STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AQUA-MANIA, INC.	:	DECISION DTA NO. 820492
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 December 1, 1997 through November 30, 2000.	:	

Petitioner, Aqua-Mania, Inc., filed an exception to the determination of the Administrative Law Judge issued on April 19, 2007. Petitioner appeared by Bowers & Company CPAs, PLLC (Michael G. D'Avirro, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support with its exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on September 17, 2007 in New York, New York.

ISSUES

I. Whether the assessments for the periods at issue are time-barred.

II. If not, whether the Division of Taxation properly determined additional sales and use taxes due from petitioner for the periods at issue.

III. Whether the Division of Taxation has sustained its burden of proof to show that the imposition of fraud penalty pursuant to Tax Law § 1145(a)(2) was proper.

IV. Whether petitioner is estopped from challenging civil fraud penalties based on Mr. Merola's criminal conviction of fraud.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "6" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

1. Aqua-Mania, Inc. ("petitioner") operates a retail store selling boats and personal water craft in Alexandria Bay, New York. Petitioner was incorporated in May 1986. During the period at issue, Richard Merola was the sole shareholder and president of petitioner.

2. In July 2000, the Division of Taxation ("Division") commenced an audit of petitioner. On July 25, 2000, the Division mailed an appointment letter to petitioner requesting the production of the corporation's books and records for the period June 1, 1997 through May 31, 2000.[1] With the exception of exemption documents, all records requested by the Division were made available and sales were, therefore, reviewed in detail. During the course of the audit, the auditor found that petitioner had not charged sales tax on the sale of certain boats to New York State residents that were delivered in New York State. During the initial part of the audit, petitioner was unable to provide the auditor with forms AU-186, Certification of Out-of-State Delivery of a Boat or Vessel.

3. In January 2001, the case was referred to the Revenue Crimes Bureau ("RCB"). Following an investigation by the RCB, the case was accepted for prosecution by the New York State Office of the Attorney General.

4. On October 3, 2003, petitioner, through Mr. Merola, entered a plea of guilty to a violation of Tax Law § 1817(c)(2)(a) which provides that:

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[1] The audit was subsequently expanded to include the period June 1, 2000 through November 30, 2000. Records for these two additional sales tax quarters were requested from petitioner by means of a subpoena duces tecum, dated April 25, 2001, issued by the Division's Revenue Crimes Bureau.

> [a] person is guilty of failure to collect sales tax when he fails to collect a sales tax required to be collected by article twenty-eight of this chapter and when (a) he does so with intent to defraud the state or a political subdivision thereof and thereby deprives the state or a political subdivision thereof, or both together, of ten thousand dollars or more.

Failure to collect sales tax under this statute is a class E felony.

5. On the same date, petitioner's president and sole shareholder, Richard Merola, who had also been charged with a violation of Tax Law § 1817(c)(2)(a), pled guilty to a violation of Penal Law § 175.30, offering a false instrument for filing in the second degree, a class A misdemeanor. Penal Law § 175.30 provides as follows:

> A person is guilty of offering a false instrument for filing in the second degree when, knowing that a written instrument contains a false statement or false information, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant.

We modify Finding of Fact "6" of the Administrative Law Judge's determination to read as follows:

> 6. On October 3, 2003, the County Court of the County of Jefferson, State of New York, imposed the sentence of a three-year conditional discharge upon petitioner and a one-year conditional discharge upon Richard Merola. Mr. Merola, in his plea allocution, stated that petitioner had sold six boats between the dates of August 14, 1998 and September 5, 2000 at a total cost of approximately $928,146.00 on which sales tax in the approximate amount of $56,040.00 was not collected. Mr. Merola, a graduate of the Syracuse University School of Management, admitted, on his own behalf and on behalf of petitioner, to the underlying acts giving rise to the charges, i.e., preparing and filing false documents with the Division of Taxation and failing to collect sales tax on the sale of boats.
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> At the plea, Gary Simpson, Esq. of the Attorney General's office stated that "the plea agreement in this matter satisfied this particular judgment in the fullest extent, your Honor, on all outstanding matters" (Ex. "K", p. 17). As to the conditional discharge imposed upon Mr. Merola, the Court ordered the payment of restitution to the New York State Commissioner of Taxation and Finance in the

amount of $56,040.00, which restitution had to be paid within one year from the date of sentencing.[2]

7. On October 3, 2003, Richard Merola executed an Affidavit for Judgment by Confession in which he confessed judgment in favor of the New York State Department of Taxation and Finance in the sum of $56,040.00 in restitution and $56,009.00 in penalties and interest[3] accrued as of September 9, 2003, for a total sum of $112,049.00. The Affidavit for Confession of Judgment provided, in relevant part, as follows:

> a. That from on or about August 14, 1998, October 7, 1998, January 6, 1999, June 6, 1999, January 18, 2000 and September 5, 2000 in the town of Alexandria Ban [sic], county of Jefferson, state of New York, defendants, with intent to defraud the State or a political subdivision thereof, failed to collects [sic] sales tax as required by Article 28 of the New York Tax Law and thereby deprived the state or a political subdivision of ten thousand dollars or more.
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> b. That on or about January 19, 2001, in the city of Syracuse, county of Onondaga, state of New York, defendants knowing that a written instrument, to wit, a New York State Department of Taxation and Finance Certification of Out-of-State Delivery of a Boat or Vessel form ("AU-186") contained a false statement and false information, and with intent to defraud the State and a political subdivision thereof, offered and presented said certification to a public office and public servant with the knowledge and belief that it would be filed, registered and recorded in and otherwise become a part of the records of such public office and public servant.
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> c. I committed the above criminal conduct while President of Aqua-Mania Inc. of Alexandria Bay, New York from August 14, 1998 to on or about January 19, 2001.
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> d. As a result of my conduct, I owe the Tax Department $56,040 in restitution and an additional $56,009 in penalties and interest accrued as of September 9, 2003, for a total sum of $112,049.

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[2]We have modified Finding of Fact "6" to more fully reflect the record.

[3] Pursuant to a RCB letter dated October 23, 2003, which is contained in the audit workpapers, the $56,009.00 consisted of interest of $39,196.71 and penalties of $16,811.81 (this total of $56,008.52 has apparently been rounded up to $56,009.00).

8. Pursuant to the Memorandum of Plea Agreement entered into between the Attorney General of the State of New York and the defendants (petitioner and Richard Merola) on October 3, 2003, the parties agreed, among other things, that restitution payments would be sent to the New York State Department of Taxation and Finance, Bankruptcy Unit, and that the plea agreement did not prevent the Division "from seeking full payment for any remaining unpaid corporate sales tax, or any applicable interest or penalties owed by the defendants."

9. The restitution in the amount of $56,040.00 (the amount of sales tax owed to the Division) was paid by Richard Merola. As of the date of the hearing, payment of the penalties and interest had not been made.

10. In addition to the restitution paid by Richard Merola, one of the six customers of petitioner who had not been charged sales tax, G.M. Boats Ltd., by Gloria Margott, paid the sales tax due of $6,407.66 on this purchase by check dated November 13, 2003. The check indicates thereon that it was for payment of sales tax, penalties and interest. It must be noted that the check was drawn on the personal checking account of Gloria J. Margott of New Hartford, New York.

11. In October 2003, the RCB referred the matter back to the Audit Division for audit. At that time, the new auditor[4] determined that sales tax had not properly been charged, collected and remitted by petitioner on the sale of six boats. Each of the six transactions will hereinafter be separately examined:

Neil J. Lajeunesse, Ltd.

A Marine Purchase Agreement, dated January 6, 1998, was entered into between petitioner and Neil J. Lajeunesse, Ltd., whose address was listed as 3511 Silverside Road, Suite 105,

[4] The auditor who had previously commenced the audit retired earlier in 2003.

Wilmington, Delaware 19810, for the purchase of a used boat (a 1992 40 Hustler Fiore serial no. HIN40324D192) for the purchase price of $150,000.00. On the line of the agreement provided for sales tax, the word "exempt" was entered. The Division's TID (Taxpayer Identification) system indicated that Mr. Lajeunesse was a New York State resident who lived in East Berne, New York. The auditor's investigation revealed that the corporation did not exist.

When the original auditor asked petitioner for an AU-186 form, it was not produced. Subsequently, an AU-186 form, dated January 15, 2001, was provided to the Division. The form was signed by the dealer (petitioner) but was not signed by the purchaser. The AU-186 indicated that the boat sale was terminated and that the boat was resold by petitioner. The record in this matter includes a Bill of Sale dated March 19, 1999 for the sale of a 1992 Hustler power boat, serial no. HIN40324D192, and a power boat trailer to Dan Keyes of Kingston, Ontario (Canada). The seller was Neil J. Lajeunesse, Ltd.

On November 15, 2001, at the request of the RCB, Neil J. Lajeunesse set forth the details concerning the purchase of the boat from petitioner. Mr. Lajeunesse indicated that the purchase took place on January 5, 1999, but due to the fact that there was an extensive "punch list" (list of repairs and other changes demanded by the purchaser) which was not being satisfied by petitioner, Richard Merola suggested that he sell the boat. The sale to Dan Keyes took place during Easter weekend in 1999, and Mr. Keyes took delivery from petitioner. During this process, the boat never left the property of petitioner.

Mr. Lajeunesse stated that Mr. Merola suggested that inasmuch as he wanted the boat delivered in Florida, the boat should be registered by the Yacht Registry. Mr. Merola provided him with the material necessary for such registration. Mr. Lajeunesse stated that he was told that

since the boat was to be delivered out of state, he was not required to pay sales tax on the purchase.

Sean Donegan

A Marine Purchase Agreement, dated August 14, 1998, was entered into between petitioner and Sean Donegan whose address was listed as 501 South Dawn Blvd., Boca Raton, Florida, for the purchase of a new 1999 388 Slingshot, serial no. 6LE38484G899, for the purchase price of $229,091.00, plus other equipment and accessories, which resulted in a total sale of $256,092.00. After discounts and allowances, the net sale was $206,500.00. Full payment was completed on September 11, 1998. An AU-186 form dated January 15, 2001 was provided to the auditor which indicated that delivery was made in Boca Raton, Florida. According to a statement made to the RCB, Sean Donegan stated that the deal was closed in Alexandria Bay and that he "sea trailed [sic] the boat in Alexandria Bay for three or so weeks with the dealer and used Aqua-Mania dealer placards." Because of some mechanical problems, "Rick Merola did some work on the boat at his business and then shipped the boat to New York City to the Hustler manufacturer for further work. The boat was shipped back to Aqua-Mania in the fall of 1998." The boat was then winterized and it stayed at petitioner's place of business until March, at which time Mr. Donegan hired Kevin Klopfer, a landscaper from Alexandria Bay, to transport the boat and trailer to him in Florida. No dates were provided regarding the transport of the boat to Florida and there is no indication that a common carrier picked up the boat and delivered it to Florida.

Mr. Donegan stated that he was shown the AU-186 form by Investigator Woodford of the Division's RCB. Mr. Donegan indicated that he did not recognize the form and did not remember signing it although the signature did look like his signature.

John P. Sommerwerck

A Marine Purchase Agreement, dated June 26, 1999, was entered into between petitioner and John P. Sommerwerck, whose address was listed as 12995 Sandy Drive, P.O. Box 340, Donnelly, Idaho 83615, for the purchase of a new 1997 3250 LXC, serial no. DNAM0055D797, for the purchase price of $122,264.00, plus optional equipment and accessories of $22,913.00, for a total sale of $145,177.00. Stamped on the agreement was "All Applicable Sales Tax Has Been Collected." Full payment was made on July 16, 1999. The Marine Purchase Agreement indicated that delivery was to be made in Alexandria Bay, New York. On the second page of the agreement, it states that pickup was to occur on July 16th with dockage at Inlet Harbor Club. A form AU-186, dated January 15, 2001, signed by both the seller and purchaser indicates that the boat was delivered by petitioner to Erie, Pennsylvania.

Mr. Sommerwerck stated in a May 20, 2001 letter to Investigator Woodford of the Division's RCB that New York State sales tax was not charged by petitioner and that he did not complete or sign the AU-186 form. Mr. Sommerwerck further stated that "I did, however, pay Aqua-Mania to deliver the boat to Erie, Pa."

The record includes an extensive punch list of items to be repaired as well as documentation (including special hauling permits and expense vouchers) which indicates that the boat was transported in late June or early July 2000, approximately one year after purchase, by Charles R. Marchesani of Alexandria Bay, New York. Also included is a check in the amount of $300.00 payable to Charles Marchesani by petitioner.

Michael Brienzi, Ltd.

A Marine Purchase Agreement, dated October 7, 1998, was entered into between petitioner and Michael Brienzi, Ltd.,[5] whose address was listed as 32 Belltower Lane, Pittsford, New York 14534, for the purchase of a new 1999 Hustler 388 Slingshot, serial no. GLE38496I899, for the purchase price of $229,091.00 plus certain optional equipment or accessories of $5,713.00, for a total sales price of $234,804.00. After certain dealer discounts, allowances and trade-in allowance, the total cash sales price was $200,000.00. Total payment was made on March 25, 1999. The Marine Purchase Agreement stated that pickup was to be made in Alexandria Bay, New York.

A second Marine Purchase Agreement, dated January 7, 1999, was entered into between petitioner and Michael Brienzi, Ltd., for the purchase of a boat trailer for the purchase price of $6,000.00. Payment in full was made on January 21, 1999. Both agreements, on the lines provided for sales tax, stated that the sales were exempt.

A form AU-186 was signed by petitioner on January 15, 2001 and by the purchaser on January 16, 2001, dates which are approximately two years after the purchases made by Michael Brienzi, Ltd. On the AU-186, the address of the purchaser, Michael Brienzi, Ltd., was listed as 3511 Silverside Road, Suite 105, Wilmington, Delaware.[6] The form also states that the place of delivery of the boat was Scranton, Pennsylvania and that delivery was made by petitioner.

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[5] On the Marine Purchase Agreement, "Michael Brienzi" was typewritten while "LTD" was handwritten.

[6] This is the same address which was set forth on the Marine Purchase Agreement between petitioner and Neil J. Lajeunesse.

R.M.Thomson, Ltd.

A Marine Purchase Agreement, dated January 18, 2000,[7] was entered into between petitioner and R.M. Thomson, Ltd., whose address was listed as 3511 Silverside Road, Suite 105, Wilmington, Delaware,[8] for the purchase of a used Sea Ray model 390 Express Cruiser for the purchase price of $92,700.00. The Marine Purchase Agreement contained no information as to date or place of delivery.

An AU-186 form, signed by petitioner on January 15, 2001 and by the purchaser (no date listed), indicated that the place of delivery was Atlantic City, New Jersey, and that delivery was made by petitioner.

Investigator Woodford of the Division's RCB informed the auditor that R.M. Thomson had a business in Alexandria Bay, New York, where petitioner's business was also located.

G.M. Boats, Ltd.

A Marine Purchase Agreement, dated September 5, 2000, was entered into between petitioner and G.M. Boats, Ltd. (the agreement listed the purchaser as "GM Boats, Ltd. Gloria Margott"), whose address was listed as 30 Christopher Circle, New Hartford, New York, for the purchase of a new 2000 Hustler 388 Slingshot, serial no. GLE 38526G900, for the purchase price of $240,000.00. After allowances and a trade-in allowance, the net sale was $52,217.72. The agreement stated that the purchaser was a "Tax Exempt Corp."

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[7] The copies of the Marine Purchase Agreement in the audit file relating to R.M. Thomson, Ltd., are poor copies which, to some extent, are illegible.

[8] This is the same address as was set forth on the purchase agreements with Neil J. Lajeunesse and Michael Brienzi, Ltd.

A form AU-186 was executed on November 1, 2000. The form indicated that the purchaser had an out-of -state address of 351 Silverside Road, Suite 105, Wilmington, Delaware,[9] and that delivery was made in Scranton, Pennsylvania by petitioner.

As indicated in Finding of Fact "10," Gloria Margott paid the tax, interest and penalties due on this sale on November 13, 2003.

12. On September 14, 2000, petitioner, by its president, Richard Merola, executed a consent extending the period of limitation for assessment of sales and use taxes whereby it was agreed that taxes for the period June 1, 1997 through November 30, 1997 could be assessed at any time on or before December 20, 2000. Subsequently, on November 2, 2000, Mr. Merola executed another consent whereby it was agreed that sales and use taxes for the period June 1, 1997 through February 28, 1998 could be assessed at any time on or before March 20, 2001.

13. The total invoice amounts of the six sales at issue was $938,135.72. The auditor determined that the taxable amounts totaled $799,639.72,[10] with total tax due thereon in the amount of $55,974.78.

14. On February 17, 2004, the Division issued a Notice of Determination to petitioner that assessed additional tax due of $55,974.78, plus interest of $46,308.40 and penalties, including fraud penalty, in the amount of $51,141.61, for a total amount due of $147,017.13 (credit was given for the payment by Gloria Margott of $6,407.66) for the period December 1, 1997 through November 30, 2000.

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[9] This was the same address which was set forth on the forms AU-186 for Neil J. Lajeunesse and Michael Brienzi, Ltd.

[10] The total taxable amount of the six sales at issue should have been $853,739.72 due to the fact that the cash sale price for the sale to Michael Brienzi, Ltd., was $200,000.00. However, only $145,900.00 was considered by the Division to be the taxable amount of this transaction.

15. The difference between the amount of restitution ($56,040.00) ordered to be paid to the Division and the amount of tax assessed in the Notice of Determination ($55,974.78) was due to the fact that the Division's RCB, when computing the amount of restitution, imposed tax at the rate of 8% on a Jefferson County transaction when, in fact, the tax should have been imposed at the rate of 7%.

16. The second auditor (as previously noted, the auditor who commenced the audit prior to its referral to the RCB retired in 2003), in his more than 200 audits performed, had never before assessed the fraud penalty. However, upon instructions from his supervisor and section head, the auditor assessed fraud penalty in this matter. If fraud penalty had not been assessed, the statute of limitations for assessing additional tax due in this matter would have expired.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

At the outset, the Administrative Law Judge rejected petitioner's argument that the Division was estopped from assessing fraud penalties because the plea agreement, encompassed the full amount of petitioner's tax liability.

The Administrative Law Judge found that since the fraud penalty imposed by Tax Law § 1145(a)(2) was not part of the criminal restitution, the Division could properly assert this penalty by issuance of a Notice of Determination following the conclusion of the criminal matter.

While the Division was not estopped from assessing the fraud penalty, the Administrative Law Judge found that the Division was, in fact, estopped from assessing additional sales and use tax against this petitioner. The Administrative Law Judge found that this is true because, in this matter, there is no "remaining unpaid corporate sales tax." The Administrative Law Judge noted that under the terms of the Memorandum of Plea Agreement and the transcript of the defendants' plea and sentencing, restitution payments were to be sent to the New York State Department of

Taxation and Finance. After the matter was referred back by the RCB for audit, the auditor determined that the total additional tax due from the six sales that were the subject of the criminal proceeding, and which are now the subject of the present matter, was $55,974.78. Since there is no "remaining unpaid corporate sales tax," the Administrative Law Judge found that the Division could not assess the tax twice. Accordingly, the Administrative Law Judge cancelled the additional tax portion only of the Notice of Determination issued February 17, 2004.

The Administrative Law Judge noted that the penalty provisions of Tax Law § 1145(a)(2) provide, in pertinent part, as follows:

> If the failure to pay or pay over any tax to the commissioner within the time required by this article is due to fraud, in lieu of the penalties and interest provided for in subparagraphs (i) and (ii) of paragraph one of this subdivision, there shall be added to the tax (i) a penalty of fifty percent of the amount of tax due, plus (ii) interest on such unpaid tax . . . .

While the additional tax assessed by the Notice of Determination was canceled, that cancellation was not based upon a finding that there was no additional tax due, but rather, it was based upon the fact that petitioner already paid the full amount of the tax asserted. Accordingly, the Administrative Law Judge observed, if found otherwise warranted, the Division was within its statutory authority to impose the fraud penalty. In addition, the Administrative Law Judge found that since petitioner did not pay the penalties and interest set forth in the Affidavit for Judgment by Confession executed October 3, 2003, the Division properly included and assessed penalties and interest in the Notice of Determination issued February 17, 2004.

The Administrative Law Judge noted that the burden of proving fraud rests with the Division. In order to establish fraudulent intent, petitioner, acting through its officer (Richard Merola), must have acted deliberately, knowingly and with the specific intent to violate the Tax Law.

The Administrative Law Judge noted that the issues in this case are identical to the issues in petitioner's prior criminal proceeding. The issues in petitioner's criminal case and the issues decided therein were whether petitioner sold six individual boats, failed to collect approximately $56,000.00 in sales tax due thereon and failed to properly complete the forms AU-186. In Mr. Merola's Affidavit for Judgment by Confession, he admitted that he knew that the forms AU-186 contained false statements and false information and that, with intent to defraud the State and a political subdivision thereof, he offered and presented these forms for filing.

The Administrative Law Judge found that petitioner is collaterally estopped from challenging the fraud penalty asserted by the Division since the conduct giving rise to this matter is identical to the conduct that gave rise to the criminal convictions in the Jefferson County Court (***see***, ***Matter of A.V.S. Laminates, Inc.***, Tax Appeals Tribunal, March 23, 2006).

Among petitioner's arguments, was the claim that the assessment of additional tax, penalty and interest is time-barred pursuant to Tax Law § 1147(b), because it was not issued within three years of the date of the filing of the sales tax returns for the periods at issue herein.

However, as already noted, the Administrative Law Judge found the imposition of the fraud penalty was proper in this case. Since in the case of a willfully false or fraudulent return an assessment of tax may be made at anytime, the Administrative Law Judge found that the assessment in the present matter is not time-barred.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception, as it did below, that:

a. The Division is estopped from assessing the fraud penalty because the plea agreement encompassed the full amount of petitioner's tax liability. Petitioner contends that the doctrine of estoppel is applicable because the Division made representations to

petitioner that petitioner relied upon to his detriment. Petitioner claims that had Mr. Merola known that fraud penalty could be assessed, the plea agreement would not have been accepted.

b. Petitioner did not commit fraud because the failure to collect tax was due to petitioner's misunderstanding of the law. Fraud penalty was only assessed solely because the auditor's supervisor requested it.

c. The reason that the forms AU-186 were executed in some of the sales at issue long after the date of sale was because the auditor provided petitioner with the forms during the audit and requested that they be forwarded to the purchasers for completion.

d. Tax Law § 1147 provides for a three-year statute of limitations for the assessment of sales and use tax, penalties and interest, and the three-year period has expired in this matter. The only reason that the fraud penalty was imposed is because Tax Law § 1147(b) provides that in the case of fraud, the tax may be assessed at any time.

e. Petitioner denies fraud was involved with respect to its sales.

The Division argues that petitioner was required to maintain records to verify the point of delivery of each boat, which it failed to do. Not only were records not maintained, but records were falsified.

The Division argues that it has established that petitioner was guilty of fraud by clear and convincing evidence.

The Division urges that the restitution ordered by the criminal court did not preclude the Division from assessing additional tax, interest and penalties.

OPINION

We affirm in part, and modify in part, the determination of the Administrative Law Judge.

The burden of proving fraud rests with the Division (***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989). A finding of fraud requires the Division to show by "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (***Matter of Sona Appliances***, Tax Appeals Tribunal, March 16, 2000). Fraud need not be established by direct evidence, but can be shown by surveying the taxpayer's entire course of conduct and drawing reasonable inferences therefrom (***Matter of Cousins Serv. Sta.***, Tax Appeals Tribunal, August 11, 1988). In order to establish fraudulent intent, petitioner, acting through its officer, Richard Merola, must have acted deliberately, knowingly and with the specific intent to violate the Tax Law.

Petitioner and its sole shareholder, Mr. Merola, were each separately charged with Failure to Collect Sales Tax, in violation of Tax Law § 1817(c)(2)(a) and Offering a False Instrument for Filing in violation of Penal Law § 175.35, both Class E felonies. Petitioner, through its owner, Mr. Merola, was offered a plea to a single count of Failure to Collect Sales Tax (Tax Law § 1817[c][2][a]) in full satisfaction of the charges against it. Mr. Merola was also offered a plea to the lessor charge of Offering a False Instrument for Filing in the second degree, a Class A Misdemeanor, in violation of Penal Law § 170.35 in full satisfaction of the charges against him. Both accepted the plea offer rather than go to trial.

Petitioner's plea statement contains an admission that petitioner committed acts constituting tax fraud. Mr. Merola admitted preparing fraudulent AU-186 forms, and the maintenance and production of records known to be false is an indicia of fraud. There was a substantial under reporting of sales tax due, which is also indicia of fraud, and the under reporting was consistent and covered a substantial, continuous period.

We find, based on this record and upon the pleas of guilty by petitioner to violating Tax Law § 1817(c)(2)(a), wherein it was admitted that the failure to collect sales tax was done "with intent to defraud the state or a political subdivision thereof," and by its president and sole shareholder, Richard Merola, to the class A misdemeanor of offering a false instrument for filing in the second degree, that the Division has carried its burden of showing the necessary elements to establish fraud, including intent.

Petitioner argues that the Division is estopped from asserting fraud penalties, since its full tax liability was set by the Jefferson County Court's Order of Restitution. We disagree. The Division is not restricted as a matter of law from issuing a Notice of Determination for the total amount of taxes it determines is due, where that amount is greater than an amount agreed to as restitution in a criminal case based on the same facts for the same time period (***see***, Penal Law § 60.27[6]; ***Matter of N.T.J. Liquors, Inc.***, Tax Appeals Tribunal, May 7, 1992). We note that in the Memorandum of Plea Agreement entered into on October 3, 2003 between the Attorney General of the State of New York and the defendants (petitioner and Richard Merola), it was agreed that the plea agreement did not prevent the Division "from seeking full payment for any remaining unpaid corporate sales tax, or *any applicable interest or penalties* owed by defendants" (emphasis added). Petitioner's and Mr. Merola's subjective understanding notwithstanding, there is nothing in the plea agreement entered before Jefferson County Court that limits the Division's right to assert fraud penalties and there is nothing in the record to indicate that the State promised not to impose such penalties. Once the criminal proceeding was over and petitioner's file was returned by the Revenue Crimes Unit to the Division of Taxation, it could then properly determine whether fraud penalties should be asserted. In this case, it decided in the affirmative.

Petitioner's argument that fraud penalties were only asserted after the file was reviewed by the auditor's supervisor is irrelevant, so long as there was a legal basis for the penalties.

Petitioner relies on the statement of Assistant Attorney General Simpson and says it would never have entered this plea but for Simpson's statement to the Court that:

> I would just like to state for the record that the plea agreement in this matter ***satisfies this particular judgment*** to the fullest extent, Your Honor, on all outstanding matters."

We must disagree with the petitioner's interpretation of this statement. It is clear that Mr. Simpson's statement merely reflected that the plea Mr. Merola entered to the reduced charge, and Aqua-Mania's plea to a single E felony, was in full satisfaction of "all outstanding matters" before the Court. Hence, the reference in Simpson's statement to "satisfies this particular judgment" refers only to matters before the Court. It is not an umbrella covering all potential future proceedings. Further, petitioner's claim that it would not have entered its plea but for this statement is somewhat incongruous, since Mr. Simpson did not make the statement until *after* petitioner had already entered its plea.

Petitioner now attempts to argue that the nonpayment of sales tax and the offering of false documents was not fraud, but merely a mistake by Mr. Merola. We are not persuaded. Mr. Merola is a graduate of Syracuse University School of Management. We do not find that a man with this level of education would mistakenly falsify documents and fail to pay taxes due on behalf of his corporation. This claim of mistake also flies in the face of Mr. Merola's statements to the Court in his plea colloquy and his executed Confession of Judgment.

Fraud is an element of the Class E Felony to which the petitioner was convicted under plea. That is a:

> [p]erson is guilty of failure to collect sales tax when he fails to collect a sales tax required to be collected by article twenty-eight . . . and when (*a)he does so with intent to defraud the state* or a political subdivision thereof and thereby deprives the state or a political subdivision thereof, or both together, of ten thousand dollars or more" (Tax Law 1817[c][2][a]).

The Division urges that petitioner is collaterally estopped from denying it committed fraud. Collateral estoppel is a legal doctrine that precludes a party from relitigating, in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (***see***, ***Ryan v. New York Tel. Co.,*** 62 NY2d 494 [1984]).

In order for the doctrine of collateral estoppel to apply: (1) the issue as to which preclusion is sought must be identical with that in the prior proceeding; (2) the issue must have been decided in the prior proceeding; and (3) the litigant who will be held precluded in the present matter must have had a full and fair opportunity to litigate the issue in the prior proceeding (***see***, ***Staatsburg Water Co. v. Staatsburg Fire Dist.***, 72 NY2d 147 [1988]; ***Capital Tel. Co. v. Pattersonville Tel. Co.***, 56 NY2d 11 [1982]).

The record here demonstrates that the question of whether Aqua-Mania, Inc. had committed fraud, present here, was also present in its previous criminal proceeding. That issue was decided in the Jefferson County Court upon petitioner's and Mr. Merola's plea of guilty to the charges in full satisfaction. The plea colloquy makes clear that petitioner and Mr. Merola were fully advised of the implications of their pleas and were fully and fairly advised of their right to litigate the issue if they so wished. Instead of going to trial, petitioner accepted the plea bargain by pleading guilty to a single violation of Tax Law § 1817(c)(2)(a), an E felony, in full satisfaction of the two felony charges against it and Mr. Merola took advantage of the opportunity to plea to a single Class A misdemeanor in full satisfaction of the two felony charges

against him. Rather than take their chances at trial, petitioner and Mr. Merola entered their pleas, the Court accepted their pleas and petitioner now stands convicted. Since fraud is an element of the charge to which petitioner stands convicted, it is estopped from now denying that it committed fraud during the subject period.

Petitioner's claim that restitution of the amount of tax asserted bars the Division from asserting fraud penalties is without merit. We find no support for petitioner's claim that the Division agreed not to impose civil fraud penalties. In fact, the record supports the conclusion that the Division retained that option (Ex. 11, para 12). Accordingly, there is no merit to petitioner's claim that the Division was estopped from asserting fraud penalties.

Finally, we reject petitioner's claim that the assessment of additional tax, penalty and interest is time-barred pursuant to Tax Law § 1147(b) because it was not issued within three years of the date of the filing of the sales tax returns for the periods at issue herein. Since we have held the imposition of the fraud penalty pursuant to Tax Law § 1145(a)(2) was proper, the assessment of tax may be made at anytime and the assessment in the present matter is not time-barred (Tax Law § 1147[b]).

The Administrative Law Judge found that while the Division is not estopped from assessing the fraud penalty, it was, in fact, estopped from assessing additional sales and use tax against this petitioner because there is no "remaining unpaid corporate sales tax." The Administrative Law Judge's reasoning being that petitioner had already paid the entire amount of sales and use tax due to the Division, pursuant to the Court's restitution order. Since there is no "remaining unpaid corporate sales tax" due, the Administrative Law Judge cancelled the tax portion assessed by the Notice of Determination issued February 17, 2004. We modify the determination of the Administrative Law Judge. We agree with the Administrative Law Judge

that the Division cannot properly twice collect the additional sales tax asserted in the subject Notice of Determination, it having already been paid. However, the proper remedy was not to cancel the tax portion of the assessment, but to direct that petitioner be given credit for the full amount of the tax paid, which we do at this time.

Except as modified, we affirm the determination of the Administrative Law Judge for the reasons therein. We find that the Administrative Law Judge has fully and correctly addressed each of the issues and arguments raised by the parties, and we can find no further basis, based on this record, to modify the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Aqua-Mania, Inc. is denied;

2. The determination of the Administrative Law Judge as modified herein above, is affirmed;

3. The petition of Aqua-Mania, Inc. is granted to the extent indicated within this decision and as set forth in conclusion of law "D" of the Administrative Law Judge's determination, but in all other respects is denied; and

4. The Notice of Determination dated February 17, 2004 as modified in accordance with paragraph "3" above is sustained.

DATED:Troy, New York
March 6, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

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

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