

GUIDELINES FOR BULK SALES TRANSACTIONS

This memorandum highlights and summarizes the rights, obligations, and liabilities of both the purchaser and the seller in a bulk sale transaction, as well as the responsibilities of the Tax Commission. It does not supplant the provisions of Regulation Part 537 which contain fully detailed information and examples with respect to bulk sales. Unless all the requirements are met, a purchaser of business assets in a bulk sale transaction may be held personally liable for any unpaid sales taxes due from the seller (limited to the purchase price or the fair market value of the business assets sold, whichever is higher).

Definitions:

(1) Bulk sale transaction

a 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. Transfer by way of a gift does not preclude such transfer from being a bulk sale. (The term "bulk sale" does not include sales, transfers, or assignments of business assets in settlement or realization of a valid lien, mortgage, or other security interest or sales, transfers, or assignments of business assets by executors, administrators, receivers, trustees in bankruptcy, or any public officer under judicial process.)

(2) Business assets

any assets of a business pertaining directly to the conduct of the business whether such assets are tangible, intangible, or real property. Any asset owned by a corporation is a business asset.

(3) Seller

any person required to collect tax who sells, transfers, or assigns any of his business assets other than in the ordinary course of business.

(4) Purchaser

any person who, as part of a bulk sale, purchases or is the transferee or assignee of business assets.

(5) Ordinary course of business

any function, operation, or transaction which is done ordinarily or customarily in the course of business. All the facts and circumstances surrounding the transaction must be examined to ascertain whether the transaction is in the ordinary course of business.

### Filing Requirements

- (1) A person who is the purchaser of the whole or any part of another's business assets, otherwise than in the ordinary course of business, must, at least ten days before taking possession of such assets, or paying for them, whichever comes first, mail a Notification of Sale, Transfer or Assignment in Bulk, form AU-196.10, to the Department of Taxation and Finance by United States registered mail or United States certified mail - return receipt requested, with the sender's receipt postmarked by an employee of the United States Postal Service. Hand delivery must also be made at least ten days prior to the taking of possession of or payment for such sale, transfer or assignment, whichever comes first. Such hand delivery must be made to persons in Albany, New York authorized by the Tax Department to receive such notification. The notification must indicate the price, terms, and conditions of sale. Form AU-196.10 may be obtained from the Taxpayer Assistance Bureau, Department of Taxation and Finance, State Campus, Albany, New York 12227, and the Audit Division of any local district tax office.
- (2) Such purchaser who intends to commence business or to open a new place of business, and who will be required to collect any sales or compensating use tax, or who will sell tangible personal property for resale, must at least twenty days prior to commencing or opening such place of business, or before purchasing or paying for business assets, whichever comes first, file a Certificate of Registration, form TP-153, with the Tax Department. Form TP-153 may be obtained from the Taxpayer Assistance Bureau, Department of Taxation and Finance, State Campus, Albany, New York 12227.

### Purchaser's Rights and Liabilities

- (1) Pursuant to section 1141(c) of the Tax Law, the purchaser in a bulk sale transaction is required to notify the Tax Commission of the impending purchase by completing form AU-196.10 and hand delivering it, or sending it by United States registered mail, or United States certified mail - return receipt requested (as described in Filing Requirements) to the Tax Commission at least ten days before taking possession of, or paying for the assets, whichever comes first.

Within five business days of receipt of a timely and properly completed form AU-196.10 from the purchaser, the Tax Commission will mail to the purchaser a form AU-196.2, which gives notice in general terms, of the sales tax implications of the impending transaction. Any consideration which the purchaser is required to transfer to the seller becomes subject to a first priority right and lien for any taxes theretofore or thereafter determined to be due from the seller. The purchaser is forbidden to transfer any consideration to the seller to the extent of the amount of the State's claim. However, if the Commission fails to meet the five day deadline, the purchaser will be released from his obligation to withhold funds, and of his personal liability for the taxes due from the seller, except where there are outstanding warrants or judgments for unpaid sales taxes owed by the seller, and except for those sales taxes due on the bulk sale transaction. The date of

receipt of form AU-196.10 by the Department will be the date it was actually delivered to the Bulk Sales Unit, but no earlier than ten days before the purchaser takes possession of, or pays for the assets, whichever comes first.

- (2) Failure to file a proper and timely Notification of Sale, Transfer, or Assignment in Bulk by the purchaser, or failure to withhold sufficient consideration when the purchaser has been timely notified by the Tax Commission, will result in personal liability of the purchaser for taxes due from the seller, limited to the purchase price or the fair market value of the business assets sold, whichever is higher. This liability is separate and apart from the taxes due from the purchaser on the assets themselves, as distinguished from the seller's back taxes.

Under certain circumstances, a purchaser may incur personal liability for back taxes of owners previous to the seller in the immediate transaction.

- (3) Within ninety days of the receipt of a properly completed form AU-196.10, Notification of Sale, Transfer, or Assignment in Bulk from the purchaser, the Tax Commission shall give notice to the purchaser (and seller) of the actual amount of taxes due from the seller for which the purchaser will be held liable.

Upon receipt of such notice, the purchaser may pay the amount of such claim to the State, deducting the amount from funds withheld from the seller. He will then be released from all future liability with respect to such amounts to the seller and to the State.

- (4) If the Tax Commission fails to give notice within ninety days of the date of receipt of the Notification of Sale, Transfer, or Assignment in Bulk, form AU-196.10, of the total amount of taxes due, the purchaser may release the funds to the seller, (after the ninety day period). The purchaser will have no further liability to the State Tax Commission with respect to the funds released.
- (5) If the seller makes a partial payment which reduces the seller's liability to less than the purchaser's liability, the purchaser will only be liable for an amount equal to the remainder of sales taxes due from the seller, and will be notified accordingly by the Tax Commission.

#### Purchaser's Right To A Hearing And Other Rights:

- (1) Within ninety days of receipt of a Notification of Sale, Transfer, or Assignment in Bulk (form AU-196.10) from the purchaser in a bulk sale transaction, the Tax Commission will issue a notice of taxes due, provided any taxes are due. This notice may be in the form of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (form AU-16) or a Notice and Demand for Payment of Sales and Use Taxes Due (form AU-16.1). Section 1138(a)(3) of the Tax Law provides that the liability of a bulk purchaser for the payment of taxes determined to be due from the seller, pursuant to section 1141(c), shall be finally and irrevocably fixed (even when estimated), unless the purchaser applies to the

Tax Commission for a hearing within ninety days after the mailing of the Notice.

A purchaser may challenge an assessment on pertinent grounds, e.g., the Commission failed to notify him of its possible claim prior to closing; or he may argue that the asserted liability of the seller is erroneous or excessive.

Section 1138(a)(3) of the Tax Law also provides that whenever the Commission makes such finding of error or excess it shall, on behalf of the purchaser, determine the amount of tax properly due and, if such amount is a reduction, decrease the purchaser's liability accordingly. In addition, section 1138(a)(3) allows the Commission, on its own motion, to abate, on behalf of the purchaser, any part of the taxes determined to be erroneous or excessive, whether or not such taxes had become finally and irrevocably fixed.

- (2) A bulk sale purchaser is not entitled to sign a consent, fixing the tax finally and irrevocably, prior to the ninety day period allowed for filing a hearing application, pursuant to section 1138(d).
- (3) Section 1138(a)(4) provides for an Article 78 proceeding for a bulk sale purchaser when, after application for a hearing he disagrees with the Tax Commission's determination resulting from such hearing.
- (4) A purchaser is entitled to a hearing to review a denial of his application for refund of tax determined to be due from the seller, whether or not the seller's liability has been finally and irrevocably fixed, where the purchaser has paid the tax to the Commission and has applied for a hearing within ninety days from the date of the denial of his application for a refund. (A claim for a refund must be filed by the purchaser within two years of the date of the assessment.)
- (5) A purchaser is entitled to examine the returns of the seller and any other information in the possession of the Department of Taxation and Finance with respect to any sales taxes due from the seller, but only those portions of such returns or other information which are pertinent to the issue of the purchaser's liability.

Seller's Rights And Liabilities:

- (1) A seller must file a final return within twenty days after ceasing to do business, and must make payment of all taxes due. He must also surrender his Certificate of Authority to do business by attaching the Certificate to his final return and submitting the return, the Certificate and payment of taxes to the Tax Commission.
- (2) A seller must give each prospective purchaser of a business a copy of the Notice to Prospective Purchasers of Business and Business Assets, form TP-153D. This notice relates to a purchaser's requirements. Copies of such notice may be obtained from the Taxpayer Assistance Bureau, Department of Taxation and Finance, State Campus, Albany, New York 12227.

- (3) The seller is entitled to have the tax due finally and irrevocably fixed in accordance with section 1138(c) of the Tax Law.
- (4) A seller may request a pre-sale audit of his books to determine any liability up to the date of sale. The seller is limited to one such request during any three year period. Request for an audit must be made to the Bulk Sales Unit of the Tax Department and should include some evidence of the intended sale. The Tax Commission will, in its discretion, determine whether such an audit will be performed. When it is decided that such an audit will be performed, the Tax Department will attempt to conduct the audit as promptly as possible and will issue the seller a Bulk Sales Tax Certificate stating the amount of the liability up to the date set forth on the Certificate. The seller will remain liable for taxes due by him whether or not the audit is actually conducted.
- (5) The seller will remain liable for taxes due by him, whether or not the purchaser has been relieved of his obligations to pay taxes due from the seller.

#### Additional Liability of the Purchaser and the Seller

- (1) A sales tax will be imposed upon the transfer of any tangible personal property from the seller to the purchaser which is included in the property sold in bulk, except for property intended for resale or property exempt from tax.

The tax is not imposed on real property or on intangible personal property such as cash, goodwill, or accounts receivable.

The seller must keep and make available to the Tax Commission all books and records required to determine his tax liability.

- (2) The purchaser and the seller will also be subject to the rights and liabilities under Article 6 of the Uniform Commercial Code relating to transfers in bulk.

#### Tax Commission's Responsibilities

- (1) The Tax Commission, upon receipt of a notice of sale, transfer, or assignment in bulk of business assets from the purchaser, transferee, or assignee, will mail within five business days (excluding Saturday, Sunday, or legal State holidays) one or all of the following:
  - (a) an acknowledgment of the receipt of such notice,
  - (b) advice to the purchaser, transferee, or assignee that such notice is or is not proper,
  - (c) a notice of possible claim to Lite purchaser, seller, and escrow agent, if any, for taxes due the State or a statement that no taxes are due.

- (2) If the Tax Commission fails to mail to the purchaser, within five days of receipt of a form AU-196.10 (Notification of Sale, Transfer, or Assignment in Bulk) a notice of possible claim for taxes due the State (form AU-196.2), and the purchaser has given proper and timely notice of the purchase, the purchaser is released from both his obligation to further withhold funds from the seller for the taxes due, and his liability for the taxes due from the seller; except where there are outstanding warrants or judgments for unpaid sales taxes owed by the seller, and except for those sales taxes due on the bulk sale transaction.
- (3) The Tax Commission will, within ninety days after receipt of a properly completed form AU-196.10 (Notification of Sale, Transfer, or Assignment in Bulk) mail to the purchaser and the seller, notices of the total taxes, penalty, and interest due the State from the seller--or notices that no taxes are due and, therefore, the funds withheld may be released. If the Tax Commission fails to mail a notice for total taxes due from the seller within ninety days of notification of a sale, the purchaser is released from both his obligation to withhold funds from the seller for the taxes due, and from his personal liability for the taxes due from the seller, except for those sales taxes due on the bulk sale transaction.
- (4) Upon payment of all sales taxes due from the seller, the Tax Commission shall issue to the purchaser an authorization to release any funds withheld from the seller, to which the seller may be entitled. Such authorization may limit the amount of funds to be released.
- (5) When an audit has been performed prior to a sale of business assets, and taxes determined to be due as a result of such audit have been paid by the seller, the Tax Commission shall issue to the seller a Bulk Sales Tax Certificate indicating satisfaction either in part or in full of the seller's tax liability up to the date of issuance of the certificate. When presented by the seller, the Bulk Sales Tax Certificate shall serve as proof of the seller's liability, if any, to the date of the certificate.
- (6) The Tax Commission is prohibited from issuing a jeopardy assessment against the bulk purchaser, according to section 1138(d) of the Tax Law.