

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ABERBACH ENTERPRISES, LTD. :
D/B/A ABERBACH FINE ART :
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 September 1, 1983 :
through May 31, 1986. :

In the Matter of the Petition :
of :
JULIAN ABERBACH :
OFFICER OF ABERBACH ENTERPRISES, LTD. :
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 September 1, 1983 :
through May 31, 1986. :

DECISION
DTA Nos. 807509
807510 and 807511

In the Matter of the Petition :
of :
JOACHIM (JEAN) ABERBACH :
OFFICER OF ABERBACH ENTERPRISES, LTD. :
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 September 1, 1983 :
through May 31, 1986. :

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 14, 1991 with respect to the petitions of Aberbach Enterprises, Ltd. d/b/a Aberbach Fine Art, 980 Madison Avenue, New York, New York 10021, Julian Aberbach, officer of Aberbach Enterprises, Ltd., 163 South Main Street, South Hampton, New York 11968

and Joachim (Jean) Aberbach, officer of Aberbach Enterprises, Ltd., 33 Bacon Road, Old Westbury, New York 11568 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 September 1, 1983 through May 31, 1986. Petitioners appeared by Robert Bandman, CPA. The Division of Taxation appeared by William F. Collins, Esq. (Robert Jarvis, Esq., of counsel).

The Division of Taxation did not file a brief in support of its exception. Petitioners filed a brief in opposition. Oral argument, requested by the Division, was denied.

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

ISSUE

- I. Whether petitioners have shown that the audit results were inaccurate.
- II. Whether petitioners have established reasonable cause for cancellation of penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "3," "9," "9(c)," and "10" which have been modified. We also make an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact, and the additional finding of fact are set forth below.

Petitioner Aberbach Enterprises, Ltd. operates an art gallery in New York City doing business under the name Aberbach Fine Art. A sales tax field audit of Aberbach's books and records for the period September 1, 1983 through May 31, 1986 began in May 1986. At that time, a field audit appointment letter was sent to Aberbach, requesting that all records pertaining to Aberbach's sales tax liabilities for the audit period be made available to the Division of Taxation ("Division") for its review.

Initially, the auditor communicated with Aberbach's bookkeeper, a woman named Patricia Gallagher. She informed the auditor that all records necessary for audit were available. On July 2, 1986, at the auditor's request, Ms. Gallagher provided the auditor with records for the sales

tax quarterly periods ended May 31, 1984 and November 30, 1985. Soon thereafter, Ms. Gallagher died. The auditor's log does not reveal whether he was informed of Ms. Gallagher's death; however, it does show that in August 1986, the auditor spoke with several different representatives of Aberbach who asked for postponements of the audit and stated that Aberbach was having some difficulty in assembling the records required for audit. The log also shows that by August 19, 1986, a new bookkeeper, Paula Glass, had been appointed by Aberbach.

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

The records eventually made available included: Federal and State income tax returns, a sales journal, a general ledger, a check disbursements journal, a great many sales invoices, resale certificates and shipping documents. It is difficult to determine exactly which records were and were not available because of inconsistencies in the proof offered at hearing. For instance, the auditor's checklist of available books and records indicates that a general ledger was not available, but the determination of tax due relied, in part, on a comparison of figures found in the general ledger and the sales journal. Although the auditor indicated that Aberbach's books and records were in only "fair" condition, the evidence does not establish in what way the records were deficient, other than the failure to maintain complete shipping documents. Also, the auditor testified that, after consulting with his supervisor, it was determined that a detailed audit should be performed.¹

The audit found tax due in three areas: \$444.97 was determined to be due on Aberbach's recurring expense purchases; \$1,103.61 was determined to be due on Aberbach's purchases of fixtures and equipment; and \$89,958.74 was determined to be due on additional taxable sales by Aberbach. Petitioners do not challenge the determinations of tax due in the first two areas; therefore, the remainder of this determination treats only the Division's audit of Aberbach's sales.

The Division determined Aberbach's tax liability based on a detailed audit of petitioners' books and records. Aberbach reported gross sales for the audit period of \$5,125,336.00 and taxable sales of \$398,463.00 which yields nontaxable sales of \$4,726,873.00. The audit began then with a review of Aberbach's records to determine whether there was documentation to

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We modified finding of fact "3" by adding a sentence to the end of this finding.

verify the claimed nontaxable sales. The auditor transcribed all sales posted to Aberbach's sales journal which did not show sales tax collected, thus calculating nontaxable sales per Aberbach's sales journal of \$4,878,938.62. Information taken from the journal included the name and address of the customer, where shown, and the amount of the sale. The auditor then asked Aberbach to provide a sales invoice for each sale shown in the journal and proof that the sale was not subject to sales tax, such as a resale certificate or shipping documents showing delivery outside of New York. There is no evidence that Aberbach was unable to provide sales invoices for any of these sales. Based on a review of the sales invoices and related documentation, the auditor concluded that Aberbach was unable to substantiate the nontaxable status of sales in the amount of \$2,308,592.97. A great majority of these appear to be sales to out-of-state customers for which Aberbach was unable to provide shipping documents or other evidence that the artwork was delivered out of state.

Aberbach's general ledger contained a monthly summary of sales. The auditor compared these monthly summaries with sales posted to the sales journal and found a discrepancy of \$498,733.97 (total sales in this summary section of the general ledger amounted to \$5,377,672.59). The discrepancy between sales per the general ledger and sales per the sales journal was treated as unreported sales subject to sales tax.

The Division then added unsubstantiated nontaxable sales to unreported sales to determine additional taxable sales of \$2,807,326.94, with a tax due on that amount of \$231,604.47. A statement of proposed audit adjustment in that amount was issued to Aberbach.

Following the issuance of the statement of audit adjustment, a conference was held between representatives of Aberbach and the Division. In preparing for the conference, the auditor realized that he made an error in calculating unreported sales. The auditor had transcribed from the sales journal only those sales upon which no sales tax was collected, and he had not transcribed those sales upon which Aberbach did charge and collect sales tax. In calculating unreported sales, the auditor had subtracted claimed nontaxable sales per the sales journal from gross sales (i.e., taxable and nontaxable sales) per the general ledger. Therefore,

the discrepancy between the two was explained, at least in part, by the taxable sales posted to the sales journal. Since the auditor had not made a record of these, he could not perform an accurate reconciliation of the sales journal and general ledger. To overcome this problem, he added Aberbach's reported taxable sales (taken from Aberbach's filed sales tax returns) to the nontaxable sales shown in the sales journal to calculate gross sales per the sales journal ($\$398,463.00 + \$4,878,938.62 = \$5,277,401.62$). This amount was subtracted from sales per the general ledger ($\$5,377,672.59$) to calculate additional audited sales of $\$100,270.97$. The Division requested sales invoices documenting these sales. References in the audit report to missing sales invoices refer to these audited sales, determined on the basis of the discrepancy between the general ledger and the sales journal.

At the conference, Aberbach presented documentation which substantiated the nontaxable status of sales amounting to $\$1,318,455.00$. To calculate additional taxable sales, the Division subtracted the sales shown to be nontaxable at this conference ($\$1,318,455.00$) from additional taxable sales as originally calculated ($\$2,807,326.94$). The result ($\$1,488,871.94$) was further reduced by reported taxable sales ($\$398,463.00$) to calculate additional taxable sales of $\$1,090,408.94$, with a tax due on that amount of $\$89,958.74$.

The Division issued two notices of determination and demands for payment of sales and use taxes due, dated April 27, 1988, to Aberbach. The first notice of determination assessed tax due for the period September 1, 1983 through May 31, 1986 of $\$91,517.04$ plus penalty and interest. The second notice assessed an additional penalty for the period June 1, 1985 through May 31, 1986 in the amount of $\$2,851.45$. Notices of determination assessing identical amounts of tax, penalty and interest were issued to Julian Aberbach and Jean Aberbach, as officers of Aberbach Fine Art. These notices of determination were timely issued as Aberbach had previously signed consents extending the period of limitation for the assessment of sales and use taxes.

Conciliation orders, dated August 11, 1989, were issued to petitioners, reducing the tax assessment to $\$90,716.30$ and sustaining all penalties.

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

The Administrative Law Judge determined that petitioners introduced documentation into evidence at the hearing which substantiated the nontaxable status of sales in the amount of \$422,874.67.²

The Division treated as taxable two sales to Jan Krugier Galleries in the amounts of \$55,000.00 (invoice no. 6994) and \$110,000.00 (invoice no. 7298), respectively, on the ground that the resale certificate submitted bore the certificate of authority number of Chusa Art Development. Petitioners submitted a letter from Jan Krugier Galleries, establishing that Jan Krugier was the name under which Chusa did business.

Sales shown on three different invoices (numbers 7044, 7063 and 7064), totalling \$57,000.00, were proven to be not subject to sales tax, because the actual sale of the artworks took place outside the United States. The works of art in question were part of a larger group of paintings and sculptures shipped to museums in Colombia for exhibition. Many of these paintings and sculptures were sold in Colombia by the Museo De Arte Moderno de Bogota in Colombia, acting on behalf of Aberbach. Documents introduced by petitioners make it possible to trace the works of art shown on the invoices in question to an inventory of items shipped to Colombia in conjunction with this exhibition and, from there, to a list of items sold by the museum in Colombia and delivered to customers in Colombia.

We modify finding of fact "9(c)" of the Administrative Law Judge's determination to read as follows:

Invoice number 7245 shows a sale of a sculpture to Global Fine Arts, Ltd., for a price of \$9,000.00. The invoice is dated October 18,

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Finding of fact "9" of the Administrative Law Judge's determination originally stated:

"At hearing, petitioners introduced documentation into evidence which substantiated the nontaxable status of sales in the amount of \$422,874.67."

We modified this fact to distinguish the dollar value of the adjustments determined by the Administrative Law Judge from the adjustments we have made.

1984. Petitioners introduced a blanket resale certificate for services for

resale, dated February 4, 1985, from Global Fine Arts to Aberbach.³

Invoice number 7302 shows a sale in the amount of \$5,000.00 to a customer in California. The customer was also charged a shipping fee of \$12.50. Petitioners submitted two United Parcel Service receipts to substantiate that delivery of this item took place in California.

Invoice number 7423, in the amount of \$174,874.67, relates to a transaction between Aberbach and Thomas Gibson Fine Art, Ltd. of London. Aberbach purchased a sculpture by Alberto Giacometti in Paris for 680,000 Swiss Francs, or approximately \$338,680.00 in March 1986. A half-interest in the sculpture was sold to Thomas Gibson for \$174,874.67 (as documented by invoice number 7423). The sculpture was sold in December 1986 for \$550,000.00 by the Thomas Gibson gallery in London to a European client. Thomas Gibson paid Aberbach \$273,199.00 in December 1986, representing Aberbach's share of the sale price of the sculpture minus expenses. The sculpture did not enter New York State during this time. These transactions were fully documented by letters, invoices, bank statements and Aberbach's books of original entry.

The final disputed invoice, number 7433, involves the sale of two works: "Rita at 5:30 p.m." for \$18,000.00 and "Rita at 3:30 p.m." for \$12,000.00. Both works are listed on the original invoice. Notations added to the invoice show that the sale of "Rita at 3:30" was cancelled, and the \$1,000.00 deposit was applied to the customer's purchase of "Rita at 5:30". Thus, the total invoice amount should be reduced by \$12,000.00.

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

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Finding of fact "9(c)" of the Administrative Law Judge's determination read as follows:

"Invoice number 7245 shows a sale of a sculpture to Global Fine Arts, Ltd., for a price of \$9,000.00. The invoice is dated October 18, 1984. Petitioners introduced a blanket resale certificate, dated February 4, 1985, from Global Fine Arts to Aberbach.

This finding of fact was modified to more fully reflect the record.

Petitioners introduced two invoices (numbers 6925 and 7455) to demonstrate that the Division's finding of additional taxable sales, based on the difference between sales in the general ledger and sales in the sales journal, was erroneous. Invoice number 6925, dated November 22, 1983, shows a sale of two paintings for \$61,000.00, with a \$10,000.00 deposit. It also

shows that this sale was canceled and the deposit applied to the purchase price of a sculpture as shown on a second invoice, number 7455, dated May 30, 1986. In calculating taxable sales from the sales journal, the auditor first listed invoice number 6925 and the amount of \$61,000.00 in two columns. The first column was intended to determine the total amount of claimed nontaxable sales reviewed. The second column was to determine the total amount of claimed nontaxable sales disallowed. Later, apparently upon review of the second invoice, he listed invoice number 6925 as a canceled sale and subtracted \$61,000.00 from the column of total claimed nontaxable sales reviewed, but not from the column of total nontaxable sales disallowed. In calculating sales per the general ledger, the auditor referred only to the monthly sales summary and did not review adjusting entries or otherwise attempt to reconcile the various ledgers and books of original entry.⁴

We find the following additional fact:

When totalling the pages of claimed nontaxable sales disallowed, the auditor made computational errors in his workpapers of \$10,350.30. These errors occurred as follows: on page C-9, the running total for claimed nontaxable sales disallowed is overstated by \$7,500.00; on page C-12, the running total for claimed nontaxable

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Finding of fact "10" of the Administrative Law Judge's determination originally read as follows:

"10. Petitioners introduced two invoices (numbers 6925 and 7455) to demonstrate that the Division's finding of additional taxable sales based on the difference between sales in the general ledger and sales in the sales journal was erroneous. Invoice number 6925, dated November 22, 1983, shows a sale of two paintings for \$61,000.00, with a \$10,000.00 deposit. It also shows that this sale was canceled and the deposit applied to the purchase price of a sculpture as shown on a second invoice, number 7455, dated May 30, 1986. In calculating taxable sales from the sales journal, the auditor first listed invoice number 6925 and the amount of \$61,000.00. Later, apparently upon review of the second invoice, he listed invoice number 6925 as a canceled sale and subtracted \$61,000.00 from his totals. Thus, the auditor's calculations of sales per the sales journal accurately reflected the actual transactions. In calculating sales per the general ledger, however, the auditor referred only to the monthly sales summary and did not review adjusting entries or otherwise attempt to reconcile the various ledgers and books of original entry. Consequently, his calculations per the general ledger would not have reflected the cancelation of the \$61,000.00 sale.

This finding of fact was modified to more accurately reflect the record by eliminating the last sentence of the original fact "10."

sales disallowed is overstated by \$2,850.00; on page C-17, the running total for claimed nontaxable sales disallowed is overstated by \$.30.

Petitioners also presented a letter from Saint Peter's College in New Jersey which established that the college is a not-for-profit corporation exempt from taxes under section 501(c)(3) of the Internal Revenue Code and that St. Peter's purchased paintings from Aberbach for \$20,100.00 (invoice no. 6997) for use in a charitable program for the benefit of the college.

The vast majority of those transactions upon which Aberbach did not charge sales tax involved sales to persons or businesses located outside of New York. These were found to be taxable because Aberbach was unable to produce documentation, such as common carrier receipts, to show that the items were actually delivered to customers outside of New York. While not conceding that the deliveries took place in New York, petitioners acknowledge that they have been unable to provide proof that the items were shipped out of state. They point out that Aberbach's bookkeeper died shortly after this audit began and assert that their inability to locate the required shipping documents is attributable to the confusion in Aberbach's office caused by her death.

OPINION

The Administrative Law Judge determined that there was no basis for the Division's conclusion that additional taxable sales existed based on a discrepancy between Aberbach's sales journal and general ledger. Therefore, the Administrative Law Judge ruled that the calculation of additional taxable sales (\$1,090,408.94) should be reduced by \$107,270.97. Further, the Administrative Law Judge held that petitioners had established the nontaxable status of sales of \$422,874.67 -- specifically, invoice numbers 6994, 7298, 7044, 7063, 7064, 7245, 7302, 7423, and 7433. Finally, the Administrative Law Judge determined that the penalties imposed should be canceled, as petitioners had demonstrated reasonable cause for their failure to pay sales tax. This was based on the fact that petitioners kept adequate books and records, and that the primary reason for petitioners not being able to locate documentation to support the remaining alleged nontaxable sales was due to the death of petitioners' bookkeeper during the audit.

On exception, the Division makes the following assertions. Regarding the books and records of petitioners, the Division asserts that they should be deemed deficient because petitioners cannot produce all resale and exempt organization certificates. Further, the Division disagrees with the Administrative Law Judge's reduction of additional taxable sales by \$107,270.97 and the Administrative Law Judge's finding that the auditor failed to deduct \$61,000.00 (invoice numbers 6925 and 7455) from his calculations per the general ledger. Basically, the Division argues that these adjustments are based on conjecture, and that the record lacks evidence to support such findings.

Regarding the taxability of individual sales, the Division agrees with the Administrative Law Judge's finding that invoice numbers 6994, 7298, 7302, and 7423 were nontaxable sales. However, the Division disputes the finding that invoice numbers 7245, 7433, 7044, 7063, and 7064 are nontaxable. Specifically, the Division asserts that: (1) invoice number 7245 is taxable because, according to the law at that time, the resale certificate had to be obtained before or on the date of the transaction, not after. Further, the resale certificate indicates that it was for services, not tangible personal property; (2) invoice number 7433 is taxable because the sale occurred in one period, which was within the audit period, and the cancelation occurred in a different period, which was outside the audit period. The proper procedure was to collect and remit sales tax and then request a refund upon cancelation; and (3) invoice numbers 7044, 7063, and 7064 are taxable because petitioners have failed to show delivery of the goods out of state in that invoice 7044 bears no "ship to" address, and none of the documents submitted to show that the artwork was shipped to Bogota support the assertion that these are the pieces of artwork which were sold.

Also, the Division challenges the Administrative Law Judge's determination that the letter from St. Peter's College establishes that the paintings referred to in invoice number 6997 were purchased for use in a charitable program.

Finally, regarding the abatement of the penalties, the Division states that 20 NYCRR 536.5(d)(2) does not apply to this case because it is inapplicable to the penalties imposed by

Tax Law § 1145(a)(1)(i). Further, the Division asserts that the death of the bookkeeper, without an explanation linking that event to the failure to produce the necessary documents, is insufficient to support a finding of reasonable cause and the absence of willful neglect. Therefore, the penalties should not be waived.

Petitioners make the following response.

Regarding the \$61,000.00 reduction of alleged exempt sales that were disallowed, petitioners assert that the \$61,000.00 should be added to the \$422,874.67 of nontaxable sales which the Administrative Law Judge determined were substantiated.

Regarding the specific sales at issue, petitioners state that (1) invoice number 7245 is nontaxable because there is no question that the blanket resale certificate from Globe Fine Art, Ltd., recognized art dealers, was intended for a sale for resale; (2) invoice number 7433 is nontaxable because the sale was conditional and canceled during the period, and the sale was finally consummated in a later period; and (3) invoice numbers 7044, 7063, and 7064 are nontaxable because petitioners have clearly demonstrated delivery of the artwork, and clearly identified it as the pieces that were sold.

Further, petitioners assert that the Division never challenged the sale for resale aspect of the sale to St. Peter's College (invoice number 6997) because this sale was deemed taxable on the basis of a failure to provide proof of exempt organization status prior to delivery. Petitioners charge that refusing to treat this as an exempt sale is harsh and arbitrary, as exempt status would clearly be granted had the College applied for it.

Finally, regarding the abatement of the penalties, petitioners state that they employ one bookkeeper and infer that her death, the subsequent permanent absence of her successor, and two office relocations constitute grounds for waiver of the penalties imposed.

We modify the determination of the Administrative Law Judge on the issue of the sales journal/general ledger discrepancy and conclude that a reduction in claimed nontaxable sales disallowed is warranted based upon our analysis of the record; we affirm in part and reverse in part the determination of the Administrative Law Judge regarding the nontaxable status of

specific invoices at issue on exception; and we reverse the Administrative Law Judge on the issue of reasonable cause.

We begin by examining the auditor's review of the sales journal, and will then address the discrepancy between the sales journal and general ledger of petitioners.

In compiling the workpapers, the auditor looked at each claimed nontaxable sale invoice and recorded the number, customer, and invoice amount on his workpapers. The auditor then noted whether each invoice was supported by documentation. If supported, the sale was allowed as a nontaxable sale; otherwise it was disallowed. If disallowed, the amount of the invoice was recorded in a second column so that, upon completing a review of all the invoices, the total claimed nontaxable sales disallowed could be determined.

However, there are several errors in the auditor's workpapers for the sales journal. The first concerns invoice number 6925. Invoice number 6925 was recorded on the workpapers as a disallowed sale at page C-4. Therefore, the \$61,000.00 amount of the invoice was entered in the column for determining the total amount of claimed nontaxable sales examined, and in the column for claimed nontaxable sales disallowed by the auditor. At page C-17, invoice number 6925 was again recorded on the workpapers, this time as a deduction because the sale was canceled. However, the auditor only subtracted \$61,000.00 from the column for determining the total amount of claimed nontaxable sales examined; \$61,000.00 was not deducted from the column of claimed nontaxable sales disallowed by the auditor. Therefore, the total amount of claimed nontaxable sales disallowed by the auditor was overstated by \$61,000.00.

Second, the auditor made mathematical errors on workpaper pages C-9, C-12, and C-17 when totaling disallowed sales on those pages. These errors equal \$10,350.30.⁵

⁵Although these mathematical errors were not raised by petitioners in a timely exception, we find our consideration of them appropriate. This conclusion is based on the fact that the \$61,000.00 transaction was an issue properly raised on exception by the Division. To resolve that issue required a review of the auditor's calculations in his workpapers (Exhibit "I"). Pages C-1 through C-17 of the workpapers constitute one large, running calculation for the determination of total claimed nontaxable sales disallowed (Exhibit "I"). By raising the \$61,000.00 issue, the entire 17 page calculation was implicitly drawn into scrutiny and was, therefore, subject to our review (*cf.*, Matter of Robritt Liq. Store, Tax Appeals Tribunal, December 27, 1991; Matter of Sabel, Tax Appeals Tribunal, March 21, 1991; Matter of G & R Mach. & Equip., Tax Appeals Tribunal, May 24, 1990; Matter of Scotty's Garage, Tax Appeals Tribunal, May 17, 1990; Matter of Sabel, Tax Appeals Tribunal, May 10, 1990; Matter of

The reason that these errors were not discovered by the auditor was because he failed to create an additional column where the claimed nontaxable sales he allowed could be recorded and totaled. Since total claimed nontaxable sales disallowed plus total claimed nontaxable sales allowed must equal total claimed nontaxable sales examined, the failure to create this additional column deprived the auditor of a method by which he could check his work.

Set out below is a restatement of claimed nontaxable sales disallowed, as determined by the Division, side-by-side with our interpretation of the audit workpapers, which allow petitioners \$71,350.30 more in nontaxable sales.

	DIVISION	TRIBUNAL
claimed nontaxable sales per general ledger	\$5,377,672.59	
claimed nontaxable sales per sales journal	<4,878,938.62>	
difference	498,733.97	
less: taxable sales reported on sales tax returns	< 398,463.00>	
discrepancy in petitioners' books deemed to be unreported taxable sales	100,270.97	
claimed nontaxable sales per sales journal	\$4,878,938.62	\$4,878,938.62
less: nontaxable sales allowed by the auditor	<2,570,345.65>	
disallowed by auditor	2,308,592.97	
proper amount allowed		<2,641,695.95>
proper amount disallowed		2,237,242.67

Regarding the \$100,270.97 discrepancy, we agree with the Administrative Law Judge that that portion of the assessment should be canceled. There is no evidence in the record which suggests that petitioners' records were inadequate to support a detailed audit. In fact, it was determined by the auditor and his supervisor that a detailed audit would be appropriate (Tr., pp. 18, 20). Based on this determination, the auditor reviewed every claimed nontaxable sale in

Hall, Tax Appeals Tribunal, March 22, 1990; Matter of Hershey Enters., Tax Appeals Tribunal, July 27, 1989; Matter of Villa Capri Rest., Tax Appeals Tribunal, August 11, 1988; Matter of Klein's Bailey Foods, Tax Appeals Tribunal, August 4, 1988 [where we declined to exercise our discretionary review because the issues raised outside of the exception were not inextricably linked to those raised in the exception]).

petitioners' sales journal and transcribed it to the audit workpapers. When the auditor compared total sales per his workpapers to total sales per the general ledger, a discrepancy of \$498,733.97 was found (Exhibit "K"). However, the auditor later determined that, in compiling the workpapers from petitioners' sales journal, he had only transcribed claimed nontaxable sales and had failed to take into account petitioners' taxable sales (Tr., p. 19). The auditor attempted to correct this fundamental error. But, rather than conduct a detailed review of petitioners' sales journal to determine taxable sales, the auditor chose a different method. To determine what discrepancy, if any, existed between total sales per the sales journal and total sales per the general ledger, the auditor took the following steps: he calculated total taxable sales for the audit period from petitioners' sales tax returns, added to that figure the total claimed nontaxable sales per the audit workpapers, and compared this sum to total sales per the general ledger. This calculation yielded a discrepancy of \$100,270.97 (Tr., pp. 19-20; Exhibit "K," Revised Summary of Tax Due). Without any further review of petitioners' records to investigate the source of this discrepancy, the auditor treated this discrepancy as additional taxable sales.

We reject the method by which this discrepancy was determined and characterized as additional taxable sales. When records are available from which the exact amount of tax may be determined, the use of other methods to determine tax liability demonstrates a lack of a rational basis for the assessment (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). Although there was no question regarding the adequacy of petitioners' books and records, the Division failed to utilize these records to determine the exact amount of petitioners' taxable sales. Instead, the Division used an estimate, assuming that the discrepancy it found between two limited aspects of petitioners' records was additional taxable sales. We conclude that this choice of procedure was improper. Accordingly, that portion of the assessment related to the \$100,270.97 discrepancy is canceled.

This cancellation does not affect the remainder of the audit. Given the existence of adequate books and records, the auditor's detailed review of the claimed nontaxable sales in the sales journal was proper and rational and should not be disturbed (Matter of Mohawk Airlines

v. Tully, 75 AD2d 249, 429 NYS2d 759; see also, Matter of McCluskey's Steak House v. State Tax Commn., 80 AD2d 713, 437 NYS2d 736).

We will now address the specific invoices at issue. Invoice number 7245 represents a sale by petitioners to Global Fine Arts, Ltd. on October 18, 1984. Petitioners offer a blanket resale certificate from Global Fine Arts, Ltd. dated February 4, 1985 as proof of the nontaxable status of this sale (Exhibit "1").

Petitioners assert that this sale is nontaxable because it is clearly a sale for resale and is covered by the blanket resale certificate. However, the blanket resale certificate offered by petitioners is for services for resale, not tangible personal property for resale. Thus, the resale certificate is, on its face, inadequate. Since petitioners have offered no other evidence in support of their position, the sale is deemed a taxable sale at retail (Tax Law former § 1132[c]). The Administrative Law Judge's determination that the resale certificate supported a finding that the sale to Global Fine Arts, Ltd. was nontaxable is reversed with respect to invoice number 7245.

Invoice number 7433 represents a sale by petitioners to a Mr. Carlos Mattos on May 15, 1986. This sale was subsequently canceled on August 19, 1986.

The Division asserts that this sale is taxable because, under the sales tax law, petitioners owed tax on the May 15, 1986 sale since they are unable to prove that it was nontaxable (Tax Law §§ 1136[b], 1137[a]). The Division contends that refund procedures are provided in the Tax Law and that that is the proper avenue for receiving credit for the canceled sale (Tax Law § 1139).

We affirm the Administrative Law Judge's determination to allow credit for the canceled sale, thereby reducing the taxable sales by the amount of the invoice. We base our decision on National Cash Register v. Joseph (299 NY 200), a Court of Appeals case which introduced the concept of "recoupment" into disputes of sales tax liability (see also, Matter of Mobil Oil Corp. v. State Tax Commn., 62 AD2d 668, 406 NYS2d 365).

In National, the taxpayer was challenging a sales tax assessment imposed by the City of New York. The taxpayer sought to introduce evidence showing that it was entitled to a refund of tax paid during the same period covered by the assessment. Special Term struck that cause of action, finding that the bid for a refund was untimely because the statute of limitations for making such a claim had expired. The Appellate Division, First Department affirmed, with two judges dissenting. The Court of Appeals reversed, adopting the conclusion of the Appellate Court dissenters, who stated that:

""[a]s respondent [comptroller] has opened the question of petitioner's sales tax liability and determined a deficiency for past years, it seems to us that petitioner should be entitled to set off, against any deficiency finally determined, the amount of any overpayment of sales taxes made during the period under review, although petitioner did not file a timely refund claim"" (National Cash Register v. Joseph, supra, at 203).

The Court determined that, since the city had reopened the issue of the petitioner's sales tax liability for the audit period, the petitioner should be given "an equitable right to plead against the city for a recoupment claim for taxes of the same type which the vendor . . . had erroneously paid to the comptroller in the same period" (National Cash Register v. Joseph, supra, at 203). The recoupment "permits a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole" (National Cash Register v. Joseph, supra, at 203).

The equitable right set out in National provides petitioners with the opportunity to offset the assessment by offering additional proof as to the outcome of the sale reflected on invoice number 7433, i.e., to allow the transaction to be examined in all its aspects. Specifically, petitioners have shown that the May 15, 1986 sale was canceled on August 19, 1986 (Exhibit "1"). Despite this cancelation occurring in a different sales tax quarter, and occurring outside the audit period, it is proper to consider these subsequent events because they directly relate to the transaction at issue. In the end, no sales tax is due because the sale was ultimately canceled.

Invoice numbers 7044, 7063, and 7064 represent sales by petitioners resulting from an exhibit presented in Bogota, Colombia. Petitioners have offered substantial evidence detailing the sales of artwork which resulted from the exhibit. Specifically, petitioners have presented a

listing of pieces of artwork sent to Colombia; correspondence between the relevant parties concerning shipment of the art and identifying which pieces are available for sale; shipping receipts; invoices for sales made; and a piece-by-piece list from the museum at Bogota summarizing each piece sold, the buyer, and the place of delivery (Exhibit "1"). Based upon this comprehensive and detailed documentation of sales generated by the exhibit in Bogota, we agree with the Administrative Law Judge that petitioners have successfully demonstrated that invoice numbers 7044, 7063, and 7064 are nontaxable because delivery of the artwork sold was made outside New York State (see, 20 NYCRR 526.7[e]).

The Division advanced an additional challenge to invoice number 7044, asserting that the absence of a "ship to" address on the invoice supports a finding of taxability. Notwithstanding the evidence already discussed, we find it necessary to point out that invoice numbers 6940 and 7000, which were also part of the exhibit in Bogota, Colombia (Exhibit "1"), also lack an address in the "ship to" portion of the invoice. Originally disallowed by the auditor during his review of petitioners' sales journal (see, Exhibit "I," auditor's workpapers, p. C-5, line 10 and p. C-7, line 5), these invoices were subsequently allowed as nontaxable sales by the Division at the post-audit conference (see, Exhibit "J"). Therefore, we fail to see how the Division can accept invoice numbers 6940 and 7000, yet challenge invoice number 7044 on a ground which is common to all three invoices.

Invoice number 6997 represents a sale by petitioners to St. Peter's College. The Administrative Law Judge found the sale taxable because petitioners failed to prove that St. Peter's was an exempt organization (Tax Law former § 1132[c]). The Division, while agreeing with the result, takes exception to the Administrative Law Judge's finding that the sale was for use in a charitable program. We agree with the Administrative Law Judge's determination that the sale is taxable and find it unnecessary to address the Division's contention. Petitioners' assertion of harsh and arbitrary treatment of this invoice is undermined by their failure to present evidence which supports a different result.

The final issue to be addressed is whether the death of petitioners' bookkeeper during the audit constitutes reasonable cause and the absence of willful neglect so that penalties and interest should be waived.

Failure to timely file a return or remit tax to the Division causes liability to be imposed for the tax due (Tax Law § 1138[a][1]), as well as for the attendant penalty and interest (Tax Law § 1145[a][1][i],[ii]). However, if it is determined that the failure or delay in paying taxes was due to reasonable cause and not the result of willful neglect, the penalty and a portion of the interest may be remitted to the taxpayer (Tax Law § 1145[a][1][iii]). The regulations explain what constitutes reasonable cause (Tax Law § 1145[a][1][iii]; 20 NYCRR 536.5). The relevant portion of the regulations states that:

"(c) The following exemplify grounds for reasonable cause, where clearly established by or on behalf of the taxpayer or other person.

* * *

"(5) Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause" (20 NYCRR 536.5[c][5]).

We reverse the determination of the Administrative Law Judge. We find that petitioners have not demonstrated reasonable cause and the absence of willful neglect which would support a dismissal of the penalties and interest. Petitioners state that their bookkeeper passed away during the audit, implying that this resulted in petitioners being unable to locate documentation to support all of the claimed nontaxable sales. While sympathetic to the position petitioners found themselves in, we are unable to conclude that the circumstances support a finding of reasonable cause. This decision is based on the following factors. First, petitioners' assertion that their bookkeeper passed away during the audit, without more, fails to "clearly establish" the existence of reasonable cause and absence of willful neglect (see, Matter of Ross-Viking Mdse. Corp., Tax Appeals Tribunal, August 8, 1991). Without petitioners offering evidence to show a link between the bookkeeper's death and the subsequent inability to produce supporting

documentation for claimed nontaxable sales which were disallowed, we are unable to find reasonable cause.

Second, petitioners also asserted that they moved their offices twice during the audit period, and that these moves created problems in locating documentation (Tr., p. 62). Again, such a statement, without additional evidence or testimony linking the moves to the inability to produce supporting documents, is insufficient to support a finding of reasonable cause and an absence of willful neglect (see, Matter of Ross-Viking Mdse. Corp., supra).

Third, the amount of time available to petitioners to organize their records contradicts a finding of reasonable cause. Petitioners' representative stated that the bookkeeper, Ms. Gallagher, passed away approximately 30 days after first meeting with the auditor (Tr., p. 61). Based on the initial meeting date recorded in the auditor's notes, her death occurred in the first week of August, 1986 (Exhibit "L"). The auditor provided petitioners' representative with a copy of the audit workpapers on August 6, 1987 (Exhibit "L"). The conciliation conference between petitioners and the Division took place on March 14, 1989 (Exhibit "E"). The hearing before the Administrative Law Judge took place on May 8, 1990. Therefore, petitioners had nearly four years to review those files of Ms. Gallagher which were relevant to the audit period. Further, during three of those four years, petitioners had a copy of the audit workpapers, allowing them to focus on finding documents to support each of the claimed nontaxable sales which were disallowed.⁶

In sum, ample time was available for petitioners to locate the necessary documentation.

Given the number and complexity of the issues presented in this case, a summary of the final disposition of the issues is in order. Prior to the hearing before the Administrative Law Judge, petitioners were assessed tax, interest, and penalty on claimed nontaxable sales disallowed totaling \$1,090,408.94 (Exhibit "K").

The Administrative Law Judge determined that claimed nontaxable sales disallowed should be reduced as follows:

⁶Approximately 500 claimed nontaxable sales were reviewed by the auditor. Of those 500, approximately 200 were disallowed by the auditor.

claimed nontaxable sales	
disallowed by auditor	\$1,090,408.94
less:	
invoice number 6994	< 55,000.00>
invoice number 7298	<110,000.00>
invoice numbers 7044, 7063, 7064	< 57,000.00>
invoice number 7245	< 9,000.00>
invoice number 7302	< 5,000.00>
invoice number 7423	<174,874.67>
invoice number 7433	< 12,000.00>
sales journal/general ledger	
discrepancy	< <u>107,270.90</u> > *
total amt. of disallowed nontax. sales	
per the Administrative Law Judge's	
determination	\$560,263.37 plus the cancelation
	of penalties and
	interest

(* The Administrative Law Judge transposed the numbers of this figure in the determination.

The proper amount is \$100,270.97.)

On exception, we made several changes and modifications to the Administrative Law Judge's determination. These are summarized as follows:

claimed nontaxable sales	
disallowed by auditor	\$1,090,408.94
less:	
invoice number 6994	< 55,000.00> (not excepted to)
invoice number 7298	<110,000.00> (not excepted to)
invoice numbers 7044, 7063, 7064	< 57,000.00> (aff'd)
invoice number 7245	(reversed)
invoice number 7302	< 5,000.00> (not excepted to)
invoice number 7423	<174,874.67> (not excepted to)
invoice number 7433	< 12,000.00> (aff'd)
calculation errors in workpapers	< 71,350.30>
sales journal/general ledger	
discrepancy	< <u>100,270.97</u> > (aff'd on alt. theory)
total amt. of disallowed nontax. sales	
per the decision of the Tribunal	\$504,913.00

Further, we reversed the Administrative Law Judge's cancelation of penalties and interest. Thus, interest and penalty are still due subject to an adjustment consistent with the modifications set out in the Administrative Law Judge's determination and this decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied on the issue of the sales journal/general ledger discrepancy, granted in part on the issue of claimed nontaxable sales allowed, granted on the issue of reasonable cause, and is otherwise denied;

2. The determination of the Administrative Law Judge is modified with respect to conclusion of law "B," modified with respect to conclusion of law "C," reversed with respect to conclusion of law "D," modified with respect to conclusion of law "E," and is otherwise affirmed;

3. The petitions of Aberbach Enterprises, Ltd. d/b/a Aberbach Fine Art, Julian Aberbach, officer of Aberbach Enterprises, Ltd. and Joachim (Jean) Aberbach officer of Aberbach Enterprises, Ltd. are granted in part on the issue of claimed nontaxable sales allowed, and are otherwise denied; and

4. The notices of determination and demand for sales and use taxes due issued on April 27, 1988, as modified by this decision, are sustained.

DATED: Troy, New York
August 6, 1992

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

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

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