

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
STEVEN DVORAK :
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 2004 through February 28, 2007. :

In the Matter of the Petition :
of :
TRIPLE C RETAIL CORPORATION :
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 2004 through February 28, 2007. :

DETERMINATION
DTA NOS. 823879,
823880 AND 823881

In the Matter of the Petition :
of :
TRIPLE C RETAIL CORP. - TINDERBOX #362 :
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 2004 through February 28, 2007. :

Petitioners, Steven Dvorak, Triple C Retail Corporation and Triple C Retail Corp. -
Tinderbox #362, filed petitions for revision of determinations or for refund of sales and use taxes
under Articles 28 and 29 of the Tax Law for the period March 1, 2004 through February 28,
2007.

On March 20, 2012 and March 26, 2012, respectively, petitioners, appearing by Labin & Buffomante (Frank J. Buffomante, Esq., of counsel), and the Division of Taxation, appearing by Mark F. Volk, Esq. (Michelle Helm, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs to be submitted by July 16, 2012, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly assessed interest and civil penalties against petitioners after an audit of their books and records revealed unreported sales tax and unreported tobacco products tax, which taxes were subsequently paid through a confession and judgment signed by petitioner Steven Dvorak.

FINDINGS OF FACT

1. In May of 2007, the Division of Taxation (Division) audited petitioners' sales and use taxes, as well as cigarette/tobacco taxes for the period March 1, 2004 through February 28, 2007.
2. During the audit, petitioner Steven Dvorak stated that there were problems with his sales tax returns and that he needed the sales tax monies for other purposes.
3. At the conclusion of the audit, it was determined that petitioners owed \$30,701.20 in unreported sales tax and \$88,456.35 in unreported tobacco products tax.
4. As a result of the audit, the Erie County District Attorney's Office pursued a criminal case against petitioner Steven Dvorak.

5. Mr. Dvorak signed a waiver of indictment in February of 2009. Subsequently, a Superior Court Information and Felony Complaint charged the offenses of grand larceny in the fourth degree, an “E” felony, for stealing sales tax monies belonging to the New York State Department of Taxation and Finance (Department), and charged a second “E” felony for cigarette and tobacco products tax evasion.

6. Mr. Dvorak signed two confessions of judgment on February 5, 2009. One was for unreported tobacco products tax in the amount of \$68,456.23. This amount reflected a down payment in the amount of \$20,000.00 as a condition of the plea. The other confession of judgment was for unreported sales tax in the amount of \$30,701.20. These tax amounts are not at issue in this proceeding.

7. On April 30, 2009, a judgment and restitution order was entered based upon Mr. Dvorak’s guilty plea to grand larceny in the fourth degree and cigarette and tobacco products tax evasion, whereby he was to pay criminal restitution of \$94,157.55 to the Department. This restitution amount reflected the total tax due on unreported sales and unreported tobacco products less the \$20,000.00 down payment and a second payment of \$5,000.00 that was remitted prior to sentencing.

8. The Division issued notices of determination assessing penalties and interest on the underlying tax amounts as outlined above to petitioners as follows: Notice # L-033269794 dated January 29, 2010 to Steven Dvorak, Notice # L-033140986 dated January 4, 2010 to Triple C Retail Corporation and Notice # L-033269666 dated February 8, 2010 to Triple C Retail Corp. - Tinderbox #362.

CONCLUSIONS OF LAW

A. Petitioners argue that the amount of the restitution, which represented the full tax liability as asserted by the Division, as part of the plea agreement in the criminal case was in full satisfaction of any civil liability. Petitioners state that, at the time the confessions of judgment were executed, no other document indicated any further amount was due and owing. Petitioners assert that the only additional requirements to the plea agreement addressed by the parties concerned the payment plan for the full restitution amount. Petitioners claim that the plea agreement constitutes a bargained for exchange for a specific amount and, as such, is a contract that binds both the Division and petitioners.

B. Petitioners' plea agreement did satisfy the criminal liability. However, the Division is not restricted, as a matter of law, from asserting both interest and civil penalties based upon the same facts and the same time period (*see* Penal Law § 60.27[6]; ***Matter of N.T.J. Ligs.***, Tax Appeals Tribunal, May 7, 1992). Since the notices were properly issued by the Division, it is petitioners' burden of proof to show that, based on the plea agreement, the amounts set forth in the notices are erroneous because of some promise made by the district attorney that petitioners relied upon to their detriment (*see Matter of Sona Appliances*, Tax Appeals Tribunal, March 16, 2000; ***Matter of Miras***, Tax Appeals Tribunal, October 22, 1992; ***Matter of N.T.J. Ligs.***). There is no support in this record for a conclusion that the Division agreed, either expressly, or through the District Attorney's office, that as a result of being charged with criminal offenses relating to their taxpaying responsibilities, it would not pursue both interest and civil penalties in this case.

C. The petitions of Steven Dvorak, Triple C Retail Corporation and Triple C Retail Corp.
- Tinderbox #362 are denied and notices of determination L-033269794, L-033140986 and L-
033269666 issued to petitioners, respectively, are sustained.

DATED: Albany, New York
January 3, 2013

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE