

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

TSB-H-80 (198) S
Sales Tax
December 2, 1980

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S800701B

On July 1, 1980, a Petition for Advisory Opinion was received from Kleinberg, Kaplan, Wolff & Cohen, P.C., 551 Fifth Avenue, New York, N.Y. 10017.

The issue raised by Petitioner is whether a purchaser in a bulk sale transaction is relieved of any and all potential liability for any unpaid sales or use taxes of the seller (other than any sales or use tax arising from the bulk sale itself), where such purchaser files the notice of bulk sale required by Section 1141(c) of the Tax Law (a) at least ten days prior to such sale and (b) at a time later than ten days prior to such sale. Petitioner represents clients who are contemplating the purchase of the assets of corporations in transactions that will constitute bulk sale transactions.

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, notify 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 choses 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 choses 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 the 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 choses in action, or other consideration which the purchaser... is required to transfer over to the seller. For failure to comply with the provisions of this subdivision the purchaser... 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...except that the liability of the purchaser...shall be limited to an amount not in excess of the purchase price or fair market value of the business assets sold...whichever is higher.... Upon receipt within the ninety days as aforesaid of the notice of the total amount of the state's claim from the tax commission, and demand for payment thereof, the purchaser...may make payment of such claim to the state from any sums of money, property, or choses in action withheld in accord with the provisions of this paragraph...and upon making the payment, such purchaser...shall be relieved of all liability for such amounts to the seller...and such amounts paid to the state shall be deemed satisfaction of the tax liability of the seller...to the extent of the amount of such payment."

Accordingly, a purchaser is not relieved of any and all potential liability for unpaid taxes of the seller merely by filing the notice required by Section 1141(c) of the Tax Law. Rather, the timely filing of such notice, coupled with the required withholding of funds described above, enables the purchaser to become aware of existing and potential tax liabilities of the seller and to limit his own liability therefor. That is, where the purchaser files a proper and timely notice of bulk sale with the Tax Commission and the Tax Commission (a) fails promptly to notify the purchaser of possible claims against the seller, or (b) within 90 days from receipt of the notice of bulk sale fails to notify the purchaser of the total amount of taxes due, the purchaser may turn over to the seller the funds which are due the seller, and the purchaser is thereupon relieved of any liability for taxes due to the State from the seller. If within the 90 days the Tax Commission does notify the purchaser of the amount of taxes due from the seller, the purchaser may pay such taxes from the funds withheld and is thereupon relieved of all liability for the seller's taxes. The purchaser's obligation to pay over funds to the Tax Commission is thus limited to the purchase price, which he has withheld from the seller.

Where a notice of bulk sale is not filed or is filed late, the purchaser becomes personally liable for taxes due from the seller, up to an amount equal to the higher of the purchase price or the fair market value of the assets. Thus, where a notice of bulk sale is filed late the Tax Commission has ninety days to inform the purchaser of the total amount of tax due from the seller, and all of the conditions outlined above apply except that (a) the purchaser is personally liable for the taxes due, irrespective of whether or not he has withheld the funds from the seller, and (b) the limit to his liability is not the purchase price but the higher of the purchase price or the fair market value of the assets involved.

Petitioner is therefore advised that the filing of the notice of bulk sale required by the statute, whether timely or untimely, does not by itself relieve a purchaser of any and all liability for taxes due from the seller. However, the timely filing of such notice does protect the purchaser from inheriting an unknown tax liability of the seller after completing a bulk sale transaction. The filing of the notice after the time stated in the statute insures the purchaser a statement of his obligations within ninety days of such filing, which obligation may be met wholly or partially from withheld funds.

DATED: October 24, 1980

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau