

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CORNER QUICK STOP, INC.** : DETERMINATION  
For Revision of a Determination or for Refund of Sales : DTA NO. 822342  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period December 1, 2001 through :  
February 28, 2005. :  
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Petitioner, Corner Quick Stop, Inc., 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 1, 2001 through February 28, 2005.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at 183 Main Street, Rochester, New York, on August 12, 2009 at 10:15 A.M., with all briefs to be submitted by March 3, 2010, which date began the six-month period for issuance of this determination. Petitioner appeared by Neil M. Gingold, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert Maslyn, Esq., of counsel).

***ISSUE***

Whether the transactions at issue constituted sales, transfers or assignments in bulk under Tax Law § 1141(c).

***FINDINGS OF FACT***

1. At issue in this proceeding are some business transactions by and between petitioner, Corner Quick Stop, Inc., (Corner Quick Stop), and Alaskan Oil, Inc., (Alaskan Oil). These

business transactions involved closed gas stations/convenience stores located in Wayne and St. Lawrence counties.

2. Incorporated in 2003, petitioner is a New York corporation solely owned by Cindy Neugebauer. Alaskan Oil is a New York corporation solely owned by Richard Neugebauer, Ms. Neugebauer's husband. Both corporations have the same Skaneateles, New York, business address.

**The Clyde, New York, transaction**

3. On November 3, 2006, petitioner agreed to purchase from Alaskan Oil the real property and improvements thereon located at 10329 NYS Route 31 West, Clyde, New York (the Clyde property). Under the terms of the purchase agreement, petitioner agreed to deliver a purchase money bond and mortgage in the amount of \$50,000.00 to Alaskan Oil at the closing. The purchase agreement also provided that the interest rate on the 15-year purchase money mortgage was to be 6%, with monthly installments of \$421.93, "including entire principal and interest." According to the terms of the purchase agreement, the closing was to take place on or about December 29, 2006, and possession of the premises was to be delivered upon transfer of title.

4. On January 23, 2007, the Sales Tax Desk Audit - Casual Sales Unit of the Division of Taxation received a form ST-130, Business Purchaser's Report of Sales and Use Tax, dated January 19, 2007, from petitioner reporting sales tax due on its \$2,500.00 purchase of business assets located at the Clyde property from Alaskan Oil. Petitioner also remitted \$200.00, the sales tax reported due, with this report. Ms. Neugebauer signed this report on behalf of Corner Quick Stop.

5. On February 5, 2007, the Division issued to Corner Quick Stop a letter advising petitioner that the Division had information that a possible bulk sale transaction had occurred

between Alaskan Oil, as seller, and petitioner, as purchaser. The letter further advised petitioner that under the Tax Law, a notification of sale, transfer or assignment in bulk form (AU-196.10) is required to be filed ten days prior to the date of sale. As the Division's records indicated that such a notification had not been received, the letter requested that petitioner complete the enclosed Form AU-196.10 and return it within 20 days of the date of the letter.

6. A Notification of Sale, Transfer or Assignment in Bulk dated February 25, 2007 was received by the Division on February 28, 2007, reporting petitioner's purchase of a convenience store located at the Clyde, New York, property on December 29, 2006 from Alaskan Oil. The notification form reported the total purchase price as \$50,000.00, consisting of tangible personal property in the amount of \$2,500.00 and real estate in the amount of \$47,500.00, and that no funds were escrowed. Ms. Neugebauer signed this notification form on behalf of Corner Quick Stop.

7. Subsequently, on March 5, 2007, the Division issued a Notice to the Seller to Alaskan Oil requesting payment for open assessments totaling in excess of \$1,000,000.00. A Consolidated Statement of Tax Liabilities, dated March 2, 2007, listing assessments for the period December 1, 2001 through February 28, 2005 was attached to the notice sent to Alaskan Oil.

8. With respect to Bulk Sales Number 2007000434, the Division issued to petitioner a letter, dated March 5, 2007, advising, in pertinent part, that:

All open sales tax liabilities of the seller Alaskan Oil Inc can be transferred to you as the purchaser in a bulk sale, in accordance with Section 1141(c) of the New York State Sales and Use Tax Law. Currently, Alaskan Oil Inc's sales tax file shows open sales tax liabilities in excess of \$50,000.00. We are asking for a prompt payment by Alaskan Oil Inc or payment from escrow funds which will prevent this liability from being transferred to you.

Your check for the seller open sales tax liabilities should be made payable to New York State Sales Tax. . . . When full payment is received, release of claim letters will be issued to all interested parties.

**The Oswegatchie, New York, transaction**

9. Under the terms of a Purchase Agreement, dated December 13, 2006 and executed by the parties on January 10, 2007, petitioner agreed to purchase the real property and improvements thereon located at 7352 NYS Route 68, Oswegatchie, New York (Oswegatchie property) from Alaskan Oil for \$50,000.00. According to paragraph 2 of this contract, petitioner agreed “to pay the back taxes due on the property as part of the consideration to be paid at the time of closing, or as may be worked out with the taxing authorities, which amount the taxing authorities have indicated amounts to \$16,342.08.” Paragraph 2 also required petitioner to deliver a 15-year purchase money bond and mortgage in the amount of \$33,657.92, bearing interest at the rate of 6% and monthly installments of \$284.02, “including entire principal and interest,” at the time of closing. According to the terms of the purchase agreement, the closing was to take place on or about January 10, 2007, at which time Alaskan Oil was to transfer to petitioner title to the Oswegatchie property by warranty deed with lien covenant. The terms of the purchase agreement also provided that possession of the premises was to be delivered upon transfer of title.

10. The closing on the Oswegatchie property took place on January 10, 2007. At that time, Corner Quick Stop, as mortgagor, executed its Note and Mortgage dated January 10, 2007 in favor of Alaskan Oil, as mortgagee, on the Oswegatchie property. The Note and Mortgage secured a principal debt in the amount of \$33,657.92 and required monthly installments of \$284.02, “including principal and interest.” Subsequently, the deed for the Norfolk property, and the Note and Mortgage were recorded in the office of the St. Lawrence County Clerk on January 12, 2007.

11. On March 2, 2007, the Division received a Business Purchaser's Report of Sales and Use Tax dated February 27, 2007 from petitioner reporting sales tax due on its \$2,500.00 purchase of business assets located at the Oswegatchie property from Alaskan Oil. Petitioner also remitted \$175.00, the sales tax reported due, with this report. A Notification of Sale, Transfer or Assignment in Bulk dated February 26, 2007 was also received on March 2, 2007, reporting petitioner's purchase of a convenience store located at the Oswegatchie property on January 10, 2007 from Alaskan Oil. The notification form reported the total purchase price as \$50,000.00, consisting of tangible personal property in the amount of \$2,500.00 and real estate in the amount of \$47,500.00, and that no funds were escrowed. Ms. Neugebauer signed both the report and the notification form on behalf of Corner Quick Stop. The Division assigned Bulk Sale Number 2007000876 to this transaction.

12. The Division issued to petitioner a Notice of Claim to Purchaser, dated March 5, 2007, advising of a possible claim for sales and use taxes owed by the seller. 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.

13. On March 7, 2007, the Division issued a Notice to the Seller to Alaskan Oil requesting payment for open assessments totaling in excess of \$1,000,000.00. A Consolidated Statement of Tax Liabilities, dated March 7, 2007, listing assessments for the period December 1, 2001 through February 28, 2005 was attached to the notice sent to Alaskan Oil.

14. With respect to Bulk Sale Number 2007000876, the Division issued to petitioner a letter, dated March 7, 2007, advising, in pertinent part, that:

All open sales tax liabilities of the seller Alaskan Oil Inc can be transferred to you as the purchaser in a bulk sale, in accordance with Section 1141(c) of the New York State Sales and Use Tax Law. Currently, Alaskan Oil Inc's sales tax file shows open sales tax liabilities in excess of \$50,000.00. We are asking for a prompt payment by Alaskan Oil Inc or payment from escrow funds which will prevent this liability from being transferred to you.

Your check for the seller open sales tax liabilities should be made payable to New York State Sales Tax. . . . When full payment is received, release of claim letters will be issued to all interested parties.

15. In a letter dated March 22, 2007, Ms. Neugebauer, on behalf of petitioner, responded to the Division's March 7, 2007 letter regarding Bulk Sale Number 2007000876. Ms. Neugebauer, in her letter, advised that Corner Quick Stop was not able to pay \$50,000.00 towards the Alaskan Oil sales tax liability because petitioner's purchase "included a promissory note to which payments started in Feb 2007." Ms. Neugebauer copied Dick Bryant, petitioner's former representative, on this letter.

#### **The Norfolk, New York, transaction**

16. Under the terms of a Purchase Agreement, dated December 13, 2006 and executed by the parties on January 10, 2007, Corner Quick Stop agreed to purchase the real property and improvements thereon located at 8585 New York State Route 56, Norfolk, New York (Norfolk property) from Alaskan Oil for \$45,000.00. According to paragraph 2 of this contract, petitioner agreed "to pay the back taxes due on the property as part of the consideration to be paid at the time of closing, or as may be worked out with the taxing authorities, which amount the taxing authorities have indicated amounts to \$23,313.76." Paragraph 2 also required petitioner to deliver a 15-year purchase money bond and mortgage in the amount of \$21,686.24, bearing interest at the rate of 6% and monthly installments of \$183.00, "including entire principal and interest," at the time of closing. According to the terms of the purchase agreement, the closing

was to take place on or about December 13, 2006, at which time Alaskan Oil was to transfer to petitioner title to the Oswegatchie property by warranty deed with lien covenant. The terms of the purchase agreement also provided that possession of the premises was to be delivered upon transfer of title.

17. The closing on the Norfolk property took place on January 10, 2007. At that time, Corner Quick Stop, as mortgagor, executed its Note and Mortgage dated January 10, 2007 in favor of Alaskan Oil, as mortgagee, on the Norfolk property. The Note and Mortgage secured a principal debt in the amount of \$21,686.24 and required monthly installments of \$183.00, "including principal and interest." Subsequently, the deed for the Norfolk property, and the Note and Mortgage were recorded in the office of the St. Lawrence County Clerk on January 12, 2007.

18. On March 2, 2007, the Division received a Business Purchaser's Report of Sales and Use Tax dated February 26, 2007 from petitioner reporting sales tax due on its \$2,500.00 purchase of business assets located at the Norfolk property from Alaskan Oil. Petitioner also remitted \$175.00, the sales tax reported due, with this report. A Notification of Sale, Transfer or Assignment in Bulk dated February 27, 2007 was also received on March 2, 2007, reporting petitioner's purchase of a convenience store located at the Norfolk property on January 10, 2007 from Alaskan Oil. The notification form reported the total purchase price as \$45,000.00, consisting of tangible personal property in the amount of \$2,500.00 and real estate in the amount of \$42,500.00, and that no funds were escrowed. Ms. Neugebauer signed both the report and the notification form on behalf of Corner Quick Stop. The Division assigned Bulk Sale Number 2007001018 to this transaction.

19. The Division issued to petitioner a Notice of Claim to Purchaser, dated March 19, 2007, advising of a possible claim for sales and use taxes owed by the seller. 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.

20. On March 21, 2007, the Division issued a Notice to the Seller to Alaskan Oil requesting payment for open assessments totaling in excess of \$1,000,000.00. This notice also requested submission of the corporation's final sales tax return and its books and records pertinent to the accounting of its business operations. A Consolidated Statement of Tax Liabilities, dated March 21, 2007, listing assessments for the period December 1, 2001 through February 28, 2005 was attached to the notice sent to Alaskan Oil.

21. With respect to Bulk Sale Number 2007001018, the Division issued to petitioner a letter, dated March 22, 2007, advising, in pertinent part, that:

All open sales tax liabilities of the seller Alaskan Oil Inc can be transferred to you as the purchaser in a bulk sale, in accordance with Section 1141(c) of the New York State Sales and Use Tax Law. Currently, Alaskan Oil Inc's sales tax file shows open sales tax liabilities of approximately \$45,000.00. We are asking for a prompt payment by Alaskan Oil Inc or payment from escrow funds which will prevent this liability from being transferred to you.

Your check for the seller open sales tax liabilities should be made payable to New York State Sales Tax. . . . When full payment is received, release of claim letters will be issued to all interested parties.

22. In a letter dated March 30, 2007, Ms. Neugebauer, on behalf of petitioner, responded to the Division's March 22, 2007 letter regarding Bulk Sale Number 2007001018 (the Norfolk property). Ms. Neugebauer, in her letter, advised that Corner Quick Stop was not able to pay \$45,000.00 towards the Alaskan Oil sales tax liability because petitioner's purchase "included a

promissory note to which payments started in Feb 2007.” Ms. Neugebauer copied Mr. Bryant on this letter.

23. On or about April 2, 2007, Mr. Bryant spoke with the Division regarding petitioner’s purchase of the Oswegatchie property from Alaskan Oil. At that time, Mr. Bryant stated that petitioner was paying Alaskan Oil by promissory note and no funds were being held in escrow.

24. The Division’s CARTS - Collection & Enforcement Processing Consolidated Balance Report, Open Assessment Detail for Alaskan Oil, printed on March 5, 2007, indicates that Alaskan Oil had open assessments in the total amount of \$1,755,142.73 for the period December 1, 2001 through February 28, 2005. Specifically, Alaskan Oil had open notice and demand assessments (nonremit and part-remit returns) for the period December 1, 2001 through August 31, 2003 and delinquency assessments (no returns filed) for the period September 1, 2003 through February 28, 2005.

25. On April 26, 2007, the Division issued to petitioner three notices of determination, L-028428867-7 (relating to the Clyde transaction), L-028428868-6 (relating to the Oswegatchie transaction) and L-028428869-5 (relating to the Norfolk transaction), each asserting sales tax due in the amount of \$50,000.00 for the period ended February 28, 2005. The explanation section of each notice states that “[b]ased on an audit, you owe an additional amount. Refer to the Computation and Computation Summary Sections for details. We have estimated the amount of tax under section 1138 of the Tax Law.” The computation section of each notice states “[w]e determined that taxes are due from ALASKAN OIL INC (seller name). These taxes are your liability, as purchaser, under section 1141(c) of the Tax Law.”

26. By Conciliation Order (CMS No. 220175) dated March 18, 2008, Notice L-028428869-5 was recomputed to \$45,000.00 to reflect the stated contractual purchase price in the Norfolk transaction, and the other notices were sustained.

27. Petitioner filed its petition dated June 12, 2008, claiming that no cash consideration was given for its purchases of the gas stations and that the regulation (20 NYCRR 537.1) excluding from the definition of bulk sale a transfer of assets in satisfaction of a valid lien or mortgage should extend to petitioner's three transactions. The petition did not contest the amount of tax asserted due in the notices of determination.

28. At the hearing, petitioner conceded that the transfer of the Clyde business assets constituted a bulk sale under Tax Law § 1141(c), and that the Division's issuance of Notice of Determination L-028428867-7 against petitioner was proper. However, petitioner continued to contest the Oswegatchie and Norfolk transactions.

29. As noted above, the Oswegatchie and Norfolk properties contained closed gas stations. The purchase prices for the Oswegatchie and Norfolk business assets were determined by the parties, based in part on the back real property taxes and environmental cleanup concerns. The business assets included in each of the subject transactions consisted of the real property, gas pumps, tanks, a cash register and a convenience store located thereon. Both properties were located in rural areas of St. Lawrence County.

30. At the hearing, Ms. Neugebauer confirmed that petitioner entered into purchase agreements with Alaskan Oil for each of the transactions at issue. She stated that Corner Quick Stop's purchases of the Oswegatchie and Norfolk properties from Alaskan Oil did not entail any cash down payment, and that the consideration for each of the transfers was assumption of outstanding property taxes and delivery of purchase money mortgages requiring monthly

payments. Ms. Neugebauer also confirmed that the closings for Oswegatchie and Norfolk occurred on January 10, 2007 at the offices of Neil Gingold, Esq., the attorney representing both Alaskan Oil and Corner Quick Stop regarding the Oswegatchie and Norfolk transactions. On that date, Corner Quick Stop received and accepted executed deeds, and the corporation executed and delivered purchase money mortgages for both transactions. She further confirmed that the deeds and purchase money mortgages were filed with the Office of the St. Lawrence County Clerk, and that sales tax due on the personalty purchased in both the Oswegatchie and Norfolk transactions was paid by petitioner.

31. In November 2008, the St. Lawrence County Treasurer notified Corner Quick Stop of unpaid taxes in the total amount of \$34,033.79, including tax, fees, interest and penalty, on the Oswegatchie property for tax years 2002 through 2008. This notice advised Corner Quick Stop that St. Lawrence County was in the process of foreclosing on the Oswegatchie property for nonpayment of prior years taxes.

32. In November 2008, the St. Lawrence County Treasurer issued a Second Delinquent Tax Notice for 2008 to Corner Quick Stop for the Norfolk property. In addition to listing the delinquent taxes for the year 2008, this notice also listed outstanding taxes on the Norfolk property for tax years 2002 through 2007. This notice requested payment of \$37,704.30, the total amount of outstanding taxes, including tax, fees, interest and penalty, due on the Norfolk property for tax years 2002 through 2008.

33. On December 31, 2008, the Town of Oswegatchie issued to Corner Quick Stop a 2009 town and county tax bill for the Oswegatchie property. On December 31, 2008, the Town of Norfolk issued to Corner Quick Stop a 2009 town and county tax bill for the Norfolk property.

34. As of the date of the hearing, August 12, 2009, Ms. Neugebauer, on behalf of Corner Quick Stop, had not executed any recision documents or obtained any releases from the contracts. She also had not executed any deeds, on behalf of Corner Quick Stop, transferring the properties back to Alaskan Oil.

35. As of the date of the hearing, Corner Quick Stop had not applied for a refund of the sales tax paid on the personalty purchased in both the Oswegatchie and Norfolk transactions.

36. At the hearing, Mr. Neugebauer confirmed that at the closings for the Oswegatchie and Norfolk properties held on January 10, 2007, Alaskan Oil executed deeds and delivered them to Corner Quick Stop. He also confirmed that Alaskan Oil received purchase money mortgages executed by Corner Quick Stop at the closings. Mr. Neugebauer also admitted that Alaskan Oil has never commenced a foreclosure proceeding for either the Oswegatchie property or the Norfolk property, or taken any steps to enforce collection of the monies owed to it under the contracts. He also acknowledged that nothing had been done to cancel or reverse the sales or purchases at issue.

37. At the hearing, Ms. Neugebauer acknowledged that Corner Quick Stop had not loaned any money to Alaskan Oil, and that Corner Quick Stop never held a lien, mortgage, or other security interest on either the Oswegatchie property or the Norfolk property.

38. On August 29, 2003, the Division filed a warrant and judgment against Alaskan Oil for unpaid sales and use taxes in the amount of \$38,451.02. On October 28, 2003, the Division filed a warrant and judgment against Alaskan Oil for unpaid sales and use taxes in the amount of \$225,017.44. Each warrant and judgment was filed in Onondaga County. In November 2003, Alaskan Oil's representative, Mr. Gingold, contacted the Division to request releases of liens on several properties that it was in the process of selling. In response to that request, Mary Ellen

Smith, a Tax Compliance Agent in the Division's Syracuse District Office, required for each proposed sale: an explanation of the proposed transfer, an abstract of title, a proposed closing statement and a statement of the proposed disposition of the sale proceeds. At the hearing, Ms. Smith stated that since it appeared that other creditors were ahead of the Division's judgment, the Division granted a release of lien on property located in the Town of Richland for no consideration on January 5, 2004. She further stated that a second request for a release of lien was made in January 2004, concerning property in the Town of Elbridge that Alaskan Oil wished to convey to a third party. According to Ms. Smith, the request was reviewed, and upon the same requirements, a release of lien was issued by the Division on January 20, 2004. Alaskan Oil's sales of the Richland and the Elbridge properties took place after the releases of lien were obtained from the Division.

39. In 2006, the Division issued a letter to Alaskan Oil advising it that since the purchaser of one of Alaskan Oil's properties (bulk sale case number 2006004680) was determined to hold a valid mortgage on that property and a deed was accepted in lieu of foreclosure, that transfer was deemed to be in satisfaction of a valid lien or security interest, and the transaction did not meet the definition of a bulk sale.

40. On September 9, 2009, Corner Quick Stop conveyed the Norfolk property to Alaskan Oil, "in consideration of One Dollar, plus other good and valuable consideration" paid by Alaskan Oil, by warranty deed with full covenants executed by Ms. Neugebauer on behalf of Corner Quick Stop. This deed was recorded in the office of the St. Lawrence County Clerk on September 10, 2009.

41. On September 9, 2009, Corner Quick Stop conveyed the Oswegatchie property to Alaskan Oil, "in consideration of One Dollar, plus other good and valuable consideration" paid

by Alaskan Oil, by warranty deed with full covenants executed by Ms. Neugebauer on behalf of Corner Quick Stop. This deed was recorded in the office of the St. Lawrence County Clerk on September 10, 2009.

***SUMMARY OF PETITIONER'S POSITION***

42. Ms. Neugebauer claimed that Corner Quick Stop never took possession of the Oswegatchie and Norfolk properties, and never made any payment on the notes and mortgages or on the back real property taxes. Ms. Neugebauer also claimed that in 2009, Corner Quick Stop "reconsidered" the purchases of the Oswegatchie and Norfolk properties, and that she changed her mind. She also asserted that Corner Quick Stop never formally took any steps to reverse its transactions with Alaskan Oil because Corner Quick Stop's representatives were trying to reach a mutually agreeable settlement with the Division from March 2007 until shortly before the hearing in this matter.

43. Mr. Neugebauer claimed that the parties were fully prepared to send Corner Quick Stop's mortgage payments to the Division on a monthly basis over the 15-year life of the two mortgages. He further claimed that the ultimate goal of the transactions was to pay the Division over time, to pay the back real property taxes, and to improve the subject properties via Corner Quick Stop's lease of the two properties to unrelated third parties. Mr. Neugebauer asserted that Division's demand, that Corner Quick Stop immediately pay the full amount of each purchase price, made the transactions impossible as far as Alaskan Oil and Corner Quick Stop were concerned because Corner Quick Stop would have to pay the back real property taxes twice, i.e., as part of the purchase price paid to the Division and as back real property taxes paid to St. Lawrence County. He maintained that shortly before the hearing, a second set of notifications of sale, transfer or assignment in bulk were filed to reflect different sales prices for the Oswegatchie

and the Norfolk properties because the parties (Corner Quick Stop and Alaskan Oil) did not believe that the back real property taxes should be included as part of the consideration. Mr. Neugebauer averred that Alaskan Oil never received any payments from Corner Quick Stop on either the Oswegatchie or the Norfolk mortgage. Mr. Neugaebauer claimed that Alaskan Oil and Corner Quick Stop mutually agreed that the terms of both contracts changed in such a substantial way that the contracts were no longer enforceable but no action was taken to reverse the transactions because Alaskan Oil hoped Corner Quick Stop could reach a settlement with the Division.

### ***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 at least ten days before taking possession of or making payment for the business assets. Compliance with this provision affords the purchaser protection against becoming liable for the seller's unpaid sales tax liabilities. That is, upon the timely filing of a notification of bulk sale, the Division is obligated to inform the purchaser of the existence of a possible claim for sales and use taxes owing by the seller (20 NYCRR 537.6[a][3]). Once this notice of claim is provided to the purchaser, it is then advised of the existence of such claim of taxes due from the seller and of its personal liability for such taxes to the extent of the greater of the fair market value of the assets transferred or the consideration paid (*see* 20 NYCRR 537.0[c][2]; 537.4[a][1];[c]). Thus, a purchaser may protect itself by placing the consideration to be paid for the transfer in escrow, pending resolution of the Division's claim, so as to be available in the event a liability is determined and upheld. In contrast, if the purchaser fails to file a proper and timely notice of bulk sale, then such purchaser remains personally liable for the sales and use taxes due from the seller.

B. The term “bulk sale” is defined at 20 NYCRR 537.1(a) 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” 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 Gaughan*, Tax Appeals Tribunal, May 14, 1992 [a “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 [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]). Business assets include “any assets of a business pertaining directly to the conduct of the business, whether such assets are intangible, tangible or real property,” and “[a]ny asset owned by a corporation” (20 NYCRR 537.1[b]).

D. It is clear from the record that the Oswegatchie and the Norfolk transactions were bulk sales. Contracts for the purchase and sale of the Oswegatchie and the Norfolk business assets (real property and improvements thereon) were executed by petitioner and Alaskan Oil on January 10, 2007. Under the terms of the Oswegatchie contract, Alaskan Oil, in consideration of Corner Quick Stop’s assumption of back real property taxes in the amount of \$16,342.08 and delivery of a purchase money mortgage in the principal sum of \$33,657.92 requiring monthly

payments, agreed to transfer to Corner Quick Stop title to the Oswegatchie property by deed. Under the terms of the Norfolk contract, Alaskan Oil, in consideration of Corner Quick Stop's assumption of back real property taxes in the amount of \$23,313.76 and delivery of a purchase money mortgage in the principal sum of \$21,686.24 requiring monthly payments, agreed to transfer to Corner Quick Stop title to the Norfolk property by deed. On January 10, 2007, Alaskan Oil, the grantor, executed and delivered deeds for the Oswegatchie and the Norfolk properties to Corner Quick Stop, the grantee, which accepted them. On the same date, petitioner executed and delivered purchase money mortgages on both properties to Alaskan Oil. The deeds and purchase money mortgages for both properties were recorded in the St. Lawrence County Clerk's office on January 12, 2007. Upon Alaskan Oil's delivery of the executed deeds to petitioner and its acceptance of them on January 10, 2007, transfer of titles to the Oswegatchie and the Norfolk properties passed to petitioner (*see* Real Property Law § 244; *Manhattan Life Ins. Co. v. Continental Ins. Cos.*, 33 NY2d 370, 353 NYS2d 161 [1974]; *Ten Eyck v. Whitbeck*, 156 NY 341 [1898]). Furthermore, with the delivery of the deeds, Alaskan Oil parted with its title and possession of the Oswegatchie and Norfolk properties, and petitioner was vested with title and the right to immediate possession of the properties (*Stiebel v. Grosberg*, 202 NY 266 [1911], *reh denied* 203 NY 547 [1911]). Petitioner's subsequent failure to pay the back real estate taxes due on the Oswegatchie and the Norfolk properties or to make payments on the mortgages has no bearing on the fact that Alaskan Oil transferred the Oswegatchie and the Norfolk properties to petitioner on January 10, 2007. Additionally, on or about March 2, 2007, petitioner reported and paid sales tax on its purchases of business assets (tangible personal property) located at the Oswegatchie and the Norfolk properties from Alaskan Oil. Petitioner

also filed notifications of sale, transfer or assignment in bulk confirming that bulk sales of the Oswegatchie and the Norfolk business assets took place on January 10, 2007.

Accordingly, petitioner is determined to be a purchaser in a “bulk sale” as that term is defined at 20 NYCRR 537.1(a) and is therefore subject to the statutory requirements provided in Tax Law § 1141(c).

E. Because, as has been determined, petitioner was the purchaser in the Oswegatchie and the Norfolk transactions, it was required under Tax Law § 1141(c) to give notice of such sales to the Division of Taxation at least ten days before taking possession of or making payment for the Oswegatchie and the Norfolk business assets. Transfers of the Oswegatchie and the Norfolk properties occurred on January 10, 2007 at the time of delivery and acceptance of each deed. On March 2, 2007, the Division received notifications of sale, transfer or assignment in bulk, dated February 26, 2007 and February 27, 2007, respectively, reporting petitioner’s purchases of the Oswegatchie and the Norfolk properties on January 10, 2007. By its failure to comply with the notice requirements of Tax Law § 1141(c), Corner Quick Stop exposed itself to liability for sales and use taxes due from Alaskan Oil, the bulk seller of the Oswegatchie and the Norfolk properties, limited to the greater of the purchase price or fair market value of the business assets sold (20 NYCRR 537.0[c][2]). While this liability is limited to the greater of the purchase price or fair market value of the business assets sold (*see* 20 NYCRR 537.0[c][2]), petitioner has lost the measure of protection provided by placing the consideration for each of the transfers at issue in escrow and having the same available to satisfy the purchaser’s liability for the unpaid sales and use taxes.

F. Given its failure to comply with the notice requirements of Tax Law § 1141(c), petitioner is properly liable for tax assessed against it based on the seller’s unpaid sales tax

(*Matter of North Shore Cadillac-Oldsmobile, Inc. v. Tax Appeals Tribunal*, 13 AD3d 993, 787 NYS2d 463 [2004], *lv denied* 5 NY3d 704 [2005]).

G. Petitioner argues that the purchase agreements for the Oswegatchie and the Norfolk properties were not enforceable because the prices of the properties substantially changed when the Division demanded the full amount of each purchase price, including the back real property taxes that Corner Quick Stop agreed to assume. This argument is without merit. The record shows that Alaskan Oil had an outstanding sales tax liability long before it entered into the contracts with Corner Quick Stop. Given the fact that petitioner's principal was married to Alaskan Oil's principal, petitioner cannot claim that it was unaware of Alaskan Oil's outstanding sales tax liability when it entered into the contracts. Corner Quick Stop and Alaskan Oil set the purchase prices in the contracts that the parties executed on January 10, 2007. The same attorney represented both parties on the transfers of the Oswegatchie and the Norfolk properties that were completed on January 10, 2007. The Division was not involved in the transfers at issue. It received notification of these sales on March 2, 2007, after the transfers had taken place. Subsequently, the Division asserted its statutory right under Tax Law § 1141(c) to subject petitioner, the purchaser of the Oswegatchie and the Norfolk business assets, to the seller's (i.e., Alaskan Oil) outstanding sales tax liability. 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 Liqs. v. Evsam Parking*, 48 NY2d 503, 423 NYS2d 873 [1979]). The statute's assertion of personal liability on the purchaser encompasses all consideration that the purchaser is required to transfer as part of the sale, regardless of its form (*Matter of Norbert H. O'Brien*, Tax Appeals Tribunal, September 26, 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)). The purpose of Tax Law § 1141(c) is to preserve the Division's "indisputable right to collect taxes which could be extinguished by the simple expedient of a taxpayer transferring its assets" (*Harcel Liqs. v. Evsam Parking*, 423 NYS2d at 875; *see also Spandau v. United States*, 73 NY2d 832, 537 NYS2d 120, 121 [1988]). The consideration paid by petitioner for each transfer included petitioner's assumption of unpaid real property taxes due on the property and execution of a purchase money mortgage for the balance of the purchase price. The prices of the Oswegatchie and the Norfolk business assets transferred to petitioner did not change. Rather, petitioner's overall costs of the acquisitions changed because it failed to structure its agreements to avoid duplicative payments.

H. Petitioner's principal claimed that in 2009, the corporation reconsidered its purchases of the Oswegatchie and Norfolk properties and that she changed her mind. Ms. Neugebauer further claimed that petitioner never formally took any steps to reverse its transactions with Alaskan Oil because Corner Quick Stop's representatives had been trying to reach a mutually agreeable settlement with the Division since March 2007. After the hearing in this matter, on September 9, 2009, Corner Quick Stop conveyed the Oswegatchie and the Norfolk properties to Alaskan Oil by warranty deed with full covenants. These deeds were recorded in the St. Lawrence County Clerk's office on September 10, 2009, exactly two years and nine months after Alaskan Oil transferred titles to the Oswegatchie and the Norfolk properties to Corner Quick Stop. These subsequent transfers do not relieve petitioner from its responsibility for the taxes due pursuant to Tax Law § 1141(c). The Oswegatchie and the Norfolk business assets were transferred when Alaskan Oil delivered the executed deeds for the properties to petitioner and it accepted them on January 10, 2007 - the same date on which the parties executed the purchase agreements for the properties. The statutory requirements of Tax Law § 1141(c) were triggered

by these transfers in bulk. Because petitioner did not notify the Division at least ten days prior to the sales of the Oswegatchie and the Norfolk properties, Corner Quick Stop became personally liable for taxes due from the seller (Tax Law § 1141[c]). The statute provides more than adequate protection to prospective purchasers, who need only to inform the Division of the expected sale to protect themselves from liability.

I. 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 Appeals Tribunal, August 17, 1995). Accordingly, the assessment relating to the Oswegatchie transfer, and the assessment relating to the Norfolk transfer, as adjusted by the Bureau of Conciliation and Mediation Services, each carry a presumption of correctness that has not been overcome.

J. Petitioner seeks abatement of penalties and interest accruing from the issuance of the notices of determination (Tax Law § 1141[c]; § 1145[a]; *Matter of Velez v. Division of Taxation of the Dept. of Taxation & Finance*, 152 AD2d 87, 547 NYS2d 444 [1989]; *Matter of Gaughan*). 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 amounts of tax in dispute, and that its failure to make payments to the Division does not constitute wilful neglect. It is concluded that petitioner has not established reasonable cause for the abatement of penalties (*see Matter of CBS Corp. v. Tax Appeals Tribunal*, 56 AD3d 908, 867 NYS2d 270 [2008], *lv denied* 12 NY3d 703 [2009] [the court affirmed the stiff standard imposed upon a taxpayer to establish that its failure to pay tax due was due to reasonable cause and not willful neglect emphasizing that ‘willfulness does not require an intent to deprive the government of its money but only something more than accidental nonpayment’ *citing Matter of Auerbach v. State Tax Commn.* (142 AD2d at 395)]).

Petitioner failed to notify the Division of the bulk sales in advance of the transfers of the Oswegatchie and the Norfolk properties. Petitioner's position that the assumption of back real estate taxes did not come within the requirements of Tax Law § 1141(c) had already been decided to be erroneous in *Spandau v. United States* and *Matter of Norbert H. O'Brien*. In addition, an inability to pay is not a basis which allows the abatement of penalty. Under these circumstances, petitioner has not established that reasonable cause exists for its failure to pay the amounts 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. . . .

Accordingly, petitioner remains liable for the penalty and interest accruing on the amounts of tax due.

K. The petition of Corner Quick Stop, Inc., is denied. Notices of determination (L-028428867-7 and L-028428868-6), dated April 26, 2007, and Notice of Determination (L-

028428869-5), dated April 26, 2007, as modified by Conciliation Order (CMS No. 220175),  
dated March 18, 2008, are sustained.

DATED: Troy, New York  
September 2, 2010

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE