

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>PRESTIGE POOL &amp; PATIO CORP.</b>	:	DETERMINATION
	:	DTA NO. 822713
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 2003 through February 28, 2006.	:	

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Petitioner, Prestige Pool & Patio Corp., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2003 through February 28, 2006.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 633 Third Avenue, New York, New York, on November 24, 2009 at 11:00 A.M., with all briefs to be submitted by March 15, 2010 which date began the six-month period for the issuance of this determination. Petitioner appeared by Ronald V. DeCaprio, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael B. Infantino, Esq., of counsel).

***ISSUE***

Whether petitioner was a purchaser in a bulk sale transaction so that it became liable under Tax Law § 1141(c) for sales tax determined to be due from the seller.

***FINDINGS OF FACT***

1. On January 9, 2006, in the course of an audit of Epic Pool Corporation (Epic), the Bulk Sale Unit of the Division of Taxation (Division) received notification from the Tax Compliance Division of a possible bulk sale transfer of assets from Epic to petitioner, Prestige Pool & Patio Corp.

2. Initially, the Division examined its records and determined that it had not received notification of a bulk sale from either Epic or petitioner. Therefore, on January 10, 2006, the Division created a “dummy” Notification of Sale, Transfer or Assignment in Bulk in order to assign the matter a case number and generate letters.

3. On January 23, 2006, the Division mailed a letter to petitioner stating, among other things, that it had received information indicating that a possible bulk sale had occurred but it had not received the notification of a bulk sale required under the Tax Law. The letter further stated that if the Division did not receive the completed notification of bulk sale form within 20 days, petitioner’s sales tax liability, together with penalties and interest, would be determined on the basis of the available information. If petitioner felt that the transaction did not meet the criteria of a bulk sale, it was asked to send an explanation of what occurred to the Division.

4. Petitioner’s principal responded to the foregoing letter with a telephone call stating that a bulk sale had not occurred.

5. On August 10, 2007, the Division mailed an additional letter to petitioner stating, among other things, that the Division had received information that a possible bulk sale had occurred and that it had not received notification of a bulk sale. The letter requested that petitioner complete a Form AU-196.10, Notification of Sale, Transfer, or Assignment in Bulk, within 20 days of the date of the letter.

6. In a letter dated September 25, 2007, petitioner responded that this matter was previously resolved. The letter also stated that there was no sale between Epic and petitioner.

7. On October 18, 2007, the Division sent petitioner a Notice of Claim to Purchaser. This document was sent in order to serve notice that there was a liability that could be passed on from Epic. The letter advised petitioner to, among other things, place the purchase amount for the seller's assets into an escrow account in order to satisfy any outstanding sales tax liabilities.

8. The Division obtained a copy of three forms DTF-802, which is a form used if a taxpayer is required to pay sales tax and the seller did not collect the tax. The forms were filed with the New York State Department of Motor Vehicles in order to pay tax on vehicles that were being registered. The first form was dated March 23, 2006 and showed that petitioner purchased a 2000 Ford motor vehicle from Epic for \$4,500.00. The second form reported the sale of a 2002 Ford F 550 from Epic to petitioner for \$12,125.96. The remaining form reported the sale by Epic of a 2002 Conrail trailer to petitioner for \$2,000.00. The total value of the vehicles transferred was approximately \$18,626.00.

9. The Division believed that there were two bulk sale purchasers of Epic. It was the Division's understanding that the retail part of the business, including the chemicals and pool supplies, was sold to Epic Pool & Spa. It further believed that the part of the business which involving pool installation was sold to petitioner.

10. On January 26, 2007, an accountant for Epic signed a Statement of Proposed Audit Change for Sales and Use Tax agreeing that sales and use tax was due in the amount of \$17,702.95, plus interest in the amount of \$6,384.39, for a balance due of \$24,087.34.

11. On January 28, 2008, the Division issued a Notice of Determination to petitioner that assessed sales and use taxes in the amount of \$17,702.95. By this document the Division passed on the tax liability from Epic to petitioner as a purchaser in a bulk sale.

### ***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* 20 NYCRR 537.1[c][2]).

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.

C. At the hearing, petitioner raised two issues. First, petitioner argued that the transfer of the three vehicles, in and of itself, does not constitute a bulk sale as a matter of law. This argument lacks merit. As set forth above, the definition of a bulk sale includes the sale of any part of the business assets other than in the ordinary course of business. The sale of assets pursuant to a liquidation of the seller’s business is not in the ordinary course of business and is within the purview of Tax Law § 1141(c) (*Matter of Gaughan*, Tax Appeals Tribunal, May 14, 1992). Since petitioner has not offered any evidence to establish that its sale of the motor vehicles or trailer was in the regular course of its business, the Division properly regarded the transfers as constituting a bulk sale.

D. Petitioner also argued that the Division had previously determined that Epic Pool & Spa was the bulk sale purchaser of the assets of Epic. It is submitted that the Division cannot now maintain that petitioner is a bulk sale purchaser because there cannot be two bulk sale purchasers of the same business. This argument is also without merit. The Division has correctly noted that there is no authority in the Tax Law or regulations prohibiting a seller from making more than one bulk sale (*see* Tax Law § 1141[c]; 20 NYCRR part 537).

E. The record shows that petitioner did not give the Division the requisite notice of a bulk sale (Tax Law § 1141[c]). As a result, petitioner became liable for the sales and use taxes due from Epic Pool to the extent of the purchase price or fair market value of the business assets sold (*id.*; *Matter of Gaughan*).

F. The petition of Prestige Pool & Patio Corp. is denied and the Notice of Determination, dated January 28, 2008, is sustained.

DATED: Troy, New York  
August 19, 2010

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE