

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RELAX AUTO SERVICES, INC. : DETERMINATION
for Revision of Determinations or for Refund of Sales : DTA NO. 829708
and Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period December 1, 2012 through February 29, 2016. :

Petitioner, Relax Auto Services, Inc., 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 December 1, 2012 through February 29, 2016.

A videoconferencing hearing via CISCO Webex was held before Barbara J. Russo, Administrative Law Judge, on August 12, 2021, with all briefs to be submitted by December 16, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared by Sarwar Chaudri, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel).

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

1. In or around November 2016, petitioner, Relax Auto Services, Inc., acquired business assets from Arju Auto Repair & Transmission, Inc. (Arju). A form AU 196.10, notification of

sale, transfer or assignment in bulk was not filed with the Division of Taxation (Division) at any time.

2. Petitioner filed form DTF-17, application to register for a sales tax certificate of authority, dated November 23, 2016, with the Division, stating that it would begin business on November 28, 2016 at 40-23 23RD Street, Queens County, New York (the Queens County location). The DTF-17 lists Jaiysmin Hossain as the president and responsible person of petitioner and lists her address as ***** 85TH Avenue, Jamaica New York 11432-1932, and daytime telephone number as 646-239-*****.¹

3. Petitioner operated an automotive repair shop at the Queens County location.

4. Prior to petitioner's business operation at the Queens County location, Arju operated an automotive repair shop at the same location from approximately July 2008 to August 2016.

5. Arju filed form DTF-17, dated June 6, 2008, with the Division, stating that it would begin business on July 1, 2008. The DTF-17 lists Mohammed Mosharaf Hossain as the president and responsible person of Arju and lists the same address and daytime telephone number for him as Ms. Hossain.

6. Jaiysmin Hossain and Mohammed Hossain jointly filed resident income tax returns for the years 2016 and 2017, as married filing joint returns. The returns list the same address for Mr. and Ms. Hossain as their responsible person addresses listed on the forms DTF-17 for petitioner and Arju.

7. On January 30, 2018, April 19, 2018, and April 25, 2018, tax compliance agents for the Division made field visits to the automotive repair shop at the Queens County location. On January 30, 2018, Tax Compliance Agent Armando Smith noted that the location is a garage

front mechanic commercial space, that Arju is no longer in business at the location, and the sign at the location identifies Relax Auto Repair. According to Mr. Smith's notes, based on a conversation with a manager at the location, both businesses are owned by the same family; Ms. Hossain is the owner of petitioner and Mr. Hossain was owner of Arju. Mr. Smith noted that he left a business card and requested that the owner contact him.

8. On April 25, 2018, Tax Compliance Agent II John Virzi visited the automotive repair shop at the Queens County location to investigate the potential bulk sale. Mr. Virzi testified that he spoke with an employee at the business who informed him that there was only a name-change for the business and it still had the same management team. The employee further informed him that the telephone number for petitioner was 646-239-7737, which was the same business telephone number listed for Arju on form DTF-17. Mr. Virzi observed that this telephone number was listed on petitioner's sign. Mr. Virzi further testified that petitioner's repair shop did not appear to have been remodeled or changed from Arju's repair shop.

9. Based upon the information obtained, the Division determined that a bulk sale had occurred. The basis for the Division's conclusion was that both the seller and purchaser engaged in the same type of business at the same location and with the same telephone number, an employee at the business location confirmed that nothing had changed for the business other than the name, and the same individual signed checks for both petitioner and Arju. The responsible person for the selling entity is Mohammed Hossain, who is the spouse of the responsible person for the purchasing entity, Jaiysmin Hossain. Mr. and Ms. Hossain reside at the same address and filed joint tax returns. Ms. Hossain applied for and received a Certificate of Authority for the new entity, the purchaser.

¹ Portions of the address and telephone number are redacted for privacy.

10. The seller, Arju, had outstanding sales tax liabilities at the time of the transfer to petitioner.

11. Petitioner presented no information concerning the fair market value of the assets transferred.

12. Based upon the foregoing and the lack of documentation supplied by petitioner, the Division determined that petitioner was liable for the entire amount of the tax portion of the seller's outstanding sales tax liabilities.

13. On July 13, 2018, the Division issued to petitioner notices of determination, L-048548646, assessing tax in the amount of \$14,143.21, and L-048548645, assessing tax in the amount of \$69,383.30, based upon the outstanding sales tax liability of the bulk sale transferor, Arju.

14. During the hearing, the Division entered copies of two checks into the record, one from petitioner dated November 3, 2017, and one from Arju, dated August 23, 2016. Both checks list the same business address, are from the same Chase bank account, and both appear to bear the same signature.

15. Petitioner did not submit any evidence, either testimony or documents, during the hearing.

16. Petitioner's representative conceded at the hearing that petitioner did not file a notification of bulk sale with the Division.

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], *affd* 48 NY2d 503 [1979]; *see also Spandau v United States of Am.*, 73 NY2d 832 [1988]).

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]).

B. The term "bulk sale" is defined at 20 NYCRR 537.1 (a) (1) as follows:

"The term *bulk sale* as used in this Part means 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."

A bulk sale also includes a transfer by gift, or for nominal consideration (*see* 20 NYCRR 537.1 [a] [3], example 4), assumption of indebtedness (*Matter of Peconic Bay Motors, Inc.*, Tax Appeals Tribunal, September 26, 1991), the sale of assets as part of a liquidation of the seller's business (20 NYCRR 537.1 [d] [2], examples 16 and 17), and the sale of business assets regardless of whether the seller was operational when the assets were sold (*see Matter of Gaughan*, Tax Appeals Tribunal, May 14, 1992).

C. A purchaser in a bulk sale includes "any person who, as part of a bulk sale, purchases or is the transferee or assignee of business assets" (*see* 20 NYCRR 537.1 [e]). The term "business assets" includes "any assets of a business pertaining directly to the conduct of the business, whether such assets are intangible, tangible or real property" and any asset owned by a corporation (20 NYCRR 537.1 [b]).

D. The facts here demonstrate that the transfer from Arju to petitioner was clearly a bulk sale transfer of the entire business assets outside the ordinary course of business. Arju transferred its entire business operation, including the automotive repair shop and equipment, to petitioner.

E. The notification requirement of Tax Law § 1141 (c) provides “more than adequate protection to the prospective purchaser who needs only to inform the [Division] of the expected sale in order to protect itself from liability” for the seller’s unpaid sales tax (*Harcel Ligs. v Evsam Parking*, 48 NY2d at 507). Upon receipt of a timely Notice of Sale, the Division is required to inform the purchaser of the existence of any possible claim for New York State and local sales and use taxes due by the seller of the business assets (20 NYCRR 537.6 [a] [3]). Once this notice is issued to the purchaser, the purchaser is then on notice of the existence of such taxes determined to be due from the seller and becomes liable to the Division to the extent of the fair market value of the assets transferred, or the consideration paid, whichever is higher (20 NYCRR 537.0 [c] [2]; 20 NYCRR 537.4 [a] [1]; [c]). The purchaser may then protect itself by placing the consideration to be paid in escrow pending resolution of the Division’s claim (20 NYCRR 537.3 [b]). Failure to comply with the provisions of Tax Law § 1141 (c) exposes the purchaser to personal liability for the seller’s taxes (*Matter of BMW Pizza, Inc. v Urbach*, 235 AD2d 146 [3d Dept 1997]).

F. As set forth in the facts, at the time of the bulk sale transfer, the seller, Arju, owed sales tax. Petitioner, as the purchaser, was obligated under Tax Law § 1141 (c) to notify the Division of the transaction and withhold from the seller the transfer of any consideration on the purchase until payment of that liability was made. Petitioner does not dispute that it failed to provide such notice. Failure to comply with the notification requirements resulted in petitioner becoming

personally liable for the payment of any New York State sales and use taxes determined to be due from the seller (*see Matter of North Shore Cadillac-Oldsmobile v Tax Appeals Trib.*, 13 AD3d 994 [3d Dept 2004], *lv denied* 5 NY3d 704 [2005]; *Matter of Velez v Division of Taxation*, 152 AD2d 87 [3d Dept 1989]; *see also* 20 NYCRR 537.4[a][1]).

G. Tax Law § 1141 (c) provides that the amount of tax liability that may transfer to the “purchaser” of assets in a bulk sale is limited to the higher of the purchase price or the fair market value of the assets transferred. In this case, the Division asserted tax due from petitioner in an amount equal to the seller’s assessment, based on the transfer of the entire business to petitioner. The Division was reasonable in valuing the business assets at the amount of the tax owed by the seller and assessing petitioner, as purchaser, for the full amount of the tax owed by the transferor (*Matter of Ultimat Security, Inc.*, Tax Appeals Tribunal, May 31, 2012; *Matter of Suffolk Center Corp.*, Tax Appeals Tribunal, November 23, 2011). Petitioner failed to provide the Division with any information concerning the purchase price or the value of the assets transferred. In order to establish a lower liability than the amount of tax owed by Arju, it was incumbent upon petitioner to prove the fair market value of the assets transferred or the purchase price (*Matter of Ultimat Security, Inc.*, Tax Appeals Tribunal, May 31, 2012). In this case, petitioner has failed to establish the fair market value of the assets transferred or the purchase price. Petitioner did not present any argument or produce any evidence at the hearing to show that the purchase price or fair market value of the assets transferred was less than the amount of Arju’s assessment. Accordingly, it is determined that petitioner failed to establish that the liability asserted exceeded any maximum amount of liability that could transfer with the assets.

The subject notice of determination is presumptively correct (*see Matter of Tavalacci v State Tax Commn.*, 77 AD2d 759 [3d Dept 1980]; *see also Matter of Hammerman*, Tax

Appeals Tribunal, August 17, 1995). The burden rests with petitioner to show by clear and convincing evidence that the methodology utilized by the Division was unreasonable or that the amount of tax assessed was erroneous (*see Matter of Meskouris Bros. v Chu*, 139 AD2d 813 [3d Dept 1988]; *see also Matter of Surface Line Operators Fraternal Org. v Tully*, 85 AD2d 858 [3d Dept 1981]). Petitioner failed to establish a fair market value for any of the assets transferred to it. In the absence of appropriate substantiation for its position, it failed to meet its burden of proof that the fair market value of the assets transferred was lower than the amount assessed. As such, petitioner has failed to meet its burden of proof in challenging the notice of determination.

H. The petition of Relax Auto Services, Inc., is denied and the notices of determination dated July 13, 2018 are sustained.

DATED: Albany, New York
June 16, 2022

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE