price. Also, no penalty or interest was assessed against Mr. Rosen.

3. On October 29, 1984, the Audit Division issued to petitioner, Donna Luneburg, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a tax due of \$2,165.00, plus penalty of \$129.90 and interest of \$27.93, for a total amount due of \$2,322.83 for the period July 23, 1984.

The notice provided the following explanation:

"The following taxes are determined to be due from Jack Rosen and represents your liability, as purchaser, in accordance with Section 1141(c) of the Sales Tax Law."

4. On July 25, 1984, petitioner mailed a Notification of Sale, Transfer or Assignment in Bulk, Form ST-274, to the Audit Division notifying it of her purchase of the business as required by section 1141(c) of the Tax Law. In addition to the terms and conditions of the sale, the notification also indicated that the sales price of fixtures, furniture and equipment was \$2,000.00. On August 1, 1984, the Audit Division issued a Notice of Claim to Purchaser and a Notice to Escrow Agent advising said individuals of a possible claim for New York State and local sales and use taxes due in accordance with the provisions of Article 28 and 29 of the Tax Law.

5. On August 28, 1984, the Audit Division sent a Notice to the Seller requesting, inter alia, that Parkview or Jack Rosen submit returns for the periods indicated in Finding of Fact "2", above. Subsequently, Parkview filed sales tax returns for the required periods with payments as follows:

<u>Quarter Ended</u>	<u>Tax Due</u>	<u>Tax Paid</u>
August 31, 1983	\$ 577.25	\$577.25
November 30, 1983	694.65	47.07
February 29, 1984	328.45	-0-
May 31, 1984	298.90	200.00
	<u>\$1,899.25</u>	<u>\$824.32</u>

Total Tax Due \$1,074.93

In addition to the above payments, the bulk sales tax of \$165.00 applicable to petitioner's assessment was paid on August 22, 1984.

6. Petitioner admitted that she **is** liable for the tax but maintained that Parkview is primarily liable and the Audit Division should attempt to collect the taxes from it or Jack Rosen before seeking to collect them from her.

CONCLUSIONS OF LAW

A. That the transaction between petitioner and Jack Rosen constituted a bulk sale within the meaning and intent of section 1141(c) of the Tax Law.

B. That the State may not be estopped "from collecting tax lawfully imposed and remaining unpaid in the absence of statutory authority" (McMahan v. State Tax Commission, 45 AD2d 625, 627). There is no statutory duty or responsibility imposed on the State to first obtain tax due from the seller in a bulk sale transaction (Matter of Edward M. Burns d/b/a Studio B, State Tax Commission, December 14, 1982).


C. That the taxes due are reduced to \$1,074.93 pursuant to Finding of Fact "5".

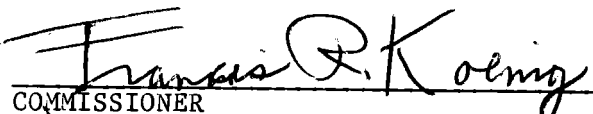
D. That the petition of Donna Luneburg *is* granted to the extent indicated in Conclusion of Law "C", above; the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 29, 1984; and, that except as so granted, the petition *is* denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 20 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER