

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
WHAT A DIFFERENCE CLEANING, INC. : DECISION
for Revision of Determinations or for Refund of Sales and : DTA NO. 820745
Use Taxes under Articles 28 and 29 of the Tax Law for the :
period September 1, 1997 through August 31, 2003. :

Petitioner, What A Difference Cleaning, Inc., filed an exception to the determination of the Administrative Law Judge issued on May 21, 2007. Petitioner appeared by Bertrand, Arno, Welch & Putzer (Daniel J. Arno, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock Esq. (Osborne K. Jack, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition, and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on November 19, 2007 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 determined additional sales and use taxes due from What A Difference Cleaning, Inc.

II. Whether the Division of Taxation has established that petitioner was properly subject to the imposition of fraud penalties on a Notice of Determination dated September 30, 2004.

III. Whether petitioner has established facts or circumstances warranting the reduction or abatement of penalties imposed.

FINDINGS OF FACT

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

Petitioner, What A Difference Cleaning, Inc. (hereafter “petitioner” or “What A Difference”) was incorporated on or about September 17, 1991. The corporation, doing business as Personal Touch Cleaning Services, was registered as a sales tax vendor by the Division of Taxation (“Division”) on November 27, 1991. Since its incorporation, Tom Glamcevski has been an officer and shareholder of What A Difference.

During the period September 1, 1997 through August 31, 2003, What A Difference provided cleaning and maintenance services, including, but not limited to, carpet and upholstery cleaning, floor and window cleaning, and housekeeping and janitorial services, to residential and commercial customers located in Onondaga County, New York.

On or about August 1, 2003, the Division assigned an auditor, Shannon Colonnese, to conduct a sales and use tax field audit of What A Difference for the period September 1, 1997 through May 31, 2003. Petitioner was selected for audit because an audit of an unrelated corporation, Tactair Fluid Controls (“Tactair”), indicated that What A Difference collected sales tax on housekeeping services provided to that corporation, and a routine check of What A Difference’s filing status indicated that it was not filing sales tax returns.

An appointment letter dated August 5, 2003 and setting an appointment for September 10, 2003 was sent by Ms. Colonnese to What A Difference. The letter included a Records Requested List which requested the following records to be available for audit on the appointment date:

Sales Tax Returns, Worksheets and Canceled Checks for entire audit period
Federal Income Tax Returns (1120's or 1065's or 1040's) for entire audit period
NYS Corporation Tax Returns for entire audit period
General Ledger for the entire audit period
General Journal and Closing Entries for entire audit period
Sales Invoices for entire audit period
All Exemption Documents Supporting Non-taxable Sales for entire audit period

Chart of Accounts for entire audit period
Fixed Asset Purchase/Sales Invoices for entire audit period
Expense Purchase Invoices for entire audit period
Merchandise Purchase Invoices for entire audit period
Bank Statements, Canceled Checks and Deposit Slips for All Accounts for entire
audit period
Cash Receipts Journal for entire audit period (also Sales Journal if applicable)
Cash Disbursement Journal for the entire audit period (also Purchase Journal if
applicable)
The Corporate Book (Minutes, Board of Directors, Articles of Incorporation) for
entire audit period
Depreciation Schedules for entire audit period

***This includes resale, exempt use, exempt organization, capital improvement
certificates as well as any other necessary documentation to prove non-taxable
sales.

A review of the Tax Field Audit Record (“audit log”) indicates that, after receiving the
appointment letter, Mr. Glamcevski contacted the auditor by telephone on August 18, 2003 and
requested the audit appointment be rescheduled for September 17, 2003 at the Division’s
Syracuse District Office. Further review of the audit log entry for that date indicates that during
his telephone conversation with the auditor, Mr. Glamcevski explained that the corporation does
not issue invoices and nothing is computerized. In the same audit log entry, the auditor noted
that the Division had copies of computerized invoices issued by the corporation from another
audit.

On August 19, 2003, Mr. Glamcevski contacted the auditor by telephone to confirm the
audit appointment for September 17, 2003. During that telephone conversation, Mr. Glamcevski

explained that petitioner had been collecting sales tax on one account for the past three years and not remitting it to the Division. He also asked what petitioner should do about the nonremitted sales tax. During the same telephone conversation, the auditor told Mr. Glamcevski that the Division would pick up the nonremitted sales tax as part of the audit. The audit log entry for that date does not identify the specific customer from whom petitioner collected tax or the amount of tax collected and not remitted to the Division.

On September 17, 2003, Mr. Glamcevski and his accountant, Walter Nendza, met with the auditor and a team leader, Richard Ayoub. During this meeting, Mr. Glamcevski explained that the corporation's bank deposits equaled its gross sales for Federal income tax purposes. He also explained that tax was included in the net sales amount listed on several invoices. At this meeting, Mr. Glamcevski provided the following records: What A Difference's Federal income tax returns (forms 1120) for the period August 1, 1997 through July 31, 2002, i.e., the fiscal years ending July 31, 1998, July 31, 1999, July 31, 2000, July 31, 2001 and July 31, 2002; What A Difference's bank statements for the months of September 1997 through July 2003; some job work orders issued under the trade name Personal Touch Cleaning Services by petitioner to its customers, bearing dates within the months of September 1997 through July 2003; and selected expense purchase invoices for the years 2001 and 2002. However, Mr. Glamcevski did not provide, among other things, the corporation's general ledger, an asset depreciation schedule or any backup for items being depreciated on the corporation's Federal income tax returns for the period September 1, 1997 through May 31, 2003. The auditor retained the records for further review and the team leader gave Mr. Glamcevski a receipt for the records. At this meeting, the auditor gave Mr. Glamcevski a sales tax registration kit because he stated that petitioner never registered to collect sales tax.

During the September 17, 2003 meeting, the Division extended the audit period to September 1, 1997 through August 31, 2003 and orally requested, among other things, petitioner's records, including job work orders, for the period June 1, 2003 through August 31, 2003. Mr. Glamcevski agreed to provide the corporation's records for the updated audit period at this meeting.

Immediately after the September 17, 2003 meeting, the auditor began reviewing the records provided. Using the corporation's bank statements and Federal income tax returns, the auditor prepared a spreadsheet to compare deposits reported on the bank statements to the gross sales reported on the Federal income tax returns. The auditor found the total deposits for the period September 1, 1997 through July 31, 2002 to be only \$1,207.09 greater than the gross sales reported on the corporation's Federal income tax returns for the period August 1, 1997 through July 31, 2002.¹ Her initial review of the job work orders and invoices ("sales invoices") indicated that petitioner billed sales tax on some sales, but did not remit the collected tax, and did not charge sales tax on some taxable sales. The auditor found that the dated and legible sales invoices were filed in date order. She also found that the prenumbered sales invoices were issued to every customer. The auditor prepared a spread sheet summarizing all sales invoices provided to date. She also reviewed and summarized the expense purchase invoices provided to date.

On September 19, 2003, during a telephone conversation with Mr. Glamcevsi, the auditor requested the job work orders for the period September 1, 1997 through August 31, 2003. During this same conversation, Mr. Glamcevski stated that he would bring the job work orders for the period June 1, 2003 through August 31, 2003 and the equipment purchase invoices for the

¹In her comparison of bank deposits to gross sales reported on the corporation's Federal income tax returns, the auditor made an adjustment for the missing August 1997 bank deposits because that month was prior to the beginning of the audit period.

period September 1, 1997 through August 31, 2003 to the District Office the following week. He further stated that he did not think he had any additional job work orders for the audit period, but he would look. Mr. Glamcevski also explained that any job work order that did not have sale information on it was merely an estimate to provide services, which the customer had not accepted. He further explained that there were two different kinds of invoices because the corporation's supplier sent a different kind once.

On October 1, 2003, Mr. Glamcevski dropped off some job work orders for the period June 1, 2003 through August 31, 2003. Review of the audit log entry for that date indicates that Mr. Glamcevski informed the auditor that she had the asset invoices because they were included with the expense purchase invoices previously provided.

On October 6, 2003, the auditor left a message for Mr. Glamcevski concerning missing job work orders. On October 8, 2003, during a telephone conversation with the auditor, Mr. Glamcevski requested the return of his job work orders as soon as possible. The audit log entry for that date indicates that the auditor again asked Mr. Glamcevski if he had provided all of the corporation's job work orders for the period September 1, 1997 through August 31, 2003. Mr. Glamcevski responded that if any invoices were missing, it was because they were estimates for services to be provided that were cancelled and the paperwork was thrown away. During this same telephone conversation, Mr. Glamcevski also stated that the corporation's bank deposits were composed entirely of sales. Later that same day, the auditor left a message for Mr. Glamcevski regarding items depreciated on the corporation's Federal income tax returns.

During an October 14, 2003 telephone conversation with Mr. Glamcevski, the auditor asked for a listing of assets for each fiscal year that the corporation depreciated equipment on its Federal income tax returns. The audit log entry for that date indicates that Mr. Glamcevski

responded that he would check with his accountant. On or about October 14, 2003, Mr. Glamcevski picked up What A Difference's documents at the District Office.

The auditor reviewed all records provided by the corporation and determined that the records were inadequate for the performance of a detailed audit. Specifically, What A Difference did not provide all of its sales invoices for the audit period, nor did it provide depreciation schedules for assets acquired during the audit period. Additionally, What A Difference did not provide any general ledger for the audit period.

The auditor reviewed the Federal income tax returns, bank statements and the sales invoices provided by the corporation. A reconciliation performed by the auditor indicated that total bank deposits for the audit period exceeded the total amount of sales reported on the job work orders and invoices, i.e., sales invoices, provided for the audit period by \$233,281.37.

The auditor sent a letter dated October 29, 2003 to Mr. Glamcevski requesting an explanation of the \$233,281.37 discrepancy between total bank deposits for the audit period and the total amount of sales reported on the job work orders and invoices provided by the corporation. In the same letter, the auditor also requested the corporation's records for the period September 1, 1997 through August 31, 2003. A spreadsheet analysis of the discrepancy accompanied this letter.

By letter dated November 10, 2003, Mr. Glamcevski and his accountant, Mr. Nendza, responded to the auditor's October 29, 2003 letter regarding the corporation's sales tax audit and the missing work orders. In their letter, Messrs. Glamcevski and Nendza wrote:

Work orders were never used to account for the profit and loss of the corporation. Since all receipts of the corporation are deposited intact, the total income was computed from bank deposits and total expenses from checks written. Therefore, work orders were never considered a critical part of the accounting and many were misplaced or lost.

To arbitrarily assume the missing work orders to be totally taxable would be highly unjust. Since the corporation [sic] contracts are fairly consistent from year to year, the total taxable to non-taxable ratio would remain the same. At best, the taxable portion of the missing work orders would be approximately the same ratio as the work orders you examined.

The purpose of an audit is to arrive at a fair and just tax which we are will [sic] to pay. To call the missing work orders totally taxable would be unfair and unjust.

The search for the missing work orders has been exhausted and no additional orders have been located.

On or about November 12, 2003, Mr. Glamcevski faxed to the Division a copy of an exempt organization certificate for the Liverpool Fire Department, Inc., as well as information pertaining to the amounts paid by the Liverpool Fire Department to the corporation for cleaning services rendered from May 2000 through November 5, 2003. Notations in the audit log indicate that the auditor removed sales to this customer from work papers detailing taxable sales because the sales were to a tax exempt organization. Subsequently, on or about January 12, 2004, the auditor mailed to Mr. Glamcevski work papers detailing her audit findings of taxable sales transactions, taxable expense purchases and taxable purchases of fixed assets for the period September 1, 1997 through August 31, 2003 and requested that he respond to these work papers by February 9, 2004.

On or about January 26, 2004, Mr. Glamcevski provided additional job work orders to the auditor who subsequently reviewed and summarized them in her work papers. Her review of the additional job work orders revealed that total bank deposits for the audit period exceeded the total amount of sales reported on the job work orders and invoices provided by the corporation for the audit period by \$152,176.32. The auditor then reviewed the summary of taxable sales and removed all sales made to exempt organizations during the period September 1, 1997 through August 31, 2003. She also reviewed the summary of taxable expense purchases made by the

corporation during the audit period and removed the use tax that she had computed on the corporation's purchases of Scotch guard because it remains with the customer. On February 20, 2004, the auditor mailed to Mr. Glamcevski updated work papers detailing her audit findings of tax due on sales, expense purchases and fixed asset purchases made by the corporation during the period September 1, 1997 through August 31, 2003 and requested that he provide backup information for any transaction which he believed should be adjusted.

On or about March 5, 2004, What A Difference appointed Philip E. Pellizzari, CPA, to act as its representative with respect to the audit. On March 23, 2004, the auditor met with Messrs. Pellizzari and Glamcevski at Mr. Pellizzari's office. At this meeting, the auditor and Messrs. Pellizzari and Glamcevski discussed the audit findings set forth in the updated work papers. At the conclusion of this meeting, Messrs. Glamcevski and Pellizzari requested and received additional time to submit further documentation.

Petitioner did not submit any additional documentation regarding sales, expense purchases or fixed asset purchases that it made during the period September 1, 1997 through August 31, 2003. However, its representative sent a letter dated March 23, 2004 to the auditor requesting that penalties be waived and minimum interest be imposed on the ultimate tax liability determined to be due. In his letter, petitioner's representative asserted that any underpayment of sales tax by the corporation was not the result of negligence or intentional disregard of the Tax Law. Rather, the representative contended that Mr. Glamcevski, the corporation's owner, relied upon his outside accountant to prepare all tax returns and keep him informed of all filing requirements. The representative also claimed that Mr. Glamcevski was now aware of his responsibilities regarding collecting and remitting sales tax and filing timely sales tax returns.

He further asserted that Mr. Glamcevski now maintained appropriate record keeping to be in compliance with the Tax Law.

On June 8, 2004, the auditor and her team leader, Thomas Afhammer, met with Messrs. Pellizzari and Glamcevski for a further discussion of the updated work paper analysis of taxable transactions, i.e., sales, expense purchases and fixed asset purchases, made by the corporation during the period September 1, 1997 through August 31, 2003. During this meeting, Messrs. Pellizzari and Glamcevski explained that the corporation only purchased supplies and assets from three vendors, and items subject to depreciation on the corporation's Federal income tax returns would have been listed in the expense purchase invoices previously supplied to the auditor. At that meeting, the auditor agreed to remove capital items because any purchase that was not taxed would have been picked up under expense purchases. During the same meeting, in response to Mr. Pellizzari's request, the auditor also agreed to apply a 53 percent taxable ratio to the bank deposit discrepancy.

Subsequent to the June 8, 2004 meeting, petitioner's representative sent a letter dated June 11, 2004 to the auditor's team leader requesting that no penalties be assessed and the application of simple interest on any tax determined to be due on out-of-state purchases, unidentified bank deposits and taxable sales (job work orders) on which the corporation failed to charge sales tax. In support of this request, petitioner's representative asserted that Mr. Glamcevski relied totally on his accountant, Mr. Nendza, for advice and counsel in relation to income tax and sales tax matters.

Although a number of written and oral requests were made for all of the corporation's books and records pertaining to its sales and use tax liability for the audit period, the corporation presented bank statements, Federal income tax returns for the period August 1, 1997 through July

31, 2002, some sales invoices, some tax exemption certificates and some expense purchase invoices. The corporation did not provide any general ledgers, sales journals, cash disbursement journals, fixed asset purchase invoices, depreciation schedules, any resale certificates, or any capital improvement certificates for the audit period. After reviewing the documents received during the audit, the auditor broke the audit into four areas and concluded that additional sales or use tax was due in each area.

The first area of the audit was the auditor's determination of additional tax due on bank deposits. After reviewing the sales records provided, the auditor determined they were inadequate. After comparing total bank deposits for the audit period to the total amount of sales reported on the job work orders and invoices (sales invoices) for the audit period provided by the corporation, the auditor determined that total bank deposits exceeded the total amount of sales reported on the sales invoices by \$152,176.32. During the audit, Mr. Glamcevski informed the auditor that all monies deposited into the corporation's bank account were from the corporation's sales. Since no explanation was provided for the difference between the total amount of bank deposits for the audit period and the total amount of sales reported on the sales invoices provided for the audit period, the auditor concluded that the entire difference, \$152,176.32, was additional sales for the audit period. The auditor then determined a taxable ratio of 53 percent by dividing taxable sales per the records provided and reviewed, \$328,745.00, by gross sales per records provided and reviewed, \$615,703.00. Thereafter, the auditor applied the taxable ratio of 53 percent to the additional sales, i.e., the excess bank deposits of \$152,176.32, and determined additional taxable sales to be \$80,653.44 and additional sales tax due in the amount of \$5,647.35 for the period September 1, 1997 through August 31, 2003.

As part of the second and third areas of the audit, the auditor reviewed and summarized all job work orders and invoices provided by the corporation for the audit period. The auditor found that the sales invoices were filed in date order. She also found that every customer was issued a prenumbered sales invoice, which was dated and legible. Based upon her review of the sales invoices provided, the auditor determined that the corporation had failed to provide approximately 71 percent of the sales invoices for the audit period.

The second area of the audit was the auditor's determination of the amount of sales tax collected by petitioner during the audit period, which it did not remit to the Division. Shortly after the commencement of the audit and prior to her review of the corporation's books and records for the audit period, Mr. Glamcevski informed the auditor that the corporation had collected sales tax from one of its customers for the prior three years and failed to remit the collected tax to the Division. During the September 17, 2003 opening meeting with Mr. Glamcevski and his accountant, Mr. Glamcevski also informed the auditor that tax was included in the net sales amount on several invoices. The auditor's review of the job work orders and invoices provided by the corporation revealed that sales tax was separately stated on the majority of invoices on which sales tax was collected. However, in some instances, she found that the sales invoices contained either the statement "tax included," or calculations indicating that sales tax was included in the net invoice amount. Based upon her review of the job work orders and invoices provided, the auditor determined that petitioner collected a total of \$18,781.73 in sales tax on \$268,310.42 in sales made by it during the period September 1, 1997 through August 31, 2003, which it failed to remit to the Division. The auditor also determined that these sales taxes were collected by petitioner on both taxable and nontaxable sales during the audit period.

The third area of the audit was the auditor's determination of the additional sales tax due, but not collected, on taxable sales made by the corporation during the period September 1, 1997 through August 31, 2003. Based upon her review of the job work orders and invoices provided by the corporation, the auditor found that the corporation rendered taxable services such as floor cleaning and waxing, window washing, general maintenance, janitorial services, bathroom cleaning and dusting during the audit period, but failed to charge sales tax. She determined that additional sales tax in the amount of \$4,211.19 was due on \$60,164.14 in additional taxable sales made by the corporation during the period September 1, 1997 through August 31, 2003. The auditor did not include the corporation's sales of carpet and upholstery cleaning services in her determination of the corporation's additional taxable sales for the audit period.

The last area of the audit was the auditor's determination of the use tax due on the corporation's purchases of supplies from an out-of-state vendor during the period September 1, 1997 through August 31, 2003. During the audit, petitioner provided expense purchase invoices from one supplier, Jon-Don, for the period September 1, 1997 through August 31, 2003. Although the auditor requested asset records for the audit period, the corporation failed to provide any asset purchase invoices and asset depreciation schedules. During the audit, Mr. Glamcevski claimed that asset purchase invoices were filed with the expense purchase invoices provided to the auditor. The auditor reviewed all expense purchase invoices provided and found that petitioner purchased supplies from Jon-Don, an out-of-state vendor, who did not charge sales tax on its invoices. She considered cleaning supplies that remained with petitioner's customers to be purchases for resale and she did not assess tax on those purchases. The auditor determined that petitioner's additional taxable expense purchases totaled \$37,876.00, and additional use tax

due on these purchases totaled \$2,651.34 for the period September 1, 1997 through August 31, 2003.

As a result of the audit, the auditor found the corporation's gross sales to be \$767,879.32 and determined total taxable sales to be \$409,128.00, with additional sales tax due of \$28,640.57 for the period September 1, 1997 through August 31, 2003. She also determined the corporation's additional taxable expense purchases to be \$37,876.00, with additional use tax due of \$2,651.34 for the period September 1, 1997 through August 31, 2003.

During the audit, the auditor searched the Division's computer database for information concerning the corporation's status as a sales tax vendor and the filing of any sales tax returns. The Division's records indicated that the corporation became registered as a sales tax vendor on November 15, 1991, but its sales tax filing status became inactive on February 7, 1995. The records also indicated that the corporation failed to file sales and use tax returns for the period September 1, 1997 through August 31, 2003.

During the audit, Mr. Glamcevski submitted a copy of a letter dated January 3, 2000 that he had received from Patricia Rapasadi, a Tax Compliance Agent II assigned to the Division's Syracuse District Office, regarding assessments issued to him as a responsible person of What A Difference Cleaning, Inc., for the sales tax quarters ending November 30, 1994 and February 28, 1995. In her letter, Ms. Rapasadi stated that "[t]he assessments issued against [Mr. Glamcevski] as a responsible person of [What A Difference Cleaning, Inc.] are in the process of being canceled. Carpet cleaning is not a taxable service."

On July 13, 2004, three statements of proposed audit change for sales and use tax were issued to What A Difference. The first Statement of Proposed Audit Change for Sales and Use Tax proposed additional tax due in the amount of \$5,647.35, plus penalty and interest. This

statement reflected the auditor's determination of additional sales tax due on the bank deposit discrepancy, i.e., additional sales, outlined above. A review of this statement indicates that the auditor determined additional tax to be due in the quarters ending August 31, 1998, August 31, 1999, August 31, 2000, August 31, 2001, August 31, 2002, May 31, 2003 and August 31, 2003. The second Statement of Proposed Audit Change for Sales and Use Tax proposed additional tax due in the amount of \$18,781.73, plus penalties and interest. This statement reflected the auditor's determination of the amount of sales tax that the corporation collected from its customers during the audit period, but failed to remit to the Division, as outlined above. A review of this statement indicates that the auditor determined additional tax was due in all quarters of the audit period except for the quarter ending November 30, 2002, i.e., 23 of the 24 quarters constituting the audit period. The last Statement of Proposed Audit Change for Sales and Use Tax proposed additional tax due in the amount of \$6,862.83, plus interest. This statement reflected the auditor's determination of additional sales tax due (\$4,211.19), but not collected on taxable sales made by the corporation during the period September 1, 1997 through August 31, 2003, plus additional use tax due (\$2,651.34) on taxable expense purchases made by the corporation during the same period, as outlined above. A review of the audit log indicates that the statements of proposed audit change for sales and use tax and the final supporting work papers were provided to petitioner's representative and Mr. Glamcevki at their July 13, 2004 meeting with the auditor's team leader.

On or about August 5, 2004, the corporation appointed Daniel J. Arno, Esq., to act as its representative with respect to the audit. In his letter dated August 5, 2004, Mr. Arno stated that the corporation disagreed with the proposed audit adjustments for a variety of reasons. However, none of the reasons were set forth in his letter. On September 2, 2004, the auditor spoke with

Mr. Arno concerning the proposed audit adjustments. The audit log entry for that date indicates that during their conversation, Mr. Arno informed the auditor that he had no additional information to provide at that time.

No further documentation was provided to the auditor prior to the issuance of the notices of determination at issue in this proceeding.

On September 30, 2004, the Division issued the following notices of determination to What A Difference Cleaning, Inc.:

a. Notice of Determination (Notice No. L-024542188-3) asserting additional sales and use taxes due in the amount of \$5,647.35 for the quarters ending August 31, 1998, August 31, 1999, August 31, 2000, August 31, 2001, August 31, 2002, May 31, 2003 and August 31, 2003, plus penalties of \$1,663.30 and interest of \$2,113.85, for a current balance due of \$9,424.50. The computation section of this Notice of Determination contained the following explanation: "Since you have not submitted adequate records for audit, as required under sections 1135 and 1142 of the Tax Law, we determined that you owe tax, interest, and any applicable penalties, under sections 1138 and 1145 of the Tax Law, based upon available records and information." Penalties were assessed pursuant to Tax Law § 1145(a)(1)(i) on this notice because the corporation's records were inadequate and it had unsubstantiated bank deposits, i.e, additional sales, for the audit period.

b. Notice of Determination (Notice No. L- 024542189-3) asserting additional sales and use taxes due in the amount of \$18,781.73 for the period September 1, 1997 through August 31, 2002 and December 1, 2002 through August 31, 2003, plus penalties of \$14,333.17 and interest of \$9,884.49, for a current balance due of \$42,999.39. The computation section of this Notice of Determination contained the following explanation: "Based on our audit of your records, we

determined that you owe tax, interest, and . . . penalties, under sections 1138 and 1145 of the Tax Law. We added fraud penalty of 50% of the tax you owe, plus 50% of the statutory interest, under section 1145 of the Tax Law.”

c. Notice of Determination (Notice No. L-024542190-3) asserting additional sales and use taxes due in the amount of \$6,862.83 for the period September 1, 1997 through August 31, 2003, plus interest of \$1,998.09, for a current balance due of \$8,860.92. The computation section of this Notice of Determination contained the following explanation: “Based on our audit of your records, we determined that you owe tax, interest, and any applicable penalties, under sections 1138 and 1145 of the Tax Law.”

The Division imposed fraud penalties on one of the notices of determination for the following reasons:

a. petitioner admitted collecting sales tax from one customer during the audit period and not remitting the collected tax to the Division;

b. petitioner, a registered sales tax vendor, failed to file sales tax returns, report or remit any tax due for the entire six-year audit period, i.e., a total of 24 sales tax quarters;

c. corporate records, provided during the audit to the Division, showed that petitioner collected and failed to remit sales tax in every quarter of the audit period except for the quarter ending November 30, 2002, i.e., 23 of the 24 quarters constituting the audit period;

d. there was a substantial under reporting of tax due, i.e., the Division determined that petitioner collected and failed to remit \$18,781.73 in sales tax during the audit period;

e. petitioner continued to collect sales tax on nontaxable transactions even after it was notified by the Division that those services were not taxable; and

f. petitioner failed to maintain adequate records of sales that it made during the audit period.

During the audit, the auditor reviewed and prepared a detailed summary of all job work orders and invoices provided by the corporation. As part of her preparation of this summary, the auditor assigned record numbers to all sales invoices. Thereafter, some of the job work orders and invoices were photocopied by Division personnel and the auditor wrote the appropriate record number in the upper left corner of each photocopy. As noted above, prior to the conclusion of the audit, all job work orders and invoices provided by petitioner were returned to Mr. Glamcevski, petitioner's owner.

The final supporting work papers for each audit area are part of the record. In her audit work papers, the auditor summarized the details of each job work order and invoice that she determined was subject to tax because the corporation either collected sales tax and did not remit it, or did not charge sales tax on a taxable sale. Specifically, for each sales transaction subject to tax, the work paper schedules included, among other things, the record number assigned by the auditor, customer name, invoice date, invoice number, invoice amount, taxable amount and comments summarizing the description of work performed as stated on the particular sales invoice. Summaries of the transactions included, but were not limited to, "tax collected / not rem," "tax collected / not remitted - janitorial services for," "tax collected / not remitted - total apartment cleaning," "tax collected / not remitted - cleaning services for," "tax collected / not remitted - housekeeping services for," "taxable - cleaning services for," "taxable- janitorial services for," "taxable - stripped and waxed floors," and "taxable - window washing."

At the hearing, the job work orders and invoices photocopied by the Division during the audit were received into evidence as the Division's Exhibit "K," which exhibit consisted of

approximately 358 sales invoices bearing various dates throughout the period September 1, 1997 through August 31, 2003. Each of these sales invoices contained, among other things, the name, address and telephone number of the customer to whom the invoice was issued, a description of the work performed and the amount charged for such work. On many invoices, the sales tax due on such work was listed as a separate amount and then the total amount due was listed. Multiple invoices were issued to the same customers. Sometimes, petitioner stated only a net amount due on invoices issued to regular customers. As noted above, if the auditor observed a pattern where the sales tax had been separately stated and included in the total amount due on one or more invoices issued to a particular customer and then the same total amount was stated as due on another invoice issued to the same customer, she assumed that the net invoice amount due included sales tax. The auditor noted the pattern of separately stating the tax on the invoice in question by listing the record number of the invoice or invoices on which the sales tax had been separately stated for that particular customer. Further review of the sales invoices in the record indicates that the word "paid" was stamped or handwritten on almost all of these sales invoices. While a handwritten circled letter "p," either alone or in combination with the handwritten word "paid," appeared on some of the sales invoices.

A review of the schedule detailing the sales on which tax was collected and not remitted indicates that the auditor also made note of her determination that the corporation collected sales tax on multiple invoices issued to particular customers based on patterns discovered from review of other sales invoices issued to the same customers.

Mr. Glamcevski, a high school graduate, began doing business as Personal Touch Cleaning Services sometime in 1987. The Division's records indicate that he became registered as a sales tax vendor using the trade name Personal Touch Cleaning Services on January 1, 1988 and his

filing status became inactive on May 1, 1992. As noted above, What A Difference doing business as Personal Touch Cleaning Services became registered as a sales tax vendor on November 27, 1991. Mr. Glamcevski, as president of What A Difference, signed the sales tax certificate of registration that the corporation filed with the Division in November 1991.

Petitioner used job work orders to provide estimates to potential customers and also as bills after the services were performed. Job work orders were issued to both residential and commercial customers. Invoices were issued monthly by petitioner to some commercial customers. Mr. Glamcevski prepared all job work orders and invoices issued by petitioner during the period September 1, 1997 through August 31, 2003. He also prepared all proposals for work submitted by petitioner to potential customers.

A review of the job work orders and invoices in the record reveals that petitioner continued to collect sales tax on both taxable and nontaxable services that it rendered to customers after January 3, 2000. Many job work orders contain a detailed description of the work performed by petitioner. According to the job work orders and invoices, the services that petitioner performed for its customers included, but were not limited to, carpet and upholstery cleaning, janitorial services, housekeeping services, window cleaning, stripping and waxing floors, buffing floors, dusting, vacuuming and cleaning bathrooms and kitchens.

The record includes job work orders issued to The Meadows at Westbrook for “total apartment cleaning” of various units by petitioner during the audit period. A review of these job work orders indicates that petitioner separately stated and collected tax on the vast majority of these job work orders.

The record includes job work orders and invoices issued to Evergreen Manufacturing (“Evergreen”) throughout the audit period. Job work orders were issued as bills for “janitor

services” or “janitorial services” rendered by petitioner during the preceding month. Shortly before the end of the audit period, invoices were issued to Evergreen for “cleaning services” rendered by petitioner during the preceding month. A review of these job work orders and invoices indicates that petitioner charged sales tax on janitorial services billed on some job work orders, but did not charge sales tax on other job work orders or invoices.

Petitioner’s commercial customers included Young & Franklin, Inc. (“Young & Franklin”) and its affiliate Tactair. The record includes some monthly invoices issued between February 3, 2003 and August 30, 2003 by petitioner to Young & Franklin for housekeeping services performed by petitioner at the Young & Franklin building and the guesthouse. Each of these invoices references “P.O. Number 56435,” and sales tax is separately stated on most of the invoices. Young & Franklin purchase order number 56435 is not part of the record. The record also does not include any contract between Young & Franklin and petitioner. A number of documents related to petitioner’s business relationship with Tactair are part of the record. First, the record includes petitioner’s proposal dated April 18, 2000 to provide janitorial services to Tactair’s office areas in accordance with a contract for the sum of \$60,000.00 per year to be billed at rate of \$5,000.00 plus tax per month. Second, it includes a purchase order (purchase order number 42064) that Tactair issued on August 27, 2001 for housekeeping services to be rendered by petitioner. It is noted that the Tactair purchase order references a “Housekeeping Contract for Office Areas,” dated April 14, 2000 and the proposal dated April 18, 2000. The April 14, 2000 contract is not part of the record. Lastly, the record includes some monthly invoices, bearing various dates in 2002 through August 30, 2003, issued to Tactair for housekeeping services that petitioner performed at the Tactair building. Each of these invoices references “P.O. Number 42064.” Further review of these invoices reveals that sales tax was

separately stated on some of the invoices and included in the net amount billed on other invoices. It is noted that petitioner separately stated and collected sales tax on the invoices issued to both Young & Franklin and Tactair on August 30, 2003.

At the hearing, petitioner presented the testimony of George Powers, an accountant, who reviewed the final audit work papers and the copies of the sales invoices which are part of the Division's records pertaining to this audit, i.e., Division's Exhibit "K," and prepared two schedules of his findings. Although Mr. Powers asked Mr. Glamcevski for the records that the corporation had provided to the auditor during the audit, they were not provided to him because Mr. Glamcevski said they were unavailable. The two schedules were submitted into evidence.

The record does not include any of the Federal income tax returns filed by the corporation for the fiscal years ending July 31, 1998, July 31, 1999, July 31, 2000, July 31, 2001, July 31, 2002, July 31, 2003 or July 31, 2004. Nor does the record include any tax return filed by the corporation after the close of the audit period, i.e., after August 31, 2003. The record also does not include What A Difference's general ledger or bank statements for the period September 1, 1997 through August 31, 2003.

At the hearing, petitioner did not submit any of the job work orders or invoices issued to customers during the period September 1, 1997 through August 31, 2003 into the record. It also did not submit any exempt organization certificates, any resale certificates, or any capital improvement certificates into the record. The record does not include any service contracts between petitioner and any customers.

Petitioner submitted into evidence a four-page list of cleaning supplies. The record does not include any purchase invoices for supplies or equipment that petitioner purchased from Jon-Don or any other vendor during the period September 1, 1997 through August 31, 2003.

Petitioner submitted into the record a letter dated March 1, 2006 written by Walter J, Nendza, the individual who prepared Federal and New York State returns for both Mr. Glamcewski and petitioner.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In this case, the Administrative Law Judge noted that the Division made several written and oral requests for What A Difference's books and records for the entire audit period. After reviewing the records made available, the Administrative Law Judge found that the auditor reasonably concluded that petitioner's records were insufficient to conduct a detailed audit to verify its gross and taxable sales for the audit period.

The Administrative Law Judge concluded that given the inadequacy of petitioner's sales records and the discrepancy between the total bank deposits versus the total amount of sales reported on its sales invoices, the Division properly resorted to a bank deposit analysis to determine the sales tax due on additional taxable sales. Since petitioner did not explain the difference between the total amount of bank deposits and the total amount of sales reported on the sales invoices, the Administrative Law Judge found it was reasonable for the auditor to conclude that the entire difference, \$152,176.32, was additional sales for the audit period. The Administrative Law Judge also found that it was reasonable for the auditor to use petitioner's actual sales invoices in determining a taxable ratio of 53 percent that was applied to petitioner's sales to compute additional taxable sales for the audit period.

The Administrative Law Judge observed that early in the audit process, Mr. Glamcewski informed the auditor that the corporation had collected sales tax from one of its customers during the audit period without remitting it to the Division of Taxation. The Administrative Law Judge found the auditor's use of the actual job work orders and invoices to determine the

amount of sales tax collected, but not remitted to the Division and the additional sales tax due, but not collected on taxable sales during the audit period was reasonable.

The Administrative Law Judge also found reasonable the auditor's use of the actual purchase invoices, issued by Jon-Don for the period September 1, 1997 through August 31, 2003, to determine whether petitioner paid sales tax on its expense purchases. The Administrative Law Judge found that petitioner failed to carry its burden of proof, and that the Division's determination that use tax was due on petitioner's purchases of supplies from Jon-Don was proper (*see*, Tax Law § 1132[c]).

The Administrative Law Judge observed that in addition to any amount of tax imposed, Tax Law § 1145(a)(2) makes provision for a fraud penalty, where a taxpayer's failure to pay any tax to the Commissioner of Taxation and Finance within the time required by law is due to fraud.

The Administrative Law Judge found that the Division sustained its burden of proof of establishing that the imposition of the fraud penalty was appropriate. Based on petitioner's substantial underreporting of sales tax over a long and continuous period of time, petitioner's collection and failure to remit \$18,781.73 in sales tax during the audit period and the fact that petitioner, a registered sales tax vendor, failed to file sales tax returns, report or remit any tax due for the entire six-year audit period.

Lastly, the Administrative Law Judge found that petitioner failed to establish reasonable cause or an absence of willful neglect pursuant to Tax Law § 1145(a)(1)(iii).

ARGUMENTS ON EXCEPTION

Petitioner, on exception, takes issue with so much of the determination of the Administrative Law Judge that finds petitioner has failed to carry its burden of showing

entitlement to its requested adjustments to the tax asserted for nontaxable sales. Petitioner urges that the Administrative Law Judge should have looked behind the invoices and given credence to Mr. Glamcevski's testimony. Petitioner argues that the Administrative Law Judge erred in sustaining fraud penalties. Petitioner urges that its failure to file returns and pay taxes due was a result of the owner's lack of education and misunderstanding of the tax law and reliance on advice from its accountant. Petitioner urges that it has carried its burden of proof of establishing reasonable cause for abatement of penalty. Finally, petitioner urges that there should not be an imposition of use tax on its purchase of supplies from Jon-Don, since these items were used in the tax exempt service of carpet cleaning.

Petitioner raises for the first time the argument that the doctrine of equitable estoppel should be applied in this matter to bar the Division from asserting the tax here. This argument was raised in petitioner's brief, but not raised in the exception and not argued or decided below. Accordingly, we decline to entertain it here.

We note that petitioner does not take exception to any of the findings of fact of the Administrative Law Judge.

The Division argued that petitioner failed to provide any documentary evidence or credible testimony to warrant a reversal of the Administrative Law Judge's determination. The Division requests that the exception be denied and the Notices of Determination be sustained.

OPINION

Every person required to collect tax must maintain and make available for audit records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (*see*, Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Failure to maintain and make available such records, or the maintenance of inadequate records, will result in the Division's estimating

tax due (*see*, Tax Law § 1138[a]; *see also*, *Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348 [1984]; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858 [1981]).

A presumption of correctness attaches to a notice of determination upon its issuance (*see*, *Matter of Hammerman*, Tax Appeals Tribunal, August 17, 1995). So long as it appears that a rational basis existed for the auditor's calculations, the burden is then placed upon petitioner to show, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (*see*, *Matter of Meskouris Bros. v. Chu*, 139 AD2d 813 [1988]). Petitioner on exception does not appear to challenge the method of the assessment and, based upon the record in this case, we conclude the audit methods used were proper.

As a result of the audit, three notices were issued to petitioner on September 30, 2004: Notice of Determination (Notice No. L-024542190-3) asserting additional sales and use taxes due in the amount of \$6,862.83 plus interest only. This was based a review of petitioner's records, which showed it owed additional sales tax and additional tax on its expense purchases; Notice of Determination (Notice No. L-024542188-3) asserting additional sales and use taxes due in the amount of \$5,647.35, plus interest and negligence penalties under Tax Law § 1145(a)(1)(i). Penalties were assessed on this notice because of petitioner's inadequate records and because it had unexplained bank deposits which, ultimately, were treated as additional sales; and Notice of Determination (Notice No. L- 024542189-3) asserting additional sales and use taxes due in the amount of \$18,781.73 plus interest and fraud penalties pursuant to Tax Law § 1145(a)(2). This notice was based on the auditor's determination, from a review of the books and records, that petitioner was collecting sales tax from its customers but not remitting it to the State of New York.

Petitioner's only challenge to the audit on exception is that the Administrative Law Judge should have "looked behind the invoices" (Exception, p. 1) or should have considered the testimony or other evidence which showed that petitioner was engaged in nontaxable carpet cleaning services. The Division does not appear to dispute that petitioner engaged to some extent in carpet cleaning services. However, the record indicates that none of the tax determined upon audit was asserted on carpet cleaning. Petitioner argues that use tax should not have been imposed on its purchases from Jon-Don, since those items were used in carpet cleaning services. Unfortunately, petitioner did not prove by clear and convincing evidence, i.e., by verifiable books and records, to show the extent, if any, to which it is entitled to have the tax adjusted. The Administrative Law Judge can only consider the evidence that is presented, so "looking behind the invoices," as urged by petitioner, would not be appropriate in this forum. We find that petitioner has failed to carry its burden of proving that the audit method was improper or that the amount assessed is erroneous (*Matter of Meskouris Bros. v. Chu, supra*).

The Administrative Law Judge gave little weight to Mr. Glamcevski's testimony given the apparent inconsistencies with other parts of the record. Based on the facts in this matter, we are not disposed to disturb her judgment of credibility, although mindful of our authority to do so given extraordinary circumstances (*Matter of Spallina*, Tax Appeals Tribunal, February 27, 1992).

Petitioner argues that it has shown reasonable cause for abatement of penalties imposed under Tax Law § 1145(a)(1)(i). We disagree. We find no evidence that would support the abatement of penalties in this case and we affirm the determination of the Administrative Law Judge on this issue for the reasons stated therein.

One of the Notices of Determination issued to petitioner asserted not only additional tax and interest but also fraud penalty pursuant to Tax Law § 1145(a)(2). When a taxpayer's failure to pay sales tax to the Commissioner of Taxation in the time required by law is due to fraud, a penalty of 50% is added to the tax (*see*, Tax Law § 1145[a][2]).

The issue of whether a taxpayer wilfully failed to file returns and timely pay tax was with the intent to evade payment of tax presents a question of fact to be determined upon consideration of the entire record (*see, Matter of Drebin v. Tax Appeals Tribunal*, 249 AD2d 716 [1988]). The burden of demonstrating this falls upon the Division (*see, Matter of Sona Appliances*, Tax Appeals Tribunal, March 16, 2000). Fraud is not defined in Tax Law § 1145. However, a finding of fraud requires the Division to show “clear, definite, and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing” (*see, Matter of Sona Appliances, supra*). In order to establish fraudulent intent, petitioners must have acted deliberately, knowingly and with the specific intent to violate the Tax Law (*see, Matter of Cousins Serv. Sta.*, Tax Appeals Tribunal, August 11, 1988).

The sales tax penalty provisions are modeled after Federal penalty provisions and, thus, Federal statutes and case law may properly provide guidance in ascertaining whether the requisite intent for fraud has been established (*see, Matter of Uncle Jim's Donut & Dairy Store*, Tax Appeals Tribunal, October 5, 1989). Since direct proof of a taxpayer's intent is rarely available, fraud may be proved by circumstantial evidence, including the taxpayer's course of conduct (*Intersimone v. Commissioner*, T.C. Memo 1987-290, 53 TCM 1073 [1987]; *Korecky v. Commissioner*, 781 F2d 1566 [1986], 86-1 USTC ¶ 9232). Relevant factors held to

be significant include consistent and substantial understatement of tax, the amount of the deficiency itself, the existence of a pattern of repeated deficiencies and the taxpayer's entire course of conduct (*see, Merritt v. Commissioner*, 301 F2d 484 [1962], 62-1 USTC ¶ 9408; *Bradbury v. Commissioner*, T.C. Memo 1996-182, 71 TCM 2775 [1996]; *Webb v. Commissioner*, 394 F2d 366 [1968], 68-1 USTC ¶ 9341; *see also, Matter of AAA Sign Co.*, Tax Appeals Tribunal, June 22, 1989).

The burden rests with the Division to prove by clear and convincing evidence that petitioners, with willful intent, were in violation of the tax laws (*see, Matter of Cardinal Motors*, State Tax Commn., July 8, 1983, *confirmed Cardinale v. Chu* 111 AD2d 458 [1985]). Fraud must be established with affirmative evidence and may not be presumed (*see, Intersimone v. Commissioner, supra*). Therefore, mere suspicion of fraud from the surrounding circumstances is not enough (*see, Goldberg v. Commissioner*, 239 F2d 316 [1956], 57-1 USTC ¶ 9261).

We find that the Division has carried its burden to show that petitioner's failure to timely pay over the taxes it collected from its customers to the State of New York was willful and with the intent to evade the tax.

We glean this intent from petitioner's course of conduct in an audit period covering several years, including the fact that petitioner was a registered sales tax vendor but failed to file sales tax returns. Petitioner failed to report or remit any tax due for the entire six-year audit period, i.e., a total of 24 sales tax quarters. We also find that intent in the fact that petitioner collected and failed to remit sales tax in every quarter of the audit period except for the quarter ending November 30, 2002, i.e., 23 of the 24 quarters constituting the audit period. We note that petitioner continued to collect sales tax on nontaxable transactions even after it was notified

by the Division that those services were not taxable. Finally, petitioner failed to maintain adequate, verifiable records of sales made during the audit period.

The determination of the Administrative Law Judge is, therefore, affirmed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of What A Difference Cleaning, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of What A Difference Cleaning, Inc. is denied; and
4. The three notices of determination dated September 30, 2004 are sustained.

DATED:Troy, New York
May 15, 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