STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DACS TRUCKING CORP. AND THEODORE PERSICO AND NICHOLAS COSTANZO AS OFFICERS	:	DECISION
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, 1980 through August 31, 1983.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on February 8, 1990 with respect to the petition of Dacs Trucking Corp., and Theodore Persico and Nicholas Costanzo, as officers, 6713 11th Avenue, Brooklyn, New York 11219, 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, 1980 through August 31, 1983 (File Nos. 802153, 802154 and 802155). Petitioners appeared by Hyman R. Friedman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Briefs were filed by the Division of Taxation and petitioners. Oral argument, at the request of the Division of Taxation, was heard on September 26, 1990.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the carting services provided by Dacs Trucking Corporation were exempt from tax as services performed as part of capital improvement projects.

II. Whether the test period audits of the sales of carting services and of use tax on repair purchase were valid.

III. Whether the use tax assessed on fixed assets and fuel purchases should be adjusted based on petitioners' objections to the audits.

IV. Whether the officers of Dacs are personally liable for penalty and penalty interest on the sales and use taxes found due by the corporation.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1", "2", "6" and "7" which have been modified, and finding of fact "11" which has been deleted.[1] We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

Finding of fact "1(a)" of the Administrative Law Judge's determination is modified to read as follows:

> Petitioner Dacs Trucking Corporation, (hereinafter "Dacs"), was in the business of carting construction and demolition debris. It would leave large containers at a work site to be loaded by its customer. To have the container hauled away, the customer would telephone Dacs which would then send a truck to the site. The truck was specially designed to lift and carry these containers. Before the driver left the site, he would check the

---

[1]The Administrative Law Judge's finding of fact "11" read as follows:

> "11. (a) Petitioners' own review of the repair audit has revealed some mistakes in that audit. In 11 transactions they found that the postings in Dacs's books were not for repairs. These totaled $7,526.06. They reduce the error rate found by the auditor from 70.98% to 46.15% and the tax due for the audit period from $11,003.36 to $8,412.48.
>
> (b) Petitioners' own review of the fixed asset audit revealed two mispostings and four transactions where sales tax was paid to the vendor. These totaled $101,531.80, and reduce the tax due from $19,295.07 to $10,951.20.
>
> (c) Petitioners' review of the fuel audit turned up four mispostings totaling $10,874.95 (after reduction by Federal excise tax). They reduce the tax due from $2,019.87 to $1,130.09."

The Administrative Law Judge's original finding of fact has been deleted as not supported by the record.

load and get a signed work order from the customer's foreman at the work site. An empty container would typically be left at the site.[2]

Finding of fact "1(b)" of the Administrative Law Judge's determination is modified to read as follows:

> Dacs owned three trucks each about 32 feet long with a hydraulic lift system to carry the containers. It had 40 or 50 containers, called "roll off" containers, which were about 20 feet long with an open top. These could "slide" or "roll" off of, and on to, the trucks. These trucks were not closed and had no method of compressing their load.[3]

Dacs was licensed by the City of New York for the transportation of construction and demolition waste materials. The loads from Dacs's trucks would be dumped at dumps limited by New York City authorities to construction debris. For such dumping, the trucks had to carry medallions and have permits issued by the City.

The employees of Dacs were members of local 282 of the teamsters union. They were confined to transporting construction debris. The carting of garbage and certain other types of waste was the jurisdiction of a different teamsters local.

Finding of fact "1(e)" of the Administrative Law Judge's determination is modified to read as follows:

---

[2] The Administrative Law Judge's finding of fact "1(a)" read as follows:

> "1. (a) Petitioner Dacs Trucking Corporation's business was carting. It would leave large containers at the site of a building to be loaded by its customer, a building contractor. To have the container hauled away, the contractor would telephone Dacs which would then send a truck to the site. The truck was specially designed to lift and carry these containers. Before the driver left the site, he would check the load and get a signed work order from the contractor's foreman. An empty container would typically be left at the site."

The Administrative Law Judge's original finding of fact has been modified to more accurately reflect the record.

[3] The last sentence of the Administrative Law Judge's original finding of fact "1(b)" has been deleted as not supported by the record. The sentence read as follows:

> "They could not be used for garbage."

> Petitioners Persico and Costanzo were owners and officers of Dacs. Mr. Persico stated that he was the president and that he had duties with respect to the filing of income tax returns and that he hired the accountant for the corporation. Mr. Costanzo's duties are not clear from the record.[4]

Finding of fact "2" of the Administrative Law Judge's determination is modified to read as follows:

> Mr. Persico testified that Dacs did not cart garbage, rubbish or trash; it carried only construction debris. The debris removed included bulky wood and concrete pieces. The previous owner of the business never collected sales tax. No customer ever offered to pay the sales tax.[5]

Dacs was not registered as a sales tax vendor and has filed no sales tax returns. (At the time of the audit it was already out of business.)

Dacs kept a general ledger, cash receipts journal, cash disbursements journal, sales journal, accounts receivable ledgers, a check book, invoices of fixed assets and fuel invoices.

Dacs purchased some goods on which it was charged and paid sales tax. Petitioners made no attempt to inquire into why such tax might not be due on other purchases Dacs made.

---

[4] The Administrative Law Judge's finding of fact "1(e)" read as follows:

> "1. (e) Petitioners Persico and Costanzo were both owners and officers of Dacs. Mr. Persico admits that he had duties with respect to the filing of income tax returns and that he hired the accountant for the corporation. Mr. Costanzo's duties are not clear from the record."

The Administrative Law Judge's original finding of fact has been modified to more completely reflect the record.

[5] The Administrative Law Judge's finding of fact "2" read as follows:

> "2. Dacs's [sic] officers testified that Dacs did not cart garbage, rubbish or trash; it carried only construction debris. The debris removed was bulky wood and concrete pieces. At each work site a building was either going up or coming down. The previous owner of the business never collected sales tax. No customer ever offered to pay the sales tax."

The Administrative Law Judge's original finding of fact has been modified to more accurately reflect the record.

There is no evidence in the record that there was, as alleged by petitioners, an industry-wide custom and understanding that there would be no use tax on the purchase of goods to be used in performing nontaxable carting services or any other nontaxable services.

A sales tax audit of Dacs was conducted. For this audit, gross sales were taken from the sales journals which had been found to be consistent with Federal income tax returns. Dacs and its accountant cooperated with the auditor during the audit.

To test taxable sales, records of sales were examined for the month of September 1982. Thirty-seven invoices were found and gross sales from these totalled $43,246.60. Of those, 19 totalling $17,972.50 were determined to be taxable. Thus 41.56% of sales were found to be taxable. This ratio was applied to the gross sales for the audit period to determine the taxable sales for the audit period and a sales tax due was computed.

For about half its sales Dacs had some evidence that the customer had a direct pay permit, a capital improvement certificate or an exempt organization certificate. Some of these documents had been given to petitioner at the time of the job. Others were given at Dacs's request at the time of the audit.

Finding of fact "7" of the Administrative Law Judge's determination is modified to read as follows:

> Records of repair expense purchases were examined for the six-month period June 1982 through November 1982. Not all the invoices were available. It was found that 70.98% of purchases showed no evidence of any sales tax paid. In addition, it was found that 11.09% showed evidence of New Jersey tax paid but not New York tax.[6]

---

[6] The Administrative Law Judge's finding of fact "7" read as follows:

> "7. Records of repair expense purchases were examined for the six-month period June 1982 through November 1982. (Records were available for the full audit period.) It was found that 70.98% of purchases showed no evidence of any sales tax paid. In addition, it was found that 11.09% showed evidence of New Jersey tax paid but not New York tax."

The Administrative Law Judge's original finding of fact has been modified to more accurately reflect the record.

Records of purchases of fixed assets were examined for the full three-year audit period. Of the 29 transactions examined, 22 were deemed to be subject to tax.

Records for fuel expense purchases were examined for the full three-year audit period. Where there was no showing that New York tax was paid, tax on these expenses was assessed. (Where New Jersey tax had been collected, a credit was given.)

We find the following additional facts:

> After the above described audits had been completed, the auditor provided Dacs' accountant (Mr. Simonwitz) with tentative assessments and work papers. In a telephone conversation on November 27, 1984, the auditor asked Mr. Simonwitz if he wanted a full three year audit. Mr. Simonwitz advised the auditor that he did not want to proceed any further with the auditor on any aspects of the audit. The auditor sent Mr. Simonwitz a letter dated December 5, 1984, in which he restated their conversation including his offer to do a complete three year audit and Mr. Simonwitz's refusal. The auditor also stated in the letter that based on their conversation the case would be closed as unagreed. Mr. Simonwitz did not respond to this letter or communicate with the auditor after the November 27th conversation.[7]

On February 20, 1985, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1980 through August 31, 1983 was issued to each petitioner. The tax due was stated as $86,700.53, penalty of $21,383.80 under Tax Law § 1145 and interest of $34,228.07 for a total amount due of $142,312.40. The tax due is comprised of $54,382.23 in sales tax on additional gross sales, $19,295.87 for use tax on fixtures and equipment, $11,003.36 for use tax on repair expenses and $2,019.87 for use tax on fuel expense.

---

[7] The Administrative Law Judge's finding of fact "6(b)" read as follows:

> "6. (b) During the audit and after, petitioners objected to the "use and application" of the test period method being used. The objection made in particular was that the test period included some misposted items that the auditor was not allowing for. The auditor offered to do an audit utilizing the books and records for the entire audit period. Petitioner did not respond to this. The auditor then proceeded with his audit in part using test period methods."

The Administrative Law Judge's original finding of fact "6(b)" has been deleted and this finding of fact has been added to more accurately reflect the record.

In recommending the penalty, the auditor stated that the penalty was recommended due to "the large number of missing certificates and missing invoices, also vendor is not registered, fails to register when requested and has filed no tax returns."

The auditor's report stated that:

> "Officer assessments should also be issued due to the overall lack of cooperation of the vendor and the large amount of tax in dispute."

Opinion

The Administrative Law Judge determined that: (1) all of Dacs' sales were exempt from tax because the services it performed were capital improvements to real property; (2) audits of Dacs' sales and of use tax on its repair purchases were invalid because petitioners did not consent to test period audits; (3) the use tax assessment of Dacs' purchases of tangible personal property was correct; (4) the tax assessed on fixed assets and fuel purchases should be adjusted based on petitioners' objections to the audits; and (5) although the two petitioners who were officers of Dacs were personally liable for the use tax unpaid by the corporation, they were not liable for penalty and interest because there is no statutory authority for imposing such liability for unpaid use tax.

The Division of Taxation (hereinafter the "Division") excepted to the Administrative Law Judge's findings: (1) that all of Dacs' sales were exempt; (2) that the test period audits were invalid; (3) that petitioners established that adjustments should be made in the use tax assessments for fixed assets and fuel purchases; and (4) that the officers of the corporation were not liable for penalty and interest on the use tax assessments.

Petitioners assert that the Administrative Law Judge's determination is correct and should be upheld.

We reverse in part the determination of the Administrative Law Judge for the reasons set forth below.

We discuss first the Administrative Law Judge's determination that the test period audits were invalid. The auditor used test periods to determine the amount of the assessments for sales tax on Dacs' sales and for use tax on repair purchases. The Administrative Law Judge found

that since Dacs' books and records were available for the entire audit period, the test period audits were invalid because petitioners had not agreed to them. The Administrative Law Judge's conclusion is not supported by the applicable case law or a proper reading of the facts here.

The Division has the right to resort to test periods and external indices to compute the tax due if a complete audit cannot be performed because the taxpayer refuses to make the books and records available (see, Matter of Continental Arms Corp. v. State Tax Commn., 72 NY2d 976, 534 NYS2d 362, 363, revg 130 AD2d 929, 516 NYS2d 338; Matter of Club Marakesh v. Tax Commn. of State of New York, 151 AD2d 908, 542 NYS2d 881, 883, lv denied 74 NY2d 616, 550 NYS2d 276).

The record here clearly establishes that the auditor made a proper request to do a full audit of all Dacs' books and records and that this offer was declined by Dacs' representative. Although at the time the auditor made the offer to do a complete audit he had prepared an assessment based in part on test period audits of certain items, it is clear that this assessment was tentative and that he was prepared to do a complete audit if the tentative assessment was not acceptable to petitioners. This is evidenced by the content of the auditor's notes of his November 27, 1984 conversation with petitioners' accountant (Mr. Simonwitz) which indicate that the auditor asked Mr. Simonwitz if he wanted a three year audit and that he told Mr. Simonwitz that the numbers contained in the work papers which had been previously supplied to Mr. Simonwitz were "only a proposal." The auditor's notes then indicate that Mr. Simonwitz told the auditor that he (Mr. Simonwitz) did "not want to proceed any further with examiner on any aspects of the audit" (emphasis in original), (Exhibit I, Tax Field Audit Record). The auditor then wrote Mr Simonwitz the letter of December 5, 1984 which made reference to their conversation on November 27th concerning the auditor's offer to do an audit of the entire audit period in lieu of the test period and Mr. Simonwitz's refusal to discuss the case further with the auditor (Exhibit I, last page). The auditor also advised Mr. Simonwitz that based on their conversation the case would be closed as unagreed. Mr. Simonwitz's testimony at the hearing

that all the books and records were available is not responsive to the question of whether petitioners' refused the auditor's offer to do a complete audit of these books and records. At the hearing, Mr. Simonwitz did not deny the accuracy of the auditor's testimony and notes or the contents of the December 5th letter. Significantly, Mr. Simonwitz did not explain why he did not respond to the auditor's letter of December 5, 1984 or communicate with the auditor after the November 27th conversation. The final assessment was not issued until approximately three months after the December letter, clearly allowing time for petitioners to reconsider the auditor's offer. The representative's failure to respond to the December 5th letter or to otherwise dispute the auditor's statements in the letter, can only be seen as confirmation of the refusal to allow the auditor to do a complete audit.[8] Under these circumstances, the Division was justified in proceeding with assessments based upon the test periods.

The second issue to be discussed is the question of whether petitioners established that all of Dacs' sales were exempt from tax. The Administrative Law Judge concluded that the services supplied by Dacs "can constitute a capital improvement to real property"; that they were "capital in nature"; and that Dacs' employees and customers' employees all "thought they were involved in construction and demolition and not in mere trash removal." (Administrative Law Judge's Determination, Conclusion of Law A.) Based on these conclusions, and apparently also on the fact that the Division did not introduce evidence that any particular work site was not a capital improvement, the Administrative Law Judge found that all of Dacs' sales were exempt from tax as services performed as part of capital improvements. The Administrative Law Judge's reasons do not support a conclusion that all Dacs' sales were exempt from tax.

Petitioners allege that the only services Dacs performed were the removal of construction and demolition debris from capital improvement sites. Petitioners claim that they established at the hearing that because of the nature of Dacs' business all of the transactions were automatically exempt without further proof. Therefore, petitioners argue that they were not

---

[8]Although there is reference in the record to a written disagreement by petitioners' accountant to the use of the test periods, this document is not in the record and, in any case, appears to predate the auditor's offer to do a full audit.

required to specifically establish that each transaction in fact involved the removal of debris from a capital improvement.

The Division argues that petitioners have failed to meet the burden imposed by Tax Law § 1132(c) of showing that none of Dacs' receipts were taxable. The Division asserts that petitioners' general allegations as to Dacs' activities are insufficient and that petitioners must prove the tax exempt status of each transaction by reference to documents, testimony or other evidence related specifically to that transaction.

Tax Law § 1105(c)(5) imposes tax on the receipts from every sale of the service of maintaining, servicing or repairing real property including "trash removal from buildings" but excluding services which are a capital improvement as defined in Tax Law § 1101(b)(9). In Matter of Building Contr. Assn. v. Tully (87 AD2d 909, 449 NYS2d 547), it was held that the removal of construction and demolition debris from the site of a capital improvement was not "trash removal" within the meaning of the statute, but rather, since the removal of debris was a necessary part of the completion of a capital improvement project, these services were not included within the services taxable under Tax Law § 1105(c)(5).

Tax Law § 1101(b)(9)(i) defines "capital improvement" as:

> "An addition or alteration to real property which:
>
> "(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
>
> "(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
>
> "(C) Is intended to become a permanent installation."

Tax Law § 1132(c) states in part that:

> "For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivision (a), (b), (c) and (d) of section eleven hundred five, . . . are subject to tax until the contrary is established, and the burden of proving that any receipt, . . . is not taxable hereunder shall be upon the person required to collect tax or the customer."

The language of Tax Law § 1132(c) is clear: all receipts of the described types (including the receipts at issue here) are presumed to be taxable until the contrary is established and the burden of proving that any receipt is not taxable is on the taxpayer. The purpose of this section is contained in the section itself so it need not be inferred; it is to allow for the proper administration of the tax and to prevent tax evasion. Once the Division has identified receipts for property or services of the types indicated for which tax has not been paid, this section does not impose on the Division a further burden to show that each of the taxpayer's receipts are in fact taxable (see, Matter of Koren-Di Resta Constr. Co. v. State Tax Commn., 138 AD2d 909, 526 NYS2d 654, lv denied 72 NY2d 805, 532 NYS2d 755; Matter of Mendon Leasing Corp. v. State Tax Commn., 135 AD2d 917, 522 NYS2d 315, lv denied 71 NY2d 805, 529 NYS2d 276; Matter of On the Rox Liquors v. State Tax Commn., 124 AD2d 402, 507 NYS2d 503, lv denied 69 NY2d 603, 512 NYS2d 1026).

This does not mean, however, that it is not possible for a taxpayer to prove that all of its receipts were not taxable by showing with testimony, documents or other evidence that the only transactions it engaged in were nontaxable ones. This possibility does not, however, change the taxpayer's burden to prove that all of its transactions were not taxable. It merely means that there may be more than one way of doing so.

We agree with the Division that in this case petitioners have failed to show that all of their transactions were exempt. In order for the carting services to be exempt, the activities generating the waste must meet the definition of a capital improvement contained in Tax Law § 1101(b)(9). Given the technical nature of capital improvements and the possibility that all projects generating the same type of debris may not all be capital improvement projects within the meaning of Tax Law § 1101(b)(9), the evidence to show that all transactions were exempt must be clear and unequivocal. The evidence in this case is insufficient to justify such a conclusion.

The Administrative Law Judge seemed to believe that it was the contents of the containers and the general nature of Dacs' business that was important. Although these matters

are relevant, they are far from conclusive. Petitioners' evidence does not exclude the possibility that at least some of their transactions were taxable. There is no testimony in the record from any witness which described the activities of the business in sufficient detail to meet petitioners' burden of establishing that all of Dacs' transactions were exempt. Testimony from Dacs' employees as to what they "thought" or testimony or documents that indicate that Dacs was limited to carting construction debris cannot meet petitioners' burden of proof. That the waste carted by Dacs was construction or demolition debris does not by itself prove that the debris was being removed from a capital improvement project. Construction or demolition debris can result from a project that does not qualify as a capital improvement under Tax Law § 1101(b)(9). Many types of repairs which may be taxable as services to maintain real property or not subject to tax for other reasons could generate the types of construction debris petitioners' witnesses indicate was carted by Dacs (for example, window replacement, 20 NYCRR 527.7[b][1] or roof repairs, 20 NYCRR 527.7[b][4]; see also, Matter of Merit Oil of New York v. New York State Tax Commn., 124 AD2d 326, 508 NYS2d 107, 109 [where fuel tanks, piping, canopies over fuel pumping area, cashier's booths, storage buildings and concrete parking areas were held not to be capital improvements because they were not intended to be permanent]; Matter of Raised Computer Floors v. Chu, 116 AD2d 958, 498 NYS2d 288, 289, lv denied 68 NY2d 606, 506 NYS2d 1031 [where raised floor made of steel pedestals and flooring were found not to be capital improvements because they were not intended to be permanent]). It should be noted that of the transactions examined by the auditor, exemption was supported by documentation supplied by petitioners in approximately half of the transactions. As a result, the error rate used by the auditor was considerably reduced. At the hearing, however, petitioners did not attempt to show that each of the other transactions included in the test period also related to capital improvement projects. If, as petitioners' allege, all of Dacs' services were supplied to buildings "going up or coming down," this does not seem to be an insurmountable burden.

We discuss next the Administrative Law Judge's conclusion that petitioners established at the hearing that the assessments for fixed assets and fuel purchases should be adjusted due to errors in the books and records reviewed by the auditor.

Although the Administrative Law Judge was correct in stating that a taxpayer can always present evidence at the hearing to correct mistakes in an audit, it is the taxpayer's burden to show by clear and convincing evidence that the amount assessed was erroneous (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679, 681; Matter of Surface Lines Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451, 453). The evidence submitted by petitioners at the hearing is insufficient to establish that the audits should be adjusted. Mr. Simonwitz testified to his belief that the audit was in error because items had been incorrectly posted in Dacs' books. A document entitled "Summary of Use Tax Errors" prepared by Mr. Simonwitz was accepted by the Administrative Law Judge as an exhibit. Mr. Simonwitz testified on cross-examination that the document had been "recently" prepared by him (Hearing Tr., p. 133). He did not testify as to what documents he used to prepare the summary, nor were any original books and records submitted to support petitioners' allegation of errors. Under these circumstances, the Administrative Law Judge's findings of fact on the "mispostings" are not supported by the record and his conclusion that the assessment should be adjusted based on the summary sheet presented by petitioners is in error.

The last issue to be addressed is whether the officers are liable for penalty and penalty interest on the use tax assessments. The Administrative Law Judge found that penalty and additional interest on the corporation's use tax liability could not be asserted against the responsible officers because there was no statutory authority to support such an assessment.

Tax Law § 1145(a)(i) in effect for the period at issue required that a penalty and additional penalty interest be imposed on any person (including a corporation) "failing to file a return or to pay over any tax . . . within the time required by or pursuant to this article [Article 28 - Sales and Compensating Use Taxes]." Tax Law § 1145(a)(1)(iii) requires that the penalty and penalty interest be remitted if reasonable cause is shown.

The Division imposed penalty and additional interest as required by the statute on the corporation and on the two responsible officers. At the hearing, petitioners failed to show that there was reasonable cause to remit the penalty or additional interest for any of the taxes assessed. We agree with the Division that given the mandatory language of the statute, the reasons given by the auditor for the penalty assessments were not relevant.

The Administrative Law Judge concluded that a responsible officer cannot be held liable for penalty and penalty interest because the language of Tax Law § 1133(a) which imposes personal liability for "the tax imposed, collected or required to be collected under this article," means that personal liability is imposed only for the tax and not the penalty and interest.[9] In addition, the Administrative Law Judge found that Tax Law § 1131(3) defines the term "tax" to include only the tax imposed by Tax Law §§ 1105, 1110 and 1137. The Administrative Law Judge found that his conclusion was supported by the decision in Matter of Velez v. Division of Taxation of Dept. of Taxation & Fin. (152 AD2d 87, 547 NYS2d 444).

In Velez, it was held that while a bulk sale purchaser may be personally liable for the unpaid sales and use taxes of the seller, the purchaser cannot be held liable for the penalty and penalty interest on the seller's unpaid taxes because Tax Law § 1141(c) which imposes the liability does not specifically mention penalty and interest in defining the scope of the purchaser's liability. The court pointed out that the purchaser was not in a position to obtain the relief from penalties contained in Tax Law § 1145(a)(1)(iii) because it would be difficult for the purchaser to establish reasonable cause for the seller's failures.

We reverse the determination of the Administration Law Judge with regard to this issue. In Matter of Hall (Tax Appeals Tribunal, March 22, 1990), where an identical argument was made with regard to a responsible officer's liability for penalty and interest on a sales tax assessment, the Tribunal held that the language of Tax Law § 1133(a) does not limit the responsible person's liability to tax only, and that the decision in Velez may be distinguished

[9]The Administrative Law Judge did not address the penalty imposed on the taxable sales because he cancelled the underlying tax. The Division has explicitly stated that it "is not taking an exception in regard to penalty due on unsubstantiated exempt sales" (Division's brief on exception, p. 18); therefore, we have not addressed the cancellation of the penalty imposed on taxable sales.

from the facts presented by Hall. The same reasoning and conclusion apply to the facts presented here.

As in Hall, and unlike the bulk purchaser in Velez, the responsible officers here were in a position to establish that they should not be held personally liable for the penalty and interest due from the corporation. In fact, as the sole owners and officers of the corporation, they were in the best position to present such proof. No legislative intent to limit the liability of such officers is expressed in the Tax Law. As we stated in Hall:

> "In addition to these bases to distinguish the Velez decision, we find affirmative evidence in the Tax Law that a responsible person can be liable for the penalty and interest assessed against the corporation. As noted above, an officer or employee is held liable because he satisfies the definition of "persons required to collect tax" set forth in § 1131(1) of the Tax Law as an officer or employee who is under a duty to act for the corporation in complying with any provision of the sales tax law. The penalties and interest at issue are imposed, by § 1145(a)(1)(i) of the Tax Law, on any person failing to file a return or to pay over any tax. Since the requirements to file a return and pay over tax are among the most essential to comply with the sales tax law, there is a clear and logical integration between the responsible person provisions of § 1131(1) and the penalty and interest provisions of § 1145(a)(1)." (Matter of Hall, supra.)

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed, except for conclusions of law "C", "G" and "I", that portion of conclusion of law "E" which upholds the audits of fixed assets and fuel purchases, that portion of conclusion of law "F" which upholds the penalty on the assessment for tax due on purchases of fixtures and fuel, and that portion of conclusion of law "H" which upholds the assessments against the officers which are sustained;

3. The petition of Dacs Trucking Corp., and Theodore Persico and Nicholas Costanzo, as officers, is granted to the extent that the Administrative Law Judge's conclusion of law "F" did not impose penalty on the corporation's taxable sales but is otherwise denied in all respects; and

4. The Division of Taxation is directed to modify the notices of determination issued on February 20, 1985 to the extent indicated in paragraph "3" above, but such notices are otherwise sustained.

DATED: Troy, New York
March 21, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner