

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>LEONARD BROWN</b>	:	
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, 2000 through	:	
June 30, 2002.	:	
<hr/>		DETERMINATION
In the Matter of the Petition	:	DTA NOS. 821005
of	:	AND 821012
<b>PAOLO NARDI</b>	:	
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, 2000 through	:	
June 30, 2002.	:	
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Petitioners, Leonard Brown and Paolo Nardi, 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 June 1, 2000 through June 30, 2002.

A consolidated hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 26, 2006 at 10:30 A.M. and was continued to conclusion at the same location on January 4, 2007 at 10:30 A.M., with all briefs to be submitted by June 18, 2007, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Isaac

Sternheim, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (James Della Porta, Esq., of counsel).

### ***ISSUES***

I. Whether petitioners are collaterally estopped from contesting their status as responsible officers under Tax Law §§ 1133(a) and 1131(1) by virtue of their respective guilty pleas to violations of Tax Law § 1817(b)(1) and (2).

II. Whether, under the instant facts and circumstances, the corporate form of the subject business enterprise, New York Rent A Car, Inc., should be disregarded and such business should be deemed a partnership.

III. Whether the Division of Taxation properly assessed tax due from petitioners as persons responsible to collect and pay sales tax on behalf of New York Rent A Car, Inc., and not on behalf of certain affiliated corporations, under whose names sales tax returns were filed and tax paid.

IV. Whether petitioners were persons responsible for the collection and payment of sales and use taxes on behalf of New York Rent A Car, Inc., within the meaning and intent of Tax Law §§ 1131(1) and 1133(a).

V. Whether fraud penalty is properly imposed against petitioners herein.

VI. If not, whether negligence penalty is properly imposed.

VII. Whether the subject notices of determination were issued beyond the relevant period of limitations for assessment.

### ***FINDINGS OF FACT***

1. New York Rent A Car, Inc. (NYRAC) was a New York corporation engaged in the business of renting cars on a daily or short-term basis. It was affiliated in this enterprise with

approximately 65 other corporations. Although the precise relationship among these affiliated corporations is not in the record (e.g., parent-subsidary, brother-sister), the record is clear that NYRAC and the affiliated corporations operated as a single enterprise and that such enterprise was run by David Ourian and Elliot Zolin.

2. NYRAC and its affiliated companies collected sales tax on all of their car rentals.

3. NYRAC's main office was located at 3231 Junction Boulevard, East Elmhurst, Queens, New York. This office had a rental car location on the main floor and NYRAC's accounting (or bookkeeping) office in the basement. NYRAC also had an office next door to 3231 Junction Boulevard, where all of NYRAC's motor vehicle records, such as title, registration and insurance records, were kept. Mr. Ourian's office was at this location.

4. In addition to 3231 Junction Boulevard, NYRAC rented cars at 14 other locations throughout the New York metropolitan area. One location did business under the name "Village Rent A Car" and another under the name "Midtown Rent A Car." The rest of the locations did business as "New York Rent A Car." All of the locations used a logo featuring an outline of the New York City skyline and a key.

5. NYRAC maintained a web site during the relevant period. The web site referred to "New York Rent A Car" and its "fifteen locations in greater New York." The web site made no reference to any of the affiliated companies.

6. Generally, a NYRAC-affiliated corporation would be attached to or associated with a particular rental location.<sup>1</sup> The corporation would also open a bank account, and credit card rental receipts for that location would go directly into that bank account.

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<sup>1</sup> Obviously, with 65 corporations and 15 rental locations not all corporations were associated with a location.

7. The vehicles rented by NYRAC and affiliated companies were organized into “fleets” according to the ownership of the rental vehicles. Generally, such fleets of vehicles were associated with particular rental locations, but could be moved to different locations if a need arose. Fleet #1 was owned by Mr. Ourian and Mr. Zolin and was associated with 11 locations. Fleet #5 was owned by Mr. Ourian, Mr. Zolin and Yuval Havatzelet and was associated with NYRAC’s Village Rent A Car and NYRAC’s location in Brooklyn. Fleet #7 was associated with NYRAC’s locations in the Bronx and Englewood, New Jersey, and was owned by Mr. Ourian, Mr. Zolin, Mr. Havatzelet, Shlomo Bashan and petitioner Leonard Brown. Fleet #7 was also associated with a NYRAC-affiliated entity called Sterling Rent A Car. There is also reference in the record to a Fleet #36 owned by Mr. Ourian, Mr. Zolin, Mr. Havatzelet and another individual. There is no information in the record regarding locations associated with Fleet #36.<sup>2</sup>

8. Profits earned by the various fleets were paid to the owners of the fleets.

9. The equity interests of the fleet owners were maintained on a spreadsheet in NYRAC’s computer.

10. Although ownership of the rental vehicles was organized by fleets, title to vehicles was held by NYRAC-affiliated corporations.

11. Each rental location provided a daily report to the main accounting office at 3231 Junction Boulevard. This report included copies of rental agreements, credit card receipts, a cash report and cash. The accounting office would then reconcile the credit card receipts and the cash to the business report. The cash was then stored in a safe in the accounting office. The cash was

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<sup>2</sup> The record indicates that there was also a Fleet #28 owned by Mr. Ourian, Mr. Zolin and one Moshe Tweg. Mr. Tweg died prior to the period at issue, however, and it appears that the locations associated with Fleet #28 became associated with Fleet # 1.

removed from the office safe every day or two by Mr. Ourian and was used to pay expenses, as well as wages and bonuses to employees. The cash was also sometimes distributed as profits to the fleet owners.

12. NYRAC maintained a single set of books for all of the affiliated companies. Included in NYRAC's books was a single sales tax accrual account for all of the affiliated companies. Sales tax collected by any affiliated company was credited to the accrual account. All records of NYRAC and the affiliated companies were maintained by the accounting department in the basement at 3231 Junction Boulevard.

13. The accounting department was headed by petitioner Paolo Nardi. Mr. Nardi was NYRAC's controller throughout the period at issue. Mr. Nardi supervised a bookkeeping staff of five or six.

14. Mr. Nardi began working for NYRAC in 1995. He was hired as the head of the accounting department with the title of controller. At the time he was hired, he had worked in bookkeeping for about five years. He has a degree in accounting.

15. The responsibilities of the accounting department under Mr. Nardi included bank reconciliations, credit card reconciliations, and the filing and maintaining of records.

16. Mr. Nardi was responsible for NYRAC's general ledger, which was maintained on a computer using a "Quickbooks" accounting system. He regularly made entries in the general ledger.

17. Mr. Nardi developed the chart of accounts used in NYRAC's general ledger. The chart of accounts contains a category of accounts labeled "Partners Contribution" and lists such accounts for Mr. Ourian, Mr. Zolin, Mr. Havatzelet and petitioner Leonard Brown. The chart of

accounts also contains a category of accounts labeled "Partners Withdrawal" and lists such accounts for Mr. Ourian, Mr. Zolin, Mr. Havatzelet, Mr. Brown, and Mr. Nardi.

18. As part of his duties, Mr. Nardi regularly prepared checks for Mr. Ourian's signature. Included among the checks prepared by Mr. Nardi for Mr. Ourian's signature were checks in payment of creditors.

19. Mr. Nardi did not have authority to sign checks for NYRAC or any of its affiliated companies. Nor did he sign any such checks.

20. Mr. Nardi's duties as controller included involvement in NYRAC's dealings with banks and other finance companies. In 2002, at Mr. Ourian's direction, he discussed possible loan terms with a private finance entity. Also at Mr. Ourian's direction he discussed the terms of a letter of credit with a bank's representative.

21. Mr. Nardi had the authority to recommend hiring and firing within the accounting department. Mr. Ourian had the final decision on such matters.

22. Mr. Nardi also had access to NYRAC's Bluebird computer record keeping system, which contained data on the motor vehicles used in the rental car business. Mr. Nardi was not, however, involved in the vehicle rental aspect of the business.

23. Mr. Nardi was custodian of corporate records such as certificates of incorporation for NYRAC and affiliated companies. He rarely, if ever, accessed such records.

24. An e-mail message dated September 26, 2002 from Mr. Zolin to NYRAC's managers indicated that Mr. Zolin would "direct" Mr. Nardi to pay a fine imposed on one of NYRAC's locations for failing to clean refuse in the street in front of the location.

25. An e-mail message from Mr. Zolin to Mr. Nardi also dated September 26, 2002 inquired as to why certain real property taxes for 3231 Junction Boulevard had not been paid.

26. NYRAC was not registered as a vendor for sales tax purposes and did not file sales tax returns.

27. Several of the affiliated companies were registered as vendors for sales tax purposes and filed sales tax returns. Specifically, the following affiliated companies filed sales tax returns at various points during the period at issue: West Management, Woolfie Management, Sterling Systems, UES Sales, DIL Leasing Co., Tristate Leasing, 333 Adams St. Management, JFL Management, MGY Services, Priceking RAC, RCSL Management, Flatbush Leasing, and Ardan Management.

28. Early in his career at NYRAC, Mr. Nardi became aware that NYRAC and the affiliated companies were consistently collecting more sales tax than they were remitting. Mr. Nardi was aware that this failure to remit sales tax collected was reflected in the consistent and steady increase to NYRAC's sales tax accrual account over time. At no point during the relevant period did the balance in the accrual account approach zero at the end of a sales tax period as it would if the full amount of tax collected was remitted.

29. Mr. Nardi discussed the fact that NYRAC was consistently collecting more sales tax than it was remitting with Mr. Ourian.

30. As noted, sales tax returns were filed on behalf of some of the NYRAC companies. Such returns were prepared by NYRAC's accountant, Charles Frenkel. Mr. Frenkel had been hired by NYRAC upon the recommendation of Mr. Nardi. In preparing such returns, Mr. Frenkel used sales and sales tax figures provided by NYRAC. The sales and sales tax figures were generally provided to the accountant by Mr. Ourian.

31. NYRAC, usually through Mr. Ourian, knowingly provided the accountant with sales and sales tax amounts that were far below the actual figures. With respect to the October 1999

part-quarterly sales tax period, Mr. Ourian directed Mr. Nardi to submit sales figures to the accountant at 50 percent of sales for 5 of the 6 corporations that were filing returns and 33 percent for the remaining corporation. Mr. Nardi followed this direction in reporting figures to the accountant. Whenever Mr. Ourian transmitted sales and sales tax information to the accountant, Mr. Nardi received a copy of the memorandum containing such information. Mr. Nardi was thus aware that the sales and sales tax figures transmitted to the accountant were inaccurate.

32. Mr. Nardi did not sign any sales tax returns filed by any of the NYRAC companies.

33. NYRAC also ran a franchise for Cruise America, a recreational vehicle rental business, at one of its locations. Revenue from this business went directly into accounts controlled by Cruise America. NYRAC was paid a commission by Cruise America for its efforts on a biweekly or monthly basis. NYRAC earned \$83,723.42 in commissions during the period January 1 through October 31, 2001. When NYRAC stopped this Cruise America franchise operation in October 2001, it had a balance in its Cruise America account of \$26,100.00.

34. Mr. Nardi received a bonus of \$8,000.00 in 2001 for his handling of the Cruise America operation. This was labeled "partners withdrawal" on the books of NYRAC.

35. Petitioner Leonard Brown began working for Mr. Ourian and Mr. Zolin in their rental car business in 1982 at the age of 19 while he was in college, and he continued to work for their rental car business through the period at issue. He started at the entry-level position of service agent, moved up to counter work, which involved the renting of cars to customers, and then became the office manager of the one rental office they had at the time. The Ourian and Zolin car rental business grew with more locations, and Mr. Brown continued to work there. At all times relevant to the instant matter, Mr. Brown was general manager of NYRAC.

36. Mr. Brown attended college for two years. He did not graduate. He has no background in finance.

37. As general manager of NYRAC, Mr. Brown was in charge of day-to-day operations at all locations and all employee supervision and training. NYRAC had about 5 employees per location and 15 locations during the period at issue. On one occasion Mr. Brown consulted with Mr. Ourian regarding relocating employees from location to location to avoid complacency. He also consulted with Mr. Ourian on a question of bonuses for area managers and the possibility of insuring more cars so they could be rented for an upcoming holiday season.

38. Mr. Brown was involved in setting rental rates by researching the rates of competitors. Mr. Ourian and Mr. Zolin made the final decisions regarding rental rates.

39. Mr. Brown had the authority to recommend hiring and firing. Mr. Ourian had the final decision on such matters.

40. Mr. Brown did not have authority to sign checks for NYRAC or any of the associated companies. Mr. Brown did not sign any checks for NYRAC or any of the related companies.

41. Mr. Brown was not involved in the preparation of any tax returns for NYRAC or any of the associated companies.

42. Mr. Brown was not involved in the accounting, bookkeeping, or record keeping aspects of NYRAC's operation.

43. Mr. Brown attended dinner meetings with Mr. Ourian and others at which NYRAC's finances and commissions were discussed.

44. On one occasion, Mr. Brown met with a salesman soliciting business from NYRAC.

45. As part of a Commercial Credit Application by Talron Enterprises, Inc., doing business as New York Rent A Car, dated March 4, 2002, Mr. Brown was listed as general

manager and a five-percent owner. Mr. Brown completed a personal financial statement as part of the application. On the same application, Mr. Nardi was listed as a contact person and a “key” member of management with the position and title of controller.

46. In 1999, Mr. Brown made two payments totaling \$63,000.00 to Sterling Rent A Car, an entity formed to operate a new NYRAC location at 604 East Fordham Road in the Bronx and a location in Englewood, New Jersey. In exchange for such payments, Mr. Brown received a 20-percent interest in the business at those locations. Other principals in Sterling were Mr. Ourian, Mr. Zolin and one Shlomo Bashan. Sterling was operated in the same manner as any other branch or location of NYRAC.

47. Mr. Brown’s duties with respect to the Sterling Rent A Car locations were the same as his duties with respect to the other NYRAC locations.

48. In an e-mail from Mr. Ourian to the ownership e-mail group dated April 20, 1999, Mr. Ourian stated that all partners in Sterling should start to draw \$1,000.00 per month beginning June 1, 1999. Mr. Brown admitted to receiving a few payments of \$1,000.00 but denied receiving any other payments in respect of Sterling. A NYRAC workpaper in the record titled “Partners Withdrawal” shows a total of \$120.00 in such withdrawals for Mr. Brown for 2000 and 2001.

49. The record is inconclusive as to the total amount of payments Mr. Brown received in respect of his investment in Sterling.

50. A “Partnership Worksheet” prepared on July 6, 1999, indicates that Sterling Rent A Car was a partnership with Mr. Ourian, Mr. Zolin, Mr. Havatzelet, Mr. Brown, and Mr. Bashan as partners each with an equal 20 percent interest. Attached to the same document are corporate “Bylaws of Sterling RAC.”

51. An office e-mail from David Ourian to the ownership e-mail group dated April 20, 1999 states in part that “Shlomo [Bashan] would like to increase his stock (shares) in Sterling.”

52. Other than his interest in Sterling, Mr. Brown had no equity interest in NYRAC or any of the associated companies.

53. While serving as general manager of NYRAC, Mr. Brown agreed to the terms of and executed an Employment Agreement, dated January 14, 1999, by which NYRAC agreed to employ him as general manager, subject to the general supervision, advice and direction of NYRAC and NYRAC’s supervisory personnel. The agreement set his compensation at \$1,295.00 per week plus commissions based on increases to NYRAC’s time and mileage figures, i.e., car rental revenue. The Employment Agreement described Mr. Brown’s duties as general manager as follows:

Manage and supervise all aspects of NYRAC operations, personnel, pricing, reservations, branch development, and all financial matters.

54. The employment agreement contained a confidentiality agreement and noncompete agreement. It also specifically provided that Mr. Brown did not have authority to enter into any contracts for or on behalf of NYRAC without first obtaining the express written consent of NYRAC.

55. The Employment Agreement was not executed by NYRAC.

56. Like many NYRAC employees, Mr. Brown and Mr. Nardi were paid by paycheck, company check and in cash for their services. Their compensation consisted of salary and commissions. The commissions were based on increases in NYRAC’s time and mileage receipts (i.e., car rental receipts). Mr. Brown’s commission was five to six percent of increases to time and mileage receipts and Mr. Nardi’s commission was one percent of such increases.

57. By check dated July 7, 1999, Mr. Brown was paid \$22,897.00 as a commission. The memo on the check indicates “T&M Comm. 06/99.” The check was drawn on the account of Liberty Management Services, Inc., a NYRAC-associated company. A note from Mr. Ourian to Mr. Brown accompanying the check states: “Len, few people in the RAC industry can show a check like this! You are one of the few! Congratulations!”

58. Some NYRAC employees were paid solely in cash. NYRAC did not pay FICA or withholding taxes on cash compensation to its employees.

59. Mr. Ourian, Mr. Zolin, Mr. Brown, and Mr. Nardi were NYRAC’s highest paid employees. According to NYRAC’s general ledger, their wages for 2000 and 2001 were as follows:

Year	Ourian	Zolin	Brown	Nardi
2000	\$94,350.00	\$94,811.00	\$130,374.00	\$84,017.04
2001	\$96,200.00	\$98,978.34	\$81,879.00	\$80,001.05

60. While NYRAC’s records indicate wages as noted above, Mr. Nardi’s 2000 New York return indicates that he received wages of \$25,500.00 from Jaxas-Stanton Management, Inc., a NYRAC-associated company. Mr. Nardi’s 2001 New York return indicates wages of \$26,000.00 from PNA Management, Inc., also a NYRAC-affiliated company. The wages reported on Mr. Nardi’s 2000 and 2001 W-2 forms equal the amount paid to him by paycheck.

61. NYRAC’s records also show that Mr. Nardi received \$59,608.00 and \$86,802.00 in income in 1998 and 1999, respectively, while his New York returns indicate \$15,716.00 and \$15,173.00 in wages from a NYRAC-affiliated company during those years.

62. NYRAC had an internal e-mail system which enabled employees to communicate within that system. Every employee of NYRAC was assigned a user number for use in the

e-mail system. NYRAC's internal e-mail system also listed certain employees as members of certain e-mail groups. Mr. Brown was a member of, among others, the following groups: Branch Managers/Assistant Manager, Owners, Accounting Dept. and Area Managers. Mr. Nardi was a member of the Branch Manager/Assistant Manager, Accounting Dept. and Area Manager groups.

63. An e-mail message from Mr. Ourian to Mr. Brown dated June 9, 2000 states: "With the increase [sic] business opportunities, it's time to start and re-think our corp. structure." The e-mail then lists the current responsibilities of certain employees. Mr. Ourian is listed as responsible for Finance, Senior Management and Fleet, Mr. Brown is listed as responsible for Operations/Rates, and Mr. Nardi is listed as responsible for Accounting. The memo proposes that Mr. Brown become responsible for Senior Management and that Mr. Nardi become responsible for Finance. The day-to-day responsibilities of neither Mr. Nardi nor Mr. Brown changed as a result of this e-mail.

64. In or about 2002, NYRAC was investigated by the United States Department of Labor. As a result of this investigation, NYRAC was required to retroactively pay its employees additional wages. In response, Mr. Nardi created checks payable to employees, which Mr. Ourian signed. Photocopies of the checks were presented to the Department of Labor as evidence of compliance with its directive. The checks, however, were never cashed by the employees.

65. As noted previously, Mr. Nardi was paid \$8,000.00 as a partner's withdrawal in 2001 and Mr. Brown was paid a total of \$120.00 in such withdrawals for 2000 and 2001. The same records indicate that Mr. Ourian invested \$175,632.01 and withdrew \$441,462.00, and Mr. Zolin invested \$156,313.72 and withdrew \$494,551.72 during 2000 and 2001.

66. In 2002, the Revenue Crimes Bureau (RCB) of the Division of Taxation (Division) began an investigation of NYRAC. RCB was assisted in its investigation by the New York State Department of Motor Vehicles, the Queen's County District Attorney's Office and the NYPD. This investigation was prompted by guilty pleas by Mr. Ourian, Mr. Zolin, and two NYRAC-affiliated companies in connection with an insurance fraud scheme. Specifically, on December 19, 2000, the companies, Talron Enterprises, Inc., and Holiday Leasing, Inc., pled guilty to insurance fraud in the second degree, and Mr. Zolin pled guilty to falsifying business records in the second degree. Mr. Ourian also pled guilty to criminal charges in connection with the insurance fraud scheme, but the record of such conviction was sealed.

67. The insurance fraud scheme involved the registration of motor vehicles in the name of paper companies and the creation of fictitious employees of the paper companies. The daily rental vehicles were then insured as though they were being driven by these fictitious employees and were being leased on a long-term basis. This scheme enabled Mr. Zolin and Mr. Ourian and their companies to pay insurance premiums which were about one-fourth of what would have been required had the insurance companies known that the vehicles were being used as daily rentals. The losses to the insurance companies as a result of this scheme were estimated in excess of a million dollars.

68. The insurance fraud arrests were reported in a Newsday article dated February 16, 2000.

69. Neither Mr. Brown nor Mr. Nardi was implicated in the insurance fraud investigation. Mr. Brown was generally aware of the insurance fraud criminal investigation, but did not ask any questions of Mr. Ourian or Mr. Zolin regarding such investigation.

70. Among the initial steps taken by RCB in its investigation was to obtain sales information from American Express with respect to NYRAC and the affiliated companies. Such information identified sales to specific affiliated companies and also revealed that all billing for all locations and companies was addressed to the 3231 Junction Boulevard location. A review of the American Express information revealed that the sales tax for the American Express charges was in excess of the sales tax remitted by the affiliated companies for the same period. Specifically, the American Express information indicated that the affiliated companies charged their Amex customers a total of \$2,655,712.61 in sales tax for the period January 1999 through January 2001, while the same affiliated companies remitted a total of \$1,125,566.00 in sales tax to the Division for the same period.

71. The RCB obtained a search warrant for all of the rental locations, the business office at 3231 Junction Boulevard and the office next door, as well as the residences of Mr. Ourian, Mr. Zolin and Mr. Brown. The warrant was executed on October 1, 2002. Approximately 260 boxes of business records were seized as part of the search. Among the records seized were computer records, including NYRAC's Quickbooks software which contained NYRAC's general ledger and sales tax accrual account, and a Bluebird operating system which contained NYRAC's e-mail records.

72. The search of Mr. Brown's residence did not reveal any significant information regarding NYRAC or any of the affiliated companies.

73. Following the RCB investigation, criminal charges were filed against Mr. Ourian, Mr. Zolan, Yuval Havatzelet, and both petitioners herein, as well as NYRAC and several of the affiliated corporations. On December 17, 2003 all of these parties pled guilty to criminal charges.

74. Mr. Brown pled guilty to one count of violating Tax Law § 1817(b)(2) for willfully delivering or disclosing to the Division “any list, return, report, account, statement or other document known to him to be fraudulent or to be false as to any material matter.”

75. Mr. Nardi pled guilty to one count of violating Tax Law § 1817(b)(1) for willfully making and subscribing a return which is required to be filed with the Division “which he does not believe to be true and correct as to every material matter.”

76. Mr. Ourian and Mr. Zolin pled guilty to grand larceny charges and Mr. Havatzelet pled guilty to petit larceny charges and a violation of Tax Law § 1817 (b)(2).

77. NYRAC and affiliated corporations Florida Sales, Inc., Woolfie Mgt., Inc., SADS Auto Mgt., Inc., Sterling Rent-A-Car, Inc., and Tristate Leasing Mgt., Inc., pled guilty to failing to file New York City corporate tax returns for three or more years in violation of New York City Administrative Code §11-4003.

78. Affiliated corporations Superled Corporation, Inc., QB King Mgt., Inc., GDFY Mgt., Inc., 333 Adams Street Mgt., Inc., Hewlett Sales, Inc., JFL Mgt., Inc., Liberty Mgt., Inc., RCSL Mgt., Inc., and MGY Services, Inc., each pled guilty to third degree grand larceny.

79. Mr. Nardi was sentenced to pay \$20,000.00 in restitution and a conditional discharge. Mr. Nardi paid the \$20,000.00 in restitution.

80. Mr. Brown was sentenced to a conditional discharge.

81. Both Mr. Brown and Mr. Nardi were represented by counsel in connection with the criminal charges. NYRAC paid the attorney’s fees for both Mr. Nardi and Mr. Brown.

82. The transcripts of petitioners’ plea allocutions are not in the record. The office of the Queens County District Attorney advised the Division that they were unable to locate the court minutes of petitioners’ cases.

83. After the criminal proceedings were closed, NYRAC and the affiliated companies listed above, which pled guilty to criminal charges, and Mr. Ourian and Mr. Zolin, as officers of NYRAC, executed a Closing Agreement with the Division dated March 26, 2004 and April 1, 2004. Pursuant to that agreement, the Division agreed to accept payment of additional sales and use tax, penalties and interest in the total amount of \$6,644,985.00 in full satisfaction of any and all underreporting of sales tax for the period June 1, 1997 through June 30, 2002, including fraud and other penalties, and interest. Additionally, NYRAC and the affiliated companies and Ourian and Zolin agreed to waive all protest rights with respect to the subject taxes, penalties and interest for the subject period. The taxpayers further agreed to a payment of \$2,036,858.77 on or before April 15, 2004.

84. On September 20, 2004, the Division issued to petitioners, Paolo Nardi and Leonard Brown, respectively, identical notices of determination, each asserting \$3,054,106.83 in additional sales and use taxes due, plus fraud penalty and interest, for the period June 1, 2000 through June 30, 2002. The notices advised each petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from NYRAC and therefore personally liable for the sales and use taxes due from the corporation. The notices also indicated payments or credits of \$2,036,858.77 had been applied to the liability and asserted a balance due of \$4,746,078.26.

85. The sales tax liability is based on sales tax credited to NYRAC's sales tax accrual account less amounts reported and remitted by the affiliated companies that filed sales tax returns. NYRAC's accrual account recorded all sales tax collected by NYRAC and affiliated companies.

86. Petitioners do not contest the computation of tax liability in the notices of determination.

87. At hearing the Division moved to amend its answer to assert alternative penalties for negligence if the fraud penalties asserted in the statutory notices are not sustained. Petitioners objected to the Division's motion.

### ***CONCLUSIONS OF LAW***

A. The first issue to be addressed is whether petitioners are collaterally estopped from contesting their status as responsible officers under Tax Law § 1133(a) and § 1131(1). The Division contends that petitioners are so estopped by virtue of their respective guilty pleas to violations of Tax Law § 1817(b)(1) and (2). The Division notes that such pleas involve sales tax collected but not remitted by NYRAC and its affiliated companies and contends that petitioners could not be guilty of these offenses unless they were responsible persons.

This contention is rejected. For the doctrine of estoppel to apply, the petitioners must have had a fair opportunity to litigate the same issues during the prior criminal proceeding (*see Kuriansky v. Professional Care*, 158 AD2d 897, 899, 551 NYS2d 695, 696 [1990]). As the party seeking the benefit of collateral estoppel it was the Division's burden to demonstrate the identity of issues and the necessity of their having been decided in the prior proceeding (*see State of New York v. Sokol*, 113 F3d 303, 306 [2d Cir 1997]). The Division has failed to meet its burden.

The issue of whether either petitioner was under a duty to act for NYRAC in complying with the requirements of Article 28 of the Tax Law, i.e., whether either was a responsible officer for sales tax purposes, was not an essential element of their respective convictions under Tax Law § 1817(b)(1) and (2) (*see Matter of Seruya*, Tax Appeals Tribunal, December 2, 1993).

Such crimes deal with persons who knowingly make and subscribe false returns (Tax Law § 1817[b][1]) or persons who deliver or disclose false returns (Tax Law § 1817[b][2]). Neither crime requires that the person committing the act be a person under a duty to act for a corporation pursuant to Tax Law § 1131(1). Furthermore, the record contains only a certificate of conviction for each petitioner. The record does not contain transcripts of petitioners' plea allocutions.

Accordingly, it cannot be determined that the responsible officer issue was ever litigated during the course of the criminal proceeding. This instant matter is thus distinguished from *Matter of DeFeo* (Tax Appeals Tribunal, April 22, 1999), and *Matter of Sona Appliances* (Tax Appeals Tribunal, March 16, 2000), both cited by the Division in support of its position. In each of those cases, the Division clearly established that the issue of whether the petitioner was a responsible officer was answered in the affirmative during criminal guilty plea proceedings.

The record also lacks evidence of the specific period covered by the charge to which each petitioner pled guilty. This also precludes an estoppel against petitioners on the responsible officer issue, as a taxpayer may be estopped only for the period to which he entered a guilty plea to a criminal charge (*see Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989, citing *Plunkett v. Commr.*, 465 F2d 299 [7<sup>th</sup> Cir 1972]). This is particularly significant in the instant matter because the period covered by the criminal proceedings, as evidenced by the Closing Agreement (*see* Finding of Fact "83"), runs from June 1, 1997 through June 30, 2002, while the period covered by the subject notices of determination is June 1, 2000 through June 30, 2002. Hence, the crimes to which petitioners pled guilty could have occurred prior to the period at issue.

The Division sought to distinguish the instant matter from *Matter of Seruya* by noting that in that the petitioner in *Seruya* had pled guilty to *attempted* filing of a false instrument under

Penal Law § 175.35 and petitioners herein were convicted, as discussed, of violating Tax Law § 1817(b)(1) and (2). This is an irrelevant distinction, resting on a dubious premise (i.e., that a nonresponsible officer could attempt to file false tax returns, but only a responsible officer could violate Tax Law § 1817[b][1] or [2]). The question is whether the authority to act for the corporation, i.e., responsible officer status, is an essential element of the crime of which petitioners were convicted. Here, as discussed, it was not. Moreover, this distinction is all but eliminated considering that the petitioner in *Seruya* signed an affidavit of confession of judgement in connection with his guilty plea in which he stated that he knowingly signed and filed false sales tax returns (*id.*).

B. The Division next argues that the corporate form of NYRAC and the affiliated companies should be disregarded and that such corporate entities should be treated as a partnership for sales tax purposes. The Division further argues that petitioners Nardi and Brown should be treated as members of this partnership personally liable for the tax at issue under Tax Law § 1131(1) (“Persons required to collect tax’ . . . shall include . . . any member of a partnership”).

This contention is rejected. The disregard of the corporate form is appropriate where necessary to prevent fraud or to achieve equity (*see Matter of Morris v. Dept. of Taxation and Finance*, 82 NY2d 135, 603 NYS2d 807 [1993]). This equitable concept is generally employed as a means to circumvent the limited liability of corporate owners and to hold such owners personally liable for a corporate obligation (*id.*). Here, disregard of NYRAC’s corporate form is not necessary because Tax Law § 1133(a) holds persons under a duty to act for the corporation, i.e., responsible officers, personally liable for sales tax owed by the corporation. The Tax Law

thus provides a statutory means to assert personal liability against responsible officers of a corporation.

Additionally, it is noted that to disregard the corporate form and to deem the business a partnership as urged by the Division would permit a finding of personal liability without a finding of the indicia of authority required of a corporate responsible officer (*see* Conclusion of Law “D”). Considering that the Tax Law provides a statutory means to assert personal liability against corporate responsible officers, it seems particularly inappropriate to lower the bar to personal liability in this manner.

C. Before addressing the central issue of whether petitioners were responsible officers, it is noted that the Division properly asserted personal liability against petitioners as officers of NYRAC and not the affiliated corporations. NYRAC conceded liability for all of the sales tax collected by its affiliated companies in the Closing Agreement (*see* Finding of Fact “83”). NYRAC thus conceded its responsibility for the tax at issue. Accordingly, persons responsible to collect tax on behalf of NYRAC are properly liable for the tax collected but not remitted by the affiliated companies (*see Matter of Hammerman*, Tax Appeals Tribunal, August 17, 1995 [sole shareholder of a corporation personally liable for sale tax due from a partnership in which the corporation was a partner]).

D. Turning to the central issue in this matter, Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax includes “any officer, director, or employee of a corporation . . . who as such officer, director, [or] employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28] . . .” (Tax Law § 1131[1]).

Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities such that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of the case (*see Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564 [1987]). The ultimate question to be resolved in any responsible officer case is :

whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

Specific factors to consider when determining responsible officer status under Article 28 are the authorization to hire and fire employees (*Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536 [1986], *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027 [1987]); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation (*Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862 [1979]; *Matter of Stern*, Tax Appeals Tribunal, September 1, 1988); the duties and functions of the officers and directors as outlined in the certificate of incorporation, corporate bylaws and minutes of corporate meetings, and the preparation and filing of sales tax forms and returns (*Vogel v. New York State Dept. of Taxation & Fin., supra*); the individual's economic interest in the corporation and whether he had authority to sign tax returns for the corporation (*Matter of Martin v. Commissioner of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239 [1990]); the payment, including the authorization to write checks on behalf of the corporation, of creditors other than the State of New York and the United States (*Matter of Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427 [1978]). Another factor is the individual's simultaneous status as an officer, director and shareholder (*Matter of Cohen v. State*

*Tax Commn., supra*); and in a closely-held corporation, as in the present matter, the individual's knowledge of the affairs of the firm and the firm's profits (*Vogel v. New York State Dept. of Taxation & Fin., supra; Matter of Blodnick v. New York State Tax Commn., supra*).

It is noted that a proper analysis of responsible officer status is not simply a matching of the traditional indicia of responsibility to a person's surface acts. A consideration of the circumstances is required:

Thus the pertinent inquiry in a responsible officer case is not whether a person was an officer or performed the duties traditionally associated with such a position, but rather, whether the person in fact had authority to control the performance of the duties he performed (*see, Matter of Hall*, [Tax Appeals Tribunal, March 22, 1990]; *Matter of Constantino, supra.*). In other words, our analysis takes into account whether the person's acts were ministerial rather than evidence of actual authority. (*Matter of Taylor*, Tax Appeals Tribunal, October 24, 1991.)

E. The record in the instant matter, considered in light of the factors discussed above, reveals that Mr. Nardi was neither an officer nor director of NYRAC. He was also neither a shareholder nor an investor in NYRAC.<sup>3</sup> Although he prepared checks for Mr. Ourian's signature, Mr. Nardi did not have authority to sign checks on behalf of NYRAC and he did not sign checks.<sup>4</sup> Although he provided sales information used in the preparation of sales tax returns

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<sup>3</sup> In this regard it is noted that NYRAC's books show that Mr. Nardi received \$8,000.00 as a "partners withdrawal" in 2000. The Division contends that such evidence establishes that Mr. Nardi was a partner or at the very least had an equity interest in NYRAC. Considering that the same books do not reveal any investment by Mr. Nardi in any of NYRAC's operations (while they do show investment by others), and that Mr. Nardi is not listed as an owner on any of the documents in the record (*see* Finding of Fact "7"), it is concluded that the \$8,000.00 partners withdrawal is properly characterized as a bonus paid from the profits of the Cruise America enterprise (*see* Finding of Fact "34").

<sup>4</sup> The Division asserted that Mr. Nardi (and Mr. Brown) both signed checks. This assertion is based on the following testimony of the lead investigator for the Division's RCB: "I believe I saw checks signed by Mr. Brown and Mr. Nardi." However, in the absence of any such checks in the record, notwithstanding that the Division seized 260 boxes of records; the same investigator's testimony that "without them in front of me, I don't know who signed the checks;" and his further testimony that, despite having subpoenaed and reviewed NYRAC and the affiliated companies' bank records, he did not know whether Mr. Brown or Mr. Nardi was authorized to sign for any of the companies, and in the absence of any other evidence in the record supporting the Division's assertion, it is concluded

to either Mr. Ourian or, at Mr. Ourian's direction, directly to the accountant, he did not prepare or sign tax returns for any of the affiliated companies. He did not have authority to hire or fire employees of NYRAC. His involvement in the day-to-day operations was limited to the accounting office. He was not involved in NYRAC's primary business, the renting of vehicles. Given his lack of authority to sign checks and Mr. Ourian's and Mr. Zolin's dominating presence within the enterprise, it is concluded that Mr. Nardi lacked authority to determine which creditors to pay. Additionally, although he dealt with financial institutions, he did so at Mr. Ourian's direction.

The foregoing factors strongly support a conclusion that Mr. Nardi was not a responsible person under Tax Law § 1133(a) and therefore not personally liable for the tax at issue Tax Law § 1131(1). Such a straightforward conclusion is complicated, however, by the presence of other facts in the record which are less favorable to Mr. Nardi's position. Specifically, there is no question that Mr. Nardi had a thorough knowledge of NYRAC's financial affairs and was fully aware of NYRAC's ongoing fraud with respect to its consistent and intentional underreporting of sales tax. On at least one occasion, albeit at Mr. Ourian's direction, he knowingly submitted false sales figures to NYRAC's accountant. He benefitted from the fraud by his continued employment and the payment of a bonus of \$8,000.00, which resulted from profits at least indirectly attributable to the fraud. He pled guilty to "making and subscribing" a false sales tax return and paid \$20,000.00 in restitution. His guilty plea establishes that he participated in the fraud. His self-serving explanation that he pled guilty because he could not afford to pay the legal costs of a criminal trial for financial reasons is unconvincing. It is concluded that Mr. Nardi pled guilty

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that neither Mr. Nardi nor Mr. Brown had check-signing authority and that neither signed checks.

because he was guilty. Additionally, the record also contains strong evidence that Mr. Nardi cheated on his personal income tax returns.

Although these facts reveal Mr. Nardi to be a willing participant in criminal activity, and clearly show rampant fraud by NYRAC and the affiliated companies, such facts do not show that Mr. Nardi possessed sufficient authority to be considered a responsible officer of NYRAC. Rather, the record shows that Mr. Nardi worked under the direction and control of Mr. Ourian and lacked the autonomy and authority of responsible person under Tax Law §1131(1). It should be noted that there is a distinction between participating in a fraud, and thus committing a crime, and responsible officer status. As discussed, one can commit a crime without being a responsible officer (*see Matter of Seruya, supra*).

It should be further noted that the evidentiary weight to be accorded Mr. Nardi's guilty plea is limited given the lack of a transcript of his plea allocution and the lack of evidence as to the specific period covered by the guilty plea. Thus any statements made by Mr. Nardi at his plea allocution are not in the record.

As an additional factor in support of its position that Mr. Nardi was a responsible officer and as evidence of fraud, the Division contends that NYRAC withdrew money from its sales tax accrual account which was not remitted to New York State. The Division contends that such unaccounted-for withdrawals exceeded a million dollars. As controller and the person responsible to maintain the general ledger, the Division asserts that Mr. Nardi was responsible for these withdrawals from the accrual account.

Clearly, participation in a scheme to secrete sales tax collected from customers could be a significant factor in determining Mr. Nardi's status as a responsible officer. Contrary to the

Division's assertions, however, the record does not support the existence of unaccounted-for draw downs to the sales tax accrual account.

The Division's position appears to be based on the approximately \$2,223,000.00 in total debits to NYRAC's sales tax accrual account for the period January 2000 through September 2002, and a workpaper (Exhibit "KK") prepared by a Division auditor which indicates approximately \$74,000.00 in sales tax paid by NYRAC companies for the period at issue. Upon closer scrutiny, however, it appears that these figures are inaccurate or misleading.

Addressing first the question of the amount of sales tax remitted, the Division's assessment in this matter is based on the difference between credits to NYRAC's sales tax accrual account and sales tax reported and remitted to the Division (*see* Finding of Fact "85"). On audit, the Division calculated sales tax reported and remitted by NYRAC-associated companies for the period March 1995 through June 2002. The amount of tax so reported and remitted was contained on a workpaper entered in evidence as Exhibit "EE." An auditor for the Division, Martin Stehlin, testified that sales tax amounts listed on Exhibit "EE" were taken from the sales tax returns filed by NYRAC companies and were in fact remitted to the Division. Total sales tax reported and remitted for the period January 1, 2000 through June 30, 2002 as indicated by Exhibit "EE" was approximately \$1,919,000.00.

In light of the testimony of Mr. Stehlin and the fact that the Division based its assessment on the amounts listed as reported and remitted on Exhibit "EE" and not Exhibit "KK," the accuracy of the \$74,000.00 figure is questionable. It is further noted that Exhibit "KK" lists only three NYRAC companies as reporting and remitting sales tax during the period at issue while Exhibit "EE" lists six such companies. The Division's Exhibit "KK" thus appears to be incomplete or inaccurate.

As to the total of debits to NYRAC's sales tax accrual account, the detail of the accrual account for the period January 1, 2000 through September 27, 2002 was entered in the record. As noted previously, this document shows total debits of approximately \$2,223,000.00. Of this amount, \$2,086,000.00 was for New York State sales tax for the period December 1999 through August 2002, \$70,000.00 was for three payments of "back taxes" to New York State, about \$16,000.00 was for New Jersey sales tax, and about \$47,000.00 in debits resulting from hundreds of minor adjustments, usually less than \$100.00 in amount. A close review of the accrual account thus does not reveal any significant unaccounted-for withdrawals which might be indicative of fraudulent activity. Indeed, the accrual account appears fairly consistent with the amounts listed as reported and remitted on the Division's Exhibit "EE." As noted, Exhibit "EE" shows sales tax reported and remitted of \$1,919,000.00 for the period January 2000 through June 2002. The accrual account detail shows debits in respect of the same period totaling about \$1,908,000.00.

F. With respect to the question of Mr. Brown's personal liability, a review of all the facts in the record indicates that this petitioner was also not a responsible officer of NYRAC. Although Mr. Brown was a supervising employee of NYRAC with significant responsibilities over day-to-day vehicle rental operations as the person responsible for employee supervision and training, his authority was limited and subordinate to that of Mr. Ourian and Mr. Zolin (*see* Findings of Fact "37," "38" and "39"). He was neither an officer nor a director of NYRAC. While he could make recommendations, he did not have the authority to hire and fire employees. He did not have check signing authority and did not sign checks. While he attended dinner meetings at which financial matters were discussed, the record shows that, contrary to the Employee Agreement, he was not involved in NYRAC's financial affairs. Accounting, bookkeeping, record keeping and the preparation of tax returns were outside the scope of his duties. He was not involved in the

preparation of tax returns and did not sign tax returns. Additionally, although contrary to his contention, he did have an ownership interest in Sterling Rent A Car, one of the NYRAC associated companies,<sup>5</sup> and he was a minority owner with a 20-percent interest in two of NYRAC's 15 locations. Such an investment did not give him authority or control over NYRAC so as to be a responsible officer. While Mr. Brown's guilty plea to a violation of Tax Law §1817(b)(2) certainly weighs against his position, as with Mr. Nardi the significance of this plea is limited by the lack of a transcript of Mr. Brown's plea allocution and the lack of evidence as to the specific period covered by the guilty plea. Additionally, the weight to be accorded the guilty plea is further limited by the minimal sentence of a conditional discharge and lack of any other evidence in the record indicating that Mr. Brown was involved in the preparation of sales tax returns, notwithstanding his plea of guilty to a charge involving such returns.

In many ways, Mr. Brown's case is stronger than that of the petitioner in *Matter of Constantino (supra)* where the Tax Appeals Tribunal upheld an administrative law judge determination that the petitioner was not a responsible officer. Like the petitioner in *Constantino*, Mr. Brown was a supervising employee and investor in the corporation. Unlike the petitioner in *Constantino*, however, Mr. Brown was not an officer of the corporation, did not have check signing authority and could only recommend hiring and firing employees. Additionally, in both cases the corporations were clearly controlled by other individuals.

G. In light of the foregoing conclusions of law, Issues V, VI and VII are moot and need not be addressed.

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<sup>5</sup> Mr. Brown contended that the \$63,000.00 he provided to the Sterling operation was a loan. Considering that he produced no loan documents and was listed as a partner of Sterling on the corporate books, and his own description of the transaction in his testimony as an exchange of cash for "a percentage of business," it is concluded that the \$63,000.00 is properly characterized as an equity investment and not debt.

H. The petitions of Leonard Brown and Paolo Nardi are granted and the notices of determination dated September 20, 2004 are cancelled.

DATED: Troy, New York  
December 13, 2007

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE