STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions of HAROLD RASHBAUM, AS OFFICER OF U.S. GENERAL SUPPLY CORP. for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1985 through November 30, 1988.	:	DETERMINATION DTA NOS. 810446, 810447, 810448 AND 810449
In the Matter of the Petitions of MURRAY HARROW, AS OFFICER OF U.S. GENERAL SUPPLY CORP. for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1985 through November 30, 1988.	:	

Petitioner Harold Rashbaum, as officer of U.S. General Supply Corp., 366 North Broadway, Suite 310, Jericho, New York 11753, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1985 through November 30, 1988.

Petitioner Murray Harrow (deceased), as officer of U.S. General Supply Corp., 196-97 Turnberry Way, North Miami Beach, Florida 33180, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 for the period September 1, 1985 through November 30, 1988.

A consolidated hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500Federal Street, Troy, New York, on March 2, 1993 at 10:45 A.M. and continued to completion on March 24, 1993 at 11:00 A.M. Briefs were filed by petitioners and the Division of Taxation. Petitioners' reply brief was filed

on August 16, 1993 which began the six-month statutory period for issuance of a determination. Petitioners appeared by James H. Tully, Jr., Esq. The Division of Taxation appeared by William F. Collins, Esq. (James P. Connolly, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation can be estopped from asserting sales and use taxes against two corporate officers when it failed to assert a claim for the taxes against the corporation during the course of bankruptcy proceedings.

II. Whether a consent to extend the period of limitation for assessment of sales and use taxes against the corporate taxpayer serves to extend the period of limitation for assessing tax against the corporate officers as well.

FINDINGS OF FACT

Petitioners, Murray Harrow and Harold Rashbaum, were chairman and vice-chairman, respectively, of U.S. General Supply Corp. ("U.S. General"). U.S. General was a retail supplier of tools and hardware. It operated stores in 10 states and conducted a large mail order business. The Division of Taxation ("Division") began an audit of U.S. General in July 1988 for the period September 1, 1985 through May 31, 1988. The auditor assigned to the case contacted U.S. General's chief finance officer on August 15, 1988 and was told that the corporation was planning to file a petition in bankruptcy under Chapter 11 of the Bankruptcy Code within the next week. The auditor was asked to hold the audit in abeyance until the corporation made a final decision regarding the bankruptcy proceeding.

Between August 15, 1988 and September 23, 1988, the auditor made several phone calls to employees of U.S. General, including Charlotte Burns, the office manager, and Joseph Septimus, the new chief finance officer. He was informed that U.S. General filed a voluntary petition in bankruptcy on September 23, 1988 and that the claims bar date (the date set by the bankruptcy judge for the filing by creditors of claims against the debtor) was December 23, 1988. The auditor scheduled audit appointments on October 13 and October 14, 1988. On those dates, he began reviewing U.S. General's records and transcribing information. On

October 21, 1988, he informed the Division's Bankruptcy Unit that a petition in bankruptcy had been filed by U.S. General.

U.S. General was a large operation with voluminous sales and purchase transactions. From the first audit appointments in October 1988 through the beginning of February 1989, the auditor spent approximately two weeks of actual audit time reviewing available books and records and establishing an audit plan. The audit was further complicated by the reorganization of U.S. General being undertaken under the bankruptcy plan. For instance, U.S. General's mail order business was no longer in operation, and employees knowledgeable about this area were no longer employed by U.S. General. The Division decided to use a computer-assisted statistical sampling method to estimate tax due in the area of expense purchases, and a great deal of time was devoted to setting up the electronic data processing programs necessary for this type of audit. During this time period, the auditor was in contact with Charlotte Burns, U.S. General's office manager; Philip Mendolia, U.S. General's comptroller for a time; and Jerry Dresel, Mr. Mendolia's replacement. U.S. General rehired on a part-time basis Donna Lindberg, a former employee familiar with U.S. General's computer systems, to assist in the electronic data processing audit.

In February 1989, U.S. General appointed three individuals to represent it in connection with the sales and use tax audit for the period September 1, 1985 through November 30, 1988, Stanley Chrein, Ralph Steinman and Roberta A. Strasberg. The power of attorney filed with the Division was signed by Harold Rashbaum, as president of U.S. General, on February 17, 1989.

The audit proceeded from February 1989 through April 1990. The auditor's written log documents an ongoing stream of communication between the Division's auditor and representatives of U.S. General, primarily Ms. Strasberg and Mr. Dresel. On February 17, 1989, the auditor reviewed the expense accounts with Mr. Dresel, in preparation for setting up a statistical sampling audit. The auditor spent some time in March 1989 reviewing the records provided and discussing the audit plan with the Division's Electronic Data Processing Unit. He sent Ms. Strasberg various reconciliations and workpapers on March 13, 1989. He spoke to Ms.

Strasberg at least once in April and met with her, Ms. Lindberg and Mr. Dresel in May 1989. In June and July 1989, the auditor performed various reconciliations and calculations having to do with the statistical sampling audit. He met with Ms. Strasberg again in September 1989 to review the audit findings. Apparently, it was at this point that Ms. Strasberg questioned the use of a test period computer-assisted audit. The auditor's log shows that he spoke with Ms. Strasberg by telephone twice in October 1989. He received additional information from U.S. General by mail on October 31, 1989. In November 1989, the Division issued a Statement of Proposed Audit Adjustment to U.S. General. The Division also requested that a written agreement to a test period audit be signed and was refused. The auditor spoke to Ms. Strasberg again in December 1989. Most of the communication with representatives of U.S. General involved various requests by the Division, including its request that U.S. General execute a written consent to a test period audit and requests for additional books and records. In a letter to Ms. Strasberg dated January 9, 1990, the Division stated in part:

> "PURSUANT TO OUR TELEPHONE CONVERSATION THIS MORNING, SINCE U.S. GENERAL SUPPLY CORP. HAS RESCINDED ITS VERBAL AGREEMENT TO A TEST PERIOD AUDIT, AND WILL NOT SIGN AN EXTENTION [sic] WAIVER, IT IS NECESSARY THAT ALL INVOICES FOR THE AUDIT PERIOD 9/1/85-9/23/88 FOR THE FOLLOWING EXPENSE ACCOUNTS BE MADE AVAILABLE (SEE ATTACHED SCHEDULES). ON 1/16/, 17, 18 & 19, 1990 I WILL BE AT U.S. GENERAL SUPPLY CORP.'S CORPORATE OFFICE TO EXAMINE THESE INVOICES AND TO CONCLUDE THE AUDIT."

By letter dated January 16, 1990, Mr. Dresel informed the auditor that Ms. Strasberg would be unavailable on January 16, 1990 and further stated:

> "We deem your appearance to be highly irregular knowing that she is unavailable at this point in time and as previously discussed, our records have been filed away and not immediately accessible and a substantial amount of time would be necessary to reassemble these files."

On January 17, 1990, the auditor received a letter from attorneys representing U.S. General stating that the Division was barred from assessing sales and use taxes for any period prior to April 25 1989, the date of the bankruptcy court's order confirming the plan of reorganization. According to his log, the auditor then spoke to a Mr. Divinski in the Division's Bankruptcy Unit who confirmed this information. The auditor then attempted to determine

whether assessments could be issued against the corporate officers. He contacted various individuals in the Bankruptcy Unit and the Division's Law Bureau and received contradictory information. Finally, the auditor and his supervisor determined that it would be appropriate to issue assessments against the corporate officers, although no assessments could be issued against U.S. General.

The Division then issued to each petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated January 22, 1990, assessing tax due for the period September 1, 1985 through May 31, 1987 in the amount of $252,608.74, plus penalty and interest.

The Division received a power of attorney appointing James H. Tully, Jr. and Stewart Buxbaum to represent U.S. General in connection with the audit. The power of attorney is signed by Harold Rashbaum, as president of U.S. General, and dated February 1, 1990. The Division remained in contact with Ms. Strasberg and began communications with Mr. Buxbaum and Mr. Tully.

Apparently, the Division made further requests for books and records, and, in response, U.S. General took the position that it would no longer supply such records. The Division then issued to each petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated April 4, 1990, assessing tax due for the period June 1, 1987 through November 30, 1988 in the amount of $192,115.68 plus penalty and interest.

During the course of the audit, two consents were executed extending the period of limitation for assessment of sales and use taxes. The last consent was signed by Mr. Chrein, acting under the power of attorney signed by Mr. Rashbaum appointing him to represent U.S. General. It states:

> "PURSUANT TO SECTION 1147c* of ARTICLE 28 and of SECTION 1250 of ARTICLE 29 OF THE TAX LAW, THE COMMISSIONER OF TAXATION AND FINANCE and
>
> U.S. General Supply Corp.
>
> * * *

AGREE AS FOLLOWS:

"THAT THE AMOUNT OF SALES AND USE TAXES DUE FROM THE ABOVE NAMED VENDOR, FOR THE TAXABLE PERIOD(S) 9-1-85 THROUGH 8-31-86, UNDER THE TAX LAW MAY BE DETERMINED AT ANY TIME ON OR BEFORE 1-20-90."

The first consent contains identical language and extended the period of limitation for assessment of taxes against U.S. General for the period September 1, 1985 through August 31, 1986 to December 20, 1989. This consent is signed by Harold Rashbaum as president of U.S. General and dated November 21, 1988. At the time the first notice of determination was issued, on or about January 22, 1990, Mr. Chrein did not hold a power of attorney from either Mr. Rashbaum or Mr. Harrow.

The Division filed no claims for taxes in U.S. General's bankruptcy proceeding based on the sales tax audit then being conducted. It did file a proof of claim dated November 22, 1988 for $16,723.04. The form filed by the Division shows that $15,508.81 of the the total amount claimed was for taxes due for the period March 1, 1988 through May 31, 1988 and was based on an actual return filed.

The Division filed a ballot with the bankruptcy court dated March 24, 1989, voting for rejection of the plan for reorganization for reasons having nothing to do with the then ongoing audit. The ballot showed post-petition tax due in the amount of $6,374.58 and pre-petition interest due of $722.29. The plan of reorganization was adopted by the bankruptcy court on April 25, 1989. The judge specifically added in writing that "[a]nything to [t]he contrary notwithstanding, the [d]ebtor shall escrow $110,000 in total with regard to disputed claims." All claims filed by the Division were paid.

After filing a petition in bankruptcy, U.S. General continued operating as a debtor in possession. Eventually, all creditors were paid under the bankruptcy plan. U.S. General obtained the money to pay off its debts by selling off portions of its business and from an infusion of cash provided by its owners. Mr. Rashbaum testified that he contributed $125,000.00 of his own money and that approximately $800,000.00 was received in the form of loans and gifts from family and friends.

U.S. General was represented in the bankruptcy proceeding by Abraham Backenroth, an attorney with extensive experience in bankruptcy law. He testified regarding his general experience in bankruptcy proceedings and specifically about the U.S. General bankruptcy proceeding. He stated that in his experience the bankruptcy attorney is informed by the State of any ongoing audits so that a proof of claim can be filed by the State based on the results of the audit. He also stated that he has known the taxing authorities to file a proof of claim which states that the tax liability is undetermined or which shows a very large estimated sum.

When proofs of claim were filed by the Division against U.S. General, Mr. Beckenroth believed, based on his past experience, that no other tax claims would be filed for periods prior to the filing of the bankruptcy petition. He stated that he has never heard of an insufficient claim being filed during the course of an ongoing audit. In his estimation, U.S. General's plan for reorganization would not have been approved if the judge and parties had known that there was an outstanding tax liability in an unknown sum. In that case, Mr. Beckenroth believes that U.S. General would have liquidated.

Following a conciliation conference, the Division issued conciliation orders reducing the amount of tax assessed against petitioners for the period September 1, 1985 through May 31, 1987 to $58,507.05 and for the period June 1, 1987 through November 30, 1988 to $84,087.59. All penalties were cancelled as well.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners assert that the Division should be estopped from assessing taxes against them for the taxes of U.S. General. They base their estoppel claim on a number of factors. First, they claim that, by filing a notice of claim in the bankruptcy proceeding for about $16,000.00, the Division led them to believe that no other assessments of sales and use tax would be issued for the audit period. Petitioners note that the Division was aware of the bankruptcy proceeding and had an opportunity to file a larger claim (either an estimated claim or an open-ended claim) in connection with that proceeding. Based on Mr. Beckenroth's testimony they contend that they reasonably believed that no additional tax would be assessed as a result of the audit. They

argue that, inasmuch as the auditor was aware of the bankruptcy proceeding and had spent several months auditing U.S. General before the claims bar date, the Division was in a position to make a claim for additional sales tax due in connection with the bankruptcy proceeding. Petitioners concede that the audit activity continued after the claims bar date of December 23, 1988 but assert that the the activity dropped off after the ballot date, March 27, 1989. Based on this perceived change in audit activity, petitioners claim that they had no reason to know that the audit would result in additional assessments being issued. Based on all of these factors, petitioners maintain that they had no reason to believe that any assessments would be issued against U.S. General or against them personally. Petitioners invested substantial sums of their own money and borrowed money from family and friends to avoid the liquidation of U.S. General. They state that they would not have finalized a plan of reorganization if they had known that sales tax assessments would be issued against them personally, and they maintain that allowing the Division to collect sales and use tax from them personally will cause them irreparable damage.

Petitioners also take the position that taxes assessed for the period September 1, 1985 through November 30, 1986 were barred by the three-year statute of limitations found at Tax Law § 1147(b). They note that the consents to extend the period of limitation for assessment of taxes specifically identified the party against whom the tax could be assessed as U.S. General and that petitioners did not individually consent to an extension of the limitation period for assessment of taxes against them.

The Division argues that petitioners have failed to show the basic elements which would warrant the granting of equitable relief. The Division contends that petitioners have not proven that that the Division either misled them by some positive action or failed in a duty to act. Consequently, argues the Division, petitioners have not carried their burden of proof to show that they reasonably relied on the Division to their detriment.

The Division takes the position that consents to extend the period of limitation which are executed on behalf of the corporation serve to extend the period for assessing the

responsible officers of the corporation as well.

CONCLUSIONS OF LAW

A. Generally, the doctrine of estoppel is not available against an administrative agency acting in its governmental capacity and may not be applied unless there are exceptional facts which require its application to avoid a manifest injustice (Matter of Harry's Exxon Service Station, Tax Appeals Tribunal, December 6, 1988). The general rule has special force when a taxing authority is involved, because public policy supports full enforcement of the Tax Law (Matter of Turner Construction Co. v. State Tax Commn., 57 AD2d 201, 394 NYS2d 78, 80; Matter of Glover Bottled Gas Corp., Tax Appeals Tribunal, September 27, 1990). To apply the doctrine to a taxing authority, the equitable interest of the party asserting estoppel must be "compelling" and the loss which the party would sustain must be "unwarrantable" and "unconscionable" (Schuster v. Commr., 312 F2d 311, 317). To successfully invoke the doctrine of estoppel against the Division, the petitioner must offer proof that the Division made an actual misrepresentation or committed some other wrongdoing (see, Matter of Harry's Exxon Service Station, supra), that the petitioner reasonably relied on that misrepresentation (see, Matter of Eastern Tier Carrier Corp., Tax Appeals Tribunal, December 6, 1990) and that application of the doctrine is necessary to avoid a manifest injustice (Matter of Sheppard-Pollack v. Tully, 64 AD2d 296, 298, 409 NYS2d 847, 849).

Here, petitioners have not offered proof that the Division made an actual misrepresentation or omitted to perform any act which it was under a duty to perform. They assert that their belief that no taxes would be assessed against them for any period prior to the reorganization was based on the notices of claim and the ballot filed by the Division. Such an inference could not be based on those documents. The proof of claim filed by the Division was for the period March 1, 1988 through May 31, 1988 and was based on a return filed without remittance of the tax shown as due. Petitioners could not have thought that the claim related to the sales tax audit. It is true that the Division did not inform the bankruptcy court of the ongoing audit; however, petitioners have failed to demonstrate that the Division had a legal duty

to inform the court of such a possibility. It is significant that a final determination of tax due had not been made at the time documents were filed with the bankruptcy court (the notices of claim in November 1988 and the ballot in March 1989). Moreover, petitioners must have been aware that the audit was ongoing during the time that a plan for reorganization was being worked on.

The evidence shows that the audit began before the petition in bankruptcy was filed and continued until well after the plan for reorganization was accepted in March 1989. If petitioners were shocked by the issuance of assessments in January 1990, it cannot be because of any positive action of the Division. Certainly, Mr. Rashbaum was aware that the audit was proceeding when he executed a power of attorney in February 1989 appointing three individuals to represent U.S. General in the audit. The corporation's appointed representatives were in contact with the auditor in March, April and May 1989. In September 1989, the auditor reviewed the audit findings with Ms. Strasberg. In November 1989, the Division issued a Statement of Proposed Audit Changes to petitioners. These facts establish that the Division, by its actions, never implied that the audit was being discontinued or that assessments would not be issued.

Petitioners claim that they had reason to believe that the sales tax audit was terminated before the plan for reorganization was adopted and that no assessments would be issued against them as a result of the audit. They rely very heavily on the expertise and experience of their bankruptcy attorney to show that their beliefs were reasonable. The flaw in their position is that their reliance, if there was such, was on Mr. Beckenroth and not on any positive assurances made by the Division. In sum, petitioners have failed to show that the Division made an actual misrepresentation, and, as a consequence, they have failed to lay a foundation for application of the doctrine of estoppel.

B. Tax Law § 1147(b) provides, as pertinent here:

> "[E]xcept in the case of a willfully false or fraudulent return with intent to evade the tax no assessment of additional tax shall be made after the expiration of more than three years from the date of filing of a return."

Petitioners contend that the notices of determination mailed to them on January 22, 1990 are untimely as they apply to the period September 1, 1985 through November 30, 1986 because they were not issued within three years from the date of filing of the returns for those periods.[1] The Division takes the position that the assessment period was extended by consent of U.S. General pursuant to Tax Law § 1147(c) and that U.S. General's consent was binding on the corporate officers. Petitioners argue that the consents executed during the audit extended the period for determining additional tax due from U.S. General, but did not extend the period for issuing assessments against them personally.

Tax Law § 1147(c) provides:

> "Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at any time within such extended period." (Emphasis added.)

As the Division interprets section 1147(c), a taxpayer's (in this case U.S. General's) consent to extend the limitation period for assessing sales and use taxes extends the period of assessment for all persons eventually

found liable for the tax. Petitioners (citing to Matter of Mustafa, Tax Appeals Tribunal, December 27, 1991 and other cases) argue that since the liability of the corporation and its officers is separate, a consent executed on behalf of a corporation cannot extend the period of limitation for assessment of its officers.

In support of its position, the Division cites to several determinations of the State Tax Commission (see, Matter of Najjar, State Tax Commn., February 24, 1987 [TSB-H-87(78)S]; Matter of Schuyler Market, State Tax Commn., October 20, 1986 [TSB-H-86(195)S]); Matter of Playmor Amusement Co., State Tax Commn., September 27, 1982 [TSB-H-82(140)S]). In Playmor, the State Tax Commission stated:

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[1]The parties stipulated that the notices of determination dated January 22, 1990 were actually mailed on January 22, 1990. January 20, 1990 was a Saturday; therefore, the actual date of mailing fell within the consent period.

> "Harold Kaufman in his capacity as president signed consents to extend the statute of limitations on Playmor Amusement Co., Inc. . . . . Such consent by a corporation extends the liability of its corporate officers required to collect tax under sections 1131(1) and 1133(a) of the Tax Law for the period consented to by the corporation."

The other determinations essentially repeat this general rule as stated in Playmor (see, Matter of Najjar, supra; Matter of Schuyler Market, supra). These determinations demonstrate that the Division has a longstanding policy of treating a consent executed by a corporation as binding on the responsible officers of the corporation; however, the rationale behind the policy is not fully developed. The determinations cite to Tax Law §§ 1131(1) and 1133(a) to support their conclusion. As relevant, 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 [article 28]." "Persons required to collect tax" include, among others, "any officer, director or employee of a corporation or of a dissolved 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]. . . ." (Tax Law § 1131[1].) Apparently, the reasoning on which the determinations rest is as follows. Once a corporate officer is found to be a person under a duty to act for the corporation in complying with the provisions of article 28, that officer is liable for any tax finally determined to be due from the corporation, including tax assessed under the consent provision of section 1147(c).

Determinations of the State Tax Commission are entitled to respectful consideration; however, they are not binding precedents in the Division of Tax Appeals (see, Matter of Racal Corp., Tax Appeals Tribunal, May 13, 1993). Moreover, neither the courts nor the Tax Appeals Tribunal have had the opportunity to directly address the issue raised here: whether, or to what extent, a responsible officer is bound by a corporation's consent to extend the period of limitation for assessment of tax.[2] Therefore, it is appropriate to examine this question in some

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[2]In Matter of BAP Appliance Corp. (Tax Appeals Tribunal, May 28, 1992) a consent fixing tax due was signed on behalf of a corporation by a corporate officer. The Tax Appeals Tribunal found the consent to be binding on both the corporation and the corporate officer. However, the decision indicates that the corporate officer never argued that the consent might be binding on the

detail.

Petitioners concede that they were officers of U.S. General under a duty to act for that corporation in complying with the requirements of article 28; however, they challenge the Division's authority to assess tax against them based upon a consent executed on behalf of the corporation. The limits of the Division's authority to collect tax from a responsible officer by proceeding under certain administrative provisions of the Tax Law was tested in Matter of Parsons v. State Tax Commn. (34 NY2d 190, 356 NYS2d 593). There, the court held that the State Tax Commission lacked the statutory authority (under Tax Law § 1138) to issue assessments against corporate officers where the corporation had filed essentially correct returns but failed to pay the tax shown as due. Although the court's holding is not material to the issues raised here, its reasoning is instructive. The court emphasized that it was not considering whether the petitioners were persons responsible for collecting tax (Tax Law § 1131[1]) and, therefore, personally liable for the tax due from the corporation (Tax Law § 1133[a]). Rather, the only issue before the court was "the proper remedy available to the commission to recover . . . taxes" (Matter of Parsons v. State Tax Commn., supra, 356 NYS2d at 596). The court rejected the State Tax Commission's suggestion that an administrative procedure for determining the liability of the corporate officers could be inferred from Tax Law §§ 1131(1), 1133, 1138 and 1142(6). The reasoning in Parsons is relevant to the issue raised by petitioners because it clearly distinguishes between the tax liability imposed on persons required to collect tax under Tax Law §§ 1131(1) and 1133(a) and the administrative remedies available for the collection of such tax.[3] Most important for this

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corporation and not on her. Rather, both of the petitioners argued before the Tribunal that they had been misled and "browbeaten into signing the consent". The Tribunal found no evidence that the consent was signed involuntarily and thus found the consent binding on the petitioners.

[3]Tax Law § 1147(b) and (c) which generally control time limitations for the issuance of notices are properly viewed as procedural provisions which, in conjunction with other statutory provisions, provide the Division with a remedy for recovery of taxes. "The theory of the statute

discussion, the court found that the imposition of liability under Tax Law §§ 1131(1) and 1133(a) did not imply an administrative remedy for collecting the tax liability. The court held that the first could exist without the second. Drawing on the court's reasoning here, it can be concluded that Tax Law §§ 1131(1) and 1133(a) provide no statutory basis for the Division's argument that U.S. General's consent to extend the period of limitation is binding on its officers.

As well as distinguishing between the imposition of the tax liability and the remedies for the tax's collection, the case law distinguishes between the liability of the corporation and its corporate officers. Thus, in Matter of Yellin v. State Tax Commn. (81 AD2d 196, 440 NYS2d 382) the court held that the liability of a responsible officer is separate and independent from that of the corporation. Consequently, bankruptcy proceedings involving a corporation will not act as a bar to collection of tax from responsible officers of the corporation (see, Matter of Kadish, Tax Appeals Tribunal, November 15, 1990). On the same basis, the Tax Appeals Tribunal has held that the dismissal of an assessment against a corporation on procedural grounds has no effect on an assessment issued to a corporate officer (Matter of Mustafa, Tax Appeals Tribunal, December 27, 1991).

In Mustafa, the Tribunal also specifically noted that Tax Law § 1138 distinguishes the corporation from its corporate officers. The authority to issue notices of determination to the corporation is contained in Tax Law § 1138(a)(1). The authority to proceed administratively to collect tax from a corporate officer is now fixed in section 1138(a)(3)(B) "whether or not a return is filed under [article 28], whether or not such return when filed is incorrect or insufficient, or where the tax shown to be due on the return filed under [article 28] has not been paid or has not been paid in full . . ." (Tax Law § 1138[a][3][B], added by L 1985, ch 65, § 82).

In Matter of Mast (Tax Appeals Tribunal, July 29, 1993), the Tax Appeals Tribunal, relying on Matter of Hall v. New York State Tax Commn. (108 AD2d 488, 489 NYS2d 787),

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of limitations generally followed in New York is that the passing of the applicable period does not wipe out the substantive right; it merely suspends the remedy" (Siegel, NY Prac § 34, at 38 [2d ed]).

reversed an Administrative Law Judge's determination that the three-year statute of limitations of Tax Law § 1147(b) did not apply to notices of determination issued to corporate officers for the tax reported on a corporation's filed return, but not paid. The Tribunal specifically held that the period of limitation applies to all notices of determination issued under the authority of Tax Law § 1138(a)(3)(B).

The following principles can be distilled from the foregoing discussion. First, the liability of the corporate officer is separate and independent from that of the corporation (Matter of Yellin v. State Tax Commn., supra). Tax Law §§ 1131(1) and 1133(a) which impose liability on persons liable for collection of tax neither provide for nor imply any administrative procedure for the collection of tax (see, Matter of Parsons v. State Tax Commn., supra). The administrative procedures provided for determining tax due and collecting the tax apply separately to the corporation and its responsible officers (see, Matter of Halperin v. Chu, 134 Misc 2d 105, 509 NYS2d 692, affd 138 AD2d 915, 526 NYS2d 660, appeal dismissed in part, denied in part 72 NY2d 938, 532 NYS2d 845; Matter of Mustafa, supra). Finally, the three-year period of limitation of Tax Law § 1147(b) is an affirmative defense to the tax assessment (Matter of Servomation Corp. v. State Tax Commn., 60 AD2d 374, 400 NYS2d 887) which may be raised separately by the corporate officer whether or not the defense is available to the corporation (Matter of Mast, supra).

In essence, section 1147(c) provides a vehicle by which a taxpayer may consent to waive the affirmative defense of the period of limitation. Section 1147(c) states that where "a taxpayer has consented in writing" to extend the period of limitation the "tax due may be determined at any time" within the extended period. The clearest and least strained reading of this provision is that "the tax due" from the "taxpayer" who executed the consent may be determined at any time within the extended period. In light of the general principles discussed above, I do not believe that section 1147(c) can be read so broadly as to mean that in all instances a consent by a corporation to extend the period of limitation for assessment of tax is binding on all corporate officers liable for that tax, regardless of the actual wording of the

consent or the person who signed it. The better practice would be to determine the effect of the written consent based upon its actual wording and the general rules of waiver.

Since a party to a proceeding may waive any claim, defense or statutory right as long as it is done intelligently and voluntarily (Brooklyn Union Gas Co. v. City of New York, 104 Misc 2d 441, 428 NYS2d 564, 567, affd 83 AD2d 921, 443 NYS2d 691, affd 56 NY2d 881, 453 NYS2d 398; DeStefano v. Papa, 37 NYS2d 950, appeal dismissed 265 App Div 919, 39 NYS2d 413), section 1147(c) was not necessary to provide the taxpayer with a vehicle for waiving his or her right to claim a statute of limitations defense.[4]

What the statute does is require that the consent to extend the period of limitation be in writing. This is a limitation on the general principles of waiver which hold that a waiver may be inferred from conduct which expresses a clear intent to waive rights to which a party might otherwise have been entitled (Hadden v. Consolidated Edison Co., supra). This limitation argues against reading a corporation's consent so broadly as to automatically include all corporate officers responsible for collection of tax.

Generally speaking, the burden of proving a waiver is on the party asserting it. To show such a waiver, there must be a clear unequivocal act expressing an intention to waive a known right (Horne v. Radiological Health Services, 83 Misc 2d 446, 371 NYS2d 948, affd 51 AD2d 544, 379 NYS2d 374). A written consent executed by a taxpayer in his or her own name pursuant to Tax Law § 1147(c) would, very obviously, provide unequivocal evidence of a waiver. Such a consent does not exist here.

The written consent in dispute here states that the amount of tax due "FROM THE ABOVE NAMED VENDOR . . . MAY BE DETERMINED AT ANY TIME ON OR BEFORE 1-20-90." The "vendor" is identified as U.S. General. Neither Mr. Harrow nor Mr. Rashbaum

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[4]A waiver is defined "as the voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege which, except for such waiver, the party would have enjoyed" (57 NY Jur 2d, Estoppel, Ratification, and Waiver, § 74; see, Hadden v. Consolidated Edison Co., 45 NY2d 466, 410 NYS2d 274).

signed the consent executed on December 11, 1989 which extended the period of limitation to January 20, 1990.[5] It was signed by Mr. Chrein under a power of attorney signed by Mr. Rashbaum appointing Mr. Chrein to represent U.S. General. Mr. Chrein did not have a power of attorney appointing him to represent either Mr. Harrow or Mr.

Rashbaum. From these facts, it cannot be inferred that either Mr. Harrow or Mr. Rashbaum knowingly and intentionally consented to waive the period of limitation for assessment of tax against them.[6] Accordingly, I conclude that the Division was barred by Tax Law § 1147(b) from assessing tax against petitioners for the quarters ending November 30, 1985; February 28, 1986; May 31, 1986; August 31, 1986 and November 30, 1986. The tax assessed for these periods shall be cancelled.

C. The petitions of Harold Rashbaum, as officer of U.S. General Supply Corp., and Murray Harrow, as officer of U.S. General Supply Corp., are granted to the extent indicated in Conclusion of Law "B"; the notices of determination and demands for payment of sales and use taxes due issued on January 22, 1990 (as modified by the conciliation orders issued on November 29, 1991) shall be modified accordingly; and in all other respects the petitions are denied.

DATED: Troy, New York
February 3, 1994

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE

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[5]The consent signed by Mr. Rashbaum was dated November 21, 1988, more than a year before the second consent.

[6]This determination does not consider whether a corporate officer's consent to extend the period of limitation for assessment of tax against the officer can be inferred where the officer executed a consent on behalf of the corporation.