STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
IAN BRUCE EICHNER, STUART EICHNER AND MARTIN STEPNER	:	DETERMINATION DTA NOS. 819327, 819328 AND 819329
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1998 through May 31, 2000.	:	

Petitioners, Ian Bruce Eichner, 222 Columbia Heights, Brooklyn, New York 11201-2187, Stuart Eichner, c/o Becker & Company, 551 Madison Avenue, New York, New York 10022, and Martin Stepner, c/o Scott Ehrenpreis, E.A., Becker & Company, LLC, 551 Madison Avenue, New York, New York 10022, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1998 through May 31, 2000.

On October 23, 2003 and October 31, 2003, respectively, petitioners, appearing by Becker & Company, LLC (Scott B. Ehrenpreis, E.A., of counsel), and the Division of Taxation, by Christopher C. O'Brien, Esq. (Michael P. McKinley, Esq., of counsel), waived a hearing and agreed to submit the matters for determination based upon documents and briefs to be submitted by April 30, 2004, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division may properly hold petitioners personally responsible for the unpaid sales and use taxes, plus interest and penalties thereon, of H. Park Central, LLC.

FINDINGS OF FACT

1. H. Park Central, LLC ("H. Park") operates a hotel in Manhattan.

2. H. Park filed a petition with the Bankruptcy Court for the Southern District of New York under Chapter 11 of the Federal Bankruptcy Code on April 25, 2000. Subsequently, and in response to this filing, the Division of Taxation ("Division") issued to H. Park a Notice and Demand for Payment of Tax Due for each of the sales tax quarterly periods spanning June 1, 1998 through May 31, 2000. Each notice included a statement explaining that it was the type of notice allowed by Bankruptcy Code § 362(b)(9), was issued for information only so as to advise the taxpayer of the amount of tax determined to be due by the Division, and that no demand for payment was being made at the time of issuance of the notices. The notices as issued to H. Park are summarized as follows:

NOTICE NO.	PERIOD	TAX AMOUNT[1]	REASON
L-018695000	06/01/98 - 08/31/98	$0.00	late filed, late paid
L-018694907	09/01/98 - 11/30/98	$322,877.31	late filed, late paid, partial remit
L-018308818	12/01/98 - 02/28/99	$183,360.29	late filed, non-remit
L-018307935	03/01/99 - 05/31/99	$421,716.98	late filed, non-remit
L-018307898	06/01/99 - 08/31/99	$603,300.53	late filed, non-remit
L-018705202	09/01/99 - 11/30/99	$0.00	late filed, late paid
L-018705315	12/01/99 - 02/29/00	$640,694.00	late filed, non-remit
L-018734872	03/01/00 - 05/31/00	$997,817.16	late filed, late paid, partial remit

[1] Where the tax amount listed is $0.00, the notice asserted penalty and interest only.

3. As part of the bankruptcy proceedings, H. Park included schedules showing a claim held by the Division in the amount of $2,253,971.00 for unpaid sales tax and interest as of April 25, 2000 ("the Scheduled Claim"). The Division filed two proofs of claim against H. Park thereafter on November 6, 2000, as follows:

> –Proof of Claim No. 00436 in the amount of $2,870,765.96, consisting of an unsecured priority claim for sales tax and interest in the amount of $2,295,766.38 and an unsecured nonpriority claim for penalties in the amount of $574,999.58.
>
> –Proof of Claim No. 00437 in the amount of $1,230,552.70 ("the Administrative Claim") asserting an administrative claim for sales taxes, interest and penalty for the period ended May 31, 2000.

4. The Division's proofs of claim against H. Park were subsequently amended via the filing of a proof of claim (Proof of Claim No. 00496) in the amount of $2,831,406.80 ("the Tax Claim"), consisting of an unsecured priority claim for sales taxes and interest in the amount of $2,259,884.98 ("the Priority Claim"), and an unsecured nonpriority claim for penalties in the amount of $571,521.82 ("the Non-Priority Claim"). The Division also determined that the Administrative Claim (Claim No. 00437) had been paid in full, except for $52,880.99.

5. Pursuant to a Stipulation and Order dated February 16, 2001, H. Park, as the debtor, and the Division agreed that the November 6th proofs of claim (Proof of Claim No. 00436 and No. 00437) were withdrawn, and that Proof of Claim No. 00496, the Tax Claim, was allowed as an unsecured priority tax claim in the amount of $2,312,765.97 (representing the tax and interest in the amount of $2,259,884.98 as set forth in Proof of Claim No. 00496, plus the $52,880.99 amount of the Administrative Claim [Proof of Claim No. 00437] which had not been paid). The Stipulation and Order provided that the $2,312,765.97 amount was to be paid by H. Park over six years at six percent per annum, beginning 30 days after the "Effective Date" of any plan of reorganization confirmed in the bankruptcy proceeding.

6. H. Park, as the debtor in bankruptcy, together with Lehman Brothers Holdings, Inc., a secured creditor of H. Park, filed a joint plan of reorganization with the Bankruptcy Court. The joint plan of reorganization was thereafter modified by the Fifth Amended Joint Plan of Reorganization ("The Fifth Amended Plan"), dated April 26, 2001. This Fifth Amended Plan was confirmed by the Bankruptcy Court (Judge Prudence Carter Beatty) on April 27, 2001, via the Court's "Findings of Fact, Conclusions of Law and Final Order Pursuant to 11 U.S.C. § 1129(a) and (b) Relating to and Confirming the [Fifth Amended Plan]." While the Fifth Amended Plan was confirmed by the Bankruptcy Court, it had not (as of the date of this proceeding) become effective and thus no payments had been made with regard to the Division's Tax Claim as encompassed in the February 16, 2001 Stipulation and Order.

7. Article I of the Fifth Amended Plan provides definitions relevant to this matter, as follows:

> Section 1.32–"Debtor" means H. Park Central LLC.
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> Section 1.38–"Entity" means any individual, corporation, limited or general partnership, limited liability company, joint venture, association, joint stock company, estate, Entity, entity, trust, trustee, United States trustee, unincorporated organization, government, governmental unit (as defined in the Bankruptcy Code), agency or political subdivision thereof.
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> Section 1.39–"Equity Holders" means any and all of the following: TPC Hotel LLC, Leslie Hollander Eichner, Ian Bruce Eichner, Stuart Eichner and Alexis Promuto, or any of their successors or assigns.
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> Section 1.40–"Equity Holder's Contribution" means the amount to be contributed by the Equity Holders to fund distributions under this [Fifth Amended Plan] consisting of [various amounts as specified].

8. Article VII of the Fifth Amended Plan, at section 7.4, provides, in relevant part, as follows:

Section 7.4– Releases

(a) Except as otherwise expressly provided herein or in the Confirmation Order, on the Effective Date, in consideration for, or as part of, the treatment accorded to the Holders of Claims and Interests under this Plan, and for other consideration and reasons, the Debtor, the Equity Holders, the Affiliated Parties, Lehman, Lehman Participant and all of the Debtor's, the Equity Holders', the Affiliated Parties', Lehman Participant's respective present and former affiliates, officers, directors, members and members of members, managers, agents, employees, attorneys, and financial consultants, and their successors and assigns (all of the foregoing, collectively, the "Released Parties"), shall be deemed forever released from any and all rights, claims, demands, debts, or liabilities, of every kind or nature, known or unknown, whether in law or equity, including by way of setoff, that any Entity, including the Debtor, the Equity Holders, the Affiliated Parties, Lehman, Lehman Participant, any of their affiliates, of any holders of Claims or Interest, may have asserted, could have asserted, or could in the future assert, directly or indirectly, against any of the Released Parties, the Hotel or any other Property of the Debtor directly or indirectly relating to the Debtor, the Chapter 11 Case, the Hotel or any other Property, the business of the Debtor, the Note, the Mortgage or any of the other Loan Documents.

9. Article VII of the Fifth Amended Plan, at section 7.5, provides, in relevant part, as follows:

Section 7.5 Injunction. As of the Confirmation Date, all Entities who have held, hold or may hold Claims against the Debtor and/or the other Released Parties, arising on or before the Confirmation Date or who have held, hold or may hold Interests acquired on or before the Confirmation Date shall be permanently enjoined from taking any of the following actions with respect to such Claims or Interests (except to enforce their rights under this Plan):

(a) commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind against the Debtor, and the other Released Parties, any of their assets or any direct or indirect transferee of any assets of, or successor in interest to the Debtor, and the other Released Parties or any assets of any transferee or successor directly or indirectly relating to the Debtor, the Chapter 11 Case, the Hotel or any other Property, the business of the Debtor, the Note the Mortgage or any of the other Loan Documents.

(b) enforcing, levying, attaching, collecting or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree or order against the Debtor, and/or the other Released Parties, any of their assets or any direct or indirect transferee of any assets of, or successor

> in interest to the Debtor, or the other Released Parties or any assets of any such transferee or successor.
>
> (c) creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any encumbrances of any kind against the Debtor, and/or the other Released Parties, any of their assets or any direct or indirect transferee of any assets of, or successor in interest to the Debtor, and/or the other Released Parties or any assets of any such transferee or successor.
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> (d) asserting any setoff, right of subrogation or recoupment of any kind, directly or indirectly, against any obligation due the Debtor, and/or the other Released Parties or any of their assets or any direct or [sic] the Debtor and the other Released Parties or any assets of any such transferee or succor, and
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> (e) proceeding in any manner in any place or forum whatsoever that is not specifically permitted by or that does not conform to or comply with the provisions of this Plan.

10. Paragraph "AF" of Judge Beatty's April 27, 2001 Findings of Fact, Conclusions of Law and Final Order provides as follows:

> AF. Releases. The release provisions set forth in Article 7 of the Plan:
>
> (1) are within the jurisdiction of this Court under 28 U.S.C. §§ 1334 (a), (b) and (c);
> (2) are each an essential means of implementing the Plan pursuant to Section 1123(a)(5) of the Bankruptcy Code;
> (3) confer material benefits on, and are thus in the best interest of, the Debtor's Estate;
> (4) all persons released under the Plan have contributed value to the Debtor's Estate in consideration for such releases and would not have contributed such value absent such releases; and
> (5) are, based on the facts and circumstances of this chapter 11 case, consistent with and permitted pursuant to Sections 105, 524, 1123, 1129 and all other applicable provisions of the Bankruptcy Code.

11. On July 16, 2001, the Division issued eight notices of determination to each of the three petitioners assessing tax, penalties and interest due for the sales tax quarterly periods spanning June 1, 1998 through May 31, 2000. These notices were issued on the basis that each petitioner was a person responsible to collect, account for and remit sales and use taxes on behalf of H. Park during the periods in issue, who failed to do so thus becoming personally liable for

such taxes, plus penalties and interest thereon. Each notice assesses the same amount with respect to each petitioner, and each of the notices is identical (with the exception of the notice for the latest sales tax quarterly period in issue) as to the purpose and amount of the corresponding Notice and Demand issued to H. Park, as follows:

IAN B. EICHNER NOTICE NO.	STUART EICHNER NOTICE NO.	BRUCE STEPNER NOTICE NO.	TAX AMOUNT[2]
L-019826682	L-019826690	L-019826698	$0.00
L-019826683	L-019826691	L-019826699	$322,887.31
L-019826684	L-019826692	L-019826700	$183,360.29
L-019826685	L-019826693	L-019826701	$421,716.98
L-019826686	L-019826694	L-019826702	$603,300.53
L-019826681	L-019826689	L-019826697	$0.00
L-019826680	L-019826688	L-019826696	$640,694.00
L-019826679	L-019826687	L-019826695	$48,891.00

12. Petitioner Ian Bruce Eichner is a 35 percent member of H. Park, and is listed as an owner and officer on H. Park's Application for Registration as a Sales Tax Vendor. He is also an authorized signatory on H. Park's bank account and is designated an officer/member/manager duly elected to hold office and empowered to act on behalf of H. Park.

13. Petitioner Stuart Eichner is a nine percent member of H. Park, and is listed as an owner and officer on H. Park's Application for Registration as a Sales Tax Vendor. He is also an authorized signatory on H. Park's bank account and is designated an officer/member/manager duly elected to hold office and empowered to act on behalf of H. Park. He signed H. Park's sales tax returns for the period March 1, 2000 through March 31, 2000 and March 1, 2000 through

[2] Where the tax amount listed is $0.00, the notice asserted penalty and interest only. The difference between the tax amount listed on the notice to H. Park for the sales tax quarterly period ended May 31, 2000 ($997,817.16) and that listed on the notices issued to petitioners for the same period ($48,891.00) is not specified.

May 31, 2000 as a "member manager." He also signed a Consent Extending the Period of Limitation for Assessment of Sales Tax as a "member" on behalf of H. Park.

14. Petitioner Bruce Stepner signed H. Park's sales tax returns for the periods September 1,1998 through September 30, 1998, October 1 1998 through October 31, 1998, September 1, 1998 through November 30, 1998, March 1, 1999 through March 31, 1999, and April 1, 1999 through April 30, 1999 as "Dir. Of Financial Mgmt." He signed H. Park's Telecommunications Tax Return for the period January 1 1998 through December 31, 1998 as "Dir. Financial Mgt." Mr. Stepner also signed a Statement of Proposed Audit Adjustment on behalf of H. Park agreeing to additional sales tax for the period August 1, 1995 through August 31, 1997, and an Application for Credit or Refund for the same period. As "Director of Financial Management" for H. Park, Mr. Stepner signed a letter to the Division, dated February 4, 1998, requesting penalty abatement. Mr. Stepner is described as the Chief Financial Officer of H. Park during the calendar years 1998 through 2000.

SUMMARY OF THE PARTIES' POSITIONS

15. Petitioners maintain that issuance of the subject notices of determination against them violates the permanent injunction provided in Section 7.5 of the Fifth Amended Plan. Specifically, petitioners argue that they are each "Released Parties" as defined in Section 7.4 of the Fifth Amended Plan.[3] In turn, they assert that Section 7.5 of the Plan precludes any party from "commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind against the Debtor [H. Park] or the other Released Parties

[3] Petitioners Ian Bruce Eichner and Stuart Eichner are each specifically identified as "Equity Holders" at Section 1.39 of the Fifth Amended Plan. Section 7.4 of the Fifth Amended Plan identifies "Released Parties" to include, among others, the Equity Holders and the present and former employees of the Debtor (H. Park). As the Chief Financial Officer of H. Park, petitioner Martin Stepner, an employee during the years in issue would, together with petitioners Ian Bruce Eichner and Stuart Eichner, as Equity Holders, be included within the class defined as "Released Parties" for purposes of the injunction imposed under Section 7.5 of the Fifth Amended Plan.

. . . ." Thus, petitioners maintain that the Division is precluded from issuing or acting upon the notices of determination in question in this proceeding.

Petitioners have not challenged the status of either Ian Bruce Eichner or Stuart Eichner as persons responsible to collect, account for and remit sales and use taxes on behalf of H. Park pursuant to Tax Law § 1133(a) and § 1131(1). However, petitioners do assert, specifically with respect to petitioner Martin Stepner, that he lacked the authority to sign checks on behalf of H. Park, and that he therefore may not in any event be held liable for the unpaid amounts owed by H. Park.

16. The Division agrees that, except for Martin Stepner, petitioners have not disputed their status as persons responsible for the unpaid taxes of H. Park, but only claim that the Division is precluded from pursuing them individually for such liability by virtue of the terms of the Fifth Amended Plan. As to such claim, the Division notes that the February 16, 2001 Stipulation and Order and the April 27, 2001 Findings of Fact, Conclusions of Law and Final Order (confirming the Fifth Amended Plan) should be accorded "limited weight," since the copies of such documents as submitted on this record are not signed by any of the designated individuals (including the Bankruptcy Court Judge) and do not contain the seal of the Bankruptcy Court. The Division also argues that release of the petitioners from their potential personal liability for the amounts at issue, via the Bankruptcy Court's release and permanent injunction, would be incorrect and impermissable, absent extraordinary circumstances. The Division maintains that petitioners have not shown that the instant case presents such extraordinary circumstances, nor have petitioners established that they have provided any consideration to the Division which would support their release from liability for the amounts owed. Finally, the Division maintains that penalties imposed against the petitioners should be sustained, noting that even if the cancellation of penalties against H. Park per the Stipulation and

Order is upheld, there is no basis to conclude that the Division agreed to such cancellation with regard to the petitioners.

17. In response, petitioners assert that the validity of the permanent injunction is not before the Division of Tax Appeals, and that the issuance of the subject notices of determination simply violates such injunction. Petitioners also maintain that pursuant to the Fifth Amended Plan, the owner of H. Park's property will be a newly formed entity holding 100 percent of the preferred equity interest in such property and 99 percent of the common equity interest therein. As a result, the respective 35 percent and 9 percent ownership interests of petitioners Ian Bruce Eichner and Stuart Eichner will be severely diluted and diminished to an indirect 1- percent equity ownership interest, and that such diminution in value constitutes consideration sufficient to support the releases from liability. Finally, petitioners argue that the Stipulation and Order clearly resulted in cancellation of the penalties against H. Park, and that the Division is thus precluded from asserting penalties against the petitioners herein.

CONCLUSIONS OF LAW

A. Treated first is the issue of whether petitioners fall within the status of "persons" who are properly included among those subject to liability for the unpaid sales and use taxes, and attendant penalty and interest, owed by H. Park. Exposure to such liability arises under Tax Law § 1133(a), which states that:

> Every person required to collect any tax imposed by this article [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article. . . .

Tax Law § 1131(1), in turn, defines "persons required to collect tax" and a "person required to collect any tax imposed by this article [Article 28]" to include any officer or employee of a corporation who, as such officer or employee, is "under a duty to act for such corporation in complying with any requirement of [Article 28]."

B. The mere holding of corporate office does not, *per se*, impose sales tax liability upon an officeholder (***see, Vogel v. New York State Dept. of Taxation & Fin.***, 98 Misc 2d 222, 413 NYS2d 862; ***Chevlowe v. Koerner***, 95 Misc 2d 388, 407 NYS2d 427, 430; ***Matter of Unger***, Tax Appeals Tribunal, March 24, 1994, ***confirmed*** 214 AD2d 857, 625 NYS2d 343, ***lv denied*** 86 NY2d 705, 632 NYS2d 498). Rather, whether a person is an officer or employee liable for tax must be determined based upon the particular facts of each case (***see, Matter of Cohen v. State Tax Commn.***, 128 AD2d 1022, 513 NYS2d 564; ***Stacey v. State***, 82 Misc 2d 181, 368 NYS2d 448; ***Chevlowe v. Koerner, supra***, 407 NYS2d at 429; ***Matter of Hall***, Tax Appeals Tribunal, March 22, 1990, ***confirmed*** 176 AD2d 1006, 574 NYS2d 862; ***Matter of Martin***, Tax Appeals Tribunal, July 20, 1989, ***confirmed*** 162 AD2d 890, 558 NYS2d 239; ***Matter of Autex Corp.***, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]). As summarized in ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990):

> [t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (***Cohen v. State Tax Commn.***, ***supra***, 513 NYS2d 565; ***Blodnick v. State Tax Commn.***, 124 AD2d 437, 507 NYS2d 536,538, ***appeal dismissed*** 69 NY2d 822, 513 NYS2d 1027; ***Vogel v. New York State Dept. of Taxation & Fin.***, ***supra*** , 413 NYS2d at 865; ***Chevlowe v. Koerner***, ***supra*** , 407 NYS2d at 429; ***Matter of William D. Barton***, [Tax Appeals Tribunal, July 20, 1989]; ***Matter of William F. Martin***, ***supra***; ***Matter of Autex***, ***supra***).

C. Summarized in terms of a general proposition, the issue to be resolved is whether any of the petitioners had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (***Matter of Constantino, supra; Matter of Chin***, Tax Appeals Tribunal, December 20, 1990). In order to prevail, each petitioner "was required to establish by clear and convincing evidence that he was not an officer [or employee] having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own [citations omitted]" (***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998).

D. It is clear that petitioners bear the burden of proof to overcome the presumed correctness of the Division's assessments (***Matter of Mera v. Tax Appeals Tribunal***, 204 AD2d 818, 611 NYS2d 716; ***Matter of Blodnick v. State Tax Commn., supra***). Petitioners Ian Bruce Eichner and Stuart Eichner have offered no challenge to their status as persons responsible, or to the indicia of such responsibility noted by the Division (***see*** Findings of Fact "12" and "13"). Thus, they may escape liability only if the bankruptcy proceedings provide a bar to the notices or to actions and proceedings thereon. Petitioner Martin Stepner, for his part, has alleged only that he had no (independent) authority to sign checks on behalf of H. Park, arguing that he therefore cannot be held responsible for the sums in question. As summarized above, resolution of the issue of a particular person's liability turns on all of the facts and circumstances, and no one factor, including the presence or absence of check signing authority, is dispositive. Even accepting the assertion that petitioner Martin Stepner did not have independent authority to sign checks on behalf of H. Park, it remains that he held the title of Director of Financial Management, was described as H. Park's Chief Financial Officer, and exercised other authority

including the signing of tax returns as detailed (***see*** Finding of Fact "14"). Given the absence of any countervailing evidence, petitioner Martin Stepner was properly determined to be a person subject to liability and thus, like the other two petitioners, may escape liability only if the bankruptcy proceedings provide a bar to the notices or to actions and proceedings thereon.

E. As an initial matter the Division, in its brief, points out that the copies of the February 16, 2001 Stipulation and Order and the April 27, 2001 Findings of Fact, Conclusions of Law and Final Order, as submitted herein, are not signed and do not bear the seal of the Bankruptcy Court. The Division asserts that, as a result, such documents should be accorded "limited weight." It is true that such documents provided in evidence here by submission are not, in fact, signed or sealed. However, other correspondence submitted for the record in this matter (letters between the parties dated April 2, 2003, April 16, 2003 and April 25, 2003) refers to such documents in a tenor which indicates that the same were signed on the dates noted. The Division could have verified the authenticity of such documents (or lack thereof) via accessing the public records of the Bankruptcy Court. Further, petitioners' arguments in this case are founded on the premise that such documents were confirmed (and signed) on the dates specified which, if proven untrue, could be construed as deliberately misleading this forum. Given these factors, it is accepted that the documents were signed on the dates claimed and the Division's request that they should be accorded "limited weight" for lack of signatures and seal is rejected.

F. Turning to the impact of the bankruptcy proceedings, the general rule is that the liability of a responsible person is separate and independent from that of the corporation, and that an individual is not relieved of his personal liability for taxes, penalties or interest by virtue of the corporation's bankruptcy (***see Matter of Yellin v. New York State Tax Commn.***, 81 AD2d 196, 440 NYS2d 382; ***see also*** 11 USC 524[e]). At the same time, it is well settled that any

reductions in the corporate liability, or any payments by the corporation of all or a part of such a liability, will result in a like decrease in any responsible person's liability therefor (Tax Law § 1138(a)(3)(B); ***see 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 NY 2d 938, 532 NYS2d 845).[4] This matter, however, differs from previous cases in that the Bankruptcy Court has, in confirming the H. Park Plan of Reorganization, imposed an injunction which by its terms appears to preclude any actions or proceedings of any nature which would seek to impose liability for H. Park's tax obligations against, among others, the petitioners herein. In turn, petitioners maintain that the bankruptcy injunction provision constitutes a bar to the issuance of the subject notices against them and thus requires cancellation of the notices at issue. The Division argues, in contrast, that the Bankruptcy Court's injunction was simply not permissible, that is, that the Court exceeded its authority in issuing such injunction.[5]

G. There is no argument that either the Division or petitioners are not covered by the terms of the Bankruptcy Court's Findings of Fact, Conclusions of Law and Final Order, which included the Fifth Amended Plan and the injunction provision at section 7.5 thereof. In this regard, the Division clearly falls within the definition of an "Entity" per section 1.38 of the Fifth Amended Plan, and each of the petitioners is included within the definition of "Released Parties" under such Plan (***see*** Footnote "3"), to whom the benefit of the injunction at issue applies.

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[4] The Division argues that the penalties against the officers were properly assessed and remain outstanding, unless the penalties assessed against H. Park were canceled by the February 16, 2001 Stipulation and Order of the Bankruptcy Court. Since the Stipulation and Order (***see*** Finding of Fact "5") makes clear that the Non-Priority Claim, i.e., the penalty portion of the Tax Claim, was withdrawn by the Division with prejudice, it follows that the penalties assessed against the petitioners are withdrawn and are not at issue herein, and the amounts assessed against the petitioners should be reduced accordingly.

[5] The Division argues that both the injunction and release provisions adopted by the Court are impermissible. By the terms of the Fifth Amended Plan, the injunction becomes effective when the plan is "Confirmed" by the Court, while the releases are effective when the Confirmed Plan becomes "Effective." Since the Plan has been "Confirmed" by the Court but has not been declared "Effective," it is only the injunction and its impact which is properly at issue herein.

Similarly, the Division raises no argument that the clear and unambiguous terms of the injunction do not serve to preclude pursuit of the liabilities assessed by the notices of determination against the petitioners. In this regard, the injunction at section 7.5(a) bars "*commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind against . . . the Released Parties . . .*" and at section 7.5(e) bars "*proceeding in any manner in any place or forum whatsoever that is not specifically permitted by or that does not conform to or comply with the provisions of this Plan*." (***See*** Finding of Fact "9".)

H. The Division's challenge is not that the injunction would not apply to petitioners or to the liabilities in issue, but rather is a challenge to the authority of the Bankruptcy Court to issue such an injunction in the first instance. Specifically, the Division points to section 524(e) of the Bankruptcy Code (11 USC § 524), which provides that "discharge of a debt of the debtor does not effect the liability of any other entity on, or the property of any other entity for, such debt," and argues that the Bankruptcy Code does not operate as a private contract to relieve co-debtors of their liabilities. The Division cites to cases from the Third, Seventh, and Ninth Circuit Courts of Appeal for the proposition that such releases and injunctions are impermissable (***see, Copelin v. Spirco, Inc.***, 182 F3d 174, 182 [3rd Cir 1999]; ***Union Carbide Corp. v. Newboles***, 686 F2d 593, 396 [7th Cir 1982]; ***In re: Continental Airlines and Continental Airlines Holdings, Inc. v. Continental Airlines; Continental Airlines Holding, Inc.***, 203 F3d 203, 212 [3rd Cir 2000] ***citing Underhill v. Royal***, 769 F2d 1426 [9th Cir 1985]). The Division acknowledges that the Second Circuit Court of Appeals, in contrast, has upheld such releases and permanent injunctions in "extraordinary" bankruptcy reorganization cases involving large numbers of plaintiffs and limited defendant resources (***see, Continental Airlines, supra, citing SEC v. Drexel, Burnham Lambert Group, Inc.***, 960 F2d 285 [2nd Cir 1992]; ***Kane v. Johns-Manville***

Corp., 843 F2d 636 [2nd Cir 1988]). However, the Division posits that H. Park's reorganization in bankruptcy was not an extraordinary case, and thus seeks a determination herein that the Bankruptcy Court's Order was impermissible and invalid insofar as its injunction and release apply to these petitioners. Petitioner counters that the validity of the Bankruptcy Court's injunction is not properly subject to review herein, but rather the only question is whether proceeding herein violates such injunction.

I. The Division's position that the Bankruptcy Court's injunction should be set aside as impermissable in light of 11 USC § 524(e) is rejected. Paragraph AF of the Bankruptcy Court's Findings of Fact and Conclusions of Law specifically validates the provisions of Article 7 of the Fifth Amended Plan under which the injunction and release is found, including a specific Finding and Conclusion that such provision is consistent with and permitted pursuant to, *inter alia*, section 524 of the Bankruptcy Code (***see*** Finding of Fact "10"). Given this direct reference to section 524 by the Bankruptcy Court, it follows that the inclusion of the injunction provision by the Bankruptcy Court was considered and deliberate, and it cannot be concluded that the same was simply included and confirmed by oversight.

J. The notices of determination in this matter were issued against petitioners pursuant to the Division's statutory right, authority and obligation to do so within the relevant period of limitations on assessment (Tax Law § 1138[a][1]; § 1131[1]; § 1133[a]). Likewise, and in turn, petitioners' challenge to such notices was made pursuant to their statutory right to protest within the requisite period of limitations (Tax Law § 1138[a][1]; § 170[3-1][1]; 20 NYCRR 3000.3[c]). As a result of these actions, issue has been joined in the proper forum, to wit, the Division of Tax Appeals and, absent other considerations, the matter would be ripe for adjudication. However, in this instance, the Bankruptcy Court has intervened by its injunction, the clear language of which bars any further proceedings at this juncture with regard to petitioners' personal liability for,

inter alia, the sales tax liabilities of H. Park (***see*** Finding of Fact "9"). It is simply not within the jurisdiction of this forum to declare the Bankruptcy Court's injunction invalid, or to overrule or ignore the same.

K. All further proceedings in this forum on the petitions of Ian Bruce Eichner, Stuart Eichner and Martin Stepner challenging the Division's notices of determination dated July 16, 2001 are hereby stayed pending resolution of the bankruptcy proceeding of H. Park. (or removal of the injunction issued in connection with such proceeding).

DATED: Troy, New York
October 21, 2004

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE