STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AQUA-MANIA, INC.	:	DETERMINATION 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., 45765 NYS Route 12, Alexandria Bay, New York 13607, 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 December 1, 1997 through November 30, 2000.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 3, 2006 at 10:30 A.M., with all briefs to be submitted by October 23, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared by Bowers & Company CPAs, PLLC (Michael G. D'Avirro, CPA). The Division of Taxation appeared by Mark F. Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

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.

FINDINGS OF FACT

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 which 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:

> [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.

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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 .

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.

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. 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.

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[2] accrued

[2] 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).

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.

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[3] 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, 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.

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

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.,[4] 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

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

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.[5] The form also states that the place of delivery of the boat was Scranton, Pennsylvania and that delivery was made by petitioner.

R.M.Thomson, Ltd.

A Marine Purchase Agreement, dated January 18, 2000,[6] was entered into between petitioner and R.M. Thomson, Ltd., whose address was listed as 3511 Silverside Road, Suite 105, Wilmington, Delaware,[7] 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.

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

[6] 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.

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

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."

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,[8] 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

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

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,[9] 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 which 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.

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.

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[9] 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.

SUMMARY OF THE PARTIES' POSITIONS

17. Petitioner asserts the following:

a. The Division is estopped from assessing the fraud penalty because the plea agreement encompassed the full amount of petitioner's tax liability. This is true because the Memorandum of Plea Agreement contained the entire calculation of tax, penalty and interest. In addition, petitioner asserts that the transcript of the plea sentencing indicates that the plea by petitioner and Richard Merola "satisfies this particular judgment to the fullest extent . . . on all outstanding matters." Therefore, petitioner contends that the doctrine of estoppel is applicable because the Division made representations to petitioner which petitioner had the right to rely upon and which it did, in fact, rely upon to its detriment. Had petitioner or 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 reliance on information provided by the purchasers and petitioner's honest misunderstanding of the law. Petitioner never admitted the commission of fraud; Mr. Merola admitted only to making a mistake. In addition, the Division, as late as October 8, 2003, had no intention of assessing the fraud penalty as evidenced by the revised calculation sent to petitioner which did not assess the fraud penalty. Subsequently, on November 23, 2003, a further revision was sent to petitioner which assessed the fraud penalty. Fraud penalty was 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. As to the sales at issue:

(1) Neil Lajeunesse, Ltd. - Petitioner maintains that the sale never took place because certain conditions of the sale were not met and the purchaser did not, therefore, ever take possession of the boat. The boat was later sold to a Canadian customer and the boat was delivered in Canada.

(2) Sean Donegan - The sale was made to a purchaser who represented that the boat would be delivered and used at his Florida residence. Once the conditions as set forth in the punch list were met, the buyer arranged for his own delivery by common carrier.

(3) John J. Sommerwerck - The sale was made to someone who represented that he was a nonresident of New York and that use of the boat and delivery thereof would be made outside New York. After certain contract terms were satisfied, the boat was delivered to Erie, Pennsylvania.

(4) Michael Brienzi, Ltd.; (5) R.M. Thomson, Ltd.; and (6) G.M. Boats, Ltd. - The sales were made to Delaware corporations although the boats were subsequently used in New York which required the purchasers, not the seller, to remit use tax directly to the State.

18. In response, the Division contends:

a. The sale of the boats occurred not upon final payment, but upon delivery. 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.

b. As to the particular sales at issue:

(1) Neil Lajeunesse, Ltd. - The purchase invoice lists the corporation as the purchaser, but the invoice is signed by Neil Lajeunesse individually. The corporation has the same address (and phone number) as the other corporations which also allegedly were purchasers of boats from petitioner. The purchase invoice indicates that the transaction was exempt from tax but sets forth no basis therefor. The certificate of title was signed over to Neil Lajeunesse who thereafter executed a bill of sale to Daniel Keyes. The sale to Lajeunesse was never canceled and no refund of the purchase price by petitioner has been shown.

(2) Sean Donegan - Mr. Donegan is a resident of Alexandria Bay, New York and the boat remained there for months after the sale. Thereafter, Mr. Donegan paid a designee to pick up the boat and transport it out of state. The AU-186 form for this transaction was executed approximately two and one-half years after the sale. The transaction occurred in New York, payment was received in New York and the boat was picked up in New York by Mr. Donegan's designee.

(3) John J. Sommerwerck - Mr. Sommerwerck was a New York State resident. His name was typed onto the purchase invoice and the "Ltd." was handwritten afterward. The purchase invoice indicates that delivery was at Alexandria Bay, New York. Mr. Sommerwerck, in his letter to the RCB, stated that he did not sign an AU-

186 form. The purchaser arranged for transportation of the boat to Erie, Pennsylvania by his designee.

(4) Michael Brienzi, Ltd. - Mr. Brienzi was a New York State resident and the corporation had the same address and phone number as the other corporations who were purchasers of boats from petitioner. The purchase invoice is signed by Mr. Brienzi individually and lists the purchaser as Michael Brienzi (typed) and Ltd. (handwritten). The invoice states that the boat was to be picked up at Alexandria Bay. There was no evidence of delivery outside New York.

(5) R.M. Thomson, Ltd. - Mr. Thompson owns a business in Alexandria Bay, New York. There was no information on the invoice concerning delivery. The address of corporation was the same as other purchasers at issue in this proceeding.

(6) G.M. Boats, Ltd. - Gloria Margott was a New York State resident. The Delaware corporation had the same address and phone number as the others at issue herein. The sales invoice contained no delivery information. Following the plea by petitioner and Mr. Merola, Ms. Margott paid the tax, interest and penalty due on the transaction.

c. The Division has established by clear and convincing evidence that petitioner was guilty of fraud. Petitioner pled guilty to the crime of failure to collect tax, a class E felony. Since tax fraud is an element of the crime to which petitioner pled guilty, it is estopped from contesting the civil fraud penalty for the period at issue. Petitioner's plea statement contains an admission that petitioner committed 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 underreporting of sales tax due which

is an indicia of fraud, and the underreporting was consistent and substantial for a continuous period.

d. The restitution ordered by the criminal court does not preclude the Division from assessing additional tax, interest and penalties.

CONCLUSIONS OF LAW

A. As to petitioner's contention that the Division should be estopped from assessing the fraud penalty because the plea agreement encompassed the full amount of petitioner's tax liability, such contention is without merit as to the fraud penalty and to other penalties and interest assessed herein.

It is well established that 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). 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."

Since the fraud penalty imposed by Tax Law § 1145(a)(2) was not part of the criminal restitution, the Division may assert this penalty by issuance of a Notice of Determination following the conclusion of the criminal matter.

B. However, while the Division may not be estopped from assessing the fraud penalty (subject to its sustaining its burden of proof to show that the fraud penalty was justified), it must,

in fact, be estopped from assessing additional sales and use tax against this petitioner. This is true because, in the present matter, it is clear that there is no "remaining unpaid corporate sales tax."

Pursuant to 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 which were the subject of the criminal proceeding and which are now the subject of the present matter was $55,974.78.

In fact, due to a slight error by the RCB in computing the proper amount of restitution (***see***, Finding of Fact "15"), petitioner has actually paid an amount of tax which is greater than that computed by the auditor as the tax due on the six sales at issue. Petitioner has, therefore, paid the entire amount of sales and use tax due to the Division. Since there is no "remaining unpaid corporate sales tax," the Division is not entitled to assess the tax twice. Accordingly, the additional tax assessed by the Notice of Determination issued February 17, 2004 must be canceled.

C. Petitioner contends 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. Petitioner, by its president, Richard Merola, executed consents extending the period of limitation for assessment of sales and use taxes due whereby it was agreed that taxes for the period June 1, 1997 through February 28, 1998 could be assessed at any time on or before March 20, 2001. While the period June 1, 1997 through November 30, 1997 is not at issue in this proceeding, it is clear that the last sales tax quarter covered by the consents (December 1, 1997 through February 28, 1998) would be time-

barred since the Notice of Determination was not issued until February 17, 2004. In addition, for the remaining periods at issue, March 1, 1998 through November 30, 2000, Tax Law § 1147(b) provides that an assessment must be issued within three years from the date of filing of the returns.

It appears from the record that with the exception of the last sales tax quarter at issue, September 1, 2000 through November 30, 2000, all returns were timely filed. For the period September 1, 2000 through November 30, 2000, while due on or before December 20, 2000, the return was not received until January 8, 2001. Nevertheless, pursuant to Tax Law § 1147(b), the assessment for this period would have to have been issued on or before January 8, 2004. As noted above, the Notice of Determination was not issued until February 17, 2004. Therefore, unless it can be shown that petitioner filed returns which were willfully false or fraudulent with intent to evade tax, the assessment would be time-barred (***see***, Tax Law § 1147[b]).

D. Tax Law § 1145(a)(2) provides, in pertinent part, as follows:

> If the failure to pay or pay over any tax to the commissioner of taxation and finance 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 it could be argued that in the present matter, the fraud penalty cannot now be imposed because it consists of "a penalty of fifty percent of the amount of tax due" and, based upon Conclusion of Law "B", there is now no tax due, that argument is without merit. While the additional tax assessed has been canceled herein, that cancellation is not based upon a finding that there was no additional tax due, but was instead based upon the fact that petitioner has already paid the full amount of the tax assessment. Accordingly, if found to be warranted, the Division is within its statutory authority to impose the fraud penalty. In addition, since petitioner

did not pay the penalties and interest as set forth in the Affidavit for Judgment by Confession executed October 3, 2003, the Division properly assessed penalties and interest in the Notice of Determination issued February 17, 2004.

E. The burden of proving fraud rests with the Division (***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989; ***Matter of Sener***, Tax Appeals Tribunal May 5, 1988). 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). 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. 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).

Based on the record herein, it is hereby determined that based upon the pleas of guilty by petitioner to the class E felony of violating Tax Law § 1817(c)(2)(a), wherein it was admitted that the failure to collect sales tax was done so "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, petitioner is collaterally estopped from challenging the fraud penalty.

Collateral estoppel is a legal doctrine which 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 *(**see**, **Buechel v. Bain***, 97 NY2d 295, 303, 740

NYS2d 252, 257; ***Ryan v. New York Tel. Co.,*** 62 NY2d 494, 500, 478 NYS2d 823*;* ***Matter of Attea***, Tax Appeals Tribunal, November 18, 1999*)*.

Two prerequisites must be met before collateral estoppel may be applied: (1) the issue to which preclusion is sought must be identical with that in the prior proceeding even if the causes of action are not the same, and the issue must be decisive of the present proceeding; and (2) the litigant who will be held precluded in the present matter, or one in privity with him, must have had a full and fair opportunity to litigate the issue in the prior proceeding. The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate (***see***, ***D'Arata v. New York Cent. Mut. Fire Ins. Co.,*** 76 NY2d 659, 563 NYS2d 24; ***Staatsburg Water Co. v. Staatsburg Fire District***, 72 NY2d 147, 531 NYS2d 876; ***Capital Tel. Co. v. Pattersonville Tel. Co.***, 56 NY2d 11, 451 NYS2d 11).

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.

Both petitioner and Richard Merola had a full and fair opportunity to litigate these issues rather than entering pleas of guilty to the aforementioned criminal offenses which they elected to do. Based upon such pleas, it must be 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 which 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).

By virtue of the holding herein, it is unnecessary to discuss the elements of fraud and their application to the six transactions which gave rise to this proceeding.

F. Since it has been determined that the imposition of the fraud penalty pursuant to Tax Law § 1145(a)(2) was proper and since Tax Law § 1147(b) provides that in the case of a willfully false or fraudulent return with intent to evade the tax, the assessment of tax may be made anytime, the assessment in the present matter is not time-barred.

G. The petition of Aqua-Mania, Inc. is granted to the extent indicated in Conclusions of Law "B" and "D"; the Division of Taxation is hereby directed to modify the Notice of Determination issued February 17, 2004 accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
April 19, 2007

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE