

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
KHAYER KAYUMI : DECISION
 : DTA NO. 825953
for Revision of a Determination or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Periods Ended June 30, 2010 and :
December 20, 2010. :

Petitioner, Khayer Kayumi, filed an exception to the determination of the Administrative Law Judge issued on April 21, 2016. Petitioner appeared by Mumtaz Alvi, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. No reply brief was filed. Oral argument was not requested. The six-month period for issuance of this decision began on January 17, 2017, the date petitioner's reply brief was due.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Giardina took no part in the consideration of this decision.

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to address the substantive arguments set forth by the parties when it is unclear whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services.

II. If such substantive arguments may be addressed, whether petitioner is personally liable under Tax Law § 1141 (c) as a purchaser in a bulk sale transaction for sales tax determined to be due from the seller.

III. If such substantive arguments may be addressed, whether petitioner is liable on the transfer of tangible personal property for amounts he paid for the purchase or transfer of furniture, fixtures and equipment.

IV. If such substantive arguments may be addressed, whether penalties are appropriate.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact 2, 6, 8, 10, 14 and 15, which have been modified to more accurately and completely reflect the record. We have also made additional findings numbered 16 through 19 herein. The Administrative Law Judge's findings, the modified findings and the additional findings are set forth below.

1. BK Inner City Chicken, Inc., operated Popeye's Chicken & Biscuit (Popeye's Chicken) located at 290 Livingston Street, Brooklyn, New York (the seller).

2. On December 31, 2010, the Division of Taxation (Division) received a notification of sale, transfer or assignment in bulk (notification) regarding the proposed sale of Popeye's Chicken on January 10, 2010 for \$160,000.00. The notification included a copy of the Agreement of Sale (Agreement) and a Rider to the Agreement (Rider) wherein petitioner agreed to purchase the business assets, inventory, accounts receivable and goodwill of Popeye's Chicken for \$160,000.00. The Agreement states that the consideration was due at the time of the closing, but that the details of the disbursement of funds were set forth in the Rider. With regard to the disbursement of funds, the Rider provides that the \$160,000.00 consideration was to be disbursed

as follows: (1) a down payment of \$80,000.00 in the form of a certified check made payable to the seller at the time of signing the Agreement and Rider, with the seller having the option of requesting that the check be made out to "New York State sales tax"; (2) a payment of \$20,000.00 in the form of a certified check made payable to a creditor of the seller at the closing; and (3) the balance of \$60,000.00 to the seller in monthly payments of \$2,000.00 each for a period of 30 months. The Agreement, by its terms effective as of September 20, 2010, was signed by the seller on October 30, 2010 and by petitioner on December 1, 2010. Neither the Agreement nor the Rider mentioned any franchise related to the business. Thus, the Agreement did not require the franchisor's approval of the purchaser.

3. The Rider was also signed by the seller on October 30, 2010 and petitioner on December 1, 2010. The first paragraph of the Rider provided, in part:

"At the time of the signing of the contract, the Purchaser shall pay to the Seller by Certified Check an amount of \$80,000. . . . However, at seller's request, such check may be made payable to the New York State Sales Tax Department which shall be applied towards payment of sales tax due by the seller. Seller shall immediately remit such funds to the New York State Sales Tax Department and apply such amount as down payment toward the total purchase price of \$160,000."

4. The second paragraph of the Rider acknowledged that there was a sales tax liability of at least \$200,000.00 and that the agreement was expressly conditioned upon the seller's payment of this obligation. In addition, the seller acknowledged that the sales tax liability was the seller's responsibility.

5. The third paragraph stated:

"Business shall be delivered free of any liabilities including but not limited to any tax liability due by seller to any governmental authority and seller shall be absolutely and unconditionally responsible for payment of any such amounts to any governmental authority. **This clause shall survive closing.**"

6. On January 3, 2011, the Division issued a notice of claim to purchaser advising petitioner that the Division had received information indicating that he was a purchaser in a bulk sale and that there was a possible claim for sales and use taxes. Among other things, the notice stated that although not required by law, in order to be protected from incurring the seller's sales tax liability, he should place the entire amount for the purchase in an escrow fund for the purpose of satisfying the sales tax liabilities.

7. On January 7, 2011, the Division sent a follow-up letter to petitioner pointing out that sales tax is imposed on the transfer of tangible personal property and that, according to its records, the Division had not received the tax due on the same of \$10,338.67. The Division also noted that the sales tax liability of the seller could be passed on to the purchaser in a bulk sale and that it was advisable to maintain an escrow account until he received releases from the Division.

8. As of July 26, 2010, the seller had an outstanding assessed sales tax liability of \$116,397.65. As of March 29, 2011, the seller had an outstanding assessed sales tax liability of \$262,535.90.

9. On March 29, 2011, the Division issued a notice of determination to petitioner assessing tax due in the amount of \$160,000.00. The notice explained that the Division determined that taxes are due from BK Inner City Chicken and that, as a purchaser, petitioner is liable for the same taxes under Tax Law § 1141 (c). The amount of the assessment was premised upon the amount tendered for the restaurant. On the same date, the Division issued a second notice of determination to petitioner assessing tax due, for the period ended December 20, 2010, in the amount of \$10,338.67, plus penalty and interest for a total due of \$11,908.83. The second notice explained that petitioner was liable on the transfer of tangible personal property in

accordance with the provisions of Tax Law §§ 1133, 1138 and 1141 (c). This assessment was premised upon the amount paid for the furniture, fixtures and equipment.

10. Petitioner was a 25% shareholder of a firm known as Ariana Management Corp. (Ariana). Ariana authorized petitioner to obtain a check drawn in the amount of \$80,000.00. Accordingly, petitioner secured a check from TD Bank, dated October 28, 2010, for the amount authorized by Ariana payable to “New York State sales tax” and delivered the check to Kevin Davis, a shareholder of the seller. Another payment of \$20,000.00 was made to a creditor of the seller as required in the Rider. It not possible to discern from the record the exact dates these two payments were made. According to the Agreement, petitioner was to pay the remaining \$60,000.00 of the purchase price through 30 monthly payments of \$2,000.00 each. Petitioner never made any of these monthly payments. Petitioner did not place any of the consideration in escrow in order to satisfy the seller’s outstanding sales tax liability.

11. At the end of 2010 or beginning of 2011, petitioner began operating the business and filed sales and use tax returns beginning with the period December 1, 2010 through February 28, 2011. The returns were filed in the name of 290 Livingston Chicken, LLC. At least two of the returns were signed by petitioner.

12. In August of 2012, petitioner was notified by the Division that it had not received the check for the payment of sales tax. Thereafter, petitioner contacted Mr. Davis regarding the disposition of the check, and he replied that it had been sent to the New York sales tax unit. In November 2013, petitioner contacted TD Bank regarding what became of the check and learned that the check had been deposited into a business account under the name of Platinum Properties at the Hackensack Courthouse TD branch. Upon learning that the check had been converted,

petitioner filed a complaint with the Hackensack Police Department. The criminal complaint led to an indictment against Mr. Davis for unlawful deception and theft.¹

13. In or about 2013, Bank of America took possession of the restaurant because of an unpaid debt that the seller had with the bank.

14. The franchisor of the restaurant refused to give permission to petitioner to close on the restaurant because it had an issue and did not want to become involved in the situation, although it refused to inform petitioner of the exact nature of the issue.

15. Neither the lease of the restaurant, nor title to any of the equipment was ever transferred to petitioner's name.

16. A petition was received by the Division of Tax Appeals on November 6, 2013. Among other documents attached to the petition was a copy of a conciliation order dismissing request dated August 23, 2013 (conciliation order). The conciliation order indicated that, as the notices of determination involved were issued on March 29, 2011, but the request for conciliation conference was not received by the Bureau of Conciliation and Mediation Services (BCMS) until August 8, 2013, or in excess of the required 90-day filing window, the request was dismissed as late filed. A cover letter issued with the conciliation order states that "[I]f you wish to contest the timeliness of your filing, you may file a petition within ninety (90) days from the date of this order with the Division of Tax Appeals." The petition filed with the Division of Tax Appeals contains a request that the timeliness requirement be waived in the interests of justice. It is further asserted in the petition that petitioner was the victim of poor professional advice and

¹ The record does not reveal the disposition of the indictment.

therefore should be allowed to either present his substantive case to the Division of Tax Appeals, or have his case referred back to BCMS for a conference.

17. Paragraph 15 of the Division's answer affirmatively states that as petitioner did not file a request for conciliation conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days of the issuance of the notices of determination at issue, "the Division of Tax Appeals has no jurisdiction to review the petition herein."

18. Petitioner filed a document in response to the Division's answer, essentially a reply, wherein he agrees with paragraph 15 of the answer, but again asserts that because of poor professional services he missed the deadline to file his request or petition and a gross injustice will result if he is unable to present his case.

19. There is no further mention in the record, as defined in Tax Law § 2016, of the apparently late-filed request for conciliation conference or the effect of same on the scope of the review allowed the Division of Tax Appeals in this matter. Furthermore, a review of the complete file of the Division of Tax Appeals, including documents such as correspondence, computer records and briefs, reveals no further mention of the apparently late-filed request for conciliation conference or the effect of the same on the scope of the review allowed the Division of Tax Appeals in this matter.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge initially discussed the provisions of Tax Law § 1141 (c) regarding the obligations of a purchaser in a bulk sale transaction, specifically that a purchaser: (1) provide the Division with 10 days' notice prior to taking possession of, or making payment for, the business assets that are the subject of the bulk sale; and (2) thereafter withhold payment of any consideration to the seller pending receipt from the Division of its claim for any

outstanding sales tax liabilities due from the seller. The Administrative Law Judge explained that if the purchaser fails to meet these obligations, the purchaser becomes liable for the sales and use taxes owed by the seller in an amount limited only by the greater of the fair market value or the sales price of the business assets sold.

The Administrative Law Judge concluded that even though petitioner had met his obligation to notify the Division of the proposed bulk sale of assets as required by Tax Law § 1141 (c), he had failed to meet his obligation to withhold payment from the seller as required by the same statute. Thus, the Administrative Law Judge concluded that petitioner was personally liable for the payment of the seller's outstanding sales and use taxes.

The Administrative Law Judge also concluded that although petitioner appears to have been taken advantage of by the seller, such circumstances alone did not result in petitioner's liability pursuant to Tax Law § 1141 (c). Rather, petitioner's liability was based upon his own failure to withhold payment from the seller. The Administrative Law Judge rejected petitioner's contention that the imposition of liability on him was in violation of fundamental principles of fairness for the following reasons: (1) there was a provision in the Rider clearly stating that the seller had a substantial sales tax liability; and (2) the Division had notified petitioner on several occasions that placing any funds due the seller in escrow until the sales tax liabilities were resolved would release petitioner from personal liability for such taxes.

Finally, the Administrative Law Judge addressed petitioner's arguments that because there was no transfer of title to the lease or other assets of the business, nor approval of petitioner's purchase of the assets by the franchisor, there was no bulk transfer. The Administrative Law Judge concluded that based upon petitioner's actual possession of the assets of the business, a

bulk transfer of the assets occurred thus subjecting petitioner to the provisions of Tax Law § 1141 (c) and 20 NYCRR 525.2 (a) (2) and 537.1 (a) (1).

The Administrative Law Judge did not address the issue of whether the Division of Tax Appeals had the authority to reach the substantive issues herein where it appears from the petition filed that no request for a conciliation conference, or petition for a hearing, was filed within 90 days from the issuance of the notices of determination. Furthermore, the Administrative Law Judge did not address the notice of determination premised upon the amount paid for the actual purchase of the furniture, fixtures and equipment, other than by describing it in the findings of fact and sustaining the notices.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner argues that no legal transfer of property occurred because the terms of the Rider clearly required that the business be delivered to petitioner free of any state tax liabilities. Petitioner asserts that not only did this not happen, but also that the seller defrauded petitioner by diverting a check in the amount of \$80,000.00 that petitioner had delivered to the seller, and that the seller had requested be made payable to “New York State sales tax.” Thus, petitioner asserts that as the terms of the Rider were not met by the seller, no transfer occurred. In support of his argument that no transfer actually occurred, petitioner also asserts that approval of the transfer by the franchisor was required. As no such approval was obtained, petitioner would have us conclude that no transfer of property took place.

Additionally, petitioner argues that based upon the fraudulent acts of the seller, the application of the doctrine of equitable estoppel against the Division is appropriate in this matter. Petitioner’s position is that the imposition of personal liability on him under the circumstances

presented herein is inequitable, unfair and does not serve either the underlying purpose of Tax Law § 1141 (c) or the interests of justice.

Petitioner contends that the provisions of Tax Law § 1141 (c) were met based upon his making the check for \$80,000.00 of the purchase price payable to “New York State sales tax.” On this basis, petitioner asks us to conclude that he did not transfer any funds to the seller.

Finally, petitioner asserts that he is not liable for penalties and interest that accrue from the seller’s unpaid taxes.

The Division argues that contrary to petitioner’s assertion and pursuant to the provision of Tax Law § 1141 (c) defining a bulk sale as “a sale, transfer, or assignment in bulk” of business assets, a transfer of the business assets of Popeye’s Chicken did occur. Furthermore, the Division points to the fact that petitioner operated the business for more than two years as evidence that a transfer occurred.

The Division further argues that petitioner did not comply with his obligations under Tax Law § 1141 (c) in that he did not timely notify the Division of the sale and did not withhold payment from the seller.

The Division notes that it was not a party to the Agreement or the Rider and thus the doctrine of equitable estoppel may not be asserted against it under these facts. Furthermore, because the Division was not a party to the Agreement or the Rider, it is not bound by the terms of those documents.

The Division explains that holding petitioner personally liable for the outstanding sales tax liabilities of the seller is not an unfair or unjust result because petitioner was aware of the seller’s outstanding sales tax liabilities of over \$200,000.00 prior to his transfer of any funds to the seller.

With regard to the penalty issue, the Division notes that two separate notices of determination were issued in this matter, one dealing with the outstanding tax liability of the seller and one based upon the value of the tangible personal property transferred. The Division explains that petitioner is correct in his assertion that he is not liable for interest and penalties on the seller's outstanding tax liabilities up until the notice of determination was issued to petitioner. However, it is the Division's position that after the notice was issued, the liability accrued interest and penalty. The Division argues, however, that interest and penalty are appropriate with regard to petitioner's sales tax liability on the purchase of tangible personal property pursuant to Tax Law § 1105 (a). Finally, the Division asserts that petitioner failed in his burden to show reasonable cause or lack of willful neglect upon which this Tribunal could abate penalties.

OPINION

Although not addressed by the Administrative Law Judge, or the parties on exception, we must first address the issue of the jurisdiction of the Division of Tax Appeals in this matter, as it appears that petitioner did not timely file a request for conciliation conference (*Matter of Huang*, Tax Appeals Tribunal, April 27, 1995 [issue of whether a timely request for conciliation conference has been filed is jurisdictional in nature and may be raised by the Tribunal]; *see also Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

The petition filed in this matter included a copy of a conciliation order issued by BCMS dismissing petitioner's request for conciliation conference as untimely. The conciliation order specifically states that the notices of determination were issued by the Division on March 29, 2011, but that petitioner's request for conciliation conference was not received until August 8, 2013, which is well beyond the 90-day time period within which petitioner could have timely

filed his request. Petitioner seems to acknowledge that the request for conciliation conference was late filed in that his petition and his response to the Division's answer contain a request that the timeliness requirement be waived in the interests of justice. The answer of the Division acknowledges the issue by stating that a timely protest was not filed and therefore "the Division of Tax Appeals has no jurisdiction to review the petition herein." There is no further mention either in the official record as defined in Tax Law § 2016, or in the remainder of the file kept by the Division of Tax Appeals, of a late-filed request for conciliation conference or the effect of the same on the scope of review allowed the Division of Tax Appeals in this matter.

Petitioner had 90 days from the issuance of the notices of determination by the Division to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals (Tax Law §§ 170 (3-a) (e) and 1138 (a) (1); *see also Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). Where, as here, it appears that a petitioner has filed an untimely request for a conciliation conference with BCMS, the Division of Taxation has jurisdiction to determine whether such request was, in fact timely filed (*3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995). The Division of Tax Appeals does not, however, have jurisdiction to consider the merits of petitioner's protest (*Matter of Abdullah*, Tax Appeals Tribunal, April 14, 2017; *Matter of Modica*; *Matter of Simons*, Tax Appeals Tribunal, September 12, 2013).

While there may be an explanation as to why this issue was not addressed by the Administrative Law Judge, there is nothing in the record, or the remainder of the Division of Tax Appeals' file, to indicate why the Administrative Law Judge held a hearing on the merits rather than a hearing on the issue of the timeliness of petitioner's request for conciliation conference. Due to the jurisdictional nature of the timeliness issue, it must be addressed first in order to determine if this Tribunal has the requisite jurisdiction to address the merits of this matter. As

there is nothing in the record upon which we can base any such decision, we are left with no alternative but to remand for an additional determination on this matter. As the Administrative Law Judge who issued the original determination has retired from state service, we will remand this matter to the Supervising Administrative Law Judge to be reassigned.

We anticipate that either a hearing will be held on the issue of the timeliness of petitioner's request for conciliation conference, or a submission will be agreed to by the parties in lieu of a hearing. As this matter is being remanded, we would also request that the issue of the notice of determination premised upon the amount paid for the actual purchase of the furniture, fixtures and equipment be addressed in the conclusions of law of any supplemental determination, as this issue was also not addressed in the conclusions of law of the original determination. The parties will not be allowed to address either the notice of determination premised upon the assertion by the Division of petitioner's derivative liability (*see* Tax Law § 1141 [c]), or the penalty issue, as both parties have already had an adequate opportunity to address the substantive issues presented in this matter.

We will retain jurisdiction over this matter based upon the exception already timely filed by petitioner. After the issuance of a supplemental determination, petitioner will be allowed to add to his existing exception and brief so long as he does so within 30 days of the issuance of the supplemental determination, or requests an extension of time within the 30-day period. The Division will be given an opportunity to respond to any additional material submitted by petitioner. If the Division wishes to except to any portion of the supplemental determination, the Division will be required to submit a timely exception to the supplemental determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Supervising Administrative Law Judge for reassignment and the issuance of a supplemental determination.

DATED: Albany, New York
July 14, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner