

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BEAVER STREET PIZZA, LLC	:	DETERMINATION
	:	DTA NO. 830580
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 June 1, 2017 through November 30, 2017,	:	
March 1, 2018 through August 31, 2018, and June 1, 2015	:	
through May 31, 2018.	:	

Petitioner, Beaver Street Pizza, 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 periods June 1, 2017 through November 30, 2017, March 1, 2018 through August 31, 2018, and June 1, 2015 through May 31, 2018.

A formal hearing by videoconference was held before Nicholas A. Behuniak, Administrative Law Judge, on July 20, 2023, with all briefs to be submitted by November 2, 2023, which date began the six-month period for the issuance of this determination. Petitioner appeared by Weinberg Law Firm, P.A. (John Weinberg, Esq., of counsel) and the Division of Taxation appeared by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel).

ISSUE

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.

FINDINGS OF FACT

1. In or around November 2018, petitioner, Beaver Street Pizza, LLC, acquired business assets from Manhattan's Best Pizza, Inc. (Manhattan's Best). Form AU 196.10, notification of sale, transfer or assignment in bulk, was not filed with the Division of Taxation (Division) at any time. Manhattan's Best operated a pizzeria restaurant at 20 Beaver Street, New York, New York (the Beaver Street location) from approximately June 2009 to October 2018.

2. Petitioner filed form DTF-17, application to register for a sales tax certificate of authority, dated August 14, 2018, with the Division, stating that it would begin business on August 20, 2018, at the Beaver Street location. Form DTF-17 lists Lalitharuban Singarasan as a member and responsible person of petitioner with an ownership percentage of 80%. Petitioner responded "no" to the DTF-17 form's question "[d]id you acquire all or part of an existing business, or the assets of a business, that was registered or required to be registered for sales tax?" Petitioner operates a pizzeria restaurant at the Beaver Street location.

3. The Division issued to petitioner form DTF-17-A, certificate of authority, effective August 15, 2018.

4. On July 27, 2018, August 14, 2018, September 24, 2018, and October 5, 2018, the Division's Tax Compliance Agent, Rosa McCray, made field visits to Manhattan's Best at the Beaver Street location. At the time of the hearing, Ms. McCray had retired from the Division and did not appear at the hearing. At the hearing, Nazmul Ahsan, Tax Compliance Agent 3, testified for the Division. Mr. Ahsan was Ms. McCray's supervisor. On December 20, 2018, Ms. McCray, made a field visit to petitioner at the Beaver Street location. Ms. McCray's records reflect that she found petitioner's operations at the Beaver Street location to be substantially similar to those of Manhattan's Best's business operations at that same location. In particular,

Ms. McCray's records indicate that both petitioner and Manhattan's Best operated their business at the same location, conducted the same type of pizzeria restaurant business, had similar menus, used the exact same telephone number, and utilized similar furnishings. Ms. McCray's records also noted that Manhattan's Best assigned its lease of the Beaver Street location to petitioner.

5. Petitioner provided the Division with a copy of an assignment and assumption of lease agreement, dated October 2018 (lease assignment agreement), for the Beaver Street location. The lease assignment agreement is between petitioner, Manhattan's Best, and Beaver Street Commons, LLC, the landlord of the Beaver Street location (landlord). The lease assignment agreement notes that the Beaver Street location lease term began on February 2005, and was originally between the landlord and GJ&F Pizza Corp., but was subsequently assigned to Villa Pizza of New York, Inc., then re-assigned to Georgio's Pizzeria, Inc., and then re-assigned to Manhattan's Best on June 25, 2009. The lease assignment agreement provides that Manhattan's Best assign all of its rights and interests in the Beaver Street lease to petitioner for ten dollars. The lease assignment agreement provides that Manhattan's Best assign its rights to its \$65,907.80 lease security deposit to petitioner. The lease assignment agreement provides that Manhattan's Best remit a payment of \$145,210.02 to the landlord for all past due rent, property tax charges, late fee charges, water charges, legal fee charges and sprinkler charges. In addition, the lease assignment agreement provides that Manhattan's Best pay the landlord a lease assignment fee of \$16,476.95, and legal fees relating to the assignment of \$4,615.67. Under the lease assignment agreement, petitioner agreed to assume full responsibility for the Beaver Street lease as if it were the original tenant. The lease assignment agreement was executed on November 29, 2018, by Dipak Banik on behalf of petitioner, who represented on the document signature line that he was the "Sole Member" of petitioner.

6. Petitioner provided the Division a copy of a lease extension and modification agreement, dated October 2018 (lease extension agreement). The lease extension agreement is between petitioner and the landlord. The lease extension agreement provided that, for ten dollars of consideration, petitioner's lease for the Beaver Street location would be extended to October 31, 2028. The lease extension agreement references a copy of the original lease that was attached to the lease extension agreement; however, the original lease was not attached to the lease extension agreement petitioner provided the Division. The lease extension agreement was executed on November 29, 2018, by Dipak Banik on behalf of petitioner, who represented on the document signature line that he was the "Sole Member" of petitioner.

7. Manhattan's Best had outstanding sales tax liabilities at the time of the Beaver Street lease assignment to petitioner.

8. A copy of petitioner's 2018 federal schedule K-1, partner's share of income, deductions, credits, etc., indicates that Mr. Singarasan was a member-manager of petitioner with a 10% ownership interest.

9. A copy of Manhattan's Best forms NYS-45 WEB, quarterly combined withholding, wage reporting, and unemployment insurance returns, for the periods of January 1, 2018 through March 31, 2018, and October 1, 2017 through December 31, 2017, indicate that Mr. Singarasan was an employee of Manhattan's Best.

10. On June 11, 2019, the Division issued to petitioner a notice of determination, bearing audit case identification number X-188170506 (notice), for \$109,123.07 in tax due¹ as a bulk

¹The notice of determination recognized a payment/credit of \$9,634.21.

sale purchaser that included the following specific assessments which were originally assessments issued against Manhattan’s Best:

Assessment ID	Period	Tax
L-050005475	June 1, 2015 – May 31, 2018	\$31,823.32
L-050005476	June 1, 2018 – August 31, 2018	\$13,686.23
L-050005477	March 1, 2018 – May 31, 2018	\$21,489.57
L-050005478	September 1, 2017 – November 30, 2017	\$20,991.33
L-050005479	June 1, 2017 – August 31, 2017	\$21,132.62 ²

11. Petitioner filed a request for a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

12. On July 2, 2021, BCMS issued a conciliation order dismissing request, CMS No. 000330330 (conciliation order), to petitioner. The conciliation order determined that petitioner’s protest of the subject notice was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on June 11, 2019, but the request was not mailed until June 5, 2021, or in excess of 90 days, the request is late filed.”

13. Petitioner then filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on August 14, 2021.³

14. At the hearing, petitioner provided the testimony of Suthakaran Arulampalam, a former owner of Manhattan’s Best. Mr. Arulampalam testified that Mr. Singarasan was never a “partner” of Manhattan’s Best and Manhattan’s Best ceased operations in 2018 because it was losing money.⁴ He testified that the other “partner” of Manhattan’s Best was Vasatha Kumaran

² In its brief, the Division incorrectly stated this number.

³ The Division filed a motion, dated April 15, 2022, seeking dismissal of the petition, or in the alternative, for summary determination in its favor, based upon the timeliness of petitioner’s challenge of the notice to BCMS. The Division of Tax Appeals issued an Order, dated September 8, 2022, denying the Division’s motion.

⁴ At the hearing, petitioner’s witnesses used the term “partner” when referring to the ownership of

who had guaranteed Manhattan's Best lease of the Beaver Street location and that in order for Vasatha Kumaran to be released from his lease guarantee, the landlord required that a substitute tenant for Manhattan's Best be provided. Mr. Arulampalam testified that Manhattan's Best did not receive any money from petitioner for the assignment of the lease of the Beaver Street location. Mr. Arulampalam testified that Manhattan's Best did not sell any assets, including leftover food supplies, restaurant equipment, tables or furniture, menus, silverware, or plates to petitioner.

15. At the hearing, petitioner provided the testimony of Dipak Banik, a "partner" of petitioner. Mr. Banik testified that petitioner did not pay any money to Manhattan's Best for the assignment of the Beaver Street lease, nor did petitioner buy any equipment, furniture, recipes, food or anything of value from Manhattan's Best. Mr. Banik testified that he was an 80% owner of petitioner since November 2018. Mr. Banik testified that petitioner kept the same phone number as Manhattan's Best's phone number. Mr. Banik testified that petitioner changed the menu from Manhattan's Best's menu, but petitioner was still operating as a pizzeria. Mr. Banik testified that he was not sure if petitioner's rent for the Beaver Street location was different than Manhattan's Best's rent for that location because petitioner paid whatever the landlord asked. Mr. Banik testified that petitioner took over the Beaver Street lease which included a pizza oven and tables and chairs. Petitioner used at least some of the tables and chairs in its business operations, although it eventually bought additional tables and chairs for the business.

16. Petitioner argues that it did not make a bulk sale purchase of Manhattan's Best since it did not pay for any assets of Manhattan's Best and merely took over its lease of the Beaver Street

Manhattan's Best or petitioner. It is noted that owners of Manhattan's Best were shareholders (*see* New York Business Corporation Law) and owners of petitioner are "members" (*see* New York Limited Liability Company Law).

location. Petitioner also argues that the Division's tax compliance agent, Ms. McCray, should have testified at the hearing, since she was the Division's employee who completed the audit at issue.

17. The Division argues that petitioner made a bulk sale purchase because it took the assignment of the Beaver Street lease from Manhattan's Best which consisted of most of the pizzeria's business assets.

18. Petitioner presented no information concerning the fair market value of the assets transferred in the lease assignment agreement.

19. 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.

CONCLUSIONS OF LAW

A. Tax Law § 1141 (c) requires the purchaser in a bulk sale transaction to give notice of such a 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 Liqs. v Evsam Parking*, 48 NY2d 503, 507 [1979], quoting *Spandau v United States* 73 NY2d 832, 833 [1988]).

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]; *see also* 20 NYCRR 537.4 [a] [1]).

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), the sale of assets as part of a liquidation of the seller’s business (20 NYCRR 537.1 [d] [2], example 17), and the sale of business assets regardless of whether the seller was operational when the assets were sold (*see Matter of Gaughan*, Tax Appeals Tribunal, May 14, 1992).

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” and any asset owned by a corporation (20 NYCRR 537.1 [b]).

D. The facts here demonstrate that the assignment of the Beaver Street lease from Manhattan’s Best to petitioner was a bulk sale transfer of business assets outside the ordinary course of Manhattan’s Best’s regular business operations. Manhattan’s Best transferred its sole real property interests to petitioner. The subject lease appears to be one of the primary assets for operating a pizzeria. Based upon the fact that the Beaver Street lease had been assigned to several other pizzerias in the past, and the property included at least a pizza oven and tables and chairs used in the operation of a pizzeria, it appears as though the Beaver Street location was essentially a pizzeria business that just needed food supplies, utensils and personnel to operate its business. Petitioner argues that it did not pay Manhattan’s Best any compensation for the assignment of the Beaver Street lease. However, as noted above, even gifts of assets may be

considered a transfer for bulk sale purposes. The fact that Manhattan's Best was in business for nine years at the Beaver Street location strongly supports the notion that the location had value as a pizzeria. Petitioner's witness claimed Manhattan's Best suddenly closed because it was not profitable. The transfer of the business's assets is suspect given the proximity of the looming sales tax assessments against Manhattan's Best. Petitioner, the new tenant, appears to have adopted all the terms of the old lease as though it were the original leasee, just to conduct what in essence appears to be a substantially similar business. The timing of the transition between Manhattan's Best's operation of a pizzeria and petitioner's operation of what was substantially the same business appears to have been absolutely seamless. Both businesses even used the same phone number. Moreover, one of petitioner's members, Mr. Singarasan, was previously an employee of the transferor, Manhattan's Best. Thus, it appears petitioner was well aware of the property it was taking over, the value of such and operating a pizzeria at that location. Petitioner does not make any argument regarding how the two businesses may have substantively differed or why it took an assignment of the Beaver Street lease. On its form DTF-17, petitioner misrepresents that it did not acquire any of Manhattan's Best's assets. Apparently, the Beaver Street lease was so valuable that petitioner immediately sought and obtained an extension of the lease for several more years past its initial expiration date. Most importantly is the simple fact that petitioner did take possession of a substantial asset of Manhattan's Best, the Beaver Street lease, outside of the ordinary course of Manhattan's Best's normal operations.

E. 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 Ligs. v Evsam Parking*, 48 NY2d at 507). Upon receipt of a timely Notice of Sale, the Division is

required 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 (*see* 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 it becomes liable to the Division to the extent of the fair market value of the assets transferred, or the consideration paid, whichever is higher (*see* 20 NYCRR 537.0 [c] [2]; *see also* 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 (*see* 20 NYCRR 537.3 [b]), or alternatively reject the transfer of the assets in question from the entity with the tax liabilities. "Failure to comply with the provisions of Tax Law § 1141 exposes the purchaser to personal liability for the seller's taxes" (*Matter of BMW Pizza v Urbach*, 235 AD2d 146, 147 [3d Dept 1997]).

F. As set forth in the facts, at the time of the bulk sale transfer, the seller, Manhattan's Best, 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. Alternatively, petitioner could have refused to take title to the asset at issue, the Beaver Street lease, unless Manhattan's Best extinguished or provided security for its outstanding tax liabilities, much like it did with all of its other outstanding liabilities with the landlord in order to facilitate the assignment. Petitioner does not dispute that it failed to provide the Division with notice of the transaction. 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 (*see Matter of North Shore Cadillac-Oldsmobile v Tax Appeals Trib.*, 13 AD3d 994, 997

[3d Dept 2004], *lv denied* 5 NY3d 704 [2005]; *Matter of Velez v Division of Taxation*, 152 AD2d 87 [3d Dept 1989]; *see also* 20 NYCRR 537.4 [a] [1]).

G. Tax Law § 1141 (c) provides that the amount of tax liability that may transfer to the “purchaser” of assets in a bulk sale is limited to the higher of the purchase price or the fair market value of the assets transferred. In this case, the Division asserted tax due from petitioner in an amount equal to the seller’s assessment, based on the transfer of the Beaver Street lease to petitioner. Petitioner failed to provide the Division with adequate information concerning the fair market value of the assets transferred. In order to establish a lower liability than the amount of tax owed by Manhattan’s Best, it was incumbent upon petitioner to prove the fair market value of the assets transferred and the purchase price. In this case, petitioner’s witness testified that petitioner did not pay Manhattan’s Best any consideration for the assignment of the Beaver Street lease. Thus, the purchase price appears to be zero. However, petitioner has failed to establish the fair market value of the assets transferred. Petitioner did not present any argument or produce any evidence at the hearing to show that the fair market value of the Beaver Street lease was less than the amount of Manhattan’s Best’s tax assessments. Accordingly, it is determined that petitioner failed to establish that the liability asserted exceeded the maximum amount of liability that could transfer with the assets.

The subject notice of determination is presumptively correct (*see Matter of Tavalacci v State Tax Commn.*, 77 AD2d 759, 760 [3d Dept 1980]; *see also Matter of Hammerman*, Tax Appeals Tribunal, August 17, 1995). The burden rests with petitioner to show by clear and convincing evidence that the methodology utilized by the Division was unreasonably inaccurate or that the amount of tax assessed was erroneous (*see Matter of Meskouris Bros. v Chu*, 139 AD2d 813, 815 [3d Dept 1988]; *see also Matter of Surface Line Operators Fraternal Org. v*

Tully, 85 AD2d 858, 859 [3d Dept 1981]). Petitioner failed to establish a fair market value for any of the assets transferred to it. In the absence of appropriate substantiation for its position, it failed to meet its burden of proof that the fair market value of the assets transferred was lower than the amount assessed. As such, petitioner has failed to meet its burden of proof in challenging the notice of determination.

H. Petitioner argues that by not having the tax compliance agent who performed the audit testify the Division has violated the Confrontation Clause of the Sixth Amendment of the United States Constitution. However, the Confrontation Clause provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him” (US Const, 6th Amend). Accordingly, the Confrontation Clause applies only to criminal prosecutions (*see Haigh v Commr.*, TC Memo 2009-140, citing *United States v Ray*, 530 F3d 666, 668 [8th Cir 2008]). The case at hand is not a criminal prosecution and, therefore, petitioner’s argument is misplaced.

Furthermore, it is noted that petitioner could have independently subpoenaed the tax compliant agent who performed the audit (*see* 20 NYCRR 3000.7 [a]), but failed to do so.

I. Petitioner argues that the rules of evidence, including the hearsay and document authenticity rules, were not applied in the case at hand.

Section 306 of the State Administrative Procedure Act (SAPA) states, in part:

“1. Unless otherwise provided by any statute, agencies need not observe the rules of evidence observed by courts....

2. All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference” (SAPA § 306 [1], [2]).

Section 3000.15 (d) (1) of the Tax Appeals Tribunal's Rules of Practice and Procedure, which addresses administrative hearings, states, in part:

“(d) Conduct of hearing.... Technical rules of evidence will be disregarded to the extent permitted by the decisions of the courts of this State, provided the evidence offered appears to be relevant and material to the issues” (20 NYCRR 3000.15 [d] [1]).

It is within the discretion of the administrative law judge to apportion whatever weight is appropriate to hearsay evidence (*see Matter of Alselmi*, Tax Appeals Tribunal, March 24, 2021; 20 NYCRR 3000.15 [d] [1]).

Petitioner's attempts to strictly apply the rules of evidence in this matter are also misplaced.

J. The original notice did not contain interest and penalty since those are not transferred to a purchaser in a bulk sale transaction. However, interest and penalties do accrue on petitioner's derivative tax liability from the date five days after the date of issuance of the notice of determination and demand for payment (*see* Tax Law §§ 1141 [c]; 1145 [a]; *see also* 20 NYCRR § 537.4 [e]). Petitioner did not challenge the underlying calculations of petitioner's derivative bulk sales tax liability or the associated penalties and interest. In this case, the Division appropriately assessed penalties and interest on petitioner's derivative tax liability.

K. The petition of Beaver Street Pizza, LLC, is denied and the notice of determination, dated June 11, 2019, is sustained.

DATED: Albany, New York
May 02, 2024

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE