

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**A.V.S. LAMINATES, 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, 1990 through May 31, 1996. :

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DECISION  
DTA NOS. 819295  
AND 819301

In the Matter of the Petition :

of :

**STEIGER BOAT SALES, 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, 1995 through May 31, 1996. :

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Petitioners A.V.S. Laminates, Inc. and Steiger Boat Sales, Inc., 99 Bellport Avenue, Bellport, New York 11713, each filed an exception to the determination of the Administrative Law Judge issued on November 4, 2004. Petitioners appeared by Kestenbaum & Mark (Richard S. Kestenbaum, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (James Della Porta, Esq., of counsel).

Petitioners filed a brief in support of their exceptions and the Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on September 27, 2005 in New York, New York.

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

***ISSUES***

I. Whether the Division of Taxation properly subjected certain sales made to New York customers by petitioner A.V.S. Laminates, Inc. to sales tax.

II. Whether the Division of Taxation properly subjected sales made by petitioner Steiger Boat Sales, Inc. to sales tax.

III. Whether the Division of Taxation has established that petitioners were properly subject to the imposition of a fraud penalty and, if not, whether the penalty pursuant to Tax Law § 1145(a)(1) should be sustained.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact “4,” “8,” “15,” “19,” “20,” “24,” “25,” “2<sup>nd</sup> 25,” “34,” “37,” “41” and “45.” We have also made additional findings of fact. The Administrative Law Judge’s findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

1. Petitioner A.V.S. Laminates, Inc. (“A.V.S.”), doing business as Steiger Craft, manufactures and sells fiberglass boats for use in salt water and fresh water by, among others, sports fishermen and commercial fishermen, governmental agencies (Federal, states and municipalities), utilities and marine businesses. A.V.S. is located at 99 Bellport Avenue, in Bellport, New York, on Long Island, about 8 to 10 miles from the ocean. The Bellport property consists of a showroom building containing an office, and four buildings directly behind that

showroom building. Three of the buildings are used for manufacturing boats and the fourth building is used for offices where the books and records are located.

2. Alan V. Steiger is the sole shareholder and sole officer of A.V.S. Mr. Steiger, a high school graduate, has been designing and building boats for many years.<sup>1</sup> Initially, he built commercial clam rakes in boats, i.e., nets and other items used in commercial fishing, then he began building fiberglass boats as well. On or about 1980, his company, Steiger Clamming Supplies, obtained a government contract to manufacture fiberglass solar systems for it. However, Steiger Clamming Supplies was unable to invoice the government because of its name and, as a result, A.V.S. Laminates, Inc. was incorporated in 1980. The corporation's name is a combination of Mr. Steiger's three initials and the type of manufacturing the corporation performs.

3. Prior to the period in issue, A.V.S. conducted a manufacturing and wholesale business with marine dealers including three Steiger Craft boat dealers on Long Island. After the recession of 1989 to 1991, during which the three Steiger Craft boat dealers on Long Island closed, A.V.S. began selling its boats directly to the ultimate boat owner in addition to continuing its business with various marine businesses. A.V.S. did not collect sales tax from its retail customers. Rather, those customers were instructed to pay the sales tax at the New York State Department of Motor Vehicles ("DMV") when they registered their boats. In August 1991, after receiving complaints from its customers about difficulties they had registering their boats with the DMV, A.V.S. began collecting sales tax from its retail boat sales and registering boats for its customers.

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<sup>1</sup> The record is silent as to the exact year Mr. Steiger began designing and building boats.

We modify finding of fact “4” of the Administrative Law Judge’s determination to read as follows:

4. From 1991 until the summer of 1993, A.V.S. employed Fran Waller as its bookkeeper. Among her duties as A.V.S.’s bookkeeper, Ms. Waller prepared sales tax returns and checks for Mr. Steiger’s signature, and began the process of putting the A.V.S. accounts into the office’s new computer. During this time, she discovered that Alan Steiger was preparing double sets of sales invoices. Both invoices had the same invoice number. One sales invoice listed the actual sales price for a boat and the other sales invoice listed a lower dollar amount as the sales price. Ms. Waller states that the invoices with the lower amounts were given to the customers to register the boats. The difference in dollar amounts on the invoices often represented cash consideration paid by the customers. Ms. Waller testified that she left the employ of A.V.S. because she no longer wanted to comply with Mr. Steiger’s instructions, which she viewed as illegal. Ms. Waller denied that she was responsible for sales tax returns or for checks payable to the Department of Taxation and Finance not being mailed. Mr. Steiger ultimately decided which creditors were paid and what checks were mailed out in payment of A.V.S.’s bills (Ex. “TT”).<sup>2</sup>

5. In the summer of 1993, Allan Suchman, C.P.A., was hired to review A.V.S.’s books and records. Mr. Suchman found A.V.S.’s records to be in disarray. He also found that A.V.S. had not filed sales tax returns or paid its sales tax liabilities. After consultation with Mr. Steiger, Mr. Suchman anonymously contacted the Division of Taxation (“Division”) to ascertain whether the delinquent returns could be filed and a payment plan worked out. The Division’s employee informed Mr. Suchman that if the returns were filed without payment, a lien would be filed for the outstanding tax liabilities. Mr. Suchman further explained that if a lien was filed his client would be unable to get a loan it wanted to obtain. The Division’s employee reiterated that the tax warrant would be filed if the delinquent returns were filed without an accompanying tax

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<sup>2</sup>We modified finding of fact “4” to more completely reflect the record.

payment. Mr. Suchman discussed the matter with Mr. Steiger. A.V.S. was unsuccessful in obtaining financing.

6. During the period June 1, 1990 through May 31, 1995, A.V.S. manufactured and sold boats. Although it was registered as a sales tax vendor with the Division, A.V.S. did not file sales tax returns for the period June 1, 1990 through May 31, 1995. It also did not file New York withholding tax returns for the period June 1, 1990 through May 31, 1995.

7. During the period June 1, 1990 through May 31, 1996,<sup>3</sup> rather than remitting the sales tax collected by A.V.S., Mr. Steiger used the money to keep the business afloat. In January 1994, A.V.S. repaid Mr. Steiger's mother, Josephine Steiger, \$54,855.16 in principal and interest on a loan it owed her. In addition to its other debts, A.V.S. owed Federal taxes. Mr. Steiger chose to pay that debt rather than A.V.S.'s sales tax liability.

We modified finding of fact "8" of the Administrative Law Judge's determination to read as follows:

8. During the period in issue, A.V.S. manufactured about 20 different boat models. However, during the early part of the audit period, A.V.S. was unable to supply the outboard motors to the purchasers of its boats because it was an original equipment manufacturer ("OEM") and the manufacturers of the outboard motors would not sell their products to OEMs, such as A.V.S. On or about June 1995, petitioner Steiger Boat Sales, Inc. ("Steiger Boat") was incorporated when Mr. Steiger was able to become a Mercury engine and parts dealer.<sup>4</sup> During the period June 1, 1995 through May 31, 1996, Mr. Steiger was the sole shareholder and officer of Steiger Boat.<sup>5</sup>

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<sup>3</sup>Sometimes infra, "the subject period" or "the audit period."

<sup>4</sup>The record is silent as to the exact date of Steiger Boat Sales, Inc.'s incorporation.

<sup>5</sup>We modified finding of fact "8" by deleting extraneous and irrelevant material.

9. During the period June 1, 1995 through May 31, 1996, Steiger Boat sold boats out of the same Bellport, New York location as A.V.S. Between June 1, 1995 and May 31, 1996, A.V.S. sold boats to Steiger Boat without charging sales tax. Even though Steiger Boat failed to give A.V.S. any resale certificates, A.V.S. considered these as sales for resale and therefore nontaxable. Steiger Boat charged sales tax to the customer on its own sales invoices. Steiger Boat did not register as a sales tax vendor with the Division and did not file sales tax returns for the period June 1, 1995 through May 31, 1996. Steiger Boat did not file New York franchise tax reports for the period June 1, 1995 through May 31, 1996.

10. Steiger Boat did not maintain its own checking account. Rather, only A.V.S. maintained a checking account. A.V.S./Steiger Boat did not remit the sales tax due during the period June 1, 1995 through May 31, 1996 for sales made by Steiger Boat.

11. After the summer of 1993, Mr. Suchman continued to provide A.V.S. with accounting services. Once Steiger Boat was incorporated, Mr. Suchman also provided accounting services to it. Mr. Suchman was aware of Steiger Boat's obligation to register as a sales tax vendor.

12. In July 1996, after receiving an anonymous letter which alleged that A.V.S. was selling boats at retail without filing sales tax returns, the Division assigned an auditor, David Fitzgerald, to conduct a sales tax field audit of A.V.S. for the period June 1, 1990 through May 1, 1996. An appointment letter dated July 18, 1996 and setting an appointment for August 12, 1996 was sent by Mr. Fitzgerald to A.V.S. The letter requested that the corporation make available all of its books and records pertaining to its tax liability for the period under audit, including financial statements, journals, ledgers, sales invoices, cash register tapes, sales and use tax returns, Federal income tax returns and exemption certificates.

13. At the written request of A.V.S., the field audit appointment was rescheduled for October 28, 1996. Mr. Fitzgerald met with Messrs. Steiger and Suchman on October 28, 1996. At that meeting, they admitted that A.V.S. had collected sales tax for the period June 1, 1990 through May 31, 1996 but that it had not remitted the sales tax monies.

14. A review of the Tax Field Audit Log (“audit log”)<sup>6</sup> reveals that the auditor began his detailed audit of A.V.S.’s sales records on October 28, 1996 by spending six days in October 1996 and November 1996 transcribing its sales invoices for the period June 1, 1990 through May 31, 1996. Review of the audit log also reveals that on November 19, 1996 he analyzed all available exemption certificates. The exemption certificates provided were resale certificates. Based on his analysis of these resale certificates, which he deemed to be sufficient, the auditor concluded that some of A.V.S.’s sales were exempt from sales tax.

We modify finding of fact “15” of the Administrative Law Judge’s determination to read as follows:

15. As he continued his audit, Mr. Fitzgerald made additional written and oral requests for A.V.S.’s records including additional exemption certificates. On February 5, 1997, Mr. Fitzgerald prepared a copy of the listing of all A.V.S.’s sales invoices for the period June 1, 1990 through May 31, 1996 that included, among other things, for each transaction: the customer’s name, the date of the transaction, the invoice number, the invoice amount, the taxable amount, the tax paid, additional tax due and the auditor’s comments concerning the transaction such as: no sales tax charged - NJ; no sales tax charged - exempt; and sales tax charged, not paid. During a February 7, 1997 field appointment, Mr. Fitzgerald gave Mr. Suchman a copy of the listing of all A.V.S.’s sales invoices, so that A.V.S. could provide substantiation for any sales which it considered to be exempt. On February 10, 1997, the auditor sent a letter to A.V.S.’s accountant

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<sup>6</sup>Also referred to sometimes, *infra*, as the “daily contact sheet” (DO-225.5[6/94]).

requesting, among other things, purchase invoices, bank statements and “[a]ll exemption certificates to verify non-taxable sales.” Notations in the audit log reveal that, during a June 7, 1997 field audit appointment, in response to the auditor’s request for additional exemption certificates, both Mr. Suchman and Karen Andrews, A.V.S.’s purchasing agent and bookkeeper, stated that there were no additional exemption certificates available. During the June 7, 1997 audit appointment, Mr. Steiger admitted that petitioners did not file the sales tax returns because he did not want the Division to file any tax warrants. He also admitted that petitioners used the sales tax money to pay petitioners’ other creditors. In a telephone conversation with Mr. Fitzgerald, Mr. Suchman admitted that Steiger Boat collected sales tax but did not remit these funds to the Division.<sup>7</sup>

16. Between October 28, 1996 and June 2, 1997, the auditor examined the records provided by A.V.S. including, among other things, all sales invoices for the period June 1, 1990 through May 31, 1996, some exemption certificates (resale certificates), copies of Federal income tax returns for the fiscal years September 1, 1990 through September 30, 1995, bank statements for various accounts located in North Fork Bank, Marine Midland Bank and The Bank of New York, cancelled checks payable to Josephine Steiger in the month of January 1994, cash disbursements for miscellaneous dates and cash receipts for miscellaneous dates.

17. After reviewing A.V.S.’s sales invoices and the admissions made by its representatives, in July 1997, the auditor prepared and forwarded a Referral of Possible Fraud (“fraud referral”) pertaining to A.V.S. to the Revenue Crimes Bureau. A review of the fraud referral reveals that Mr. Fitzgerald described A.V.S.’s record-keeping as poor. The Revenue Crimes Bureau accepted the case for investigation.

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<sup>7</sup>We modified finding of fact “15” to more clearly reflect the record.

18. On September 7, 1997, the Revenue Crimes Bureau issued a subpoena duces tecum to A.V.S. for all sales invoices, purchase invoices, purchase journals, bank statements, cancelled checks and all other accounting and bookkeeping records and exemption certificates regarding the business activity of A.V.S. for the period June 1, 1990 through May 31, 1996.

We modified finding of fact “19” of the Administrative Law Judge’s determination to read as follows:

19. On or about September 24, 1997, in response to the subpoena, A.V.S. handed over boxes of records to a representative from the Revenue Crimes Bureau. At the same time, Steiger Boat also handed over its records to the Revenue Crimes Bureau. Both Mr. Steiger and Mr. Suchman claimed they did not receive a receipt from the Revenue Crimes Bureau enumerating the records being taken. Neither Mr. Steiger nor Mr. Suchman retained copies or a list of the records before handing them over to the Revenue Crimes Bureau.<sup>8</sup>

We modify finding of fact “20” of the Administrative Law Judge’s determination to read as follows:

20. On or about December 18, 1997, after the Revenue Crimes Bureau assigned Michael Ou as investigator in the A.V.S.’s criminal investigation, Mr. Fitzgerald sent Mr. Ou a set of the initial work papers that he prepared during the civil audit of A.V.S.<sup>9</sup> Mr. Fitzgerald did no further work on the civil audit of A.V.S. until after the criminal case was closed.<sup>10</sup>

21. After the criminal investigation began, Mr. Ou met with Mr. Suchman at the Revenue Crimes Bureau office at Two World Trade Center. At that meeting, Mr. Ou presented petitioners’ representative with a list of items in question.

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<sup>8</sup>We modified finding of fact “19” to more fully reflect the record.

<sup>9</sup>Mr. Ou also handled Steiger Boat’s criminal investigation.

<sup>10</sup>We modified finding of fact “20” to more clearly reflect the record.

22. After reviewing A.V.S.'s records, Mr. Ou initially determined that on A.V.S.'s total taxable sales of \$4,761,884.64 for the period June 1, 1990 through May 31, 1996, it had collected and failed to remit sales tax in the amount of \$182,663.32 and had additional uncollected (undercharged or uncharged) sales tax in the amount of \$212,088.82 for total tax due of \$394,752.14. After reviewing Steiger Boat's records, Mr. Ou initially determined that on Steiger Boat's total taxable sales of \$758,651.83 for the period June 1, 1995 through May 31, 1996, it had collected and failed to remit sales tax in the amount of \$58,432.32 and had additional uncollected (undercharged or uncharged) sales tax in the amount of \$4,662.81 for a total tax due of \$63,080.30. Mr. Ou prepared detailed work papers supporting his initial determinations of total sales tax due for both petitioners.

23. In early 2000, Mr. Suchman brought Mr. Ou some resale certificates and some invoices indicating out-of-state sales. The proof of out-of-state deliveries were invoices bearing out-of-state addresses. Mr. Suchman did not prepare a cover letter transmitting these documents. Neither a list of documents being transmitted nor a schedule of the adjusted tax due based on the documents being transmitted was prepared. Mr. Suchman also failed to copy the documents that he submitted to Mr. Ou.

We modified finding of fact "24" of the Administrative Law Judge's determination to read as follows:

24. In late April or early May 2000, in an effort to further reduce Mr. Ou's determination of tax due on unsubstantiated exempt sales, Mr. Suchman again met with Mr. Ou over several days. Mr. Ou provided Mr. Suchman with copies of the invoices and other documents, so that Mr. Suchman could contact the people necessary to substantiate petitioners' exempt sales. Mr. Suchman was also allowed to go over and copy all the documents in Mr. Ou's possession. By way of example,

Mr. Suchman would take the copied invoices back to petitioners' place of business and the sales and customer information on the invoices would be used to find the exemption documents, if any. The invoices would then be stapled to the resales or exempt certificates and these were then returned to Mr. Ou to substantiate exempt sales. There was a point in time, Mr. Suchman testified, that he "absolutely" had all of the information he needed to substantiate alleged exempt sales, but he returned it all to Mr. Ou (Tr., p. 118). Mr. Suchman made no copies of these documents for his clients' records before giving them back to Mr. Ou. Mr. Suchman admitted that he never made any copies or written record of the sales invoices that were in the possession of Mr. Ou and the Revenue Crimes Bureau. Subsequently, after he obtained the invoice copies from Mr. Ou, Mr. Suchman met with Mr. Steiger and explained what he would need to show in order to reduce the asserted determinations of tax due on unsubstantiated exempt sales. Discussions were then held with Ms. Andrews and a plan was formulated. While Mr. Suchman supervised Ms. Andrews and temporary employees, Mr. Steiger was not involved in the actual implementation of the plan.<sup>11</sup>

We modify finding of fact "25" of the Administrative Law Judge's determination to read as follows:

25. The "Plan" was as follows: Since A.V.S.'s unsubstantiated exempt sales consisted of four types of sales, each type of sale was assigned its own part with supporting material gathered for each part. Part one is retail sales made in the State of New York. For these retail sales, A.V.S. contacted all the people who had paid the sales tax at the DMV when they registered their boats. In response, it received copies of sales tax receipts, copies of cancelled checks, copies of registration certificates or some combination of those depending on the person. Part two is wholesale sales made in the State of New York. For these wholesale sales, A.V.S. obtained resale certificates and exemption certificates from virtually everybody listed on the invoices. Part three is all sales made outside of the State of New York. For these sales, A.V.S. obtained letters, advertising brochures, yellow page ads and other types of documentation. For part four, the

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<sup>11</sup>We modified finding of fact "24" to reflect that in his meetings with Mr. Ou to review sales documents over several days, Mr. Suchman made no written record of the sales invoices or exemption documents he reviewed.

“everything else” category, A.V.S. obtained documentation for, among other things, boats taken in trade.<sup>12</sup>

We modify the second finding of fact “25” of the Administrative Law Judge’s determination to read as follows:

25. After all the documents were gathered, in the late summer of 2000, Mr. Suchman testified he hand delivered a box and a folder containing them to Mr. Ou. Mr. Suchman did not prepare a cover letter transmitting the documents. Neither a list of the documents being transmitted nor a schedule of the adjusted tax due based on the documents being transmitted was prepared. Mr. Suchman also failed to copy the documents that he submitted to Mr. Ou. Accordingly, the record does not provide a specific identifiable description of the documents.<sup>13</sup> There is no more detailed description in the record of what the documents consisted of or the sales they related to.<sup>14</sup>

26. On December 13, 2000, Mr. Steiger pled guilty in New York State, Suffolk County Court, to a superior court information charging the Class D felony of Grand Larceny in the Third Degree, in violation of New York Penal Law § 155.35. In the plea proceeding, Mr. Steiger admitted that he was the owner of A.V.S. and Steiger Boat, between June 1, 1990 and May 31, 1996; that he collected sales tax for the sales of certain boats by A.V.S. and Steiger Boat, during the period between June 1, 1990 and May 31, 1996; that he failed to remit that tax to the Division; that the tax collected but not remitted amounted to \$241,095.00; and that he knew it was wrong to fail to remit that tax. Of the amount of tax which Mr. Steiger admitted he failed to

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<sup>12</sup>We modified the first finding of fact designated “25” to clarify that its contents refer to the “Plan.”

<sup>13</sup>This is unfortunate, since much of petitioners’ case centers on these documents. These are, apparently, the documents sometimes referred to, *infra*, as “additional documents,” which petitioners claim to have provided to Mr. Ou in the late summer of 2000 and which petitioners claim were not properly taken into account by Mr. Ou prior to his death on September 11, 2001, or subsequently reviewed by Mr. Fitzgerald in arriving at tax due.

<sup>14</sup>We modified the second finding of fact designated “25” to clarify “the additional records” which are the center of this case.

remit, \$182,663.00 was attributable to tax billed or collected by A.V.S. and \$58,432.00 was attributable to tax billed or collected by Steiger Boat. The record of the plea proceedings indicates that Mr. Steiger's attorney was aware that the Division planned on pursuing additional civil tax liabilities.

27. On February 7, 2001, the Honorable Joseph Farneti, County Court Judge for Suffolk County, sentenced Mr. Steiger to five years probation based upon the aforesaid plea of guilty. Judge Farneti stated that Mr. Steiger's guilty plea "is in no way to impact upon any civil remedies the State of New York may have against Mr. Steiger, and they are free to pursue those remedies." As part of the plea agreement, Mr. Steiger paid the Division the sum of \$241,095.00.

28. On March 20, 2001, Mr. Ou sent an e-mail to Mr. Fitzgerald informing him of the disposition of the criminal case against A.V.S. and Steiger Boat and asking him to close the case using attached schedules. Mr. Ou attached three sets of work papers to the e-mail.

29. A review of A.V.S.'s audit log indicates that on March 23, 2001, Mr. Fitzgerald sent Mr. Ou an e-mail requesting copies of his worksheets revealing how the tax was computed.

30. In a March 26, 2001 e-mail, Mr. Ou informed Mr. Fitzgerald that, even though the attorneys had discussed a possible solution many times, there was no final agreement. He went on to explain that the civil fraud penalty and interest still needed to be collected on that portion of the tax which the subject had collected and, as part of the plea agreement, paid to the Division. As for the unsubstantiated exempt sales, Mr. Ou advised Mr. Fitzgerald that they were still in dispute. Mr. Ou further advised Mr. Fitzgerald that he would send detailed worksheets.

31. Mr. Fitzgerald had several communications with Mr. Ou about his tax computations. Mr. Ou's first set of work papers lists \$212,088.82 in sales tax due from A.V.S. on

unsubstantiated exempt sales and \$4,662.81 in sales tax due from Steiger Boat on unsubstantiated exempt sales. Although Mr. Ou acknowledged getting records from A.V.S.,<sup>15</sup> he never indicated that little additional tax was due. Rather, he informed Mr. Fitzgerald that he had reviewed additional records that resulted in changes in sales tax due and the changes were reflected in his work. His second set of work papers lists \$123,750.05 in sales tax due from A.V.S. on unsubstantiated exempt sales and \$4,662.81 in sales tax due from Steiger Boat on unsubstantiated exempt sales.<sup>16</sup>

32. In Mr. Ou's April 12, 2001 e-mail, he advised Mr. Fitzgerald that the fraud penalty should be assessed on the unresolved portion of the audits.

33. Review of the Division's audit logs reveals that Mr. Fitzgerald issued AU-346s<sup>17</sup> and related worksheets to A.V.S. and Steiger Boat on April 16, 2001. Further review reveals that on May 14, 2001, copies of these documents were sent to Mr. Suchman. The logs also reveal that Mr. Suchman requested a meeting.

We modify finding of fact "34" of the Administrative Law Judge's determination to read as follows:

34. On June 14, 2001, Mr. Fitzgerald and his supervisor, William Sparke, met with Mr. Suchman to review Mr. Ou's work papers concerning the additional tax due from A.V.S. and Steiger Boat. Mr. Fitzgerald asked petitioners to supply him with documents to support their unsubstantiated exempt sales. Mr. Suchman stated additional records had been given to Mr. Ou

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<sup>15</sup>As noted earlier, the record is silent as to specific documents provided or what specific transactions they related to.

<sup>16</sup> In the Schedule of Additional Tax Due prepared by Mr. Fitzgerald, the sales tax due from A.V.S. is broken down as follows: \$96,533.79 in additional tax not charged plus \$27,216.26 in additional tax on unsubstantiated out-of-state sales.

<sup>17</sup>Statement of Proposed Audit Change for sales tax.

in support of petitioners' unsubstantiated exempt sales. Here Mr. Suchman is apparently referring to the additional documents he said were provided to Mr. Ou during the summer of 2000. Other than Mr. Suchman's testimony there is no evidence as to what these documents were, what they purported to show, what sales transactions they related to, or how much, if any, they would have reduced that tax asserted as due. There is no evidence in the record that Mr. Ou did not take these records into account. During that June 14, 2002 meeting, Mr. Suchman did not identify any additional transactions that were exempt from sales tax. Rather, he claimed that no additional tax was due other than the amounts agreed upon in court. After the meeting, Mr. Fitzgerald called Mr. Ou who confirmed that he had been provided with additional records and that they were reflected in his work. The notation in the audit log indicates that Mr. Fitzgerald agreed to call Mr. Ou back if he (Mr. Fitzgerald) planned on analyzing these records. Mr. Suchman did not ask Mr. Fitzgerald to get the taxpayers' records from Mr. Ou nor did Mr. Fitzgerald make such a promise. Mr. Fitzgerald did not view it as his responsibility to retrieve the additional records that petitioners had turned over to Mr. Ou. Mr. Fitzgerald told Mr. Suchman when he obtained his clients' records from Mr. Ou, he [Mr. Fitzgerald] would be happy to review them at petitioners' place of business, but they were taxpayers' records and their responsibility to obtain. Mr. Fitzgerald never analyzed these additional records, because they were never provided to him for review.

An auditor's log or daily contact sheet is an auditor's daily record of his work performed on a particular audit, including meetings and phone conversations. The entries on the log are made contemporaneous with the dates and actions they record. There is no mention in the auditor's daily contact sheets for the June 14<sup>th</sup> meeting that Mr. Suchman requested or otherwise raised the issue of return of petitioners' records. There is also no mention in the log with respect to Mr. Fitzgerald telling Mr. Suchman to retrieve his clients' records from Mr. Ou. The auditor's log does not reflect that Mr. Fitzgerald promised to obtain petitioners' books and records from Mr. Ou. Mr. Suchman did not contact Mr. Fitzgerald again to see how his review of petitioners' records was progressing. Nor did Mr. Fitzgerald contact Mr. Ou again.

With regard to the additional records that had been turned over to Mr. Ou, Mr. Suchman stated it would be conjecture on his part as to whether they had been analyzed by Mr. Ou.<sup>18</sup>

35. On October 25, 2001, the Division issued a Notice of Determination to A.V.S., number L-020157840-5, asserting sales and use tax due in the amount of \$123,750.05 plus penalty in the amount of \$171,574.52 and interest in the amount of \$206,640.37 for a current balance due of \$501,964.94. On October 29, 2001, the Division issued a second Notice of Determination to A.V.S., number L-020157839-5, asserting sales and use tax due in the amount of \$182,663.34 plus penalty in the amount of \$231,246.59 and interest in the amount of \$267,748.60 less payment of \$182,663.00 for a current balance due of \$498,995.53. The computation section of each notice states that a fraud penalty of 50% of the tax plus 50% of the statutory interest under Tax Law § 1145 was being assessed.

36. On October 29, 2001, the Division issued two notices of determination to Steiger Boat. The first notice, number L-020174162-5, asserts sales and use tax due in the amount of \$4,662.81 plus penalty in the amount of \$14,640.73 and interest in the amount of \$4,618.85 for a current balance due of \$23,922.19. The second Notice of Determination, number L-020157841-4, asserts sales and use tax in the amount of \$58,432.32 plus penalty in the amount of \$54,194.82 and interest in the amount of \$51,354.75 less payment of \$58,432.00 for a current balance due of \$105,549.89. The computation section of each notice states that a fraud penalty of 50% of the tax plus 50% of the statutory interest under Tax Law § 1145 was being assessed.<sup>19</sup>

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<sup>18</sup>We modified finding of fact “34” to more clearly reflect the record.

<sup>19</sup> The Division’s Answer states that, with respect to Notice number L-020157841-4, in addition to the fraud penalty, it assessed a \$10,000.00 penalty against Steiger Boat under Tax Law § 1145(a)(3)(i) for failure to obtain a certificate of authority as required by Tax Law § 1134.

We modified finding of fact “37” of the Administrative Law Judge’s determination to read as follows:

37. On November 15, 2001, Mr. Suchman sent a letter to Joseph Brooking, the Director of the Revenue Crimes Bureau, requesting the return of the documents that the Revenue Crimes Bureau had seized via subpoena from A.V.S. and Steiger Boat for the period June 1, 1990 through May 31, 1996. This is the first time Mr. Suchman made a verifiable written request for return of the records. By letter dated December 19, 2001, Mr. Brooking informed Mr. Suchman that the subpoenaed records had been stored in the Revenue Crimes Bureau office at Two World Trade Center and were presumed destroyed. Mr. Ou was killed during the terrorist attack on September 11, 2001.<sup>20</sup>

38. In December 2001, the Division provided Mr. Suchman with copies of A.V.S.’s sales journal for the period January 1993 through September 1994 and copies of A.V.S.’s cash receipts journal for the period January 1993 through December 1994. It also provided copies of Mr. Ou’s work papers utilized to arrive at the audit adjustments.

39. The Division was able to secure some documents pertaining to A.V.S. and Steiger Boat from the Attorney General’s Office. On January 15, 2002, Albert Coringrato, District Audit Manager at the Division’s Suffolk District Office, sent a letter to Mr. Suchman. Enclosed with the letter was a packet of documents that Mr. Coringrato had obtained from the Attorney General’s Office including sales invoices, resale certificates, assignment statements, testimonials and other various documents.

40. Petitioners filed requests for conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) and such conferences were scheduled. Mr. Fitzgerald met with his supervisors to analyze the documents that they had received from the Attorney

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<sup>20</sup>We modified finding of fact “37” to clarify the date that Mr. Suchman first made a written request for records to be returned.

General's Office. By letter dated March 18, 2002 addressed to Mr. Suchman, Mr. Fitzgerald proposed to reduce the tax asserted due from A.V.S. on the unsubstantiated exempt sales from \$123,750.05 to \$82,095.94.<sup>21</sup> The adjustments were based on allowance of sales for resale to boat dealers, the elimination of duplicate invoices, the elimination of sales tax on trade-in amounts and the allowance of all out-of-state sales. Mr. Fitzgerald included detailed 28-page work papers that identified the specific invoices being adjusted.<sup>22</sup>

We modify finding of fact "41" of the Administrative Law Judge's determination to read as follows:

41. On or about April 29, 2002, Mr. Fitzgerald called Mr. Suchman and discussed the audit work papers with him. Mr. Suchman said that he had briefly reviewed the workpapers. He went on to urge that after supplying Mr. Ou with the additional records on the second occasion,<sup>23</sup> that the additional tax due on A.V.S.'s unsubstantiated exempt sales was between \$12,000.00 and \$15,000.00. Mr. Fitzgerald asked Mr. Suchman what kind of additional information he had provided to Mr. Ou. Mr. Suchman replied that it was advertizing brochures, to prove boat sales to dealers that were out of business and to a lesser extent, resale certificates. Mr. Fitzgerald told him that adjustments had already been made for resale sales and boat sales to dealers. Mr. Fitzgerald stated there was no further documentary basis for him to further adjust the additional tax due and suggested his client proceed to the Bureau of Conciliation and Mediation Services for a conference (Ex. "MM").<sup>24</sup>

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<sup>21</sup>The auditor claimed these adjustments were computed as a proposed settlement to petitioners at BCMS. Petitioners declined.

<sup>22</sup>The record is unclear as to whether the records referred to here are the "additional records."

<sup>23</sup>Referring here, apparently, to the last set of documents provided to Mr. Ou in the summer of 2000 to support petitioners' claimed exempt sales. The record does not reflect any documents were provided to Mr. Ou after that time. The record does not reflect a specific date these records were provided to Mr. Ou. Mr. Suchman testified it was the late summer of 2000.

<sup>24</sup>We modified finding of fact "41" to more fully reflect the record.

42. After a conciliation conference, the conferee sustained the statutory notices issued to A.V.S. (L-020157839 and L-020157840) in an Order (CMS No. 190283) dated October 11, 2002. After a conciliation conference, the conferee also sustained the statutory notices issued to Steiger Boat (L-020157841 and L-020174162) in an Order (CMS No. 190284) dated October 11, 2002.

43. A.V.S. requested and received amnesty for Notice of Determination, number L-020157839-5, dated October 29, 2001. Steiger Boat requested and received amnesty for Notice of Determination, number L-020157841-4, dated October 29, 2001. These two amnesty notices concerned the sales tax collected but not remitted by petitioners.

44. A.V.S. filed a petition challenging the Notice of Determination asserting sales tax due in the amount of \$123,750.05 on unsubstantiated exempt sales. Steiger Boat filed a petition challenging the Notice of Determination asserting sales tax due in the amount of \$4,662.81 on unsubstantiated exempt sales.

We modify finding of fact “45” of the Administrative Law Judge’s determination to read as follows:

45. The Division, in its brief to the Administrative Law Judge, agreed to reduce the sales tax asserted against A.V.S. in Notice of Determination number L-020157840-5, to \$82,095.94 - - the amount determined by Mr. Fitzgerald.<sup>25</sup> Notice of Determination, number L-020174162-5, issued to Steiger Boat Sales and asserting tax due in the amount of \$4,662.81 remained unchanged. All of A.V.S.’s and Steiger Boat’s sales transactions

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<sup>25</sup>Plus fraud penalties and applicable interest. These are the same “adjustments” computed and referred to in finding of fact “40.”

remaining in dispute pertain to unsubstantiated exempt sales to New York customers.<sup>26</sup>

46. As noted above, the Division was able to secure some documents pertaining to A.V.S. and Steiger Boat from the Attorney General's Office. The record includes copies of 213 documents pertaining to A.V.S and Steiger Boat used by Mr. Fitzgerald to reduce the sales tax due from A.V.S. on unsubstantiated exempt sales. Specifically, these documents include, among other things, checks payable to A.V.S., numerous manufacturer's statements of origin for a boat sold by A.V.S., resale certificates, letters from customers, notes from customers, owner registration cards, an exempt use certificate, a retail installment contract, purchase agreements, first assignments to customers and approximately 160 Steiger Craft sales invoices. Although A.V.S. received a copy of these documents in January 2002, it received another copy prior to the continued hearing on November 18, 2003.

47. Included among these documents is a memorandum written by Frank Palmieri to Mr. Steiger on April 12, 2000 concerning sales tax on the purchase of boats. In his memorandum, Mr. Palmieri states that boats were purchased in the fall of 1992 for "our boat rental business located at Windswept Marina." He went on to state that when the boats were registered at the DMV as rental vehicles, no sales tax was paid. Rather, the DMV advised him to collect the tax on the rental service at the time of the sale. Mr. Palmieri did not identify the business that purchased the boats in 1992. Nor were sales invoices issued in the name of Frank Palmieri. A.V.S. did not provide any other information concerning this memorandum.

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<sup>26</sup>We modified finding of fact "45" to more clearly reflect the record.

48. In support of his adjustments of the sales tax on A.V.S.'s unsubstantiated exempt sales, Mr. Fitzgerald prepared detailed work papers consisting of 28 pages which identified, among other things, each of A.V.S.'s sales invoices by customer, invoice date, invoice number, invoice amount, and additional tax. In addition, Mr. Fitzgerald also identified the sales invoices being adjusted, the amounts remaining in dispute based on the documents reviewed and all the other unsubstantiated exempt sales.

49. After his review of the documents secured from the Attorney General's office, Mr. Fitzgerald determined that the amount of additional tax attributable to the disputed items totaled \$22,911.79.<sup>27</sup> Mr. Fitzgerald disallowed the nontaxability claim on the following items.

Amount Disallowed	Customer Name	Date of Transaction
1. \$1,490.16	Bobby Lyons	10-03-90
2. \$2,463.75	Steiger Craft/George Marshall	12-12-90
3. \$518.00	Goren	03-05-91
4. \$2,047.50	Steiger/LC Construct	06-14-91
5. \$14.65	A. J. Spas	01-10-92
6. \$1,802.72	Jack Polo	01-30-92
7. \$184.00	Polo Fishing Co.	03-30-92
8. \$1,968.00	Addie Kenney	03-08-92
9. \$12.88	Ferrigno Fishing	05-12-92
10. \$80.00	Jack Polo/Polo Fishing	04-30-92
11. \$34.80	Dr. Mike Ferrigno	05-27-92

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<sup>27</sup>Solely with respect to the documents returned from the attorney general.

12. \$1,040.00	Dock Shoppe	07-24-92
13. \$160.00	Dock Shoppe	07-24-92
14. \$228.00	Dock Shoppe	07-31-92
15. \$466.00	Dock Shoppe	07-31-92
16. \$398.00	Dock Shoppe	08-06-92
17. \$228.00	Dock Shoppe	08-14-92
18. \$378.00	Anthony Rocco	03-30-93
19. \$51.00	Ocean Rich Seafood	05-19-93
20. \$2,819.88	Steven Singler	03-29-94
21. \$2,125.00	Thomas Love	03-29-94
22. \$136.57	Center Yacht Club	05-23-94
23. \$97.30	Center Yatch [sic] Club	06-26-94
24. \$552.00	Center Island Yatch [sic]	06-21-94
25. \$54.85	Center Yacht Club	07-11-94
26. \$552.00	Michael K. Laguardia	03-29-95
27. \$2,936.75	Thomas B. Foley	04-07-95
28. <u>\$71.40</u>	John Van Hardt	04-18-95
\$22,911.79		

50. One of the disputed items is sales invoice number 3518, dated October 3, 1990, for customer Bobby Lyons; the amount of sales tax in dispute is \$1,490.16. The supporting document initially submitted is a letter, dated March 20, 2000, written by Robert Lyons, IV, on Lyons Fuel Oil Co., Inc. stationery. In this letter, Mr. Lyons states that on November 10, 1990, Lyons Fuel Oil registered and paid State sales tax on a 23-foot Steiger Craft Miami. A

handwritten notation on this letter states that the invoice was issued in the name of Bobby Lyons, not Lyons Fuel.<sup>28</sup> At the hearing, A.V.S. submitted into evidence a letter dated November 17, 2003 written by Sue Lyons, manager of Lyons Fuel Oil Co., Inc. Ms. Lyons wrote in pertinent part: “in response to your request for proof of payment of sales tax by us on a 23 ft Steigercraft [sic] in the fall of 1990. . . . we do not have the original canceled check. However, I can tell you that the sales tax was paid by our check #7436 in the amount of \$1513.18 (sales tax \$1490.18 plus \$23.00 registration fee).” Ms. Lyons included a copy of the original check stub.

51. According to the DMV records, Lyons Fuel Oil Co., Inc. has not registered a boat with the DMV since at least July 1988.

52. The record includes the resale certificate for Ocean Seafood. It was rejected because Ocean Seafood was not a registered sales tax vendor. The record includes the exemption certificate for Polo Fishing/Jack Polo which states as its exempt use “commercial fishing.” This exemption certificate was rejected because it was impossible to obtain any information about Polo Fishing.

53. During the period June 1, 1990 through May 31, 1996, on many occasions A.V.S.’s employees failed to obtain resale certificates or exemption certificates at the time of sales from those customers with whom they routinely dealt. On many occasions, A.V.S. issued sales invoices in an individual’s name rather than in the name of the corporation or organization for whom the purchase was actually being made.

54. On May 10, 1996, Mr. Steiger purchased a \$78,500.00 boat and A.V.S. failed to charge any sales tax on sales invoice number 3923 that it issued for the transaction. Review of

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<sup>28</sup>It is presumed that the author of this notation is Michael Ou.

Mr. Fitzgerald's work papers indicate that the \$6,476.25 in sales tax due on this transaction is part of the additional tax determined to be due from A.V.S. on unsubstantiated exempt sales. A.V.S. did not provide any evidence about this transaction. Mr. Steiger also did not provide any information about this transaction.

55. A review of Mr. Fitzgerald's work papers indicate that A.V.S. made repeat sales to many of its New York customers during the period in issue. Documents in the record establish that A.V.S. employed Thomas Love as its sales manager during the period in issue. Review of Mr. Fitzgerald's work papers indicate that Mr. Love purchased a number of boats from A.V.S. The sales to Mr. Love are among the unsubstantiated exempt sales at issue. A.V.S. has not provided any evidence concerning the sales to Mr. Love.

56. The record includes the detailed work paper of tax due on Steiger Boat sales prepared by Mr. Ou. A review of this work paper reveals that the \$4,662.81 in additional tax found due is from ten Steiger Boat sales invoices. Further review of the work paper reveals that Steiger Boat failed to charge sales tax on six sales invoices and the additional sales tax due on these six invoices totals \$2,478.49. A summary of the largest sale of the six sales invoices follows. On October 23, 1995, Hubbert L. Wells purchased a \$26,324.00 boat from Steiger Boat, which failed to charge the \$2,237.54 in New York sales tax due on sales invoice number 0006. On the four remaining invoices, Steiger Boat undercharged the amount of sales tax due on each sale. Steiger Boat did not present any evidence concerning any of its unsubstantiated exempt sales including the sale to Mr. Wells.

We make the following additional findings of fact.

In his plea proceeding in Suffolk County Court on December 13, 2001, Mr. Steiger admitted that he was the sole officer and

shareholder of A.V.S. and Steiger Boat Sales, Inc., between June 1, 1990 and May 31, 1996. Steiger admitted that he collected sales tax in the amount of \$241,095.00 on the sale of boats made by A.V.S. and Steiger Boat Sales, Inc. during that period and that he knowingly and intentionally failed to remit those taxes to the State of New York.

However, in his answers to the Notice to Admit in this matter, Mr. Steiger claimed he could not truthfully admit, *inter alia*, whether A.V.S. and Steiger Boat Sales had sales subject to tax or that they collected sales tax on boat sales during the period June 1, 1990 to May 31, 1996, or whether A.V.S. collected sales tax on boat sales.<sup>29</sup> Mr. Steiger claimed he could not admit to these items, because his books and records had been destroyed in the World Trade Center on 9/11.<sup>30</sup>

Upon cross-examination in the hearing in this matter, Mr. Steiger was questioned about his answers to the Notice to Admit. He admitted that when he pled guilty, he knew that he had not filed the subject sales tax returns for the subject period. He also admitted that the claim that he could not answer the above questions because his records had been destroyed in the World Trade Center was false.

We find Mr. Suchman's testimony vague, and at times, inconsistent and contradictory. With regard to the June 14, 2001 meeting between Mr. Suchman and Mr. Fitzgerald, Mr. Suchman was asked on cross examination if he had asked Mr. Fitzgerald for the return of his clients' records. Mr. Suchman replied, "No, he didn't have them"(Tr., p. 135). But later changed his answer to yes. Mr. Suchman first denied that Steiger Boat failed to register as a vendor, but later admitted that Steiger Boat had failed to register. Regarding books and records requested for audit, the record shows that Mr. Fitzgerald made repeated requests for the same documents, including exemption and resale certificates, that were later requested and turned over to Mr. Ou and the Revenue

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<sup>29</sup> Notice to Admit are Ex. "H-1," "H-2," "J-1" and "J-2." Answer to Notice to Admit are Ex. "I," "K-1," "K-2" and "L." Also attached to each Notice to Admit is the transcript of Mr. Steiger's plea colloquy in Suffolk County Court.

<sup>30</sup>We note that Mr. Steiger's books and records were in the same destroyed condition on December 13, 2001 when he entered his guilty plea, as they were on the date of the hearing in this matter.

Crimes Bureau. When asked whether Mr. Fitzgerald received the requested documents, Mr. Suchman replied, “Mr. Fitzgerald was provided with everything he asked for. If he had asked for them, he got them . . .” (Tr., p. 72). Would Mr. Fitzgerald have seen the same exemption certificates that were provided to Revenue Crimes? “No, not necessarily . . .” (Tr., p. 72). Was Mr. Fitzgerald provided with all the exemption documents? “No, I’m not saying that . . .” (Tr., p. 74).

Still later, Mr. Suchman acknowledged that all the exemption certificates provided to Mr. Ou had not been provided to Mr. Fitzgerald. Mr. Suchman could not explain why the resale and exemption documents that were later provided to Mr. Ou had not been earlier turned over to Mr. Fitzgerald pursuant to his requests during the civil audit. We note that at the June 4, 1997 field audit appointment with Mr. Fitzgerald, Mr. Suchman and Ms. Andrews claimed there were no additional exemption certificates.

With regard to the records turned over to Mr. Ou, did Mr. Suchman or anyone keep a list or inventory of the records that were put into the boxes? “You mean a – no. No one bothered” (Tr., p. 86). Nevertheless, Mr. Suchman later appeared to testify with authority about what the boxes of files provided to Mr. Ou under subpoena contained, including exemption certificates. Mr. Suchman admitted, however, that he saw no one gathering exemption certificates and saw no one put exemption certificates in file boxes provided to Mr. Ou.

We find that it is the regular business procedure of the Revenue Crimes Bureau when it issues a subpoena for records to a taxpayer, to issue an Office of Tax Enforcement Property Receipt/Release Form (“EN 651”), which enumerates the records that have been taken under subpoena (*see*, Ex. “P”). We find it reasonable to infer, based on this usual business procedure, that petitioners were issued a Form EN 651 enumerating the files and records received from petitioners under subpoena. Petitioners claim they have no such receipt. We have Mr. Suchman’s testimony that there were 22 boxes of files; there is nothing in written corroboration. Mr. Suchman was not present when the documents under subpoena were gathered, nor when they were placed in boxes, but he testified that “every single corporate record for the years at issue” were in those boxes (Tr., pp. 88-89). It is unclear what specific records were in the boxes, but Mr. Suchman

testified virtually all corporate records were included. Nevertheless, additional corporate documents were still being provided to Mr. Ou in late 1999 or early 2000.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

At issue in this matter, the Administrative Law Judge noted, is the sales tax due on petitioners' unsubstantiated exempt New York sales, and petitioners have the burden of showing that the amounts assessed are incorrect.

Petitioners contended that since the Division was negligent in failing to retrieve their books and records from the Revenue Crimes Bureau and since those records were destroyed in the World Trade Center on 9/11, that these facts warrant an adjustment in the burden of proof to the Division. Petitioners asserted that, in this case, as in *Andrew Crispo Gallery v. Commissioner* (16 F3d 1336, 94-1 USTC ¶ 50,097), the Division is responsible for their inability to produce documents necessary to prove the sales to their New York customers are exempt from sales tax. They urged that the audit log verifies that in June 2001 Mr. Fitzgerald knew that Mr. Ou had additional documents, and that these documents supported their claim that many of the sales were exempt from sales tax. Petitioners alleged that, at the June 14, 2001 meeting, Mr. Fitzgerald told Mr. Suchman that he would get petitioners' additional documents from Mr. Ou and review them. They argued that but for the negligence of Mr. Fitzgerald these documents would have been at the Division's Suffolk District Office, rather than destroyed in the World Trade Center on 9/11. Based on this alleged negligence, petitioners urged the modifications to the burden of proof set forth in *Crispo Gallery*.

The Administrative Law Judge rejected petitioners' argument, finding the instant matter distinguishable. In *Crispo Gallery*, unlike the case here, the Internal Revenue Service seized the

taxpayer's records and then lost them. In the instant matter, the documents<sup>31</sup> were not seized but voluntarily supplied to Mr. Ou on two separate occasions.<sup>32</sup> In June 2001, Mr. Ou confirmed to Mr. Fitzgerald that he had been provided with additional records. The Administrative Law Judge found Mr. Fitzgerald's testimony credible when he stated that he did not agree to get petitioners' records from Mr. Ou, and she also found that Mr. Fitzgerald's audit log supported his version of what transpired. The Administrative Law Judge determined that petitioners' documents were not lost by the Division's negligence, but destroyed by the terrorist attack on the World Trade Center on September 11, 2001.

The Administrative Law Judge also found *Crispo Gallery* distinguishable on another basis. In *Crispo Gallery*, the Tax Court failed to explain the nature of the deductions or recoveries which were in dispute. The lost records were needed to understand what precisely was at issue and, thus, what proof was needed. That is not the case here, the Administrative Law Judge noted. The audit work papers list all of petitioners' sales invoices and include, among other things, for each invoice, the name of the customer, the date of the transaction, the invoice number and the amount of the sale. In addition, in support of his adjustments of the sales tax on A.V.S.'s unsubstantiated exempt sales,<sup>33</sup> Mr. Fitzgerald prepared 28 pages of work papers listing all of the transactions remaining at issue. Petitioners, the Administrative Law Judge pointed out, were given copies of these work papers. Notwithstanding the fact that they have had copies of

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<sup>31</sup>Sometimes, *infra*, "the additional documents" or "additional records." These are not the documents that were submitted to Mr. Ou under subpoena.

<sup>32</sup>Actually, it appears there is only one set of "lost" documents in dispute, and they were the second set of voluntarily provided documents Mr. Suchman says were submitted to Mr. Ou in late summer of 2000. It is true, as the Administrative Law Judge states, that there were two sets of voluntarily provided documents, but only the second set constitutes the alleged lost "additional records."

<sup>33</sup>Reducing the tax asserted against A.V.S to \$82,095.94 plus applicable interest and penalties.

these work papers for a long time, the Administrative Law Judge observed, petitioners contended that they are unable to locate customers because they did not have their addresses. The Administrative Law Judge found petitioners' efforts at locating their customers to be minimal. In January 2002, the Division returned to petitioners documents pertaining to A.V.S. and Steiger Boat including approximately 160 sales invoices listing customers' names and addresses. The Administrative Law Judge found it incredible that petitioners were unable to use these invoices to locate at least some of their customers. The Administrative Law Judge observed that the sales invoices at issue reveal that A.V.S. made repeat sales to many of its customers, therefore reducing the number of customers who needed to be located. In addition, the Administrative Law Judge noted that A.V.S. even failed to explain why Mr. Steiger did not provide any documentation concerning his own purchase of a boat. For all of the above reasons, the Administrative Law Judge found that the burden of proof did not shift to the Division.

The Administrative Law Judge attributed A.V.S.'s present predicament directly to its failure to obtain resale and exemption certificates from its customers at the time of the original sales. The Administrative Law Judge found that A.V.S. has failed to prove that the remaining sales at issue were exempt from sales tax (*see*, Tax Law § 1132[c][1]), and accordingly, the Division's determination of additional tax as adjusted and reduced by Mr. Fitzgerald was proper.

The Administrative Law Judge next addressed the issue of fraud.

The Administrative Law Judge noted that case law provides that whether petitioners fraudulently failed to pay sales tax to the Division or filed willfully false or fraudulent returns with the intent to evade payment of tax are questions 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 fraud falls upon 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*, Tax Appeals Tribunal, March 16, 2000). In order to establish fraudulent intent, petitioners, acting through their officers, 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).

Mr. Steiger pled guilty to grand larceny in the third degree, a felony, and admitted that he collected but failed to remit the sales tax to the Division during the period June 1, 1990 through May 31, 1996. The Administrative Law Judge found that Mr. Steiger’s actions were fraudulent and met the *Sona Appliances* requirements. In addition, the Administrative Law Judge also found that petitioners are estopped by Mr. Steiger’s guilty plea to grand larceny of sales tax monies from arguing that the fraud penalty in this matter was improperly asserted (*see, Matter of T. Management*, Tax Appeals Tribunal, April 12, 2001; *Matter of DeFeo*, Tax Appeals Tribunal, April 22, 1999).

The Administrative Law Judge observed that even if estoppel did not apply, the criminal conviction remains relevant as to the fraud issue (*see, Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). She pointed out that during the plea proceedings, Mr. Steiger admitted that he knowingly failed to remit sales tax collected and due the Division. The Administrative Law Judge found that since he was the president and sole stockholder of both A.V.S. and Steiger Boat, his knowledge and actions are imputed to petitioners.

The Administrative Law Judge sustained fraud penalties and concluded that during the period June 1, 1990 through May 31, 1996 petitioners acted willfully, knowingly and intentionally in a manner that resulted in a deliberate nonpayment of taxes due and owing (*see, Matter of Sona Appliances, supra*).

### ***ARGUMENTS ON EXCEPTION***

Petitioners have taken exception to finding of fact “34” of the Administrative Law Judge’s determination relating to the meeting held on June 14, 2001 between Mr. Fitzgerald, *inter alia*, and Mr. Suchman. Petitioners on exception object to all of the dispositive conclusions of the Administrative Law Judge, making substantially the same arguments as were raised below. Petitioners continue to argue that the Division was negligent in failing to retrieve their books and records from the Revenue Crimes Bureau. They point out that in June 2001 Mr. Fitzgerald knew that Mr. Ou had been provided with additional documents by petitioners in the late summer of 2000. Since those records were destroyed in the World Trade Center on 9/11, petitioners argue, these facts warrant a shifting of the burden of proof to the Division. Petitioners assert that the Division is responsible for their inability to prove their case here and urge that these additional documents supported their claim that many of the sales were exempt from sales tax. Petitioners continue to allege that, at the June 14, 2001 meeting, Mr. Fitzgerald told Mr. Suchman that he would get the documents from Mr. Ou and review them. They argue that but for Mr. Fitzgerald’s negligence these documents would have been at the Division’s Suffolk District Office on 9/11, rather than destroyed in the World Trade Center. Based on this alleged negligence, petitioners urge the modifications in the standard of proof set forth in *Andrew Crispo Gallery v. Commissioner (supra)*. Petitioners claim they should not have to bear the

brunt of the Division's negligence and at the very least, should be entitled to an inference that the facts, as set forth in their papers and at trial, are true. Petitioners claim they are not seeking to have the assessments cancelled, but rather, they request that the burden of proof be modified to reflect a level playing field.

Petitioners also argue that their conduct was not willful and did not intentionally defraud the government by failing to collect tax. They claim that Mr. Steiger did not discover A.V.S.'s tax remittance problem until 1993. Petitioners blame A.V.S.'s former bookkeeper, Ms. Waller, for the failure to remit the sales tax due for the period June 1, 1990 until her departure in the summer of 1993. They claim that, as soon as Mr. Suchman pointed out to Mr. Steiger that A.V.S. was in default of filing and paying its taxes, Mr. Steiger tried to raise financing to satisfy the liabilities and made every effort to rectify the situation.

Petitioners object to the Administrative Law Judge's conclusion that they are estopped from arguing the fraud penalty based on Mr. Steiger's admissions and plea of guilty in Suffolk County Court.

### ***OPINION***

#### ***THE BURDEN OF PROOF***

The burden of proof lies with the taxpayer to show by clear and convincing evidence that the audit method was unreasonable or that the results were unreasonably inaccurate (*see, Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679).

Petitioners argue that but for the negligence of Mr. Fitzgerald in not retrieving their documents<sup>34</sup> for them, the documents would have been at the Division's Suffolk District Office, instead of destroyed in the World Trade Center on 9/11. Based on Mr. Fitzgerald's alleged negligence, petitioners urge the modifications set forth in *Andrew Crispo Gallery v.*

*Commissioner (supra)*. The Court in *Crispo Gallery* held that two modifications are appropriate where the taxpayer's records have been seized and lost by the government: 1) the trier of fact should be permitted to infer the true facts are as alleged by the taxpayer to be set forth in the documents seized and lost; and 2) where the taxpayer can offer credible evidence that the seized and lost records were properly maintained by the taxpayer, prior to the seizure, *and* accurately reflected the facts that the taxpayer alleges they purport to reflect, then the taxpayer is entitled to a presumption that the records would reflect those alleged facts (*see, Andrew Crispo Gallery v. Commissioner, supra*).

We agree with the Administrative Law Judge and find the Court's decision in *Andrew Crispo Gallery v. Commissioner (supra)* distinguishable. As the Administrative Law Judge noted, in *Crispo Gallery*, the Internal Revenue Service *seized* the taxpayer's records and then lost them. The permissible inference authorized by the Court's decision in *Crispo Gallery* dealt solely with seized records, not with records that had been voluntarily submitted. In the instant matter, the documents were voluntarily supplied to Mr. Ou. Further, these taxpayers have offered no persuasive evidence that the documents that had been voluntarily turned over to Mr. Ou were properly maintained by the taxpayer *and* accurately reflected the facts that the taxpayer alleges, prior to being turned over to Mr. Ou (*Andrew Crispo Gallery v. Commissioner,*

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<sup>34</sup>We again note that these records have never been specifically identified in this record, e.g., by invoice number, by buyer's name, etc.

*supra*). In fact, the evidence in the record suggests that exemption and resale certificates were not properly maintained at all for many of petitioners' customers. It was necessary years after the sales transactions (and years after the audit began in 1997) for petitioners to go back to their customers and obtain exemption information on sales that occurred from mid-1990 to mid-1996. We find, based on this record, that the Court's decision in *Andrew Crispo Gallery v. Commissioner (supra)* has no application to the facts here.

We note that petitioners' argument here is premised on the testimony of their accountant, Mr. Suchman, who testified that at the meeting on June 14, 2001 with Mr. Fitzgerald, he made an *oral* request for taxpayers' records to be returned and that Mr. Fitzgerald agreed to obtain them from Mr. Ou and the Revenue Crimes Bureau. Mr. Fitzgerald's daily contact sheet does not corroborate that Mr. Suchman ever made such a request or that Mr. Fitzgerald ever acceded to it. On the contrary, Mr. Fitzgerald denied Mr. Suchman ever made the request or that he ever agreed to obtain petitioners' records from Mr. Ou, noting his lack of authority to do so. The Administrative Law Judge found Mr. Fitzgerald's testimony credible as does this Tribunal.

More to the point, we cannot give credence to Mr. Suchman's testimony. We find it troubling, for one thing, that Mr. Suchman became aware that Mr. Steiger was not filing sales tax returns and paying applicable taxes as early as 1993. We regard his continued participation in Mr. Steiger's chronic noncompliance as bearing on his credibility. Mr. Suchman says Mr. Steiger did everything possible to raise the financing to pay the taxes. However, the record does not support this claim. In fact, it appears that the decision was made to do nothing, except sell boats, collect the tax due and put it in Mr. Steiger's pocket. Taken as a whole, Mr. Suchman's testimony is vague and contradictory. The record shows that after the June 14,

2001 meeting, there was no further contact between Mr. Suchman and Mr. Fitzgerald in 2001. By June 14, 2001, Mr. Ou had completed his audit, yet there is nothing in this record to show that Mr. Suchman ever wrote a letter to Mr. Ou requesting his clients' records. Instead, on that June day in 2001, he says he made an *oral* request, not to Mr. Ou (who **had** the records), but to Mr. Fitzgerald, who did **not** have them. The very first time we see anything in writing from Mr. Suchman on this issue was when he made a request for return of the taxpayers' books and records in his November 15, 2001 letter to Joseph Brooking, Director of the Revenue Crimes Bureau. Of course, at this point Mr. Ou was deceased, but the way Mr. Suchman explains his agreement with Mr. Fitzgerald on June 14, 2001, it would place Mr. Suchman in a position to rely on Mr. Fitzgerald to retrieve his own clients' records for him. If he was acting on the assumption that Mr. Fitzgerald had retrieved his clients' records pursuant to his claimed request of June 14<sup>th</sup>, why, when he finally sat down and wrote a letter requesting their return (two months *after* the World Trade Center was destroyed) did he address it to someone other than Mr. Fitzgerald? At the very least, Mr. Suchman's conduct in writing the letter to Mr. Brooking in the Revenue Crimes Bureau in November 2001 draws into question the veracity of his testimony as to what occurred at the June 14, 2001 meeting.

We also find Mr. Suchman's contradictory testimony telling. First, he testified that Mr. Fitzgerald was provided with all of the records he asked for in 1997, According to Mr. Suchman, if Mr. Fitzgerald asked for them, he got them. Later, he recanted. He had no explanation as to why the records that were later turned over to Mr. Ou, had not been turned over to Mr. Fitzgerald pursuant to his earlier requests. Mr. Suchman testified that exemption documents were in the boxes of records provided to Mr. Ou under subpoena, but then admitted

he was not present when the boxes were packed. He testified that he is sure that exemption documents were in the boxes, because the Revenue Crimes Bureau got all of the company records. The record shows that petitioners were still turning records over to the auditors three years later.

We also find it remarkable that Mr. Suchman repeatedly failed to copy or develop and retain any inventory or list of the documents he was turning over to the government on behalf of his clients. We do not find it likely that Mr. Fitzgerald would have agreed to obtain the taxpayers' records for Mr. Suchman when he had no obligation to do so, and when he was not privy to the specific records that had been turned over.

There has been no showing by petitioners that Mr. Fitzgerald had a duty or obligation to obtain their books and records from Mr. Ou, the breach of which might give rise to a claim of negligence. There is also insufficient evidence in this record to show that Mr. Fitzgerald, on behalf of the Division or Mr. Ou, on behalf of the Revenue Crimes Bureau, acted improperly or lost petitioners' records. The only written evidence that petitioners, through Mr. Suchman, made *any* attempt to retrieve their records after Mr. Ou's audit was complete, was the letter of November 15, 2001 to Mr. Brookings at the Revenue Crimes Bureau. That is the first time we see anything from Mr. Suchman *in writing*. We find the testimony of Mr. Suchman and Mr. Steiger inadequate as a basis to draw any conclusions or inference that would support petitioners' claim of negligence or that the Division's actions somehow deprived them of an opportunity to prove their case. Mr. Suchman's testimony is compromised not only by vagueness and inconsistency, but by his and his clients' apparent aversion to creating and maintaining written documentation that might be used to corroborate petitioners' version of the

facts. We agree with the Administrative Law Judge that petitioners' documents were destroyed because of the terrorist attack on the World Trade Center on September 11, 2001, not as a result of the Division's negligence. There is no basis, given the record, to support a shift in the burden of proof to the Division.

The sales tax deficiency remaining in dispute results from the Division's detailed audit of petitioners' invoices showing boat sales during the audit period. This audit showed that petitioners had unreported and unsubstantiated exempt sales, which were properly subject to tax. Pursuant to Tax Law § 1132(c)(1), all of the transactions at issue were presumptively taxable and the burden of proving that any or all of these transactions were not subject to tax is on petitioners.

Petitioners have failed to demonstrate that the additional documents (which were turned over to Mr. Ou in the summer of 2000, i.e., one year before 9/11) were not already reviewed and disallowed by Mr. Ou. If they had been disallowed by Mr. Ou, that would account for the reason there was no change in the tax due from when petitioners' received their earlier notice of audit changes. The evidence in the record does not permit us to draw any other conclusion.

Mr. Fitzgerald's audit work papers for unsubstantiated exempt sales list all of petitioners' sales invoices and include, among other things, for each invoice, the name of the customer, the date of the transaction, the invoice number and the amount of the sale. In addition, in support of his adjustments of the sales tax on A.V.S.'s unsubstantiated exempt sales, Mr. Fitzgerald prepared 28 pages of work papers listing all of the transactions remaining at issue. We agree with the Administrative Law Judge that it confounds credulity that petitioners were unable to use these documents to locate at least *some* of their customers who, during the subject period,

including an employee, Thomas Love, and Mr. Steiger himself, both of whom had made purportedly exempt boat purchases without substantiating documentation. We note that had petitioners maintained the resale and exemption certificates required by law to be maintained by registered vendors, it would not have been necessary to locate customers years later (Tax Law § 1132[c][1]).

Petitioners have failed to offer clear and convincing evidence to substantiate their disputed exempt sales and, accordingly, have failed to carry their burden of proof that the amounts assessed are incorrect (*Matter of Meskouris Bros. v. Chu, supra; Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451; Tax Law § 1115[a][24]; § 1132[c][1]).

#### *COLLATERAL ESTOPPEL*

The Administrative Law Judge held that A.V.S. and Steiger Boat were estopped from challenging the fraud penalty, based on Mr. Steiger's plea of guilty to grand larceny in Suffolk County Court.

Collateral estoppel is a legal doctrine which precludes a party from re-litigating, in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding and decided against that party *or those in privity* (*see, Buechel v. Bain*, 97 NY2d 295, 740 NYS2d 252; *Ryan v. New York Tel. Co.*, 62 NY2d 494, 478 NYS2d 823; *Matter of Attea*, Tax Appeals Tribunal, November 18, 1999).

Two prerequisites must be met before collateral estoppel may be applied: (1) the issue to which preclusion is sought must be identical with that in the prior proceeding even if the causes of action are not the same, and the issue must be decisive of the present proceeding; and (2) the

litigant who will be held precluded in the present matter, or one in privity with him, must have had a full and fair opportunity to litigate the issue in the prior proceeding. The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate (*see, D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 563 NYS2d 24; *Staatsburg Water Co. v. Staatsburg Fire District*, 72 NY2d 147, 531 NYS2d 876; *Capital Tel. Co. v. Pattersonville Tel. Co.*, 56 NY2d 11, 451 NYS2d 11).

A nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation (*D'Arata v. New York Cent. Mut. Fire Ins. Co.*, *supra*). This constitutes a form of privity. However, in the context of collateral estoppel, privity does not have a single well-defined meaning (*see, Buechel v. Bain, supra*). Rather, privity is an amorphous concept which may include those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and those who are co-parties to a prior action. In addressing privity, courts carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion (*see, Buechel v. Bain, supra*).

We conclude that Mr. Steiger's relationship as sole owner, operator and officer of A.V.S. and Steiger Boat Sales, both closely held corporations, is sufficient privity for collateral estoppel to apply to petitioners if other requisites are satisfied.

The issue in Mr. Steiger's criminal case, and the issue necessarily decided, was whether Mr. Steiger, as owner of A.V.S. and Steiger Boat Sales, was guilty of grand larceny arising out

of the theft of sales tax monies he collected from petitioners' boat sales, and which were due and owing to the State of New York. Mr. Steiger had a full and fair opportunity to litigate the issue rather than entering his plea of guilty, which he ultimately did. We find, based on his plea, that Mr. Steiger would be collaterally estopped from challenging the fraud penalties asserted here since his conduct giving rise to this case is identical to the conduct giving rise to the criminal conviction in Suffolk County Court. We find that Mr. Steiger was a person in privity with A.V.S. and Steiger Boat. Mr. Steiger's actions in collecting and failing to remit sales tax to the State of New York were committed in his capacity as owner and officer of both petitioners and resulted in Mr. Steiger's criminal conviction. Although petitioners were not parties in the criminal action, both their interests were fully represented by their owner and officer, Mr. Steiger.

Mr. Steiger's actions not only constituted the crime of grand larceny in the third degree under the penal code, but also subject petitioners to fraud penalties pursuant to Tax Law § 1145(a)(2) (*see, Matter of DeFeo, supra*). Since the issue litigated before the Suffolk County Court and in this matter is the same, i.e., the collection and failure to remit sales tax to the State of New York, and since petitioners are in privity with Mr. Steiger and there is no evidence that Mr. Steiger was not given a full and fair opportunity to litigate the charge in Suffolk County Court, A.V.S. and Steiger Boat Sales are estopped from arguing that the fraud penalty in this matter was improperly asserted against them.

#### *FRAUD*

The subject notices of determination assess civil fraud penalties pursuant to Tax Law § 1145(a)(2). The burden of showing that the failure to pay tax occurred as a result of fraud rests

with the Division (*Matter of Sener*, Tax Appeals Tribunal, May 5, 1988). A finding of fraud requires the Division to show by “clear, definite, and unmistakable evidence of every element of fraud, including willful, knowledgeable and unintentional 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, petitioners, acting through their officers, must have acted deliberately, knowingly and with the specific intent to violate the Tax Law. Fraud need not be established by direct evidence, but can be shown by surveying the taxpayer’s entire course of conduct and drawing reasonable inferences therefrom (*Matter of Cousins Serv. Sta., supra*).

Even in the absence of estoppel, the evidence in this record clearly establishes that petitioners, acting by and through their sole owner and officer, Alan Steiger, engaged in a fraudulent course of conduct for the subject audit period. Alan Steiger’s guilty plea and admissions in his plea colloquy describing how he, as sole owner of A.V.S. and Steiger Boat, knowingly and intentionally collected, but did not remit to the State of New York, sales tax due constituted direct evidence of fraud. Additionally, the record shows that from June 1, 1990 through May 31, 1996, Mr. Steiger, on behalf of the two corporate petitioners, engaged in a continuing course of conduct by also failing to file sales and use tax returns for A.V.S. and Steiger Boat Sales. During the June 7, 1997 audit appointment, Mr. Steiger admitted to the Division’s auditor that he had not filed sales tax returns on behalf of A.V.S. and Steiger Boat, because he did not want the Division to file tax warrants if the taxes went unpaid. This admission is relevant to show the “knowing” nature of his conduct. Mr. Steiger also admitted that he used the sales tax monies to pay other creditors of petitioners. In a phone call with Mr.

Fitzgerald, Mr. Suchman confirmed that Steiger Boat Sales had collected sales tax on boat sales but did not remit these funds to the State of New York. We also note that the tax asserted here is not arrived at based on an estimate, but was the result of a detailed audit of petitioners' own invoices. The tax deficiency in this matter is the direct result of petitioners' failure to provide the Division with resale and exemption certificates to substantiate their alleged exempt sales. The evidence in this record, when taken together, clearly and convincingly establishes that civil fraud penalties were properly imposed in this matter (*see, Matter of Sona Appliances, supra*).

Finally, petitioners' attempt to shift responsibility to their former employee, Ms. Waller, for their failure to file sales tax returns, failure to pay tax collected but not remitted, and failure to substantiate alleged exempt sales is rejected. There is no evidence in this record to show any benefit to Ms. Waller arising from petitioners' failure to pay tax. There is also no evidence that she had any authority to act independently on behalf of petitioners. There was substantial benefit to Mr. Steiger since he had use and control of the tax monies that were not remitted. We view petitioners' claim here as akin to their claim that it was Mr. Ou's or Mr. Fitzgerald's fault that they did not keep copies of records ultimately destroyed in the World Trade Center. We regard both claims as without merit.

For the reasons stated above, the determination of the Administrative Law Judge is affirmed.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exceptions of A.V.S. Laminates, Inc. and Steiger Boat Sales, Inc. are denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of A.V.S. Laminates, Inc. and Steiger Boat Sales, Inc., are denied; and

4. The Notice of Determination (number L-020157840-5) issued to A.V.S. Laminates, Inc. on October 25, 2001 as modified by finding of fact "45" of the Administrative Law Judge's determination is sustained. The Notice of Determination (number L-020174162-5) issued to Steiger Boat Sales, Inc. on October 29, 2001 is sustained.

DATED: Troy, New York  
March 23, 2006

/s/Charles H. Nesbitt

Charles H. Nesbitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Robert J. McDermott

Robert J. McDermott  
Commissioner