

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANDREW CARLSON : ORDER
 : DTA NO. 828491
for Revision of Determinations or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 2004 through November 30, 2010. :

Petitioner, Andrew Carlson, filed a petition for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2004 through November 30, 2010.

Petitioner, by his representative, Duke, Holzman, Photiadis and Gresens, LLP (Gary M. Kanaley, Esq., of counsel), brought a motion dated June 19, 2018, seeking summary determination in the above-referenced matter pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. On August 20, 2018, the Division of Taxation, by Amanda Hiller, Esq. (Stephanie M. Scalzo, Esq., of counsel) submitted an affirmation, together with affidavits and accompanying documents in opposition to the motion and filed a cross-motion for summary determination. On September 17, 2018, petitioner filed papers in opposition to the Division of Taxation's cross-motion. The 90-day period for issuance of this determination commenced on September 19, 2018. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUES

I. Whether the Division of Taxation properly issued notices of determination to petitioner by electronic means.

II. Whether a bulk sale purchaser's responsible person can be held liable for the unpaid sales tax debts of the seller when the purchaser fails to comply with the bulk sale filing notifications.

III. Whether petitioner or the Division of Taxation can establish the purchase price or fair market value of business assets transferred via bulk sales, thus allowing for a determination in either's favor on a motion or cross-motion for summary determination.

FINDINGS OF FACT

1. This matter proceeds by way of a motion for summary determination filed by petitioner and a cross-motion for summary determination filed by the Division. In his motion for summary determination petitioner, Andrew Carlson, claims that notices of determination issued to him are invalid on the basis that: (a) he did not consent to receive notices of determination through electronic means of communication; (b) the Tax Law does not authorize the assessment of a bulk sale purchaser's responsible persons; and (c) his liability should be zero because the term "fair market value" as used in the context of Tax Law § 1141 (c) does not account for liens and encumbrances on property. The motion is accompanied by the affirmation of petitioner's representative, Gary Kanaley. Mr. Kanaley provides a synopsis of his version of the facts as garnered from his review of documents presented at a conciliation conference in the Division of Taxation's Bureau of Conciliation and Mediation Services (BCMS) and upon speaking with petitioner's unnamed representatives. Mr. Kanaley does not profess to have first hand

knowledge of any of the purported facts contained in his affirmation, nor are any exhibits attached thereto, including affidavits from individuals with first hand knowledge.

2. In opposition to petitioner's motion, the Division submitted the affirmation of its representative Stephanie Scalzo, along with numerous exhibits, including the affidavit of Monica Amell. The Division opposes petitioner's motion and has cross-moved for summary determination seeking judgment in its favor on the issues raised by petitioner in his motion for summary determination.

3. On November 20, 2012, Best Wings LLC (Best Wings) filed two notifications of sale, transfer, or assignment in bulk, form AU-196.10 (bulk sale notifications), reporting that it purchased the business assets of The Village Casino (the Casino) from Carlson Food Enterprises, Inc. (Carlson) and the business assets of the Wing City Grille (Wing City) from Car-Kid Development, Inc. (Car-Kid). Both bulk sale notifications were signed by petitioner as managing member of Best Wings.

4. The Casino bulk sale notification listed a total sales price of \$249,500.00 and indicated that Best Wings assumed liabilities of \$28,000.00 and paid sales tax of \$2,921.75 on equipment. This bulk sale notification indicated that sale occurred on May 4, 2008.

5. The Wing City bulk sale notification listed a total sales price of \$145,700.00 and indicated that Best Wings assumed liabilities of \$140,000.00 and paid sales tax of \$4,437.65 on equipment. This bulk sale notification indicated that the sale occurred on June 13, 2008.

6. On February 11, 2013, the Division issued a notice of determination to Best Wings asserting tax due in the amount of \$328,391.53 representing the outstanding sales tax owed to the Division by Carlson. The notice informed Best Wings that it was liable as a bulk sale

purchaser for taxes determined to be due in accordance with sections 1141 (c) and 1138 (a) (3) of the Tax Law. Also on February 11, 2013, the Division issued a notice of determination to Best Wings as bulk sale purchaser for \$261,991.66, the outstanding sales tax owed by Car-Kid to the Division.

7. On December 19, 2012, Professional Hospitality LLC (Professional) filed a bulk sale notice reporting that it purchased the business assets associated with the Casino from Best Wings in a bulk sale which took place January 1, 2011. The total sales price was listed as \$249,500.00. The bulk sale notice indicated that Professional assumed liabilities of \$28,000.00 and paid sales tax of \$2,921.75 on equipment. The bulk sale notice was signed by petitioner as managing member of Professional. Professional's reported mailing address, telephone number, trade name, and business location is identical to that of Best Wings d/b/a the Casino.

8. Also on December 19, 2012, Great Food Great Fun LLC (Great Food) reported that it purchased the business assets associated with Wing City from Best Wings in a bulk sale which took place on February 10, 2012, for a total sales price of \$145,700.00. This bulk sale notice indicated that Great Food assumed liabilities of \$140,000.00 and paid sales tax of \$4,437.65 on equipment. This bulk sale notice was signed by petitioner as managing member of Great Food. Great Food's reported mailing address, telephone number, trade name, and business location is identical to that of Best Wings d/b/a Wing City.

9. On February 4, 2013, the Division issued a notice of claim to purchaser to both Professional and Great Food.

10. On March 14, 2013, the Division issued a notice of determination to Professional as bulk sale purchaser and a notice of determination to Great Food, as bulk sale purchaser, for the sales tax owed by Best Wings to the Division. Each notice asserted tax due of \$640,172.97.

11. Best Wings filed requests for conciliation conferences with BCMS appealing the notices issued to it referred to in finding of fact 6. On June 21, 2013, Best Wings executed two consents settling these notices. Both consents were signed by petitioner on behalf of Best Wings.

12. On July 2, 2015, the Division issued notice of determination L-043291618 to petitioner, as a responsible person of Great Food, asserting \$395,200.00 for sales taxes determined to be due in accordance with Tax Law §§ 1138 (a), 1131 (1), and 1133.

13. On July 9, 2015, the Division issued notice of determination L-043328199 to petitioner, as a responsible person of Professional, asserting tax due of \$395,200.00, for sales taxes determined to be due in accordance with Tax Law §§ 1138 (a), 1131 (1), and 1133.

14. On March 27, 2017, the Division reduced Professional's sales tax assessment to \$249,500.00 and Great Food's sales tax assessment to \$145,700.00.

15. On July 24, 2017, both Professional and Great Food filed for Chapter 11 bankruptcy. The bankruptcy filings were signed by petitioner as sole member of both Professional and Great Food.

16. By conciliation order dated September 15, 2017, BCMS reduced the notices of determination in accordance with amounts consented to by Best Wings, and the corresponding adjustments made to the assessments of Professional and Great Food, as follows: (a) as a responsible person of Professional, notice L-043328199 was reduced to \$249,500.00 and (b) as a responsible person of Great Food, notice L-043291618 was reduced to \$145,700.00.

17. The notices of determination at issue herein (notices L-043291618 and L-043328199) were not issued to petitioner via certified mail but electronically. The Division submitted the affidavit of Monica Amell which sets forth its general practice and procedure for the processing and delivery of taxpayer specific electronic communications, including electronic statutory notices. Ms. Amell has been Team Lead of the External Communication Unit of the Division since June 2013. As part of Ms. Amell's duties, she manages the processing and delivery of taxpayer specific electronic communications. Taxpayers may open an Online Services (OLS) account and request electronic communication of their tax-related documents from the Division. The OLS system allows a taxpayer to authorize the Division to send an email alert to their chosen external email address advising the taxpayer to check their OLS account for any message in the Message Center section. The Message Center is a secure section within OLS where a taxpayer can view electronic correspondence from the Division. Taxpayers can choose which email service they would like to receive through OLS by clicking on check boxes in the Manage Email section of their OLS account, with options including emails for bills and related notices and other notifications. The Division acknowledges when an online account has been created by sending correspondence to the taxpayer confirming the taxpayer's creation of an OLS account.

18. Petitioner opened an OLS account with the Division on July 23, 2012 under his name, taxpayer identification number, and user identification number, using a Logon ID of "a***5***" and an email address of "f**f****@***.com." Petitioner's OLS account for this user identification number and email address remains active to date.¹

¹ The user identification and email address are partially redacted to preserve confidentiality.

19. On July 26, 2012, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account on July 23, 2012 under the username of “a***5***.”

20. The Division’s OLS Account Terms and Conditions for Individuals provides that in consideration of a taxpayer’s use of an OLS account, the taxpayer agrees that by providing electronic communication authorization, the taxpayer agrees to receive the indicated tax-related documents and communications electronically and agrees that the Division will not use physical (postal) mail to provide the communications. The Division instead sends an email that alerts the taxpayer to sign on to his or her OLS account to access the information. The taxpayer further agrees to provide an updated email address and periodically check for new account activity.

21. In the OLS system, an account holder must affirmatively opt-in to receive tax bills and related statutory notices via electronic communication by checking a box labeled “Bills and Related Notices - Get emails about your bills.” The account holder must then click on the “Save” button to register and record the account holder’s authorization to receive same electronically. Immediately above the save button is an acknowledgment section which provides:

“By selecting one or more of the choices above and clicking **Save** (emphasis in original):

- I agree to receive tax bills and similar account notices electronically at my online services account.
- I understand that I will no longer receive these communications via physical (postal) mail.
- I understand that my right to challenge bills received through my online services account is the same as that for paper bills.”

22. On November 22, 2013, petitioner affirmatively opted to receive tax bills and related statutory notices electronically by checking the box labeled “Bills and Related Notices - Get emails about your bills” in his OLS account and saving that authorization.

23. The Division's Advanced Function Presentation (AFP) system initiates billing printouts. The AFP system uses the Division's DZ4010Z Retrieve View Data (RVD) program. The RVD program verifies email eligibility based on the Internal Taxpayer ID, tax type and billing form. The RVD program uses Internal Taxpayer ID, User ID, email address, and email eligibility to determine authorization to receive electronic communications through OLS.

24. When a statutory notice is scheduled to be issued to a taxpayer under this procedure, the AFP system generates a mail file of the electronic statutory notices. The AFP system stores the file of the electronic statutory notices and the verified email address from the RVD program until the issuing date is reached. On the issuing date, email alerts are sent to the external email address associated with the recipient's OLS account and the message is displayed in the OLS Message Center. The email alerts are delivered through a third-party vendor, formerly GOVDelivery (now Granicus). GOVDelivery provides the Division delivery status information that the Division stores and reports, advising of every email sent on behalf of the Division, with a status of "D" for delivered or "U" for undelivered.

25. The statutory notice is stored in a message file until the issuing date. On the issuing date, the notice is posted on a secure database for viewing by the taxpayers in their Message Center upon logging in to the OLS. The statutory notice is viewable in the Message Center section of the taxpayer's OLS account.

26. On July 2, 2015 and July 9, 2015, the Division posted messages stating, "You have a new liability due" to petitioner's OLS account and sent corresponding email alerts to petitioner's email address of f**f****@***.com. Also on July 2, 2015 and July 9, 2015, the Division posted

notices of determination L-043291618 and L-043328199, respectively, to petitioner's OLS account, which were stored in a secure database.

27. The Division maintains delivery status information of email alerts in the Delivery Details by Template ID (Delivery Details). The Delivery Details relevant to the present case indicate that the Division sent email alerts to petitioner at his email address of f**f****@***.com on July 2, 2015, with APL Tracking IDs MG070220157788064, and on July 9, 2015 with APL Tracking IDs MG070920157922858. The Delivery Details indicate the status of the email sent to petitioner on July 2, 2015 and July 9, 2015 as "D" (delivered).

28. Ms. Amell avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division's External Communication Unit on July 2, 2015 and July 9, 2015.

29. In reply to the Division's cross-motion for summary determination, petitioner contends that the Division failed to prove that petitioner consented to receiving statutory notices electronically and further claims he has no recollection of creating an OLS account much less authorizing electronic service of bills. No affidavit was submitted by petitioner in this regard. Petitioner also questions why other collection notices were sent to him via United States Postal Service Mail and the first notices sent to him from the Division via email were the statutory notices at issue herein. Petitioner also submitted revised notifications of bulk sale indicating that the sales price for the transfers from Carlson and Car-Kid of the Casino and Wing City, respectively to Best Wings was \$0.00 and the sales price on the subsequent transfer of by Best Wings to Professional and Great Food was also \$0.00.

CONCLUSIONS OF LAW

A. 20 NYCRR 3000.9 (b) (1) states the following:

“[a]fter issue has been joined . . . any party may move for summary determination. Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party’s favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party.”

B. Section 3000.9 (c) of the Tax Appeals Tribunal’s Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of

material questions of fact on which he rests his claim” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1ST Dept 1992], citing *Zuckerman*).

C. At the outset, it is determined that petitioner has failed to make a prima facie showing that summary determination as a matter of law is warranted in his favor. It is well settled that a “bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing” (*Zuckerman* at 563). Furthermore, an affirmation by an attorney who is without the requisite knowledge of the facts has no probative value (*see Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 [1ST Dept 1981] *aff’d* 54 NY2d 715 [1981]). Thus, petitioner’s motion for summary determination must fail.

D. Nonetheless, the Division in its cross-motion has tendered sufficient evidence to make a ruling on two of the three issues presented for resolution. First, addressing whether the Division properly issued notices of determination to petitioner, it is determined that proper issuance was effectuated. While Tax Law § 1138 requires the mailing of a notice of determination by certified or registered mail to the taxpayer’s last known address, Tax Law § 35 provides for an alternative method of issuing a notice by means of electronic communication.

Specifically, Tax Law § 35 provides as follows:

“Notwithstanding any other provision of New York state law, where the department has obtained authorization of an online services account holder, in such form as may be prescribed by the commissioner, the department may use electronic means of communication to furnish any document it is required to mail per law or regulation. If the department furnishes such document in accordance with this section, department records of such transaction shall constitute appropriate and sufficient proof of delivery thereof and be admissible in any action or proceeding.”

E. In accordance with Tax Law § 35, the Division properly furnished the notices of determination and estimated determination to petitioner by use of electronic means of communication. The Division has established that it obtained petitioner's authorization, as an OLS account holder, to furnish such notices electronically. Specifically, the Division has proven, through the affidavit of Monica Amell and the documentary evidence attached thereto, its standard procedure for establishing OLS accounts, obtaining authorization from OLS account holders for electronic communications, and sending notices electronically to OLS account holders.

F. The Division has also established through the affidavit and documentary evidence that the standard procedure was followed in this particular instance (*see Matter of Perez*, Tax Appeals Tribunal, November 12, 2015). The evidence shows that petitioner established an OLS account on July 23, 2012 under his name and identification number, using a username of "a***5***" and an email address of "f**f***@***.com." On July 26, 2012, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account under the username of "a***5***." The evidence also establishes that on November 22, 2013, petitioner authorized the Division to send notices electronically by checking the box within his OLS account, which indicated his agreement to receive email regarding bills, notices and other notifications. Pursuant to the petitioner's authorization for electronic communication, petitioner agreed to receive the indicated documents electronically rather than by mail.

G. The Division has also offered proof sufficient to establish that the statutory notices were furnished to petitioner by means of electronic communication on July 2, 2015 and July 9, 2015, to his OLS account with alerts sent to his email address. Specifically, the Division's

records show that two email alerts were sent to petitioner's email address and the two subject notices were posted to petitioner's OLS account and stored in his OLS Message Center on July 2, 2015 and July 9, 2015. The email alerts sent to petitioner's email address advised him that "you have a new liability due," alerting him to view the statutory notices posted in the Message Center of his OLS account. The Division's records further show the delivery status of these emails as "D" (delivered). Based on the foregoing, it is determined that the Division has presented sufficient records to establish that it furnished the subject notices of determination on July 2, 2015 and July 9, 2015, respectively, by use of electronic means of communication pursuant to Tax Law § 35, and that the records presented constitute appropriate and sufficient proof of delivery thereof (*id.*). Petitioner's unsworn claims to the contrary are insufficient to raise a triable issue of fact. Petitioner has presented no evidence to counter the Division's evidence submitted in its cross-motion that the notices of determination were in fact issued electronically on July 2, 2015 and July 9, 2015. Accordingly, summary determination is granted in the Division's favor on this issue.

H. Next, petitioner's argument that the Division is not authorized to issue a notice of determination for the seller's outstanding sales tax liabilities to the responsible persons of a purchaser who fails to comply with the bulk sale notifications, is rejected as a matter of law. As background, 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 Liqs. v Evsam Parking*, 48 NY2d

503, 507 [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* 20 NYCRR 537.0 [c] [3]). 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* 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]). In this case the Division asserted tax against petitioner as a responsible person of both Professional and Great Food. The tax in question is derived from the successive transfers of the business assets of Wing City and the Casino from Carlson and Car Kid, respectively to Best Wings and then the transfer of the same assets from Best Wings to Professional and to Great Foods. Petitioner was the managing member of both Professional and Great Foods and, as such, is a person responsible under Tax Law § 1133 (a) (*see Matter of Santo*, Tax Appeals Tribunal, December 23, 2009). Petitioner, however, disputes that a responsible person can be held liable for the bulk sale transferor's sales tax. Petitioner is incorrect as a matter of law.

I. Section 1133 (a) of the Tax Law provides that “. . . every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article.” Best Wings failed to comply with the bulk sale notification prior to the purchase of the Casino and Wing City. Likewise, neither Professional nor Great Food complied with the bulk sale notification prior to the purchase of the Casino and Wing City from Best Wings. Petitioner, as a responsible person of both Professional and Great Food (as well as

Best Wings) was under a duty to act with respect to compliance of any requirement of article 28, including the bulk sale filing notifications. Accordingly, petitioner became personally liable for these outstanding tax liabilities (*see Matter of Laschever*, Tax Appeals Tribunal, March 23, 1989; *Matter of J & L Home Improvement Corp.*, Tax Appeals Tribunal, August 1, 1991). Thus, it is determined that summary determination is granted in the Division's favor on this issue.²

J. As noted in Conclusion of Law H, the liability of the purchaser in a bulk sale 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 [a] [1]). In his motion, petitioner seeks cancellation of the notices because no consideration changed hands on the respective transfers and further claims that the fair market value of the assets transferred was zero. By contrast, the Division in opposition to petitioner's motion and in support of its cross-motion relies upon the sales prices set forth by Professional and Great Food in their respective bulk sales notification to seek a determination in its favor. Other than the bulk sale notifications filed by Best Wings, Professional and Great Foods, the record is devoid of any details of the transactions, including contracts, etc. It is clear that the amount asserted against petitioner is based upon the sales prices

²In the alternative, the Division in its cross-motion asserted that the corporate veil of both Professional and Great Food to hold petitioner personally liable for the taxes owed by these entities. As the Division acknowledges, Tax Law § 1133 (a) specifically makes petitioner personally liable for the sales tax liabilities of Professional and Great Food. Accordingly, imposing liability upon petitioner under the corporate veil theory is unnecessary. To the extent that the Division wishes to pursue this theory, that part of the Division's cross-motion is denied as there is not enough of a factual record before the administrative law judge to make a determination on this issue. "[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Here while the record establishes petitioner was the sole member of both Professional and Great Food, there is nothing to establish these entities were used to commit a fraud or wrong against the Division.

listed on the bulk sale notifications filed. Nonetheless, there are clearly facts in dispute as to whether any consideration changed hands or the fair market value of the transferred assets. Based upon this lack of evidence in the record, petitioner's and the Division of Taxation's motions for summary determination on this issue are denied.

K. Petitioner's motion for summary determination is denied; the Division of Taxation's cross-motion is granted in accordance with conclusions of law A, B, C, D, E, F, G, H and I, but otherwise denied; and this matter will be scheduled for a hearing on the remaining issues in due course.

DATED: Albany, New York
December 13, 2018

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE