STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MICHAEL D. BUTTON AND JAMES F. BUTTON	:	DECISION DTA NO. 817034
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period October 7, 1997 through November 8, 1997.	:	

Petitioners Michael D. Button and James F. Button, 2 Button Lane, Frankfort, New York 13340, filed an exception to the determination on remand of the Administrative Law Judge issued on March 14, 2002. Petitioners appeared by Iseman, Cunningham, Riester & Hyde, LLP (Michael J. Cunningham, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a letter brief in opposition. Petitioners' request for oral argument was withdrawn.

In the original determination in this case issued on October 12, 2000, the Administrative Law Judge granted the petition of Michael D. Button and James F. Button finding that they lacked the authority to see that the sales tax was paid when payment came due and, accordingly, were not liable for penalties as responsible persons. On the exception of the Division of Taxation, a divided Tax Appeals Tribunal reversed that determination in a decision issued on January 28, 2002 concluding that the petitioners were under a duty to act with respect to the payment of tax and their failure to cause the payment was not due to reasonable cause. The

decision also remanded the case to the Administrative Law Judge for a determination on the issue set forth below.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner DeWitt took no part in the consideration of this decision.

ISSUE

Whether the Division of Taxation had an obligation to seek return of the stamps or payment for them from Marine Midland Bank and to determine the amount of credit due, if any.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner Michael D. Button is the former president of Herkimer Wholesale Company, Inc. ("Herkimer"), a wholesale supplier of groceries, candy, cigarettes and other sundries. His brother, James F. Button, is the former vice-president of Herkimer. The Button family purchased Herkimer in 1968 and operated the business for almost 30 years from its main office in Utica, New York.

Herkimer was licensed as a cigarette agent by the Division of Taxation ("Division"). In this capacity, Herkimer was required to advance and pay the cigarette tax imposed under Tax Law § 471. As of September 1, 1995, Herkimer was also required to prepay on account of sales taxes imposed by articles 28 and 29 of the Tax Law. Herkimer advanced and prepaid the cigarette and sales taxes by purchase of cigarette tax stamps from Fleet Bank acting as an agent of New York State. The tax stamps were affixed to packages of cigarettes sold by Herkimer in New York State as evidence that the taxes had been paid.

Herkimer filed a credit bond with the Division and was permitted to purchase tax stamps on credit and to pay for them 30 days later. By late 1997, the amount of Herkimer's credit bond was $2.2 million. The surety was National Union Fire Insurance Company of Pittsburgh, Pennsylvania.

To pay for the tax stamps purchased on 30-day credit, Herkimer filed an authorization for Automatic Clearing House ("ACH") debits which authorized Fleet Bank to use ACH procedures to debit a designated account that Herkimer maintained with a branch of Marine Midland Bank ("Marine") in Utica, New York for the amount of tax owed.

During the entire time that it was owned by members of the Button family, Herkimer's sole banking relationship was with Marine where it maintained checking accounts and received mortgages, demand loans and installment loans. Herkimer's receipts grew from $2 million per year in 1968 to almost $125 million per year in 1996. During that time, Herkimer's borrowings from Marine also grew to almost $12 million.

By arrangement with Marine, all of Herkimer's receipts were deposited daily into operating accounts maintained at Marine. Overdrafts on Herkimer's checking accounts routinely occurred in the course of Herkimer's business. Since large deposits of cash were being made by Herkimer on a daily basis, Marine permitted the overdrafts which were repaid on days when Herkimer had deposits in amounts large enough to cover them, and Marine charged Herkimer interest on the daily average outstanding amount.

From the beginning of its relationship with Marine, Herkimer had never been late in making payments on any mortgage, note or interest expense. However, its total indebtedness to Marine grew.

On Friday, September 24, 1996, representatives of Marine required Herkimer's officers to attend a meeting at Marine's offices. At that meeting, Herkimer was informed that Marine was altering its methodology for computing Herkimer's borrowing base (i.e., the amount of collateral maintained by Herkimer to support its loans). From that date forward, Marine eliminated the value of affixed and unaffixed tax stamps, cigarette coupons, cigarette coupon receivables and manufacturer's receivables to determine the loan amounts for which Herkimer qualified. As a result of this change, Herkimer was placed in default of its collateral obligations under the Marine loans.

On October 25, 1996, Herkimer and Marine entered into a Loan and Security Agreement (the "Loan Agreement") which consolidated and restructured certain of Herkimer's pre-existing debt to Marine. As pertinent here, Marine agreed to make available $250,000.00 to cover short term overdrafts in Herkimer's operating accounts with advances being repaid within five business days provided that the sum of the aggregate principal not exceed $8,850,000.00.

In the Loan Agreement, Herkimer, by its officers, specifically granted Marine a security interest in and lien on all its accounts wherever located, among other items. Further, the agreement specifies that if Herkimer defaulted, Marine could declare the indebtedness due and payable without further notice to Herkimer.

Herkimer executed an amendment to the Loan Agreement, "Amendment No. 4," dated September 24, 1997, in which Herkimer agreed to provide evidence satisfactory to Marine of a prospective purchaser of the business by October 31, 1997. The Amendment provided that if Herkimer failed to produce such evidence it would be in default under the security agreement and Marine would be entitled to take immediate possession of the collateral, including all

Herkimer's accounts. This provision was incorporated into the Loan Agreement of October 25, 1996 as section 12.1(p).

Herkimer's financial condition at the end of 1996 is summarized in an independent auditor's report issued by Pasquale & Bowers, Certified Public Accountants, on April 24, 1997.

> [Herkimer] incurred a substantial net loss for the period ended December 31, 1996. In addition, at December 31, 1996, [Herkimer] has a working capital deficit of approximately $4,400,000 and total liabilities exceed total assets by approximately $4,600,000. The loss included approximately $3,800,000 in trade and nontrade receivable allowances and write-offs and other significant increases in operating costs that management has deemed to be nonrecurring. These factors raise substantial doubt about [Herkimer's] ability to continue as a going concern. [Herkimer's] ability to establish favorable bank terms and maintain bonding and account drafting arrangements with cigarette manufacturers factor heavily into its ability to continue as a going concern. Management has met with representatives from its bank in an attempt to restructure debt and secure the bank's continuing support. The bank previously amended its loan agreement and provided an extension of the line through June 30, 1997.
>
> During the last quarter of calendar 1996, management retained a group of industry consultants to assist in restructuring [Herkimer's] operations. . . . The new management team has analyzed operations and is focusing on increasing efficiency, profitability and cash flow through inventory management and reduced operating costs. Management is confident it is taking the steps necessary to enable [Herkimer] to return to profitability.
>
> It is not possible, however, to predict at this time the success of management's efforts. The financial statements do not include any adjustments relating to the recoverability and classification of recorded assets, or the amounts and classification of liabilities that might be necessary in the event [Herkimer] cannot continue in existence.

As a condition of extending Herkimer's loans, Marine required Herkimer to seek a buyer for its business. Herkimer's principals entered negotiations with another New York State cigarette agent, A.D. Bedell, about the possibility of that agent's purchasing Herkimer's assets and inventory and assuming some of Herkimer's debt. The negotiations between Herkimer and

the potential buyer broke down on November 5, 1997, and Bedell withdrew from further negotiations.

On Thursday, November 6, 1997, Herkimer received faxed copies of two letters from Marine's attorneys, Hancock & Estabrook, each dated November 6, 1997. The first letter notified Herkimer of Marine's demand for immediate repayment of all indebtedness owing under the Loan Agreement and for overdrafts existing in Herkimer's operating accounts plus interest, costs and expenses. In addition, Marine demanded all inventory, equipment, accounts, general intangibles and chattel paper of Herkimer and of a related company (Button Leasing Co.). Marine also demanded that Herkimer "hold in trust for the benefit of, and immediately turnover to Marine any proceeds of any of the Collateral now or hereafter in possession of the Borrower." Herkimer was warned that failure to turn over any proceeds might be deemed a criminal conversion. Finally, Herkimer was informed that Marine would be returning all items submitted for payment to it, adding: "Borrowers' accounts are, as you are aware, currently overdrawn." The second letter dated November 6, 1997 corrected several amounts stated in the first letter. According to the letters, Herkimer's indebtedness under the Loan Agreement amounted to $9,750,000.00, and, Herkimer's overdrafts amounted to $1,234,495.04.

On the morning of Friday, November 7, 1997, Herkimer's principals learned that its operating accounts had been frozen as of November 5, 1997, and all monies in Herkimer's payroll account and operating account had been used by Marine to reduce Herkimer's debt. This included deposits of $148,897.66 made directly into a Marine account by Herkimer's sales personnel. As a result, an ACH debit submitted by Fleet Bank on November 5, 1997 for cigarette stamps purchased 30 days earlier was returned by Marine for insufficient funds.

At approximately 5:00 P.M. on November 7, 1997, Marine served Herkimer with a restraining order issued by the New York State Supreme Court of Onondoga County which prevented Herkimer from using or transferring any of the collateral (essentially all cash and assets owned by Herkimer and related corporations wherever located). This effectively prevented Herkimer from doing business.

On Monday, November 10, 1997, an involuntary petition under Chapter 7 of the Bankruptcy Code was filed against Herkimer in the United States Bankruptcy Court, Northern District of New York (the "Bankruptcy Court") and served on Herkimer on the same day. The petitioners were Geri Button, a sister of petitioners, A.E. Austin-Brown Associates, Inc. and Scott Brown & Co. The total amount of the petitioners' claims was $107,100.00.

On November 12, 1997, Marine moved in the Bankruptcy Court for an injunction enjoining Herkimer from using or otherwise disposing of certain collateral and cash collateral described in the affidavit of Steven F. Ricca, a vice-president of Marine, and for an order prohibiting Herkimer's continued use of Marine's cash collateral during the pendency of the bankruptcy proceeding, among other things. In his affidavit, Mr. Ricca asserted that Herkimer's daily deposits ranged between $70,000.00 and $900,000.00 and that its deposits for the seven business days beginning November 6, 1997 through November 14, 1997 should have amounted to $2,175,000.00. Marine accused Herkimer of diverting this collateral since no deposits had been made into Marine accounts after November 6, 1997.

Honorable Stephen D. Gerling, Chief Judge of the Bankruptcy Court, issued an Order to Show Cause and Temporary Restraining Order on November 12, 1997 which, as pertinent here, states:

> **ORDERED,** that pursuant to § 303(f)[1] and pending the hearing and determination of the subject motion, the Debtor be and hereby is enjoined and restrained from using, transferring, selling, pledging, assigning, hypothecating or otherwise disposing of subject collateral other than in the usual and ordinary course of its business, and shall deposit any and all proceeds of the collateral collected since November 5, 1997 in a separate checking account to be established at Marine, except for the sum of $100,000 or such other amount as may be agreed to by the parties, currently on deposit at Albank, in order to cover payroll obligations for the weeks of Nov. 3rd and Nov. 16, 1997, pursuant to Rule 7065 of the Federal Bankruptcy Rules of Procedure, Rule 65(b) of the Federal Rules of Civil Procedure and Local Rule 913.2; and it is further
>
> **ORDERED**, that at least one business day prior to said hearing, the Debtor shall provide Marine and its counsel with a detailed accounting with respect to the Debtor and its affiliates conduct with respect to the disposition of the collateral since November 5, 1997; along with copies of invoices and receivables listings reflecting all outstanding receivables as of November 12, 1997.

On November 26, 1997, Judge Gerling issued an order granting Herkimer's motion to convert the case to a Chapter 11 proceeding, and on December 10, 1997, Herkimer and Marine entered into a cash collateral stipulation, approved by the Bankruptcy Court, that allowed Herkimer access to the cash collateral subject to the terms of the stipulation. The stipulation was placed on the record of the hearing held on December 10, 1997. Stephen A. Donato, Esq., and James Canfield, Esq., appeared on behalf of Marine. The pertinent portions of the stipulation are as follows:

> Mr. Canfield: The debtor's use of cash in the cash collateral account on a given day is going to be limited to the extent that the inventory borrowing basis and receivable borrowing basis, and those are calculated per the October 25, 1996 Loan and Security Agreement, and collected funds in the cash collateral account exceed, then we have the following provisions: One is $6,552,900 as of December 11, 1997. That's defined as the base. That base is increased by $50,000 each day on Friday, December 12, Monday, December 15th, Tuesday, December 16th, Wednesday, December 17th and for Thursday, December 18th.

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[1] Subsection (f) permits the debtor to continue to operate any business of the debtor and to dispose of property the same as if the case had not been commenced. However, the court is permitted to control the debtor's powers to prevent the debtor from disposing of assets to the detriment of the creditors. Judge Gerling did just this.

That bases or the floor, as I call it, must be $6,758,000. That is essentially what Marine's collateral position was as of the date of the Petition.

In determining the borrowing bases, we are going to allow the debtor to include pre-paid inventory, which is in transit in the formula in determining those bases.

* * *

Mr. Donato: The debtor shall and has already opened up a debtor-in-possession account at Marine Midland Bank. During the terms of the stipulation the debtor shall comply with all terms and conditions of the Loan Agreement, except as modified herein, excluding known defaults as of today. *This includes compliance with Section 7 of the Loan Agreement requiring the deposit of all cash collateral and proceeds in the same medium in which received within 24 hours of receipt into the bank account at Marine Midland.*

The debtor shall not engage in any transactions outside the ordinary course of business. The bank's collateral shall only be used in the ordinary course of the debtor's business. No other sale or disposition of the collateral shall be made by the debtor without further order of the Court.

The cash collateral account shall be held under the joint control of the debtor, subject to the lien of the bank. *The debtor will not attempt to draw any checks against or initiate any wire transfer from the cash collateral account and hereby authorizes the bank to place a hold on the cash collateral account to ensure the prevention of same.*

The debtor intends to use the cash collateral on a daily basis in varying amounts . . . on each day of the week in which the stipulation is in effect. And after receipt by the bank of a duly completed and verified cash collateral certificate for each particular date, . . . the bank shall transfer, from the debtor's cash collateral account to the [debtor-in-possession] account, the amount authorized in the cash collateral account, and to the extent of such funds, the debtor may use such funds in the ordinary course of business.

* * *

Mr. Donato: The bank will have no obligation to make any transfer from the cash collateral account to the debtor's [debtor-in-possession] account at the bank if the debtor is in default of any term or provision of this stipulation or any other loan document, except for known defaults as of today.

> *Further, any transfers by the bank from the cash collateral account to the [debtor-in-possession] account, other than authorized by this agreement, will be subject to the bank's sole and absolute discretion.*

The collateral stipulation was approved by Order of the Bankruptcy Court.

When the ACH debit submitted by Fleet Bank was returned for insufficient funds, a representative of Fleet Bank notified Christine Bowen, a Tax Technician in the Division's Commodities Audit Unit. She was able to speak with Michael Button after making several phone calls to Herkimer over a period of a few days. He informed her of the bankruptcy proceeding and asked if Herkimer would be allowed to continue purchasing stamps. Ms. Bowen initially told Mr. Button that Herkimer would not be able to purchase stamps until Herkimer satisfied the outstanding balance of tax due on the prior purchases. After receiving the bankruptcy documents she had requested and discussing the matter with her supervisors, Ms. Bowen informed Mr. Button that Herkimer would be allowed to continue purchasing stamps; however, Herkimer was required to wire transfer payment for all stamps at the time they were ordered.

On December 8, 1997, the Division issued to Herkimer a Notice and Demand for payment of sales and use taxes due for the period ended November 8, 1997 in the amount of $427,560.00 plus interest of $6,490.38 and penalty of $46,963.80 for a total due of $481,014.18 (assessment number L-014466172-5). The prepaid sales tax liability relates to stamps ordered by Herkimer in the period October 6, 1997 through November 7, 1997. Under the terms of the 30-day credit agreement, payments for those stamps would have come due from November 5, 1997 through December 7, 1997. ACH transactions were initiated by Fleet Bank on November 5, 1997, November 6, 1997, November 7, 1997, November 13, 1997 and November 14, 1997. These

were returned by Marine for insufficient funds or because the operating account was frozen. When these ACH debits were returned by Marine, the Division accelerated the remaining payments due; thus, the Notice and Demand is for the period ended November 8, 1997, the last date of stamp purchase rather than the date the last payment was due, December 5, 1997. The Division filed a Proof of Claim in the bankruptcy proceeding on December 19, 1997 listing the December 8, 1997 sales tax assessment as well as claims for cigarette tax and highway use tax.

On January 26, 1998, the Division issued identical notices of determination to petitioners, assessing sales tax of $427,560.00 plus penalty and interest for the period October 7, 1997 through November 8, 1997. The notices state: "This notice is issued because you are liable as an Officer/Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1), and 1133 of the New York State Tax Law." The parties agree that the assessments were improperly drawn and should have been issued as a penalty equal to the tax due from Herkimer plus penalty and interest pursuant to Tax Law § 1145(e).

From December 10, 1997 through February 24, 1998, Herkimer continued to do business as a wholesale supplier of cigarettes and other products. During that time, it was able to purchase limited amounts of inventory and to make payroll payments to a small number of employees. It continued to purchase tax stamps but was required to directly wire transfer payment for the stamps. On February 24, 1998, Herkimer ceased all operations, and the Bankruptcy Court issued an order permitting Marine to enforce the terms of the Stipulation and foreclose on all of the collateral securing Herkimer's indebtedness to Marine.

By letter dated February 25, 1998, R. John Clark, as the attorney for Marine, informed the Division that Herkimer, a licensed cigarette agent had surrendered possession of all of its

inventory to Marine as a secured creditor and that Marine intended to sell the cigarettes and other tobacco product to a licensed wholesaler or wholesalers. The letter goes on to state:

> We are assuming that Marine's taking possession of the inventory of the Licensee and subsequent sale as the secured creditor to a licensed dealer would be deemed an "isolated circumstance" and that your Department would allow Marine to do such without obtaining an agent's license pursuant to Section 331.1(a)(5) and 332.1(a)(3) of the Regulations adopted under Article 20 of the New York State Tax Law.
>
> Assuming such is the case, we would request written confirmation from your Department that Marine is authorized to act in the capacity of an agent without obtaining an agent's license for the purpose of liquidating the inventory of Licensee. If Marine intends to dispose of any of the tobacco inventory other than to a licensed wholesaler, Marine will advise you accordingly.

Peter Spitzer who was then an auditor in the Division's Registration and Bond Unit responded with a letter to Robert Markowski in Marine's Syracuse office, dated March 3, 1998. In that letter, the Division granted Marine authorization to act in the capacity of a cigarette agent and wholesale dealer, subject to certain conditions: (1) within three days after authorization was granted, and prior to any sales, the Division was to be allowed access to the premises to conduct an inventory of all cigarettes and tobacco products and any unaffixed New York State cigarette stamps; (2) all unaffixed tax stamps were to be returned to the Division at the time the inventory was conducted and "upon receipt of a properly completed Claim for Redemption/Refund of Cigarette Tax Stamps and Prepaid Sales Tax (CG-114), the refund claim will be processed and paid pursuant to law;" all stamped cigarettes were to be sold only to licensed agents, wholesale dealers or retailers; (4) cigarettes were to be sold in accordance with the Cigarette Marketing Standards Act; tobacco products were to be sold tax free to a licensed distributor who would then be responsible for remitting the tax due; and (5) Marine was to submit a separate accounting of all cigarette and tobacco product sales providing the following information for each transaction

entered into: customer name, address, license number, product type, brand, quantity sold, denomination of affixed tax stamps, selling price per unit without tax and total selling price per unit including tax if any.

On March 6, 1998, Mr. Spitzer received a second letter from Marine's attorneys referring to a conversation had the preceding day between Mr. Spitzer and one of Marine's attorneys, Mr. Clark. The letter asks Mr. Spitzer to state whether the Division would authorize a check to be issued payable directly to Marine or a two-party check to Marine and Herkimer in payment of a refund for unaffixed tax stamps in Herkimer's inventory. There is no evidence that Mr. Spitzer replied to the letter, nor is there evidence that Marine ever filed a claim for refund for tax stamps purchased by Herkimer.

Employees from the Division's Syracuse District Office conducted an audit of the Herkimer inventory which was completed on or before April 1, 1998. These employees removed unaffixed New York State tax stamps and tax stamps from other jurisdictions from the premises at this time.

Marine Midland retained American Industrial Auctioneering Co. of Buffalo, New York (the "Auctioneer") to dispose of Herkimer's inventory. Much of the cigarette inventory consisted of stale or otherwise unsalable cigarettes with tax stamps affixed. The entire Herkimer inventory was transferred to Tripifoods, Inc., a Buffalo cigarette agent, which tendered the best offer in response to an offer to bid on the inventory. The inventory purchased by Tripifoods, included both stamped and unstamped cigarettes and sellable and unsaleable cigarettes.

The Bureau of Conciliation and Mediation Services issued identical conciliation orders to petitioners, each dated March 5, 1999. In those orders, the Division sustained the amount of tax

assessed in the notices of determination but canceled the penalties assessed and ordered that the interest be recomputed at the applicable rate.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge rejected petitioners' arguments that the Division had an obligation to seek payment from Marine for any unused or unpaid for stamps in Marine's possession as a result of Marine's seizure of Herkimer's inventory and that the penalty imposed on petitioners should have been reduced by amounts recovered from Marine. ***Lincoln First Commercial Corp. v. New York State Tax Commn.*** (136 Misc 2d 478, 518 NYS2d 904) and the Opinion of the Division's Office of Counsel, discussed below, were found to provide no grounds for imposing these obligations on the Division.

Relying on ***Matter of Yellin v. New York State Tax Commn.*** (81 AD2d 196, 440 NYS2d 382), the Administrative Law Judge found that the penalty imposed on a responsible person for failure to pay taxes was separate and distinct from a corporation's liability for the unpaid taxes, with the result that the corporation's discharge of the tax debt under a bankruptcy court's order did not preclude the Division from collecting the penalty from a corporate officer. Accordingly, the Division was not obligated to reduce the penalty imposed on petitioners by collecting tax from Marine or seizing the stamps. In ***Yellin,*** the court held that a penalty imposed on a corporate officer for willful failure to account for and pay over withheld personal income tax was not affected by the corporation's discharge of the tax debt in bankruptcy. The Administrative Law Judge noted that although ***Yellin*** did not involve sales taxes, the Tax Appeals Tribunal has followed the same line of reasoning in construing the responsible officer provisions applicable to sales taxes under Article 28 of the Tax Law (***see***, ***Matter of Geiger***, Tax Appeals Tribunal,

March 8, 2001; ***Matter of Schwartz***, Tax Appeals Tribunal, August 19, 1999; ***Matter of Waite***, Tax Appeals Tribunal, January 12, 1995 and ***Matter of Mustafa***, Tax Appeals Tribunal, December 27, 1991). Likewise, the courts and the Tribunal have consistently held that a responsible officer's liability for outstanding taxes is personal so that an officer cannot avoid liabilities by pointing to other persons equally responsible for payment of the taxes (***see***, ***Matter of Blodnick v. New York State Tax Commn.***, 124 AD2d 437, 507 NYS2d 536; ***Matter of Rashbaum***, Tax Appeals Tribunal, December 15, 1994, ***affd Matter of Rashbaum v. Tax Appeals Tribunal***, 229 AD2d 723, 645 NYS2d 175 and ***Matter of Binder***, Tax Appeals Tribunal, August 19, 1993).

The Administrative Law Judge also concluded that even if the Division had the authority to collect unpaid sales taxes from Marine before authorizing it to resell the cigarette inventory in its possession or alternatively to seize unaffixed tax stamps, it had no obligation to reduce the penalty assessed against petitioners by the amount of any proceeds collected from Marine.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that Marine did not have a security interest in unpaid tax stamps in the possession of Herkimer. Petitioners rely on an opinion letter issued by the Office of Counsel of the Department of Taxation and Finance on December 19, 1997 which concluded that it was impossible for the creditor to acquire a security interest in the stamps. The letter states, in part, as follows:

> Licensed agents such as Herkimer are, by law, agents of the State for the administration of tax imposed by Article 20 of the Tax Law. Such agents are fiduciaries and must account to the State for any unused or unpaid for stamps. (Tax Law §§ 472.1, 473; 20 NYCRR Parts 331 and 337). Cigarette tax stamps are only and essentially tangible evidence of the payment of the cigarette tax,

> and cannot be pledged by an agent (***Lincoln First Commercial Corp. v. New York State Tax Commn.,*** 136 Misc 2d 478). Accordingly, Marine can never acquire a secured interest in cigarette tax stamps whether affixed to cigarettes, or not. No private individual can obtain a lien on a sovereign State's taxing powers.

The cited case, ***Lincoln First***, was decided by the Supreme Court, New York County in 1987 and involved facts similar to those present here. A lender was granted a security interest in a cigarette dealer's inventory and the dealer entered bankruptcy nine months later. In the action, the lender sought a declaratory judgment that it was entitled to the proceeds of the liquidation of the cigarette inventory. The court concluded that the dealer "did not possess the type of rights in the collateral which could be pledged to a third party without permission of the owner of the collateral," *i.e.,* the State and City of New York (***Lincoln First Commercial Corp. v. New York State Tax Commn.***, ***supra***, 518 NYS2d, at 906). As a result, the lender was entitled to the proceeds of the sale of the cigarettes but not "the proceeds of the sale of the tax stamps affixed to the cigarette boxes" (***Lincoln First Commercial Corp. v. New York State Tax Commn.***, ***supra***, 518 NYS2d, at 905). Those amounts were payable to the State and City in proportion to the taxes owed to each. In light of the foregoing, petitioners assert that they "should not be liable for the Division's mishandling of these issues" (Petitioners' brief in support, p. 7).

Petitioners also assert that the Division's formal authorization of Marine to act as a cigarette dealer for purposes of disposing of the collateral went beyond the mere failure to assert its rights under ***Lincoln First***. Instead, that authorization represented the Division's exercise of dominion over the unpaid stamps which had the result of discharging the indebtedness of Herkimer for the tax as well as that of petitioners as responsible corporate officers. In this connection, petitioners rely on ***Matter of Trachtenberg v. New York State Tax Commn.*** (107

AD2d 57, 485 NYS2d 621), where the settlement of a corporation's withholding tax liabilities in bankruptcy was found to have reduced a responsible officer's penalty.

In its letter brief, the Division states that the Administrative Law Judge correctly addressed the issues in her determination on remand. Second, the Division agrees that petitioners should have credit for any unattached stamps that were returned to the Division. Third, it is unclear to what extent the affixed stamps seized by Marine were unpaid since Herkimer made cash purchases of stamps subsequent to the purchases at issue in this case. In the absence of evidence that the affixed stamps on the inventory seized by Marine were unpaid, the Division argues that the rule of ***Lincoln First*** is inapplicable. The Division notes that the opinion letter of December 19, 1997 reserves on this point.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

In our previous decision in this case, ***Matter of Button*** (Tax Appeals Tribunal, January 28, 2002), we found that petitioners had sufficient authority and control over the corporation to be considered responsible officers and accordingly were "under a duty to act for" the corporation in complying with the requirements of the sales tax. We also found that although the petitioners did not divert funds to another purpose in the usual way – i.e., by paying the money to another creditor – their actions had the same effect by granting another creditor a security interest that would be superior to the claim of the Division on the funds of the corporation. We accordingly found that there was no reasonable cause for the failure to pay the tax.

The normal sequence for the collection of sales tax is that the retail vendor collects the tax from the purchaser in the regular course of business and then pays these funds to the Division. The statutory scheme governing sales taxes on cigarettes contemplates that, while the tax is imposed on the ultimate retail customer, it is collected in advance from the agent through the purchase of stamps which are affixed to the cigarette packages (***see***, Tax Law §§ 471.2, 472, 473, 1103). The agent is, however, permitted to defer payment for the stamps for 30 days, which is presumably designed to permit the agent to fund the payment from the proceeds of the disposition of the cigarette inventory. Whatever credit risk is presented to the Division by this procedure is addressed by the requirement that the agent post a surety bond in an amount determined by the Division (***see***, Tax Law §§ 471, 1103[a][2]; 20 NYCRR 71.2, 533.4[c]).

At the time of our prior decision, it appeared that the surety in the present case had refused to honor its bond. The unavailability of this security was one of the premises for our conclusion. We stated in part:

> Herkimer's (and petitioners') failure to provide enough security for the taxes to be paid in the event of default (i.e., the credit bond) cannot provide a basis for releasing the officers from liability for the taxes. It may very well be that petitioners believed the Division's interests were ultimately protected by the bond thus justifying their agreement to allow Marine to take their accounts without notice on default, but their error in judgment does not translate into the Division sharing in the risks they chose to take in running their business enterprise. Any preclusion from action by these petitioners was of their own creation, with full appreciation of the possible tax ramifications if the business operations failed. In our opinion, this conclusion disposes of the issue of whether there was reasonable cause for the failure to pay the tax (***Matter of Button***, ***supra***).

We think it appropriate for us to take notice of another case involving one of the parties and the factual circumstances of the matter before us (***see***, State Administrative Procedure Act

§ 306.4; ***Newitt v. Newitt***, 282 App Div 81, 121 NYS2d 311). Subsequent to our decision, the Division successfully litigated with the surety (***see***, ***State of New York v. Insurance Co. of the State of Pennsylvania***, 305 AD2d 916, 762 NYS2d 116, ***affg*** Sup Ct, Albany County, Jan. 25, 2002, Teresi, J., index No. L-00575-00, ***lv denied*** 1 NY3d 502, 775 NYS2d 240). The amount paid by the surety will reduce the unpaid tax liability of the corporation and the amount of the penalty at issue here (***see***, ***Matter of Kadish***, Tax Appeals Tribunal, November 15, 1990; ***Matter of Yegnukian***, Tax Appeals Tribunal, March 22, 1990). We note, however, that the opinion of the Appellate Division states that the amounts owed to the state exceeded the penal amount of the bond which was $2.2 million.

Having decided that petitioners were responsible persons who failed in their duty to ensure the payment of the corporation's tax liability, we are left to consider only the question remanded to the Administrative Law Judge – namely, whether the Division had an obligation to seek return of the stamps or payment for them from Marine and a determination of credit due, if any.

The liability for the responsible person penalty and the liability for the underlying tax are independent, although the amount of the first is dependent on the amount of the second. Also, the tax collector has no duty to mitigate the amount of the penalty through efforts to collect the underlying tax from other persons (**s*ee***, ***Matter of Geiger***, Tax Appeals Tribunal, March 8, 2001; ***see generally***, ***Skouras v. United States***, 854 F Supp 962, 93-2 USTC ¶ 50,380, ***affd*** 26 F3d 13, 94-1 USTC ¶ 50,274; ***Hutchinson v. United States***, 559 F Supp 890). Accordingly, assertions that the Division negligently failed to make certain claims in bankruptcy or to challenge another creditor's lien do not constitute a defense to the penalty.

There appears to be a narrow exception to the foregoing general rule in circumstances where the tax collector has affirmatively interfered with the withholding agent's assets that might otherwise have been used to satisfy the tax liability. In ***Matter of Nece*** (92-2 USTC ¶ 50,352), the bankruptcy court held that the Internal Revenue Service ("IRS") had engaged in an abuse of discretion as a matter of law when it failed to sue to collect on a surety bond that would have covered unpaid withholding taxes of a corporation and instead asserted the "responsible person" penalty against a corporate officer. The United States District Court for the Southern District of Texas reversed, holding that the IRS has no duty to pursue other responsible persons before asserting the penalty. While the district court agreed that there is an equitable exception to this general rule, it is quite narrow. The court stated as follows:

> The judicial exception was carved from cases in which the taxpayer's control over available assets was usurped by the IRS, either through assignment of funds or levy. See *United States v. Barlow's Inc.,* 767 F.2d 1098 (4th Cir. 1985); *Mangeri v. United States* [86-2 USTC ¶ 9824], 657 F. Supp 726 (D. Md. 1986). In a case in which a taxpayer owned an account receivable and the IRS seized it by levy and gave the taxpayer notice of this levy, the IRS could not later claim the same funds from the taxpayer. The court held that the actions of the IRS, in "exercising complete dominion and control over the account," precluded the taxpayer from satisfying its tax liability. *United States v. Barlow's Inc.,* 767 F.2d 1098 (4th Cir. 1985). In another case, the corporate taxpayer assigned to the IRS its right to collect on a contract with a third party. The IRS never secured the assignment, and the proceeds went to other creditors. The court would not allow the IRS to collect the 100% penalty from the president because as the responsible officer he thought he had taken care of the liability. *Mangeri v. United States* [86-2 USTC ¶ 9824], 657 F. Supp. 726 (D. Md. 1986) (***Matter of Nece***, ***supra,*** at 85,146).

The mere involvement of the state with the source of the funds that might have been used to pay the tax does not estop the state from collecting the penalty (***see***, ***Matter of Wolfstich v. New York State Tax Commn.***, 106 AD2d 745, 483 NYS2d 779).

Petitioners, relying on ***Matter of Trachtenberg v. New York State Tax Commn.*** (***supra***), assert that "once the Division exercised dominion over the unpaid stamps, Herkimer's indebtedness for those stamps was discharged, along with that of the petitioners as responsible corporate officers" (Petitioners' brief in support, p. 9). In ***Trachtenberg***, the Appellate Division held that the state's acceptance of a reduced amount of tax pursuant to a negotiated settlement in bankruptcy had the effect of reducing the amount of the responsible officer penalty. Apparently, petitioners' position is that permitting Marine to dispose of the cigarette inventory with the stamps attached somehow amounts to agreeing to a reduction in the corporation's tax liability or perhaps to a redemption and reissuance of the stamps. There are two difficulties with petitioners' argument. First, in light of the security interest of Marine in the cigarette inventory, petitioners are in effect asking us to find a duty on the part of the Division to have thwarted the liquidation of the collateral and thereby force the bank into negotiations or litigation. Under the general rule discussed above, the Division had no such duty. Also, the Division's acquiescence in the disposition of the collateral did not amount to the exercise of "dominion" over assets available to pay the tax comparable to the cases discussed in ***Nece***. Second, in ***Trachtenberg***, the Appellate Division refused to consider an argument based on the ***Yellin*** case because it had not been raised below. Here, the argument that liability for the responsible officer penalty is separate and independent of the corporation's liability for unpaid withholding taxes has been thoroughly briefed on the theory of the ***Yellin*** case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Michael D. Button and James F. Button is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Michael D. Button and James F. Button is denied; and

4. The notices of determination dated January 26, 1998 are sustained.

DATED: Troy, New York
October 20, 2005

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner