

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	
<b>EUGENE BOISSIERE</b>	:	
<b>AND</b>	:	DECISION
<b>JASON KRYSTAL</b>	:	DTA NOS. 824467,
	:	824937 AND 824938
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period September 1, 2007 through	:	
May 31, 2009.	:	

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Petitioners, Eugene Boissiere and Jason Krystal, filed an exception to the determination of the Administrative Law Judge issued on September 18, 2014. Petitioners appeared by Hodgson Russ LLP (Timothy P. Noonan, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioners filed a letter brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Neither party requested oral argument. The six-month period for the issuance of this decision began on January 28, 2015, the date petitioner's reply letter brief was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioners were persons required to collect sales tax on behalf of Ask 244, LLC, pursuant to Tax Law §§ 1131 (1) and 1133 (a).

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except that finding of fact 7, which discussed petitioners' proposed findings of fact, has been omitted. We note that the facts are not in dispute.

1. Ask 244, LLC (the LLC) is a limited liability company that was assessed sales and use tax for the period June 1, 2004 through May 31, 2009 in the amount of \$735,899.91, plus interest.

2. Petitioners, Eugene Boissiere and Jason Krystal, held membership interests in the LLC of 14.9044% and 13.522%, respectively.

3. The Division of Taxation (Division) issued a notice of determination, dated November 15, 2010, to petitioner Eugene Boissiere that assessed sales and use taxes for the period September 1, 2007 through May 31, 2009 in the amount of \$251,647.90 plus penalty and interest for a balance due of \$429,014.06. On the same date, the Division issued a notice of determination to petitioner Jason Krystal that assessed the same amount of tax, penalty and interest, over the same period of time, as had been assessed against Eugene Boissiere. Petitioners were assessed as persons required to collect tax on behalf of the LLC pursuant to Tax Law § 1133, solely as a result of their status as members of the LLC.

4. On the basis of negotiations between petitioners and the Division, petitioners' liabilities have been reduced to reflect their ownership in the business: Jason Krystal's liability has been reduced to \$18,510.42 plus applicable interest and Eugene Boissiere's liability has been reduced to \$20,202.81 plus applicable interest.

5. Neither petitioner had managerial responsibility, the ability to hire and fire employees, knowledge of or control over the LLC's financial affairs, nor did either petitioner have the authority to sign the LLC's tax returns.

6. Petitioners did not participate in the audit of the LLC and do not know the basis of how the tax was computed.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge noted that the definition of persons responsible to collect sales tax under Tax Law § 1131 (1) includes any member of a limited liability company, and he determined, accordingly, that petitioners' status as LLC members rendered them liable for sales tax due from the LLC pursuant to Tax Law § 1133 (a). He noted further that this Tribunal reached the same conclusion with respect to LLC members in *Matter of Santo* (Tax Appeals Tribunal, December 23, 2009). He also noted that the language of Tax Law § 1131 (1) is clear and unambiguous and therefore may not be ignored.

***ARGUMENTS ON EXCEPTION***

Petitioners do not dispute that the language of Tax Law § 1131 (1) imposes per se responsible person liability on any member of a limited liability company. They assert, however, that such language conflicts with New York Limited Liability Company Law (LLC Law) § 609 (a), which provides that an LLC member may not be held liable for an LLC's liabilities "solely by reason of being such member." Petitioners contend that this conflict results from a mistake by the drafters of this legislation, which contained many Tax Law changes necessitated by the concomitant enactment of the LLC Law in 1994 (*see* L 1994, ch 576). They suggest that the conflict may be resolved by considering the object of the 1994 legislation, which was the creation of the LLC form of business in New York. Petitioners note that an important feature of

an LLC is limited liability for its members (*see* LLC Law § 609 [a]). They assert that the “unlimited liability” for LLC members under Tax Law § 1131 (1) impermissibly negates the protections afforded petitioners as LLC members under LLC Law § 609 (a) and thus contravenes the asserted legislative purpose underlying the enactment of the LLC Law. Accordingly, petitioners contend that LLC Law § 609 (a) precludes the imposition of liability against them herein.

The Division contends that the Administrative Law Judge properly determined that petitioners are subject to per se responsible person liability with respect to the sales tax obligations of the LLC pursuant to Tax Law § 1131 (1) and *Matter of Santo*.

#### ***OPINION***

We affirm the determination of the Administrative Law Judge.

Tax Law § 1133 (a) imposes personal liability for sales and use taxes upon all persons required to collect such taxes.

The term “persons required to collect tax” is defined in Tax Law § 1131 (1) to include every vendor of tangible personal property or services and:

“also include[s] any officer, director or employee of a corporation . . . , any employee of a partnership, any employee or manager of a limited liability company . . . who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company . . . in complying with any requirement of this article; *and any member of a partnership or limited liability company*” (emphasis added).

The definition of persons required to collect tax was amended in 1994 (L 1994, ch 576) to include members of an LLC. The 1994 amendment also added to the definition employees and managers of an LLC who are “under a duty to act” for the LLC.

The same bill (L 1994, ch 576) created the New York LLC Law. As noted, petitioners cite LLC Law § 609 (a) in support of their position herein. That section provides:

“Neither a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company (including a person having more than one such capacity) is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities or participating (as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company.”

As we have previously held, and as the language of Tax Law § 1131 (1) plainly states, the definition of persons required to collect sales tax includes members of an LLC (*see Matter of Franklin*, Tax Appeals Tribunal, May 14, 2015; *Matter of Santo*). Accordingly, as such members, petitioners were personally liable for sales and use taxes due from the LLC pursuant to Tax Law § 1133 (a).

We disagree with petitioners’ contention that LLC Law § 609 (a) precludes the imposition of liability against as persons required to collect sales tax. The text of Tax Law § 1131 (1) is unambiguous. “Long settled principles of statutory interpretation” require us to give effect to clear language (*Matter of Golub Corp. v New York State Tax Appeals Trib.*, 116 AD3d 1261, 1263 [2014]; *see also Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006] [“the statutory text is the clearest indicator of legislative intent”]). Petitioners’ proposed interpretation of Tax Law § 1131 (1) renders substantive statutory language superfluous. Such a construction is to be avoided (*see Matter of Branford House v Michetti*, 81 NY2d 681, 688 [1993]).

We also note that the 1994 amendment imposing per se liability on LLC members treats such members in a manner similar to partners in partnerships, who had been subject to such per

se liability under Tax Law § 1131 (1) prior to the 1994 amendment. This pairing of partners and LLC members under the responsible person definition parallels the 1994 enactment of Tax Law § 2 (6) (also part of L 1994, ch 576) that includes “LLC” and “member” within the definition of “partnership and partner,” unless the context requires otherwise. These two 1994 amendments to the Tax Law indicate a legislative intent to treat LLCs and partnerships similarly. We note further that, in amending Tax Law § 1131 (1) in 1994 to impose responsible person liability upon individuals associated with LLCs, the Legislature could have made LLC members responsible persons under the “duty to act” standard, as it did with LLC managers and employees, but chose not to. This legislative choice supports the legislative intent reflected in the statute’s unambiguous language.

Additionally, we note that petitioners’ liabilities as responsible persons herein have been reduced to reflect their respective ownership interests in the LLC (*see* Finding of Fact 4). This reduction was made pursuant to a Division policy to provide such relief (which also includes cancellation of penalties) to LLC members with minority ownership interests who are not “under a duty to act” for the LLC (*see* NY St Dept of Taxation & Fin Technical Memorandum TSB-M-11[17]S [2011] [“New Policy Relating to Responsible Person Liability Under the Sales Tax Law”]). The Division’s policy thus maintains per se liability for LLC members, but ameliorates the “harsh consequences” that can result from the assertion of such liability against minority investors with no involvement in business operations (*id.*). Given the application of this policy in the instant matter, we see no unjust or unreasonable result in the assertion of per se liability against petitioners to warrant a departure from the literal interpretation of the words used in Tax Law § 1131 (1) (*Zappone v Home Ins. Co.*, 55 NY2d 131, 137 [1982] [“Literal interpretation of

the words used will not be accorded when to do so will . . . produce inequality, injustice or absurdity [citations omitted]”).

We dismiss as speculative petitioners’ contention that the creation of per se liability for LLC members pursuant to the 1994 amendment to Tax Law § 1131 (1) was a mistake by the drafters of the legislation.

“Generally, a court may not assume the existence of legislative error and change the plain language of a statute to make it conform to an alleged intent. However, a court may apply a statute by disregarding a clerical error in legislation so as to make to corrected statute conform to the Legislature’s true intent, if it is established unquestionably that (1) the true legislative intent is contrary to the statutory language, and (2) the mistake is due to inadvertence or clerical error (citations omitted)” (*DaimlerChrysler Corp.* at 686).

Here, as discussed, the language of Tax Law § 1131 (1) evinces a legislative intent to impose per se responsible person liability on members of LLCs and partnerships. Moreover, there is no evidence in the record of inadvertence or clerical error in the drafting of the 1994 amendment to Tax Law § 1131 (1). Indeed, the error complained of by petitioners involves the substantive statutory language and is therefore not clerical in nature.

Ultimately, petitioners’ claim in the present matter is premised on an asserted inconsistency between Tax Law § 1131 (1) and the limitation on LLC members’ liability provided by LLC Law § 609 (a). Considering the foregoing discussion, we see no such inconsistency. Rather, we find that the Legislature did not intend that the limitation of liability for LLC members under LLC Law § 609 (a) should extend to sales tax responsible person liability under Tax Law §§ 1131 (1) and 1133 (a).

We acknowledge that our interpretation of Tax Law § 1131 (1) herein may effectively modify the literal language of LLC Law § 609 (a). In our view, however, this is a more reasonable reconciliation of these two provisions than petitioners’ proposed interpretation, which

would nullify an express provision in Tax Law § 1131 (1). Moreover, our interpretation is in accord with the basic rule of statutory construction that “where a general statute is in apparent conflict with a specific statute dealing with the same subject matter, the specific statute creates an exception to the general (citations omitted)” (*Williamson v 16 W. 57<sup>th</sup> St. Co.*, 256 AD2d 507, 513 [2d Dept 1998]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Eugene Boissiere and Jason Krystal is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Eugene Boissiere and Jason Krystal are granted to the extent indicated in conclusion of law E of the determination, but are denied in all other respects; and
4. The notices of determination dated November 15, 2010, modified as indicated in conclusion of law E of the determination, are sustained.

DATED: Albany, New York  
July 28, 2015

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
Commissioner