STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **MATTHEW IANNIELLO, OFFICER OF P & G FUNDING, INC. D/B/A MARDI GRAS** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1978 through February 4, 1986.	:	DECISION DTA Nos. 805106 & 806698
In the Matter of the Petition of **BENJAMIN COHEN, OFFICER OF P & G FUNDING, INC. D/B/A MARDI GRAS** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1978 through February 4, 1986.	:	

Petitioners Matthew Ianniello, officer of P & G Funding, Inc. d/b/a Mardi Gras, 10 Tredwell Drive, Old Westbury, New York 11568 and Benjamin Cohen, officer of P & G Funding, Inc. d/b/a Mardi Gras, 30 Frost Pond Road, Roslyn, New York 11576 filed an exception to the determination of the Administrative Law Judge issued on June 6, 1991 with respect to their petitions for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1978 through February 4, 1986. Petitioners appeared by Richard H. Champion and John L. Pollok, Esqs. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Each party filed a brief on exception. Oral argument, at the request of petitioners, was heard on May 28, 1992.

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

ISSUES

I. Whether petitioners Cohen and Ianniello were "persons required to collect tax" under Tax Law § 1131(1) when they were not officers, directors or employees of P & G Funding, Inc.

II. Whether the Division of Taxation can use the evidence underlying the federal court convictions of petitioners Cohen and Ianniello for RICO violations concerning tax evasion for the period 1978 through November 30, 1982 for the audit period subsequent to November 30, 1982 for purposes of determining a State sales tax assessment and fraud penalty.

III. Whether the Division of Taxation is precluded from proceeding against petitioners Cohen and Ianniello because it allegedly did not timely secure the sales tax owing against the escrow account held by the bulk sale purchaser, the Estate of Michael Zaffarano.

IV. Whether petitioners Cohen and Ianniello should be held liable for sales tax on $2,000,000.00 in sales when that amount was forfeited to the federal government pursuant to 18 USC 1963(a)(3).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that we have deleted findings of fact "12" and "17" because they are not relevant to the issues before us on exception. We have also modified finding of fact "18" for the same reason.[1] In addition, we have added paragraphs "8" and "9" of the stipulation of the parties as facts in this case.[2] The

[1]Findings of fact "12," "17" and "18" of the Administrative Law Judge's determination relate in whole or in part to petitioner, Estate of Michael Zaffarano, as purchaser of P & G Funding, Inc. d/b/a/ Mardi Gras. The Administrative Law Judge determined that the Estate of Michael Zaffarano, the bulk sale purchaser of P & G Funding, Inc., was not liable for sales tax assessment under section 1141(c) of the Tax Law. Since this portion of the Administrative Law Judge's determination is not before us on exception, we have modified the facts accordingly.

[2]In paragraphs "8" and "9," the parties stipulated that Jerome Brickman and John DiPilato, if called as witnesses, would testify to certain facts as stated in paragraph "8," subparagraphs a through d, and paragraph "9," subparagraphs a through h. The Administrative Law Judge did not include these paragraphs in her findings of fact

Administrative Law Judge's findings of fact, with the exceptions noted, and the added paragraphs of the stipulation are set forth below.

On or about September 26, 1978, Paul Gelb, as president of P & G Funding Corp., signed with Michael Zaffarano as landlord, a 15-year 3-month lease for property located at 1599 Broadway, New York, New York, to operate a bar called the "Mardi Gras". The lease was effective subject to the State Liquor Authority's ("SLA's") approval and licensing. The period of occupancy was contracted by Paul and Pauline Gelb to run from October 1, 1978 through December 31, 1993.

P & G Funding Corporation ("P & G Funding") d/b/a Mardi Gras Bar, was licensed by the SLA to operate as a bar on or about December 20, 1978. The applicant for the SLA license was Paul Gelb and the application indicated that Paul and Pauline Gelb were the only stockholders, officers and directors of the business -- Paul Gelb, as president, and Pauline Gelb, as secretary and treasurer.

Reports furnished to the SLA evidenced the fact that Paul and Pauline Gelb used their own funds, to wit, proceeds from the sale of the Plymouth Hotel in Fort Fairfield, Maine, to fund the initial start-up and operation of the bar.

The Mardi Gras commenced operation in January 1979. Pauline Gelb served as the day manager and Paul Gelb operated the bar from approximately 4:00 P.M. until closing.

On or about November 24, 1980, P & G Funding applied to the SLA for a corporate change allowing Paul Gelb to resign as corporate president and transfer his shares of P & G stock to his wife, Pauline Gelb. The SLA granted the application and Pauline Gelb thereafter served as president and sole stockholder of P & G Funding. The SLA file indicated that an amicable

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on the grounds that the statements do not substitute for testimony or affidavits by Jerome Brickman and John DiPilato to the same effect, inasmuch as the statements are not sworn or even signed by them.

separation in contemplation of divorce of the Gelbs was the basis for the change in title.

All applications for SLA renewal of liquor licenses were thereafter submitted by Pauline Gelb. All applications until 1986 were granted inasmuch as there were no major violations, offenses, or threatened revocations of licenses from the date of the opening of the bar. There were, however, some minor SLA non-compliance summonses issued to the bar.

Sometime shortly after the Mardi Gras obtained its liquor license, Benjamin Cohen and Matthew Ianniello acquired an interest in the profits of the Mardi Gras (Stip., para. 6).

Paragraphs "8" and "9" of the stipulation of the parties read as follows:

"8. Jerome Brickman, if called as a witness, would testify that:

"a. He is a registered public accountant, duly qualified to practice in the State of New York, with offices in Bayside, New York.

"b. From its inception in late 1978 through February, 1986, he was engaged by P & G d/b/a Mardi Gras as its accountant. As the accountant, he prepared all required federal, state, and city tax returns, including the sales tax returns that were required to be filed.

"c. During the period that he was engaged as its accountant, the shareholders, officers, and directors of P & G were Paul and Pauline Gelb. During the fall of 1980, Paul Gelb ceased to be a shareholder of the corporation and subsequent to that time, Pauline was the corporation's sole shareholder and served as the principal officer and director. All sales and income tax returns prepared by the Brickman office were executed by Paul Gelb and subsequent to 1980 by Pauline Gelb. Neither Benjamin Cohen nor Matthew Ianniello were at any time shareholders, officers, or directors of P & G.

"d. Finally, to his knowledge, neither Benjamin Cohen nor Matthew Ianniello were at any time employed by P & G in any capacity.

"9. John DiPilato, if called as a witness, would testify that:

"a. He worked in the Mardi Gras from early 1981 through and including the end of December, 1985, as the day manager. His normal hours were from 10 a.m. to 8 p.m., but he would often work to 10 or 11 p.m. when required.

"b. During the day, Pauline Gelb was in charge and at night, Paul Gelb was in charge.

"c. To his knowledge, either Paul or Pauline Gelb were the

> owners of the bar. They ordered all supplies, paid all bills, made and executed all checks. Pauline Gelb was the only person permitted to sign checks.
>
> "d. During the course of his employment, he saw Benjamin Cohen on the premises on one or two occasions during his four-year tenure but never saw Matthew Ianniello on the premises.
>
> "e. He knows Jerome Brickman, who was the bar's accountant, and Carl Moskowitz, who was the bar's attorney. He saw these gentlemen either once or twice a year.
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> "f. As part of his function as a day manager, he was to take the receipts from the previous night, count them, make sure they matched the register tapes which were in the custody of the Gelbs, and to take deposits which were prepared by the Gelbs to P & G's local bank. His other duties involved overseeing each of the bartenders, checking deliveries as they came in, and to remind the owners to order inventory, as needed.
>
> "g. It appeared to him that the financial affairs of the bar were totally under the control of Mrs. Gelb who made determinations of what creditors to pay and how much they were to be paid.
>
> "h. Pauline Gelb also exercised sole discretion on what employees to hire and fire."

On August 26, 1982, a United States district court judge for the Southern District of New York, approved an application by the Federal Bureau of Investigation (FBI) for electronic surveillance of Benjamin Cohen's business office (C & I Trading, located at 135 West 50th Street, New York, N.Y.). The surveillance, which was installed on September 7, 1982, included both audio and video recording devices placed in various locations within the suite of offices occupied by C & I Trading, including the office of Benjamin Cohen. The electronic surveillance continued until December 27, 1982.

In February 1985, petitioners Cohen and Ianniello, along with others, including Paul and Pauline Gelb, were indicted for, inter alia, unlawfully, willfully and knowingly devising a scheme to evade and defeat a large part of the sales tax on gross sales of P & G Funding due and owing to the Department of Taxation and Finance.

After a jury trial in the Southern District of New York, Benjamin Cohen, Matthew Ianniello

and Paul Gelb[3] were found guilty of, inter alia, a broad conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, tit. IX, 84 Stat. 941 (codified as amended at 18 USC §§ 1961-1968 [1982 & Supp. III 1985]), ("RICO"), mail fraud with regard to applications for renewal of liquor licenses before the SLA and the filing of sales tax returns with the New York State Department of Taxation and Finance, and tax evasion. On December 4, 1986, these convictions were upheld by the United States Court of Appeals, Second Circuit, in United States v. Ianniello (808 F2d 184, cert denied 483 US 1006, 107 S Ct 3230, 97 L Ed 2d 736), wherein the Court stated:

> "At trial, the government established that the defendants were part of a group that skimmed profits from bars and restaurants that they owned and operated in New York City. Matthew Ianniello and Benjamin Cohen directed the enterprise's activities, supervising and overseeing its affairs from offices in Manhattan. While they received the greatest profits from its operations, the bars and restaurants ostensibly were owned and managed by others, who acted as 'fronts' for Ianniello and Cohen.
>
> As part of the scheme to skim money, the defendants obtained liquor licenses from the SLA for the businesses. Ianniello's and Cohen's financial interests in the receipt of money from the bars and restaurants were concealed from the SLA. This eased the granting of the liquor licenses and made the skimming more difficult to detect.
>
> In addition, the scheme included a plan to defraud the New York State Department of Taxation and Finance (the 'Department') by understating gross receipts in sales tax returns....
>
> A lawyer and accountant also participated. Carl Moskowitz ('Moskowitz'), the lawyer, prepared false liquor license applications that were submitted to the SLA for the Mardi Gras, the Haymarket, the Grapevine and the Peppermint Lounge....
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> The most profitable business was P & G Funding Corp., which operated the Mardi Gras. The bar opened in January, 1979, and for the first two years of its operation the owners of record were Paul Gelb and his wife, Pauline Gelb. Subsequently, Pauline Gelb became the sole owner of record. From the time the Mardi Gras opened its doors in 1979, Ianniello, Cohen and Gelb regularly skimmed its cash receipts, dividing the money equally among themselves. By the end of 1982, the defendants had divided over $2 million in unreported income.

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[3]Pauline Gelb was acquitted at the close of the government's case.

> The original liquor license application prepared by Moskowitz and filed by the Mardi Gras with the SLA in October 1978 stated that no one other than Paul and Pauline Gelb had a financial interest in the Mardi Gras or would share in the receipts of the bar, hiding Ianniello's and Cohen's stake in the Mardi Gras. This was repeated in the later liquor license renewal applications. These defendants also concealed their skimming at the Mardi Gras from the Department by understating the bar's true gross receipts" (id. at 186-187 [footnotes omitted]).

On March 18, 1986, the Department assigned a sales tax auditor, Osteen Richardson, to conduct an audit of P & G Funding. On March 21, 1986, the auditor attempted to visit the premises but the business was closed. He then spoke to Pauline Gelb by telephone and was referred to her attorney, Mr. Pollok, who on March 26, 1986 informed the auditor that any available business records were in the possession of the U.S. Attorneys, Robert Allman and Randy Mastro. Randy Mastro directed the auditor to John Sabetta who was the custodian of P & G's records. The auditor discussed the case with Mr. Sabetta on the telephone on March 27, 1986 and followed up the discussion with an appointment letter requesting that he make available on April 15, 1986 all books and records of P & G Funding for the audit period March 1, 1983 through February 28, 1986. Among the documents requested were journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates, and sales tax records, daily sales readings and Federal income tax returns.

At the appointment the auditor reviewed the sales tax returns with worksheets and bank statements for the business's three bank accounts. Subsequently, the auditor was also provided with a general ledger, a cash receipts journal, a check disbursements journal, and Federal corporate income tax returns for 1982, 1983, and 1984.

The auditor's worksheets indicated that the following amounts were reported as taxable sales for each quarter:

2/79	$ 22,701.00	11/82	$192,644.00
5/79	111,455.00	2/83	172,352.00
8/79	180,899.00	5/83	171,394.00
11/79	201,063.00	8/83	174,487.00
2/80	211,641.00	11/83	205,109.00

5/80	171,046.00	2/84	235,472.00
8/80	183,182.00	5/84	260,433.00
11/80	159,542.00	8/84	256,657.00
2/81	159,345.00	11/84	254,281.00
5/81	177,515.00	2/85	233,065.00
8/81	174,377.00	5/85	250,063.00
11/81	176,721.00	8/85	210,165.00
2/82	167,109.00	11/85	254,657.00
5/82	190,981.00	2/1/85 to 2/4/86	143,175.00
8/82	194,476.00		

At no time was the auditor presented with source documents (e.g., sales invoices, purchase invoices, receipts, cash register tapes).

The auditor also discussed the case with numerous U.S. attorneys and agents concerning the federal conviction against petitioners Cohen and Ianniello and read the court documents including the Special Verdict Form concerning the case. Based on this information and the court's finding that petitioners Cohen and Ianniello had defrauded various federal and state governmental agencies, including the New York Department of Taxation and Finance, by preparing false documents, the auditor moved the audit period back to December 1, 1978 to correspond with the federal investigation and court findings. The auditor also determined that the business books and records provided were inadequate for performing a detailed and accurate audit.

Inasmuch as the Special Verdict Form stated that petitioners Cohen and Ianniello had "skimmed", as unreported sales, over $2,000.000.00 from the sales of Mardi Gras over a four-year period,[4] the auditor determined that there were at least $500,000.00 in unreported sales a year over the entire audit period. Using this amount, he determined that there were additional unreported sales of $125,000.00 per quarter and multiplied the quarterly sales by

[4] The $2,000,000.00 was based on a conversation on November 22, 1982 between Benjamin Cohen and Paul Gelb that was recorded by the FBI during the course of its investigation.

28.733 quarters (December 1, 1978 - February 4, 1986 [the date of the sale of the business]). The auditor arrived at additional sales of $3,592,000.00 for the entire audit period with $292,902.50 in additional sales tax due. The auditor also determined that petitioners Cohen and Ianniello were responsible similar to officers for any sales tax due based on the information contained in the U.S. court documents and Special Verdict Form that they had ownership in, as well as control over, the business.

We modify finding of fact "18" to read as follows:

> "Three notices of determination and demands for payment of sales and use taxes due, dated May 23, 1986, were issued separately to Benjamin Cohen and Matthew Ianniello, as persons responsible for the collection of sales tax. The notices assessed a tax deficiency in the total amount of $292,902.50, a fraud and omnibus penalty in the amount of $149,272.75 and interest in the amount of $166,290.20 for the audit period December 1, 1978 through February 4, 1986.[5]

The Department of Taxation and Finance had previously sent two Notices of Claim to Purchaser, dated February 27, 1986 and April 23, 1986, to the Estate of Zaffarano stating that no distribution of funds, to the extent of the amount of the State's claim for any sales and use taxes, may be made before (1) the State Tax Commission had determined the seller's liability, if any, (2) payment of such liability had been made to the State (payment might be made from the funds being withheld in accordance with Section 1141[c] of the Tax Law), and (3) the Department of Taxation had authorized the purchaser to release the funds or property.

In accordance with the Department's Notice of Claim to Purchaser, $675,000.00 of the purchase price for the lease cancellation was placed in escrow with the Estate's attorney Linnett, Schechter, Reicher & Altman.[6] According to the unrefuted statement made by the Estate's

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[5] We modified finding of fact "18" by eliminating the reference to the Estate of Zaffarano since the issue concerning the liability of the estate as bulk sale purchaser is not before us on exception.

[6] A check for $575,000.00, which had been issued to Pauline Gelb, was endorsed to Linnett, Schechter, Reicher

representative in his submission papers, the remaining $75,000.00 was paid to the New York State Department of Taxation and Finance for gains tax owed by P & G Funding on the sale of its leasehold rights.

On March 24, 1986, John C. Sabetta was appointed trustee of the assets of P & G Funding in accordance with a court order dated March 13, 1986, by the U.S. District Court, Southern District. The court order provided, in pertinent part:

> "The Court shall appoint a trustee, to be selected by plaintiff [United States] and approved by the Court for the purpose of identifying and marshalling the assets of P & G Funding Corp; [and] arranging for the payment of all cash assets of P & G Funding Corp. into the United States District Court for the Southern District of New York."

By letter dated March 28, 1986, Mr. Sabetta, requested that all assets of P & G Funding held by Linnett, Schechter, Reicher & Altman, to wit, the $675,000 held in escrow on behalf of the Estate of Zaffarano, be transferred to him as trustee. In response to this letter, Norman H. Schaumberger, on behalf of the law firm, wrote to Mr. Sabetta enclosing the Notice of Claim to Purchaser received by the Estate and stating:

> "Under the circumstances, I am directed to hold the funds pending receipt from the State of a determination or authority to release the funds.
>
> Should this create an issue, it is suggested the matter be taken up with the appropriate Department."

By Notice of Motion dated February 12, 1987, Mr. Sabetta moved in the U.S. District Court, Southern District, for an order directing the law firm of Linnett, Schechter, Reicher & Altman to transfer to him the cash assets of P & G Funding held in escrow by the law firm on behalf of the Estate. The Notice of Motion was sent to both Dennis Spillane, of the Tax Enforcement Division, and Michael Alexander, as Director of Litigation of the New York State

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& Altman to be held in escrow along with $100,000.00. The $575,000.00 was placed in an interest bearing account and the $100,000.00 was placed in a non-interest bearing account.

Department of Taxation and Finance. In his affidavit in support of the motion, Mr. Sabetta stated that Linnett, Schechter, Reicher & Altman refused to transfer the escrow funds to him as trustee of P & G Funding because it was concerned that to do so without court authorization would expose it to tax liability. Mr. Sabetta also stated in the affidavit that the order sought was not "intended to affect in any way the rights of the parties and other interested persons in and to the $675,000 of P & G Funding's assets now held by Linnett, Schechter."

On May 12, 1987, Judge Charles S. Haight, Jr., of the U.S. District Court, Southern District, granted the motion to transfer the $675,000.00 to Mr. Sabetta, as trustee. In its memorandum opinion and order, the court noted that only New York State resisted the motion because it was concerned that the State would lose its first priority lien if the order were issued. However, the court decided that the validity of New York State's claim to priority status over the funds at issue had not been litigated, might have to be in the future but was not being determined at that time. The court concluded that:

> "An order directing the transfer of the $675,000.00 to the trustee that bars the trustee from distributing those funds except upon motion with notice to all claimants causes no prejudice to New York and accomplishes the purposes of this Court's March 13, 1986 Order."[7]

Thereafter, by check dated June 26, 1987, the law firm of Linnett, Schechter, Reicher & Altman paid over to the Clerk of the U.S. District Court $720,941.17, the amount held in escrow plus interest on behalf of P & G Funding. This amount was deposited at Mr. Sabetta's request in an interest bearing account subject to further orders of the court disposing of the funds of P & G Funding.

Petitioners challenged their respective notices of determination. With regard to petitioners Ianniello and the Estate of Zaffarano, a conciliation conference was held on June 18,

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[7] The March 13 Order directed that a trustee be appointed for the assets of P & G Funding (see, above).

1987 and the statutory notices were sustained by two conciliation orders dated October 30, 1987. With regard to petitioner Cohen, a conciliation conference was held on June 14, 1988 and the statutory notices were sustained by conciliation order dated December 16, 1988.

Petitioners Cohen, Ianniello and the Estate of Zaffarano brought petitions dated, respectively, March 13, 1989, January 26, 1988 and January 13, 1988, challenging their respective notices of determination.

OPINION

The Administrative Law Judge rejected petitioners' assertion that, because they are not officers, directors or employees of P & G Funding, they are not persons required to collect taxes under Tax Law § 1131(1) and are not personally liable for the sales and use taxes assessed. The Administrative Law Judge determined that, under the facts of the case, petitioners were "persons required to collect tax" under section 1131(1) since they possessed all the indicia of control to make them liable for the tax.

The Administrative Law Judge also determined that, given the absence of reliable records, the Division of Taxation (hereinafter the "Division") was entitled to estimate petitioners' liability for the entire period; that there is no question that the Division could estimate that Mardi Gras had $500,000.00 of unreported sales per year for the audit period from December 1, 1978 to November 30, 1982 based on the Federal conviction and recorded conversation on November 22, 1982 for that period; and that, based on this information, it was reasonable for the Division to assume the same level of unreported sales for the post-conviction period, absent clear and convincing evidence by petitioners demonstrating the contrary.

The Administrative Law Judge sustained the imposition of the fraud penalty against petitioners, stating that:

> "[a]lthough the criminal convictions for fraud for the audit period prior to the quarter ending November 30, 1982, cannot alone serve as the basis for civil fraud penalties for the audit period subsequent to November 30, 1982, the total context of events, including the reason for the consistent and substantial underreporting and the ongoing relationship of petitioners Cohen and Ianniello with the Mardi Gras up until and after their indictments in February 1985 provide sufficient evidence to reasonably infer fraudulent intent for the entire audit period (see, Merritt v. Commr., 301 F2d 484; Matter of A. Charles Cinelli, Tax Appeals Tribunal, September 14, 1989)" (Determination, p. 25).

The Administrative Law Judge rejected petitioners' claim that the Division should be precluded from proceeding against them because the Division allegedly did not timely secure the tax liability owed by petitioners against the escrow account held by the bulk sale purchaser on behalf of P & G Funding. The Administrative Law Judge determined that the claim is without merit:

> "[t]he tax liability assessed against the three petitioners was separate and independent. Although the satisfaction of the debt by one may relieve the liability imposed on the others, the failure of one party to satisfy the debt, regardless of the reason, does not relieve the liability imposed on others. All parties are equally liable under the statute and the reason for the Division's failure or inability to obtain satisfaction of the debt against one party is immaterial to the continued liability of any other individual who is liable under the statute" (Determination, pp. 25-26).

Finally, the Administrative Law Judge rejected petitioners' contention that, because they forfeited the $2,000,000.00 sales to the Federal government, they are not liable for the sales tax on that amount. The Administrative Law Judge determined that:

> "[t]his argument has no merit. Petitioners failed to pay State sales tax on $2,000,000.00 in sales in a timely manner. Any subsequent disposal of the $2,000,000.00 is immaterial to the sales tax liability that was incurred when the sales were made" (Determination, p. 26).

On exception, petitioners assert that the rules of practice and procedure governing all proceedings before the Tribunal did not authorize the Administrative Law Judge to ignore the stipulation of the parties and that, therefore, the Administrative Law Judge erred in not including paragraphs "8" and "9" of the stipulation of the parties as findings of fact.

Petitioners assert that the Administrative Law Judge erred in holding petitioners personally liable for sales tax since they were not listed as officers, directors or employees of P & G Funding and, thus, could not possess any of the indicia of control which, under case law in this State, would make an officer, director or employee personally liable for tax as a person required to collect tax. Petitioners assert that the Administrative Law Judge's determination is wrong and does not comport with the legislative intent of section 1131(1).

Petitioners assert that: the Administrative Law Judge erred in sustaining as reasonable the Division's use of the Federal conviction as a basis for estimating sales taxes due for periods subsequent to November 30, 1982; the Administrative Law Judge erred in sustaining the fraud penalty for the periods subsequent to November 30, 1982; and the inaction of the Division in collecting petitioners' forfeiture of the sales tax should relieve petitioners from liability for the taxes assessed.

The Division asserts that the determination of the Administrative Law Judge is correct in all respects and urges that it be affirmed by this Tribunal.

We affirm the determination of the Administrative Law Judge.

We deal first with the assertion of petitioners that the Administrative Law Judge improperly deleted paragraphs "8" and "9" of the stipulation of the parties from the findings of fact in this case.

The Administrative Law Judge deleted the paragraphs because the statements in them "are not sworn or even signed" by the witnesses and because the "stipulation represents mere speculation as to the content of . . . [the] testimony . . ." (Determination, p. 3, footnote "1").

We agree with petitioners that the Administrative Law Judge erred in not finding, as a fact, the full stipulation of the parties. However, we disagree with petitioners that the testimony of the witnesses, as represented in the stipulation, materially affects the merits of their case.

The regulations of the Tribunal provide that:

> "[a] stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the tribunal, administrative law judge or presiding officer, or agreed upon by the parties. The tribunal, administrative law judge or presiding officer will not permit a party to a stipulation to qualify, change or contradict a stipulation in whole or in part, except where justice requires. A stipulation and the admissions therein shall be binding and have effect only in the pending proceeding and not for any other purpose, and cannot be used against any of the parties thereto in any other proceeding" (20 NYCRR 3000.7[e]).

The effect of paragraphs "8" and "9" of the stipulation is that the parties agreed to the content of the testimony of the two witnesses. We find no justification for the Administrative Law Judge to have eliminated paragraphs "8" and "9" of the stipulation from the facts. The Administrative Law Judge should have found the full stipulation as a fact.

However, the fact that the parties agreed to the content of the testimony of the two witnesses does not mean that 1) the parties stipulated that the testimony was fact, or 2) the Administrative Law Judge was required to find such testimony as fact.

We deal next with the issue of whether petitioners, who concededly were not officers, directors or employees of P & G Funding, could be "persons required to collect tax" under Tax Law § 1131(1).

We affirm the determination of the Administrative Law Judge.

Tax Law § 1133(a) provides that "every person required to collect any tax imposed by [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article."

Tax Law § 1131 provides:

> "(1) 'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and . . . <u>shall also include 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]</u>" (emphasis added).

The crux of petitioners' argument is that personal liability under section 1131(1) is limited to those persons who are officers, directors or employees of the corporation. Petitioners cite the decision of this Tribunal in Matter of Cambria (Tax Appeals Tribunal, September 1, 1988) in support of their position.

We disagree.

Petitioners misconstrue our decision in Cambria. There, we decided that the specific amendment to section 1131(1) in 1985 (L 1985, ch 65, § 160[j]), i.e., to include a "director" of a corporation in the list of specific persons who can be liable for the collection of tax, indicated that the Legislature did not construe the law prior to the amendment as including directors as persons who could be responsible for the collection of the tax. Our decision does not say that only those persons listed in section 1131(1) could be persons liable for the collection of tax or that that was the intent of the Legislature.[8] We conclude that petitioners can be personally liable for the collection of the tax within the purview of section 1131(1).

We deal next with whether petitioners engaged in activities concerning the corporation's business which render them personally liable for the tax.

We agree with the Administrative Law Judge.

In determining whether an individual is personally liable under section 1131(1), consideration must be given to all the facts in each case (Matter of Cohen v. State Tax Commn.,

[8]In Cambria, liability was asserted for the period June 1, 1981 through May 31, 1982. The question was whether Mr. Cambria, whose only formal connection with the corporation was as a director, could be a person required to collect tax within the purview of section 1131(1). The Division argued that he was, relying on United States v. Graham (309 F2d 210), where the question was whether a member of a corporation's board of directors could be a "person" required to collect tax when that member was not an employee or officer of the corporation. The court, interpreting language in the Internal Revenue Code (26 USC, §§ 6671[b]; 6672) similar to section 1131(1), held that the term "person" under the statute "does include officer and employee, but certainly does not exclude all others" (United States v. Graham, supra, at 211-212). We stated that "[w]hile the analysis of the Graham decision would otherwise be persuasive, its impact [in Cambria] was diminished because in Graham the Court was not confronted with a legislative enactment and the evidence of legislative intent directing our interpretation."

128 AD2d 1022, 513 NYS2d 564; Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; see also, 20 NYCRR 526.11[b][2]). The pivotal question is whether the individual had or could have had sufficient authority and control over the affairs of the corporation. A variety of factors are considered in resolving this question such as the individual's status as an officer; the individual's knowledge of and control over the financial affairs of the corporation; the authority to write checks on behalf of the corporation; the authority to hire and fire employees; the preparation, filing and signing of tax returns for the corporation; and the individual's economic interest in the corporation (Matter of Cohen v. State Tax Commn., supra, 513 NYS2d 564, 565; Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536; Matter of Constantino, supra). The factual determination demands a consideration of all the surrounding circumstances and involves more than the matching of the traditional indicia of responsibility to an officer's surface acts. Indeed, a person's officer status can be offset by the circumstances, such as where the officer's actions were done under the supervision and control of persons later convicted on criminal racketeering charges (see, Matter of Taylor, Tax Appeals Tribunal, October 24, 1991). Further, the lack of an official title in a corporation should not shield an individual from responsibility where that individual in fact controls the corporation. This conclusion is consistent with the Appellate Division's recent statement, in a slightly different context, that "we should be concerned with 'reality and not form [and] with how the corporation operated and the [individual's] relationship to that operation' [citation omitted]" (see, Morris v. Department of Taxation & Fin., ___ AD2d ___ [Oct. 22, 1992]).

Applying these principles to the present case, we can only conclude that petitioners possessed all of the indicia of control to make them personally liable for the collection of the tax. More specifically, as the Administrative Law Judge stated in her determination:

> "[a]s noted in United States v. Ianniello (supra) Paul and Pauline Gelb functioned as 'fronts' for petitioners Cohen and Ianniello as part of their

> scheme to skim money. That petitioners had a substantial economic interest in, and substantial control over, the finances of P & G Funding is evidenced by the fact that they received $2,000,000.00 of unreported sales income over a four-year period. Certainly the definition of 'persons required to collect tax' in Tax Law § 1131(1) does not act as a shield to protect petitioners from sales tax liability simply because they devised a scheme to conceal their involvement with P & G Funding. As argued by the Division's counsel, petitioners acted as de facto officers or directors.[9] With full knowledge and sufficient control over the finances of P & G Funding, they failed to report taxable sales from which they derived personal benefits. Holding them responsible as 'persons required to collect tax' comports with the legislative intent of Tax Law § 1131(1) to combat tax evasion and improve tax enforcement (see, Governor's Bill Jacket L 1985, ch 65)" (Determination, pp. 18-19).

We deal next with whether the Division could use the Federal court convictions for the period 1978 through November 30, 1982 for the audit period subsequent to November 30, 1982 for purposes of determining a State sales tax assessment.

Petitioners assert that the Division's reliance was unreasonable and challenge that the Division's audit method for the period subsequent to November 30, 1982 is "fatally flawed," asking:

> "[w]here, beyond his single phone call to Mrs. Gelb's attorney, is there any evidence that the auditor sought to raise his concerns with anyone potentially affected by his decision? Where is there any evidence that agents of the government, or the trustee, would likely have been in possession of records that were for periods subsequent to those upon which their investigation focused? [Footnote omitted.] Under the circumstances, how could the owner be aware that the auditor determined that her record-keeping appeared faulty (if in fact it was for periods during which it was well known to her, her husband and petitioners that a federal investigation was being conducted)? In the absence of some notice, when and where would the owner, let alone the petitioners, have some opportunity to provide 'clear and convincing evidence' to the contrary? Further it defies common sense to engage in the presumption that petitioners would sit by idly while the Division was busily

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[9] In a different but similar context the courts have held that they have the authority to pierce the corporate veil and look beyond the corporate form where necessary to prevent fraud or to achieve equity (Port Chester Elec. Const. Corp. v. Atlas, 40 NY2d 652, 389 NYS2d 327; Walkovszky v. Carlton, 18 NY2d 414, 276 NYS2d 585 [liability extended to shareholder when the corporation is a "dummy" for individual stockholders who are in reality carrying on the business in their personal capacity for purely personal rather than corporate ends]).

> constructing a $500,000 plus joint and several assessment against them on some new and novel construction of the tax law. At the very least, had they known in the Spring of 1986, that the proposed assessment was based upon the Division's assumption of unreliable and faulty record keeping for both pre-and post-indictment tax periods, they could have determined whether to argue at the District Court hearing, where the Division obviously did not, that some portion, or all, of the Bulk Sale proceeds held by the Trustee should have been devoted to the assessed tax liabilities" (Petitioners' brief on exception, pp. 9 and 10, emphasis in original).

Petitioners further state that: "[i]t was only the mutual discovery, engaged in by the parties during 1990 that apprised petitioners of the basis of the post November, 1982 assessments" (Petitioners' brief on exception, p. 10, footnote 5).

We affirm the determination of the Administrative Law Judge.

First, the Division properly requested the books and records of Mardi Gras (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109). It is unrefuted that in March 1986, at the outset of the audit, the auditor spoke first to Mrs. Gelb, was referred to her attorney who referred the auditor to the United States Attorney who, in turn, referred him to John Sabetta, trustee of P & G Funding, who presented the auditor with all books and records in his possession. We note that, in addition to the phone call, the trustee, Mr. Sabetta, was formally notified by letter that the audit period at issue covered "3/1/83 to 2/28/86" (Exhibit "R").

Second, with regard to the implications of petitioners' other assertions, we find no basis to conclude that petitioners were, in any way, impaired to present their case and controvert the Division's asserted liability against them. We point out that petitioners were apprised of the basis of the assessment prior to the matter being submitted to the Administrative Law Judge; petitioners agreed to waive the hearing and have the matter determined by the Administrative Law Judge on submission of documents; and petitioners presented no records or other evidence that would refute the basis for the Division's determination.

In fact, the auditor's examination of the books and records revealed that there were no

source documents (e.g., sales invoices, purchase invoices, receipts or cash register tapes). Since the RICO convictions and supporting documents evidenced tax evasion and fraudulent tax returns for the period 1978 through 1982, the auditor properly concluded that the records made available were unreliable and bore no relationship to the amount of sales tax due. Accordingly, the Division properly determined to estimate liability under the authority of section 1138. Petitioners do not challenge the Administrative Law Judge's determination that it was appropriate for the Division to estimate that Mardi Gras had $500,000.00 of unreported sales per year for the audit period December 1, 1978 to November 30, 1982 based on the Federal conviction and the recorded conversation on November 22, 1982.

We agree with the Administrative Law Judge that the Division's use of the same proof to estimate sales tax due for the periods after November 30, 1982 was appropriate under the circumstances. As the Administrative Law Judge pointed out, the method used by the Division is similar to the use of a test period or observation test audit to the extent that the result of an audit of a smaller time frame is deemed representative of the entire audit period. Moreover, as the Administrative Law Judge concluded:

> "[t]he only evidence presented by petitioners to the contrary was that reported sales increased after November 1983, contemporaneous with the issuance of grand jury subpoenas, and that it would be illogical for petitioners Cohen and Ianniello to continue their practice of skimming after they were indicted in February 1985. Although this argument may have some common sense appeal, it does not rise to the level of 'clear and convincing' evidence. The increase in the reported sales after November 1983 is not so aberrant as to indicate anything other than normal fluctuations in the business. For example, Mardi Gras' reported taxable sales for the period ending August 31, 1985 had decreased approximately $20,000.00 from the previous quarter ending February 28, 1985 (the month of the indictments) and was approximately the same as the amount of taxable sales reported in February of 1980. Thus, absent 'clear and convincing' evidence to the contrary, the auditor's estimate of sales tax due was reasonably determined" (Determination, p. 23).

We deal next with whether the Division met the burden of proof imposed upon it regarding the imposition of the fraud penalty (Matter of Cinelli, Tax Appeals Tribunal,

September 14, 1989; Matter of Sener, Tax Appeals Tribunal, May 5, 1988). We affirm the determination of the Administrative Law Judge in all respects.

First, we agree with the Administrative Law Judge that petitioners' criminal conviction for fraudulently filing false tax returns collaterally estops petitioners from challenging the civil fraud penalty imposed under Tax Law § 1145(a)(2) only for the same period covered by the conviction (see, Plunkett v. Commissioner, 465 F2d 299, 72-2 USTC ¶ 9541). The former State Tax Commission followed the same policy (see, Matter of Botwinick & Sons, State Tax Commn., December 5, 1986; Matter of Chateau Chemists, State Tax Commn., May 4, 1984).

Second, with regard to the post-conviction periods, the standard to which the Division must adhere is to show by clear, definite and unmistakable evidence every element of fraud, including willful, knowledgeable and intentional wrongful acts or ommissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing (Matter of Sener, supra). As the Administrative Law Judge correctly noted:

> "fraud need not be established by direct evidence, but can be established by circumstantial evidence by surveying the taxpayer's entire course of conduct in the context of the events in question and drawing reasonable inferences therefrom (Plunkett v. Commissioner, supra at 303; Matter of Cinelli, Tax Appeals Tribunal, September 14, 1989, citing Korecky v. Commissioner, 781 F2d 1566 [11th Cir 1986]; Briggs v. Commissioner, 440 F2d 1 [6th Cir 1962])" (Determination, p. 25).

We agree with the Administrative Law Judge that: "the total context of events, including the reason for the consistent and substantial underreporting and the ongoing relationship of petitioners Cohen and Ianniello with the Mardi Gras up until and after their indictments in February 1985 provide sufficient evidence to reasonably infer fraudulent intent for the entire audit period" (Determination, p. 25).

We reject petitioners' assertion that this conclusion is wrong and that the total context of events "suggests that fraudulent conduct was not present" (Petitioners' brief on exception, p. 11).

We find no basis for the core of petitioners' assertions -- first, that petitioners were aware that their conduct was being investigated and second, that because of such awareness they altered their course of conduct and began paying the proper amount of taxes.[10]

The reported taxable sales indicate no measurable change in the activities of petitioners. As the Administrative Law Judge noted:

> "[t]he increase in the reported sales after November 1983 is not so aberrant as to indicate anything other than normal fluctuations in the business. For example, Mardi Gras' reported taxable sales for the period ending August 31, 1985 had decreased approximately $20,000.00 from the previous quarter ending February 28, 1985 (the month of the indictments) and was approximately the same as the amount of taxable sales reported in February of 1980" (Determination, p. 23).

Finally, we address petitioners' assertions that 1) the Division should be precluded from proceeding against them because the Division allegedly did not timely pursue the tax liability

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[10]Petitioners assert that:

> "[i]t strains credibility to indulge in the presumption that the federal government, which continued its investigation at least until the moment of indictment in the Spring of 1985, would not have sought to charge fraudulent conduct if the same had been present in 1983 and 1984. Likewise it strains credibility to believe that petitioners, aware that their conduct was being investigated, would conduct themselves in a fashion designed to insure that the federal investigation would continually expand" (Petitioners' brief on exception, p. 11, emphasis in original).

On the same basis, petitioners also challenge the Administrative Law Judge's reliance on Matter of Cinelli (supra), arguing that the instant case is different since in Cinelli:

> "only three subsequent tax periods were involved and those tax periods had always been a component of the audit investigation which led to the criminal indictment. That is to be contrasted with the circumstance present here where the post indictment audit periods involved span nine periods, the audit was commenced post conviction and the audit period ab initio focused on tax periods subsequent to those embraced by both the indictment and the conviction. Indeed, the Division asks [the] Tribunal to assume that while on trial in the Winter of 1985, and post-conviction until the Mardi Gras' closure, petitioners were busily skimming receipts at the same rate that may have obtained in November, 1982. Such rank speculation cannot, under [the] Tribunal's prior decisions, serve as a basis to sustain the penalty here imposed" (Petitioners' brief on exception, pp. 11 and 12).

owed by petitioners against the escrow account held on behalf of P & G Funding by the bulk sale purchaser and 2) because they forfeited $2,000,000.00 sales tax to the Federal government, they are not liable for sales tax on the amount. Both of these issues were raised before the Administrative Law Judge, who rejected them. Petitioners have not raised any new arguments on exception to cause us to modify, in any way, the Administrative Law Judge's determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Matthew Ianniello, Officer of P & G Funding, Inc. d/b/a Mardi Gras and Benjamin Cohen, Officer of P & G Funding, Inc. d/b/a Mardi Gras is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Matthew Ianniello, Officer of P & G Funding, Inc. d/b/a Mardi Gras and Benjamin Cohen, Officer of P & G Funding, Inc. d/b/a Mardi Gras are denied; and

4. The notices of determination and demand for payment of sales and use taxes due, dated May 23, 1986, are sustained.

DATED: Troy, New York
November 25, 1992

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

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

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