

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SINGH RESTAURANT, INC. : DECISION
for Revision of a Determination or for Refund of Sales : DTA NO. 827456
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period September 1, 2008 through February 29, :
2012. :

Petitioner, Singh Restaurant, Inc., filed an exception to the determination of the Administrative Law Judge issued on June 21, 2018. Petitioner appeared by Law Offices of Shelby, Bakshi & White (Justin S. White, Esq.). The Division of Taxation appeared by Amanda Hiller, Esq. (Jessica DiFiore, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner requested and was granted oral argument, but withdrew its request on February 27, 2019, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except findings of fact 8 and 10, which we have modified for clarity. These facts, so modified, are set forth below.

1. This case involves the alleged bulk transfer of assets from Kashmir Kitchen LLC d/b/a Shalimar Gardens (Kashmir) to Singh Restaurant, Inc. (petitioner). Kashmir had acquired the business from New Ichiban Japanese Food, Inc. (Ichiban), in 2013. Prior to Kashmir's acquisition, Ichiban was under audit by the Division of Taxation (Division). The basis for the liability assessed to petitioner began with the investigation of sales and use taxes owed by Ichiban in May 2011.

2. The Ichiban audit period was September 2008 through February 2012. After determining that Ichiban's records were not adequate to perform a detailed audit, the Division utilized information regarding sales tax collected and paid by Ichiban from its point of sale system to compute additional tax due of \$63,623.35. The amount of tax determined and the methodology of this calculation have not been disputed by petitioner.

3. Prior to the close of the Ichiban audit, the Division became aware that Kashmir had purchased the business from Ichiban. By correspondence dated March 19, 2013, Kashmir's representative filed a notice of bulk sale transfer from Ichiban to Kashmir. The Division sent correspondence to Kashmir, dated March 25, 2013, advising the company to put the entire amount of the purchase price into an escrow account and that sales tax was due on the tangible personal property purchased in the transaction. The Division then sent a notice of claim, dated March 26, 2013, to Kashmir advising it: 1) not to pay any part of the purchase price to the seller until the Division completed its review of the matter; and 2) to put the entire amount of the purchase price into an escrow account and advise the escrow agent not to release the escrow

funds until the Division issued a bulk sales notice of release; and 3) that sales tax was due on the tangible personal property purchased in the transaction.

4. The Division issued a notice of determination to Ichiban, dated April 2, 2013, for additional tax due of \$63,623.35 for the period September 1, 2008 through February 29, 2012.

5. On April 26, 2013, the Division received correspondence and an amended notification of sale, transfer or assignment in bulk, with a check from a member of Kashmir. The letter from Kashmir indicated there was no sales contract regarding the transfer from Ichiban to Kashmir and acknowledged making full payment for Ichiban. It also provided more details regarding the various assets transferred in the transaction as a basis for allocating a portion of the purchase price to tangible personal property, and computed and paid the sales tax due on the tangible personal property pursuant to the allocation.

6. The Division issued a notice of determination to Kashmir, dated May 7, 2013, for sales tax due of \$63,623.35, based on: 1) Kashmir's failure to timely file a notification of bulk sale; and 2) Kashmir's failure to place the proceeds from the sale in escrow and keep them there until the Division issued a release, or otherwise arranged for payment of proceeds to the Division to satisfy the outstanding sales tax liabilities of Ichiban.

7. Subsequently, by correspondence dated April 15, 2015, petitioner filed a notice of bulk sale transfer from Kashmir, as the seller, to petitioner, with a business or trade name of Taste of India, indicating Kashmir's last day of business as December 31, 2014, a scheduled sale date of April 1, 2015, a sales price of \$20,000.00 allocated 100% to tangible personal property, and an escrow fund amount of \$20,000.00.

8. Attached to the notice of bulk sale transfer from Kashmir to petitioner was an asset purchase agreement, dated March 10, 2015, that explicitly stated that Kashmir desired to sell to

petitioner, and that petitioner desired to purchase from Kashmir, substantially all of the assets of Kashmir upon the terms set forth in the agreement, for consideration. The agreement also established that petitioner had agreed to assume and be responsible for the lease of Kashmir then in effect, after the closing date of the sale between the two parties. An assignment of lease, dated March 1, 2015, between Piccadilly Plaza II, Inc., as lessor, Kashmir, as lessee, and petitioner as assignee was also provided as evidence of the assignment of Kashmir's lease to petitioner.

9. The Division issued to petitioner a notice of claim to purchaser, dated April 23, 2015. The notice of claim advised petitioner: 1) not to pay any part of the purchase price to the seller until the Division had completed its review of the matter; 2) to place the entire amount of the purchase price into an escrow account; 3) to instruct the escrow agent not to release the escrow funds until the Division issued a bulk sales notice of release; and 4) that sales tax was due on the tangible personal property purchased in the transaction.

10. The Division sent correspondence to petitioner, dated April 24, 2015, again advising petitioner that the entire amount of the purchase price should be held in an escrow account until the Division issued a release and that sales tax of \$1,750.00 was due on the tangible personal property in the transaction.

11. The Division also sent correspondence entitled "notice to seller" to Kashmir indicating the Division would not authorize the release of the proceeds from the sale, and that among other things, Kashmir needed to send payment for taxes due in accordance with an attached consolidated statement of tax liabilities, the amounts of which were redacted for the taxpayer privacy protection of Kashmir.

12. Petitioner submitted a \$1,750.00 payment of sales tax due on the tangible personal property purchased in the transaction on or about July 15, 2015.

13. Petitioner never notified the Division whether the proceeds from the sale had been placed in escrow or were otherwise secured, and petitioner never submitted the proceeds from the sale to the Division to satisfy the tax liabilities of Kashmir.

14. The Division never authorized the release of proceeds from the sale from petitioner to Kashmir.

15. The Division issued a notice of determination (notice L-043328139) to petitioner, dated July 9, 2015, that assessed sales and use taxes in the amount of \$17,558.99. By this document the Division passed on the tax liability from Kashmir to petitioner as a purchaser in a bulk sale.¹

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began the determination by reviewing Tax Law § 1141 (c), which requires a purchaser in a bulk sale transaction to give notice of such sale to the Division at least 10 days before taking possession of or making payment for the business assets. The Administrative Law Judge noted that the consequence of failing to do so would result in the purchaser's personal liability for outstanding sales and use taxes due from the seller. However, the Administrative Law Judge noted that the liability of the purchaser is limited to the greater of the purchase price or fair market value of the business assets sold.

The Administrative Law Judge next set forth the meanings of the terms "bulk sale" and "business assets" as defined under the regulations. The Administrative Law Judge found that

¹ The liability incurred by Ichiban, and subsequently imposed on Kashmir and petitioner had been partially satisfied prior to the issuance of petitioner's assessment. The notice of determination at issue herein represents the balance due at the time of the issuance of petitioner's assessment and continued to be the amount outstanding at the time of the hearing. The Division further acknowledges that cancellation of the penalties imposed upon petitioner by notice L-043328139 was warranted.

petitioner's argument that the purchase of some furniture from Kashmir did not rise to the level of a bulk sale lacked merit and was not supported by the record.

The Administrative Law Judge found that Kashmir's assignment of its lease to petitioner was a significant indicator of a bulk sale of Kashmir's business assets. Noting that assignment of a lease would be sufficient to find a bulk sale, the Administrative Law Judge found that the transfer of additional business assets, as conceded by petitioner, clearly indicated a bulk sale transaction.

Then, to the question of whether petitioner bore personal liability for Kashmir's past due sales tax liability, the Administrative Law Judge observed that petitioner did not give the Division the requisite notice of a bulk sale required by Tax Law § 1141 (c). As a result, the Administrative Law Judge concluded that petitioner became liable for the sales and use taxes due from Kashmir to the extent of the purchase price or fair market value of the business assets sold.

The Administrative Law Judge thus denied the petition and sustained the notice of determination.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception that the sale of property that formed the basis for the Division's notice of determination was de minimis and thus should not qualify as a bulk sale of business assets for purposes of personal liability for the seller's outstanding sales tax liability. In support of its argument, petitioner points out that the only assets transferred were some tables and chairs and an assignment of Kashmir's lease. It claims that these assets did not make up the majority of Kashmir's property while it was in business and thus failed to qualify as a bulk purchase upon their transfer. Petitioner asks that this Tribunal find that no bulk sale occurred.

The Division argues that the record demonstrates that petitioner purchased substantially all the assets of Kashmir, as demonstrated in the purchase agreement between Kashmir and petitioner. The Division states that petitioner failed to comply with the bulk sale notice requirements and thus was not protected from personal liability for the seller's outstanding tax liability. The Division asserts that a bulk sale includes the sale or assignment of any part or whole of a business. The Division points to petitioner's testimony as admitting transfer of possession of business assets from the seller. The Division requests that the notice of determination be sustained.

OPINION

We begin with Tax Law § 1141, which, among other things, requires that prospective purchasers, transferees, or assignees must put the Division on notice of any pending acquisition of business assets from a person required to collect sales tax. In relevant part:

“Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof whether or not the seller, transferrer or assignor, has represented to, or informed the purchaser, transferee or assignee that he owes any tax pursuant to this article, and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing” (Tax Law § 1141 [c]).

Petitioner's primary argument on exception is that the sale of property that formed the basis for the Division's notice of determination was de minimis and thus should not qualify as a bulk sale of business assets for purposes of determining petitioner's personal liability for the seller's outstanding sales tax obligation. In support of its argument, petitioner points out that the only assets transferred were some tables and chairs and an assignment of Kashmir's lease. It

claims that these assets did not make up the majority of Kashmir's property while it was in business and thus their transfer failed to qualify as a bulk sale.

We disagree. The definitions of "bulk sale" and "business assets," for purposes of Tax Law § 1141 (c) under the Division's regulations, do not support petitioner's contentions. A "bulk sale" is defined 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 and pay the same over to the Department of Taxation and Finance" (20 NYCRR 537.1 [a]). The term "business assets" is defined as "any assets of a business pertaining directly to the conduct of the business, whether such assets are intangible, tangible or real property. Any asset owned by a corporation is a business asset" (20 NYCRR 537.1 [b]). A bulk sale includes the transfer of any tangible, intangible or real property asset used in operating a business, notwithstanding whether such asset makes up merely a part or the entirety of such business's assets when transferred so long as it is not done in the ordinary course of business.

In this case, the Administrative Law Judge correctly determined that the assignment of the seller's lease alone would be sufficient to find that a bulk sale had occurred (*see Matter of Acres Stor. Co. v Chu*, 120 AD2d 854, 856 [3d Dept 1986], *appeal dismissed* 68 NY2d 807 [1987]; *Matter of Suffolk Center Corp.*, Tax Appeals Tribunal, November 23, 2011). We also agree with the Administrative Law Judge that this lease assignment, considered in conjunction with the asset purchase agreement between petitioner and Kashmir wherein petitioner agreed to purchase substantially all of Kashmir's assets, further demonstrates that a bulk purchase of Kashmir's business assets occurred. Although petitioner asserts that a bulk sale cannot be found after a purported seller is no longer in business, the contrary has been long established under our case law (*Matter of Gaughan*, Tax Appeals Tribunal, May 14, 1992).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Singh Restaurant, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Singh Restaurant, Inc. is denied; and
4. The notice of determination, dated July 9, 2015, is sustained.

DATED: Albany, New York
August 15, 2019

s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner