

**New York State Department of Taxation and Finance**  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-85(36)S  
Sales Tax  
August 21, 1985

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S840612A

On June 12, 1984 a Petition for Advisory Opinion was received from Susan Jane Jankowski, 69 Westmont Avenue, Elmira, New York 14901.

The issue raised is whether Petitioner, the purchaser in a bulk sale transaction, is relieved of her liability, in accordance with Section 1141, subd.(c) of the Tax Law, for any unpaid sales or use taxes of the seller upon returning to the seller, in lieu of foreclosure proceedings, the property purchased in bulk under an installment sale contract.

On September 9, 1982, Petitioner and the owner of a bar and tavern business (hereinafter "Seller") entered into a written agreement whereby Petitioner consented to purchase said business subject to completion of payments required under an installment agreement. On November 12, 1982, after execution on that date of the bill of sale, the installment contract, and a security agreement (naming Seller as the secured party), Petitioner took possession of the business assets.

The terms of the installment contract provide, in part, as follows: "The buyer agrees to pay the Seller for said business and equipment the sum of \$25,000.00 and interest at the rate of ten percent per annum as follows: \$5,000.00 upon the execution of this Agreement, thereafter, \$1,500.00 with interest at the rate of ten percent per annum shall be paid on or before one year from the date hereof; and an additional \$1,500.00 with interest at the rate of ten percent per annum shall be paid on or before two years from the date hereof. The Buyer shall pay the balance of the purchase price of \$17,000 by making monthly payments. . .for a period of ten years. . ., until the full purchase price is paid." The provisions of the security agreement state that "upon default by the debtor. . ., the obligations secured by this agreement shall immediately become due and payable in full. . . and the Secured Party shall have all the rights. . . with respect to repossession, retention and sale of the collateral and disposition of the proceeds as are accorded by the applicable sections of the Uniform Commercial Code respecting "Default". . . The Debtor shall remain liable for any deficiency resulting from a sale of the collateral and shall pay any such deficiency forthwith on demand."

Petitioner states that its business has suffered reverses because of a decline in local economic conditions, and it has been unable to make the installment payments due the seller since November of 1983. Petitioner inquires whether the return of the business assets to Seller under the conditions of the security agreement would constitute a cancellation of the sale and would therefore effectuate Petitioner's release from its liability for Seller's unpaid sales and use taxes.

Section 1141(c) of the Tax Law provides, in relevant part, that "Wherever 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. . .or paying therefor, notifying the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof. . . .

Whenever the purchaser. . .shall fail to give notice to the tax commission as required by the preceding paragraph or whenever the tax commission shall inform the purchaser. . .that a possible claim for such tax or taxes exists, any sums of money, property or chooses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller. . . shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller. . .to the state, and the purchaser, transferee or assignee is forbidden to transfer to the seller. . .any such sums of money, property or chooses in action to the extent of the amount of the state's claim. Within ninety days of receipt of the notice of the sale. . .from purchaser. . .the tax commission shall give notice to the purchaser. . .and to the seller. . .of the total amount of any tax or taxes which the state claims to be due from the seller. . .to the state, and whenever the tax commission shall fail to give such notice to the purchaser. . .and the seller. . .within ninety days from receipt of notice of the sale, transfer, or assignment, such failure will release the purchaser. . .from any further obligation to withhold any sums of money, property or chooses in action, or other consideration which the purchaser. . .is required to transfer over to the seller. . . .

Applicable sections of the New York State Sales and Use tax Regulations provide as follows:

"The purchaser, transferee or assignee is relieved of his obligation to withhold such funds and is relieved from liability for taxes due from the seller (except the sales and use taxes due on the sale of tangible personal property between the seller and purchaser) if notice to the Tax Commission has been given pursuant to section 537.2 of this Part; and. . .the purchaser, transferee or assignee has received from the Tax Commission a notice that the funds being withheld may be released; or the purchaser, transferee or assignee has received, from the seller, transferee or assignor, a bulk sales tax certificate issued by the Tax Commission to such seller, transferee or assignor stating that all taxes due up to the date of sale have been paid". . .20 NYCRR 537.3(c)(3)(4). "Failure by the purchaser, transferee or assignee to withhold funds from the seller, transferee or assignor makes the purchaser, transferee or assignee personally liable for the payment to the State of any and all sales and use taxes, including penalties or interest theretofore or thereafter determined to be due the State from the seller, transferee or assignor. . . ." (20 NYCRR 537.4(a)).

Within three months after November 12, 1982, the Tax Commission, in compliance with the time limits set by the Statute, served Petitioner first a "Notice of Claim to Purchaser" and, secondly, notice of taxes determined due from Seller and representing Petitioner's liability, as purchaser, in accordance with Section 1141(c) of the Tax Law.

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Documentation supplied by Petitioner affirms that the agreement between Petitioner and Seller to purchase the latter's business was consummated November 12, 1982, and that there was a transfer of business assets by Seller to Petitioner on that date. The subsequent use of the property by Petitioner in the operation of the business for at least one year from the date of acquisition negates its contention that the sale was canceled. Matter of Maurice S. Englander, Decision of the State Tax Commission, May 13, 1981, TSB-H-81(96)S.

Furthermore, the return of the fixtures and equipment to Seller is held a separate transaction under the provision of Regulations Section 526.7(a)(3) which provides:

"The term sale also includes the transfer of tangible personal property in a repossession or foreclosure action. Such transfer may be effected in any manner, including, but not limited to voluntary relinquishment, assignment or seizure by the mortgagee." (20 NYCRR 526.7(a)(3))

Accordingly, Petitioner's non-compliance with any conditions of the security agreement does not affect her status as the purchaser in a bulk sales transaction, nor does failure to pay any notes due under the installment contract and the resulting repossession of property by the Seller diminish Petitioner's obligation for payment of sales and use taxes owed by the Seller to the extent stated in either paragraph (A) or (B) below.

(A) Where purchaser has filed a proper and timely Notification of Sale, Transfer or Assignment in Bulk and has retained funds as required by the Tax Commission, the purchaser's liability is limited to the purchase price, which she has withheld from the Seller.

(B) Where a notice of bulk sale is not filed or is filed late, the purchaser becomes personally liable for taxes due from Seller, irrespective of whether or not she has kept back funds from the Seller, up to an amount equal to the higher of the purchase price or the fair market value of the assets, determined as of the date of sale.

DATED: August 1, 1985

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth herein.