STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

DONG MING LI :

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 June 1, 1995 through August 31, 1997. :

In the Matter of the Petition :

of :

XIU YING ZHENG : DETERMINATION

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 June 1, 1995 through August 31, 1997. : DTA NOS. 820331, 820332 AND 820333

In the Matter of the Petition :

of :

YI BAO ZHENG :

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 June 1, 1995 through May 31, 1997. :

Petitioner Dong Ming Li, 41-06 111th Street, #3A, Corona, New York 11368, filed a petition 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 June 1, 1995 through August 31, 1997.

Petitioner Xiu Ying Zheng, 11 Delta Way, Clifton Park, New York 12065, filed a petition 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 June 1, 1995 through August 31, 1997.

Petitioner Yi Bao Zheng, 1130 8th Avenue, Schenectady, New York 12303, filed a petition 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 June 1, 1995 through May 31, 1997.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 29, 2005 at 10:30 A.M., with all briefs to be submitted by March 24, 2006, which date began the six-month period for the issuance of this determination. Petitioners appeared by Yiguan Li, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation is estopped from assessing sales and use taxes as the result of the erroneous granting of amnesty to petitioners.

II. 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. Yan's Chinese Buffet, Inc., was a restaurant located at 831 New Loudon Road, Latham, New York. Petitioners, Dong Ming Li, Xiu Ying Zheng and Yi Bao Zheng, were officers of the corporation.

2. The corporation was investigated and audited by the Division of Taxation's Revenue Crimes Bureau for violations of the New York State Sales and Use Tax Law. The investigation led to the filing of a criminal complaint by the New York State Attorney General's Office against Dong Ming Li, Xiu Ying Zheng and Yi Bao Zheng in the Albany City Court on July 24, 2000. On July 25, 2000, each petitioner pled guilty to one count of Petit Larceny, a class A misdemeanor, for his failure to remit sales tax collected by the corporation in the amount of $75,441.76 during the period June 1, 1995 through November 30, 1997. As part of the plea agreement, each petitioner was ordered to pay $20,000.00 in restitution, and they each executed confessions of judgment for $55,411.76 which were filed in the Albany County Clerk's Office on September 13, 2000.

3. On September 17, 2001, the Division of Taxation issued to petitioners Dong Ming Li and Xiu Ying Zheng notices of determination in the amount of $75,411.76 of unpaid and underreported sales tax as determined in the criminal investigation, plus fraud penalty and fraud interest. On the same date, the Division of Taxation ("Division") issued to petitioner Yi Bao Zheng a Notice of Determination in the amount of $66,595.06 of unpaid and underreported sales tax as determined in the criminal investigation, plus fraud penalty and fraud interest. The three notices of determination stated that petitioners were personally liable as responsible persons of Yan's Chinese Buffet, Inc., under sections 1131 and 1133 of the Tax Law. The difference in the amounts assessed in the notices of determination issued to Dong Ming Li and Xiu Ying Zheng and the Notice of Determination issued to Yi Bao Zheng is the result of the Division's not assessing Yi Bao Zheng for the quarter ended August 31, 1997. Each notice reflected a credit of $20,000.00 for the amount of restitution paid as part of the plea agreement in the criminal proceedings.

4. In 2002, New York State's third general tax amnesty program was enacted (L 2002, ch 85) and was effective for the period November 18, 2002 through January 31, 2003. The tax amnesty program offered an opportunity for eligible taxpayers to satisfy certain unpaid liabilities for income, withholding, corporation, sales and use and other designated taxes administered by the New York State Department of Taxation and Finance. Taxpayers were required to make full payment of the tax and a portion of the interest due and in exchange received a waiver of the penalty assessed, a reduction in the applicable rates of interest by two percentage points for tax periods covered by the amnesty program and immunity from future administrative, civil and criminal actions relating to liabilities for which amnesty was granted. (***See***, L 2002, ch 85.)

5. On December 20, 2002, Certified Public Accountant Jenny Liu telephoned the Division on behalf of petitioners to inquire about the amnesty program. Ms. Liu was told the balance due on the notices of determination under the amnesty program and that petitioners' assessments were eligible for amnesty. Ms. Liu could not recall whether she informed the Division that her clients had been convicted of a crime relating to the tax for which amnesty was sought. Ms. Liu, when she made the telephone call, was unaware of the requirements for amnesty. The Division's representative informed Ms. Liu that she should apply for amnesty under the corporation and that any payments made against the corporation's liability would be credited against petitioners' associated assessments. Ms. Liu was told that the balance due under amnesty as of March 15, 2003 was $92,097.40. On or about March 5, 2003, petitioners collectively made payments totaling $92,097.40, which amount was applied to the corporation's tax assessment and petitioners' associated individual assessments.

6. The Division's telephone bank representative was unaware that petitioners had been convicted of a crime relating to the tax for which amnesty was being sought, but only that these

particular tax assessments were eligible for amnesty. The representative did not have the authority to grant amnesty over the telephone. He could only determine whether a particular assessment was eligible for amnesty, but was unable to determine whether the individual applying for amnesty was eligible. When Ms. Liu telephoned on behalf of petitioners, due to their criminal conviction, an automated process informed the Division's Office of Tax Enforcement about the amnesty inquiry. The Office of Tax Enforcement's original decision was to deny amnesty to the corporation, and, as a consequence, to petitioners. Subsequently, following meetings and discussions involving members of the Audit Division, the Amnesty Program and the Office of Tax Enforcement, it was determined that the corporation was eligible for amnesty but the officers were not.

7. The Department of Taxation and Finance's computerized billing system is programmed to provide for payments or credits to be applied to associated assessments when a payment is received. Due to the fact that the corporation was to receive amnesty but the officers were ineligible, it was necessary for the Division to disassociate petitioners' assessments from the corporation's assessment. The Division's solution was to issue notices and demands with different identification numbers than on the original notices of determination to each petitioner, assessing fraud penalty and additional interest above that paid by the corporation under amnesty.

8. On October 14, 2003, the amnesty unit sent Ms. Liu a letter explaining that while the corporation was eligible for and had received amnesty, petitioners were not eligible due to their criminal convictions. The letter went on to explain that assessments would be issued to all responsible persons of the corporation for fraud and omnibus penalties. However, on or about October 27, 2003, the Division issued to each petitioner a Statement of Amnesty Account

reflecting the granting of amnesty on the notices at issue. These letters were issued to petitioners in error.

9. On November 3, 2003, the Division issued to petitioners Dong Ming Li and Yi Bao Zheng notices and demands for payment of additional tax due requesting payment of the interest and penalty due. On November 4, 2003, the Division issued to petitioner Xiu Ying Zheng a Notice and Demand for Payment of Additional Tax Due requesting payment of the interest and penalty due.

CONCLUSIONS OF LAW

A. Petitioners argue that the Division should be estopped from assessing penalty and interest because they relied upon the Statement of Amnesty Account issued by the Division on October 27, 2003. In general, unless there are exceptional facts which require its application to avoid a manifest injustice, the doctrine of estoppel does not apply to governmental acts (***Matter of Consolidated Rail Corp***., Tax Appeals Tribunal, August 24, 1991, ***confirmed*** 231 AD2d 140, 660 NYS2d 459, ***appeal dismissed*** 91 NY2d 848, 667 NYS2d 683). This rule is considered especially strong when a taxing authority is involved, because public policy supports the enforcement of the Tax Law (***Matter of Glover Bottled Gas Corp.***, Tax Appeals Tribunal, September 27, 1990).

The Tax Appeals Tribunal has utilized a three-part test in order to determine whether to invoke an estoppel. The test asks if there was a right to rely on the representation, whether there was such reliance and whether the reliance was to the detriment of the party who relied upon the representation (***see, Matter of Consolidated Rail Corp., supra***).

B. Petitioners do not have the right to rely on the Statement of Amnesty Account as they have no right to rely on statements that are contrary to law (***Heckler v. Community Health***

Services of Crawford County, 467 US 51). In addition, taxpayers are charged with knowledge of the law including subsequent judicial interpretation thereof, and the relevant statute clearly provided that "[a]mnesty shall also not be granted to any taxpayer who has been convicted of a crime relating to a tax that is the basis of the penalty or interest with respect to which amnesty is sought for any period or assessment for that tax" (L 2002, ch 85, § 1[f]). Finally, prior to the October 27, 2003 letter which erroneously granted amnesty, the amnesty unit had notified petitioners' representative by letter dated October 14, 2003 that petitioners were not eligible for amnesty due to their criminal convictions.

Petitioners have also failed to establish how their alleged reliance on the Statement of Amnesty Account was detrimental. Petitioners find themselves in the same circumstances as if amnesty had not been granted. Petitioners' main argument appears to be that the Division made a mistake which inured to their benefit and therefore the Division must accept the results of such an error. As the Court stated in ***E.F.S. Ventures Corp. v. Foster*** (128 AD2d 28, 514 NYS2d 981, 987, ***revd on other grounds*** 71 NY2d 359, 526 NYS2d 56):

> It is firmly established in this State, that the defense of estoppel may not be invoked against a governmental entity where that entity is acting in its governmental capacity . . . . These rules are not only conceptual, but pragmatic, for it would be counterproductive and ultimately harmful to the public to prevent an agency from fulfilling its legislatively ordained public function. It would be equally detrimental to bind an agency to a prior determination which was made in direct contravention of a statute enacted for the benefit of the public (citations omitted).

Therefore, it is determined that the doctrine of estoppel has no application in this matter.

C. Petitioners appear to argue that the cancellation of the fraud penalty and reduction in interest at the corporate level have the subsequent effect of canceling the fraud penalty and reducing the interest at petitioners' level as responsible persons of the corporation.

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 of penalty or interest commensurate with a reduction afforded the corporation for such items. In ***Matter of Halperin v. Chu*** (134 Misc 2d 105, 509 NYS2d 692, 695, ***affd*** 138 AD2d 915, 526 NYS2d 660, ***appeal dismissed in part, denied in part*** 72 NY2d 938, 532 NYS2d 845), 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 petitioners' 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,*** 212 AD2d 992, 623 NYS2d 455, ***affd*** 87 NY2d 1004, 642 NYS2d 621; ***Matter of Hall v. Tax Appeals Tribunal,*** 176 Ad2d 1006, 574 NYS2d 862***; Matter of Food Concepts v. State Tax Commn.,*** 122 AD2d 371, 513 NYS2d 928, ***lv denied*** 68 NY2d 610, 508 NYS2d 1027; ***Matter of Harding Caterers, Inc.,*** Tax Appeals Tribunal, January 9, 1992). 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 reduced interest, it follows that petitioners can only be liable for such tax and interest, i.e., the amount of the "tax determination" rendered against the corporation following the granting of amnesty.

D. The Division argues that "[t]he explicit addition of the words 'penalty' in sections 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 § 1145(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 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. 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 obviating 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" in 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.

E. 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 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.

F. 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 officers' 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 officers. 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).

G. The petitions of Dong Ming Li, Xiu Ying Zheng and Yi Bao Zheng are granted to the extent that the notices of determination issued against them are 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 Dong Ming Li, Xiu Ying Zheng and Yi Bao Zheng are otherwise denied, and the notices of determination dated September 17, 2001, as so reduced, are sustained.

DATED: Troy, New York
September 21, 2006

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE