STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

BENAK CORPORATION :

for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Period January 1, 1983 through May 1, 1984. :

In the Matter of the Petition :

of :

BENAK CORPORATION :

for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period Ended December 31, 1983. :

In the Matter of the Petition :

of :

BENAK CORPORATION :

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 September 1, 1982 through February 29, 1984. :

In the Matter of the Petition :

of :

EDWARD J. KANEB, OFFICER OF BENAK CORPORATION :

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 September 1, 1982 through February 29, 1984. :

DECISION
DTA NOS. 808633, 808634, 808638, 808639 & 809435

In the Matter of the Petition

of

**CATHERINE KANEB,
OFFICER OF BENAK CORPORATION**

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 September 1, 1982 through February 29, 1984.

Petitioners Benak Corporation, Edward J. Kaneb, Officer of Benak Corporation, Catherine Kaneb, Officer of Benak Corporation, Route 2, Highland Road, Massena, New York 13662 and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on May 5, 1994. Petitioners also filed exceptions to the order of the Administrative Law Judge issued on June 13, 1991 denying their motions for default determinations. Petitioners appeared by Bond, Schoeneck & King (Arthur J. Siegel, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (John E. Matthews and Patricia L. Brumbaugh, Esqs., of counsel).

Each party filed a brief in support of their exceptions and in opposition to the other parties' exception. Oral argument was heard on February 15, 1995 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 Benak Corporation was liable for sales and use taxes for the period September 1, 1982 through February 29, 1984.

II. Whether petitioners Edward J. Kaneb and Catherine Kaneb were persons responsible for the collection of sales and use taxes on behalf of Benak Corporation during the period September 1, 1982 through February 29, 1984.

III. Whether petitioner Benak Corporation imported or caused to be imported motor fuel it purchased in Canada thereby subjecting it to tax under Article 12-A of the Tax Law.

IV. Whether petitioners' good faith receipt of resale certificates should have precluded the assessment of sales and use taxes and motor fuel tax.

V. Whether overlapping motor fuel audits, if established, should have precluded the assessment of certain sales and use and excise taxes against petitioners.

VI. Whether the Division of Taxation should be compelled to accept petitioners' amnesty applications previously denied pending criminal investigations.

VII. Whether the Division of Taxation should be defaulted and all the assessments at issue herein annulled because it failed to file timely answers in each of the matters in issue.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "11" and "17" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

On June 7, 1993, petitioners and the Division of Taxation ("Division") entered into a stipulation of exhibits and facts. The 36 exhibits were entered as part of the Division's Exhibit "P." The facts, as modified by the parties, have been incorporated into the following Findings of Fact. Additionally, petitioners submitted proposed findings of fact. Proposed findings designated Point I - 1, 2, 5 and 6; Point II - 10, 14, 16, 17, 24, 25, 28, 30 and 32; Point III - 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 16; Point IV - 7 and Point V - 1, 2 and 3, have been incorporated into the following Findings of Fact, while all others have been excluded because of the way in which they mischaracterized facts in the record, are conclusory in nature, are irrelevant or immaterial or have been found to have no basis in the record.

On January 31, 1983, petitioner Benak Corporation ("Benak") became registered as a motor fuel distributor under Article 12-A of the Tax Law. It also conducted business under the name Massena Petroleum Terminal ("Massena") as well.

During the audit period, January 1, 1983 through May 1, 1984, Massena's offices were located at the Highland Nursing Home, where there were no tanks, pumps or other facilities other than offices for conducting a petroleum business. The nursing home employed petitioner Edward J. Kaneb as its administrator, the president of Benak. The nursing home location also housed the Kaneb Realty Corporation, which owned the nursing home property.

Although an Article 12-A motor fuel distributor, Benak owned no tanker trucks, employed no drivers and maintained no petroleum inventories. However, it is uncontroverted that Benak made sales of petroleum during the years in issue.

We modify the Administrative Law Judge's finding of fact "2" to read as follows:

> The parties stipulated that during the calendar years 1982 and 1983, motor fuel distributors continued to use resale certificates and the State of New York Department of Taxation and Finance continued to accept said resale certificates in lieu of Form TP-146.4, if the Article 12-A distributor registration of the customer was confirmed by reference to the Division's records. The Form TP-146.4 was used to identify distributors exempt from sales tax on the purchases of gasoline, diesel motor fuel and fuel oil. When the resale certificate was in use by distributors, said certificate was routinely used for the sale of all petroleum products including fuel oil, gasoline and diesel fuel.[1]

As a consequence of making these sales, Benak filed certain returns and paid certain taxes. Catherine Kaneb, as officer of Benak, Edward Kaneb, as officer of Benak, and Benak timely filed sales tax and excise tax amnesty applications for the period December 1, 1982 through February 29, 1984 relating to petroleum products. For the tax period January 1, 1983 through December 31, 1983, Benak paid to the State of New York motor fuel excise taxes in the sum of $205,037.68. For the tax period January 1, 1983 through December 31, 1983, Benak paid sales and use tax for motor fuel in the sum of $36,207.70.

Since 1983, Benak imported or caused to be imported gasoline from basically two Canadian suppliers, Sipco Oil, Ltd. and Universal Terminals. For the sake of simplicity, Benak

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[1] We modified the Administrative Law Judge's finding of fact "2" by moving the footnote into the text of the finding of fact. We made this change to make it clear that the parties' stipulation included the condition that the 12-A registration of the customer had to be confirmed by the Division's records.

paid all its import duties through a customs broker known as A. N. Derringer of Fort Covington, New York.

Because Benak lacked the trucks to bring the gasoline into New York, it created a system whereby certain of its largest customers, to wit, James Vock, Purdy Coal & Oil, Inc. and John Fountain, would pick up the product at the terminals in their trucks and transport it to New York State.

Delivery tickets issued by the terminals clearly indicated that Massena was the party to whom the gasoline was being shipped and that the carrier or transporter was one of Benak's or Massena's customers like James Vock, Purdy Coal & Oil, Inc. and John Fountain. During the period, Canadian terminals only sold to registered New York distributors.

Invoices between Benak and its customers indicated that New York sales tax was included in the purchase price.

Sales invoices between the Canadian terminals like Sipco and Universal and Benak indicated that only Canadian taxes were charged.

The Article 12-A audit was begun by the Division on January 18, 1984. The Division had knowledge of unreported gallons of gasoline imported from a border investigation being conducted by the U.S. Customs Service. Following up on this, the Division contacted A. N. Derringer and received a printout of charges to Benak which showed dates of purchase, invoice numbers and amounts paid. Benak produced corresponding invoices which were matched to the printout as well as available third-party information garnered from Sipco. Tax-paid purchases were also examined as well as tax-free sales to Purdy Coal & Oil, Inc. which were summarized and appropriate credit given. It is noted that Purdy became a registered Article 12-A distributor in its own right in August of 1983 and purchased gasoline from Benak in November and December 1983.

The Division's investigation revealed unreported importation of gasoline in the amount of 2,408,396 gallons which yielded an additional 12-A tax due of $187,517.84. It is noted that

Benak did file Article 12-A returns during the audit period, most late filed, which indicated the importation of only 2,563,006 gallons.

On July 27, 1984, the Division issued a Notice of Determination of Tax Due under Article 12-A to Benak for the audit period January 1983 through May 1984, indicating additional tax due of $187,517.84, plus penalty and interest. At the conciliation conference, the tax was reduced to $175,672.24.

It is noted that a New York State audit of gasoline sales and excise tax was conducted of Purdy Coal & Oil, Inc. for the audit period December 1982 through November 1985. The Division's auditor relied upon and considered documents and information received from his audit of Purdy in conducting Benak's audit. The Division's auditor did not know the whereabouts of any other Purdy audit documents other than the Purdy field audit report in the record. As part of the auditor's audit of Purdy, he examined the gallons of gasoline that Purdy received from Benak and also compared Benak transactions with those transactions he analyzed in the Purdy audit for the same audit period.

We modify the Administrative Law Judge's finding of fact "11" to read as follows:

> Also, an audit was conducted of John Fountain d/b/a Cash Line Fuels for gasoline and diesel fuel sales tax during the period December 1981 through May 1984. As part of the audit, the Division also examined Fountain's operation of a truck stop, particularly with regard to sales tax liability. The Division's analysis of Fountain's wholesale purchases of gasoline from numerous fuel suppliers, including Benak, encompassed the period May 1982 through April 1984. The same auditor, Gerald Cowen, conducted the Fountain audit and the instant matter covering the same audit period. As a result of the Fountain sales tax audit, the Division found additional sales tax liability in the sum of $24,780.73. The audit report states that the taxpayer did not agree to this determination of tax.
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> The Fountain audit was performed between January 24, 1985 and May of 1985.[2]

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[2] We modified the Administrative Law Judge's finding of fact "11" by adding the last sentence to the first paragraph to reflect more details of the record.

It is uncontroverted that, during the applicable audit period, petitioners received resale certificates from Purdy Oil, James B. Vock, Transportation Supplies, Inc., Hurley Brothers, Edgetown Plaza, Inc., Sharlow's Service Station, and Cash Line Cherry Knolls.

As noted above, during the calendar years 1982 and 1983, motor fuel distributors continued to use resale certificates and the State continued to accept them in lieu of Form TP-146.4, if the Article 12-A distributor registration of the customer was confirmed by reference to the Division's records. When used in this manner, the resale certificates were routinely used for the sale of all petroleum products including fuel oil, gasoline and diesel fuel.

The sales tax audit conducted by the Division was done as a result of the unreported gallons of gasoline discovered during the motor fuel audit, i.e., 2,408,396 gallons. The period covered was September 1, 1982 through February 29, 1984. The Division examined a sample of sales to determine percentages of regular, unleaded and premium gasoline sold. These percentages were then applied to the total unreported gallons to arrive at gallons of each type of gasoline. The regional average retail price charts were used to compute tax per gallon which was then applied to the gallons of unreported gasoline imported by Benak.

Benak remitted sales tax only for the quarter March 1, 1983 through May 31, 1983. However, as indicated on one of its invoices to Purdy Oil during the sales tax audit period, "all state and federal taxes [were] included in [the purchase] price."

The audit also revealed that Benak operated a truckstop in Ogdensburg, New York, the Edgetown Plaza. Sales from Edgetown Plaza were to have been included in the sales tax returns of Benak until March 31, 1983, when Edgetown Plaza was incorporated. Between September 1, 1982 and March 31, 1983, Benak did not remit sales tax collected on diesel sales at the Edgetown Plaza.

Although Benak also sold diesel fuel and heating oil on a wholesale basis during the audit period, it was able to provide exemption certificates for nearly all such sales and no tax was imposed.

As a result of the audit, Benak was issued a Notice and Demand for Payment of Sales and Use Taxes Due on December 4, 1984, which set forth total tax due of $378,981.40, plus fraud penalty and interest. Two officer assessments, notices of determination and demands for payment of sales and use taxes due, were issued for the same tax, penalty and interest to Edward J. Kaneb and Catherine Kaneb on February 1, 1985 for the period September 1, 1982 through February 29, 1984. At a conciliation conference held in the Bureau of Conciliation and Mediation Services on March 22, 1990, the conferee allowed certain exempt sales to Indian reservations and cancelled the fraud penalty.[3] This resulted in additional sales tax due in the sum of $367,779.90, plus penalty and interest. In its petition, Benak conceded tax liability for certain sales it made in New York State in the sum of $98,254.92 for the period in issue.

Between December of 1990 and March of 1991, the Division performed a desk audit for the purpose of determining Benak's liability for the gross receipts tax under Article 13-A of the Tax Law. The period audited was July 1, 1983 through December 31, 1983.

The Division, having already determined that Benak was importing petroleum products from Canada during that period, discovered that no gross receipts tax was paid by Benak during this period.

The tax was calculated utilizing the audits conducted for motor fuel and sales tax in 1984. Monthly sales for July through December of 1983 totalled $6,737,979.17. When the tax rate of 3.25% was applied to this figure, it yielded tax due of $218,984.33. On March 18, 1991, the Division issued a Notice of Deficiency to Benak for Article 13-A tax in the sum of $218,984.33, plus interest.

We modify the Administrative Law Judge's finding of fact "17" to read as follows:

> Prior to hearing, petitioner Edward J. Kaneb served a subpoena on the New York State Department of Taxation and Finance, requesting sales tax audit information on various businesses, to be examined, in camera, for the purpose of establishing whether these businesses were audited or if taxes were assessed to these businesses.
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> In response to the subpoena, the Division produced a sales tax field audit report for Purdy Coal & Oil, Inc. covering an audit period from December 1982 through November 1985. The result of the audit

[3]The modifications also applied to the offer assessments.

> was no change, or no tax liability determined. The Division also produced a field audit report of sales tax for John Fountain of Malone, New York. The result of this audit was an additional liability of $16,245.35 for the period December 1981 through May 1984. The third audit
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> produced by the Division included the sales tax audit for the period December 1981 through May 1984 and also audits of diesel sales tax, truck mileage tax and fuel use tax. The list of fuel suppliers to John Fountain in the audit report included Massena Petroleum.
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> The audit report states "Gasoline sales were examined for test period. . . . Vendor properly computing sales taxes on his retail sales and deducts the sales tax paid to his suppliers and remits the balance of sales taxes due on his Schedule R" (Exhibit "G"). The report also states "Vendor's purchase invoices for both test period were examined. . . . All suppliers were charging the correct sales taxes on their invoices" (Exhibit "G").[4]

In a letter from petitioner Edward J. Kaneb, acting as president of Massena Petroleum Terminal, to Purdy Coal & Oil, Inc., dated January 11, 1984, Mr. Kaneb stated that all Federal and State taxes were included in sales from Massena to Purdy between January 1, 1983 and August 31, 1983. Mr. Kaneb also stated that no sales took place between Massena and Purdy in September and October 1983 and that no taxes were included in sales between the companies in November and December 1983.

Benak filed two returns of tax on motor fuels for the months of January and February 1983. For the month of January 1983, said return indicated a tax due of $7,174.16 and a check, dated February 24, 1983, in that amount and signed by Edward J. Kaneb was attached. The return for February 1983 set forth tax due of $25,269.76 and a check, dated May 18, 1983, in that amount and signed by Mr. Kaneb was attached. The returns also indicated that Benak was a wholesale distributor of motor fuel, that it received its supply by tank truck and that it operated service station outlets.

Benak was registered as a distributor of gasoline and motor fuel by the Department of Taxation and Finance on January 28, 1983. The application for registration filed by Edward J. Kaneb, as president of Benak, stated that Benak was an importer of motor fuel, incorporated on

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[4] We modified the Administrative Law Judge's finding of fact "17" by adding the last paragraph to reflect more details of the record.

June 2, 1981, with two officers: Edward J. Kaneb, president, and Catherine Kaneb, secretary. The application also stated that Benak received its supply of motor fuel from Sipco Oil Ltd. of Toronto, Canada.

Benak submitted two affidavits into evidence. One was of Philip E. Brown, the owner of One Stop Shoppe. Mr. Brown averred that, to the best of his knowledge, he was audited by the Division for the year 1982 for sales tax. The second was an affidavit of James B. Vock, owner of a business by the same name which was a "petroleum business". Mr. Vock averred that he was audited by the Division for the years 1982 and 1983 for sales and use tax and for excise and gross receipts tax. Neither affiant stated the outcome of their audits or their business relationship with Benak, if any. Further, both businesses were listed on the subpoena and a search of the Division's records indicated that no audits had been performed of either entity for sales tax purposes. The Division's auditor testified that he did not care if he ever audited Vock.

As stated in Finding of Fact "17" above, petitioner Edward J. Kaneb subpoenaed sales tax audit documents for many businesses which he believed were audited for sales tax for the same audit periods as Benak. However, after searching its records, the Division was able to produce only those files set forth in Finding of Fact "17". Many of the businesses which were listed in the subpoena did not have records in the computer system and a essage, "No Audit Record", was the only response to the search of said businesses.

The Division submitted an affidavit of Richard M. McNamara, a calculations clerk in the Policy and Compliance Section, Computer Audit and Systems Bureau. Mr. McNamara had extensive experience in the maintenance of personal computer databases and the utilization of mainframe computer databases for the production of reports. His unit was responsible for processing data entry forms for audit programs on the "Sperry" computer system. The forms were entered by the processing division and then returned to his office for confirmation of correct entry. Mr. McNamara stated that a Form "MIS-3" was used to close files and required the taxpayer's name and vendor identification number. If an audit was conducted and closed, even "no change audits", entry of an "MIS-3" form would have produced an audit record on the

computer. Where a search was made and the system reported "no audit record" in response, Mr. McNamara said it meant that no audit information was ever entered into the system for the identified vendor.

A second affidavit submitted by the Division was that of Judi Cavanaugh, Director of the Returns Processing Bureau ("RPB") of the Information Systems Management Division. As Director of RPB, she managed the processing of returns and the development and maintenance of computer programs used in that processing. She explained that records of sales tax returns were kept on the "Sperry" system, placed in service prior to 1980, and on an IBM system, placed in service in 1986. The Sperry system is still used for sales tax return data and sales tax audit histories, the latter organized by vendor identification number. Since March 1992, audit history data has been entered into the IBM System, which then transfers the information to the Sperry system. Audit history data is not purged from the Sperry system. Ms. Cavanaugh also averred that the message "No Audit Record" meant that no audit history records exist for the identified vendor and that no audit information was ever entered into the system because the audit histories are not purged.

Benak, or its "d/b/a", Massena Petroleum, received resale certificates regarding State and local sales and use taxes on the following dates from the following vendors:

Certificate Dated	Vendor
March 1982	Purdy Oil
December 1982	James B. Vock
4-16-83	Cherry Knolls
7-1-82	Transportations Supplies, Inc.
7-15-82	Ubold Garceau
April 1983	Edgetown Plaza, Inc.
7-20-83	Shallows Service Station
6-28-82	Massena Iron & Metal Co., Inc.

Massena also received a resale certificate for sales tax exemption on certain fuels, Form TP-146.4, from Hurley Brothers, dated September 10, 1984, beyond all audit periods involved herein.

The auditor refused to accept these certificates for the purpose of sales of gasoline, only fuel oil. Further, the auditor checked to see if the vendors were registered distributors and found they were not.

It was the practice of the Department of Taxation and Finance to issue lists of registered distributors to all such distributors so that if they made sales to such registered distributors they would be tax-exempt sales. Benak claimed never to have received this list.

Benak requested a copy of the list of registered distributors for 1985 in 1989 from the Division. By letter dated October 25, 1989, the Division responded that it did not have the list of registered motor fuel distributors as of September 1, 1985 "since this date is beyond the three-year statute." However, the Division did offer to provide information regarding the date of cancellation and/or registration of any current or past motor fuel distributor. A copy of the list of registered distributors as of September 1, 1986 was enclosed with the letter.

By letter dated April 2, 1990, the Division provided Mr. Kaneb with a list of all 12-A motor fuel distributors, which disclosed the status of all 12-A motor fuel distributors commencing February 1, 1982 (an MD-350 printout) and a "Motor Fuel List #8 dated 2/1/83" which disclosed the new registrations, changes and cancellations to the list of registered distributors of motor fuel as of April 1, 1982.

A search of the Division's records was made with regard to Purdy Coal & Oil, Inc. for a sales tax audit history. The search produced one audit for sales and use tax covering the period December 1982 through November 1985 and found no taxes due. The audit was returned September 30, 1986.

Benak also was audited by the Internal Revenue Service and was found liable for additional tax on gasoline and diesel fuel for the year 1983.

Benak was a registered petroleum business pursuant to Article 13-A of the Tax Law for the period July 1, 1983 through October 31, 1984, holding certificate number J-0336-4.

Benak prepared schedules which set forth the motor fuel tax liability which would be due if the Purdy Oil sales for 1983 were deemed nontaxable. That figure resulted in a refund of

$177,520.02. A second schedule prepared by Benak was for excise taxes due if Benak was not deemed an importer. That figure indicated a liability of $13,595.20.

On January 16, 1986, Benak applied for amnesty with regard to assessment 2271, dated July 27, 1984, which set forth motor fuel tax in the sum of $187,517.84, plus penalty and interest.

On February 4, 1986, the Amnesty Project Counsel informed Benak that its application for motor fuel tax amnesty for the period January 1, 1983 through May 30, 1984 had been denied due to "an ongoing criminal investigation relating thereto." All application materials were returned to Benak, including the payment. The letter also provided terms upon which Benak could reapply for amnesty:

> "This notice is the only evidence that your application was filed timely during the Amnesty period. We advise you to keep it for your records. If the investigation does not result in criminal liability (whether through a prosecution not resulting in a conviction or by the investigating agency otherwise terminating the investigation), you may re-submit your application, returns and full payment along with this notice (within 30 days of such result) and be eligible to receive Amnesty for the type of tax, periods and amount rejected herein, provided all other Amnesty criteria are met."

On January 24, 1986, Benak filed three other applications for amnesty covering the sales and use tax assessments issued to it and its two officers, Edward J. Kaneb and Catherine Kaneb, by notices dated December 4, 1984 and February 1, 1985, respectively.[5]

On February 4, 1986, the Amnesty Project Counsel informed Benak and its officers that their applications were denied due to "an ongoing criminal investigation relating thereto." As in the case of the motor fuel amnesty application, all materials including payment were returned to the applicants. The same provisions were included in the letters to the sales tax amnesty applicants concerning reapplication as set forth above.

Petitioners did not reapply for amnesty until they did so at hearing on June 9, 1993, some seven years later, claiming at that time that they were not informed by the Division that State criminal proceedings had been terminated.

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[5]Catherine Kaneb, as officer of Benak Corporation, signed her own application for amnesty on January 24, 1986.

As stated in the application for motor fuel distributor, Edward J. Kaneb and Catherine Kaneb were the president and secretary of Benak. Although these two individuals were the only officers and stockholders of the corporation, therefore sharing in the profits, they did not actively participate in the daily operations of the business. Instead, they delegated responsibility for all the daily operations and management to an employee named Jack Casion. They also hired a bookkeeper, Peggy Chase, to keep the books and perform the general secretarial duties associated with the office. These two employees were responsible for customer contracts and relations and the preparation and issuance of invoices. Edward Kaneb signed checks on behalf of the corporation on at least two checking accounts (Bank of Montreal and Key Bank, N.A.) and hired various accountants to assist the business. Peggy Chase also signed checks.

Mr. Kaneb also worked 60 hours a week in the nursing home and operated the Kaneb Realty Corporation. In his petition he stated that he used his contacts in the petroleum industry to establish Benak's petroleum business.

Mr. Kaneb worried about oil spills and his liability for same. He contacted his insurance agent who wrote him a letter on January 23, 1990 in which he stated that it was his understanding that if Benak acted as broker and a distributor picked up and signed for product at a terminal, Benak was absolved from liability because ownership of the product passed to the distributor.

Catherine Kaneb, secretary and one of the two stockholders in Benak, did not appear at the hearing and, therefore, did not testify in her own behalf. However, she maintained the same passive role in the business as Edward J. Kaneb.

On April 20, 1988, the United States Attorney advised Benak, through its attorneys, that a grand jury investigation had been terminated and that the Internal Revenue Service had been advised to return their records.

No proceedings or actions were brought by the Attorney General of the State of New York against Edward J. Kaneb, as officer of Benak, to impose personal liability upon him for alleged sales and use taxes assessed from September 1, 1982 to February 28, 1984.

No proceedings or actions were brought by the Attorney General of the State of New York against Catherine Kaneb, as officer of Benak, to impose personal liability upon her for alleged sales and use taxes assessed from September 1, 1982 to February 28, 1984.

The State's auditor contacted Peggy Chase and Jack Casion concerning the audit and did not investigate Catherine Kaneb's authority to act for the corporation or her involvement in the motor fuel business. In fact, the auditor did not make the decision to assess her nor did he know if anyone else investigated Catherine Kaneb's involvement with the business.

Edward Kaneb maintained no personal office at Benak, even though its headquarters were located at the Highland Nursing Home, where he worked as administrator for 60 hours per week.

There is no evidence in the record other than sales invoices which document Benak's relationship with the Canadian terminals with which it did business during the years in issue. Likewise, there was no evidence of Benak's relationship with its transporters other than delivery tickets.

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

> Petitioners filed timely petitions on or about September 12, 1990. The Supervising Administrative Law Judge deemed these petitions to be in proper form on October 2, 1990. The Division filed answers on February 7, 1991, 68 days beyond the due date for filing the answers.
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> Petitioners each filed a motion for a determination on default under 20 NYCRR 3000.4(a)(4) based on the filing of the late answers.

OPINION

The first issue raised by petitioners in their brief is that we do not have authority to determine the personal liability of Edward and Catherine Kaneb as corporate officers of Benak.

First, as the Administrative Law Judge noted, the corporate liability in this case is based on the assertion by the Division that Benak did not remit the appropriate amount of sales tax

with its returns. The liability is not one which was reported on a return by the corporation but not paid by the corporation. It is only in the latter situation that the case relied on by petitioners, Stacy v. State of New York, (82 Misc 2d 181, 368 NYS2d 448) is relevant. In a situation as here, when the Division asserts that the proper amount of tax has not been reported, there is no question that an administrative procedure was authorized to adjudicate the dispute prior to the 1985 amendment to section 1138 (see, Matter of Parsons v. State Tax Commn., 34 NY2d 190, 356 NYS2d 593).

The Administrative Law Judge also correctly concluded that the Supreme Court, Fourth Department's decision in Laks v. Division of Taxation (183 AD2d 316, 590 NYS2d 958) was not sound authority for the conclusion that corporate officers could not be held liable for penalty and interest due from the corporation. Since the Administrative Law Judge's determination was issued, the Fourth Department itself recognized the problem in the Laks decision and specifically overruled Laks in Lorenz v. Department of Taxation & Fin. (___ AD2d ___, 623 NYS2d 455). Thus, the Fourth Department now follows the rule adopted by the Third Department in Matter of Hall v. Tax Appeals Tribunal (176 AD2d 1006, 574 NYS2d 862) that a corporate officer may be liable for the penalties and interest due from the corporation. Therefore, we see no merit to petitioners' assertion that we do not have jurisdiction over the notices of determination issued to Edward J. Kaneb and Catherine Kaneb.

Turning to the merits of this issue, the Administrative Law Judge determined that Edward J. and Catherine Kaneb were personally liable under section 1131(1) of the Tax Law for the taxes, penalty and interest due from the corporation because they were the only officers and shareholders of the corporation and because they retained the authority to hire and fire the two employees to whom they delegated authority over the day-to-day operations of the corporation. The Administrative Law Judge stated "[i]n such a closely-held corporation, where only two shareholders/officers split the profits and delegate all responsibility, said officers cannot escape liability for the corporation's taxes" (Determination, conclusion of law "E").

On exception, petitioners repeat their position that Edward J. Kaneb and Catherine Kaneb are not personally liable because they delegated their authority to their employees.

We believe that the Administrative Law Judge correctly ruled on this issue and affirm based on the reasons stated in the determination.

The third issue raised by petitioners is whether the Administrative Law Judge erred in concluding that Benak was a distributor within the meaning of Tax Law § 282(1) on the grounds that Benak imported motor fuel or caused motor fuel to be imported into New York State for use, distribution, storage or sale within the State. The Administrative Law Judge concluded that petitioner was the owner of the fuel and the importer because: Benak paid the customs duty, through the customs broker A. N. Deringer, on the fuel in question; the invoices Benak issued to its customers stated "all state and federal taxes included" and there would have been no such taxes due if Benak had sold the fuel in Canada; the delivery tickets in evidence show Benak as the export customer under the heading "ship to" while Benak's customers are listed as the "carriers" or "transporters"; none of the transporters which Benak claimed were importing the fuel were licensed to do so by New York State and during the period Canadian terminals sold only to New York registered distributors; and Benak did not introduce any evidence that they sold the fuel in Canada.

On exception, Benak asserts that it did not have title to, nor bear the risk of loss of, the fuel sold to Purdy Coal & Oil, John Fountain and James B. Vock when this fuel entered the State. Relying on Matter of Harbor Petroleum Corp. (Tax Appeals Tribunal, September 21, 1989), petitioners argue that unless it either had title to the fuel or bore the risk of loss of the fuel when it entered the State it was not a distributor.

Petitioner's assertion that it did not have title to the fuel is based on the portion of section 2-401(2) of the Uniform Commercial Code (UCC) that states "title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." Petitioners claim that it was undisputed at the hearing that "Benak completed its performance with respect to the 'physical delivery' of the petroleum products

when the distributors physically took possession of the petroleum in Canada" (Petitioners' brief on exception, p. 9).

We find petitioners' argument unpersuasive for a number of reasons. First, the provision of the UCC that petitioners rely on begins "[u]nless otherwise explicitly agreed" (UCC § 2-401[2]).[6] Petitioners have not introduced any documentary evidence to establish the terms of the contracts between Benak and its customers and the testimonial evidence provided by Edward J. Kaneb and Dennis C. Coulson was obviously found incredible by the Administrative Law Judge and accorded little weight. Therefore, we have no way of determining what the agreement of the parties was and whether it varied from the general rule of section 2-401(2) that passes title at the time delivery is completed.

Second, section 2-401(2) provides at subdivision (b) that "if the contract requires delivery at destination, title passes on tender there." Again, because Benak has failed to establish the terms of its contracts with its customers, it has not established that these contracts did not require delivery at destination. If delivery at destination was required, Benak's customers would have taken delivery in Canada as transporters, not as purchasers. Therefore, we conclude that Benak did not establish that title passed, pursuant to the terms of section 2-401(2) of the UCC, to its customers in Canada.

Similarly, Benak did not establish that the risk of loss passed to its customers in Canada. For this aspect of its argument, petitioners rely on a portion of section 2-509(3) of the UCC

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[6]In its entirety, section 2-401(2) of the UCC provides as follows:

> "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading
>
> "(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but
>
> "(b) if the contract requires delivery at destination, title passes on tender there."

which states that "the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant." Benak argues that it is a merchant, its customers received the petroleum in Canada; therefore, the customers bore the risk of loss as the fuel entered in New York.

A portion of section 2-509(3) not quoted by petitioners provides that the rule of subdivision (3) applies only for cases not within subdivisions (1) or (2) of section 2-509.[7]

Subdivision 1 states in part that if the seller is required or authorized to ship the goods by carrier and is required to deliver them at a particular destination, the risk of loss passes to the customer when the goods are tendered for delivery by the carrier to the customer. As stated above, Benak has not proved that it was not required to deliver the petroleum at a particular destination. Accordingly, it has not shown that the risk of loss passed in Canada.

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[7]In its entirety, section 2-509 of the UCC provides as follows:

> "(1) Where the carrier requires or authorizes the seller to ship the goods by carrier
>
> > "(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but
> >
> > "(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.
>
> "(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer
>
> > "(a) on his receipt of a negotiable document of title covering the goods; or
> >
> > "(b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or
> >
> > "(c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Section 2-503.
>
> "(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.
>
> "(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510)."

In conclusion, we agree with the Administrative Law Judge's evaluation of the record and his determination that Benak did not establish that either title or the risk of loss passed to its customers in Canada. Petitioners acknowledge that some of the "paperwork" suggests that Benak retained title, but argue that the Administrative Law Judge erred in his "sterile" examination of the the record (Petitioners' brief on exception, p. 10). We believe that the Administrative Law Judge correctly gave the documentary evidence more weight than the testimony of Mr. Benak and we will not disturb the Administrative Law Judge's conclusions.

We next address the issues raised by both parties with respect to the audits of Benak's customers.

In Matter of Allied Aviation Serv. Co. of N.Y. (Tax Appeals Tribunal, June 27, 1991), we discussed the Division's policy on overlapping audits and stated that it was the Division's policy to make an adjustment to the audit of the vendor if the vendor established: 1) the audit period of the purchaser; 2) that the purchaser agreed to the audit findings; and 3) that there was no agreement to exclude the particular transactions at issue from the audit of the customer. As the Administrative Law Judge noted, in Allied we concluded "that it was the Division's policy to eliminate from the vendor's assessment any tax assessed with respect to transactions with a specific customer during periods for which the purchaser was also audited, even where the customer's audit was a test period audit" (Matter of Allied Aviation Serv. Co. of N.Y., supra).

Applying these rules, the Administrative Law Judge held that Benak was entitled to adjustments with respect to the Purdy Coal & Oil Co. sales, but that Benak had not established that it was entitled to adjustments for the sales to John Fountain, James B. Vock or Philip E. Brown. The Administrative Law Judge held that petitioners failed to prove that the latter three audits satisfied the Allied criteria.

On exception, petitioners argue that, contrary to the Administrative Law Judge's finding,

> "the Fountain audit information was sufficient to determine that an overlapping audit occurred. Petitioners should not be penalized because the Division's records were less than complete. Moreover, the affidavits of Vock and Brown adequately demonstrated the existence of overlapping audits. The Division's inability to produce the records relating to these audits should not thwart valid overlapping audit

> claims. The Division should carry the burden of showing that these overlapping audits did not exist, once petitioners made their initial showing by affidavit" (Petitioners' brief on exception, p. 11).

We see absolutely no basis to petitioners' claim that the information in the record establishes that the Fountain, Vock and Brown audits satisfied the Allied criteria.

As the Administrative Law Judge determined, the Fountain audit does not qualify because the Fountain audit report indicated that the taxpayer did not agree to the audit findings and petitioners did not introduce any evidence contradicting the audit report. In addition, petitioners failed to prove that there was no agreement to exclude the particular items at issue here from the Fountain audit. Similarly, the Vock and Brown affidavits do not allege that those taxpayers agreed to the audit findings or that there was no agreement to exclude the particular items at issue here from those audits.

Petitioners bore the burden to prove that all of the Allied criteria were met for each customer for which Benak claimed an overlapping audit adjustment (Tax Law § 1132[c]; Matter of Gartner Group, Tax Appeals Tribunal, December 8, 1994). Petitioners could have satisfied this burden with information solely from the Division, solely from its customers or from a combination of sources. However, it was petitioners' burden to obtain the evidence, not the Division's.

We also do not understand petitioners' contention that the Division should be required to prove that the Brown and Vock audits satisfied the Allied criteria because, as stated in the facts, the Division's records indicate that no sales tax audit was conducted of these businesses. Further, there is nothing in the record to suggest that the Division failed to divulge all the information in its possession in response to Edward J. Kaneb's subpoena. Thus, the instant case is very different from Matter of Gartner Group (supra) where the Division inexplicably failed to respond to the specific evidence introduced by the petitioner which indicated that audits of its customers had occurred that satisfied the Allied criteria.

We turn next to the Division's contention that the Administrative Law Judge erred in granting an adjustment based on the Purdy audit.

The Division asserts that its policy and the Allied decision "require an overlapping of items assessed before an overlapping audit situation will be deemed to exist" (Division's brief on exception, p. 6). The Division contends that the "assessed items in the Purdy Oil audit did not include any transactions with Benak because these transactions utilized tax paid invoices and were 'deducted' from the calculation of liability" (Division's brief on exception, p. 6).

As stated in the facts, the Purdy audit was based on an examination of Purdy's records for a test period. The Audit Guideline relied on by the Division (Exhibit "P," attachment DD) states, under the heading "Overlapping Audits - Test Periods," that:

> "In the event a test period is involved, the following example demonstrates the correct procedure:
>
> > "Vendor A is currently being audited for a three year audit period.
> >
> > "A test of A's sales disclosed invoices to vendee B which should have been taxed. It is brought to the auditor's attention that B was audited for the same period of time. Under the audit of B, a three month test of purchases was made and the invoices in question were held taxable to B and taxed accordingly. Given this information, the auditor should not hold A liable for the tax on any sales to B throughout the period of the audit.
> >
> > "It should further be noted that even if the invoices did not appear in the sample of B, as long as A's sales to B were included in the base for the projection of B's additional tax, the invoices should not be included as taxable in the audit of A."

The last quoted paragraph negates the Division's assertion that the Benak transactions had to be specifically disclosed in the Purdy test period audit in order for the latter to qualify as an overlapping audit. Therefore, we affirm the Administrative Law Judge's determination that Benak was entitled to an adjustment based on the Purdy audit.

The next issue raised by petitioners is whether the Administrative Law Judge erred in concluding that Benak could be held liable for sales tax on automotive fuel sales where Benak obtained a resale certificate but had not established that the customer was a registered distributor.

The Administrative Law Judge noted that during the period in issue section 1101(b)(4) of the Tax Law provided that all sales, with just one exception not relevant here, by a distributor

were deemed to be retail sales.[8] Therefore, the Administrative Law Judge concluded that the sales by Benak were retail sales for purposes of the sales tax and the acceptance of resale certificates could not alter this status.

With respect to the Division's policy of accepting resale certificates notwithstanding the provisions of Tax Law § 1101(b)(4)(ii), the Administrative Law Judge pointed out that the parties stipulated to the fact that this policy was conditioned upon the distributor demonstrating that the customer providing the resale certificate was an Article 12-A distributor as confirmed by reference to the Division's records. Because Benak did not establish that its customers were 12-A distributors, the Administrative Law Judge determined that Benak could not rely on the Division's policy. The Administrative Law Judge also rejected petitioners' argument that they were not provided with a list of registered distributors during the period in issue. The Administrative Law Judge found that the Division mailed these lists to all registered distributors every time they were published and if Benak did not receive such a list during 1982 and 1983, then Benak should have requested one before it accepted resale certificates. The Administrative Law Judge also stated that because Mr. Kaneb admitted that he had little substantive involvement in the business, his testimony that the lists were not received was without value.

On exception, petitioners renew their argument that Benak never received a list of registered distributors and argue, therefore, that Benak was entitled to rely on the resale certificates received from its customers.

The Administrative Law Judge correctly and adequately addressed this issue and we affirm based on the reasons stated in the determination.

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[8]Tax Law former § 1101(b)(4)(ii) provides, in part, as follows:

> "Notwithstanding the provisions of subparagraph (i) of this paragraph, a sale of automotive fuel by a distributor is deemed to be a retail sale, except for a sale of automotive fuel by a distributor to a purchaser duly registered with or licensed by the taxing authorities of another state as a distributor of or dealer in automotive fuel therein, for immediate exportation from the state into such other state, provided the distributor making such sale complies with all regulations of the tax commission relating thereto."

On his own initiative, the Administrative Law Judge pointed out that the Division had erroneously issued a Notice and Demand to assess the sales tax against Benak when a Notice of Determination was required. Relying on Matter of Kayton Specialty Shop (Tax Appeals Tribunal, January 17, 1991), the Administrative Law Judge concluded that the Notice and Demand was issued without a statutory basis and cancelled it.

On exception, petitioners state:

> "[a]s pointed out by Judge Pinto, the Division failed to serve Benak with a Notice of Determination, as required under 20 NYCRR 535.2(a), instead serving a notice and demand which was void and of no effect. However, contrary to Judge Pinto's ruling, the Division's failure to serve this notice of determination constitutes a jurisdictional defect, since the three year statute of limitations begins to run from the notice of determination. 20 NYCRR 535.3(c). Since more than three years have passed since returns were filed, the Division is precluded from seeking collection of any alleged taxes owned (sic) from Benak" (Petitioners' brief on exception, p. 16).

Although we are not certain we understand petitioners' point, it appears to be a request for a ruling that the Division would now be prohibited, by the statute of limitations, from issuing a Notice of Determination to Benak for the sales tax.

We refuse to address this question because it raises a factual issue, when the statute of limitations began to run for the periods covered by the Notice and Demand, that was not addressed at the hearing. We have consistently ruled that neither party may raise factual issues on exception that were not raised at the hearing (see, Matter of Howard Enterprises, Tax Appeals Tribunal, August 4, 1994). In any event, this issue is premature and would require us to speculate on a Notice of Determination that has apparently not been issued yet and which certainly is not before us in this proceeding.

The next issue raised by petitioners relates to their claim that they were entitled to renew their amnesty applications because the Division had never notified them of the termination of the criminal investigation which caused petitioners' initial amnesty application to be denied. The Administrative Law Judge held that "petitioners' claim in the present forum is premature and their remedy is to resubmit their applications to the Division. If those applications are subsequently denied, at that point an appeal to the Division of Tax Appeals would be proper"

(Determination, conclusion of law "F"). The Administrative Law Judge also noted that amnesty could only waive the penalties imposed, that all tax and interest had to be remitted before amnesty could be granted and, pursuant to 20 NYCRR 2500.4, that amnesty could not be granted unless petitioners withdraw from this proceeding.

In the alternative, the Administrative Law Judge held that if petitioners were not required to resubmit their application to the Division, their claim was untimely because they were required to reapply within 30 days of the termination of the criminal investigation and they failed to do so. The Administrative Law Judge found no basis for petitioners' contention that the Division had a duty to inform petitioners of the date of the termination.

On exception, petitioners again argue that they are entitled to renew their amnesty application. They state that "[c]ontrary to [the Administrative Law Judge's] finding, there was no requirement that petitioners actively inquire as to when criminal investigation has ended. Since no notice of termination was given, petitioners should now be entitled to renew their amnesty application" (Petitioners' brief on exception, p. 14).

Because the Administrative Law Judge held that petitioners could resubmit their amnesty application to the Division, and thus, "renew" their application, we do not understand the nature of petitioners' complaint about this aspect of the Administrative Law Judge's determination. In any event, we conclude that the Administrative Law Judge correctly and adequately addressed the amnesty issue and affirm his determination for the reasons stated in it.

The last issue before us is whether the Administrative Law Judge properly denied petitioners' motions for default determinations.

The Administrative Law Judge noted that an answer, within 60 days of the date that a petition was acknowledged by the Supervising Administrative Law Judge, was required by the Tribunal's Rules of Practice and Procedure (20 NYCRR 3000.4[a][1]), but was not required by any statute. The Administrative Law Judge also stated that the New York courts

> "have recognized the general principle that such time periods are directory rather than mandatory (see, Matter of Geary v. Commissioner of Motor Vehicles, 92 AD2d 38, affd 59 NY2d 950; Matter of Hamelburg v. Tully, Sup Ct, Albany County, April 16, 1979, Prior, J.);

> therefore, the Division's lateness in answering is not in itself a sufficient basis for granting petitioners' motions (Matter of Dworkin Constr. Co., Inc., Tax Appeals Tribunal, August 4, 1988)" (Administrative Law Judge's Order).

The Administrative Law Judge held that the harm suffered by petitioners (the death of potential witnesses) during the five-year delay between the filing of the initial petitions and the conduct of the conciliation conference occurred prior to the filing of the petitions with the Division of Tax Appeals and was not, therefore, a result of the late answers. Because petitioners failed to show prejudice caused by the late answers, the Administrative Law Judge denied the motion for a default.

On exception, petitioners renew their claim that the delay in scheduling and holding the conciliation conference coupled with the late answer is a sufficient basis to grant a default judgment pursuant to 20 NYCRR 3000.4(a)(4). In addition, petitioners assert that they have proved prejudice -- the death of key witnesses during the delay. Petitioners also claim that they have:

> "demonstrated that the Division of Taxation is routinely failing to answer petitions in a timely manner. In the Division of Taxation's responding affidavit, it is admitted by the responsible attorney that '[t]he case load which is assigned to me is such that I am unable to assure that answers will be timely filed.' Thus, it is clear that the Division of Taxation has failed to staff its counsel's office so as to permit answering petitions in a timely manner. This has resulted in systematic delays and is a sufficient basis for granting a default judgment" (Petitioners' exception to the Administrative Law Judge's order, attachment "B").

In response, the Division states that the Administrative Law Judge correctly decided the default motion. Further, the Division asserts that even

> "were pre-petition delays relevant, and Petitioners have cited no authority for that proposition, Petitioners have failed to demonstrate that such delays were attributable to [the Bureau of Conciliation and Mediation Services] rather than themselves. Furthermore, they have not indicated that any effort was made on their part to expedite the matters pending before [the Bureau of Conciliation and Mediation Services]. (see, Scott-Textor Productions v. Murphy, 34 AD2d 1076 [3rd Dept. 1970])" (Division's brief, p. 4).

First, we agree with the Administrative Law Judge that the delays that occurred while this matter was pending in the Division are not relevant to the issue raised by petitioners.

Petitioners have requested default determinations pursuant to 20 NYCRR 3000.4(a)(1). This regulation provides that "[w]here the division of taxation fails to answer within the prescribed time, the petitioner may make a motion to the tribunal on notice to the law bureau, for a determination on default." This regulation does not authorize a default determination based on any other acts of the Division, and petitioners have not cited any authority which does authorize a default determination on other grounds; therefore, we conclude that only the delay in answering is relevant to petitioners' motions.

The Court case law relevant to the Division's failure to timely answer was recently summarized by the Appellate Division, Third Department, as follows:

> "in a case, as here, where a regulatory time limit is merely directory (see, 20 NYCRR 3000.3[c]; 3000.4[a][1], [4]; Matter of Sarkisian Bros. v. State Div. of Human Rights, 48 NY2d 816, 817-818), 'relief will be granted only if petitioners show that substantial prejudice resulted from the noncompliance' (Matter of Syquia v. Board of Educ. of Harpursville Cent. School Dist., 80 NY2d 531, 535)" (Matter of Center Moriches Monument Co. v. Commissioner of Taxation & Fin., ___ AD2d ___, 621 NYS2d 720).

As petitioners note, we have suggested in our own decisions that a systematic disregard of the time period for filing answers could constitute substantial prejudice sufficient to grant a default motion, even where the petitioner failed to prove a specific injury (Matter of Rizzo, Tax Appeals Tribunal, May 13, 1993; Matter of Macbet Realty Corp., Tax Appeals Tribunal, May 17, 1990; Matter of Maggin, Tax Appeals Tribunal, March 8, 1990). The rationale for this rule is as follows.

Pursuant to our authority to prescribe the rules governing the hearings in the Division of Tax Appeals (Tax Law § 2006[4]), we have determined that an answer is required to assist the parties and the Administrative Law Judge in identifying the issues to be heard (20 NYCRR 3000.4[2]). We perceive the answer as a fundamental element of the adversarial process in the Division of Tax Appeals because it requires the Division to disclose prior to the hearing, perhaps for the first time in the process, its response to the petition. We have required the answer to be served within a fixed amount of time, 60 days, because a fair and efficient hearing system requires definition and finality (see, Matter of Schoonover, Tax Appeals Tribunal,

August 15, 1991). If the answer could be served at anytime at the will of the Division, the system would lack both definition and finality.

A systematic disregard for the rule requiring an answer in 60 days would be the functional equivalent of having no rule at all, with the Division determining this outcome. To allow the Division, one of the parties before us, to determine its own Rules of Practice would create the perception of unfairness and would undermine the integrity of the Division of Tax Appeals. We believe that our charge of "providing the public with a just system of resolving controversies" with the Division (Tax Law § 2000) can only be achieved if the public perceives the system as fair and the Division of Tax Appeals as an independent body. At the same time, the public has a significant interest in collecting the taxes lawfully imposed (see, Matter of Heller v. New York State Tax Commn., 116 AD2d 901, 498 NYS2d 211); thus, a default determination, and the precedent of such a determination, is a serious act. It is in this context that we issued our warnings and attempted to obtain the Division's compliance with our rule. We have not been completely successful as this case indicates. The question before us is, however, whether petitioners have shown that the Division is systematically disregarding the 60-day time limit.

The most damaging evidence is the admission of the Division's attorney that "[t]he caseload which is assigned to me is such that I am unable to assure that answers will be timely filed" (Division's affidavit in opposition). This statement suggests that it may not be unusual, at least for this attorney, to have late answers. However, this statement does not establish that this attorney has in fact had other late answers, nor does it reveal the experience of the other attorneys representing the Division. Because this statement merely raises the possibility that the filing of late answers may be routine and commonplace by the Division's attorneys, but does not prove this fact, we conclude that petitioners have not established a systematic disregard for the 60-day limit. Therefore, we affirm the Administrative Law Judge's order denying the motion for a default determination.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Benak Corporation, Edward J. Kaneb, as Officer of Benak Corporation, Catherine Kaneb, as Officer of Benak Corporation and the Division of Taxation are denied;

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

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

4. The petitions of Benak Corporation, Edward J. Kaneb, as Officer of Benak Corporation and Catherine Kaneb, as Officer of Benak Corporation are granted to the extent indicated in conclusion of law "G" of the Administrative Law Judge determination's but are otherwise denied;

5. The motions of Benak Corporation, Edward J. Kaneb, as Officer of Benak Corporation and Catherine Kaneb, as Officer of Benak Corporation are denied;

6. The Notice of Determination dated July 27, 1984 is sustained as modified by the Conciliation Order dated June 15, 1990; the Notice and Demand dated December 4, 1984 is cancelled; the Division of Taxation is directed to modify the notices of determination dated February 1, 1985 in accordance with paragraph "3" above, but such notices are otherwise sustained; and the Notice of Deficiency dated March 18, 1991 is sustained.

DATED: Troy, New York
August 10, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner