STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROCHESTER AMPHIBIAN AIRWAYS, INC.	:	DECISION DTA NO. 821342
for Revision of a Determination or Refund of Sales and Use Taxes under Articles 28 & 29 of the Tax Law for the Period Ended February 21, 2003.	:	

Petitioner, Rochester Amphibian Airways, Inc. and the Division of Taxation, each filed exceptions to the determination of the Administrative Law Judge issued on April 17, 2008. Petitioner appeared by Sherry S. Kraus, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (James Della Porta, Esq., of counsel).

Petitioner filed a brief in support of its exception and a brief in opposition to the Division of Taxation's exception. The Division of Taxation filed a brief in support of its exception and a brief in opposition to petitioner's exception. Petitioner and the Division of Taxation each filed reply briefs. Oral argument, at the request of both parties, was heard on February 11, 2009 in Troy, New York.

After reviewing the entire record in this matter the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation properly estimated and asserted sales or use taxes due on petitioner's purchase or use of an aircraft in New York State.

II. Whether the Division of Taxation has the burden of proof on legal issues underlying a notice of determination after the filing of a petition in response to the notice.

III. Whether the Division of Taxation has established that petitioner, a corporate entity, is a "sham" corporation that should be disregarded and its sole shareholder held liable for the sales or use tax due.

IV. Whether the Division of Taxation has established that petitioner should be disregarded as a corporation thereby permitting it to "pierce the corporate veil" and hold petitioner's sole shareholder liable for the sales or use tax due.

V. Whether the Division of Taxation has established that petitioner leased the aircraft to its sole shareholder or entered into a barter or exchange with him for the right to use the plane, thus subjecting it to sales tax liability.

VI. Whether petitioner has demonstrated reasonable cause for the abatement of penalty asserted by the Division of Taxation pursuant to Tax Law § 1145.

FINDINGS OF FACT

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

Rochester Amphibian Airways, Inc. (petitioner) was a Delaware corporation, incorporated on April 16, 2002 for the general purpose of engaging in "any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware." Its sole shareholder, officer and director, Mark Rueckwald, a New York resident who maintained residences in New York and Florida, and a skilled pilot, explained that the corporation was incorporated in Delaware because other corporations he owned were incorporated there also. For

tax purposes, petitioner was treated as a Subchapter C corporation under the Internal Revenue Code.

Petitioner's registered office in Delaware was located at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808, and the registered agent was the Corporation Service Company.

Petitioner was formed for the primary purpose of shielding Mr. Rueckwald from liability arising from the ownership and operation of aircraft, an ownership methodology his family had historically utilized.

Petitioner was originally formed to purchase and hold ownership in an amphibious World War II vintage aircraft called a Grumman "Widgeon." The aircraft had been owned by Mr. Rueckwald's grandfather, bequeathed to him and his brother and then sold to a third party. Mr. Rueckwald experienced "seller's remorse" and attempted to purchase the aircraft back. However, his attempt was in vain, as were attempts to locate another Widgeon in similar condition throughout the country.

The Widgeon, which had been located in New York State when owned by Mr. Rueckwald and his brother, was sold to a New York company owned by a resident of Rochester, New York.

When it was not able to purchase another Widgeon, petitioner began a search for another World War II era plane called a P-51 Mustang, a fighter plane which, like the Widgeon, lacked stability in favor of increased maneuverability and required a very skilled pilot.

The corporation remained dormant until late 2002, when it purchased a new stunt plane called an "Extra" 300L (Extra), which petitioner's 2002 U.S. Corporation Income Tax Return

valued at $304,934.00 and revealed was purchased with a combination of a mortgage, notes and bonds, capital contributions and loans from the shareholder.

On April 24, 2003, petitioner purchased a 1944 P-51 Mustang aircraft (Mustang) from two Illinois residents for $1,600,000.00. This aircraft had been carefully restored by its owners consistent with its original design. Petitioner took delivery of the Mustang on April 25, 2003 in East Troy, Wisconsin, where the plane was flight tested and inspected by Mr. Lee Lauderback, a nationally recognized aviation expert and flight trainer for the P-51 Mustang aircraft.

In performing his inspection, Mr. Lauderback noted that the Mustang had been overhauled in August 1998 and had since logged 140.4 hours of flying time. With few minor exceptions, the aircraft was determined to be a "very nice flying aircraft" with exceptional overall appearance. In fact, the aircraft, called "Miss Marilyn II," was later featured on the cover of Warbirds International Magazine, Volume 23, Number 3, May/June 2004.

The Mustang was financed in a manner similar to the Extra, including a commercial loan from the Uptown National Bank of Chicago (Bank) in the sum of $1,280,670.00, guaranteed by Mr. Rueckwald, and personal loans from Mr. Rueckwald, as well.

Although informed by petitioner's attorney that petitioner did no business in the State of New York, the bank demanded, as an additional requirement for granting the loan, that petitioner file an "Application for Authority" in New York State in order that the bank would be able to utilize the courts of the State of New York to enforce its loan agreement with petitioner. Said application designated the Secretary of State as agent of the corporation for service of process in New York and provided an address to which the Secretary of State would forward such process. The address provided was 1110 Crosspointe Lane, Building A, Suite D, Webster, NY 14580, which was an office address leased by one of Mr. Rueckwald's businesses.

As mandated by the Bank, petitioner maintained a policy of insurance on the Mustang in the sum of $1,500,000.00 and liability coverage of $1,000,000.00 for bodily injury and property damage for which petitioner paid an annual premium of $42,094.00.

Petitioner registered the Mustang with the Federal Aviation Administration (FAA) and a certificate was issued on June 12, 2003. Under the "Limited Operating Limitations" imposed by the FAA with respect to petitioner's Mustang, the aircraft could not be used for commercial purposes, such as carrying persons or property for compensation or hire, and violation of said provision could be grounds for severe penalties. Violation could result in revocation of the airworthiness certificate on the aircraft and any person operating the aircraft after such revocation would be subject to sanctions and possible loss of his or her pilot's license.

There was no written lease or rental agreement between petitioner and Mr. Rueckwald or any other person or entity for use of the Mustang aircraft, and petitioner has never advertised the Mustang for hire or other commercial use. In fact, there was no market for rental of a plane of this vintage, which required a highly skilled pilot, could carry only one aviator and was notably unstable.

Petitioner's Mustang aircraft was a "one seater" World War II fighter plane that was very difficult to fly and required special pilot training, making it unsuitable for transporting passengers or use in other commercial or business ventures. Pilots of Mustangs wore parachutes and helmets for safety and received training on specially modified "two seater" aircraft at schools such as "Stallion 51," operated by Lee Lauderback in Kissimmee, Florida, where petitioner's sole shareholder, Mr. Rueckwald, perfected his skills in flying the P-51 Mustang aircraft.

During the time petitioner owned the aircraft, between April 24, 2003 and September 2004, only two other pilots besides Mr. Rueckwald flew the Mustang. Mr. Lauderback flew the

plane during the inspection and flight test to confirm its condition and airworthiness in April of 2003, and then on a regular basis for maintenance after the aircraft was moved to his facility in Florida in December 2003, for which he was named as an approved pilot on petitioner's insurance confirmation. Antique aircraft such as petitioner's Mustang must be "exercised" or flown regularly to keep them in operational order and avoid metal deterioration, accelerated aging of hardware and lack of lubrication. Exercising the aircraft entailed bringing all parts and fluids to operating temperatures a "couple" of times a month while flying the plane. Therefore, it was necessary to have a Mustang certified pilot available to perform this maintenance year round.

The only other pilot to fly the plane was John Williams, one of the individuals who sold petitioner the Mustang, who was permitted to fly the aircraft in the Oshkosh Air Show shortly after petitioner purchased the plane.

Petitioner never received any fees or compensation for appearances by its Mustang in air shows, since such appearances were for educating the public and preserving the heritage of the last generation of aircraft flown in combat without the benefit of computers, missile systems or other sophisticated artificial intelligence.

As mentioned, petitioner moved the Mustang to Stallion 51 in Kissimmee, Florida, in December 2003, where it remained in the care of Mr. Lauderback until its sale in September 2004, although moved to Georgia during a hurricane threat. The annual inspection of the aircraft on May 15, 2004 noted 170.4 hours flown since its restoration. Since the number of hours since restoration was 140.4 when petitioner acquired the plane in April 2003, this meant it had been flown 30 hours during that time. It excludes the flight time expended for exercise flights between May and September 2004. During the 17 months petitioner owned the Mustang, it was in New York State for 5 months. It was also kept in Michigan, Wisconsin, Illinois and Florida.

Although Mr. Rueckwald had hoped the value of the Mustang would have appreciated before petitioner sold the aircraft, such that his loans to petitioner would be paid, in fact the Mustang was sold below the price paid to acquire it 17 months earlier.

Petitioner's 2003 federal and New York State tax returns reported no income or profits from the use of the Mustang or any other asset, and none of petitioner's returns in evidence, including the 2002, 2003 and 2004 federal income tax returns or the 2003 and 2004 New York State corporation tax returns indicated that any of petitioner's assets had been depreciated, indicating that said assets were not used in a trade or business.

Testimony of Mr. Robert Penta, petitioner's accountant, and the federal and New York State tax returns demonstrated that, in the absence of income or profits, the expenses of the corporation in purchasing and owning the Mustang were paid by institutional loans, shareholder contributions to capital and shareholder loans.

Mr. Rueckwald kept a separate record of the corporation's expenses and his payments on petitioner's behalf, but he did not report all his payments to his accountant for inclusion on petitioner's tax returns because no expenses in excess of income could be passed through to his individual return. Consequently, during 2003 and 2004, although Mr. Rueckwald paid the down payment on the aircraft, purchase money debt and other debt financing, bank finance charges, fuel, insurance, inspection and maintenance expenses in the sum of $614,101.24, he did not include all of these payments made on petitioner's behalf as loans from shareholders on the balance sheets of the corporation attached to the federal income tax returns. Specifically, expenses such as those for insurance, fuel, maintenance and inspections were not reflected on the balance sheets attached to petitioner's returns, even though such payments were intended to be shareholder loans. In addition, the corporation maintained a checking account during the period

the Mustang was owned by petitioner. The account was maintained at JP Morgan Chase Bank and Mr. Rueckwald was a signatory on the account. The bank account was established by a validly executed corporate resolution.

Although Mr. Rueckwald had hoped to recoup his loan payments when the Mustang was sold, he only received $114,000.00 on the sale of both the Extra 300L and the Mustang in 2004. Other than this sum, Mr. Rueckwald never took any money or assets from the corporation.

As of the date of the hearing, petitioner remained a corporation in good standing in the State of Delaware, holding no assets, but still able potentially to hold assets, conduct a trade or business or earn income in the future under its broad "purposes" clause.

Petitioner's management requirements were straightforward and included maintaining a record of expenses, filing income tax returns and asset maintenance. Petitioner maintained no offices for these functions and found it advantageous and convenient to use various mailing addresses as "mail drops" for tax and other important documents. In fact, petitioner never had office furnishings, fixtures, equipment, supplies or business cards. The choice of "mail drops" was made to assure that important communications would be made in a timely fashion to petitioner's sole officer and to insure prompt compliance with government authorities and financial institutions. At various times, petitioner used the home and business addresses of Mr. Rueckwald and its attorney, John Bulger, Esq. Specifically, petitioner used the address for one of Mr. Rueckwald's companies, Mitchell Technologies, at 1110 Crosspoint Lane, Suite D, Webster, New York.

Petitioner never maintained a separate telephone listing for itself, but did on occasion use the telephone number for Mitchell Technologies when a telephone number was required, to ensure that Mr. Rueckwald, its sole officer, would be contacted on its behalf.

Petitioner's capital included the two aircraft owned by the company worth in excess of $1,900,000.00 and a contribution to capital of $10,000.00. The Mustang was insured for 1.5 million dollars and carried liability insurance for one million dollars. The record is not clear on the funds advanced to the corporation by Mr. Rueckwald that were not listed as shareholder loans on its books, other than that Mr. Rueckwald paid all the expenses of the corporation and that such payments were made in anticipation of reimbursement on the sale of the aircraft. As such, they may have been loans or contributions to capital.

The Division of Taxation (Division) regularly received information from Aero Fax, a private company that monitors the registration of aircraft with the Federal Aviation Administration (FAA) that lists a location for aircraft within New York State. In this matter, the Division was informed by Aero Fax that the Mustang had been registered with the FAA and listed a New York address. Further, the Division had no record of any payment of sales or use tax by petitioner.

The Division sent petitioner a letter, dated October 6, 2004, which sought information on the purchase of the Mustang. Although petitioner admitted the plane had been in New York State, it claimed it was entitled to an exemption from tax as a foreign corporation not conducting a trade or business in New York.

The Division issued a Notice of Determination to petitioner pursuant to Tax Law §§ 1133, 1138 and 1145, dated June 3, 2005, which asserted tax due in the sum of $128,000.00, interest of $46,359.94 and penalty of $38,400.00 for a total amount due of $212,759.94. The tax was calculated by applying an 8% tax rate to the purchase price of the Mustang, $1,600,000.00.

At no time has the Division asserted fraud or wrongdoing against petitioner or Mr. Rueckwald, other than assessing a penalty for underpayment of tax.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that the undisputed facts of this case demonstrate that the Mustang aircraft was purchased by petitioner from Illinois residents and that transfer of the plane occurred in East Troy, Wisconsin. The Mustang was stored in New York State for five of the 17 months it was owned by petitioner.

The Administrative Law Judge noted that if petitioner, a foreign corporation, was not carrying on any employment, trade, business or profession in New York, it would qualify for the exemption from use tax provided for in Tax Law § 1118(2).

The Administrative Law Judge held that the corporation's purpose was to purchase and own the aircraft, which it accomplished with very little administrative resources after purchase, much less the need to establish and maintain a place of business. The Administrative Law Judge determined that Mr. Rueckwald credibly testified that he hoped to receive enough money on the sale of the aircraft to pay off the corporation's debts, including the loans he made to it, but that never materialized. The Administrative Law Judge stated that Mr. Rueckwald's extending loans to the corporation when necessary over the 17 month period did not constitute carrying on a trade or business or maintaining a place of business in the State, which would confer resident status on petitioner (***see***, 20 NYCRR 526.15[b][1]). The Administrative Law Judge found that petitioner was entitled to the use tax exemption set forth in Tax Law § 1118(2).

The Administrative Law Judge then addressed the Division's contention that the corporate form should be disregarded (pierced) and Mr. Rueckwald should be held liable for the use tax due. The Administrative Law Judge noted that the equitable remedy of piercing the corporate veil seeks to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation.

The Administrative Law Judge held that there had been no showing of fraud or any fraudulent acts by petitioner or Mr. Rueckwald perpetrated on the Division. The Administrative Law Judge noted that petitioner was formed for a legal purpose. The Administrative Law Judge found no intent to defraud or perpetrate a wrong on the Division and no intent to evade payment of sales or use tax that would warrant piercing the corporate veil.

The Administrative Law Judge also rejected the Division's other arguments that sought to disregard the corporate entity, as vague. The Division mentioned the concepts of sham entity and substance over form. The Division appeared to argue that if a corporation has but one officer, shareholder and director, it must be a mere alter ego of the individual and deserving of no separate identity or limitation of liability, particularly when the corporate form entitles it to a tax exemption. The Administrative Law Judge rejected this argument as having no legal or factual basis under the facts of this case.

The Administrative Law Judge found that petitioner had a legitimate business purpose in its formation and carried on its business of owning and maintaining aircraft thereafter, and that the Division failed to demonstrate that it was set up as a sham or for the purpose of tax avoidance.

The Administrative Law Judge also found that the Division's claims that the corporation should be disregarded because it was thinly capitalized and its financing "bogus" were also without merit.

Petitioner's balance sheet for 2004, the Administrative Law Judge found, indicated a stated capital contribution (common stock) of $10,000.00 and shareholder loans valued at over $485,000.00. The loans were made to cover the down payment on the purchase of the Mustang and its initial debt costs and expenses. The Administrative Law Judge also observed that Mr.

Rueckwald made continuing payments of petitioner's expenses with respect to its aircraft, although he admittedly never "booked" all his contributions because they were so far in excess of income (none in this case). Petitioner owned two aircraft in its own name, the Extra 300L, valued at $304,934.00, and the P-51 Mustang, valued at $1,600,670.00. The Mustang alone was insured for $1.5 million and carried a liability coverage of one million dollars.

The Division did not dispute these figures and failed to develop its thin capitalization theory in furtherance of its argument. The Administrative Law Judge found that given the discussion of capitalization above, the Division's argument failed if the loans are considered either shareholder loans or contributions to capital. In either case, the Administrative Law Judge found that the corporation could have been considered sufficiently capitalized and concluded from the totality of the facts that it was.

The Division next contended that the actual substance of the relationship between Mr. Rueckwald and petitioner was that of lessor/lessee, where Mr. Rueckwald paid the corporation for the use of the aircraft. The Administrative Law Judge noted that there is no dispute that an actual lease did not exist and found that the record established that to lease the Mustang would have jeopardized petitioner's FAA airworthiness certificate and the license of any pilot who flew the aircraft after such a violation. Further, the Administrative Law Judge found that there was no market for such a rental.

The Administrative Law Judge rejected the Division's sweeping, unfounded generalizations that attribute all the contributions to capital and shareholder loans by Mr. Rueckwald as de facto rental payments for the use of corporate property.

Its financing strategy, consisting of capital contributions, bank loans and loans from shareholders, the Administrative Law Judge stated, was also valid, regardless of whether the

corporation had one or 20 shareholders. The Administrative Law Judge found that this method of financing did not constitute a rental payment subject to sales tax. The Administrative Law Judge noted that the Division failed to identify which, if any, shareholder loans constituted rental payments other than to say that if money was paid to the corporation it must have been for personal use of the aircraft. The Administrative Law Judge rejected this argument as pure conjecture.

The Administrative Law Judge pointed out that Mr. Rueckwald did not even fly the Mustang from December 2003 through September 2004 when the plane was in Florida, over half the period petitioner owned the Mustang, yet he continued to make loans or contributions to capital to assist petitioner in maintaining it, without any opportunity to use the asset. Yet, the Administrative Law Judge noted that the Division made no adjustments for the tax it claimed was due on the de facto lease theory.

Next, the Administrative Law Judge addressed a motion brought by petitioner prior to hearing, which objected to the timing of the Division's alternative theories for its assessment and the subsequent effect on the shifting of the burden of proof.

The Administrative Law Judge found that petitioner here suffered no violation of its due process rights and was accorded the fundamental considerations of fairness. The Administrative Law Judge found that prior to the hearing, each party was aware of the legal theories of its adversary through prehearing conferences with the parties, and neither party was surprised by additional theories at the hearing. Since petitioner has not asserted a violation of its due process rights, the Administrative Law Judge denied petitioner's motion.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge erred in denying his motion to shift the burden of proof to the Division on the alternative theories of liability it raised for the first time in its answer to the petition.

Petitioner argues, in opposition to the Division's exception, that it is entitled, as a non-resident of New York State, to an exemption from use tax under Tax Law § 1118(2) in connection with its out of state purchase, and later use within New York, of a vintage P-51 Mustang aircraft.

Petitioner also urges, in opposition to the Division's alternative arguments, that it is not subject to sales tax by reason of an alleged taxable lease or barter arrangement between itself and Mr. Rueckwald in connection with the P-51 Mustang. Finally, petitioner states that its corporate existence is valid and should not be disregarded and that Mr. Rueckwald should not be held liable for the tax asserted as if he purchased the aircraft personally.

The Division argues, as it did below, that while petitioner claims it is a lawful corporation, it has no assets. The Division questions how petitioner is going to repay Mr. Rueckwald for his so-called loans. If the loans were bona fide, the Division contends, the corporation would have to have a business purpose, and that is to sell the plane for a profit. Here, the Division seems to argue that if the plane cannot be sold for a profit, then petitioner is not in business (***see***, Tr., Oral Argument, pp. 7-8). The Division takes the definition of "doing business" from franchise tax regulations, in reaching its conclusion that the ownership of property for ultimate sale for profit is sufficient to disqualify a foreign corporation from the non-resident tax exemption.

Petitioner, on the other hand, states that even if the franchise tax definition was appropriately used here, petitioner was not doing business, since the record shows that the P-51 Mustang was not held by petitioner for investment, appreciation or profit.

Rather, petitioner urges, the corporation was formed to recover a prize piece of the family heritage, a 1944 Amphibian aircraft known as a Grumman "Widgeon" that had been owned by Mr. Rueckwald's grandfather. Petitioner states that the Mustang was not purchased for a commercial use or held as an investment for profit, but for display to the public.

In paragraph 5 of its Answer to the petition, the Division articulated a new, alternative theory of liability for the tax asserted as due. The Division argued that the corporation should be disregarded and that Mr. Rueckwald, as it sole shareholder and officer, should be held personally liable for the use tax as if he had personally purchased the plane. Petitioner urges that the Division is wrong and that just because a corporation does not use its assets in a commercial activity does not mean that it does not have a valid corporate purpose. In any event, petitioner argues that Mr. Rueckwald is not a party to this proceeding.

Petitioner claims that the Division has not alleged or shown that petitioner's formation and later purchase of the Mustang were devoid of any purpose or economic substance. Further, petitioner states that, the Division has not alleged or proven the petitioner's adoption of the corporate form was for a fraudulent or deceptive motive or that petitioner has engaged in fraudulent conduct with respect to the Division.

Petitioner urges that it is incorporated for a valid legal purpose of limitation of liability and that it has a very broad business clause. Petitioner argues that at the time the P-51 Mustang was purchased, Mr. Rueckwald had a reasonable expectation that it would appreciate in value, so that he could at least recover the purchase price and expenses paid amounts that were lent to the

corporation. Petitioner asserts that while it was a reasonable expectation at the time of purchase that Mr. Rueckwald would get his money back, by the time the airplane was sold, the market had "tanked." In any event, petitioner states, it was not an investment for profit.

OPINION

We reject petitioner's argument on motion that its right to a fair hearing has been compromised by the Division's late raising of its alternative arguments. While the Division may have raised its arguments late in the process, it is clear from this record that petitioner has had every opportunity to be informed of the issues and, adequately prepare arguments on those issues. We can find no legitimate basis for petitioner's claim and affirm the Administrative Law Judge on this issue.

We agree with the Administrative Law Judge that the Division has failed to carry its burden to show that petitioner or Mr. Rueckwald owes use tax on the P-51 aircraft because petitioner was a resident of New York for purposes of the use tax or that petitioner was a person engaged in or carrying on any employment, trade, business or profession in New York and not entitled to nonresident exemption (Tax Law § 1118[2]; 20 NYCRR 526.15[b][1]and [2]).

We hold that petitioner's mere ownership and maintenance of the P-51 Mustang, purchased in another state, did not constitute doing or carrying on a business in New York. The Division argues under sundry theories, but has not demonstrated by evidence, that petitioner is engaged in business in this State. Given the facts presented, we conclude that the corporation was not a resident and was not doing or carrying on a business in New York. In sum, because petitioner's corporation was not a resident and it did not do or carry on a business in New York, we conclude that it was exempted from New York State use tax under Tax Law § 1118(2).

Next, the Division urges that the corporate veil should be pierced and Mr. Rueckwald should be held personally liable for the assessed tax. The Division here makes the same arguments it made in ***Morris v. New York State Dept. of Taxation and Fin.***, 83 NY 2d 135 [1993].

The instant corporation was formed on April 16, 2002 for the general purpose of engaging in "any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware." The evidence shows that Mr. Rueckwald formed the corporation to purchase and own an aircraft and that petitioner, in fact, purchased two planes, the last of which was the P-51 Mustang, purchased in April 2003. The corporation owned and maintained these two aircraft until 2004. The limitation of liability has been recognized by the courts as a "perfectly legal" express purpose to incorporate (***Morris v. New York State Dept. of Taxation and Fin., supra, at 140***).

The concept of piercing the corporate veil is equitable in nature and assumes that the corporation itself is liable. The party seeking to pierce the corporate veil must establish that the corporate owners, through their domination, abused, in the formation or operation, the privilege of doing business in the corporate form in order to perpetrate some fraud or wrongdoing against that party, in this case, the Division, such that a court of equity will intervene. In ***Morris***, there was no evidence of an intent to use the corporation as a tax shield, and such evidence is not present here. As in the ***Morris*** case, the Division has failed to show any evidence of fraud or wrongdoing with respect to petitioner's formation or its conduct. We find that there is no basis for disregarding the corporate form and imposing liability on the officer. Additionally, since piercing the corporate veil presupposes that "the corporation is liable" (***Morris v. New York State***

Dept. of Taxation and Fin., supra, at 141), and we have found that the corporation owed no tax, there is no obligation on which Mr. Reuckwald can be held.

We have considered the Division's remaining alternative arguments and find them to be similarly without merit. Thus, the determination of the Administrative Law Judge is affirmed for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:.

1. The exception of Rochester Amphibian Airways, Inc. is denied;

2. The exception of the Division of Taxation is denied;

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

4. The petition of Rochester Amphibian Airways, Inc. is granted; and

5. The Notice of Determination, dated June 3, 2005, is canceled.

DATED:Troy, New York
August 6, 2009

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

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