STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
T. MANAGEMENT, INC.	:	DECISION DTA NO. 816662
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1989 through August 31, 1993.	:	

Petitioner T. Management, Inc., 4 Centre Drive, Orchard Park, New York 14127-2280, filed an exception to the determination of the Administrative Law Judge issued on March 16, 2000. Petitioner appeared by Falk & Siemer, LLP (Gary M. Kanaley, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Brian J. McCann and Dennis A. Fordham, Esqs., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on October 12, 2000 in Troy, New York.

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

ISSUE

Whether the Division of Taxation properly asserted fraud penalties against petitioner.

FINDINGS OF FACT

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

On June 30, 1997, the Division of Taxation ("Division") issued a Notice of Determination, notice number L-013784096, to petitioner in the amount of $179,143.48 in tax, $271,649.60 in interest and $180,965.92 in penalty, for a total due of $631,759.00. The "Current Balance Due" as of the date of the notice was $452,507.51 which reflected the following payments: $100,000.00 on January 4, 1995; $10,000.00 on April 13, 1994; $24,000.00 on April 28, 1994; and $45,251.49 on August 31, 1994 for total payments of $179,251.49. The notice was for the period March 1, 1989 through August 31, 1993. It appears from the notice that the payments made by petitioner were approximately equal to the amount of tax due and that the Division applied such payments, pursuant to petitioner's instructions, to the tax due for each sales tax quarterly period listed on the notice.[1]

The notice states that calculation of tax due was based upon petitioner's records and that "fraud penalties of 50 percent of the amount of the tax due plus statutory interest have been added pursuant to section 1145(A)(2) of the New York State Sales and Use Tax Law."

Petitioner requested a conciliation conference regarding the notice and on May 15, 1998 a conciliation order sustaining the notice was issued. Petitioner then filed the petition that is the subject of the current proceedings with the Division of Tax Appeals.

---

[1]Petitioner paid $108.01 more than the amount of tax due, which was applied by the Division to the remainder due (penalties or interest) for the initial sales tax quarter listed on the notice of March 1, 1989 through May 31, 1989.

Douglas Wittmeyer is the president and sole owner of petitioner, as he was during the period at issue. Petitioner's business during that period consisted of selling jewelry. Mr. Wittmeyer testified that at some point the business changed from selling jewelry at wholesale to selling it at retail.

On November 3, 1993 the Division sent petitioner an appointment letter stating that petitioner had been scheduled for a field audit of its returns on November 16, 1993. The letter was signed by Mr. Andrew Kucharski, Tax Auditor. The appointment letter listed the period under audit as September 1, 1990 through August 31, 1993.

The Division's audit was initiated through a Federal information match program which compared petitioner's gross sales as reported on its Federal form 1120 to its gross sales as reported on its sales tax returns. Petitioner had reported higher gross sales on its Federal form 1120 than on its sales tax returns for a comparable period.

On November 10, 1993 Mr. Wittmeyer called the auditor and requested that the appointment be postponed because the time before Christmas was the busiest season of the year for his business. The appointment was rescheduled for January 5, 1994, and petitioner submitted a consent to extend the statute of limitations for the period September 1, 1990 through February 28, 1991, to June 20, 1994.

During the time between when he received the appointment letter and the appointment on January 5, 1994, Mr. Wittmeyer reviewed the records of petitioner for the period September 1, 1990 through August 31, 1993. Based upon that review Mr. Wittmeyer prepared a schedule entitled "Sales Tax Deficit" which was provided to the auditor when the auditor appeared at

petitioner's place of business for the scheduled appointment on January 5, 1994.[2] The schedule showed sales tax collected of $200,405.27, sales tax paid of $68,508.00 and sales tax due of $133,891.99. At the time petitioner provided this document to the auditor, a check in the amount of $100,000.00 was also provided to the auditor.

Mr. Wittmeyer testified that during the audit period petitioner was in a difficult financial situation and that as soon as monies were received they were used to pay bills. With regard to his preparation of petitioner's sales tax returns he stated:

> When I did the sales tax returns, there's one fact here that I did not know at the time, which I learned later, which I have used in subsequent years, lately in the last few years I have had to do this a few times, and if you look back at the quarters, you would see it; I did not know, at that time, in 1989 through 1993, that you could fill out a sales tax return and how much money you owe and send it in without the money. That, I did not know that fact; I believed that you had to send in the money to equal the sales tax return. Well, I never had the money available to me because we were so strapped all the time, so when I would do the sales tax returns, I would just look at my checkbook, and whatever money that was there that day, I would send that out. I did not say to myself, what can I afford; as was insinuated earlier; what I did is, I did what I could do at the moment, knowing I would have to face it later; but I did not know how to fill the sales tax return out correctly. That's an error on my part; that's all it is, it's an error. I did not know the proper way to do it. (Tr. pp. 101, 102.)

Mr. Wittmeyer explained on cross examination that he would start with the amount of funds he had available at the time the sales tax return was due and from that number calculate the amount of sales to report. Therefore, Mr. Wittmeyer knew, prior to the initial audit appointment, that he owed additional sales tax for the period at issue, causing him to prepare the schedule. He was however, surprised by the amount of taxes due after completing the schedule.

---

[2]Accompanying the auditor was Mr. Jeff Eimer, the auditor's supervisor.

During the initial appointment on January 5, 1994, the auditor prepared a schedule that compared sales as set forth in petitioner's books for the period January 31, 1990 through December 31, 1993, to sales as reported on petitioner's sales tax returns for the same period. With regard to the audit period as set forth in the appointment letter, i.e., September 1, 1990 through August 31, 1993, the auditor found additional tax due pursuant to petitioner's own books and records of $134,281.22. This amount is basically equal to the amount set forth in the schedule provided by Mr. Wittmeyer on the same day (the Division's calculations resulted in $389.23 more in tax due). On January 7, 1994, the auditor compared petitioner's gross sales to its bank statements and prepared a schedule. This was also done at petitioner's place of business.

The auditor then prepared a Referral of Possible Fraud, which was dated January 24, 1994. This referral indicates that a detailed audit was done using petitioner's own books and records. This information when compared with the sales tax returns as filed by petitioner indicated that petitioner was aware of the amount of sales tax due at the time the tax returns were filed and simply filed returns and paid a lesser amount.

According to the Division's Office of Tax Enforcement ("OTE"), this case was referred to it on March 3, 1994. OTE subpoenaed the records of petitioner for the period June 1, 1989 through November 30, 1993. The subpoenaed records (25 boxes) were provided to OTE through petitioner's attorneys on May 2, 1994, May 17, 1994 and May 18, 1994. An audit of these records was undertaken and an audit report was issued by Mr. David Gehring, the OTE auditor, on December 8, 1994. The audit report concluded that petitioner knew the correct sales tax due at the time the returns were filed. Furthermore, the report concluded that petitioner's voluntary payment of $179,000.00 in taxes, after first being informed an audit would be conducted, was an

admission of guilt. The audit report also concluded that Mr. Wittmeyer, as president and sole stockholder of petitioner, repeatedly offered false tax returns for filing. The OTE auditor recommended this case be prosecuted criminally. Another OTE document dated December 8, 1994 (a memorandum from a Mr. James Zientek to Mr. Daniel Jaroszewski) related similar facts and reached the same conclusion.

By letter dated January 5, 1996, the Division was informed that the Erie County District Attorney's Office was "unwilling and unable to dedicate the time and resource [sic] right now to accept this matter for prosecution." The letter further explained that it was understood that the Attorney General's Office would be handling the prosecution.

A felony complaint signed on June 24, 1996 by James Zientek, Revenue Crimes Investigator of the Division, was filed in the Town of Orchard Park Town Court against petitioner and Mr. Wittmeyer individually. The defendants were charged with one count each of grand larceny in the fourth degree (Penal Law § 155.30[1]) and filing a false sales tax return (Tax Law § 1817[b][2]). The grand larceny charge alleged that the defendants stole property in the amount of $179,143.48 in sales tax owed to New York State. The filing a false sales tax return charge was for the period ending December 1993.

On May 13, 1997, Mr. Wittmeyer pleaded guilty to the filing a false sales tax return charge and was given a conditional discharge, the conditions being that he lead a law-abiding life and reimburse the Division for whatever legal liabilities were owed.

On May 14, 1997, a Superior Court Information was filed in the Supreme Court, Erie County charging petitioner with grand larceny in the fourth degree and alleging that between

September 20, 1989 and December 20, 1993 petitioner stole $179,143.48 "in sales tax trust funds owed to New York State."

On the same day, petitioner pleaded guilty to this charge in Erie County Supreme Court, the Honorable Justice Christopher J. Burns presiding. The record of those proceedings was submitted by the Division. During the course of those proceedings petitioner appeared by Mr. Wittmeyer and was represented by Michael S. Taheri, Esq. Petitioner's representative in the present matter, Gary M. Kanaley, Esq., was also present and participated in the proceedings. Assistant Attorney General Richard Goodell appeared for the State of New York. Petitioner first waived its right to an indictment by a grand jury. The judge then explained the charge that petitioner had stolen $179,143.48 in sales tax trust funds owed to the State of New York between September 20, 1989 and December 20, 1993. The judge asked petitioner whether anyone had coerced or in any way influenced petitioner to plead guilty against its own will, to which petitioner responded no; and whether it had enough time to discuss this matter with its attorney and whether it was voluntarily making this guilty plea to which petitioner responded yes. Then, through a series of questions, the judge asked petitioner whether it realized that it was waiving its right to a jury trial, its right to have the prosecution's witnesses testify against it and have its attorney cross examine such witnesses; that a plea of guilty was the same as a conviction after trial and whether it understood the charges against it. Petitioner responded in the affirmative to each of these inquiries. Petitioner and the representatives from both sides told the judge that they were not aware of any promises having been made with regard to sentencing in return for the guilty plea. The judge explained that he would not allow the corporation to plead guilty unless it was in fact guilty, and Mr. Wittmeyer responded in the affirmative when asked if petitioner had

stolen $179,143.48 in sales tax trust funds owed to the Sate of New York. When asked to explain in his own words what happened, Mr. Wittmeyer stated:

> The company, the company was in extreme debt at that point, debt in excess of over $970,000.00, which caused, which caused an error in judgment on my part. The funds were never removed from the premises, they were tied up in a tremendous, tremendous onslaught of inventory which was not handled correctly on the corporate tax returns, which I was later informed about and it caused the situation. The money was never taken. I personally did not take the money. The corporation did not use the money for other things. The money was tied up in a very nasty financial situation which I — in inventory, in debt inventory which, which in our case we found out later could have been written down on a corporate federal level on an annual basis which was never done by my accountant and I was forced, I was forced to have to make very nasty financial decisions, i.e. file false returns which obviously have come out this way. However, I have done everything in my power to correct that situation since and I, when this audit occurred I told the state the truth at the point of occurrence, it was not uncovered later, I told them the truth the day they walked in the door, I explained the situation I was in and I handed them a check the day they walked in the door from Christmas receipts on January 4th, 1994 for $100,000.00 and I explained to them that I owed them the money and I was willing to pay the money but during the years prior to that I could not do it because I was in a very nasty financial situation.

When Judge Burns inquired of Assistant Attorney General Goodell what his proof would be if the matter went to trial, Mr. Goodell responded that the proof would show petitioner reported and paid less sales tax than was due resulting in the total amount due set forth in the information. He went on to state that the Division was pleased by the actions of petitioner when the audit was commenced in that petitioner produced accurate records and allowed the audit to proceed promptly. He further stated that, "with the exception of penalties, interest and other sorts of sanctions that may be imposed civilly," he understood that the amount of tax due had been paid. While not making a sentence recommendation, the State did say that a conditional discharge would not be an unreasonable result. Petitioner's representative asked the court for a

conditional discharge, the condition being: "that he will comply with any civil fines, penalties and interest that are appropriate under the circumstances." The judge imposed a conditional discharge requiring that the company comply with the law regarding payment of sales taxes in the future and that it "abide by any determination with regard to any civil penalties and fines that may be imposed and pay those promptly."

Petitioner's version of the events that transpired, as told through Mr. Wittmeyer's testimony during the plea proceedings and the hearing in this matter, may be summarized as follows. Petitioner started out in the wholesale jewelry business. Petitioner got into financial trouble in this business because it would provide retailers with inventory and the retailers were not paying for the inventory. Petitioner did not have the resources to extend this type of credit to the retailers. This situation put petitioner in serious debt. At some point the business began changing into a retail jewelry business to alleviate this problem. Also, petitioner called back the inventory that was at the retailers and began to auction it off to raise money to pay off its debts. While the exact time periods are difficult to ascertain, it was Mr. Wittmeyer's testimony that the audit period corresponded to this period of financial turmoil. He testified that he had considered filing for bankruptcy, but chose to try to reorganize his business and keep it going. Mr. Wittmeyer testified that during the audit period when it was time to file petitioner's sales tax returns, he would pay as tax whatever was in the checkbook and basically would calculate his sales tax returns backwards from that number. Mr. Wittmeyer was sincerely upset that the Division's witnesses had testified that he had told them he had paid what he could afford, which was to him different from paying whatever was in his checkbook. He wanted to make clear that he did not utilize sales tax funds for personal use or live an extravagant lifestyle. He testified

that had he known he could have filed the returns showing the correct amount of tax due and remitting a lesser amount, he would have filed the returns that way. Therefore, Mr. Wittmeyer believed petitioner had simply made a mistake and had not committed fraud.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that when a civil fraud penalty is asserted pursuant to Tax Law § 1145(a)(2), the Division bears the burden of proving

> clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing (***Matter of Sener***, Tax Appeals Tribunal, May 5, 1988, ***citing Matter of Shutt***, State Tax Commn., July 13, 1982).

The Administrative Law Judge determined that the issues in the related criminal proceedings were the same as the issues to be determined in the present matter; that such issues were required to be decided in the criminal proceedings; and that the record of the plea proceedings made clear that petitioner was being charged with intentionally underreporting and underpaying sales taxes for the period at issue.

The Administrative Law Judge found that petitioner's books and records were adequate enough to be the primary source relied upon by the Division in calculating the amount of tax due and the existence of these records alone indicated that petitioner knew the correct amount of tax due at the time the returns were filed. Additionally, the Administrative Law Judge observed that petitioner admitted in the criminal proceeding that he had stolen $179,143.48 by filing false returns in sales tax trust funds owed to the State of New York. The Administrative Law Judge concluded that petitioner knowingly and intentionally filed false sales tax returns resulting in underpayment of sales tax. The Administrative Law Judge resolved that these actions constituted

the crime of grand larceny in the fourth degree under the penal code as well as subjected petitioner to fraud penalties pursuant to Tax Law § 1145(a)(2). Therefore, the Administrative Law Judge found that petitioner was estopped from arguing that the fraud penalty in this matter was improperly asserted.

Based on these conclusions, the Administrative Law Judge noted that it became petitioner's burden to show that it did not have a full and fair opportunity to litigate those issues during the criminal proceeding. The Administrative Law Judge found that petitioner did not meet its burden on this issue. The Administrative Law Judge rejected petitioner's argument that it did not have an opportunity to fairly and completely litigate the issue of guilt because the guilty plea was entered only for expediency. The Administrative Law Judge stated that even if this were accurate, it did not negate the fact that a full and fair opportunity to litigate was available to petitioner and did not preclude the application of the doctrine of estoppel.

The Administrative Law Judge concluded, in the alternative, that even if petitioner was not estopped from contesting the fraud penalty at issue, the Division has met its burden to prove that fraud was committed during the audit period based upon petitioner's own testimony. The Administrative Law Judge rejected petitioner's argument that petitioner did not know the correct amount of tax due at the time the returns were filed and corrected the deficiencies as soon as petitioner became aware of them. The Administrative Law Judge noted that the testimony of petitioner's witness was credible for the most part and he testified that petitioner did know the amount of tax due at the time the returns were filed and chose to file false returns.

The Administrative Law Judge acknowledged that merely understating tax due does not require a finding of fraud. However, the record indicated that fraudulent conduct occurred at the

time the returns were filed. Subsequent actions by petitioner cannot excuse the fraudulent conduct at the time of filing. The Administrative Law Judge concluded that regardless of petitioner's cooperation after being contacted by the Division, at the time the returns in question were filed, petitioner committed fraud by willfully filing false sales tax returns resulting in underpayment of sales tax. Based on this conclusion, the Administrative Law Judge found that the issue of whether the Notice of Determination was issued outside the statute of limitations was moot.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Division has failed to meet its burden to prove fraud by clear and convincing evidence. As a result, the statute of limitations has expired for purposes of the assessment of penalties. Petitioner states that the standard of proof necessary to support a finding of fraud requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation resulting in deliberate nonpayment or underpayment of taxes due and owing. Specifically, petitioner asserts that given the testimony of petitioner at the hearing, the Division may be able to establish that petitioner willfully and knowingly filed sales tax returns for the period in question that reflected less than the proper amount due because of an inability to pay. However, petitioner argues that this willfulness and knowledge relate only to petitioner's *mens rea* regarding its inability to pay rather than its intent to deprive the Division of its rightful tax proceeds.

Petitioner argues that the critical element of intent to evade the payment of taxes due and owing is missing. Instead, based on Mr. Wittmeyer's testimony, petitioner argues that it is clear

that petitioner intended to comply with what it understood the Tax Law to require - that it was obligated to remit the full amount of sales tax indicated on its return. Petitioner asserts that it was not aware that a sales tax return could be filed without full payment of the tax indicated as owed thereon. Petitioner's intent was not to evade payment of the tax but to pay the full amount of tax due first by paying all that was available to him at the time and then paying the balance in the future. Petitioner admittedly handled the payment of taxes incorrectly but argues that it did not have the specific intent to evade payment of taxes.

Nor, argues petitioner, should it be collaterally estopped from contesting the fraud penalty. Petitioner argues that the same issues were not involved in the criminal proceedings as those to be decided herein. Therefore, petitioner did not have a full and fair opportunity to litigate those issues during the criminal proceeding. Specifically, petitioner argues that the Division has failed to prove that the intent associated with petitioner's plea of guilty to grand larceny in the fourth degree (i.e., intent to convert) is identical with the intent to evade tax required to sustain a finding of fraud.

The Division, in opposition, asserts that petitioner committed larceny by embezzlement when it knowingly underreported tax. Embezzlement is the fraudulent conversion of the property of another by one who has lawful possession of it. Therefore, petitioner had the specific intent to fraudulently convert the property of the State when it lawfully collected the sales tax as the State's trustee and substantially understated the amount of its taxable sales (the fraud) and illegally gave the money to its creditors (the conversion). The Division agrees with the Administrative Law Judge that petitioner should be collaterally estopped from contesting civil fraud penalties. The Division asserts that petitioner's guilty plea is definitive as to its intention to

deprive New York State of its sales tax and the guilty plea pertains to the entire amount of unremitted tax.

The Division maintains that the *mens rea* required for fraud involves petitioner's state of mind at the time it filed falsified sales tax returns without remitting the full amount of tax due. The Division argues that by drawing reasonable inferences from petitioner's entire course of conduct, it must be concluded that petitioner knowingly and willfully made false representations on its sales tax returns concerning the amount of its sales tax liability. This resulted in petitioner remitting less than the full amount of sales tax due and owing at the end of each reporting period. Further, the Division maintains that at the time petitioner filed the sales tax returns, it intended to deceive the State in order to conceal the actual use which was being made of this money.

The Division disputes petitioner's argument that it intended to comply with what it understood the Tax Law to require. Rather, petitioner intended to commit fraud because it was unaware that a non-fraudulent means was available to file accurate tax returns and not remit the amount of tax owed. The Division points out that there is no mention in the record of when petitioner planned to remit the full amount of tax arrears due. The Division suggests that the only reason for petitioner's method of calculating taxable sales, i.e., to have the amount of tax due equal the amount of funds available, was petitioner's illegal use of trust money to pay its creditors. The Division maintains that petitioner's concealment of sales tax due and owing by deliberately understating the amount of tax due constitutes fraud. It is no defense, argues the Division, that petitioner did not have the money available to remit it in full. The Division asserts that there is no basis on which to conclude that petitioner would ever remit the stolen tax money

to the State on his own accord and petitioner's cooperation with the auditor does not constitute a defense to fraud.

OPINION

As set forth above, the Division issued a Notice of Determination to petitioner asserting additional tax, fraud penalty and interest pursuant to Tax Law § 1145(a)(2).

At its hearing, petitioner argued that the assessment of fraud penalty and interest was time-barred pursuant to Tax Law § 1147(b), in that it was not made within three years of the date of the filing of petitioner's returns. Section 1147(b) contains an exception to the three-year period of limitations for willfully false or fraudulent returns filed with the intent to evade tax.

The issue of whether petitioner filed willfully false or fraudulent returns with the intent to evade payment of tax presents a question of fact to be determined upon consideration of the entire record (***Jordan v. Commissioner***, T.C. Memo 1986-389, 52 TCM 234; ***Matter of Drebin v. Tax Appeals Tribunal,*** 249 AD2d 716, 671 NYS2d 565). The burden of demonstrating this falls upon the Division (***Matter of Sona Appliances,*** Tax Appeals Tribunal, March 16, 2000). Fraud is not defined in Tax Law § 1145. However, a finding of fraud requires the Division to show "clear, definite, and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (***Matter of Sona Appliances, supra***). In order to establish fraudulent intent, petitioner, acting through its officer(s), must have acted deliberately, knowingly and with the specific intent to violate the Tax Law (***Matter of Cousins Serv. Sta.***, Tax Appeals Tribunal, August 11, 1988).

The sales tax penalty provisions are modeled after Federal penalty provisions and, thus, Federal statutes and case law may properly provide guidance in ascertaining whether the requisite intent for fraud has been established (***Matter of Uncle Jim's Donut & Dairy Store,*** Tax Appeals Tribunal, October 5, 1989). Since direct proof of a taxpayer's intent is rarely available, fraud may be proved by circumstantial evidence, including the taxpayer's course of conduct (***Intersimone v. Commissioner***, T.C. Memo 1987-290, 53 TCM 1073; ***Korecky v. Commissioner,*** 781 F2d 1566, 86-1 USTC ¶ 9232). Relevant factors held to be significant include consistent and substantial understatement of tax, the amount of the deficiency itself, the existence of a pattern of repeated deficiencies and the taxpayer's entire course of conduct (***see, Merritt v. Commissioner***, 301 F2d 484, 62-1 USTC ¶ 9408; ***Bradbury v. Commissioner***, T.C. Memo 1996-182, 71 TCM 2775; ***Webb v. Commissioner***, 394 F2d 366, 68-1 USTC ¶ 9341; ***see also, Matter of AAA Sign Co.***, Tax Appeals Tribunal, June 22, 1989).

The Division has established, through the testimony of petitioner, that petitioner consistently and substantially underreported his sales tax throughout the audit period. Petitioner argues that it was unaware that it could file returns and not remit the full amount of the tax due. Therefore, it simply filed returns which underreported the tax due and paid as tax the amount it had on hand. This was not fraud, argues petitioner, but only an incorrect method of collecting and remitting tax. Petitioner maintains that this "indicates that Petitioner's intent was not to evade tax but to pay the full amount of tax due first by paying all that was available at the time and then paying the balance in the future" (Petitioner's reply brief, p. 5). We do not share petitioner's viewpoint. Rather, the record establishes that petitioner collected sales and use tax as it was required to do and falsely reported to the Division only the amount of sales that would

generate a tax liability equal to the funds petitioner had "on hand" at the end of the tax period. This amount "on hand" was what remained after petitioner had unlawfully converted to its own use the balance of the sales tax already collected. Petitioner continued in this mode of behavior for over four years until it was contacted by the Division. There is no indication in the record that petitioner contacted the Division *sua sponte* to advise the Division of its pattern of underpayments and to voluntarily remit the balance due and owing to the Division.

Once the Division contacted petitioner, it remitted the balance of tax due. The amount actually due was calculated by petitioner from its own records. Thus, petitioner knew the amount of tax that was properly reportable and payable. However, it purposefully and regularly filed tax returns which significantly understated its tax liability. Further, it did this to conceal its failure to remit the correct amount of tax which it had legally collected, held in trust for and was obligated to remit to the State of New York.

Petitioner was charged with the crime of grand larceny in the fourth degree for the period September 20, 1989 through December 20, 1993. Petitioner pled guilty to this charge in Erie County Supreme Court. Petitioner also pled guilty in the Orchard Park Town Court to one count of filing a false sales tax return on or about December 20, 1993 for the tax period September 1, 1993 through December 31, 1993. Petitioner's guilty pleas to these charges may constitute evidence of fraudulent intent for the entire assessment period (***see, Matter of Cinelli,*** Tax Appeals Tribunal, September 14, 1989; ***cf., Matter of Chateau Chemists,*** State Tax Commn., May 4, 1984 [guilty plea with respect to an indictment covering one tax period not evidence of fraud for a subsequent audit of a later tax period]). While mere proof of an understatement of tax, by itself, is insufficient to prove fraud, a consistent and substantial understatement of tax

constitutes strong evidence of fraud (***Merritt v. Commissioner***, ***supra*** [understatement of $80,000.00 in income over a seven-year period]; ***see, Foster v. Commissioner***, 391 F2d 727, 68-1 USTC ¶ 9256 [understatement alone not sufficient to prove fraudulent intent but, where other factors indicate fraudulent intent, the size and frequency of the omissions are to be considered in determining fraud]). Petitioner's actions after the commencement of the audit cannot excuse the fraudulent conduct at the time of filing (***see***, ***Sansone v. United States***, 380 US 343, 13 L Ed 2d 882; ***Matter of Alteri***, Tax Appeals Tribunal, August 20, 1998).

We conclude that the evidence considered as a whole provides clear and convincing proof that petitioner willfully, deliberately and intentionally filed false sales tax returns with the intent to evade payment of taxes that were legally due. As a result, the Division was not constrained by the three-year period of limitation imposed by Tax Law § 1147 for the assessment of fraud and interest penalties. Further, we agree with the Administrative Law Judge that the Division has met its burden of proof to show that petitioner willfully, knowledgeably and intentionally committed wrongful acts constituting false representation which resulted in deliberate underpayment of taxes due and owing for the entire assessment period. Petitioner was asked at the plea hearing whether it had stolen $179,143.48 in sales tax trust funds owed to the State of New York. Petitioner replied in the affirmative. Petitioner's actions not only constituted the crime of grand larceny in the fourth degree under the penal code, but also subject petitioner to fraud penalties pursuant to Tax Law § 1145(a)(2) (***see***, ***Matter of DeFeo***, Tax Appeals Tribunal, April 22, 1999). Since the issue before the Supreme Court and herein is identical, petitioner is estopped from arguing that the fraud penalty in this matter was improperly asserted (***see***, ***Plunkett v. Commissioner***, 465 F2d 299, 72-2 USTC ¶ 9541; ***Matter of DeFeo***, ***supra***; ***Matter of***

Cinelli, ***supra***). Petitioner's argument that ***DeFeo*** is not applicable to its situation because the taxpayer in ***DeFeo*** pled guilty to grand larceny in the second degree is unavailing. The distinction between grand larceny in the fourth degree and grand larceny in the second degree relates simply to the value of the property stolen.

Even if petitioner had not been estopped from contesting the imposition of the fraud penalty, the Division has introduced sufficient evidence to sustain the fraud penalty against petitioner. The Division did not rely solely on petitioner's plea of guilty to the criminal charge brought against it as proof of petitioner's fraud. As set forth above, the Division presented evidence which clearly and convincingly established the fraudulent conduct of petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of T. Management, Inc. is denied;

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

3. The petition of T. Management, Inc. is denied; and

4. The Notice of Determination issued on June 30, 1997 is sustained.

DATED: Troy, New York
April 12, 2001

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

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

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