

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
H & A WINE AND SPIRITS, INC. : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 825984
and Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period September 1, 2011 through August 31, 2013. :

Petitioner, H & A Wine and Spirits, Inc., 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, 2011 through August 31, 2013.

A hearing was held before Herbert M. Friedman, Jr., Administrative Law Judge, in New York, New York, on January 6, 2015, with all briefs to be submitted by April 21, 2015, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by its president, Habte Gebreselassie. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly assessed petitioner, a bulk sale purchaser, for the sales tax liability owed by the seller at the time of the bulk sale, pursuant to Tax Law § 1141(c).

FINDINGS OF FACT

1. On August 5, 2013, petitioner, H & A Wine and Spirits Inc., entered into an asset purchase agreement with Hunter Wine & Spirits LLC (Hunter) for the purchase of Hunter's

package liquor business located on 2nd Avenue, New York, New York. Included in the sale were the existing lease for the business premises, Hunter's liquor license, stock-in-trade, furniture and fixtures. The purchase price was agreed to be \$163,000.00.

2. The asset purchase agreement provided that "[t]here are no judgments, liens, actions, or proceedings pending or threatened involving the business or liquor license."

3. Petitioner filed a Notification of Sale, Transfer or Assignment in Bulk with the Division of Taxation (Division) on August 27, 2013. The notification indicated a sale date of September 5, 2013 for the consideration of \$163,000.00, which was divided among the assets to be transferred. The form contains an unexplained, handwritten entry of "Oct 10th" next to the "September 5, 2013" typed entry for date of sale.

4. On August 30, 2013, the Division issued to petitioner a Notice of Claim to Purchaser, informing it of a possible claim against Hunter for outstanding sales and use taxes. Additionally, petitioner was directed to refrain from distributing funds until the Division could ascertain Hunter's liability and receive payment.

5. The sale from Hunter to petitioner did not take place on September 5, 2013, as scheduled.

6. The Division sent petitioner an additional letter on September 11, 2013 reiterating that Hunter may have outstanding sales and use tax liability and directing petitioner to hold the consideration for the purchase in escrow until Hunter's liability was resolved. This letter also requested that petitioner provide the Division with an amended Notification of Sale, Transfer or Assignment in Bulk with the new closing date.

7. On September 11, 2013, based on information on the bulk sale notification and a comparison of Hunter's previously reported sales to the contractual purchase price, the Division

commenced an audit of Hunter's sales for the period September 1, 2011 through August 31, 2013. Also on September 11, the Division requested by letter that Hunter provide it with all business related books and records, including federal returns, daily register tapes, credit card sales information, purchase ledgers and invoices, cash disbursement journals, bank statements, any lease agreements, and its State Liquor Authority license serial number.

8. The Division's auditor spoke telephonically with Richard Gottesman, petitioner's then attorney, on October 1, 2013, and again advised that the sales proceeds be held in escrow pending resolution of Hunter's potential outstanding sales tax liability.

9. On October 10, 2013, the sale occurred and petitioner acquired the business assets of Hunter for \$163,000.00. The record does not evidence retention by petitioner of the necessary funds to satisfy Hunter's potential tax liability.

10. Petitioner filed an amended Notification of Sale, Transfer or Assignment in Bulk dated October 10, 2013 and received by the Division on October 15, 2013. The amended notification indicated a scheduled date of sale of October 10, 2013. Enclosed with the amended notification was a check dated October 10, 2013 in the amount of \$177.50. The check was earmarked by petitioner to satisfy the bulk sales tax obligations from the transaction.

11. Despite written and telephonic requests from the Division, no books and records were ever received from Hunter. As a result, Hunter's sales tax liability for the period September 1, 2011 through August 31, 2013 was determined by using third-party purchase information for cost of goods sold on file with the Division. A cost of goods sold ratio of 78.3% for beer, wine and liquor was derived from the Almanac of Business and Industrial Financial Ratios, 2013 Edition

(Almanac),¹ and applied to the purchase information to determine Hunter's gross and taxable sales for the period at issue as follows:

Tax Period Ending	Reported Sales	Cost of Goods Sold	Estimated Taxable Sales	Tax Paid	Additional Tax Due
11/30/11	\$32,704.00	\$56,186.00	\$71,757.34	\$2,757.00	\$3,611.46
02/29/12	\$61,089.00	\$103,936.00	\$132,740.74	\$5,221.00	\$6,559.74
05/31/12	\$64,117.00	\$130,151.00	\$166,220.95	\$5,490.00	\$9,262.11
08/31/12	\$71,782.00	\$134,100.00	\$171,264.37	\$6,170.00	\$9,029.71
11/30/12	\$59,598.00	\$94,882.00	\$121,177.52	\$5,089.00	\$5,665.51
02/28/13	\$52,399.00	\$58,492.00	\$74,702.43	\$4,450.00	\$2,179.84
05/31/13	\$47,439.00	0	\$102,874.46	\$3,594.00	\$5,536.11
08/31/13	\$39,966.00	0	\$86,304.93	\$3,547.00	\$4,112.56
TOTAL	\$341,689.00		\$737,863.35		\$45,957.04

For the quarters ending May 31 and August 31, 2013, the Division had no information on Hunter's cost of goods sold. As a result, the error rate of 2.159 between reported and estimated taxable sales, derived from the other six periods in the audit, was applied to Hunter's reported sales for those periods.

12. In order to ascertain the proper cost of goods sold ratio, the Division used the North American Industrial Classification System (NAICS) code 445310, used by both petitioner and Hunter in their prior tax filings. The NAICS codes, used in the Almanac, identify the principal business activity of industry sectors for New York State tax purposes. The code chosen by petitioner and Hunter represents "Beer, Wine and Liquor Stores."

¹ The Almanac of Business and Industrial Financial Ratios provides a precise benchmark for evaluating an individual company's financial performance. It states that it provides users with a reliable and comprehensive source of standard financial ratios and financial statistics on all corporations, public and private. The results were computed from Internal Revenue Service statistics culled from tax returns for the most recent period available, which for this edition was July 2009 through June 2010.

13. On November 13, 2013, the Division issued Notice of Determination number L-040363594 to petitioner, for the period September 1, 2011 through August 31, 2013, asserting additional sales and use taxes due in the sum of \$45,957.04. The notice explained that petitioner was liable as a bulk sale purchaser for taxes determined to be due from Hunter in accordance with Tax Law §§ 1141(c) and 1138(a)(3).

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioner argues that it was not the owner or operator of the business during the period covered by the statutory notice and, therefore, should not be responsible for the taxes assessed. Moreover, petitioner adds that it relied on the provision in its contract with Hunter, which stated there were no outstanding liabilities. Finally, petitioner contends that the amount of the Division's assessment is excessive.

15. The Division argues that petitioner has not met its burden of proof on any of the issues and, thus, pursuant to Tax Law § 1141(c), is liable for the full amount of tax assessed against the seller.

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 term "bulk sale" is defined at 20 NYCRR 537.1(a)(1) to mean:

“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.”

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 Liqs. v. Evsam Parking*, 48 NY2d 503 [1979], *affd* 48 NY2d 503 [1979]; *see also Spandau v United States of Am.*, 73 NY2d 832 [1988]).

Upon receipt of a timely notice of sale, the Division is required to inform the purchaser of any potential claims for sales and use taxes that may still be owed by the seller of the business (*see* Tax Law § 1141[c]; 20 NYCRR 537.6 [a] [3]). The purchaser is instructed to retain the requisite funds to pay the outstanding tax claim (*see* 20 NYCRR 537.0[c][1]). The purchaser may then protect itself by placing the consideration to be paid in escrow pending resolution of the Division’s claim (*see* 20 NYCRR 537.3[b]). If the purchaser fails to withhold funds from the seller or fails to file a proper and timely notice of bulk sale with the Division, then such purchaser becomes personally liable for the sales and use taxes determined to be due from the seller (*see* Tax Law § 1141[c]; *Matter of BMW Pizza, Inc. v. Urbach*, 235 AD2d 146 [1997]; 20 NYCRR 537.4 [a] [1]). The liability of the purchaser is limited to the greater of the purchase price or the fair market value of the business assets sold or transferred (*see* 20 NYCRR 537.4 [c]). The Division has 90 days from receipt of the notice of bulk sale to provide the purchaser with notice of the actual amount of taxes due from the seller (*see* NYCRR 537.0[c][3]).

B. In the instant case, it is undisputed that a bulk sale, as described in Tax Law § 1141(c) and its accompanying regulations, occurred between Hunter and petitioner on October 10, 2013. Petitioner filed a notification of bulk sale with the Division on August 27, 2013, which was more than 10 days prior to the transfer of assets. Petitioner did not, however, withhold sufficient funds from the seller in order to satisfy the Division’s potential tax claim. Consequently, petitioner is liable for the seller’s outstanding sales and use tax liability to the extent of the greater of the purchase price or fair market value of the assets transferred (*see* Tax Law § 1141[c]).

C. Petitioner presents several arguments in opposition to the notice of determination. First, it maintains that it should not be responsible for the sales tax liability incurred during a period prior to its ownership. Of course, this position runs contrary to the basic premise of the bulk sales provisions under Tax Law § 1141(c). By failing to withhold sufficient funds from the purchase to protect itself in the case of Hunter's outstanding tax liability, petitioner exposed itself to the risk it now faces.

D. Additionally, petitioner argues that the amount of tax at issue is excessive. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, "or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices. . . ." When acting pursuant to section 1138(a)(1), the Division is required to select an audit methodology reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the audit methodology or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

Despite several unequivocal requests from the Division, Hunter failed to provide the requested records to allow for a direct audit. Consequently, the Division properly used third-party purchase records available to it and selected a cost of goods sold analysis as its chosen methodology. Using the Almanac, a publication compiled to help determine a company's true measure of performance and value from statistics gathered from numerous accommodation and food service companies, the Division was able to obtain a ratio expressed as a percentage for businesses like Hunter and apply it to cost of goods sold to ultimately estimate taxable income. Use of such ratios is specifically provided for under the second sentence of Tax Law § 1138(a)(1)

and has been accepted by the Tax Appeals Tribunal and confirmed by the courts (*see e.g. Matter of A & J Gifts Shop v. Chu*, 145 AD2d 877 [1988], *lv denied*, 74 NY2d 603 [1989]). Hence, in this case, the Division's methodology was sound and reasonable.

Meanwhile, although petitioner contends that the estimated sales figures are irrational, it failed to provide any evidence to demonstrate that actual sales were otherwise. The notice issued to petitioner is entitled to a presumption of correctness and it is petitioner's burden to overcome this presumption (*see 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]). Mere conclusory allegations of error are insufficient to show that the selected method of audit was unreasonable or that the amount of tax determined was erroneous (*see Matter of Vebole Edibles v. Tax Appeals Tribunal*, 162 AD2d 765 [1990]). Based on the lack of contradictory evidence in the present record, petitioner failed to meet its burden on this point.

E. As the purchaser in this bulk sale, petitioner is liable for any sales tax remaining due and unpaid by the transferor to the extent of the greater of the actual purchase price or the fair market value of the assets transferred as of the date of the sale (Tax Law § 1141 [c]; 20 NYCRR 537.0 [c] [2], 537.4 [c]). It is incumbent upon petitioner to establish what this maximum limit is by adequately proving the fair market value of the assets transferred or the purchase price (*see Matter of Ultimat Security, Inc.*, Tax Appeals Tribunal, May 31, 2012). In this case, the asset purchase agreement valued the assets transferred at \$163,000.00, which was also the actual purchase price, and far exceeds the amount of tax assessed. Thus, petitioner's argument that the liability asserted was excessive must fail.

F. Furthermore, petitioner maintains that it relied upon Hunter's assertion in the asset purchase agreement that there were no liens against the business at the time of the sale and claims its attorney at the time failed to properly handle this matter. While petitioner may have a cause of action against others for failing to protect its interests or for overlooking Hunter's outstanding liabilities, petitioner is not absolved of its liability under Tax Law § 1141(c) based on wrongful acts of third parties (*see Matter of Salh*, Tax Appeals Tribunal, March 10, 2011). The record shows that the Division acted promptly to advise petitioner of then-known sales tax liabilities and informed petitioner's representative that an audit was being conducted of Hunter and additional sales tax may be owed. Crucially, petitioner was also warned in the Division's notice to disregard disclaimers by Hunter in the asset purchase agreement. Finally, petitioner was also advised to retain sufficient funds from the sale to protect itself. Unfortunately for petitioner, it ignored those instructions.

G. Given its failure to comply with the requirements of Tax Law 1141(c), petitioner was properly held to be responsible for Hunter's unpaid sales tax as determined by the audit performed (*see e.g. Matter of North Shore Cadillac - Oldsmobile, Inc. v. Tax Appeals Tribunal*, 13 AD3d 994 [2004], *lv denied* 5 NY3d 704 [2005]).

H. The petition of H & A Wine and Spirits, Inc., is denied, and the Notice of Determination dated November 13, 2013 is sustained.

DATED: Albany, New York
September 10, 2015

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE