

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
GULZAR A. KHAN	:	DECISION
AND	:	DTA Nos. 820701
ISHTIAQ KHAN	:	AND 820702
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 2001	:	
through February 28, 2003.	:	

Petitioners, Gulzar A. Khan and Ishtiaq Khan, filed an exception to the determination of the Administrative Law Judge issued on July 19, 2007. Petitioners appeared by David Silverman, Esq. and Shirlee Aminoff, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was held on March 10, 2008 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 audit methodology utilized by the Division of Taxation in arriving at the determination that 7th Avenue Service Station, Inc., owed additional sales tax, plus interest and penalties, was proper and should be sustained.

II. Whether petitioners have established any basis warranting reduction or elimination of penalties imposed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

During the period September 1, 2001 through February 28, 2003, 7th Avenue Service Station, Inc. ("the Corporation") operated a gasoline service station located on Hylan Boulevard, Staten Island, New York. The Corporation sold gasoline, cigarettes and other miscellaneous items, and performed automotive inspection and repair services. Petitioners, Ishtiaq Khan and Gulzar A. Khan, have conceded that they were officers and shareholders of the Corporation and were persons required to collect and remit taxes on behalf of the Corporation within the contemplation of Tax Law §§ 1131(1) and 1133(a) during the period in issue.

By a letter dated May 9, 2003, the Division of Taxation ("Division") advised the Corporation that a sales tax field audit of its business operations for the period spanning September 1, 2000 through February 28, 2003, would commence on June 4, 2003.¹ This audit appointment letter, and an accompanying Records Requested List, advised the Corporation that all of its books and records pertaining to the audit period, including cash receipts and disbursement journals, general ledgers, sales invoices, purchases invoices, cash register tapes, Federal income tax returns, bank statements, canceled checks and the like should be available for

¹ The audit period was subsequently shortened to span September 1, 2001 through February 28, 2003 since 145th Street Service Station, Inc., a predecessor corporation also owned by the Khans, had operated a gasoline service station at the same location during the period September 1, 2000 through August 31, 2001 and had filed sales tax returns for such period.

the auditor's review. The letter also advised the Corporation that additional records and information might be required during the course of the audit.

On or about May 19, 2003, petitioner Ishtiaq Khan contacted the Division's auditor to request a meeting. Mr. Khan and the auditor met thereafter on May 30, 2003, at which time Mr. Khan requested that the audit be cancelled since the Corporation had not been engaged in business for three years, was allegedly doing poorly, and that petitioners had personal problems that would make it difficult to participate in the conduct of the audit. No records were provided at this meeting. The Division's auditor declined to cancel the audit, requested that the Corporation's bank records be provided to him within one week, and also allowed an additional two months for petitioners to gather and present the Corporation's records for review.

When the requested bank records were not furnished within one week, as had been agreed, the auditor contacted Mr. Khan by telephone on June 16, 2003. He was advised that petitioners' mother was ill in their home country of Pakistan and that petitioners had forgotten about the records but would provide the same soon. Subsequent telephone contacts on July 18, 2003 and August 12, 2003 resulted in the same outcome such that neither the bank records nor any other records were produced for the auditor to review.

On August 28, 2003, the auditor attempted to contact Mr. Khan by telephone, but learned that the telephone number had been disconnected. The auditor, in turn, mailed a second audit appointment letter and records request to petitioners on September 8, 2003. When no response was received, the auditor directed one of the Division's investigators, who had previously conducted a preaudit field visit to the Corporation's premises, to conduct another field visit to the Corporation's premises to gather any available information to conduct the audit. On December 2, 2003, the auditor received the investigator's report, which revealed that the Corporation was

closed and that the gasoline station was being operated by a new corporation. The investigator's report also confirmed that Mr. Khan's telephone number had been disconnected and that no forwarding information was available.

In light of the lack of response and availability of records, the Division's auditor determined to utilize available information to conduct the audit. The initial preaudit report by the Division's investigator revealed that the Corporation made sales of fuel (gasoline), sales of miscellaneous nonfuel items including cigarettes, and sales of motor vehicle repairs. The auditor calculated the Corporation's sales and its sales tax liability on the basis of available information for each of these three areas of sales.

Gasoline Sales

The auditor utilized a combination of information reported by the Corporation on its sales tax returns, together with information available from the Oil Pricing Information System ("OPIS"), which maintains a database of the actual price of regular gasoline purchased with credit cards at many gasoline service stations including, specifically, the Corporation.

The Corporation filed sales tax returns for all six of the sales tax quarterly periods covered by the audit, on which it reported the number of gallons of gasoline sold by grade (i.e., regular grade, mid-grade, and super-grade). For all six quarterly periods, the auditor accepted the number of gallons of gasoline sold as reported by the Corporation on its sales tax returns. The auditor obtained the OPIS selling price per gallon for regular grade gasoline for the Corporation for the last four quarterly periods in issue, to wit, \$1.550 (quarterly period ended 05/31/02), \$1.629 (quarterly period ended 08/31/02), \$1.672 (quarterly period ended 11/30/02) and \$1.716 (quarterly period ended 02/28/03). During the August 8, 2002 preaudit visit to the Corporation's premises, the Division's investigator noted that there was a ten cent per gallon difference

between the price of regular gasoline and mid-grade gasoline, and a sixteen cent per gallon difference between the price of regular gasoline and super-grade gasoline. The auditor added these differences in price to the OPIS price for regular grade gasoline to arrive at the prices for the three different grades of gasoline. OPIS prices were not available for the first two quarterly periods of the audit, and the auditor calculated audited gasoline sales for such periods by using an error rate computed by comparing reported gasoline sales to audited gasoline sales for the quarterly period ended May 31, 2002.

To compute audited gasoline sales for the quarterly periods spanning March 1, 2002 through February 28, 2003, the auditor multiplied gallons sold by the audited price per gallon. To compute audited gasoline sales for the first two quarterly periods, the auditor compared reported gasoline sales for the quarterly period ended May 31, 2002 (\$2,191,421.00) with audited taxable gasoline sales for the same quarterly period (\$2,838,965.10), resulting in an error rate of 29.49%. This error rate was then applied to the reported gasoline sales for each of the first two quarterly periods in issue.

By the foregoing method, the auditor calculated additional tax due on gasoline sales in the amount of \$368,220.16 for the audit period. The auditor did not allow any credit for claimed prepaid sales tax on gasoline purchases because the Corporation did not provide any records to substantiate such credit.

Nonfuel Sales

Cigarette Sales: The auditor divided the amount of claimed prepaid sales tax on cigarettes, as reported on the Corporation's sales tax returns, by the prepaid tax rate to determine the number of packs of cigarettes sold. He then multiplied the number of packs of cigarettes sold (1,330) by an estimated selling price of \$5.00 per pack, based upon his and the Division's prior

audit experience, to determine total cigarette sales of \$6,650.00. As with gasoline sales, no credit was allowed for prepaid cigarette tax because the Corporation provided no records to substantiate the credits claimed.

Automotive Repair Sales: The auditor relied upon information gathered by the Division's investigator, who reported that the Corporation's premises included two repair bays and that there were sufficient employees present to operate both bays on a full-time basis. Based on prior Division audit experience, the auditor estimated that each bay generated sales in the amount of \$130.00 per hour, comprised of a labor rate of \$65.00 per hour and a combined parts cost and profit amount of \$65.00 per hour. Thus, total hourly sales of \$260.00 were multiplied by eight hours of operation per day and, in turn, by six days of operation per week when the repair shop was open. Quarterly repair sales were calculated by multiplying weekly repair sales by the thirteen weeks per quarterly period. By this method, total audited repair sales for the audit period was computed to be \$648,960.00.

The auditor compared cigarette sales (\$6,650.00) and automotive repair sales (\$648,960.00), totaling together \$655,610.00, to reported nonfuel sales of \$42,770.00, resulting in an error rate of 1,432.87%. Applying this error rate to reported nonfuel sales for each of the quarterly periods resulted in audited sales tax due on nonfuel sales in the amount of \$88,088.34.

Audited sales tax due on gasoline sales (\$368,220.16) and on nonfuel sales (\$88,088.34) totaled \$456,308.50. After allowing credit for sales tax reported with its returns, the auditor calculated that the Corporation owed additional sales tax in the amount of \$423,541.10, plus interest and penalties (including the additional penalty pursuant to Tax Law § 1145[a][1][vi] imposed where a taxpayer omits from its returns an amount in excess of 25% of the amount of tax required to be shown thereon).

On February 12, 2004, based upon the foregoing audit results, the Division issued identical notices of determination to Ishtiaq Khan and to Gulzar Khan assessing sales tax due for the period September 1, 2001 through February 28, 2003 in the amount of \$423,541.10, plus interest and penalties (including the penalty per Tax Law § 1145[a][1][vi]) against each as a person responsible to collect and remit sales tax due on behalf of the Corporation.²

Petitioners protested the notices of determination by filing requests for conciliation conferences with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). Petitioners provided no records of the Corporation's business activities at their BCMS conference, but were allowed an additional two weeks, post-conference, to supply records to the Division's auditor. On January 7, 2005 and January 11, 2005, petitioners provided some gasoline purchase invoices, some shift printouts, and some records of automotive inspections performed by the repair shop.

The shift printouts provided were not explained with any specificity by petitioners, nor did the printouts show any sales prices per gallon of gasoline. Review of the shift printouts provided reflects, *inter alia*, fuel purchase information including "hose volumes" (in gallons and dollars) dispensed into the Corporation's tanks, tank delivery volumes and temperature information, tank reconciliations (beginning inventory plus deliveries less gallons dispensed to arrive at ending inventory), low tank alarm histories, and gross sales information (broken into cash sales and credit card sales). The shift printouts also show dollar sales of "other merchandise," i.e., nonfuel sales. Shift printouts were missing for the months of December 2001, February 2002, March 2002 and August 2002.

² It appears that a Notice of Determination was also issued against the Corporation. The record does not disclose whether the Corporation, in turn, protested the same.

While the records furnished were not complete records for the entire audit period, and did not suffice to allow the conduct of a detailed audit, the auditor nonetheless concluded that the records supplied did support a reduction of the assessment originally issued. In this regard, the purchase invoices supported the claim that credit should be allowed for prepaid sales tax with respect to gasoline and cigarette purchases. The auditor also accepted that the amount of tax assessed on automotive repair sales should be adjusted based on the Corporation's performance of nontaxable automobile inspections. The auditor utilized the additional information supplied by petitioners as follows:

Gasoline Sales

_____ While all gasoline purchase invoices for the entire audit period were not submitted, the auditor nonetheless concluded that such purchases were made from an "established distributor" (Amoco). The auditor further concluded that the purchase invoice, combined with the gasoline volume information from the shift printouts, were sufficient to substantiate and allow a reduction for the amount of credit for prepaid sales tax on gasoline purchases, as was reported on the Corporation's sales tax returns.³ On this basis, the auditor reduced sales tax due on gasoline sales by some \$256,765.83 in prepaid sales tax, thus arriving at \$121,668.97 in net additional sales tax due on gasoline sales.

Repair Sales and Other Nonfuel Sales

Motor vehicle inspection slips were provided for the quarterly period ended November 30, 2002 showing that 149 vehicle inspections had been performed resulting in nontaxable receipts in the amount of \$5,140.00. Accordingly, the auditor reduced the dollar amount of

³ Complete purchase invoices were provided only for the month of September 2002 with some, but not all, purchase invoices provided for the balance of some of the other months within the audit period.

repair sales per quarterly period, as calculated on audit (\$162,240.00) by such nontaxable amount to arrive at quarterly audited repair sales of \$157,500.00. The auditor utilized the shift printouts for the same period to arrive at quarterly nonfuel sales (other than repair sales) of \$21,073.98, and thereafter calculated total nonfuel sales (i.e., audited repair sales plus audited other nonfuel sales) of \$178,173.98.⁴ Comparing audited total nonfuel sales (\$178,173.98) to reported taxable nonfuel sales (\$11,564.00) resulted in an error rate of 1,440.7643 percent. Applying this error rate to reported nonfuel taxable sales (\$69,656.00) for the audit period resulted in audited nonfuel taxable sales of \$1,073,234.78, with sales tax due thereon in the amount of \$88,541.87.

The auditor's review resulted in a recomputation such that the amount of sales tax due totaled \$210,210.84 (consisting of \$121,668.00 on gasoline sales plus \$88,541.87 due on nonfuel sales). This amount was reduced by \$32,767.40 of sales tax paid with returns, to arrive at net sales tax due in the amount of \$177,443.44, plus interest and penalties (including the penalty imposed pursuant to Tax Law § 1145[a][1][vi]). The recomputed amount due was reflected in a Conciliation Order issued to petitioners by BCMS on April 22, 2005.

We make the additional finding of fact:

The auditor's log states:

We estimated quarterly repair sales based on the observation that there were 2 bays and enough employees on the premises for both to be working full time. We attributed full time activity to be 8 hours and 6 days a week, at \$130 an hour based on departemtn (sic) experience at \$65 per hour with double that being charged after factoring in part and profit (Ex. "K").

When the auditor met with Mr. Khan for 3.5 hours on May 30, 2003, he was not asked any questions about his gas station's hours of operation, the number of employees, the number of mechanics, or whether they were full or part time (Ex. "K," p. 2). We note that the investigator's report contains the name of both the

⁴ The auditor eliminated the sales tax amount included in nonfuel sales (other than repair sales) as set forth in the shift printouts in arriving at quarterly nonfuel sales of \$21,073.98.

manager and the owner of the gas station, but does not state to whom he spoke. The report indicates that, as of the date of the report (8/8/2002), the business had four employees, but does not specify that any are mechanics. The report states that there were nine customers during the time of the visit, but fails to show how long each visit lasted or what type of customers are referred to.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that the Division made clear and unequivocal written requests for books and records of the Corporation's sales. Based on petitioners' failure to respond to repeated requests for the Corporation's records, the Administrative Law Judge found that the auditor properly concluded that the Corporation did not maintain verifiable books and records for audit. Based on petitioners' failure to produce books and records, the Administrative Law Judge concluded that the Division was entitled to resort to the use of indirect methods to determine the Corporation's fuel sales and, further, to resort to estimates based on audit experience to determine sales of cigarettes and of vehicle repair services. Hence, the only issue for the Administrative Law Judge to determine was whether petitioners had established that the amount of tax assessed arising from the methods used in the audit was erroneous.

With respect to petitioners' fuel sales, the Administrative Law Judge found petitioners' evidence and their proposed method of calculation was insufficient to override the results of the audit, since the audit was based on the Corporation's own reported sales volume amounts, per sales tax returns filed, coupled with observed selling prices and differentials.

Similarly, the Administrative Law Judge found petitioners' assertion that the Division's estimated repair sales were too high was unsubstantiated. The Administrative Law Judge also rejected petitioners' claim that the Corporation lost its license to sell cigarettes shortly after the beginning of the audit period as inconsistent with evidence in the record.

The Administrative Law Judge also emphasized that petitioners failed to offer evidence that would support a reduction or abatement of the penalties imposed, and therefore, sustained all penalties.

The Administrative Law Judge noted that petitioners, Gulzar Khan and Ishtiaq Khan, admitted that they were owners of the Corporation, were responsible for the sales tax collection, reporting and payment obligations of the Corporation at all times, and neither petitioner challenged nor provided any evidence or argument to refute the Division's assessments against them in this regard. Accordingly, the Administrative Law Judge concluded that both petitioners were properly held responsible for the liability, including penalties and interest, assessed against the Corporation (Tax Law §§ 1131[1], 1133[a]; *Lorenz v. Div. of Taxation*, 212 AD2d 992 [1995], *aff'd* 87 NY2d 1004 [1996]).

ARGUMENTS ON EXCEPTION

In their exception, petitioners take issue with the tax imposed on repairs and whether reasonable cause has been shown for the abatement of penalties. At oral argument, the issues were further limited by petitioners' representative when he stated that the sole argument in dispute was the tax imposed on repairs.⁵ In this regard, petitioners argue that a rational basis must exist for the method used for ascertaining estimated taxes, and that no rational basis existed for the taxes imposed on petitioners' repair sales.

Petitioners argue that the Division's estimates of the scope and extent of petitioners' repair work and the amount of time the repair bays were operated were excessive. Petitioners maintain that they only had one employee working in the repair shop and that they did not undertake major vehicle repairs.

⁵That being the case, the issue of reasonable cause for abatement of penalties is deemed abandoned.

The Division responds that the determination of the Administrative Law Judge should be sustained. The Division argues that its audit was proper, relying on *Matter of Del's Mini Deli v. Commissioner of Taxation and Fin.*, 205 AD2d 989 (1994); *Matter of Sarantopoulos v. Tax Appeals Tribunal*, 186 AD2d 878 (1992); *Matter of Oak Beach Inn Corp. v. Wexler*, 158 AD2d 785 (1990); *Matter of Marte*, Tax Appeals Tribunal, August 5, 2004.

OPINION

We affirm in part, and reverse in part, the determination of the Administrative Law Judge for the reasons set forth below.

A determination of tax must have a rational basis in order to be sustained upon review (*see, Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948 [1986]). Although a determination of tax must have a rational basis in order to be sustained, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (*see, Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768 [1992], *lv denied* 81 NY2d 704 [1993]; *Matter of Atlantic and Hudson Limited Partnership*, Tax Appeals Tribunal, January 30, 1992). Evidence that both rebuts the presumption of correctness and indicates the irrationality of the audit may appear on the face of the audit as described by the Division through testimony or documentation (*see, Matter of Fortunato*, Tax Appeals Tribunal, February 22, 1990), from factors underlying the audit which are developed by the petitioner at hearing (*see, Matter of Fokos Lounge*, Tax Appeals Tribunal, March 7, 1991).

While considerable latitude is given an auditor's method of estimating sales under such circumstances as may exist in a given case, it is necessary that the record contain sufficient evidence to allow the trier of fact to determine whether the audit has a rational basis (*Matter of*

Grecian Sq. v. New York State Tax Commn., supra). For instance, we have held that the record must contain information identifying the external index used by the Division to establish a rational basis for the audit methodology employed (*Matter of Fokos Lounge, supra*). The Court in *Grecian Square*, had before it an audit that estimated a bar's sales based on an auditor's wide experience in auditing other bars. Because there was no testimony or evidence in the record detailing the nature or applicability of this audit experience to the bar in question, the Court concluded that there had been insufficient evidence before the State Tax Commission to determine whether a rational basis existed for the auditor's computation (*Matter of Grecian Sq. v. New York State Tax Commn., supra, at 950*). We have held that such information is necessary to provide the taxpayer with an opportunity to meet their burden of proving such methodology unreasonable (*Matter of Basileo*, Tax Appeals Tribunal, May 9, 1991). Once the Division shows that it has a rational basis for the assessment, the taxpayer then has the burden to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813 [1988]).

In the instant matter, petitioners do not contest that their records were inadequate or that the Division was entitled to conduct an estimated audit of the sales tax due on petitioners' repairs. However, petitioners urge that the audit method chosen by the Division lacked a rational basis and was not reasonably calculated to determine the tax due. Petitioners claim that the auditor and the Division's investigator both failed to properly inquire into what type of repairs were being done at petitioners' gas station.

In conducting the audit, the Division's investigator, Joseph Lloyd, visited the taxpayers' premises on August 8, 2002. The tax investigator's report of his visit (part of Ex. J)⁶ states, "A busy service station with a two bay repair shop. No convenient store. Few Tires." The investigator does not give any details regarding repairs that were being done at the time or how many bays were in use. The report does not elaborate on the phrase "a busy service station" and whether it refers to the fact that the taxpayer was selling a large amount of gasoline or whether the investigator actually observed that repairs were being conducted. The fact that the taxpayer has "sufficient employees" to operate two repair bays does not mean that both repair bays were busy when he was there. The report fails to quantify how many employees is "sufficient." It is unclear how many of these alleged employees were actually employed as mechanics. Neither his report, nor the audit report itself, makes any reference to the investigator inquiring of the owner, the manager or the employees as to the type of repairs they did or their frequency by category. The report does not address whether mechanics were present every day or only certain days a week. We note that the investigator took no pictures of the actual business activity or the bays on August 8, 2002 (although he did take pictures on his second visit to the premises after the business had been sold to new owners). It appears that the auditor also did not inquire as to the nature of the work performed at the garage, e.g., oil changes and inspections, brake jobs, major engine repair, transmission work+. We find this lack of curiosity by the investigator and the auditor troubling, because it leaves us with very little information on which to decide the case. The fact that the taxpayer was "busy" does not tell us anything; it is just another conclusory statement.

⁶We do not have the benefit of his testimony.

This is significant because the audit report states that audited repair sales were determined by starting with the investigator's report that "the taxpayer had two bays, and sufficient employees to operate both bays on a full time basis." The auditor then estimated quarterly repair sales by allowing that both repair bays were working eight hours a day, six days a week, at the rate of \$130.00 per hour. The hourly rate was based on *department experience* indicating a labor rate of \$65.00 per hour, with twice that being typically charged to cover parts and profit (Ex. "J"; Tr. 41).

As noted above, the auditor based his audit for repairs on Mr. Lloyd's investigative report and upon audit experience in similar audits of other taxpayers. However, the record does not disclose any specific information concerning his "audit experience." Without at least some indication in the audit report to show how the audit experience relied on ties into, and has relevance to, the facts of this taxpayers' business (e.g., was the other audit experience derived from audits of small gas stations, in similar neighborhoods, were they local businesses), we have no way of knowing whether the audit experience relied on is valid or not (*Matter of Savino*, Tax Appeals Tribunal, September 22, 1988). Further, this information is something a taxpayer is entitled to know if he is to be able to develop a valid argument against the assessment. Thus, we conclude that the Division has failed to show a rational basis for its audit of petitioner's repairs, and that portion of the audit results must be cancelled (*Matter of Chartair, Inc*, 65 AD2d 44 [1978]; *Matter of Grecian Sq. v. New York State Tax Commn.*, *supra*; *Matter of Savino*, *supra*).

We note that three of the cases relied on by the Division, i.e., *Matter of Del's Mini Deli v. Commissioner of Taxation and Fin.*, *supra*, *Matter of Sarantopoulos v. Tax Appeals Tribunal*, *supra*, and *Matter of Marte*, *supra*, are distinguishable from the facts here. These

cases all involved one day observation tests where, unlike here, the auditor or the investigator conducting the test had interaction with the owners or employees and made inquiries as to how the particular business was operated. The ***Oak Beach Inn*** case was also distinguishable.

Although the auditor relied, in part, on prior audit experience in that case, it involved a much more detailed record surrounding the test period and markup audit of that taxpayer.

We have sustained the use of the Division's prior audit experience in other cases and this case does not reflect a change in that regard, but some evidence must be offered to show how that prior audit experience relates to the specific taxpayer. Further, the audit record in this case gives us very little with which to work, as it is based on the very brief, conclusory statements of an investigator who did not testify and could not be cross examined as to the manner of his "investigation." Petitioners have asked that the matter be remanded for further proceedings, but we see no basis to justify a remand under these facts.

Petitioners' representative posited upon oral argument that the tax imposed on petitioners' repairs was the sole issue remaining in dispute. That being the case, we do not address the penalty issue. Provided, however, that to the extent penalties are computed on the basis of the amount of tax asserted, the Division is directed to recompute penalties to reflect the lower amount of taxes asserted based on this decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gulzar A. Khan and Ishtiaq Khan is granted to the extent that the portion of the audit results relating to petitioners' repairs is cancelled, but in all other respects is denied;
2. The determination of the Administrative Law Judge is reversed to the extent set forth in paragraph "1" above, but is otherwise affirmed;

3. The petitions of Gulzar A. Khan and Ishtiaq Khan are granted in accordance with paragraph "1" above, but are otherwise denied; and

4. The notices of determination dated February 12, 2004, as recomputed in the Conciliation Order dated April 22, 2005 and, further, modified in accordance with paragraph "1" above, are sustained.

DATED:Troy, New York
September 4, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

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

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner