

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MUHAMMAD S. ABBASI</b>	:	DETERMINATION
	:	DTA NO. 820239
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, 1999 through	:	
February 28, 2002.	:	

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Petitioner, Muhammad S. Abbasi, 369 Cross Street, Westbury, New York 11590, 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, 1999 through February 28, 2002.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 3, 2005 at 10:30 A.M.. with all briefs to be submitted by May 17, 2006, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Lawrence R. Cole, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

***ISSUES***

I. Whether the Division of Taxation properly determined additional sales tax due from Muhammad S. Abbasi.

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

***FINDINGS OF FACT***

1. Petitioner, Muhammad S. Abbasi, operated a retail jewelry business known as Intrigue Jewelers, selling jewelry, including “costume” jewelry, made of silver, sterling silver and gold. This business was located in a ten foot by ten foot kiosk in the Broadway Mall in Hicksville, New York, with such space subleased by petitioner from Gold Concepts, Inc., a Texas corporation. The lease between the Broadway Mall and Gold Concepts, Inc. is dated August 24, 1999. The record does not contain a sublease document between petitioner and Gold Concepts, Inc., but according to petitioner he paid rent directly to Broadway Mall, as opposed to Gold Concepts, Inc.<sup>1</sup>

2. There appears to be no dispute between the parties that petitioner did not commence doing business at the subject location until approximately February 1, 2000. The first sales and use tax return for petitioner’s business was filed under sales tax identification number B-59-3607425 (emphasis added), and covered the sales tax quarterly period spanning March 1, 2000 through May 31, 2000.

3. Petitioner operated the business on a day-to-day basis. Credit card sales were deposited directly into a business checking account at Astoria Federal Savings Bank. Sales paid for by cash or by check were allegedly deposited into the same account by petitioner on a periodic basis. There were also sales of merchandise left on consignment with petitioner, although the record contains no specific information concerning such sales. Sales tax returns were prepared by petitioner’s accountant on the basis of the total amount of deposits made to the bank account.

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<sup>1</sup> Petitioner also operated a similar business located in the Roosevelt Field Mall in Garden City, New York. However, the subject audit covered only petitioner’s business operations at the Broadway Mall.

4. By a letter dated April 2, 2002, an auditor for the Division of Taxation (“Division”) advised petitioner that an appointment was scheduled for May 2, 2002 in order to commence a sales and use tax field audit of petitioner’s business for the period spanning June 1, 1999 through February 28, 2002. The Division’s letter requested that all of petitioner’s books and records pertaining to the business for the audit period be available for review. Among the records specifically requested, as detailed in an attached Records Requested List, were the general ledger, cash receipts journal, federal income tax returns, purchase invoices, sales invoices, guest checks, cash register tapes, bank statements, financial statements and exemption documents. The initial audit appointment date of May 2, 2002 was changed at petitioner’s accountant’s request to May 16, 2002.

5. The Division’s auditor made a pre-audit visit to the business location on April 17, 2002. Thereafter, on May 16, 2002, the auditor met with petitioner’s accountant, at which time some bank statements, a few bank deposit slips, and a small number of purchase invoices were provided. Petitioner did not provide any other records, such as a general ledger, daybook of sales, cash receipts journal, cash register tapes, sales invoices, daily summary tapes, or the like.

6. Petitioner’s accountant notified petitioner of the meeting with the auditor and, in turn, petitioner contacted the auditor, via e-mail dated October 28, 2002, seeking further clarification of the type of invoices required for audit review. The auditor, in turn, sent a responding e-mail to petitioner on October 29, 2002, further identifying and requesting specific records necessary for the conduct of the audit, as follows:

What we need to correctly compute the tax that you owe is Sales Invoices and or Charge slips for every sale that you made. You did give me invoices from several suppliers which I did transcribe. Unfortunately you indicated that you take merchandise from

certain suppliers on a consignment agreement whereby you get a commission for items sold and return the unsold items after a certain period of time. What we need to accurately understand your business activities is every purchase invoice from all suppliers including the consignment suppliers. We need to know how much of those goods were sold by you or not returned to your supplier.

Mr. Ghorl advised that this is what you are trying to obtain.

In any event, you are paying a large amount of rent to your landlord or landlords. Having paid this substantial rent you show very little income being generated by the business. The question then becomes why you would continue to do business? In the absence of sales and or purchase records to tie into the amounts that you report on your Federal and State Income tax returns, we will have to use some sort of fair estimation of the sales that you made during our audit period. This would usually take into account the rent you are paying and what people in a similar business reports [sic].

Unfortunately, I cannot tell you how or where to get the records at this time. The records should have been kept during the period in question. If you have not kept the records you will have to get them from the individuals that you did business with - both your suppliers and your customers.

7. No additional records were submitted by petitioner and, after reviewing the very limited records presented, the Division's auditor determined that they were not sufficient to allow the conduct of a detailed audit and concluded that the use of indirect auditing methods to determine petitioner's sales would be appropriate. Most specifically in this regard was the absence of any source records of petitioner's sales (e.g., sales invoices), coupled with the auditor's review of petitioner's business bank records for the 11 month period spanning February 2000 through December 2000 which showed that total deposits (\$197,085.08) exceeded gross sales for the business per petitioner's Federal income tax return for the year 2000 (\$129,979.00) by more than \$67,000.00.

8. The auditor utilized a rent factor method to determine petitioner's gross sales. Specifically, the auditor determined that petitioner's rent for the period February 1, 2000 through December 31, 2000 was \$6,717.00 per month, based on petitioner's Federal income tax return for the year 2000, and that petitioner's rent for the period January 1, 2001 through February 28, 2002 was \$6,250.00 per month, based on the lease for the premises. Total rent in the amount of \$161,387.00 was thus calculated for the period February 1, 2000 through February 28, 2002. In turn, the auditor reviewed information from two "no change" audits recently performed for two other jewelry businesses in the same geographical area. In one such audit, gross sales were determined to have been 40 times the annual rent, while in the other gross sales were determined to have been 8 times the annual rent. The auditor selected a factor of 10 as the multiplier to determine gross sales in this instance, based on his experience and belief that a factor on the lower end of the range was appropriate. Using the foregoing information and methodology, the auditor calculated audited gross sales in the amount of \$1,613,870.00. Petitioner presented no claim or evidence of non-taxable sales, thus all sales were presumed to have been taxable sales, and tax due thereon was calculated in the amount of \$137,178.95.

9. Petitioner filed for and received two sales tax Certificate of Authority registration identification numbers for his business. The first Certificate of Authority was issued April 28, 2000 while the second was issued May 2, 2000.

10. Petitioner filed two sales and use tax returns under the first certificate number specifically for the sales tax quarterly periods ended May 31, 2000 ("return #101") and August 31, 2000 ("return #201"), and remitted tax therewith in the respective amounts of \$3,172.00 and

\$2,838.00, for total tax remitted in the amount of \$6,010.00.<sup>2</sup> The auditor reduced the amount of tax calculated as due on audit (\$137,178.95) by allowing credit for the tax paid with the aforementioned two sales tax returns. However, the auditor erred in the transcription of the amount of tax paid by petitioner for the sales tax quarterly period ended August 31, 2000, such that credit was allowed only in the amount of \$2,383.00 rather than in the amount of \$2,838.00 as paid, a difference of \$455.00. Thus, the auditor's work papers, and attendant calculation of additional tax due was premised on a credit of \$5,555.00, rather than the correct amount of \$6,010.00, resulting in audited additional tax due in the amount of \$131,623.95.

11. In addition to the sales tax returns filed by petitioner under the first certificate number, petitioner also filed sales tax returns under the second certificate number as follows:

<b>Three Digit Return Identifier</b>	<b>Sales Tax Quarterly Period</b>	<b>Sales Tax Amount</b>
101	03/01/00 through 05/31/00	\$3,172.00
301	09/01/00 through 11/30/00	\$3,399.00
401	12/01/00 through 02/28/01	\$4,626.00
102	03/01/01 through 05/31/01	\$2,249.00
302	09/01/01 through 11/30/01	\$ 0.00

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<sup>2</sup> Identifying sales tax returns by a three digit number (e.g., "return # 101") provides reference to the sales tax quarterly period to which a particular return pertains. Under this system of identification, the first digit refers to the particular sales tax quarterly period, and the last two digits refer to the year in which the four sales tax quarterly period cycle will end (e.g., return #101 refers to the first sales tax quarterly period of the four period cycle which ends in the year 2001). The sales tax quarterly periods commence, under this system, with the period spanning March 1 through May 31. Hence, return # 101 pertains to the first sales tax quarterly period of the four period cycle ending in the year 2001 (i.e., spanning March 1, 2000 through May 31, 2000), return #201 pertains to the second sales tax quarterly period of the year 2001 (i.e., spanning June 1, 2000 through August 31, 2000), return #301 pertains to the third sales tax quarterly period (i.e., spanning September 1, 2000 through November 30, 2000), and return #401 pertains to the fourth and final sales tax quarterly period of the cycle (spanning December 1, 2000 through February 28, 2001).

Review of the foregoing reveals that a return for the sales tax quarterly period spanning March 1, 2000 through May 31, 2000 (“return #101”) was filed under both sales tax identification numbers, though there is no indication or evidence that duplicate payment of sales tax was made for such quarterly period.

12. The Division issued to petitioner a Notice of Determination dated March 4, 2004, assessing additional sales tax due for the period December 1, 1999 through February 28, 2002 in the amount of \$131,623.95, plus interest and penalties, including an omnibus penalty pursuant to Tax Law § 1145(a)(vi) for underreporting tax liability in excess of 25% of the amount of tax required to be shown on a return.<sup>3</sup> As noted previously, although the full audit period spans June 1, 1999 through February 28, 2002, the Division did not assess any tax, penalties or interest for the first two sales tax quarterly periods thereof in light of the fact that petitioner did not commence business operations until February 1, 2000. It is further noted that in view of the transcription error described above (*see*, Finding of Fact “10”), the Notice of Determination should be reduced by the amount of \$455.00, so that the resulting amount of tax assessed and remaining at issue herein is \$131,168.95, plus interest and penalties.

13. Petitioner also submitted a sales tax return for the quarterly period ended August 31, 2001 (“return # 202”) under the first certificate number. This return, which showed zero gross sales and zero sales tax as due, was marked “final” on its face. This return was accompanied by a copy of the sales tax Certificate of Authority for Muhammad S. Abbasi/Intrigue Jewelers, 3507 Broadway Mall, Hicksville, New York 11801 under the second certificate number. The area of

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<sup>3</sup> Petitioner executed consents extending the period of limitations on assessment so that the Division was entitled to assess sales and use tax liability for the period June 1, 1999 through February 28, 2002 at any time on or before September 20, 2004.

the Certificate of Authority in which to provide information to the Division in the event a business is sold or discontinued or changes its status reflects May 31, 2001 as the last day of business for Muhammad S. Abbasi/d/b/a Intrigue Jewelers, lists New Intrigue Jewelers, Inc. (emphasis added) as the new business name, and reflects the same 3507 Broadway Mall business address. Check boxes on the Certificate of Authority to indicate that a business was sold, discontinued or changed in status were left blank.

14. A filing receipt from the New York State Department of State and a Certificate of Incorporation reflect the formation of the corporation New Intrigue Jewelers, Inc. and the filing of its certificate of incorporation as having occurred on April 24, 2001 and April 25, 2001, respectively. The auditor's notes from the initial audit appointment reflect that the auditor was informed of this change of business form from a proprietorship to a corporation, and that the corporation applied for a sales tax Certificate of Authority (and identification number) on or about August 1, 2001.

15. Petitioner incorporated his business at the suggestion of his accountant, and continued to operate the business at the same 3507 Broadway Mall location after its incorporation until approximately August 2002, at which time petitioner ceased operations in the Broadway Mall. After incorporation, petitioner was the president and sole shareholder of the corporation, signed tax returns on behalf of the corporation and controlled its books and records. The initial sales tax return for New Intrigue Jewelers, Inc. was filed for the sales tax quarterly period ended August 31, 2001 and shows taxable sales of \$26,446.00 in Nassau County with a sales tax liability (after reduction for a vendor collection credit) in the amount of \$2,210.89.



16. As noted, the business utilized a business checking account maintained at the Astoria Federal Savings Bank. Monthly statements for this account from the beginning of the audit period through September 2001 were in the name Intrigue Jewelers, 3507 Broadway Mall, Hicksville, New York. Commencing in October 2001 and continuing through the end of the audit period, monthly statements for this same account were in the name New Intrigue Jewelers, Inc. at the same address. The record includes a corporate resolution, dated October 16, 2001 and signed by petitioner under the title of corporate secretary, as filed with Astoria Federal Savings Bank to authorize the change of name to New Intrigue Jewelers, Inc. There is no apparent entry for a check drawn on this account, under either the name of Intrigue Jewelers or New Intrigue Jewelers, Inc., in payment of the \$2,210.89 sales tax amount listed above for the sales tax quarterly period ended August 31, 2001.

17. Petitioner submitted copies of two checks drawn on the Intrigue Jewelers account at Astoria Federal Savings Bank and payable to New York State Sales Tax. Check number 1171, in the amount of \$4,626.02, is dated March 18, 2001, while check number 1187, in the amount of \$2,249.50, is dated June 18, 2001. The memo section of each check indicates that it is for the sales tax identification number of the second certificate. There is a deposit serial number on the face of each check, and the reverse side of each check indicates that each of the checks has been "paid". According to the Division, check number 1171 pertains to the sales tax quarterly period ended February 28, 2001 and to a sales tax return filed for such period ("return # 401"), while check number 1187 pertains to the sales tax quarterly period ended May 31, 2001 and to a sales tax return filed for such period ("return #102"). The Division explained that these checks were placed in a "suspended payment" file due to the use of the sales tax identification number of the

second certificate. Hence, the Division conceded that no credit for such payments was allowed with respect to the sales tax identification number of the first certificate, under which the Notice of Determination herein was issued. The Division further advised that it will, “upon direction by petitioner and assuming the checks are honored,” apply these checks totaling \$6,875.52, toward any liability found due herein with respect to the sales tax identification number of the first certificate.<sup>4</sup>

18. In the same manner, review of the Division’s sales tax filing and payment records in evidence, from which the foregoing filing and payment information is taken, also reveal that two additional sales tax returns were filed by petitioner under the sales tax identification number of the second certificate (*see*, Finding of Fact “11”). The first of these returns pertains to the sales tax quarterly period ended November 30, 2000 (“return # 301”), and was accompanied by payment in the amount of \$3,399.00, while the second such return pertains to the sales tax quarterly period ended November 30, 2001 (“return #302”), and was not accompanied by any payment. While the record does not include a copy of a canceled check with regard to the first of such filings and accompanying payment, the Division’s records are consistent and identical in comparison to the two earlier returns for which credit is being afforded (return #401 and return #102), specifically in that a deposit serial number is reflected for each filing and payment. Further, there is no evidence or claim that such payment was dishonored. Accordingly, and consistently, it is appropriate that credit be allowed for such payment in the amount of \$3,399.00 made under the sales tax identification number of the second certificate for the quarterly period

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<sup>4</sup> The Notice of Determination herein was issued under sales tax identification number of the first certificate. Given that the checks in question have been paid, and that petitioner has challenged such Notice of Determination in this proceeding, it follows that such checks have been “honored” and that petitioner would “direct” application of such amounts against any liability found due herein.

ended November 30, 2000, toward any liability found due herein with respect to the sales tax identification number of the first certificate.

19. Petitioner claimed that he maintained complete records, including all sales invoices, and that he submitted the same to the auditor. However, the testimony in this regard was unclear and equivocal at best, with petitioner first claiming to have given such sales records (i.e., credit card slips and summary tapes) to his accountant to provide to the auditor. However, when petitioner was shown a letter by his accountant noting that the accountant had given the auditor bank statements (as opposed to sales invoices), petitioner stated that he (petitioner) had provided the sales invoices directly to the auditor. In any event, the only sales records provided in evidence consisted of seven credit card sales receipts for sales made on April 7, 2001, and an accompanying cash register summary tape for such date listing the same credit sales for this one day. No other such source records of credit card sales for any other days were provided, nor were any source records of sales by cash or check provided for any days.

#### ***SUMMARY OF PETITIONER'S POSITION***

20. Petitioner claims that he kept and provided to the auditor complete and adequate books and records such that resorting to an indirect auditing method was not warranted or authorized. Petitioner also argues that, in any event, the audit method used was inappropriate and suggested that an observation test or a bank deposits audit method would have yielded a more accurate result. Petitioner maintains that using the rent payments as a basis for determining sales was inappropriate, stating that the mall in which his business was located was doing poorly, with many store closings and little foot traffic during the period at issue.

### **CONCLUSIONS OF LAW**

A. The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of AGDN, Inc.*** (Tax Appeals Tribunal, February 6, 1997), as follows:

a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (*see*, Tax Law §§ 1138[a]; 1135; 1142[5]; *see, e.g., Matter of Mera Delicatessen*, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained “shall include a true copy of each sales slip, invoice, receipt, statement or memorandum” (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, “the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . .” (Tax Law § 1138[a]; *see, Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (*Matter of Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869); exactness is not required (*Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451).

B. In this case, the record establishes the Division’s clear and unequivocal written request for books and records of petitioner’s sales, as well as the auditor’s specific e-mail clarification responding to petitioner’s question as to the type of records required for review. Petitioner, in turn, failed to produce any of such records for the Division’s review. As a result, the auditor reasonably concluded that petitioner did not maintain books and records that were sufficient to verify his gross and taxable sales for the audit period. Having established the insufficiency of petitioner’s books and records, the auditor properly resorted to external indices

to determine petitioner's sales and sales tax liability, specifically using the method of a projection based on the amount of rent petitioner paid for his business location. Such method is specifically provided for under the second sentence of Tax Law § 1138(a)(1), and its application by the Division has been upheld as valid in numerous instances (*see, Matter of A&J Gifts Shop v. Chu*, 145 AD2d 877, 536 NYS2d 209). Petitioner's claim in this proceeding that he maintained complete and adequate books and records, including most specifically records of his sales, and made the same available to the auditor, either directly or through his accountant, is neither believable nor borne out by the testimony or documentary evidence in the record. Hence, the only issue is whether petitioner has established that the amount of tax assessed as the result of the application of the Division's method of audit was erroneous.

C. Petitioner takes issue with the Division's audit method and result because it is imprecise, suggesting that a bank deposits analysis or an observation test might have yielded a more accurate result. In this case, the complete absence of any original sales records left the Division clearly justified in the method of audit chosen. Moreover, petitioner's suggested alternatives of a bank deposits analysis or an observation of sales audit overlooks the fact that petitioner provided no records to establish that all sales amounts, including specifically cash sales were, in fact, deposited into petitioner's business bank account and further fails to acknowledge the holiday seasonal nature of this type of business. Ultimately, any imprecision in the results of an audit arising by reason of a taxpayer's own failure to keep and maintain records of all of his sales as required by Tax Law § 1135(a)(1) must be borne by that taxpayer (*Matter of Markowitz v. Sate Tax Commission, supra*).

D. Notwithstanding the foregoing, it is necessary to reduce the dollar amount of the assessment to reflect adjustments to the mathematical results of the audit in three areas, as follows:

1) Review of the auditor's workpapers revealed a transposition error pursuant to which the amount of credit allowed for tax paid by petitioner with returns filed under sales tax identification number B-59-3607425 was understated by some \$455.00 (*see*, Findings of Fact "10" and "12"), and thus the amount of tax assessed pursuant to the Notice of Determination must be reduced in any event from \$131,623.95 to \$131,168.95;

2) The Division has conceded that petitioner is entitled to credit for sales tax paid under sales tax identification number B-59-3609425 in the aggregate amount of \$6,875.52 (based on sales tax paid by check with respect to returns filed for the sales tax quarterly periods ended February 28, 2001 [return #401] in the amount of \$4,626.02 and March 31, 2001 [return #102] in the amount of \$2,249.50, respectively). Accordingly, the amount of tax assessed pursuant to the Notice of Determination must be further reduced from \$131,168.95 to \$124,293.43 (*see*, Finding of Fact "17");

3) Review of the Division's records in evidence reveals that petitioner is entitled to credit for sales tax paid under sales tax identification number B-59-3609425 in the amount of \$3,399.00 (based on sales tax paid by check with respect to the return filed for the sales tax quarterly period ended November 30, 2000 (return # 301). Accordingly, the Notice of Determination must be further reduced from \$124,293.43 to \$120,894.43 (*see*, Finding of Fact "18").

E. Much of the confusion in this matter appears to have been caused by the fact that petitioner had applied for and received two sales tax identification numbers as Muhammad S. Abbasi d/b/a Intrigue Jewelers, each of which reflected the same business address. Thereafter, and compounding the confusion, petitioner filed some returns and made some payments under one of such identification numbers, and also filed some returns and made some payments under the other identification number as well. Finally, during the latter part of the time period covered

by the audit, petitioner changed the form of operation of the business from a proprietorship to a corporation. Notwithstanding this less-than-perfect manner in which petitioner's business was organized and operated, and the confusion resulting therefrom, petitioner has nonetheless established that the proprietorship Muhammad S. Abbasi/Intrigue Jewelers ceased operation as a proprietorship at some point during the sales tax quarterly period ended August 31, 2001, and was thereafter organized and operated in the form of a corporate entity known as New Intrigue Jewelers, Inc., at least from September 1, 2001 through February 28, 2002 (i.e., the last two sales tax quarterly periods covered within this audit). In this regard, the auditor's notes and the balance of the evidence in the record reveal that New Intrigue Jewelers, Inc. was formed on April 24, 2001, its Certificate of Incorporation was filed on April 25, 2001, an application for a sales tax vendor identification number was made to the Division on or about August 1, 2001, an identification number was issued by the Division at some point thereafter, and a sales tax return for New Intrigue Jewelers, Inc. dated September 15, 2001 listing such identification number and covering the sales tax quarterly period ended August 31, 2001 was allegedly filed by petitioner's accountant. At the same point in time, and consistent with a change of business form, petitioner filed a sales tax return for Intrigue Jewelers for the sales tax quarterly period ended August 31, 2001, listing the sales tax identification number of the first certificate, which was marked "final" on its face and is, in turn, reflected as a "final return" on the Division's records. This filing, showing zero tax due, was accompanied, as required, by the surrender of petitioner's Certificate of Authority for Muhammad S. Abbasi/Intrigue Jewelers, albeit under the sales tax identification number of the second certificate, indicating New Intrigue Jewelers, Inc. as the name of the new business. No further sales tax filings were made under the first identification number, and the

only additional filing under the second identification number (the number for which the Certificate of Authority had been surrendered) was a zero due return filed (according to the Division's records) for the quarterly period ended November 30, 2001.

F. Review of all of this evidence and the relevant dates supports the conclusion that petitioner ceased conducting business as a proprietorship at Broadway Mall as of the sales tax quarterly period ended August 31, 2001 (per the "final" return filed), and that the vendor conducting business at such location thereafter was the corporate entity New Intrigue Jewelers, Inc. While imperfect and imprecise as to dates, the evidence is consistent with petitioner's cessation of the proprietorship and the commencement of operations by the corporate entity as the vendor at this point in time. Significantly, the evidence bears out that the auditor became aware of this change of situation during the course of conducting the audit (*see*, Finding of Fact "14").<sup>5</sup> Despite being advised of such change, there is no evidence that the auditor attempted any inquiries to ascertain whether or not such a change had, in fact, occurred.

G. Under the circumstances outlined above, it was incumbent upon the Division to recognize and respect the existence of the corporate entity as the vendor and to issue its audit assessment for periods subsequent to August 31, 2001 against that entity and, as applicable, against the officers or persons responsible to collect and remit sales taxes on behalf of that entity, as opposed to the individual previously conducting business as a sole proprietor. Contrary to the Division's arguments, petitioner did not continue filing sales tax returns using the

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<sup>5</sup> In fact, the auditor issued a subpoena for and received the bank statements for Astoria Federal Savings Bank account number 8310231057. This account was initially a business checking account for Intrigue Jewelers. However, an October 16, 2001 New Intrigue Jewelers, Inc. corporate resolution included with the bank statements furnished to the auditor pursuant to the subpoena reveals that the name on the account was changed to New Intrigue Jewelers, Inc. Although the account number was not changed, the name on the account on all monthly statements from October 2001 forward clearly reflects New Intrigue Jewelers, Inc.



proprietorship's identification numbers after an identification number was issued for the corporation, save for the filing of a "final" proprietorship return under the first identification number for the sales tax quarterly return for the period ended August 31, 2001, and for a "zero due" return for the quarterly period ended November 30, 2001 under the second identification number (for which the Certificate of Authority had previously been surrendered).

While the sales tax return for New Intrigue Jewelers, Inc. pertains to the quarterly period ended August 31, 2001, the auditor's notes indicate that application for a Certificate of Authority and vendor identification number for such entity was not made until on or about August 1, 2001. Furthermore, surrender of the proprietorship's Certificate of Authority did not occur until after such date with the filing of the "final" proprietorship return. Hence, the earliest quarterly period for which the Division could reasonably be required to recognize the corporate existence for sales tax purposes would be the quarterly period beginning September 1, 2001. Issuance of the Notice of Determination to petitioner as the vendor, as opposed to issuance to the corporate entity (and to petitioner as a person responsible to collect and remit taxes on its behalf), especially in view of the auditor's knowledge of the change, was not harmless error but rather was legal error with regard to those quarterly periods subsequent to the change of entity. The consequence of this error is that the assessment against petitioner as a proprietor is invalid for the final two quarterly periods covered by the audit. Further, absent the issuance of an assessment against the corporate entity, as required, there can be no assessment against petitioner as a person required to collect and remit taxes on behalf of such entity (*see, Halperin v. Chu* 134 Misc.2d 105, 509 NYS2d 692, **affirmed**, 138 AD2d 915, 526 NYS 2d 660, **appeal dismissed in part, denied in part**, 72 NY2d 938, 532 NYS2d 845). Accordingly, the Notice of Determination must be adjusted to reflect elimination of the tax assessed thereon for periods subsequent to the

quarterly period ended August 31, 2001 (i.e., the final two quarterly periods of the audit spanning September 1, 2001 through February 28, 2002).<sup>6</sup>

H. Petitioner has provided no basis upon which penalties, properly imposed, should be reduced or abated, and the same are, therefore, sustained.

I. The petition of Muhammad S. Abbasi is hereby granted to the extent indicated in Conclusions of Law “D” and “G” but is otherwise denied, the Notice of Determination dated March 4, 2004 is to be reduced accordingly, and such Notice as reduced, together with penalties and interest thereon, is sustained.

DATED: Troy, New York  
November 16, 2006

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/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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<sup>6</sup> There is no evidence in the record establishing that New Intrigue Jewelers, Inc. filed any sales tax returns subsequent to the return covering the quarterly period ended August 31, 2001, and thus there would appear to be no impediment to the Division (re)issuing an assessment against such corporate entity, and against petitioner as a person required to collect and remit taxes on its behalf, for such final two sales tax quarterly periods.