STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM G. LOMBARD, OFFICER OF CONTROL SYSTEMS ASSOCIATES, INC.	:	DECISION DTA No. 812266
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 December 1, 1986 through August 31, 1991.	:	

Petitioner William G. Lombard, officer of Control Systems Associates, Inc., 4211 State Route 13, Truxton, New York 13158, filed an exception to the determination of the Administrative Law Judge issued on December 7, 1995. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kathleen D. Church, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Petitioner filed a letter in reply. Petitioner's request for oral argument was denied.

Commissioner Jenkins delivered the decision of the Tax Appeals Tribunal. Commissioner DeWitt concurs. Commissioner Pinto took no part in the consideration of this decision.

ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Control Systems Associates, Inc. and its president, petitioner herein.

II. Whether the Division of Taxation made a proper request for the books and records of Control Systems Associates, Inc. for the period in issue.

FINDINGS OF FACT

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

Control Systems Associates, Inc. ("Control") was a New York corporation incorporated on November 17, 1986. Control's primary business was selling computerized and noncomputerized controls, which were used to control and monitor heating and ventilation equipment and processes. Some of the company's work was monitoring software for customers who could not do thesame for themselves and this work was often done under contract. The company also did troubleshooting for customers who experienced environmental changes which entailed modifying software programs to solve such problems. The Division of Taxation ("Division") characterized Control as a heating, ventilation and air conditioning ("HVAC") contractor.

In a petition for an Advisory Opinion filed by a successor corporation to Control, but allegedly carrying on the same business, petitioner, William G. Lombard, president of Control and the successor corporation, characterized the business as one which installs and modifies custom software in industrial and commercial applications. The software managed energy and controlled processes under specific environmental rules and conditions. The software needed to be modified on a continual basis whenever conditions changed or when requested by a customer.

Since its incorporation, William G. Lombard was the president of the company. He was the sole shareholder until he took on a partner, Mr. David Robinson, pursuant to the terms of an agreement, dated July 12, 1989, and pursuant to which Mr. Robinson became a 50% owner of the business.

However, Mr. Lombard signed various tax returns between 1988 and 1992, indicating on each one that he was the president of Control. He had the authority to sign corporate checks (although a payroll company was engaged to issue payroll checks), corporate documents and

contracts and tax returns. He also had the authority to purchase inventory, hire and fire employees and make business decisions on behalf of the company.

Mr. Lombard hired a manager, Elaine Divita, to whom he delegated the management of the day-to-day operations of the business, and David Robinson, prior to his obtaining an ownership interest in the business. However, Mr. Lombard had a working knowledge of the business affairs of Control, its cash flow and difficulties and always participated in the major business decisions made on behalf of Control. Mr. Lombard was partly responsible for maintaining the books and records of the business, but delegated the majority of that responsibility to his office manager, Ms. Divita. She was responsible for the preparation of tax returns, in conjunction with Control's accountants, which task was executed and the returns submitted to Mr. Lombard for his signature.

Mr. Lombard delegated the authority for paying creditors to Ms. Divita. Although some actions were taken without Mr. Lombard being consulted, he was never precluded from reviewing the books and records.

The Division conducted a field audit between October of 1991 and April of 1992. As a result of an examination of the books and records of Control, which were determined to be inadequate for part of the audit period, the Division found additional tax due on recurring purchases of $9,819.09, additional tax on fixtures and equipment of $91.00 and additional sales tax of $10,862.11 on unsubstantiated exempt sales, for a total tax deficiency for the audit period December 1, 1986 through August 31, 1991 of $20,772.20.

In addition to penalty and statutory interest, Control was assessed omnibus penalty for operating without a certificate of authority. Control did not register for sales tax purposes until September 1, 1991 even though invoices indicated that it had collected sales tax on some sales. The omnibus penalty is not in issue herein.

The Division issued a Notice of Determination, dated August 24, 1992, to William G. Lombard, as officer of Control, which set forth additional taxes due of $20,772.20, plus penalty and interest, for a total of $34,483.02. Petitioner protested the notice and the matter went to the

Bureau of Mediation and Conciliation Services. After the conference, held on February 12, 1993, the tax assessed was adjusted, based on additional documentation submitted. The Conciliation Order, dated June 25, 1993, recomputed the tax due based upon the accepted additional documentation, arriving at an adjusted tax due of $18,859.62, plus penalty and interest.

This was the amount in issue when the case reached the Division of Tax Appeals. However, since formal hearing on August 24, 1994, additional documentation submitted by petitioner to the Division has resulted in further adjustments to the statutory notice. The Division has agreed that the amount now in issue is $9,509.03, plus penalty and interest.

At hearing, petitioner was afforded time to produce further documentation with respect to sales and expense purchases. In fact, documentation was produced and reviewed by the Division. Initially, the Division credited Mr. Lombard with $2,603.69 based upon the material received from petitioner in September of 1994, pursuant to a memorandum from Robert L. Dean, auditor, to Kathleen D. Church, Esq., dated October 11, 1994. Subsequently, the Division made a further adjustment of $507.99 to the assessment to petitioner based upon documentation submitted to the Division in November 1994, pursuant to a memorandum sent by Mr. Dean to Ms. Church, dated November 30, 1994.

Finally, the adjustments made by the Division were incorporated into a letter and attached workpapers, dated March 6, 1995, from Mr. Dean to Mr. Lombard, which indicated that the tax due had been reduced to $15,747.94 as a result of the documentation submitted by petitioner.

As referred to above, after further discussions with Mr. Lombard and a review of his documentation, the Division reduced the additional tax due to $9,509.03, as more fully set forth in attachments to a letter from Mr. Dean to Ms. Church, dated June 27, 1995.

During the audit period, Control was located at 72 Albany Street, Cazenovia, New York. Its two owners were William Lombard and David Robinson. The original auditor, Ms. Jan Krisak, described the business of Control as "construction" and the principal service as installing and servicing heating and cooling systems for commercial properties.

As mentioned above, the Division began the audit in October of 1991. However, Ms. Krisak did not send an appointment letter with a written request for records or specifically define the term of the audit period. The only mention of a request for books and records from Ms. Krisak was the entry in her log for October 4, 1991, which stated as follows:

> "10/4 Bookkeeper called: more in depth detail of what books & records available & what I will want to see. Directions to audit."

There is no other reference in the audit report of any other request for books and records.

When the Administrative Law Judge asked Mr. Dean, the second auditor assigned to the matter, whether there had ever been a written request for books and records, his answer was no, other than a March 13, 1992 letter to the taxpayer from Mr. Dean asking for additional exemption certificates.

The audit was transferred to Mr. Dean from Ms. Krisak in or about January of 1992. There is no reference in the log after that point of a request for books and records or an entry which would have clearly informed petitioner of the period under audit. Further, Mr. Dean specifically stated that he based his opinion that Control's records were inadequate primarily on Ms. Krisak's report, and therefore in reliance on her request for books and records (tr., p. 55). Mr. Fred Brissette, supervisor of both Ms. Krisak and Mr. Dean, stated at the hearing that the majority of the audit work was performed by Ms. Krisak, that she had performed all the workup through the initial audit results, and that he had attended the final conference with her on January 6, 1992, where the audit results were presented and explained to Mr. Lombard. In fact, under cross-examination, Mr. Brissette confirmed that Ms. Krisak was the only auditor who performed an "in-house" audit of Control's books and records and that she made the initial decision as to what tax was due based upon the audit information she left with the district office when she left. There were many instances in the hearing transcript where Mr. Lombard stated that he had produced records for Ms. Krisak and that she had reviewed them. However, he contended that "if [Mr. Dean] you'd requested them, you would have been shown them at any time" (tr., p. 46). This statement, the numerous references by petitioner that he continually had to ask what books and records the Division wanted to examine, and the statement that there had

been no written request or clear evidence of an oral request for books and records by Ms. Krisak, combined to raise the issue of whether there had been an adequate request for books and records, if not framed in quite the traditional manner by a pro se taxpayer.

Thirty percent of the audit findings were due to a projection of missing invoices. In addition, Mr. Dean stated that the books and records were generally inadequate for the entire audit period.

At many times throughout the hearing, petitioner raised the point that some of his records were computerized and that Ms. Krisak was made aware of this fact. However, both Mr. Dean and Mr. Brissette denied any knowledge of computerized records which were not also available in hard copy. There is no reference to computerized records in Ms. Krisak's log.

As set forth above, Control was not registered as a vendor for sales tax purposes during the period under audit, December 1, 1986 through August 31, 1991. An examination of the books and records made available on audit were complete for some periods and incomplete for others. The Division was able to perform a detailed audit for approximately 70% of the audit period and a projection method for the remaining period where invoices were missing.

On the detailed portion of the audit, the Division inspected invoices which indicated tax collected and not remitted totalling $2,885.87; tax due on sales of repairs and maintenance totalling $3,084.50; and tax due on purchase of materials, from out-of-state and in-state suppliers for the installation of heating and cooling systems, totalling $8,141.40. Some of these latter sales were demonstrated to be capital improvements, in which case the auditor looked to the purchase side of the transaction to determine if the tax had been paid on the purchase of the material.

The estimated portion of the audit concerned missing invoices for the years 1987, 1990 and 1991. The Division used the cash receipts journals from the years 1988 and 1989, which were complete, to estimate the taxable portion of gross receipts as reported on the Federal tax returns. An analysis of the cash receipts journal for 1988 and 1989 resulted in a 9.4% taxable sales ratio. The actual invoices the auditors saw for those years were deducted from the totals to

prevent double taxing, and the remainder were considered the taxable sales for those years. The total additional tax for the estimated portion was $4,747.85.

All of these figures have been adjusted to reflect the modifications made at conference, which reflect a decrease from the original notice which assessed $9,910.09 in additional use tax and $10,862.11 in additional sales tax, or a total deficiency of $20,772.20. The modifications resulted from the submission of additional documentation at conference.

The Division also noted that Control made exempt sales for which it was given credit where it demonstrated its right to the exemption. However, many certificates were rejected because they were improperly completed, omitting the buyer or seller, or were issued by an unregistered vendor.

The Division also held as taxable many sales of what Control described on its invoices as repair and maintenance to installed equipment, seasonal on-line changes to temperature settings (sometimes done via modem), and troubleshooting heating and cooling systems. The Division made this determination despite petitioner's protestations that the receipts from the sale of custom software and the receipts from updating and modification services are exempt from sales tax, consistent with Tax Law § 1101(b)(14), a Technical Services Bureau memorandum (TSB-M-93[3]S [March 1, 1993]), and New York State Department of Taxation and Finance Sales Tax Newsletter, Vol. 19, No. 1, March, 1992.

The Division asserted penalty and statutory interest as well as omnibus penalty pursuant to Tax Law § 1145(a)(3)(i) for operation without a certificate of authority. As stated above, the omnibus penalty does not appear on the Notice of Determination and is not an issue herein.

Petitioner has tried to establish his true tax liability by submitting additional documentation since February of 1992. He has been given ample opportunity on audit, at conference and in the proceedings in the Division of Tax Appeals. Briefly, with regard to the tax remaining in issue, petitioner contends that he does not owe the additional tax remaining in issue because of the following:

(a) the additional tax found due by the Division was calculated from projections for the years with the missing invoices;

(b) several invoices were erroneously marked as repairs or service by the Division interns who transcribed them;

(c) some of the invoices inspected and marked "overlap audit" were not removed or credited;

(d) the Division taxed invoices petitioner characterized as consulting and evaluating and the installation of custom software and computer equipment;

(e) petitioner believed that the Division double taxed him on some purchases which were incorporated into capital improvements;

(f) petitioner contended that the billings to Corp Center, Hidden Valley Apts., CIM-POB, and 550 Harrison were in fact billed to either Sutton Real Estate or Sutton Management Co., who refused to provide petitioner with a resale certificate;

(g) items purchased for stock were erroneously taxed even though they eventually were taxed as part of other sales;

(h) invoices for projects relating to Jamesway stores allegedly billed to out-of-state contractors who have since gone out of business and are unable to produce resale certificates;

(i) an expense purchase paid directly by Sutton Management to DETCO Ind.;

(j) duplicate billing for an expense purchase from Novar Controls on invoice numbers 72317, dated July 2, 1990, and 72318, dated January 30, 1990 in the invoice amount of $7,862.50 and tax due of $550.38;

(k) various invoices for which petitioner was not able to obtain resale certificates, to wit, all invoices billed to Pioneer Development relating to Business Park II project, and Ward Controls and Ward Supply Co., Inc.;

(l) reference numbers 482 and 475 were allegedly duplicates relating to an item which was a negotiated rental arrangement;

(m) reference numbers 599, Novar Pcess custom software package for Pioneer Development relating to Business Park II and also reference number 572 for a Novar Pcess custom software package for Burts of Endicott; and

(n) a credit for two variable frequency drives that went into the J.C. Penney project at Carousel Mall that petitioner contended was determined to be exempt.

Petitioner's records were not in auditable form. The fact that the invoices were not available with substantiation of exemption indicated that petitioner's poor records were the primary reason for the Division's inability to determine if tax had been properly collected or not collected.

Petitioner made a motion for summary determination at hearing which was based upon the facts adduced at hearing and documentation submitted subsequent to the hearing. Mr. Lombard contends that the proof demonstrated that he paid all taxes due and owing and is owed a refund (tr., pp. 191-192). The Administrative Law Judge took the motion under advisement and reserved decision until determination.

OPINION

The Administrative Law Judge denied petitioner's motion for summary determination, and that denial is not an issue before us on appeal.

The Administrative Law Judge next addressed the issue of whether the Division had made an adequate request for petitioner's books and records.

Tax Law § 1138(a)(1) provides that if:

> "a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by [the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ."

This language has been interpreted to provide that:

> "[t]he honest and conscientious taxpayer who maintains comprehensive records as required has a right to expect that they will

> be used in any audit to determine his ultimate liability" (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43).

To determine the adequacy of a taxpayer's records, the Division must first request (Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859) and thoroughly examine (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978, 979-980) the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109). The request for records must be explicit and not "weak and casual" (Matter of Scholastic Specialty Corp. v. Tax Appeals Tribunal, 198 AD2d 684, 603 NYS2d 357, lv denied 83 NY2d 751, 611 NYS2d 133; Matter of Christ Cella, Inc. v. State Tax Commn., supra).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (Matter of Urban Liqs. v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138, 139). The Administrative Law Judge concluded that the Division did not follow the procedure in this case, since the auditor, Ms. Krisak, made no request for books and records. Nor does the record show that anyone else made such a request.

Therefore, the Administrative Law Judge concluded that the Division is precluded from estimating tax for those periods it determined petitioner did not have adequate books and records, i.e., 1987, 1990 and 1991. Neither side has taken exception to this portion of the determination below.

The Administrative Law Judge went on to conclude that since a proper request for records was not made, then the only periods left in issue are the two years for which the Division conceded adequate books and records and performed a detailed audit, i.e., the years 1988 and 1989. For those two years, the Division looked at the invoices (1) on which tax had been collected and not remitted; (2) for sales for which invoices were observed and taxes not collected because petitioner believed that they were exempt rather than repairs and maintenance to installed equipment; (3) which indicated seasonal changes to temperature settings done by modem; and (4) for time spent troubleshooting heating and cooling systems. The final area

looked at in detail by the Division for the years 1988 and 1989 was materials purchases on which sales tax was due but not paid. These materials were taxable equipment and supplies used in the installation of heating and cooling systems which are capital improvements.

In some cases, petitioner was able to produce capital improvement certificates. In others, the Division accepted that the projects were capital improvements without certificates. The invoice description dictated whether the sale was taxable. Where the project or service was not documented it was considered by the Division to be a taxable repair or service, based upon the presumption of taxability set forth in Tax Law § 1132(c).

The Administrative Law Judge noted that petitioner did not raise a defense to petitioner's collection of, but failure to pay over to the State, tax amounts set forth on invoices examined by the Division. Therefore, the Administrative Law Judge concluded that those items were properly assessed in the sum of $2,555.99, as revised on June 27, 1995.[1]

As to that portion of the audit conducted on a detailed basis, the underpinnings of petitioner's challenge lie in his records, or lack thereof. Tax Law § 1132(c) creates a presumption that the receipts from the sale of tangible personal property or for certain enumerated services are subject to tax until the contrary is established and the burden of proving that any receipt is not taxable is upon the person required to collect tax. The statute shifts the burden of proving that a receipt is not taxable solely to the customer if the "vendor, not later than 90 days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe" (Tax Law § 1132[c]). The Administrative Law Judge noted despite the shortcomings in petitioner's records, both in quantity and quality, the Division permitted exemptions for capital improvements where the only evidence was the invoice that the auditors believed indicated a project that met the definition of a capital improvement as set forth in Tax Law § 1101(b)(9)(i). Tax Law § 1105(c)(3)(iii) excepts from tax the services of installing tangible personal property which "when installed, will constitute an addition or capital improvement to real property,

[1]See, finding of fact "4" of the Administrative Law Judge's determination.

property or land." In other words, if the Division believed the end result of the services was a capital improvement, it held the services to be nontaxable (see, 20 NYCRR 527.7[b][4]).

Petitioner was given a credit for capital improvements where he was able to produce a properly completed exemption certificate or where the job or project was obviously a capital improvement to the Division. No sales tax was assessed in those circumstances, but the Division examined the purchases of materials used in those projects to see whether tax had been paid, because tax must be paid on materials used in capital improvements by the last person to purchase the materials (the ultimate consumer) before they are installed (see, 20 NYCRR 527.7[b][5]).

Petitioner contends that he should be given credit for invoices which were marked "overlap audit" by the Division, or, in the alternative, they should be omitted. It is noted that the audit of petitioner began as a result of the audit of one of its customers, Hoyts, and the audit report notes that any additional tax due on petitioner's invoices was held taxable in the customer's audit. However, the referenced invoices to which petitioner objects indicate no additional tax due. Therefore, the Administrative Law Judge concluded no adjustment is justified due to the overlap.

In addressing the evidence presented, the Administrative Law Judge noted petitioner's burden of proof. Petitioner has the burden of proof in any case where, as here, he claims an exemption (Tax Law § 1132[c]). He must adequately document his claim as well (Matter of Airport Indus. Park, Tax Appeals Tribunal, April 11, 1991). Once the Division has identified receipts for property or services of the types indicated for which tax has not been paid, Tax Law § 1132(c) does not impose on the Division a further burden to show that each of the taxpayer's receipts are in fact taxable (see, Matter of Koren-Di Resta Constr. Co. v. State Tax Commn., 138 AD2d 909, 526 NYS2d 654, lv denied 72 NY2d 805, 532 NYS2d 755; Matter of Mendon Leasing Corp. v. State Tax Commn., 135 AD2d 917, 522 NYS2d 315, lv denied 71 NY2d 805, 529 NYS2d 276; Matter of On the Rox Liqs., Ltd. v. State Tax Commn., 124 AD2d 402, 507 NYS2d 503, lv denied 69 NY2d 603, 512 NYS2d 1026; Matter of DACS Trucking Corp., Tax

Appeals Tribunal, March 21, 1991). In the instant matter, petitioner has submitted purchase invoices and testimony of exempt sales and purchases. Petitioner was given more than a fair opportunity to prove his claims of exempt sales, taxes paid in error and exempt purchases, and was able to substantiate said claims to all but $9,509.03 in additional tax due. He did this between October 1991 and June of 1995 and accomplished it despite the poor bookkeeping and lack of records available. The law is clear with regard to petitioner's duty in this area, to wit, the requirements of Tax Law § 1135(a)(1) which provides that persons required to collect tax keep records of all sales made, and the Division's regulations which require vendors who accept an exemption certificate to maintain a method of associating a sale made for exempt purposes with the certificate on file (20 NYCRR 533.2[b][4]; see, Matter of On the Rox Liqs., Ltd. v. State Tax Commn., supra; Matter of King Catering Corp., Tax Appeals Tribunal, April 8, 1993). In short, petitioner herein did not produce the necessary records and those that were produced were not in auditable form. Petitioner was fortunate that he had the ample opportunity afforded him to assemble proof acceptable to the Division over a 3½-year period. Therefore, the Administrative Law Judge concluded, petitioner is liable for the additional tax due of $9,509.03, less any periods for which taxes were estimated.

Petitioner cited an Advisory Opinion he received from the Taxpayer Services Bureau, dated October 4, 1993, on behalf of his new corporation, Control Systems Assoc. of CNY, Inc., which petitioner contends conducts the same business as the corporation in issue herein. This Advisory Opinion advised petitioner that the receipts from the sale of custom software and from updating and modification services are not subject to sales and use taxes. The Division contends that the invoices referred to by petitioner were not such tax-exempt services but taxable sales and repairs to real property.

The regulation at 20 NYCRR 527.7(b)(4) provides:

> "[t]he imposition of tax on services performed on real property depends on the end result of such service. If the end result of the services is the repair or maintenance of real property, such services are taxable. If the end result of the same service is a capital improvement to the real property, such services are not taxable."

The problem in the instant matter is that petitioner characterizes the transactions in issue here as consistent with the Advisory Opinion he received from Taxpayer Services. Petitioner contends that the available invoices do not accurately reflect the transactions either because they were inartfully drafted by Elaine Divita, his manager, or erroneously transcribed by the Division's interns.

However, petitioner was unable to produce substantiating documentation for the invoices which the Division refused to accept as nontaxable or exempt. Petitioner did not have resale certificates, exemption certificates, proof of Industrial Development Authority projects or other sales to exempt organizations, or contracts. Nor does this record show documentation, e.g., contracts or specifications, to show what makes petitioner's software "custom" software. Details concerning the specifics of this software and how it is developed in response to the unique needs of particular customers are not in the record. Petitioner's characterization of his product as "custom software" is a mere conclusory statement. The Administrative Law Judge concluded that, under these circumstances, the Division was entitled to rely on the presumption of taxability in Tax Law § 1132(c) for these sales (Matter of Savemart, Inc. v. State Tax Commn., 105 AD2d 1001, 482 NYS2d 150, appeal dismissed 64 NY2d 1039, 489 NYS2d 1029).

Petitioner's allegations of errors by the Division in its audit, set forth in his letter to the Administrative Law Judge, dated July 11, 1995,[2] essentially allege that invoices do not accurately describe the underlying transaction; that the transactions are exempt pursuant to an Advisory Opinion received by petitioner with regard to the sale of custom software or modifications to custom software; that customers would not or could not produce resale certificates; items were double taxed as stock and as part of other sales; items related to a negotiated rental arrangement (reference numbers 482 and 475); duplicate billings for expense purchases from Novar Controls; and an expense purchase paid by Sutton Management directly to DETCO Ind. However, petitioner has failed to present any evidence that would rebut the

[2]Summarized in finding of fact "11" of the Administrative Law Judge's determination.

presumption of taxability with regard to these transactions (Tax Law § 1132[c]) and the Division does not bear the burden of demonstrating that each of the rejected invoices were taxable (Matter of Koren-Di Resta Constr. Co. v. State Tax Commn., supra).

Without more evidence, it cannot be discerned from the record what was the actual nature of the transactions in issue. For this reason, the Administrative Law Judge determined that petitioner failed to carry his burden of proof.

The Administrative Law Judge reached this conclusion even though petitioner testified that the business of Control was identical to the business of the successor corporation whose transactions with respect to the installation and modification of custom software were found nontaxable by the Division. Petitioner testified that this was the nature of the transactions in issue, but his testimony was in conflict with the description of services appearing on the invoices issued by Control and, therefore, under his ultimate control. Therefore, the Administrative Law Judge determined that petitioner's testimony, without more, was not sufficient, given all of the other facts and circumstances of this matter, to establish that the disputed transactions were not taxable.

Tax Law § 1133(a) places personal liability for taxes imposed, collected or required to be collected under Article 28 upon a "person required to collect such tax." Tax Law § 1131(1) defines this term as:

> "any officer, director or employee of a corporation . . . who as such officer . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]."

The Administrative Law Judge concluded that the record established that petitioner was a responsible officer of Control for the period in issue. Petitioner has not taken exception to this conclusion, so it is not before us on appeal.

Petitioner, on exception, argues that the entire audit should be vacated because the Division failed to make a proper request for books and records. Petitioner states that since the audit was found to be procedurally defective for those periods where tax was estimated, the Administrative Law Judge should necessarily have concluded that the audit was also defective

for those periods where the Division conceded adequate books and records and conducted a detailed audit.

We have reviewed petitioner's remaining arguments and find them to be without merit. Petitioner argues that: 1) he had adequate books and records; 2) that the Division made errors in the course of its audit; and 3) that the Administrative Law Judge failed to address the issue of the taxability of claimed custom software. All of these arguments were completely and adequately addressed by the Administrative Law Judge. As was noted by the Administrative Law Judge, petitioner did not produce clear and convincing evidence to establish that Control was engaged in selling custom software.

Accordingly, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William G. Lombard, officer of Control Systems Associates, Inc., is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of William G. Lombard, officer of Control Systems Associates, Inc. is granted to the extent set forth in conclusion of law "B" of the Administrative Law Judge's determination, but is otherwise denied; and

4. The Notice of Determination issued on August 24, 1992, as modified by paragraph "3" herein and as set forth in the auditor's letter dated June 27, 1995, is sustained.

DATED: Troy, New York
March 6, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner