STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALVIN'S WINE & LIQUOR, 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 December 1, 1994 through November 30, 1997.	:	
	:	DECISION DTA Nos. 821638 and 821639
In the Matter of the Petition	:	
of	:	
RAFAEL RODRIGUEZ	:	
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 December 1, 1994 through November 30, 1997.	:	
	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on November 20, 2008. Petitioners appeared by James H. Tully, Jr., Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori Antolick, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a letter brief in reply. Oral argument, at the request of the Division of Taxation, was held on May 13, 2009 in Troy, 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 has met its burden of proof to show that its imposition of fraud penalty pursuant to Tax Law § 1145(a)(2) was proper and the notices of

determination, issued more than eight years after tax returns were filed, were not barred by the period of limitations for assessment of additional tax.

II. Whether, if the notices of determination were timely issued, the audit method employed by the Division of Taxation was reasonable or whether petitioner has shown error in either the audit method or result.

III. Whether, if the notices of determination were timely issued, the corporate petitioner failed to show in excess of 25% of the amount of tax required to be shown on its sales tax returns so that penalty under Tax Law § 1145(a)(1)(vi) was properly imposed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "3," "4," "5," "7," "8," "9," "10," "11" and "12," which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioner Alvin's Wine & Liquor, Inc., has operated a liquor store on the Grand Concourse in the Bronx since 1994 to date. During the audit period at issue, consisting of three years running from December 1, 1994 through November 30, 1997, petitioner[1] reported on its sales tax returns total gross sales and total taxable sales in the same amount of $406,018.00 as follows:

Sales tax quarter ending	Sales reported
02/28/95	$ 16,588.00
05/31/95	28,130.00
08/31/95	22,800.00
11/30/95	23,394.00

[1] Rafael Rodriguez filed a separate petition, as an individual responsible for the tax liabilities of the corporate petitioner, challenging the assessment at issue. For purposes of this decision, references to "petitioner" are to the corporation and to Mr. Rodriguez, as responsible person, jointly, unless the context otherwise requires. Any relief granted to the corporate petitioner would flow likewise to the benefit of Mr. Rodriguez (***see, Matter of Mackiewicz***, Tax Appeals Tribunal, June 7, 2007).

02/29/96	27,005.00
05/31/96	30,248.00
08/31/96	28,964.00
11/30/96	37,753.00
02/28/97	36,428.00
05/31/97	27,753.00
08/31/97	27,633.00
11/30/97	99,322.00
Total	$406,018.00

By a Notice of Determination dated August 14, 2006, the Division of Taxation ("Division") assessed sales tax due of $104,785.72, for the period December 1, 1994 through November 30, 1997, plus interest and penalties, including fraud penalty pursuant to Tax Law § 1145(a)(2) and penalty for omitting, from the taxes reported on its sales tax returns, an amount in excess of 25% of taxes required to be reported pursuant to Tax Law § 1145(a)(1)(vi), against Alvin's Wine & Liquor, Inc. A conforming Notice of Determination, also dated August 14, 2006, was issued against Rafael Rodriguez as "an officer/responsible person" of the corporate petitioner. By a Conciliation Order dated February 23, 2007, tax assessed was reduced to $94,311.35, after an adjustment based upon an increase in the liquor store's inventory.

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

> Petitioner Rafael Rodriguez concedes that as the sole owner of the corporate petitioner, he is a person required to collect sales and use tax under Tax Law § 1131(1) on behalf of his Bronx liquor store. An immigrant to the United States in 1969 with, at that time, limited English language abilities, petitioner first operated a small grocery store, where he obtained business experience. He then opened his Bronx liquor store in 1994 as a new store, which remains in business at the same location to date. As a new store, it had no inventory when it opened.

Petitioner testified that he has one other employee, but he is usually alone in the store.[2]

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

A review of the photographs of petitioner's Bronx liquor store shows that a customer who enters the store is surrounded by bulletproof glass and is unable to touch any liquor. Small windows in the glass permit the purchase and exchange of liquor. Petitioner keeps inventory in three locations at the business premises: the basement, backroom, and selling area behind the bulletproof glass. In addition, given the store's limited size, petitioner also utilizes a "buy and hold" option offered by his suppliers or liquor distributors, which enables petitioner to take advantage of discounts offered on the sale of larger amounts of liquor. The liquor is then held by the distributor for later delivery. Invoices show that petitioner pays monthly storage fees to his suppliers, ranging from $29.00 to $65.00, in order to take advantage of this option. It is unclear from this record if all or only some of petitioner's suppliers permit the "buy and hold" option, or whether the option existed for the whole audit period or only part of it. Petitioner has no documentation to show the percentage of his purchases that go into "buy and hold" and he stated he could not estimate the percentage (Tr., p. 178).

Petitioner claimed that 15 percent of the items ordered were lost, stolen or undelivered by delivery drivers. Petitioner offered no documentation to corroborate this percentage. He testified that he would have to pay for these items, if he did not catch it at the time of delivery. When asked on cross-examination how he keeps track of his inventory, Mr. Rodriguez stated that he used his purchase invoices (***see***, Tr., p. 171). These same invoices were also used to prepare sales tax returns.[3]

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

Mr. Rodriguez admits that the corporation's sales tax returns he filed for the audit period were not accurate. Mr. Rodriguez states that he provided his former accountant, Manuel Vidal, with his purchase invoices, so he could prepare his tax returns for the subject period. Mr Rodriguez blames Manuel Vidal for the inaccuracies in the returns. Mr. Rodriguez states that he filed the sales tax returns without first reviewing them. According to Mr. Rodriguez, it was not until a meeting at the State Liquor Authority to contest the granting of a liquor license to a potential competitor for a business at a nearby location that he realized his store's sales tax returns, prepared by Mr. Vidal, were not accurate. According to Mr. Rodriguez, he learned then that Mr. Vidal prepared petitioner's returns without using the purchase invoices he provided.

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[2]We have modified finding of fact "3" to more accurately reflect the record and to delete editorial matter.

[3]We have modified finding of fact "4" to more accurately reflect the record.

Mr. Rodriguez admits that he did not maintain any sales records from which petitioner's sales tax returns could be prepared. He kept track of daily sales by counting the money at the end of the day (***see***, Tr., p. 167). By 1997, Mr. Rodriguez estimates he was selling five or six thousand dollars a week in liquor, but he never wrote anything down (***id***). During the audit period, Mr. Rodriguez states that he purchased his inventory with checks and with cash from his personal account. When asked whether all of the canceled checks were provided to the Division's auditor, he replied, "Maybe not." (Tr., p. 169). Mr. Rodriguez stated that his purchase invoices did not necessarily reflect actual deliveries. Nevertheless, when asked how he kept track of what he purchased for the store, he stated, "I keep the invoices" (Tr., p. 171). Mr. Rodriguez claims that he thought Mr. Vidal could prepare the returns with sufficient accuracy by utilizing the store's purchase invoices and a reasonable markup. Mr. Rodriguez, after discovering the inaccuracies in his corporation's returns, did not file amended returns for the subject period. Mr. Rodriguez claims he did not know that estimating the corporation's sales by using a markup of purchases was insufficient to comply with sales and use tax requirements of reporting actual sales that are accounted for by source records of sales.[4]

The Audit

The auditor, by a letter dated December 4, 1997, notified petitioner that its sales tax records for the period March 1, 1995 through November 30, 1997 had been selected for field audit to begin on January 5, 1998. This letter specified that the following books and records should be made available for the auditor's review: financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns, federal income tax returns, and exemption certificates. The auditor followed up with a letter dated January 6, 1998 to petitioner's then representative, Manuel Vidal, who rescheduled the commencement of his field audit to January 13, 1998 and expanded the period under review to June 1, 1994 through November 30, 1997. This later letter also included a similar request for records as noted above in the earlier letter dated December 4, 1997.

We modify finding of fact "7" of the Administrative Law Judge's determination to read follows:

> Mr. Rodriguez did not provide for audit review any cash register tapes, sales invoices, or any other source documents to establish individual sales transactions. Sales tax was included in the price of liquor, but sale receipts were

[4]We have modified finding of fact "5" to more accurately reflect the record.

not provided to customers (***see***, Exhibit "AA"). Mr. Rodriguez admits to not maintaining cash register tapes during the audit period.[5]

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

> In May of 1998, petitioner replaced its former accountant, Manuel Vidal, with a new accountant, Marty Liss. Mr. Rodriguez, at all relevant times, has done all of the purchasing for the store. The Division determined that purchases per petitioner's general ledger were much less than third party suppliers' information (***see***, Exhibit "AA"). Mr. Vidal reported petitioner's "purchases per records" of $319,142.00, while Mr. Liss presented "purchases per records" of $604,031.00. In contrast, the auditor found "purchases per third party suppliers of $1,321,200.00." Petitioner's inventories were estimated for every year except 1998, which was actual (***see***, Exhibit "AA"). Although petitioner was ambiguous as to whether all canceled checks had been provided to the auditor, some cancelled checks as were provided made out to petitioner's liquor suppliers for the audit period, totaled $589,483.00 (***see***, Exhibit "GG"). This figure is in addition to whatever purchases Mr. Rodriguez may have made on his personal checking account or in cash.
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> Mr. Rodriquez reported the corporation's sales of $406,018.00 for the audit period, which were substantially less than its purchases as indicated by Mr. Liss and Mr. Vidal and dramatically less than purchases determined by the Division from information obtained from petitioner's suppliers. In fact, the taxpayer's purchases, based on third party data, substantially exceeded purchases reported on the corporation's Federal Income Tax returns and they were also substantially higher than **sales** reported by Mr. Rodriquez on the corporation's Federal Income Tax Returns and New York Sales Tax Returns for every quarter of the audit period (***see***, Exhibit "DD"). As a result, on May 8, 2000, the matter was referred by the auditor to the Revenue Crimes Division for investigation and possible criminal prosecution.[6]

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> With the referral to the Revenue Crimes Division, petitioner retained the representation of an attorney, James H. Tully, Jr and accountant, Stewart Buxbaum. On October 31, 2000, Mr. Tully advised the Revenue Crimes Division that petitioner had obtained purchase information from suppliers. Petitioner provided the Revenue Crimes Division, which was located at the World Trade Center, with documents, notably some purchase invoices. Documents were later destroyed during the attack on the World Trade Center, but before such destruction, more than half of the documents were photocopied and returned to petitioner. Photocopies of purchase invoices for 1995 and 1997 were returned by

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[5]We have modified finding of fact "7" to more accurately reflect the record.

[6]We have modified finding of fact "8" to more accurately reflect the record.

the Division to petitioner but none for 1996. Ultimately, the Division referred the matter to the office of the Bronx District Attorney for criminal prosecution. It was not until February of 2006 that the case was referred back to the Division when the office of the Bronx District Attorney declined prosecution. The Division then completed the "civil audit," which resulted in the issuance of the notices of determination detailed above. The Division issued the Notice of Determination dated August 14, 2006, which asserted sales tax due of $104,785.72 as well as a civil penalty for fraud. By such date, petitioner claims that it no longer had in its possession the photocopies of its purchase invoices for 1995 and 1997, that were provided by the Division, the originals of which were destroyed on September 11, 2001. The record is silent as to petitioner's efforts, if any, to obtain duplicate copies of purchase invoices from its suppliers.[7]

We have modified finding of fact "10" of the Administrative Law Judge's determination to read as follows:

Sales tax asserted due of $104,785.72 was computed as follows. Petitioner's audited purchases for the audit period totaling $1,298,941.00 were calculated by the auditor's review of purchase invoices obtained from 12 different third-party suppliers, including petitioner's three main suppliers, Charmer, Peerless and Premier. Based on petitioner's federal tax returns, an inventory adjustment was allowed for "ending inventory buildup" of $35,163.51. Deducting this allowance from the audited purchases resulted in purchases available for sale of $1,263,777.49. A markup percentage of 32.63% was then applied to such purchases available for sale, resulting in audit period gross sales of $1,676,148.00. The Division relied for its markup upon a Robert Morris Associates 1995 Retailer Liquor (SIC#5921) study to calculate a markup percentage of 32.63%. This study was based upon an analysis of financial statements for 142 retail liquor businesses, and shows that it is applicable to liquor retailers in general without any differentiation based upon location. Rather, the liquor retailers are categorized only by their volume of sales. The auditor's starting point for calculating petitioner's markup percentage was gross profit of 24.6%, as shown in the study for liquor retailers with annual sales of up to $1,000,000.00.

The auditor then computed a markup percentage of 32.63% by dividing the gross profit percentage by cost of goods sold percentage, i.e., 24.6% divided by 75.4%.[8]

We have modified finding of fact "11" of the Administrative Law Judge's determination to read as follows:

On January 11, 2006, the Division received an unsigned letter. The envelope shows a sender's name and address in the Bronx. This letter claimed that as the result of the death of the Division's investigator and destruction of documents in the September 11th attacks on the World Trade Center, Rafael Rodriquez, was making "a mockery" of the government by bragging about

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[7]We have modified finding of fact "9" to more accurately reflect the record.

[8]We have modified finding of fact "10" to more accurately reflect the record.

"having avoided prosecution of tax evasion and fraud," since the evidence had been destroyed. This letter, mailed on November 28, 2005, had originally been addressed to the New York City Department of Finance, which forwarded it to the Division for review. No further action was taken on the letter, since petitioner was already being audited.[9]

We have modified finding of fact "12" of the Administrative Law Judge's determination to read as follows:

> An unsigned document allegedly prepared by accountant Stewart Buxbaum in preparation for this proceeding, resulted in his estimate of unreported sales of $157,036.00, in contrast with the Division's determination of unreported sales for the audit period of $1,270,130.00. Mr. Buxbaum utilized the larger amount of $500,000.00 for petitioner's inventory and "bill and hold" purchases, an allowance of 15% for pilferage and breakage, and a markup percentage of only 10%, since "this was a beginning store," which had to attract customers. Mr. Buxbaum in his report further suggested that it would have been reasonable to use an even lower markup, based on petitioner's testimony that in the beginning, much of his inventory was sold at cost. An inventory of petitioner's premises conducted on May 10, 2004 showed an inventory value of $577,045.00. Further, Mr. Buxbaum did not consider "short" deliveries, which Mr. Rodriguez complained was a part of doing business in the Bronx.
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> Mr. Rodriguez estimated "short deliveries" amounted to 15% to 20% of his purchases. According to Mr. Rodriguez, drivers would not deliver all of the items shown on purchase invoices, retaining items to sell themselves for personal profit. Petitioner offered no documentation to support this claim either, e.g. a letter of complaint to the supplier making such a charge. Petitioner's claim has no support in the documentary record.
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> It is also unclear what factual basis Mr. Buxbaum had for much of his unsigned estimate. For instance, his numbers used for "bill and hold" inventory and a ten percent markup have no verifiable documentary support in this record.[10]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

At the outset, the Administrative Law Judge pointed out that generally, under the statute, no assessment of additional sales tax may be made after the expiration of more than three years from the date of the filing of a return. The notices of determination in dispute and dated August 14, 2006, were issued more than three years from the date of the filing of the sales tax returns for the twelve sales tax quarters at issue. Tax Law § 1147(b) provides for an *exception* to this period

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[9]We have modified finding of fact "11" to more accurately reflect the record.

[10]We have modified finding of fact "12" to more accurately reflect the record.

of limitation for assessment of three years in the case of a fraudulent return. Fraud penalties were also imposed here.

The Administrative Law Judge observed that in order to establish fraud, it must first be concluded that petitioner's sales tax returns were *willfully* false or fraudulent and filed with the *intent* to evade tax, not only to find an exception to the three-year period of limitation for assessment, but also to support the imposition of fraud penalty, and the Division has the burden of proof to show fraud.

The Administrative Law Judge concluded that the Division failed to carry its burden to show fraud by petitioner or that the exception to the three year period of limitations applies in this case.

The Administrative Law Judge stated that petitioner offered various explanations as to why the estimate of sales tax due calculated by the Division was in error: (1) use of an unreasonable markup percentage, (2) failure to account for "buy and hold" purchases, (3) breakage, (4) nondelivery of items shown on purchase invoices, and (5) the need to build up the inventory. In addition, the Administrative Law Judge pointed out that petitioner's own rational estimate of its sales is dramatically less than the Division's calculation.

In response to the Division's contention that petitioner acted willfully and with intent to underreport its sales during the period at issue, the Administrative Law Judge found convincing petitioner's claim of inexperience in the liquor business and the lack of sophistication of the corporation's sole shareholder and officer, Rafael Rodriguez. The Administrative Law Judge found the Division's attempt to shoulder its burden of proving such willfulness and intent to underreport sales was undermined by the petitioner's countervailing explanations, which were bolstered by the testimony of Mr. Rodriguez at hearing, as well as accountant Buxbaum's reasonable estimate.

Consequently, the Administrative Law Judge found that the notices of determination, dated August 14, 2006, are time-barred by the three year period of limitation for assessment and canceled the subject notices.

ARGUMENTS ON EXCEPTION

On exception, the Division challenges the Administrative Law Judge's determination and maintains that it has proven that Mr. Rodriguez's failure to file returns and pay sales tax on behalf of his corporation was due to fraud. It argues that it has carried its burden to prove fraud by showing that petitioner's underreporting was substantial, which has been held to be a clear indicia of fraud, and that it was for an extended and continuous period of years, including the audit period. In addition, the Division argues that, at no point during the hearing, was petitioner able to explain how he paid for the $1.3 million in purchases, while having reported sales of $406,018.00.

Petitioner argues, as he did below, that Mr. Rodriguez did not willfully fail to pay sales tax. Rather, he, on behalf of the corporation, relied upon the accountant, Manuel Vidal, who, he was shocked to learn, prepared the store's sales tax returns but failed to utilize the liquor store's purchase records. In addition, petitioner contends that the auditor's estimate of the store's sales was unreasonable. The auditor did not take into consideration the nondelivery of inventory shown on purchase invoices. Petitioner complains that its liquor distributors reported goods that were purchased when, in fact, they were not received. In addition, petitioner contends that the markup used was grossly excessive, given that it was a new business, and the nature of an inner-city liquor store, which is not accounted for in the Robert Morris studies. According to petitioner, the Robert Morris studies should not be applicable to a new store where the vendor is attempting to build up its trade by selling items sometimes at cost to attract customers.

Petitioner also complains that the auditor did not consider petitioner's use of "bill and hold," due to the small size of its premises. Petitioner states that it paid for inventory, but did not take physical possession of it, in order to take advantage of discounts for larger volume purchases.

Petitioner also notes that the actual purchase invoices it provided to the auditor were destroyed on September 11, 2001, which made it impossible to defend against an assessment issued many years later. Further, petitioner argues that it cooperated during the investigation, which should be viewed as a mitigating factor. Most important, according to petitioner, any tax due for the years at issue is no longer assessable based upon the statute of limitations for assessments.

Petitioner urges that we affirm the Administrative Law Judge in all respects.

OPINION

We first address petitioner's claim that the fraud penalty was improperly imposed against petitioner and, as a result, the assessment of additional sales tax for periods from December 1, 1994 through November 30, 1997 was time-barred pursuant to Tax Law § 1147(b). As set forth above, on August 14, 2006, the Division issued a Notice of Determination to each petitioner, the corporation and Mr. Rodriguez, asserting additional tax, interest and fraud penalty pursuant to Tax Law § 1145(a)(2). That section provides for the imposition of a civil fraud penalty if the failure to report or pay over any tax to the Division within the time required is due to fraud. Although Tax Law § 1147 generally provides a three-year period of limitation on assessments of additional tax, section 1147(b) contains an exception to that limitation for willfully false or fraudulent returns filed with the intent to evade tax.

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 (***see***, ***Korecky v. Commissioner***, 781 F2d 1566 [1986]; ***see also, Intersimone v. Commissioner***, TC Memo 1987-290). 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 [1983]; ***see also***, ***Webb v. Commissioner***, 394 F2d 366 [1968]; ***Bradbury v. Commissioner***, TC Memo 1996-182; ***Matter of 1126 Genesee St.***, Tax Appeals Tribunal, August 22, 2002; ***Matter of AAA Sign Co.***, Tax Appeals Tribunal, June 22, 1989).

Whether Mr. Rodriguez, on behalf of the corporation, 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 (***see***, ***Jordan v. Commissioner***, TC Memo 1986-389; ***see also***, ***Matter of Drebin v. Tax Appeals Tribunal***, 249 AD2d 716 [1998]). 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" (***Matter of Sona Appliances, supra***). In order to establish fraudulent intent, petitioner corporation, acting through its officer, Mr. Rodriguez, 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).

In this case, the evidence contained in the record underscores the need to reverse the determination of the Administrative Law Judge.

This record establishes that Mr. Rodriguez, on behalf of his corporation, willfully, knowingly and intentionally underreported and underpaid the sales and use taxes due and owing for the entire three year audit period. Mr. Rodriguez calculated the store's sales each day by counting the cash in the cash register, when it must have been clear to him that after making cash purchases (as he said he did), such a method could not accurately reflect actual sales. Petitioner failed to maintain cash register tapes and other source documents of its sales and failed to provide the same to its accountants, so that accurate sales tax returns could be prepared. Petitioner

correctly argues that substantial underreporting is not enough to establish fraud. However, where, as here, it continues throughout the audit period, it constitutes strong evidence of fraud (***see***, ***Merritt v. Commissioner, supra***; ***see also***, ***Matter of 1126 Genesee St.***; ***Matter of Cousins Serv. Sta., supra***). We also find significant evidence of fraud in petitioner's audited purchases of liquor, which were substantially greater than its reported taxable sales for the whole audit period. Further, petitioner claims that it reported its sales based on its purchase invoices, while at the same time, arguing that its purchase invoices did not reflect actual deliveries. Purchases, according to Mr. Rodriguez's testimony, were paid for, variously, with cash from the register, cash from his personal account or by check from the corporate account. He kept track of his sales, not by maintaining records, but by counting the money at the end of the day. The audit could not account for cash purchases or checks drawn on his personal account and we do not know for certain if petitioner provided all of its canceled checks to the auditor. When asked at the hearing if all checks were provided, Mr. Rodriguez stated, "Maybe not" (Tr., p. 169). We do know, however, that the canceled checks payable to suppliers that are in the record total $589,483.00, which, alone, far exceeds the corporation's reported sales of $408,018.00. When the third party information on petitioner's purchases is taken into account, we have purchases of $ 1,321,200.00. This raises the question, how does a store that sells $408,018.00, afford to purchase 2/3 more inventory than it sells. Where does the money come from? That is a question that has not been adequately explained by Mr.Rodriguez or his counsel. Further, we find petitioner's "buy and hold" argument has no merit. If petitioner purchased the liquor, petitioner controlled it, no matter where it was stored and it still does not address how a store can afford to purchase 2/3 more inventory than it reported in sales. In any event, petitioner did not know how much of his inventory was subject to "buy and hold." He only had estimates. Mr. Rodriguez appeared to testify at the hearing but we find his uncorroborated testimony insufficient. The Administrative Law Judge appeared to emphasize the fact that Mr. Rodriguez lacked a formal education and that English was his second language. English may have been his second language,

but he had been in the United States for over 30 years and testified without apparent difficulty. As for his education, he appeared and testified at some length on how he owned and ran a grocery store business for several years and now a liquor store for several more years. We think that this is sufficient time for anyone to learn what the Tax Law requires. We conclude that Mr. Rodriguez's failure to maintain source documentation of his corporation's sales is further evidence of fraud (***see***, ***Matter of Lefkowitz***, Tax Appeals Tribunal, May 3, 1990; ***see also***, ***Matter of Waples***, Tax Appeals Tribunal, January 11, 1990).

It is not sufficient for a taxpayer to claim that he gave his purchase records to his accountant so that the sales tax returns could be prepared, and yet the accountant did not prepare them correctly. That is not an explanation of why he did not maintain sales invoices and cash register tapes evidencing each sale in verifiable form. Taken as a whole, we do not find Mr. Rodriguez's testimony compelling.

Finally, based on the testimony of Mr. Rodriguez, he did not provide the tax preparer, Mr. Vidal with sales invoices, cash register tapes or other source documents to substantiate sales for the audit period. This is, in itself, an additional indication of an intention to evade tax (***see***, ***Intersimone v. Commissioner***, ***supra)***. We look to who stood to benefit from underreporting and underpaying sales tax due and conclude that it was not Mr. Vidal or his successors, it was petitioner who benefitted.

Based on the foregoing, we conclude that the evidence, considered as a whole, supports the imposition of the fraud penalty by the Division. As a result, the Division was not constrained by the three-year period of limitation imposed by Tax Law § 1147 for the assessment of additional tax for the entire audit period.

That being said, we now address whether petitioner has shown a defect in the audit method or the amount asserted above. Petitioner presented a variety of explanations why the Division's estimate of sales tax due calculated by the Division was in error: 1) use of an unreasonable markup percentage given the newness of the business, 2) failure to account for 'buy and hold"

purchases, 3) breakage, pilferage and theft, 4) nondelivery of items shown on purchase invoices, and 5) the need to build up the inventory of a new business. All of these arguments require us to ignore that petitioner failed to maintain verifiable source documentation of its sales. Where a taxpayers fails to keep the records required by Tax Law § 1135(a), the Commissioner may select a method of audit "reasonably calculated to reflect the taxes due" (***Matter of Urban Liq. v. State Tax Commn.***, 90 AD2d 576, [1982]; ***see also***, ***Matter of Grant Co. v. Joseph***, 2 NY2d 196, 206 [1957]). In such an event, "It is then incumbent upon petitioner to show by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous" (***Matter of Clarence R. Oliver Post Mem. v. State Tax Commn.***, 101 AD2d 921, 922 [1984]). In the case at bar, petitioner's evidence consisted of its own estimates of purchases and sales and for pilferage, breakage and nondelivery, which are all rejected as unsupported by the kind of verifiable source documentation necessary to sustain them.

We note that the Administrative Law Judge characterized Mr. Buxbaum's estimate done in preparation for this case as being "reasonable." While his estimate may have been reasonable, it was not evidence. This paper was merely an extension of petitioner's argument based upon the facts he was provided by petitioner and his counsel. Unsupported as they are by source documentation, they are not sufficient to carry the day in this forum.[11] We can, therefore, give no credence to the estimate done by Mr. Buxbaum. We should also note, that, while the Tax Law permits the Division to estimate sales tax due under appropriate circumstances, it does not extend the same privilege to taxpayers. We therefore conclude that petitioner has failed to meet its burden of proof on this issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

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

3. The petition of Alvin's Wine & Liquor, Inc., and Rafael Rodriguez is denied; and

[11]Since this document was not evidentiary in nature, it should not have been taken in as evidence.

4. The notices of determination issued on August 14, 2006 are sustained.

DATED: Troy, New York
October 29, 2009

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

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