

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
KHAYER KAYUMI : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 825953
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Periods Ended June 30, 2010 and :
December 20, 2010. :
:

Petitioner, Khayer Kayumi, 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 periods ended June 30, 2010 and December 20, 2010.

A hearing was held before Arthur S. Bray, Administrative Law Judge, in New York, New York, on July 6, 2015 at 10:30 A.M., with all briefs to be submitted by January 4, 2016 which date began the six-month period for the issuance of this determination. Petitioner appeared by Mumtaz Alvi, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. BK Inner City Chicken, Inc., operated Popeye's Chicken & Biscuit (Popeye's Chicken) located at 290 Livingston Street, Brooklyn, New York.

2. On December 31, 2010 the Division of Taxation (Division) received a Notification of Sale, Transfer or Assignment in Bulk (Notification) regarding the proposed sale of Popeye's Chicken on January 10, 2010 for \$160,000.00. The Notification included a copy of the Agreement of Sale and Rider wherein petitioner, Khayer M. Kayumi, agreed to purchase the business assets, inventory, accounts receivable, and goodwill of Popeye's Chicken for \$160,000.00 consisting of a down payment of \$80,000.00 at the time of signing the contract, a payment of \$20,000.00 to a creditor at closing and a monthly payment of \$2,000.00 for a period of 30 months. The Agreement, effective as of September 20, 2010, was signed by petitioner on December 1, 2010. The Agreement did not require the franchisor's approval of the purchaser.

3. The Rider to the Agreement was signed by the president of the seller on October 30, 2010 and petitioner on December 1, 2010. The first paragraph of the Rider provided, in part:

“At the time of the signing of the contract, the Purchaser shall pay to the Seller by Certified Check an amount of \$80,000. . . . However, at seller's request, such check may be made payable to the New York State Sales Tax Department which shall be applied towards payment of sales tax due by the seller. Seller shall immediately remit such funds to the New York State Sales Tax Department and apply such amount as down payment toward the total purchase price of \$160,000.”

4. The second paragraph of the Rider acknowledged that there was a sales tax liability of at least \$200,000.00 and that the agreement was expressly conditioned upon the seller's payment of this obligation. In addition, the seller acknowledged that the sales tax liability was the seller's responsibility.

5. The third paragraph stated:

“Business shall be delivered free of any liabilities including but not limited to any tax liability due by seller to any governmental authority and seller shall be absolutely and unconditionally responsible for payment of any such amounts to any governmental authority. **This clause shall survive closing.**”

6. On January 3, 2011, the Division issued a Notice of Claim to Purchaser advising petitioner that the Division had received information indicating that he was a purchaser in a bulk sale and that there was a possible claim for sales and use taxes. Among other things, the notice stated that in order to be protected from incurring the seller’s sales tax liability, he should place the entire amount for the purchase in an escrow fund for the purpose of satisfying the sales tax liabilities.

7. On January 7, 2011, the Division sent a follow-up letter pointing out that sales tax is imposed on the transfer of tangible personal property and that, according to its records, the Division had not received the tax due on the same of \$10,338.67. The Division also noted that the sales tax liability of the seller could be passed on to the purchaser in a bulk sale and that it was advisable to maintain an escrow account until he received releases from the Division.

8. At the time of the bulk transfer, the seller had an outstanding sales tax liability of \$262,535.90.

9. On March 29, 2011, the Division issued a Notice of Determination to petitioner assessing tax due in the amount of \$160,000.00. The notice explained that the Division determined that taxes are due from BK Inner City Chicken and that, as a purchaser, petitioner is liable for the same taxes under Tax Law § 1141(c). The amount of the assessment was premised upon the amount tendered for the restaurant. On the same date, the Division of Taxation issued a second Notice of Determination to petitioner assessing tax due, for the period ended December 20, 2010, in the amount of \$10,338.67, plus penalty and interest for a balance due of \$11,908.83.

The second notice explained that petitioner was liable on the transfer of tangible personal property in accordance with the provisions of Tax Law §§ 1133, 1138 and 1141(c). This assessment was premised upon the amount paid for the furniture, fixtures and equipment.

10. Petitioner was a 25% shareholder of a firm known as Ariana Management Corp. (Ariana). Ariana authorized petitioner to obtain a check drawn in the amount of \$80,000.00. Accordingly, petitioner secured a check from TD Bank, dated October 28, 2010, for the amount authorized by Ariana payable to New York State sales tax and delivered the check to Kevin Davis, a shareholder of the seller. Petitioner did not place any consideration in escrow, nor did he retain any funds to satisfy any of the seller's outstanding sales tax liability.

11. At the end of 2010 or beginning of 2011, petitioner began operating the business and filed sales and use tax returns beginning with the period December 1, 2010 through February 28, 2011. The returns were filed in the name of 290 Livingston Chicken, LLC. At least two of the returns were signed by petitioner.

12. In August of 2012, petitioner was notified by the Division that it had not received the check for the payment of sales tax. Thereafter, petitioner contacted Mr. Davis regarding the disposition of the check, and he replied that it had been sent to the New York sales tax unit. In November 2013, petitioner contacted TD Bank regarding what became of the check and learned that the check had been deposited into a business account under the name of Platinum Properties at the Hackensack Courthouse TD branch. Upon learning that the check has been converted, he filed a complaint with the Hackensack Police Department. The criminal complaint led to an indictment against Mr. Davis for unlawful deception and theft.¹

¹ The record does not reveal the disposition of the indictment.

13. In or about 2013, Bank of America took possession of the restaurant because of an unpaid debt that the seller had with the bank.

14. The franchisor of the restaurant refused to give permission to petitioner to close on the restaurant because it did not want to become involved in the situation involving the alleged larceny of funds.

15. Neither the lease of the restaurant, title to the equipment nor title to the restaurant was ever transferred to petitioner's name.

CONCLUSIONS OF LAW

A. Tax Law § 1141(c) provides, in pertinent part, 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, transferer 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.

Whenever the purchaser, transferee or assignee shall fail to give notice to the tax commission as required by the preceding paragraph, or whenever the tax commission shall inform the purchaser, transferee or assignee that a possible claim for such tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferer or assignor shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller, transferer or assignor to the state, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferer or assignor any such sums of money, property or choses in action to the extent of the amount of the state's claim.”

B. Initially, petitioner contends that he complied with the applicable statute by providing the Division with notice of the sale. It is petitioner's position that personal liability may only be

imposed if the taxpayer fails to inform the Division of the transfer. Accordingly, petitioner concludes that he should not be held personally liable for the sales tax due from the seller.

C. Petitioner is correct that Tax Law § 1141(c) requires the 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. 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 sale price or fair market value of the business assets sold (*see* 20 NYCRR 537.4[c]).

D. Here, petitioner notified the Division of the proposed bulk transfer. However, his position fails to take into account a purchaser's additional obligation to withhold from the seller funds for the payment of sales tax. The record shows that following the filing of the Notification of Sale, Transfer or Assignment in Bulk, he was advised by the Division, on at least two occasions, that he could be held liable for the payment of the seller's sales tax liability unless the funds for the purchase of the business were placed in an escrow account. Despite this warning and the provision in the Rider that there was a substantial outstanding sales tax liability, petitioner handed the funds for the payment of the sales tax directly to the seller. The failure to withhold the funds from the seller rendered petitioner personally liable for the payment of the sales and use taxes (Tax Law § 1141(c); 20 NYCRR 537.4[a][1]).

E. Petitioner argues that denying imposition of personal liability on petitioner would not contradict the underlying purpose of Tax Law § 1141(c) and would promote the most equitable result. Relying upon *Harcel Liqs. v. Evsam Parking* (61 AD2d 967 [1ST Dept 1978], *affd* 48 NY2d 503 [1979]), petitioner contends that New York is adequately protected by the provision in the statute that requires the prospective purchaser to notify the Division before the expected sale.

Petitioner also submits that *Harcel* shows that a court considers fairness in deciding whether to impose liability.

F. Petitioner's reliance upon *Harcel* is misplaced. *Harcel* concerned the tax liability of corporate officers under a duty to act for a corporation in complying with the tax laws. It did not concern the obligation of a purchaser of a business to withhold payment of funds when the Division notifies the purchaser in a bulk sale transaction that there is a possible claim for taxes from the seller.

G. Petitioner submits that he was a victim of fraud and deceit and that imposing liability upon him would contradict fairness and justice. The record shows that the Rider to the Agreement placed petitioner on notice that there was a substantial outstanding sales tax liability. Thereafter, on two occasions, petitioner was advised by the Division to place the funds into an escrow account. Rather than follow this advice, petitioner chose to deliver the check directly to the seller. While it is unfortunate that petitioner was taken advantage of by the seller, his present difficulties are a direct result of his failure to adhere to the requirements of Tax Law § 1141(c) and the instructions received from the Division. While petitioner may have believed that he was acting in good faith, it cannot be said that he acted lawfully. Misconduct by the seller of a business may not deprive the state of the tax revenues to which it is entitled (*see Harcel Liquors, Inc. v. Evsam Parking, Inc.*, 48 NY2d 503, 507 [1979]).

H. Petitioner contends that he may not be held personally liable for the unpaid taxes because transfer of the property did not occur. According to petitioner, the transfer of the franchise was subject to the approval of the franchisor, Popeye's Chicken. Petitioner notes that neither the lease, title to the restaurant equipment nor legal title of the franchise restaurant was placed in petitioner's name. Rather, the seller retained legal title of the restaurant until the

restaurant was taken over by Bank of America. In support of this argument, petitioner refers to certain documents that are not a part of the record but are apparently available on-line, and an unpublished decision for the proposition that if the bulk sale is not completed then the purchaser does not assume the seller's tax liability.

I. These arguments are also without merit. As noted by the Division, the Agreement does not make the sale conditioned upon the approval of the franchisor. Second, a sale is defined as a transfer of title or possession or both (20 NYCRR 525.2[a][2]). Here, it is undisputed that petitioner took possession of the restaurant. The transfer of possession out of the ordinary course of business constituted a sale and rendered petitioner subject to the bulk sale provisions of Tax Law § 1141(c) and 20 NYCRR 537.1(a)(1) regardless of the franchisor's lack of consent for the transfer. Moreover, the documents referenced in petitioner's brief are not a part of the record and, at this juncture, may not be considered (*Matter of New Cingular Wireless PCS LLC*, Tax Appeals Tribunal, February 16, 2016; *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

J. The petition of Khayer Kayumi is denied and the notices of determination, dated March 29, 2011, are sustained together with such penalties and interest as may be lawfully due.

DATED: Albany, New York
April 21, 2016

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE