STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **RONALD W. SIMMONDS D/B/A LAKE COUNTRY WINE & LIQUOR** | : | DETERMINATION |
| | : | DTA NO. 819125 |
| 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, 1994 through November 30, 1998. | : | |
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Petitioner, Ronald W. Simmonds d/b/a Lake Country Wine & Liquor, 309 West Morris Street, Bath, New York 14810, filed a petition 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, 1994 through November 30, 1998.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 340 East Main Street, Rochester, New York on October 22, 2003 at 1:30 P.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Jason Robinson and Paul Bucci).

The final brief in this matter was due by January 7, 2004 and it is this date that commences the three-month period for the issuance of this determination.

## ***ISSUE*S**

I. Whether petitioner, by virtue of his guilty plea to a criminal charge of grand larceny in the fourth degree, is prohibited from contesting the Division of Taxation's assertion of a fraud penalty pursuant to the doctrine of collateral estoppel.

II. Whether, if the doctrine of collateral estoppel is not applicable in the instant matter, the Division of Taxation has sustained its burden of proof to show that petitioner's failure to remit the proper sales tax was due to fraud.

III. Whether it is proper for the Division of Taxation, if it is unsuccessful in meeting its burden of proof to establish fraud, to alternatively assert that penalties and statutory interest were due pursuant to Tax Law § 1145(a)(1)(i), (ii) and (vi).

## *FINDINGS OF FACT*

1. Petitioner herein, Ronald W. Simmonds, has owned and operated Lake Country Wine & Liquor ("the liquor store") as a sole proprietor since its inception in 1982 through the end of the period at issue herein. The liquor store, open 6 days a week, 12 hours a day, was originally located at 24 West Stueben Street, Bath, New York until July 1996, at which time it moved to its current location at 309 West Morris Street, Bath, New York.

2. The Division of Taxation ("Division") obtained information from petitioner's suppliers which revealed that his wine and liquor purchases significantly exceeded sales as reported on his sales tax returns. Accordingly, the Division decided to conduct a field examination of petitioner's books and records to determine if the proper sales tax had been collected and remitted.

3. The Division assigned the field audit to its Rochester District Office and the audit, which initially encompassed the period June 1, 1995 through May 31, 1998, commenced in October 1998. On audit, it was determined that petitioner's books and records were inadequate and insufficient since he did not maintain or retain any cash register tapes, sales invoices, sales journal, purchases journal or cash disbursements journal. The only records provided on audit were purchase invoices, check registers and bank statements. Petitioner has not filed Federal or

State income tax returns since 1991. Since petitioner's records were inadequate and insufficient, the Division's auditor used a markup analysis of wine and liquor purchases to determine sales. Initially, the auditor determined, via letters to petitioner's suppliers, that his wine and liquor purchases for resale totaled $1,334,126.08 for the audit period. Next, purchase invoices for September 1998 were reviewed and compared to shelf sale prices to determine an audited average weighted markup of 27.5688 percent. The audited average weighted markup was applied to purchases to arrive at an audited sales figure of $1,701,928.63. Subtracting reported sales of $681,972.00 from audited sales of $1,701,928.63 produced additional taxable sales of $1,019,956.63 and a tax due thereon of $82,065.29.

4. Since petitioner's purchases of $1,334,126.08 almost doubled his reported sales of $681,972.00, the auditor referred the matter to the Division's Revenue Crimes Bureau ("RCB") for criminal investigation. The RCB expanded the audit to encompass the period June 1, 1994 to November 30, 1998; however, instead of using the purchase markup analysis performed by the initial auditor, it resorted to a bank deposit methodology to reconstruct sales. The RCB determined that bank deposits for the expanded audit period totaled $2,339,017.05 and that $2,165,756.53 of this amount represented taxable sales. Additional taxable sales of $1,126,456.53 were computed by subtracting reported sales of $1,039,300.00 from audited sales of $2,165,756.53. The RCB's computation produced an additional tax due figure of $90,116.52.

5. Based on its audit and investigation, the Division referred this matter to the Attorney General's Office for criminal prosecution. On December 13, 2000, the Attorney General charged petitioner with one count of grand larceny in the fourth degree pursuant to Superior Court Information No. 2000-336W. The charge read as follows:

Defendant RONALD SIMMONDS, d/b/a LAKE COUNTRY
WINE & LIQUOR committed GRAND LARCENY IN THE FOURTH

> DEGREE, in violation of New York Penal Law § 155.30(1), from June 1994 through November 1998 in the Village of Bath, County of Steuben, State of New York, when he stole property in excess of one thousand dollars ($1,000.00). Defendant RONALD SIMMONDS stole $90,116.52 from the State of New York by failing to pay to the NYS Department of Taxation and Finance sales tax trust funds collected by him at his place of business, LAKE COUNTRY WINE & LIQUOR, 309 West Morris Street, Bath, New York. Defendant RONALD SIMMONDS owned, operated, managed and did business at LAKE COUNTRY WINE & LIQUOR, which is a retail liquor store primarily engaged in the retail sale of liquor and wine.

6. On December 14, 2000, petitioner executed a Plea Agreement and Colloquy wherein he pled guilty to the charge contained in Superior Court Information No. 2000-336W. In addition to relinquishing his right to appeal from any conviction, the agreement also provided that petitioner waived and relinquished his right, if any, to:

> use the criminal disposition as a defense or objection to any civil or administrative remedy the NYS Department of Taxation and Finance might choose to pursue. Those remedies would include an administrative proceeding seeking to impose and recoup penalties and interest concerning the sales tax owed. The plea will not affect the defendant's ability to challenge the imposition of penalties and interest nor impair the ability of the Department of Taxation and Finance to levy penalties and interest.

7. On March 23, 2001, the day of his sentencing, petitioner remitted to the Division payment of the additional tax due in the amount of $90,116.52. Petitioner was sentenced to a three-year conditional discharge and charged a $210.00 penalty surcharge.

8. On August 20, 2001, the Division issued a Notice of Determination to Lake Country Wine & Liquor for the period June 1, 1994 to November 30, 1998 wherein it assessed a tax due of $90,116.52, interest of $57,224.85 and penalty of $72,504.29, for a total due of $219,845.66. The Notice of Determination gave petitioner credit for the $90,116.52 payment made on March 23, 2001, leaving a balance due of $129,729.14. The computation section of the Notice of Determination contained the following explanation, "[B]ased on our audit of your records, we

determined that you owe tax, interest, and any applicable penalties, under sections 1138 and 1145 of the Tax Law. We added fraud penalty of 50% of the tax you owe, plus 50% of the statutory interest, under section 1145 of the Tax Law."

9. Petitioner, born on January 18, 1936, served in the United States Navy for 26 years and was also a reservist for another seven and one-half years. He is a high school and college graduate. The sales tax returns filed by Lake Country Wine & Liquor for all 18 quarters at issue in this proceeding were personally prepared by petitioner; however, it is not known how he determined the figures entered on the returns since there were no worksheets attached to petitioner's copies of the returns and no books or records detailing sales were ever produced for audit.

10. On June 22, 2000, petitioner, at the Attorney General's Office in Monroe County, executed a notarized "Voluntary Statement" wherein he swore that:

> I moved [the liquor store] from 24 West Stueben Street in July of 1996 to my current location, (309 West Morris Street, Bath N.Y.). My store is about triple the size of my old store. I did not have enough inventory to fill this location with product, so I continually reinvested the money I was taking in to purchase more inventory. I did this to be competitive with other stores and [to] keep the place going. I failed to pay the proper sales tax for the product I was selling because I was reinvesting all the money back into the store. It was always my intention to straighten things out with the sales tax as we became more profitable.

## *SUMMARY OF THE PARTIES' POSITIONS*

11. Petitioner argues that he was not informed that the Division intended to assess statutory interest and fraud penalty and that had he known prior to his plea agreement that statutory interest and fraud penalty would total almost $130,000.00 on a tax liability of $90,000.00, he would have never pled guilty. Petitioner believes that the Division had a duty and responsibility to advise him prior to his execution of the plea agreement of its intention to

assess statutory interest and fraud penalty and also provide him with the dollar amount of such interest and fraud penalty. It is petitioner's position that he was severely prejudiced as the result of the Division's actions and that it is now unfair and inequitable to hold him liable for statutory interest and fraud penalty.

12. As further grounds for reducing interest charges and waiving all penalties, petitioner asserts that he was actually a member of a "co-op" buying club with other retail liquor stores and that purchases and sales which were discovered on audit actually represent purchase of product that was resold at no profit to other members of the "co-op" buying club for their retail sale. Both during the criminal proceeding and at the hearing held herein, petitioner refused to divulge the names of the other businesses involved in the "co-op" buying club. Petitioner explained that at the time he signed the plea agreement he was willing to "take the hit" for the $90,116.52 found on audit as he thought this would end the matter. As noted above, petitioner contends that he would have never signed the plea agreement had he known that statutory interest and fraud penalty charges would total $130,000.00.

13. The Division argues that as the result of his guilty plea in the criminal proceeding, the doctrine of collateral estoppel prevents petitioner from contesting the fraud penalty asserted due in the Notice of Determination dated August 20, 2001. If petitioner is not collaterally estopped from contesting the fraud penalty, the Division maintains that it has adduced sufficient evidence to establish that petitioner's failure to pay the proper tax was due to fraud. Finally, the Division asserts that if it has not established fraud, it alternatively seeks the imposition of penalties pursuant to Tax Law § 1145(a)(1)(i) and (vi), for failure to remit the tax due on time and for the omission of more than 25% of the tax due from the returns, respectively, and that statutory interest be imposed in accordance with Tax Law § 1145(a)(1)(ii).

## *CONCLUSIONS OF LAW*

A. The first issue to address is whether petitioner is collaterally estopped from contesting the fraud penalty by virtue of his guilty plea in the criminal proceeding to grand larceny in the fourth degree. For the doctrine of estoppel to apply, petitioner must have had a fair opportunity to litigate the same issues during the prior proceeding. (***See***, ***Kuriansky v. Professional Care***, 158 AD2d 897, 551 NYS2d 695.) This means that:

> the party seeking the benefit of collateral estoppel (here, the State) has the burden of demonstrating the identity of the issues and the necessity of their having been decided, and the party opposing its use (here, petitioner [Sokol]) has the responsive burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action. (***State of New York v. Sokol***, 113 F3d 303, 306 [2d Cir 1997][citations omitted].)

B. In ***Matter of DeFeo*** (Tax Appeals Tribunal, April 22, 1999) the Tribunal affirmed the determination of the Administrative Law Judge wherein the doctrine of collateral estoppel was applied in a situation where the petitioner therein pled guilty to grand larceny in the second degree and conspiracy in the fourth degree. Notwithstanding the Tribunal's decision in ***DeFeo,*** I conclude that petitioner is not collaterally estopped from contesting the Division's assertion of the fraud penalty. The Plea Agreement and Colloquy executed by both petitioner and the Assistant Attorney General specifically states that "[T]he plea will not affect the defendant's ability to challenge the imposition of penalties and interest . . . ." To invoke the doctrine of collateral estoppel would, in my view, directly contradict the terms of the plea agreement. Whether the Assistant Attorney General intended to relinquish the State's right to assert collateral estoppel in a civil fraud proceeding with her execution of the plea agreement or whether this was an unintended result, it must be found that the terms of the plea agreement are clear and unambiguous and cannot be ignored or dismissed.

C. The next issue to address is whether the Division has met its burden of proof to establish fraud. In ***Matter of Ellett*** (Tax Appeals Tribunal, December 18, 2003), the Tribunal stated that:

> For the Division to establish fraud by a taxpayer, it must produce "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (***Matter of Sener***, Tax Appeals Tribunal, May 5, 1988; ***see also***, ***Schaffer v. Commissioner***, 779 F2d 849, 86-1 USTC ¶ 9132; ***Matter of Cousins Serv. Sta.***, Tax Appeals Tribunal, August 11, 1988).

D. I conclude that the record herein contains sufficient evidence to establish that petitioner's failure to pay the sales tax at issue was in fact due to fraud. Petitioner's purchases substantially exceeded reported sales, he failed to maintain or retain sales records, there exist no worksheets to show how petitioner calculated sales as reported on the returns he personally prepared, he has not filed income tax returns since 1991 and the Division, using two entirely different audit methods, discovered significant additional unreported sales spread over the entire audit period. Furthermore, petitioner, in his Voluntary Statement, has admitted to knowingly diverting sales tax funds to purchase additional inventory for the larger store. While this may explain his actions after July 1996 when he moved to the new store, it in no way addresses the understatements which occurred during the two years prior to the move to the larger store. Although petitioner has alleged the existence of a "co-op" buying club, he has refused to identify the individuals or businesses involved, and he has not offered any corroborating evidence to establish that a "co-op" buying club existed or the amount of sales allegedly made to this club. Finally, petitioner's guilty plea must weigh heavily against him. Considering the entire record, there is ample evidence to support a finding of fraud (***Matter of Sona Appliances, Inc.,*** Tax Appeals Tribunal, March 16, 2000).

E. Lastly, addressing petitioner's argument that the Division had a duty and responsibility to inform him of its intent to assess statutory interest and fraud charges, the record herein simply does not support that petitioner was in any way misled by the Division's action. To the contrary, the Plea Agreement and Colloquy which petitioner signed on December 14, 2000 leaves absolutely no doubt that the Division reserved the right to assess penalties and interest. Moreover, petitioner's attorney, in a letter dated November 20, 2000 addressed to the Assistant Attorney General handling the criminal matter, indicated that he wished to discuss this matter "so that we may arrive at an overall resolution of not only the restitution due, but any potential penalties and interest to be assessed." Thus, it must be concluded that both petitioner and his attorney were aware of the Division's intention to assert penalties and interest and that petitioner was in no way prejudiced by the manner in which this case was handled (***see, Matter of N.J.T. Liquors, Inc.,*** Tax Appeals Tribunal, May 7, 1992).

F. The petition of Ronald W. Simmonds d/b/a Lake Country Wine & Liquor, is denied and the Division's Notice of Determination date August 20, 2001 is sustained.

DATED: Troy, New York
March 25, 2004

/s/ James Hoefer
PRESIDING OFFICER