

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SINGH RESTAURANT, INC. : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 827456
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period September 1, 2008 through February 29, :
2012.

Petitioner, Singh Restaurant, 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, 2008 through February 29, 2012.¹

A hearing was held before Catherine M. Bennett, Administrative Law Judge, in Rochester, New York, on September 21, 2017, at 9:15 A.M., with all briefs to be submitted by January 19, 2018, which date began the six-month period for the issuance of this determination. Petitioner appeared by Justin S. White, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

ISSUES

I. Whether petitioner was a purchaser in a bulk sale transaction such that it became liable under Tax Law § 1141 (c) for sales tax determined to be due from the seller.

II. Whether petitioner has shown that the liability assessed herein has been paid in full.

¹ Although the petition listed the notice number contested (L-043328139), the petition did not list the periods contested. However, the statutory document, the conciliation order issued in this matter (CMS No. 267600), concerned notice number L-043328139 for the period September 1, 2008 through February 29, 2012. Therefore, the period contested is deemed to be that stated on the conciliation order.

FINDINGS OF FACT

1. This case involves the alleged bulk transfer of assets from Kashmir Kitchen LLC d/b/a Shalimar Gardens (Kashmir) to Singh Restaurant, Inc. (petitioner). Kashmir had acquired the business from New Ichiban Japanese Food, Inc. (Ichiban), in 2013, and prior to Kashmir's acquisition, Ichiban was under audit by the Division of Taxation (Division). The basis for the liability assessed to petitioner began with the investigation of sales and use taxes owed by Ichiban in May 2011.

2. The audit period established to evaluate the books and records of Ichiban was September 2008 through February 2012, after a determination by the Division that Ichiban's records were not adequate for it to perform a detailed audit. The Division utilized information regarding sales tax collected and paid by Ichiban from its point of sale system to compute additional tax due of \$63,623.35. The amount of tax determined and the methodology of this calculation have not been disputed by petitioner.

3. Prior to the close of the Ichiban audit, the Division became aware that Kashmir had purchased the business from Ichiban. By correspondence dated March 19, 2013, Kashmir's representative filed a notice of bulk sale transfer from Ichiban to Kashmir. The Division sent correspondence to Kashmir dated March 25, 2013, advising the company 1) to put the entire amount of the purchase price into an escrow account, and 2) that sales tax was due on the tangible personal property purchase in the transaction. The Division sent a notice of claim to Kashmir advising it 1) not to pay any part of the purchase price to the seller until the Division completed its review of the matter, 2) to put the entire amount of the purchase price into an escrow account and advise the escrow agent not to release the escrow funds until the Division

issued a bulk sales notice of release, and 3) that sales tax was due on the tangible personal property purchased in the transaction.

4. The Division issued a notice of determination to Ichiban dated April 2, 2013, for additional tax due of \$63,623.35 for the period September 1, 2008 through February 29, 2012.

5. On April 26, 2013, the Division received correspondence and an amended notification of sale, transfer or assignment in bulk, with a check from a member of Kashmir. The letter from Kashmir indicated there was no sales contract regarding the transfer of Ichiban to Kashmir and acknowledged making full payment for Ichiban. It also provided more details regarding the various assets transferred in the transaction as a basis for allocating a portion of the purchase price to tangible personal property, and computed and paid the sales tax due on the tangible personal property pursuant to the allocation.

6. The Division issued a notice of determination to Kashmir date May 7, 2013, for sales tax due of \$63,623.35, based on 1) Kashmir's failure to timely file a notification of bulk sale, and 2) Kashmir's failure to place the proceeds from the sale in escrow and keep them there until the Division issued a release, or otherwise arranged for payment of proceeds to the Division to satisfy the outstanding sales tax liabilities of Ichiban.

7. Subsequently, by correspondence dated April 15, 2015, petitioner filed a notice of bulk sale transfer from Kashmir, as the seller, to petitioner, with a business or trade name of Taste of India, indicating Kashmir's last day of business as December 31, 2014, a scheduled sale date of April 1, 2015, a sales price of \$20,000.00 allocated 100% to tangible personal property, and an escrow fund amount of \$20,000.00.

8. Attached to the notice of bulk sale transfer from Kashmir to petitioner was an asset purchase agreement dated March 10, 2015, that explicitly stated the Kashmir desired to sell to

petitioner, and petitioner desired to purchase from Kashmir, substantially all of the assets of Kashmir upon the terms set forth in the agreement, for consideration. The agreement also established that petitioner had agreed to assume and be responsible for the lease of Kashmir then in effect, after the closing date of the sale between the two parties. An assignment of lease dated March 1, 2015, between Piccadilly Plaza II, Inc., as lessee, Kashmir, as lessor and assignor, and petitioner as assignee was also provided as evidence of the assignment of lease of Kashmir to petitioner.

9. The Division issued to petitioner a notice of claim to purchaser dated April 23, 2015. The notice of claim advised petitioner 1) not to pay any part of the purchase price to the seller until the Division had completed its review of the matter, 2) to place the entire amount of the purchase price into an escrow account, 3) to instruct the escrow agent not to release the escrow funds until the Division issued a bulk sales notice of release, and 4) that sales tax was due on the tangible personal property purchased in the transaction.

10. The Division sent correspondence to petitioner dated April 27, 2015, again advising petitioner that the entire amount of the purchase price should be held in an escrow account until the Division issued a release and that sales tax of \$1,750.00 was due on the tangible personal property in the transaction.

11. The Division further sent correspondence entitled "notice to seller" to Kashmir indicating the Division would not authorize the release of the proceeds from the sale, and that among other things, Kashmir needed to send payment for taxes due in accordance with an attached consolidated statement of tax liabilities, the amounts of which were redacted for the taxpayer privacy protection of Kashmir.

12. Petitioner submitted a \$1,750.00 payment of sales tax due on the tangible personal property purchased in the transaction on or about July 15, 2015.

13. Petitioner never notified the Division whether the proceeds from the sale had been placed in escrow or were otherwise secured, and petitioner never submitted the proceeds from the sale to the Division to satisfy the tax liabilities of Kashmir.

14. The Division never authorized the release of proceeds from the sale from petitioner to Kashmir.

15. The Division issued a notice of determination to petitioner dated July 9, 2015, that assessed sales and use taxes in the amount of \$17,558.99. By this document the Division passed on the tax liability from Kashmir to petitioner as a purchaser in a bulk sale.²

SUMMARY OF THE PARTIES' POSITIONS

16. Petitioner asserts that the purchase of some furniture from Kashmir did not amount to a bulk sale transaction and claims that the notice of bulk sale was filed in error.

17. The Division maintains that petitioner has offered no evidence to refute the Division's imposition of tax liability pursuant to Tax Law § 1141, or that the liability has been fully satisfied, and therefore, the assessment should be upheld.

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. If the purchaser fails to file a proper and timely notice of bulk sale, then such

² The liability incurred by Ichiban, and subsequently imposed on Kashmir and petitioner had been partially satisfied prior to the issuance of petitioner's assessment. The notice of determination at issue herein represents the balance due at the time of the issuance of petitioner's assessment, and continued to be the amount outstanding at the time of the hearing. The Division further acknowledges that cancellation of the penalties imposed upon petitioner by notice L-043328139 was warranted.

purchaser becomes personally liable for the sales and use taxes due from the seller. The liability of the purchaser is limited to the greater of the purchase price or fair market value of the business assets sold (*see* 20 NYCRR 537.1 [c] [2]).

B. The term “bulk sale” is defined at 20 NYCRR 537.1 (a) as:

“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.”

C. The term “business assets” is defined at 20 NYCRR 537.1 (b) as:

“any assets of a business pertaining directly to the conduct of the business, whether such assets are intangible, tangible or real property. Any asset owned by a corporation is a business asset.”

D. At the hearing, petitioner argued that the purchase of some furniture from Kashmir did not rise to the level of a bulk sale of Kashmir’s assets and does not constitute a bulk sale as a matter of law. This argument lacks merit and the evidence indicates to the contrary. As set forth above, the definition of a bulk sale includes the sale of any part of the business assets other than in the ordinary course of business. The sale of assets subsequent to the closing of the seller’s business is not in the ordinary course of business and is within the purview of Tax Law § 1141 (c) (*Matter of Gaughan*, Tax Appeals Tribunal, May 14, 1992). The asset purchase agreement between Kashmir and petitioner explicitly states that both parties agreed that the purchase covered substantially all of Kashmir’s assets. Since petitioner has not offered any evidence to establish that the sale of the furnishings was in the regular course of Kashmir’s business, the Division properly regarded the transfer as constituting a bulk sale to petitioner.

E. Petitioner took over Kashmir’s lease and the assignment became part of the record. Petitioner dismissed the importance of the assignment and its meaningfulness to the bulk sale

issue. There is no question that a bulk sale occurred between Kashmir and petitioner on or about April 1, 2015. Although petitioner contends that the transaction did not constitute a bulk sale, petitioner conceded that Kashmir assigned a lease to it. While the assignment of the lease alone would be sufficient to find a bulk sale (*Matter of Acres Storage Company, Inc. v Chu*, 120 AD2d 854 [3d Dept 1986], *lv dismissed* 68 NY2d 807 [1986]; *Matter of Suffolk Center Corp.*, Tax Appeals Tribunal, November 23, 2011), the transfer of the additional business assets, as conceded by petitioner, clearly constitutes a bulk sale.

F. The record shows that petitioner did not give the Division the requisite notice of a bulk sale (Tax Law § 1141 [c]). As a result, petitioner became liable for the sales and use taxes due from Kashmir to the extent of the purchase price or fair market value of the business assets sold (*see Matter of Gaughan*), adjusted to \$17,558.99, after payments made were properly applied (see finding of fact 15). Petitioner has offered no proof that the liability has been paid in full or that any further payments have been made reducing the amount due further.

G. The petition of Singh Restaurant, Inc., is denied and the notice of determination, dated July 9, 2015, is sustained.

DATED: Albany, New York
June 21, 2018

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE