

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**EXPRESS FLEET SERVICE, INC.** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NO. 828056  
and Use Taxes under Articles 28 and 29 of the Tax Law for :  
the Period September 1, 2004 through November 30, 2010. :  
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Petitioner, Express Fleet Service, Inc., 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 September 1, 2004 through November 30, 2010.

An expedited hearing was held before James P. Connolly, Administrative Law Judge, on September 7, 2018, in Albany, New York. Petitioner appeared by its president, Gregory Gottorff. The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel). The parties agreed to a briefing period ending December 28, 2018, which date began the period for issuance of this determination. After due consideration of the evidence and arguments submitted, James P. Connolly, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly issued a notice of determination imposing fraud penalties under articles 28 and 29 against petitioner for the period September 1, 2004 through November 30, 2010.

***FINDINGS OF FACT***

1. Petitioner, Express Fleet Service, Inc., is a subchapter S corporation that operated a motor vehicle repair business at 22 Marway Circle in Rochester, New York. Petitioner was solely owned by Gregory Gottorff from the mid-1990s until October 2010, when Mr. Gottorff sold the business to Robyn Chiavaroli and Jack Hassall (new owners). The record does not disclose whether the sale involved the shares of petitioner, or its assets. Mr. Gottorff signed petitioner's sales tax returns for the period September 1, 2004 through November 30, 2010 (audit period), and listed his position as president.

2. In June 2011, the Division of Taxation (Division) received a complaint from the new owners, advising that they believed petitioner had been underpaying its State and local sales and use tax liabilities. The complaint was referred to the Rochester District Office of the Division's Criminal Investigation Division (CID). As a first step in determining whether there was any merit to the new owners' complaint, CID compared the gross sales listed on petitioner's quarterly sales tax returns with the gross income amounts shown on the corporation's annual corporate franchise tax returns for 2008 and 2009, and discovered a discrepancy consistent with an underpayment of sales tax during those years in the amount of \$30,000.00. As a result, CID determined that the new owners' complaint was worth further investigation.

3. On August 29, 2011, CID investigators conducted an interview of Ms. Chiavaroli. On May 23, 2013, CID investigators conducted interviews of both Ms. Chiavaroli and Mr. Hassall. Investigator Peter Ricci, who participated in both interviews, prepared summaries of them, which he recorded in the "Event Entries" log (event log) for the investigation. The interview summaries reveal that after purchasing the business, the new owners continued to use the same point-of-sale (POS) software system that Mr. Gottorff had used to track work orders, prepare

invoices, and record payments, by a company named Mitchell 1 (the Mitchell 1 system). For about two weeks after purchasing the business, the new owners used the Mitchell 1 system in their business through petitioner's account with Mitchell 1 before they opened their own account. A representative from Mitchell 1, whom they had asked to help them with the system, told them that there were an unusually large number of open invoices on the system. The new owners also stated that a number of their customers told them that Mr. Gottorff continued to request payment from them for services for which they had already paid. Mr. Hassall said that the status of individual records in the system could be "estimates," "repair," or "invoice." Estimates are invoices that have not been paid and are estimated costs for the service and repair. "Repair" records are invoices on which the work has been completed but not yet paid for, while "invoice" records, also known as "posted orders," are invoices that represent work that has been completed, paid for, and closed. He explained that closed invoices could be altered on the system by changing their status to "in progress," altering them, and changing their status back to closed.

4. The interviews with the new owners also revealed that their relationship with Mr. Gottorff was a hostile one. Mr. Gottorff had taken back a mortgage from the new owners as part of the sale of the business. Ms. Chiavaroli claimed that Mr. Gottorff was holding on to the mortgage checks and not cashing them in order to claim that the new owners were not repaying the mortgage because he wanted get the business back. According to Ms. Chiavaroli, Mr. Gottorff had been arrested for throwing a brick through the window at the repair shop.

5. The CID investigators later confirmed with a Mitchell 1 representative that on the Mitchell 1 POS software used by petitioner and the new owners, a posted order could be "unposted," altered, and switched back to posted status without any indication that it was changed in the system.

6. The CID investigators conducted an unannounced interview of Mr. Gottorff on October 25, 2011, which is summarized in the event log. After they advised him that they were investigators with CID, Mr. Gottorff confirmed that he had owned and managed petitioner for 18 or 19 years before selling the business in October 2010. His business practice was to give a customer an invoice for every sale and that each sale was recorded on the office computer, but that the computer hard drive had crashed a number of times, destroying the data, most recently two years ago. He deposited all the monies he received from the business in his account at Canandaigua National Bank, and did not deposit any other monies in that account. He said that he did his own bookkeeping, but that he did not maintain any daily, weekly, or any other sales summary reports apart from the Mitchell 1 system. He did, however, use QuickBooks software. He prepared petitioner's sales tax returns using his QuickBooks software, but had a local accounting firm prepare petitioner's New York State corporate franchise tax returns. He said that he might have a backup of his computer records on his computer at another business location, but that other sales records were still on the computer he had left with the new owners at 22 Marway Circle.

7. At the interview, the investigators showed Mr. Gottorff a spreadsheet comparing the gross receipts reported on petitioner's corporate franchise tax returns with the total sales reported on its sales tax returns for the tax years 2006 through 2009, which showed the corporate franchise gross sales to be \$774,994.00 higher than the gross receipts reported on the sales tax returns for that period, resulting in an estimated sales tax liability of \$61,999.00. Mr. Gottorff said that he had no explanation for the discrepancy, but that he would be contacting his accountant for assistance. The investigators gave Mr. Gottorff a letter notifying him that he was under criminal investigation and a written request for books and records. The request for books

and records covered January 1, 2006 through August 31, 2011, and sought from petitioner and Mr. Gottorff “all original books and records in your custody and control, in whatever form created, stored or maintained,” including all sales records and monthly bank statements.

8. According to the event log, on December 5, 2011, Miguel Reyes, Esq., attorney for Mr. Gottorff, came to the Rochester District Office to deliver financial records of Mr. Gottorff and petitioner. Mr. Reyes said that petitioner’s sales records had been stored in the basement of Mr. Gottorff’s new place of business, but had been rendered unusable by a flood, caused by overflowing machinery. Further, he stated that relations were far from amicable between the new owners and Mr. Gottorff, as the new owners were no longer making payments on their mortgage that Mr. Gottorff held. According to Mr. Reyes, an order of protection had been issued, so that Mr. Gottorff would not be contacting the new owners for petitioner’s old sales records and that the investigators should subpoena the new owners to obtain access to the computer holding those sales records. Finally, Mr. Reyes also stated that Mr. Gottorff had lacked a reliable “IT person,” instead relying on family to help him with the bookkeeping, and that his client would be willing to make payment arrangements if there was a tax consequence due to the poor record keeping.

9. The event log explains that, to obtain Mr. Gottorff’s Mitchell 1 sales records, CID investigators traveled to the 22 Marway Drive location of the business on June 19, 2012, to take possession of the computer on which Mr. Gottorff had said the records were to be found. CID asked the Division’s “OIA” unit to examine the computer, which examination showed that there were few traces of the software on the computer, which was consistent with the software being “browser based.”<sup>1</sup> On January 14, 2013, investigator Rizzo, along with Lee Shepter, a sales tax

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<sup>1</sup> The record does not explain the meaning of the “OIA” acronym.

auditor also assigned to the case, went to 12 Pixley Industrial Parkway in Rochester, apparently the new owners' new place of business, and obtained from them a CD with pdf copies of petitioner's Mitchell 1 sales information for the audit period.<sup>2</sup> The sales information included electronic copies of the sales tax invoices issued by petitioner, and "electronic cash receipts records, which list the customer, purchase amount, tax, and method of payment." The record does not explain how the new owners were able to access the sales information.

10. CID also obtained, via subpoena, bank statements for petitioner's account with Canandaigua National Bank. Investigator Rizzo prepared an analysis that compared the sales tax receipts reported on petitioner's sales tax returns with petitioner's sales tax liability indicated by three different sets of records: the Mitchell 1 software records obtained from the new owners, the deposits listed in its Canandaigua National Bank account records, and the gross sales reported in petitioner's corporate franchise returns. An entry in the event log for September 4, 2013 quotes a summary of that analysis prepared by Diane LaVallee, a senior investigative counsel with CID. The summary indicates that for the period December 1, 2006 through November 30, 2010, analysis of the Mitchell 1 sales records indicated sales tax underpayment in the amount of \$61,998.00. According to the summary, this amount of sales tax underpayment "[was] supported by the electronic cash receipts records, which list the customer, purchase amount, tax, and method of payment." The summary notes that investigator Rizzo's bank deposit analysis showed sales tax underpayment in the amount of \$45,275.00, while the corporate franchise return analysis showed sales tax underpayment in the amount of \$47,200.00.

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<sup>2</sup> 12 Pixley Industrial Parkway is inferred as the address of the new owners' business from an Office of Tax Enforcement property receipt in the record, dated January 10, 2013, for a "CD-RW containing the sales records for Express Fleet Services," received from Ms. Chiavaroli, and which listed "Express Fleet Services" and the 12 Pixley Industrial Parkway address as the location where the property was obtained.

11. According to the event log, Investigator Ricci prepared a spreadsheet to compare the tax due from petitioner based on the Mitchell 1 sales records with the sales tax reported as due by petitioner on its sales tax returns. In October 2013, Mr. Shepter reviewed the spreadsheet for accuracy and began drafting an audit report. On December 5, 2013, Mr. Shepter revised a schedule comparing the sales tax found due using the Mitchell 1 records with the gross sales reported on petitioner's corporate franchise returns to also show a comparison of the sales tax found due using the Mitchell 1 records with petitioner's bank deposit records. No copy of this schedule is in the record. On December 20, 2013, Mr. Shepter forwarded the final version of the audit report to Ms. LaVallee. On January 6, 2014, CID referred the matter to the Monroe County District Attorney's office for prosecution.

12. The Monroe County District Attorney's office eventually obtained an indictment against Mr. Gottorff, although the record does not include a copy of the indictment or give a date for the indictment. Mr. Gottorff entered into a plea agreement with the Monroe County District Attorney's office, memorialized in an email dated February 17, 2016, by Assistant District Attorney Mark Monaghan to Justice Winslow of the New York State Supreme Court, Monroe County. The email, on which Mr. Gottorff's attorney, Mr. William Easton, was copied, sought the court's approval of the plea agreement. Under the plea agreement, Mr. Gottorff agreed to plead guilty to one count of offering a false instrument for filing in the first degree, and one count of committing a tax fraud act in the third degree in full satisfaction of the remaining counts, which included one count of grand larceny in the second degree and seven counts of offering a false instrument for filing in the first degree. The agreement contemplated that Mr. Gottorff would receive a sentence of five years' probation and would pay \$68,840.92 in restitution to the Division. The email noted that "[t]he Defendant understands that the plea agreement in this

criminal case has no effect upon the civil liabilities that Defendant may have to the NYS Department of Taxation and Finance or any other governmental agency or authority.”<sup>3</sup>

13. Mr. Gottorff’s plea allocution hearing took place in New York State Supreme Court, Monroe County, on February 18, 2016. At the outset of the hearing, Justice Winslow confirmed her receipt of Mr. Monaghan’s February 17, 2016 email outlining the parties’ plea agreement and expressed her approval of the plea agreement. Mr. Gottorff’s attorney, Mr. Easton, agreed that he had reviewed the email plea agreement with Mr. Gottorff, and that he and Mr. Gottorff considered it an accurate reflection of the parties’ plea agreement. Mr. Monaghan then summarized the plea agreement including the agreed upon sentence and restitution amount, stating, among other things: “I want to make it clear that the plea agreement in the criminal case has no affect [sic] upon any civil liabilities the defendant may have with the New York State Department of Taxation and Finance or any other governmental agency or authority.” In response, Mr. Easton stated that the plea agreement had been “extensively negotiated” and that:

“I’ve gone over it with Mr. Gottorff. We fully intend by the sentencing date to have that money in my escrow account and a check payable to New York State Taxation. On those terms, it is agreeable to Mr. Gottorff. We are ready to proceed.”

The court asked Mr. Gottorff “[h]ave you had sufficient time to talk to your lawyer about what you wish to do relative to these charges?,” to which Mr. Gottorff replied “yes.” The court also asked Mr. Gottorff whether he was satisfied with his representation, to which Mr. Gottorff

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<sup>3</sup> The email noted that the guilty plea was subject to a number of contingencies. One of these contingencies was that if, within 60 days of Mr. Gottorff’s guilty plea, the Division confirmed that Mr. Gottorff had paid the agreed upon amount of the restitution, the People would not oppose a motion by the defense to have Mr. Gottorff withdraw his guilty plea in return for entering into guilty pleas to one charge of offering a false instrument for filing second degree, and one charge of criminal tax fraud fifth degree, and certain other provisions. The record makes clear that Mr. Gottorff has paid the restitution amount, but does not disclose whether he took advantage of this contingency clause to reduce his plea.

indicated that he was. The court then asked Mr. Gottorff certain questions to confirm that he understood the rights he was giving up as a result of entering into a plea agreement and that he was voluntarily entering into the agreement. With regard to the restitution aspect of the plea agreement, the court asked whether Mr. Gottorff understood that he was giving up “any right to a restitution hearing and accepting the amount that was included in the offer that was made,” which the court identified as \$68,840.92. Mr. Gottorff responded that he understood those points.

14. Justice Winslow then had Assistant District Attorney Monaghan question Mr. Gottorff as to the factual basis of the guilty plea:

“MR. MONAGHAN: Thank you, Judge. I’m going to ask you some questions about count number 6 and count number 16, Mr. Gottorff. If you are not clear about anything, you can speak with Mr. Easton and we’ll take a pause while you do that.

THE DEFENDANT: Okay.

MR. MONAGHAN: Count 6 alleges that on or about March 22nd, 2010, in Monroe County that knowing that a written instrument contained false information or a false statement, and with intent to defraud the state or any political subdivision, you offered or presented it to a public office with the knowledge or belief that it would be filed with, registered or recorded in, or otherwise become part of the records of that public office, and the public office that’s alleged is the New York State Department of Tax and Finance. Did you do those things on or about March 22nd, 2010, in Monroe County?

THE DEFENDANT: Yes.

MR. MONAGHAN: I’m going to move on to count number 16. Count number 16 alleges that on or about and between September 1st of 2009 and August 31st of 2010 in Monroe County that you committed what’s known as a tax fraud act or acts, that with the intent to evade any tax that’s due under the New York State Tax Law, or to defraud the state or a political subdivision of it, that you paid the state, that being the Department of Tax and Finance, an amount of money that was – this is a difficult question to ask, so I want to make sure you understand it. In a period that was not longer than one year, you paid more than ten thousand dollars,

less than what you owed to the Department of Tax and Finance. Do you understand the question?

THE DEFENDANT: I understand the question, but I don't – yes, I guess.

MR. MONAGHAN: For the period of time that we're talking about, September 1st, 2009, to August 31st, 2010.

THE DEFENDANT: Yes.

MR. MONAGHAN: Okay. At the time, the business that you were running was known as what?

THE DEFENDANT: Express Fleet Service.

MR. MONAGHAN: And it was located in the Town of --

THE DEFENDANT: Gates.

MONAGHAN: - Gates. Here in Monroe County. I think that's sufficient, your Honor, considering it's a plea-down."

15. On or about July 29, 2016, the Division issued to petitioner a notice of determination, assessment identification number L-045286944 (the notice), asserting sales tax fraud penalties in the amount of \$136,812.93, plus interest in the amount of \$154,201.58, for a total amount due of \$291,014.51 for the audit period.<sup>4</sup>

16. Following a conciliation conference in the Division's Bureau of Conciliation and Mediation Services, that unit issued a conciliation order sustaining the notice on December 30, 2016. Petitioner timely filed a petition with the Division of Tax Appeals and this proceeding ensued. The petition identifies the notice as the statutory notice being protested. In response to the petition's question as to what petitioner is protesting, the petition states "Withdrawal of Plea Agreement." The petition left blank item 6, which asks the petitioner to identify the errors of the

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<sup>4</sup> The addressee block at the top of the notice listed Mr. Gottorff's name immediately underneath petitioner's name, but the notice listed only petitioner's name as the "taxpayer's legal name." At hearing, the Division's counsel stipulated that the notice was issued only to petitioner.

Commissioner of Taxation and Finance. In its answer, the Division, among other things, noted that the petition fails to state a claim as required by section 3000.4 of the Tax Appeal Tribunal's Rules of Practice and Procedure. The answer also stated that, in the event that the fraud penalties imposed by the notice are not sustained, the Division asserts in the alternative the imposition of interest and penalties under Tax Law § 1145 (a) (1) (i) and (ii) and reserves the right to prove such penalties.

17. At hearing, Tammy Reding, co-manager of the Rochester District Office's CID unit, testified on behalf of the Division. Ms. Reding supervised Mr. Shepter, the auditor assigned to the investigation of petitioner. To explain the calculation of the \$68,840.92 restitution amount, the Division introduced a one-page spreadsheet (exhibit F), which compared, on a sales tax quarter by quarter basis, (i) the gross sales, taxable sales, and sales tax reported as due on petitioner's sales tax returns, with (ii) the gross sales, taxable sales, and sales tax petitioner collected from its customers as shown on the Mitchell 1 sales records obtained by the Division (*see* finding of fact 9). That spreadsheet, along with the testimony of Ms. Reding, shows that the restitution amount was computed by subtracting the sales tax reported as collected on petitioner's sales tax returns during the audit period from the sales tax collected from its customers for that period, as shown by the Mitchell 1 sales records. The table below summarizes the calculation shown on exhibit F:

Quarter	Taxable Sales Reported	Sales Tax Reported Due	Audited Taxable Sales Per Mitchell 1 Records	Sales Tax Collected Per Mitchell 1 Records	Sales Tax Not Remitted
9/1/2004-8/31/2005	\$141,326.00	\$11,570.27	\$164,652.96	\$13,463.59	\$1,893.32
9/1/2005-8/31/2006	\$147,627.00	\$11,810.16	\$278,038.26	\$22,243.06	\$10,432.90
9/1/2006-8/31/2007	\$271,102.00	\$21,899.85	\$426,109.39	\$34,088.75	\$12,188.90
9/1/2007-8/31/2008	\$340,996.00	\$27,280.48	\$502,216.50	\$40,177.32	\$12,896.84
9/1/2008-8/31/2009	\$391,919.00	\$31,353.52	\$493,218.14	\$39,457.45	\$8,103.93
9/1/2009-8/31/2010	\$404,776.00	\$32,382.08	\$687,756.51	\$55,020.52	\$22,638.44
9/1/2010-11/30/2010 <sup>5</sup>	\$89,244.00	\$7,139.52	\$97,826.38	\$7,826.11	\$686.59
Totals		\$143,435.88		\$212,276.80	\$68,840.92

The appendix to this determination compares, by sales tax quarter, the amount of the sales tax underpayment as shown on exhibit F with the amount of the fraud penalty imposed by the notice for that quarter and is incorporated by reference into this finding of fact.

18. Ms. Reding testified that the Division concluded sales tax was paid when there was a “sales tax” line on the Mitchell 1 invoice and by tracing the amount of the invoice to the customer’s payment using the Mitchell 1 system’s report showing the amount and method of the customer’s payment. According to Ms. Reding, CID decided to refer the matter to the Monroe

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<sup>5</sup> Mr. Gottorff sold the business on October 22, 2010, so the data in this column only reflect petitioner’s sales through that date.

County District Attorney's office for prosecution based on the sales receipts shown by the Mitchell 1 sales records and the fact that petitioner's bank deposit records and its corporate franchise tax returns showed "similar numbers," with the only record showing substantially lower sales numbers being petitioner's sales tax returns.<sup>6</sup> She also testified that the Division imposed civil fraud penalties on petitioner because of its continuous and substantial sales tax underpayment and because of Mr. Gottorff's guilty plea to the two charges discussed above in connection to that sales tax underpayment.

19. In his opening statement at the hearing in this matter, Mr. Gottorff denied that he ever intended to defraud New York State and he also questioned the computation of the fraud penalties, claiming that the new owners had altered the Mitchell 1 sales records on which the fraud penalties were based. In his testimony at hearing, Mr. Gottorff asserted that the new owners had access to his Mitchell 1 sales records and that they used that access to alter the records to show that petitioner collected more sales tax than it actually did. To buttress that assertion, Mr. Gottorff submitted the sales records from the Mitchell 1 system that he obtained from the Monroe County District Attorney's office during the course of the prosecution against him.

20. More specifically, Mr. Gottorff introduced three "Posted Order Detail Report" pages (posted order pages) from the Mitchell 1 system showing three sales to "Gates Ambulance (Randy Campbell)" on December 19, 2006 and four sales to the same customer on January 19, 2007. The Mitchell 1 sales records for two out of the three December 19, 2006 sales do not

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<sup>6</sup> Ms. Reding testified that the Division also compared the total sales tax liability determined by its analysis of the Mitchell 1 sales records with petitioner's QuickBooks records. The event log makes clear that, even as late as September 5, 2013, the Division was still looking for petitioner's QuickBooks records, but had not obtained them, and there is no further mention of them in the event log. It is determined, therefore, that the Division did not use petitioner's QuickBooks records for any purpose on audit.

include any sales tax charge, while the third includes a \$5.34 charge for sales tax. Of the four January 19, 2007 sales, the Mitchell 1 sales record for one does not show any charge for sales tax, while the sales records for the other three show that sales tax was charged on each in the total amount of \$96.68. Mr. Gottorff testified that he would not have charged sales tax with regard to Gates Ambulance because it was exempt from sales tax. The header on all of these pages showed an address for the business as “12 Pixley Industrial Parkway, Rochester, New York,” which is the address at which the CID investigators obtained the CD-ROM containing petitioner’s sales records from Ms. Chiavaroli, and which was not petitioner’s business address under Mr. Gottorff’s ownership.

21. Mr. Gottorff also introduced two Mitchell 1 “Work in Progress” report pages that included repair jobs commencing after Mr. Gottorff sold the business to the informants, on one of which Mr. Gottorff was shown as the “writer” of the entry.

22. Mr. Gottorff testified that he pled guilty in order to “end the timeless back and forth to courts and get it out of my hair once and for all,” that his attorney had told him that the Division was not going to pursue any “civil” remedies from him, and that he never saw the plea agreement until the date of the plea allocution. According to Mr. Gottorff, the only thing he was really guilty of was being a “a poor bookkeeper” and a bad judge of character.

23. On cross-examination, Ms. Reding testified that she did not examine individual invoices and thus could not say that the transactions shown on the posted order pages discussed in finding of fact 20 were ones included in Mr. Shepter’s calculation of the restitution amount.

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

A. At issue in this matter is the validity of the fraud penalties imposed by the Division on petitioner under Tax Law § 1145 (a) (2). That provision authorizes the Division to impose fraud

penalties of two times the amount of the tax due, plus interest at the minimum rate of 14.5% per annum, based on an underpayment of sales tax “due to fraud.” 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). The Division need not establish fraud by direct evidence, but can show it “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). In order to establish fraudulent intent here, the Division must show that petitioner, acting through its owner, Mr. Gottorff, acted deliberately, knowingly and with the specific intent to violate the Tax Law (*see Matter of Aqua-Mania, Inc.*, Tax Appeals Tribunal, March 6, 2008). Another element that the Division must prove is that the amount of the fraud penalties was properly calculated (*Matter of Yerry*, Tax Appeals Tribunal, December 8, 2016).

Here, the Division seeks to meet its burden of establishing fraud by means of the doctrine of collateral estoppel, i.e., petitioner is estopped from contesting the issue of its fraudulent intent by virtue of Mr. Gottorff’s guilty pleas in Supreme Court, Monroe County. “[A]n issue decided in a criminal proceeding may be given preclusive effect in a subsequent civil action (citations omitted)” (*D’Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). “The doctrine of collateral estoppel is based on the notion that it is not fair to permit a party to relitigate an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point” (*Gilberg v. Barbieri*, 53 NY2d 285, 291 [1981]). Collateral estoppel may apply where, as here, the prior criminal action has been resolved by a

guilty plea and a restitution order (*see Kuriansky v Professional Care*, 158 AD2d 897 [3d Dept 1990]). A nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*). The Tax Appeals Tribunal has applied collateral estoppel to find that the guilty plea of a sole owner of a corporation also applies to the corporation (*see Matter of A.V.S. Laminates, Inc.*, Tax Appeals Tribunal, March 23, 2006).

B. In this case, CID investigated Mr. Gottorff for sales tax underpayment for the audit period and referred the matter to the Monroe County District Attorneys office for prosecution. That office obtained a 10-count indictment against Mr. Gottorff, petitioner's sole owner and president. Rather than go to trial on the charges against him, Mr. Gottorff pled guilty to one count of offering a false instrument for filing in the first degree, and one count of committing a tax fraud act in the third degree in full satisfaction of the remaining counts, which included one count of grand larceny and seven counts of offering a false instrument for filing in the first degree. As part of the plea agreement, he was sentenced to five years' probation and agreed to pay \$68,840.92 in restitution. As pertinent here, to be guilty of a tax fraud act in the third degree, a person must underpay his or her tax liability in the amount in excess of \$10,000.00 in a period less than a year "with the intent to evade any tax due under [the Tax Law], or to defraud the state or any political subdivision of the state" (Tax Law § 1804). In the plea allocution, Mr. Gottorff admitted to committing that crime for the period September 1, 2009 to August 31, 2010. Thus, because the intent needed for the crime that Mr. Gottorff pled guilty to committing is identical to the fraudulent intent needed for the imposition of fraud penalties for the September 1, 2009 to

August 31, 2010 period, and Mr. Gottorff is the sole owner of and responsible person for petitioner, petitioner is collaterally estopped from challenging whether the intent requirement of the fraud penalties imposed here is satisfied for that portion of the audit period.

Moreover, as part of that guilty plea, Mr. Gottorff agreed to pay \$68,840.92 in restitution, waiving the right to contest that amount in a restitution hearing. Given that restitution “is the return of all the fruits of a crime” (*People v White*, 119 AD2d 708, 709 [2d Dept 1986]; *see* Penal Law § 60.27 [1]), the restitution portion of the plea agreement here necessarily rests on a judicial determination of the amount of petitioner’s underpayment resulting from the Tax Law crimes of which Mr. Gottorff stood accused. Mr. Gottorff could have gone to trial to contest whether he was guilty of those crimes. Even if found guilty of those crimes, Mr. Gottorff could have asked for a restitution hearing to challenge the restitution amount sought by the District Attorney’s office (*see* Penal Law § 60.27 [2]). Instead of going to trial, Mr. Gottorff pled guilty to two of the crimes charged and agreed to the amount of the restitution found through the Division’s investigation of petitioner’s sales tax filings for the entire audit period and included in the plea agreement, thereby waiving his right to a restitution hearing. Under these circumstances, it is fair to hold that petitioner, based on Mr. Gottorff’s guilty plea, is collaterally estopped from contesting the amount of the restitution, on which the fraud penalties imposed herein are based (*see Matter of Yerry*).

C. For the remainder of the audit period (September 1, 2004 through August 30, 2009, and the sales tax quarter ending November 30, 2010) (remaining sales tax quarters), petitioner is not collaterally estopped from contesting the fraudulent intent aspect of the fraud penalties imposed because Mr. Gottorff did not enter into any guilty pleas for that period (*see Plunkett v Commissioner*, 465 F2d 299 [7th Cir 1972]). Nonetheless, it is determined that the Division has

met its burden of proving petitioner's fraudulent intent for that period. First, Mr. Gottorff's guilty plea to a tax fraud act in the third degree for the September 1, 2009 to August 31, 2010 period is relevant to his intent for the remainder of the audit period (*see Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989 ["Although the petitioner is collaterally estopped from contesting the civil fraud penalty only for that period to which he entered a plea of guilty to the criminal charge . . . the plea of guilty and the statement offered with the plea are evidence of fraudulent intent for the entire period of assessment"]). Moreover, the fact that petitioner's underpayment of sales tax here was both substantial and continuous over the whole audit period is "strong evidence of fraud" (*Matter of Alvin's Wine & Liquor, Inc.*, Tax Appeals Tribunal, October 29, 2009; *see Matter of 1126 Genesee St., Inc.*, Tax Appeals Tribunal, August 22, 2002).

Finally, petitioner has never supplied an adequate explanation for the substantial sales tax underpayment at issue herein. He did not advance any explanation when originally interviewed by CID investigators. When his lawyer met with the CID investigators more than a month later, the lawyer alluded to the fact that Mr. Gottorff had lacked bookkeeping help but did not otherwise explain the underpayment. At hearing, Mr. Gottorff also did not explain the underpayment, except, perhaps, by referring to himself as being a "poor bookkeeper." The information, however, that Mr. Gottorff would have needed to prepare petitioner's quarterly sales tax returns, its receipts from sales, its exempt sales, and its sales tax collected, was available on the Mitchell 1 system. After all, that system kept track of sales invoices and customer payments, and is the source of the information that the Division used to compute the restitution amount here, to which Mr. Gottorff agreed. It is also difficult to see how bad bookkeeping would explain the consistently lower gross receipts petitioner reported on its sales tax returns than on its

corporate franchise returns or the uni-directional nature of petitioner's erroneous tax reporting here, i.e., consistent under-reporting and underpayment of sales tax due. Unexplained continuous underpayment of tax is often cited as an indication of fraud (*see Scott v Commr.*, T.C. Memo. 1986-102 [1986]; *Daniels v Commr.*, 1992 WL 357820 13 [Tax Court, 1992]).

D. In his hearing testimony, Mr. Gottorff also asserted that the new owners falsified the Mitchell 1 sales records to increase the amount of sales tax that petitioner purportedly collected. In support of this claim, he introduced into the record Mitchell 1 posted orders that he claimed must have been changed after he gave up possession of the computer with access to the Mitchell 1 system (*see* findings of fact 19 through 21). This evidence, involving seven transactions with "Gates Ambulance (Scott Campbell)" occurring on two dates a month apart in 2006 and 2007, on four of which sales tax was charged in the total amount of \$102.02, is not sufficient, even when combined with petitioner's testimony, to show that the new owners falsified the Mitchell 1 sales records before turning them over to CID. A premise of petitioner's allegation that the new owners must have changed the Mitchell 1 software system records to show tax collected on four of the seven sales is that petitioner would not have collected sales tax on those transactions because the customer was exempt from tax. To prove that petitioner did collect sales tax on those transactions, however, petitioner did not introduce an affidavit from the customer avowing that petitioner did not charge it sales tax or even a copy of the customer's exempt organization certificate, which an exempt organization is required to present to allow a vendor to document an exempt sale (*see* Tax Law § 1132 [c] [1]). Instead petitioner chose to rely exclusively on Mr. Gottorff's testimony to prove the customer's exempt status, which, given his guilty plea to a tax fraud act, is not sufficiently convincing to establish that the presence of sales tax charges on the four Mitchell 1 invoices was a falsification on the part of the new owners. In any event, even if

petitioner's evidence that the new owners falsified the Gates Ambulance Mitchell 1 invoices is credited, that evidence does not refute all the proof of fraud here for the remaining sales tax quarters because it would still not explain the unchallenged determination on audit that petitioner's corporate franchise tax returns (and bank deposit records) showed higher gross sales than petitioner's sales tax returns (*see* findings of fact 10, 18). Mr. Gottorff's testimony and the posted order pages, therefore, are not sufficient to rebut the Division's proof of petitioner's fraudulent intent for the remaining sales tax quarters. While that evidence is relevant to the question of whether Division properly calculated the amount of the sales tax underpayment for those sales tax quarters, which calculation underlies the computation of the fraud penalties in this matter, petitioner's opportunity to challenge the amount of the sales tax underpayment was at the time of Mr. Gottorff's criminal prosecution. As discussed above, because Mr. Gottorff accepted the restitution amount as part of his plea agreement, petitioner is now estopped from contesting the sales tax underpayment amount in this matter.

E. While the Division has met its burden of proving petitioner's fraudulent intent and the overall amount of sales tax underpayment that forms the basis of the fraud penalties here, it has not met its burden of showing that the fraud penalties were properly computed. As discussed above, under Tax Law § 1145 (a) (2), the amount of a fraud penalty is to be twice the amount of the tax that the taxpayer underpaid. Here, as demonstrated by the appendix, the amount of the fraud penalties computed for some quarters is more than twice the amount of the sales tax underpayment found on audit, while for other quarters it is less than twice the underpayment amount (*see* finding of fact 17 and appendix hereto). Even though the total amount of fraud penalties comes out to slightly less than twice the amount of restitution required here, the fact that in some of the sales tax quarters in the audit period the penalty is more than twice the

underpaid tax amount might cause the interest owed on the fraud penalty amounts to be more than permitted by Tax Law § 1145 (a) (2). Accordingly, the Division is directed to recompute the fraud penalties in this matter such that the penalty amount imposed in any sales tax quarter is exactly twice the amount of petitioner's sales tax underpayment for that quarter as shown in the second column of the appendix.

F. The Division asserted in its answer and in its brief that, in the event that the fraud penalties are not sustained, negligence penalty under Tax Law § 1145 (a) (1) should be imposed. It is determined that the evidence outlined in conclusions of law (B) through (E) would clearly support the imposition of the alternatively pled penalty.

G. The petition of Express Fleet Service, Inc. is granted in accordance with conclusion of law E, but is in all other respects denied, and the notice of determination dated July 29, 2016, as modified in accordance with conclusion of law E, is sustained.

DATED: Albany, New York  
February 14, 2019

/s/ James P. Connolly  
ADMINISTRATIVE LAW JUDGE

*Appendix*

Sales Tax Quarter Ending	Under-remitted Amount Per Division's Exh. F	Amount of Fraud Penalty Imposed per Notice	Proportion of Fraud Pen. to Under-reported Amt.
November 30, 2004	\$155.03	\$403.42	2.60
February 28, 2005	\$443.46	\$1,114.80	2.51
May 31, 2005	\$297.89	\$722.90	2.43
August 31, 2005	\$996.94	\$2,435.12	2.44
November 30, 2005	\$2,239.36	\$5,289.96	2.36
February 28, 2006	\$3,148.19	\$7,195.24	2.29
May 31, 2006	\$2,233.05	\$4,934.49	2.21
August 31, 2006	\$2,812.30	\$6,008.80	2.13
November 30, 2006	\$4,310.35	\$8,908.50	2.07
February 28, 2007	\$1,913.11	\$3,635.00	1.90
May 31, 2007	\$2,538.54	\$4,909.99	1.93
August 31, 2007	\$3,426.90	\$6,410.34	1.87
November 30, 2007	\$2,865.52	\$5,186.22	1.81
February 29, 2008	\$4,085.18	\$7,156.68	1.75
May 31, 2008	\$3,028.86	\$5,132.71	1.69
August 31, 2008	\$2,917.28	\$4,782.37	1.64
November 30, 2008	\$3,388.69	\$5,376.27	1.59
February 28, 2009	\$2,011.48	\$2,888.69	1.43
May 31, 2009	\$1,435.99	\$2,871.98	2.0
August 31, 2009	\$1,267.77	\$2,535.54	2.0
November 30, 2009	\$4,275.21	\$8,977.94	2.09
February 28, 2010	\$5,885.38	\$12,359.30	2.1
May 31, 2010	\$6,960.19	\$14,616.40	2.1
August 31, 2010	\$5,517.66	\$11,587.09	2.1
November 30, 2010	\$689.59	\$1,373.18	2.0
Totals	\$68,840.92	\$136,812.93	

