

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>CORNER QUICK STOP, INC.</b>	:	<b>DECISION</b>
		<b>DTA NO. 822342</b>
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, 2001 through	:	
February 28, 2005.	:	

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Petitioner, Corner Quick Stop, Inc., filed an exception to the determination of the Administrative Law Judge issued on September 2, 2010. Petitioner appeared by Neil M. Gingold, Esq. The Division of Taxation appeared by Mark Volk, Esq. (Robert Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a letter brief in lieu of a formal reply brief. Oral argument, at petitioner's request, was heard on May 11, 2011 in Troy, New York.

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

***ISSUE***

Whether the transactions at issue constituted sales, transfers or assignments in bulk under Tax Law § 1141(c).

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set

forth below.

At issue in this proceeding are some business transactions by and between petitioner, Corner Quick Stop, Inc., (Corner Quick Stop), and Alaskan Oil, Inc., (Alaskan Oil). These business transactions involved closed gas stations/convenience stores located in Wayne and St. Lawrence counties.

Incorporated in 2003, petitioner is a New York corporation solely owned by Cindy Neugebauer. Alaskan Oil is a New York corporation solely owned by Richard Neugebauer, Ms. Neugebauer's husband. Both corporations have the same Skaneateles, New York, business address.

#### The Clyde, New York, Transaction

On November 3, 2006, petitioner agreed to purchase from Alaskan Oil the real property and improvements thereon located at 10329 NYS Route 31 West, Clyde, New York (the Clyde property). Under the terms of the purchase agreement, petitioner agreed to deliver a purchase money bond and mortgage in the amount of \$50,000.00 to Alaskan Oil at the closing. The purchase agreement also provided that the interest rate on the 15-year purchase money mortgage was to be 6%, with monthly installments of \$421.93, "including entire principal and interest." According to the terms of the purchase agreement, the closing was to take place on or about December 29, 2006, and possession of the premises was to be delivered upon transfer of title.

On January 23, 2007, the Sales Tax Desk Audit - Casual Sales Unit of the Division of Taxation received a form ST-130, Business Purchaser's Report of Sales and Use Tax, dated January 19, 2007, from petitioner reporting sales tax due on its \$2,500.00 purchase of business assets located at the Clyde property from Alaskan Oil. Petitioner also remitted \$200.00, the sales

tax reported due, with this report. Ms. Neugebauer signed this report on behalf of Corner Quick Stop.

On February 5, 2007, the Division issued to Corner Quick Stop a letter advising petitioner that the Division had information that a possible bulk sale transaction had occurred between Alaskan Oil, as seller, and petitioner, as purchaser. The letter further advised petitioner that under the Tax Law, a notification of sale, transfer or assignment in bulk form (AU-196.10) is required to be filed ten days prior to the date of sale. As the Division's records indicated that such a notification had not been received, the letter requested that petitioner complete the enclosed Form AU-196.10 and return it within 20 days of the date of the letter.

A Notification of Sale, Transfer or Assignment in Bulk dated February 25, 2007 was received by the Division on February 28, 2007, reporting petitioner's purchase of a convenience store located at the Clyde, New York, property on December 29, 2006 from Alaskan Oil. The notification form reported the total purchase price as \$50,000.00, consisting of tangible personal property in the amount of \$2,500.00 and real estate in the amount of \$47,500.00, and that no funds were escrowed. Ms. Neugebauer signed this notification form on behalf of Corner Quick Stop.

Subsequently, on March 5, 2007, the Division issued a Notice to the Seller to Alaskan Oil requesting payment for open assessments totaling in excess of \$1,000,000.00. A Consolidated Statement of Tax Liabilities, dated March 2, 2007, listing assessments for the period December 1, 2001 through February 28, 2005 was attached to the notice sent to Alaskan Oil.

With respect to Bulk Sales Number 2007000434, the Division issued to petitioner a letter, dated March 5, 2007, advising, in pertinent part, that:

All open sales tax liabilities of the seller Alaskan Oil Inc can be transferred to you as the purchaser in a bulk sale, in accordance with Section 1141(c) of the New York State Sales and Use Tax Law. Currently, Alaskan Oil Inc's sales tax file shows open sales tax liabilities in excess of \$50,000.00. We are asking for a prompt payment by Alaskan Oil Inc or payment from escrow funds which will prevent this liability from being transferred to you.

Your check for the seller open sales tax liabilities should be made payable to New York State Sales Tax. . . . When full payment is received, release of claim letters will be issued to all interested parties.

#### The Oswegatchie, New York, Transaction

Under the terms of a Purchase Agreement, dated December 13, 2006 and executed by the parties on January 10, 2007, petitioner agreed to purchase the real property and improvements thereon located at 7352 NYS Route 68, Oswegatchie, New York (Oswegatchie property) from Alaskan Oil for \$50,000.00. According to paragraph 2 of this contract, petitioner agreed "to pay the back taxes due on the property as part of the consideration to be paid at the time of closing, or as may be worked out with the taxing authorities, which amount the taxing authorities have indicated amounts to \$16,342.08." Paragraph 2 also required petitioner to deliver a 15-year purchase money bond and mortgage in the amount of \$33,657.92, bearing interest at the rate of 6% and monthly installments of \$284.02, "including entire principal and interest," at the time of closing. According to the terms of the purchase agreement, the closing was to take place on or about January 10, 2007, at which time Alaskan Oil was to transfer to petitioner title to the Oswegatchie property by warranty deed with lien covenant. The terms of the purchase agreement also provided that possession of the premises was to be delivered upon transfer of title.

The closing on the Oswegatchie property took place on January 10, 2007. At that time, Corner Quick Stop, as mortgagor, executed its Note and Mortgage dated January 10, 2007 in favor of Alaskan Oil, as mortgagee, on the Oswegatchie property. The Note and Mortgage

secured a principal debt in the amount of \$33,657.92 and required monthly installments of \$284.02, "including principal and interest." Subsequently, the deed for the Norfolk property, and the Note and Mortgage were recorded in the office of the St. Lawrence County Clerk on January 12, 2007.

On March 2, 2007, the Division received a Business Purchaser's Report of Sales and Use Tax dated February 27, 2007 from petitioner reporting sales tax due on its \$2,500.00 purchase of business assets located at the Oswegatchie property from Alaskan Oil. Petitioner also remitted \$175.00, the sales tax reported due, with this report. A Notification of Sale, Transfer or Assignment in Bulk dated February 26, 2007 was also received on March 2, 2007, reporting petitioner's purchase of a convenience store located at the Oswegatchie property on January 10, 2007 from Alaskan Oil. The notification form reported the total purchase price as \$50,000.00, consisting of tangible personal property in the amount of \$2,500.00 and real estate in the amount of \$47,500.00, and that no funds were escrowed. Ms. Neugebauer signed both the report and the notification form on behalf of Corner Quick Stop. The Division assigned Bulk Sale Number 2007000876 to this transaction.

The Division issued to petitioner a Notice of Claim to Purchaser, dated March 5, 2007, advising of a possible claim for sales and use taxes owed by the seller. This notice directed petitioner not to distribute funds or property to the seller until the seller's liability was determined and either payment was made or the Division authorized the release of such funds or property. The notice further advised petitioner that its failure to comply with its terms would subject petitioner to liability for any sales tax deficiency due from the seller.

On March 7, 2007, the Division issued a Notice to the Seller to Alaskan Oil requesting

payment for open assessments totaling in excess of \$1,000,000.00. A Consolidated Statement of Tax Liabilities, dated March 7, 2007, listing assessments for the period December 1, 2001 through February 28, 2005 was attached to the notice sent to Alaskan Oil.

With respect to Bulk Sale Number 2007000876, the Division issued to petitioner a letter, dated March 7, 2007, advising, in pertinent part, that:

All open sales tax liabilities of the seller Alaskan Oil Inc can be transferred to you as the purchaser in a bulk sale, in accordance with Section 1141(c) of the New York State Sales and Use Tax Law. Currently, Alaskan Oil Inc's sales tax file shows open sales tax liabilities in excess of \$50,000.00. We are asking for a prompt payment by Alaskan Oil Inc or payment from escrow funds which will prevent this liability from being transferred to you.

Your check for the seller open sales tax liabilities should be made payable to New York State Sales Tax. . . . When full payment is received, release of claim letters will be issued to all interested parties.

In a letter dated March 22, 2007, Ms. Neugebauer, on behalf of petitioner, responded to the Division's March 7, 2007 letter regarding Bulk Sale Number 2007000876. Ms. Neugebauer, in her letter, advised that Corner Quick Stop was not able to pay \$50,000.00 towards the Alaskan Oil sales tax liability because petitioner's purchase "included a promissory note to which payments started in Feb 2007." Ms. Neugebauer copied Dick Bryant, petitioner's former representative, on this letter.

#### The Norfolk, New York, Transaction

Under the terms of a Purchase Agreement, dated December 13, 2006 and executed by the parties on January 10, 2007, Corner Quick Stop agreed to purchase the real property and improvements thereon located at 8585 New York State Route 56, Norfolk, New York (Norfolk property) from Alaskan Oil for \$45,000.00. According to paragraph 2 of this contract, petitioner agreed "to pay the back taxes due on the property as part of the consideration to be paid at the

time of closing, or as may be worked out with the taxing authorities, which amount the taxing authorities have indicated amounts to \$23,313.76.” Paragraph 2 also required petitioner to deliver a 15-year purchase money bond and mortgage in the amount of \$21,686.24, bearing interest at the rate of 6% and monthly installments of \$183.00, “including entire principal and interest,” at the time of closing. According to the terms of the purchase agreement, the closing was to take place on or about December 13, 2006, at which time Alaskan Oil was to transfer to petitioner title to the Oswegatchie property by warranty deed with lien covenant. The terms of the purchase agreement also provided that possession of the premises was to be delivered upon transfer of title.

The closing on the Norfolk property took place on January 10, 2007. At that time, Corner Quick Stop, as mortgagor, executed its Note and Mortgage dated January 10, 2007 in favor of Alaskan Oil, as mortgagee, on the Norfolk property. The Note and Mortgage secured a principal debt in the amount of \$21,686.24 and required monthly installments of \$183.00, “including principal and interest.” Subsequently, the deed for the Norfolk property, and the Note and Mortgage were recorded in the office of the St. Lawrence County Clerk on January 12, 2007.

On March 2, 2007, the Division received a Business Purchaser’s Report of Sales and Use Tax dated February 26, 2007 from petitioner reporting sales tax due on its \$2,500.00 purchase of business assets located at the Norfolk property from Alaskan Oil. Petitioner also remitted \$175.00, the sales tax reported due, with this report. A Notification of Sale, Transfer or Assignment in Bulk dated February 27, 2007 was also received on March 2, 2007, reporting petitioner’s purchase of a convenience store located at the Norfolk property on January 10, 2007 from Alaskan Oil. The notification form reported the total purchase price as \$45,000.00,

consisting of tangible personal property in the amount of \$2,500.00 and real estate in the amount of \$42,500.00, and that no funds were escrowed. Ms. Neugebauer signed both the report and the notification form on behalf of Corner Quick Stop. The Division assigned Bulk Sale Number 2007001018 to this transaction.

The Division issued to petitioner a Notice of Claim to Purchaser, dated March 19, 2007, advising of a possible claim for sales and use taxes owed by the seller. This notice directed petitioner not to distribute funds or property to the seller until the seller's liability was determined and either payment was made or the Division authorized the release of such funds or property. The notice further advised petitioner that its failure to comply with its terms would subject petitioner to liability for any sales tax deficiency due from the seller.

On March 21, 2007, the Division issued a Notice to the Seller to Alaskan Oil requesting payment for open assessments totaling in excess of \$1,000,000.00. This notice also requested submission of the corporation's final sales tax return and its books and records pertinent to the accounting of its business operations. A Consolidated Statement of Tax Liabilities, dated March 21, 2007, listing assessments for the period December 1, 2001 through February 28, 2005 was attached to the notice sent to Alaskan Oil.

With respect to Bulk Sale Number 2007001018, the Division issued to petitioner a letter, dated March 22, 2007, advising, in pertinent part, that:

All open sales tax liabilities of the seller Alaskan Oil Inc can be transferred to you as the purchaser in a bulk sale, in accordance with Section 1141(c) of the New York State Sales and Use Tax Law. Currently, Alaskan Oil Inc's sales tax file shows open sales tax liabilities of approximately \$45,000.00. We are asking for a prompt payment by Alaskan Oil Inc or payment from escrow funds which will prevent this liability from being transferred to you.

Your check for the seller open sales tax liabilities should be made payable to New



York State Sales Tax. . . . When full payment is received, release of claim letters will be issued to all interested parties.

In a letter dated March 30, 2007, Ms. Neugebauer, on behalf of petitioner, responded to the Division's March 22, 2007 letter regarding Bulk Sale Number 2007001018 (the Norfolk property). Ms. Neugebauer, in her letter, advised that Corner Quick Stop was not able to pay \$45,000.00 towards the Alaskan Oil sales tax liability because petitioner's purchase "included a promissory note to which payments started in Feb 2007." Ms. Neugebauer copied Mr. Bryant on this letter.

On or about April 2, 2007, Mr. Bryant spoke with the Division regarding petitioner's purchase of the Oswegatchie property from Alaskan Oil. At that time, Mr. Bryant stated that petitioner was paying Alaskan Oil by promissory note and no funds were being held in escrow.

The Division's CARTS - Collection & Enforcement Processing Consolidated Balance Report, Open Assessment Detail for Alaskan Oil, printed on March 5, 2007, indicates that Alaskan Oil had open assessments in the total amount of \$1,755,142.73 for the period December 1, 2001 through February 28, 2005. Specifically, Alaskan Oil had open notice and demand assessments (nonremit and part-remit returns) for the period December 1, 2001 through August 31, 2003 and delinquency assessments (no returns filed) for the period September 1, 2003 through February 28, 2005.

On April 26, 2007, the Division issued to petitioner three notices of determination, L-028428867-7 (relating to the Clyde transaction), L-028428868-6 (relating to the Oswegatchie transaction) and L-028428869-5 (relating to the Norfolk transaction), each asserting sales tax due in the amount of \$50,000.00 for the period ended February 28, 2005. The explanation section of each notice states that "[b]ased on an audit, you owe an additional amount. Refer to the

Computation and Computation Summary Sections for details. We have estimated the amount of tax under section 1138 of the Tax Law.” The computation section of each notice states “[w]e determined that taxes are due from ALASKAN OIL INC (seller name). These taxes are your liability, as purchaser, under section 1141(c) of the Tax Law.”

By Conciliation Order (CMS No. 220175) dated March 18, 2008, Notice L-028428869-5 was recomputed to \$45,000.00 to reflect the stated contractual purchase price in the Norfolk transaction, and the other notices were sustained.

Petitioner filed its petition dated June 12, 2008, claiming that no cash consideration was given for its purchases of the gas stations and that the regulation (20 NYCRR 537.1) excluding from the definition of bulk sale a transfer of assets in satisfaction of a valid lien or mortgage should extend to petitioner’s three transactions. The petition did not contest the amount of tax asserted due in the notices of determination.

At the hearing, petitioner conceded that the transfer of the Clyde business assets constituted a bulk sale under Tax Law § 1141(c), and that the Division’s issuance of Notice of Determination L-028428867-7 against petitioner was proper. However, petitioner continued to contest the Oswegatchie and Norfolk transactions.

As noted above, the Oswegatchie and Norfolk properties contained closed gas stations. The purchase prices for the Oswegatchie and Norfolk business assets were determined by the parties, based in part on the back real property taxes and environmental cleanup concerns. The business assets included in each of the subject transactions consisted of the real property, gas pumps, tanks, a cash register and a convenience store located thereon. Both properties were located in rural areas of St. Lawrence County.

At the hearing, Ms. Neugebauer confirmed that petitioner entered into purchase agreements with Alaskan Oil for each of the transactions at issue. She stated that Corner Quick Stop's purchases of the Oswegatchie and Norfolk properties from Alaskan Oil did not entail any cash down payment, and that the consideration for each of the transfers was assumption of outstanding property taxes and delivery of purchase money mortgages requiring monthly payments. Ms. Neugebauer also confirmed that the closings for Oswegatchie and Norfolk occurred on January 10, 2007 at the offices of Neil Gingold, Esq., the attorney representing both Alaskan Oil and Corner Quick Stop regarding the Oswegatchie and Norfolk transactions. On that date, Corner Quick Stop received and accepted executed deeds, and the corporation executed and delivered purchase money mortgages for both transactions. She further confirmed that the deeds and purchase money mortgages were filed with the Office of the St. Lawrence County Clerk, and that sales tax due on the personalty purchased in both the Oswegatchie and Norfolk transactions was paid by petitioner.

In November 2008, the St. Lawrence County Treasurer notified Corner Quick Stop of unpaid taxes in the total amount of \$34,033.79, including tax, fees, interest and penalty, on the Oswegatchie property for tax years 2002 through 2008. This notice advised Corner Quick Stop that St. Lawrence County was in the process of foreclosing on the Oswegatchie property for nonpayment of prior years taxes.

In November 2008, the St. Lawrence County Treasurer issued a Second Delinquent Tax Notice for 2008 to Corner Quick Stop for the Norfolk property. In addition to listing the delinquent taxes for the year 2008, this notice also listed outstanding taxes on the Norfolk property for tax years 2002 through 2007. This notice requested payment of \$37,704.30, the total

amount of outstanding taxes, including tax, fees, interest and penalty, due on the Norfolk property for tax years 2002 through 2008.

On December 31, 2008, the Town of Oswegatchie issued to Corner Quick Stop a 2009 town and county tax bill for the Oswegatchie property. On December 31, 2008, the Town of Norfolk issued to Corner Quick Stop a 2009 town and county tax bill for the Norfolk property.

As of the date of the hearing, August 12, 2009, Ms. Neugebauer, on behalf of Corner Quick Stop, had not executed any recision documents or obtained any releases from the contracts. She also had not executed any deeds, on behalf of Corner Quick Stop, transferring the properties back to Alaskan Oil.

As of the date of the hearing, Corner Quick Stop had not applied for a refund of the sales tax paid on the personalty purchased in both the Oswegatchie and Norfolk transactions.

At the hearing, Mr. Neugebauer confirmed that at the closings for the Oswegatchie and Norfolk properties held on January 10, 2007, Alaskan Oil executed deeds and delivered them to Corner Quick Stop. He also confirmed that Alaskan Oil received purchase money mortgages executed by Corner Quick Stop at the closings. Mr. Neugebauer also admitted that Alaskan Oil has never commenced a foreclosure proceeding for either the Oswegatchie property or the Norfolk property, or taken any steps to enforce collection of the monies owed to it under the contracts. He also acknowledged that nothing had been done to cancel or reverse the sales or purchases at issue.

At the hearing, Ms. Neugebauer acknowledged that Corner Quick Stop had not loaned any money to Alaskan Oil, and that Corner Quick Stop never held a lien, mortgage, or other security interest on either the Oswegatchie property or the Norfolk property.

On August 29, 2003, the Division filed a warrant and judgment against Alaskan Oil for unpaid sales and use taxes in the amount of \$38,451.02. On October 28, 2003, the Division filed a warrant and judgment against Alaskan Oil for unpaid sales and use taxes in the amount of \$225,017.44. Each warrant and judgment was filed in Onondaga County. In November 2003, Alaskan Oil's representative, Mr. Gingold, contacted the Division to request releases of liens on several properties that it was in the process of selling. In response to that request, Mary Ellen Smith, a Tax Compliance Agent in the Division's Syracuse District Office, required for each proposed sale: an explanation of the proposed transfer, an abstract of title, a proposed closing statement and a statement of the proposed disposition of the sale proceeds. At the hearing, Ms. Smith stated that since it appeared that other creditors were ahead of the Division's judgment, the Division granted a release of lien on property located in the Town of Richland for no consideration on January 5, 2004. She further stated that a second request for a release of lien was made in January 2004, concerning property in the Town of Elbridge that Alaskan Oil wished to convey to a third party. According to Ms. Smith, the request was reviewed, and upon the same requirements, a release of lien was issued by the Division on January 20, 2004. Alaskan Oil's sales of the Richland and the Elbridge properties took place after the releases of lien were obtained from the Division.

In 2006, the Division issued a letter to Alaskan Oil advising it that since the purchaser of one of Alaskan Oil's properties (bulk sale case number 2006004680) was determined to hold a valid mortgage on that property and a deed was accepted in lieu of foreclosure, that transfer was deemed to be in satisfaction of a valid lien or security interest, and the transaction did not meet the definition of a bulk sale.

On September 9, 2009, Corner Quick Stop conveyed the Norfolk property to Alaskan Oil, “in consideration of One Dollar, plus other good and valuable consideration” paid by Alaskan Oil, by warranty deed with full covenants executed by Ms. Neugebauer on behalf of Corner Quick Stop. This deed was recorded in the office of the St. Lawrence County Clerk on September 10, 2009.

On September 9, 2009, Corner Quick Stop conveyed the Oswegatchie property to Alaskan Oil, “in consideration of One Dollar, plus other good and valuable consideration” paid by Alaskan Oil, by warranty deed with full covenants executed by Ms. Neugebauer on behalf of Corner Quick Stop. This deed was recorded in the office of the St. Lawrence County Clerk on September 10, 2009.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge observed the relevant statutes and case law concerning bulk sales. The Administrative Law Judge determined that the transactions between Alaskan Oil and petitioner were bulk sales and that petitioner failed to comply with the notice requirement in Tax Law § 1141(c), exposing itself to liability for the seller’s unpaid sales tax. The Administrative Law Judge found no merit in petitioner’s arguments that the notices should be cancelled because the transactions were unenforceable. The Administrative Law Judge also concluded that petitioner presented no grounds that would support the abatement of penalties.

#### ***ARGUMENTS ON EXCEPTION***

Petitioner continues to argue that the Notices should be cancelled because the transactions were either unenforceable or rescinded. Petitioner claims that the agreements should be voided under the equitable doctrine of mutual mistake because the parties misapprehended the costs of

the assets due to Notices issued by the Division. Petitioner also argues that the Notices should be cancelled because the transactions were rescinded by petitioner's transfer back of the assets. Based on the foregoing, petitioner argues that the determination should be reversed and the Notices cancelled.

The Division argues that neither the record nor the law support petitioner's view of the facts and that the determination should be affirmed. The Division argues that no mutual mistake existed because both parties were aware of the seller's sales tax liability. The Division also contends that petitioner did not execute a rescission by its transfer back of the assets more than two years after the subject transactions had been consummated.

### ***OPINION***

We affirm the determination of the Administrative Law Judge.

Tax Law § 1141(c) provides, in pertinent part:

[w]henever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale . . . notify the tax commission by registered mail of the proposed sale . . . .

Upon the timely filing of a notification of a bulk sale, the Division is obligated to inform the purchaser of the existence of a possible claim for sales and use taxes owed by the seller (20 NYCRR 53.6[a][3]). If the purchaser does not comply with this notice requirement, the purchaser will be held "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, transferrer or assignor [subject to certain price limitations] . . ." (Tax Law § 1141[c]).

The term "bulk sale" is defined 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 (20 NYCRR 537.1[a]).

The definition includes transfers wherein the purchaser need not pay sums of money (*see e.g. Matter of Peconic Bay Motors*, Tax Appeals Tribunal, September 26, 1991), and includes transfers by way of a gift (*see e.g. Matter of Gaughan*, Tax Appeals Tribunal, May 14, 1992).

The regulatory definition of purchaser includes “any person who, as part of a bulk sale, purchases or is the transferee or assignee of business assets” (20 NYCRR 537.1[e]). Such “business assets” include “any assets of a business pertaining directly to the conduct of the business, whether such assets are intangible, tangible or real property” (20 NYCRR 537.1[b]).

The record clearly establishes that, on January 10, 2007, contracts for the purchase and sale of the Oswegatchie and Norfolk properties were executed and delivered. Upon Alaskan Oil’s delivery of the executed deeds to petitioner and its acceptance of them on January 10, 2007, titles to the Oswegatchie and the Norfolk properties passed to petitioner (*see* Real Property Law § 244; *Manhattan Life Ins. Co. v. Continental Ins. Cos.*, 33 NY2d 370 [1974]; *Ten Eyck v. Whitbeck*, 156 NY 341 [1898]). Along with the passage of title to the Oswegatchie and Norfolk properties, petitioner was also vested with title and the right to immediate possession of the properties (*see Stiebel v. Grosberg*, 202 NY 266 [1911], *rearg denied* 203 NY 547 [1911]). Given the foregoing, we find that the Administrative Law Judge properly determined that the transactions between petitioner and Alaskan Oil constitute bulk sales within the meaning of 20 NYCRR 537.1(a).

The record indicates that the parties were aware of the sales tax liability on Alaskan Oil and that petitioner made no attempt to comply with the bulk sale notification obligations under



Tax Law § 1141(c). Petitioner did not provide notice of the January 10, 2007 transactions until March 2, 2007, well after the transactions were executed. By its failure to comply with the notice requirements, petitioner forfeited the protection provided to purchasers in bulk sales by the statutory scheme (*see e.g. Matter of Spandau v. United States*, 73 NY2d 832 [1988]).

Accordingly, we find that the Administrative Law Judge properly determined that petitioner is liable for the tax assessed against it based on the seller's unpaid sales tax up to the amount, *inter alia*, of the purchase price (*Harcel Liqs. v. Evsam Parking*, 48 NY2d 503 [1979]).

We agree with the Administrative Law Judge's conclusion that petitioner's argument that the agreements are unenforceable lacks merit. We first turn to petitioner's argument regarding mutual mistake. As recently stated by the Appellate Division in *Asset Mgt. & Capital Co. v. Nugent* (85 AD3d 947, 948 [2011]):

“For a party to be entitled to reformation of a contract on the ground of mutual mistake, the mutual mistake must be material, i.e., it must involve a fundamental assumption of the contract” (*True v True*, 63 AD3d 1145, 1147 [2009]). “A party need not establish that the parties entered into the contract because of the mutual mistake, only that the ‘material mistake . . . vitally affects a fact or facts on the basis of which the parties contracted’” (*True v True*, 63 AD3d at 1147, *quoting Janowitz Bros. Venture v 25-30 120th St. Queens Corp.*, 75 AD2d 203, 214 [1980]). Moreover, “proof of [mutual] mistake must be ‘of the highest order,’ [and] must ‘show clearly and beyond doubt that there has been a [mutual] mistake’ and . . . must show with equal clarity and certainty ‘the *exact* and *precise* form and import that the instrument ought to be made to assume, in order that it may express and effectuate what was really intended by the parties’” (*Janowitz Bros. Venture v 25-30 120th St. Queens Corp.*, 75 AD2d at 215, *quoting* 13 Williston, Contracts § 1548, at 125 [3d ed]; *see* Amend v Hurley, 293 NY 587, 595 [1944]).

In our view, the record lacks any evidence indicating that the agreements do not represent a meeting of the minds (*see e.g. Matter of Gould v. Board of Educ.*, 81 NY2d 446 [1993]). We agree with the Administrative Law Judge and find that petitioner's argument regarding the

contracted price of the assets lacks any merit because the prices themselves did not change. Rather, the overall cost of the transactions increased due to petitioner's own failure to comply with the notice requirements under Tax Law § 1141(c). Petitioner's failure to meet its statutory obligations does not constitute a mistake. Accordingly, we conclude that the Administrative Law Judge properly found no grounds that would permit voiding the January 10, 2007 agreements under the mutual mistake doctrine.

Similarly, we reject petitioner's argument that the Notices should be cancelled because the agreements have been rescinded. Initially, we reject this contention because the existence of outstanding sales tax at the time of closing does not entitle a party to rescind a contract (*Matter of Sabhlok v. Dana*, 112 AD2d 411 [1985]). Further, the record contains no evidence that the parties cancelled the transfers by promptly returning the transferred assets and refunding the purchase price (*see e.g. Matter of Miehle*, Tax Appeals Tribunal, August 24, 2000). There is no evidence that any of the business assets were returned to the seller or that any part of the purchase price was returned to petitioner. Rather, the record indicates that petitioner utilized the business assets for over two years prior to the hearing. Accordingly, we reject petitioner's argument that the Notices should be cancelled based upon a rescission or cancellation of the subject transactions.

We have considered petitioner's remaining arguments, including its arguments regarding the imposition of penalties, and find them without merit. Petitioner failed to carry its burden of showing reasonable cause to abate the penalties imposed (*see e.g. Matter of MCI Telecom. Corp.*, Tax Appeals Tribunal, January 16, 1992; 20 NYCRR 3000.15[d][2]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Corner Quick Stop, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Corner Quick Stop, Inc. is denied; and
4. The Notices of Determination (L-028428867-7, L-028428868-6) dated April 26, 2007

and the Notice of Determination (L-028428869-5) dated April 26, 2007, as modified by Conciliation Order (CMS No. 220175), dated March 18, 2008 are sustained.

DATED: Troy, New York  
November 3, 2011

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
President

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner