

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**DONG MING LI** :

DECISION  
DTA Nos. 820331, 820332  
AND 820333

for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period June 1, 1995 through August 31, 1997. :

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In the Matter of the Petition :

of :

**XIU YING ZHENG** :

for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period June 1, 1995 through August 31, 1997. :

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In the Matter of the Petition :

of :

**YI BAO ZHENG** :

for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period June 1, 1995 through May 31, 1997. :

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued September 21, 2006 with respect to the petitions of Dong Ming Li, Xiu Ying Zheng and Yi Bao Zheng. Petitioners appeared by Yiguan Li, Esq. 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 brief in reply. Oral argument, at the Division of Taxation's request, was heard on June 20, 2007 in Troy, New York.

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

### ***ISSUES***

I. Whether the Division of Taxation is estopped from assessing sales and use taxes as a result of the erroneous granting of amnesty to petitioners.

II. 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.

Yan's Chinese Buffet, Inc., was a restaurant located at 831 New Loudon Road, Latham, New York. Petitioners, Dong Ming Li, Xiu Ying Zheng and Yi Bao Zheng, were officers of the corporation.

The corporation was investigated and audited by the Division of Taxation's Revenue Crimes Bureau for violations of the New York State Sales and Use Tax Law. The investigation led to the filing of a criminal complaint by the New York State Attorney General's Office against Dong Ming Li, Xiu Ying Zheng and Yi Bao Zheng in the Albany City Court on July 24, 2000. On July 25, 2000, each petitioner pled guilty to one count of Petit Larceny, a class A

misdemeanor, for failure to remit sales tax collected by the corporation in the amount of \$75,441.76 during the period June 1, 1995 through November 30, 1997. As part of the plea agreement, each petitioner was ordered to pay \$20,000.00 in restitution, and they each executed confessions of judgment for \$55,411.76, which were filed in the Albany County Clerk's Office on September 13, 2000.

On September 17, 2001, the Division of Taxation ("Division") issued to petitioners Dong Ming Li and Xiu Ying Zheng notices of determination in the amount of \$75,411.76 of unpaid and underreported sales tax as determined in the criminal investigation, plus fraud penalty and fraud interest. On the same date, the Division issued to petitioner Yi Bao Zheng a Notice of Determination in the amount of \$66,595.06 of unpaid and underreported sales tax as determined in the criminal investigation, plus fraud penalty and fraud interest. The three notices of determination stated that petitioners were personally liable as responsible persons of Yan's Chinese Buffet, Inc., under sections 1131 and 1133 of the Tax Law. The difference in the amounts assessed in the notices of determination issued to Dong Ming Li and Xiu Ying Zheng and the Notice of Determination issued to Yi Bao Zheng is the result of the Division's not assessing Yi Bao Zheng for the quarter ended August 31, 1997. Each notice reflected a credit of \$20,000.00 for the amount of restitution paid as part of the plea agreement in the criminal proceedings.

In 2002, New York State's third general tax amnesty program was enacted (L 2002, ch 85) and was effective for the period November 18, 2002 through January 31, 2003. The tax amnesty program offered an opportunity for eligible taxpayers to satisfy certain unpaid liabilities for income, withholding, corporation, sales and use and other designated taxes administered by the New York State Department of Taxation and Finance. Taxpayers were required to make full

payment of the tax and a portion of the interest due and in exchange received a waiver of the penalty assessed, a reduction in the applicable rates of interest by two percentage points for tax periods covered by the amnesty program and immunity from future administrative, civil and criminal actions relating to liabilities for which amnesty was granted (*see*, L 2002, ch 85).

On December 20, 2002, Certified Public Accountant Jenny Liu telephoned the Division on behalf of petitioners to inquire about the amnesty program. Ms. Liu was told the balance due on the notices of determination under the amnesty program and that petitioners' assessments were eligible for amnesty. Ms. Liu could not recall whether she informed the Division that her clients had been convicted of a crime relating to the tax for which amnesty was sought. Ms. Liu, when she made the telephone call, was unaware of the requirements for amnesty. The Division's representative informed Ms. Liu that she should apply for amnesty under the corporation and that any payments made against the corporation's liability would be credited against petitioners' associated assessments. Ms. Liu was told that the balance due under amnesty as of March 15, 2003 was \$92,097.40. On or about March 5, 2003, petitioners collectively made payments totaling \$92,097.40, which amount was applied to the corporation's tax assessment and petitioners' associated individual assessments.

The Division's telephone bank representative was unaware that petitioners had been convicted of a crime relating to the tax for which amnesty was being sought, but only that these particular tax assessments were eligible for amnesty. The representative did not have the authority to grant amnesty over the telephone. He could only determine whether a particular assessment was eligible for amnesty, but was unable to determine whether the individual applying for amnesty was eligible. When Ms. Liu telephoned on behalf of petitioners, due to their criminal conviction, an automated process informed the Division's Office of Tax

Enforcement about the amnesty inquiry. The Office of Tax Enforcement's original decision was to deny amnesty to the corporation, and, as a consequence, to petitioners. Subsequently, following meetings and discussions involving members of the Audit Division, the Amnesty Program and the Office of Tax Enforcement, it was determined that the corporation was eligible for amnesty but the officers were not.

The Department of Taxation and Finance's computerized billing system is programmed to provide for payments or credits to be applied to associated assessments when a payment is received. Due to the fact that the corporation was to receive amnesty but the officers were ineligible, it was necessary for the Division to disassociate petitioners' assessments from the corporation's assessment. The Division's solution was to issue notices and demands with different identification numbers than on the original notices of determination to each petitioner, assessing fraud penalty and additional interest above that paid by the corporation under amnesty.

On October 14, 2003, the amnesty unit sent Ms. Liu a letter explaining that while the corporation was eligible for and had received amnesty, petitioners were not eligible due to their criminal convictions. The letter went on to explain that assessments would be issued to all responsible persons of the corporation for fraud and omnibus penalties. However, on or about October 27, 2003, the Division issued to each petitioner a Statement of Amnesty Account reflecting the granting of amnesty on the notices at issue. These letters were issued to petitioners in error.

On November 3, 2003, the Division issued to petitioners Dong Ming Li and Yi Bao Zheng notices and demands for payment of additional tax due requesting payment of the interest and penalty due. On November 4, 2003, the Division issued to petitioner Xiu Ying Zheng a

Notice and Demand for Payment of Additional Tax Due requesting payment of the interest and penalty due.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

At the outset, the Administrative Law Judge rejected petitioners claim that the Division should be estopped from assessing penalty and interest. The Administrative Law Judge noted that unless there are exceptional facts which require its application to avoid a manifest injustice, the doctrine of estoppel does not apply to governmental acts (*Matter of Consolidated Rail Corp.*, Tax Appeals Tribunal, August 24, 1991, *confirmed* 231 AD2d 140 [1997], *appeal dismissed* 91 NY2d 848 [1997]). This rule is considered especially strong when a taxing authority is involved because public policy supports the enforcement of the Tax Law (*Matter of Glover Bottled Gas Corp.*, Tax Appeals Tribunal, September 27, 1990). The Administrative Law Judge did not find facts that would justify an estoppel. Therefore, the Administrative Law Judge concluded that the doctrine of estoppel had no application in this matter.

Petitioners next argued that the cancellation of the fraud penalty and reduction in interest at the corporate level have the effect of canceling the fraud penalty and reducing the interest at petitioners' level as responsible persons of the corporation.

The Administrative Law Judge found that the use of the word "tax," in Tax Law § 1138(a)(3)(B) should be read to include penalty and interest in the context of reductions to personal liability based on reductions to the corporate liability from which the personal liability is derived. Accordingly, the Administrative Law Judge found that it necessarily follows that petitioners can only be liable for such tax and interest, i.e., the amount of the "tax determination" rendered against the corporation following the granting of amnesty.

The Administrative Law Judge found that without corporate liability there is no liability on which the person under a duty to act would be obligated. The Administrative Law Judge found then, that reduction of the corporate obligation, in whole or in part, must necessarily result in like reduction of the individual's derivative personal obligation.

### ***ARGUMENTS ON EXCEPTION***

The Division argues that the adjustment to the corporation's liability did not constitute a "determination or redetermination" of tax within the meaning of Tax Law § 1138(a)(3)(B). The Division also urges that insofar as it mandates a reduction to an individual officer or employee's liability for a corporation's obligation, that provision only refers to "tax" thus arguing that a person under a duty is not eligible for a reduction of penalty or interest commensurate with a reduction afforded the corporation for such items.

Petitioners continue to argue based on Tax Law § 1138(a)(3)(B) that the cancellation of the fraud penalty and reduction in interest at the corporate level have the subsequent effect of canceling the fraud penalty and reducing the interest at petitioners' level as responsible persons of the corporation.

### ***OPINION***

Petitioners argued below that the Division should be estopped from assessing penalty and interest against them. We agree with the Administrative Law Judge that petitioners have not shown a basis for granting estoppel in this matter, and we affirm the Administrative Law Judge on this issue for the reasons stated in his determination.

We next address whether the Division's cancellation of fraud penalties assessed against the corporation also requires cancellation of such penalties assessed against officers or employees

of the corporation who were under a duty to act for the corporation pursuant to Tax Law § 1131(1) and § 1133(a).

Petitioners have not disputed that they are persons under a duty to act for the corporation for purposes of Tax Law § 1131(1) and § 1133(a). Therefore, petitioners are deemed to have submitted to the presumption of correctness which attaches to a properly issued statutory notice (*see, Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992).

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*, 134 Misc 2d 105 [1986], *affd* 138 AD2d 915 [1988], *appeal dismissed in part, denied in part* 72 NY2d 938 [1988]). 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 (*see, Matter of Halperin v. Chu, supra, see also, Lorenz v. Division of Taxation of Dept. of Taxation & Fin.*, 212 AD2d 992 [1995], *affd* 87 NY2d 1004 [1996]; *Matter of Food Concepts v. State Tax Commn.*, 122 AD2d 371 [1986], *lv denied* 68 NY2d 610 [1986]). The liability of an officer or responsible employee is joint and several with the corporation (*see*, Tax Law § 1133[a]; *Matter of Mackiewicz, Jr.*, Tax Appeals Tribunal, June 7, 2007). 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]). Generally, the liability for taxes is fixed from the time the taxes are to be collected from the customer, and not from the time that the return is due to be filed (*see, Matter of Kadish*, Tax Appeals Tribunal, November 15, 1990). The original "tax determination" in this matter included tax, fraud, penalty and interest calculated pursuant to Tax Law § 1145(a)(2).

The legislature enacted a revenue measure which, in part, granted amnesty to eligible taxpayers under certain circumstances (L 2002, ch 85, Part R). The tax amnesty program offered an opportunity for eligible taxpayers to satisfy unpaid liabilities for certain enumerated taxes, including sales taxes. Under this program, taxpayers were required, as a condition precedent to amnesty, to make full payment of the tax and a portion of the interest due and, in exchange, received a waiver of the penalty assessed, a reduction in the applicable interest rate and immunity from future administrative, civil and criminal actions relating to the liabilities for which amnesty was granted. However, a taxpayer who was under criminal investigation or had been convicted of a crime relating to the subject tax was not eligible to apply for amnesty. Thus, Yan's Chinese Buffet, Inc. successfully applied for and was granted amnesty, since it had not been convicted, nor was it then under investigation for commission of a crime relating to the subject tax. The taxes due were paid on behalf of the corporation pursuant to the amnesty application requirements and fraud penalties asserted against the corporation were forgiven. Petitioners, however, were convicted of a crime relating to the taxes they had collected as responsible officers of the corporation but failed to remit to the State of New York. Thus, they were not eligible to apply for amnesty. While petitioners were credited with the taxes paid on behalf of the corporation, the fraud, penalties and interest remain. Petitioners now seek to achieve through this proceeding what they could not obtain through the amnesty program. Petitioners argue that the fraud, penalties and interest asserted against them should be eliminated as it was for their corporation.

Petitioners rely primarily on Tax Law § 1138(a)(3)(B) which provides, in relevant part, that:

Where the tax commission *determines or redetermines* that the amount of *tax* claimed to be due from a vendor of tangible personal property or services . . . is *erroneous or excessive* in whole or in part, it shall redetermine the amount of tax properly due from any such person as a person required to collect tax with respect to such vendor, recipient, or operator, and if such amount is less than the amount of tax for which such person would have been liable in the absence of such determination or redetermination, it shall reduce such liability accordingly.

We reject petitioners' argument as without merit and note that the statute does not support their argument. The penalties and interest in this case were not "determined or redetermined" against Yan's Chinese Buffet, Inc. based on a finding that it was "erroneous or excessive." Rather, the amounts asserted against the corporation as fraud penalties and excess interest were cancelled as a matter of legislative grace pursuant to special legislation enacted for that purpose and for the purpose of raising State revenues. This is akin to a legislatively authorized settlement. As part of "the deal" for Yan's Chinese Buffet, Inc., it was freed of liability for fraud penalties and the possibility of future litigation arising out of that liability. The benefit to the State was that it received an immediate injection of revenue and avoided the necessity of further litigation to collect it. Since the statute barred their participation, petitioners could not benefit from this amnesty agreement. There was, however, no redetermination of the tax, penalty or interest as provided for Tax Law § 1138(a)(3)(B).

Every person required to collect the tax imposed by article 28 of the Tax Law is personally and independently liable for the tax due (*see*, Tax Law § 1133[a]). While a responsible officer's liability may derive from his actions on behalf of the corporation (*Matter of Mackiewicz, Jr., supra*), the general rule remains that the liability of a responsible officer is separate and independent from that of the corporation and that liability is fixed at the time the taxes are collected from the customer (*see, Matter of Kadish, supra*).

We view this case as distinguishable from *Matter of Mackiewicz, Jr. (supra)*. In that case, the Division's Bureau of Conciliation and Mediation Services made a *redetermination* reducing penalty asserted against the corporation. That was not the case here. If the Division had *redetermined* the amount of tax due from the corporation, then the Notice of Determination issued to the corporation's responsible officers would be similarly adjusted (*see*, Tax Law §1138(a)(3)(B)). However, in the instant matter, the reduction of fraud penalties and fraud interest against the corporation was not a redetermination within the meaning of Tax Law § 1138(a)(3)(B), but rather, was part of the Division's amnesty settlement with the corporation pursuant to a statute enacted for that purpose.

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 to the extent that petitioners are not entitled to a reduction in their individual liability as responsible persons on behalf of the corporation, but is otherwise sustained;
3. The petitions of Dong Ming Li, Xiu Ying Zheng and Yi Bao Zheng are denied; and

4. The Notices of Determination dated September 17, 2001 issued to Dong Ming Li, Xiu Ying Zheng and Yi Bao Zheng together with applicable penalty and interest are sustained.

DATED:Troy, New York  
December 20, 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