

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

58-01 JUNCTION GROCERY CORP. : DECISION

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, 1979 :
through November 30, 1983.

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on November 23, 1988 concerning the petition of 58-01 Junction Grocery Corp., 58-01 Junction Boulevard, Rego Park, New York 11373 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, 1979 through November 30, 1983 (File No. 800953). Petitioner appeared by Sanford B. Goldberg, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Both parties filed briefs on exception. Oral argument was heard on September 27, 1989.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner as a purchaser in a bulk sale who failed to comply with the notice requirements of Tax Law § 1141(c) is liable for penalty and interest asserted by the Division against the seller.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

On January 13, 1984, the Division of Taxation issued two notices of determination and demands for payment of sales and use taxes due to petitioner, 58-01 Junction Grocery Corp.,

covering the period December 1, 1979 through November 30, 1983 for taxes determined to be due from Beit Najjar, Inc. ("seller") and which represented petitioner's liability as a purchaser in a bulk sale from the seller. The notices assessed tax, penalty and interest as follows:

- (a) For the period December 1, 1979 through May 31, 1983, \$305,086.65 in tax, \$67,575.61 in penalty and \$88,349.98 in interest, for a total due of \$461,007.24.
- (b) For the period June 1, 1983 through November 30, 1983, \$34,050.49 in tax, \$2,409.04 in penalty and \$1,025.01 in interest, for a total due of \$37,484.54.

On November 2, 1984, the Division issued to petitioner two notices of assessment review reducing petitioner's liability based on an adjustment of the liability of the seller:

- (a) For the period December 1, 1979 through May 31, 1983, adjusted tax due \$219,680.37, adjusted penalty and/or interest \$153,939.52, total due \$373,619.89.
- (b) For the period June 1, 1983 through November 30, 1983, adjusted tax due \$16,966.43, adjusted penalty and/or interest \$5,001.59, total due \$21,968.02.

The Audit of Beit Najjar, Inc.

An examination of the seller's books and records by the Division was scheduled to commence on February 3, 1983. The audit, however, was postponed for approximately six months at the request of the seller's accountant. The auditor did, however, visit the store on February 24, 1983 and obtained sample selling prices of taxable items. The examination of the books and records eventually was commenced on August 8, 1983. The auditor found the books and records to be inadequate and incomplete. Accordingly, sales were reconstructed using a markup method based on the test months of August 1982 and February 1983. The seller executed consents extending the period of limitation on assessment for the period December 1, 1979 through November 30, 1980 to March 20, 1984. The audit ultimately resulted in assessments issued to the seller on January 13, 1984 in the same amount as those issued to petitioner. Said assessments were also reduced by notices of assessment review similar to those issued to petitioner on November 2, 1984.

The Bulk Sale

On October 17, 1983, the Division received a Notification of Sale, Transfer or Assignment in Bulk pertaining to the sale of the assets of a supermarket located at 58-01 Junction Boulevard, Rego Park, New York. The purchaser was said to be 58-01 Junction Grocery Corp. and the seller was named as Beit Najjar, Inc. The selling price of the assets sold was stated to be as follows:

Furniture, fixtures, etc.		\$ 10,000.00
Motor vehicles	-0-	
Inventory		180,000.00
Real estate (leasehold)	-0-	
Good will and other assets		<u>210,000.00</u>
Total selling price		\$400,000.00

The document was signed by Edilio Flores, president of petitioner, and was dated October 10, 1983. It was mailed by certified mail, return receipt requested, and the envelope in which it was enclosed was postmarked October 13, 1983.

On October 24, 1983, the Division sent a Notice of Claim to Purchaser to petitioner in care of its attorneys, the address listed in the notification of sale described in Finding of Fact "4". This document was issued to place petitioner on notice of a potential New York State claim for sales and use taxes owed by the seller.

Also on October 24, 1983, the Division issued a Notice to Escrow Agent advising the escrow agent (seller's attorneys) of a possible claim for New York State sales and use taxes.

On November 22, 1983, the Division issued a Notice to the Seller to Beit Najjar, Inc. advising it of a possible claim for sales and use taxes and advising it also that it would be contacted by a Division district office with respect to an examination of its books and records.

When petitioner learned of the potential tax liability, it stopped payment on the notes issued to the seller.

The assessments against the seller, as modified by the notices of assessment review, were sustained by the State Tax Commission in a decision dated February 24, 1987 and the seller commenced an Article 78 proceeding for review of said decision. The Article 78 proceeding is currently pending in the Appellate Division, Third Department.

OPINION

Tax Law § 1141(c) provides, in relevant part, that whenever a purchaser fails to comply with the notice provisions of the section that the purchaser "shall be personally liable for the payment to the state of any such taxes theretofore or thereafter determined to be due to the state from the seller . . .". The Division, by regulation, has interpreted this liability to include penalty and interest imposed on the sales tax for which the seller is liable. The relevant provisions of the regulations are set forth below.

20 NYCRR 537.4(e) provides as follows:

"The liability of the purchaser, transferee or assignee is assessed and enforced in the same manner as the liability for any tax imposed by article 28 of the Tax Law, and includes penalty and interest imposed on the sales tax for which the seller is liable."

20 NYCRR 537.4(f) provides as follows:

"If the purchaser, transferee or assignee establishes that his failure to comply with the provisions of section 537.3 of this Part was not willful or with intent to evade or defeat the tax, the Tax Commission may waive penalties and as much of the interest as it is authorized to waive pursuant to law. Any such waiver with respect to the purchaser, transferee or assignee, however, does not act as a waiver on behalf of the seller, transerrer or assignor."

20 NYCRR 537.3, referred to in 20 NYCRR 537.4(f), sets forth the rights and obligations of purchasers, transferees and assignees. It provides, in pertinent part:

"(a)(1) A purchaser, transferee or assignee of business assets in a bulk sale must give timely notice to the Tax Commission concerning the bulk sale as provided for in paragraph (c) of section 1141 of the Tax Law, and Section 537.2 of this Part."

The Administrative Law Judge determined that the regulations clearly distinguish between bulk sellers and bulk purchasers with respect to waiver of penalties and statutory interest. The Administrative Law Judge held that the bulk seller must show that failure to pay over tax was due to reasonable cause (20 NYCRR 536.5[a]), while the bulk purchaser need only show that his failure to comply with the bulk sale requirements (20 NYCRR 537.3) was "not willful or with intent to evade or defeat the tax" (20 NYCRR 537.4[f]). To meet this standard, the Administrative Law Judge found that petitioner need not show that the nonpayment of the liability

was due to reasonable cause, but need only show that, in failing to timely file the notice of sale, it did not act consciously and voluntarily with the knowledge that taxes owing would not be paid. The Administrative Law Judge concluded that petitioner met the standard in this case and that penalty should be waived.

On exception the Division relying on the decision of this Tribunal in the Matter of Giovanni Velez (Tax Appeals Tribunal, May 26, 1988) asserts that the Administrative Law Judge erred and that 20 NYCRR 537.4(f) relates only to the abatement of penalties for failure to comply with the bulk sales provisions of the Tax Law and not to the purchaser's derivative sales tax liability from the seller.

We affirm the determination of the Administrative Law Judge, to the extent it cancelled penalty, based on the decision of the Appellate Division in the Matter of Giovanni Velez v. Division of Taxation of the Department of Taxation and Finance (App Div, 3d Dept, Nov. 9, 1989, Mahoney, J.) in which the court modified the decision of this Tribunal and held that the purchaser in a bulk sales transaction is liable only for the principal amount of tax asserted against the seller and not for penalty and interest asserted against the seller. In reaching this conclusion, the court determined that the Division of Taxation had acted beyond the purview of the language of section 1141(c) of the Tax Law in promulgating regulations which placed liability for such interest and penalty on the purchaser. Since Velez clearly prohibits the collection from the purchaser of both the penalty and interest assessed against the seller, we modify the Administrative Law Judge's determination to the extent it held that any interest due from the seller could be collected from petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is in all respects denied;
2. The determination of the Administrative Law Judge is modified to the extent that it allowed minimum interest due from the seller to be assessed against petitioner, but the determination is in all other respects affirmed;

3. The petition of 58-01 Junction Grocery Corp. is granted to the extent indicated in paragraph "2" above and in conclusions of law "G" and "I" of the Administrative Law Judge's determination but is otherwise denied; and

4. The Division of Taxation shall modify the notices of determination issued on January 13, 1984 and modified by the notices of assessment review issued on November 2, 1984 as directed in paragraph "3" above but such notices are otherwise sustained.

DATED: Troy, New York
January 4, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner