STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GARTNER GROUP, INC.	:	DECISION DTA No. 807983
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 March 1, 1984 through February 28, 1988.	:	

Petitioner Gartner Group, Inc., 56 Top Gallant Road, Stamford, Connecticut 06902, filed exceptions to the determination of the Administrative Law Judge issued on January 21, 1993 with respect to its petition and to the order of the Administrative Law Judge issued on September 2, 1993 with respect to its motion to reopen. Petitioner appeared Hutton & Solomon (Stephen L. Solomon and Kenneth I. Moore, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioner filed a brief in support of its exceptions, the Division of Taxation filed a brief in opposition to both of petitioner's exceptions and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on June 16, 1994 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioner has established that an audit-based assessment should be reduced due to claimed overlapping audits of petitioner's customers and/or the possession by certain customers of direct payment permits.

II. Whether the Administrative Law Judge erred in denying petitioner's motion to reopen the record.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge in his January 21, 1993 determination except that we modify finding of fact "8(d)." The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, Gartner Group, Inc. ("Gartner"), performs market research in various segments of the information processing industry. The results of the firm's research and analysis are sold to clients, by way of subscription, in the form of publications referred to as bi-weekly Research Notes and periodic Strategic Analysis Reports. Petitioner has been in business since 1979 but maintained offices in New York City only during the first year of operations. Subsequently, Gartner has operated exclusively out of its Connecticut offices. Gartner was registered with New York State as a sales tax vendor and filed sales and use tax returns up to and including the quarter ended February 28, 1988, when a final return was filed and its sales tax registration cancelled.

Gartner solicits business within New York State through several channels. It advertises its services in publications such as Forbes and the Wall Street Journal and uses direct mailing via acquired customer lists. Gartner also sponsors conferences directed at prospective clients for purposes of presenting the available services and products of the firm, and additionally distributes samples of its publications at various trade shows and exhibitions. In addition, Gartner sends sales representatives into New York State to directly call on selected prospective clients.

Petitioner did not charge sales tax to its clients during the period March 1, 1984 through November 30, 1986. Instead, Gartner allocated and reported 10% of gross client fees as taxable sales attributable to the publications, and remitted this amount directly out of the gross receipts. The balance of revenues from client fees was allocated as tax-exempt research and consulting income. After the period ended November 30, 1986, petitioner ceased reporting any taxable sales in New York State.

Following the Division of Taxation's ("Division") auditor's determination that petitioner's sales records were adequate, the parties executed an Audit Election Method Agreement form. The auditor tested Gartner's sales for the period June 1, 1986 through August 31, 1987 using the client billings worksheets and accompanying invoices. The following distribution of sales revenues was determined:

Subscriptions	90.04%
Reprints	.52%
Consulting	6.58%
Presentations	1.21%
Exempt Organization Sales	1.65%
Total Percentage	100%

The auditor combined the sales of subscriptions and reprints to arrive at an audited taxable percentage of 90.56%. This percentage was applied to New York State gross sales for the audit period to arrive at audited taxable sales. Additional taxable sales of $9,742,252.94 were determined by subtracting reported taxable sales from audited taxable sales. The additional tax due of $750,526.54 was arrived at by applying the various jurisdictional tax rates to the appropriate amounts of additional taxable sales.

On May 19, 1987, August 13, 1987, November 5, 1987 and May 27, 1988, petitioner executed a series of consents having the effect of extending the period of limitations for assessment of sales and use taxes for the period March 1, 1984 through May 31, 1985 to September 20, 1988. On November 10, 1988, petitioner executed a consent which extended the period of limitations for assessment of sales and use taxes for the period September 1, 1985 through February 28, 1986 to June 20, 1989.

On September 20, 1988, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Gartner for the period March 1, 1984 through August 31, 1985 assessing a sales tax liability of $197,748.91, plus penalty (Tax Law former § 1145[a][1]) and interest. On the same date, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Gartner for the period June 1, 1985 through August 31, 1985 assessing a penalty (Tax Law § 1145[a][1][vi]) of $2,106.22.

On March 17, 1989, the Division issued a Notice of Determination and Demand for

Payment of Sales and Use Taxes Due to Gartner for the period September 1, 1985 through February 28, 1988 assessing a sales tax liability of $552,777.39, plus penalty (Tax Law § 1145[a][1][i]) and interest. On the same date, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Gartner spanning the same period and assessing penalty (Tax Law § 1145[a][1][vi]) of $55,277.73.

Petitioner concedes that the transactions at issue are information services subject to the imposition of sales tax under Tax Law § 1105(c)(1). Petitioner also concedes the audit findings with respect to the amount of gross sales, the taxable sales percentage (computed on the basis of a test of sales for the period June 1, 1986 through August 31, 1987) and the amount of sales reported by petitioner.

Petitioner seeks a reduction of its sales tax liability as a vendor on the above-stated transactions on the following grounds: (1) overlapping audits; (2) exempt sales; and (3) direct payment by petitioner's customers. Petitioner also seeks credit against the sales tax liability for the $129,999.23 in checks submitted to the Division.

In support of its position, petitioner submitted copies of customer invoices for the audit period and a summary sheet showing the computation of the tax attributable to each invoice. In support of its position relating to the issue of overlapping audits, petitioner introduced letters from its customers concerning New York State sales and use tax field audits that had been conducted for periods during which the customers had made purchases from Gartner. The contents of the letters can be divided into four categories:

(a) The following customers' letters indicate that they had been audited for the same audit period and had agreed to or paid the audit findings. In addition, six of the customers' (*) letters are accompanied by a signed consent fixing the tax due:

AT & T
Bankers Trust Company
Barrons (Dow Jones)
CBS, Inc. *
Chase Manhattan Bank
Ciba-Geigy
Citicorp
Citicorp NA, Inc.
National Westminster Bank
G.E. - Knolls Atomic Power Lab
Irving Trust (Bank of New York)
Manufacturers Hanover
McGraw-Hill*
Metropolitan Life Insurance
Morgan Guaranty Trust
Morgan Stanley

Computer Associates
Computer Consoles, Inc.
Consolidated Edison
Continental Insurance*
Corning Glass
Dillon Read & Co., Inc.
Ernst & Young
E. F. Hutton
Equitable Life Assurance
European American Bank
First Boston Corporation
Forbes*
MSC, Inc.
New York Times
Paine Webber
Paramount Pictures
Pepsico
Philip Morris
Salomon Bros.
Siemens Info Systems
SIAC*
Union Pacific*
United States Trust
United Technologies

The letters indicate that either the tax due on the transactions with Gartner was paid as part of the agreement with New York State or that there was no agreement to exclude the transactions with Gartner from the audit.

(b) The following letters indicate that the customers are currently being audited for the same audit period:

Avon Products, Inc.
Bear Sterns
Coopers & Lybrand
General Foods (Kraft)
IBM
Information Builders
ITT Corporation
Lehman Bros.
Manufacturers & Traders
Marine Midland Bank
Merrill Lynch
Shearson Lehman
Sprout Group (DLJ Inc.)
Xerox
Young & Rubican, Inc.

(c) The letters of the following customers indicate that the customers were audited for the same audit period as petitioner but do not state whether the customer agreed to the audit findings:

Goldman Sachs & Co.
Grumman Data Systems
Joseph Seagram
Mobil Corp.
Mobil Oil Corp.
NBC
NEC America, Inc.

The letter from Grumman Data Systems further states that for the audit covering the

period March 1, 1984 through August 31, 1987, "the issue at hand was not assessed."

We modify finding of fact "8(d)" to read as follows:

(d) The following customers indicate in their letters that they had been audited for the same period and had protested some or all of the audit findings:

Eastman Kodak F. W. Woolworth

The letter from F. W. Woolworth states that F. W. Woolworth was not assessed and did not pay any sales tax on the Gartner Group invoices. The letter from Eastman Kodak does not explicitly state whether the Gartner Group invoices were part of the agreed audit.[1]

The Division concedes that the following customers are exempt organizations whose purchases from petitioner are not subject to the imposition of sales tax:

Blue Cross/Blue Shield (Empire)

Federal Reserve - New York

Port Authority of New York and New Jersey

Gartner also claims that the Metropolitan Transit Authority is an exempt organization.

Petitioner alleges that sales to two of its customers are exempt from sales tax because delivery occurred outside New York State. In support of its position, petitioner produced a letter from the Assistant Manager - Corporate Taxes of The Penn Central Corporation. The letter states that Penn Central had moved its corporate offices from New York City to Greenwich, Connecticut on April 1, 1984 and the consulting services purchased from petitioner would have been used in Connecticut rather than New York. The letter further states that although the bills in question were mailed to the New York City address, they were processed and paid from Connecticut. In addition, a letter from a tax partner of Deloitte & Touche was introduced into the record. The letter indicates that Touche Ross & Co. had subscribed to

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[1] We modified finding of fact "8(d)" by deleting the sentence "Where there is a partial consent, there is no indication whether it covers the same invoices as in the audit at issue:" and adding the last two sentences.

several services provided by Gartner which permitted Touche Ross & Co. to designate two interfaces or individuals to receive printed reports. The letter further indicates that for each subscribed service Touche Ross designated two individuals, one in New York City and one outside New York State, to receive copies of the printed reports.

Gartner's sales invoices to both The Penn Central Corporation and Touche Ross & Co. listed the customers' addresses as being in New York City.

Petitioner introduced into the record of this matter a letter dated May 28, 1991 from the Brooklyn Union Gas Company which advises Gartner that Brooklyn Union Gas had a New York State Direct Payment Permit for sales and use taxes and that Brooklyn Union Gas had paid use tax on its purchases from Gartner with its October 1987 Use Tax Report. Attached to the letter was the Direct Payment Permit and a copy of Brooklyn Union Gas' Use Tax Accrual Report for October 1987 showing the invoice number, amount and use tax amount relating to its transaction with petitioner. Direct Payment Permits were also presented by The Gleason Corporation, The J. C. Penney Company, Inc., and Pepsico.

During the course of the proceedings in this matter, petitioner submitted to the Division checks from various purchasers representing the sales tax due on some of the transactions at issue. The customers and the amounts submitted are as follows:

CUSTOMER	AMOUNT
Avon Products, Inc.	$ 4,108.00
Bristol-Myers	1,361.00
Clarendon Group	1,815.00
Group W Cable	908.00
MONY Financial	8,357.02
New York Life Insurance	11,973.00
Norstar Data Services	10,290.00
NYNEX	44,068.62
Olivetti	8,664.00
Schroder Leasing Corp.	895.00
Swissre Holding - North America	17,320.87
Touche Ross & Co.	6,500.00
TRW	3,142.72
Union Pacific	10,596.00
	$129,999.23

We find the facts as determined by the Administrative Law Judge in his September 2,

1993 order except that we have deleted the Administrative Law Judge's finding of fact "3" because it is set forth as finding of fact "8" above. We have also made additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

On March 1, 1991, a hearing in the instant matter was commenced before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York. Gartner Group, Inc. ("Gartner") was provided until June 3, 1991 to submit additional documentation. By letter dated May 29, 1991, petitioner's time to submit additional documentation was extended to July 8, 1991 by the Administrative Law Judge. Petitioner submitted additional documentation by letters dated July 9, 1991 and August 29, 1991. The Division submitted its brief in response to petitioner's submitted documentation on October 21, 1991. In January and March 1992, petitioner submitted additional documentation into the hearing record. The hearing was rescheduled for January 14, 1992 and March 11, 1992. Both hearings were adjourned. In a telephone conversation between the respective parties' representatives and the Administrative Law Judge on March 9, 1992, the parties agreed that the March 11, 1992 hearing was no longer necessary. Petitioner requested and was given until March 13, 1992 to submit additional documentation. It was agreed, that thereafter, the record would be closed. A briefing schedule was established which concluded on May 22, 1992.

The issue of the hearing was whether petitioner established that an audit-based assessment should be reduced due to claimed overlapping audits of petitioners' customers, claimed exempt sales and/or the possession by certain customers of direct payment permits.

On January 21, 1993, a determination was issued wherein the Administrative Law Judge held that it was the Division's policy to reduce a vendor's assessment for any amount assessed on sales to a particular customer if the customer was audited and agreed to the audit findings for the same audit period, relying on the Tax Appeals Tribunal's decision in Matter of Allied Aviation Serv. Co. of N.Y. (June 27, 1991).

The Administrative Law Judge found that, based upon the Division's audit policy

regarding overlapping audits, petitioner was entitled to an adjustment to the audit findings as to the customers listed in paragraph "8(a)" above, in that petitioner established through the customers' letters and supporting documents that these customers were audited and agreed to the audit findings for the same audit period. The Administrative Law Judge further found that petitioner was not entitled to any adjustment to the audit findings with regard to the customers listed in paragraphs "8(b)", "8(c)" or "8(d)". The information relating to these customers did not meet the requirements of the Division's audit policy as the audits were either ongoing and not, as yet agreed to ("8[b]"), were complete but not agreed to ("8[c]") or were being protested ("8[d]").

In his affidavit and affirmation in support of the motion, Mr. Moore asserted that after the determination had been issued, he contacted the 26 customers contained in paragraphs "8(b)", "8(c)" and "8(d)" and discovered that over one-half of the customers, subsequent to the date of the commencement of the hearing (March 1, 1991), had their audits completed and had agreed to the audit findings. Mr. Moore stated that the evidence was not available at the time of the hearing because the audits had not yet been completed and/or there was no agreement to the audit findings at such time.

Petitioner introduced in support of its motion 22 letters from customers advising that they had been audited for the same period as petitioner, that they had agreed to the audit adjustments and that there was no agreement to exclude transactions with petitioner from the audit. None of the letters contained the date that the audit was completed. Mr. Moore's assertions as to when the audits occurred in relation to the final date for submitting documentation can be divided into three categories:

(a) According to Mr. Moore, the following customers had their audits closed and the taxes paid after March 13, 1992:

American Express
Bear Stearns
General Foods (Kraft)
IBM
ITT Corporation
Manufactuers & Traders
Marine Midland Bank
Merrill Lynch
Sprout Group (DLJ Inc.)
Young & Rubicam, Inc.

(b) According to Mr. Moore, the following audits were concluded before March 13, 1992:

Eastman Kodak	Mobil Corp.
Goldman, Sachs & Co.	Mobil Oil Corp.
J.C. Penney	NBC
Joseph Seagram	Shearson Lehman
Lehman Bros.	Xerox

(c) According to Mr. Moore, the following audit was closed when the Division allowed the statute of limitations to expire on an extension:

The Gleason Works

The affirmation of the Division's representative, James Della Porta, Esq., submitted in opposition to petitioner's motion, contends that petitioner's motion papers do not establish that due diligence was exercised in attempting to locate the evidence which petitioner now seeks to introduce. The affirmation further states that the new evidence does not meet the current audit guidelines concerning overlapping audits. In addition, the affirmation states that since a reasonable period of time has passed, in this case 18 months from the date of the first scheduled hearing to the last date for the submission of evidence, the hearing process must be concluded.

In addition to the facts found by the Administrative Law Judge, we find the following:

> As indicated above, the record in this matter was held open to allow petitioner to introduce its evidence and to allow the Division to respond to this evidence. At one point, the Division requested and was granted additional time to reply to petitioner's customer letters because the Division was "still checking the records of its district offices in order to verify the claims made by Gartner's customers" (Letter dated October 2, 1991). This checking was consistent with the Division's policy on overlapping audits which suggests that auditors may contact "their counterpart in the office which conducted the other audit to determine if a duplication of tax would occur and to determine the appropriate action(s)" (Exhibit 2, Division's memorandum on overlapping audits).
>
> Although the Division had ample opportunity to investigate the status of the audits of the customers listed in finding of fact "8(c)" (the 8[c] customers), the Division offered no evidence to controvert the evidence offered by petitioner. At oral argument on exception, the Division's representative suggested that he could not have readily verified petitioner's information because "I don't have a vendor identification number, I have no way of associating with a particular audit, I don't know if the trade name on the letter is the same as I'm going to find if I make an inquiry" (Oral Argument Tr., p. 18).

> However, most of the 8(c) customer letters do contain identifying information. Specifically, the Goldman Sachs & Co. letter states the auditor's name and telephone number, the Joseph Seagram letter states the auditor's name, the letter relating to the Mobil Corp. and the Mobil Oil Corp. states each of these corporations' sales tax registration numbers and the letter from NEC America identifies the permit number under which the audit was conducted. This information suggests that the Division could have investigated the status of the audits of the 8(c) customers and either chose not to or chose not to introduce the results of the investigation.

OPINION

On exception, petitioner first challenges the Administrative Law Judge's determination and argues that the Administrative Law Judge erred in not granting an adjustment for those customers listed in finding of fact "8(b)" (the 8[b] customers) who submitted letters stating that they were currently being audited. Petitioner acknowledges that these customers are not within the Division's audit policy (because the audits of the customers were not completed) but contends that the "law embraces a different, broader concept" (Petitioner's brief on exception, p. 8). Petitioner asserts that:

> "[i]n analyzing this issue, certain basic precepts must be kept in mind. Foremost is that the law imposes primary liability for tax on the purchaser; the seller is only secondarily liable as being responsible to collect the tax from the purchaser. Another premise is that the Department should only be permitted to collect <u>one</u> tax per taxable transaction" (Petitioner's brief on exception, p. 8).

From these premises, petitioner concludes that once the Division becomes aware that a purchaser who has not paid tax is being audited, the Division is obligated to seek payment from the purchaser first and not the seller.

Petitioner has cited no statute or case law for the principle that from the Division's perspective the customer is primarily liable for the tax. Instead, as the Division notes, Tax Law § 1133(a) provides that every person required to collect the tax is personally liable for the "tax imposed, collected or required to be collected." The liability imposed by this statute on the vendor is absolute. The statute does not limit the vendor's liability for tax to those instances where the Division has first sought payment from the customer.

Petitioner points out that section 1133(a) allows the vendor to sue the customer for the

tax. In our view, this provision is only defining the liability for the tax between the vendor and the customer; it is not prescribing the recourse for the Division to collect the tax.

Not only have we found no support in the statute or case law for petitioner's position, but to require the Division to first seek payment from the customer would be impractical because it would severely hinder the Division's ability to collect any tax. While the Division was pursuing efforts to assess and collect the tax against a customer, the statute of limitations would be running on the assessment that might ultimately be issued against the vendor. Further, the delay in pursuing the vendor could allow dissipation of the vendor's assets.

With respect to petitioner's premise that the Division should not be allowed to collect the tax twice on a single transaction, there is authority for this rule (see, Fifth Ave. Bldg. Co. v. Joseph, 297 NY 278). However, there is no evidence that the rule has any application in this case because there is no evidence that the tax assessed against petitioner has already been paid by any customer. The Division acknowledges that if petitioner had established that the tax had been paid, petitioner would not be liable for the tax (Division's brief on exception, p. 15).

Because we find no basis to support petitioner's contention that the Division should be required to seek the tax first from the customer, we affirm the Administrative Law Judge's determination sustaining the assessment with respect to the 8(b) customers.

Next, petitioner argues that the transactions with the customers listed in finding of fact "8(c)" (the 8[c] customers) should be excluded from the audit because the letters from these customers imply that the audits were agreed and the information to controvert this implication is peculiarly within the knowledge of the Division, i.e., whether the vendee agreed with the audit assessment. In response, the Division argues that the overlapping audit policy is not required by law.

As stated in the facts, the Division had ample opportunity to investigate whether the 8(c) customers had agreed to their audits, correspondence from the Division indicated that the Division was conducting such a check and most of the 8(c) letters contained identifying information. However, the Division did not introduce any evidence confirming or denying that

the 8(c) customers had agreed to the audits. Contrary to the Division's argument, the question here is not whether the Division had to have a policy with respect to overlapping audits; the question is whether petitioner proved that the 8(c) customers were within this policy. Given the Division's failure to respond to the 8(c) letters, we agree with petitioner that, with the exception of the Grumman Data Systems letter, the letters from the 8(c) customers were sufficient to prove that petitioner was entitled to an audit adjustment for these customers. Because the Grumman Data Systems letter states that "the issue at hand was not assessed," we conclude that petitioner is not entitled to an adjustment for this customer.

With respect to the customers listed in finding of fact "8(d)" (the 8[d] customers), we similarly conclude that the Eastman Kodak letter implies that petitioner's sales were not protested by Eastman Kodak and petitioner should receive an adjustment for this customer. On the other hand, because the F. W. Woolworth letter states that F. W. Woolworth "was not assessed nor did we pay any sales tax on the Gartner Group, Inc. invoices in question" petitioner is not entitled to an adjustment for this customer.

With respect to the transactions with The Penn Central Corporation and Touche Ross & Co., the Administrative Law Judge held that the letters submitted by petitioner were insufficient to establish delivery outside of New York State. The Administrative Law Judge stated that "[t]he Division, through its own records, could not verify this information as it could with the overlapping audits and the letters are contradicted by petitioner's invoices to the two customers showing addresses within the State. Furthermore, the services provided by Gartner to Touche Ross & Co. were in fact delivered in New York State" (Determination, conclusion of law "C").

On exception, petitioner contends that the fact that the bill contained the New York City address is not indicative of where delivery took place. Petitioner contends that the letters from The Penn Central Corporation and from Touche, Ross & Co. were not contradicted and should be given conclusive effect.

In response, the Division argues that petitioner's proof merely shows that the reports were used outside of New York. The proof does not establish that petitioner transferred possession

of the reports outside of New York.

We affirm the determination of the Administrative Law Judge on this issue for the reasons stated in the determination.

Next, the Administrative Law Judge concluded that petitioner had established that Brooklyn Union Gas Company had paid tax on its transactions with petitioner directly to the Division under a direct payment permit. Although petitioner presented copies of direct payment permits for The Gleason Corporation, The J.C. Penney Company, Inc. and Pepsico, the Administrative Law Judge concluded that these permits did not entitle petitioner to an adjustment because they were received by petitioner after the time to assess the customers had expired. The Administrative Law Judge stated that "[t]o relieve Gartner from its responsibility at this time would place the Division in the position of being unable to collect the sales tax from either petitioner, due to its receipt of the Direct Payment Permit, or the customer, due to the running of the statute of limitations. Such a result is untenable" (Determination, conclusion of law "D").

On exception, petitioner contends that the language in section 1132(c) of the Tax Law which states that "[a] vendor shall not be required to collect tax from a purchaser who furnishes a direct payment permit in proper form" means that the customer can provide the permit at anytime. In response, the Division argues that a direct payment may never be received after the sale.

We affirm the determination of the Administrative Law Judge on this issue for the reasons stated in the determination.

In his determination, the Administrative Law Judge also concluded that the Metropolitan Transportation Authority was an exempt organization and that petitioner was entitled to a credit of $129,999.23 based on the submission of checks from various customers representing tax due on some of the transactions at issue. Neither party has taken exception to these conclusions.

With regard to petitioner's motion to reopen, the Administrative Law Judge denied the motion because petitioner made an insufficient showing that the "newly discovered evidence"

was unavailable at the time of the hearing or could not have been discovered with due diligence prior to the hearing. With respect to the customers in 17(a), the Administrative Law Judge held that the completion of these audits after the record was closed could not be newly discovered evidence because, relying on Matter of Commercial Structures v. City of Syracuse (97 AD2d 965, 468 NYS2d 957), only evidence in existence at the time of the hearing can be characterized as newly discovered. The Administrative Law Judge also held that petitioner had failed to prove that these audits were completed after the record was closed. With respect to the audits of the customers listed in findings of fact "17(b)" and "17(c)," the Administrative Law Judge concluded that petitioner failed to prove when these audits were completed and that without such information it was not possible to determine when the information became available and whether petitioner had exercised due diligence in obtaining it. The Administrative Law Judge opined that merely contacting the customer after the issuance of the determination did not establish due diligence.

On exception, petitioner argues that "[t]he failure to re-open the hearing to allow proof of payment works a virtual fraud on the part of the Department, which insists on payment by the vendor even though it knows or should know that the tax has already been paid by the purchaser . . ." (Petitioner's brief on exception, p. 12).

In response, the Division argues that the essence of petitioner's position is that a vendor's sales tax liability cannot be irrevocably fixed until the last audit of its customers has been concluded. This is an erroneous view, asserts the Division, because

> "[p]etitioner had its chance to collect tax during the period at issue, during audit and during the petition process. Petitioner had the opportunity to establish that its customers had paid the tax directly to the Division or agreed to pay tax found due on audit. Therefore, petitioner's liability for the tax should be fixed" (Division's brief in opposition, pp. 21-22).

We affirm the order of the Administrative Law Judge.

It is our well established rule that additional evidence will not be accepted after the record is closed (Matter of Rose, Tax Appeals Tribunal, June 30, 1994). The purpose for this rule is to ensure that the hearing process is both defined and final (Matter of Schoonover, Tax Appeals

Tribunal, August 15, 1991). Accordingly, we have held that motions to reopen the record will be allowed only in very special circumstances (Matter of Rose, supra). Newly discovered evidence that could not have been discovered with due diligence in time for the hearing can be a basis to reopen a hearing (Matter of Byram, Tax Appeals Tribunal, August 11, 1994). Petitioner has not convinced us that this record should be reopened.

With respect to those customers listed in finding of fact "17(b)," who petitioner now claims had their audits concluded prior to the closing of the record on March 13, 1992, petitioner has offered no explanation as to why evidence with respect to these customers could not have been provided prior to the closing of the record. Therefore, we see no special circumstances that would warrant reopening the record with respect to these customers.

For the customer in finding of fact "17(c)," The Gleason Works, we affirm the Administrative Law Judge's order for the reasons stated in the order.

With regard to the customers listed in finding of fact "17(a)," we are unwilling to find that this evidence which purportedly came into existence after the record is closed constitutes a basis to reopen the record. As the Administrative Law Judge correctly noted, relying on Matter of Commercial Structures v. City of Syracuse (supra), such evidence is not newly discovered. Further, we are concerned that if the record can be reopened based on evidence coming into existence after the hearing is held, no hearing will ever be final. As the Division suggests, petitioner's position would lead to the result that a vendor's liability could not be finally determined in the hearing process until the last audit of the vendor's customers had been concluded. Of course, a rule to reopen hearings based on evidence coming into existence after the hearing would have to apply with equal force to evidence obtained by the Division. Balancing the interests here, we conclude that the general interest in finally concluding the hearing process outweighs petitioner's interest in attempting to obtain a further benefit from the Division's policy on overlapping audits.

Of course, our decision to maintain the integrity of the hearing process does not preclude the Division from examining petitioner's evidence, after this decision is issued, "to determine if

a duplication of tax would occur and to determine the appropriate action(s)" (Exhibit 2, Division's memorandum on overlapping audits). In other words, the Division will still be free to apply the Division's audit policy on overlapping audits.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gartner Group, Inc. is granted to the extent that it is granted a further audit adjustment for those customers listed in findings of fact "8(c)" and "8(d)," excluding Grumman Data Systems and F. W. Woolworth, but the exception is otherwise denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above, but is otherwise affirmed;

3. The order of the Administrative Law Judge is affirmed;

4. The petition of Gartner Group, Inc. is granted to the extent indicated in the Administrative Law Judge's conclusions of law "A," "B," "D," "E" and "F" and in paragraph "1" above, but is otherwise denied;

5. The motion of Gartner Group, Inc. is denied; and

6. The Division of Taxation is directed to modify the notices of determination dated September 20, 1988 and March 17, 1989 in accordance with paragraph "4" above, but such notices are otherwise sustained.

DATED: Troy, New York
December 8, 1994

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

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