STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **E. GEORGE BADCOCK, III** | : | DETERMINATION<br>DTA NO. 819742 |
| 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 March 1, 1989 through May 31, 1990. | : | |

Petitioner, E. George Badcock, III, c/o Donna Marie Zerbo, 10 Sentry Court, Basking Ridge, New Jersey 07920, 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 March 1, 1989 through May 31, 1990.

On January 10, 2005 and January 25, 2005, respectively, petitioner, by his representative, Donna Marie Zerbo, Esq., and the Division of Taxation, by Christopher P. O'Brien, Esq. (Robert A. Maslyn, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by July 15, 2005, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy J. Alston, Administrative Law Judge, renders the following determination.

## *ISSUES*

I. Whether the subject assessments were made within the period of limitations set forth in Tax Law §1147(b).

II. Whether the petition should be granted and the subject assessments canceled because of an approximate 12-year delay from the filing of petitioner's request for conciliation conference and the date of the conciliation conference.

III. Whether petitioner is liable for the sales and use taxes due from Superlease-Rent-A-Car, Inc., as a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

IV. Whether, under the instant circumstances, interest should be computed from the date of the Conciliation Order and not from the date tax was due, or, alternatively, whether interest should be abated pursuant to Tax Law § 3008(a).

## *FINDINGS OF FACT*

1. Superlease-Rent-A-Car, Inc. ("the corporation") was a New Jersey corporation engaged in the business of renting and leasing automobiles in New York during the period December 1, 1989 through May 31, 1990. Information submitted by petitioner indicates that the corporation generated in excess of $20 million in sales annually during the years 1989 and 1990. The corporation's 1987 U.S. Corporation Income Tax Return (the most recent such return in the record) reports gross sales of $13,267,722.00 for that tax year.

2. Petitioner, E. George Badcock, III, was president of the corporation during the period at issue. Various corporate tax returns in the record indicate that petitioner had been president since at least 1983. Petitioner received compensation from the corporation for his services as president. In 1989, petitioner was paid about $510,000.00 for such services. He was also the sole shareholder of the corporation during the period at issue. Corporate tax returns indicate that petitioner devoted 100 percent of his time to corporate business.

3. Throughout the period at issue, petitioner had authority to sign checks on behalf of the corporation. He regularly signed checks in payment of sales tax. His facsimile signature was on corporate payroll checks. Petitioner also regularly signed documents on behalf of the corporation, including tax returns. Petitioner had authority to hire and fire employees.

4. During the period at issue the corporation conducted its business through four operating entities (three of which were wholly-owned subsidiaries). Each of the operating entities was headed by a general manager.

5. The corporation's comptroller was responsible for the financial aspects of the corporation, including the day-to-day operations involving banking, payroll, tax returns and financial statements. From February 1986 to July 1989, Randy Petrino was the corporation's comptroller. Petitioner then hired Gilbert Small to fill the position of comptroller. Alan Edwards replaced Mr. Small as comptroller in January 1990.

6. On January 18, 1991 the Division of Taxation ("Division") issued to petitioner notices of determination and demands for payment of sales and use taxes due as follows:

a. Notice S-910118707M assessed penalty of $3,090.96 and interest for the period March 1, 1989 through May 31, 1989. This notice was issued as a result of a late-filed return by the corporation. The Division later converted Notice S-910118707M to Notice and Demand L-006612094.

b. Notice S-910118708M assessed $191,805.33 in additional tax due, plus penalty and interest, for the period June 1, 1989 through August 31, 1989. This notice was issued in response to a late-filed, partial remit return. This notice was issued for the balance reported due. The Division later converted Notice S-910118708M to Notice and Demand L-006612095.

c. Notice S-910118709M assessed $314,890.99, plus penalty and interest, for the period September 1, 1989 through November 30, 1989. This notice was also issued in response to a late-filed, partial remit return. The Division later converted Notice S-910118709M to Notice and Demand L-006612096.

d. Notice S-910118710M assessed $416,045.40, plus penalty and interest, for the period December 1, 1989 through February 28, 1990. This notice was issued in response to a late-filed, no remit return. The Division later converted Notice S-910118710M to Notice and Demand L-006612097.

e. Notice S-910118711M assessed $416,045.40, plus penalty and interest, for the period March 1, 1990 through May 31, 1990. This was an estimated notice resulting from a failure to file a return. When the return was subsequently filed, the estimated amount was adjusted based upon the filed return by issuance of Notice and Demand L-006612098.

7. Each of the above-referenced statutory notices advised petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from the corporation and therefore personally liable for the sales and use taxes due from the corporation.

8. On March 8, 1991, petitioner filed five requests for conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") in protest of the five notices referenced above. Petitioner included copies of the five notices with the requests.[1]

[1] Also on March 8, 1991, petitioner filed a request for conference in respect of Notice S-910118706M (and attached a copy of such notice with his request). Said notice pertained to the period ended May 31, 1988. Neither the subject petition nor the underlying conciliation order (***see***, Finding of Fact "15") addressed this notice.

9. Also on March 8, 1991, petitioner filed three other requests for conciliation conference with BCMS. The notice numbers associated with these three other requests are not in the record. The requests reference the notices being protested as "8/31/88," "11/30/88," and "2/28/89."

10. By letter to petitioner's former representative dated March 18, 1991, BCMS referenced petitioner's requests for the periods "8/31/88, 11/30/88 & 2/28/89" and stated:

> Your protest of the Tax Department's notice(s) is acknowledged. However, before we can process your protest you must give us more specific information. Please furnish a copy of each notice (assessment) which you are protesting.
>
> It is most important that you comply with this request within ten (10) days. This will enable us to notify the Tax Compliance Division to stop any collection action on the protested notice(s).

11. By letter to petitioner's former representative dated April 17, 1991, Patricia L. Brumbaugh, Esq., of the Division's Office of Counsel, advised petitioner, in relevant part:

> The Bureau of Conciliation and Mediation Services (BCMS) confirms the receipt of timely requests for conciliation by . . . [petitioner] with regard to the six notices of determination issued to [him] copies of which were submitted to BCMS. At the present time BCMS is awaiting your response to their letter inquiring about [petitioner's] requests for conciliation for three other sales tax periods (8/31/88, 11/30/88, and 2/28/89) . . . for which [petitioner] did not submit copies of the notices of determination to BCMS. It is my understanding that when these questions have been resolved BCMS will process the requests for conciliation for the six notices issued on 1/18/91 to [petitioner].

12. Petitioner did not respond to the BCMS request for copies of the notices issued in respect of the periods ended 8/31/88, 11/30/88, and 2/28/89.

13. On March 12, 1992, the Division issued to petitioner as a responsible officer of the corporation a Notice of Determination and Demand (Notice L-005374786-1) which assessed $604,610.68 in additional sales tax, plus penalty and interest for the period December 1, 1988 through February 28, 1990. This assessment was based upon a field audit of the corporation's books and records for the same period.

14. A BCMS conference in respect of the five assessments issued on January 18, 1991, as detailed above, was held on February 11, 2003, approximately twelve years after petitioner filed his requests for such conference.

15. Following the conference, BCMS issued a Conciliation Order dated August 8, 2003, which recomputed the deficiencies asserted by notices L006612095 through L006612098 to a combined total of $440,183.32 in additional tax due, plus penalty and interest, for the period June 1, 1989 through May 31, 1990. The Conciliation Order canceled Notice L006612094.

16. The BCMS recomputations resulted from a consolidation of the audit assessment (Notice L-005374786-1; ***see***, Finding of Fact "13") with notices L006612095 through L006612098. The audit assessment credited the corporation for all payments remitted with the sales tax returns for the audit period.

17. Petitioner concedes that the amounts set forth in the subject statutory notices, as modified by the Conciliation Order dated August 8, 2003, are properly computed and are correct. Petitioner thus offered no evidence contesting the computation of the subject assessments.

18. The corporation filed a petition in the United States Bankruptcy Court under Chapter 11 of the Bankruptcy Code on March 6, 1990. The corporation continued, however, to operate the business as a debtor in possession. Pursuant to an order of the Bankruptcy Court dated March 12, 1993 the corporation was authorized to use up to $150,000.00 in cash collateral for immediate payroll and operating expenses of the business. Pursuant to an order dated March 22, 1990 the corporation was authorized to use up to $350,000.00 in cash collateral for the actual and necessary operating expenses of the business for the period March 14, 1990 through March 23, 1990.

19. On July 27, 1990, the Bankruptcy Court appointed a trustee to operate the corporation. Petitioner was removed from control of the corporation at that time. The corporation continued to operate under the trustee. By Order filed September 7, 1990, the bankruptcy proceeding was converted to Chapter 7.

20. In addition to various other matters, the parties herein stipulated to the following:

> Petitioner hereby amends his petition to remove the allegations [therein] . . . that the computation of the assessment was flawed or incorrect, and petitioner will not present any evidence in support of such assertion. Petitioner stipulates that the amounts set forth in the Notices as tax, with applicable penalty and interest, as modified by the Conciliation Order, were properly computed and are true and correct.
>
> Petitioner hereby amends his petition to remove the allegations [therein] . . . that petitioner did not timely and properly receive the assessments at issue, and petitioner will not present any evidence at hearing in support of such assertion. Petitioner stipulates that he timely received the Notices at issue herein.
>
> Petitioner therefore protests and will proceed at hearing on only the issue of whether he was properly subject to the assessments as an officer/responsible person of [the corporation] under Tax Law §§ 1131(1) and 1133(a) during the period at issue.

***SUMMARY OF THE PARTIES' POSITIONS***

21. Petitioner contends that the subject assessments are invalid by reason of the 12-year gap between the filing of petitioner's request for a conciliation conference and the date of the conference. Petitioner asserts that the failure of the Division to provide a conference in a timely manner means that the taxes at issue were not assessed in a timely manner pursuant to Tax Law § 1147. Petitioner also claims that the recomputations made pursuant to the Conciliation Order were untimely assessments. Petitioner contends he bears no responsibility for the delay in providing a conference and that sole responsibility for the delay falls upon the Division. Petitioner further asserts that the Division failed to provide a conciliation conference within a reasonable time as mandated under State Administrative Procedure Act ("SAPA") § 301.

Petitioner also claims that the delay prejudiced his case because memories of witnesses fade, and the whereabouts of key corporate personnel are not known. Petitioner asserts that the Division's delay effectively resulted in a denial of his due process right to contest the assessments.

22. Petitioner also contends that he was not a person under a duty to collect and remit sales taxes pursuant to Tax Law §1131(1) and was therefore not personally liable for such taxes under Tax Law §1133(a). Petitioner asserts that he was "totally pre-occupied with the [corporation's] chaotic state of affairs during May-December 1989 caused by the fire destruction of all books and records and the gross incompetence of Mr. Small, the [corporation's] financial advisor."

23. Petitioner further contends that, if the assessments are deemed valid, interest should be calculated from the date of the Conciliation Order, i.e., August 8, 2003. Petitioner reasons that since the correct assessment was not calculated until the BCMS conference, interest should run from that point and not from the date tax was due. Additionally, petitioner asserts that in this case it would be manifestly unjust to impose interest from the date tax was due, given the 12-year gap between the filing of the request for conciliation conference and the actual date of the conference. Petitioner contends Tax Law § 3008(a) supports the abatement of interest in the instant matter.

24. The Division asserts that petitioner is limited by the stipulation of facts from raising any issue other than the question of whether petitioner was a responsible officer of the corporation (***see***, Finding of Fact "20"). Accordingly, issues arising from the 12-year delay in providing petitioner with a conciliation conference should not be considered herein. The Division further asserts the subject assessments were timely issued pursuant to Tax Law § 1147. The Division denies petitioner's claim that the delay in providing a conference is contrary to

SAPA § 301. The Division asserts that petitioner's claim with respect to the delay amounts to a claim of laches and that petitioner has failed to prove that grounds for such equitable relief exist in the instant matter.

25. The Division contends that the record clearly establishes that petitioner was a responsible officer of the corporation during the period at issue and was therefore personally liable for the sales taxes due from the corporation. In response to petitioner's allegations, the Division asserts that, given the facts and circumstances in the present matter, petitioner was a responsible officer of the corporation notwithstanding any incompetence on the part of Mr. Small. The Division also notes that there is no evidence in the record of any fire destroying the corporation's records.

26. The Division further contends that interest on an assessment is properly computed from the date the tax was due in accordance with Tax Law § 1145(a)(1)(ii). The Division asserts that Tax Law § 3008(a) does not apply in the instant matter, as the assessments at issue pertain to periods which precede the effective date of the statute.

## ***CONCLUSIONS OF LAW***

A. Preliminarily, the Division's contention that petitioner is limited by the stipulation of facts from raising any issues other than the question of whether petitioner was a responsible officer of the corporation is rejected. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide for stipulations of fact which are generally binding upon the parties (***see***, 20 NYCRR 3000.11). The rules do not, however, provide for binding stipulations as to the issues presented in a particular case. Rather, the raising of an issue at a hearing, or as in the present submission case, with the filing of petitioner's documents and brief, is within the discretion of the administrative law judge (***see***, 20 NYCRR 3000.4[d]). Since there are no facts in dispute

with respect to Issues I and II, and since the Division has had the opportunity to address these issues in its brief, there is no prejudice to the Division by allowing petitioner to raise these issues. Accordingly, this determination will address Issues I and II.

B. Tax Law §1147(b) provides, generally, that assessments of tax must be made within three years of the date of filing of the return; if no return was filed, the tax may be assessed at any time. Here, assessments for the sales tax periods ended May 31, 1989 through May 31, 1990 were made by the issuance of statutory notices on January 18, 1991, and were thus made well within the three-year limitations period. The subsequent renumbering of the assessments was merely a clerical function which in no way constituted an assessment of tax. Additionally, and contrary to petitioner's assertion, the issuance of the Conciliation Order on August 8, 2003 did not constitute the issuance of new assessments. The Conciliation Order's recomputation was simply that - a *recomputation* of the January 18, 1991 assessments.

C. Turning to Issue II, there is no reasonable explanation in the record for the inordinate and excessive delay in scheduling and holding a conciliation conference in this matter. The Division asserts that petitioner has failed to show that he was not responsible for the delay. However, there is no evidence in the record to even suggest that petitioner was in any way responsible for any part of the delay. Considering that the Division is charged with the responsibility to schedule and hold conferences (***see***, 20 NYCRR 4000.5) there is no basis to presume, absent some evidence, that petitioner was responsible for any delay. Moreover, given the Division's responsibility to schedule conferences, it was incumbent upon the Division to produce evidence to show that petitioner was responsible for the delay (***see***, ***Matter of Harry Heller v. Chu***, 111 AD2d 1007, 490 NYS2d 326, 328, ***appeal dismissed*** 66 NY2d 696, 496 NYS2d 424).

The Division speculates that incomplete paperwork may have caused the delay (***see***, Finding of Fact "9" through "12"). The record clearly shows, however, that the requests for conference with incomplete paperwork were for periods other than those at issue herein. The record also shows that the requests for conference with respect to the subject statutory notices were in all respects complete. Incomplete paperwork thus fails as an explanation for the excessive delay in holding a conciliation conference. The Division also suggests in its brief, without evidence, that "it was the Division being subject to the automatic stay (11 USC § 362[a][1]) under the corporation's bankruptcy that delayed the conference." The general rule, however, is that "the liability of an officer is separate and independent from that of the corporation" (***see***, ***Matter of Kadish***, Tax Appeals Tribunal, November 15, 1990). It does not appear, therefore, that the automatic stay arising from the corporation's bankruptcy would necessitate a delay in petitioner's conciliation conference. If the Division did, in fact, delay the conference because of the corporation's bankruptcy proceeding, it should have offered evidence demonstrating that fact and thereby explaining the delay.

D. While "the mere passage of time *normally* will not constitute substantial prejudice in the absence of some showing of actual injury" (***Matter of Sarkisian Bros. v. State Division of Human Rights***, 48 NY2d 816, 818, 424 NYS2d 125, 126 [emphasis added]), under certain circumstances a delay may be so excessive as to be "contrary to fundamental notions of fairness" and may "constitute substantial prejudice, even in the absence of some showing of actual injury" (***Matter of Harry Heller v. Chu***, ***supra***, 490 NYS2d 326, 327).

In ***Heller***, the Third Department found that the former State Tax Commission's unexplained delay of approximately 12 years to answer the petition, to schedule and hold a hearing, and an additional four years to issue a determination "is the type of delay that is not

normal" and "constitutes an erroneous exercise of discretion which requires annulment of the determination" (***id.***, 490 NYS2d at 327, 328). In effect, the Court found that a delay of this length and nature is in itself prejudicial.

E. In the instant matter, as in ***Heller***, petitioner's initial protest of the statutory notices languished in the Tax Department for approximately 12 years before any sort of hearing or, as in this case, conciliation conference was held. There is no question that such a delay is excessive and "not normal." Further, as in ***Heller***, the reason for the inordinate delay in the instant matter remains unexplained. "Taxpayers should be able to plan for the future with some idea of their tax liability and the Tax Commission's delay of over a decade in just scheduling a hearing and filing an answer has effectively prevented petitioner from doing such" (***id.***, 490 NYS2d at 327). The petitioner in this case has been similarly thwarted by the Division's delay of over a decade in simply scheduling and holding a conciliation conference. Accordingly, consistent with ***Matter of Harry Heller v. Chu***, the delay in scheduling and holding a conciliation conference with respect to petitioner's requests for such a conference constitutes an erroneous exercise of discretion which requires cancellation of the notices of determination at issue herein.[2]

F. The Division asserts that factors such as actual prejudice, the length and nature of the delay, the cause of the delay, and whether the taxpayer made inquiries during the delay should be weighed in determining whether the period of delay is unreasonable. The Division thus seeks to

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[2] The fact that there have been no undue administrative delays subsequent to the conciliation conference comparable to the four-year delay from hearing to final administrative determination present in ***Heller*** may appear to distinguish the instant matter from ***Heller***. As the above-quoted language demonstrates, however, the Court's decision in ***Heller*** clearly focused on the 12-year delay in scheduling and holding a hearing. Moreover, given the present administrative system for resolving tax disputes, with taxpayers afforded the opportunity to present evidence at the conciliation conference level and, if the matter remains unresolved, at a Division of Tax Appeals hearing, an inordinate delay before holding a conciliation conference may have greater consequences than the delay in ***Heller***. Such a delay may impair (through the loss of evidence over time, or the death, inability to locate or fading memories of witnesses) a taxpayer's ability to present evidence at not only a conciliation conference but also a Division of Tax Appeals hearing. Accordingly, ***Heller v. Chu*** is not distinguishable from the instant matter.

apply the standard employed by the Third Department in ***Matter of James Heller v. State Tax Commn.*** (116 AD2d 901, 498 NYS2d 211). That case involved an unexplained delay of six years between the hearing and final determination by the former State Tax Commission. The Court found that the petitioner in that case had "not shown any actual prejudice resulting from the delay" and that he "made no inquiry during the six-year period as to the status of his case" (***id.***, 498 NYS2d at 212). The Court also noted that "the length and nature of the delay in this case differs significantly from that in ***Matter of Harry Heller v. Chu***, [***supra***]."

The Division's contention that the standard of ***Matter of James Heller v. State Tax Commn.*** is applicable to this case is rejected. The length and nature of the delay in the instant matter are much more akin to that of ***Matter of Harry Heller v. Chu*** than to ***Matter of James Heller v. State Tax Commn***. As noted previously, both the instant matter and ***Matter of Harry Heller v. Chu*** involved delays of 12 years simply to hold a hearing or conciliation conference. In contrast, in ***Matter of James Heller v. State Tax Commn.*** the delay was post-hearing and was only half as long. Accordingly, ***Matter of James Heller v. State Tax Commn.*** is factually distinguishable from the instant matter and, as noted previously, the rule of ***Matter of Harry Heller v. Chu*** applies.

G. In light of the foregoing conclusions of law, Issues III and IV are moot.

H. The petition of E. George Badcock III is granted and the notices of determination and demands for payment of sales and use taxes due dated January 18, 1991, as modified by the Conciliation Order dated August 8, 2003 are canceled.

DATED: Troy, New York
January 12, 2006

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE