

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHARLES H. GEIGER	:	DETERMINATION
	:	DTA NO. 816598
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period March 1, 1994 through January 7, 1997.	:	

Petitioner, Charles H. Geiger, c/o Barr & Rosenbaum, 664 Chestnut Ridge Road, P.O. Box 664, Spring Valley, New York 10977, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1994 through January 7, 1997.

On January 12, 1999 and January 25, 1999, respectively, the parties waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by August 27, 1999, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Barr & Rosenbaum, LLP (Elizabeth A. Haas, Esq., of counsel) and the Division of Taxation appeared by Terrence M. Boyle, Esq. (Andrew S. Haber, Esq., of counsel). After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation, having failed to file a timely proof of claim in the Chapter 11 bankruptcy proceedings of the corporation, is precluded from asserting sales and use taxes against petitioner, the acknowledged responsible officer of the corporation.

FINDINGS OF FACT

1. Geiger Lumber & Supply Co., Inc. (“Geiger Lumber”) is a wholesale and retail vendor of lumber and building supplies. Petitioner, Charles H. Geiger, is the president and a director of Geiger Lumber. He owns approximately 86% of the issued and outstanding stock of Geiger Lumber.

2. On or about April 3, 1996, the Division of Taxation (“Division”) commenced a field audit of Geiger Lumber's books and records pertaining to its sales and use tax liability for the period March 1, 1993 through February 29, 1996. During the course of the audit, the period covered was expanded three times and, ultimately, the audit covered the period March 1, 1993 through January 7, 1997.

3. During the course of the audit, two consents were executed extending the period of limitation for assessment of sales and use taxes. Both consents were executed by petitioner as president of Geiger Lumber.¹ The first consent extended the period of limitation for assessment of taxes against Geiger Lumber for the period March 1, 1993 through November 30, 1993 to December 20, 1996. The second consent extended the period of limitation for assessment of taxes against Geiger Lumber for the period March 1, 1993 through May 31, 1994 to June 20, 1997.

4. On November 21, 1996, Geiger Lumber filed a petition for relief pursuant to Chapter 11, Title 11 of the United States Code (the “Bankruptcy Code”), with the Bankruptcy Court for the Southern District of New York.

¹ The first consent was executed by petitioner on April 22, 1996 and the second consent was executed by petitioner on October 30, 1996.

5. Geiger Lumber listed the Division as a creditor in its schedules filed with the Bankruptcy Court. The amount of the debt listed was \$145,000.00. Geiger Lumber indicated on its schedule that the \$145,000.00 debt was disputed.

6. Geiger Lumber ceased doing business on January 7, 1997.

7. A review of the auditor's work papers indicates that her audit of Geiger Lumber was broken down into two parts: the first, a pre-bankruptcy petition audit covering the period March 1, 1993 through November 21, 1996 and the second, a bankruptcy administrative expense audit covering the period November 22, 1996 through January 7, 1997.²

8. As a result of the pre-petition audit, the Division issued to Geiger Lumber a Statement of Proposed Audit Adjustment, dated March 13, 1997, asserting sales and use taxes due for the period March 1, 1993 through November 21, 1996 in the amount of \$98,818.84, plus interest of \$5,295.51, for a total amount due of \$104,114.35 ("pre-petition statement").

9. As a result of the administrative expense audit, the Division issued to Geiger Lumber a Statement of Proposed Audit Adjustment, dated March 13, 1997, asserting sales and use taxes due for the period November 22, 1996 through January 7, 1997 in the amount of \$4,069.30, plus interest of \$57.88, for a total amount due of \$4,127.18 ("administrative expense statement").

10. On March 14, 1997, Geiger Lumber consented to the fixing of the tax by the execution of the pre-petition statement by Charles Geiger, as president of Geiger Lumber.

On the same date, Geiger Lumber consented to the fixing of the tax by the execution of the administrative expense statement by Charles Geiger, as president of Geiger Lumber.

² The period November 22, 1996 through January 7, 1997 covers the time span in which Geiger Lumber continued to operate the business as debtor-in-possession.

11. On April 18, 1997, the Division issued a Notice of Determination (Notice No. L-013407366-9) to petitioner for sales and use taxes due for the period March 1, 1994 through November 21, 1996 in the amount of \$95,965.90, plus interest of \$5,063.01, for a total amount due of \$101,028.91.

On the same date, the Division issued a Notice of Determination (Notice No. L-013407367-8) to petitioner for sales and use taxes due for the period November 22, 1996 through January 7, 1997 in the amount of \$4,069.30, plus interest of \$87.49, for a total amount due of \$4,156.79.

Both notices were issued to petitioner as an officer or responsible person of Geiger Lumber & Supply Co., Inc. for taxes determined to be due in accordance with sections 1138(a), 1131(1) and 1133 of the Tax Law.

12. Federal Rule of Bankruptcy Procedure 3003 ("Rule 3003") is applicable to Geiger Lumber's Chapter 11 case. Rule 3003 states that a creditor whose debt is scheduled as disputed must file a proof of claim for the liability alleged to be owed in order to share in distribution. Rule 3003 also provides that the Bankruptcy Court shall establish the time in which proofs of claim must be filed. The Division was required to file a proof of claim in the Chapter 11 proceeding of Geiger Lumber pursuant to Rule 3003.

13. On November 24, 1997, the Hon. Adlai S. Hardin, Jr., United States Bankruptcy Judge, entered an Order in the Geiger Lumber Chapter 11 case fixing December 31, 1997 ("bar date") as the last date for the filing of pre-petition and Chapter 11 administrative expense claims (the "bar order").

14. On November 26, 1997, the Division was served with a copy of the notice and the bar order.

15. On November 26, 1997, the Office of the Attorney General for the State of New York was also served with a copy of the notice and the bar order.

16. The Division did not file any proofs of claim prior to the expiration of the bar date.

17. On June 1, 1998, approximately six months after the bar date, the Division filed an unsecured, priority proof of claim³ in the Geiger Lumber Chapter 11 case in the amount of \$173,685.45.

18. On June 1, 1998, the Division filed an administrative expense claim⁴ in the Geiger Lumber Chapter 11 case in the amount of \$364,685.74. This, too, was filed approximately six months after the bar date.

19. The Attorney General filed a Notice of Appearance in the Chapter 11 case on September 10, 1998.

20. It is contemplated that the assets of Geiger Lumber will be distributed pursuant to a liquidating Chapter 11 plan but that there will be insufficient assets to pay all creditors in full.

21. The Division will not share in the distribution of Geiger Lumber's assets in the Chapter 11 proceeding because it did not file a proof of claim prior to the bar date.

22. On July 10, 1997, petitioner filed two requests for a conciliation conference, one for the pre-petition assessment (Notice No. L013407366) and the second for the administrative expense assessment (Notice No. L013407367). After a conciliation conference, the conferee

³ The priority proof of claim was docketed as Claim No. 91. A notice asserting sales and use taxes due for the audit period March 1, 1993 through November 21, 1996 was listed as one of the debts in the priority proof of claim.

⁴ The administrative proof of claim was docketed as Claim No. 90. The notice asserting sales and use taxes due for the audit period November 22, 1996 through January 7, 1997 was listed as one of the debts in the administrative proof of claim.

issued a Conciliation Order (CMS No. 162501) dated April 10, 1998 sustaining the statutory notices.

23. A timely petition challenging the two notices of determination issued to petitioner, as well as the Conciliation Order sustaining the statutory notices, was filed with the Division of Tax Appeals. In his petition, petitioner asserts that, because the Division failed to file timely proofs of claim in the corporation's bankruptcy proceeding, the Division cannot hold him responsible as an officer of Geiger Lumber for that corporation's sales and use tax liabilities.

24. On June 2, 1999, a stipulation was executed by Geiger Lumber's representative and the Division's representative in which the parties agreed that both the administrative and the priority proofs of claim are expunged. The stipulation also stated that it "is without prejudice to the New York State Department of Taxation and Finance to assert any claim against the Debtor if the Chapter 11 proceeding is dismissed or subsequently converted to a Chapter 7 proceeding."

25. On June 8, 1999, an Order was entered by U.S. Bankruptcy Court Judge Hardin expunging the proofs of claim filed by the Division.

26. The parties entered into a stipulation of facts, executed April 6, 1999 by petitioner's representative and April 7, 1999 by the Division's representative, relevant portions of which have been incorporated into these findings of fact.

SUMMARY OF THE PARTIES' POSITIONS

27. While petitioner does admit that he is a person required to collect sales tax and is personally liable for the tax assessments of the corporation (Tax Law § 1131[1]; § 1133[a]), he contends that the Division should be equitably estopped from assessing taxes against him for the taxes of Geiger Lumber. He bases his estoppel claim on the fact that, despite having adequate knowledge of the filing of Geiger Lumber's bankruptcy proceeding and notice of its obligations

to protect its rights, the Division failed to file timely proofs of claim in the bankruptcy proceeding. Petitioner also notes that the undisputed facts clearly show that: he fully cooperated with the audit; the corporate liabilities were fixed long before the bar date; and because of its own negligence, the Division will not share in any distributions from the corporation's Chapter 11 bankruptcy proceeding. He asserts that this is an unusual fact situation which warrants the cancellation of the notices of determination to prevent manifest injustice to him.

28. The Division asserts that petitioner has failed to show that the Division engaged in any misrepresentation that would support an estoppel or that he meets any of the three elements required to be entitled to an estoppel. The Division also asserts that the record does not support a finding of manifest injustice as it does not indisputably establish that petitioner is not responsible for the payment of the taxes. It argues that an “injustice” might exist given the fact that the Division cannot collect tax from Geiger Lumber in the Chapter 11 bankruptcy proceeding. However, the Division maintains that the bar on collection of the taxes from the corporation must be balanced against the fact that the corporate liability is not discharged. Citing relevant case law, the Division further contends that petitioner ignores the fact that the officer's liability is separate and distinct from the corporate liability.

CONCLUSIONS OF LAW

A. Generally, the doctrine of estoppel cannot be invoked against the State or its governmental units unless such exceptional facts exist as would require its application in order to avoid “manifest injustice” (*see, Matter of Wolfram v. Abbey*, 55 AD2d 700, 388 NYS2d 952, 954; *Matter of Sheppard-Pollack, Inc. v. Tully*, 64 AD2d 296, 409 NYS2d 847, 849). This general rule is particularly applicable with respect to a taxing authority since sound public policy favors full and uninhibited enforcement of the tax laws (*Matter of Turner Construction Co. v.*

State Tax Commn., 57 AD2d 201, 394 NYS2d 78, 80). The doctrine as it applies to tax matters was concisely stated in *Schuster v. Commissioner* (312 F2d 311, 62-2 US Tax Cas ¶ 12,121).

There, the Court, after recognizing that estoppel should be applied against the government with utmost caution and restraint, stated:

It is conceivable that a person might sustain such a profound and unconscionable injury in reliance on the Commissioner's action as to require, in accordance with any sense of justice and fair play, that the Commissioner not be allowed to inflict injury. It is to be emphasized that such situations must necessarily be rare, for the policy in favor of an efficient collection of the public revenue outweighs the policy of the estoppel doctrine in its usual and customary context (*Schuster v. Commissioner, supra*, at 317).

In *Matter of Consolidated Rail Corp.* (Tax Appeals Tribunal, August 24, 1991, *confirmed* 231 AD2d 140, 660 NYS2d 459, *appeal dismissed* 91 NY2d 848, 667 NYS2d 683), the Tribunal, discussing the doctrine of estoppel, stated as follows:

This Tribunal has embraced a three-part test to determine applicability of the doctrine to specific cases. We ask if petitioner had the right to rely on the Division's representation; whether, in fact, there was such a reliance; and whether such reliance was to the detriment of petitioner (*Matter of AGL Welding Supply Co.*, Tax Appeals Tribunal, May 11, 1995; *Matter of Harry's Exxon Serv. Sta.*, Tax Appeals Tribunal, December 6, 1988).

B. Petitioner is not relying upon any act or misrepresentation committed by the Division to support his estoppel claim. Rather, he contends that because his case is a truly unusual fact situation the Division should be estopped from enforcing its rights against him. Petitioner bases his estoppel claim on the Division's failure to file timely proofs of claim in Geiger Lumber's bankruptcy proceeding, notwithstanding the fact that the Division had adequate knowledge of the filing of the bankruptcy proceeding and notice of its obligations to protect its rights. He argues that "the wanton negligence of the Division to protect its claim is such an extraordinary unusual

circumstance that it rises to a level of manifest injustice” to him which warrants the cancellation of the notices of determination (Petitioner's reply letter, p. 4).

C. I do not conclude that petitioner will suffer a manifest injustice if the Division is allowed to pursue its claim against him. The Division's failure to protect its claim against the corporation is not an omission of an act which it was under a duty to perform. It is well established that the liabilities of a corporation and its officers are separate and independent, and the Division has the discretion to pursue its claim against any responsible party without being obliged to pursue all of such parties or estopped by its failure to pursue any particular party (*see, Matter of Yellin v. State Tax Commn.*, 81 AD2d 196, 440 NYS2d 382; *Matter of Kadish*, Tax Appeals Tribunal, November 15, 1990; *Matter of Mustafa*, Tax Appeals Tribunal, December 27, 1991; *Matter of Edens*, Tax Appeals Tribunal, April 25, 1996). Neither the corporation's bankruptcy nor the Division's failure to file timely proofs of claim in the bankruptcy proceeding alters the fact that, as an admitted responsible officer of the corporation for the period in issue, petitioner is personally liable for the tax owed by the corporation.

There being no facts to support a finding of “manifest injustice” (*Matter of Moog Inc. v. Tully*, 105 AD2d 982, 983, 482 NYS2d 138; *see, Matter of Rashbaum v. Tax Appeals Tribunal of State of N.Y.*, 229 AD2d 723, 725, 645 NYS2d 175, 176), the doctrine of estoppel may not be applied against the Division (*see, Matter of AGL Welding Supply Company Inc. v. Commissioner of Taxation and Finance*, 238 AD2d 734, 656 NYS2d 502, 504, *lv denied* 90 NY2d 808, 664 NYS2d 270).

D. Petitioner asserts that the facts in his case are most closely analogous to those present in *Matter of Levy* (State Tax Commission, August 24, 1976), a decision in which the former State Tax Commission canceled the assessments issued to Stewart M. Levy as a responsible

officer of the Stewart Milford Corporation, a corporation which had filed a voluntary petition in bankruptcy (Chapter 7).

State Tax Commission decisions are not binding precedent, but are entitled to respectful consideration (*see, Matter of The Racal Corporation and Decca Electronics*, Tax Appeals Tribunal, May 13, 1993, *citing Matter of Cruickshank*, 169 Misc 514, 8 NYS2d 279; *Matter of Mc Donnell Douglas Corporation*, Tax Appeals Tribunal, January 8, 1998). Petitioner's reliance on *Matter of Levy* (*supra*) is misplaced. The issue in *Levy* was whether Mr. Levy was a person required to collect sales tax and was personally liable for the taxes due from the corporation. The former State Tax Commission found that after June 10, 1966, the date on which the corporation filed its bankruptcy petition, Mr. Levy no longer had any duty to act on behalf of the corporation. The former State Tax Commission's decision was based upon the fact that the bankruptcy trustee had control of the corporation's assets when the returns for the periods in issue were due. In the instant matter, the tax due was for returns for periods prior to the filing of Geiger Lumber's chapter 11 bankruptcy petition or for the period in which the corporation was a debtor-in-possession in which petitioner managed the corporation's affairs. In addition, there is no dispute that petitioner is a responsible officer who is personally liable for the tax due from the corporation.

E. Since there is no basis for invoking the doctrine of estoppel in this case and there is no dispute that petitioner is a responsible officer who is personally liable for the tax due from Geiger Lumber, the assessments issued for the period March 1, 1994 through January 7, 1997 are sustained.

F. The petition of Charles H. Geiger is denied and the notices of determination dated April 18, 1997 are sustained.

DATED: Troy, New York
February 17, 2000

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE