

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| ASHLEY JARWOOD, OFFICER OF WIZARD PETROLEUM, INC. | : | DECISION |
| | : | DTA No. 811098 |
| 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 June 1, 1986 | : | |
| through November 30, 1987. | : | |

Petitioner Ashley Jarwood, Officer of Wizard Petroleum, Inc., 200 East 62nd Street, New York, New York 10021, filed an exception to the determination of the Administrative Law Judge issued on May 4, 1995. Petitioner appeared by Uncyk, Borenkind & Nadler (Norman R. Berkowitz, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter on July 31, 1995 stating it would not be filing a brief in opposition. This date began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioners Koenig and DeWitt concur.

ISSUES

I. Whether petitioner is barred by the doctrine of collateral estoppel from litigating certain issues which were resolved in Matter of Wizard Petroleum (Tax Appeals Tribunal, March 24, 1994).

II. Whether the assessment of sales and use taxes was barred by the statute of limitations.

III. Whether the audit method employed by the Division of Taxation was reasonably calculated to determine taxes due.

IV. Whether Ashley Jarwood was a person required to collect and pay over sales tax on behalf of Wizard Petroleum, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) during the period in issue.

V. Whether the Division of Taxation carried its burden of proof to show that any failure to pay sales taxes due resulted from fraud.

FINDINGS OF FACT

At the hearing in this case, the Division of Taxation (hereinafter "Division") offered into evidence the record at hearing in Matter of Wizard Petroleum (supra). Based on the record in Wizard Petroleum, the Administrative Law Judge made the findings of fact stated in finding of fact "1" which were the same as those found by this Tribunal in Wizard Petroleum. Findings of fact "2" through "31" are based on the evidence in the record made at the hearing before the Administrative Law Judge in this case. We find the facts as determined by the Administrative Law Judge except for finding of fact "7" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

During all periods pertinent to this determination, petitioner, Wizard Petroleum ("Wizard"), was registered as a motor fuel distributor under article 12-A of the Tax Law. The Division issued to Wizard three notices of determination and demands for payment of sales and use taxes due, each dated July 20, 1990. The first notice assessed sales tax due for the period June 1, 1986 through July 31, 1987 in the amount of \$4,204,879.96, plus fraud penalties equal to 50 percent of the tax and interest, for a total due of \$8,466,445.58. A box was checked on this notice next to the following statement: "THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(a)(1) OF THE TAX LAW." The notice also contains the following statement:

"The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records. In addition, fraud penalties of 50 percent of the amount of the Tax plus Interest have been added pursuant to Section 1145 of the Tax Law."

The second notice of determination issued to Wizard assessed sales tax due for the period

August 1, 1987 through September 30, 1987, in the amount of \$234,707.39, plus fraud penalty and interest, for a total due of \$445,644.91. The third notice assessed penalty only for the period June 1, 1986 through November 30, 1987 in the amount of \$443,958.72.¹

The notices of determination were issued as a result of a combined motor fuel tax and sales tax field audit commenced by the Division in April 1986. At the time the audit was begun, the Division was working jointly with the Internal Revenue Service ("IRS"). On July 8, 1986, the Division's auditor, Richard Yeates and an IRS auditor, provided Wizard with a written document request, asking for copies of 1984 and 1985 motor fuel tax returns, sales invoices for 1984 and 1985 and purchase invoices for the same period and other related records. Mr. Yeates began his audit by preparing summary worksheets of information received from Wizard and analyzing that information.

Motor fuel imported by Wizard entered New York through a terminal operated by Terminelle Corporation ("Terminelle"), a Wizard affiliate. Terminelle also serviced Janus Petroleum, Inc. ("Janus") and On-Site Petroleum, Inc. ("On-Site") which are also affiliated with Wizard. Terminelle and Wizard shared offices located at 364 Maspeth Avenue, Brooklyn where the audit was conducted. Two of Wizard's corporate officers, Ashley Jarwood and Trevor Wisdom, were principals of Terminelle during all periods under discussion.

Terminal operators, like Terminelle, are required by Tax Law § 286 (see also, 20 NYCRR 418.3) to file monthly fuel inventory reports showing, among other things, the identity of the person for whom motor fuel is stored, the identity of the person transporting the fuel to and from the storage facility, and the identity of the person to whom motor fuel is released from storage. According to Mr. Yeates's handwritten log (prepared in connection with the motor

¹Penalties were assessed pursuant to Tax Law § 1145(a)(1)(vi) which states, in part:

"Any person required by this article to file a return, who omits from the total amount of state and local sales and compensating use taxes required to be shown on a return an amount which is in excess of twenty-five percent of the amount of such taxes required to be shown on the return shall be subject to a penalty equal to ten percent of the amount of such omission."

fuel tax audit), he began cross-checking the monthly fuel inventory reports filed by Terminelle with Wizard's motor fuel tax returns in March 1987.

In June 1987, Mr. Yeates visited Wizard's offices where he spoke with Ashley Jarwood. According to his contact sheet, he requested copies of sales and purchase invoices and cancelled checks. The period covered by this request is not indicated. On July 7, 1987, Mr. Yeates returned to Wizard's offices and notified Wizard that sales invoices were missing. The terminal operator reports filed by Terminelle showed book transfers of motor fuel from Wizard to Janus and On-Site for which no invoices were provided.² Wizard provided whatever information it had available and asked for additional time to gather the other information requested by the auditor.

Mr. Yeates's supervisor, James Hika, asked one of the Division's management units to provide him with information regarding Wizard's sales tax filing record. In response to that request, he received a computer printout generated on November 4, 1987, summarizing the Division's records regarding Wizard's filing of tax returns. The printout shows that Wizard filed returns for the months of November 1985, December 1985 and March 1986 without payment of tax shown as due on those returns. In November 1986, Wizard gave the Division's auditor two certified checks in the amounts of \$7,407.64 and \$228,690.90 as payment for tax due for the months of December 1985 and March 1986 respectively. The Division later issued an assessment for tax due for the month of November 1985 in the amount of \$122,588.24. The computer printout also showed that Wizard filed no sales tax returns after May 1986.

On November 10, 1987, Mr. Hika and Mr. Yeates met with Ms. Jarwood and requested copies of sales tax returns (forms FT-945, Sales Tax Prepayment on Motor Fuel) for the period May 1986 through September 1987, plus supporting documentation and schedules. In response to this request, Ms. Jarwood gave the Division copies of returns purportedly filed with the

²A book transfer involves the transfer of motor fuel from the books of one corporation to the books of another corporation, without any actual movement of the fuel.

Division. Each of the returns shows substantial amounts of motor fuel imported into New York by Wizard, and a credit equal to the amount of the prepaid sales tax due, resulting in a zero tax liability. Ms. Jarwood told the auditors that Wizard sold all of the product it imported into New York during this period to All City Gas Sales, Inc. ("All City") for export out of New York.

Both auditors testified that Ms. Jarwood told them that Wizard had previously filed the sales tax returns provided on audit with the Division by mailing them to Holtsville, New York. The Division has no offices in Holtsville, New York. Ms. Jarwood did not testify at hearing, but in an affidavit she stated:

"I have no recollection of stating to an auditor of the New York State Department of Taxation and Finance that any tax returns of Wizard Petroleum, Inc. were sent to Holtsville, N.Y."

Ms. Jarwood provided the auditors with a copy of a "Certificate for Sales Tax Exemption on Purchase of Certain Fuels" for All City. It bears the signature of Peter Strauss and is dated May 28, 1986. Entries on the certificate indicate that it is a blanket certificate and that fuel was purchased exclusively for immediate export to New Jersey. The certificate, which bears the print date "10/83" was not authorized for use after June 1985.

The auditors compared Wizard's filed motor fuel tax returns, the sales tax returns provided on audit and Terminelle's monthly report of fuel inventory. This comparison disclosed the following information.

Wizard's motor fuel tax returns for the months of June 1986 through September 1987 show no credits taken for sales to out-of-state customers or for transfers out of state. Thus, Wizard's motor fuel returns, which show no exports of motor fuel, were found to be in complete conflict with the sales tax returns which show that all of its fuel was sold for export.

Terminelle's reports show book transfers of motor fuel to entities other than All City, including Janus, On-Site, and companies identified as "Dome", "Rack Sales, Inc.", and others. This is contrary to Wizard's claim that it sold all of the motor fuel it imported to All City. Terminelle's reports also show book transfers of motor fuel from All City to Janus and others,

indicating that all fuel purchased by All City was not immediately exported. The reports also show that the motor fuel which entered the Terminelle terminal eventually was trucked out, primarily by vehicles owned by Janus.

Terminelle's reports were signed by Trevor Wisdom as vice-president. Mr. Wisdom also signed Wizard's motor fuel tax returns and some of the sales tax returns provided to the auditors.

The following information is typical of information contained in Terminelle's monthly fuel inventory report.

One report (placed in evidence) is for the month of July 1987. It is signed by Trevor Wisdom as vice president of Terminelle. Attached to the report are six individual customer reconciliations. The first reconciliation is for "ACP" (All City).³ It shows a beginning inventory of 12,621,727 gallons of motor fuel, and book transfers totalling 2,214,336 gallons of motor fuel from Wizard to All City. It then shows book transfers of 2,456,910 gallons of motor fuel from All City to "Tun-Yung." The summary of withdrawals section shows no delivery or transportation of motor fuel out of the terminal. Other reconciliations show book transfers of motor fuel from Wizard to Janus and the withdrawal and trucking of that fuel from the terminal; book transfers from Wizard to On-Site (also trucked out of the terminal). A reconciliation for Tun-Yung shows book transfers of motor fuel from All City to Tun-Yung and from Tun-Yung to Sun-Light and again no actual withdrawals of fuel from the terminal.

Based upon the facts uncovered on audit, Mr. Hika recommended that the audit results be transferred to the Division's Petroleum, Alcohol and Tobacco Bureau for possible criminal investigation. After meeting with representatives of that bureau, Mr. Hika was instructed to hold the audit in abeyance until the criminal investigation was completed. In June 1990, the auditors were instructed to proceed with the audit by assessing any tax determined to be due.

³Where the name "All City" is spelled out on the reconciliations, the customer motor fuel registration number is shown as "5199." This is the same number shown where the abbreviation "ACP" is used.

The amount of tax assessed by the Division for each month of the assessment period is the amount shown as due on each sales tax return provided to the auditors. No adjustments were made except that the credit claimed on each return was disallowed. The fraud penalty was imposed on all tax assessed. An additional penalty was imposed under Tax Law § 1147(a)(7) for the period June 1, 1986 through September 30, 1987. Worksheets prepared by the Division and provided to petitioner show that this penalty was calculated on a monthly basis (as was the tax assessment) for the months of June 1986 through September 1987, although the notice of determination assessing the penalty indicates that the penalty was determined for the sales tax quarterly period ending November 30, 1987.

All of the sales tax returns provided to the auditors in November 1987 bear the following imprint in the upper left-hand corner "FT-945 (5/85)." Form FT-945 was revised in May 1985, June 1986 and September 1987. The returns provided to the auditors were completed on obsolete forms. According to the affidavit of James J. Morris, Jr., a Division employee whose office is in charge of revising these forms, revised forms are distributed to registered motor fuel distributors on a monthly basis.

Chapter 44 of the Laws of 1985 made significant amendments to New York's motor fuel tax law. The "First Import Act," as it came to be called, provided for the imposition of the motor fuel tax and the prepayment of sales tax at the time of importation or production, rather than at the time of sale. The Division introduced into evidence three publications of the Division which explained to motor fuel distributors their obligations under the First Import Act. Among other things these publications explain that a purchaser buying for immediate export would be required to file a properly completed Form FT-936, "Statement of Exportation of Motor Fuel by Purchaser." The publications also explain that purchases of motor fuel for immediate export do not qualify for exemption from taxation, although a refund or credit would be allowed for tax paid or passed through if certain conditions were met. The FT-936 differs from the All City sales tax exemption certificate provided by Wizard in several important

respects.

The FT-936 requires attachment of a copy of the purchaser's "valid distributor/dealer license" or a letter from the state in which the dealer operates certifying his status as a distributor/dealer of motor fuel. The FT-936 requires the purchaser to identify the location of the out-of-state facility to which the fuel will be transported and to identify the mode of transportation and the name of the transporter (if different from the purchaser). Finally, the FT-936 asks the purchaser to state the number of gallons of motor fuel purchased. The sales tax exemption certificate contains none of these requirements.

Wizard entered into evidence several documents which demonstrate that the Division's recordkeeping system contained an error with regard to Wizard's sales tax payment record.

Mr. Yeates received a certified check from Wizard in the amount of \$228,690.90 as payment for sales tax due for the period ended March 31, 1986. In a letter to Wizard's attorney, Norman Berkowitz, dated March 16, 1990, the Division correctly advised that no sales tax was due for that period, but also advised that penalty and interest totalling \$126,269.62 remained due. The Division issued to Wizard a Notice and Demand dated June 1, 1992, requesting payment of penalty and interest in connection with the late payment of tax for the period ended March 31, 1986. By this time, the penalty and interest amounted to \$145,155.15. There is no proven error in these documents; however, attached to the Notice and Demand is a Consolidated Statement of Tax Liabilities which asserts that the tax assessment for the period ended March 31, 1986 in the amount of \$228,690.90 was not paid and is subject to collection action by the State.

Wizard also entered in evidence a letter signed by Joseph M. Fiano as Director of the Division's Tax Compliance Division which states, in pertinent part:

"Your client's return for the period ending November 30, 1985 was received timely on December 20, 1985, without payment. Due to a systems problem, our Processing Division was unable to issue an assessment for this unpaid tax until February 27, 1989, however, your client could have made voluntary payment at any

time. We have no record that any payments were received for this period. The balance now due is \$229,412.30 which consists of \$122,588.24 in tax, \$36,776.42 in penalty and \$70,047.64 in interest."

Petitioner's purpose in introducing this letter is to show that the Division's computer system is flawed and, as a consequence, that the Division's assertion that no sales tax returns were filed for periods after May 31, 1986 is unreliable.

Benet Doloboff, Wizard's accountant during the periods at issue, testified concerning accounting work done by him or his staff for Wizard. He stated that he or a member of his firm prepared Wizard's monthly motor fuel tax returns and sales tax prepayment returns at the same time. The completed returns were given to Wizard's bookkeeper with instructions for payment of the tax shown as due on the returns. The returns were prepared from information provided by Wizard. Mr. Doloboff did not maintain Wizard's books and records but relied on the records provided. He testified that, to the best of his knowledge, all returns he prepared were filed.

When Mr. Doloboff was asked the basis for his belief that All City was exporting motor fuel he stated: "I had a resale certificate." He admitted under cross-examination that book transfers of motor fuel do not constitute an export of fuel and also admitted he had no personal knowledge as to whether All City actually exported motor fuel.

Mr. Doloboff was asked to explain why Wizard claimed no credit for out-of-state sales on its motor fuel tax returns for the subject period, but claims that all of its purchases were sold for export for sales tax purposes. He responded as follows:

"We had in our possession this export resale certificate for export, and were never given any sort of resale certificate for excise taxes. Since we had no certificate in our files, we -- and the taxpayer said they were going to try and get that, we felt that it was prudent that they file the excise tax return, and if and when we were able to receive a certificate of exemption we could always file for a refund." (Tr., pp. 294-295.)

All City provided Wizard with a Federal Registration for Tax-Free Transactions Under Chapters 31 and 32 of the Internal Revenue Code, dated May 5, 1986.

The Division had in its audit files a copy of a New York State Export Certificate for article 13-A petroleum business taxes. It is a blanket certificate, showing All City as the buyer

and Wizard as the seller of petroleum purchased for immediate export for use outside New York. Apparently, it was received from Wizard during the audit.

The Division offered in evidence a sample invoice showing a sale by Wizard of 167,412 gallons of gasoline to All City for \$120,536.64, plus an 8% State "gross receipts tax" of \$3,463.30, for a total due of \$123,999.94. Mr. Doloboff testified that the invoice is typical of those issued by Wizard to All City. He also testified that he used Wizard's sales invoices to prepare its motor fuel and sales tax returns. Mr. Doloboff testified that Wizard maintained adequate books and records for the audit period.

The petition of Wizard was signed by Norman Berkowitz, Esq., as petitioner's representative. The power of attorney which appointed Mr. Berkowitz to represent Wizard was signed by Mr. Trevor Wisdom.

The Division issued to petitioner, Ashley Jarwood, three notices of determination and demands for payment of sales and use taxes due, each dated July 20, 1990. The first notice assessed sales and use taxes due for the period June 1, 1986 through July 30, 1987 in the amount of \$4,204,879.96, plus penalty of \$2,102,439.98 and interest of \$2,159,125.64, for a total amount due of \$8,466,445.58. The second notice assessed sales and use taxes for the period June 1, 1987 through September 30, 1987 in the amount of \$234,707.39, plus penalty of \$117,353.70 and interest of \$93,583.82, for a total amount due of \$445,644.91.

On each of the foregoing notices, a box was checked next to the statement: "THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(a)(1) OF THE TAX LAW." The notices also contained the following statement:

"You are liable individually and as Officer of Wizard Petroleum Inc. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law. In addition, fraud penalties of 50 percent of the amount of tax due plus interest have been added pursuant to Section 1145(a)(2) of the Tax Law."

The third notice assessed penalty only for the period June 1, 1986 through November 30,

1987 in the amount of \$443,958.72. The notice explained that:

"The following penalties are being imposed pursuant to Section 1145 of the Tax Law. This notice is in addition to Notice number S900720803M & S900720804M."⁴

Since Wizard's inception, the firm of Seller, Stein and Doloboff has provided accounting services to Wizard. Mr. Doloboff was the partner in charge of Wizard's account. For the period at issue, Wizard's accounting firm prepared sales and use tax returns for Wizard contemporaneously with the due dates for filing. When the accounting firm did not have a return envelope from the taxing authority, it was the practice of the accounting firm to prepare an envelope for filing the return. Mr. Doloboff never prepared envelopes for sales tax to be remitted to Holtsville, New York.

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

During the period in issue, the sales and use tax returns which Mr. Doloboff prepared, did not report any taxes due. During the same period, Wizard filed, among other returns, Federal excise tax returns, corporate income tax returns and truck mileage tax returns. Other than the sales tax returns, none of the returns have been questioned as not timely filed. In most instances, the returns included tax payments.⁵

The New York motor fuel tax liability of Wizard during the audit period was between three and four million dollars. To the best of Mr. Doloboff's knowledge, all of Wizard's motor fuel tax returns during the audit period were timely filed and paid. The Federal excise tax liability of Wizard would have been approximately \$6,000,000.00. Mr. Doloboff believes that these taxes were also timely filed and paid.

In Mr. Doloboff's experience, if tax returns were not filed for a period of time the

⁴The explanation refers to the notices described in Finding of Fact "3."

⁵The first sentence of finding of fact "7" of the Administrative Law Judge's determination read as follows: "[d]uring the period in issue, Wizard's sales and use tax returns did not report any taxes due." We modified this sentence to clearly refer to the sales tax return Mr. Doloboff prepared for Wizard.

company would receive a notice and then a visit from someone involved in tax compliance. Mr. Doloboff was never notified that sales tax returns were not timely filed and paid, and Wizard never advised Mr. Doloboff that it received a notice that returns were not filed.

After preparing the tax returns, Mr. Doloboff's office gave the returns with the envelopes to the bookkeeper for processing.

It was the practice of Mr. Doloboff's firm to give Wizard an original and a copy of the tax returns it prepared. Wizard, in turn, maintained copies of the returns in its files.

Wizard shared offices with several related corporations -- On-Site Petroleum Unlimited, Inc., Janus Corporation, and Terminelle Corporation. Returns for each of the foregoing corporations were prepared by Mr. Doloboff's office. In each instance, Mr. Doloboff's firm provided the taxpayer with an original return, a copy of the return and a pre-addressed envelope. Mr. Doloboff never received a notice that the returns were filed late.

Sylvia Frank, was the bookkeeper for the related group of corporations. When Mr. Doloboff gave Ms. Frank returns for a particular month, he would look in a folder and observe that there were no unfiled returns. On those tax returns on which no tax was due, the corporate officer only had the responsibility of signing the returns and returning the material to Ms. Frank.

Petitioner provided an affidavit from Sylvia Frank which stated that she had been employed by Janus Petroleum, Inc. and its related corporations, including Wizard, since 1985. Ms. Frank states that each month she reviews with the accountants which returns must be filed that month and how much tax is due for each return. She then obtains an officer's signature on each return and a check for the appropriate amount. According to Ms. Frank, she attaches the appropriate payment check to the proper tax return and inserts the return and check, if any, in the pre-addressed envelope provided by the accounting firm. The proper amount of postage is then placed on the pre-addressed envelopes.

Ms. Frank states that she checks the tax return to be filed against the list of tax returns

previously reviewed with the corporation's accountants to verify that all of the returns are ready for mailing. Ms. Frank avers that she provides the mail clerk with the paid pre-addressed envelopes, containing the tax returns, for mailing. Each month she verifies with the corporation's mail clerk that all of the tax returns were properly and promptly mailed. On the basis of the foregoing, Ms. Frank concludes that she is certain that the sales tax returns for the period June 1, 1986 through November 30, 1987 were timely filed.

To the best of Mr. Doloboff's knowledge, Wizard corporation kept accurate books and records. He was never advised that Wizard's books and records were inadequate. In addition, he was never given a list of the books and records that the Division wanted for an audit and was not even aware that a sales tax audit of Wizard was in progress.

Mr. Doloboff never filed a power of attorney form authorizing him to appear on Wizard's behalf.

All City was a customer of Wizard which issued a resale certificate to Wizard. Once it reviewed the sales tax exemption certificate, Wizard did not collect sales tax from All City.

Mr. Doloboff visited the premises of Wizard once a month. Most of the time when he was there, someone from the Division was there.

It was Mr. Doloboff's understanding that the exemption certificate from All City was a valid certificate and he advised the officers of Wizard that it was a valid certificate.

Petroleum is stored in tanks on the premises of a terminal. Each tank can hold hundreds of thousands of gallons. There are separate tanks for different types of gasoline - regular, unleaded and hi-test. Although the different types of gasoline are not commingled, gasoline from different customers was stored in the same tank.

At the hearing, Mr. Doloboff explained that when a transfer of ownership of product was called for, it was a common practice at Terminelle Corporation to make transfers from one company to another through entries on records rather than the physical transfer of the product. In this manner, Wizard would make transfers to its related companies - Janus and On-Site.

Wizard considered these activities to be book transfers and not sales since the gasoline would be replaced or replenished by the associated corporation when it bought products. Wizard did not charge the related company when the transfer of gasoline occurred. There was also no charge for sales tax or excise tax. When Janus or On Site repaid Wizard by pumping products back, there was no counter charge or charge for sales tax.

All City provided Wizard with a registration for tax-free transactions under the Internal Revenue Code. Mr. Doloboff did not believe that Wizard collected excise tax from All City because the registration meant that the purchaser would be paying tax directly to the Federal government.

It was Mr. Doloboff's understanding that All City may have been exporting more than it was selling in New York. Mr. Doloboff states that he and the people at Wizard relied in good faith on the exemption certificate. Further, he advised Wizard that the exemption certificate was appropriate, valid and proper. No one from the Division ever told Mr. Doloboff that it was not a proper certificate.

Ms. Jarwood held the title of treasurer. In this capacity she bought and sold product and oversaw the running of the office. She signed checks which were made payable to creditors and had access to the company records.

As the secretary-treasurer of Wizard, petitioner signed an Application for Registration as Distributor of Gasoline and Similar Motor Fuels. The application, which listed petitioner as the owner of one-third of Wizard's stock, led to Wizard's being mailed a certificate on July 8, 1985. Wizard's Application for Motor Fuel Tax and Sales and Use Tax Reregistration, which was received by the Division on June 16, 1987, shows that petitioner had increased her stock ownership to 50%.

Ms. Jarwood was not compensated by Wizard for her services because the company was young and could not afford to pay her.

Tax returns were presented to petitioner by Ms. Frank with paper clips on the pages

which required signatures. The envelopes were attached by paper clips to those papers.

Ms. Jarwood just went to those pages that had paper clips on them and returned the papers to Ms. Frank. In the course of business, Ms. Jarwood would ask Ms. Frank if the tax returns were mailed on time.

According to Ms. Jarwood, she relied on Mr. Doloboff's explanation that the exemption certificate from All City was valid and proper. Further, the Division's employees never told petitioner that the exemption certificate from All City was improper.

It is Ms. Jarwood's testimony that all of the appropriate sales tax returns for the period in issue were filed by Wizard. Neither Ms. Jarwood nor anyone from Wizard ever received a notice that tax returns were not filed.

Ms. Jarwood was never told that the Division had commenced a sales tax audit of Wizard. No one from the Division ever discussed the results of the audit with her.

OPINION

In Matter of Wizard Petroleum (*supra*), we determined that the assessment against Wizard was not barred by the statute of limitations, that the sales tax audit method used by the Division was reasonable and that there was clear and convincing evidence to support a finding of fraud.

In this case, petitioner Ashley Jarwood asserts that the assessment issued to her is barred by the statute of limitations and that she was not a "responsible officer" of Wizard, i.e., a person required to collect and pay over the sales tax on behalf of Wizard within the meaning and intent of Tax Law §§ 1131(1) and 1133(a). She also contests the validity of the Division's audit on the same grounds asserted by Wizard Petroleum in its case. Petitioner was not a party in Wizard Petroleum nor was the responsible officer issue litigated in Wizard Petroleum.

The Administrative Law Judge rejected the Division's assertion that petitioner was collaterally estopped from litigating those issues which were decided in Wizard Petroleum, i.e., that the assessment against Wizard was not barred by the statute of limitations; that the sales tax

audit method was reasonable; and that the Division proved fraud. The determination of the Administrative Law Judge was based on his finding that the record does not establish petitioner was a party to the Wizard Petroleum proceeding, or that the Division showed that petitioner had the necessary privity with the party who lost in the prior proceeding, i.e., Wizard Petroleum.

The Administrative Law Judge, citing to the State Administrative Procedure Act § 306(2), also determined that it was appropriate for him to allow into the record in this case the record made in the Wizard Petroleum case.⁶ Based on the record in Wizard Petroleum and the evidence in the record in this hearing, the Administrative Law Judge concluded that: the assessments were not time barred; the audit method was reasonable; petitioner's assertion that the Division has not proved that petitioner was an officer under a duty to act for the corporation was without merit; and the Division proved that petitioner engaged in fraud.

On exception, petitioner asks us to make the following conclusions of law:

"(a) The record of a previous hearing, where the Petitioner was not a party, may not be admitted into evidence, which would result in an impermissible denial of a taxpayer's fundamental right to due process.

"(b) The Petitioner is entitled to a full and fair hearing with respect to each and every issue of this matter.

"(c) The Division failed to meet its burden of proof with respect to willful fraud on the part of the Petitioner.

"(d) The period permitted to assess additional taxes expired by operation of law.

"(e) There is no evidence that the Petitioner was an officer under a duty to act for the corporate taxpayer and, therefore, the Petitioner was not a responsible officer, liable for the sales and use taxes in issue.

"(f) The corporate taxpayer's books and records were sufficient to enable verification and audits of its returns. As a result, the Notices of

⁶State Administrative Procedure Act § 306(2) states:

"All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. In case of incorporation by reference, the materials so incorporated shall be available for examination by the parties before being received in evidence."

Determination must be voided.

"(g) The acceptance of a sales tax exemption certificate in good faith by Wizard and the Petitioner relieved the Petitioner of any duty to collect sales tax from the purchaser" (Petitioner's exception, p. 2).

We deal first with petitioner's assertion that the ruling by the Administrative Law Judge allowing the Wizard Petroleum record into evidence:

"was completely unfair and unjust and seriously prejudicial to the Petitioner's right to a full and fair hearing.

"If the result of a previous hearing cannot be used to preclude a taxpayer from a full, complete and fair hearing, it follows that the record of the previous hearing may not be used in evidence in the subsequent hearing" (Petitioner's brief, p. 10).

The gist of petitioner's position is that the Wizard Petroleum record is hearsay evidence and, as such, deprived her of the ability to cross examine witnesses in the Wizard Petroleum case.

We cannot agree.

The Wizard Petroleum record is hearsay evidence. However, that does not render it inadmissible into evidence (SAPA § 306[1]; see, Matter of Gray v. Adduci, 73 NY2d 741, 536 NYS2d 40; Matter of Mira Oil Co. v. Chu, 114 AD2d 619, 494 NYS2d 458, appeal dismissed 67 NY2d 756, 500 NYS2d 1027; Matter of Hopper, Tax Appeals Tribunal, August 18, 1994). Nor was petitioner deprived of the opportunity to prove her case by the fact that the Wizard Petroleum record was admitted into evidence. Petitioner was free to call witnesses and introduce evidence into the record to controvert the "hearsay" in the Wizard Petroleum record (20 NYCRR 3000.7[a]; see, Matter of Kucherov v. Chu, 147 AD2d 877, 538 NYS2d 339; Matter of Gray v. Adduci, supra; Matter of Fisher, Tax Appeals Tribunal, April 19, 1990, affd Matter of Fisher v. Tax Appeals Tribunal, 177 AD2d 801, 576 NYS2d 415, appeal dismissed 79 NY2d 914, 581 NYS2d 666).⁷ The decision of the Administrative Law Judge to admit the

⁷In this context, we would point out that in her petition, petitioner intimated she would pursue such a course, i.e., "[t]he corporate taxpayer (Wizard Petroleum, Inc.) has various receipts, vouchers and other evidentiary data to support its sales as set forth on its tax returns for the periods involved" (Petition, p. 2). Petitioner, on direct examination of Mr. Doloboff, used exhibits "F" and "G" in connection with Mr. Doloboff's testimony on the filing

record into evidence was proper and the Administrative Law Judge was free to consider this evidence in finding his facts in this case.

We deal next with the issue of whether the statute of limitations bars the issuance of the assessments against petitioner. We affirm the determination of the Administrative Law Judge. Section 1147(b) of the Tax Law requires that an assessment of sales and use taxes be made within three years of the date of the filing of the return. When a return is filed before the last date prescribed for filing a return or before the last day of an extension of time for filing, the return is deemed filed on the last day.

In order for petitioner to establish a statute of limitations defense, she must go forward with a prima facie case showing the date on which the limitations period commences, the expiration of the statutory period, and receipt or mailing of the statutory notice after the running of the period (Matter of Richards, Tax Appeals Tribunal, December 3, 1991; Matter of Jencon, Inc., Tax Appeals Tribunal, December 20, 1990). As noted, pursuant to Tax Law § 1147(b), the period of limitation for assessment of sales and use tax commences on the date of filing of the subject returns. Thus, to succeed in making a prima facie case, petitioner was required to establish both the fact and the date of filing of the sales tax returns for the assessment period. Petitioner has not established that the returns in question were filed before they were given to the auditors on November 10, 1987. Petitioner here relies solely on the testimony of Mr. Doloboff and the affidavit of Ms. Frank to prove that returns were timely filed. We agree with the Administrative Law Judge that, while Mr. Doloboff's testimony and the affidavit of Ms. Frank may show that Wizard had a procedure for the preparation and filing of tax returns, it fell far short of showing that those returns were ever mailed or submitted to the Division.

We also reject petitioner's assertion in her brief that the notices for the period beginning June 1, 1986 and ending May 31, 1987 are time barred. Specifically, petitioner asserts that:

of tax returns by Wizard (Tr., pp. 17 et seq.).

"the Notices were all dated July 20, 1990. However, the Notices mailed to the Petitioner were returned to the Tax Department marked 'unclaimed' and were not received by the Petitioner. Subsequently, because of this defective notice, the Tax Department re-mailed the Notices to the Petitioner on June 14, 1991. (See Division's Exhibit 'B' attachment to Petitioner)" (Petitioner's brief, p. 20).

Petitioner relies for this assertion on handwritten sentences on the bottom of the notices.

However, there is no testimony or other evidence concerning the origin of the handwriting or that the postal service, in fact, returned the notices as unclaimed (see, Matter of Ruggerite v. State Tax Commn., 97 AD2d 634, 485 NYS2d 517, affd 64 NY2d 688, 485 NYS2d 517). We find the handwritten sentences on the bottom of the notices are not sufficient to establish a prima facie case of receipt or mailing of the notices after the statutory period and, thus, are insufficient to have required the Division to respond with evidence that the notices were timely mailed (Matter of Jencon, supra).

We also reject petitioner's assertion in her brief that she properly relied upon the exemption certificate provided by All-City (Petitioner's brief, p. 30). We agree with the conclusion of the Administrative Law Judge:

"[t]he record does not support petitioners claim that the exemption certificate was accepted in good faith. As noted in Matter of Wizard Petroleum, Inc. (supra), in order to sell motor fuel to All City without pass through of the prepaid sales tax, petitioner was required to obtain a Statement of Exportation of Motor Fuel by Purchaser (FT-936). The exemption certificate provided by petitioner was outdated and did not contain all of the information required by a Statement of Exportation of Motor Fuel by Purchaser.

"Petitioner presented evidence that the book transfers of gasoline between companies were merely loans which were repaid in kind. This explanation fails to address the difficulty presented herein. That is, the series of book transfers shows that, contrary to petitioners explanation, all of the motor fuel was not sold to All City for export. Petitioner's explanation was also contradicted by the fact that most of the motor fuel which entered the Terminelle terminal eventually was trucked out, primarily by vehicles owned by Janus. The foregoing facts belie petitioner's claim that Wizard accepted and acted upon the certificate from All City in good faith" (Determination, conclusion of law "L").

We deal next with the issue of whether petitioner was a responsible officer of Wizard Petroleum.

We affirm the determination of the Administrative Law Judge.

The relevant factors to be considered in determining whether a person has a duty to act for the corporation are whether the person is authorized to sign the corporation's tax returns or is responsible for maintaining the corporate books, or responsible for the corporation's management (20 NYCRR 526.11[b][2]). Other factors include the authority to hire and fire employees, the derivation of substantial income from the corporation, stock ownership and the authority to write checks on behalf of the corporation (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988).

Here, the Administrative Law Judge, based on petitioner's testimony at the hearing in this case, found that petitioner held the title of treasurer and in this capacity she bought and sold products and oversaw the running of the office. She signed checks which were made payable to creditors and had access to the company records. As the secretary-treasurer of Wizard, petitioner signed an Application for Registration as Distributor of Gasoline and Similar Motor Fuels. The application, which listed petitioner as the owner of one-third of Wizard's stock, led to Wizard being mailed a certificate on July 8, 1985. Wizard's Application for Motor Fuel Tax and Sales and Use Tax Reregistration, which was received by the Division on June 16, 1987, shows that petitioner had increased her stock ownership to 50%. Petitioner signed tax returns for Wizard and followed up to see if the returns were taken care of on time. Thus, it is clear to us that based on the evidence introduced at the hearing in this case, petitioner was a "responsible officer" of Wizard.

We turn next to petitioner's assertions concerning the audit by the Division of Wizard.

We affirm the determination of the Administrative Law Judge. Petitioner raises the same arguments here as were raised in Wizard Petroleum, namely, that there was no written or oral request to examine Wizard's books and records for the audit period, that the Division offered no

proof that the books and records were not adequate and that resort to estimating Wizard's taxable sales was, thus, impermissible. We agree with the Administrative Law Judge that petitioner has not controverted any of the facts which formed the basis of our decision in Wizard Petroleum. The Administrative Law Judge properly determined that:

"[a]s found by the Tribunal, the record clearly establishes that Mr. Yeates requested Wizard's books and records for the entire audit period. Mr. Doloboff has not presented any evidence which contradicts this finding. The request for books and records was made to Ms. Jarwood and not Mr. Doloboff. Since Mr. Doloboff was not an authorized representative of Wizard, there is no reason to expect that he should have been aware that a sales tax audit was in progress. It is noted that Ms. Jarwood's testimony that she was unaware that a sales tax audit was in progress is unconvincing. The request for sales and purchase invoices, cancelled checks, sales tax returns plus supporting documentation and schedules should have put Ms. Jarwood on notice that a sales tax audit was underway.

"Petitioner's arguments with respect to the scope of the audit were also rejected by the Tribunal in Matter of Wizard Petroleum, Inc. (*supra*). As noted therein, the record does not support petitioner's claim that the amount of tax assessed was estimated. Rather, "[t]he amount assessed . . . was based entirely on petitioner's own calculation of sales tax prepayments due on its import of motor fuel. The Division's only adjustment was to disallow the credit claimed on each return for purported sales for immediate export" (Matter of Wizard Petroleum, Inc., *supra*, quoting the determination of the Administrative Law Judge). Since petitioner has not presented evidence or argument that the statement on the notices that the tax was estimated prejudiced petitioner, the notices are considered valid (see, Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892). It was also noted therein that the taxpayer bears the burden of establishing entitlement to a credit. There is no authority which requires the Division to always conduct a full and complete audit and which prohibits the Division from limiting its audit to requesting evidence establishing that a taxpayer is entitled to the 21 credits which it claimed" (Determination, conclusions of law "I" and "J").

We deal next with the assertion by petitioner that the Division failed to meet its burden of proof with respect to willful fraud on the part of petitioner. We affirm the determination of the Administrative Law Judge, to wit, that:

"[a]s was the case in Matter of Wizard Petroleum (*supra*), the record contains clear and convincing evidence that petitioner participated in a scheme to evade payment of sales tax. Petitioner was a principal of both Wizard and Terminelle and was familiar with each corporation's activities. As previously noted, Wizard made transfers of motor fuel to companies other than All City. Therefore, the Division has shown that Ms. Jarwood's explanation that all of Wizard's sales were made to All City was a

fabrication. Further, contrary to Ms. Jarwood's explanation, All City did not export all of the product it purchased from Wizard. Some motor fuel was transferred to other companies using the Terminelle terminal. As the Tribunal noted in affirming the earlier determination 'because of Mrs. Jarwood's and Mr. Wisdom's day-to-day involvement with both Wizard and Terminelle, they must have been aware that all of Wizard's sales were not made to All City and that All City did not immediately export all the motor fuel it purchased' (Matter of Wizard Petroleum, supra)" (Determination, conclusion of law "P").

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ashley Jarwood, Officer of Wizard Petroleum, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Ashley Jarwood, Officer of Wizard Petroleum, Inc. is denied; and
4. The notices of determination dated July 20, 1990 are sustained.

DATED: Troy, New York
January 25, 1996

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

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

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