

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>NEW CORNER BOOK STORE, LTD.</b>	:	DETERMINATION
		DTA NO. 817088
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 March 1, 1996 through February 28,	:	
1997.	:	

---

Petitioner, New Corner Book Store, Ltd., 115 South Cayuga Street, Ithaca, New York 14850-5507, 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 March 1, 1996 through February 28, 1997.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 2, 2000, at 1:00 P.M., with all briefs to be submitted by June 16, 2000, which date began the six-month period for the issuance of this determination. Petitioner appeared by Richard H. Holtzberg, Esq., 349 West Commercial Street, Suite 3400, East Rochester, New York 14445. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

***ISSUE***

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

***FINDINGS OF FACT***

1. On September 29, 1997, the Division of Taxation (“Division”) issued to New Corner Book Store, Ltd. (“petitioner”) a Notice of Determination of sales and use taxes due as follows:

<b>ASSESSMENT ID NO.</b>	<b>TAX PERIOD ENDED</b>	<b>TAX AMOUNT DUE</b>
L-014129196	May 31, 1996	\$ 7,203.36
L-014129195	August 31, 1996	7,848.54
L-014129194	November 30, 1996	28.79
L-014129193	February 28, 1997	19,797.50
<b>TOTAL</b>		<b>\$34,878.19</b>

The notice indicates that petitioner is being held liable as a bulk sale purchaser for taxes determined to be due pursuant to Tax Law § 1138(a)(3) and § 1141(c).

2. For the tax periods ended May 31, 1996 and August 31, 1996, Ithaca Corner Book Store, Inc., filed New York State and local sales and use tax returns for limited jurisdictions (Form ST-102) indicating amounts due of \$7,203.36 and \$7,848.54, respectively. Payment of the tax due did not accompany the returns. The corporation filed form ST-102 for the tax period ended November 30, 1996 indicating sales and use taxes due of \$3,839.20, a vendor collection credit of \$28.79 and an amount due of \$3,810.41, which was remitted. The return is dated December 19, 1996, was due to be filed on December 20, 1996 and was in-date stamped on “JAN 08,” without any portion of the year showing. No return was filed for the tax period ended February 28, 1997.

3. On July 7, 1997, the Division received a Notification of Sale, Transfer or Assignment in Bulk ("notification of sale") from petitioner concerning its purchase of a retail book store from The Ithaca Corner Book Store, Inc. in exchange for the assumption of a bank loan with a balance

of approximately \$33,000.00. The notification of sale further advised the Division that the sale was to take place on July 23, 1997.

Attached to the notification of sale was an unsigned Bill of Sale (Fixtures) which had as its parties The Ithaca Corner Book Store, Inc., as seller, and New Corner Book Store, Ltd., as purchaser. The Bill of Sale indicates the consideration to be the assumption by petitioner of a note payable to the Tompkins County Trust Company of Ithaca, such note being secured by a lien against the subject property. According to the Bill of Sale, the current principal amount of the note was approximately \$34,000.00. The Bill of Sale anticipated a May 1997 date of sale.

4. In response to the notification of sale, the Division mailed to petitioner a Notice of Claim to Purchaser ("notice of claim"), dated July 10, 1997. The notice advised petitioner of a possible claim for sales tax due and owing by the seller and directed that no distribution of funds or property to the extent of the Division's claim be made until the seller's liability was determined, and either payment was made, or the Division authorized the purchaser to release the funds or property.

5. In September 1997, the sale was completed pursuant to a Bill of Sale executed on September 3, 1997. The Bill of Sale provided that The Ithaca Corner Book Store, Inc. was to transfer to petitioner all fixtures, leasehold improvements, equipment, supplies and inventory relating to the business in consideration of petitioner's assuming the note payable to the Tompkins County Trust Company of Ithaca at a current principal amount of approximately \$32,000.00. From the date of sale to the date of this hearing, petitioner continued to make payments to the trust company on the loan it assumed under the Bill of Sale.

6. As of April 11, 1986, the Tompkins County Trust Company had a lien on all machinery, equipment, furniture, fixtures, inventory and accounts receivable of The Ithaca

Corner Book Store, Inc. The trust company also possessed a lien upon a flexible supermicrocomputer system beginning on November 19, 1997. Financing statements pursuant to the Uniform Commercial Code were filed with the Tompkins County Clerk's Office.

7. At the hearing, the Division conceded the assessment L-014129193 for the quarter ended February 28, 1997, and therefore this part of the notice of determination is canceled.

### ***CONCLUSIONS OF LAW***

A. Section 1141(c) of the Tax Law provides, in pertinent part, as follows:

Whenever 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, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof whether or not the seller, transferrer or assignor, has represented to, or informed the purchaser, transferee or assignee that he owes any tax pursuant to this article, and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing.

. . . [W]henever 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, transferrer 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, transferrer or assignor to the state, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferrer or assignor any such sums of money, property or choses in action to the extent of the amount of the state's claim.... For failure to comply with the provisions of this subdivision the purchaser, transferee or assignee, in addition to being subject to the liabilities and remedies imposed under the provisions of article six of the uniform commercial code, 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, transferrer or assignor, except that the liability of the purchaser, transferee or assignee shall be limited to an amount not in excess of the purchase price or fair market value of the business assets sold, transferred or assigned to such purchaser, transferee, or assignee, whichever is higher, and such liability may be assessed and enforced in the same manner as the liability for tax under this article.

The term "bulk sale" is defined at 20 NYCRR 537.1(a)(1), which provides in relevant part:

[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.

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."

B. In the instant matter, petitioner, as bulk sale purchaser, initially complied with the provisions of Tax Law § 1141(c). Specifically, petitioner timely filed with the Division of Taxation its Notification of Sale, Transfer or Assignment in Bulk. This filing occurred at least 10 days prior to the date of sale as required by the statute. In response, the Division timely issued to petitioner a notice of claim, pursuant to 20 NYCRR 537.6(a), and, subsequently, a notice of determination as required by Tax Law § 1141(c). Following the sale, petitioner transferred money to the trust company in contravention of the express provision of the statute. Given this failure to comply with Tax Law § 1141(c), petitioner became personally liable for taxes due from the seller. The Division's assessment of such taxes against petitioner was therefore proper.

C. The issue contested by the parties centers upon whether the non-cash consideration paid by petitioner to the seller constituted "other consideration" subject to the State's first priority right and lien under Tax Law § 1141(c). Petitioner argues that its liability for payment of taxes owed by the seller is limited to the amount that the Division could have collected directly from the consideration given to the seller at the time of the sale. Since the seller's property transferred

in the bulk sale was encumbered by liens, petitioner argues that there was no money available to the Division for payment of the seller's outstanding taxes. Petitioner argues that the "noncash" consideration paid by petitioner in the form of the assumption and payments of the obligation on the note would not have been available to the Division for payment of the seller's sales tax liability since this claim was superior to the Division's claims. Therefore, petitioner argues, petitioner's liability should be canceled.

The Division asserts that petitioner, as a bulk sale purchaser who failed to follow the provisions of Tax Law § 1141(c), is liable for sales taxes owed by the seller to the extent of the purchase price, or the fair market value of the business assets sold, transferred or assigned to petitioner, whichever is higher. The Division argues that petitioner's liability is not limited by the type of consideration given and, therefore, cannot be avoided by payment of other obligations of the seller in lieu of direct payments of the purchase price to the seller.

D. In this case, petitioner was a bulk sale purchaser who admittedly made payments to the trust company following the Division's issuance of a notice of claim and a notice of determination. Pursuant to the provisions of Tax Law § 1141(c), petitioner became personally liable for the payment of the seller's unpaid sales and use taxes to the extent of the purchase price or the fair market value of the assets sold, whichever is higher. Petitioner attempts to limit a purchaser's personal liability by claiming that the Division's first priority right and lien under Tax Law § 1141(c) is secondary to any liens which may exist on property which is the subject of a bulk sale, and that debts on property paid by a purchaser are not "other consideration" because the Division could not collect its sales tax from the seller through the mechanism of a foreclosure sale of the seller's property without the payment of such liens. As the Division correctly argued, the Division's first priority right and lien under Tax Law § 1141(c) is not a lien on the seller's

property but on the consideration paid by the purchaser to the seller (*Harcel Ligs. v. Evsam Parking*, 48 NY2d 503, 423 NYS2d 873). Therefore, the extent to which the property was encumbered by prior liens does not determine the amount of the Division's lien on the consideration given for the property. Contrary to petitioner's assertions, there is nothing in the statute which limits the purchaser's liability to the amount the Division would have received had there been a foreclosure sale on the property. Instead, the purchaser's liability is limited by statute only to the greater of the purchase price or fair market value of the assets sold (Tax Law § 1141[c]).

E. Petitioner further argues that the liability of a purchaser is limited to amounts actually transferred by the purchaser to the seller, and that the assumption or payment of notes on the seller's property was not consideration transferred to the seller. Petitioner cites the New York State Court of Appeals decision in *Spandau v. United States* (73 NY2d 832, 537 NYS2d 120) in support of its position. In *Spandau*, the Court held that the assumption by the purchaser of the seller corporation's unsecured personal debt on a promissory note constituted "consideration" within Tax Law § 1141(c). Petitioner argues that the Court of Appeals decision applies only to the type of debt assumed by the purchaser in that case, i.e., unsecured personal debt on a promissory note. Petitioner asserts that "other consideration" includes the assumption of the seller's debts only when those debts are unsecured in nature, and not when the debts assumed are secured.

In order for the provisions of Tax Law § 1141(c) to operate meaningfully as a mechanism for the Division to take action to collect a seller's outstanding sales tax debts prior to the transfer of the seller's business assets, the statute's assertion of personal liability on the purchaser for failure to comply with the notice and transfer provisions must encompass all consideration that

the purchaser is required to transfer as part of the sale regardless of its form. This view is supported by the language used by the court in *Spandau*. While the particular consideration in *Spandau* was the assumption by the purchaser of the seller corporation's "personal debt on a promissory note" (*Spandau v. United States, supra*), the court, in holding that this "relief from obligation" constituted consideration under Tax Law § 1141(c), stated that "[t]he Tax Commission's first priority lien over all statutorily designated kinds of consideration must be given effect under the statute lest the structuring of transactions and creative financing be facilely employed to frustrate the collection, after fair notice, of taxes due and owing" (*Spandau v. United States, supra; cf., Matter of Norbert H. O'Brien*, Tax Appeals Tribunal, March 19, 1992 [petitioner's payment of various debts of the sellers, assumption and payment of mortgages and cash held to be consideration to the sellers within the meaning of Tax Law § 1141(c)]; *Matter of Peconic Bay Motors*, Tax Appeals Tribunal, September 26, 1991 [the petitioner's assumption of the seller's secured indebtedness to a bank held to be consideration to the seller within the meaning of Tax Law § 1141(c)]).

Here the purchase price was transferred to the seller by petitioner's assumption and payment of a note owed to the trust company by the seller. As a result, the seller's consideration consisted of relief from this financial obligation in exchange for the assets of the business. To hold otherwise would narrow a purchaser's personal liability by the form in which a purchaser conveys the purchase price to the seller, and allow the State's right to collect taxes to be "extinguished by the simple expedient of a taxpayer transferring its assets" (*Harcel Liqs. v. Evsam Parking, supra*), and "taking payment for the transfer in forms other than cash" (*Matter of Norbert H. O'Brien, supra*).



F. Petitioner was assessed penalties and interest from the date of the notice of determination until full payment of the amount due (Tax Law § 1141[c]; § 1145[a]; *Velez v. Division of Taxation*, 152 AD2d 87, 547 NYS2d 444; *Matter of Gaughan*, Tax Appeals Tribunal, May 14, 1993). Petitioner claims that it should not be liable for the penalties and interest unless or until the corporation is determined to be liable for the amount of tax in dispute, and that its failure to make payments to the Division does not constitute wilful neglect. However, petitioner was aware before the sale was completed that the seller owed New York State sales and use taxes when it received from the Division the notice of claim to purchaser. The notice of claim advised petitioner that payment of the liability must be made to the Division before funds should be distributed to the purchaser. In addition, petitioner's position that the factual setting surrounding its purchase did not come within the requirements of Tax Law § 1141(c) had already been decided to be erroneous in *Spandau v. United States (supra)* and *Matter of Peconic Bay Motors (supra)*. Under these circumstances, petitioner has not established that reasonable cause exists for its failure to pay the amount of tax due (Tax Law § 1145[a][1][iii]).

By requesting that all of the interest charges be abated, petitioner, in essence, seeks an interest-free loan from the State of New York. As noted by the Tribunal in *Matter of Rizzo* (Tax Appeals Tribunal, May 13, 1993):

Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due. . . . It is not proper to describe interest as substantial prejudice, as it is applied to all taxpayers who fail to remit . . . tax due in a timely manner. Rather, a more accurate interpretation would be to say that interest represents the cost to the taxpayer for the use of the funds. . . .

Petitioner also could have paid the additional tax due at any time to stop the accrual of additional penalty and interest charges; however, it chose not to avail itself of this option. Therefore, petitioner remains liable for the penalty and interest accruing on the amount of tax due.

G. As the Division conceded the assessment L-014129193 for the quarter ended February 28, 1997, that portion of the notice of determination is canceled.

H. The petition of New Corner Book Store, Ltd. Is granted to the extent indicated in Conclusion of Law “G”; in all other respects the petition is denied, and the notice of determination dated September 29, 1997, as modified, is sustained.

DATED: Troy, New York  
October 5, 2000

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE