

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
751 BERGEN DELY, INC. : DETERMINATION
for Revision of Determinations or for Refund of : DTA NO. 821738
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Periods December 1, 2000 through :
November 30, 2004 and September 1, 2005 through :
November 30, 2005. :

Petitioner, 751 Bergen Dely, Inc., filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 2000 through November 30, 2003 and September 1, 2005 through November 30, 2005.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 29, 2007 at 10:30 A.M., with all briefs to be submitted by March 27, 2008, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Leonard Fein, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUES

- I. Whether petitioner acquired certain assets in a bulk sale transaction.
- II. Whether sales tax determined on an estimated audit should be sustained.

FINDINGS OF FACT

1. Pursuant to an Agreement dated October 3, 2003, Brooklyn Subs, Inc. (Brooklyn), purchased a bodega-style convenience store business located at 751 Bergen Street, Brooklyn, New York. The seller in the transaction was Buy Rite Grocery Corp. (Buy Rite). The total selling price for the business was \$125,000.00. Brooklyn continued to operate the bodega-style convenience store at 751 Bergen Street following the purchase.

2. In connection with its purchase of the business, Brooklyn filed a Notification of Sale, Transfer or Assignment in Bulk dated October 3, 2003 with the Division of Taxation (Division). Such notification, received by the Division on October 9, 2003, does not indicate the date or scheduled date of the sale.

3. By letter dated November 7, 2003, the Division advised the seller, Buy Rite, that it had been selected for a desk audit of its sales tax liability and requested that Buy Rite provide copies of business-related books and records for the period December 1, 2000 through November 30, 2003.

4. Buy Rite did not, at any time, respond to the Division's request for records.

5. Also by letter dated November 7, 2003, the Division advised Brooklyn of its potential liability for unpaid sales tax liabilities owed by Buy Rite in the bulk sales transaction. The Division's letter further advised Brooklyn that "at this time there may be a substantial [sales tax] liability due" and recommended that Brooklyn put any note payments due to the seller into an escrow account pending resolution of the matter. The letter also noted that, according to the Division's records, Brooklyn was not registered as a vendor for sales tax purposes. Additionally, the letter requested that Brooklyn file an amended bulk sale notification indicating the date of the sale. Brooklyn filed no such amended bulk sale notification.

6. The Division issued to Brooklyn a Notice of Claim to Purchaser dated November 10, 2003 which advised of a possible claim for sales and use taxes from the seller, Buy Rite. This notice directed Brooklyn 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 Brooklyn that its failure to comply with its terms would subject Brooklyn to liability for any sales tax deficiency due from the seller.

7. The Division also issued a Notice to Escrow Agent dated November 10, 2003, which similarly advised the escrow agent listed on the bulk sale notification 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.

8. On November 7, 2003 a Division investigator visited Brooklyn's business premises at 751 Bergen Street in Brooklyn. Based on a conversation the investigator had with the store employee present at the time of the visit, the investigator determined that the business operated on the premises was the same as that of the seller; that monthly rent was \$2,500.00; that the store was open 6 days per week from 7:00 AM to midnight; and that average daily sales were \$750.00. The investigator's report further notes that the store sold taxable items such as hot and cold sandwiches, soda, beer, candy, paper goods, detergents, batteries and film, and nontaxable items such as coffee, tea, bread, milk, iced tea, baby food, cereal, cold cuts by the pound, over-the-counter medicine, potato chips, and prepackaged ice cream. The report estimates that 50 percent of the store's sales were taxable based on the investigator's review of the items sold.¹

¹ Buy Rite's reported taxable sales ratio was 13 percent.

9. The investigator's report, in an entry under the heading "purchaser name," lists "Brooklyn," a telephone number and "Peter (owner)."

10. Following the investigator's visit, the Division estimated Buy Rite's sales tax liability for the audit period using the information contained in the investigator's report. Specifically, the Division multiplied the estimated daily sales of \$750.00 by the number of days per quarter, 90, to reach quarterly gross sales of \$67,500.00. Such quarterly gross sales were then multiplied by the taxable ratio of 50 percent to reach quarterly taxable sales of \$33,750.00. The Division then multiplied the applicable sales tax rate by such taxable sales and, after allowing for sales tax paid, determined additional sales tax due from Buy Rite of \$28,649.28 for the period December 1, 2000 through November 30, 2003.

11. The Division subsequently issued to Buy Rite a Statement of Proposed Audit Change for Sales and Use Tax dated December 1, 2003 which asserted \$28,649.33 in additional tax due, plus penalty and interest, for the period December 1, 2000 through November 30, 2003.

12. Jose A. Gutierrez was president of Brooklyn. He executed the contract of sale dated October 3, 2003 pursuant to which Brooklyn purchased the business (*see* Finding of Fact 1). He also signed the bulk sale notification dated October 3, 2003 filed by Brooklyn with the Division in connection with its purchase of the business from Buy Rite (*see* Finding of Fact 2). In addition, Mr. Gutierrez signed, as president of Brooklyn, an Application for Registration of Retail Dealers and Vending Machines for Sales of Cigarettes and Tobacco Products dated October 16, 2003. This application indicates September 19, 2003 as the date Brooklyn began doing business in New York. Mr. Gutierrez also signed sales tax returns on behalf of Brooklyn for the quarterly sales tax periods ended November 30, 2003 through May 31, 2005, as well as checks in payment of sales taxes remitted with such returns. Additionally, Mr. Gutierrez is listed

as president of Brooklyn on Brooklyn's quarterly combined withholding, wage reporting and unemployment insurance returns for the period January 1, 2005 through September 30, 2005.

Mr. Gutierrez is also listed as an employee on the same returns.

13. Petitioner, 751 Bergen Dely, Inc., purchased the business assets of Brooklyn in a bulk sale transaction in or about October or November 2005. Following its purchase, petitioner continued to operate the store at 751 Bergen Street in the same manner as Brooklyn.

14. Petitioner did not file a bulk sale notification with the Division with respect to its purchase of Brooklyn's assets, and there is no contract of this sale in the record.

15. Petitioner filed an Application for Registration as a Sales Tax Vendor dated October 24, 2005. This application indicates that the applicant (petitioner) purchased an existing business, described as a "deli/grocery store," located at 751 Bergen Street, Brooklyn, New York. The application further lists Mr. Gutierrez as president of petitioner.

16. At around the time of the transfer of assets from Brooklyn to petitioner, the parties to that transfer executed a New York State Liquor Authority Application for Liquidator's Permit, which lists Brooklyn as the seller and petitioner as the buyer and is stamped received by the State Liquor Authority on November 4, 2005. This application provides that it is "to be completed by the licensee who is selling or liquidating their business and who proposes to dispose of the stock of alcoholic beverages in connection with such sale." The application is signed by Mr. Gutierrez on behalf of both the buyer and seller.

17. Petitioner filed an Application for Registration of Retail Dealers and Vending Machines for Sales of Cigarettes and Tobacco Products dated November 23, 2005. This application indicates October 27, 2005 as the date petitioner began doing business in New York and is signed by Mr. Gutierrez as president.

18. By letter dated February 9, 2006, the Division advised petitioner that information received by the Division indicated that a possible bulk sale transaction had occurred between petitioner as the purchaser and Brooklyn Subs as the seller. The letter noted that the Division had not yet received a bulk sale notification as required under the Tax Law and requested that petitioner complete such a notification and return it to the Division within 20 days. The letter further advised petitioner that if it did not return the completed notification within 20 days the Division would determine petitioner's sales tax liability based on all available information.

19. The information alluded to in the February 9, 2006 letter resulted from a visit to the business premises by an employee of the Division's compliance division regarding a bulk sale assessment against Brooklyn arising from its purchase of Buy Rite's assets.

20. By letter dated March 10, 2006 the Division advised petitioner that it had not responded to the Division's previous letter of February 6, 2006 and that petitioner's failure to respond within 15 days "may result in assessments being issued against you as a purchaser in a bulk sale transaction."

21. Petitioner responded to the Division's correspondence by letter dated March 15, 2006 which stated as follows:

Please be advised that there was no bulk sale transaction. We purchased an empty store. Please correct your records to indicate this.

22. The Division subsequently issued a Notice of Claim to Purchaser, dated March 24, 2006, to petitioner advising of a possible claim for sales and use taxes from the seller, i.e., Brooklyn. 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.

23. On April 3, 2006, the Division issued to petitioner a Notice of Determination which assessed \$27,999.33 in tax due. The notice identified the period at issue as the tax period ended November 30, 2004 and explained the assessment as follows: “We determined that taxes are due from Brooklyn Subs, Inc (seller name). These taxes are your liability, as purchaser, under section 1141(c) of the Tax Law.”

24. At hearing the Division conceded that its estimate of tax due for the period at issue was in error to the extent that it was based on a 7-day week and 90-day quarter. As noted, the investigator’s report indicates that the business was open six days per week. The Division therefore recomputed the tax deficiency accordingly. Specifically, given the 6-day week, the Division determined 76 days per quarter, multiplied by \$750.00 in daily gross sales and a 50 percent taxable ratio, which resulted in audited quarterly taxable sales of \$28,500.00.

Application of the applicable sales tax rate and after giving credit for tax paid, including credit for \$209.00 reported by Buy Rite and \$650.00 paid by Brooklyn not previously credited, resulted in additional tax due from petitioner of \$22,550.75.²

25. At hearing petitioner submitted a photocopy of a handwritten document dated November 1, 2005 and signed by Jose Gutierrez which states the following:

751 Bergen Deli Inc. owe [sic] a promisery [sic] note of \$25,000 to be paid to landlord Washington Bergen Realty Corp. for 48 monthly installments of

² It is observed that in its recomputation submitted post-hearing the Division improperly asserted penalties and interest against petitioner. A bulk sale purchaser is not liable for interest and penalty owed by the seller (*see Matter of Velez v. Division of Taxation of the Dept. of Taxation & Fin.*, 152 AD2d 87, 547 NYS2d 444 [1989]). Interest owed by the purchaser accrues only from the date of issuance of the notice of determination. Indeed, the April 3, 2006 Notice of Determination issued to petitioner assessed tax only and did not assess penalties and interest (*see Finding of Fact 23*).

\$520.84. To paid [sic] every first of the month together with monthly rent of \$2,600 dollars. For equipment and inventory for 751 Bergen Street, Brooklyn, N.Y. 11238. Any default on the monthly payment of \$520.84 terminate [sic] your lease of 5 years.

26. Petitioner also submitted a copy of a lease dated November 1, 2005 between Washington Bergen Realty Corp. as landlord and petitioner as tenant, pursuant to which petitioner leased the building at 751 Bergen St., Brooklyn, to be used as a grocery store only, for a term of five years beginning November 1, 2005 for an annual rent of \$31,200.00. The lease is not signed on behalf of petitioner as tenant and is signed "Washington Bergen Realty" as landlord.

27. On February 17, 2006, the Division issued to petitioner a Notice of Nonreceipt of Sales and Use Tax Return which advised petitioner that the Division had not received petitioner's sales tax return for the period September 1, 2005 through November 30, 2005. The notice advised that if petitioner failed to file a return by March 4, 2006 the Division would issue a Notice of Determination.

28. Petitioner did not respond to the Division's notice of nonreceipt, and on May 9, 2006 the Division issued to petitioner a Notice of Determination (Estimated) which assessed \$750.00 in tax due, plus penalty and interest, for the period September 1, 2005 through November 30, 2005. This notice advised petitioner that the Division would cancel this estimated liability if petitioner filed the return and paid the actual tax due plus penalty and interest by August 7, 2006. The notice also advised that even if no tax was due for the period, petitioner was required to file a return and pay the minimum penalty for late filing.

29. On May 16, 2006 petitioner did respond to the notice of nonreceipt, indicating that it filed its return for the period in question and that no tax was due. Petitioner offered no proof of such filing.

SUMMARY OF PETITIONER'S POSITION

30. Petitioner asserts that it was not a party to a bulk sale and thus cannot be liable under Tax Law § 1141(c). Specifically, petitioner asserts that the owner of the real property evicted Brooklyn from the store premises because Brooklyn failed to pay its rent. According to petitioner, the landlord then took possession of the store's inventory and equipment. Petitioner asserts that it purchased the inventory and equipment from the landlord.

31. Petitioner further contends that Mr. Gutierrez did not own Brooklyn, but was only an employee of Brooklyn. Petitioner asserts that the owner of Brooklyn used Mr. Gutierrez's name on documents, likely in order to obtain a liquor license. Petitioner asserts that its position on this point is supported by the listing of "Peter (owner)" on the investigator's report.

32. With respect to the audit, petitioner contends that the Division's use of \$750.00 per day in gross sales was unreasonable because there is no evidence as to how the Division came up with this amount. Petitioner asserts that the taxable ratio of 50 percent used on audit was excessive because the store was located in a low income neighborhood and that therefore a high percentage of its sales were food stamp purchases of otherwise taxable food.

33. Petitioner also complains that it had little opportunity or ability to prove the Division wrong when it was presented with the details as to the audit method for the first time at the hearing.

CONCLUSIONS OF LAW

A. The Division's regulations define the term "bulk sale" for sales and use tax purposes 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" (20 NYCRR 537.1[a][1]). A purchaser in a bulk sale transaction becomes personally liable for the sales and use taxes which the Division claims to be due from the seller if the purchaser fails to file a proper and timely notice of bulk sale (Tax Law § 1141[c]). The purchaser's liability is limited to the greater of the purchase price or fair market value of the business assets sold (20 NYCRR 537.0[c][2]).

B. Where there have been successive bulk sales each successive purchaser acquires a derivative liability from all previous bulk sales to the seller for which an outstanding liability still exists (20 NYCRR 537.4[j]). Accordingly, assuming petitioner made a bulk sale purchase of the business assets of Brooklyn, petitioner acquired a derivative liability from Brooklyn with respect to tax claimed by the Division to be due, in the first instance, from Buy Rite as a result of the audit. Brooklyn's liability for taxes claimed to be due from Buy Rite resulted from Brooklyn's failure to timely file a properly completed notice of bulk sale in accordance with Tax Law § 1141(c) (*see* Finding of Fact 2).

C. There is ample evidence in the record to establish a rational basis for the Division's assertion that Brooklyn sold to petitioner all of its business assets in a bulk sale in or about October or November 2005. Specifically, petitioner's Application for Registration dated October 24, 2005 filed with the Division indicates that petitioner purchased, as an existing business, a "deli/grocery store" located at 751 Bergen Street in Brooklyn. Additionally, the State Liquor Authority Application for Liquidator's Permit stamped received by the Liquor Authority on November 4, 2005 indicates that Brooklyn sold its business to petitioner, including its beer

inventory. Both of these contemporaneous documents credibly support the Division's position that petitioner purchased the assets of Brooklyn in a bulk sale.

In contrast, the evidence presented by petitioner lacks credibility and thus fails to establish petitioner's claim that it purchased the store's assets and inventory from the owner of the premises, Washington Bergen Realty Corp. Petitioner's version of events rests largely on the testimony of its representative, Lawrence Fein. Mr. Fein, however, had no personal knowledge of these purported events. His testimony was based on conversations he had with Mr. Gutierrez, who, notably, did not testify at the hearing.³ The administrative law judge is thus unable to assess Mr. Gutierrez's credibility, and Mr. Fein's testimony with respect to the purported transaction between petitioner and Washington Bergen Realty is therefore properly given little weight.

Additionally, petitioner's tangential contention that Mr. Gutierrez was not the owner of Brooklyn fails in light of the documentary evidence showing his signature as president of Brooklyn (*see* Finding of Fact 12), the absence of any testimony from Mr. Gutierrez himself, and the fact that this contention also rests upon Mr. Fein's hearsay testimony.

The photocopy of the purported promissory note by which petitioner claims it paid for the inventory and equipment purchased from the landlord is also properly given little evidentiary weight. This document lacks credibility as the maker of the note, petitioner (i.e., Mr. Gutierrez), did not testify to establish its authenticity. Nor did petitioner offer any testimony from the payee of the note, Washington Bergen Realty Corp. Furthermore, petitioner offered no evidence of

³ Petitioner's representative indicated that Mr. Gutierrez did not appear at the hearing because he does not speak English well. As to this information, it is observed that the Notice of Hearing sent to petitioner by the Division of Tax Appeals provides that "[p]etitioners and witnesses who are not able to participate in the hearing process because of their inability to speak or understand the English language should bring to the hearing an individual capable of translating for them."

repayment of the note, such as cancelled checks. The copy of the note in evidence thus fails to establish an indebtedness between petitioner and Washington Bergen Realty Corp. and thus fails to support petitioner's contention that it purchased the store's equipment and inventory from Washington Bergen Realty and not from Brooklyn.

The lease between petitioner and Washington Bergen Realty Corp. also offers little support to petitioner's position as there is no dispute that petitioner and Brooklyn are different entities and that petitioner began operating the store at 751 Bergen Street in or about October 2005. The fact that Washington Bergen Realty entered into a lease with petitioner for the premises does not support a finding that Washington Bergen Realty sold the equipment and inventory to petitioner.

Petitioner also cites the Division's investigator's report of her visit to Brooklyn's store which indicates "Peter (owner)" in support of its contention that petitioner did not purchase the assets in a bulk sale but purchased them from the landlord. While this evidence may suggest that an individual at the store identified himself to the investigator on November 7, 2003 as "Peter," an "owner," it does not in any way support the contention that petitioner purchased the business assets from the landlord in or about October or November 2005.

D. Because, as has been determined, petitioner was a purchaser in a bulk sale transaction, it was required under Tax Law § 1141(c) 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. There is no question that petitioner did not give notice to the Division as required under Tax Law § 1141(c). 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 Brooklyn, the bulk seller, and Buy Rite, the previous bulk seller (20 NYCRR 537.4[j]), limited to the greater of the purchase price or fair market value of the business assets sold (*see* 20 NYCRR 537.0[c][2]).

E. Turning to the Division's determination of additional tax due, in the first instance, from Buy Rite, the record shows that Buy Rite, the seller in the first bulk sale transaction, did not produce records in response to the Division's request. Under such circumstances, the Division was authorized to estimate Buy Rite's sales, as long as it selected an audit method reasonably calculated to reflect the sales and use taxes due (*see Matter of Grant v. Joseph*, 2 NY2d 196, 204, 159 NYS2d 150, 157 [1957], *cert denied* 355 US 869 [1957]).

The Division's use of its investigator's report to estimate Buy Rite's average daily sales and its percentage of taxable sales provided a reasonable basis for calculating Buy Rite's sales tax liability. The use of an estimated daily sales amount provided by the person interviewed by the investigator at the store was affirmed as a reasonable basis for calculating sales by the Tax Appeals Tribunal in *Matter of Rincon* (Tax Appeals Tribunal, October 3, 2003). As to the estimate of Buy Rite's percentage of taxable sales, given the statutory presumption of taxability of retail sales (*see* Tax Law § 1132 [c]) and the fact that the estimate was based on the investigator's observation of items on display in the store, it cannot be concluded that such estimate was unreasonable or irrational (*see Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219 [1986]). Consequently, the burden of proof was on petitioner to show, by clear and convincing evidence, that the result of this estimate of its liability was unreasonably inaccurate or that the amount of tax assessed was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

F. Petitioner has clearly failed to meet this burden. Petitioner contended, contrary to the record (*see* Finding of Fact 8), that the Division did not show how it "came up with the \$750." Petitioner did not offer any proof to challenge the Division's evidence that this figure was

provided to the investigator by the individual she spoke with during her visit to the store. Nor did petitioner offer any evidence to show that the \$750.00 amount was erroneous.

Petitioner also argued that the estimate of Buy Rite's taxable ratio was excessive. Petitioner did not, however, offer any evidence as to Buy Rite's percentage of taxable sales, but offered only the testimony of its representative that the store was located in a low-income neighborhood and that therefore a high percentage of its sales were food stamp purchases of otherwise taxable food (*see* 20 NYCRR 528.27). Such conclusory allegations of error are insufficient to show that an audit method was unreasonable or an audit result erroneous (*see Matter of Vebol Edibles v. Tax Appeals Tribunal*, 162 AD2d 765, 557 NYS2d 678 [1990], *lv denied* 77 NY2d 803, 567 NYS2d 643 [1991]).

Petitioner also contended, for the first time in its brief, that "the taxpayer does not have much of an opportunity to prove the Division wrong when the taxpayer is presented with [the Division's audit estimates] for the first time at hearing." Petitioner, however, did not raise this point at the hearing and there is no evidence in the record that petitioner ever requested any documents from the Division at any point in this proceeding.

It is well established that a presumption of correctness attaches to a Notice of Determination upon its issuance and petitioner bears the burden of overcoming this presumption (*see Matter of Hammerman*, Tax Appeal Tribunal, August 17, 1995). Accordingly, while the Division's audit was surely not immune from attack (*see Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679 [1988]), by its failure to present evidence showing error in the audit method or result petitioner has "surrendered to the statutory presumption of correctness" (*see Matter of Tavolacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174, 175 [1980]).

Accordingly the assessment, as adjusted, must be sustained.

G. Other than the response to the Division's notice of nonreceipt (*see* Finding of Fact 29), petitioner offered no evidence or argument in opposition to the Notice of Determination (Estimated) dated May 9, 2006. Accordingly, this notice, which, as noted above, is presumed correct upon its issuance (*see Matter of Hammerman*), must be sustained.

H. The petition of 751 Bergen Dely, Inc. is denied and the Notice of Determination dated April 3, 2006, as modified in accordance with Finding of Fact 24, and the Notice of Determination (Estimated) dated May 9, 2006, are sustained.

DATED: Troy, New York
June 26, 2008

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE