

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARIE ROBERTS : DETERMINATION
 : DTA NO. 821756
for Revision of a Determination or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 2001 through February 28, 2003. :

Petitioner, Marie Roberts, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2001 through February 28, 2003.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 30, 2009 at 10:30 A.M., and continued to completion on June 5, 2009 at the same location, with all briefs to be submitted by January 15, 2010, which date began the six-month period for issuance of this determination. Petitioner appeared by William V. Alesi, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

I. Whether the Closing Agreement by and between petitioner, as officer of Penn Station Grocery, Inc., and the Division may be vacated because of fraud, malfeasance or misrepresentation of a material fact.

II. Whether the Closing Agreement by and between petitioner, as officer of Penn Station Grocery, Inc., and the Division binds her personally for sales taxes due from the corporation for the period June 1, 2001 through February 28, 2003.

III Whether petitioner was personally liable for the sales and use taxes due on behalf of Penn Station Grocery, Inc., as a person required to collect and pay such taxes under Tax Law §§ 1131 and 1133.

FINDINGS OF FACT

1. On November 18, 2004, the Division of Taxation (Division) issued to petitioner, Marie Roberts, a Notice of Determination (Notice No. L-024694613-1) that assessed \$106,743.26 in sales and use taxes due, plus interest, for the period June 1, 2001 through February 28, 2003. The notice indicated that Ms. Roberts was being held liable as an officer or responsible person of Penn Station Grocery, Inc. (PSG or the corporation).

2. PSG, a New York corporation, was organized in October 1994 by Salvatore Catalanotto, petitioner's late husband, and his three adult sons, Joseph, Alfred and Dominic Catalanotto (petitioner's stepsons). At the time PSG was formed, petitioner, a high school and a Katherine Gibbs Secretarial School graduate, was not employed and was a housewife. Although petitioner did not provide any capital to start the business, she was made president and owner of the company by Mr. Catalanotto. According to petitioner, she was never a member of PSG's board of directors and she never attended any board meetings.

3. A copy of PSG's Corporate Records (corporate book) contains standard form fill-in documents for, among other things, minutes of the first meeting of the board of directors and minutes of the first meeting of the shareholders. Neither of these documents contains information regarding the identity of PSG's board of directors, the date of the director's first meeting, the nomination and election of PSG's corporate officers or the date of the first meeting of PSG's shareholders. The corporate book also contains fill-in stock certificates for PSG's total authorized issuance of 200 no par value common shares. By PSG stock certificate no. 1,

petitioner, as sole shareholder, was issued 100 shares on July 20, 1995. This certificate was signed by PSG's duly authorized officers, Marie Roberts, president, and Dominic Catalanotto, secretary-treasurer. The corporate book was misplaced until shortly before the hearing in this matter.

4. PSG elected to be treated as a federal and New York State S corporation effective as of July 20, 1995 and such election continued past the period at issue.

5. On or about July 20, 1995, PSG began doing business as Central Market in Penn Station on the Long Island Railroad concourse level. From July 1995 until approximately November 2001, PSG operated as a grocery store and a fresh butcher shop. Thereafter, PSG operated as a deli.

6. From its inception through April 2000, petitioner's stepsons physically ran PSG, and Mr. Catalanotto handled PSG's paperwork and any problems that arose. Mr. Catalanotto took the paperwork to the accountant for preparation of the tax returns. Petitioner did not work at PSG during that time.

7. Sometime before 1998, PSG procured a key man life insurance policy on petitioner's life. PSG continued to pay the premiums on this policy through 2005.

8. At the direction of Mr. Catalanotto, petitioner transferred 60 shares of the corporation's stock to her stepson Alfred Catalanotto on January 2, 1999. This transfer was reflected on the books of the corporation, with issuance of stock certificate no. 2 to petitioner for 40 shares and stock certificate no. 3 to Alfred for 60 shares by the corporation's duly authorized officers, Ms. Roberts (president) and Dominic (secretary-treasurer). No other stock transfers are reflected in PSG's corporate books.

9. After Mr. Catalanotto's death in May 2000, petitioner's stepsons continued to manage and operate PSG. Joseph physically ran the deli, Alfred managed operations, and Dominic handled the financial and administrative matters that included, among other things, having check signing authority for PSG. From May 2000 through the period at issue, petitioner made numerous oral requests for copies of PSG's records and corporate tax returns. However, her stepsons ignored her requests.

10. From its incorporation through 2001, Richard Stevens, CPA, was PSG's accountant. Mr. Stevens also prepared personal income tax returns for petitioner and her late husband. Early in 2002, Dominic hired Jeffrey Naftol, and his accounting firm, Naftol & Weberman, CPA, PC, as PSG's accountants. Petitioner learned that Mr. Naftol was PSG's accountant in early 2002 when she asked Dominic for papers necessary to file her 2001 income tax returns. Beginning in 2001 and continuing beyond the period at issue, Naftol & Weberman prepared PSG's federal and New York State S corporation income tax returns. Naftol & Weberman also prepared petitioner's personal income tax returns for the years 2001, 2002 and 2003.

11. In a letter dated August 17, 2001, Alfred advised the Division that "[a]s of November 1999, there are no employees of Penn Station Grocery, Inc. . . . All employees are employed by CM Resources Inc. [*sic*] . . . All taxes for CM Resources are paid current." Alfred further requested that PSG's withholding tax account be closed. No title appears beneath Alfred's name. CM Resources continued to lease employees to PSG beyond the period in issue.

12. Petitioner and Mr. Catalanotto were married 21 years at the time of his death. Shortly before his death, Mr. Catalanotto told petitioner to get involved in the business and work side by side with Dominic. However, shortly after her husband's death, Dominic advised petitioner that he would be handling all administrative matters for the business, and there was nothing for her to

do. Petitioner continued to offer her assistance to Dominic. Eventually, Dominic told her that she could go to CM Resources Corp.'s office and file paperwork for all of the CM Resources businesses. From late 2000 until early 2002, petitioner reported to Joanne, president of CM Resources and her stepsons' cousin, and filed paid bills for PSG, 52 Vanderbilt Avenue Grocery Corp.,¹ and businesses owned by her stepsons. In early 2002, Joanne told petitioner that there was no need to come in anymore because she was doing the filing. Subsequently, Dominic told petitioner that she did not have to come into work anymore and he would send her checks by mail. Documents in the record indicate that CM Resources paid petitioner \$30,800.00 and \$36,400.00 in the years 2002 and 2003, respectively. CM Resources continued to pay petitioner until approximately April 2005.

13. Although petitioner thought she owned 40 shares of PSG and Alfred owned the other outstanding 60 shares, Alfred offered to buy out her 50-percent interest on February 27, 2002. At that time, he gave her an Assignment and Assumption Agreement dated January 1, 2001 (agreement) that provided for a purchase price of \$1.00 and no other consideration for petitioner's assigned shares. This agreement also provided that petitioner would provide consulting services to PSG through December 31, 2010, and PSG would pay her the sum of \$35,000.00 per calendar year through December 31, 2010, along with Medicare and secondary health benefits from PSG through the same period. The signatory section of this agreement provided that Alfred, as president of PSG, would sign on behalf of the corporation. Elliot S. Schlissel, Esq., reviewed this agreement for petitioner and advised her that it was not a real offer because there was no personal guarantee. Therefore, petitioner rejected this offer, and no further offers for her shares of PSG were made by any of her stepsons.

¹ Petitioner was a shareholder of 52 Vanderbilt Grocery, a S corporation.

14. PSG filed New York State sales and use tax returns and paid tax for the period June 1, 2000 through February 28, 2003. Dominic Catalanotto signed PSG's sales tax return for the period June 1, 2001 through August 31, 2001 as controller, for December 1, 2001 through February 28, 2002 and June 1, 2002 through August 31, 2002 as general manager, for September 1, 2002 through November 30, 2002 as manager, and for December 1, 2002 through February 28, 2003 as general manager. Alfred Catalanotto, as vice president, signed PSG's sales tax return for the period September 1, 2001 through November 30, 2001. No one signed PSG's sales tax return for the period March 1, 2002 through May 31, 2002.

15. The record includes an unsigned copy of PSG's U.S. Income Tax Return for an S Corporation (form 1120S) for the year 2000, on which an ordinary loss of \$41,826.00 was reported. Other deductions claimed on this S corporation income tax return included, among other items, leased executive salaries in the amount of \$38,400.00 and leased employees in the amount of \$115,809.00. The Schedule K-1 (form 1120S) Shareholder's Share of Income, Credits, Deductions, etc. for the year 2000 issued to petitioner by PSG indicates that petitioner, the 100% shareholder, had an ordinary loss of \$41,826.00 for the tax year. The preparer of PSG's 2000 S corporation income tax return was Mr. Stevens.

16. On or about March 15, 2002, PSG's federal and New York State S corporation income tax returns for the year 2001 were filed. Costs of leased employees were included as other costs under cost of goods sold reported on the federal S corporation income tax return. PSG's reported ordinary income of \$16,512.00 was divided equally between Alfred and Dominic, the two shareholders of the corporation at the end of 2001. Both the federal and New York State S corporation income tax returns for the year 2001 were prepared by Naftol & Weberman, and were signed by Alfred, president of PSG. Amended S corporation income tax returns for the year

2001, prepared by Naftol & Weberman and signed by Alfred without a title, were filed on or about August 15, 2002. These amended 2001 S corporation income tax returns reported an ordinary loss in the amount of \$13,413.00, and the identity of the sole shareholder and president of PSG as Marie Roberts.

17. PSG's federal and New York State S corporation income tax returns for the year 2002 were signed by Dominic, as manager, and filed on or about March 15, 2003. Costs of leased employees were included as other costs under cost of goods sold reported on the federal S corporation income tax return. PSG's reported ordinary income of \$16,804.00 was allocated to the sole shareholder, Marie Roberts, who was listed as president of the corporation.

18. As noted above, Mr. Naftol also prepared petitioner's personal income tax returns. When Mr. Naftol presented petitioner with her 2002 income tax returns, petitioner advised Mr. Naftol that she was not the 100% shareholder of PSG. Mr. Naftol stated that he had not seen any paperwork indicating that she did not own 100% of PSG. On or about April 11, 2003, petitioner consulted with her former attorney, Mr. Schlissel, regarding her 2002 tax returns. During her consultation, petitioner advised Mr. Schlissel that she was neither the 100% owner of PSG nor the recipient of the income attributed to the corporation on the returns and schedules prepared by Mr. Naftol for the year 2002. By letter dated April 11, 2003, Mr. Schlissel asked Mr. Naftol for copies of the tax returns prepared for both PSG and 52 Vanderbilt Grocery, and inquired whether Mr. Naftol could obtain an extension of time to file for Ms. Roberts "without penalty or interest incurring" because Mr. Schlissel had advised petitioner not to sign the returns as prepared to date.

19. On the New York State resident personal income tax return filed by petitioner for the year 2002, petitioner reported, among other items of income, wage income in the amount of

\$30,800.00, and S corporation income totaling \$13,669.00, consisting of a nonpassive loss from 52 Vanderbilt Grocery in the amount of \$3,135.00 and nonpassive income from PSG in the amount of \$16,804.00 (per the attached Schedule E).

20. On or about March 28, 2003, the Division assigned Tzvi Harry Mozes, an auditor in the New York City Metro Audit Group (Metro audit group) to conduct a sales and use tax field audit of PSG. The corporation was selected for audit after a November 2002 survey of the premises found that the taxable sales ratio may have been substantially understated.

21. On March 31, 2003 at 12:30 P.M., Mr. Mozes visited PSG's place of business and conducted a survey of the premises. At that time, the auditor found an extremely busy medium sized deli that sold sandwiches, salads, coffee, soda, beer, beer by the cup, sushi, and muffins; had at least 10 employees; and was equipped with 5 tables, 10 chairs, and 3 registers at the front of the store. During his survey, the auditor estimated the taxable sales ratio to be between 75% and 85%. The auditor's survey notes also indicate that the certificate of authority was not displayed.

22. The Division's auditor sent an appointment letter to PSG, dated March 31, 2003, which stated that its sales and use tax records for the period June 1, 2000 through February 28, 2003 had been scheduled for a field audit beginning April 22, 2003 at PSG's office. The letter further advised that all books and records pertaining to PSG's sales and use tax liability for the audit period must be available on the appointment date, and a "Records Requested List," containing a "detailed list of all records required to be available for audit on the appointment date," was attached to the letter. In addition to the appointment letter and the records requested list, the auditor also mailed, among other items, The New York State Tax Audit - Your Rights

and Responsibilities form (PUB 130F), a power of attorney form, and a responsible person questionnaire (form AU-431).

23. On April 7, 2003, the auditor called the corporation and spoke with PSG's manager, Joseph, who provided the telephone number of the main office. On the same date, the auditor called the main office and left a message for the bookkeeper. During an April 7, 2003 telephone call initiated by Jeffrey Naftol, the corporation's representative, the audit was orally rescheduled for May 21, 2003. During that telephone call, Mr. Naftol stated that he would send the auditor a power of attorney and the corporation's federal income tax returns.

24. On May 7, 2003, petitioner signed a power of attorney authorizing Jeffrey E. Naftol to represent PSG in the sales and use tax audit for the period June 1, 2000 through February 28, 2003. Petitioner's title in the corporation was not filled in on this form. On or about May 8, 2003, petitioner's former attorney sent Mr. Naftol the executed power of attorney, along with a cover letter, in which Mr. Schlissel wrote, in pertinent part, the following:

I have not filled in Marie Roberts [*sic*] title in the corporation because at this time my client is unaware what her position is. She advises me that in the past she was characterized as "President." I do have documentation in my file indicating that Ms. Roberts is a 40% owner of the corporation, not a 100% owner as indicated in the recently filed tax returns.

I have advised Ms. Roberts to be extremely cautious in her dealings with the other officers of Penn Station Grocery, Inc. Her decision to allow you to act as her agent in the sales tax audit is conditioned upon you providing my office with: (1) copies of all documentation forwarded to the New York State Department of Taxation, and (2) copies of the annual statement for Penn Station Grocery, Inc. for the years 2001 and 2002. Your prompt compliance with this condition is greatly appreciated.

25. A review of PSG's Tax Field Audit Record (PSG's audit log) indicates that the first field audit appointment took place on June 10, 2003 at Mr. Naftol's office. During that first meeting, PSG's business activity was discussed. Mr. Naftol advised the auditor that until he

became the corporation's accountant in the beginning of 2002, the deli only sold meats, cold cuts and cheeses by the pound. According to Mr. Naftol, customers bought rolls, bread, bagels, sliced cold cuts and cheeses to make their own sandwiches. When the auditor stated that he had not seen that type of operation in delis in business areas in Manhattan and that the 15% taxable ratio reported by PSG was extremely low, Mr. Naftol became very agitated.

26. The following records were provided to and reviewed by the auditor at the first audit appointment on June 10, 2003: unsigned copies of the corporation's federal income tax returns for 2000 and 2002 and its amended federal income tax return for 2001, copies of the sales tax returns, bank statements and canceled checks from June 2000 through May 2002, purchase invoices and register "Z" readings for the periods September 2001 through November 2001 and December 2002 through February 2003.

27. On June 13, 2003, the auditor's supervisor, Hamdi Fattah, advised Mr. Naftol that an all day observation test of the deli might be conducted because PSG did not have adequate records. Mr. Naftol asked for additional time to speak with his client. A July 9, 2003 entry in the audit log indicates that the following items were mailed to Mr. Naftol for completion: a consent to extend the period of limitations on assessment of sales and use taxes for the period June 1, 2000 through November 30, 2000, and a new power of attorney form.

28. A power of attorney authorizing Mr. Naftol to represent PSG in the sales and use tax audit for the period June 1, 2000 through February 28, 2003 was executed by Marie Roberts on July 17, 2003 (July 2003 power of attorney). Ms. Roberts drew multiple lines through the title "Pres" and wrote the initials "mr" in lower case cursive. At the hearing, petitioner testified that she put her initials on the July 2003 power of attorney at the direction of her former attorney. However, petitioner could not recall who sent Mr. Naftol the executed July 2003 power of

attorney. Mr. Naftol faxed a poor quality copy of the executed July 2003 power of attorney to the Division on August 5, 2003. Believing that petitioner executed this July 2003 power of attorney as owner of PSG, the Division determined that it was a valid power of attorney and continued to work with Mr. Naftol on PSG's audit.

29. In his conversations with the auditor or the auditor's supervisors during the course of the audit, Mr. Naftol repeatedly used the pronouns she and her when referring to his client. The Division understood the references to be to Ms. Roberts. During the course of the audit, the Division had no direct contact with petitioner.

30. During the course of the audit, Mr. Naftol executed three consents extending the period of limitations on assessment of sales and use taxes due from PSG.

31. During the course of the audit, the auditor never made any internal requests for copies of the sales tax returns filed by PSG for the period June 1, 2000 through February 28, 2003, or copies of the S corporation income tax returns filed by PSG for the years 2000, 2001, 2002, and 2003.

32. Because Mr. Naftol indicated that his client was ill and wished to settle PSG's audit expeditiously, settlement negotiations began in March 2004 and were completed during a field audit appointment on May 12, 2004. The settlement reached by Mr. Naftol and the Division resulted in additional taxable sales of \$1,450,955.80 and additional tax due from PSG in the amount of \$119,703.84 for the period June 1, 2000 through February 28, 2003. As part of the settlement agreement, the Division waived the penalties. During the May 12, 2004 field audit appointment, the auditor explained to Mr. Naftol that closing agreements would be used for the officer and the corporation because this was a negotiated settlement.

33. On May 25, 2004, Mr. Naftol spoke with the auditor and indicated that PSG would make a partial payment of \$20,000.00. On the same date, the auditor prepared a schedule of additional tax due plus interest for the period June 1, 2000 through February 28, 2003 (schedule of additional sales tax due), a summary of tax, penalty, interest and refund due by quarter (summary schedule), and the closing agreements for the officer and the corporation. The four-page closing agreement prepared for PSG referenced additional sales and use taxes and interest due from the corporation for the period June 1, 2000 through February 28, 2003 (PSG's closing agreement). The four-page closing agreement prepared for Marie Roberts, as officer of PSG, referenced additional sales and use taxes and interest due from the corporation for the period June 1, 2001 through February 28, 2003 (closing agreement for Marie Roberts).

34. Mr. Naftol completed a Responsible Person Questionnaire for Ms. Roberts on May 27, 2004, and forwarded it to the Division. In this responsible person questionnaire, Mr. Naftol indicated that Ms. Roberts held the position of president since the corporation's inception; devoted her time as required to the business; and received a salary and health benefits from the corporation. Mr. Naftol also indicated, among other things, that Ms. Roberts was responsible for preparing or supervising the preparation of sales tax returns and ensuring the remittance of tax, and for maintaining and managing the business. He also indicated that Ms. Roberts had the authority to, among other things, manage the business with knowledge and control over financial affairs; sign checks; act, on behalf of the business with the Tax Department; sign consents extending periods of limitation; sign a power of attorney for the business; sign consents fixing tax; sign deferred payment agreements; hire and fire employees; and to negotiate loans, borrow money for the business or guarantee business loans. Mr. Naftol did not list any sources of information that he used to complete the responsible person questionnaire in the space provided

on the form. Mr. Naftol did not advise petitioner that he prepared a responsible person questionnaire for PSG.

35. Included in the audit file is a printout of a TID Registration Association Detail Inquiry for PSG and petitioner performed by the Division on May 27, 2004. A review of this printout indicates that for sales tax purposes, petitioner's association as a responsible person of PSG began on June 1, 2000, and for corporate tax purposes, petitioner's association as the 100% S corporation shareholder of PSG began on January 1, 2002 and ended on December 31, 2002.

36. On June 2, 2004, the auditor mailed the schedule of additional sales tax due, the summary schedule and the closing agreements for the officer and the corporation to Mr. Naftol. No cover letter accompanied these documents. Instead, the following request was handwritten and initialed by the auditor on the schedule of additional sales tax due: "[p]lease have the taxpayer sign & return all 6 copies of the closing agreement. Thank you." The auditor did not send any documents to petitioner.

37. On June 10, 2004, Mr. Naftol sent a letter to Dominic Catalanotto regarding PSG's "Sales Tax Audit - Closing Agreement." In this letter, Mr. Naftol wrote, in pertinent part, as follows.

Enclosed are six (6) copies of the closing agreement for the recent sales tax audit. I need Marie to sign all six and return the forms to me. In addition, I also need a check for \$20,000.00 to send them. This should close the matter.

The agreement is standard fair.

Mr. Naftol did not copy either petitioner or her former attorney on this letter. Dominic did not discuss the subject matter of this letter with petitioner.

38. Mr. Naftol never discussed the audit or the settlement negotiations with petitioner. Rather, she first learned that a settlement had been reached during a telephone conversation

initiated by Alfred on July 19, 2004. During that telephone call, Alfred told her that a settlement of \$120,000.00 was reached, which was to be paid in installment payments. He also told her that she had to attend a meeting scheduled for 4:30 P.M. on July 21st at Mr. Naftol's office. Although Alfred advised her that he and his brothers would be attending the July 21st meeting, he did not explain why petitioner's presence was required at the meeting as well.

39. On July 21, 2004, petitioner met with her three stepsons and Mr. Naftol in a conference room at Mr. Naftol's office. No representative for the Division was present at this meeting. During the July 21st meeting, Mr. Naftol explained that they had come to an agreement with the Division and that it was \$120,000.00 to be paid in installments of \$3,000.00 per month. Mr. Naftol further explained that the Division originally asked for \$300,000.00 and that he and Dominic had worked very hard on the settlement. Then, Mr. Naftol informed petitioner that she would have to sign for the corporation because she was the president and sole shareholder. At that point, petitioner told Mr. Naftol that he must talk to Mr. Schlissel because Mr. Schlissel had advised her not to sign anything until Mr. Naftol spoke with him. Whereupon Mr. Naftol and her three stepsons left the room and Mr. Naftol called Mr. Schlissel. Subsequently, Mr. Naftol came back into the conference room and informed petitioner that Mr. Schlissel would call her in a few minutes. Shortly thereafter, Mr. Schlissel called petitioner and advised her that, although she was not the responsible person of PSG, there was no choice but to accept the settlement and for her to sign for PSG as president of the company, because her stepsons refused to sign anything. According to petitioner, Mr. Schlissel did not say anything about whether or not she should sign personally or individually. When Mr. Naftol and her stepsons came back into the conference room, she advised them that Mr. Schlissel said that she could sign for PSG as president. At which point, Mr. Naftol gave her a page, and pointed to where she should sign. Although she

asked whether she should sign her name, the title president and the date, Mr. Naftol directed her to sign her name only. According to petitioner, Mr. Naftol kept shoving pages at her, and she was unable to sign fast enough. As she was signing the pages, petitioner asked Mr. Naftol why there were so many pages to sign. Mr. Naftol's response was the state wanted that many.

40. Prior to the conclusion of the July 21st meeting and after signing the pages presented to her by Mr. Naftol, petitioner asked for a copy of the closing agreement. Mr. Naftol stated that he could not give her a copy until it was fully executed. Mr. Naftol never sent her copies of the fully executed closing agreements.

41. A certified check payable to New York State Dept of Taxation & Finance in the amount of \$20,000.00 was drawn on PSG's Signature Bank checking account on July 21, 2004. D. Catalanotto's stamped signature appears on this check as the authorized signature. The memo section of this check bears the typed notation "period 6/01/2001 - 2/28/2003 partial payment." On July 28, 2004, the Division received the closing agreements and the certified check for \$20,000.00. The auditor mailed copies of the fully executed closing agreements to Mr. Naftol on August 11, 2004. The auditor never sent a copy of petitioner's fully executed closing agreement to her.

42. Petitioner signed and printed her name and the date of July 21, 2004 on the last page of PSG's closing agreement on behalf of the corporation; however, no title appears next to her printed name. Thomas J. Heinz, the Division's Director of Tax Audits, signed this closing agreement on August 2, 2004. The parties entered into PSG's closing agreement pursuant to Tax Law § 171(18).

43. The closing agreement for Marie Roberts bears petitioner's signature, her printed name without a title, and the handwritten date of July 21, 2004, as well as Mr. Heinz's signature

and the handwritten date of August 2, 2004 on the last page. The parties entered into this closing agreement pursuant to Tax Law § 171(18). Under the terms of this closing agreement, captioned: “In the Matter of an Audit of MARIE ROBERTS . . . As Officer of PENN STATION GROCERY, INC. . . . for Sales and Use Taxes for the periods between 06/01/2001 - 02/28/2003,” petitioner is deemed a responsible person under Tax Law § 1131(1), and pursuant to Tax Law § 1133(a), is personally liable for sales and use taxes and interest due from PSG for the period June 1, 2001 through February 28, 2003.

44. Each closing agreement contained seven paragraphs. Paragraph 4 of each closing agreement provided that:

this agreement shall be final and conclusive of the liabilities of the Taxpayer for the subject taxes and captioned taxable periods, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact: (a) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of this state, and (b) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, abatement, refund or credit made in accordance therewith shall not be annulled, modified, set aside or disregarded.

The first two lines of text contained in paragraph 7 of PSG’s closing agreement are set forth on page 3 and the remaining 6 lines of text in that paragraph are set forth on page four. Paragraph 7 of the closing agreement for Marie Roberts, consisting of eight lines of text, is set forth in its entirety on page four of that closing agreement.

45. Petitioner did not read either closing agreement prior to signing multiple copies of each agreement’s last page (page four) because Mr. Naftol had spoken with Mr. Schlissel about the settlement.

46. The Division was never advised by either petitioner or her former attorney that there were any restrictions on Mr. Naftol’s authority to represent PSG during the sales tax audit.

Petitioner never executed a power of attorney authorizing Mr. Schlissel to represent PSG before the Division.

47. Joseph Catalanotto, as general manager, signed PSG's federal and New York State S corporation income tax returns for the years 2003 and 2004. Costs of leased employees were included as other costs under cost of goods sold reported on each year's federal S corporation income tax return. For the year 2003, PSG's reported ordinary income in the amount of \$16,797.00 was allocated to Ms. Roberts, the sole shareholder. For the year 2004, PSG's reported ordinary loss in the amount of \$76,028.00 was allocated to petitioner, the sole shareholder.

48. On the New York State resident personal income tax return filed by petitioner for the year 2003, petitioner reported, among other items of income, wage income in the amount of \$36,400.00, and S corporation income totaling \$14,805.00, consisting of a nonpassive loss from 52 Vanderbilt Grocery in the amount of \$1,992.00 and nonpassive income from PSG in the amount of \$16,797.00 (per the attached Schedule E). After applying estimated tax payments in the amount of \$4,640.00 against tax reported due in the amount of \$5,237.00, petitioner owed and paid \$597.00 in tax when she filed her 2003 New York State personal income tax return in April 2004.

49. Petitioner frequently asked her stepsons whether the \$3,000.00 installment payments on PSG's sales tax liability for the period at issue were being made to the Division. Her stepsons always assured petitioner that timely payments were being made.

50. As noted above, on November 18, 2004, the Division issued a Notice of Determination (Notice No. L-024694613-1) to petitioner, which asserted that she was personally liable, as a responsible person, for additional sales and use taxes due from PSG for the period

June 1, 2001 through February 28, 2003. Subsequently, the Division issued a Notice and Demand for payment of tax due dated March 14, 2005 to petitioner as a responsible person liable for additional sales and use taxes due from PSG for the same period.

51. Upon receipt of the notice and demand, petitioner contacted Mr. Naftol, Dominic and Alfred regarding PSG's installment payment plan with the Division. According to petitioner, Mr. Naftol was too busy to speak with her, Dominic did not return her calls, and Alfred told her that she could pay the entire bill. At that point, Ms. Roberts went to see Mr. Schlissel, who sent a letter dated April 1, 2005 to the Division's Metro audit group regarding this notice and demand. In this letter, Mr. Schlissel stated that petitioner disagreed with the notice and demand because a settlement had already been worked out regarding PSG's tax liability. He further stated that any questions regarding the corporation's sales tax liability should be directed to Mr. Naftol, the representative handling this matter for Ms. Roberts.

52. When petitioner received a collection notice dated May 2, 2005 regarding assessment L-024694613-1, she immediately took it to Mr. Schlissel for clarification. On May 3, 2005, Mr. Schlissel faxed a letter and a copy of the collection notice to Mr. Naftol. In his letter, Mr. Schlissel wrote, in pertinent part, that "[t]his debt was created by her stepsons mismanaging Ms. Roberts' business. My client is extremely upset with regard to this notice. Kindly call me upon receipt of this document to advise me what arrangements are being made to pay this debt. . . ." Petitioner and her stepsons' attorney, Jay Levinton, Esq., were copied on this letter. On June 2, 2005, Mr. Naftol faxed papers to Mr. Schlissel that he requested regarding PSG's tax audit, which consisted of PSG's closing agreement, the schedule of additional sales tax due and the summary schedule. The record is silent as to what discussions, if any, Mr. Schlissel may have

had with either Mr. Naftol or Mr. Levinton regarding PSG's outstanding sales tax liability for the period June 1, 2001 through February 28, 2003.

53. According to petitioner, a meeting to discuss PSG's business affairs was scheduled for August 3, 2005. However, her stepsons cancelled the meeting and never rescheduled it. In an attempt to schedule a meeting, petitioner's former attorney contacted her stepsons' attorney; however, there was no response.

54. The Division diverted part of petitioner's New York State personal income tax refund for the year 2004 and applied it against PSG's outstanding sales tax liability for the period in issue. A warrant for unpaid tax and interest due on tax assessment L-025694613-1 was docketed against petitioner, individually and as a responsible person of PSG, on August 18, 2005.

55. The Metropolitan Transit Authority (MTA) leased the store to PSG for a term of ten years. As the lease was nearing expiration, petitioner asked her stepsons about renegotiating the lease, and their response was that it was too soon. In or about August 2005, petitioner met with the MTA regarding the renewal of PSG's lease that was due to expire in November 2005. At that time, she learned that PSG was behind in its lease payments and that the MTA would not negotiate a new lease with her on behalf of PSG until the corporation was current in its rent payments.

56. On the advice of her former attorney, petitioner hired Jeffrey Goldberg, C.P.A., as PSG's accountant during the summer of 2005. Based upon information supplied by PSG's managers, Mr. Goldberg prepared and forwarded PSG's sales and use tax return for the period September 1, 2005 through November 30, 2005 to Dominic for filing and his preparation of a check in payment of the tax reported as due on the return. Shortly before this sales tax return was due to be filed, petitioner received the original unsigned return in the mail. However, no check

accompanied this unsigned return. On December 20, 2005, petitioner filed PSG's unsigned sales tax return for the quarter ending November 30, 2005, along with a cover letter explaining the circumstances underlying the submission of the unsigned return and her inability to pay the reported sales tax liability.

57. On or about November 17, 2005, Penn Station Grocery, Inc., and petitioner, as president and shareholder of the corporation, filed a law suit against Alfred, Dominic and Joseph Catalanotto, CM Resources and Naftol & Weberman. In her verified complaint, petitioner charged her three stepsons and Naftol & Weberman with, among other things, self dealing, breach of fiduciary duties, misrepresentation and fraud, and sought an accounting regarding their mismanagement of PSG's business and affairs. Petitioner's current attorney, William V. Alesi, Esq., commenced this action for petitioner and the corporation. At the time the law suit was filed, petitioner was still unaware that there were two closing agreements relating to the settlement of PSG's sales tax audit.

58. On January 6, 2006, PSG was evicted from its business premises in Penn Station, and ceased operations. At the time of its eviction, PSG owed the MTA in excess of \$50,000.00 in rent.

59. At some point after discovery began, petitioner settled her law suit against her stepsons for \$35,000.00. However, petitioner received approximately \$15,000.00 and she continues to receive monthly payments of \$1,000.00. Petitioner's law suit against Naftol & Weberman was discontinued without prejudice.

60. At the time of the hearing, petitioner was 72 years old.

61. The Division brought a motion filed September 27, 2007, seeking an order of dismissal of the petition or, in the alternative, an order of summary determination in this matter.

The Division's motion sought dismissal of the petition pursuant to 20 NYCRR 3000.9(a)(1)(i), (ii) or (vi) on the grounds that: a defense is founded in documentary evidence, the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition and the petition fails to state a cause for relief; or, in the alternative, summary determination in favor of the Division on the ground that there exist no material issues of fact and its motion must be granted as a matter of law. The alternative grounds raised by the Division's motion to dismiss the petition all related to the closing agreement for Marie Roberts, the terms of which made petitioner personally liable for sales and use taxes due from PSG. In an Order dated February 14, 2008, the Division's Motion to Dismiss the Petition or for Summary Determination was denied because the petition stated a claim or cause of action, and material and triable issues of fact existed. At the conclusion of the hearing, the Division's representative made the following oral motion: "[t]he Division renews and to whatever extent necessary initiates another motion to dismiss based on documentary evidence and the lack of jurisdiction of the Division of Tax Appeals."

CONCLUSIONS OF LAW

A. Pursuant to subdivision eighteenth of Section 171 of the Tax Law, the Commissioner of Taxation and Finance shall:

Have authority to enter into a written agreement with any person, relating to the liability of such person (or of the person for whom he acts) in respect of any tax or fee imposed by the tax law or by a law enacted pursuant to the authority of the tax law or article two-E of the general city law, *which agreement shall be final and conclusive*, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact: (a) the case shall not be reopened as to matters agreed upon or the agreement modified, by any officer, employee, or agent of this state, and (b) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, abatement, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded. As used in this paragraph the term "person" includes an individual, trust, estate, partnership and corporation. (Emphasis added.)

B. In the instant case, after reaching an audit settlement with PSG's duly appointed representative, Mr. Naftol, the Division prepared a four-page closing agreement for PSG and a four-page closing agreement for Marie Roberts, as officer of PSG. On June 2, 2004, multiple copies of both unsigned closing agreements were forwarded to Mr. Naftol for execution by the taxpayer. Subsequently, each closing agreement was executed by petitioner on July 21, 2004 and by the Division's Director of Tax Audits on August 2, 2004. The parties to each closing agreement entered into same pursuant to Tax Law § 171(18). Based upon the terms of the executed closing agreement for Marie Roberts, the Division issued a Notice of Determination, dated November 18, 2004, to petitioner as a person responsible for additional sales and use taxes due from PSG for the period June 1, 2001 through February 28, 2003.

C. It is petitioner's position that the closing agreement for Marie Roberts, as officer of PSG, should be annulled because of fraud, misrepresentations of material facts and mutual mistakes. Petitioner contends that the fraud perpetuated against her and the Division began when Mr. Naftol filed a false and inaccurate responsible person questionnaire with the Division during PSG's sales tax audit for the period June 1, 2000 through February 28, 2003. She maintains that the Division was misled into believing that she was the responsible person for PSG based upon that false responsible person questionnaire and, as a result, the Division prepared two closing agreements, one for PSG and the other for Marie Roberts, as officer of PSG. Since the Division seeks to enforce the closing agreement for Marie Roberts, a contract of personal guarantee, petitioner maintains that it had the strict duty of *uberrimae fidei* to provide clear and full disclosure of every relevant point in that closing agreement to her. Petitioner contends that because the Division had actual and constructive notice that she had not signed sales tax returns and S corporation income tax returns for PSG based upon the original signed tax returns in its

files, it had a responsibility to her when it prepared the closing agreement for Marie Roberts to see that she understood the nature of the document and that it imposed liability upon her. She further contends that the Division could not escape this responsibility by mailing the closing agreement for Marie Roberts to PSG's accountant. Although she does not claim that the Division actively participated in the fraud perpetrated against her, petitioner does contend that the Division closed its eyes to the inconsistent information that had been provided to it and took no steps to see that she had full disclosure of the facts prior to her execution of both closing agreements.

While petitioner acknowledges that her signature appears on the last page of both closing agreements, she asserts that her signature on the closing agreement for Marie Roberts was a product of fraud and mistake. Petitioner maintains that Mr. Naftol and her stepsons committed both fraud in the inducement and fraud in the execution when they met with her in Mr. Naftol's office and told her that she would have to sign the closing agreement because she was PSG's president and sole shareholder. She contends that these representations were false because her stepsons were officers and managers of PSG and they could have signed the closing agreement. Petitioner points out that she took the precaution of speaking to her former attorney; however, he advised her that there was no choice but to accept the settlement and sign for PSG as president of the company since her stepsons would not sign. Petitioner claims that after she told Mr. Naftol and her stepsons that she would sign for PSG as president, Mr. Naftol and her stepsons duped her into believing that there was only one closing agreement - PSG's closing agreement- and that the pages placed before her for signing were part of that agreement. Petitioner asserts that the closing agreement for Marie Roberts is void as if it were a forgery because she signed a document different from what she was led to believe it was.

D. After careful review of the record, I find there is no basis to annul the closing agreement for Marie Roberts, as officer of Penn Station Grocery, Inc. After consulting with her former attorney, petitioner executed the July 2003 power of attorney that appointed Jeffrey Naftol as PSG's representative for the corporation's sales tax audit for the period June 1, 2000 through February 28, 2003. Despite the fact that she took no part in hiring Mr. Naftol as PSG's accountant in early 2002 and her relationship with her stepsons was somewhat strained, petitioner did not restrict Mr. Naftol's authority to act for the corporation in any way in the July 2003 power of attorney. On behalf of PSG, Mr. Naftol submitted some documentation, including, among other things, a responsible person questionnaire that indicated that Marie Roberts was a responsible person for PSG, and engaged in audit settlement negotiations with the Division. Given the unlimited authority granted to Mr. Naftol, as PSG's representative, by the July 2003 power of attorney, it was proper for him to prepare a responsible person questionnaire on behalf of the corporation. It is noted that, upon receipt of the responsible person questionnaire, the Division accessed its internal records and confirmed that petitioner was a responsible person for PSG. After the audit settlement was reached, the Division prepared two closing agreements, one for PSG and the other for Marie Roberts, as officer of PSG, and mailed them to Mr. Naftol, along with schedules of additional tax and interest due from PSG for the period June 1, 2000 through February 28, 2003. I do not find that the Division breached its duty to provide petitioner with clear and full disclosure of every relevant point of the closing agreement for Marie Roberts when it mailed that closing agreement to PSG's representative, Mr. Naftol. Since the Division's internal records indicated that petitioner was the 100% shareholder of PSG and she executed the July 2003 power of attorney appointing Mr. Naftol as PSG's representative, it was reasonable for the Division to assume that Mr. Naftol was the

representative for PSG and its 100% shareholder, and that he had discussed the terms and condition of the settlement and the closing agreement for Marie Roberts, as officer of PSG, with petitioner. As for petitioner's claim that the closing agreement for Marie Roberts is void because fraud was committed at the time of execution of that document, it is without merit. There is no evidence that the Division took part in any fraud that may have been perpetuated against petitioner. Indeed, the Division, one of the parties to both closing agreements, did not have a representative at the July 21, 2004 meeting at which petitioner signed the closing agreements. Petitioner attended the meeting at Mr. Naftol's office alone. During that meeting, petitioner consulted with her former attorney, Mr. Schlissel, by telephone, and then agreed to accept the settlement and sign for PSG as president. Clearly, her former attorney would not have advised petitioner to sign documents outside of his presence, if fraud was present. In addition, petitioner admitted that she did not read anything prior to signing the pages presented to her by Mr. Naftol because Mr. Schlissel had discussed the settlement with Mr. Naftol by telephone. As noted in Finding of Fact 43, the textual format of the last page of the closing agreement for Marie Roberts is different from the textual format of the last page of PSG's closing agreement. Had petitioner merely taken the time to look at each page four before she signed it, she would have realized that she was not signing copies of the same closing agreement, and could have refused to sign any more copies until she or her former attorney received a satisfactory explanation of the differences. It is noted that the Division pursued collection of the corporation's additional sales tax liability due for the period June 1, 2001 through February 28, 2003 from petitioner, as a responsible person of PSG, only after PSG failed to pay the additional sales tax liability. The subsequent failure of PSG to pay its additional sales tax liability for the period at issue does not provide a basis for voiding the closing agreement for Marie Roberts, as officer of PSG.

In sum, petitioner has failed to prove that the Division committed fraud, malfeasance, or misrepresentation of a material fact and, as a result, there is no reason to annul the closing agreement for Marie Roberts, as officer of Penn Station Grocery, Inc., executed by petitioner (*Matter of Brahms*, Tax Appeals Tribunal, July 3, 1997, *confirmed* 256 AD2d 822, 681 NYS2d 699 [1998]).

E. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Article 28 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as “any officer, director or employee of a corporation . . . who as such officer, director, employee or manager is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]” (Tax Law § 1131[1]).

F. Petitioner contends that the closing agreement for Marie Roberts does not impose personal liability upon her for PSG’s sales tax liabilities for the period June 1, 2001 through February 28, 2003. She argues that the only reference to her in the agreement is “as officer of Penn Station Grocery, Inc.” and that she can only be deemed to have signed in that capacity.

Petitioner’s argument is without merit. Under the clear and definite terms of the closing agreement for Marie Roberts, petitioner, as officer of PSG, agreed to be deemed a responsible person under Tax Law § 1131(1) and personally liable for the taxes due for PSG pursuant to Tax Law § 1133(a).

G. Issue III is rendered moot.

H. The petition of Marie Roberts is hereby dismissed and the Notice of Determination dated November 18, 2004 is sustained.

DATED: Troy, New York
July 15, 2010

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE