

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM P. MACKIEWICZ, JR.	:	
for Revision of Determinations or for Refund of	:	DECISION
Sales and Use Taxes under Articles 28 and 29	:	DTA NO. 820277
of the Tax Law for the Period March 1, 1997	:	
through February 29, 2000.	:	
	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on May 11, 2006 with respect to the petition of William P. Mackiewicz, Jr., 617 Richmond Avenue, Buffalo, New York 14222. Petitioner appeared by Duke, Holzman, Yeager & Photiadis, LLP (Gary M. Kanaley, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception and petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on December 13, 2006 in Troy, New York.

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

ISSUE

Whether the Division of Taxation's cancellation of a sales tax fraud penalty assessed against a corporation also requires cancellation of such a penalty assessed against an officer or employee of the corporation under a duty to act for that corporation pursuant to Tax Law § 1131(1) and § 1133(a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner 121 Grant Street Inc. ("the Corporation") operates a retail liquor and beverage center under the name of Frontier Liquor and Beverage located at 121 Grant Street, Buffalo, New York. The Corporation is a Federal and New York State Subchapter S corporation of which petitioner William P. Mackiewicz, Jr., is the sole shareholder and officer.

During the period at issue, the Corporation filed sales tax returns which reported the following gross taxable sales and remitted the following sales tax:

Taxable Period Ended	Reported Taxable Sales	Sales Tax	Prepaid Sales Tax on Cigarettes	Net Sales Tax
05/31/97	\$313,484.30	\$25,078.74	\$3,294.44	\$21,784.30
08/31/97	\$338,178.12	\$27,054.25	\$4,095.14	\$22,959.11
11/30/97	\$311,106.73	\$24,888.54	\$3,378.10	\$21,510.44
02/28/98	\$349,326.58	\$27,946.13	\$4,138.14	\$23,807.99
05/31/98	\$316,375.52	\$25,310.04	\$4,077.10	\$21,232.94
08/31/98	\$347,112.79	\$27,769.02	\$4,513.30	\$23,255.72
11/30/98	\$314,563.15	\$25,165.05	\$3,003.35	\$22,161.70

02/28/99	\$350,215.25	\$28,017.22	\$3,545.85	\$24,471.37
05/31/99	\$313,884.18	\$25,110.73	\$3,875.90	\$21,234.83
08/31/99	\$345,805.30	\$27,664.43	\$4,277.95	\$23,386.48
11/30/99	\$332,542.76	\$26,603.42	\$3,046.47	\$23,556.95
02/29/00	\$387,235.61	\$26,603.42	\$3,835.20	\$27,143.65
Total	\$4,019,830.29	\$321,856.42	\$45,080.94	\$276,505.48

All of the returns were signed by petitioner William P. Mackiewicz, Jr.

In March 2000, the Division of Taxation (“Division”) commenced a sales tax audit of the Corporation’s business. Utilizing third-party vendor information, an analysis of bank deposits and various other records, the audit determined that reported taxable sales and reported sales tax were substantially understated, and the matter was referred to the Division’s Revenue Crimes Bureau and to the Attorney General’s office for a possible criminal prosecution of petitioner William P. Mackiewicz, Jr. Subsequently, Mr. Mackiewicz was indicted on the charge of Grand Larceny in the Third Degree in violation of New York Penal Law § 155.35. On December 19, 2002, Mr. Mackiewicz pled guilty to Grand Larceny in the Third Degree, admitting that between March 1997 and April 2000 he failed to remit to the Division the sales tax collected by the Corporation.

Additional taxable sales were determined on audit which resulted in additional sales tax as follows:

Taxable Period Ended	Audited Taxable Sales	Sales Tax per Audit	Tax Paid as Originally Reported	Additional Sales Tax Due
05/31/97	\$915,813.23	\$59,625.56	\$21,784.30	\$37,841.26
08/31/97	\$986,203.55	\$66,383.08	\$22,959.11	\$43,423.97

11/30/97	\$906,493.56	\$60,455.79	\$21,510.44	\$38,945.35
02/28/98	\$853,948.15	\$58,946.46	\$23,807.99	\$35,138.47
05/31/98	\$942,242.91	\$63,954.31	\$21,232.94	\$42,721.37
08/31/98	\$1,095,197.83	\$77,659.97	\$23,255.72	\$54,404.25
11/30/98	\$927,894.45	\$65,837.36	\$22,161.70	\$43,675.66
02/28/99	\$1,036,348.34	\$71,695.27	\$24,471.37	\$47,223.90
05/31/99	\$885,339.98	\$60,542.35	\$21,234.83	\$39,307.52
08/31/99	\$1,026,255.18	\$71,425.45	\$23,386.48	\$48,038.97
11/30/99	\$931,440.64	\$66,444.11	\$23,556.95	\$42,887.16
02/29/00	\$783,758.67	\$53,911.99	\$27,143.65	\$26,768.34
Total	\$11,290,936.49	\$776,881.70	\$276,505.48	\$500,376.22

As a result of the audit, on February 18, 2003 the Division issued a Notice of Determination to the Corporation for the additional sales tax, as well as fraud penalty and interest pursuant to Tax Law § 1145(a)(2).

On May 6, 2003, petitioner William P. Mackiewicz, Jr. was sentenced to a three-year conditional discharge. As part of a plea agreement, Mr. Mackiewicz agreed to pay restitution in the amount of \$286,533.00, which amount was paid prior to his sentencing.

On September 15, 2003, the Division issued a Notice of Determination to William P. Mackiewicz, Jr. as a person responsible to collect and remit taxes on behalf of the Corporation. This notice assessed the same amounts of sales tax, fraud penalty and interest as were assessed against the Corporation, except that the amount of restitution previously paid by Mr. Mackiewicz had been applied to the tax amounts assessed for the periods ended May 31, 1997 through November 30, 1998.

Each petitioner protested the relevant notice by filing a Request for a Conciliation Conference before the Division's Bureau of Conciliation and Mediation Services. By conciliation orders dated September 3, 2004, the conciliation conferee sustained the Notice of Determination in full as to petitioner William P. Mackiewicz, Jr., and sustained the tax and interest but cancelled the fraud penalty as to the Corporation.¹

Each petitioner filed a timely petition with the Division of Tax Appeals protesting their respective Notice of Determination. Each petitioner agrees that the tax assessed is correct and that William P. Mackiewicz, Jr. was a person responsible for the collection and remittance of sales and use taxes on behalf of the Corporation. The parties to this proceeding agree that the Corporation has been relieved of all penalty liability and has been granted a reduction of interest. Petitioner William P. Mackiewicz, Jr., claims that lowering the overall liability of the Corporation requires the Division to lower his overall liability to an amount equal to the overall liability of the Corporation.

The only issue presented for determination is whether the cancellation of the fraud penalty and reduction in interest as to the Corporation by the conciliation conferee must, as a matter of law, act to cancel the fraud penalties and reduce the interest as to petitioner William P. Mackiewicz, Jr., as a responsible person.

¹ It would appear that sustaining interest as to the corporation refers to interest computed at a rate lower than that which was computed in connection with the fraud penalty per Tax Law § 1145(a)(2). In this manner, this finding of fact, which states that tax and interest were sustained as to the Corporation, may be reconciled with the finding below, which states that a reduction of interest was granted as to the Corporation.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that petitioner did not challenge the Division's method of determining tax, interest and a penalty for fraud against the Corporation. Moreover, the Administrative Law Judge stated that petitioner did not dispute that he is a "person" who was subject to personal liability for the unpaid sales and use taxes, and attendant penalty and interest, determined to be owed by the Corporation. It is noted that the total amount of tax, interest and penalty was asserted against the Corporation in a single notice of determination pursuant to Tax Law § 1138(a)(1).

The interest and penalties to which a taxpayer may be subjected are provided for in Tax Law § 1145. Applicable in this matter, Tax Law § 1145(a)(2), provides for the imposition of a fraud penalty equal to 50 percent of the amount of tax due, plus interest at the rate specified. Penalties and interest may be "determined, assessed, collected and enforced in the same manner as the tax imposed by this article [Article 28]" (Tax Law § 1145[a][7]). Thus, the Administrative Law Judge noted, the determination and assessment of such penalty and interest is to be made via a notice of determination authorized and issued pursuant to Tax Law § 1138(a)(1).

The amount of the "tax determination" rendered against the Corporation was ultimately reduced by the Division's Bureau of Conciliation and Mediation Services by the elimination of the penalty for fraud and attendant reduction of interest. While petitioner did not contest that he is a person under a duty to act for the Corporation and liable for the "determination of tax" against the Corporation, petitioner argued that his liability is limited to the extent of the amounts asserted against the Corporation.

The Division disagreed and focused on the fact that Tax Law § 1138(a)(3)(B) uses only the word “tax” insofar as it mandates a reduction to an individual officer or employee’s liability for a corporation’s obligation, thus, according to the Division, a person under a duty is not eligible for a reduction in penalty or interest commensurate with a reduction afforded the Corporation for such items. The Administrative Law Judge noted that in *Matter of Halperin v. Chu* (134 Misc 2d 105, 509 NYS2d 692, 695, *aff’d* 138 AD2d 915, 526 NYS2d 660, *appeal dismissed in part, denied in part* 72 NY2d 938, 532 NYS2d 845), the Court clearly stated that “any redetermination decreasing the corporation’s tax liability will result in a decrease of petitioner’s personal liability. . . .” The Administrative Law Judge rejected the Division’s interpretation of *Halperin* as codified at Tax Law § 1138(a)(3)(B), because it focused only on the word “tax” and ignored the overall statutory framework whereby interest and penalty (including fraud penalty) are determined simply as a mathematical function of the amount of the tax assessed. More importantly, the Administrative Law Judge found that the Division’s interpretation ignores the clear statutory language that such amounts are to be “determined, assessed, collected and enforced in the same manner as the tax” (Tax Law § 1145[a][7]). The Administrative Law Judge found that while these sections (Tax Law § 1131[1] and § 1133[a]) under which petitioner’s liability arises, like Tax Law § 1138(a)(3)(B), use only the word “tax,” the personal liability for the corporate officer or employee arising under such sections includes penalty and interest determined against the Corporation. Since the “tax determination” as it now exists against the Corporation includes only tax and interest, the Administrative Law Judge found that petitioner can only be liable for such tax and interest, i.e., the amount of the “tax determination” rendered against the Corporation.

The Administrative Law Judge concluded, where all or some portion of a corporate liability is compromised by reduction or elimination, the benefit of such reduction or elimination must be afforded to the individual also being held liable as under a duty to act for the corporation. Though individually categorized as tax, penalty and interest, the total liability was determined “as tax” against the Corporation and, as derived therefrom, “as tax” against petitioner and any reduction to such total liability against the Corporation must similarly reduce such total liability against Mr. Mackiewicz (*see, Matter of Halperin v. Chu, supra*).

The Administrative Law Judge also rejected as not on point, the Division’s reliance on *Matter of Velez v. Division of Taxation of Dept. of Taxation & Fin.* (152 AD2d 87, 547 NYS2d 444). *Velez* involved the liability of a bulk sale purchaser under Tax Law § 1141(c) and is limited to the amount of tax owed by the seller. The Administrative Law Judge found that since *Velez* addresses the circumstances present in a bulk sale situation as dealt with directly in Tax Law § 1141(c), that case provides no support for the Division’s position.

ARGUMENTS ON EXCEPTION

The Division takes exception generally to the determination of the Administrative Law Judge, but does not specify error in any particular conclusion of law. The Division argues, as it did below, that its cancellation of fraud penalties and reduction of interest asserted against the Corporation did not act to cancel the fraud penalties and reduce the interest asserted against a responsible officer. The Division argues, as it did below, that reference in Tax Law § 1138(a)(3)(B) to the term “tax” is not inclusive of penalties and interest. The Division also argues that a responsible person’s individual liability for tax, penalty and interest due from a corporation is not secondary or derivative from the corporation’s liability.

OPINION

It has been held that an officer or employee under a duty is personally liable for the tax determination rendered against the corporation (*see, Matter of Halperin v. Chu, supra*). The amount of a corporation's liability for which an officer or employee under a duty to act may be held liable, though denominated a "tax determination," includes not only tax, but also interest and penalty, including the penalty for fraud (*id.; see, Lorenz v. Division of Taxation of Dept. of Taxation & Fin.*, 212 AD2d 992, 623 NYS2d 455, *affd* 87 NY2d 1004, 642 NYS2d 621; *Matter of Hall v. Tax Appeals Tribunal*, 176 AD2d 1006, 574 NYS2d 862; *Matter of Food Concepts v. State Tax Commn.*, 122 AD2d 371, 503 NYS2d 928, *lv denied* 68 NY2d 610, 508 NYS2d 1027; *Matter of Harding Caterers*, Tax Appeals Tribunal, January 9, 1992). The liability of an officer or responsible employee is joint and several with the corporation (Tax Law § 1133[a]). This liability also extends to penalty and interest, which the Tax Law provides, can be imposed and collected in the same manner as the tax (*see, Tax Law §§ 1138[a][1], 1145[a][7]*). The "tax determination" here included tax, fraud penalty and interest calculated pursuant to Tax Law § 1145(a)(2). During the conciliation conference in this matter, the Division's conferee reduced the amount of the "tax determination" rendered against the Corporation by the elimination of the fraud penalty and with an attendant reduction of interest. Petitioner argues that while he is liable as a person under a duty to act for the corporation, his liability cannot exceed the amounts in tax and interest remaining due from the Corporation.

The Division argues, as it did below, that Tax Law § 1138(a)(3)(B) uses only the word "tax" insofar as it mandates a reduction to an individual officer or employee's liability for a corporation's obligation, arguing that a person under a duty is not eligible for a reduction to

penalty or interest commensurate with a reduction afforded the Corporation for such items. We note that the Divisions argues this point while at the same time conceding at oral argument that any payments reducing the corporate liability would also be credited to reduce the outstanding liability of a responsible officer.²

As we noted earlier, there was no separate Notice issued asserting interest or penalty, including fraud penalty. Rather the entire liability for tax, interest and penalty is set forth on the one Notice of Determination issued pursuant to Tax Law § 1138(a)(1), as to the Corporation, and on the one Notice of Determination issued pursuant to Tax Law § 1138(a)(3)(B), as to petitioner. While identified as tax, penalty or interest, respectively, on the notices the entire amount asserted is, pursuant to Tax Law § 1138(a)(1) and § 1147(a)(7), determined as a single tax liability.

We affirm the determination of the Administrative Law Judge.

In *Matter of Hall* (Tax Appeals Tribunal, March 22, 1990, *affd Matter of Hall v. Tax Appeals Tribunal*, 176 AD2d 1006, 574 NYS2d 862), we determined, *inter alia*, that a corporate officer could be held liable for taxes, as well as the attendant interest and penalties *owed by the corporation*. The Division claims that if the Corporation's liability is reduced in the manner that was done here, that the responsible corporate officer is nevertheless liable for the full, unadjusted amount. According to the Division, the officer's liability is independent and does not derive from the corporate liability. We disagree.

In considering this argument, we look at the mechanics of what has occurred here. The Division audited the Corporation. No separate audit was conducted of petitioner. At some point

²Oral Argument Tr., p. 5.

after the Corporation's audit and the other proceedings³ were completed, the Division issued a Notice of Determination to the Corporation. Only then was a Notice of Determination issued to petitioner for his derivative liability as an officer. It is counterintuitive for the Division to claim at oral argument⁴ that a corporate officer's liability, in these circumstances, is not derivative, since there would be no officer assessment but for the assessment issued to the Corporation. It is undisputed here that petitioner was a responsible person under a duty to act for the Corporation and that he committed acts on behalf of the Corporation constituting fraud. However, the present tax liability of petitioner is derived from that imposed on the Corporation, the entity that was audited. If the Division never assessed the Corporation for tax, penalty and interest, we would not now be discussing petitioner's liability. To the extent petitioner is liable for any amounts asserted, those amounts are based on and derivative of, the Notice of Determination issued to 121 Grant Street, Inc. If the Division, in its wisdom concluded at the conciliation conference that it could/should not sustain fraud penalties against the Corporation, for whatever reasons, and cancelled such penalties and attendant interest, then the Notice of Determination issued to petitioner must be similarly adjusted. This is particularly the case since the fraud penalties against the Corporation and petitioner arose out of the same wrongful acts. The fact that petitioner was the person who committed the fraudulent acts on behalf of the Corporation does not change the result here, since the Division was aware of that fact when it elected to cancel fraud penalties and attendant interest against the Corporation.

³The fraud proceedings in criminal court.

⁴Oral Argument Tr., p. 8.

In *Matter of Halperin v. Chu* (*supra*), the Court stated that “any redetermination decreasing the corporation’s tax liability will result in a decrease of petitioner’s personal liability. . . .”

We agree with the Administrative Law Judge that the Division’s interpretation of the reduction mandated in *Halperin*, and codified at Tax Law § 1138(a)(3)(B), so as to isolate and focus on the word “tax,” overlooks the statutory mosaic under which interest and penalty (including fraud penalty⁵) are determined simply as a mathematical function of the amount of the tax involved. More importantly, the Division’s interpretation essentially ignores the clear statutory language that such amounts are “determined, assessed, collected and enforced in the same manner as the tax” (Tax Law § 1145[a][7]). We agree with the Administrative Law Judge that the Division’s view is inconsistent with Tax Law § 1131(1) and § 1133(a). While these sections, under which petitioner is liable, like Tax Law § 1138(a)(3)(B), use only the word “tax,” it is clear that the personal liability for the corporate officer or employee arising under such sections includes penalty and interest determined against the Corporation (*Lorenz v. Division of Taxation of Dept. of Taxation & Fin.*, *supra*; *Matter of Hall v. Tax Appeals Tribunal*, *supra*; *Matter of Harding Caterers*, *supra*). We find that the Legislature’s inclusion of only the word “tax,” in Tax Law § 1138(a)(3)(B) must be read to include penalty and interest. Since the “tax determination” issued to the Corporation now includes only tax and interest, petitioner can likewise be held liable only for the total tax and interest amounts due from the Corporation. Without corporate liability, there is no liability for which petitioner, the individual under a duty to act for the corporation, may be called to answer for as a person under a duty to act on behalf

⁵Where acts constituting fraud are arguably present.

of such corporation (Tax Law §§ 1131[1] and 1133[a]). In the context of Article 28 of the Tax Law, the liability of a person under a duty to act for a corporation may not exceed the liability of the corporate entity from which such personal liability is derived.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of William P. Mackiewicz, Jr. is granted to the extent that the Notice of Determination issued against him is to be reduced by elimination of the penalty for fraud and reduction of the amount of interest to the same extent as the reduction afforded the Corporation, but is otherwise denied; and
4. The Notice of Determination dated September 15, 2003 as reduced in accordance with paragraph “3” above is sustained.

DATED: Troy, New York
June 7, 2007

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner