

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**FRIENDLY MOTORS, 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, 1986 through November 30, 1990. :

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In the Matter of the Petition :  
of :  
**GABRIEL AVINARI, OFFICER** :  
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, 1986 through November 30, 1990. :

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DECISION  
DTA Nos. 812960,  
812961 and 812962

In the Matter of the Petition :  
of :  
**ILANA AVINARI, OFFICER** :  
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, 1986 through November 30, 1990. :

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Petitioners Friendly Motors, Inc., c/o Gabriel and Ilana Avinari, 15-47 208th Street, Bayside, New York 11360-1120, Gabriel Avinari, Officer, 15-47 208th Street, Bayside, New York 11360-1120 and Ilana Avinari, Officer, 15-47 208th Street, Bayside, New York 11360-1120, filed exceptions to the determination of the Administrative Law Judge issued on March 7, 1996. Petitioners appeared by Murray Honig, Esq. and Michael Smith, C.P.A. The Division of Taxation appeared by Steven U. Teitelbaum (Brian J. McCann, Esq., of counsel).

Petitioners submitted a brief in support of their exceptions. The Division of Taxation

submitted a brief in opposition. Petitioners filed a reply brief. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Jenkins took no part in the consideration of this decision.

***ISSUE***

Whether petitioners established that certain sales of used cars were, in fact, sales for resale and that any other part of the assessments was erroneous.

***FINDINGS OF FACT***

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

The Division of Taxation ("Division") issued a Notice of Determination dated July 3, 1992 against the corporate petitioner, Friendly Motors, Inc. ("Friendly Motors"), asserting tax, penalty and interest as follows:

Tax Period Ended	Tax Asserted	Interest	Penalty	Payments/ Credits	Balance Due
8/31/86	\$ 6,886.41	\$ 6,805.44	\$ 7,423.87	\$5,000.00	\$ 16,115.72
11/30/86	7,097.86	6,708.22	7,506.21	-----	21,312.29
2/28/87	6,355.50	5,646.24	6,541.31	-----	18,543.05
5/31/87	7,358.18	6,123.10	7,372.45	-----	20,853.73
8/31/87	6,712.39	5,219.36	6,547.36	-----	18,479.11
11/30/87	5,092.30	3,692.86	4,838.63	-----	13,623.79
2/29/88	30,000.00	20,230.35	28,115.17	-----	78,345.52
5/31/88	8,401.07	5,246.20	7,560.41	-----	21,207.68
8/31/88	8,105.23	4,669.24	7,101.14	-----	19,875.61
11/30/88	9,073.63	4,805.67	7,742.29	-----	21,621.59
2/28/89	7,739.63	3,754.03	6,429.76	-----	17,923.42
5/31/89	9,597.53	4,230.61	7,756.31	-----	21,584.45
8/31/89	7,648.58	3,043.23	6,019.55	-----	16,711.36
11/30/89	5,422.36	1,934.09	4,159.99	-----	11,516.44
2/28/90	4,245.04	1,346.27	3,173.89	-----	8,765.20
5/31/90	5,735.95	1,594.03	4,186.54	-----	11,516.52
8/31/90	4,806.79	1,152.83	3,418.45	-----	9,378.07
11/30/90	<u>2,529.46</u>	<u>514.23</u>	<u>1,755.80</u>	-----	<u>4,799.49</u>
TOTAL	\$142,807.91	\$86,716.00	\$127,649.13	\$5,000.00	\$352,173.04

This notice included an explanation that the tax asserted due was estimated in accordance with provisions of Tax Law § 1138 and was "based on an audit of your records." In addition,

the notice noted that pursuant to Tax Law § 1145(a)(2), fraud penalties of 50 percent of the amount of the tax due were imposed. Penalties for willful neglect to comply with the Tax Law were also imposed. Corresponding notices, each dated July 13, 1992, were issued against petitioner Ilana Avinari and petitioner Gabriel Avinari, respectively, which asserted the same amounts due for tax as specified above for Friendly Motors, but which asserted slightly larger amounts for interest and penalty because the notices issued against the individual petitioners were dated ten days later than the notice against Friendly Motors.

According to a sales tax audit report information sheet included in the field audit report (Division's Exhibit "J"), the business of Friendly Motors, which commenced in 1986, was described as a "used car dealership-export, wholesale, & retail" in the New York City borough of Queens. The audit report, at page 6 of 10 pages, also reveals that Friendly Motors went out of business on May 31, 1991 although the principals involved in Friendly Motors started "a new business in the same [Jamaica, Queens] location under a different name and I.D. number."

### ***THE AUDIT***

By a letter dated June 6, 1989 (Division's Exhibit "I"), the auditor, Gairy Toorie, commenced his audit, which took 190 hours, by informing Friendly Motors that its sales tax returns "have been scheduled for a field examination". He requested that the corporation's books and records pertaining to its sales tax liability be made available for his review as follows:

"Required documents include sales tax returns and accompanying workpapers, detailed sales book(s), sales journals, all sales invoices, documents supporting the nontaxable status of all untaxed sales (i.e. resale certificates, diplomatic and exempt certificates, shipping records), ledgers, cash register tapes and any type of memoranda prepared for consignment sales. Federal tax returns and New York State WRS-2 wage reporting forms should also be made available. Additional information may be required during the course of the audit."

The auditor testified that at his first meeting with petitioners' accountant, identified as an individual named Y. Bar-Chama, no sales invoices were produced because "all the sales invoices for the audit period will be too much to be produced by him" (tr., p. 41). Instead, Mr. Bar-Chama requested that the auditor select a test period.

The field audit report (Division's Exhibit "J"), at page 5 of 10, includes the following narrative that describes the test period audit conducted by Mr. Toorie:

"Sales were tested for the quarters ending 2/29/88 and 5/31/88 respectively. Questionnaires were mailed out to the taxpayer's customers for those periods. The questionnaires mailed totalled one hundred and fifty-six (156). Sixty-nine (69) customers answered the questionnaires. The followings [sic] are the make-up of the questionnaires' responses. Total per taxpayer's taxable sales invoices equals \$265,650. Total per customers' responses equal \$391,446. This resulted in a difference of \$125,796 and a margin of error on taxable sales of 47.35%. Questionnaires were also mailed out for resale customers denoted by taxpayers' records. Resale certificate with the name 'N & G Motors, Inc.' was provided as documentation to substantiate the non-taxability of certain sales. These sales were disallowed because 'N & G Motors, Inc.' could not be found. Investigation proved that this company did not exist. The telephone number was another business's telephone number. The address on the certificate was found to be fictitious because this company could not be found at this address. Therefore, all non-taxable sales in which resale certificate bearing 'N & G Motors, Inc.' were [sic] provided as documentation as proof of their non-taxability were disallowed.

"These sales (N & G Motors, Inc.) tested totalled \$40,300 but the customers' responses equal \$45,550. This computed to a difference in non-taxable sales of \$5,250. Therefore, non-taxable sales were increased by a margin of error of 13.03% and a disallowance margin of error of 7.96%."

The Division's Exhibit "M" at pages 15, 38, 73 and 149 show invoices claiming that individuals named Ferguson, Winley, Brown and Payne, respectively, purchased cars on behalf of N & G Motors, but investigator Tate's investigation proved otherwise that these customers purchased such cars for themselves.

Included in the auditor's work papers (Division's Exhibit "K") is a schedule labelled "Analysis of questionnaire's responses". This analysis also shows a margin of error on taxable sales of 47.35% based upon a difference of \$125,796.00<sup>1</sup> between a total questionnaire response amount of \$391,446.00 and a total sales invoice (as provided by petitioners) amount of \$265,650.00. This analysis is based upon 63 transactions during December 1987 to May 1988 and shows 45 questionnaire responses which indicated a greater selling price than noted in Friendly Motors' sales invoices and 18 questionnaire responses where there were no variances

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<sup>1</sup>In a letter dated February 20, 1992 (Division's Exhibit "N"), the auditor's supervisor indicated that this amount should be reduced to \$123,344.00 resulting in a margin of error of 46.43%. The specific basis for this adjustment is unknown. The auditor testified that "the adjustment was gotten in review--partially in reviewing my responses and also in discussion with the investigator" (tr., p. 79).

from the sales invoices. It is observed that according to this analysis, "The questionnaire responses were netted of tax (8.25%) and handling fees of \$100.00 [and] [t]he invoice amount is netted of all taxes and other charges." A second schedule labelled "Analysis of nontaxable sales" also included in the work papers shows a margin of error on nontaxable sales of 13.03% based upon 6 transactions during December 1987 to May 1988. Two of the six transactions show a greater selling price than noted on Friendly Motors' sales invoices. In addition this analysis shows a disallowance of nontaxable sales of 7.96% apparently based upon sales to N & G Motors, Inc., which as noted above, were treated as taxable sales and disallowed as sales for resale.

In sum, after audit, Friendly Motors' gross sales were increased from the reported \$5,726,433.00 to \$6,952,939.00 and taxable sales from the reported \$2,473,727.00 to \$3,841,096.00 for the audit period at issue which consists of four and one-half years (June 1, 1986 through November 30, 1990).

The auditor testified that as a result of his uncovering the attempt by the "taxpayer" to control the way its customers completed the questionnaires, he referred the matter to "the investigation department" (tr., p. 52). The Division introduced into evidence as its Exhibit "M" an affidavit of Ruth Tate dated May 6, 1995, an investigator employed by the Office of Tax Enforcement of the New York City Department of Finance, who conducted a fraud investigation of petitioners. Attached to Ms. Tate's affidavit is an Exhibit "A" consisting of 220 pages which she described in her affidavit as "true and accurate copies of the materials prepared or assembled by me as part of my investigation of the [petitioners]". It appears that many of these documents are the questionnaires which the auditor had sent out to Friendly Motors' customers and which investigator Tate "assembled" into some coherent order.

On cross-examination of the auditor, petitioners' representative attempted to show mistakes in the difference between the total of Friendly Motors' sales invoices and the total based upon the customers' responses to the auditor's questionnaires. He questioned the auditor's calculation that there was a difference of \$4,848.00 between a sales invoice of \$1,000.00 which

is included at page 22 of Exhibit "A" attached to investigator Tate's affidavit (Division's Exhibit "M") and a questionnaire amount of \$5,848.00. A close review of pages 17-22 of Exhibit "A" of the affidavit shows that, according to a letter from the consumer loan department of Banco de Ponce dated May 23, 1989, Eric Harris had a balance due on a car loan of \$5,184.91 which would lend support to the auditor's use of \$5,848.00 as a questionnaire amount although the questionnaire was not introduced into evidence. Petitioners' representative then incorrectly focused on a transaction involving an individual named Leo Harris because as the auditor pointed out the sales invoice amount was \$5,000.00 and the questionnaire response amount was also \$5,000.00. Petitioners' representative proceeded to focus on page 23 of the Exhibit "A" attached to investigator Tate's affidavit which showed a difference of \$419.00 between a customer's invoice and the invoice presented by Friendly Motors. He changed the subject apparently upon realizing that this difference was not included in the calculation of a margin of error. No other mistakes or errors concerning particular customers were noted during cross-examination of the auditor although much attention was given to an incorrectly addressed mailing that was corrected by the responding customer.

At the continuation of the hearing approximately two and one-half months later, petitioners' attorney, in his closing argument, referenced certain transactions where the auditor's calculation of the difference in amount between the sales invoice produced by Friendly Motors and what was reported by a particular customer as a result of the third-party verification conducted by the auditor and/or investigator Tate reflected certain discrepancies to the disadvantage of petitioners. As noted in paragraph "18" below, the Division has conceded that it is prepared to reduce tax asserted due resulting from such discrepancies. The transactions specified by petitioners' attorney (in which the auditor apparently included sales tax in the amount of the invoice verified with the customer while excluding sales tax from the invoice provided by Friendly Motors) were the following:

Page Reference to Division's Exhibit "M"	Customer's Name	Amount Calculated as Difference by Auditor per Division's Exhibit "K"	Corrected Amount of Difference Based on Exhibit "M"
pp. 80-82	Diane Byard	\$2,243.00	\$1,600.00
pp. 97-100	Carolyn Chappell	1,731.00	1,250.00
pp. 113-116	Theobald Delfish	1,269.00	<sup>2</sup>
pp. 151-156	Lemuel Perry	6,800.00	2,950.00
pp. 217-220	Kevin Williams	1,506.00	1,350.00

Petitioners also focused on the auditor's finding that sales to N & G Motors should not be treated as sales for resale because such entity did not, in fact, exist. Petitioners introduced into evidence as their Exhibit "1", which was their only exhibit, a certified copy of a Facility Record of the New York State Department of Motor Vehicles dated July 6, 1995 which shows that N & G Motors Inc. of 4700 76 St., Elmhurst, New York was a used vehicle dealer of unknown size owned by an individual identified as Marco Goldenberg, which went out of business on December 28, 1988.

#### ***FRAUD PENALTY***

As noted above, the Division imposed a fraud penalty on each of the petitioners. As its Exhibit "U", the Division introduced into evidence a certified transcript of the plea allocation dated August 13, 1991 involving criminal pleas of petitioners Gabriel Avinari and Friendly Motors. These petitioners pleaded guilty to offering a false instrument for filing in the first degree. They admitted that they filed a sales and use tax return for the period December 1, 1987 to February 29, 1988 that contained false information concerning the true gross sales and taxable sales of Friendly Motors for such period. In addition, Gabriel Avinari executed affidavits of judgment by confession for himself as an individual and on behalf of Friendly Motors as its president in which judgment in favor of the Division in the amount of \$30,000.00, exclusive of interest and penalties, was confessed as a debt justly due to the Division. Neither petitioner has paid any part of the \$30,000.00 which was referred to as "restitution" to the

Division although the plea agreement between the Attorney General of the State of New York and Gabriel Avinari and Friendly Motors required the payment of such amount within six months of the date of sentence. It is observed that in their response to the Divisions' notices to admit each dated April 20, 1995 (Division's Exhibit "E") which were served on the three petitioners, respectively, petitioners denied "that no part of the restitution referred to in a plea agreement has been paid" (Division's Exhibit "F"). However, petitioners offered no evidence to establish that any part of the \$30,000.00 was, in fact, paid to the Division. The plea agreement also provided that any amounts of restitution paid by petitioners shall be credited by the Division towards any civil assessments issued against Friendly Motors or any of its officers. In addition, the plea agreement noted that petitioners agreed to pay a fine in the amount of \$5,000.00.

Petitioners' representative specifically challenged the imposition of a fraud penalty against Ilana Avinari. He conceded that petitioners Gabriel Avinari and Friendly Motors admitted fraud "before Judge Adlerberg in Supreme Court in Manhattan" (tr., p. 29) and did not specifically challenge the imposition of fraud penalty on taxes asserted due for the sales tax quarters at issue herein which were not the subject of the criminal plea. Gabriel Avinari and Friendly Motors admitted filing a false sales tax return for the period December 1, 1987 to February 29, 1988 while the period at issue covers June 1, 1986 through November 30, 1990. Further, in his closing remarks, petitioners' representative expressly stated: "It isn't a question of whether there is a fraud in this case by Gabriel Avinari" (tr., p. 183).

At the continuation of the hearing on July 24, 1995, petitioners' presentation consisted of the introduction of one exhibit only as described above. No witnesses were presented. In response, the Division called Ilana Avinari as its witness. Mrs. Avinari testified that she was a "40 percent owner" of Friendly Motors and that she was either vice-president or treasurer of the corporation (tr., p. 159). She also testified that she was responsible for all bookkeeping for Friendly Motors during the audit period including the company's sales journal. She admitted that bills of sale were "recreated" because:



"We were robbed a few times; the office was in shambles when we came back. A lot of bills of sale were missing; they could have been misfiled; whatever the reason was" (tr., p. 168).

It is noted that in response to questioning by the Division's representative, Ilana Avinari testified that certain handwritten pages she prepared, which were included in petitioners' bill of particulars (Division's Exhibit "D"), were her "best explanations of some of the transactions which were the subjects of this assessment" (tr., p. 161). However, no documents were introduced to support Mrs. Avinari's explanations.

In its brief, the Division pointed to its Exhibit "M" as supporting its claim that Ilana Avinari falsified records. For example, Ilana Avinari prepared and signed the bill of sale for the transaction involving customer Michael Ferguson (Division's Exhibit M, pp. 15-16). This bill of sale showed Ferguson purchasing the vehicle on behalf of N & G Motors, but Mr. Ferguson stated to investigator Tate that he purchased the vehicle for his own use and supplied the investigator with bank financing documents confirming his position. The Division pointed out many other examples of Ilana Avinari's falsification of records during the test period to which petitioners have not specifically responded.

### ***OPINION***

In his determination below, the Administrative Law Judge found that petitioners failed to rebut the presumption of correctness raised by the issuance of the notices of determination by the Division. The Administrative Law Judge noted that there was no evidence on the face of the audit to base a conclusion that the determination of tax due lacked a rational basis.

The Administrative Law Judge also concluded that other than certain adjustments conceded by the Division, petitioners failed to establish any errors in the audit that require further adjustments to the notices of determination. The Administrative Law Judge specifically found that petitioners had not met their burden of proving that sales of cars were made to N & G Motors, Inc. for resale. With respect to the issue of whether the amount of tax due should be reduced by \$30,000.00 which petitioners claim had been paid pursuant to the plea allocation, the Administrative Law Judge determined that petitioners failed to prove payment of any part of

the \$30,000.00.

The last issue decided by the Administrative Law Judge below was that petitioner Ilana Avinari was a person required to collect tax under Tax Law § 1131(1) so that she is personally liable for sales tax determined due from Friendly Motors, and that fraud penalty, which was imposed against the corporation and her husband, was also properly imposed against her but only during the test period which was December 1, 1987 through May 31, 1988.

In concluding that the fraud penalty was properly imposed upon her, the Administrative Law Judge focused upon Ms. Avinari's active involvement in the business and her falsification of records as noted in the findings of fact. The Administrative Law Judge concluded that since the only proof of fraudulent behavior on her part was limited to certain activities during the test period and there was no evidence that such behavior during that time frame was reflective of the nature of her involvement throughout the audit period, the Division had not met its burden to show that the fraud penalty was properly asserted against Ilana Avinari for the entire audit period. Neither party took an exception to this issue.

Petitioners specifically take exception to two items of the Administrative Law Judge's determination. Primarily, petitioners argue that they should be credited in the amount of \$30,000.00 which they allege was paid in restitution pursuant to the plea agreement.<sup>3</sup> Also, they continue to argue that certain sales made to N & G Motors, Inc. were, in fact, sales for resale and, as such, were not taxable sales.

Petitioners have attached four documents labeled exhibit "A" to their exceptions filed with the Tax Appeals Tribunal which had not been presented into evidence at the hearing before the Administrative Law Judge. Moreover, petitioners attached four exhibits labeled "A," "B," "C-1" through "C-7" and "D-1" through "D-4" to their brief in support of their exceptions. The four documents labeled "D-1" through "D-4" are the same four documents labeled exhibit "A" attached to petitioners' exceptions. The Division objects to the submission of these additional

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<sup>3</sup>In the exceptions, petitioners also argue that they are entitled to a \$5,000.00 credit. However, petitioners concede in their reply brief that they had previously received credit for this payment so that this amount is no longer at issue.

documents to the extent that they were not made part of the hearing record.

We have consistently held that:

"[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record" (Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

Accordingly, the documents attached to the exceptions labeled as exhibit "A," the same documents relettered as exhibits "D-1" through "D-4" attached to their brief, and exhibits "C-2" and "C-7" were not considered by us in rendering this decision.

We affirm the determination of the Administrative Law Judge.

Petitioners continue to argue that they are due a credit in the amount of \$30,000.00 they allegedly paid in restitution. However, as noted by the Administrative Law Judge below, petitioners failed to demonstrate that this amount was ever paid toward the tax due as set forth in their notices of determination.

Petitioners argue in their brief that they are entitled to other adjustments to the amount of tax due as calculated by the auditor. Petitioners state that many of the audited amounts include sales tax and inspection and registration fees which inflated the variance amounts as calculated by the auditor. Furthermore, they argue that in a close review of the questionnaires, there were responses from a few questionnaires that were not included in the auditor's analysis. Petitioners argue that the omission of these amounts has caused the margin of error to be greater. Petitioners produced their own analysis compared with what the auditor found and attached it to their brief.

In response, the Division argues that these arguments concerning the correction of certain transactions comprising the test period analysis of the auditor are issues raised for the first time in petitioners' letter brief in support of their exception. The Division argues that this analysis and argument regarding these transactions go beyond the issues raised in the notices of exception.

We agree with the Division. We have consistently held that new legal issues can be raised on exception (see, Matter of Chuckrow, Tax Appeals Tribunal, July 1, 1993). However, the raising of factual issues after the closing of the record has been distinguished from the raising of legal issues (Matter of Sandrich, Inc., Tax Appeals Tribunal, April 15, 1993). The introduction of factual issues after the record is closed is not allowed as it deprives the party with the burden to prove the disputed fact of the opportunity to submit evidence, thereby prejudicing the party (see, Matter of Consolidated Edison Co. of New York, Tax Appeals Tribunal, May 28, 1992).

In this case, petitioners did not raise these factual issues below. The Division presented its auditor as a witness at the hearing, yet the auditor was not asked to explain this aspect of his analysis. Furthermore, these specific transactions articulated in petitioners' brief were not addressed in petitioners' representative's closing argument and, since no brief was filed by petitioners below, the Division was not apprised of these new factual issues until this proceeding before the Tribunal. Accordingly, we will not address any new factual issues asserted for the first time on exception.

Lastly, petitioners argue that they were able to prove that N & G Motors, Inc. was in existence although the auditor claimed that N & G Motors, Inc. was fictitious. However, the existence of N & G Motors, Inc. does not prove that certain sales by petitioners were sales for resale. Thus, petitioners fail to meet their burden of proof to establish entitlement to any further adjustments to the notices of determination than those already determined by the Administrative Law Judge below.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Friendly Motors, Inc., Gabriel Avinari, Officer, and Ilana Avinari, Officer, are denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petitions of Friendly Motors, Inc., Gabriel Avinari, Officer, and Ilana Avinari, Officer, are granted to the extent set forth in conclusions of law "B" and "D" of the

Administrative Law Judge's determination, but in all other respects are denied; and

4. The notices of determination as modified in accordance with paragraph "3" herein are sustained.

DATED: Troy, New York  
March 20, 1997

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

/s/Joseph W. Pinto, Jr.  
Joseph W. Pinto, Jr.  
Commissioner