

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
ANDREW CARLSON
for Revision of Determinations or for Refund of Sales
and Use Taxes under Articles 28 and 29 of the Tax Law
for the Period June 4, 2004 through November 30, 2010.

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: DETERMINATION
: DTA NO. 828491
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Petitioner, Andrew Carlson, filed a petition for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 4, 2004 through November 30, 2010.

A formal hearing was held before Kevin R. Law, Administrative Law Judge, in Rochester, New York, on July 24, 2019, with all briefs to be submitted by November 22, 2019, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Duke, Holzman, Photiadis and Gresens, LLP (Gary M. Kanaley, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie M. Scalzo, Esq., of counsel).

ISSUE

Whether petitioner can establish the that the amounts asserted due from him as a responsible person of two bulk sale transferees should be reduced or cancelled based upon his contention that the business assets were transferred for no consideration and that their fair market value was zero because they were encumbered by federal tax liens.

FINDINGS OF FACT

1. On November 20, 2012, Best Wings LLC (Best Wings) filed two notifications of sale, transfer, or assignment in bulk, form AU 196.10 (bulk sale notifications), reporting that it purchased the business assets of The Village Casino (the Casino) from Carlson Food Enterprises, Inc. (Carlson) and the business assets of the Wing City Grille (Wing City) from Car Kid Development, Inc. (Car Kid). Steven Carlson owned both Carlson and Car Kid. Both bulk sale notifications were signed by petitioner, Andrew Carlson, as managing member of Best Wings. Petitioner is Steven Carlson's son.

2. The Casino bulk sale notification listed a total sales price of \$249,500.00 and indicated that Best Wings assumed liabilities of \$28,000.00 and paid sales tax of \$2,921.75 on equipment. This bulk sale notification indicated that the sale occurred on May 4, 2008.

3. The Wing City bulk sale notification listed a total sales price of \$145,700.00 and indicated that Best Wings assumed liabilities of \$140,000.00 and paid sales tax of \$4,437.65 on equipment. This bulk sale notification indicated that the sale occurred on June 13, 2008.

4. In 2008, 2009 and 2010, Best Wings was a limited liability corporation that elected to be taxed as a partnership. Best Wings' 2008 New York State partnership return indicates that Best Wings began business on May 9, 2008. It listed its principle business activity as a restaurant. The partnership returns also indicate that petitioner owned a 75% interest in Best Wings and was its managing member. Steven Van Ness owned the remaining 25%.

5. On its 2008 partnership return, Best Wings reported gross sales of \$2,131,225.00 and listed \$293,872.00 "due from Carlson" on its balance sheet as of the end of the tax year. There is no indication as to whether this amount was due from petitioner, petitioner's father, or from Carlson.

6. On its 2009 partnership return, Best Wings reported gross sales of \$2,958,883.00, and listed assets of \$356,998.00 due from “related companies” at the end of the tax year on its balance sheet.

7. On its 2010 partnership return, Best Wings reported gross sales of \$3,008,504.00. Best Wings’ balance sheet at the end of the 2010 tax year listed other assets of \$630,297.00. The balance sheet reflected \$452,884.00 of liabilities consisting of accounts payable (\$329,030.00), mortgages, notes and bonds payable in less than one year (\$87,798.00), and other current liabilities (\$36,056.00).

8. On his 2010 and 2011 personal income tax returns petitioner reported the business activities of the Wing City Grille, LLC, on a federal schedule C. Gross sales of \$630,509.00, \$1,942,467.00 and \$1,627,743.00 were reported during 2010, 2011, and 2012, respectively. The record does not indicate if this limited liability company had any relation to the Wing City Grille business purchased by Best Wings from Car Kid in 2008.

9. In 2011, petitioner reported Best Wings’ earnings on a federal schedule C.¹ In that year petitioner reported \$1,657,610.00 in gross sales from Best Wings.

10. On February 11, 2013, the Division issued a notice of determination to Best Wings asserting tax due in the amount of \$328,391.53 representing the outstanding sales tax owed to the Division by Carlson. The notice informed Best Wings that it was liable as a bulk sale purchaser for taxes determined to be due in accordance with sections 1141 (c) and 1138 (a) (3) of the Tax Law. Also on February 11, 2013, the Division issued a notice of determination to Best Wings as bulk sale purchaser for \$303,355.00, the outstanding sales tax owed by Car Kid to the Division.²

¹ The record is silent as to when, and how, petitioner obtained David Van Ness’s membership interest in Best Wings.

² Finding of Fact 6 of the December 13, 2018 order in this matter stated that the notice of determination issued to Best Wings for the outstanding sales tax owned by Car Kid amounted to \$261,991.66, rather than \$303,355.00.

11. On December 19, 2012, Professional Hospitality LLC (Professional) filed a bulk sale notice reporting that it purchased the business assets associated with the Casino from Best Wings in a bulk sale which took place January 1, 2011. The total sales price was listed as \$249,500.00. The bulk sale notice indicated that Professional assumed liabilities of \$28,000.00 and paid sales tax of \$2,921.75 on equipment. The bulk sale notice was signed by petitioner as managing member of Professional. Professional's reported mailing address, telephone number, trade name, and business location are identical to that of Best Wings d/b/a the Casino.

12. Professional's sales activities were reported on petitioner's federal schedule C. Specifically, gross sales of \$1,375,768.00, \$1,365,379.00, and \$1,287,324.00 were reported for 2011, 2012, and 2013, respectively. Petitioner also amortized goodwill of \$203,000.00 on Professional's federal schedule C forms commencing in April 2012.

13. Also on December 19, 2012, Great Food Great Fun LLC (Great Food) reported that it purchased the business assets associated with Wing City from Best Wings in a bulk sale which took place on February 10, 2012, for a total sales price of \$145,700.00. This bulk sale notice indicated that Great Food assumed liabilities of \$140,000.00 and paid sales tax of \$4,437.65 on equipment. This bulk sale notice was signed by petitioner as managing member of Great Food. Great Food's reported mailing address, telephone number, trade name, and business location are identical to that of Best Wings d/b/a Wing City.

14. Great Food's business activities were reported on a federal schedule C. Specifically, gross sales of \$1,540,078.00 and \$1,242,282.00 were reported for 2012 and 2013, respectively. Petitioner also amortized goodwill of \$81,040.00 on Great Food's federal schedule C forms commencing in April 2012.

15. On petitioner's 2012 federal form 4562 for "all business activities," petitioner listed,

among other assets, \$57,260.00 in “used restaurant equip – S. Carlson, and \$37,700.00 of “used restaurant equip.”

16. On February 4, 2013, the Division issued a notice of claim to purchaser to both Professional and Great Food.

17. On March 14, 2013, the Division issued a notice of determination to Professional as bulk sale purchaser and a notice of determination to Great Food, as bulk sale purchaser, for the sales tax owed by Best Wings to the Division. Each notice asserted tax due of \$640,172.97 consisting of the following:

- i. \$8,426.44 for the period ending November 30, 2010 (notice number L-037600814);
- ii. \$328,391.53 as bulk sale purchaser of assets from Carlson;
- iii. \$303,355.00 as bulk sale purchaser of assets from Car Kid.

18. Best Wings filed requests for conciliation conferences with BCMS appealing the notices issued to it referred to in finding of fact 10. On June 21, 2013, Best Wings executed two consents settling these notices. The consents adjusted the notices to reflect the sales amounts reported on the bulk sales notifications. Both consents were signed by petitioner on behalf of Best Wings.

19. On July 2, 2015, the Division issued notice of determination L-043291618 to petitioner, as a responsible person of Great Food, asserting \$395,200.00 for sales taxes determined to be due in accordance with Tax Law §§ 1138 (a), 1131 (1), and 1133.

20. On July 9, 2015, the Division issued notice of determination L-043328199 to petitioner, as a responsible person of Professional, asserting tax due of \$395,200.00, for sales taxes determined to be due in accordance with Tax Law §§ 1138 (a), 1131 (1), and 1133.

21. On March 27, 2017, the Division reduced Professional's sales tax assessment to \$249,500.00 and Great Food's sales tax assessment to \$145,700.00.

22. On July 24, 2017, both Professional and Great Food filed for Chapter 11 bankruptcy. The bankruptcy filings were signed by petitioner as sole member of both Professional and Great Food.

23. By conciliation order dated September 15, 2017, BCMS reduced the notices of determination issued to petitioner in accordance with amounts consented to by Best Wings, and the corresponding adjustments made to the assessments of Professional and Great Food, as follows: (a) as a responsible person of Professional, notice L-043328199 was reduced to \$249,500.00; and (b) as a responsible person of Great Food, notice L-043291618 was reduced to \$145,700.00.

24. The notices at issue herein were issued to petitioner electronically rather than by certified mail.

25. On November 21, 2017 petitioner filed a petition with the Division of Tax Appeals challenging the notices of determination. The petition alleged that: (i) petitioner never consented to electronic service of notices, so issuance of the notices was never properly effectuated; (ii) a responsible person of an entity cannot be held liable for the entity's sales tax liabilities as a bulk sale transferee; and (iii) both the consideration and the fair market value of the business assets transferred to Best Wings and subsequently transferred by Best Wings to Professional and Great Food was zero.

26. After issue had been joined, petitioner filed a motion for summary determination on the issues raised in the petition. The Division filed its response and cross-moved for summary determination. In his reply to the Division's motions for summary determination, petitioner submitted four "revised" bulk sale notifications each indicating the consideration on the transfers to be zero. None of the notifications were signed nor were they ever filed with the Division's

bulk sale unit. By order dated December 13, 2018, the Division was granted summary determination on the issue of whether the notices of determination were properly issued to petitioner and on the issue of whether a responsible person of a bulk sale transferee could be held responsible for the transferor's outstanding sales tax liabilities. Both parties' motions were denied as to what the consideration and the fair market value of the assets transferred on the bulk sales. The findings of fact and conclusions of law set forth in the December 13, 2018 order are incorporated herein by reference.

27. A hearing was held on the remaining issue on July 24, 2019. At the hearing petitioner submitted the affidavit of his representative, Gary Kanaley. Mr. Kanaley researched the federal tax liens of Car Kid and Carlson filed by the Internal Revenue Service in the Chautauqua County Clerk's office. Mr. Kanaley submitted certified copies of federal tax liens filed against Carlson as follows:

Assessment Date	Lien Filing Date	Amount
7/30/01	12/11/07	\$38,179.90
10/8/07	12/11/07	\$63,656.13
7/2/07	12/11/07	\$8,955.18

Mr. Kanaley submitted certified copies of federal tax liens filed against Car Kid, as follows:

Assessment Date	Lien Filing Date	Amount
9/24/07	1/25/08	\$46,979.61
9/24/07	1/25/08	\$2,492.70
12/3/07	2/21/08	\$26,274.11
8/29/11	1/23/12	\$3,004.12

2/14/11	1/23/12	\$4,180.35
3/24/08	1/23/12	\$8,579.74
6/2/08	1/23/12	\$8,377.93

28. Attached as an exhibit to the Kanaley affidavit were computations utilizing the federal tax lien information obtained by Mr. Kanaley made by an unnamed accountant from the accounting firm Lawlor and Witkowski. This exhibit purports to detail the updated amount of Carlson's and Car Kid's federal tax liens on the day the underlying business assets were transferred to Professional and Great Food. According to a summary sheet prepared which incorporates updated penalty and interest calculations, the federal tax liens against Carlson totaled \$229,681.62 on the date Carlson's business assets that had been previously transferred to Best Wings were transferred to Professional. Likewise, the summary sheets indicate that the federal tax liens against Car Kid totaled \$190,633.96 on the date its assets were subsequently transferred to Great Food. Mr. Kanaley's affidavit with attached exhibits was admitted into evidence over the objection of the Division's representative. The Division's representative objected as the individual or individuals who performed such calculations were not identified nor was there any indication as to whether payments had been made on the liens. The record was held open for Mr. Kanaley to provide a certification from the individual who performed the calculations. Mr. Kanaley was instructed that if anything other than a certification was submitted, those documents would be returned.

29. Following the hearing, Mr. Kanaley submitted what purports to be an affidavit from Lawrence M. Lawler, CPA attesting that he performed the calculations referred to in finding of fact 28. Although the document does not constitute an affidavit as it lacks a jurat, Mr. Lawler signed the document, subject to penalties of perjury and certified that the contents were true to

the best of his knowledge and belief. Nonetheless, Mr. Lawler acknowledged that the original calculations were inaccurate as they did not take into account payments that had been applied to Carlson's and Car Kid's federal tax liens and he did not realize that the lien amounts included penalty and interest when the initial calculations were made. Mr. Lawler attached revised calculations based upon Internal Revenue Service account transcripts provided to his firm for Carlson and Car Kid and corrected the duplication his original calculations contained. These revised calculations have not been accepted, because, as noted, the record was held open for the sole purpose of a certification being provided.

30. Petitioner did not appear and testify at the hearing in this matter nor were any contracts of sale documenting the transfer of assets by Car Kid and Carlson to Best Wings and then from Best Wings to Great Food and Professional entered into evidence; nor were any appraisals setting for the appraised value of the transferred assets on the transfer dates entered into evidence.

31. Pursuant to 20 NYCRR 3000.15 (d) (6), the Division submitted with its brief proposed findings of fact numbered 1 through 14. Each of the proposed facts is supported by the record, and has been consolidated, condensed, combined, renumbered and substantially incorporated herein (*see* State Administrative Procedure Act § 307 [1]).

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 10 days before taking possession of, or making payment for, the business assets of the selling company. The purpose of Tax Law § 1141 (c) is to preserve the Division's "indisputable right to collect taxes which could otherwise be extinguished by the simple expedient of a taxpayer transferring its assets" (*Harcel Liqs. v Evsam Parking*, 48 NY2d

503, 507 [1979]; *see also Spandau v United States of Am.*, 73 NY2d 832 [1988]). Upon receipt of a timely notice of sale, the Division is required to inform the purchaser of any potential claims for sales and use taxes that may still be owed by the seller of the business (*see* 20 NYCRR 537.0 [c] [3]). If the purchaser fails to withhold funds from the seller or fails to file a proper and timely notice of bulk sale with the Division, then such purchaser becomes personally liable for the sales and use taxes determined to be due from the seller (*see* 20 NYCRR 537.4 [a] [1]). The liability of the purchaser is limited to the greater of the purchase price or the fair market value of the business assets sold or transferred (*see* 20 NYCRR 537.4 [c]).

B. As noted in the findings of fact, petitioner was assessed as a responsible person of Great Food and Professional. The tax at issue is the derivative liability from Best Wings' failure to file bulk sale notifications on the bulk sale transfers from Carlson and Car Kid to Best Wings and the subsequent transfers of these same assets from Best Wings to Great Food and Professional. Summary determination was granted in the Division's favor on whether the notices of determination were properly issued and whether a responsible person of a bulk sale purchaser could be held derivatively liable for the seller's unpaid sales tax liabilities. Those conclusions of law are incorporated herein by reference.

C. The hearing in this matter was to determine whether the notices of determination asserted against petitioner, as modified by the BCMS order, should be further reduced based upon 20 NYCRR 537.4 (a) (1), which provides that the liability of the purchaser in a bulk sale is limited to the greater of the purchase price or the fair market value of the business assets sold or transferred. As a preliminary matter, petitioner failed to establish that the business assets of The Casino and Wing City were transferred for no consideration. Petitioner did not testify nor were any contracts submitted. There is nothing in the record that establishes how the business assets

of Carlson and Car Kid were transferred to Best Wings then to Professional and to Great Food. In addition, while petitioner attempted to establish that the fair market value of the assets transferred was zero alleging that said assets were encumbered by federal tax liens, petitioner's attempts fail. While it is obvious that 26 USC § 6321 provides that federal tax liens automatically arose against Carlson and Car Kid when the underlying federal tax liabilities were assessed, and that federal tax liens are effective against all of Carlson's and Car Kid's property rights whether existing or acquired after the liens arose, it is not clear that the liens were effective against such property after it had been transferred to Best Wings and subsequently transferred to Professional and Great Food. As noted by the Division, since there is no indication that the federal tax liens filed against Carlson and Car Kid were filed with the New York Secretary of State, they would not have been valid as against Best Wings, Professional and Hospitality as purchasers (IRC § 6323 [a], [f]; Lien Law § 240 [2] [a]). Regardless, while the existence of federal tax liens would have a bearing on fair market value, petitioner submitted no evidence of the fair market value on the dates the respective business assets were transferred. Petitioner's claim that the fair market value of the business assets transferred was zero is undermined by the values ascribed to them in Best Wings', Professional's and Great Food's bulk sale notifications; notifications which he signed. Likewise, petitioner's assertion that the assets were transferred for no consideration is directly contradicted by petitioner claiming deductions for amortized goodwill on his federal schedule C forms for the transferee entities.

D. Based upon the foregoing, petitioner has not established that the notices of determination, as modified by the September 15, 2017 conciliation order, should be further reduced or cancelled.

E. The petition of Andrew Carlson is denied, and the notices of determination dated July 2, 2015 and July 9, 2015, as modified by the conciliation order, are sustained.

DATED: Albany, New York
May 21, 2020

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE