

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**ON-SITE PETROLEUM UNLIMITED, 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 June 1, 1984 :  
through May 31, 1987. :

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In the Matter of the Petition :  
of :  
**ASHLEY JARWOOD, AS OFFICER OF** :  
**ON-SITE PETROLEUM UNLIMITED, 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 June 1, 1984 :  
through May 31, 1987. :

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DECISION  
DTA NOS. 811604,  
811605 AND 811606

In the Matter of the Petition :  
of :  
**TREVOR WISDOM, AS OFFICER OF** :  
**ON-SITE PETROLEUM UNLIMITED, 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 June 1, 1984 :  
through May 31, 1987. :

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The Division of Taxation and petitioners On-Site Petroleum Unlimited, Inc., 56-15 58th Street, Maspeth, New York 11378; Ashley Jarwood, as officer of On-Site Petroleum Unlimited, Inc., 200 East 62nd Street, New York, New York 10021; and Trevor Wisdom, as officer of On-Site Petroleum Unlimited, Inc., 875 Cedar Swamp Road, Old Brookville, New York 11545, each filed an exception to the determination of the Administrative Law Judge issued on April 6,

1995. Petitioners appeared by Uncyk, Borenkind & Nadler, Esqs. (Norman R. Berkowitz, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioners filed a brief in support of their exceptions and in response to the Division of Taxation's exception and brief. The Division of Taxation did not file a reply brief. Instead, it filed a letter setting forth objections to petitioners' exceptions and relying upon its post-hearing brief and upon its brief on exception. Petitioners filed a letter in lieu of a formal reply brief. This letter was received on August 18, 1995 and began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioners Koenig and DeWitt concur.

### ***ISSUES***

I. Whether a consent to extend the period of limitation for assessment of sales and use taxes against the corporate taxpayer, which was executed on behalf of the corporate taxpayer by a prior representative, was ineffective because the power of attorney appointing such representative was defective due to the failure of the corporate officer to have his signature properly witnessed or notarized.

II. Whether a consent to extend the period of limitation for assessment of sales and use taxes against the corporate taxpayer, if found effective, serves to extend the period of limitation for assessing tax against the corporate officers as well.

III. Whether the Division of Taxation properly resorted to a test period audit for determining additional sales and use taxes, in lieu of a complete audit of the corporate taxpayer's books and records, due to the seizure of the corporate taxpayer's records by Federal authorities during the course of the audit.

IV. Whether, if the Division of Taxation properly resorted to a test period audit, such methodology was reasonably calculated to reflect sales and use taxes due and, in particular, whether the Division of Taxation properly disallowed certain tax-exempt sales claimed by the corporate taxpayer based upon the company's failure to substantiate their tax-exempt status with tax-exempt certificates.

V. Whether petitioner Ashley Jarwood and petitioner Trevor Wisdom, respectively, as officers, were persons required to collect tax under Tax Law § 1131(1) so that they were, as individuals, personally liable for sales and use taxes determined due from the corporate taxpayer for the period June 1, 1984 through May 31, 1987.

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. The auditor, Harold McKinney, described the corporate petitioner, On-Site Petroleum Unlimited, Inc. ("On-Site Petroleum"), as a petroleum company that "drop ships" fuel to construction sites (tr., p. 23). By "drop shipping" he meant that On-Site Petroleum brought "the actual fuel to the actual [construction] site itself" (tr., pp. 23-24). The auditor suggested that the fuel would be utilized at the construction site to run construction equipment such as bulldozers.

2. The Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated December 15, 1991, against On-Site Petroleum for a three-year period, June 1, 1984 through May 31, 1987, asserting total sales and use taxes due of \$82,878.11, plus penalty and interest, which was detailed as follows:

<u>Period Ending</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>
August 31, 1984 (185) <sup>1</sup>	\$ 6,659.01	\$ 1,664.75	\$ 9,205.48
November 30, 1984 (285)	6,659.01	1,664.75	8,737.96
February 28, 1985 (385)	6,659.01	1,664.75	8,289.14

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1

The first digit of the three numbers in parentheses refers to the particular sales tax quarter and the last two digits reference the particular sales tax year. For example, ("185") references the first sales tax quarter of the 1985 sales tax year, which runs from June 1, 1984 through August 31, 1984.

May 31, 1985 (485)	6,659.01	1,664.75	7,843.86
August 31, 1985 (186)	6,659.01	1,997.70	7,411.84
November 30, 1985 (286)	6,659.01	1,997.70	6,997.19
February 28, 1986 (386)	6,659.01	1,997.70	6,599.11
May 31, 1986 (486)	6,659.01	1,997.70	6,204.17
August 31, 1986 (187)	9,629.01	2,888.70	8,417.23
November 30, 1987 (287)	6,659.01	1,997.70	5,453.22
February 28, 1987 (387)	6,659.01	1,997.70	5,100.15
May 31, 1987 (487)	<u>6,659.00</u>	<u>1,997.70</u>	<u>4,749.85</u>
Totals	\$82,878.11	\$23,531.60	\$85,009.20

On the face of this notice of determination, under the subheading "Explanation", was a checked box next to the following statement:

"The tax assessed above has been estimated in accordance with the provisions of Section 1138(a)(1) of the Tax Law . . . . The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records."

Corresponding notices of determination, also dated December 15, 1991, were issued against petitioners Ashley Jarwood and Trevor Wisdom, respectively, as officers of On-Site Petroleum.

### ***THE TIMELINESS OF THE NOTICES***

3. Petitioners contend that the notices of determination were issued after the three-year period for assessment had expired.<sup>2</sup> If On-Site Petroleum's quarterly sales tax returns were filed timely, the return for the first quarter at issue, the period ending August 31, 1984 (185), would have been due on September 20, 1984, and the return for the last quarter at issue, the period ending May 31, 1987 (487), would have been due on June 20, 1987. It is observed that the record includes only the photocopies of the first page of the following six returns which were made part of the Division's Exhibit "K"<sup>3</sup>:

Gross Sales and	Taxable Sales and	Purchases Reported	Sales and Use
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<sup>2</sup>Pursuant to Tax Law § 1147(b), except in the case of a fraudulent sales tax return, "no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return." Tax Law § 1136(b) provides that quarterly sales tax returns must be filed "within twenty days after the end of the quarterly period covered thereby."

<sup>3</sup>Out of the 12 quarters at issue, as detailed in Finding of Fact "2," photocopies of the first page of only two quarterly returns were introduced into the record, only one of which was within the period at issue.

<u>Period</u>	<u>Services Reported</u>	<u>Services Reported</u>	<u>Subject to Use Tax</u>	<u>Tax Reported</u>
(1) 12/1/83-2/29/84 <sup>4</sup>	\$ -0-	\$465,073.00	\$ -0-	\$38,368.52
(2) 7/1/85-7/31/85 <sup>5</sup>	54,892.00	54,892.00	-0-	4,528.59
(3) 1/1/86-1/31/86	129,828.00	129,828.00	-0-	10,710.82
(4) 7/1/86-7/31/86	97,082.00	97,082.00	-0-	8,009.27
(5) 6/1/86-8/31/86	63,091.00	63,091.00	-0-	26,025.00
(6) 3/1/87-3/31/87	--	--	--	4,779.00 <sup>6</sup>

4. The record does not establish the specific dates of filing for each of the 12 sales tax returns at issue. However, included in the Division's Exhibit "J" are photocopies of six forms AU-2.10, "Consent Extending Period of Limitations for Assessment of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law", which would seem to suggest that the returns were timely filed given the need for the Division to secure such consents. (Furthermore, the Division has not suggested that the returns were not timely filed.) The following summarizes the consents which were executed to extend the three-year limitations period:

<u>Period Under Audit</u>	<u>Date to Which Period of Limitation for Assessment Extended</u>	<u>Date Noted by Taxpayer<sup>7</sup> on Consent</u>
(1) 6/1/84-8/31/84	December 20, 1987	August 11, 1987
(2) 6/1/84-2/28/85	June 20, 1988	November 13, 1987
(3) 6/1/84-8/31/85	December 20, 1988	May 5, 1988
(4) 6/1/84-8/31/86	December 20, 1989	December 13, 1988

4

This quarter is prior to the audit period at issue.

5

This return was a so-called "part-quarterly" return for the month of July 1985. The returns numbered "3" and "4" were also "part-quarterly" returns.

6

This return for the month of March 1987 was a so-called "March Estimated Monthly Sales and Use Tax Return" on which petitioner reported due \$4,779.00, which, according to the return, represented 1/3 of \$14,337.00, the tax shown on the return for the comparable quarter of the prior year.

7

The consents were executed on behalf of On-Site Petroleum only.

(5) 6/1/84-8/31/87<sup>8</sup>  
(6) 6/1/84-8/31/88

December 20, 1990  
December 20, 1991<sup>9</sup>

November 9, 1989  
December 3, 1990

5. The consents numbered "1", "2" and "3" in Finding of Fact "4" were executed on behalf of On-Site Petroleum by petitioner Ashley Jarwood, in her capacity as treasurer of the corporation with reference to the consents numbered "1" and "2", and in her capacity as president with reference to the consent numbered "3". The consents numbered "4", "5" and "6" were executed on behalf of On-Site Petroleum by Benet Doloboff, who wrote "power of attorney" on the line for "title" on the consents.

The power of attorney referenced by Mr. Doloboff, who was and apparently continues to be On-Site Petroleum's accountant (and who was the only witness who appeared on behalf of petitioners at the hearing held in this matter), was dated August 24, 1987 by Ashley Jarwood, who, as treasurer of On-Site Petroleum, appointed Mr. Doloboff to serve as the corporation's representative before the Department of Taxation and Finance with regard to sales tax for the period June 1, 1984 through May 31, 1987. However, Ms. Jarwood's signature was neither acknowledged by a notary public nor witnessed by two witnesses. Petitioners argue that, as a result of this failure, Mr. Doloboff had no authority to act on behalf of the corporation. However, it is observed that, subsequent to April 24, 1987, Mr. Doloboff acted on behalf of On-Site Petroleum in many ways, including the following:

(1) He scheduled audit appointments at his own office and at the corporation's place of business and met with the auditor, spoke with the auditor on the telephone, accepted requests for documents, forwarded such requests to On-Site Petroleum, obtained documents from the company and provided these to the auditor as noted in Findings of Fact "7", "8" and "9";

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<sup>8</sup>It is observed that the period designated in this consent as well as the following consent also covers a period subsequent to the period at issue.

<sup>9</sup>As noted in Finding of Fact "2," the three notices of determination at issue herein were each dated December 15, 1991, five days prior to December 20, 1991, the date to which the period of limitation for assessment was extended (by the sequential execution of the six consents detailed above).

- (2) He prepared worksheets for use by the auditor;
- (3) He reviewed the auditor's workpapers and accepted a 30-day letter on behalf of the corporation; and
- (4) He was the sole person with any personal knowledge of On-Site Petroleum's operations to appear at the hearing in this matter on behalf of petitioners.

***SEIZURE OF RECORDS BY GOVERNMENT AUTHORITIES***

6. In the course of the audit, the books and records of On-Site Petroleum were seized by the Internal Revenue Service. Petitioners introduced little evidence at the hearing and presented only the skimpy testimony of Mr. Doloboff, the corporation's accountant. For example, no background information or foundation was provided for the photocopy of the search warrant introduced into the record as petitioner's Exhibit "1". The search warrant is paged 520-522 suggesting that a lengthy record relates to it, and the "written affidavit" of Special Agent Ann Petterson, upon which it was based, was not introduced by petitioners. The search warrant appears to have been issued by a judge or U.S. Magistrate on March 26, 1988 at 5:40 P.M and was directed to "any Agent of the Internal Revenue Service and Federal Bureau of Investigation and pursuant to 18 U.S.C. § 3105 assisted by agents of the New York State Department of Taxation & Finance and Investigators from the Nassau & Suffolk County District Attorneys Offices." It authorized the search of the premises of On-Site Petroleum and its sister corporations, Wizard Petroleum Corp., Janus Corp., Terminelle Corp. and Fill-Up Corp., located at 364 Maspeth Avenue, Brooklyn, New York. The search warrant indicated that the items to be seized were "evidence, fruits, instrumentalities and the means of commission of violations of Title 26 [Internal Revenue Code], United States Code, Sections 7201 [Attempt to evade or defeat tax], 7202 [Willful failure to collect or pay over tax ], 7206 [Fraud and false statements], and 7232 [Failure to register, or false statement by manufacturer or producer of gasoline, lubricating oil, diesel fuel, or aviation fuel], and Title 18 [Crimes and Criminal Procedure], United States Code, Section 371 [conspiracy to commit offense or to defraud United States] and 1343 [Fraud by wire, radio, or television]."

As their Exhibits "2" and "3", petitioners introduced into the record photocopies of documents which apparently listed items taken by the government authorities. These photocopies are, in large part, unreadable, and petitioners presented no witness who explained or could provide a foundation for these documents. Furthermore, Exhibit "3" appears to pertain only to items regarding On-Site Petroleum's sister corporation, Terminelle Corp. The introduction of such exhibit, which upon review appears irrelevant to the matter at hand, reflects the strategy of petitioners at the hearing in this matter to merely poke holes in the Division's case and to attempt to create confusion in the factual record without providing any substantial evidence concerning the operation of petitioner. (Finding of Fact "1", which describes the nature of the corporate petitioner's business, was based upon testimony of the Division's auditor.)

***THE AUDITOR'S ATTEMPT TO CONDUCT A COMPLETE  
REVIEW OF BOOKS & RECORDS***

7. By a letter mailed June 5, 1987, the auditor scheduled "a field examination" of On-Site Petroleum's sales tax returns. The auditor made the following request in his letter:

"All books and records pertaining to your sales tax liability for the period under audit [June 1, 1984 through May 31, 1987] should be available. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates, etc. and all Sales Tax records. Additional information may be required during the course of the audit."

The auditor's log noted that at the field examination on July 14, 1987:

"T/P accountant [Mr. Doloboff] did not have all sales and purchase [invoices] for audit period. Auditor request all non-taxable sales for Q/E 11/30/84. Auditor request all back up documentation."

At the next appointment, which took place at Mr. Doloboff's office on September 2, 1987, the auditor made the following entry, in relevant part, in his log:

"Auditor got analysis FYE 1986 for the following A/C's stationery, postage, equipment rental, computer expense, office expense. There were so many invoice[s] missing audit[or] left list of missing invoices to be gotten by t/p. Auditor did not received [sic] and [sic] analysis of auto expense (repair & maintenance). Auditor wants analysis for FYE 1986. Auditor did reconciliation of sales and purchase[s]. There are difference[s]. T/P accountant must explain. Auditor left reconciliation. Auditor wants to see sales journal 9/84 - 11/84. In misc. income auditor found a sale of IBM computer sold July 31, 1986 by t/p. Auditor wants to see invoice. Also breakdown of all N/T [nontaxable] sales."



8. The log shows that on December 15, 1987, which is prior to the seizure of On-Site Petroleum's records, the auditor apparently decided to conduct a test period audit of the corporation's nontaxable sales. The auditor testified that Mr. Doloboff verbally consented to a test-period audit (tr., p. 119). Mr. Doloboff could not recall giving such consent (tr., p. 170). It is observed that the auditor's log did not include an entry noting the taxpayers' agreement to a test-period audit. An entry for February 4, 1988 shows that the auditor went to Mr. Doloboff's office to perform an "analysis of repairs & maintenance given by accountant". He also on this date worked on a "non-taxable sales test 9/1/84 - 11/30/84".

9. The log shows that it was not until April 28, 1988, about a month after the date on the search warrant, that the auditor learned that On-Site Petroleum's records had been seized. The entry for such date provides as follows:

"T/P accountant call to tell auditor that the marshalls went to t/p and took some papers. Accountant doesn't know wheather [sic] these papers are the papers that the auditor needed. But he'll go to T/P next week."

An entry in the log for May 10, 1988 indicates "that all records were seized by federal gov't."

10. The log then shows that the auditor took many steps to attempt to obtain access to the records seized by the Federal authorities including several telephone calls to Federal Agent Anne Petterson. The log shows that, from the autumn of 1989 to the summer of 1991, the auditor made continued attempts to obtain permission to review records in the possession of the Federal authorities.

11. Finally an entry in the log dated July 23, 1991 noted as follows:

"Noah Daniels (Branch Chief) spoke to Joe Machhio in Albany. He said the State does have the records. Howere [sic] he'd like us to do the current years which the state does not have and see what results we can get."

However, on direct examination, the auditor tried to contravene this entry for July 23, 1991:

Attorney Matthews: "Mr. McKinney, could you locate in your auditor log an entry dated 7/23/91?"

Auditor McKinney: "(No response)"

\* \* \*

Auditor McKinney: "Yes."

[Attorney Matthews then requested that the auditor read the first two sentences of the entry aloud.]

Attorney Matthews: "My question to you is, at the time is that sentence correct?"

Auditor McKinney: "That is not a correct sentence."

Attorney Matthews: "What is wrong about the sentence?"

Auditor McKinney: "It should be 'does not have' the records."

Attorney Matthews: "That's all I have."

Administrative Law Judge Barrie: "Is that your handwriting?"

Auditor McKinney: "Yes, it is. I just made--I just didn't put 'not' there when I should have." (Tr., pp. 55-57.)

Petitioners' attorney vigorously cross-examined the auditor concerning his "incorrect" entry for July 23, 1991 as follows:

Attorney Berkowitz: "What was the date of that entry?"

Auditor McKinney: "7/23/91."

Attorney Berkowitz: "That was about three years ago, roughly?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "And until this time, you never corrected this log?"

Auditor McKinney: "I didn't, obviously. No."

Attorney Berkowitz: "Why not?"

Auditor McKinney: "I just didn't."

Attorney Berkowitz: "Did you review the log between July 23rd, '91 and today?"

Auditor McKinney: "Yes, I did. I looked at it. Yes, I did."

Attorney Berkowitz: "And did you look at it many times?"

Auditor McKinney: "Not many times but I looked at it . . . ."

Attorney Berkowitz: "Did you look at it prior to the Conciliation Conference held in this matter?"

Auditor McKinney: "Probably did."

Attorney Berkowitz: "And you didn't notice this error?"

Auditor McKinney: "Obviously not."

Attorney Berkowitz: "And did you look at it in preparation for today's testimony?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "And did you notice the error then?"

Auditor McKinney: "Yes, I did. Yes, I did."

Attorney Berkowitz: "How did you point this out to anyone?"

Auditor McKinney: "How did I point it out to anybody? I just made a note that that was wrong."

Attorney Berkowitz: "Where did you make the note?"

Auditor McKinney: "To myself. I made the note and I spoke to the State attorney."

Attorney Berkowitz: "When was that?"

Auditor McKinney: "Ah, that was yesterday."

Attorney Berkowitz: "How long have you known you were going to testify on this matter?"

Auditor McKinney: "I'd say a couple months ago."

Attorney Berkowitz: "And in that time, a couple months and yesterday, did you review this worksheet?"

Auditor McKinney: "I read it quickly."

Attorney Berkowitz: "Did you review the worksheet?"

Auditor McKinney: "Yes, I did."

Attorney Berkowitz: "And you didn't notice the error?"

Auditor McKinney: "I didn't notice the error until I read it in detail and then I made note of that."

Attorney Berkowitz: "When did that occur?"

Auditor McKinney: "When I really -- actually looked at it as I was going up on the train."

Attorney Berkowitz: "So until yesterday, even though you reviewed several times, you never noticed this?"

Auditor McKinney: "You are correct. It's obvious I missed it."

Attorney Berkowitz: "I'm asking a simple question. Yes or no, you noticed or didn't."

Auditor McKinney: "I did not notice."

Attorney Berkowitz: "Although it was reviewed several times."

Auditor McKinney: "Yes. I looked it over, yes."

Attorney Berkowitz: "And when you found that you made the error, what did you do?"

Auditor McKinney: "I then spoke to the attorney."

Attorney Berkowitz: "When was that?"

Auditor McKinney: "When I met him."

Attorney Berkowitz: "When was that?"

Auditor McKinney: "I met with him yesterday." (Tr., pp. 57-60.)

Attorney Berkowitz: "The second sentence, however, 'He'd like us to do the current years, which the State does not have, and see what results we can get.' Does that imply the State does have records from previous years?"

Auditor McKinney: "The State didn't have his records."

Attorney Berkowitz: "What does the sentence say?"

Auditor McKinney: "(Pause for reading) All that is stating is that we wanted -- that my branch chief wanted to update the audit."

Attorney Berkowitz: "Does the word 'update' appear in the sentence?"

Auditor McKinney: "No. This is like they do the current years."

Attorney Berkowitz: "Which the State does not have?"

Auditor McKinney: "Which the State does not have."

Attorney Berkowitz: "Implying the State has prior years."

Auditor McKinney: "No. They did not have prior years."

Attorney Berkowitz: "No, no."

Auditor McKinney: "I'm just --"

Attorney Berkowitz: "Okay. You have no notes to that effect, any written document. The only written document whether the State has or does not have is in evidence and it says they do have it. Is that correct?"

Auditor McKinney: "Yeah, but it's in error."

Attorney Berkowitz: "Let me phrase the question so you can answer. Is it fair to say --"

Auditor McKinney: "Yes."

Attorney Berkowitz: "--that the only document with respect to the State having or not having -- the only written document with respect to whether the State has or does not have is this document. Is that correct?"

Auditor McKinney: "We got letters from the taxpayer."

Attorney Berkowitz: "No, no. I asked a simple question. Is it correct that this is the only written document the State has with respect to whether the State has the documents?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "Is that correct?"

Auditor McKinney: "Yes. That is correct?"

Attorney Berkowitz: "When you got up to Albany yesterday and spoke to Mr. Matthews, did you call Mr. Daniels to verify your recollection?"

Auditor McKinney: "No."

Attorney Berkowitz: "Did you call Mr. Machhio?"

Auditor McKinney: "No."

Attorney Berkowitz: "Did you call anyone who was a party to this conversation?"

Auditor McKinney: "No."

Attorney Berkowitz: "Why not?"

Auditor McKinney: "Because I didn't."

Attorney Berkowitz: "Was there a reason you didn't?"

Auditor McKinney: "No. Because I made a note to my attorney on it but I didn't call -- I did not call the parties that you just indicated."

Attorney Berkowitz: "You didn't verify your recollection?"

Auditor McKinney: "No, I didn't."

Attorney Berkowitz: "And this recollection was three years ago. Wouldn't it have been simple to call one of the people to make sure your recollection was correct?"

Auditor McKinney: "Well, I did not call them. I just didn't call them."

Attorney Berkowitz: "Is Mr. Daniels still employed by the State?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "Do you know where his office is?"

Auditor McKinney: "Yes, I do."

Attorney Berkowitz: "Where is it?"

Auditor McKinney: "345 Adams Street."

Attorney Berkowitz: "Where is your office located?"

Auditor McKinney: "345 Adams."

Attorney Berkowitz: "Do you see Mr. Daniels on a current basis?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "Do you speak to him on a current basis?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "But you never called him yesterday about that?"

Auditor McKinney: "No."

Attorney Berkowitz: "Do you know where Mr. Macchio's office is?"

Auditor McKinney: "Albany."

Attorney Berkowitz: "Who is he?"

Auditor McKinney: "Coordinator for my office in Albany."

Attorney Berkowitz: "Did you ever speak to Mr. Macchio?"

Auditor McKinney: "I spoke to him prior."

Attorney Berkowitz: "And you were in Mr. Macchio's office when you told him about this?"

Auditor McKinney: "No. Mr. Matthews --"

Attorney Berkowitz: "No. Were you in Mr. Matthews' office when you told him about the error?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "That's a State office?"

Auditor McKinney: "No. He was at my hotel room."

Attorney Berkowitz: "This was yesterday?"

Auditor McKinney: "Yes."

Attorney Berkowitz: "And is Mr. Macchio available by telephone in this area?"

Auditor McKinney: "I would assume so." (Tr., pp. 65-69.)

### ***THE TEST PERIOD AUDIT***

12. As noted in Finding of Fact "8", the auditor performed an audit of On-Site Petroleum's nontaxable sales for the period September 1, 1984 through November 30, 1984. It appears that the auditor selected this particular quarter because it was the only quarter for which the taxpayer reported any nontaxable sales. A workpaper in the Division's Exhibit "J" shows On-Site Petroleum's sales as reported on its sales tax returns as follows:

<u>Period Ending</u>	<u>Gross Sales</u>	<u>Taxable Sales</u>	<u>Nontaxable Sales</u>
8/31/84	\$ 472,035.00	\$ 472,035.00	
11/30/84	568,170.00	426,726.00	\$141,444.00
2/28/85	425,678.00	425,678.00	
5/31/85	427,126.00	427,126.00	
8/31/85	259,355.00	259,355.00	
11/30/85	303,039.00	303,039.00	
2/28/86	373,710.00	373,710.00	
5/31/86	334,184.00	334,184.00	
8/31/86	315,457.00	315,457.00	
11/30/86	278,921.00	278,921.00	
2/28/87	301,933.00	301,933.00	
5/31/87	<u>258,506.00</u>	<u>258,506.00</u>	
	\$4,318,114.00	\$4,176,670.00	<u>\$141,444.00</u>

13. Petitioners introduced into the record as Exhibit "6" a photocopy of the auditor's "non-taxable sales test" for the period September 1, 1984 through November 30, 1984. This analysis shows that the auditor reviewed invoices which petitioners claimed were for nontaxable sales amounting to \$56,066.71. Of these invoices, the auditor determined that the following invoices totalling \$6,562.20 (which were analyzed on a monthly basis) did not have supporting documentation, such as a resale or tax-exempt certificate, as detailed on a work

schedule entitled "Non-taxable sales test 9/1/84-11/30/84" dated September 2, 1986 (Petitioners' Exhibit "6")):

<u>Date of Invoice</u>	<u>Vendor</u>	<u>Invoice Amount</u>	
9/7/84	Otis Elevator	\$ 294.00	
9/7/84	Schiavone-Daidone	40.00	
9/15/84	N.Y. Botanical Gardens	592.65	
-- <sup>10</sup>	Acme Skillman	309.75	
--	Otis Elevator	50.00	
9/30/84	Acme Skillman	399.16	
--	Otis Elevator	160.80	
--	Otis Elevator	<u>147.40</u>	
September 1984 total:			\$1,993.76
--	Otis Elevator	\$ 147.40	
--	Acme Skillman	246.58	
--	Alpha Tank Co.	1,285.25	
--	Otis Elevator	<u>150.62</u>	
October 1984 total:			\$1,682.45
11/15/84	N.Y. Botanical Gardens	\$ 667.29	
--	Invirex	228.55	
--	G. W. Rogers Const.	475.28	
--	Otis Elevator	147.40	
--	Otis Elevator	142.04	
11/30/84	Acme Skillman	369.58	
--	G. W. Rogers Const.	695.85	
--	Rockefeller Manag. Corp.	120.00	
--	Technical/Pentagon	<u>40.00</u>	
November 1984 total:			<u>\$2,885.99</u>
	Total		<u>\$6,562.20</u>

14. The work schedule dated September 2, 1987 (Petitioners' Exhibit "6") shows that the auditor then computed a margin of error of 72.672% based upon the following calculation:

Invoices treated as taxable due to lack of documentation to substantiate nontaxability	\$ 6,562.20
Missing invoices	<u>125,083.00</u>
Total of invoices treated as taxable which petitioners claimed as nontaxable	\$131,645.00



The auditor then determined the margin of error of 72.672% by dividing \$131,645.00 by \$181,150.00 (nontaxable sales for the test period quarter per the books of On-Site Petroleum as noted in Finding of Fact "15").

15. By a review of a schedule labeled "Non-taxable sales 6/1/84-5/31/87", a workpaper numbered "4A" included in the Division's Exhibit "J", the auditor determined, by "using the accountant's [presumably Mr. Doloboff's] worksheets" (tr., p. 50), the nontaxable sales claimed by On-Site Petroleum for the entire audit period of \$1,247,673.00 as follows:

<u>Period Ending</u>	<u>Gross Sales Per Quarter Per Books</u>	<u>Taxable Sales Reported On Returns</u>	<u>Sales Tax Paid</u>	<u>Nontaxable Sales</u> <sup>11</sup>
8/31/84	\$ 706,700.00	\$ 472,035.00	\$ 38,943.00	\$ 195,722.00
11/30/84	643,081.00	426,726.00	35,205.00	181,150.00
2/28/85	669,095.00	425,678.00	35,118.00	208,299.00
5/31/85	600,590.00	427,126.00	35,238.00	138,226.00
8/31/85	490,500.00	259,355.00	21,397.00	209,748.00
11/30/85	358,307.00	303,039.00	25,001.00	30,267.00
2/28/86	549,072.00	373,710.00	30,831.00	144,531.00
5/31/86	425,387.00	334,184.00	27,570.00	63,633.00
8/31/86	378,744.00	315,457.00	26,025.00	37,262.00
11/30/86	316,444.00	278,921.00	23,011.00	14,512.00
2/28/87	320,040.00	301,933.00	24,910.00	(6,803.00)
5/31/87	<u>310,959.00</u>	<u>258,506.00</u>	<u>21,327.00</u>	<u>31,126.00</u>
Total	\$5,768,919.00 <sup>12</sup>	\$4,176,670.00	\$344,576.00	\$1,247,673.00

16. The margin of error of 72.672% noted in Finding of Fact "14" was subsequently decreased by the auditor to 68.878% pursuant to the following recalculation shown on a worksheet numbered "4" dated April 21, 1989, which is also included in the Division's Exhibit "J":

Disallowed sales  
(Invoices treated as taxable)

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<sup>11</sup>

Nontaxable sales were calculated by subtracting (i) taxable sales reported and (ii) sales tax paid from the gross sales per quarter per books. For example, for the period ending 11/30/84 (which the auditor examined as a test period), nontaxable sales of \$181,150.00 were computed by subtracting taxable sales reported on sales tax returns of \$426,726.00 and sales tax paid of \$35,205.00 from gross sales for the quarter per books of \$643,081.00 (\$643,081.00 - \$426,726.00 - \$35,205.00 = \$181,150.00).

<sup>12</sup>

The auditor testified that he accepted On-Site Petroleum's gross sales from Mr. Doloboff's worksheets as correct (tr., p. 53).

due to lack of documentation to substantiate nontaxability)	\$ 6,660.00 <sup>13</sup>
Missing invoices	<u>117,423.00</u> <sup>14</sup>
Total disallowed	\$124,083.00

The auditor then determined the margin of error of 68.878% by dividing \$124,083.00 by \$180,150.00.<sup>15</sup>

17. The auditor calculated tax due of \$70,898.21 on sales treated as nontaxable by On-Site Petroleum which were not substantiated as such by applying the margin of error of 68.878% noted in Finding of Fact "16" to total nontaxable sales as per On-Site Petroleum's books of \$1,247,673.00, which resulted in additional sales subject to tax of \$859,372.21. Applying a tax rate of 8¼%, the auditor determined tax due on such sales of \$70,898.21. If the auditor had utilized a corrected margin of error of 68.497% instead of 68.878%, additional sales subject to tax would be calculated as \$854,618.57, with tax due thereon of \$70,506.03.

#### ***TWO OTHER AREAS IN WHICH ADDITIONAL TAX WAS ASSERTED AS DUE***

18. The auditor also found sales tax due of \$2,970.00 on the sale by On-Site Petroleum on June 30, 1986 of computer equipment to IBM for the amount of \$36,000.00. Applying the sales tax rate of 8¼% to \$36,000.00, the auditor determined sales tax due of \$2,970.00. He categorized this tax due as "fixed assets tax due".

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<sup>13</sup>

The auditor rounded off the \$6,562.20 shown in Finding of Fact "14" upward to \$6,660.00 to the disadvantage of petitioners.

<sup>14</sup>

The earlier calculation showed missing invoices of \$125,083.00. Apparently, the auditor was able to review additional invoices.

<sup>15</sup>

It is unclear why the auditor used \$180,150.00 instead of \$181,150.00 which he used in the earlier calculation and which is the amount shown in Finding of Fact "15." If \$181,150.00 was used in this recalculation, the margin of error would be 68.497%, not 68.878%.

Mr. Doloboff, On-Site Petroleum's accountant, testified that this transaction was not really the sale of a computer but rather was a trade-in of a computer on the purchase of a new computer. However, no documentation was introduced to support this testimony.

19. The second area in which the auditor asserted additional tax due was categorized as "expense purchases". He testified as follows concerning his methodology:

"I took a year of expense purchases as my test year. Taxpayer's rep provided an analysis of the categories which I wanted to actually review and he also provided me with invoices. Okay? I then did my analysis in each category and those items that he did not have or did not provide me, I assessed it" (tr., p. 47).

A worksheet numbered "5" and labeled "Expense Purchase Year 6/30/86 Summary" included in the Division's Exhibit "J" shows tax asserted due on expense purchases totalling \$36,403.94 for the 1986 sales tax year, June 1, 1985 through May 31, 1986, calculated as follows:

	<u>Amount Assessed</u>
(1) Computer Expense	\$ 647.33
(2) Repairs and Maintenance	21,196.89
(3) Equipment Rental	4,361.58
(4) Office Expenses	<u>10,197.94</u>
	\$36,403.94

The auditor then applied the tax rate of  $8\frac{1}{4}\%$  to compute tax due for the 1986 sales tax year of \$3,003.30. He multiplied this amount by three to compute an estimated tax due on expense purchases for the entire three-year audit period of \$9,009.90. It is observed that included in the Division's Exhibit "J" are six very detailed worksheets showing the auditor's analysis of expenses in the four categories noted above on which tax was asserted as due. It is noted that the auditor's detailed analysis of On-Site Petroleum's postage and stationery expenses resulted in no additional tax found due. Petitioners introduced no evidence to show that tax, in fact, had been paid on the various expenses upon which the auditor determined no tax had been paid.

21. An auditor's worksheet numbered "2" in Division's Exhibit "J" allocated tax asserted as due, for each of the three audit areas at issue, over the 12 sales tax quarters at issue, as follows:

Expense

<u>Period Ending</u>	<u>Nontaxable Sales Tax Due</u>	<u>Purchases Tax Due</u>	<u>Fixed Assets Tax Due</u>	<u>Total Tax Due</u>
8/31/84	\$ 5,908.18	\$ 750.82	\$ -0-	\$ 6,659.00
11/30/84	5,908.18	750.82	-0-	6,659.00
2/28/85	5,908.18	750.82	-0-	6,659.00
5/31/85	5,908.18	750.82	-0-	6,659.00
8/31/85	5,908.18	750.82	-0-	6,659.00
11/30/85	5,908.18	750.82	-0-	6,659.00
2/28/86	5,908.18	750.82	-0-	6,659.00
5/31/86	5,908.18	750.82	-0-	6,659.00
8/31/86	5,908.18	750.82	2,970.00	9,629.00
11/30/86	5,908.18	750.82	-0-	6,659.00
2/28/87	5,908.18	750.82	-0-	6,659.00
5/31/87	<u>5,908.18</u>	<u>750.82</u>	-0-	<u>6,659.11</u>
Total	\$70,898.21	\$9,009.90	\$2,970.00	\$82,878.11

### ***RESPONSIBLE OFFICERS***

22. As noted in Findings of Fact "4" and "5", petitioner Ashley Jarwood executed three consents extending the period of limitations for assessment of tax against the corporate petitioner dated August 11, 1987, November 13, 1987 and May 5, 1988, respectively. In addition, the record includes the following evidence concerning Ms. Jarwood's involvement and/or relationship with On-Site Petroleum:

(1) The auditor testified that Mr. Doloboff, On-Site Petroleum's accountant, identified Ms. Jarwood as an officer of the company, and he noted such information on his Sales Tax Audit Report Information Sheet (Division's Exhibit "M");

(2) Mr. Doloboff also testified that he "was told by the officers of the corporation" that their records were taken by the IRS (tr., p. 175), and when questioned concerning the names of such officers, responded Ashley Jarwood;

(3) A stock agreement dated July 12, 1979 (included in the Division's Exhibit "K") gave Ms. Jarwood 25% of the company's stock, made her a director and treasurer of the company, authorized a salary for her and granted her the power to sign checks and commercial paper;

(4) Ms. Jarwood signed an application dated August 29, 1988 for registration of On-Site Petroleum as a petroleum distributor in her capacity as secretary/treasurer of the

corporation which indicated that she owned 100% of the stock of On-Site Petroleum (also included in Exhibit "K");

(5) Ms. Jarwood executed two powers of attorney on behalf of On-Site Petroleum, one dated May 28, 1985 in her capacity as president, and the second dated December 9, 1987 in her capacity as treasurer;

(6) Ms. Jarwood also signed various tax returns on behalf of On-Site Petroleum, including the following:

(i) Metropolitan transportation business tax surcharge returns for the years ending June 30, 1987, June 30, 1988 and June 1990;

(ii) U.S. corporation income tax return for the year 1984 which also listed Ms. Jarwood as an officer in Schedule E, "Compensation of Officers", noting compensation for 1984 of \$33,800.00, the highest of the two corporate officer salaries shown therein;

(iii) New York State corporation franchise tax reports for the years ending June 30, 1986 and June 30, 1987;

(iv) A short form New York State corporation franchise tax report for the year ending June 30, 1988; and

(v) The six sales and use tax returns noted in Finding of Fact "3"; and

(7) Ms. Jarwood signed On-Site Petroleum's petition to the Division of Tax Appeals in her capacity as president.

23. The record includes the following evidence concerning petitioner Trevor Wisdom's involvement and/or relationship with On-Site Petroleum:

(1) As was the case with Ms. Jarwood, as noted in Finding of Fact "22", Mr. Doloboff identified Mr. Wisdom as an officer of On-Site Petroleum, and the auditor noted such information on his Sales Tax Audit Report Information Sheet;

(2) On-Site Petroleum's New York City Corporation Tax Return for the year ending June 30, 1986 and the State Corporation Franchise Tax Report for the same year each listed Mr. Wisdom as a corporate officer;

(3) On-Site Petroleum's U.S. Corporation Income Tax Return for 1985 listed Mr. Wisdom in Schedule E, "Compensation of Officers", as an officer who devoted his full time to the corporation for compensation of \$36,400.00, which comprised all of the company's salaries to officers for the year; and

(4) A computer printout of sales tax registration information (i) indicated that Mr. Wisdom was an officer of On-Site Petroleum on June 1, 1984, and (ii) contains a State wage reporting report showing that Mr. Wisdom was on the company's payroll as of March 31, 1987 with quarterly wages of \$8,400.00.

24. Petitioners introduced no evidence to contradict the evidence noted in Findings of Fact "22" and "23". Neither Ms. Jarwood nor Mr. Wisdom appeared to testify at the hearing.

### ***OPINION***

The Division and petitioners, On-Site Petroleum and Ashley Jarwood and Trevor Wisdom, as officers of On-Site Petroleum, filed exceptions in this case, each dealing with the same issues. We will address each of the issues in the order dealt with by the Administrative Law Judge in his determination.

We deal first with the validity of the power of attorney designating Mr. Doloboff as petitioners' representative.

The Administrative Law Judge determined that the power of attorney appointing Mr. Doloboff to represent petitioners for the sales tax periods June 1, 1984 through May 31, 1987 was facially defective because Ms. Jarwood's signature on the power of attorney was not notarized. The Administrative Law Judge determined that the power of attorney, while facially defective, may be given effect because a written power of attorney is not an indispensable element to establish a representative's authority (Matter of Jenkins Covington, N.Y., Tax

Appeals Tribunal, November 21, 1991, affd Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal, 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, 610 NYS2d 151). Based on our decisions in Matter of Robert DeFilippis Crane Serv. (Tax Appeals Tribunal, June 9, 1994) and Matter of Top Shelf Deli (Tax Appeals Tribunal, February 6, 1992), the Administrative Law Judge determined that "On-Site Petroleum . . . subsequently ratified its representation by Mr. Doloboff by his continued position as its accountant and the numerous actions he has taken on behalf of On-Site Petroleum including the ones listed in Finding of Fact '5' [cites omitted]" (Determination, conclusion of law "B"). On this basis, the Administrative Law Judge concluded that the consents executed by Mr. Doloboff on behalf of On-Site Petroleum, the corporation, were valid.

In their exception, petitioners take issue with that portion of Finding of Fact "5" which states "[h]owever, it is observed that, subsequent to April 24, 1987, Mr. Doloboff acted on behalf of On-Site Petroleum in many ways, including the following" (Petitioners' Attachment to their exception). Petitioners ask us to find that "[t]he Division's sole witness, the Tax Auditor, admitted that the Power of Attorney issued to the corporate Petitioner's accountant was invalid" (Petitioners' Attachment to their exception).

We affirm the determination of the Administrative Law Judge. No doubt, as the auditor testified and the Administrative Law Judge found as fact, the power of attorney was facially defective. However, petitioners do not controvert the "validation principle" embraced in our decisions in DeFilippis and Top Shelf Deli which the Administrative Law Judge applied in concluding that On-Site Petroleum ratified its representation by Mr. Doloboff's continued actions on its behalf as detailed in finding of fact "5."

We deal next with the issue of whether the consents executed by Mr. Doloboff for On-Site Petroleum were valid with respect to petitioners Jarwood and Wisdom. Specifically, the Administrative Law Judge found that the consents were not valid for purposes of extending the statute of limitations against petitioners Jarwood and Wisdom as responsible officers. Referring to section 1147(c) of the Tax Law, the Administrative Law Judge opined that it:

"should not be read so broadly as to mean that a consent by a corporation to extend the period of limitation for assessment of tax is binding on all corporate officers who may be liable for that tax, regardless of the actual wording of the consent and the specific person who signed it. Rather, the effect of the written consent should be based upon its actual wording. In the matter at hand, as noted in Footnote "7" the consents were executed on behalf of On-Site Petroleum only, and the effect of such consents should be limited to the taxpayer who signed them, i.e., On-Site Petroleum. Consequently, such consents were not effective to extend the period of limitation for assessing tax against Ms. Jarwood and Mr. Wisdom as well" (Determination, conclusion of law "E").

Petitioners assert that the determination of the Administrative Law Judge was correct.

The Division asserts the Administrative Law Judge was wrong. The premise for the Division's assertion is that since petitioners are responsible officers of On-Site Petroleum within the meaning of Tax Law § 1131(1), they:

"were required by Tax Law § 1134(a)(1) to individually file with the Division a certificate of registration. And finally, upon such registration, each of these two officers was required by Tax Law § 1136(a) to file sales tax returns. As Petitioners have failed to demonstrate that they individually registered themselves, and furthermore failed to demonstrate that they individually filed sales tax returns, they have failed to demonstrate the date upon which any relevant limitations period commences with regard to their individual liability for the taxes at issue" (Division's brief, p. 5).

The Division acknowledges that it does not interpret the statutory language to require individual officers to file returns where the corporation has filed returns. Specifically, the Division's regulations provide that "[e]ven though the persons described in this paragraph are 'persons required to collect tax,' they are not personally required to file returns for sales made in their corporate function where the corporation files returns" (20 NYCRR 526.11[b][3]).

The Division argues, in effect, that since it has relieved petitioners of the responsibility of filing individual returns, their liability should be coextensive with that of the corporation since it is the corporate returns which relieves them from filing in the first place.



We rejected the Division's position in Matter of Bleistein (Tax Appeals Tribunal, July 27, 1995) where we found that the plain language of Tax Law §§ 1138(c) and 1147(c)<sup>16</sup> is that the only tax that can be addressed during an extended period is the tax of the taxpayer who signed the consent extending the period of limitation. In Bleistein we stated:

"We find that the three consents to extend the period of limitations . . . were signed on behalf of Second Street Deli, Inc., thereby binding the corporation. We find no basis on which to decide that petitioner was likewise bound . . . . [A]ll three consents to extend the period of limitations list the 'vendor' as the corporation. These forms do not in anyway suggest or imply that they apply to any other taxpayer. Petitioner, by affixing his signature to a consent to extend the period of limitations . . . did so in his capacity as officer with the only effect that the corporation was bound thereby . . . .

"We conclude that it cannot be inferred from petitioner's signature . . . that petitioner consented on his own behalf . . . to assess tax against him. To do so would be to ignore the principles of statutory construction . . . .

\* \* \*

"The natural and obvious import of [Tax Law §§ 1138(c) and 1147(c)] is that the only tax . . . that can be assessed during the extended period is the tax of the taxpayer who signed the consent extending the period of limitation. In this case, that person and taxpayer was the corporation, i.e., Second Street Deli, Inc.

"We further conclude that to read the forms as binding on both the corporation and its officers would be inconsistent with the principle of the separate liability of the officer from the corporation.

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<sup>16</sup>Tax Law § 1138(c) provides:

"A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto" (emphasis added).

Tax Law § 1147(c) provides:

"Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at any time within such extended period."

"While the State Tax Commission reached a different result in Matter of Playmor Amusement Co. (State Tax Commission, September 27, 1982) and in subsequent decisions with respect to a consent to extend the period of limitations, we decline to follow . . . . We find the Commission's conclusions in Playmor and similar cases are inconsistent with the body of case law developed by the courts and this Tribunal establishing the independent liability of officers. Consequently, we reject the Commission's conclusion that a consent to extend the period of limitations signed on behalf of the corporation by the officer binds the officer" (Matter of Bleistein, *supra*).

It follows that the consents to extend the period of limitations executed on behalf of the corporation by Ms. Jarwood and Mr. Doloboff do not extend the period for any responsible officers of the corporation.

We deal next with the issue of whether petitioners were responsible officers. The Administrative Law Judge concluded that:

"the Division established a sufficient basis for treating Ashley Jarwood and Trevor Wisdom under Tax Law § 1131(1) as officers of On-Site Petroleum responsible for the corporation's collection and payment of sales and use taxes based upon the evidence detailed in Findings of Fact '22' and '23.' The individual petitioners, who did not testify or offer any other proof at the hearing, did not sustain their burden of proving that they were merely nominal corporate officers (see, Martin v. Commr. of Taxation & Fin., 162 AD2d 890, 558 NYS2d 239)" (Determination, conclusion of law "M").

On exception, petitioners assert that:

"[t]he evidence indicates that Jarwood was an unpaid employee of [On-Site Petroleum]. To hold such an unpaid employee liable for taxes, interest and penalties now well in excess of \$200,000 would be inequitable, unjust and unconscionable.

"In this matter, the Tax Department offered no germane evidence that either Jarwood and/or Wisdom was an officer of the Petitioner during the taxable periods involved. Moreover, even if it is determined that either or both of them were corporate officers, no evidence was offered by the Tax Department relating to the factors set forth by both the Tax Department and/or the Tax Appeals Tribunal in determining responsibility in a 'responsible officer' determination.

"The evidence in this matter and the record supports the conclusion that neither Jarwood nor Wisdom had sufficient authority and control over the Petitioner's affairs to be held as responsible officers liable for the sales and use taxes in issue" (Petitioners' July 5, 1995 brief, pp. 9-10).

The Division asserts that the determination of the Administrative Law Judge was correct.

We affirm the determination of the Administrative Law Judge. Findings of fact "22" and "23" referred to by the Administrative Law Judge present clear evidence that both Ms. Jarwood and Mr. Wisdom were responsible officers. In brief, the facts show that: Ms. Jarwood was a director of On-Site Petroleum; at various times held the titles of secretary, treasurer and president of On-Site Petroleum; had the power to sign checks and commercial paper on behalf of On-Site Petroleum; executed three consents extending the period of limitations for On-Site Petroleum; signed an application for registration of On-Site Petroleum as a petroleum distributor; executed powers of attorney for On-Site Petroleum; and signed various tax returns for On-Site Petroleum. Similarly, the facts are that Mr. Wisdom was identified by Mr. Doloboff as an officer of On-Site Petroleum; was listed on On-Site Petroleum's United States Corporation Income Tax Return for 1985 as an officer who devoted his full time to the corporation and who signed tax returns for On-Site Petroleum. Ms. Ashwood and Mr. Wisdom introduced no evidence to contradict these facts. Neither Ms. Jarwood nor Mr. Wisdom testified at the hearing.

We deal next with the issue of the validity of the Division's audit.

The Administrative Law Judge determined that the Division improperly resorted to an estimate of tax due from On-Site Petroleum. The Administrative Law Judge, rejecting totally the testimony of the auditor to the contrary, found that the Division obtained possession of On-Site Petroleum's records during the course of the extended audit period and before the assessments were issued and was obligated to examine those records before it could resort to estimating On-Site Petroleum's tax liability. He concluded that "for the auditor to avoid reviewing such records and to base a determination by use of estimating methodologies cannot be countenanced" (Determination, conclusion of law "J").

On exception, the Division asserts that the record shows that for nearly three years the auditor tried to get the records from the Internal Revenue Service and that: "[i]n view of [these] extensive efforts . . . it would be illogical to conclude that, upon receiving such records, he would ignore them. Yet this is precisely what the ALJ decided had occurred" (Division's brief,

p. 11). The Division asserts that the fact that the auditor's testimony was unpersuasive may be attributable to the fact that the cross-examination was "vigorous" and not because it was untruthful.

In response, petitioners assert that the Administrative Law Judge was correct in concluding that the Division improperly resorted to estimating On-Site Petroleum's liability.

We affirm the determination of the Administrative Law Judge on this issue. Simply stated, the Administrative Law Judge did not find credible the auditor's testimony that the Division did not obtain On-Site Petroleum's records before the assessments were issued. The credibility of witnesses is a determination within the domain of the trier of facts, the person who has the opportunity to view the witness first hand and evaluate the relevance and truthfulness of their testimony (see, Matter of Gordon, Tax Appeals Tribunal, January 4, 1996; Matter of Moss, Tax Appeals Tribunal, November 25, 1992; Matter of Jericho Delicatessen, Tax Appeals Tribunal, July 23, 1992; Matter of Spallina, Tax Appeals Tribunal, February 27, 1992). Although this Tribunal is not bound by the Administrative Law Judge's evaluation of a witness's credibility (Tax Law § 2006[7]; 20 NYCRR 3000.17[e][1]; Matter of Moss, *supra*; Matter of Jericho Delicatessen, *supra*), we find nothing in the record here which causes us to alter the determination of the Administrative Law Judge (*cf.*, Matter of Wachsman, Tax Appeals Tribunal, November 30, 1995).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The exception of On-Site Petroleum Unlimited, Inc., Ashley Jarwood, as Officer of On-Site Petroleum Unlimited, Inc. and Trevor Wisdom, as Officer of On-Site Petroleum Unlimited, Inc. is denied;
3. The determination of the Administrative Law Judge is affirmed;
4. The petitions of Ashley Jarwood, as officer of On-Site Petroleum Unlimited, Inc. and Trevor Wisdom, as officer of On-Site Petroleum Unlimited, Inc. are granted and the petition of

On-Site Petroleum Unlimited, Inc. is granted, except to the extent indicated in conclusion of law "N" of the Administrative Law Judge's determination; and

5. The notices of determination dated December 15, 1991 issued against Ashley Jarwood, as officer of On-Site Petroleum Unlimited, Inc. and Trevor Wisdom, as officer of On-Site Petroleum Unlimited, Inc. are cancelled and the Division of Taxation is directed to modify the Notice of Determination dated December 15, 1991 issued to On-Site Petroleum Unlimited, Inc. in accordance with paragraph "4" above.

DATED: Troy, New York  
February 8, 1996

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

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

/s/Donald C. DeWitt  
Donald C. DeWitt  
Commissioner