

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GB&K/DCS LLC : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 825180
Use Taxes under Articles 28 and 29 of the Tax Law for the
Period December 1, 2001 through February 28, 2010. :

Petitioner, GB&K/DCS LLC, 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, 2001 through February 28, 2010.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in Albany, New York, on May 21, 2014 at 10:30 A.M., with all briefs to be submitted by September 12, 2014, which date began the six-month period for the issuance of this determination. By letter to the parties dated February 25, 2015, this due date was extended pursuant to Tax Law § 2010(3). Petitioner appeared by Brian Serotta, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert Maslyn, Esq., of counsel).

ISSUE

Whether there was a transfer of business assets that constituted a bulk sale under Tax Law § 1141(c).

FINDINGS OF FACT

1. On or about January 1, 2011, petitioner, GB&K/DCS LLC, acquired business assets from GB&K LLC. A form AU 196.10, Notification of Sale, Transfer or Assignment in Bulk was not filed with the Division of Taxation (Division) prior to the sale.

2. In July 2011, a tax compliance agent notified the Division's Bulk Sales Unit of a transfer of business assets by GB&K LLC to petitioner and requested an investigation of the transfer. Since a form AU 196.10 was not filed, the Division sent a letter to petitioner, as purchaser, requesting information concerning the transfer and requested that petitioner complete a Notification of Sale form.

3. On August 3, 2011, the Division issued a Notice of Claim to petitioner, advising it of a possible claim by the Division for New York State and local sales and use taxes due and directing that no distribution of funds to the extent of the state's claim be made until the seller's liability had been determined and payment of such liability made. An additional letter was sent to the seller on the same date, advising it not to transfer any consideration until the tax liability was determined, satisfied and a release issued to the purchaser.

4. The Division received a Notification of Sale from the purchaser on August 8, 2011. It lists the seller as GB&K LLC and petitioner as the purchaser. Both entities have the same mailing address and the same telephone number. The sale date was listed as January 1, 2011, and the purchase price was listed as \$500.00. No contract or other information or documentation was received by the Division concerning the value of the assets transferred.

5. Based upon the information obtained, the Division determined that a bulk sale had occurred. The basis for the Division's conclusion was that both the seller and purchaser engaged in the same type of business, at the same location and with the same telephone number. The

seller and purchaser both operated under the same business name, Gregory Bath & Kitchen. The responsible person for the selling entity is John Kirshner, who is the spouse of the responsible person for the purchasing entity, Cathy Kirshner. Mr. and Mrs. Kirshner reside at the same address and filed joint tax returns. Moreover, Mr. Kirshner was denied a Certificate of Authority for the new entity based upon the outstanding sales tax liability of the seller, and Mrs. Kirshner applied for and received a Certificate of Authority for the new entity, the purchaser.

6. The seller, GB&K LLC, had outstanding sales tax liabilities, including a derivative liability transferred to it as the result of an unreported bulk sale by Gregory Bath & Kitchen Center, Inc., to GB&K LLC. The Notice to Seller contained liabilities current as of August 3, 2011.

7. The Division deemed the transaction between Gregory Bath & Kitchen Center, Inc., to GB&K LLC not to be at arm's length based upon the factors set forth above and the fact that petitioner presented no information concerning the fair market value of the assets transferred, including goodwill. Goodwill was considered an important factor since petitioner appears to have profited from doing the same business at the same location, in the same name, following the transfer. Further, the amount of sales determined on two field audits of the predecessor business indicates the profitability of the business, underscored by the efforts of petitioner to continue to conduct business under that assumed business name.

8. Based upon the foregoing and the lack of documentation supplied by petitioner, the Division determined that petitioner was liable for the entire amount of the tax portion of the seller's outstanding sales tax liabilities.

9. On September 6, 2011, the Division issued to petitioner a Notice of Determination,

L-036590540, assessing tax in the amount of \$310,964.65 based upon the outstanding sales tax liability of the bulk sale transferor, GB&K LLC.

10. Petitioner filed its petition dated August 15, 2012 claiming that there was a valid business purpose for the transfer and that the value of the assets transferred was minimal. A formal hearing was held on May 21, 2014. Petitioner did not submit any evidence, either testimony or documents, in support of its position.

CONCLUSIONS OF LAW

A. Tax Law § 1141(c) requires the purchaser in a bulk sale transaction to give notice of such sale to the Division at least 10 days before taking possession of, or making payment for, the business assets of the selling company. The purpose of Tax Law § 1141(c) is to preserve the Division's "indisputable right to collect taxes which could otherwise be extinguished by the simple expedient of a taxpayer transferring its assets" (*Harcel Ligs. v. Evsam Parking*, 48 NY2d 503, 507 [1979]; *see also Spandau v. United States*, 73 NY2d 832 [1988]).

B. The term "bulk sale" is defined at 20 NYCRR 537.1(a)(1) as follows:

"The term *bulk sale* as used in this Part, means any 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 Department of Taxation and Finance."

A bulk sale also includes a transfer by gift, or for nominal consideration (*see* 20 NYCRR 537.1[a][3], example 4).

C. A purchaser in a bulk sale includes "any person who, as part of a bulk sale, purchases or is the transferee or assignee of business assets" (*see* 20 NYCRR 537.1[e]). The term "business assets" includes "any assets of a business pertaining directly to the conduct of the business, whether such assets are intangible, tangible or real property" (20 NYCRR 537.1[b]).

The facts demonstrate that this transfer was clearly a bulk sale transfer of the entire business assets outside the ordinary course of business. The seller transferred everything to the purchasing entity.

D. The notification requirement of Tax Law § 1141(c) provides “more than adequate protection to the prospective purchaser who needs only to inform the [Division] of the expected sale in order to protect itself from liability” for the seller’s unpaid sales tax (*Harcel Liqs. v. Evsam Parking*, 48 NY2d at 507). Upon receipt of a timely Notice of Sale, the Division is mandated to inform the purchaser of the existence of any possible claim for New York State and local sales and use taxes due by the seller of the business assets (20 NYCRR 537.6[a][3]). Once this notice is issued to the purchaser, the purchaser is then on notice of the existence of such taxes determined to be due from the seller and becomes liable to the Division to the extent of the fair market value of the assets transferred, or the consideration paid, whichever is higher (20 NYCRR 537.0[c][2]; 20 NYCRR 537.4[a][1]; [c]). The purchaser may then protect itself by placing the consideration to be paid in escrow pending resolution of the Division’s claim (20 NYCRR 537.3[b]). Failure to comply with the provisions of Tax Law § 1141(c) exposes the purchaser to personal liability for the seller’s taxes (*Matter of BMW Pizza, Inc. v. Urbach*, 235 AD2d 146 [1997]).

E. As set forth in the facts, at the time of the bulk sale transfer, the seller owed sales tax. Petitioner, as the purchaser, was obligated under Tax Law § 1141(c) to notify the Division of the transaction and withhold from the seller the transfer of any consideration on the purchase until payment of that liability was made. Failure to comply with the notification requirements resulted in petitioner becoming personally liable for the payment of any New York State sales and use taxes determined to be due from the seller (*Matter of North Shore Cadillac-Oldsmobile v. Tax*

Appeals Trib., 13 AD3d 994 [2004], *lv denied* 5 NY3d 704 [2005]; *Matter of Velez v. Division of Taxation*, 152 AD2d 87 [1989]; *see also* 20 NYCRR 537.4[a][1]).

F. Tax Law § 1141(c) provides that the Division holds a lien to the extent of the higher of the purchase price or the fair market value of the assets transferred. In this case, the Division asserted a lien in an amount equal to the seller's assessment of tax based upon the fact that petitioner refused to provide any information concerning the purchase price or the value of the assets transferred. Petitioner simply claims that the value of the assets was minimal. Petitioner did not produce any evidence at the hearing to support its assertions.

The notice issued to petitioner is entitled to a presumption of correctness and it is petitioner's burden to overcome this presumption (*Matter of Suburban Carting Corp.*, Tax Appeals Tribunal, May 7, 1998 *citing Matter of Tavolacci v. State Tax Commn.*, 77 AD2d 759 [1980]; *Matter of Leogrande*, Tax Appeals Tribunal, July 18, 1991, *confirmed* 187 AD2d 768 [1992], *lv denied* 81 NY2d 704 [1993]).

G. Petitioner is a kitchen and bath business as was the selling entity. The Division included goodwill as one of the business assets transferred, based upon the fact that the business operated under the same name, at the same location and using the same telephone number. Goodwill is an intangible asset within the meaning of Tax Law § 1141(c). The business assets transferred, including goodwill, enabled petitioner to immediately establish and operate a kitchen and bath business. Therefore, the Division was not unreasonable in valuing the business assets at the amount of the tax owed by the seller and assessing petitioner, as purchaser, for the full amount of the tax owed by the transferor (*Matter of Ultimat Security, Inc.*, Tax Appeals Tribunal, May 31, 2012; *Matter of Suffolk Center Corp.*, Tax Appeals Tribunal, November 23, 2011).

H. The petition of GB&K/DCS LLC is denied and the Notice of Determination L-036590540 dated September 6, 2011 is sustained.

DATED: Albany, New York
June 4, 2015

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE