

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition  | : |   |
| of   | : |   |
| <b>NEW LIN'S BUFFET, LLC</b>   | : |   |
| for Revision of a Determination or for Refund of Sales<br>and Use Taxes under Articles 28 and 29 of the Tax Law<br>for the Period June 1, 1999 through May 31, 2002. | : | SMALL CLAIMS<br>DETERMINATION<br>DTA NOS. 820827 AND 820991 |

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| In the Matter of the Petition   | : |  |
| of  | : |  |
| <b>FRIENDLY CHINESE BUFFET, INC.</b>  | : |  |
| for Revision of a Determination or for Refund of Sales<br>and Use Taxes under Articles 28 and 29 of the Tax Law<br>for the Period September 1, 1999 through May 31, 2002. | : |  |

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Petitioner New Lin's Buffet, LLC, c/o William K. Chan, 31-33A Market Street, New York, New York 10002, 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 June 1, 1999 through May 31, 2002.

Petitioner Friendly Chinese Buffet, Inc., 800 Harlem Road, West Seneca, New York 14224-1008, 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, 1999 through May 31, 2002.

A consolidated small claims hearing was held before Frank W. Barrie, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 24, 2007 at 2:45 P.M., with all briefs to be submitted by June 4, 2007, which date began the three-month period for the issuance of this determination. Petitioners appeared by William K. Chan, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Richard B. Slovacek [at hearing], Peter B. Ostwald, Esq. [on briefs]).

### ***ISSUE***

Whether the transactions at issue constituted transfers in bulk under Tax Law § 1141(c) so that the respective transferees became liable for estimated sales tax determined due from a predecessor Chinese buffet restaurant known as New Lin's Buffet Chinese Restaurant.

### ***FINDINGS OF FACT***

1. Two individuals, Chang Qin Chen and Wen Tian Lin, operated a Chinese buffet restaurant known as New Lin's Buffet Chinese Restaurant located at 710 Mineral Springs Road in the Buffalo suburb of West Seneca in Erie County. Mr. Chen and Mr. Lin operated their buffet restaurant as a partnership, with each having a half interest in the partnership.

2. Their partnership was a successor entity to Lin's Chinese Buffet Restaurant, Inc., a corporation which had entered into a lease agreement dated July 15, 1994 with a Buffalo development company named Benderson Development Company, Inc. Pursuant to this lease, the corporation rented for a period of ten years "4,000 square feet of space located at Harlem and Mineral Springs Plaza" at an annual rent of \$34,000.00 for the first three years, \$38,000.00 for the fourth through the sixth years, and \$42,000.00 for the seventh through tenth years. Petitioners introduced into evidence only the first page of this lease agreement, and the record does not disclose any details concerning the right of renewal under the lease. In addition, the

page of the lease showing its execution was also not introduced into evidence so that it is unknown who signed the lease on behalf of Lin's Chinese Buffet Restaurant, Inc., though it is observed that this corporate name includes the surname of Wen Tian Lin, a member of the successor partnership which took over the operation of the Chinese buffet restaurant.

3. By an "assignment and assumption of lease" agreement dated July 2, 1998, Lin's Chinese Buffet Restaurant, Inc., assigned the lease agreement dated July 15, 1994 to Chang Qin Chen and Wen Tian Lin for \$10.00. Pursuant to this assignment of lease, the sum of \$7,000.00 was also part of the "assignment" to Chang Qin Chen and Wen Tian Lin and appears to be the security deposit stated in the original lease. This assignment was executed by Guang Zhong Lin, as president of Lin's Chinese Buffet Restaurant, Inc. The record does not disclose any information concerning this individual and whether Wen Tian Lin, one of the two assignees, was a relation. But given the financial arrangement which included the assignment of the security deposit and the specified consideration of only \$10.00, it is reasonable to find that the assignor and the assignees were not dealing with each other on an arm's-length basis.

4. During the spring of 2002, as part of the Division of Taxation's ("Division") Buffalo District Office's "cash project," the Chinese buffet restaurant located at 710 Mineral Springs Road in West Seneca "was requested for audit." By a letter dated June 6, 2002, the Division requested that New Lin's Buffet Chinese Restaurant (then operating as a partnership of Mr. Chen and Mr. Lin as noted in Finding of Fact "1") make available for audit its sales records. The business had available for review only handwritten journals to back up its sales figures and did not have available any cash register tapes, sales invoices or guest checks to substantiate the sales figures reported on its sales tax returns. It also did not have available for review purchase records such as purchase invoices or a purchase journal. Consequently, in the course of its audit

which took 89.50 hours, the Division estimated the partnership's taxable restaurant sales by performing a "third party analysis of the [restaurant's] inventory purchases" from its suppliers. A schedule included in the audit file shows that the Division conducted a detailed analysis of the restaurant's purchases for the three-year audit period of June 1, 1999 through May 31, 2002 from the following ten suppliers: Will Poultry, Great Wall Supply Co., Depew Milk Co., Schneider's Fish, Sunshine Fruit and Vegetable, Master Provisions, Wing Guy Trading Inc., Tai Wah Trading-Rock Fu, Haas Produce and Pepsi Bottling. For example, for the sales tax quarter ending November 1999, the Division determined that the restaurant had purchases totaling \$13,622.83, \$15,846.91 and \$17,143.50 for September, October and November of this quarter. The Division then computed the restaurant's taxable sales for the sales tax quarter ending November 1999 by marking up 100% over cost only 85% of the above monthly totals, so as to make an allowance for "spoilage and self-use" of 15% of the purchases. Utilizing such methodology, the Division calculated that the restaurant had taxable sales of \$79,242.51 for the quarter ending November 1999. In this fashion, the Division estimated that the restaurant had taxable sales for the three-year audit period of June 1, 1999 through May 31, 2002 of \$897,389.34. Since the restaurant had reported total taxable sales on its returns for the audit period of only \$454,342.00, the Division calculated that sales tax was due in the amount of \$35,443.79 on additional sales of \$443,047.00 for the audit period.

5. As a result of its audit, the Division issued a Statement of Proposed Audit Change dated March 5, 2004 to New Lin's Buffet Chinese Restaurant, as noted in Finding of Fact "1", a partnership of Chang Qin Chen and Wen Tian Lin, asserting sales tax due of \$35,443.79 plus interest. No penalty was asserted due. Shortly thereafter, on March 19, 2004, Chang Qin Chen signed a consent to the tax asserted due of \$35,443.79 plus interest and made a payment in the

amount of \$3,000.00 on the assessment by a check dated March 22, 2004.<sup>1</sup> The consent executed by Mr. Chen provided in part as follows:

By signing this consent, I understand that: (1) I am waiving my right to have a Notice of Determination issued to me, and I am also waiving my right to have a hearing to contest the validity and amount of the tax, interest . . . determined and consented to.

6. In the course of the audit, in October of 2003, Wen Tian Lin died, and the sales tax return for the quarter ending November 30, 2003 showed the owner and operator of the Chinese buffet restaurant on Mineral Springs Road in West Seneca was changed to New Lin's Buffet LLC, from the partnership known as New Lin's Buffet Chinese Restaurant. Nonetheless, the check in payment of tax reported due on the return of \$4,957.72 was on a bank account for New Lin's Buffet Chinese Restaurant. This check was signed by Chang Qin Chen, who remained responsible for the restaurant's operation first as the surviving partner and then as the person who owned and controlled the successor entity, New Lin's Buffet, LLC.

7. Although the operation of the restaurant had shifted from the partnership to New Lin's Buffet, LLC, the Division had no record of a filing of a Notification of Sale, Transfer or Assignment in Bulk. On June 7, 2004, a request for information and completion of a notification was sent to New Lin's Buffet, LLC. Since no response was received, a follow-up request was sent on July 15, 2004. On August 16, 2004, a Notice of Claim to Purchaser was sent to New Lin's Buffet, LLC. In response to this correspondence, the Division was contacted by petitioners' representative, William K. Chan, who advised that the seller "was actually the

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<sup>1</sup> A report prepared prior to the Bureau of Conciliation and Mediation Services conference held in this matter on June 16, 2005 shows that on the original tax asserted due of \$35,443.79, the amount of tax that had been paid totaled \$16,151.34 leaving "tax now due" of \$19,292.45. A printout labeled "CARTS-Assessments Receivable" dated September 9, 2005 shows "account receivables payments/credits" of \$19,718.21 on the partnership's assessment.

current purchaser (Chang Qin Chen) who was a partner in the former business.” The auditor explained that the Division was not asserting sales tax due from the corporate entity on the restaurant’s tangible personal property “but that the seller assessments would be rolled to the current [business] . . . .”

8. The Division issued a Notice of Determination dated September 30, 2004 against the successor entity, New Lin’s Buffet, LLC, asserting tax due of \$35,443.79, which conforms to the amount determined due from its audit of the partnership’s operation of the buffet restaurant, as detailed in Finding of Fact “4”. This notice explained that it “is issued because you are liable as a bulk sale purchaser for taxes determined to be due . . . .” It also showed an “assessment payment/credit” in the amount of \$2,517.71 resulting in a “current balance due” of \$32,926.98.

9. With only the minimal response from New Lin Buffet, LLC, as noted above, the Division estimated “the selling price of business assets” from the partnership to New Lin’s Buffet, LLC, by utilizing a Robert Morris Statement Study Worksheet which provided that the selling price of business assets for “restaurants” may be estimated by applying a sales/total assets ratio of 3.3 to annual gross sales. The Division utilized “estimated gross sales per quarter” of \$70,998.89 to calculate “estimated annual gross sales” of \$283,995.56, which divided by 3.3 resulted in an “estimated selling price of business assets” of \$86,059.26. Since taxes asserted due against the partnership of \$35,443.79, as detailed in Finding of Fact “5”, were less than this estimated selling price of business assets, the Division asserted the full amount of the outstanding sales tax liability of the partnership against the successor corporate entity by issuing the Notice of Determination dated September 30, 2004 against petitioner New Lin’s Buffet, LLC.

10. Sales tax returns included in the record show that New Lin's Buffet, LLC, continued to operate the buffet restaurant in suburban Buffalo until the sales tax quarter ending August 31, 2004. On its last return, it reported gross sales of only \$9,125.00.

11. Petitioner Friendly Chinese Buffet, Inc., was incorporated as a New York domestic business corporation on or before April 14, 2004, the initial Department of State filing date. This corporate entity operated a Chinese buffet restaurant at 800 Harlem Road in West Seneca, less than one-tenth of a mile down the road from the Chinese buffet restaurant that had been operated by the partnership and then New Lin's Buffet, LLC, at 710 Mineral Springs Road, which had been demolished.

12. A Notice of Determination dated March 7, 2005 was issued to Friendly Chinese Buffet, Inc., asserting tax due of \$25,874.14 for the sales tax period ended May 31, 2002. The notice explained:

We determined that taxes are due from New Lin's Buffet LLC (seller name).  
These taxes are your liability, as purchaser, under section 1141(c) of the Tax Law.

13. Friendly Chinese Buffet, Inc., started up its operation in June of 2004, and the auditor in her log described the restaurant after a visit on May 12, 2005 as a "large Chinese buffet with seating for more than 50 patrons" and that it had "7 to 9 employees." She also indicated in her log that the menu for the restaurant "indicated [place of business] was previously Lin's buffet" and the telephone number for Friendly Chinese Buffet was the same telephone number previously used by New Lin's Buffet, LLC. However, other than the telephone number, no business assets were transferred by New Lin's Buffet, LLC, to Friendly Chinese Buffet, Inc.<sup>2</sup>

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<sup>2</sup> This critical finding of fact was based upon the testimony under oath of William K. Chan, CPA, who was also petitioners' representative and preparer of tax returns.

14. The Division computed an estimated sales price of business assets it claimed were transferred from New Lin's Buffet, LLC, to Friendly Chinese Buffet, Inc., by utilizing the same methodology detailed in Finding of Fact "9" which was used to estimate "the selling price of business assets" from the partnership to New Lin's Buffet, LLC, based upon a Robert Morris Statement Study Worksheet. In this instance, the Division calculated an "estimated gross sales per quarter" for New Lin's Buffet, LLC, of \$49,830.00 to calculate "estimated annual gross sales" of \$199,319.00, which divided by 3.3 resulted in an "estimated selling price of business assets" of \$60,399.70. Since taxes asserted due against Friendly Chinese Buffet, Inc., as noted in Finding of Fact "11", were less than this estimated selling price of business assets, the Division asserted the full amount of the outstanding sales tax liability of the partnership against petitioner Friendly Chinese Buffet, Inc.

### ***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. The liability of the purchaser is limited to the greater of the purchase price or fair market value of the business assets sold (*see*, Tax Law § 1141[c]).

B. The term "bulk sale" is defined at 20 NYCRR 537.1(a) in an expansive fashion to mean

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.



This regulatory definition of “bulk sale” even includes transfers “by way of gift” providing as an example of a bulk sale: “A husband makes a gift of all his business assets to his wife” (20 NYCRR 537.1[a][3] Example 4; *see also, Matter of Gauhan*, Tax Appeals Tribunal, May 14, 1992 [wherein the Tribunal noted that “sale of assets as part of a liquidation of the seller’s business is considered to be within the purview of section 1141(c)”]).

C. Furthermore, a bulk sale can exist even when the purchaser is not required to transfer over to the seller “any sums of money” (*see, Matter of Peconic Bay Motors, Inc.*, Tax Appeals Tribunal, September 26, 1991 [wherein the Tribunal noted that Tax Law § 1141(c) applies in the case where the sole consideration received by the seller takes the form of debt relief]).

Moreover, the regulatory definition of “purchaser” encompasses “any person who, as part of a bulk sale, purchases *or is the transferee or assignee* of business assets” (20 NYCRR 537.1[e] [emphasis added]). Here, as noted in Finding of Fact “6”, Chang Qin Chen became the sole owner of the Chinese buffet restaurant on Mineral Springs Road in West Seneca upon the death of his partner Wen Tian Lin. The record does not include any details concerning the formation of New Lin’s Buffet, LLC, but it is undeniable that this corporate entity took over the ownership of the restaurant formerly owned and operated by the partnership. In order for this corporate entity to be in the position of owning and operating the restaurant on Mineral Springs Road, the assets of the partnership had to have been transferred or assigned to this successor entity (despite the lack of any details in the record concerning the specifics concerning such transfer), and such transfer is encompassed by the expansive regulatory definition of “bulk sale” noted above.

Consequently, New Lin’s Buffet, LLC, as a bulk sale “purchaser,” is properly held to be responsible for the vendor’s (i.e., the partnership’s) unpaid sales tax (*see, Matter of North Shore Cadillac-Oldsmobile, Inc. v. Tax Appeals Tribunal*, 13 AD3d 994, 787 NYS2d 463, *appeal*

*denied* 5 NY3d 704). It is important to point out the Division of Taxation is not asserting that sales tax is due on the transfer of tangible personal property from the partnership to New Lin's Buffet, LLC (*see*, 20 NYCRR 526.6[d][1][iii]), which excludes "the distribution of property by a partnership to its partners in whole or partial liquidation" from the definition of "retail sale"). Furthermore, the estimate of "the selling price of business assets" from the partnership to New Lin's Buffet, LLC, detailed in Finding of Fact "9" was reasonable and need not be adjusted based upon the term of the lease which was coming to an end, as urged by petitioners, since it is unknown whether the lease contained a right of renewal, as noted in Finding of Fact "2".

D. In contrast, Friendly Chinese Buffet, Inc., may not be held responsible for the partnership's unpaid sales tax as a bulk sale transferee or "purchaser." As noted in Finding of Fact "10", no business assets were transferred by New Lin's Buffet, LLC, to Friendly Chinese Buffet, Inc., other than a telephone number which is of *de minimis* value to a buffet restaurant in contrast with a take-out Chinese restaurant (*see, Matter of Velez v. Division of Taxation of the Dept. Of Taxation & Finance*, 152 AD2d 87, 547 NYS2d 444 [which confirmed that a bulk sale purchaser's liability under Tax Law § 1141(c) is limited to the amount of tax owed by the seller, with such amount itself limited to the greater of either the purchase price (which here is zero) or the fair market value of the business assets purchased (which here is of *de minimis* value)]). It is noted that the conclusion that merely a telephone number was transferred to Friendly Chinese Buffet, Inc., from New Lin's Buffet, LLC, was based on the testimony of petitioners' representative, as noted in Footnote "2." A hearsay statement in the auditor's log that on a visit to the premises of Friendly Chinese Buffet, Inc., she observed that "the menu for the restaurant indicated [place of business] was previously Lin's Buffet" and that the owner was named Yan

*Lin* was insufficient evidence to undercut the testimony of Mr. Chan, which was not undermined by any cross-examination.

E. The petition of New Lin's Buffet, LLC, is denied, and the Notice of Determination dated September 30, 2004 is sustained except to the extent that further payments of tax have been made since the issuance date of the notice. The petition of Friendly Chinese Buffet, Inc. is granted, and the Notice of Determination dated March 7, 2005 is canceled.

DATED: Troy, New York  
August 9, 2007

/s/ Frank W. Barrie  
PRESIDING OFFICER