STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **NACMIAS & SONS AUTO SERVICE, LLC** 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, 2006 through February 28, 2009.	DECISION DTA NO. 830700

Petitioner, Nacmias & Sons Auto Service, LLC, filed an exception to the determination of the Administrative Law Judge issued on November 21, 2024. Petitioner appeared by Ballon Stoll, P.C. (Norman R. Berkowitz, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner did not file a brief in reply. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began with the last filing in this matter.

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

ISSUE

Whether petitioner has met its burden of proving entitlement to a refund.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. On May 8, 2008, petitioner, Nacmias & Sons Auto Service, LLC, entered into a purchase agreement with Coney Island Sunoco Service Station, Inc. (Coney Island) for the purchase of certain assets. Petitioner did not provide the Division of Taxation (Division) notice of its purchase of the Coney Island assets.

2. The Division determined that petitioner was liable as a bulk sale purchaser for taxes determined to be due from Coney Island. The Division issued to petitioner a notice of determination, dated April 22, 2010, bearing audit identification number X-986271907, assessing sales tax due in the amount of $152,852.00 (notice of determination). The notice of determination included a statement that indicated that the following assessments (collectively, the "assessments") were the components of the liability set forth in the notice:

Assessment ID Number:	Tax Periods Ending:	Tax Assessed:
L-033560373	5/31/2006 - 11/30/2008	$41,199.34
L-033560374	5/31/2006 - 11/30/2008	$67,811.94
L-033560375	8/31/2009	$14,614.49
L-033560376	5/31/2009	$14,614.49
L-033560377	2/28/2009	$14,614.49
	Sub-Total	$152,854.75
	Less Payments/Credits	$2.97
	Total	$152,851.78

3. In its brief below, the Division conceded that assessments L-033560375, L-033560376 and L-033560377 have been cancelled, and that assessment L-033560374 has been reduced to $35,034.74. In its brief, the Division does not provide any details regarding its adjustments to the individual assessments. After the Division's adjustments, the remaining tax amount at issue is $76,234.08 ($35,034.74 + $41,199.34).

4. In its brief below, petitioner asserts: "The [Division] erroneously applied tax payments made by [petitioner] for its own liabilities against the alleged bulk sales [tax] liability of Coney Island leaving [petitioner] with increased sales tax liabilities." Petitioner failed to provide any

citation in support of this claim or otherwise assert how much of the bulk sales tax liability petitioner already paid or what the alleged payment date(s) were. Nothing in the record indicates petitioner ever requested or demanded this information from the Division.

5. On or around January 27, 2021, petitioner filed form AU-11, Application for Credit or Refund of Sales or Use Tax, seeking a refund of the $152,852.00 in bulk sales tax liability assessed against petitioner in the notice of determination.

6. The Division issued a refund claim determination notice, bearing audit case ID number X-189671749, dated September 1, 2021 (the refund denial notice), denying petitioner's refund request. The refund denial notice stated, in relevant part, that:

> "The refund claim is being denied.
>
> Per Section 1139(c) of the Sales and Use Tax Law requires that a refund be filed by the taxpayer within three years from the time that the return was filed or two years from the time that the tax was paid, whichever is later. If no return was filed, the refund must be filed within two years from the time the tax was paid.
>
> In the case of an issuance of a Notice of Determination under Tax Law 1138 where the taxpayer[']s formal protest rights have expired, the Notice of Determination must be paid in full before a refund claim can be reviewed.
>
> In addition, based on available information, the assessments related to the refund claim are the result of [a] bulk sale transaction that [you] entered into with Coney Island Sunoco Service, Inc."

7. On October 6, 2021, petitioner filed a petition with the Division of Tax Appeals, protesting the refund denial notice.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that a taxpayer who fails to timely protest a notice of determination may still be entitled to subsequently protest the denial of a refund of the associated liability after payment thereof. The Administrative Law Judge determined that although petitioner failed to timely protest the notice of determination or any associated BCMS

order, petitioner timely filed a petition on October 6, 2021, protesting the Division's September 1, 2021 refund denial notice.

The Administrative Law Judge then addressed whether petitioner has met its burden of proving entitlement to the refund requested and determined that it failed to establish when or how much of the liability at issue was paid pursuant to the requirements of Tax Law §1139 (c). The Administrative Law Judge therefore concluded that petitioner did not demonstrate entitlement to a refund. Accordingly, the Administrative Law Judge denied the petition and sustained the refund denial notice.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge did not address whether petitioner was a purchaser in a bulk sale transaction for purposes of the Tax Law, or the value of the assets that were sold in the transaction. Petitioner also argues that if a bulk sale is determined to have occurred, the resulting tax due should have been collected from the seller and/or its responsible persons; and that with respect to its refund claim, the Division conceded that the amount of tax petitioner claimed to have paid was correct by rejecting its refund claim on grounds other than the amount of refund claimed.

The Division argues that the issue of whether a bulk sale transaction occurred has already been determined by a decision of Justice Michelle Weston, Supreme Court, Kings County. The Division further argues that in the context of a bulk sale, it is incumbent upon petitioner to demonstrate the value of the assets transferred and that petitioner is liable for the bulk sales tax liability due to its lack of notice to the Division; lack of compliance with the tax withholding requirements of such transaction; and lack of responsiveness to the Division's statutory notices of related liability.

Lastly, the Division asserts that a presumption of correctness attaches to refund denials, and that petitioner has not met its burden of proof to establish that the refund denials were erroneous or otherwise improper.

OPINION

We begin with the issue of whether petitioner was a purchaser in a sale, transfer or assignment in bulk under Tax Law § 1141 (c). The term "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]).

In ***Matter of Corner Quick Stop, Inc.*** (Tax Appeals Tribunal, November 3, 2011), we addressed bulk sale transfers wherein the purchaser need not pay sums of money (***see also Matter of Peconic Bay Motors***, Tax Appeals Tribunal, September 26, 1991), which includes transfers by way of a gift (***see Matter of Gaughan***, Tax Appeals Tribunal, May 14, 1992). The regulatory definition of purchaser includes "any person who, as part of a bulk sale, purchases or is the transferee or assignee of business assets" (20 NYCRR 537.1 [e]). Such 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" (20 NYCRR 537.1 [b]; 20 NYCRR 537.1 [a]).

In ***Matter of Khayer Kayumi*** (Tax Appeals Tribunal, June 27, 2019), we concluded that a completed transfer of title is unnecessary to impose sales tax because sales tax "is defined as a tax on a transaction resulting in the transfer of title or possession (or both) of tangible personal property" (Tax Law §§ 1101 [b] [5], 1141 [c]; ***see also*** 20 NYCRR 525.2 [a] [2]).

Here, we agree with the Division that a bulk sale transaction occurred in which petitioner received bulk business assets as defined by 20 NYCRR 537.1 (b). Since petitioner "received exactly what he bargained for under the contract, namely, the Coney Island Sunoco Station,

including the Sunoco lease and franchise agreement" (***Nacmias & Sons Auto Serv., LLC v Coney Is. Sunoco Serv. Sta., Inc., et al.***, [Sup Ct, Kings County, 2017, Weston, M., index nos. 33903/08 and 503916/14]) and took possession of the property following the payment of $120,000.00, petitioner engaged in a bulk sale transaction as defined in Tax Law § 1141 (c).

We next address the issue of the value of the bulk sale transaction. Petitioner maintains that the value of the tangible personal property acquired should be limited to the $120,000.00 paid initially as a deposit, which was followed by petitioner's possession of the business and its assets. While this issue was not addressed by the Administrative Law Judge, we note that in the ***Matter of Ultimat Security, Inc.*** (Tax Appeals Tribunal, May 31, 2012), we held that in the context of a bulk sale "it is incumbent upon petitioner to demonstrate the value of the assets transferred" and, while the Tax Law provides for a maximum amount of liability that may transfer to the purchaser, it is the taxpayer's responsibility to "establish what this maximum limit is by adequately proving the fair market value of the assets transferred or the purchase price" (***id.***, ***see also*** 20 NYCRR 537.0 [c] [2], 20 NYCRR 537.4 [c])

While it is not disputed that petitioner obtained possession of the property following the payment of $120,000.00, this was not the originally contracted purchase price. The contentious nature of the transaction resulted in a minimum price being identified based upon the possession of the business and its assets following a partial payment of the total purchase price. Since petitioner has not demonstrated the fair market value of the assets transferred, it has not met its burden of proof with respect to this issue (***Matter of Ultimat Security, Inc.)***.

The next issue we will address is petitioner's assertion that tax due resulting from the transaction should have been collected from the seller and/or its responsible persons.

Tax Law § 1141 (c) states that:

> "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 . . . .
>
> For failure to comply with the provisions of this subdivision the purchaser, transferee or assignee, in addition to being subject to the liabilities and remedies imposed under the provisions of article six of the uniform commercial code, shall be personally liable for the payment to the state of any such taxes theretofore or thereafter determined to be due to the state from the seller, transferrer or assignor, except that the liability of the purchaser, transferee or assignee shall be limited to an amount not in excess of the purchase price or fair market value of the business assets sold, transferred or assigned to such purchaser, transferee, or assignee, whichever is higher, and such liability may be assessed and enforced in the same manner as the liability for tax under this article."

The Tax Law is clear that the purchaser in a bulk sale transaction is required to provide at least a ten days notice to the Division of the transaction **before** taking possession or making payments for the business assets, and that failure to provide such notice renders the purchaser liable for the seller's related sales and use taxes determined to be due (***see also*** 20 NYCRR 537.2 [c]).

It is well established that a purchaser in a bulk sale who fails to comply with the notice requirements of Tax Law § 1141 (c) forfeits the protection provided to purchasers by the statutory scheme (***see Matter of Corner Quick Stop, Inc.***, Tax Appeals Tribunal, November 3, 2011, citing ***Matter of Spandau v United States***, 73 NY2d 832 [1988]).

The record reflects that petitioner did not give notice to the Division of the bulk sale transaction as required by Tax Law § 1141 and was not responsive to the Division's related December 28, 2009 notice of claim to purchaser resulting from the transaction, which states that

failure to comply with the notice subjects the purchaser to personal liability for any sales tax deficiency determined to be due from the seller.

In addition to the notice requirement for bulk sale transactions, the purchaser is required to withhold the lesser of: (1) the funds which the purchaser is required to turn over to the seller or; (2) the total tax due from the seller "as contained in the notice of total tax due to the State which is sent to the purchaser by the Department of Taxation and Finance within 90 days from the date or deemed date of receipt (whichever is applicable) of the notice of bulk sale" (20 NYCRR 537.3 [b]). A purchaser is "forbidden to turn over such funds to the seller, until relieved of such obligation . . ." (20 NYCRR 537.3 [b], [c]), and the law is clear that a purchaser who "fails to withhold such consideration will become personally liable for any sales and use taxes owed by the seller . . . at the time of the sale up to the greater of the selling price or fair market value of the business assets transferred" (20 NYCRR 537.3 [b]; Tax Law § 1141 [c]).

The Tax Law is also clear that the failure of the purchaser to "withhold the funds from the seller, transferrer or assignor makes the purchaser, transferee or assignee personally liable for the payment to the State of any and all sales and use taxes, theretofore or thereafter determined to be due the State from the seller, transferrer or assignor" (20 NYCRR 537.4 [a] [1]).

Because petitioner did not provide sufficient notice of the transaction, withhold funds for the tax due or withhold any of the $120,000.00 consideration paid for the assets, pursuant to Tax Law § 1141, it is liable for the sales and use tax determined to be due by the seller as a result of the bulk sale transaction.

Petitioner also argues that with respect to its refund claim, the Division "conceded" that the amount of tax petitioner claimed to have paid was correct since the Division did not dispute

the amount claimed to have been paid but rejected the refund claim based on "other unrelated facts."

The Division's regulations clearly state that an application for a refund or credit of sales tax must contain a full explanation of facts on which the claim is based, including substantiation of the basis for and the amount of the claim (20 NYCRR 534.2 [a] [2] [i] [g]). In accordance, petitioner bears the burden to prove by clear and convincing evidence that the denial of the sales tax refund claim was erroneous (***see Matter of Kroll Bond Agency, Inc.***, Tax Appeals Tribunal, October 1, 2018; ***see also*** 20 NYCRR 3000.15 [d] [5]).

Based on the facts, petitioner has not met its burden of producing clear and convincing evidence that it paid *any* amount of the sales tax liability in question. Further, since petitioner has not provided evidence substantiating either the timing or amount of any payments made for which the refund is claimed, it has failed to overcome the presumption of correctness accorded to the Division's refund denial and is therefore not entitled to the refund as claimed in its refund application.

In addition, petitioner's claim for refund was not filed within the time restraints provided for under Tax Law § 1139 (a) (iii), which states:

> "In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission . . . (iii) in the case of a tax due from the seller, transferor or assignor and paid by the applicant to the tax commission where the applicant is a purchaser, transferee or assignee liable for such tax pursuant to the provisions of subdivision (c) of section eleven hundred forty-one of this chapter, within two years after the giving of notice by the tax commission to such purchaser, transferee or assignee of the total amount of any tax or taxes which the state claims to be due from the seller, transferor or assignor."

The record reflects that the Division issued a notice to petitioner in 2010, informing it of the estimated sales tax due pursuant to the provisions of Tax Law §§ 1141 (c) and 1138 (a) (3).

As the application for credit or refund of sales or use tax was not filed until 2021, petitioner's claim for refund was untimely, as it was mailed after the expiration of the two-year period in which to file a refund claim (Tax Law § 1139; ***Matter of 550 Cent. Ave. Deli Corp. v Commissioner of Taxation & Fin.***, 188 AD2d 845, 846 [3d Dept 1992], ***lv denied*** 81 NY2d 706 [1993]).

Petitioner's subsequent protest of the denial of its application for refund was also properly denied as we noted above that petitioner bears the burden to prove by clear and convincing evidence that the denial of the sales tax refund claim was erroneous by substantiating the timing and amount of payments made for which the refund is claimed (Tax Law § 1139 [c]). Petitioner did not bear its burden of proof and thus failed to overcome the presumption of correctness accorded to the refund denial notice.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Nacmias & Sons Auto Service, LLC, is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Nacmias & Sons Auto Service, LLC is denied; and
4. The Refund Claim Determination Notice, dated September 1, 2021, is sustained.

DATED: Albany, New York
August 28, 2025

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner