

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PECONIC BAY MOTORS, INC. : DETERMINATION
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, 1986 :
through February 28, 1987. :

Petitioner, Peconic Bay Motors, Inc., Route 58, Riverhead, New York 11901, 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 period September 1, 1986 through February 28, 1987 (File No. 805833).

On April 24, 1990 and May 7, 1990, respectively, petitioner, by Gatz, Arnoff & Czygier (John M. Czygier, Jr., Esq., of counsel), and the Division of Taxation, by William F. Collins, Esq. (Susan Hutchison, Esq., of counsel), waived a hearing in the Division of Tax Appeals and agreed to submit the case for determination based on documentation and briefs to be submitted by September 20, 1990. After due consideration of the record, Robert F. Mulligan, Administrative Law Judge, hereby renders the following determination.

ISSUES

I. Whether the Division of Taxation complied with the notice requirements of Tax Law § 1141(c) with respect to an assessment issued to petitioner as purchaser of the assets of Don Wald Motors, Inc.

II. Whether the transaction at issue constituted a sale, transfer or assignment in bulk under Tax Law § 1141(c).

FINDINGS OF FACT

On April 6, 1987, petitioner, Peconic Bay Motors, Inc., by its attorneys, Gatz, Arnoff & Czygier, mailed a Notification of Sale, Transfer or Assignment in Bulk to the Sales Tax Section of the Central Office Audit Bureau in Albany, New York, by certified mail, return receipt requested.

The aforesaid notification stated that petitioner was the purchaser from Don Wald Motors, Inc. ("seller") of the following assets:

<u>Asset</u>	<u>Selling Price</u>
Furniture, fixtures, equipment & supplies	\$175,000.00
Motor vehicles	125,000.00
Merchandise inventory for sale	240,000.00
Real estate	-0-
Good will and other assets	<u>60,000.00</u>
Total selling price	<u>\$600,000.00</u>

The terms and conditions of said sale were stated to be as follows:

"Purchaser obtaining bank financing in the amount of \$600,000.00.

Contract conditioned on Purchaser obtaining approval to assume franchises from automobile manufacturers."

The scheduled date of sale was April 20, 1987.

The notice was received by the Division of Taxation, Audit Services Bureau, on April 9, 1987 and by the Central Office Audit Bureau, Sales Tax Section, on April 10, 1987.

On April 15, 1987, the Division of Taxation issued a Notice of Claim to Purchaser to petitioner at Route 58, Riverhead, New York 11901, the mailing address shown on the notification which had been mailed by petitioner's attorneys. The notice stated, in pertinent part, as follows:

"You are hereby notified that, in spite of any provisions contained in the sales contract, except as indicated in condition number two listed below, no distribution of funds or property, to the extent of the amount of the State's claim, may be made before the following conditions have been met:

- 1 The State Tax Commission has determined the seller's liability, if any.
- 2 Payment of such liability has been made to the State (payment may be made from the funds being withheld in accordance with Section 1141[c] of the Tax Law).

3 This office has authorized you to release the funds or property."

On May 4, 1987, the Division of Taxation issued a Notice to Seller to Don Wald Motors, Inc., at the address, Route 58 and Ostrander Avenue, Riverhead, New York 11901.

This notice requested the following:

- (a) Copy of the sales contract
- (b) Final sales tax return for the period March 1, 1987 to the date of sale.
- (c) Sales tax return for the period ending February 28, 1987.
- (d) Payment of bulk sales tax of \$13,125.00 (\$175,000.00 at 7.5%).
- (e) Payment of the following assessments: S0090784296, S8704200865, S8605271228.

The seller did not respond to this notice.

The seller had previously submitted a sales tax return for the period ending February 28, 1987 showing \$13,584.10 in tax due, together with its check dated March 19, 1987 in the amount of \$13,584.10. The check was returned unpaid due to insufficient funds.

On July 8, 1987, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner in the amount of \$13,584.10 in tax, \$7,859.77 in penalty and \$825.04 in interest, for a total due of \$22,268.91. The notice stated that the taxes had been determined to be due from the seller and represented petitioner's liability, as purchaser, in accordance with Tax Law § 1141(c). The breakdown showed no tax due for the period ending "11/30/86-287", but \$6,093.84 in penalty and \$324.87 in interest due. It also showed \$13,584.10 in tax, \$1,765.93 in penalty and 500.17 in interest due for the period ending "02/28/87-387".

On September 24, 1985, the seller had entered into a pledge agreement with The North Fork Bank and Trust Company, Mattituck, New York ("bank"), giving said bank a security interest in virtually all of the seller's assets. A Form UCC-1 financing statement was executed by the bank and the seller and was filed with respect to said assets.

At the time of the transaction between petitioner and the seller, the seller owed the bank in excess of \$600,000.00.

Petitioner agreed to purchase the assets of the seller for \$600,000.00. The seller and the

bank agreed that the seller's assets would be transferred to petitioner for \$600,000.00 and that the seller and its principal would remain liable for the balance over \$600,000.00. Petitioner did not make a cash payment for the assets, but assumed the \$600,000.00 obligation owed by the seller to the bank. No funds were paid to the seller and the seller and its principal executed a confession of judgment for the amount of seller's indebtedness exceeding \$600,000.00.

Although petitioner's attorney did not believe that the transaction technically constituted a bulk sale within the meaning of the Uniform Commercial Code or the New York Tax Law, he treated it as such to give notice to creditors in order to dissuade them from attempting to block or delay the sale. In fact, when a number of the seller's creditors called in response to the notice, the transaction was explained to them and the sale was not tied up in litigation.

The Division of Taxation submitted affidavits and mailing documentation which showed that the Notice of Claim to Purchaser was mailed to petitioner on April 15, 1987. Petitioner has pointed out the inconsistencies between the statement in the affidavit of Susan Rohrwasser that she would deliver notices of claim to the Division of Taxation's mailroom, but would usually not wait for the sealing and stamping of the envelopes, and the statement on the mailing record that Ms. Rohrwasser had witnessed the sealing and stamping of the envelopes in which the notices of claim had been enclosed.

13. The Division of Taxation has withdrawn its claim for the penalty and all interest above the minimum rate.¹

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioner contends that:

- (a) the Division of Taxation failed to give petitioner timely notice of its claim; and
- (b) the transaction was not a sale, transfer or assignment in bulk within the meaning of Tax Law § 1141(c).

15. The Division of Taxation asserts that timely notice was given to petitioner and that petitioner's assumption of seller's debt constituted "other consideration" under Tax Law § 1141(c).

¹Memorandum of Law for Division of Taxation, p.2.

CONCLUSIONS OF LAW

A. Tax Law § 1141(c) provides that whenever a person required to collect tax shall make a sale, transfer or assignment in bulk of any part or all of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall, at least 10 days prior to taking possession of said assets or paying therefor, notify the

Division of Taxation² of the proposed sale and provide certain information concerning the transaction.

B. Once the purchaser, transferee or assignee has given proper notice, the Division of Taxation has five business days in which to mail a notice of possible claim to the purchaser, transferee or assignee (20 NYCRR 537.6[a]). If the Division of Taxation fails to issue said notice within five business days, the purchaser, transferee or assignee is relieved from his obligation to withhold funds from the seller, transferer or assignor and is also relieved from liability for taxes due by the seller, except for sales tax due on the sale of the tangible personal property and for outstanding warrants and judgments (20 NYCRR 537.6[b]).

C. Tax Law § 1141(c) also provides, in pertinent part, as follows:

"Whenever the purchaser, transferee or assignee shall fail to give notice to the tax commission...or whenever the tax commission shall inform the purchaser, transferee or assignee that a possible claim for such tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferer or assignor shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller, transferer or assignor to the state, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferer or assignor any such sums of money, property or choses in action to the extent of the amount of the state's claim."

The Division of Taxation has 90 days after receipt of a notice of sale, transfer or assignment in bulk to issue a notice of the total taxes, penalty and interest due or a notice that no taxes are due (Tax Law § 1141[c]; 20 NYCRR 537.6[c]). If the Division of Taxation fails to mail a notice for

²Although the statute uses the term "tax commission", effective September 1, 1987 said term, as used in Tax Law § 1141(c), is to be construed as "division of taxation" (Tax Law § 2026).

total taxes due, the purchaser, transferee or assignee is relieved from both his obligation to withhold funds and his liability for taxes due (Tax Law § 1141[c]; 20 NYCRR 537.6[d]).

D. In this case, petitioner, as purchaser, gave timely notice of the impending transaction. The threshold issue, then, is whether the Division of Taxation issued the Notice of Claim to Purchaser to petitioner within five business days.

Petitioner has not sustained its burden of proof to show that the Notice of Claim to Purchaser was not timely issued. Despite the apparent inconsistencies between Ms. Rohrwasser's affidavit and the statement on the mailing record with respect to the sealing and stamping of the envelopes, it is clear that something was mailed to petitioner on April 15, 1987, which is within five business days from the receipt of petitioner's Notification of Sale, Transfer or Assignment in Bulk. There is nothing in the record indicating that petitioner received an empty envelope or some other document from the Division of Taxation in April 1987. In fact, there appears to be nothing in the record specifically denying that petitioner received the Notice of Claim to Purchaser. It is noted that due to the similarity in addresses, the notice may have been received by the seller before the closing and petitioner was unaware of it.

E. The term "bulk sale" is defined at 20 NYCRR 537.1(a)(1) which provides, in pertinent part, as follows:

"[t]he 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 Tax Commission."

Additionally, 20 NYCRR 537.1(a)(4)(i) provides that the term "bulk sale" does not include:

"sales, transfers or assignments of business assets in settlement or realization of a valid lien, mortgage or other security interest."

Petitioner has pointed out the similarity of the latter provision with Uniform Commercial Code § 6-103(3) which provides that "[t]ransfers in settlement or realization of a lien or other security interest" are not subject to the bulk transfer provisions of the Uniform Commercial Code. It would thus appear that the transaction in this case was not subject to Article 6 of the Uniform Commercial Code (see, American Metal Finishers, Inc. v. Palleschi, 55 AD2d 499).

Nevertheless, the Court of Appeals, in a case where a purchaser had paid cash and also assumed the seller's personal debt on a promissory note, held that not only the cash, but the assumption of debt constituted consideration and were thus subject to the Division of Taxation's lien under Tax Law § 1141(c):

"This relief from obligation constitutes 'other consideration' under the tax collection statute. The Tax Commission's first priority lien over all statutorily designed kinds of consideration must be given effect under the statute lest the structuring of transactions and creative financing be facily employed to frustrate the collection, after fair notice, of taxes due and owing." (Spandau v. United States, 73 NY2d 832, 834.)

Although petitioner's argument is a plausible one, in view of the holding of the Court of Appeals in Spandau (supra), the instant transaction is deemed to have constituted a bulk sale for purposes of Tax Law § 1141(c) and the \$600,000.00 obligation assumed by petitioner, which resulted in relief to the seller of said amount, constituted consideration within the meaning of Tax Law § 1141(c).

F. Except for the cancellation of penalty and reduction of interest (Finding of Fact "13"), the petition of Peconic Bay Motors, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued against it on July 8, 1987 is otherwise sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE