STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
121 GRANT STREET, INC. **AND** **WILLIAM P. MACKIEWICZ, JR.**	:	DETERMINATION DTA NOS. 820276 AND 820277
for Revision of Determinations or for Refund of of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1997 through February 29, 2000.	:	

Petitioners, 121 Grant Street, Inc., 121 Grant Street, Buffalo, New York 14213-1601, and William P. Mackiewicz, Jr., 617 Richmond Avenue, Buffalo, New York 14222, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1997 through February 29, 2000.

On July 21, 2005 and July 28, 2005, respectively, petitioners, appearing by Duke, Holzman, Yeager & Photiadis, LLP (Gary M. Kanaley, Esq., of counsel), and the Division of Taxation, appearing by Christopher C. O'Brien, Esq. (Kevin R. Law, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by November 22, 2005, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation's cancellation of a sales tax fraud penalty assessed against a corporation also requires cancellation of such a penalty assessed against an officer or employee of the corporation under a duty to act for that corporation pursuant to Tax Law § 1131(1) and § 1133(a).

FINDINGS OF FACT[1]

1. Petitioner 121 Grant Street Inc. ("the Corporation") operates a retail liquor and beverage center under the name of Frontier Liquor and Beverage located at 121 Grant Street, Buffalo, New York. The Corporation is a Federal and New York State Subchapter S corporation of which petitioner William P. Mackiewicz, Jr., is the sole shareholder and officer.

2. During the period at issue, the Corporation filed sales tax returns which reported the following gross taxable sales and remitted the following sales tax:

Taxable Period Ended	Reported Taxable Sales	Sales Tax	Prepaid Sales Tax on Cigarettes	Net Sales Tax
05/31097	$313,484.30	$25,078.74	$3,294.44	$21,.784.30
08/31/97	$338,178.12	$27,054.25	$4,095.14	$22,959.11
11/30/97	$311,106.73	$24,888.54	$3,378.10	$21,510.44
02/28/98	$349,326.58	$27,946.13	$4,138.14	$23,807.99
05/31/98	$316,375.52	$25,310.04	$4,077.10	$21,232.94
08/31/98	$347,112.79	$27,769.02	$4,513.30	$23,255.72
11/30/98	$314,563.15	$25,165.05	$3,003.35	$22,161.70
02/28/99	$350,215.25	$28,017.22	$3,545.85	$24,471.37

[1] The parties submitted a stipulation of facts with respect to this matter. Such stipulated facts are incorporated in the Findings of Fact.

05/31/99	$313,884.18	$25,110.73	$3,875.90	$21,234.83
08/31/99	$345,805.30	$27,664.43	$4,277.95	$23,386.48
11/30/99	$332,542.76	$26, 603.42	$3,046.47	$23,556.95
02/29/00	$387,235.61	$26,603.42	$3,835.20	$27,143.65
Total	**$4,019,830.29**	**$321,856.42**	**$45,080.94**	**$276,505.48**

All of the returns were signed by petitioner William P. Mackiewicz, Jr.

3. In March 2000, the Division of Taxation ("Division") commenced a sales tax audit of the Corporation's business. Utilizing third-party vendor information, an analysis of bank deposits and various other records, the audit determined that reported taxable sales and reported sales tax were substantially understated, and the matter was referred to the Division's Revenue Crimes Bureau and to the Attorney General's office for a possible criminal prosecution of petitioner William P. Mackiewicz, Jr. Subsequently, Mr. Mackiewicz was indicted on the charge of Grand Larceny in the Third Degree in violation of New York Penal Law § 155.35. On December 19, 2002, Mr. Mackiewicz pled guilty to Grand Larceny in the Third Degree, admitting that between March 1997 and April 2000 he failed to remit to the Division the sales tax collected by the Corporation.

4. Additional taxable sales were determined on audit which resulted in additional sales tax as follows:

Taxable Period Ended	Audited Taxable Sales	Sales Tax per Audit	Tax Paid as Originally Reported	Additional Sales Tax Due
05/31/97	$915,813.23	$59,625.56	$21,784.30	$37,841.26
08/31/97	$986,203.55	$66,383.08	$22,959.11	$43,423.97
11/30/97	$906,493.56	$60,455.79	$21,510.44	$38,945.35
02/28/98	$853,948.15	$58,946.46	$23,807.99	$35,138.47

05/31/98	$942,242.91	$63,954.31	$21,232.94	$42,721.37
08/31/98	$1,095,197.83	$77,659.97	$23,255.72	$54,404.25
11/30/98	$927,894.45	$65,837.36	$22,161.70	$43,675.66
02/28/99	$1,036,348.34	$71,695.27	$24,471.37	$47,223.90
05/31/99	$885,339.98	$60,542.35	$21,234.83	$39,307.52
08/31/99	$1,026,255.18	$71,425.45	$23,386.48	$48,038.97
11/30/99	$931,440.64	$66,444.11	$23,556.95	$42,887.16
02/29/00	$783,758.67	$53,911.99	$27,143.65	$26,768.34
Total	**$11,290,936.49**	**$776,881.70**	**$276,505.48**	**$500,376.22**

As a result of the audit, on February 18, 2003 the Division issued a Notice of Determination to the Corporation for the additional sales tax, as well as fraud penalty and interest pursuant to Tax Law § 1145(a)(2).

5. On May 6, 2003, petitioner William P. Mackiewicz, Jr. was sentenced to a three-year conditional discharge. As part of a plea agreement, Mr. Mackiewicz agreed to pay restitution in the amount of $286,533.00, which amount was paid prior to his sentencing.

6. On September 15, 2003, the Division issued a Notice of Determination to William P. Mackiewicz, Jr. as a person responsible to collect and remit taxes on behalf of the Corporation. This notice assessed the same amounts of sales tax, fraud penalty and interest as were assessed against the Corporation, except that the amount of restitution previously paid by Mr. Mackiewicz had been applied to the tax amounts assessed for the periods ended May 31, 1997 through November 30, 1998.

7. Each petitioner protested the relevant notice by filing a Request for a Conciliation Conference before the Division's Bureau of Conciliation and Mediation Services. By conciliation orders dated September 3, 2004, the conciliation conferee sustained the Notice of

Determination in full as to petitioner William P. Mackiewicz, Jr., and sustained the tax and interest but cancelled the fraud penalty as to the Corporation.[2]

8. Each petitioner filed a timely petition with the Division of Tax Appeals protesting their respective Notice of Determination. Each petitioner agrees that the tax assessed is correct and that William P. Mackiewicz, Jr. was a person responsible for the collection and remittance of sales and use taxes on behalf of the Corporation. The parties to this proceeding agree that the Corporation has been relieved of all penalty liability and has been granted a reduction of interest. Petitioner William P. Mackiewicz, Jr., claims that lowering the overall liability of the Corporation requires the Division to lower his overall liability to an amount equal to the overall liability of the Corporation.

9. The only issue presented for determination is whether the cancellation of the fraud penalty and reduction in interest as to the Corporation by the conciliation conferee must, as a matter of law, act to cancel the fraud penalties and reduce the interest as to petitioner William P. Mackiewicz, Jr., as a responsible person.

CONCLUSIONS OF LAW

A. Petitioners raise no challenge to the method of the Division's initial determination of tax, interest and a penalty for fraud against the Corporation. In this regard, the total amount of tax, interest and penalty was asserted against the Corporation via a single Notice of Determination. Such notice was issued pursuant to Tax Law § 1138(a)(1), entitled "Determination of Tax," which authorizes the Division's determination of the amount of tax due where a return is not filed or, as in this instance, is filed but is incorrect or insufficient. It

[2] It would appear that sustaining interest as to the corporation refers to interest computed at a rate lower than that which was computed in connection with the fraud penalty per Tax Law § 1145(a)(2). In this manner, Finding of Fact "7", which states that tax and interest were sustained as to the Corporation, may be reconciled with Finding of Fact "8", which states that a reduction of interest was granted as to the Corporation.

provides for giving a taxpayer the requisite notice of such determination via the mailing of a Notice of Determination to "the person or persons liable for the collection or payment of the tax," to wit, in the first instance the Corporation. Section 1138(a)(1) goes on to provide that such a Notice of Determination shall be an assessment of the amount of tax specified therein (and subject to collection) except only for such "tax or other amounts" as to which the taxpayer has, within the requisite period of time, applied to the Division of Tax Appeals for a hearing or unless the Commissioner of Taxation shall of his own motion redetermine the same.[3]

B. The calculation bases for interest and penalties to which a taxpayer may be subjected are provided for in Tax Law § 1145, as opposed to Tax Law § 1138(a)(1). Implicated in this case is Tax Law § 1145(a)(2), which provides for the imposition of a fraud penalty equal to 50 percent of the amount of tax due, plus interest at the rate specified therein. Tax Law § 1145(a)(7) goes on to specify that the penalties and interest provided for in Tax Law § 1145 may be "determined, assessed, collected and enforced in the same manner as the tax imposed by this article [Article 28]." Thus, the determination and assessment of such penalty and interest amounts is to be made via a notice of determination authorized and issued pursuant to Tax Law § 1138(a)(1). Accordingly, the Corporation received a single Notice of Determination encompassing its liability for tax, interest and penalty.

C. Turning to the determination pertaining to petitioner William P. Mackiewicz, Jr., there is no dispute that he is a "person" who was properly subject to liability for the unpaid sales and use taxes, and attendant penalty and interest, determined against and owed by the Corporation.

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[3] In light of Tax Law § 1145(a)(7), as discussed in Conclusion of Law "B", the phraseology "tax or other amounts" would appear clearly to provide for those relatively common instances where, for example, a taxpayer chooses to concede the propriety of the amount of tax and interest encompassed within a notice of determination, but nonetheless wishes to contest the basis and amount of penalty included therein (i.e., seek reduction or abatement of penalty on the basis of establishing "reasonable cause" for excusing the failure upon which the imposition of penalty was premised).

Mr. Mackiewicz's exposure to such liability, authorized and set forth on a Notice of Determination issued pursuant to Tax Law § 1138(a)(1), (3)(B), arises under Tax Law § 1133(a), which states that:

> Every person required to collect any tax imposed by this article [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article. . . .

Tax Law § 1131(1), in turn, defines "persons required to collect tax" and a "person required to collect any tax imposed by this article [Article 28]" to include any officer or employee of a corporation who, as such officer or employee, is "under a duty to act for such corporation in complying with any requirement of [Article 28]."

D. The officer or employee under a duty is "personally liable for the 'tax determination' rendered against the corporation" (***see, Matter of Halperin v. Chu***, 134 Misc 2d 105, 509 NYS2d 692, ***affd*** 138 AD2d 915, 526 NYS2d 660, ***appeal dismissed in part, denied in part*** 72 NY2d 938, 532 NYS2d 845). The amount of a corporation's liability for which an officer or employee under a duty to act may be held liable, though denominated a "tax determination," includes not only tax, but also interest and penalty, including the penalty for fraud (***id.; see Lorenz v. Division of Taxation of Dept. of Taxation and Finance***, 212 AD2d 992, 623 NYS2d 455, ***affd*** 87 NY2d 1004, 642 NYS2d 621; ***Matter of Harding Caterers, Inc.***, Tax Appeals Tribunal, January 9, 1992; ***Matter of Hall v. Tax Appeals Tribunal***, 176 AD2d 1006, 574 NYS2d 862; ***Matter of Food Concepts v. State Tax Commn.***, 122 AD2d 371, 503 NYS2d 928, ***lv denied*** 68 NY2d 610, 508 NYS2d 1027). In the case at hand, the "tax determination" rendered against the Corporation was embodied in a single Notice of Determination issued pursuant to Tax Law § 1138(a)(1). This "tax determination" included tax, together with interest and fraud penalty as provided for and calculated pursuant to Tax Law § 1145(a)(2). Such latter

amounts (i.e., interest and penalty) were, in accordance with Tax Law § 1145(a)(7), properly determined "in the same manner as tax," that is via a single Notice of Determination, with no separate notice of determination contemplated or issued with regard to the interest and penalty. In turn, the amount of the "tax determination" rendered against the Corporation has been reduced by the Division, specifically by the elimination of the penalty for fraud and attendant reduction of interest (***see***, Finding of Fact "8"). Petitioner William P. Mackiewicz, Jr., does not contest that he is liable, as a person under a duty, for such "determination of tax" as was rendered against the Corporation, but only to the extent of such liability as remains against the Corporation.

E. The Division focuses on the fact that Tax Law § 1138(a)(3)(B) uses only the word "tax" insofar as it mandates a reduction to an individual officer or employee's liability for a corporation's obligation, thus arguing that a person under a duty is not eligible for a reduction to penalty or interest commensurate with a reduction afforded the Corporation for such items. In ***Matter of Halperin v. Chu (supra)***, the Court clearly stated that "any redetermination decreasing the corporation's tax liability will result in a decrease of petitioner's personal liability . . . ." The Division's interpretation of the reduction mandated in ***Halperin***, and codified at Tax Law § 1138(a)(3)(B), so as to isolate and focus on the word "tax," overlooks the statutory framework under which interest and penalty (including fraud penalty) are determined simply as a mathematical function of the amount of the tax involved. More importantly, this interpretation essentially ignores the clear statutory language that such amounts are "determined, assessed, collected and enforced in the same manner as the tax." In fact, this view is inconsistent with Tax Law § 1131(1) and § 1133(a). Such sections, under which petitioner William P. Mackiewicz, Jr.'s liability arises, like Tax Law § 1138(a)(3)(B), use only the word "tax," yet it is clear and

undisputed that the personal liability for the corporate officer or employee arising under such sections includes penalty and interest determined against the corporation (***Lorenz v. Division of Taxation of Dept. of Taxation and Finance, supra; Matter of Harding Caterers, Inc., supra; Matter of Hall v. Tax Appeals Tribunal, supra; Matter of Food Concepts v. State Tax Commn., supra***). Thus, the Legislature's inclusion of only the word "tax," as opposed to "tax, penalty and interest," in Tax Law § 1138(a)(3)(B) should not be read in such a limited fashion as the Division suggests, but rather should be read to include penalty and interest in the context of reductions to personal liability based on reductions to the corporate liability from which the personal liability is derived. Since the "tax determination" as it now exists against the Corporation includes only tax and interest, it follows that petitioner William P. Mackiewicz, Jr., can only be liable for such tax and interest, i.e., the amount of the "tax determination" rendered against the Corporation.

F. As noted earlier, there was no separate document issued with regard to interest or penalty, including in this case the fraud penalty. Rather the entire liability for tax, interest and penalty is set forth on the one Notice of Determination issued pursuant to Tax Law § 1138(a)(1), as to the Corporation, and on the one Notice of Determination issued pursuant to Tax Law § 1138(a)(3)(B), as to the individual petitioner Mr. Mackiewicz. This is consistent with the specific direction of Tax Law § 1145(a)(7) that penalty and interest are to be "determined, assessed, collected and enforced in the same manner as the tax imposed by [Article 28]." It is true that the bases and amounts of the components of such liability, i.e., tax, penalty and interest, are separately set forth on the computation summary section of the notices of determination, and each and every component thereof may be challenged through the hearing process (***see***, Conclusion of Law "A"). Thus, while identified as tax, penalty or interest, respectively, on the

notices the entire amount is, pursuant to Tax Law § 1138(a)(1) and § 1147(a)(7), nonetheless determined as a single tax liability, becomes a single liability when assessed thereafter, and is subject to collection and enforcement as such.[4] In turn, where the entire amount or, as here, some portion of a corporate liability is compromised by reduction or elimination, it follows that the benefit of such reduction or elimination must be afforded to the individual also being held liable as under a duty to act for the corporation. Though individually categorized as tax, penalty and interest, the total liability was determined "as tax" against the Corporation and, as derived therefrom, "as tax" against petitioner William P. Mackiewicz, Jr., and any reduction to such total liability against the Corporation must similarly reduce such total liability against Mr. Mackiewicz (***Matter of Halperin v. Chu***, ***supra***).

G. The Division argues that "[t]he explicit addition of the words 'penalty' in 1138(a)(3)(C)& (D) and 1138(a)(4) and 1138(b) and the omission from subdivision 1138(a)(3)(B) clearly indicates that penalty and interest are not to be included when 'tax' is referred to in subdivision (C)." This argument does not support the Division's position. First, Tax Law § 1138(a)(3)(C) and (D), respectively, refer directly *and only* to the determination of specific penalties imposed against filling station owners, per Tax Law § 1147(a)(1)(vii), and retail cigarette sellers, per Tax Law § 1145(a)(1)(viii). Since these provisions (Tax Law § 1138[a][3][C], [D]) speak *only* to penalties, it follows that the word "penalty" would, of necessity, appear therein. Next, Tax Law § 1138(b), referenced by the Division, deals directly with the issuance of so-called "jeopardy" assessments. Inclusion of the word "penalty" therein, together with the words "tax" and "interest," serves only to clearly authorize the Division's

[4] The Division states that Tax Law § 1145(a)(7) is merely an "administrative provision" providing the same assessment and enforcement powers for penalty and interest as for tax. This position understates the import of such section, as borne out by the ***Lorenz*** and ***Halperin*** cases, and overlooks the fact that all of the statutory sections at issue herein are found in the "Administrative Provisions" of Part IV of Tax Law Article 28.

determination of tax, penalty and interest and its issuance of a notice of determination therefor under circumstances which differ from those outlined in Tax Law § 1138(a)(1), to wit, section 1138(b) specifically allows the issuance of a notice of determination *prior to* the filing of a return and *prior to* the date when a return is required to be filed, in those instances where the Division believes that collection of "any tax" will be jeopardized by delay in issuing its determination.[5] Finally, the Division's reference to Tax Law § 1138(c) is inapposite. Such section simply provides for a taxpayer to consent to an amount of tax liability (including penalty and interest determined in the same manner as tax per Tax Law § 1145[a][7]) either prior to the issuance of a notice of determination or prior to expiration of the 90-day protest period after such issuance. Thus, a taxpayer may choose to consent to an assessment of tax, penalty and interest, thereby obviate the need for issuance of a notice of determination and, as a result, eliminate or reduce (where a notice has been issued) the 90-day statutory time period before a determination of tax ripens (per Tax Law § 1138[a][1]) into a collectible assessment. In sum, since the statutory sections referenced by the Division clearly pertain to specific situations other than the general determination and assessment provisions of Tax Law § 1138(a)(1), the inclusion or exclusion of the word "penalty" from such sections, as noted, has no bearing on this matter. As explained above, given the terms of Tax Law § 1145(a)(7), the absence of the word "penalty" from Tax Law § 1138(a)(3)(B) does not mean that penalty and interest are not included in the term "tax" as used in such provision.

H. The Division's reliance on ***Matter of Velez v. Division of Taxation of the Dept. of Taxation & Finance*** (152 AD2d 87, 547 NYS2d 444) is also misplaced. ***Velez*** serves to

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[5] In contrast, Tax Law § 1138(a)(1), (3)(B) provides for the issuance of notices of determination when a return is not filed (by its due date), or is filed (by its due date) but is incorrect or insufficient.

specifically confirm that a bulk sale purchaser's liability under Tax Law § 1141(c) is limited to the amount of tax owed by the seller, with such amount itself limited to the greater of either the purchase price or the fair market value of the business assets purchased. In ***Matter of Harding Caterers, Inc. (supra)***, the Tribunal acknowledged the ***Velez*** holding that a bulk purchaser liable for the seller's taxes could not be held liable for penalty and interest assessed against the seller, but distinguished the ***Velez*** situation, specifically pertaining to a bulk purchaser, from that of an officer or employee under a duty to act, on four bases. First, unlike section 1141(c), section 1131(3) contains no language limiting the responsible person's liability, and thus evidences no legislative intent to do so. Second, a bulk sale purchaser is in a difficult position to establish grounds for abatement of penalty since the purchaser would have to prove that another, the seller, had reasonable cause for the failure to pay (***Matter of Hall, supra***), whereas the "person under a duty" by definition either knows or should know why the corporation failed to pay. Third, there is a clear and logical integration between the responsible person provisions of section 1131(1) and the penalty and interest provisions of section 1145(a)(1). Fourth, the Appellate Division has already explicitly held the use of the term "tax" may be inclusive of penalty and interest (***see, Matter of Food Concepts v. State Tax Commn., supra***). Given the fact that ***Velez*** speaks specifically to the circumstances present in a bulk sale situation as dealt with directly in Tax Law § 1141(c), such case provides no support for the Division's position based on focusing on the presence of the word "tax" alone in Tax Law § 1138(a)(3)(B) as a basis for denying the reduction in question here.

I. It is critical to focus on the fact that it is from the corporate entity that the "person's" individual liability is derived. That is, without such corporate liability there is no liability on which the person under a duty to act would be obligated. It follows, then, that relief of the

corporate obligation, in whole or in part, must necessarily result in like relief of the individual's derivative personal obligation (***Matter of Halperin v. Chu, supra***). To hold otherwise is to essentially ignore the existence and role of the corporate entity. In this regard, the Division posits that the officer's conduct is the reason for the liability, including interest and penalty, determined against the corporation. This reasoning is always true since a corporation acts through its officers and employees. As such, they are under a duty to carry out the corporation's obligations, and properly remain liable and responsible for the liabilities arising against the corporation as a result of its failures to act, to the extent such liabilities continue to exist. Here, however, a portion of such corporate liability no longer exists, and hence the same cannot continue to be imposed against the individual officer. Without corporate liability there is no liability for which the individual under a duty to act for the corporation may be responsible, and hence be called to answer for, as a "person under a duty to act on behalf of such corporation" pursuant to Tax Law §§ 1131(1) and 1133(a). Stated directly, the liability of a person under a duty to act for a corporation may not exceed the liability of the corporate entity from which such personal liability is derived.

J. The petition of William P. Mackiewicz, Jr. is hereby granted to the extent that the Notice of Determination issued against him is to be reduced by elimination of the penalty for fraud and reduction of the amount of interest to the same extent as the reduction afforded the Corporation; the petitions of William P. Mackiewicz, Jr., and 121 Grant Street, Inc., are otherwise denied, and the notices of determination dated February 18, 2003 (as to the

Corporation) and September 15, 2003 (as to William P. Mackiewicz, Jr.), as so reduced, are sustained.

DATED: Troy, New York
May 11, 2006

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE