

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GIOVANNI VELEZ	:	DECISION
	:	DTA NO. 802908
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,	:	
1982 through November 30, 1984.	:	

Petitioner, Giovanni Velez, 514 West 207th Street, New York, New York 10034, filed an exception to the determination of the Administrative Law Judge issued on October 1, 1987 with respect to his petition for revision of a determination or for refund of sales and use taxes under Article 28 and 29 of the Tax Law for the period September 1, 1982 through November 30, 1984 (File No. 802908). Petitioner appeared by Fotopoulos, Rosenblatt, Green, Frasciello, O'Connor & Gall, P.C. (Dennis J. Gall, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq. and Lawrence Newman, Esq., of counsel).

The Division filed a brief in opposition to the exception. Oral argument at the petitioner's request was held on February 16, 1988.

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

ISSUE

Whether the petitioner, as a bulk sales purchaser under section 1141(c) of the Tax Law, is liable for penalty and interest as well as for the taxes due from the bulk sales seller.

FINDINGS OF FACT

We find the facts in this matter as stated in the determination of the Administrative Law Judge and such facts are incorporated herein by this reference.

In summary, on September 26, 1984 petitioner purchased a grocery store known as Los Panchos Grocery located at 514 West 207th Street, New York, New York. Petitioner did not notify the Division of Taxation of the purchase ten days before taking possession of the store as required by Tax Law section 1141(c). Petitioner filed a Notification of Sale, Transfer or Assignment in Bulk with the Division on July 9, 1985 which indicated that he had purchased the store. On July 11, 1985 the Division issued a notice to the escrow agent that: the State might have a possible claim against the seller of the business for sales taxes; no funds should be distributed until the Division had determined the seller's liability, if any; payment of such liability had been made to the State; and the Division had authorized the agent to release the funds or property in his possession¹.

On October 7, 1985 the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner in the amount of \$22,500.00 plus penalty of \$4,975.00 and interest of \$5,493.60 for a total of \$32,968.60 for the period September 1, 1982 through November 30, 1984. The taxes due were estimated because the seller, Mr. Munoz, did not provide any books or records which could be audited.²

¹ The determination of the Administrative Law Judge indicates that the Division issued a Notice to escrow agent Weisberg and Weisberg. However, the record at hearing does not indicate when the escrow fund was established. At oral argument petitioner's representative asserted the escrow fund was established on September 26, 1984, the date of the closing.

³ The Division issued a "Notice to Seller" to Mr. Munoz on August 26, 1985 indicating he would be contacted by the Division for an examination of his books and records.

At the hearing the Division and the petitioner agreed that the assessment should be reduced to \$11,272.82 in tax and further agreed that the only remaining issue to be considered is whether penalty should be reduced or abated.

OPINION

The Administrative Law Judge determined that by failing to comply with the provisions of section 1141(c) the petitioner derivatively became liable for the seller's sales tax liability, including the seller's liability for penalty and interest. We affirm the determination of the Administrative Law Judge in its entirety.

Petitioner argues that the plain reading of Tax Law section 1141(c) indicates that the purchaser is liable only for taxes and not penalty and interest and that by asserting interest and penalty the Division of Taxation has exceeded its statutory authority.

The Division of Taxation, relying on Tax Law sections 1131(3) and 1141(c) and 20 NYCRR 537.4(a) argues that the liability for taxes includes interest and penalties.

Tax Law section 1141(c) provides, in part, as follows:

"Whenever a person required to collect tax shall make a sale . . . of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser . . . shall at least ten days before taking possession of the subject of said sale . . . notify the tax commission . . . of the price, terms and conditions thereof whether or not the seller . . . has represented to, or informed the purchaser, . . . that he owes any tax pursuant to this article, and whether or not the purchaser . . . has knowledge that such taxes are owing, and whether any such taxes are in fact owing."

In brief, there is an absolute requirement on a bulk purchaser to provide the statutory notification.

Section 1141(c) provides further in pertinent part that:

"Whenever the purchaser . . . shall fail to give notice to the tax commission as required by the preceding paragraph, or whenever the tax commission shall inform the purchaser . . . that a possible claim for such tax or taxes exists, any sums of money . . . or

other consideration, which the purchaser . . . is required to transfer over to the seller . . . shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller . . . and the purchaser . . . is forbidden to transfer to the seller . . . any such sums of money . . . to the extent of the amount of the state's claim. Within ninety days of receipt of the notice of sale . . . from the purchaser . . . the tax commission shall give notice to the purchaser . . . and to the seller . . . of the total amount of any tax or taxes which the state claims to be due from the seller . . . to the state, and whenever the tax commission shall fail to give such notice to the purchaser . . . and the seller . . . within ninety days from receipt of notice of sale . . . such failure will release the purchaser . . . from any further obligation to withhold any sums of money . . . or other consideration, which the purchaser . . . is required to transfer over to the seller . . . For failure to comply with the provisions of this subdivision the purchaser . . . shall be personally liable for the payment to the state of any such taxes theretofore or thereafter determined to be due the state from the seller . . . except that the liability of the purchaser . . . shall be limited to an amount not in excess of the purchase price or fair market value of the business assets sold . . . to such purchaser . . . which ever is higher, and such liability may be assessed and enforced in the same manner as the liability for tax under this article." (Emphasis added.)

The purpose of section 1141(c) is twofold: (1) to provide the Division of Taxation with adequate time to determine whether there are any taxes due the State from the seller of a business prior to the consummation of the sale; and (2) to preserve the Division's ability to collect any of the seller's liability from the consideration for the assets of the business being transferred. The purpose is accomplished by requiring the purchaser to notify the Division of the proposed sale and by requiring the Division to notify the purchaser and the seller in order to secure its first priority right and lien against the consideration for the business.

Where the purchaser fails to comply with the requirements of section 1141(c), such section provides that he is personally liable for the payment to the State of any taxes determined to be due the State from the seller up to the amount of the purchase price or fair market value of the business assets. The Division of Taxation has adopted regulations that provide that such a purchaser is also liable for penalty and interest for which the seller would be liable (20 NYCRR 537.4[a] and [d]).

Petitioner's argument that purchaser's liability is only for taxes is flawed. Carried to its logical conclusion, this argument means the Division of Taxation is able to collect from the seller, tax, interest and penalties if there is full compliance with the provisions of section 1141(c) by the purchaser, but it can collect only tax if the purchaser fails to comply with section 1141(c). This result is inconsistent with the principles underlying the derivative liability of the purchaser in a bulk sales transaction under section 1141(c). Accordingly, we find the Division's regulations holding the bulk purchaser potentially liable for penalty and interest due from the seller, a correct interpretation of section 1141(c) of the Tax Law.

The courts of this State have not dealt directly with the issue. However, Higgins & McLaughlin v. New York State Tax Commn. (109 AD2d 1029) supports our conclusion in this case. In that case the Tax Commission had assessed penalty and interest due from the seller against the purchaser. The Court, in reviewing the decision of the Tax Commission, held that the penalty should be abated for the period the petitioner/purchaser was seeking a formal review of the tax assessment. By only abating the penalty for that period, the court was upholding it for the prior periods.

The next question is whether and how the petitioner can have the penalty waived. The petitioner's liability is derived from the seller. Accordingly, he is in the same position as the seller to prove that the nonpayment of the liability was due to reasonable cause and not willful neglect. The petitioner in this case offered no proof in this regard. Nor did petitioner offer any evidence with regard to his failure to notify the Division of Taxation of his failure to comply with section 1141(c) of the Tax Law.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Giovanni Velez, is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Giovanni Velez is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on October 7, 1985 is sustained, except to the extent modified by finding of fact "3" of the Administrative Law Judge's determination.

DATED: Albany, New York
May 26, 1988

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner