STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **1126 GENESEE STREET, INC. D/B/A** **A&N GAS MART** 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 August 31, 1997.	: : : : : :	DETERMINATION DTA #817594

Petitioner, 1126 Genesee Street, Inc. d/b/a A&N Gas Mart, 1126 Genesee Street, Buffalo, New York 14211-3007, filed a petition 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 August 31, 1997.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 77 Broadway, Buffalo, New York, on November 29, 2000 at 9:30 A.M., with all briefs to be submitted by April 10, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared by Duke, Holzman, Yaeger & Photiadis LLP (Gary M. Kanaley, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether the audit methodology employed by the Division of Taxation was reasonably calculated to reflect tax due.

II. Whether the Division of Taxation has met its burden to show that the imposition of the fraud penalty pursuant to Tax Law § 1145 (a)(2) was proper.

III. Whether the assessment of sales and use taxes against petitioner was barred by the statute of limitations.

FINDINGS OF FACT

1. 1126 Genesee Street, Inc. ("petitioner") operated a grocery store/mini-mart known as the A&N Gas Mart at 1126 Genesee Street, Buffalo, New York at which gasoline, certain food items, cigarettes, beer, soda and candy were sold.

2. In October 1997, the Division of Taxation ("Division") commenced a field audit of petitioner's business. The auditor spoke by telephone to an individual at the business who referred him to Nagi A. Awas, petitioner's tax preparer. On November 6, 1997, the auditor sent a letter to Mr. Awas scheduling a field audit of petitioner's books and records pertaining to sales and use tax liability for the period December 1, 1994 through October 31, 1997. A subsequent letter revised the period under audit (December 1, 1994 through August 31, 1997). The letter asked that the following records be made available for examination: financial statements; journals; ledgers; sales invoices; purchase invoices; cash register tapes; sales and use tax returns; Federal income tax returns; and exemption certificates.

At the scheduled meeting between the auditor and petitioner's representative, the following records were made available to the auditor: sales tax returns; Federal income tax returns; a daily sales log; profit and loss statements; bank statements; canceled checks and some purchase invoices. No cash register tapes or source sales records were produced. Petitioner failed to provide work papers supporting the sales tax returns, sales journals, cash receipts journals, check disbursements journal, purchase journal or food stamp allowance documentation. In addition, petitioner provided no documentation of sales tax collected or of taxable sales. The auditor made additional requests for records, both orally and in writing, to Mr. Awas; however, no additional records were ever provided.

3. The auditor determined that the books and records provided by petitioner were insufficient to perform a detailed audit. This determination was based upon the fact that there were no source sales documents such as cash register tapes or sales invoices and that there was no documentation of tax collected or of taxable sales. Moreover, there was a discrepancy between purchases as indicated on the purchase invoices and the canceled checks and the amount of purchases reported on petitioner's Federal income tax returns (the amounts reported on the returns were less than indicated by the purchase invoices and canceled checks). No information regarding food stamp sales was provided to the auditor.

The auditor discovered that petitioner's taxable sales were being reported by first calculating the increase in cash per day in the cash register and then multiplying that amount by a ratio of taxable to nontaxable sales determined by petitioner's tax preparer, Mr. Awas.

4. In an attempt to verify petitioner's purchases, the auditor sent out letters to various suppliers of soda, beer, cigarettes and groceries. The auditor learned the names of these suppliers from petitioner's purchase invoices. Most of the suppliers responded to the auditor's requests for information. Gasoline purchases and sales were not audited; therefore, no assessment of additional tax was made on petitioner's sales of gasoline.

From the suppliers which responded to the auditor's request for information, he determined that petitioner had made purchases totaling $185,515.00 for the period January 1, 1995 through August 31, 1997. Petitioner's purchase records for those vendors indicated taxable purchases of $20,158.00 for the same period. Petitioner did not have purchase records for all months of the audit period so the auditor determined an average monthly purchase amount and projected it to arrive at estimated taxable purchases from these vendors per petitioner's records in the amount of $21,773.00. Therefore, it was determined that petitioner had unreported taxable purchases, from these vendors alone, in the amount of $163,742.00 for the audit period.

Petitioner's sales tax returns indicated gross sales of $237,556.00 and taxable sales of $118,023.00 for the audit period. The auditor determined that petitioner's total purchases of taxable goods were $267,445.00 which included the purchases obtained from third-party information. Therefore, the auditor was able to ascertain that petitioner's purchases of taxable items exceeded its reported taxable sales for the audit period.

5. The auditor then marked up petitioner's taxable purchases by a percentage obtained from its Federal income tax return for 1995, i.e., petitioner's own markup percentage of 31.83 percent was utilized. The reason for applying the markup percentage from the 1995 return was that this was the only return that could verify and separate gasoline purchases from petitioner's other purchases. After applying this markup percentage, taxable sales were found to be $352,567.00. After the subtraction of reported taxable sales ($118,023.00), it was determined that petitioner had unreported taxable sales in the amount of $234,544.00. By applying the sales tax rate in Erie County (8 percent), the auditor found additional tax due in the amount of $18,763.00.

6. The Division issued a Statement of Proposed Audit Adjustment, dated July 17, 1998, to petitioner which asserted additional tax due of $18,763.00, plus penalties (including fraud penalty) and interest, for a total amount due of $38,559.98. A copy of the Statement of Proposed Audit Adjustment was also sent to petitioner's then representative, Nagi A. Awas. The auditor

met with Mr. Awas on August 28, 1998 but, at this meeting, the only issues raised by Mr. Awas were the markup percentage and abatement of penalties.

7. On December 17, 1998, a Notice of Determination was issued to petitioner in the amount of $18,763.00 plus penalties of $14,514.00 (which included fraud penalty) and interest of $6,751.37, for a total amount due of $40,028.37 for the audit period.[1]

8. Fraud penalty was imposed by the Division for the following reasons:

a. Consistent and substantial underreporting of sales and sales tax due over a period of 11 sales tax quarters;

b. A failure or refusal to produce complete purchase records and source documents to substantiate sales;

c. Audited taxable purchases were greater than petitioner's reported gross and taxable sales;

d. Petitioner maintained no record of taxable sales and sales tax collected;

e. Petitioner made purchases in cash which were not reflected in purchase records provided;

f. Petitioner substantially understated purchases on Federal income tax returns;

g. Petitioner's corporate principal controlled all aspects of the business yet neither he nor his representative during the audit (Nagi A. Awas) provided any explanation for the consistent and substantial underreporting.

[1] A Consent Extending Period of Limitation for Assessment of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law (form AU-2.10) was signed by representatives of petitioner and the Division on January 22, 1998 and January 29, 1998, respectively, whereby it was agreed that taxes due for the period December 1, 1994 through May 31, 1995 could be assessed at any time on or before June 20, 1998.

9. The case was referred to the Division's Revenue Crimes Bureau for consideration as a criminal fraud case. It was not accepted because it did not meet the dollar threshold; however, the Revenue Crimes Bureau agreed that elements of fraud existed. Therefore, the case was completed as a civil audit including the imposition of civil fraud penalties.

10. Nagi A. Awas is in the business of tax preparation and accounting; he is not, however, a certified public accountant or a public accountant. He does not possess a degree in accounting although he took accounting courses in college. Mr. Awas collected the information from petitioner and prepared his sales tax returns from such information provided.

Petitioner kept track of its sales by its principal's counting the cash in the cash register and writing down the daily totals. Cash register receipts were not retained by petitioner. Mr. Awas prepared petitioner's sales tax returns from the information provided to him, to wit, the daily totals of cash as computed by petitioner's principal. He never compared petitioner's check disbursement journal with the purchase invoices.

Petitioner's business was located in a high crime area where shoplifting was prevalent. Petitioner maintained no records to substantiate how much was stolen from the business during the audit period nor was anyone ever prosecuted for a theft from the business.

11. At the hearing, the auditor, when questioned about the invoices from Try-It Distributing Co., Inc. ("Try-It"), admitted that he included, when calculating petitioner's purchases of beer and wine coolers, the amounts charged to petitioner by Try-It for beverage deposits ($.05 per bottle). Petitioner introduced into evidence an invoice from Try-It dated November 16, 1995 as well as a computer printout from Try-It which represented sales to petitioner for the month of November 1995.

For November 1995, the auditor utilized a purchase amount of $1,908.90. During that month, petitioner was charged the sum of $108.55 for deposits, which amount should not have been included when calculating purchases from Try-It. The auditor noted that Try-It was the only distributor (of those included in this audit) which broke out its pricing in this manner.

Pursuant to the auditor's analysis of petitioner's purchases, petitioner made purchases from Try-It totaling $19,985.00 for 1995, $21,204.00 for 1996 and $12,421.00 for the period January 1 through August 31, 1997, for a total of $53,610.00 for the audit period.

SUMMARY OF THE PARTIES' POSITIONS

12. Petitioner alleges as follows:

a. Pursuant to Tax Law § 1147(b), assessment of additional tax must be made within three years from the date of filing a return. Petitioner executed a consent which extended the statute of limitations for assessment for the period December 1, 1994 through May 31, 1995 until June 20, 1998. However, the Notice of Determination was not issued until December 17, 1998. Accordingly, the Division may not assess additional tax against petitioner for the sales tax quarters from December 1, 1994 through August 31, 1995;

b. Petitioner contends that the assessment is excessive by virtue of the Division's failure to allow for a pilferage or shoplifting allowance.

c. The auditor failed to take into account the number of items purchased with food stamps. Petitioner's tax preparer contends that items such as soda and candy which would be taxable if purchased with cash are nontaxable if purchased with food stamps. Petitioner also contends that 70 percent of its sales of soda, candy and taxable grocery items are purchased with food stamps. Petitioner's redemption of food stamps was $1,301.00 for December 1994 and $21,268.00 for 1995;[2]

d. The Division, in an attempt to circumvent the three-year statute of limitations, asserted fraud which, if proven, would permit the assessment of additional tax at any time. Petitioner maintains that the Division has failed to meet its burden of proving fraud on the part of petitioner**.** It is contended that petitioner's business is located in a high crime area, that petitioner's corporate principal is a man of limited education and English speaking ability and that his representative, Mr. Awas, has had a difficult time in getting him to understand the level of record keeping which is required.

10. The position of the Division may be summarized as follows:

a. Since petitioner failed to maintain adequate books and records, the Division was within its rights to employ external indices to determine petitioner's tax liability;

b. Petitioner has failed to prove that the audit methodology or the amount of the assessment was erroneous;

c. The Division has established, by clear and convincing evidence, that petitioner was properly subject to the fraud penalty. If, however, the fraud penalty is not sustained, the Division asserts that petitioner is liable for the negligence penalties as set forth in Tax Law § 1145(a)(1);

d. Because petitioner is asserting the statute of limitations as an affirmative defense, it has the burden of proof on this issue. However, the assessment is timely because the

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[2] In a letter from petitioner's tax preparer, Nagi Awas, to Bruce Rauch, Conciliation Conferee, subsequent to a Bureau of Conciliation and Mediation Services conference, Mr. Awas claims that petitioner's redemption of food stamps was in the amount of $74,284.00 for the audit period. Attached to the letter was a computer printout dated July 26, 1999 indicating petitioner's food stamp redemptions for various periods from 1993 through 1995. The amounts claimed in Mr. Awas's letter are not substantiated by this printout.

returns filed by petitioner were fraudulent and there is, therefore, no statute of limitations for assessment of tax.

CONCLUSIONS OF LAW

A. It is well established that every person required to collect tax must maintain and make available for audit upon request records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (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 (Tax Law § 1138[a]; ***see, Matter of Ristorante Puglia, Ltd. v. Chu,*** 102 AD2d 348, 478 NYS2d 91, 93; ***Matter of Surface Line Operators Fraternal Org. v. Tully,*** 85 AD2d 858, 446 NYS2d 451, 452). To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment. The purpose of such an examination is to determine whether the records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit ***(Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109; ***Matter of King Crab Rest. v. State Tax Commn.***, 134 AD2d 51, 522 NYS2d 978).

B. Petitioner received an audit appointment letter specifying the sales tax records requested for audit review. The auditor met with petitioner's representative, Nagi A. Awas, who prepared its sales tax returns. The auditor never met petitioner's corporate principal. The only records made available to the auditor were sales tax returns, Federal income tax returns, a daily sales log, profit and loss statements, bank statements, canceled checks and some purchase invoices. No cash register tapes, sales invoices or other source documents to substantiate sales were provided to the auditor. Given the clear, written request for records, and the response thereto by petitioner through its tax preparer, it was entirely appropriate for the Division's auditor to conclude that petitioner's records were inadequate and insufficient for purposes of conducting a detailed audit of such records to verify taxable sales and sales tax due. Despite the fact that the auditor made additional requests to Mr. Awas for additional books and records, none were ever provided. Accordingly, the auditor's decision to go forward with an indirect auditing methodology and estimate sales tax due on the basis of external indices is sustained.

C. Where, as here, the Division seeks to determine a taxpayer's sales tax liability on the basis of an indirect audit method, the methodology selected must be reasonably calculated to reflect the taxes due (***Matter of Ristorante Puglia, Ltd. v. Chu, supra; Matter of W.T. Grant Co. v. Joseph,*** 2 NY2d 196, 159 NYS2d 150, 157, ***cert denied*** 355 US 869, 2 L Ed 2d 75). However, exactness in the outcome of the audit method is not required (***Matter of Markowitz v. State Tax Commn.,*** 54 AD2d 1023, 388 NYS2d 176, 177, ***affd*** 44 NY2d 684, 405 NYS2d 454; ***Matter of Lefkowitz,*** Tax Appeals Tribunal, May 3, 1990). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (***Matter of Meskouris Bros. v. Chu,*** 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully, supra)***.

Since petitioner had incomplete purchase records and had no source documentation to substantiate taxable sales and sales tax collected, the auditor's decision to obtain third-party verification of purchases from petitioner's suppliers was clearly reasonable. After obtaining petitioner's purchases from these suppliers, the auditor, in determining whether additional tax was due, computed a markup percentage which was obtained from petitioner's Federal income tax return (***see***, Finding of Fact "5") and applied this percentage to audited taxable sales. Petitioner's reported taxable sales were subtracted and the applicable tax rate (8 percent) was applied to the resulting amount of additional taxable sales ($234,544.00) to arrive at additional tax due in the amount of $18,763.00.

D. Despite contentions that petitioner is entitled to a theft or pilferage allowance, no evidence, other than the bare allegation of entitlement thereto by petitioner's tax preparer, Mr. Awas, was presented to substantiate the amount of theft or pilferage. "Documentation must be maintained for any refund or credit claimed" (20 NYCRR 533.2[d][3]).

The same is true of petitioner's assertion that he is entitled to an additional credit for purchases made with food stamps. 20 NYCRR 533.2(d)(7) provides as follows:

> Records. In addition to the records required to be kept pursuant to this section, retail food stores and other participants approved for participation in the federal food stamp program are required to keep and make available to the department upon request the following;
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> * * *
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> (ii) records of receipts indicating whether payment is by food stamps; and
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> (iii) true and complete copies of redemption certificates, validated by the bank; or true and complete copies of bank deposit slips or receipts showing the amount of food stamps deposited with, cashed at or otherwise tendered to the bank, validated by the bank; or both such redemption certificates and deposit slips or receipts, if available; and any other document validated by a bank as to the amount of food stamps deposited, cashed or otherwise tendered.

Other than the computer printout for certain periods from 1993 to 1995 (the audit period at issue did not begin until December1994) reflecting redemptions for certain months, no records were provided to show what items were purchased with food stamps (taxable or nontaxable) and in what quantities during the audit period. Accordingly, petitioner's claim that it is entitled to an allowance for food stamp sales is rejected.

E. Petitioner has, however, shown that it is entitled to an adjustment in additional tax due based on the auditor's failure to correctly determine purchases made from Try-It (***see***, Finding of Fact "11"). As previously noted, the auditor admitted that the amount of bottle deposits paid by petitioner should not have been included when determining purchases of beer and wine coolers from Try-It. For November 1995, the amount of $108.55 was erroneously included in the total of $1,908.90 which was attributed to purchases from Try-It for that month. Accordingly, $108.55 divided by $1,908.90, or 5.69 percent, was overstated for that month. Applying that error rate to the total purchases made by petitioner from Try-It for the audit period ($53,610.00) results in a reduction in purchases from Try-It in the amount of $3,050.41. Petitioner's total purchases for the audit period, as calculated by the auditor, were $267,445.00. As a result of this error, petitioner's purchases should be $267,445.00 less $3,050.41 resulting in adjusted purchases of $264,394.59. Applying the markup percentage of 31.83 percent results in adjusted sales of $348,551.39. After subtracting petitioner's reported taxable sales of $118,023.00, additional taxable sales are $230,528.39. Additional tax due, at the applicable tax rate in Erie County (8 percent), is hereby determined to be $18,442.27, an adjustment of $321.73 from the amount originally assessed. Penalties and interest assessed must be adjusted accordingly.

F. Tax Law § 1147(b) provides that, "except in the case of a willfully false or fraudulent return with intent to evade the tax no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return." Accordingly, if petitioner is found to be subject to the fraud penalty, the three-year statute of limitations is not applicable and the tax may be assessed by the Division at any time. Therefore, before considering petitioner's contentions that the Division's assessment of additional tax is time barred, it must first be determined whether the fraud penalty was properly imposed.

G. Tax Law § 1145(a)(2) provides, in pertinent part, as follows:

> If the failure to pay or pay over any tax to the commissioner of taxation and finance within the time required by this article is due to fraud, in lieu of the penalties and interest provided for in subparagraphs (i) and (ii) of paragraph one of this subdivision, there shall be added to the tax (i) a penalty of fifty percent of the amount of the tax due, plus (ii) interest on such unpaid tax . . . .

H. In ***Matter of Cinelli*** (Tax Appeals Tribunal, September 14, 1989), the Tribunal provided the following guidance in determining whether a taxpayer may be subject to a civil fraud penalty:

> The burden of showing fraud under § 1145(a)(2) has consistently been interpreted to reside with the Division (***Matter of Ilter Sener d/b/a Jimmy's Gas Station***, Tax Appeals Tribunal, May 5, 1988; ***Matter of Nicholas Kucherov d/b/a Nick's Marine***, State Tax Commn., April 15, 1987, ***affd Kucherov v. Chu*** [147 AD2d 877, 538 NYS2d 339]). The standard of proof necessary to support a finding of fraud requires "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing." (***Matter of Ilter Sener***, ***supra***, citing, ***Matter of Walter and Gertrude Shutt***, State Tax Commn., July 13, 1982).
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> For a taxpayer to be subject to a civil fraud penalty, willful intent is a critical element; the individual or the corporation, acting through its officers, must have acted deliberately, knowingly, and with the specific intent to violate the Tax Law (***Matter of Cousins Service Station, Inc.***, Tax Appeals Tribunal, August 11, 1988). Fraud need not be established by direct evidence, but can be shown by surveying the taxpayer's entire course of business and drawing reasonable inferences therefrom (***see***, ***Korecky v. Commr.***, 781 F2d 1566 [11th Cir 1986]; ***Briggs v. Commr.***, 440 F2d 5 [6th Cir 1962]).

In ***Matter of Waples*** (Tax Appeals Tribunal, January 11, 1990), the Tribunal summarized some of the relevant considerations as follows:

> Because the sales tax penalty provisions are modeled after Federal penalty provisions, Federal statutes and case law are properly used for guidance in ascertaining whether the requisite intent for fraud has been established (***Matter of Uncle Jim's Donut and Dairy Store, Inc.***, Tax Appeals Tribunal, October 5, 1989; ***Matter of Ilter Sener***, ***supra***). Factors found to be significant include consistent and substantial understatement of tax, the amount of the deficiency itself, a pattern of repeated deficiencies, the taxpayer's entire course of conduct and the taxpayer's

> failure to maintain bank accounts or adequate records (***see***, ***Merritt v. Commr.***, 301 F2d 484; ***Bradbury v. Commr.***, T.C. Memo 1971-63; ***Webb v. Commr***., 394 F2d 366; ***see also***, ***Matter of AAA Sign Co.***, Tax Appeals Tribunal, June 22, 1989). Because direct proof of the taxpayer's intent is rarely available, fraud may be proved by circumstantial evidence, including the taxpayer's entire course of conduct (***Intersimone v. Commr.***, T.C. Memo 1987-290; ***Stone v. Commr.***, 56 T.C. 213, 223-224; ***Korecky v. Commr***., 781 F2d 1566). Fraud may not be presumed or imputed, but rather must be established by affirmative evidence (***Intersimone v. Commr.***, ***supra***). Hence, a finding of fraud should not be sustained where the attendant circumstances create at most only a suspicion of fraud (***Goldberg v. Commr.***, 239 F2d 316). The issue of whether fraud with the intent to evade payment of tax has been established presents a question of fact to be determined upon consideration of the entire record (***Jordan v. Commr.*** T.C. Memo 1986-389; ***see***, ***Matter of AAA Sign Co.***, ***supra***).

I. For the following reasons, it is hereby determined that the fraud penalty was properly imposed by the Division:

(1) Petitioner substantially underreported taxable sales and sales tax due. The information provided by petitioner's suppliers indicated that its purchases of taxable items were greater than its reported taxable sales for the audit period. Its purchases of taxable goods were found to be greater than even its gross sales reported for the period. In addition, it is uncontroverted that petitioner reported his sales based upon cash on hand, and since he also made cash purchases, it is obvious that he had knowledge that cash on hand could not and did not accurately reflect sales. This clearly is substantial under reporting and while, as petitioner correctly points out (***see***, ***Matter of Yel-Bom's Service Center, Inc.***, Tax Appeals Tribunal, May 10, 1990), substantial underreporting alone is not enough to establish fraud, it is strong evidence of fraud (***Matter of Cousins Service Station, Inc.***, ***supra***; ***Merritt v. Commr.***, ***supra***);

(2) Petitioner's substantial underreporting continued for the entire audit period, a period of nearly three years (eleven sales tax quarters). As noted by the Tax Court in ***Intersimone***

v. Commr.* (*supra), consistent and substantial understatement of large amounts of taxable income over a period of years in and of itself is strong evidence of fraud;

(3) Petitioner failed to maintain books and records. As previously noted, it computed sales by totaling cash on hand at the end of each day. Its purchase invoices were incomplete. No cash receipts journal, check disbursements journal or food stamp allowance documentation was provided. Petitioner failed to maintain or produce for inspection by the auditor, any source documentation to substantiate sales and the amount of sales tax collected. The mere fact that petitioner's purchase records, from the vendors who responded to the auditor's request for third-party verification, indicated taxable purchases of $20,158.00 for the audit period when such vendors reported sales of taxable items to petitioner in the amount of $185,515.00 demonstrates the extent of petitioner's failure to maintain adequate books and records. The failure of a taxpayer to maintain a complete and accurate set of records is evidence of fraud (***Matter of Lefkowitz***, Tax Appeals Tribunal, May 3, 1990);

(4) Petitioner either made substantial purchases in cash or paid for its purchases from a bank account the records of which were not provided to the auditor. Moreover, petitioner's purchases could not be reconciled with its canceled checks or its Federal income tax returns. Sales were calculated by counting the cash in the cash register each day when it was clear that, after making cash purchases, such a method could not reflect an accurate amount of sales. Petitioner's corporate principal had the opportunity to appear at the hearing and to testify concerning his intent; however, he chose not to do so. The Tax Appeals Tribunal, noted that petitioner's failure to appear and to offer an explanation for

the absence of records "is additional support for the finding of fraud." (***Matter of Waples***, ***supra***);

(5) In an attempt to explain the reason why petitioner failed to appear to testify at the hearing and, in addition, to account for his failure to maintain complete books and records to document his purchases and sales, petitioner's tax preparer, Nagi. A. Awas, testified that petitioner's corporate principal is a person of limited education and English speaking ability. However, this record contains no proof to support these contentions since neither the auditor nor this Administrative Law Judge was given the opportunity to meet and observe him. Mr. Awas prepared petitioner's sales tax returns from the information provided, i.e., summaries of sales based upon the amount of cash in the cash register at the end of each day. Petitioner did not provide Mr. Awas with sales invoices, cash register tapes or other source documents to substantiate sales. Mr. Awas admitted that he had informed petitioner that more complete books and records were needed. Failure to supply an accountant (or other tax preparer) with all the necessary information pertaining to a taxpayer's various transactions has also been found to be an indication of an intention to evade tax ***(Intersimone v. Commr.***, ***supra***; ***Stoltzfus v. U.S.***, 398 F2d 1002 ***cert denied*** 393 US 1020).

J. In summary, after surveying petitioner's entire course of conduct, the only reasonable conclusion that can be reached is that it willfully, knowingly and intentionally underpaid the sales and use taxes due and owing. The substantial and consistent underreporting of taxable sales and sales tax due, failure to maintain or produce for audit complete and accurate books and records, transaction of business in cash (making purchases in cash and then determining sales by counting cash on hand thereby knowing that cash on hand could not be an accurate reflection of sales), failure to provide its tax preparer with necessary information to properly prepare tax returns and failure to appear to offer any explanation for his course of conduct constitute strong evidence that petitioner deliberately underreported and underpaid its sales tax liability. Accordingly, the Division's imposition of the fraud penalty pursuant to Tax Law § 1145(a)(2) was proper.

K. While it is clear that, for some of the sales tax quarters at issue in this matter, the Division assessed taxes against petitioner more than three years after the returns for such quarters were filed (or the period covered by the consent expired), the assessment of sales and use taxes against petitioner was not barred by the statute of limitations since, pursuant to Tax Law § 1147(b), assessment of such taxes could be made at any time.

L. The petition of 1126 Genesee Street, Inc. d/b/a A&N Gas Mart is granted to the extent indicated in Conclusion of Law "E"; the Division of Taxation is hereby directed to modify the Notice of Determination issued December 17, 1998 accordingly; and, except as so modified, the petition is in all other respects denied.

DATED: Troy, New York
October 4, 2001

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE