STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **YEL-BOM'S SERVICE CENTER, INC.** **T/A MORE PETROLEUM** 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, 1981 through August 31, 1982.	DECISION
In the Matter of the Petition of **PAUL MOBLEY,** **OFFICER OF YEL-BOM'S SERVICE CENTER, INC.** 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, 1981 through August 31, 1982.	

Petitioners Yel-Bom's Service Center, Inc. T/A More Petroleum, 20 Sheridan Boulevard, Inwood, New York 11696 and Paul Mobley, officer of Yel-Bom's Service Center, Inc., 981 Willmohr Street, Brooklyn, New York 11212 filed an exception to the determination of the Administrative Law Judge issued on August 19, 1988 in which their petitions 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, 1981 through August 31, 1982 (File Nos. 801302 and 801298, respectively) were denied. Petitioners appeared by Stanley Cohen, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kevin Cahill, Esq., of counsel).

Neither party filed a brief. Oral argument was not requested.

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

ISSUES

I. Whether the Division of Taxation properly determined, upon audit, that petitioner Yel-Bom's Service Center, Inc. underreported and underpaid sales taxes during the period March 1, 1981 through August 31, 1982.

II. Whether, if so, the Division has met its burden of proving that the imposition of a fraud penalty in addition to the assessment of taxes was appropriate.

III. Whether, assuming that a fraud penalty is not warranted in this matter, the alternative imposition of penalty pursuant to Tax Law § 1145 former (a)(1) as requested by the Division is appropriate.

IV. Whether petitioner Paul Mobley was a person responsible for the collection and remittance of tax on behalf of petitioner Yel-Bom's Service Center, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) during the period in question.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below except that we modify findings of fact "4" and "13" and find additional facts as indicated below.

On April 20, 1984, the Division issued to petitioner Yel-Bom's Service Center, Inc. T/A More Petroleum ("Yel-Bom's") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1981 through August 31, 1982 in the amount of $196,800.44, plus a fraud penalty (Tax Law § 1145 former [a][2]) and interest. On the same date, the Division issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the identical period and in the identical amounts (including the fraud penalty) to petitioner Paul Mobley, asserting his liability as an officer of Yel-Bom's for the taxes assessed against Yel-Bom's.

The aforementioned notices were issued as the result of a Division field audit of the business operations of Yel-Bom's. During the period in issue, Yel-Bom's operated a gasoline

station located at 20 Sheridan Boulevard, Inwood, New York. The station location consisted of a building and six gasoline pumps with twelve nozzles for dispensing gasoline. In general, at least nine of such nozzles were always in operable condition. The station location included three underground 3,000-gallon gasoline tanks. Yel-Bom's sold only gasoline and did not have facilities for nor did it perform any repair services or parts sales. The station location was owned by General Oil Company ("General"). General leased the station location to Yel-Bom's and, for most of the period in question, was also Yel-Bom's supplier of gasoline.

Yel-Bom's sole shareholder was petitioner Paul Mobley, who was also Yel-Bom's president. Mr. Mobley commenced operation of Yel-Bom's in or about February or March of 1981 as a sole proprietorship, and shortly thereafter incorporated Yel-Bom's. Yel-Bom's leased the station location for approximately $3,000.00 in rent per month, in addition to which Yel-Bom's paid the expenses of employee wages, routine maintenance, sanitation and utilities. Yel-Bom's was an independent station (as opposed to a station operated or leased by a branded or major oil company, e.g., Shell, Mobil, Amoco). Yel-Bom's did not sell gasoline via credit card.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> In or about August of 1982, the Division commenced its audit of the business operation of Yel-Bom's. An auditor visited the premises in order to gather information as to the business location and its size and method of operation. On the day of this August 1982 visit, the auditor noted pump prices (selling prices) for gasoline of $1.24-9/10 per gallon (regular gasoline) and $1.29-9/10 per gallon (unleaded gasoline). Yel-Bom's did not sell premium grades of gasoline. During the auditor's visits to Yel-Bom's he saw "very few" automobiles purchase gasoline. The auditor said he would not characterize Yel-Bom's as a "very busy" gas station.[1]

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[1]We modified the Administrative Law Judge's finding of fact "4". It originally read:

> "4. In or about August of 1982, the Audit Division commenced its audit of the business operations of Yel-Bom's. An auditor visited the premises in order to gather information as to the business location and its size and method of operation. On the day of this August 1982 visit, the auditor noted pump prices (selling prices) for gasoline of $1.24-9/10 per gallon (regular gasoline) and $1.29-9/10 per gallon (unleaded gasoline). Yel-Bom's did not sell premium grades of gasoline."

The auditor requested that Mr. Mobley provide Yel-Bom's business books and records, but was able to secure only a checkbook and certain cancelled checks. The auditor noted that there were no daily sales sheets, no general ledger, no delivery invoices and no records of daily pump prices, nor any worksheets accompanying Yel-Bom's tax returns. The auditor was advised that Mr. Mobley provided figures as to sales and purchases to his accountant who then prepared Yel-Bom's sales tax returns.

As an initial step, the auditor compared Yel-Bom's sales as reported per its Federal income tax return for the fiscal year ending April 30, 1982 ($219,488.00) to a partial listing of Yel-Bom's bank deposits ($308,481.62). The auditor could determine no explanation for the $88,993.60 difference between these two items nor was any explanation offered on behalf of Yel-Bom's. The auditor also initially reviewed gasoline purchases according to the check stubs in petitioner's checkbook for the period spanning March 1981 through August 1982, determining the purchase of 369,882 gallons of gasoline at a cost of $426,904.62. The auditor utilized a selling price of $1.25 per gallon and applied the same to the number of gallons purchased (369,882) to compute audited taxable sales of $462,354.00. This figure, when compared to taxable sales as reported per Yel-Bom's sales tax returns ($269,604.00), resulted in additional taxable sales of $192,750.00 with sales tax computed thereon in the amount of $13,955.68.

Subsequent to the initial audit procedures described above the auditor requested, and received from General, information as to Yel-Bom's purchases of gasoline. The auditor utilized this General Oil Company information for the period March 1981 through February 1982, at which time General entered into Chapter 11 (bankruptcy) proceedings. Thereafter Yel-Bom's supplier was Pride Oil Company ("Pride"). Since the auditor did not have any information from Pride, he compared Yel-Bom's reported gallonage versus General's third party information as to gallonage and determined a reporting error of 551 percent. This error rate was then applied as the means of determining gallonage purchased during the period when Pride was Yel-Bom's supplier (February 1982 through the end of the audit period). This purchase information from

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We added the last two sentences to more fully reflect the record.

General (including application of the described error rate) indicated purchases by Yel-Bom's in the amount of 2,408,232 gallons for the audit period. The auditor applied the same $1.25 per gallon selling price to said purchases and computed audited taxable sales of $3,010,290.00. This figure resulted in a tax liability of $215,993.08 which, when compared to the amount of tax reported and paid by Yel-Bom's ($19,192.64), resulted in a deficiency of $196,800.44.

Without further records or explanation for the vast discrepancies described above, the auditor determined to rely upon the third party gasoline purchase information from General and, accordingly, issued the notice of determination herein contested in the amount of $196,800.44.

As related to this proceeding, General, Pride, and Inwood Trucking Company ("Inwood") were, during the period in issue, owned or controlled by the same individuals. These individuals did not, however, own or control Yel-Bom's. Inwood provided all trucking services to General and Pride. Deliveries were made to Yel-Bom's by Inwood's delivery trucks, with the records of such deliveries being forwarded from Inwood to General for billing to Yel-Bom's. Yel-Bom's location was directly across the street from General and General utilized Yel-Bom's location as a "dumping station". More specifically, as delivery trucks returned to General's terminal, any remaining amounts of gasoline (partial loads) were delivered into Yel-Bom's underground tanks so that the trucks could start their next round of deliveries from General carrying full loads out of General's terminal. These partial or "broken" loads would be in amounts of 250, 500, 1,000 or 1,500 gallons or some other partial amount. By contrast, a "city spec" truck (a truck in compliance with New York City gasoline transport regulations) could carry a full load of 3,000 gallons, and tractor-trailers carried between 8,500 to 9,000 gallons. Inwood's trucks generally made deliveries on a 24-hour basis, according to the demand for product. It was not specified as to whether the practice of using Yel-Bom's as a dumping station continued into and during the period when Pride was Yel-Bom's supplier.

Yel-Bom's location was in an economically-depressed area subject to high crime rates. During the period in question, Yel-Bom's office location was robbed allegedly on an average of twice per week. The result of these robberies was generally that some cash was taken and that

records were strewn about the office. Yel-Bom's submitted in evidence a series of police reports detailing robberies at the station location. These reports indicated a total of 16 separate robberies listing various amounts of currency taken, ranging in dollar amount from $15.00 to a high of $390.00. Three of such robberies, however, occurred after the period in issue. There were a number of other gasoline stations in the immediate vicinity of Yel-Bom's station, many of which sold branded or major oil company brands of gasoline (e.g., Shell, Mobil, Amoco).

Petitioner Paul Mobley did not work at the station location on a day-to-day basis, but visited the station approximately three days per week in order to check on the records and the operation of the station. Mr. Mobley commenced doing business at the station at a time when the station was vacant. The station was operated initially from 6:00 A.M. to midnight and then, in approximately June of 1981, the hours were extended from 6:00 A.M. to 2:00 A.M., with Yel-Bom's employing a watchman to stay on the premises from 2:00 A.M. until 6:00 A.M. However, no sales of gasoline occurred between 2:00 A.M. and 6:00 A.M.

In terms of records, the only credit sales made by Yel-Bom's were to employees of Inwood, General and Pride who purchased gasoline for their cars. Petitioner kept a daily record of these customers' purchases, which amounts were reconciled and paid monthly. After payment, the daily records and, apparently, the monthly reconciliations were destroyed. It was alleged that daily pump readings were taken and that a ledger of sales and purchases was maintained by a bookkeeper who worked at the station location one day per week. However, no documentary evidence of such readings was provided, nor was any such ledger, or portion thereof, introduced. Mr. Mobley would take dipstick readings on the tanks when he was at the station and try to match his results with the billings for product as received from General. Discrepancies in amounts were, according to Mr. Mobley's testimony, taken up with and resolved through Inwood which entity had the relevant delivery records.

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

> Yel-Bom's underground tanks were tested in 1981 to determine if any leakage was occurring. This 1981 test proved

> negative. However, in August of 1983, a second test was performed which determined leakage in two of the three underground tanks. One of the tanks was repaired the same day, while the second tank was required to be closed and removed. The company which tested the tanks reported that the closed tank had leaked a "substantial" amount of gasoline over a period of "some time."[2]

Although Yel-Bom's tax returns were not offered in evidence, Mr. Mobley admitted at hearing that he signed the sales tax returns during the period in question.

We find the following facts in addition to those found by the Administrative Law Judge. The hearing on this matter was begun on October 27, 1987. On this date petitioners' representative was Katherine Dembrosky, Esq. (Exhibit D). The portion of the hearing held on this day consisted primarily of the introduction of the jurisdictional documents and a short direct examination of the auditor who conducted the audit. A continuance of the hearing was requested by petitioners' representative. The continued hearing was held on January 6, 1988. At this portion of the hearing petitioners were represented by Stanley I. Cohen. The power of attorney form appointing Mr. Cohen revokes that appointing Ms. Dembrosky (Exhibit I). The bulk of the hearing took place on the second day and included further testimony from the auditor as well as testimony from Paul Mobley and two other witnesses for petitioners.

OPINION

In the determination below the Administrative Law Judge found that petitioners failed to sustain their burden of proving that the Division's audit method was not reasonably calculated to reflect the taxes due; nor did petitioners prove that the assessment was inaccurate. The Administrative Law Judge found that the Division proved with clear and convincing evidence that the imposition of a fraud penalty was appropriate, making the imposition of an alternative

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[2]The Administrative Law Judge's finding of fact "13" read as follows:

> "13. Yel-Bom's underground tanks were tested in 1981 to determine if any leakage was occurring. This 1981 test proved negative. However, in August of 1983, a second test was performed which determined leakage in two of the three underground tanks. One of the tanks was repaired the same day, while the second tank was required to be closed and removed."

We added the last sentence to more thoroughly reflect the outcome of the gasoline tank tests.

penalty unnecessary. The Administrative Law Judge also found that Paul Mobley was a person required to collect and pay sales and use tax on behalf of petitioner Yel-Bom's.

On exception, petitioners argue that they did not fail to meet their burden of proving the audit method was unreasonable and the assessment was inaccurate. Petitioners also argue that the Division failed to prove that petitioners fraudulently failed to pay their taxes. Petitioners did not specifically challenge the conclusion that Paul Mobley is personally liable for the tax due from Yel-Bom's.

In support of their exception, petitioners argue that the use of average selling prices of gasoline in the audit resulted in an inaccurate assessment; the third party information upon which the auditor relied was unsubstantiated by witnesses whom petitioners could cross-examine; and the Division's sole reliance on third party information to support its assessment was contrary to law. Additionally, petitioners argue that sales records were kept but were lost during robberies at the station; gasoline delivery amounts were often the subject of dispute between General Oil and petitioners, calling into question the accuracy of the third party report. Petitioners argue that evidence of substantial leakage in one of Yel-Bom's gasoline holding tanks, Yel-Bom's location in an economically depressed area, and the existence of numerous other gas stations which competed for gasoline sales dispute the third party report's accuracy. Petitioners say their evidence disputing the plausibility of the third party report makes the report unreliable.

With regard to the fraud penalty, petitioners assert that no evidence exists in the record warranting the conclusion that petitioners intentionally reported false sales. Additionally, petitioners say the Division's reliance on the uncorroborated third party information to prove fraud erroneously shifted the burden of proof to petitioners.

Having filed no response to the exception the Division apparently agrees with the Administrative Law Judge's determination.

We affirm the Administrative Law Judge's finding that petitioners failed to prove that the sales tax assessment was inaccurate or the audit methodology was unreasonable.

Tax Law § 1135 states that every person required to collect taxes "shall keep records of every sale, . . . and of all amounts paid, charged or due thereon, . . . such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum" upon which the sales tax shall be stated separately. Upon audit, the Division must make an explicit request for the taxpayer's records (see, Matter of Christ Cella v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858), review the records available (Matter of King Crab Restaurant v. Chu, 134 AD2d 51, 522 NYS2d 978; Matter of Max Service Center, Tax Appeals Tribunal, September 29, 1988) and find them to be inadequate before resorting to external indices to conduct an audit (Matter of Chartair v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41; Matter of Cafe Europa, Tax Appeals Tribunal, July 13, 1989). The Division's resorting to external indices to estimate the tax due is justified when a taxpayer does not have the records necessary to verify his taxable sales (Matter of Licata v. Chu, 64 NY2d 873, 487 NYS2d 552). It is an auditor's duty to select an audit method which would reasonably reflect the taxes due (Matter of W.T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157, cert denied 355 US 869), although exactness in the outcome of the audit is not required (Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, 177, affd 44 NY2d 684, 405 NYS2d 454; Matter of Cinelli, Tax Appeals Tribunal, September 14, 1989). Once an appropriate audit has been performed, the resulting assessment by the Division is presumed correct (Matter of Cousins Service Station, Tax Appeals Tribunal, August 11, 1988; see, Goldberg v. Commr., 239 F2d 316, 57-1 USTC ¶ 9261); the Division does not have the burden of proving the propriety of its assessment (Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment was erroneous (Matter of Scarpulla v. State Tax Commn., 120 AD2d 842, 502 NYS2d 113) or the audit methodology was unreasonable (Matter of Blodnik v. State Tax Commn., supra; Matter of Cousins Service Station, supra).

The petitioners have failed to sustain their burden of proving the audit methodology was unreasonable and have failed to overcome the presumption of correctness attributed to the sales tax assessment. Petitioners never made available records of each sale. After repeated requests,

the only records the auditor received were bank statements showing deposits, check disbursements and sales tax returns. No purchase records, no day sheets, and no individual receipts of actual sales were made available to the auditor. In the absence of such records, the use of estimate techniques was clearly justified (see, Matter of Licata v. Chu, supra).

Because of petitioners' failure to maintain adequate records, their contention that use of average selling prices resulted in an inaccurate assessment must fail. Average gasoline selling prices could reasonably be used for the audit period in light of the fact that no actual sales records were kept (see, Matter of S.A. Service Station, State Tax Commn., August 14, 1987; see also, Matter of R&R Auto and Truck Repair, State Tax Commn., April 15, 1987; cf., Matter of Parkway Auto Service Center, State Tax Commn., June 18, 1987 -- [where documentation of actual gasoline selling prices provided by the taxpayer was used in lieu of average selling prices]). Additionally, petitioners offered no documentary evidence to prove that the third party information which was used to calculate the assessment and which contained evidence of the number of gallons of gasoline supplied to Yel-Bom's was erroneous. Even though petitioners presented two witnesses to testify that the third party information exaggerated and overestimated the amount of gasoline sold, any inexactness in the assessment is due to petitioner Paul Mobley's failure to maintain the necessary records and is of their own making (see, Sol Walba, Inc. v. State Tax Commn., 127 AD2d 943, 512 NYS2d 542). Additional evidence of a "substantial loss of gasoline" over a period "of some time" does not meet petitioners' burden of proving the amount of gasoline assessed as sold was overestimated. Mere assertions that the area in which petitioner resided was economically depressed and that competition from other gas stations was strong, making the assessment implausible also fails to meet petitioners' burden. We agree with the Administrative Law Judge that the general testimonial evidence offered by petitioners is inadequate to prove error in the amount of tax assessed (see, Matter of Guiragossian v. Chu, 130 AD2d 901, 515 NYS2d 670).

In their exception petitioners maintain that daily records and monthly reconciliations were kept but that those records were destroyed in the numerous robberies which took place at the gas

station. We find this assertion unsupported by the record which reveals no evidence that sales records were maintained in the first place. Petitioners' accountant testified that the sales information he relied upon in filing sales tax returns came from a cash receipts/cash disbursement ledger and that this ledger along with a checkbook comprised all of petitioners' records.

Petitioners had the power to subpoena the General Oil employee who reported the purchase records or to subpoena Inwood's records to dispute the assessment through cross-examination (see, Matter of Kucherov v. Chu, infra; see also, Matter of Cousins Service Station, supra). They did not do so. Therefore, petitioners failed to meet their burden of proving the sales tax assessment was erroneous or the audit methodology which relied on average selling prices and third party gasoline purchase records was unreasonable.

Petitioners argue that the Division's complete reliance on third party information to assess sales tax due is contrary to law. As stated previously, resort to outside sources such as purchase records to determine tax due is proper when petitioners fail to maintain adequate sales records (Matter of Urban Liquors v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138; Matter of Cousins Service Station, supra). Third party information supplying evidence of gasoline purchases can be used to estimate tax due when a taxpayer's records are insufficient (Flanagan v. State Tax Commn., AD2d , 546 NYS2d 205; Matter of Don Pat Services, State Tax Commn., March 11, 1986). This is so in spite of the fact that the information is hearsay (see, Matter of Kucherov v. Chu, 147 AD2d 877, 538 NYS2d 339; see also, Matter of Mira Oil Co. v. Chu, 114 AD2d 619, 494 NYS2d 458, 459, lv denied, 68 NY2d 602, 505 NYS2d 1026). Petitioners' contention that reliance on General Oil's gasoline purchase information to assess sales tax due was contrary to law is therefore without merit.

We next address the Administrative Law Judge's determination that the Division proved with clear and convincing evidence that petitioners fraudulently failed to pay sales tax. We reverse the Administrative Law Judge's finding of fraud. In proving that a fraud penalty was properly imposed, the Division must show that petitioner Mobley and the corporation, Yel-

Bom's, acting through its officer, acted deliberately, knowingly, and with specific intent in violating the Tax Law (Matter of Cinelli, Tax Appeals Tribunal, September 14, 1989). Fraud can be proven with indirect evidence of a taxpayer's entire course of behavior and by drawing conclusions therefrom (see, Biggs v. Commr., TC Memo 1985-303, 50 TCM 203, 207; Matter of Cousins Service Station, supra) but the evidence must be "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, Tax Appeals Tribunal, May 5, 1988 quoting Matter of Shutt, State Tax Commn., July 13, 1982). Fraud must be established with affirmative evidence and may not be presumed (see, Intersimone v. Commr., TC Memo 1987-290, 53 TCM 1073);[3] therefore, mere suspicion of fraud from the surrounding circumstances is not enough (see, Goldberg v. Commr., supra).

While substantial underreporting of taxes owed is strong evidence of fraud (Matter of Cousins Service Station, supra; see, Merritt v. Commr., 301 F2d 484, 62-1 USTC ¶ 9408, at 84,167), substantial underreporting alone is not enough to establish fraud (see, Intersimone v. Commr., supra). Additionally, the Division cannot rely solely on the notice of determination to prove underreporting nor can it rely on the presumption of correctness accorded its tax assessment and notice of determination in sustaining its burden of proving fraudulent underreporting (Matter of Cousins Service Station, supra; see, George v. Commr., 338 F2d 221, 64-2 USTC ¶ 9855). To permit the Division to satisfy its burden of proving fraud by relying on the assessment that was sustained only because the petitioners had failed to overcome it, would be to allow the Division "to raise [itself] by [its] own bootstraps" (Matter of Cousins Service Station, supra quoting George v. Commr., supra; see, Jordan v. Commr., TC Memo 1986-389, 52 TCM 234, 237). This case is strikingly similar to Matter of Cousins Service Station wherein the Division relied solely on the third party purchase report. In Cousins Service Station, as here, the

[3]Since New York sales tax penalties are modeled after federal law, we look to federal cases for guidance when addressing the issue of fraud (Matter of Uncle Jim's Donuts, Tax Appeals Tribunal, October 5, 1989; Matter of Ilter Sener, supra).

only evidence which corroborated the assessment was the sales tax field audit report and the auditor's testimony. In both cases, the flaw in the auditor's report was that its figures were based solely on an unsubstantiated third party confirmation purchase report. The confirmation report in this case was a computer print-out supplied by General Oil; however, General Oil did not originate the purchase records. Inwood Trucking, which delivered General Oil's gasoline to petitioners kept non-computerized records of its deliveries and supplied those records to General. While the Division's auditor testified as to the process by which it received the computer print-out and offered evidence of the specific request for the purchase records (cf., Matter of Cousins Service Station, supra, [where the Division did not offer evidence tracing the process by which it obtained the report]), sole reliance upon such indirect, hearsay purchase information without any verification of those records from their source (e.g., Inwood Trucking) makes the confirmation report evidence very tenuous for proving substantial underreporting as an element of fraud.

While hearsay is admissible and can be relied on in an administrative proceeding, the weight accorded the evidence may be balanced against the fact that it is hearsay (see, Matter of Cafe Europa, supra). Because the validity of the report was called into question by much of the evidence at the hearing, we conclude it cannot be accorded the weight attributed it by the Administrative Law Judge. The enormity of the gasoline purchases was called into question. Petitioners presented two disinterested witnesses, one by an affidavit of the delivery supervisor at Inwood Trucking who supervised gasoline deliveries to Yel-Bom's. Petitioners also called the Vice-President of Inwood Trucking from whom petitioners purchased their gasoline. Both of these witnesses testified that they did not deliver nor did they sell anywhere near the large amounts of gasoline to Yel-Bom's which were listed in the report. The vice-president of General Oil testified that he repeatedly negotiated disputed gasoline delivery amounts with petitioner Mobley during the course of their business dealings, calling into question the accuracy of the General Oil print-out. We conclude that the evidence in the record discrediting the third party report coupled with the tenuous connection of the report to petitioners renders the report inadequate to prove fraudulent underreporting, absent any verification of the report.

We are once again in the position of holding that a Notice of Determination is sustained because petitioners have failed to overcome it and at the same time deciding that the Division did not establish a primary element of fraud--substantial and intentional underreporting of income. As we discussed in Matter of Cousins Service Station, the distinction between our two findings stems from the fact that petitioners had the burden of proving the assessment was inaccurate and/or unreasonable and the Division had the burden of proving Yel-Bom's underreporting rose to the level of fraud. Both parties failed to carry their burden (see, Windsberg v. Commr., TC Memo 1978-101, 37 TCM 455). In cases where the two issues are raised, the government has often prevailed on the deficiency and not on the fraud claim (see, George v. Commr., supra; see also, Valetti v. Commr., 260 F2d 185, 58-2 USTC ¶ 9869; Olinger v. Commr., 234 F2d 823, 56-2 USTC ¶ 9656; Matter of Don Pat Service, supra).

Our review of the record does not reveal any other indicia of fraud. The evidence showed that petitioner Mobley gave the Division's auditor what records he had (cf., Jordan v. Commr., supra, [where, during an investigation of his tax return, the petitioner lied to the auditor, forged documents and refused to produce certain records]; cf., Hershberger v. Commr., TC Memo 1983-446, 46 TCM 883--[where taxpayer refused to cooperate with the auditor]) and allowed the auditor access to his accountant. The record was devoid of any evidence that petitioner Mobley fabricated incredible stories to explain discrepancies in the record (cf., King v. Commr., TC Memo 1978-351, 37 TCM 1496), that he created non-existent entities to explain disappeared stock (cf., Matter of Kucherov v. Chu, supra), or that he had erratic and odd banking habits to hide assets (cf., Agnellino v. Commr., 302 F2d 797, 62-1 USTC ¶ 9461). Lacking any clear and definite evidence of fraud, the record does not support the imposition of a penalty for fraud.

The Division requested that an alternative penalty for late payment be imposed pursuant to § 1145(a)(1) of the Tax Law if the finding of fraud was not sustained. In Matter of Ilter Sener, supra, we allowed the Division to seek the lesser penalty as an alternative to fraud and shifted the burden of proving willful neglect to the Division. In Ilter Sener, notice in the Division's answer

of the alternative penalty was deemed adequate to allow the taxpayer an opportunity to prepare a response to the possibility of a late-payment penalty in addition to the fraud penalty.

Here, the record shows no attempt by the Division to assert the lesser penalty until the conclusion of the hearing, during summations. At this point, the Division's attorney suggested that the transcript of the first day of hearing was incorrect because it did not reflect his statement at the beginning of the hearing, seeking the lesser penalty in the alternative. Petitioners had a different representative at the second day of the hearing than they had at the beginning of the hearing. While petitioners' first representative, who was present at the second day of the hearing, said she recalled the lesser penalty request being made at the beginning of the hearing, petitioners' subsequent representative, who handled the bulk of this case, made no statement indicating that he shared this knowledge. The transcript contains nothing to show that the second representative knew, or had any way of knowing from the record, of the alternative penalty request until the close of the hearing. We note that this problem could have been avoided had the Division's attorney sought to clarify the transcript at the beginning of the second day of hearing rather than waiting until its conclusion. On the record before us, we conclude that petitioners' representative at the second part of the hearing did not know of the assertion of the lesser penalty until the close of the hearing. As we stated in Matter of Anton's Car Care Center (Tax Appeals Tribunal, November 23, 1988) "the first fundamental of due process is notice of the charges made. This principle equally applies to an administrative proceeding for even in that forum no person may lose substantial rights because of wrongdoing shown by the evidence but not charged" (id., quoting Matter of Murray v. Murphy, 24 NY2d 150, 299 NYS2d 175, 181). In Anton's Car Care Center, we held that the Division's failure to request the alternative penalty until the end of the hearing deprived the petitioners of the opportunity to prepare a response to the lesser penalty and that prejudice in such a case was presumed. We find here, as in Anton's, that petitioners were prejudiced by the Division's improper assertion of the lesser penalty and therefore, the alternative penalty cannot now be imposed.

Finally, we affirm the Administrative Law Judge's finding that petitioner Paul Mobley is a person responsible for collecting and paying sales tax on behalf of Yel-Bom's.

Tax Law § 1133(a) provides that every person required to collect sales tax shall be personally liable for such tax. A person required to collect sales tax includes an officer, director or employee of a corporation who is under duty to act for the corporation in complying with the sales tax provisions (Tax Law § 1131[1]).

It is undisputed that petitioner Paul Mobley was the sole shareholder and president of Yel-Bom's gas station. Petitioner Mobley admitted at the hearing that he signed the tax returns for the audit period in dispute. We therefore affirm the Administrative Law Judge's determination that Paul Mobley is responsible for the payment of Yel-Bom's sales tax (see, Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564, 565; see also, Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538).

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of petitioners Yel-Bom's Service Center, Inc. T/A More Petroleum and Paul Mobley, officer of Yel-Bom's Service Center, Inc. is granted to the extent that conclusion of law "D" of the Administrative Law Judge's determination is reversed and conclusion of law "C" is modified, with the result that the fraud penalty and the penalty asserted pursuant to § 1145(a)(1) are cancelled and that, except as so granted, the exception of petitioners is in all other respects denied;

2. The determination of the Administrative Law Judge is modified to the extent set forth in paragraph "1" above and except as so modified is in all other respects affirmed;

3. The petitions of Yel-Bom's Service Center, Inc. T/A More Petroleum and Paul Mobley, officer of Yel-Bom's Service Center, Inc. are granted to the extent provided in paragraph "1" above and, except as so granted, the petitions are in all other respects denied; and

4. The Division of Taxation shall modify the notices of determination dated April 20, 1984 in accordance with paragraph "1" above but such notices are in all other respects sustained.

DATED: Troy, New York
May 10, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner