STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
GENERAL BUILDING APPLIANCE CORP. AND JOSEPH INGRALDI	:	DETERMINATION DTA NOS. 819297 & 819298
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1995 through February 28, 1999.	:	

Petitioners, General Building Appliance Corporation, 750 Stewart Avenue, Garden City, New York 11530 and Joseph Ingraldi,[1] 25 Scrimshaw Drive, Southhampton, New York 11968, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1995 through February 28, 1999.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on October 27, 2003 at 10:30 A.M., with all briefs to be submitted by February 23, 2004, which date began the six-month period for the issuance of this determination. Petitioners appeared by Donald Schwartz, Esq. and Gary S. Weinick, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether petitioners have established that the Division of Taxation used an unacceptable audit method in conducting its audit of General Building Appliance Corporation, or made errors

[1]Petitioner Joseph Ingraldi passed away on April 25, 2004.

in the application of such audit in arriving at the amount of tax due, so as to require cancellation or reduction of the amount of tax determined due upon audit.

II. Whether Joseph Ingraldi was a person required to collect and remit sales and use taxes on behalf of General Building Appliance Corporation.

III. Whether the Division of Taxation has established that petitioners were properly subject to the imposition of a fraud penalty.

IV. Whether the notices of determination were timely issued.

FINDINGS OF FACT

1. On December 31, 2001, the Division of Taxation ("Division") issued to petitioner General Building Appliance Corporation, d/b/a Hampton Sales, a Notice of Determination of sales and use taxes due for the period September 1, 1995 through February 28, 1999 in the amount of $819,046.66, plus penalty (including fraud penalty) and interest. On the same date, the Division issued to petitioner Joseph Ingraldi a Notice of Determination of sales and use taxes due for the same period and amount, including penalty (fraud) and interest, stating that petitioner was an officer or responsible person of General Building Appliance Corporation. The corporation operated a wholesale and retail appliance business in Garden City, New York.

2. In August 1998, the Division of Taxation began a sales tax field audit of the corporation. An appointment letter, dated August 19, 1998, was mailed to the corporation advising that a sales tax field audit was being conducted by the Division. The letter requested that all books and records pertaining to the sales tax liability of General Building Appliance Corporation be made available on the appointment date, September 21, 1998, including financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use

tax returns, Federal income tax returns and exemption certificates for the original period of the audit, September 1, 1995 through May 31, 1998.

3. The auditor was provided with the corporation's sales tax returns, Federal income tax returns, a general ledger, monthly sales summaries, exemption documents and bank statements. Requested but not provided were worksheets supporting the sales tax returns, a cash receipts journal and purchase invoices. Initially, it appeared to the auditor that the corporation's books and records accurately reflected the corporation's activities, as the sales tax returns, sales recorded in the corporation's books, Federal income tax returns and sales invoices all reconciled. However, after a more careful review of the books and records, the auditor determined that they were not adequate to accurately determine the corporation's business activities for the audit period. Specifically, the auditor determined that the books and records were not in auditable condition, that the books and records did not allow the auditor to trace back to any source documents and that there were inadequate internal control procedures.

A review of the sales tax returns by the auditor revealed that the corporation was claiming approximately 80%[2] of its gross sales as nontaxable, a figure the auditor considered high for a retail appliance business. The auditor also found such a percentage of nontaxable sales unusual in light of the information on the monthly sales summaries which indicated that a majority of claimed nontaxable sales were to the individuals to whom the merchandise had been delivered, rather than as resales or sales to exempt entities.

The questions raised by the sales tax returns and the monthly summary sheets led the auditor to the conclusion that a test period audit was necessary. The auditor had Mr. Ingraldi

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[2]For the initial audit period of September 1, 1995 through May 31, 1998, the business claimed nontaxable sales of $10,014,173.00 out of total gross sales of $12,533,294.00.

execute, as secretary of the corporation, a Test Period Audit Method Election on November 4, 1998, in which petitioner General Building Appliance Corporation agreed to the Division's using a test period audit method to conduct its audit. The election states that a test period audit method may not be used to determine a tax liability where a taxpayer's records are adequate unless the taxpayer consents to such a method. The auditor chose the month of May 1998 as the test period because it was without sales fluctuations. In addition, the auditor's examination of the records provided indicated that the month of May 1998 was consistent with the entire audit period in terms of gross sales, nontaxable sales claimed and the taxable ratio of the business.

4. The auditor requested that the corporation provide all the sales invoices for the month of May 1998 as well as the exemption certificates for the same period. The sales invoices were provided in two folders, one marked "wholesale invoices" and one marked "retail invoices." The vast majority of the claimed nontaxable sales were contained in the wholesale folder. Some exemption certificates were provided; however, the resale certificates and exempt organization certificates were incomplete. The sales invoices contained two sections entitled "delivery to" and "sold to." The delivery destination sections were completed in detail, showing the name, address, telephone number and directions for the delivery destination. In contrast, the sold to sections were generally incomplete, often containing only the name of the purchaser. The auditor discovered many instances where the deliver to sections and the sold to sections appeared to have been completed in either different handwritings or different pens, or both.

5. The auditor next compiled a transcription of the claimed nontaxable sales. She recorded from each invoice the deliver to section and sold to section information and, where appropriate, matched the sold to information on the invoice to the exemption certificates which petitioner kept on file. In those cases where information was missing on the invoice, the auditor

added the information, such as addresses, if available on the exemption certificates. The auditor then prepared a list of missing exemption certificates and provided it to petitioners.

6. The auditor sent letters to individuals contained on the deliver to sections of the sales invoices, to confirm Mr. Ingraldi's statements that certain deliveries were made on behalf of another appliance dealer, making these sales for resale, as the actual purchaser was not the customer indicated on the invoice but another dealer. The letter sent by the auditor requested of the person receiving delivery information as to whether another dealer was involved or whether the purchase was made directly from the corporation. The auditor did not consult with petitioners before sending the letters to the parties shown on the invoices. All replies indicated that no other dealers were involved and that the purchase was made from the corporation. There were eleven instances where the customer responding provided a copy of the sales invoice which indicated that the customer had paid sales tax to the corporation, but a review of petitioners' copy of the same invoice indicated that no sales tax was collected.

The auditor also sent letters to the businesses or individuals listed in the sold to sections of the invoices. Again, the auditor did not consult with petitioners before sending the letters to the parties shown on the invoices. The responses indicated that the entities had either never done business with petitioners or had not done business during the period at issue.

In those situations where the exemption certificates were insufficient, that is they lacked certain required information, the auditor checked the Division's Business Summary Inquiry System using the business's identification numbers and found that the party listed on the exemption certificates was either unregistered for sales tax purposes during the audit period or had been inactivated prior to the transaction date. The auditor subpoenaed the corporation's bank statements for the month of May 1998, and a review of the checks deposited in the

corporation's account revealed they were from the individuals listed on the deliver to sections of the invoices, not the sold to sections. In addition, a review of the canceled checks showed no payments from other appliance dealers to General Building Appliance Corporation.

7. Following the analysis of the sales invoices, customer responses, bank statements, canceled checks and exempt certificates for the test period of May 1998, the auditor determined that 82% of the corporation's sales were taxable, and 18% were nontaxable. The auditor disallowed 77% of claimed nontaxable sales for one or more of the following reasons: there was no exemption certificate; the person listed in the "deliver to" section of the invoice dealt only with petitioners, and not with a third party; the person or entity listed in the "sold to" section of the invoice had not done business with petitioners; the copy of the canceled check indicated payment to the corporation, not a third party; the "sold to" business was not active for sales tax purposes; or, the exempt certificate was either incomplete or for a business that was unregistered or inactive.

The auditor disallowed nontaxable status to two sales, which the invoices stated had been made to Mercy Hospital, because no exemption certificates were provided. During the audit and hearing, petitioner did not provide any substantiation, such as an exemption certificate from the hospital, that these sales actually occurred as indicated.

The results of the test period audit performed for the month of May 1998 were applied against total nontaxable sales claimed for the initial audit period of $10,014,173.00 resulting in disallowed nontaxable sales of $7,748,666.00 and tax due of $648,619.95 for the original audit period of September 1, 1995 through May 31, 1998. All documents used by the auditor in her determination to disallow certain nontaxable sales and to compute the amount of tax due were provided to petitioners' representative, Laurence Keiser.

8. On July 29, 1999, the auditor referred the matter to the Revenue Crimes Bureau of the Department of Taxation and Finance. Following a case review by the Revenue Crimes Bureau, the case was referred and accepted by the Nassau County District Attorney's Office. On June 21, 2000, petitioner Joseph Ingraldi was arrested and charged with grand larceny in the third degree, a Class D Felony (Penal Law § 155.35), falsifying business records in the first degree, a Class D Felony (Penal Law § 175.10), offering false instruments for filing in the first degree, a Class E Felony (Penal Law § 175.35) and filing fraudulent sales tax returns (Tax Law § 1817[b]). On February 21, 2001, in full satisfaction of all the charges, Mr. Ingraldi pled guilty in Nassau County Court to falsifying business records in the first degree. Mr. Ingraldi admitted during the taking of his plea that during the period June 1, 1998 through August 31, 1998, he intentionally altered sales invoices of the business records of General Building and knowingly submitted false sales tax returns both with the intent to commit the crime of grand larceny by withholding the proper amount of sales tax. He was sentenced to a conditional discharge which included restitution to the Division in the amount of $537,563.00, which was paid in full on March 14, 2001.

The restitution amount was arrived at using a computation proposed by Mr. Ingraldi's criminal attorney, Jared Scharf, Esq., which was forwarded to the District Attorney's Office. Mr. Scharf stated in correspondence that he had performed a review of sales invoices for the period October 1998 through January 1999 and determined a taxable ratio of 61.54 percent. Although this figure was accepted by the District Attorney's Office, no work papers or documentation were provided to the Division to substantiate this conclusion. The matter was returned to the Division for further action relating to the civil liability.

9. Upon the return of the case, the auditor determined that during the criminal proceedings and subsequent settlement, the original audit period of September 1, 1995 through May 31, 1998 had been extended to include the period June 1, 1998 through February 28, 1999. During a meeting with petitioners' representative, Mr. Laurence Keiser, it was agreed that the audit be updated to include the additional quarters used in the computation employed to determine the restitution amount that was part of the criminal matter. On September 5, 2001, an updated appointment letter and checklist were provided to petitioners' representative to include the period June 1, 1998 through February 28, 1999. No records were provided by petitioners for this additional audit period.

The auditor's review of the corporation's sales tax returns for the two-year and three-month period immediately following the period at issue revealed that General Building was reporting a taxable ratio of approximately 81%, as compared to the taxable ratio reported during the audit period of 18%. This 81% taxable ratio compares favorably with the 82% taxable ratio determined on audit.

10. On October 29, 2001, the Division issued to petitioners a Statement of Proposed Audit Adjustment for the period September 1, 1995 through February 28, 1999. The statement indicated that 77.375% of claimed nontaxable sales for the audit period of $12,453,432.00 were being disallowed, resulting in disallowed nontaxable sales of $9,635,843.00 and additional sales tax due of $819,046.33. Petitioners were credited with the restitution payment of $537,563.00. Civil fraud penalties were imposed based upon the auditor's conclusion that there had been consistent underpayment and a scheme to alter invoices and on Mr. Ingraldi's plea to criminal charges.

11. The auditor concluded that Mr. Ingraldi was a responsible person of General Building. Mr. Ingraldi was the owner of the corporation, an officer of the corporation, managed the day-to-day activities of the business, signed a waiver and sales tax returns as either secretary or president of the corporation, maintained the business's checkbook and made the bank deposits on behalf of the business. Mr. Ingraldi signed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes which extended the period of assessment for the period September 1, 1995 through February 28, 1996 to March 20, 1999. Subsequently, petitioners' representative executed two additional consents, which provided that the sales and use tax due for the period September 1, 1995 through February 28, 1997 could be determined on or before March 20, 2000.

CONCLUSIONS OF LAW

A. Where a taxpayer's records are insufficient, unreliable and inadequate to verify, upon audit, the amount of the sales and use taxes due for the period under examination, the Division is authorized to estimate such tax liability on the basis of external indices (Tax Law § 1138[a][1]; ***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). In this case, petitioners did submit some of the requested records for audit, such as sales and income tax returns, monthly sales summaries and bank statements. However, petitioners failed to provide the worksheets supporting the sales tax returns, a cash receipts journal and purchase invoices. Although it initially appeared that the books and records accurately reflected the business activities of the corporation in that they reconciled with each other, the auditor's review of the sales tax returns and monthly summary statements raised concerns as to the accuracy of the books and records provided. A more careful review of the records provided, records obtained by

the auditor during the audit and the third-party responses to the auditor's inquiries revealed that the corporation's books and records provided to the auditor were unreliable, inaccurate and apparently fabricated to the extent that the case was referred to the Revenue Crimes Bureau and eventually the Nassau County District Attorney's Office, resulting in the arrest and conviction of Mr. Ingraldi. Under these circumstances, it was clearly appropriate for the Division to resort to an indirect audit methodology and estimate sales tax due on the basis of external indices. 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). 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)***.

B. In this case petitioners have shown no error in either the audit method utilized or the results derived from its application. Petitioners have not shown that the methodology was in any manner incorrect or unreasonable. Petitioners have not come forward with any documents, including reliable source records of sales or purchases, to refute the third-party information obtained by the auditor and relied upon in arriving at the assessments. While petitioners' post-hearing brief claims that records were adequate, there is no testimony by anyone on behalf of the corporation which in any manner supports this claim nor, as stated above, were any reliable

records offered in evidence. Although the initial review by the auditor indicated that the books and records provided could be reconciled, they also raised questions based upon the high percentage of claimed nontaxable sales in light of the majority of the sales being made to individuals as revealed on the monthly sales statements. Furthermore, a review of the information received from third parties established that the sales invoices and therefore the sales tax returns had been falsified. Petitioners' claim, by brief, that the books and records were reliable and accurate is belied by the evidence adduced at hearing, including both the auditor's testimony and the third-party information. Petitioners' claim simply is not supported by any evidence such as sales invoices, purchase invoices or exemption certificates which establish with any certainty the dollar amounts of such sales, their claimed exempt status or the inaccuracy of the amounts calculated by the auditor. The Division is clearly entitled to rely on its own audit experience in its estimation process, particularly in light of a taxpayer's failure to supply any reliable records or information concerning its operations (***Matter of Convissar v. State Tax Commn.***, 69 AD2d 929, 415 NYS2d 305; ***Matter of Giordano v. State Tax Commn.***, 145 AD2d 726, 535 NYS2d 255).

Petitioners contend that the audit methodology and results are flawed because the auditor did not follow the Division's Audit Guidelines in two instances: the auditor obtained a test period agreement prior to determining the accuracy of the books and records and the auditor failed to advise petitioners that third-party inquiries were being sent to its customers, which precluded petitioners from including a statement of their own in the mailings. It is first noted that the guidelines have no legal force or effect, nor do they possess precedential value (20 NYCRR 2375.12). In addition, the failure to comply with audit manual guidelines does not invalidate an assessment or confer substantive rights upon a taxpayer (***Vallone v. Commr.***, 88

TC 794; ***Stone v. Commr.***, 76 TCM 371). Finally, petitioners have failed to establish any prejudice suffered as a result of the auditor's failure to adhere to the Audit Guidelines. In sum, the audit method employed had a rational basis, the result derived therefrom is presumed to be correct in the absence of any evidence challenging such result and such result is, therefore, sustained (***Matter of Hammerman,*** Tax Appeals Tribunal, August 17, 1995; ***Matter of Fashana,*** Tax Appeals Tribunal, September 21, 1989).

C. Turning to the issue of Mr. Ingraldi's personal responsibility for the tax, penalty and interest in question, Tax Law §§ 1131(1) and 1133(a), together with numerous cases decided thereunder, have focused on a number of factors relevant to the issue of personal liability. These factors include whether the individual had authorization to sign corporate tax returns, had responsibility for maintaining corporate books and records and was involved in managing the affairs of the corporation. Other factors include the individual's status as an officer, director or shareholder, his authority to write checks on behalf of the corporation, and whether he signed checks, tax returns and other documents on behalf of the corporation. The individual's involvement with and knowledge and control over the financial and operational affairs of the corporation is relevant, as is whether the individual derived substantial income from the corporation and owned stock in the corporation ***(see***, ***Matter of Pais***, Tax Appeals Tribunal, July 18, 1991; ***Matter of Autex Corp,*** Tax Appeals Tribunal, November 23, 1988).

Petitioner has offered only the bare assertion that he was not a person responsible to collect and remit taxes on behalf of General Building, and this assertion is rejected as entirely unsupported. In contrast, the Division has produced testimony and documentary evidence establishing that petitioner was the owner of General Building and signed documents on behalf of the corporation, including the waiver forms and numerous sales tax returns, under the title of

president or secretary of the corporation. Further, the auditor observed petitioner at General Building's premises managing the day-to-day affairs of the business, maintaining the books and records of the business, writing checks and making deposits on behalf of the business and making financial decisions on the corporation's behalf. In sum, the uncontroverted evidence clearly shows Mr. Ingraldi's involvement in General Building's operations and establishes his personal responsibility to collect and remit tax on behalf of such entity. Accordingly, the Division's assessment of personal liability for the amounts at issue herein against Mr. Ingraldi is sustained. Furthermore, a responsible officer under Article 28 is personally liable for the penalty and interest owed by the corporation (***Matter of Lorenz v. Division of Taxation of Dept. of Taxation & Fin.***, 212 AD2d 992, 623 NYS2d 455, ***affd*** 87 NY2d 1004, 642 NYS2d 621; ***Matter of Waite v. Tax Appeals Tribunal***, 225 AD2d 962, 639 NYS2d 584).

D. Mr. Ingraldi asserted that the amount of the restitution agreed to as part of his plea agreement in the criminal case was in full satisfaction of any civil liability.

As part of his plea agreement, Mr. Ingraldi paid restitution in the amount of $537,563.00. The period covered by the indictment and plea agreement is June 1, 1988 through August 31, 1998. However, the amount of restitution was computed by petitioner's defense counsel for the period September 1, 1995 through February 28, 1999.

The Division is not restricted as a matter of law from issuing a Notice of Determination for the total amount of taxes it determined was due, where that amount is greater than an amount agreed to as restitution in a criminal case based on the same facts for the same time period (***see***, Penal Law § 60.27[6]; ***Farber v. Stockton***, 131 Misc 2d 470, 502 NYS2d 901; ***Matter of N.T.J. Liquors***, Tax Appeals Tribunal, May 7, 1992). Since the notices were properly issued by the Division, it is petitioners' burden of proof to show that, based on the plea agreement, the amount

set forth in the notices is erroneous because of some promise made by the prosecutor that Mr. Ingraldi relied upon to his detriment (***see***, ***Matter of Miras*****,** Tax Appeals Tribunal, October 22, 1992***; Matter of N.T.J. Liquors***, ***supra***). While the Division might not legally be bound to the terms of a plea agreement arrived at between a defendant and a prosecutor,

> an earlier promise made by a prosecutor, an agent of the State, must be treated as a highly significant factor when the State agency with the power to enforce the promise is called upon to do so. The mere fact that an agent of the State made a representation to a criminal defendant and the defendant then pleaded guilty, assertedly in reliance on the representation, is entitled to weight (***Matter of Chaipis v. State Liq. Auth.***, 44 NY2d 57, 404 NYS2d 76, 80).

It is determined that Mr. Ingraldi has failed to prove that any promises were made to him as part of the plea agreement to the effect that no further civil liabilities would be assessed. Neither Mr. Ingraldi nor Mr. Scharf testified at the hearing, and petitioners offered no credible proof to establish that there was any type of agreement to limit their sales tax liability to the amount of restitution paid as part of Mr. Ingraldi's conditional discharge. Therefore, the Division was not limited to the amount of restitution set forth in the plea proceedings (***see***, ***Matter of Sona Appliances, Inc.***, Tax Appeals Tribunal, March 16, 2000; ***Matter of Miras, supra; Matter of N.T.J. Liquors***, ***supra***; ***Matter of Dallacqua***, Tax Appeals Tribunal, March 2, 1989).

E. Turning to the issue of the penalty for fraud, Tax Law § 1145(a)(2) provides in pertinent part:

> 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 . . . .

The Division admits that it bears the burden of proving fraud by clear and convincing evidence (***see, Matter of Drebin,*** Tax Appeals Tribunal, March 27, 1997, ***confirmed Matter of Drebin v. Tax Appeals Tribunal,*** 249 AD 2d 716, 671 NYS2d 565; ***Matter of Cinelli,*** Tax Appeals Tribunal, September 14, 1989; ***Matter of Sener,*** Tax Appeals Tribunal, May 5, 1988). Imposition of the fraud penalty requires "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 Sener, supra***). 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. Commissioner***, 52 TCM 234; ***Matter of Drebin, supra***). 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 (***id.; Matter of Uncle Jim's Donut and Dairy Store,*** Tax Appeals Tribunal, October 5, 1989). 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, the taxpayer's entire course of conduct and the taxpayer's failure to maintain bank accounts or adequate records (***see, Merritt v. Commissioner***, 301 F2d 484, 62-1 US Tax Cas ¶ 9408; ***Bradbury v. Commissioner***, 71 TCM 2775; ***Webb v. Commissioner***, 394 F2d 366, 68-1 US Tax Cas ¶ 9341; ***see also, Matter of AAA Sign Co.***, Tax Appeals Tribunal, June 22, 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***, 53 TCM 1073; ***Korecky v. Commissioner,*** 781 F2d 1566, 86-1 US Tax Cas ¶ 9232).

F. The Division has met its burden of establishing that the imposition of a penalty for fraud is warranted in this case. On this score, the Division's audit established an enormous level of underreporting of taxable sales and sales tax over a substantial and continuous period of time. The auditor determined that petitioners had erroneously claimed $9,635,843.00 in nontaxable sales. As part of his plea bargain, Mr. Ingraldi admitted and agreed that he had underreported sales tax for the period September 1, 1995 through February 28, 1999 in the amount of $537,563.00. This amount was for the same period as the audit and was computed by Mr. Ingraldi's criminal attorney. This admission by Mr. Ingraldi establishes not only a large amount of underreporting of sales tax, but also establishes that the underreporting was consistent and substantial for a three and one-half year period.

Petitioners failed to cooperate on audit, as General Building and Mr. Ingraldi failed to produce all the records requested for audit, and in fact failed to produce any meaningful, relevant or reliable records for use in the conduct of the audit. There is no indication that General Building or Mr. Ingraldi in any manner cooperated in the conduct of the audit except to provide records that were clearly fabricated. General Building, by Mr. Ingraldi, filed sales tax returns from the beginning of the audit period to the commencement of the audit itself which clearly reflected a taxable ratio which Mr. Ingraldi knew was inaccurate, as seen by the substantial decrease in reported nontaxable sales once the audit began. The sales invoices provided on audit were intended to be misleading, in that they contained erroneous information as to the actual purchaser of the products sold and indicated that sales tax had not been collected on claimed nontaxable sales, when in fact sales tax had been properly collected but not remitted. In

addition, Mr. Ingraldi made false statements to the auditor in an effort to support the fabricated sales invoices. Mr. Ingraldi's arrest, statements at the time of his guilty plea in which he admitted to intentionally altering sales invoices with the intent to withhold the proper amount of sales tax and to filing false sales tax returns for the same purpose, and willingness to pay restitution in the amount of $537,563.00 all support the auditor's findings that Mr. Ingraldi was systematically collecting sales tax, underreporting taxable sales and diverting the sales tax collected for his personal use. In sum, the circumstances of this case, viewed in their entirety, and noting in particular the absence of any evidence to countermand the audit and its results, provide convincing evidence that petitioners knowingly and willingly participated in the failure to remit sales taxes as required and clearly support the imposition of a penalty for fraud.[3]

G. With respect to the question of timely issuance of the notices, the Division correctly points out that there is no period of limitations where the assessment of fraud is involved (Tax Law § 1147[b]). Since fraud has been determined and fraud penalties as assessed have been upheld against both petitioners, the statutory notices are therefore not barred by the otherwise applicable three-year statute of limitations (Tax Law § 1147[b]). Accordingly, petitioners' argument that the notices should be canceled because they were not received within such three-year period of limitations fails.

[3] The Division has asserted in its answer and at hearing, in the alternative to and assuming the fraud penalty was not sustained, the penalty pursuant to Tax Law § 1145(a)(1). As described hereinabove, the evidence shows that Mr. Ingraldi's actions were intentional, willful and deliberate and resulted in the nonpayment or underpayment of sales tax due and owing. Therefore, in the event the fraud penalty was not sustained, there is a clear basis to support the imposition of penalty under Tax Law § 1145(a)(1).

H. The petitions of General Building Appliance Corporation and Joseph Ingraldi are hereby denied and the notices of determination dated December 31, 2001 are sustained.

DATED: Troy, New York
August 12, 2004

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE