STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSEPH LEFKOWITZ **OFFICER OF GALIL AUTO REPAIR, INC.**	:	DECISION
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, 1977 through February 28, 1983.	:	

Petitioner, Joseph Lefkowitz, officer of Galil Auto Repair, Inc., 4698 Bedford Avenue, Brooklyn, New York 11235, filed an exception to the determination of the Administrative Law Judge issued on December 8, 1988 with respect to its 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, 1977 through February 28, 1983 (File Nos. 801198 and 801489). Petitioner appeared by Jeffrey S. Stern, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Both petitioner and the Division submitted briefs on exception.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner's liability for taxes was properly estimated on the basis of external indices.

II. Whether the assessment of a fraud penalty against petitioner was proper.

III. Whether notices of determination and demand for payment of sales and use taxes due for the periods December 1, 1977 through November 30, 1980 were timely issued.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below. We also find certain additional facts as noted.

Pursuant to a field audit of Galil Auto Repair, Inc. ("Galil") which commenced in May 1982, the Division of Taxation issued to Joseph Lefkowitz ("petitioner"), as officer of Galil, the following notices of determination and demands for payment of sales and use taxes due:

Date Issued	Period	Tax	Penalty	Interest	Total
3/15/84	12/1/80-2/28/81	$ 7,228.32	$ 3,614.16	$ 2,947.00	$ 13,789.48
5/9/84	12/1/77-2/28/78 12/1/78-2/28/82	269,532.39	134,766.20	140,579.40	544,877.98[1]
5/9/84	3/1/82-2/28/83	46,348.55	23,174.28	10,436.34	79,959.17
7/3/84	3/1/78-11/30/78	59,133.60	29,566.80	46,771.00	135,471.40

Each notice of determination advised petitioner that he was personally liable as officer of Galil Auto Repair, Inc. under Tax Law §§ 1131(1) and 1133 and that the tax assessed on each had been estimated or determined to be due in accordance with the provisions of Tax Law § 1138(a).

The Brooklyn District Office initially received the Galil file for audit from the Central Office Audit Bureau in May 1982. Included with the file was a purchase confirmation from Galil's gasoline and oil supplier, Lou Halperin Stations, Inc., for the sales tax quarter ended February 28, 1981. Lou Halperin Stations, Inc. was a distributor of Getty gasoline and oil products.

The file which the auditor initially received from the Central Office Audit Bureau indicated that Morton Semp was Galil's president. The auditor thereupon requested from Galil's accountant and from Mr. Semp the following books and records: general ledger; cash receipts and cash disbursements journals; Federal income tax returns; sales tax returns; purchase invoices; fixed asset invoices; exemption certificates supporting nontaxable sales; and

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[1] This notice of determination advised petitioner that the assessment set forth thereon was in addition to the assessment contained in the notice of determination previously issued on March 15, 1984.

bank statements. For nearly a year after said requests were made, no books and records were made available to the auditor.

On two occasions, the auditor visited the premises located at 6114 16th Avenue, Brooklyn, New York. He observed that Galil sold Getty gasoline and oil products and that it had two repair bays. Upon his second visit, the auditor learned that Galil was operating under new ownership. He attempted to obtain the new owner's name and home address from Galil's employees and from the corporation's accountant, but was unable to do so until such time (late 1983) when Mr. Semp provided him with information that petitioner and one Bernard Joseph were Galil's officers. The information was provided to the auditor as a result of assessments issued to the corporation and to Mr. Semp for the sales tax quarter ended November 30, 1980.

In January 1984, Galil's accountant presented to the auditor handwritten documents purporting to be Galil's cash receipts and disbursements for portions of 1981 and 1982.

On March 15, 1984, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner for the sales tax quarter ended February 28, 1981. Assessments were also issued to the corporation and to Morton Semp. The auditor had obtained the sales tax returns of Galil for the period at issue herein, and on the return filed for the quarter ended February 28, 1981 petitioner's signature appeared thereon. Prior returns had been signed by other persons or, in some instances, had been unsigned. The assessment issued to petitioner on March 15, 1984 was based upon the purchase confirmation obtained from Lou Halperin Stations, Inc. together with the auditor's estimate of repair sales for this quarter. The purchase confirmation indicated that Galil had purchased 46,376 gallons of gasoline at a cost of $47,718.00 for the sales tax quarter ended February 28, 1981. To this cost the auditor added four cents per gallon in Federal excise tax plus a markup on the total of 15 percent, which resulted in taxable gasoline sales of $57,009.00. Based upon his previous experience in auditing gasoline stations and upon his observation of Galil's operation, the auditor estimated repair sales at $37,440.00 per quarter ($20.00 labor + $10.00 parts = $30.00 per hour x 8 hours per day x 6

days per week x 2 mechanics x 13 weeks per quarter) resulting in total taxable sales of $94,449.00, with tax due thereon in the amount of $7,555.92. Credit was given for tax paid ($327.60). Total tax due in the amount of $7,228.32 was, therefore, assessed together with fraud penalty imposed pursuant to Tax Law § 1145(a)(2) and interest, for a total amount due of $13,789.48 for the sales tax quarter ended February 28, 1981.

Subsequent to the issuance of the aforesaid notice of determination, the auditor, upon a careful review of the disbursements documents furnished by Galil's accountant, discovered that Galil had issued several checks to Texaco. The auditor did not attempt to obtain a purchase confirmation from Texaco. The cash deposits records provided for the period January 1981 through November 1982 indicated quarterly deposits as follows:

Sales Tax Quarter Ended	Deposits
5/31/81	$ 96,755
8/31/81	103,903
11/30/81	228,906
2/28/82	147,605
5/31/82	82,731
8/31/82	142,441

Based upon these deposits and the fact that no records were provided relative to cash payouts and credit card sales, the auditor utilized the highest quarterly deposits and increased this amount by approximately $21,000.00 to account for the cash payouts and credit card sales and, therefore, estimated taxable sales to be $250,000.00 per quarter through the sales tax quarter ended August 31, 1982. For the remaining sales tax quarters at issue herein, i.e., those quarters ended November 30, 1982 and February 28, 1983, tax was assessed only on repair sales, which were estimated in accordance with the formula used in the assessment for the quarter ended February 28, 1981. For these two quarters, tax was assessed on estimated repair sales of $37,440.00 per quarter. No tax was assessed on gasoline sales for these quarters due to the amendment to Tax Law § 1101(b)(4) by Chapters 454 and 469 of the Laws of 1982 which, as of September 1, 1982, effectively imposed the sales tax on motor fuel at a higher point in the distribution chain than the point of sale by the service station. As indicated earlier, two notices of determination and demands for payment of sales and use taxes due were issued to petitioner

on May 9, 1984 and an additional notice of determination was issued on July 3, 1984 covering, in the aggregate, the period December 1, 1977 through February 28, 1983, using estimated taxable sales of $250,000.00 per quarter (excepting quarters ended November 30, 1982 and February 28, 1983), which estimates included both gasoline and repair sales. Credit was given for tax previously paid and, for the quarter ended February 28, 1981, tax previously assessed on March 15, 1984 in the amount of $7,228.32 was deducted from the amount subsequently assessed by the notice of determination issued May 9, 1984. Fraud penalty pursuant to Tax Law § 1145(a)(2) and interest were also assessed for each quarter. Since a new vendor began doing business at this location in March 1983, no tax was assessed for any period after February 28, 1983.

Galil and Morton Semp were also assessed for the period at issue herein. As indicated earlier, Mr. Semp provided the auditor with bank records of the Community National Bank and Trust Company of New York which indicated that the Galil account was opened on July 15, 1975 with Morton Semp, president, and Bernard Joseph, vice-president and secretary, as authorized signatories. On July 14, 1978, a new corporate resolution was filed with the bank with Bernard Joseph, president, and Joseph Lefkowitz, secretary, as authorized signatories. The audit report indicated that Bernard Joseph was not assessed due to the inability of the Division of Taxation to obtain his address or social security number.

The auditor also obtained additional purchase confirmations for Galil from Lou Halperin Stations, Inc. for the period March 1, 1980 through December 31, 1981. However, because the cash disbursements records revealed numerous checks issued to Texaco, the auditor determined that Getty purchases from Lou Halperin were not the only gasoline purchases made by Galil. It was his opinion that these Getty purchase confirmations were not reflective of actual gasoline purchases and were, therefore, not reliable in calculating Galil's taxable sales. The records of Texaco Refining and Marketing, Inc. did not reflect gasoline or oil purchases made by Galil for the period at issue.

Petitioner admitted that he became an officer of Galil in 1978 although he made no mention of a specific date on which he assumed office. He also stated that he was the sole officer and owner of Galil. Petitioner bought the business from Morton Semp and, although Bernard Joseph remained as a bank signatory for the corporate bank account, petitioner denied any knowledge of a Bernard Joseph.

Petitioner's uncle, Mr. Jozefovic, owned and operated a gasoline and repair station known as First Wythe Avenue Auto Rental Service, Inc. ("First Wythe").[2] Mr. Jozefovic and petitioner admitted that, during the period at issue herein, they engaged in a check kiting scheme for the alleged purpose of keeping petitioner's business (Galil) afloat. Checks were issued by First Wythe, approximately every two to three days, to various payees, many of whom were fictitious persons, and the checks were endorsed and deposited into Galil's business account at the Community National Bank and Trust Company of New York. Mr. Jozefovic admitted that he often left the payee's name blank and that petitioner would fill in the name of a payee and then deposit the check into Galil's account. The stated purpose of this scheme of issuing frequent checks by Galil and First Wythe was to conceal from the bank the fact that there were, in actuality, insufficient funds to cover many of the checks issued by each. The proceeds of these checks were admittedly used by petitioner for both business and personal purposes. Because Mr. Jozefovic usually needed to be repaid almost immediately, checks were drawn on Galil's account and, in most instances, were made payable to Texaco, Mr. Jozefovic's supplier. On the cash receipts and disbursements documents furnished to the auditor, these checks were entered under the column designated "gas". For the months included on the disbursements documents, checks designated "payroll" were also issued to B. Joseph, always in the amount of $252.77 (three to five of these checks per month) and always at or about the same time that checks in the identical amounts were issued to petitioner.

[2]Nowhere, including in the hearing record, is Mr. Jozefovic's first name disclosed.

An examination of the sales tax returns filed by Galil for the quarters ended February 28, 1978, August 31, 1978 and February 28, 1982; the corporate resolutions filed with the Community National Bank and Trust Company of New York on July 15, 1975 and July 14, 1978; and the checks issued by First Wythe which were deposited in Galil's account clearly indicate that Mr. Jozefovic is, in fact, Bernard Joseph. The fact that Bernard Joseph was an authorized signatory for Galil both prior to and during the audit period, that he received regular payroll checks from Galil and that he signed sales tax returns for Galil for various quarters within the audit period is presumptive evidence that, while Mr. Jozefovic (Bernard Joseph) was the owner and operator of First Wythe, he was also actively involved in the operations of Galil despite petitioner's statements that he did not know who Bernard Joseph was.

For each of the sales tax quarters at issue herein, Galil reported taxable sales of between $3,000.00 and $7,000.00 on its sales tax returns. Many of the returns filed were incomplete and several returns were not timely filed. The amount of gross sales was often omitted and, in instances where gross sales were reported, the amounts thereof were identical to taxable sales.

We find the following facts in addition to those found by the Administrative Law Judge:

Petitioner did not require its religious school customers to provide a properly completed exempt organization certificate. Petitioner was shown a numbered certificate of exemption but did not retain any certificates of exemption. Drivers of the schools vehicles (including passenger vehicles) were permitted to sign the invoices. Such invoices were never presented to the auditor at the time of the audit. Invoices for a five-month period were presented at the hearing (September 1981 through January 1982) along with affidavits from officers of the four religious schools for which a sales exemption is sought. The affidavits stated an average amount per quarter for purchases rather than the exact amount purchased. Sales tax was not separately stated on the invoices. Petitioner testified that he simply discounted the price on the invoice by 8 percent to account for the sales tax.

OPINION

In the determination below the Administrative Law Judge decided that: (1) the Division properly estimated a portion of the gasoline and repair sales of petitioner on the basis of external indices but certain aspects of the estimated audit were improper and should be modified, (2) the Division properly concluded that petitioner was not entitled to claimed exemptions for sales to exempt organizations, (3) petitioner was a responsible officer for a portion of the audit period, (4) the fraud penalty was properly imposed upon petitioner and (5) the notices of determination and demand for payment of sales and use taxes due were timely issued by the Division.

On exception petitioner contends that: (1) it was unreasonable to assume that Galil made sales of Texaco gasoline, (2) it was unreasonable not to adjust quarterly deposits by the amount of loans and exchanges which were included in the quarterly figures, (3) certain sales were properly exempt from tax as petitioner obtained proof of the exemptions and made such proof available to the auditor, (4) petitioner's conduct does not constitute fraud within the meaning of the Tax Law, (5) the absence of fraud compels the imposition of the three year statute of limitations on the audit period and (6) the method of audit or the amount of tax assessed was erroneous as indicated by the modification of the audit as performed.

In response the Division argues that: (1) the adjustment of petitioner's liability by the Administrative Law Judge is a reasonable estimate of the tax due, (2) petitioner has not provided sufficient evidence to clearly and convincingly establish that taxable sales were less than those determined by the Administrative Law Judge, (3) petitioner has not substantiated his claims for exempt sales and (4) the Administrative Law Judge correctly determined that petitioner, as agent of the corporation, committed tax fraud during the period at issue.

We affirm the determination of the Administrative Law Judge.

As established in Chartair v. State Tax Commn. (65 AD2d 44, 411 NYS2d 41), the resort to external indices as a method of computing tax liability must be founded on a determination of the insufficiency of the taxpayer's records which makes it virtually impossible to verify sales receipts and conduct an audit. The Division must make an actual request for the petitioner's

books and records. The request must be more than casual and weak (Christ Cella v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858), for the entire period of the assessment (Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv. denied 71 NY2d 806, 530 NYS2d 109) and the auditor must make a thorough examination of such records before looking to external indices (King Crab Restaurant v. Chu, 134 AD2d 51, 522 NYS2d 978). Once this procedure is followed and the records are found to be incomplete or inaccurate, the Division may resort to external indices to estimate tax (Urban Liquors v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138). The estimate methodology utilized must be reasonably calculated to reflect taxes due, but exactness is not required from such a method (W.T. Grant Co. v. Joseph, 2 NY2d 207, 159 NYS2d 150, 157; Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, 177).

The first issue to be addressed is petitioner's claim that its tax liability, as determined by the Division and adjusted by the Administrative Law Judge, was calculated in an unreasonable manner. In particular, petitioner claims that the audit was unreasonable as it (1) assumed that Galil made sales of Texaco gasoline, (2) did not adjust quarterly deposits by the amount of loans and exchanges and (3) did not account for certain exemptions for which petitioner was qualified.

Since the record is clear in that it was impossible to determine Galil's tax liability solely from its records, resort to external indices was proper (see, Urban Liquors v. State Tax Commn., supra; Matter of Cousins Service Station, Tax Appeals Tribunal, August 11, 1988). Once it has been established that resort to external indices is proper the petitioner must show by clear and convincing evidence that the audit methodology employed was unreasonable or the amount of the assessment was erroneous in order to prevail (Surface Line Operators v. Tully, 85 AD2d 858, 446 NYS2d 451; Matter of Cinelli, Tax Appeals Tribunal, September 14, 1989).

Petitioner first claims that the audit was unreasonable as performed in that it was made upon the assumption that Galil made purchases from Texaco. Petitioner argues that he has proven this assumption erroneous and therefore established that the audit methodology was unreasonable.

In the determination below, the Administrative Law Judge discusses the audit procedure as though the audit was in fact based upon the assumption that Galil made purchases from Texaco. We disagree with this analysis. The record is clear that the sales of Galil were estimated by the auditor using the cash receipts document provided by petitioner's accountant, not on purchases made from Texaco. Since petitioner did not have any other documentation from which it could be accurately determined that these receipts were not sales, the auditor treated them all as sales. It is this fundamental methodology that petitioner must show to be unreasonable if he is to prevail.

Petitioner attempts to attack this methodology by claiming that the receipts used to estimate Galil's sales exceeded Galil's sales because all of Galil's sales were derived from Getty purchases and the volume of Getty purchases would not generate the amount of receipts at issue. We are not persuaded by this claim. Specifically, petitioner has not shown that the cash receipts document from which the auditor estimated sales included receipts which were not sales. Merely offering an explanation for checks issued to Texaco in the cash disbursements document at best serves to explain the presence of those checks in the cash disbursements document. This explanation fails to directly address the cash receipts document which was the basis for the estimate of the liability. In particular, petitioner has not put forth any reliable evidence from which it could be determined which entries in the cash receipts document were not sales by Galil. While the Texaco checks in the cash disbursements document did not provide the basis for the auditor's estimate of sales, they did serve to confirm the auditor's suspicions that gasoline other than Getty was being sold and to contradict petitioner's argument that only Getty products were sold. Even if we are to assume, as petitioner argues, that no purchases were made from Texaco, petitioner has still not precluded the possibility that purchases were made from other sources which could account for the additional receipts. We conclude that petitioner has not met the burden of proving by clear and convincing evidence that the auditor's reliance on the cash receipts document presented by petitioner's accountant was unreasonable.

The assumption that other purchases did in fact occur gains support from the evasive and uncooperative manner in which petitioner and his witnesses, namely his uncle, have conducted themselves in the operation of the business at issue, throughout the course of the audit and in the hearing below. In particular, the record indicates that petitioner and his uncle were involved in a check kiting scheme for the purpose of deceiving banks into believing that funds existed to cover checks drawn on the account of both Galil and First Wythe when, in fact, such funds did not exist. Further, the record indicates that petitioner was uncooperative throughout the audit, especially with regard to the production of his books and records for the audit period. In addition, the unchallenged conclusion of the Administrative Law Judge that petitioner, over the course of the audit and at the hearing, knowingly concealed the identity and involvement of his uncle, Mr. Jozefovic, in the business of Galil is another indication of petitioner's uncooperative and evasive manner. The combination of these factors indicates a course of conduct concerning the operation of Galil which extended to a wide range of improper activities utilized to maintain the existence of Galil. As a result, we find that these factors support our conclusion that it was appropriate under the circumstances for the auditor and the Administrative Law Judge to reject petitioner's claims and base the estimate of petitioner's liability on the cash receipts document as presented by petitioner's accountant.

Petitioner's contention that the audit was unreasonable because it did not adjust quarterly deposits by the amount of claimed loans and exchanges must also be rejected. In particular, petitioner contends that the auditor erred by not reducing the taxable sales by the amounts of certain checks reflected in the cash receipts listing which support the "possibility of the idea of a lending relationship" (petitioner's brief p. 4). Even if the facts indicate "the possibility of the idea" that certain checks were from a loan and exchange arrangement, we find this mere possibility falls far from the clear and convincing standard which petitioner bears in proving the audit erroneous. The testimony of petitioner at the hearing clearly indicates that some of the checks which Galil received were from sales to customers while others may have been from loans and exchanges which petitioner claims to have occurred. No evidence has been presented

by petitioner from which one could accurately determine whether each check at issue was the result of a sale or a personal loan. Rather, petitioner supports this claim for reduction by mere self serving assertions which attempt to explain the transactions recorded in the cash disbursements and receipts document submitted. We reject petitioner's argument. As discussed earlier, petitioner's actions in the operation of the business, throughout the course of the audit and at the hearing below, indicate a course of conduct by petitioner which supports the decision of the Administrative Law Judge not to accept his statements with regard to which checks were loans and which were sales. Further, the only reason that the records are in the confused state that we find them to be in, which makes it impossible to verify petitioner's loan claims, is petitioner's decision to create a check kiting scheme. Since it is petitioner who concocted this illusive manner of record keeping and because it is not subject to any reasonable verification it is he who must bear the consequences of this choice.

Under these circumstances, we find that petitioner has not shown by clear and convincing evidence that the tax liability determined was unreasonable. Accordingly, we conclude that the method employed to arrive at petitioner's liability was reasonably calculated to reflect taxes due in light of the lack of records as well as the confused state of those records which were made available (see, W.T. Grant v. Joseph, supra). At best, petitioner has only demonstrated that the calculation of the tax liability was imprecise, but petitioner has not carried his more onerous burden of proving by clear and convincing evidence that the method utilized produced an unreasonably inaccurate result or that the amount of tax assessed was erroneous (see, Meskouris Brothers v. Chu, 139 AD2d 813, 526 NYS2d 679; Surface Line Operators v. Tully, supra). Further, petitioner's claim that the entire audit must be found to be unreasonable since the Administrative Law Judge modified portions of the audit is not persuasive. The reductions allowed by the Administrative Law Judge do not show that the entire audit process was affected by error, rather, it is petitioner who "retains the burden of showing that the deficiencies assessed were erroneous" (Koren-Di Resta Construction Co. v. State Tax Commn., 138 AD2d 909, 526 NYS2d 654, 656).

The next issue which we will address is petitioner's claim that the audit was unreasonable in that it did not give Galil credit for certain exemptions which were claimed. We agree with the Administrative Law Judge that Galil was not entitled to the claimed exemptions. Tax Law § 1132(c) imposes a presumption that all receipts for property or services are subject to tax unless the vendor has obtained an appropriate certificate from the purchaser indicating exemption (see, 20 NYCRR 529.7[h][2]). Further, 20 NYCRR 533.2(b)(4) requires that the certificates be retained in order to prove exempt sales and that a method for associating an exempt sale with the corresponding cerificate be maintained (see, On the Rox Liquors v. State Tax Commn., 124 AD2d 402, 507 NYS2d 503). Instead of requiring religious school customers to provide a certificate to be retained by petitioner and associated with each sale, petitioner stated that he was once shown a numbered certificate of exemption and he thereafter permitted the drivers of the schools' vehicles to sign the invoices based on his one time exposure to the certificate. In addition, petitioner admitted that some of the vehicles for which an exemption was allowed were private passenger cars driven by employees of the schools which may have been owned by either the school or the employee. Of the invoices that petitioner retained from these transactions none were presented to the auditor at the time of audit. At the hearing invoices were presented for a five-month period along with affidavits from officers of the religious schools for which the exemptions were sought. On the invoices sales tax was not separately stated. Petitioner testified that he simply discounted the price on the invoice by 8 percent to account for the exemption from sales tax. No exempt organization certificates were presented.

Since petitioner failed to comply with the law and regulations applicable to the exemption sought in that he failed to obtain and retain exemption certificates, we conclude that his claim for the exemptions was properly denied.

The final issue to be addressed is petitioner's claim that he is not guilty of fraud in that he did not willfully, knowingly and intentionally commit acts or omissions which were designed to facilitate underpayment of sales taxes owing to the State. Tax Law § 1145(a) (former [2]) provides in pertinent part:

> "If the failure to file a return or to pay over any tax to the tax commission within the time required by this article is due to fraud, there shall be added to the tax a penalty of fifty percent of the amount of tax due (in lieu of the penalty provided for in subparagraph [i] of paragraph one), plus interest . . . ."

The burden of showing fraud under Tax Law § 1145(a)(2) has consistently been interpreted to reside with the Division (Matter of Ilter Sener, Tax Appeals Tribunal, May 5, 1988; Matter of Nicholas Kucherov, 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 Shutt, State Tax Commn., July 13, 1982).

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 specific intent to violate the Tax Law (Matter of Cousins Service Station, 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, 86-1 USTC ¶ 9232). Further, "fraud may be proved by circumstantial evidence since direct proof of the taxpayer's intent is rarely available . . . [and] . . . [t]he taxpayer's entire course of conduct can often be relied on to establish the requisite fraudulent intent" (Frazier v. Commr., 91 TC 1, 12).

We agree with the Administrative Law Judge that the fraud penalty should be sustained. In particular, the imposition of the fraud penalty is supported by (1) the consistent and substantial understatement of income by petitioner, (2) the failure of petitioner to maintain complete and accurate records, (3) the failure of petitioner to fully cooperate throughout the course of the audit and (4) the overt acts of petitioner which indicate the existence of fraud.

While an understatement of income alone will not suffice to constitute proof of fraud, "[c]onsistent and substantial understatements of income is by itself strong evidence of fraud"

(Merritt v. Commr., 301 F2d 484, 62-1 USTC ¶ 9408, at 84,167). In the present case the record indicates that the taxable income of Galil was understated by petitioner for each of the years at issue and that returns were filed which were incomplete and, often, unsigned. While the exact extent of the understatement cannot be shown due to petitioner's failure to maintain adequate records, it is clear that the understatements are in fact substantial. Further, the Division has affirmatively proved this understatement through Galil's own books and records and has not merely relied on petitioner's failure to disprove the assessment (cf., Matter of Cousins Service Station, supra).

The failure of a taxpayer to maintain a complete and accurate set of records is evidence of fraud (see, Korecky v. Commr., supra, 86-1 USTC ¶ 9232, at 83,380; Merritt v. Commr., supra, 62-1 USTC ¶ 9408, at 84,167; Bryan v. Commr., 209 F2d 822, 54-1 USTC ¶ 9189, at 45,355, cert. denied 348 US 912). The record is clear in the present case that petitioner failed to keep a complete and accurate set of his sales records. In particular, the records which were made available were merely handwritten documents presented by Galil's accountant which purported to be Galil's cash receipts and disbursements for portions of 1981 and 1982. This failure to maintain records clearly prevents a full disclosure of the income of the business such that the Division has been forestalled from ascertaining with specificity the tax due from petitioner.

The failure of a taxpayer to cooperate during the course of an audit also constitutes evidence of fraud (see, Korecky v. Commr., supra, 86-1 USTC ¶ 9232, at 83,380; Estate of Granat v. Commr., 298 F2d 397, 62-1 USTC ¶ 9247). The record in the instant case is clear on this point as well in that petitioner failed to cooperate over the course of the audit. In particular, no books and records of any sort were made available to the auditor for nearly a year after they were requested. Further, the facts indicate that petitioner failed to disclose the identity of Bernard Joseph, who was in fact petitioner's uncle (Mr. Jozefovic), during the course of the audit.

The final factor indicating fraud on the part of petitioner is the manner in which he operated Galil. Specifically, petitioner has admitted that he was engaged in a scheme to deceive

banks as to the financial status of Galil. A strategy of check kiting was developed wherein the account of Galil and the account of First Wythe exchanged checks in order that Galil could mislead the bank as to its actual balance so that it could write checks on its account with funds that did not in fact exist. As part of this plot, records of Galil were intentionally falsified when an uncertain number of these bogus checks were recorded in the cash disbursements and receipts document which petitioner's accountant submitted. "[I]t is a fair inference that a man who will misappropriate another's funds to his own use through misrepresentation and concealment will not hesitate to misrepresent and conceal his receipt of those same funds from the Government with intent to evade tax" (Recklitis v. Commr., 91 TC 874, 912, quoting McGee v. Commr., 61 TC 249, 260). On the record before us it seems clear that the intentional distortion of the records of the business served not only to deceive the banks as to the financial status of Galil, but it also worked at a minimum to prevent the Division from ascertaining the exact amount of tax due from Galil. Only the wholly unreliable and largely false cash and receipts disbursements documents were made available for purposes of the audit, evidence that the payment of taxes was evaded.

A finding of fraud may be shown by surveying a taxpayer's entire course of conduct and drawing reasonable inferences therefrom (see, Korecky v. Commr., supra, 86-1 USTC ¶ 9232, at 83,380). Based on petitioner's entire course of conduct, as discussed, we conclude that the fraud penalty was properly imposed. The combination of petitioner's consistent and substantial understatement of income, poor record keeping practices, failure to fully cooperate during the audit and deceptive operation of Galil compel the conclusion that he willfully, knowingly and intentionally committed acts and omissions designed to facilitate the underpayment of sales and use taxes due and owing to the State.

Tax Law § 1147(b) provides, in part, 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 . . . ." Since we

have concluded that the fraud penalty was properly imposed, it follows that each of the notices of determination were timely issued to petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph Lefkowitz, officer of Galil Auto Repair, Inc., is denied;

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

3. The petition of Joseph Lefkowitz, officer of Galil Auto Repair, Inc., is granted to the extent indicated in Conclusions of Law "D" and "F" of the determination of the Administrative Law Judge, and is in all other respects denied, and

4. The notices of determination and demand for payment of sales and use taxes due issued March 15, 1984, May 9, 1984 and July 3, 1984 are

modified to the extent indicated in paragraph "3" above, and are in all other respects sustained.

DATED: Troy, New York
May 3, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner