STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SAMUEL D. WAKSAL	:	
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods June 22, 2000, August 7, 2000, December 7, 2000, August 8, 2001, November 9, 2001, and December 8, 2001.	:	DETERMINATION DTA NO. 820118

Petitioner, Samuel D. Waksal, c/o Alan J. Dlugash, CPA, Marks, Paneth & Shron LLP, 622 Third Avenue, New York, New York 10017-6701, 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 periods June 22, 2000, August 7, 2000, December 7, 2000, August 8, 2001, November 9, 2001, and December 8, 2001.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 17, 2005 at 11:15 A.M., with all briefs to be submitted by December 20, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared by Lani A. Adler, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

ISSUES

I. Whether the Division of Taxation has met its burden of proof to show that petitioner intentionally evaded the payment of sales tax on his purchases of over $15,000,000.00 of artwork so that fraud penalty may be imposed pursuant to Tax Law § 1145(a)(2).

II. Whether petitioner made payments of use tax plus penalty and interest pursuant to an agreement with the Division of Taxation which should estop the Division from also assessing any sales tax plus penalty and interest.

III. Whether the imposition of fraud penalty violates petitioner's constitutional right against double jeopardy or is an excessive fine precluded by the Eighth Amendment to the United States Constitution and similar provisions of the New York State Constitution.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a Notice of Determination dated April 7, 2003, with an Assessment ID# L-022159734, against petitioner asserting sales tax due of (i) $288,750.00 plus interest of $112,397.44 and fraud penalty of $200,573.72 for the period ended June 22, 2000, and (ii) $974,325.00 plus interest of $161,347.11 and fraud penalty of $567,836.05 for the period ended December 8, 2001. Fraud penalty of 50% of the sales tax owed, plus 50% of interest payable, were imposed pursuant to Tax Law § 1145(a)(2).

2. The Division also issued a Notice and Demand dated May 27, 2003 which asserted fraud penalty and interest due on petitioner's late payment of sales tax on the purchase of artwork on the four dates of August 7, 2000, December 7, 2000, August 8, 2001 and November 9, 2001. Petitioner made payments, received by the Division on April 30, 2003, in the amounts of $15,180.00, $1,443.75, $8,497.50, and $330.00 on such purchases, respectively. The Division calculated fraud penalty plus interest "from the due date[1] to the date you paid your tax" of April 30, 2003 as follows:

[1] The due date for payment of sales tax was shown on the notice as 20 days subsequent to the respective purchases of the artwork at issue. For example, the due date for payment of sales tax on the artwork purchased on August 7, 2000 was shown as August 27, 2000.

Tax Period Ended	Interest Due	Fraud Penalty	Amount Due
August 7, 2000	$5,828.44	$10,474.20	$16,302.64
December 7, 2000	475.20	957.04	1,432.24
August 8, 2001	1,919.58	5,198.66	7,118.24
November 9, 2001	62.26	195.81	258.07
Totals	$8,285.48	$16,825.71	$25,111.19

This Notice and Demand references an Assessment ID# L-022397163. At the hearing, the Division modified its assertion of fraud penalty totaling $16,825.71 in the Notice and Demand by substituting the lesser penalty under Tax Law § 1145(a)(1)(i) for late filings and payments totaling $7,621.92 calculated as follows:

Tax Period Ended	Due Date	Late filing/payment penalty
August 7, 2000	August 27, 2000	$4,554.00
December 7, 2000	December 27, 2000	432.97
August 8, 2001	August 28, 2001	2,549.15
November 9, 2001	November 29, 2001	85.80
Total		$7,621.92

3. From June 22, 2000 to December 5, 2001, petitioner, Samuel Waksal, purchased the following artwork from a Manhattan art gallery at a total cost in excess of $15,000,000.00 without paying sales tax due at the applicable rate of 8.25% totaling $1,263,075.00:

Artist	Title	Purchase Price	Unpaid sales tax
Mark Rothko	Untitled (Plum and Brown)	$ 3,500,000.00	$288,750.00
Cy Twombly	Untitled (Rome)	1,300.000.00	107,250.00
Richard Serra	The American Flag is Not an Object of Worship	350,000.00	28,875.00

Franz Kline	Mahoning II	3,000,000.00	247,500.00
Francesco Clemente	Lovers	60,000.00	4,950.00
Roy Lichtenstein	Landscape with Seated Figure	900,000.00	74,250.00
Cy Twombly	Solar Barge of Sesostris	800,000.00	66,000.00
Francis Bacon	Study from the Human Body	3,000,000.00	247,500.00
William De Kooning	Untitled V	2,400,000.00	198,000.00
Totals		$15,310,000.00	$1,263,075.00

Petitioner and the owner of the Gagosian gallery in Manhattan, who was also the gallery's principal manager, in order to evade the payment of New York sales tax due on the sale of the above artwork, agreed to represent falsely that the artwork was for delivery to and use by petitioner in New Jersey. Criminal charges brought against petitioner, relating to this evasion of sales tax owed on his purchase of artwork, were set forth in an undated Superseding Information issued by James B. Comey, the United States Attorney for the Southern District of New York, in lieu of the prosecution seeking an indictment from a grand jury. This document shows the following dates of purchase for the artwork:

Artwork: (Artist-Title of work)	Date of agreement[2] to purchase
Rothko-Untitled (Plum and Brown)	June 22, 2000
Twombly-Untitled (Rome)	June 23, 2000
Serra-The American Flag is Not an Object of Worship	August 4, 2000
Kline-Mahoning II	August 30, 2000
Clemente-Lovers	October 31, 2000
Lichtenstein-Landscape with Seated Figure	November 3, 2000

[2] The superseding information also includes the dates when payments for the artwork were made which has led to some confusion on the actual dates at issue in this proceeding, resolution of which, however, is not material to this determination. The dates used in the caption of this matter reference the dates indicated in the notices at issue.

Twombly-Solar Barge of Sesostris	February 6, 2001
Bacon-Study from the Human Body	May 25, 2001
De Kooning-Untitled V	October 26, 2001

4. After facing criminal prosecution for (i) securities fraud,[3] (ii) conspiracy to obstruct justice,[4] and bank fraud,[5] petitioner apparently had second thoughts with regard to this scheme to avoid the payment of sales tax on his purchase of artwork and filed a form ST-130, Purchaser's Report of Sales and Use Tax, for each of the nine purchases of artwork described above. On the reports, all dated October 14, 2002 and received by the Division on October 16, 2002, petitioner reported the respective purchase prices and calculated tax due at the rate of 8.25%. He also indicated on the report showing the purchase of a taxable item in the amount of $3,500,000.00, which would correspond to the artwork by Mark Rothko, that the item "was first brought into New York State" on June 22, 2000. The eight reports showing the purchase of the other

[3] On December 27, 2001, two days after petitioner received information about the Federal Drug Administration's upcoming refusal to accept the filing of the biological application with respect to Erbitux, petitioner sold 39,000 shares of stock in his company and attempted to sell through his daughter an additional 79,000 shares out of his total stock holdings in ImClone stock of over 3 million shares. If such insider trading had been successful, petitioner would have avoided a loss of approximately $1,630,000.00. In addition, one month later, petitioner's father gave him approximately $2,850,000.00 after his father's sales of ImClone shares, a transaction that was not included in counts to which petitioner would eventually plead guilty since petitioner maintained his contention that he had *not* tipped his father. Petitioner pointed out that he used the funds received from his father to postpone a "margin sale" which ironically resulted in an additional $40,000,000.00 personal loss because ImClone stock continued to decline in price so that the sale finally took place "at a much lower price" according to petitioner's criminal defense attorney (June 10, 2003 sentencing hearing tr., p. 15). The prosecutor also emphasized at the sentencing hearing that the amounts at issue in the insider trading were "extremely large" in that "$10.6 million of ImClone stock was sold to unsuspecting shareholders who were not armed with the same information that Dr. Waksal had," and that he "attempted to push off another nearly $5 million of ImClone stock to his own unsuspecting shareholders" but was thwarted (June 10, 2003 sentencing hearing tr., p. 40).

[4] This conspiracy related to petitioner's attempt to cover up his insider trading by lying to the Securities Exchange Commission when asked about the trading on insider information, by requesting his daughter to lie to conceal his conduct, and by having his secretaries redact documents.

[5] Petitioner signed someone else's name to pledge documents provided to a bank as collateral. Petitioner's criminal defense attorney pointed out "the bank never lost money in connection with that forged signature" (June 10, 2003 sentencing hearing tr., p. 20).

paintings all indicate that the respective item "was first brought into New York State" on December 8, 2001. In fact, as noted in Finding of Fact "6", the artwork was shipped either *directly* to petitioner's Manhattan residence or to his residence after only "a brief stop" in New Jersey. By a cover letter dated October 14, 2002, which transmitted these ST-130 reports for filing, petitioner indicated that "I understand that New York State is about to begin a Tax Amnesty Program," and asked to be a part of the program, which would seem to provide another motivation for petitioner's seeking to rectify his failure to pay sales tax on his substantial purchases of artwork. Petitioner requested that the Division "Please bill me for the total amount due." The Notice of Determination dated April 7, 2003, described in Finding of Fact "1," relates to these nine purchases of artwork by petitioner. However, an earlier assessment was also issued with regard to these nine purchases of artwork by petitioner since after its receipt of the nine ST-130 reports, the Division issued an assessment dated November 1, 2002 with ID# L-021762719 asserting sales and use tax[6] due against petitioner as per the amounts shown due in the tax reports.[7] By a letter dated January 6, 2003 of its Tax Compliance Manager, the Division requested additional information from petitioner's accountant before it would make a decision concerning petitioner's request for delay in payment of the sales and use tax shown due on the tax reports dated October 14, 2002. With regard to the specific tax liability related to

[6] Petitioner persisted throughout the hearing and in his briefs in referring to this tax asserted due by this earlier assessment, which is not at issue in this matter, as "use tax." The Division appears at times to have adopted this terminology as well. As discussed in the Conclusions of Law, "use tax" does *not* correctly describe the tax at issue *now or then*.

[7] The Division noted at the hearing that petitioner failed to timely contest such assessment dated November 1, 2002 so that it is not at issue in this proceeding. On March 11, 2003, the Division issued a tax warrant seeking to collect upon this earlier assessment dated November 1, 2002. As noted in Finding of Fact "13", it would not be until May 25, 2004 that the Division would ultimately fully collect upon its warrant.

petitioner's purchases of artwork in excess of $15,000,000.00 and his eligibility for amnesty,[8] the letter noted as follows:

> Mr. Waksal's current tax liability with interest through January 15, 2003 is $1,795,860.25. This tax liability assessed on November 1, 2002 under assessment L-021762719 consists of two tax periods. The first tax period ending June 22, 2000 is *eligible* for amnesty if paid by March 15, 2003. The second tax period December 8, 2001 is not *eligible* for amnesty.
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> The following is a summary of Mr. Waksal's *sales tax* liability for assessment L-021762719 with penalty and interest through January 15, 2003.

Tax Period	Tax	Penalty	Interest	Total without Amnesty	Potential Amnesty Savings	Total with Amnesty
6/22/00	$ 288,750.00	$ 86,625.00	$101,451.17	$ 476,826.17	$147,352.52	$ 329,473.65
12/8/01	974,325.00	214,351.50	130,357.58	1,319,034.08	Not available	1,319,034.08
Totals	$1,263,075.00	$300,976.50	231,808.75	$1,795,860.25	$147,352.52	$1,658,507.73

> We will bill Mr. Waksal for the amnesty segment of assessment L-021762719. The bill and full amnesty payment should be sent to my attention. Any amount paid above the amount of the amnesty bill should be sent to my attention in a separate check. (Emphasis added.)

With the filing of the reports dated October 14, 2002, the Division first became aware of the sales transactions between petitioner and the art gallery. However, it remained ignorant of the scheme between petitioner and the art gallery to evade tax until informed by the United States

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[8] As part of the New York State 2002-2003 budget, a tax amnesty program was authorized (L 2002, ch 85, Pt. R). Under terms of this amnesty legislation, applicants, accepted into the program, were required to pay their outstanding tax liability, but penalties were waived, and the interest rate on the outstanding tax liability was calculated at a rate that was reduced two percentage points from the pre-amnesty level. This amnesty program applied to tax liabilities for taxable periods ending or transactions or uses occurring on or before December 31, 2000 (with an exception not applicable herein). The amnesty period began on November 18, 2002 and ended on January 31, 2003 with payment required by March 15, 2003 (or the date specified on the Tax Amnesty bill). Further, a taxpayer who had been convicted of a crime related to a tax for which tax amnesty was sought was not eligible for any period or assessment for that tax. In addition, a taxpayer was not eligible for tax amnesty for a tax and period in which the taxpayer was a party to a criminal investigation or pending criminal or civil litigation related to such tax and period.

Attorney's Office in early March 2003. Further, no payments were remitted with the reports but rather, as noted above, petitioner requested that the Division "bill" him. In fact, petitioner withheld the actual payment of the tax due in an attempt to negotiate the waiver of penalties as detailed in Finding of Fact "10".

5. About six months after filing a form ST-130, Purchaser's Report of Sales and Use Tax, for each of the nine purchases of artwork as detailed in Finding of Fact "3", petitioner filed a form ST-130, Purchaser's Report of Sales and Use Tax, for the following four purchases[9]:

Amount subject to sales or compensating use tax	Date item first brought into New York State	Tax due at rate of 8.25%
$184,000.00	August 7, 2000	$15,180.00
$17,500.00	December 7, 2000	$1,443.75
$103,000.00	August 8, 2001	$8,497.50
$4,000.00	November 9, 2001	$330.00

With the filing of these four reports, petitioner made payment of the tax shown due. In the cover letter dated April 21, 2003 of petitioner's accountant, Alan J. Dlugash, CPA, which transmitted the reports for filing with payment, it was requested that no penalties by imposed. Mr. Dlugash noted that the purchases reported were made on petitioner's behalf "by certain of his staff" and that petitioner was unaware "that sales tax was not paid at the time of purchase." Mr. Dlugash further asserted that when petitioner became aware of the situation, he took steps to prepare the necessary tax reports. The Division was requested to compute any interest due. The Notice and Demand dated May 27, 2003 described in Finding of Fact "2" relates to these four purchases of

[9] The record does not disclose the specific artwork represented by these four purchases.

artwork by petitioner. Further, as noted in Finding of Fact "2," the Division has agreed to modify its assertion of fraud penalty by substituting the lesser penalty for late payment.

6. Petitioner was president, chief executive officer and a director of ImClone Systems, Inc. ("ImClone"), a publicly traded corporation engaged in the business of developing biologic medicines especially for use in the treatment of cancer. ImClone maintained a manufacturing facility at 22 Chubb Way in Somerville, New Jersey and research and executive offices at 180 Varick Street in Manhattan. The owner of the Manhattan gallery prepared and provided to petitioner invoices for the artwork, each of which was addressed to "Samuel Waksal, 22 Chubb Way, Sommerville, New Jersey," the address of ImClone's manufacturing facility. Each of the invoices omitted the charge for applicable sales tax, representing that the transaction was an "out of state sale," and that no sales tax was due. In fact, the artwork was delivered from the Manhattan gallery to petitioner's New York City residence by private commercial carrier, either directly or following a brief stop at 22 Chubb Way, Sommerville, New Jersey. As the result of petitioner's making payments to the art gallery by wire transfers from banking institutions located outside New York to the art gallery's bank account in New York City, this scheme provided the basis for a Federal prosecution to commit wire fraud.

7. At a plea allocution on March 3, 2003, petitioner entered a plea of guilty to a "superseding information," i.e., a charge by the Federal prosecutor since petitioner had waived his right to have the criminal case presented first to a grand jury. Petitioner explained, in response to the request by Federal District Judge William H. Pauley III ("the judge") that he tell him "what you did in connection with the conspiracy and wire fraud that is charged in the superseding information in this case to which you are entering a plea of guilty," as follows:

> Your Honor, between 2000 and the end of 2001, I bought a number of paintings from a gallery in New York City. I paid approximately $15 million for the paintings. I believe that the sales tax due on all of the paintings was approximately $1.2 million.
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> At the time that I began purchasing paintings from the gallery owner, I agreed that we would avoid paying New York sales tax on the art by allowing the gallery owner to invoice me for the art as if it were being sent to a New Jersey address for use by me there.
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> In truth, all of the art was to be delivered to and used by me at my home in New York, New York. . . . [T]he gallery owner provided invoices [which] stated the art was being shipped to me in New Jersey. In fact, the gallery owner had the art shipped to my apartment in Manhattan and had it hung there.
>
> On one occasion, the gallery owner was in my home and saw the art he had sold to me that day hanging on the walls.
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> * * *
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> *At all times I knew that avoiding payment of New York sales tax was wrong.*[10] (Emphasis added.)

8. Mark F. Pomerantz, petitioner's attorney and representative at the criminal plea allocution on March 3, 2003,[11] in appealing to the sympathy of the court, explained that before

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[10] In a contrasting spin to petitioner's contrition at the plea allocution on March 3, 2003, petitioner's criminal defense attorney contended that the suggestion to avoid tax by arranging shipment outside New York "came from the art dealer" and petitioner "did what many, many people did, and he took advantage of the circumstances to avoid the tax" (June 10, 2003 sentencing hearing tr., p. 21).

[11] As noted in Finding of Fact "4", petitioner prepared tax reports dated October 14, 2002 disclosing tax due on his purchases during 2000 and 2001 of artwork of approximately $15,000,000.00 and requested participation in the Division's Tax Amnesty Program. The specific date of the federal criminal charges against petitioner, related to the scheme to avoid payment of sales tax on his purchases of artwork, is not noted in the record since the copy of the "superseding information," which set forth the charges, is undated. Nonetheless, presumably it was on a date *after* petitioner filed the tax reports dated October 14, 2002 given the representation of attorney Pomerantz as noted above. Petitioner pleaded guilty on March 3, 2003 to the criminal charges relating to the sales tax scheme, and by a letter dated March 4, 2003, the Division's tax compliance manager, confirmed a phone conversation with petitioner's accountant of that same date, and denied amnesty for petitioner "based upon his conviction of a crime related to New York State Sales and Use Tax Returns filed on October 14, 2002." According to the affidavit of Michael J. Bond dated June 14, 2005, the "Audit Division first discovered the facts underlying the scheme for his sales tax evasion from the U.S. Attorneys' Office in March 2003." Mr. Bond further stated that "At no time did Waksal inform the Audit Division . . . that he was being investigated or criminally charged for his sales tax evasion in the Federal Criminal action." Approximately one month later, as noted in Finding of Fact "1", the Division issued a Notice of Determination dated April 7, 2003 asserting fraud penalty on sales and use tax reported due by petitioner on the tax reports dated October 14, 2002. At the criminal plea allocution on March 3, 2003, attorney Pomerantz *incorrectly assumed* that petitioner might benefit from New York State's Amnesty Program, since as noted in footnote 8 a taxpayer who has "been convicted of a crime related to a tax for which tax amnesty was sought or even a taxpayer who is "a party to a criminal investigation or pending criminal or civil litigation related to such tax and period" is not so eligible.

the Federal government became aware of the facts that resulted in the criminal charges related to unpaid sales tax on the purchases of artwork to which petitioner pleaded guilty:

> Dr. Waksal undertook to have state sales tax returns prepared and submitted to the New York State taxing authorities. Indeed, it is my understanding that a portion of the taxes due here fall within New York State's Amnesty Program, and there exists a payment plan for the balance of what is owed, including, I believe, a penalty and interest.

Mr. Pomerantz also emphasized as mitigating facts at the sentencing hearing that petitioner "also went in and discussed the details of his art purchases and the sales tax evasion directly with the prosecutors and with the FBI, and he did that before he was charged with those offenses" (June 10, 2003 sentencing hearing tr., p. 22). In contrast, at no time did petitioner inform the Division of the pending criminal investigation or the sales tax evasion scheme. But as noted in Footnote "11", as soon as it learned that petitioner had pleaded guilty to criminal charges related to the evasion of sales tax owed on the purchase of the artwork which was the subject of the sales and use tax reports dated October 14, 2002, his amnesty petition was denied.

9. On March 11, 2003, one week after petitioner's criminal plea allocution, the Division issued a warrant[12] for the sales and use tax due of $1,263,075.00[13] plus penalty of $320,463.00 and interest of $259,080.87 for an assessment total of $1,842,618.87. This warrant did not seek the payment of any fraud penalty since the Division had not yet issued a notice of determination asserting fraud penalty. By a letter dated March 18, 2003, petitioner's accountant again sought

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[12] This warrant would not be satisfied until May 25, 2004 upon the closing of the sale of petitioner's Manhattan apartment, when the Division received payment of $1,842,618.87 (despite the judgment dated June 11, 2003 in the criminal case directing payment of tax owed in the total amount of $1,263,075.00 *within 60 days*, as detailed in Finding of Fact "11"). Together with the $330,000.00 payment, as detailed in Finding of Fact "10", the Division has received a total $2,105,544.71 in tax plus interest and late payment penalty with regard to the unpaid sales tax on petitioner's purchases of approximately $15,000,000.00 in artwork.

[13] Petitioner incorrectly argues in his brief that this was a "use tax warrant, with use tax penalties against Dr. Waksal" (Petitioner's brief, p. 12). In fact, the tax designated in the warrant was "sales and use tax" and the penalties were for the late payment of sales and use tax.

the waiver of all penalty, notably penalty for failing to file or pay since fraud penalty had not yet been formally asserted due by the Division. He noted that the Division's practice was "to waive penalties when taxpayers acknowledge and pay *use tax* liability" (emphasis added). He noted that "I have never seen a request for a penalty abatement for use tax denied, even when the liability was imposed as a result of an audit by the State." Petitioner's accountant outlined the following payment proposal:

> Assuming the penalties can be waived, taxpayer would have a remaining liability of approximately $1,463,000 consisting of approximately $1,263,000 tax and $200,000 of interest. We have proposed an immediate payment of $330,000, a payment of $200,000 July 1, 2003, $10,000 payments on each of August 1, 2003 and September 1, 2003, $200,000 on October 1, 2003, $10,000 per month from November 2003 through February 2004, $200,000 March 1, 2004 and $10,000 per month thereafter until payment in full is completed.

By a letter dated March 27, 2003, petitioner's request for abatement of penalty was formally denied by the Division because:

> At the time the assessment was generated, a determination was made to assess penalty under the administrative provisions of the Tax Law, due to the fact that no valid reasonable cause explanation was provided.

10. By a letter dated April 1, 2003, petitioner's accountant made the initial payment in the amount of $330,000.00, as per his earlier letter of March 11, 2003, with the caveat in his transmittal letter that:

> The checks are offered and are only to be negotiated by the State expressly on the condition that the State agrees that taxpayer is liable only for use taxes as set forth in the above assessment and interest on such taxes. If the State cannot agree to this, the checks should be returned unnegotiated.

The State responded by negotiating the two checks sent by petitioner's accountant, which totaled $330,000.00, only after petitioner relaxed the demanding condition noted above

by a subsequent letter dated April 8, 2003.[14] In addition, not only would the Division not agree to abate penalties already asserted due for failing to pay tax due, the Division also issued the Notice of Determination (assessment L-022159734) dated April 7, 2003 asserting sales and use tax due *plus fraud penalty* and interest, as detailed in Finding of Fact "1".

11. The judgment dated June 11, 2003 in petitioner's criminal case shows that petitioner pleaded guilty to eight criminal counts including the two counts related to the unpaid sales tax on his purchase of artwork. His sentence included imprisonment "for a total of 87 months"[15] and, upon his release, three years of supervised release. In addition, the following "criminal monetary penalties" were imposed: an "assessment"of $800.00, a fine of $3,000,000.00 to be paid within 120 days; and "restitution to the New York State Tax Commission[16] totaling $1,263,075.00 within 60 days." At the sentencing hearing one day earlier on June 10, 2003, the judge provided the following explanation

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[14] By a letter dated April 8, 2003, petitioner's accountant, confirming a telephone conversation, noted that "the proceeds of the checks are to be used in payment of use *tax* only with respect to taxpayer's use tax obligation included in the assessment L-021762719" (emphasis in the original). The original emphasized the word "tax" only. The phrase "only with respect to taxpayer's use tax obligation," which was emphasized in petitioner's brief at pp. 7-8, was *not* emphasized in the original.

[15] At the sentencing hearing, the judge detailed his complicated calculation of imprisonment for a total of 87 months. He sentenced petitioner to 60 months on two counts (10 and 12) contained in the original indictment and the same 60 months on the two counts in the superceding information which pertained to the unpaid sales and use tax liability on the purchases of artwork. Both sentences of 60 months were to run concurrently. With regard to three counts (3, 4, and 13) in the original indictment, he sentenced petitioner to 87 months with 60 months to run concurrently with the other two sentences of 60 months and 27 months to run consecutively to the 60 months. Therefore, in sum, imprisonment was for a total of 87 months. In his brief, petitioner argues that "Dr. Waksal was sentenced to 60 months, the statutory maximum in connection with his failure to pay sales tax" which is correct but does not note that it was to be served concurrently with two other specific sentences, i.e., a sentence of 60 months and with 60 months of a sentence of 87 months (Petitioner's brief, p. 10). It is further noted that the judge imposed the *maximum* sentence given the sentencing range was 70 to 87 months "with an offense level of 27 and a Criminal History Category of I" (June 10, 2003 sentencing hearing tr., p. 70).

[16] Effective September 1, 1987, under Tax Law § 2026, references to the State Tax Commission in the Tax Law, in all instances other than in relation to the administration of the administrative hearing process, are deemed to refer to the Division of Taxation or Commissioner of Taxation and Finance.

for why he imposed the maximum fine of $3 million: "[G]iven the magnitude of the loss amount in this case *and your conduct* in attempting to conceal your illegal conduct" (June 10, 2003 sentencing hearing tr., p. 72 [emphasis added]). With regard to the restitution of sales and use tax of $1,263,075.00, attorney Pomerantz was asked by the judge, just prior to actual sentencing, "the precise arrangement currently in place for repayment and what moneys have been repaid" with the judge also pointing out that the "revised presentence investigation report recommends the payment of restitution within 60 days" (June 10, 2003 sentencing hearing tr., p. 54). In response, Mr. Pomerantz stated:

> I know that the defendant has actually paid in the area of $330,000.00 to the New York State tax authorities in respect of sales tax obligations. . . . . [D]iscussions with regard to amnesty had not resulted in an agreement. And I understand the tax authorities were considering taking action against remaining assets. So that situation has yet to be fully resolved. (June 10, 2003 sentencing hearing tr., p. 55.)

After noting to the court that he needed "to confer with counsel" and after a brief recess, Mr. Pomerantz added:

> I understand that the question of interest and penalties is still being negotiated with the state, and that is why I can't give your Honor a final figure in terms of the overall liability as the state tax authorities have determined it. I'm sure that figure will be forthcoming very quickly, but I don't have it as we speak. (June 10, 2003 sentencing hearing tr., p. 56.)

12. In determining the sentence in the criminal matter, the judge rejected both petitioner's and the prosecution's motions for a downward or upward adjustment, respectively, from the Federal sentencing guidelines since there was "nothing in this Court's view . . . that takes this case out of the heartland of the guidelines to justify a departure" (June 10, 2003 sentencing hearing tr., p. 68). In rejecting petitioner's motion for a downward adjustment, the judge noted that petitioner had submitted over 120 letters of support on his behalf pointing out petitioner's good works but stated:

> Although the acts referred to by Dr. Waksal and his supporters are commendable, they are not of a type and magnitude that deserves the label "extraordinary" for a defendant with Dr. Waksal's superb education, executive employment platform and substantial personal resources.
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> As for his philanthropy, between 1999 and 2001 Dr. Waksal earned over $132 million in income, but apparently gave only one-half of 1 percent of his adjusted gross income to charity. For example, in the year when Dr. Waksal earned more than $60 million and purchased more than $9 million in artwork, he reported only $157,451.00 in charitable deductions (June 10, 2003 sentencing hearing tr., p.65).

He also rejected petitioner's argument for a downward adjustment based upon "his resignation from ImClone and the constant media coverage of this case" as bordering on the "frivolous," noting that: "For years Dr. Waksal sought out public attention. Any collateral effects Dr. Waksal has suffered as a result of his illegal conduct is a circumstance he alone has brought down upon himself" (June 10, 2003 sentencing hearing tr., p. 68). In imposing sentence, the judge emphasized the seriousness of petitioner's crime which would serve to justify his imposition of the maximum sentence for imprisonment of 87 months out of the range of 70 months to 87 months and the maximum fine of $3,000,000.00:

> Dr. Waksal, the serious crimes to which you've pleaded guilty are not simply a 24-hour window of catastrophically poor judgment or a crime of impulse, as your counsel characterized it. Rather, those crimes are emblematic of a pattern of lawlessness and arrogance from your own self-described short-term cash flow needs. You abused your position of trust as the chief executive officer of a major corporation and undermined the public's confidence in the integrity of the financial markets. Then you tried to lie your way our of it showing a complete disregard for the fair administration of justice (June 10, 2003 sentencing hearing tr., p. 70).

13. Other than the two checks totaling $330,000.00 transmitted by a letter dated April 1, 2003 as detailed in Finding of Fact "10", petitioner made no further voluntary payments on the warrant issued on March 11, 2003. The Division was able to obtain payment for the remainder of the warrant through levies on August 29, 2003, November 20, 2003 and May 25, 2004, in the

amounts of $12.00, $12,844.21 and $1,775,544.71, respectively.[17] On July 13, 2004, the Division satisfied the warrant with payments totaling $1,846,618.87.

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioner argues that the Division "is precluded from collecting sales tax and sales tax penalty for transactions for which it has already accepted payment of use tax and a use tax penalty" (Petitioner's brief, p. 1). He maintains that the Division acted in bad faith by improperly "re-characterizing" the assessment as one for sales tax in order to collect a fraud penalty after it "had accepted his payment in agreement that the obligation was for payment of a use tax" (Petitioner's brief, p. 11). Further, petitioner contends that since he voluntarily came forward and filed reports showing tax due on his purchases of the artwork, penalty should have been waived. He maintains that "public policy would be violated if the fraud penalty stands" given the "voluntary filings of use tax returns" (Petitioner's brief, p. 14). He also contends that he is being treated differently from "others who have voluntarily filed and alerted the Department to the issue" (Petitioner's brief, p. 15). Petitioner emphasizes that he has already paid a $3,000,000.00 fine in the criminal matter which "included the $1.2 million loss due to the evasion of the sales taxes, and is serving 60 months for the same offense" (Petitioner's brief, p.11). He argues that "the constitutional proscriptions against double jeopardy preclude the department's collection of a fraud penalty" (Petitioner's brief, p. 15). If not, he would face "multiple punishments for the same offense" citing a long list of cases in support. A long list of cases is also cited concerning the limitation on a state prosecution after a federal prosecution based upon the "dual sovereignty doctrine" including ***Bartkus v. Illinois*** (359 US 121), which did not apply the "dual sovereignty doctrine" and prohibited a state prosecution. Petitioner also

[17] The payment of $1,775,544.71 came out of the proceeds from petitioner's sale of his Manhattan residence.

cites the divided United States Supreme Court decision in ***Hudson v. U.S.*** (522 US 93), which ruled that "double jeopardy prohibits multiple *criminal* punishments for the same offense in successive proceedings" (Petitioner's brief, p. 18 [emphasis in original]). However, petitioner claims the fraud penalty sought to be imposed by the Division is "so punitive either in purpose or effect, as to transform what was clearly intended as a civil remedy into a criminal penalty" quoting language from ***Hudson v. U.S.*** (***supra,*** 522 US at 99). Petitioner also maintains that the "fraud penalty here is an excessive fine," precluded by the Eighth Amendment to the United States Constitution and the New York State Constitution in Article I, Section 5, citing ***Hudson v. U.S. (supra***, 522 US at 103) and ***County of Nassau v. Canavan*** (1 NY3d 134, 770 NYS2d 277), respectively. Petitioner further argues that his guilty plea provides only a "dubious predicate" for establishing fraudulent intent because "he voluntarily brought his tax evasion to the attention of the authorities and voluntarily cured it- *by filing tax returns*- before any investigation of it or audit was undertaken by any governmental authority" (Petitioner's brief, p. 21 [emphasis added]). Petitioner also contends that imposition of the fraud penalty "violates the double jeopardy provision of the New York State Constitution, to which the dual sovereignty doctrine does not apply, citing ***DeCanzio v. Kennedy*** (67 AD2d 111, 115, 415 NYS2d 513, 516). Petitioner also attempts to turn the table on the Division by suggesting that it "defrauded those other lienholders" who were unable to collect their debts owed by petitioner when the Division collected on its tax lien for unpaid sales and use taxes in the amount of $1,775,544.71 on May 25, 2004 by levying upon the proceeds from the sale of his Manhattan apartment (Petitioner's brief, p. 13).

15. At the hearing,[18] the Division noted that it "has no intention of collecting this sales tax liability more than once" and "we believe that the tax has been paid by now" (tr. pp. 39-40). Further, in its brief, the Division noted its willingness "to apply the tax, non-fraud penalties, and interest paid on the Warrant towards the liability in the April 7, 2003 Notice" (Division's brief, p. 9). Nonetheless, the Division maintains that petitioner consciously and intentionally evaded the timely payment of sales tax thereby making this case "a perfect situation for a fraud penalty to be applied" (tr., p. 55), and the fraud penalty "should be sustained" (Division's brief, p. 10). According to the Division, petitioner's criminal conviction "serves as a textbook foundation for the assessment of civil fraud penalties" demonstrating that petitioner "intentionally evaded the tax with full knowledge" (Division's brief, p. 1). The Division maintains that the Notice of Determination dated April 7, 2003 was properly issued against petitioner pursuant to Tax Law § 1133(b) which places the burden upon a customer, who has failed to pay sales tax at the time of sale "to the person [in this instance, the Manhattan art gallery] required to collect the same," to pay the tax to the Division of Taxation "within twenty days of the date the tax was required to be paid." As of April 7, 2003, the Division maintains that it "had not received payment of the sales tax due" since "Petitioner had not made any unqualified, acceptable payments on the Transactions to the Division" so that the notice was properly issued on that date (Division's brief, p. 6). Furthermore, according to the Division, the April 7, 2003 notice was issued "almost immediately after the Division learned of the true nature of the Petitioner's fraudulent attempts to evade the sales tax" on his purchases of artwork (Division's brief, p. 9). The Division further

[18] In its answer dated October 13, 2004, the Division admitted "that New York State has issued an unchallenged use tax assessment and warrant, and has collected some funds [by May 25, 2004, the Division in fact had collected $2,105,544.71, as noted in footnote 12] for the same transactions" but without any indication that petitioner would receive credit against the assessment at issue for so-called "use taxes," penalty and interest collected on the earlier assessment. The Division has noted consistently in this proceeding that such earlier assessment had become final and uncontestable. Nonetheless, at the hearing, the Division took the more reasonable position (and legally required [as discussed further in the Conclusions of Law]) that the tax has been paid.

contends that petitioner's guilty plea in the Federal criminal action "estops him from contesting that he committed tax fraud during the period in issue" citing ***Matter of DeFeo*** (Tax Appeals Tribunal, April 22, 1999) and ***Matter of T. Management, Inc.*** (Tax Appeals Tribunal, April 12, 2001) (Division's brief, p. 8). Even if estoppel did not apply, petitioner "admitted that he evaded the sales tax" on his purchase of artwork in excess of $15,000,000.00, so that it may be concluded that he "acted deliberately, knowingly and with the specific intent to violate the Tax Law" (Division's brief, p. 8). The Division rejects petitioner's "attempts to hide behind the November 1, 2002 Notice and the Warrant" which was the "legal mechanism" to collect on such notice which was not protested and had become "fixed and final" (Division's brief, p. 9). The Division contends that "It is stunning that the Petitioner can claim that he was a voluntary and compliant taxpayer who is entitled to relief pursuant to 'public policy' when he knowingly evaded the tax and only filed tardy returns (without remittance) upon an investigation by the FBI and Federal prosecutor" (Division's brief, p. 10). The Division rejects petitioner's argument that the prohibition against double jeopardy prohibits the imposition of the civil fraud penalty. Under the test of the United States Supreme Court in ***Hudson v. United States*** (522 US 93), the Division maintains that the civil fraud penalty under Tax Law § 1145(a)(2) may not be transformed into a penalty which is "criminal in nature" overriding the legislative intent which denominated the fraud penalty at issue a "civil remedy" (Division's brief, p. 11). The Division emphasizes that the civil penalty for fraud is "in addition to other penalties provided by law for false or fraudulent returns" quoting language from ***Hanby v. Commissioner*** (67 F2d 125).

16. In his reply brief, petitioner continues to maintain that "Any bad faith or fraud here is that generated by the Division's conduct" (petitioner's reply brief, p.1). He contends that the Division "knowingly and explicitly accepted Petitioner's full payment of use tax and use tax

penalties" and as a result may not "collect a sales tax fraud penalty on the identical transactions" (petitioner's reply brief, p. 1). According to petitioner, "the most salient fact: that the Division agreed to accept full payment of use tax monies, and use tax penalties, which it would not permit Petitioner to challenge" (petitioner's reply brief, p. 2). Petitioner persists in arguing that it was "tantamount to fraud" on the part of the Division "to induce Dr. Waksal to make the payment for use tax and the possible use tax penalties in reliance on the Division's explicit agreement that the obligation was one for use tax with, at most, use tax penalties, and then to renege on that agreement" (Petitioner's reply brief, p. 4). He persists in his contention that the Division "acted to defraud [petitioner's] other creditors" by collecting on its warrant if it was sales tax and not use tax at issue since, according to petitioner, the warrant was a method to collect use tax plus penalties and interest owed by petitioner. According to petitioner, "the later-assessed assessment for sales tax penalties would not have entitled the Division to the same priority [against petitioner's other creditors]" (Petitioner's reply brief, p. 6). Petitioner also complains that imposition of a civil fraud penalty "violates federal and state constitutional bans on excessive fines" since "Petitioner has already paid a fine of more than 100% of the tax and is serving a five year prison term for the same conduct the Division would [further] sanction" (Petitioner's reply brief, p. 2). In addition, according to petitioner, "public policy" precludes a sales tax fraud penalty because a taxpayer, like petitioner, who "voluntarily files tax reports and voluntarily makes the Division aware of taxable transactions it would not otherwise learn of" creates incentives for taxpayers "to voluntarily cure an omission" (Petitioner's reply brief, p. 5).

CONCLUSIONS OF LAW

A. Tax Law § 1145(a)(2), as in effect during the periods at issue,[19] provides, in pertinent part, for the imposition of a civil fraud penalty:

> If the failure to pay or pay over any tax to the commissioner of taxation and finance within the time required by this article is due to fraud, in lieu of the penalties and interest provided for in subparagraphs (i) and (ii) of paragraph one of this subdivision,[20] there shall be added to the tax (i) a penalty of fifty percent of the amount of the tax due, plus (ii) interest on such unpaid tax at the rate of twelve percent per annum or the underpayment rate of interest set by the commissioner
> . . . whichever is greater, for the period beginning on the last day prescribed by this article for the payment of such tax . . . and ending on the day on which such tax is paid, plus (iii) . . . an amount equal to fifty percent of the interest payable under subparagaph (ii) of this paragraph, on that portion of the unpaid tax which is attributable to fraud.

B. In ***Matter of Alteri*** (Tax Appeals Tribunal, August 20, 1998), the Tribunal reaffirmed the following guidance it first set forth in ***Matter of Cinelli*** (Tax Appeals Tribunal, September 14, 1989) in determining whether a taxpayer may be subject to the civil fraud penalty:

> The burden of showing fraud under § 1145(a)(2) has consistently been interpreted to reside with the Division [citations omitted]. The standard of proof necessary to support a finding of fraud requires 'clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing.' (***Matter of Ilter Sener d/b/a Jimmy's Gas Station***, Tax Appeals Tribunal, May 5, 1988, citing, ***Matter of Walter and Gertrude Shutt***, State Tax Commn., July 13, 1982).
>
> For a taxpayer to be subject to a civil fraud penalty, willful intent is a critical element; the individual . . . must have acted deliberately, knowingly, and with the specific intent to violate the Tax Law (***Matter of Cousins Service Station, Inc.***, Tax Appeals Tribunal, August 11, 1988). Fraud need not be established by direct evidence, but can be shown by surveying the taxpayer's entire course of business and drawing reasonable inferences therefrom [citation omitted].

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[19] The current statutory provision increased the interest rate imposed on unpaid tax to 14% or the underpayment rate whichever is greater from 12% or the underpayment rate whichever is greater as indicated above.

[20] Tax Law § 1145(1)(i) and (ii) provide for the imposition of penalties for late payment and late filing.

C. The Division is correct that petitioner's criminal conviction, as detailed in Findings of Fact "7", "8", "11" and "12", serves to demonstrate that petitioner intentionally evaded the sales and use tax due on his purchase of artwork in excess of $15,000,000.00 as part of, in Judge Pauley's words, "not simply a 24-hour window of catastrophically poor judgment or a crime of impulse, as your counsel characterized it" but rather "a pattern of lawlessness and arrogance . . . ." Moreover, as detailed in Finding of Fact "7", at his guilty plea allocution, petitioner while exhibiting contrition, admitted that "At all times I knew that avoiding payment of New York sales tax was wrong." He noted that "At the time that I began purchasing paintings from the gallery owner, I agreed that we would avoid paying New York sales tax on the art by allowing the gallery owner to invoice me for the art as if it were being sent to a New Jersey address for use by me there." He conceded that "In truth, all of the art was to be delivered to and used by me at my home in [Manhattan] . . . . " In addition, this fraudulent conduct did not occur on only one occasion, but rather, as detailed in Finding of Fact "3", it began with the purchase on June 22, 2000 of Mark Rothko's Untitled (Plum and Brown) for $3,500,000.00 and continued *for a period of 16 months* with petitioner's final purchase on October 26, 2001 of William De Kooning's Unititled V for $2,400,000.00. Consequently, the Division has shouldered its burden to establish that petitioner willfully, deliberately, and intentionally sought to evade paying sales tax that was legally due. Besides, based on his guilty plea in the criminal matter, petitioner is "collaterally estopped from challenging the civil fraud penalty asserted here since his conduct giving rise to this case is identical to the conduct giving rise to the criminal conviction" to the charge of conspiracy and wire fraud related to the scheme to evade the payment of sales tax on his purchase of artwork in excess of $15,000,000.00 (***Matter of A.V. S. Laminates, Inc.***, Tax Appeals Tribunal, March 23, 2006).

D. Petitioner has argued vigorously that the Division waived its right to assess a fraud penalty against him as part of a sales tax assessment because it agreed to treat his tax liability for the purchases of artwork as a use tax liability and "accepted payment of use tax and a use tax penalty." Initially, it is important to clear up petitioner's confusion concerning the nature of use tax versus sales tax. The sales tax is a transaction tax, and petitioner, as the purchaser of the nine pieces of artwork, at a cost in excess of $15,000,000.00, over a period of 16 months, became liable for sales tax as each of the sales occurred. The Tax Appeals Tribunal in ***Matter of BAP Appliance Corp.*** (June 29, 1989) noted as follows:

> The sales tax is a transaction tax; liability for the tax occurs when the transaction takes place. Generally, the taxed transaction consists of the transfer of title or possession of property or the rendition of services in exchange for consideration, and the vendor collects the tax from the customer when the transaction occurs. The time or method of payment is immaterial since the tax becomes due at the time of the transfer of property or rendition of services (***see generally***, 20 NYCRR 525.2).

Despite petitioner's failure to pay sales tax to the Manhattan art gallery as each of the sales occurred, he nonetheless remained liable for the unpaid *sales* tax pursuant to Tax Law § 1133(b), which provides as follows:

> Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the tax commission[21] and to pay the tax to it *within twenty days* of the date the tax was required to be paid. (Emphasis added.)

As noted above, petitioner is clearly liable for *sales* tax due on his purchase of artwork. In contrast, Tax Law § 1110(a) authorizes the imposition of use tax: "[e]xcept to the extent that property or services have already been or will be subject to the sales tax under this article, there

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[21] Effective September 1, 1987, under Tax Law § 2026, references to the State Tax Commission in the Tax Law, in all instances other than in relation to the administration of the administrative hearing process, are deemed to refer to the Division of Taxation or Commissioner of Taxation and Finance.

is hereby imposed on every person a use tax. . . ." Since the artwork at issue has "already been . . . subject to the sales tax" (albeit *unpaid* as a result of a scheme) at the time of delivery to petitioner in his Manhattan apartment, it follows that the use tax is inapplicable. Although the term "use tax" has sometimes been used where the transaction at issue is one in which sales tax is actually due on purchases, such usage is incorrect. Tax Law §§ 1105 and 1110 evince a clear legislative intent that, under the circumstances presented here, sales tax was due at the time petitioner purchased the artwork and that the use tax is inapplicable.[22] Moreover, petitioner's subsequent filing of sales and use tax returns does not serve to undo his failure to pay sales tax in the first instance on his purchase of the artwork (***see, Matter of WIXT-TV***, Tax Appeals Tribunal, August 2, 1990).

E. Petitioner did *not* have an agreement with the Division to accept his payment of what he termed "use tax and use tax penalties" in lieu of collecting sales tax owed on his purchases of the artwork. Rather, a review of the record establishes that rather than any agreement with the Division, petitioner's accountant was attempting to create some negotiating leverage with the Division (when he really did not have any) by holding back payment of what was, in fact, *sales tax*, as discussed above. Such an aggressive strategy was bound to fail since it was based on a misunderstanding of petitioner's liability for unpaid sales tax due years earlier at the actual time when petitioner made his purchases of the artwork. (For example, sales tax in the amount of $288,750.00 was due on petitioner's purchase of Mark Rothko's Unititled [Plum and Brown] for $3,500,000.00 *back on June 22, 2000*, which ultimately was not collected by the Division *until May 25, 2004* when it enforced its warrant.) Furthermore, as noted in Finding of Fact "11",

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[22] If petitioner had in fact purchased the artwork for his use in New Jersey and had it shipped to New Jersey for his use out of state, New York sales tax would not have been due on his purchases of the artwork from the Manhattan gallery. However, if he then decided to move the artwork from New Jersey for his personal use in his home in Manhattan, use tax in such circumstance would have technically been due to New York on such artwork.

petitioner did not fulfill the recommendation in the presentence investigation report noted by Judge Pauley at the sentencing hearing that the payment of sales tax due on the artwork should be made "within 60 days." Sixty days from June 10, 2003, the date of the sentencing hearing, was August 9, 2003. As noted in Finding of Fact "13", the Division was not able to collect the sales tax due on the purchases of the artwork until it enforced a warrant against proceeds from the sale of petitioner's Manhattan apartment on May 25, 2004.

F. Petitioner's argument that public policy and equities require that the Division be estopped from collecting the fraud penalty is without merit. There is simply no basis to apply the doctrine of equitable estoppel against the Division since petitioner did *not* act against his interests by any reasonable reliance upon any representation, errors or misinterpretation made by the Division (***see, Matter of Vanderveer***, Tax Appeals Tribunal, August 18, 1994). Besides, the equities simply do not run in petitioner's favor even if an administrative law judge had equitable powers (***see, Matter of Eisenstein***, Tax Appeals Tribunal, March 27, 2003 [wherein the Tribunal reversed the administrative law judge noting that he did not have equitable powers to fashion what the Tribunal admitted was a "rational solution" to a taxpayer's dilemma given the limits of jurisdiction imposed on the Division of Tax Appeals]). Rather, a review of the record shows that even when he filed his sales and use tax returns late, petitioner did not remit payment of the taxes due and, in fact, *misled* the Division concerning the transactions at issue. As noted in Finding of Fact "4", such returns stated that eight of the nine artworks were "first brought into New York State" on December 8, 2001, and one was "first brought into New York State" on June 22, 2000. As noted in Finding of Fact "3", the paintings were actually purchased on nine distinct dates, and, as noted in Finding of Fact "4", they were "shipped either directly to petitioner's Manhattan residence or to his residence after only a *brief* stop in New Jersey"

without any use by petitioner in New Jersey (emphasis added). Moreover, as noted in Conclusion of Law "E", it was not until May 25, 2004 when the Division enforced its warrant that sales tax owed on petitioner's purchases of artwork was finally paid years late.

G. Petitioner's other contentions that the imposition of the civil fraud penalty violates his constitutional rights against double jeopardy or the imposition of "an excessive fine" are meritless. First, it is misleading for petitioner to contend that the five-year prison sentence was imposed simply as a result of his involvement in the scheme to avoid payment of sales tax on his purchases of artwork since, as detailed in Footnote "15", his imprisonment for 60 months (five years) represented the concurrent running of three sentences covering crimes in addition to petitioner's failure to pay sales tax on his purchase of the artwork. Further, much of the case law cited by petitioner is not applicable since the proceeding at hand is a *civil* proceeding in which the Division seeks to enforce a *civil* fraud penalty which may not be viewed as a criminal punishment for double jeopardy purposes. In addition, the Division is correct that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty" citing ***Hudson v. United States*** (522 US 93, 100; ***see also Doe v. Pataki,*** 120 F3d 1263, 1274, ***cert denied*** 522 US 1122 [wherein the court reaffirmed this stringent standard of proof]). No such proof has been offered here. Rather, as noted in Finding of Fact "12", petitioner's sentence in the criminal proceeding was within "the heartland" of the sentencing guidelines, and the $3,000,000.00 fine imposed in the criminal proceeding represented only 2.3% of petitioner's income of over $132,000,000.00 between 1999 and 2001. In addition, the civil fraud penalty as noted in Finding of Fact "1" totals $768,408.77, an amount which must be placed in this same financial context and, most important, is proportional to the level of purchases upon which petitioner evaded the payment of sales tax, i.e., over

$15,000,000.00. In short, the amount of such civil fraud penalty neither transforms what is a civil penalty into a criminal penalty nor equates to the imposition of an excessive fine on petitioner. The decision of the Court of Appeals in ***County of Nassau v. Canavan*** (1 NY3d 134, 770 NYS2d 277), relied upon by petitioner does not compel a different conclusion. In that case, the Court of Appeals noted that "a punitive forfeiture of an instrumentality of a crime 'violates the Excessive Fines Clause if it is *grossly disproportional* to the gravity of a defendant's offense' [citation omitted]" (***id.,***at 140; emphasis added). The Court of Appeals explicitly observed that the "forfeiture of defendant's car was not at all disproportionate to the gravity of her offense," i.e., driving while intoxicated. Nonetheless, it struck down the civil forfeiture ordinance of Nassau County because, "Although the County has, as a matter of policy, decided to focus its enforcement efforts on drunk driving arrests, the ordinance by its terms permits forfeiture for *any* offense" (***County of Nassau v. Canavan***, ***supra*** at 140; emphasis in original). In short, a civil fraud penalty equal to 50% of the sales tax evaded plus a measure of additional interest, as detailed in Conclusion of Law "A", is not "grossly disproportional" to the gravity of petitioner's offense even when added to the punishment imposed on petitioner in the criminal matter.

H. In conclusion, it appears that petitioner's vigorous opposition to the Division's imposition of the civil fraud penalty grows out of his enduring sense that he is being punished unfairly because, in the words of his attorney at the sentencing hearing, petitioner "did what many, many people did," presumably avoiding the payment of sales tax on purchases. Nonetheless, there is absolutely no basis to conclude that the Tax Law has been selectively enforced against petitioner (***see, Matter of Goetz Energy***, Tax Appeals Tribunal, November 18, 1999; ***see also, Matter of 1605 Book Center v. Tax Appeals Tribunal***, 188 AD2d 694, 590 NYS2d 591, ***affd*** 83 NY2d 240, 609 NYS2d 144). The pivotal fact is that "many, many people"

do not fail to pay sales tax on purchases in excess of $15,000,000.00 pursuant to a scheme which they knew was wrong.

I. As referenced in paragraph "15", the Division has noted its willingness "to apply the tax, non-fraud penalties, and interest paid on the Warrant towards the liability in the April 7, 2003" thereby at least clarifying, if not modifying, the position set forth in its answer, as detailed in footnote 18. This step was wisely taken in light of Tax Law § 1145(a)(2) which provides that the civil fraud penalty is imposed "in lieu of the penalties and interest provided for in [Tax Law § 1145(1)(i),(ii)]," the penalties referenced in footnote 20. Further, as discussed above, the tax collected by the Division's enforcement of its warrant, was indeed "sales" tax and not use tax. Consequently, the Notice of Determination dated April 7, 2003 must be modified to so conform. In addition, as noted in Finding of Fact "2", the Division has also agreed to modify the Notice and Demand dated May 27, 2003 by substituting the lesser late filing and payment penalties in lieu of fraud penalty. Consequently, the Notice and Demand dated May 27, 2003 must also be modified to so conform.

J. The petition of Samuel D. Waksal is granted to the extent indicated in Conclusion of Law "I", and the Notice of Determination dated April 7, 2003 and the Notice and Demand dated May 27, 2003 are to be modified to so conform, but, in all other respects, the petition is denied.

DATED: Troy, New York
May 25, 2006

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE