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**WOULD YOU LIKE SOME SELLER'S TAX LIABILITY WITH
YOUR NEW JERSEY ASSET PURCHASE?**

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Although New Jersey's "bulk sale"¹ notice requirements have been on the books for some time, it is always a good idea to remind oneself that they exist—and that the interpretation of these requirements by the New Jersey Division of Taxation (the "Division") defies reason.

Generally, in the context of asset transfers, states are concerned that the seller will disappear with the sale proceeds without satisfying his or her outstanding tax liabilities. To protect themselves, most states require the filing of a bulk sale notice, which puts the state on notice of the pending sale, allowing it time to determine whether the seller owes any taxes.² If the state determines that the seller owes taxes, the state will seek to collect such outstanding taxes from the sales proceeds. If no taxes are owed or if a state fails to contact the parties within a certain number of days, the buyer is authorized to release the proceeds to the seller. Typically, compliance with the bulk sale notice requirements protects the buyer from the seller's tax liability, whereas failure to comply results in transferee liability to the purchaser of the business assets.

Until 2007, New Jersey's bulk sale notice requirement applied only to the seller's outstanding sales tax liability.³ Consequently, in the case of a failure to comply, the purchaser's transferee liability was limited to the seller's sales tax liability.

¹ The state tax laws governing "bulk sale" notices advising a state of an asset transfer should not be confused with U.C.C. bulk sale laws designed to advise business creditors of the asset transfer. These laws are governed by different statutes, and compliance with one will not satisfy the other.

² See, e.g., Conn. Gen. Stat. § 12-424(1); Cal. Rev. & Tax. Code § 6811; Ariz. Rev. Stat. Ann. § 42-1110; Ala. Code § 40-23-25; N.Y. Tax Law § 1141(c); Md. Code Ann. Tax-Gen. § 13-802; N.C. Gen. Stat. § 105-164.38.

³ N.J. Rev. Stat. § 54:32B-22(c).

Effective August 1, 2007, a new provision was enacted that expanded the potential exposure to all New Jersey state taxes.⁴ The provision, as currently in effect, provides in relevant part:

(a)(1) Whenever a person shall make a sale, transfer, or assignment in bulk of any part or the whole of the person's business assets . . . , otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall, at least 10 days before taking possession of the subject of the sale, transfer or assignment, or paying therefor, notify the director by registered mail, or other such method as the director may prescribe, of the proposed sale and of the price, terms and conditions thereof Within 10 days of receiving such notice, the director shall notify the purchaser, transferee or assignee by such means as the director may prescribe that a possible claim for State taxes exists and include the amount of the State's claim.

(c) If the purchaser, transferee or assignee shall fail to give notice to the director as required by the preceding paragraph, or if the director shall inform the purchaser, transferee or assignee that a possible claim for such State 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, transferrer [sic] or assignor shall be subject to a first priority right and lien for any such State taxes theretofore or thereafter determined to be due from the seller, transferrer [sic] or assignor to the State, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferrer [sic] or assignor any such sums of money, property or choses in action to the extent of the amount of the State's claim. For failure to comply with the provisions of this section the purchaser, transferee or assignee . . . 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, transferrer [sic] or assignor⁵

In short, whenever a seller transfers in bulk "any part" of its business assets outside the ordinary course of business, the buyer, at least 10 business days⁶ prior to closing, must file with the Division a completed Form C-9600, with a copy of the signed contract.⁷ If any of the

⁴ N.J. Rev. Stat. § 54:50-38.

⁵ *Id.*

⁶ Although unclear, it appears that the completed Form C-9600 should be received by the New Jersey Division of Taxation at least 10 business days prior to closing.

⁷ FAQ, Law and Procedures for the Filing of the C-9600 Form, Question 8 (Dec. 6, 2010).

information is inaccurate, or if it is not supplied at least 10 business days prior to the closing, the notice will be considered invalid.⁸ Upon receipt of the Form C-9600, the Division “reviews for all state taxes which include deficiencies . . . , delinquencies . . . , assessments, penalties, interest, fees and costs.”⁹

The Division broadly defines “business assets” as referring to tangible and intangible assets, including, but not limited to, “goodwill, materials, supplies, licenses, patents, copyrights, equipment, leases, merchandise or other inventory and realty¹⁰ if the primary use of the realty is to support a business on its premises.”¹¹ It should also be noted that the the New Jersey bulk sale notice requirement may be triggered by a sale of business assets located outside New Jersey. However, if the buyer has no connection to New Jersey, it is likely that the Division would have to overcome jurisdictional challenges to impose a transferee liability on the buyer.

Upon receipt of the completed Form C-9600, the Division has 10 business days to notify the purchaser of a possible claim for state taxes, include the amount of the claim, and require the purchaser to hold that amount in escrow.¹² It should also be noted that, separately from any possible seller’s outstanding tax liabilities, the Division requires the seller to complete and file an Asset Transfer Tax Declaration (“Form TTD”) estimating the tax due on the gain from the sale of the assets.¹³ The Division expects this estimated tax to be remitted by the purchaser from the escrowed amount.

The failure to escrow an amount sufficient to satisfy the seller’s outstanding tax liabilities may result in transferee liability to the purchaser for the outstanding balance.¹⁴ Therefore, to protect themselves, buyers should negotiate escrow agreements well in advance of the closing. Additionally, the escrow agreements should require sellers to contribute their own funds to the escrow to the extent the tax liability may exceed the sales proceeds or if no proceeds are transferred in connection with the sale of the business assets.

The cherry on top is the Division’s position as to what constitutes “a sale, transfer, or assignment in bulk of any part or the whole of the person’s business assets.”¹⁵ According to the Division, the sale of *any* asset outside the ordinary course of business triggers the bulk sale

⁸ *Id.*

⁹ *Id.*, Question 2.

¹⁰ The bulk sale notice requirements do not apply to sales of single noncommercial dwelling units and sales of seasonal rental units, such as timeshares. N.J. Rev. Stat. § 54:50-38(a)(2).

¹¹ N.J. Division of Taxation Tech. Bull. No. TB-60 (June 30, 2008).

¹² FAQ, Law and Procedures for the Filing of the C-9600 Form, Question 24 (Dec. 6, 2010).

¹³ The Division cites N.J. Rev. Stat. § 54:50-38 (*i.e.*, the bulk sale notice statute) in support of this requirement, stating that the provision instructs the Division to notify the purchaser of business assets “of any possible claim for State Taxes.” Form TTD.

¹⁴ FAQ, Law and Procedures for the Filing of the C-9600 Form, Question 30 (Dec. 6, 2010).

¹⁵ N.J. Rev. Stat. § 54:50-38(a).

notice. We contacted the Division, and it confirmed that this is indeed its position. Thus, for example, under the Division's interpretation, the sale by a trucking company of a single truck out of a fleet of 100, because the truck outlasted its usable life, triggers the bulk sale notice requirement and potentially exposes the buyer to the seller's entire tax liability, conceivably far in excess of the value of the purchased truck.

Although it may be the Division's position that the transfer of "any part" of the business assets triggers a bulk sale notice, we are aware of no legal authority supporting this position. It seems that the Division ignores the words "in bulk" in the provision, which "must be given their ordinary and well-understood meaning because neither statute contains definitions of the terms."¹⁶ According to the Merriam-Webster Dictionary, the word "bulk" means "the main or greater part"¹⁷—certainly more than merely "any part" of the business assets. Furthermore, the legislative history explicitly provides that the bulk sale notice provision was added to make sure "that a business pay[s] all due State taxes before the sale of a *substantial part of the assets* of that business."¹⁸ Whether the Division's position is subject to a challenge, it is certainly a trap for the unwary.

In conclusion, unless the Division moves away from its current position, every sale outside the ordinary course of business could be viewed as triggering a bulk sale notice filing. Thus, in New Jersey, the importance of proper state and local tax due diligence rises to a whole new level, as the buyer's potential exposure extends to all of the seller's New York state taxes, without being limited to the purchase price or the fair market value of acquired assets. Of course, flooding the Division with completed Forms C-9600 for every little transaction may prove a sufficient incentive for the Division to adopt a more palatable approach. With 10 business days to respond, it is unclear whether the cash-strapped state actually has the ability to benefit from this overly aggressive position, or whether it merely places another burden on law-abiding taxpayers without achieving any results.



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¹⁶ *Bunting v. Director, Div. of Tax.*, 1 N.J. Tax 189 (Aug. 27, 1980).

¹⁷ <http://www.merriam-webster.com/dictionary/bulk>; last visited December 14, 2011.

¹⁸ Statement in Support of Assembly Bill No. 5002 (Introduced June 14, 2007) (emphasis added).