STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LATZ LANDSCAPING, INC.	:	
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, 1993 through May 31, 1999.	:	DECISION DTA NOS. 819252 AND 819253
In the Matter of the Petition		
of	:	
GLEN LATZ	:	
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, 1998 through May 31, 1999.	:	

Petitioner Latz Landscaping, Inc., c/o Glen Latz, President, 65 Piermont Road, Tenafly, New Jersey 07670, and petitioner Glen Latz, 65 Piermont Road, Tenafly, New Jersey 07670 and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on February 3, 2005. Petitioners appeared by Kane Kessler, P.C. (Michael A. Zimmerman, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (James Della Porta, Esq., of counsel).

Petitioners filed a letter brief in lieu of a formal brief in support of their exception. The Division of Taxation filed a brief in support of its exception and in opposition to petitioners' exception. Petitioners filed a letter brief in lieu of a formal brief in opposition to the Division of

Taxation's exception and in reply to the Division of Taxation's brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the request of both parties, was heard on May 15, 2006 in New York, New York.

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

ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due from petitioners for the periods at issue.

II. Whether the Division of Taxation has sustained its burden of proof to show that the imposition of fraud penalty pursuant to Tax Law § 1145(a)(2) was proper.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On June 7, 2001, the Division of Taxation ("Division") issued a Notice of Determination to Latz Landscaping, Inc. ("Latz") which assessed additional sales and use taxes in the amount of $167,240.90, plus penalties and interest, for a total amount due of $401,615.65 for the period June 1, 1993 through May 31, 1999. Included in the penalties assessed was a $10,000.00 penalty pursuant to Tax Law § 1145(a)(3)(i) for failure to obtain a certificate of authority under Tax Law § 1134 and penalty pursuant to Tax Law § 1145(a)(2) on the ground that the failure to pay or pay over the tax was due to fraud.

On June 29, 2001, the Division issued a Notice of Determination to Glen Latz, as an officer or responsible person of Latz, in the amount of $69,771.35, plus penalties and interest, for

a total amount due of $146,125.42 for the period June 1, 1998 through May 31, 1999. The penalty for failure to obtain a certificate of authority and the fraud penalty assessed against Latz were also assessed against petitioner Glen Latz.

At the hearing held in this matter, the Division conceded that it had no evidence that Latz was in business prior to the year 1995. Accordingly, all tax and penalties assessed for the period June 1, 1993 through November 30, 1994 were canceled.[1]

Also, at the hearing, petitioner Glen Latz conceded that, pursuant to Tax Law §§ 1131(1) and 1133(a), he was a person responsible for the collection of sales and use taxes on behalf of Latz and that he was personally responsible therefor.

Pursuant to a request by an auditor of the Division, Ujwal Durve, and his team leader, James Pendergast, John Barr, an investigator employed by the Division, drove to 11 Highview Avenue, Orangeburg, New York on September 14, 1999 in an attempt to ascertain whether Latz was conducting business from that address. On his way to the Highview Avenue address, the investigator passed the premises of Bell Atlantic at 616 Route 303, Blauvelt, New York when he noticed a truck in the driveway which bore the name Latz Landscaping. Mr. Barr observed grass clippings being removed and saw a lawnmower which had yet to be returned to the truck. Inside the premises of Bell Atlantic, the investigator was informed that Bell Atlantic contracted with Colin Service Systems, Inc. ("Colin") for general maintenance. After speaking with other individuals, Mr. Barr was informed that Latz was one of Colin's subcontractors.

Mr. Barr then drove to the 11 Highview Avenue address where he observed a building "similar to a house" which seemed to be used for a business. He observed landscaping vehicles

[1] The tax assessed for each of these six sales tax quarters was $.01 per quarter. However, total penalties assessed for such quarters totaled $5,872.71.

of various types and also saw a sign on the lawn which said "Latz." Inside, he spoke to Glen Latz.

The investigator spoke with representatives of Colin who furnished him with copies of checks issued to Latz during the year 1999. Mr. Barr was asked by the Division's auditors to issue subpoenas to various banks: Fleet Bank, Commerce Bank and PNC Bank.

This audit was apparently commenced as a result of an observation by two Division auditors (James Pendergast and Lou Finch) who were on business at Blue Hill Plaza in Pearl River, New York when they observed Latz trucks and crew performing work at that location. Mr. Pendergast telephoned his office and spoke with Ujwal Durve who checked on his computer and found that Latz was not registered as a vendor for purposes of New York State sales tax. In checking the Division's computer records, Mr. Durve also discovered that Latz had filed no New York State franchise tax reports for the years 1995 through 1999.

An initial appointment letter was sent by Auditor Durve to Latz at 60 Coopers Lane, Rivervale, New Jersey on August 13, 1999. The Coopers Lane address was obtained by Mr. Durve's supervisor, James Pendergast. The letter scheduled a field audit[2] for September 16, 1999 and requested that the following be produced for examination at the scheduled appointment:

> All books and records pertaining to your sales and use tax liability, for the period under audit, must be available on the appointment date. This includes financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates.

[2] The appointment letter indicated thereon that the audit period was June 1, 1993 through May 31, 1999.

On the same date, Mr. Durve telephoned the Orangeburg, New York address and was told to contact Latz's accountant, John Michaels, which he did. When he received no response, Mr. Durve telephoned Latz on August 31, 1999 and left a message; on the same day, Mr. Durve received a call from a Mr. Latz who stated that he was "not the Latz that you're looking for." That person told Mr. Durve that Glen Latz's office was located at 11 Highview Avenue in Orangeburg, New York and also provided Mr. Durve with the telephone number. When the auditor placed the call, the telephone was answered "Latz Landscaping."

The auditor did receive a telephone call from Accountant Michaels who stated that Latz had no business in New York and that Latz's business address was 60 Coopers Lane in Rivervale, New Jersey. Mr. Michaels informed the auditor that the Orangeburg, New York address was for a different company (also owned by Glen Latz) known as Commercial Snow Services, Inc.

Auditor Durve was hired as a sales tax auditor by the Division in April 1999, approximately four months prior to the commencement of this audit. He has a masters degree in accounting from India but he did not study laws of the United States there. The audit at issue in this proceeding was the ninth or tenth audit which Mr. Durve was involved in.

On October 19, 1999, the auditor met with Mr. Michaels at his office in New Jersey. When he again stated to the auditor that Latz had no taxable sales in New York, he was informed of the observations of the Division's auditors. Mr. Michaels then told the auditor that Latz had only one job in New York and that the job was not subject to sales tax. He presented to the auditor a contract between Latz and Mack-Cali Realty L.P., a managing agent for One and Two Blue Hill Plaza, Pearl River, New York, dated April 1, 1998, wherein Latz was to perform

exterior landscaping services at Blue Hill Plaza for the period April through November 1998. The auditor's Tax Field Audit Record notes that on October 19, 1999, he asked Mr. Michaels for Latz's sales invoices for the audit period.

Latz's accountant informed the auditor that the receipts from all of Latz's sales are deposited into an account at the PNC Bank. The accountant agreed to provide the auditor with bank deposit records and New Jersey sales tax returns; he indicated that the returns were prepared from the bank deposits and after reviewing the deposit records and returns, the auditor concluded that they were in substantial agreement.

Again, in October 1999, the auditor made both an oral and a written request for the books and records of Latz to its accountant, John Michaels.

The auditor asked Mr. Michaels for a copy of the lease on the Orangeburg, New York premises, but it was never provided to him. He did receive a canceled check from Commercial Snow Services, Inc., signed by Glen Latz, for the sum of $1,750.00 payable to E.C.H. Holding for "yard rent." On the top of the check was handwritten "Latz 11 Highview." Mr. Michaels stated that the premises were rented by Commercial Snow Services, Inc. and not by Latz. Commercial Snow Services, Inc. is registered as a vendor for sales tax purposes with the State of New York and files New York State sales tax returns.

During the course of the audit, Latz retained the services of an attorney, Robert Stern, of the firm of Deener, Feingold & Stern of Hackensack, New Jersey. A conference between the auditor and Mr. Stern was scheduled for March 21, 2001 and subsequently rescheduled for March 27, 2001. The auditor sent letters to Mr. Stern dated February 21, 2001 and March 12, 2001, respectively, to confirm these conferences and in the letters asked that a sales journal,

purchase journal, purchase invoices for material used in New York jobs and sales invoices for Blue Hill Plaza and Clarins be provided.

Latz's representatives during the initial stages of the audit (Mr. Michaels and Mr. Stern) suggested to the auditor that the year 1998 be used as a test period. Mr. Stern indicated to the auditor that it would be impossible to provide all of the invoices for the entire audit period. The auditor then asked for all of the sales invoices, purchase invoices and sales and purchase journals for 1998, but he was informed by Mr. Stern that Latz does not maintain a sales or purchase journal and, therefore, that the auditor's request was unreasonable. The auditor utilized the information from 1998 because that was all that was provided to him.

Initially, invoices were requested and were provided for the months of October, November and December 1998 for both New York and New Jersey sales; subsequently, invoices for the balance of 1998 were furnished to the auditor. The auditor was also provided with PNC bank statements as well as New Jersey and Federal returns for 1996 and 1998. Despite the request by the auditor, the following records were not provided: New Jersey sales tax returns for the entire audit period; Federal returns for two of the years under audit; general ledger; sales journal; purchase journal; purchase invoices; bank deposit slips; canceled checks; all monthly bank statements; resale certificates; exemption certificates; and capital improvement certificates.

For the months of October through December 1998, pursuant to the invoices furnished to the auditors, Latz's gross sales were found to be $228,256.83; New York gross sales were computed to be $163,131.06, or 71.47% percent of total gross sales. Pursuant to the PNC Bank deposit records provided to the auditor, bank deposits for the period October through December 1998 totaled $63,282.17.

While the auditor asked to photocopy the invoices for the last quarter of 1998, Latz's accountant, John Michaels, denied permission since he indicated that his client had not granted him permission to do so.

Attorney Stern thereafter provided sales invoices for the balance of the 1998 year. The invoices were shown to the auditor and his supervisor at Mr. Stern's office on January 11, 2001. The invoices were shown to the auditors but when they asked to photocopy the invoices, Mr. Stern indicated that he did not have his client's permission to make copies thereof.

The total sales per the invoices provided to the auditors for 1998 were $329,371.70; New York sales upon which tax was supposed to have been charged were $115,696.38, or 35% of the total sales. The total New York sales tax charged by Latz on these invoices was $8,388.45.

In his review of the invoices for 1998, the auditor determined that there were New York sales by Latz for which tax should have been but was not charged. The total of these sales was $138,305.00, or 41.9% of the total sales per invoices. The vast majority of the sales for which the auditor determined tax should have been but was not charged by Latz were to Lederle Lab.

When the auditor, Mr. Durve, was initially provided with invoices for the October through December 1998 period, he was shown an invoice to Palisade Center Mall on which sales tax was charged to that customer. Subsequently, when he was provided with invoices for the entire 1998 year, that invoice was not included.

Latz's accountant, Mr. Michaels, informed the auditor that the account at PNC Bank was the sole account maintained by Latz. Subsequently, Mr. Durve asked the Division's investigator, John Barr, to contact Latz's customers and obtain canceled checks in order to verify that Latz did, in fact, have just the one bank account at PNC Bank. From Latz's customer, Colin Services,

Mr. Barr ascertained that Latz made deposits with Fleet Bank and Commerce Bank, as well. Bank records were subpoenaed from all three banks, but PNC Bank refused to comply with the subpoena.

For the year 1998, Latz's Fleet Bank deposits totaled $1,141,067.18. On its Federal income tax return for 1998, Latz reported gross sales of $154,880.00. The auditor advised Latz's attorney, Mr. Stern, of this large discrepancy.

To compute total additional tax due, the auditor made the assumption that deposits into any bank except PNC Bank were New York sales. This assumption was based upon the statement made by Latz's accountant that all New Jersey sales were deposited into the PNC Bank account and because the New Jersey sales tax returns were in substantial compliance with the PNC deposit records supplied by the accountant.

Since Latz charged sales tax on 35% of its sales per the invoices supplied and since 41.9% of the sales were disallowed as exempt sales (***see***, above), the auditor applied these combined percentages to the total Fleet deposits for the period August 1995 through June 1999, the total of which was $2,999,682.37. The result of applying the total of the above percentages (76.9%) to the bank deposits resulted in taxable sales of $2,306,755.74 with additional tax due thereon, computed at the applicable tax rate of 7.25%, of $167,239.79.

After arriving at the additional tax due, the auditor gave both Mr. Michaels (Latz's accountant) and Mr. Stern (Latz's attorney) the opportunity to file sales tax returns and to pay the tax due. Neither did so. Mr. Stern indicated that he might be able to settle the matter but only if he received written confirmation from the auditors that they would not notify any other taxing authorities about the additional taxes due.

The auditor determined that the fraud penalty should be imposed. Among the reasons for his imposition of the fraud penalty were the following:

a. For some customers, Latz charged and collected sales tax, but did not remit the tax to the Division;

b. Latz's representatives made the following misleading statements to the auditor during the audit: (1) Latz had no business in New York; (2) Latz, while it had some business in New York, made no taxable sales in New York; and (3) Latz maintained only one bank account, i.e., the PNC Bank account;

c. No sales journals were maintained by Latz which could be matched to the other bank deposits;

d. Latz's Federal income tax return for 1998 reported sales of $154,880.00 while the bank deposits to the Fleet Bank account alone were $1,141,067.18 for that year;

e. Latz's representatives refused to allow the auditors to make copies of sales invoices during the audit;

f. The auditors were not provided with purchase invoices so that they could determine if sales tax had been paid on materials allegedly used in performing capital improvement jobs;

g. The auditor was unable to determine if all sales invoices for 1998 were supplied because he was not provided with any sales journal, bank deposit slips or bank statements to verify the accuracy of the sales invoices; and

h. On a number of occasions, the auditor observed Latz's trucks crossing the Tappan Zee Bridge into Westchester County which led him to believe that Latz was performing work in New York.

In May 2000, Latz's accountant furnished the auditor with a copy of a Direct Payment Permit in the name of American Cyanamid Co. of Philadelphia, Pennsylvania, the effective date of which was August 1, 1965. Lederle Pharmaceuticals ("Lederle"), a customer of Latz, is a division of American Cyanamid Co. Lederle subsequently became known as "Wyeth" which was located in Pearl River, New York. At the time that the Direct Payment Permit was provided to the auditor, three invoices were attached to the permit. The auditor asked for a copy of the contract between Latz and Lederle (he indicated that most maintenance contracts have a clause which specifies who will pay the tax), but no contract was provided to him.

Prior to the hearing held in this matter, Attorney Michael A. Zimmerman, petitioners' representative at the hearing, furnished the auditor with a letter from Wyeth, addressed "To Whom It May Concern" which stated as follows:

> We certify that, unless we advise you to the contrary in writing, all billings for delivery to us at North Middletown Road, Pearl River, New York 10965 are made under the authority of a currently valid Direct Payment Permit No. DP-000341 for American Cyanamid Company.
>
> Accordingly, please do not bill New York State and Local Sales Tax on our purchases for delivery to the above address.
>
> Our New York State and Local Sales and Use Tax Registration Number is 13-04308890.

A similar letter from Lederle (from R.J. DePasquale, Manager, General Accounting) was sent, by fax, to another Division Investigator, Christine Sicina, on August 18, 2003 referencing

the same instructions, Direct Payment Permit number and Sales and Use Tax Registration number.

Of the total disallowed nontaxable sales ($138,305.00) which made up the 41.9% used in the auditor's computation of additional tax due (***see***, above), the sales to Lederle for the period were in the sum of $137,445.00.

At hearing, when asked by Mr. Zimmerman, why he chose not to exclude the sales to Lederle from disallowed nontaxable sales, the auditor, Mr. Durve, indicated that since he was not provided with the Direct Payment Permit until 2000, he was instructed by his supervisor and his section head to disregard the permit and to deem taxable the sales to Lederle. The auditor, during cross examination by Mr. Zimmerman, was asked if he knew why his supervisor, Mr. Pendergast, told him not to consider the Direct Payment Permit, stated that "I don't question my supervisor." The auditor agreed that if the sales by Latz to Lederle had been allowed as nontaxable, then just approximately 35% of the New York sales for 1998 would have been taxable.

On February 4, 2003, the Division received from Latz a New York State Amnesty Application for the period December 1, 1993 through December 31, 1999 on which it was indicated that total tax due was in the amount of $23,456.00 for this period. Sales tax returns for most of the sales tax quarters covered by the application were filed with the application.

On July 18, 2003, the Division issued a Statement of Amnesty Account to Latz which indicated that tax amnesty had been granted for the period December 1, 1993 through November 30, 1995, December 1, 1998 through February 28, 1999 and December 1, 1999 through February 29, 2000. However, the Statement of Amnesty Account also indicated that balances were due,

including interest for the period December 1, 1995 through November 30, 1998 and for the period September 1 through November 30, 1999 (the total due under amnesty was $6,441.66). The Division's statement also indicated that for the periods ended May 31, 1996, May 31, 1999 and August 31, 1999, the returns submitted had not completed processing through the Division's systems.

In furtherance of its amnesty application, petitioners submitted to the Division on February 9, 2004, a partial withdrawal of petition in order to qualify for amnesty. Pursuant to this partial withdrawal, petitioners conceded tax due in the amount of $23,456.00 for the period December 1, 1993 through December 31, 1999, but do not concede that any further sales tax is due for this period. The partial withdrawal further states that petitioners continue to contest sales tax due above the amount of tax on their amnesty application.

Petitioner Glen Latz indicated that out of approximately 400 to 500 customers of Latz, only 4 customers were located in New York State, to wit: Colin Service Systems, Blue Hill Plaza, Clarins and Lederle, each of which was a commercial account. Glen Latz also owns Commercial Snow Services, Inc., a commercial snow and deicing company that does business in New York and New Jersey. Commercial Snow Services, Inc. files its own returns and pays sales tax to both states.

According to Glen Latz, Latz does not maintain a sales journal (invoices are generated from a computer system) or a purchase journal (a computerized listing of suppliers, materials purchased and amounts paid is generated).

Latz did not charge or collect sales tax on services performed for Lederle as a result of the instructions on the purchase orders from Lederle which stated as follows: "NOTICE: Do not

charge N.Y. State and Local Sales/Use Tax. We will pay to N.Y. State taxes due under our valid Direct Payment Permit - No. DP - 000341. (Reg. No. 13-0430890)."

Colin Services, a customer of Latz, is located in White Plains, New York. It maintains buildings for Bell Atlantic in Orange, Rockland, Putnam and Westchester counties (approximately 90 locations). While the Division's auditor did not impose tax on Latz for its services to Colin Services, it was the first company visited by Investigator Barr.[3] Glen Latz indicated that pursuant to Latz's contract with Colin Services, it was stated that no tax would be paid to any subcontractor under the Bell Atlantic contract but that Colin Services would pay the tax directly to the Division.

Blue Hill Plaza, a customer of Latz, is a corporate park located in Pearl River, New York. Latz contracted to do both maintenance and capital improvement work at this site. Glen Latz admitted some of the services performed for Blue Hill Plaza were taxable sales; Latz collected the tax, but did not remit the tax to the State of New York until it made its application for amnesty in February 2003.

Clarins is a small manufacturing facility in Orangeburg, New York. It entered into a contract with Latz whereby Latz agreed to perform certain maintenance work and capital improvements on site. Glen Latz admitted that some of the services performed for Clarins were taxable. Latz collected the tax but did not remit it to the State of New York until it made its application for amnesty in February 2003.

---

[3] Petitioner Glen Latz asserts that the contract between Latz and Colin Services provided that no tax was to be charged by any subcontractor working under the Bell Atlantic Contract. While this contract is not part of the record herein, apparently this assertion was borne out by Investigator John Barr when he obtained copies of canceled checks from Colin Services (***see***, above).

When asked on direct examination by his representative, Attorney Michael Zimmerman, why there was a discrepancy between Latz's Federal income tax returns and the schedules prepared by Glen Latz purporting to show total sales, New York sales and taxable sales for the audit period (these schedules were not supplied to the auditor during the audit but were prepared and furnished to the auditor approximately one week prior to the hearing), Glen Latz indicated that the business grew at a rapid rate from 1996 to 1998, he signed returns prepared by his accountant without properly reviewing them and, while Latz is no longer in business, he was now attempting to come into compliance. Glen Latz also stated that while he was aware that certain services performed by Latz were subject to New York State and local sales tax, he was unaware that he was required to register as a vendor with the State. Glen Latz has no accounting background although his wife, who is a certified public accountant, assisted him in preparing some of the schedules submitted to the auditor shortly before the hearing. Although sales tax was collected by Latz on some of its sales to New York customers, Glen Latz blamed his bookkeepers for failure to remit the tax. In some instances, he indicated that the bookkeepers erroneously remitted the tax to New Jersey.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed that where a taxpayer's records are inadequate to determine on audit the amount of sales and use taxes due, the Division is authorized to estimate the tax liability on the basis of external indices using a methodology reasonably calculated to result in the tax due. In order to challenge the Division's methodology, the taxpayer must show by clear and convincing evidence that the methodology was unreasonable or that the resulting amount of tax was erroneous. Applying these principles to the facts of the case, the

Administrative Law Judge found that Latz's failure to maintain journals and failure to provide complete sales invoices and bank deposit records justified the Division's use of an indirect audit method to estimate its sales tax liability. The Administrative Law Judge also concluded that based on the Direct Payment Permit issued to American Cyanamid Co. in 1965, Latz was not required to collect tax from its divisions and successors. Accordingly, receipts from sales of services to those entities should have been omitted from taxable sales for the 1998 base period and, accordingly, from the calculation of Latz's estimated tax liability. As a result, New York taxable sales for 1998 expressed as a percentage of total sales should have been reduced to 35.26%. The same adjustment was made in determining the tax liability of petitioner Glen Latz as a responsible person.

The Administrative Law Judge also rejected the argument of the Division that even if petitioners supported adjustments to the 1998 base period tax by submitting exemption documents, no adjustment should be carried over to the periods to which the base calculations were extended.

Finally, in considering the application of penalties the Administrative Law Judge referred to our decision in ***Matter of Cinelli*** (Tax Appeals Tribunal, September 14, 1989) which stated,

> [t]he standard of proof necessary to support a finding of fraud requires 'clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or under payment of taxes due and owing.'

He found that the following facts met this standard: 1. Latz's failure to register as a vendor when an affiliated company, Commercial Snow Services, Inc., was so registered, 2. Collecting tax from some customers but failing to pay over those taxes to the Division, 3. False and misleading

statements to the auditors and other obstructive behavior, 4. Failure to maintain sales or purchase journals, 5. Bank deposits grossly in excess of reported income, and 6. Failure to file New York State corporation franchise tax reports indicating an attempt to conceal Latz's presence in the state.

ARGUMENTS ON EXCEPTION

Petitioners object to the determination that 35.26% of Latz's deposits at Fleet Bank represented taxable sales on two grounds. First, they assert that the bank deposits include receipts for work that was exempt capital improvements and for which direct deposit certificates were applicable. Second, they assert that based on the auditor's work papers for a sample period, only 71.47% of the deposits should be treated as receipts from New York sales with the remainder being treated as New Jersey sales (***see,*** Petitioners' brief in support, pp. 1-5; Petitioners' brief in opposition, pp. 2-5; Petitioners' reply brief, pp. 2-4).

Petitioners also argue that they should not be liable for penalties for fraud, failure to pay or failure to file because they have demonstrated the existence of reasonable cause for the behavior of Latz (***see,*** Petitioners' brief in support, pp. 5-10; Petitioners' reply brief, pp. 10-12).

The Division argues that the determination erred in holding that the 90-day rule of Tax Law § 1132(c) does not apply to direct payment certificates and asserts that there is no evidence that the certificate in issue was received at the time of the sale (***see,*** Division's reply brief, pp. 1-2). It also argues that exempt sales should be considered only to the extent that exemption documents can be associated with specific sales and therefore the presence of exempt sales should not be supposed for periods outside 1998 (***see,*** Division's exception, Attachment B). The Division also rejects petitioners' argument that the taxable sales percentage of 35.26% should

not have been applied to 100% of petitioners' deposits in Fleet Bank because petitioners' representatives told the auditor that all of the New Jersey receipts were deposited in another bank, PNC, which supports the inference that the Fleet Bank account deposits contained only New York receipts. Moreover, if petitioners' argument was accepted, it would be necessary to apply the percentage to the PNC deposits as well (***see,*** Division's brief, pp. 2-3). The Division also contends that in the circumstances of this case a fraud penalty is proper (***see,*** Division's brief, pp. 4, 33-43).

OPINION

Every person required to collect sales tax must maintain and make available for audit records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (***see***, Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Where a taxpayer's records are insufficient, unreliable and inadequate to verify, upon audit, the amount of sales and use taxes due for the period under examination, the Division is authorized to estimate such tax liability on the basis of external indices (***see***, Tax Law § 1138[a][1]; ***Matter of Ristorante Puglia, Ltd. v. Chu***, 102 AD2d 348, 478 NYS2d 91; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451). Such an indirect audit method must be reasonably calculated to reflect the taxes due (***see, Matter of W.T. Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869, 2 L Ed 2d 75; ***Matter of Ristorante Puglia, Ltd. v. Chu***, ***supra***) but exactness of the result is not required (***see, Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454; ***Matter of Lefkowitz***, Tax Appeals Tribunal, May 3, 1990). If there is a rational basis for the auditor's calculations, the taxpayer has the burden of showing by clear and convincing evidence that the

method was unreasonable or that the amount assessed was erroneous (***see, Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, ***supra; Matter of Hammerman***, Tax Appeals Tribunal, August 17, 1995).

It is clear from the record in this case that Latz failed to maintain and to provide to the Division's auditor records sufficient to serve as the basis for an accurate calculation of sales tax due. Accordingly, the auditor was well justified in applying an estimation method in order to determine petitioners' tax liability. Rather than cooperating in the audit and providing all available information, Latz's representative presented a phalanx of obstruction and falsehood which limited the sample from which the tax liability for the audit period could be estimated. The auditor nevertheless produced calculations based on available information for 1998 which were then extended to the entire audit period. While the assumptions underlying the calculations are crude in several respects, they nonetheless appear reasonable in the circumstances.

A tactic of obstructing the work of the auditor by withholding or falsifying information and then introducing fuller information at the hearing before the Administrative Law Judge (***see, e.g.,*** Petitioners' Exhibit 7) in order to challenge the auditor's calculations, if permitted, would convert the hearing from an adjudication to a second audit. The issue before us is whether the auditor's methodology was reasonably calculated to reach a fair estimate of tax due based on the information that was available to the auditor, not whether the auditor could have made a better estimate if Latz had cooperated in the effort. It appears from the record that the Division's audit personnel were dogged in their efforts to obtain the most complete information. To the extent that those efforts were thwarted by Latz's intransigence, petitioners should not now be heard to complain about the imprecision of the result.

One of the adjustments to the calculations accepted by the Administrative Law Judge was to give credit for sales to a purchaser that furnished a direct payment permit to Latz. The Division objects to this conclusion stating, "The 90 day rule set forth in Tax Law section 1132(c) applies to Direct Payment permits. The Tribunal so held in Matter of Gartner Group, December 8, 1994" (Division's exception, Attachment B; ***see,*** Division's brief in support, pp. 30-33). Tax Law § 1132(c) contains two paragraphs--(1) and (2). Paragraph (1) sets forth rules addressing the receipt of "resale or exemption certificates" including a rule that such certificates must be received by the vendor not later than 90 days after the delivery of the property or the rendition of the service which would otherwise be subject to tax. We do not read the words "resale or exemption certificate" as comprising a direct payment permit since the permit does not claim an exception to the imposition of sales and use tax but only relieves the vendor from the role of tax collector. Paragraph (2) sets out provisions addressing "direct payment permits." It begins with the words, "Notwithstanding paragraph one of this subdivision . . ." and states in part, "A vendor shall not be required to collect tax from a purchaser who furnishes a direct payment permit in proper form . . ." There is no 90-day rule in paragraph (2). The structure of the Division's regulations is similar. Exemption certificates of various kinds are discussed in 20 NYCRR 532.4 and direct payment permits in 20 NYCRR 532.5. Our decision in ***Matter of Gartner Group*** (Tax Appeals Tribunal, December 8, 1994) adopted the holding of the Administrative Law Judge that a vendor would not be permitted to reduce its tax liability based on direct payment permits that were received by the vendor after the time to assess the purchaser's tax had expired. Contrary to the Division's assertion, there is no mention in that case of the 90-day rule of Tax Law § 1132(c)(1). In the present case, the Administrative Law Judge concluded based on the

record that the direct payment certificates were received in conformity with the statute and regulations. We find nothing in the record that causes us to question that conclusion.

As noted above, the auditor determined that 35% of Latz's sales for 1998 represented taxable New York sales and added an additional 41.9%. The Administrative Law Judge adjusted this second percentage as discussed above and found that the appropriate total percentage representing taxable sales was 35.26%. As seems clear from the worksheet in evidence (***see,*** Petitioners' Exhibit S, pp. 2-1, 2-2) this percentage reflects the exclusion of receipts for work involving capital improvements and direct payment certificates. Petitioners assert that the total deposits for the audit period, $2,999,682.37 (Division's Exhibit S, p. 3-2), should likewise be reduced by amounts representing capital improvements and direct payments (***see,*** Petitioners' brief in support, pp. 1-4). This argument seems to reflect a fundamental misunderstanding of the arithmetic at work here. The percentage expresses a fraction the numerator of which is total sales for 1998 minus excluded capital improvement and direct payment sales and the denominator of which is total sales for 1998. Reducing the total receipts for the audit period by a similar exclusion before applying the percentage multiplier would in effect be double counting the allowance for such excluded sales.

Petitioners also argue that 35.26% is the percentage of 1998 New York sales, not total sales, that are subject to tax. Accordingly, the total sales for the audit period should be adjusted to exclude non-New York sales before applying the percentage (***see,*** Petitioners' brief in support, pp. 1-4). It appears from the record that Latz was engaged in business in New York and New Jersey. As noted in the facts above, petitioners' representative told the auditor that Latz's receipts from New Jersey sources were deposited in PNC bank and that these bank records were

the basis on which they filed New Jersey sales tax returns. This led the auditor to the reasonable inference that the deposits for the 1995-1999 audit period in Fleet Bank represented the non-New Jersey sales–*i.e.,* the New York sales. As the Division points out in its brief (***see,*** Division's brief, pp. 3-4, 23-24), even if we were to accept petitioners' assertion that only 71% of the deposits in Fleet Bank were New York sales, consistency would require applying the same percentage to petitioners' other bank accounts, which petitioners have not done. On balance we, like the Administrative Law Judge, have concluded that the auditor's approach to this issue was reasonable and produces a result no less fair to the parties than the alternatives.

The Division imposed a penalty for fraud under Tax Law § 1145(a)(2) which was sustained by the Administrative Law Judge based on various facts in evidence including failure to register as a vendor, failure to pay over collected taxes, false and misleading statements to the Division's auditors, failure to maintain sales journals, bank deposits grossly in excess of reported gross income, and failure to file New York corporation franchise tax reports. The record amply supports the conclusion that Latz willfully sought to evade its tax liabilities by deceitful and fraudulent means. We accordingly sustain the imposition of the fraud penalty.

It is unclear from the record whether the Division has accepted petitioners' application for amnesty and, if so, to what extent. If amounts have been paid by petitioners against the liability for taxes and penalties asserted in the notices of determination, credit should be given for those payments to the extent appropriate.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Latz Landscaping Inc. is denied;

2. The exception of Glen Latz is denied;

3. The exception of the Division of Taxation is denied;

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

5. The petition of Latz Landscaping Inc. is granted to the extent of cancelling all tax and penalties assessed for the period June 1, 1993 through November 30, 1994 and in all other respects is denied; and

6. The Notice of Determination dated June 7, 2001 is modified consistent with paragraph "5" above and to reflect the adjustment of the percentage of taxable sales discussed above and as so modified is confirmed.

DATED: Troy, New York
October 26, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner