

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FAR EAST BUFFET, INC.	:	SMALL CLAIMS
	:	DETERMINATION
	:	DTA NO. 820611
for Revision of a Determination or Refund of New York	:	
State Sales and Use Taxes under Articles 28 & 29 of the	:	
Tax Law for the period December 31, 2001 through	:	
May 31, 2004.	:	

Petitioner, Far East Buffet, Inc., c/o DaoZheng Qin, 14-26 119th Street, College Point, New York 11356, 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 December 31, 2001 through May 31, 2004.

A small claims hearing was held before Joseph W. Pinto, Jr., Presiding Officer, at the office of the New York State Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 26, 2006 at 1:15 p.m., which date began the three-month period for the issuance of this determination. Petitioner appeared by Pearl Liu, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Thomas Jess, Sales Tax Technician II, Advocate).

ISSUE

I. Whether petitioner, as a bulk sale purchaser under Tax Law § 1141(c), is liable for sales and use taxes due from the bulk sale seller.

FINDINGS OF FACT

1. The Division of Taxation's assessment against petitioner originated in a bulk sale by a company known as King Buffet of Mt. Vernon Inc. to Ke Yao Lin of China King Buffet Inc. on March 10, 2003 for the sales price of \$20,000.00.

2. King Buffet notified the Division of the transfer on March 12, 2003, or two days after the transfer had taken place.

3. On April 1, 2003, the Division sent Ke Yao Lin a Notice of Claim to Purchaser in which it informed him of a possible claim for New York State sales and use taxes due from the seller, China Buffet of Mt. Vernon Inc., and directed him not to distribute any funds or property until the Division had determined the seller's liability, the tax was paid and the Division had given clearance for the release of the funds or property. The same notification was sent to the named escrow agent, Chiu K. Cheung, Esq. on the same date.

4. On April 10, 2003, the Division issued a Notice to Seller to King Buffet of Mt. Vernon Inc. in which it requested various sales tax records and remittance of any unpaid sales and use taxes, including those set forth in an attached statement of consolidated liabilities.

5. By letter, dated April 10, 2003, the Division of Taxation informed Chiu K. Cheung, Esq., representative of China King Buffet Inc., that King Buffet of Mt. Vernon had open sales tax liabilities of approximately \$4,500.00 which would be transferred to China King Buffet if not paid.

6. On or about September 9, 2004, petitioner acquired the assets of China King Buffet Inc. in a bulk sale for a total sales price of \$16,000.00. At the time of the sale, petitioner placed \$1,000.00 in escrow for a term of 90 days to pay any taxes which might be demanded by New

York State, after which time the escrow funds would be released to petitioner and any later claims for taxes would be the responsibility of China King Buffet Inc.

7. Petitioner notified the Division of the sale on September 14, 2004, or five days after the sale had taken place. The envelope in which this notification was sent to the Division indicated that it was sent by regular mail and bore a postmark of September 11, 2004.

8. On October 18, 2004, the Division issued a Notice of Claim to Purchaser to petitioner, in which it informed him of a possible claim for New York State sales and use taxes due from the seller, China King Buffet Inc., and directed him not to distribute any funds or property until the Division had determined the seller's liability, the tax was paid and the Division had given clearance for the release of the funds or property. The same notification was sent to the named escrow agent, Kevin K. Tung, Esq. on the same date.

9. On October 19, 2004, the Division issued a Notice to Seller to China King Buffet Inc. in which it requested various sales tax records and remittance of any unpaid sales and use taxes, including those set forth in an attached statement. In addition, the notice stated that a failure to respond within 20 days might result in the issuance of an assessment for the taxes due.

10. By letter, dated October 19, 2004, the Division of Taxation informed petitioner that China King Buffet Inc. had open sales tax liabilities of approximately \$6,000.00 which would be transferred to petitioner.

11. With no payment of the taxes forthcoming, on December 3, 2004, the Division of Taxation issued to petitioner a Notice of Determination which assessed tax due in the sum of \$7,724.02, penalty of \$1,158.60 and interest of \$517.17 for a total amount due of \$9,399.79 for the period ended May 31, 2004. The notice stated that the taxes were determined to be due from

China King Buffet Inc. and that petitioner was liable for them as a purchaser in bulk pursuant to Tax Law § 1141(c).

CONCLUSIONS OF LAW

A. Tax Law § 1141(c) requires the purchaser in a bulk sale transaction to give notice of such sale to the Division of Taxation at least 10 days before taking possession of or making payment for the business assets. If the purchaser fails to file a proper and timely notice of bulk sale then such purchaser becomes personally liable for the sales and use taxes due from the seller, limited to the greater of the purchase price or fair market value of the business assets sold (*see*, 20 NYCRR 537.0[c][2]).

B. In this case, the record is clear, and it is undisputed, that petitioner did not comply with the notice requirements of Tax Law § 1141(c). As indicated by the notification of bulk sale filed by petitioner, the sale of China King Buffet Inc. occurred on September 9, 2004. The envelope in which the notification was mailed to the Division is postmarked September 11, 2004 and the notification itself bears a stamp indicating that it was received by the Division on September 14, 2004. Based on this evidence it is concluded that the notification was not filed with the Division until September 14, 2004 (*see*, 20 NYCRR 537.2[c][3]), well beyond the 10-day period mandated by the statute. By this failure to comply with the notice requirements of Tax Law § 1141(c), petitioner exposed itself to liability for sales and use taxes due from the seller.

C. Generally, upon receipt of a notice of bulk sale, the Division of Taxation is required to issue to the purchaser a notice of possible claim for taxes due from the seller within five business days (*see*, 20 NYCRR 537.6[a]). If the Division fails to meet this requirement the purchaser is relieved of liability for taxes due from the seller (with certain exceptions) (*see*, 20

NYCRR 537.6[b]). This five-day limitations period is applicable, however, only where the purchaser has given “timely” notice of the bulk sale (*id.*). In the instant matter, as discussed previously, petitioner as the bulk sale purchaser failed to give timely notice of the bulk sale. Accordingly, the five-day limitations period does not apply and the Notice of Claim to Purchaser was timely.

D. Tax Law § 1141(c) requires the Division to give notice of the actual amount of taxes due from the seller to both the seller and purchaser within 90 days of the notice of bulk sale. This requirement is statutory and remains in effect whether or not the purchaser timely files the notice of sale. Thus, 20 NYCRR 537.6(d) provides:

If the Division of Taxation fails, within 90 days after receipt of a proper (both as to service and contents) notice of sale, transfer or assignment in bulk of business assets (*whether or not such notice was timely* in accordance with the provisions of subdivision [c] of section 537.2 of this Part), to mail a notice of claim for total taxes due from the seller, . . . the purchaser . . . is relieved from both his obligation to further withhold such funds from the seller . . . and his liability for the taxes due from such seller (emphasis added)

Since the Division did mail a notice of claim and letter to petitioner on October 19, 2004, within 90 days of receiving the notification of bulk sale from petitioner, the statutory and regulatory requirements were satisfied and there can be no claim that petitioner is absolved of its liability for the taxes due.

E. Petitioner’s only contention with respect to its liability for the taxes due was that it had an agreement with China King Buffet Inc. which purportedly indemnified it from payment of any taxes found due after the release of the escrow funds to purchaser, or 90 days after the date of sale. There are two problems with this argument. First, the Division notified seller and purchaser of the claim within 90 days of the date of sale and, therefore, the escrow funds should have been available for payment on the liability. Second, and more importantly, an

indemnification agreement between a seller and purchaser will not relieve a purchaser from its responsibility for the taxes due pursuant to Tax Law § 1141(c).

F. There is no dispute that petitioner has incurred a substantial liability because of the seller's breach of the indemnification agreement and petitioner's own failure to follow the statutory requirements for bulk sale purchasers. However, the statute provides more than adequate protection to prospective purchasers, who need only to inform the Division of the expected sale in order to protect themselves from liability.

Nor is it a valid defense that the Division should seek payment of the taxes from the seller first, since petitioner is jointly and severally liable for the taxes due by virtue of the provisions of Tax Law § 1141(c). (*See, Matter of Hurley*, Tax Appeals Tribunal, July 16, 1998.)

It is concluded that petitioner did not meet its burden of proving that the assessment issued to it was not correct. (20 NYCRR 537.8[c].)

G. The petition of Far East Buffet, Inc. is denied, and the notice of determination, dated December 3, 2004, is sustained.

DATED: Troy, New York
October 26, 2006

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE