

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

RYWIN, 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 Periods September 1, 1999 through February 29, :
2000 and June 1, 2000 through February 28, 2002. :

DECISION
DTA NOs 820268
and 820269

In the Matter of the Petition :

of :

GARY A. RYDER :

for Revision of a Determination or For Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period December 1, 2000 through :
February 28, 2002. :

Petitioners, Rywin, Inc. and Gary A. Ryder, and the Division of Taxation, filed exceptions to the determination of the Administrative Law Judge issued on December 21, 2006. Petitioners appeared by De Graff, Foy, Kunz & Devine, LLP (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (James Della Porta, Esq., of counsel).

Petitioners and the Division of Taxation filed briefs in support of their exceptions, briefs in opposition, and reply briefs. Oral argument, at the request of both parties, was heard on October 24, 2007 in Troy, 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 Rywin, Inc. and its owner, Gary A. Ryder.

II. Whether penalties imposed pursuant to Tax Law § 1145(a)(1)(i) and (vi) should be sustained.

III. Whether the Notice of Determination issued to petitioner Gary A. Ryder is barred by the statute of limitations.

FINDINGS OF FACT

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

Petitioner Rywin, Inc. (“Rywin”), doing business as Wine Warehouse, operates a retail wine and liquor store located at 816-18 Carman Avenue, Westbury, New York. Located in a strip mall in a middle class neighborhood, the Wine Warehouse sells wine, liquor, ice and lottery tickets. All wine and liquor inventory offered for sale is displayed on shelves and in boxes in the 2,506 square-foot double-size store because the store does not have a basement for storage. There is a small office located at the rear of the store. The store has one cash register. Petitioner Gary A. Ryder, president and sole shareholder of Rywin, has operated the wine and liquor store for over 30 years.

Prior to and during the period September 1, 1999 through May 31, 2002, Rywin maintained two checking accounts at Bank of New York for the business. The first business link checking account, titled “Rywin Inc., Wine Warehouse” (“operating checking account”), was used as Rywin’s operating account and the other business link checking account, titled “Rywin

Inc., Wine Warehouse, Lottery Account” (“Lottery checking account”), was used for payments due the Lottery.

Great House of Wine, Inc. (“GHW”), a Florida corporation, was in the business of providing distribution and fulfillment services for small west coast wineries which sold wines to out-of-state customers via the mail, the telephone and the Internet. It had a New York State wine wholesale license and leased warehouse space at 437 Railroad Avenue in Westbury, New York from Allied Cold Storage Warehouse. Sometime in the fall of 1998, James Mattson, president of GHW, approached Mr. Ryder with a business proposition concerning the sale and shipment of out-of-state wines to New York State customers. GHW proposed to pay Rywin a commission on sales of out-of-state wines to New York State consumers, if Rywin would: take legal possession of the wine, although physical delivery of the wine would be to GHW’s warehouse located a little over a mile from Rywin’s retail location; verify that the number of boxes of wine on the truck matched the number of items listed on the bill of lading prior to arrival of the shipment at GHW’s warehouse; direct deliveries to GHW’s warehouse; ensure that the boxes of wine were properly refrigerated in the warehouse; and mail undeliverable, damaged and returned boxes of wine to the originating wineries. In addition to the commission payments, GHW proposed to remit the sales tax receipts collected from the New York State consumers by the wineries to Rywin which would then remit same to the New York State Department of Taxation and Finance. On or about November 1, 1998, GHW and Rywin entered into a business relationship. However, the two-page document dated November 1, 1998 entitled “NEW YORK CONTRACT” was never executed by the parties.

During the period September 1, 1999 through February 28, 2002, wine transactions involving GHW, Rywin and the New York State retail customer were conducted as follows.

New York customers would place orders for wine with out-of-state wineries. GHW would pick up the wine orders from the wineries and deliver the wine to a GHW warehouse located near the Napa, California county airport. Each week a temperature controlled truck would leave this warehouse and travel to the northeast with wine shipments repacked in Styrofoam shippers, labeled for delivery to the customer and palletized by state. Some of the wine was shipped to Rywin in New York. The shipper, Garrison Transportation Services, took the shipment to Rywin's place of business, 816-18 Carman Avenue, Westbury, New York, where, after checking the load and the paperwork, either Mr. Ryder or a Rywin employee would sign the bill of lading which bore the "ship to" address of Wine Warehouse, 816-18 Carman Avenue, Westbury, NY 11590-6428. The wine was not off-loaded at Rywin's retail establishment. Rather, the driver was directed by either Mr. Ryder or a Rywin employee to deliver the wine shipments to GHW's warehouse located at 437 Railroad Avenue, in Westbury, New York. After the wine shipments were delivered to GHW's Westbury, New York warehouse, a common carrier such as UPS would pick up the boxed wine and deliver it to the retail customer.

During the period September 1, 1999 through May 31, 2002, each box of wine picked up by the common carrier at GHW's Westbury, New York warehouse had a shipping label which listed, among other things, the shipper's name and address as Wine Warehouse, i.e., Rywin's business name, 816-18 Carman Avenue, Westbury, NY 11590-1560, the recipient's name and address and that a minimum 21 years-of-age adult's signature was required for delivery of the box of wine. The New York retail customer also received a sales invoice which listed Wine Warehouse as the retailer. If the common carrier was unable to deliver the wine or the customer refused delivery, it was returned to Rywin's place of business. Any broken or spoiled bottles of

wine were also returned by the retail customer to Rywin's place of business. Mr. Ryder would forward all returns back to the originating wineries and notify GHW of the returns.

During the period September 1, 1999 through May 31, 2002, GHW issued sales invoices to Rywin for the wines shipped from the out-of-state wineries to New York retail customers. On these sales invoices, Rywin was charged the same amount for the wine as the retail customer had paid to the out-of-state wineries for it. Each sales invoice listed, among other things, the number of cases purchased, the number of bottles in a case, the names of the wine and the winery from which the purchase was being made as well as the retail customer name or names, the rate paid by the retail customer per case and the total amount due. While these bills did reflect the total amount due for each shipment of wine to Wine Warehouse, they also reflected that the shipments were prepaid.

During the period September 1, 1999 through May 31, 2002, New York retail wine customers would prepay their orders, including shipping and sales tax to the out-of-state wineries. The wineries would forward the sales tax receipts to GHW and GHW would remit the sales tax to Rywin. GHW would also send schedules recapping the taxable sales and sales tax to be reported by Rywin.

GHW paid Rywin a commission for services which it rendered. Those services included, among other things, handling deliveries of the wine and reporting the out-of-state wine sales and sales tax due on those sales on its sales tax returns. The commission was \$2.00 on each case of wine sold to a New York customer. Beginning in August 2000, Rywin began receiving an additional \$5.00 per package returned to the Wine Warehouse and then reshipped by it to the originating winery, retroactive to the October 1999 returns. GHW made the commission payments by check.

On December 5, 2000, Mr. Ryder sent a letter to Cindy Brown-Guthrie, the chief operations officer of GHW, regarding issues arising from Rywin's business relationship with GHW. In that letter, Mr. Ryder wrote, in pertinent part, as follows:

The accountant I have dealt with for the past 25 years has been expressing concern regarding some issues arising from transactions with your company. There are several snags from an accounting standpoint which need to be resolved.

First of all, the wholesale purchases of your wines, which is [sic] required by law, is [sic] only noted on your weekly data sheet. These items are never "purchased" by me and are never reflected in my books. The same holds true for sales which relate to these purchases. Since I do not receive cash payment from you for these sales, they are not reflected on my corporate books although they are reported on my sales tax returns. Therefore, my sales tax returns indicate a large volume of sales while my corporate books only reflect the sales made at my retail establishment. I am still attempting to come up with a reasonable procedure which will aid in developing consistent reporting. However, your input would be helpful, and I am agreeable to a plan that may be working with one of your other accounts.

Secondly, it is imperative that the sales tax payments you send to me be in the form of a check payable to Rywin, Inc., Wine Warehouse. If you send me a check payable to New York State, I must remit your check along with one of my own covering my in-store liability. The practice of sending two checks may raise eyebrows at the Sales Tax Bureau. Such red flags can be eliminated by having you make out the check to Rywin Inc., Wine Warehouse. In addition, due to the large volume of sales, the state is requiring me to file future sales tax returns on a monthly basis rather than quarterly as I had in the past. I must have your sales tax check by the 10th of each month so that I can deposit the check into my account, allow enough time for it to clear, and issue one check to New York State by the filing date of the 20th of each month. Failure to file on a timely basis will result in a 10% penalty which can be avoided by sending your checks to me by the 10th of each month. Please note, also, that my commission checks should also be made payable to Rywin Inc., Wine Warehouse.

Until these two issues are resolved, my accountant has refused to continue in that capacity. As I mentioned, the long-standing relationship I have developed with my accountant is not one I would like to jeopardize, and I would like to resolve these issues as quickly as possible. Please let me know if you can be of help with regard to the wholesale purchases situation, as I am sure other companies you deal with have had similar problems. Also, I would appreciate it if you would confirm, in writing, that you will comply with my request to have sales tax checks made payable to my Corporation and remitted to me by the 10th of each month

On December 11, 2000, Ms. Brown-Guthrie sent Mr. Ryder a "Fax" regarding sales tax which stated, in pertinent part, as follows:

Thanks so much for your call Friday night. I am thrilled you found the Kistler order. If you get me a revised list today of returns I will have Helene work on them to clean you out.

More importantly, I think you could tell by my tone last week I was taken a little off guard by your letter and realizing the tax was due next week for NY. I had in my mind it was due in January. As you can see our October was huge as was November and I am still collecting money from the wineries on receivables. I will only have about half this week to forward to you. Jim and I agreed we will simply forward the money to you once a week until we get the debt paid off, and of course incur any penalty that will arise. He also suggested we submit the services sales tax so that you do not have to worry about that burden from now on since we are allowed to do so as we have had this discussion with NY sales tax authorities several times. It was simply convenient to pass that through you as well. We do not have a problem writing the check out to you as Rywin Inc, as long as you sign your contract. At this point Gary we have been working together to the specifications of the contract for several years. It benefits you as well as us. I would like to get you a cashier's check made out to Rywin on Monday, so you wouldn't have to worry about it clearing and it gives me time to collect throughout the week I would overnight it next day UPS so you would have it. I want to get you as much as I can so we have less penalty to pay. I will pay you the remaining sales tax as soon as possible as we do not want to pay more than absolutely necessary on the penalty side for obvious reasons.

I am also attaching the revised recaps not inclusive of services sales tax for you and your accountant so that you can see the wine sales tax amounts you need to submit are slightly less and we will submit our own services.

I tried calling you and know you are busy. I will be in all day today to discuss this further. In the future I will get the money to you by the 10th and you will have these recaps by the 10th of each month if you find this to be more beneficial.

We will pay your commission once we pay off the sales tax debt as well as pay you for any returns outstanding

Further review of the Fax indicates that a total of seven pages were transmitted by facsimile transmission to Mr. Ryder on December 11, 2000.

On or about December 16, 2000, GHW sent a cashier's check payable to Rywin in the amount of \$30,000.00 in partial payment of the sales tax due for the months of October and November 2000.

Even though there were large sales of out-of-state wines to New York customers in the months of September, October and November 2000 and a total of \$95,017.44 in sales tax had been collected by the wineries, GHW was only able to remit \$30,000.00, i.e., the amount paid by cashier's check as noted above, of the total amount of New York sales and use tax due for those months. As such, Rywin agreed to pay the sales tax to New York State, in the amount of \$65,017.44. In a note dated January 20, 2001, GHW agreed to repay this amount to Rywin.

At first, GHW remitted sales tax to Rywin by check payable to New York State Department of Taxation and Finance. However, after Rywin objected to this method of payment in Mr. Ryder's December 5, 2000 letter, GHW began remitting the sale tax to Rywin via wire transfer deposits into Rywin's Lottery checking account. In addition to wire transfers, at times, GHW remitted the sales tax via checks payable to Rywin.

On or about October 10, 2002, James Mattson, as president of GHW, executed a two - page Promissory Note and Memorandum of Agreement ("promissory note and agreement") and forwarded this document to Mr. Ryder, as Rywin's president, for his execution as well. Under the terms of the promissory note which superceded all promissory notes prior to April 1, 2002 (the date listed on this promissory note) between GHW and Rywin, for value received, GHW promised to pay Rywin the sum of \$65,000.00, together with interest at the rate of 10 percent per annum on the unpaid balance, in four installments, on June 20, 2002, September 20, 2002, December 20, 2002 and March 31, 2003.

The two-page Promissory Note and Memorandum of Agreement also required Rywin to agree:

to continue providing the following services to Great House of Wine, Inc., pursuant to the contract between the parties dated November 1, 1998, for the period of six years ending August 31, 2004, with the following clarifications of RYWIN, INC.'s duties and compensation.

a) RYWIN, INC., shall accept and confirm weekly alcoholic beverage shipments from Great House of Wine, Inc., a licensed New York alcoholic beverage wholesaler, utilizing a maximum of 250 square feet of air-conditioned, indoor floor area for temporary storage of said wines returned to RYWIN, INC., as undeliverable to New York customers; and

b) RYWIN, INC., shall assist New York purchasers of said alcoholic beverages from Great House of Wine, Inc., who contact RYWIN, INC., and to responsibly convey said purchasers' concerns and needs to Great House of Wine at its Florida or California office, as appropriate;

c) RYWIN, INC., agrees to continue the compensation agreement with Great House of Wine dated November 1, 1998. Great House of Wine, Inc., shall pay such agreed sums to RYWIN, INC., for its duties of accepting and confirming shipments, re-labeling and re-shipping returned goods on a weekly basis, administrative expenses, vehicle and delivery expenses, and labor costs. Great House of Wine, Inc., shall pay said agreed compensation to RYWIN, INC., in addition to New York sales taxes, monthly or quarterly depending on RYWIN, INC.'s reporting period to the State of New York.

It is noted that the compensation agreement dated November 1, 1998 referenced above is not part of the record.

Mr. Ryder never executed the Promissory Note and Memorandum of Agreement.

However, the parties continued their business relationship after October 2002.

On February 11, 2003, GHW filed a voluntary petition under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court, Southern District of Florida, Fort Lauderdale Division. As part of its bankruptcy proceeding, GHW filed a schedule of creditors holding unsecured priority claims which listed Rywin as a creditor owed \$65,017.44. GHW

listed the date this claim was incurred as December 31, 2000 and the consideration for the claim as “New York Sales Taxes, to be reported and paid by Rywin, Inc., in exchange for promissory note from debtor.”

On or about April 28, 2003, Rywin filed a proof of claim in GHW’s bankruptcy proceeding seeking payment in the total amount of \$16,269.86 on the April 1, 2002 promissory note. The basis of its claim was services performed and taxes. Rywin attached a copy of the Promissory Note and Memorandum of Agreement executed by Mr. Mattson to its proof of claim. It also included an “Interest Statement” on which it stated the terms of payment by the debtor, the interest rate and the receipt by Rywin of two payments of \$25,000.00 each in May and June 2002. On the same date, Rywin also filed a proof of claim in GHW’s bankruptcy proceeding seeking payment for services performed in the total amount of \$5,424.73.

During the period September 1, 1999 through May 31, 2002, Rywin reported on its sales tax returns total gross sales of \$2,718,785.00 and total taxable sales of \$2,670,265.00 as follows:

| Sales tax quarter ending | Gross sales reported | Taxable sales reported | Nontaxable sales reported |
|--------------------------|----------------------|------------------------|---------------------------|
| 11/30/1999 | \$ 492,933.00 | \$ 487,737.00 | \$ 5,196.00 |
| 02/29/2000 | 163,958.00 | 160,249.00 | 3,709.00 |
| 05/31/2000 | 736,539.00 | 730,694.00 | 5,845.00 |
| 08/31/2000 | 74,762.00 | 72,175.00 | 2,587.00 |
| 11/30/2000 | 180,959.00 | 177,243.00 | 3,716.00 |
| 02/28/2001 | 118,744.00 | 115,595.00 | 3,149.00 |
| 05/31/2001 | 130,464.00 | 128,528.00 | 1,936.00 |
| 08/31/2001 | 123,963.00 | 118,266.00 | 5,697.00 |
| 11/30/2001 | 338,210.00 | 332,557.00 | 5,653.00 |
| 02/28/2002 | 173,889.00 | 170,720.00 | 3,169.00 |

| | | | |
|------------|-------------------|-------------------|-----------------|
| 05/31/2002 | <u>184,364.00</u> | <u>176,501.00</u> | <u>7,863.00</u> |
| Totals: | \$2,718,785.00 | \$2,670,265.00 | \$48,520.00 |

During the period September 1, 1999 through May 31, 2002, Rywin filed sales tax returns on a part-quarterly basis, i.e., it filed monthly sales tax returns, and on a quarterly basis. On the sales tax return which it filed for the quarter ending November 30, 1999, Rywin reported net sales tax due of \$41,307.65, a sales tax payment of \$69,659.77 and a net overpayment of sales tax in the amount of \$28,352.12. On the sales tax return which it filed for the quarter ending February 29, 2000, Rywin reported sales tax in the amount of \$13,621.17 less credits totaling \$28,502.12, consisting of the net overpayment of sales tax from the quarter ending November 30, 1999 in the amount of \$28,352.12 plus a vendor collection credit of \$150.00, for a net sales tax due of negative \$14,880.95. On the sales tax return which it filed for the quarter ending May 31, 2000, Rywin reported sales tax in the amount \$62,108.99 less credits totaling \$15,030.95, consisting of the remainder of the net overpayment of sales tax from the quarter ending November 30, 1999 in the amount of \$14,880.95 plus a vendor collection credit of \$150.00, for a net sales tax due of \$47,078.04, a payment of \$55,759.00 and a net overpayment of sales tax in the amount of \$8,690.96. On the sales tax return which it filed for the quarter ending August 31, 2000, Rywin reported sales tax in the amount of \$6,134.88 less credits totaling \$8,736.95, consisting of an overpayment of sales tax from the quarter ending May 31, 2000 in the amount of \$8,635.90 plus a vendor collection credit of \$101.50, for a net sales tax due of negative \$2,602.07. On the sales tax return which it filed for the quarter ending November 30, 2000, Rywin reported sales tax in the amount of \$15,065.65 less credits and prepaid sales tax totaling \$3,908.50, consisting of an overpayment of sales tax from the quarter ending May 31, 2000 in the

amount of \$2,602.05 plus prepaid sales tax in the amount of \$1,156.45 plus a vendor collection credit of \$150.00, for a net sales tax due of \$11,157.15 and a sales tax payment of \$11,157.15.

On or about May 9, 2002, the Division of Taxation (“Division”) assigned an auditor, Karel A. Ezegelian, to conduct a sales tax field audit of Rywin for the period September 1, 1999 through May 31, 2002. An appointment letter dated May 22, 2002 and setting an appointment for June 19, 2002 was sent by Ms. Ezegelian to Rywin. The letter included a Records Requested List which requested the following records to be available for audit on the appointment date:

- Sales Tax Returns, Worksheets and Canceled Checks for entire audit period
- Federal Income Tax Returns (1120's or 1065's or 1040's) for entire audit period
- NYS Corporation Tax Returns for entire audit period
- General Ledger for the entire audit period
- General Journal and Closing Entries for entire audit period
- Sales Invoices for entire audit period
- All Exemption Documents Supporting Non-taxable Sales for entire audit period

- Chart of Accounts for entire audit period
- Fixed Asset Purchase/Sales Invoices for entire audit period
- Expense Purchase Invoices for entire audit period
- Merchandise Purchase Invoices for entire audit period
- Bank Statements, Canceled Checks and Deposit Slips for All Accounts for entire audit period
- Cash Receipts Journal for entire audit period (also Purchase Journal if applicable)
- The Corporate Book (Minutes, Board of Directors, Articles of Incorporation) for entire audit period
- Depreciation Schedules for entire audit period

***This includes resale, exempt use, exempt organization, capital improvement certificates as well as any other necessary documentation to prove non-taxable sales.

A review of the Tax Field Audit Record (“audit log”) indicates that Rywin’s officer, Gary Ryder, scheduled a June 3, 2002 appointment at the Division’s Nassau District Office with the auditor to discuss the business, to ask what records were needed from the records list and to request a postponement of the field audit appointment. Further review of the audit log indicates

that at the June 3, 2002 meeting, the auditor told Mr. Ryder “to keep all cash register tapes, general ledger, all invoices, fixed asset receipts,” to have all sales tax returns available for review, to make copies of the Federal income tax returns for the Division to keep and to put his request for a postponement of the field audit appointment in writing. On or about June 17, 2002, the auditor received Mr. Ryder’s letter requesting a postponement of the audit appointment until sometime in August.

On June 20, 2002, Mr. Ryder, as president of Rywin, Inc., executed a consent extending the statute of limitations for the assessment of sales and use taxes for the period September 1, 1999 through May 31, 2000 to any time on or before June 20, 2003.

Using a database of liquor suppliers maintained by the Division, the auditor prepared and mailed 111 third-party liquor supplier letters on or about June 10, 2002. Each of these letters requested the liquor supplier to advise the Division of the dollar amount of Rywin’s purchases of wine and liquor during the period September 1, 1999 through May 31, 2002. Over time, the auditor received responses from numerous liquor suppliers concerning Rywin’s purchases of wine and liquor during the period September 1, 1999 through May 31, 2002.

In a letter dated September 16, 2002, the Division made a second request to schedule an appointment to conduct an audit of Rywin’s sales and use tax records for the period September 1, 1999 through May 31, 2002 at Rywin’s offices on October 2, 2002. This letter requested that all books and records pertaining to the sales and use tax liability for the period September 1, 1999 through May 31, 2002 be available on the appointment date. The Records Requested List attached to this letter contained a detailed list of the same records requested by the initial appointment letter dated May 22, 2002.

On September 18, 2002, during a telephone conversation with the auditor, Mr. Ryder inquired whether the Division had received his letter requesting a further postponement of the first audit appointment until January 2003. The audit log entry for that date indicates that the auditor explained to Mr. Rywin that it would be impossible to postpone the first audit appointment again because the June appointment had been rescheduled at his request but she indicated that she would speak with her team leader and let him know. During a subsequent telephone conversation initiated by Mr. Ryder on September 18, 2002, the team leader informed Mr. Ryder that the audit would commence on October 2, 2002 and all cash register tapes, daily logs and bank statements should be available for review on that date. During that same telephone conversation, Mr. Ryder informed the team leader that the cash register tapes were compiled and recorded in a daily log.

On October 2, 2002, Mr. Ryder brought a box of Rywin's records to a meeting with the auditor at the Division's District Office. The records presented to the auditor by Mr. Ryder included Rywin's general ledgers and cash disbursements journal, Rywin's Federal income tax returns (form 1120's) for 1999 (fiscal year April 1, 1999 through March 31, 2000), 2000 (fiscal year April 1, 2000 through March 31, 2001) and 2001 (fiscal year April 1, 2001 through March 31, 2002) and some bank statements for Rywin's operating checking account. The auditor retained the records for further review and gave Mr. Ryder a receipt for the records.

During the October 2, 2002 meeting, the auditor asked Mr. Ryder how the gross sales were determined on the sales tax returns and why credits for sales tax prepaid were reflected on some sales tax returns. However, Mr. Ryder was unable to answer her questions and stated that he would have to get that information for her. During this meeting, Mr. Ryder mentioned GHW

and explained that he held the wines for this company and collected and remitted sales tax for GHW.

On November 16, 2002, the auditor sent a letter to GHW asking for information regarding its sales to Rywin during the period September 1, 1999 through May 31, 2002.

During a December 11, 2002 telephone conversation with Mr. Ryder, the auditor requested Rywin's operating checking account bank statements for the months of September 1999 through November 2000, February 2001, June 2001, January 2002, February 2002, April 2002 and May 2002, all Lottery checking account bank statements for the period September 1, 1999 through May 31, 2002 and an explanation of Rywin's work with GHW.

As a follow-up to their December 11, 2002 telephone conversation, the auditor sent a letter dated December 16, 2002 to Mr. Ryder requesting Rywin's operating checking account bank statements for the months of September 1999 through November 2000, February 2001, June 2001, January 2002, February 2002, April 2002 and May 2002, all of Rywin's Lottery checking account bank statements for the period September 1, 1999 through May 31, 2002, a written explanation of Rywin's business with GHW (purchases and sales) and a copy of any contract between Rywin and GHW.

On January 29, 2003, Mr. Ryder met with the auditor at the District Office. Although Mr. Ryder brought additional bank statements for Rywin's operating checking account, he would not leave them with the auditor because he had not photocopied them. Mr. Ryder did not bring any bank statements for the Lottery checking account to the meeting. During the meeting, the auditor requested sales invoices from GHW but Mr. Ryder explained that he never received any sales invoices from GHW and GHW electronically deposited money, i.e., Rywin's commissions and sales taxes, into Rywin's Lottery checking account. At this meeting, Mr. Ryder also informed

the auditor that GHW would probably be going into bankruptcy and Rywin would not get the commission which it was owed.

On January 23, 2003, GHW faxed the sales schedule for the period September 1, 1999 through May 31, 2002 to the Division. A review of the sales schedule indicates that GHW reported making sales totaling \$5,582,496.45 to Rywin during the period September 1, 1999 through May 31, 2002. Further review of this sales schedule reveals that GHW reported making zero sales to Rywin during the months of September 1999 through April 2000. Subsequently, on February 10, 2003, the auditor made an oral request to GHW for copies of sales invoices reflecting its sales to Rywin during the period September 1, 1999 through May 31, 2002. On February 24, 2003, the auditor received copies of sales invoices issued by GHW to Rywin for the month of May 2002.

On February 3, 2003, the Division subpoenaed copies of Rywin's Bank of New York operating checking account and Lottery checking account bank statements for the period September 1, 1999 through May 31, 2002 and the signature cards and account opening information for those accounts. Subsequently, on March 13, 2003, the Division received copies of the signature cards and checking account bank statements for Rywin's operating checking and Lottery checking accounts for the period September 1, 1999 through May 31, 2002 from the Bank of New York.

On or about March 7, 2003, Rywin appointed James H. Tully, Jr., Esq., to act as its representative with respect to the audit. On April 3, 2003, Mr. Tully executed a consent on behalf of Rywin extending the time for determination of sales and use taxes for the period September 1, 1999 through November 30, 2000 until December 20, 2003. Subsequently, on October 16, 2003, Mr. Tully executed a consent on behalf of the corporation extending the time

for determination of sales and use taxes for the period September 1, 1999 through February 28, 2001 until March 20, 2004.

During a March 12, 2003 telephone conversation with Mr. Ryder, the auditor requested bank deposit records, bank statements, cash register tapes and any other source documentation for the audit period.

On April 14, 2003, the Division sent a letter to Rywin's representative, Mr. Tully, setting forth its analysis of the information presented by Rywin, i.e., general ledgers and bank statements, or its suppliers to date and requesting the following records be produced for review:

1. All records regarding business relationship with Great House of Wine - including initial contract, purchase invoices, receiving documents, distribution documents, commission received, etc. . . .
2. Daybook for entire audit period.
3. All purchase invoices for all suppliers for the fiscal year ended 3/31/02.
4. All sales invoices and exemption documents supporting nontaxable sales for the audit period.
5. All cancelled checks for all bank accounts for the audit period.
6. Personal income tax returns for Mr. Gary Ryder filed for 2000 and 2001.

On May 29, 2003, the Division received copies of GHW's promissory note to Rywin and GHW's bankruptcy papers from Mr. Tully. On June 17, 2003, Mr. Ryder called the auditor to confirm which documents from the April 14, 2003 letter to Mr. Tully were needed. During the June 17, 2003 telephone conversation, Mr. Ryder informed the auditor that Rywin did not maintain a day book and the original source documents were the cash register tapes. During the same conversation, the auditor requested that Mr. Ryder bring the cash register tapes and all other documents to the District Office before the end of June 2003, which request Mr. Ryder stated he would comply with after his June 23, 2003 meeting with Mr. Tully.

On July 11, 2003, Mr. Ryder dropped off a box containing original operating checking account bank statements and cancelled checks for the months of September 1999 through

January 2001, March 2001 through December 2001, February 2002, March 2002 and May 2002 and cancelled checks for the month of January 2002; purchase invoices related to Rywin's retail store's purchases for the quarter ending August 31, 2001, nontaxable sales invoices without exemption certificates and copies of Mr. and Mrs. Ryder's personal income tax returns. On July 15, 2003, the Division received a one-page worksheet entitled "Analysis of Sales and Sales Tax" for Rywin ("sales tax worksheet") for the period September 1, 1999 through May 31, 2002 from Mr. Ryder. This sales tax worksheet listed Rywin's retail store's gross, taxable and exempt sales, GHW's taxable sales, total taxable sales (retail store taxable sales plus GHW's taxable sales), the retail store's sales tax, GHW's sales tax and the total sales tax due for each month during the audit period. Mr. Ryder's handwritten notation on the sales tax worksheet indicated that the numbers listed for the retail store sales and the retail store exempt sales were taken from Rywin's general ledger and the numbers listed for GHW's sales and sales tax were taken from Rywin's sales tax returns.

The auditor reviewed the general ledgers, bank statements and Federal corporate income tax returns provided by the corporation. A reconciliation performed by the auditor indicated that gross sales reported on the corporation's sales tax returns were \$1,561,304.38 greater than the gross sales reported in the general ledger. The auditor found that the amount recorded in the corporation's general ledger sales tax accrual account was less than the amount of sales tax reported on the corporation's sales tax returns. After reviewing the operating checking account and Lottery checking account bank statements provided by Bank of New York, the auditor compared the net bank deposits compiled from those bank statements, i.e., \$1,748,947.77, with the gross sales reported on the corporation's general ledger, i.e., \$1,202,480.62, and found that bank deposits exceeded sales reported on the general ledger.

Although numerous written requests were made for all of the corporation's books and records pertaining to its sales and use tax liability, the corporation presented general ledgers, a cash disbursement journal, some bank statements and some exempt sales invoices. While the corporation claimed to have all cash register tapes for the audit period, it did not maintain a day book or any summary of daily sales. There were no records of the corporation's transactions with GHW and no records pertaining to sales tax credits taken on the corporation's sales tax returns for the quarters ending February 29, 2000 and August 31, 2000. The sales records provided by the corporation did not allow the auditor to trace any transaction back to the original source or forward to a final total. After reviewing the records provided by the corporation, the auditor determined the records to be inadequate.

After discussing the matter with her section head, the auditor decided to perform a markup audit of Rywin's purchases. The auditor sent third-party information requests to the suppliers listed in the corporation's cash disbursements journal. She reconciled the purchase information contained in the suppliers' responses to the purchase information recorded in the corporation's cash disbursements journal and found that the corporation failed to record \$33,372.99 in purchases for its retail store in its cash disbursements journal. The auditor also found that the corporation had no records of its purchases from GHW in its cash disbursements journal. The auditor went to the store and gathered shelf prices of the inventory to use in the markup test. After performing an analysis of the corporation's sales, applying a markup percentage and computing taxable sales for the audit period, the auditor determined an additional tax due in the amount of \$654,110.36.

A Statement of Proposed Audit Change for Sales and Use Tax (form AU-346) was issued to Rywin on October 28, 2003 that proposed additional tax due in the amount of \$654,110.36

plus penalties and interest. A review of the audit log indicates that the auditor mailed the pertinent work papers and the statement to the corporation's representative.

Mr. Tully disagreed with the proposed audit change. He insisted that the corporation did not take possession of the merchandise and was not a customer of GHW. During a November 3, 2003 telephone conversation with Mr. Tully, the auditor informed him that she had never received any information from Mr. Ryder concerning GHW and its business relationship with Rywin. December 3, 2003 was set as the date for an office appointment to discuss the audit findings.

On November 10, 2003, the Division received copies of the Promissory Note and Memorandum of Agreement between GHW and Rywin dated April 1, 2002 and the Schedule D-Creditors Holding Secured Claims from GHW's bankruptcy proceeding from Mr. Tully.

On November 26, 2003, Mr. Tully contacted the auditor and requested that the appointment be rescheduled because Mr. Ryder would be very busy at the store for the next week. The auditor rescheduled the appointment for December 18, 2003 at the District Office. During that telephone conversation, the auditor informed Mr. Tully that the corporation's exempt sales would be discussed at the appointment. She also informed Mr. Tully that he should bring any additional information pertinent to the audit to that meeting.

On December 18, 2003, the auditor, her team leader, Mr. Tully and Mr. Ryder had a conference at which the audit findings were discussed. During the conference, Messrs. Tully and Ryder explained that the warehouse in which the wine was stored was not part of the corporation's business and presented an affidavit from Peter Griffith, an officer and part owner of Allied Cold Storage Warehouse. The auditor and team leader showed Messrs. Tully and Ryder work papers which indicated that there were additional deposits into Rywin's operating checking

account which were unexplained. Mr. Ryder explained that he received money from GHW and took part as commissions and the rest as sales tax due. At the conference, the auditor and team leader asked Mr. Ryder to try to obtain copies of GHW checks which had been deposited into Rywin's operating checking account during the audit period so that they could see the amounts of money received from GHW. Mr. Ryder brought exemption certificates and sales invoices for exempt sales to the conference. The auditor acknowledged receiving the exemption certificates and nontaxable sales invoices from Mr. Ryder. He also brought some of the audit period's cash register tapes to the conference. Mr. Tully suggested that a test period analysis of Rywin's retail store sales be conducted using cash register tapes, nontaxable sales invoices and the related exemption certificates. At the conclusion of the conference, the auditor provided Mr. Tully with copies of the work papers.

A review of the audit record indicates that the auditor received a letter from Mr. Tully which contained additional explanations of Rywin's business with GHW on December 23, 2003. Rywin never supplied the copies of the GHW checks deposited into Rywin's operating checking account during the audit period which the auditor had requested during the December 18, 2003 conference.

Subsequently, the auditor examined the sales invoices presented for nontaxable sales and found the handwritten notation "not rung up" on numerous invoices presented for audit. Based upon this information, the auditor determined it to be unproductive to examine the cash register tapes since all sales were not recorded on those tapes.

After reviewing the documents received during the audit, the auditor broke the audit into three components and concluded that additional sales tax was due in each component. The first component was the Division's disallowance of sales tax credits taken from Rywin on its sales tax

returns for the quarters ending February 29, 2000 and August 31, 2000. During the audit, Mr. Ryder had explained that GHW had sent him checks payable to the New York State Department of Taxation and Finance and had not separated his commission. Therefore, Mr. Ryder took a credit on his sales tax returns because he felt part of those monies were his commissions. The auditor determined additional sales tax in the amount of \$36,988.02, i.e., \$28,352.12 plus \$8,635.90, was due on the disallowed sales tax credits taken by Rywin on its sales tax returns for the quarters ending February 29, 2000 and August 31, 2000.

The second component of the audit was the determination of the sales tax payments made by GHW to Rywin. First, the auditor reviewed the electronic transfer of funds made by GHW into Rywin's Lottery checking account during the period March 1, 2001 through May 31, 2002 and determined that electronic transfers from GHW totaled \$230,450.19 during that period. Then, the auditor subtracted the commissions from GHW reported in Rywin's general ledger, \$85,517.47,¹ from the \$230,450.19 and determined that Rywin received \$144,932.72 in sales tax from GHW during the period March 1, 2001 through May 31, 2002. Next, using the sales tax worksheet submitted by Mr. Ryder, the auditor determined that Rywin had made sales tax payments on behalf of GHW in the amount of \$32,054.99 during the period March 1, 2001 through May 31, 2002. The auditor then subtracted \$32,054.99, the sales tax payments made by Rywin on behalf of GHW, from \$144,932.72, the sales tax received by Rywin from GHW, and determined additional sales tax to be due in the amount of \$112,177.72, which amount Rywin failed to report on its sales tax returns.

¹ Rywin reported receipt of commission income from GHW in its general ledger as follows: \$4,875.00 in March 2001, \$68,081.97 in March 2002, \$12,560.50 in April 2002 and zero income in May 2002.

The final component of the audit was a bank deposit analysis of Rywin's operating checking account. After making adjustments for transfers from the Lottery checking account, loans, check reversals and returned checks, the auditor determined that the net deposits in the operating checking account totaled \$1,462,370.00 for the period September 1, 1999 through May 31, 2002. Then, the auditor subtracted \$1,192,492.49, the total sum of the gross sales receipts plus the sales tax for the period September 1, 1999 through May 31, 2002 reported on the sales tax worksheet, from \$1,462,370.00, the net deposits in the operating account for the audit period, determined additional taxable receipts in the amount of \$269,877.51 and additional sales tax due in the amount of \$22,939.58.

The auditor determined additional sales tax was due in each quarter of the audit period in the following amounts:

| Quarter Ending | Additional Sales Tax Due from Disallowed Sales Tax Credit | Quarterly Net Sales Tax received from GHW | Sales Tax Due from Additional Bank Deposits | Total Additional Sales Tax Due |
|----------------|---|---|---|--------------------------------|
| November 1999 | | \$0.00 | \$443.24 | \$443.24 |
| February 2000 | \$28,352.12 | 0.00 | 2,593.04 | 30,945.16 |
| May 2000 | | 0.00 | -854.58 | -854.58 |
| August 2000 | 8,635.90 | 0.00 | 188.85 | 8,824.75 |
| November 2000 | | 0.00 | 2,548.22 | 2,548.22 |
| February 2001 | | 0.00 | 3,222.34 | 3,222.34 |
| May 2001 | | 54,807.09 | 150.63 | 54,957.72 |
| August 2001 | | 19,448.77 | 1,170.34 | 20,619.11 |
| November 2001 | | 30,948.96 | 3,613.77 | 34,562.73 |
| February 2002 | | 48,061.99 | 4,989.55 | 53,051.54 |
| May 2002 | _____ | <u>-40,389.08</u> | <u>4,874.18</u> | <u>-35,514.90</u> |

| | | | | |
|-------|-------------|--------------|-------------|--------------|
| TOTAL | \$36,988.02 | \$112,877.73 | \$22,939.58 | \$172,805.33 |
|-------|-------------|--------------|-------------|--------------|

For the quarter ending May 31, 2002, the auditor determined that the net sales tax received from GHW was negative \$40,389.08. This determination was based upon the finding that electronic deposits from GHW into Rywin's Lottery checking account totaled \$3,818.33 and commissions from GHW per the general ledger totaled \$68,081.97 in March 2002. Subtracting \$68,081.97 from \$3,818.33 resulted in negative \$64,263.64 in sales tax received from GHW in March 2002.

A Statement of Proposed Audit Change for Sales and Use Tax (form AU-346) was issued to Rywin on January 7, 2004 that proposed additional tax due in the amount of \$172,805.33, plus penalties and interest. A review of the audit log indicates that the auditor mailed the statement to the corporation's representative.

The auditor accepted the loans in the amount of \$7,500.00 noted on Rywin's operating checking account bank statements. At no point after learning that a bank deposit analysis had been performed by the auditor on Rywin's operating checking account and receiving the proposed audit changes, did either Mr. Tully or Mr. Ryder claim that there were any additional loans made to the corporation by Mr. Ryder or family friends during the period September 1, 1999 through May 31, 2002. Messrs. Tully and Ryder also did not claim that the Lottery sales were deposited into Rywin's operating checking account. Nor did they claim that a check was drawn on Rywin's operating checking account once a week for the amount owed for Lottery transactions and then deposited into Rywin's Lottery checking account.

On each of the sales tax returns which it filed during the period September 1, 1999 through May 31, 2002, Rywin claimed a vendor collection credit. A review of the audit work papers indicates that the auditor made no adjustments to the vendor collection credit claimed by Rywin on those returns.

In a letter dated January 21, 2004, Rywin's representative disagreed with the proposed audit adjustment. With respect to the additional sales tax imposed on bank deposits, Mr. Tully asserted that it was inappropriate because there was no indication that bank deposits represented taxable sales. He further asserted that the corporation had complete records, and exemption certificates had been provided to the auditor. With regard to the sales tax received from GHW, Mr. Tully enclosed a fax from Mr. Ryder's accountant indicating commission income for the year ending March 31, 2001 in the amount of \$10,531.00. With regard to penalties, Mr. Tully wrote:

the reason Rywin got involved in this matter was in trying to remit sales tax for the Great House of Wines [sic], payments for the taxes and the commissions were put in the same check. Mr. Ryder didn't think the State was out any money because the wineries were supposedly collecting the tax. It's a very confused situation.

The fax referenced in Mr. Tully's letter is not part of the record.

No further documentation was provided to the auditor prior to the issuance of the notices of determination at issue in this proceeding.

On February 9, 2004, the Division issued to Rywin, Inc., a Notice of Determination (Notice No. L-023517766-8) asserting additional sales and use taxes due in the amount of \$172,805.33 for the period September 1, 1999 through February 29, 2000 and June 1, 2000 through February 28, 2002, plus penalties of \$68,499.85 and interest of \$71,134.18, for a current balance due of \$312,439.36. The computation section of the Notice of Determination contained the following explanation: "Based on our audit of your records, we determined that you owe tax, interest and any applicable penalties, under sections 1138 and 1145 of the Tax Law."

On March 4, 2004, the Division also issued to Gary A. Ryder, a Notice of Determination (Notice No. L-023520971-4) asserting additional sales and use taxes due in the amount of

\$130,898.54 for the period December 1, 2000 through February 28, 2002, plus penalties of \$52,036.65 and interest of \$47,792.20, for a current balance due of \$230,727.39. The explanation section stated that this notice was issued to Mr. Ryder as a responsible officer of Rywin, Inc.

Each of the statutory notices herein assessed penalties pursuant to Tax Law § 1145(a)(1)(i) and (vi). Both statutory and omnibus penalties were assessed because the additional tax due is more than 25 percent of the audited tax due.

Shortly after receiving the Notice of Determination issued to it, Rywin filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services. By letter dated March 9, 2004, Dawn M. Walsh, Principal Audit Clerk in the Division's Bureau of Conciliation and Mediation Services ("BCMS") informed Mr. Ryder that because the corporation had previously filed a formal protest to its assessment and BCMS had received information that the Division had recently issued Notice No. L023520971 to him, his status as a responsible person for the liability of Rywin would be considered at the BCMS conference to be scheduled. A review of this letter indicates that it was addressed to "Gary A. Ryder, 1984 Lilac Drive, Westbury, NY 11590-5923," referenced Department Notice No. L023520971 and the period December 1, 2000 through February 28, 2002.

On or about June 30, 2004, Mr. Ryder appointed James H. Tully, Jr., Esq., as his representative with regard to all matters before the New York State Department of Taxation and Finance.

A conciliation conference in the matter of the request of Rywin, Inc. was held on September 30, 2004. At that conciliation conference, the status of Mr. Ryder as an alleged responsible officer of Rywin, Inc. was also considered despite his representative's claim that Mr.

Ryder had never been properly served with the Notice of Determination dated March 4, 2004. Subsequently, a conciliation order was issued to Rywin, Inc. on November 19, 2004 sustaining the Notice of Determination (Notice No. L-023517766). A conciliation order was also issued to Gary A. Ryder on November 19, 2004 sustaining the Notice of Determination (Notice No. L-023520971).

Both petitioners filed petitions with the Division of Tax Appeals on November 26, 2004. In its petition, Rywin asserted that it was neither a vendor receiving products from GHW, nor an agent of GHW. Rather, Rywin asserted that it was to perform services for GHW including replacing any damaged product, handling customer complaints and remitting to New York State sales taxes indicated to be payable by GHW on sales to New York customers which sales were arranged by GHW through California wineries and on which GHW collected the sales tax due. In the petition, it further asserted that it correctly collected and remitted all sales tax due on its retail store's sales; all of its cash register tapes, sales invoices and exempt certificates were available to the auditors and that portion of the assessment was based on retail store sales which Rywin had not made. In his petition, Mr. Ryder asserted that any assessments for periods prior to the quarter ending November 30, 2001 were barred by the statute of limitations because he was never served with the Notice of Determination, "nor did he sign any waivers of said service." The remaining assertions in Mr. Ryder's petition were identical to those asserted by Rywin in its petition. It is noted that Mr. Ryder's petition lists his address as 1984 Lilac Drive, Westbury, NY 11590-5923.

A hearing was held before Administrative Law Judge Winifred M. Maloney on October 17, 2005 and continued to completion on October 18, 2005. At the hearing, Rywin's president, Gary A. Ryder, testified.

Mr. Ryder concedes that he is a responsible officer of Rywin, Inc.

On the Federal income tax return that it filed for the fiscal year ending March 31, 2000 (1999 corporate tax return), Rywin reported Lottery commission income in the amount of \$6,730.00. Rywin reported receiving commission income in the amount of \$10,531.00 and \$72,157.00 in the fiscal years ending March 31, 2001 (2000 corporate tax return) and March 31, 2002 (2001 corporate tax return), respectively, on the Federal income tax returns filed for those fiscal years. In the same corporate income tax returns, Rywin reported that loans received from shareholders increased by \$11,716.00 and \$989.00 in the fiscal years ending March 31, 2000 and March 31, 2001, respectively, and decreased by \$7,044.00 in the fiscal year ending March 31, 2002.

On or about August 12, 2005, Rywin filed its Federal income tax return for the fiscal year April 1, 2002 through March 31, 2003 (2002 corporate tax return). On that corporate tax return, Rywin reported commission income in the amount of \$87,890.00. It also reported that loans from shareholders decreased by \$2,732.00 during the fiscal year ending March 31, 2003. Rywin also listed under "other liabilities" that \$10,000.00 was due to A. Knorowski at both the beginning and ending of the fiscal year. However, Rywin did not report the existence of the liability to Mr. Knorowski on the corporate tax returns filed for the prior three fiscal years, i.e., the 1999, 2000 and 2001 corporate tax returns. Mr. Ryder could not recall the date on which Mr. Knorowski lent the money to Rywin or the date on which Rywin repaid him. Neither a note memorializing the loan nor a check in repayment of the loan was produced at the hearing.

Rywin did not maintain a day book or any book summarizing its daily retail establishment sales. Rather the daily sales came off of the cash register tapes. Sales to tax exempt organizations were not rung up on Rywin's cash register because the cash register automatically

calculated tax on all sales rung up on it. For a sale to a tax exempt organization, an official sales invoice would be written up on which the exempt organization, its tax exempt number, the merchandise purchased and the total sale were listed. The representative of the exempt organization was required to sign the sales invoice. The notation "not rung up" was placed on the sales receipt by either Mr. Ryder or the Rywin employee who made the sale. At the end of the month, Mr. Ryder would staple all nontaxable sales invoices together along with an adding machine slip which listed the total sales from those sales invoices. Rywin also maintained a file of exemption certificates provided by the organizations at the time of their purchases.

During the audit, cash register tapes for some months in the audit period were provided to the auditor. Rywin did not retain its cash register tapes for all of the months in the audit period. None of the cash register tapes were produced at the hearing.

During the audit, sales invoices for exempt sales were presented to the auditor who allowed all exempt sales reported on Rywin's sales tax returns for the period September 1, 1999 through May 31, 2002. Rywin did not produce any sales invoices for nontaxable sales or exemption certificates related to those sales at the hearing.

During the period September 1, 1999 through May 31, 2002, Rywin's operating checking account was its everyday account. The money deposited into that operating checking account basically came from taxable and nontaxable sales made at Rywin's retail establishment. Weekly Lottery sales were also deposited regularly into the operating checking account. Once a week, a check would be drawn on the operating checking account for the amount owed for Lottery transactions and it would be deposited into the Lottery checking account. Rywin did not produce any documentation concerning Lottery sales which it made during the period September 1, 1999 through May 31, 2002 at the hearing. The record does not include any checks drawn on the

operating checking account and deposited into the Lottery checking account which represent the transfer of funds for Lottery payments during the period September 1, 1999 through May 31, 2002.

When necessary, Mr. Ryder lent money to Rywin to purchase inventory. Those loans in the form of Mr. Ryder's personal checks were deposited into Rywin's operating checking account. Once the inventory was sold, Rywin would repay the loan. The record does not include any checks drawn on the personal checking account of Mr. Ryder or a family friend for loans made to Rywin during the period September 1, 1999 through May 31, 2002. The record also does not include an analysis of loans made to Rywin by any individuals during the period September 1, 1999 through May 31, 2002.

Rywin's operating checking account had a check stub style checkbook which Mr. Ryder maintained and kept at Rywin's retail establishment. No check stubs for the operating checking account for the period September 1, 1999 through May 31, 2002 were produced at the hearing.

During the period September 1, 1999 through May 31, 2002, Mr. Ryder provided Rywin's accountant with cash register tapes, all sales invoices for tax exempt sales, check stubs from the operating checking account and deposit receipts for a given month in a bag on which the particular month and year were marked. Mr. Ryder also included his notes concerning GHW's sales, and the sales tax and the commissions which Rywin received from GHW during the given month.

The accountant used the cash register tapes and the sales invoices for the tax exempt sales to record the retail store's sales in Rywin's general ledger. At times, the accountant recorded the amount of the retail store's daily sales as a daily amount in Rywin's general ledger. While at other times, the accountant recorded the daily sales of the retail store as a weekly total amount

only. GHW sales were not recorded in the general ledger. Rywin's general ledgers for the period September 1, 1999 through May 31, 2002 are not part of the record.

The accountant prepared Rywin's sales tax returns using the cash register tapes, the sales invoices for tax exempt sales and Mr. Ryder's notes concerning GHW's sales and the sales tax remitted to Rywin by GHW on those sales. It is unclear whether the accountant prepared all of the sales tax returns filed by Rywin during the period September 1, 1999 through May 31, 2002 or whether sales tax returns filed for the period January 2002 and beyond were prepared by Mr. Ryder.

A few weeks after receiving the bagged information from Mr. Ryder, the accountant would return the bags to him along with any tax documents that needed to be signed. Mr. Ryder would sign the documents and also prepare and sign any checks which had to accompany the tax documents being filed.

In accordance with an oral agreement between Mr. Ryder, as Rywin's president, and Mr. Mattson, as GHW's president, Rywin provided services for GHW which included, among other things, collecting and remitting to New York State the sales tax which Rywin received from GHW, in exchange for commissions.

At the hearing, Mr. Ryder admitted that Rywin received some delivery slips listing sales, tax and handling charges for out-of-state wines sales at the very beginning of the period September 1, 1999 through May 31, 2002. Rywin did not produce any delivery slips for out-of-state wine sales at the hearing.

According to Mr. Ryder, the commission which GHW orally agreed to pay Rywin was allegedly 20 percent of GHW's sales to New York customers. It was Mr. Ryder's understanding that both Rywin's commission and the sales tax due on the sales of out-of-state wines to New

York customers were included in the GHW checks, payable to either New York State Department of Taxation and Finance or Rywin, which GHW sent Rywin as payments and also in the wire transfers made by GHW into Rywin's Lottery checking account during the period September 1, 1999 through May 31, 2002. Therefore, since the 20 percent commission was greater than the applicable sales tax rate of $8\frac{3}{4}$ percent and GHW's payment included both Rywin's commission and the sales tax to be remitted to New York State, he determined that approximately two-thirds of each payment represented his commission and the remainder was the sales tax which was required to be remitted to New York State for the sales of the out-of-state wines. The corporation never received anything in writing from GHW which stated that the GHW checks payable to the New York State Department of Taxation and Finance included both sales tax and Rywin's commissions.

As noted above, after December 2000, GHW began sending the sales tax to be remitted by Rywin through wire transfers into Rywin's Lottery checking account but also continued making some sales tax payments to Rywin by checks payable to Rywin. Even if a check sent to Rywin by GHW bore the notation "sales tax" or a similar notation referencing specific months and the words "sales tax" on the bottom of the check, Mr. Ryder still deducted Rywin's commission from the amount listed on the check and remitted the balance as sales tax due on the sales of out-of-state wines to New York customers. The corporation never received anything in writing from GHW which stated that GHW checks payable to Rywin or wire transfers by GHW into Rywin's Lottery checking account included both the New York sales tax due and Rywin's commissions.

According to Mr. Ryder, small checks sent by GHW to Rywin represented payments for doing returns and were additional payments above Rywin's commissions.

GHW sent Rywin a check payable to New York State Department of Taxation and Finance in the amount of \$69,659.77 for the sales tax due for the period September 1, 1999 through November 30, 1999. Mr. Ryder submitted that check along with Rywin's sales tax return which it filed for the quarter ending November 30, 1999. On that sales tax return, Rywin reported a net overpayment of sales tax in the amount of \$28,352.12. On the sales tax return which it filed for the quarter ending February 29, 2000, Rywin claimed a credit totaling \$28,502.12, consisting of the net overpayment of sales tax from the quarter ending November 30, 1999 in the amount of \$28,352.12 plus a vendor collection credit of \$150.00. GHW sent Rywin a check payable to New York State Department of Taxation and Finance in the amount of \$55,759.00 for the sales tax due for the period March 1, 2000 through May 31, 2000. Mr. Ryder submitted that check along with Rywin's sales tax return which it filed for the quarter ending May 31, 2000. On that sales tax return, Rywin reported a net overpayment of sales tax in the amount of \$8,690.96. On the sales tax return which it filed for the quarter ending August 31, 2000, Rywin claimed credits totaling \$8,736.95, consisting of an overpayment of sales tax from the quarter ending May 31, 2000 in the amount of \$8,635.90 plus a vendor collection credit of \$101.50. Mr. Ryder made the decision to take a sales tax credit in the amount of \$28,352.12 and \$8,635.90 for the period December 1, 1999 through February 29, 2000 and June 1, 2000 through August 31, 2000, respectively. Mr. Ryder deducted the credits on the corporation's sales tax returns in order to reflect Rywin's 20 percent commission which he believed was due from GHW. The record does not include either GHW check submitted to the Division by Rywin, with its sales tax returns for the quarters ending November 30, 1999 and May 31, 2000.

At the hearing, Mr. Ryder denied receiving the Notice of Determination allegedly issued to him on March 4, 2004. To prove that he did not receive the Notice of Determination allegedly

issued to him on March 4, 2004, Mr. Ryder submitted into evidence a copy of Request for Delivery Information/Return Receipt After Mailing (PS Form 3811-A) which he received from the Division in the mail. A review of the PS Form 3811-A indicates that delivery information was requested for certified service to Gary A. Ryder, 1984 Lilac Dr. Westbury, N.Y. 11590-5923, Article Number 7104 1002 9730 0404 2163, mailing date 03/04/04 by the N.Y.S. Tax Dept. (Office of Counsel), W.A. Harriman Campus BLDG #9, Albany, N.Y. 12227. This form bears a Pitney Bowes postage meter date stamp of January 18, 2005 with \$3.50 postage paid. Further review of this Request for Delivery Information/Return Receipt After Mailing form reveals that in the section of the form entitled "For Delivery Office Use Only" a delivery date of "11-12-04" was handwritten. Attached to the PS Form 3811-A is the response, dated January 27, 2005, received from the U.S. Postal Service which shows that certified mail number "7104 1002 9730 0404 2163" was delivered on "11/12/2004 at 10:14 A.M.," in "Shelter Island, NY 11964." Further review of the response shows the scanned signature of a different man above the handwritten name of that man, and the address of the recipient has been written as "PO Box 788."²

At the hearing, in support of its proof of mailing of the Notice of Determination dated March 4, 2004 to Gary A. Ryder, the Division submitted the affidavit dated March 25, 2005 of Geraldine Mahon, with attached photocopies of a 58-page certified mail record, a Notice of Determination and associated Mailing Cover Sheet; the affidavit dated March 25, 2005 of Bruce Peltier and the affidavit dated May 1, 2005 of Heidi Corina, with an attached response dated March 25, 2005 of Gary Chiboucas. Ms. Mahon, Mr. Peltier and Ms. Corina are all Division employees.

² The identity of the individual whose scanned signature appears in the response is not being disclosed to protect his confidentiality.

The affidavit of Geraldine Mahon, Principal Clerk of the Division's CARTS (Case Resource and Tracking System) Control Unit, described the regular practices of her unit regarding the general procedure for the issuing and mailing of notices of determination to taxpayers. Notices of determination, such as the one at issue herein, are computer generated and are predated with the anticipated date of mailing and each statutory notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page "Mailing Cover Sheet" (form DTF-997) which also bears, among other things, a bar code and the taxpayer's mailing address. Each batch of statutory notices is accompanied by a computer printout entitled "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE" (hereinafter "certified mail record" or "CMR"). The CMR lists each statutory notice in the order that the notices are generated in the batch. The certified control numbers appear on the CMR under the first heading, entitled "CERTIFIED NO." The assessment numbers are listed under the second heading, entitled "REFERENCE NO." The names and addresses of the taxpayers are listed under the third heading, entitled "NAME OF ADDRESSEE, STREET AND PO ADDRESS," and the remaining headings list appropriate postage and fees. Each CMR and associated batch of statutory notices are forwarded to the Division's Mail Processing Center together.

The CMR for the block of statutory notices allegedly issued on March 4, 2004, including the Notice of Determination allegedly issued to Gary A. Ryder, consists of 58 connected pages. All pages are connected when the document is delivered into the possession of the United States Postal Service ("USPS") and the pages remain connected when it is returned to the CARTS Control Unit.

Attached to Ms. Mahon's affidavit as Exhibit "A" are the 58 pages of the CMR containing a list of notices allegedly issued by the Division on March 4, 2004 (hereafter the "March 4, 2004 CMR") which she asserts bears the information relating to Mr. Ryder's notice and is a true and accurate copy of the original CMR. Attached to Ms. Mahon's affidavit as Exhibit "B" is a copy of a Notice of Determination addressed to petitioner, Ryder-Gary A., 1984 Lilac Dr., Westbury, NY 11590-5923 and bearing assessment identification number L-02352097-4 and the associated Mailing Cover Sheet addressed to Ryder-Gary A., 1984 Lilac Dr., Westbury, NY 11590-5923 and bearing certified control number 7104 1002 9730 0404 2163. Page 38 of the March 4, 2004 CMR shows an article of certified mail, certified control number 7104 1002 9730 0404 2163, notice number L 023520971, addressed to petitioner, RYDER-GARY A., 1984 LILAC DR, WESTBURY, NY 11590-5923. The certification and notice numbers on the March 4, 2004 CMR correspond with those found on the Notice of Determination and the associated Mailing Cover Sheet.

On this copy of the March 4, 2004 CMR, there are 11 entries per page except for page 58, which contains 2 entries. Portions of Exhibit "A" have been redacted to protect the confidentiality of other taxpayers. Each of the 58 pages of the March 4, 2004 CMR contains columns labeled "CERTIFIED NO," "REFERENCE NO" and "NAME OF ADDRESSEE, STREET, AND P.O. ADDRESS." The certified control numbers listed in the vertical column on the left side of each page do not run consecutively. In the upper left hand corner starting on page one and each subsequent page of the CMR is the Run which signifies the date and time the CMR was produced by year, Julian day of the year and military time of day. The original date and time of "20040541734" was the date and time that the entire March 4, 2004 CMR was printed. The CMR is printed approximately 10 days in advance of the anticipated date of mailing of the

particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for mailing by the Division's Mail Processing Center. In the upper left hand corner of page one of the March 4, 2004 CMR, an illegible handwritten notation including the number 4 appears. Ms. Mahon states that in the upper left hand corner of page one of the March 4, 2004 CMR, the date the notices were mailed was handwritten by personnel in the Division's Mail Processing Center to conform with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS. It is noted that in the upper left corner of page 58, the handwritten notations "3/04" and "JOB-1" appear.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative. The postal service representative then affixes his or her initials or signature or a U.S. postmark to a page or pages of the CMR. In this case, each of the 58 pages bears a postmark of March 4, 2004 from the Albany, New York General Mail Facility of the United States Postal Service ("USPS") except for page 58 which bears illegible handwritten initials or signature next to the postmark. Ms. Mahon stated that the USPS postmark appearing on each page of the CMR on which the notice at issue appeared, confirmed that such notice was sent on March 4, 2004. In addition, Ms. Mahon stated that, in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

It is noted that on page 58 of the March 4, 2004 CMR, the phrases "TOTAL PIECES AND AMOUNTS" and "TOTAL PIECES RECEIVED AT POST OFFICE" appear. On that page, the number 629 is stated to be the number of pieces listed on the CMR. However, the total

number of pieces received at the Post Office is blank. It is also noted that the total fee of \$1,446.70 listed on page 58 is consistent with the mailing of 629 pieces of mail at a fee of \$2.30.

The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Division's Registry Unit, described the procedures for delivery of outgoing mail to branch offices of the USPS. After a Notice of Determination is placed in an area designated for "Outgoing Certified Mail," a member of the Mail Processing Center staff weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk also performs a random review of up to 30 pieces of certified mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area where a postal employee will then affix a postmark or his initials or signature to the CMR indicating receipt of the mail listed on the CMR and the CMR itself. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed on it. The CMR is then picked up at the USPS the following day by a member of the Mail Processing Center staff who delivers it to the CARTS Control Unit.

As to the CMR delivered to the USPS on March 4, 2004, Mr. Peltier's review of the March 4, 2004 CMR confirmed that a USPS employee initialed or signed page 58 of the CMR and affixed a postmark to each page of the CMR.

Heidi Corina is a Legal Assistant 2 in the Division's Office of Counsel and has been employed by the Division since April 2000. As part of her duties, Ms. Corina prepares a Request for Delivery Information/Return Receipt After Mailing (PS Form 3811-A) which is a form used by the mailer to request return receipts after mailing and can be used for registered, certified,

insured and express mail. While Ms. Corina avers in her affidavit that she prepared a Request for Delivery Information/Return Receipt After Mailing (PS Form 3811-A) for Gary Ryder and mailed it to Gary Chiboucas, Claims and Inquiry Clerk of the U.S. Postal Service-General Mail Facility, 30 Old Karner Rd., Albany, NY 12288, a copy of the prepared PS Form 3811-A is not attached to her affidavit. Attached to Ms. Corina's affidavit as Exhibit "A" is the response from Gary Chiboucas, dated March 3, 2005, which indicates that a piece of certified mail bearing number 7104 1002 9730 0404 2163 was delivered on "03/10/04 at 11:42 AM" in "WESTBURY, NY 11590." The response also shows the scanned signature image of the recipient "G. Ryder" which was above the handwritten name "Gary Ryder" and the address of the recipient was written in as "1984 Lilac Dr."

While at the District Office on October 2, 2002, Mr. Ryder filled out and signed a Sales Tax Bureau Responsible Person Questionnaire (form AU-431) for Rywin on which he listed his home address as 1984 Lilac Drive, Westbury, NY.

At the hearing, Mr. Ryder admitted that he was residing at 1984 Lilac Drive, Westbury, New York in March 2004. He further admitted that the 1984 Lilac Drive address was the address listed on the personal income tax returns which he filed for the years 2002, 2003 and 2004. Copies of Mr. Ryder's New York State personal income tax returns for the years 2002, 2003 and 2004 are not part of the record. The record is silent as to when Mr. Ryder filed his New York State personal income tax returns for the years 2002, 2003 and 2004.

At the hearing, Mr. Ryder denied that he signed for a piece of certified mail bearing certified control number 7104 1002 9730 0404 2163 on March 10, 2004. He also denied that the scanned signature was his signature.

At the hearing, the Division claimed that it used certified control number 7104 1002 9730 0404 2163 twice, once when it was assigned to the Notice of Determination issued to Gary A. Ryder on March 4, 2004 and a second time when it was assigned to a statutory notice issued to PO Box 788, 23 N Ferry Street, Shelter Island, New York 11964-0788 on November 8, 2004.

In support of the position that its policy for assigning certified control numbers to items of certified mail containing tax notices changed during 2004, the Division submitted the unsworn statement of Mary Beth Maschewski, an Associate Computer Programmer employed by the Division.³

In support of its position that certified control number 7104 1002 9730 0404 2163 was assigned to a statutory notice issued to a different taxpayer on November 8, 2004, the Division submitted the affidavit dated October 17, 2005 of Geraldine Mahon, with an attached photocopy of three pages of a CMR and the affidavit dated October 18, 2005 of Bruce Peltier.

The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Division's Registry Unit, described the procedures for delivery of outgoing mail to branch offices of the USPS. After a statutory notice is placed in an area designated for "Outgoing Certified Mail," a member of the Mail Processing Center staff weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of mail listed on the CMR against the information contained on the CMR. The clerk also performs a random review of up to 30 pieces of certified mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area where a postal employee will then

³ Ms. Maschewski's statement is labeled "AFFIDAVIT." However, her signature is unsworn because the notary public, James J. Della Porta, failed to sign the document.

affix a postmark or his initials or signature to the CMR indicating receipt of the mail listed on the CMR and the CMR itself. The Mail Processing Center has requested that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the CMR. The CMR becomes the Division's record of receipt by the USPS for the items of certified mail. The CMR is then picked up at the USPS the following day by a member of the Mail Processing Center staff who delivers it to the CARTS Control Unit.

On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. Peltier concluded that on November 8, 2004, an employee of the Mail Processing Center delivered a piece of certified mail addressed to "P.O. BOX 788, 23 N FERRY ST., SHELTER ISLAND, NY 11964-0788." In addition, based on his review of the CMR attached to Ms. Mahon's affidavit, Mr. Peltier confirmed that a USPS employee affixed a postmark to each page of the CMR and also determined that a member of his staff obtained a copy of the postmarked CMR delivered to and accepted by the USPS on November 8, 2004 for the records maintained by the CARTS Control Unit of the Division. He concluded that the regular procedures comprising the ordinary course of business for the staff of the Mail Processing Center were followed in the mailing of the item of certified mail to the P.O. Box 788, 23 N Ferry St., Shelter Island, New York address on November 8, 2004.

The affidavit of Geraldine Mahon, Principal Clerk of the Division's CARTS Control Unit, described the general procedure for issuing and mailing statutory notices. As part of her duties, Ms. Mahon supervises the processing of notices of deficiency, notices of estimated determination and notices of determination ("statutory notices") prior to shipment to the Division's Mail Processing Center for mailing. In the course of these duties, she routinely receives a batch of statutory notices generated by CARTS. The computer generated statutory

notices are predated with the anticipated date of mailing and each statutory is assigned a certified control number. The certified control number for each notice appears on a separate one-page "Mailing Cover Sheet" (form DTF-997) which also bears, among other things, a bar code and the taxpayer's mailing address. Each batch of statutory notices is accompanied by a computer printout entitled "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE" (hereafter "certified mail record" or "CMR"). The CMR lists each statutory notice in the order the notices are generated in the batch. The certified control numbers appear on the certified mail record under the first heading, entitled "CERTIFIED NO." The assessment numbers are listed under the second heading, entitled "REFERENCE NO." The names and addresses of the taxpayers are listed under the third heading, entitled "NAME OF ADDRESSEE, STREET AND PO ADDRESS." Each certified mail record and associated batch of statutory notices are forwarded to the Mail Processing Center together.

Ms. Mahon averred that the CMR pertaining to the mailing on November 8, 2004 consisted of 974 connected pages and included a Notice of Determination mailed to P.O. Box 788, 23 N Ferry St., Shelter Island, NY 11964-0788. She described the CMR as having all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected until otherwise requested by Ms. Mahon.

Attached to Ms. Mahon's affidavit, as Exhibit "A," is a copy of pages 1, 712 and 974 of the original CMR issued by the Division on November 8, 2004. The CMR includes an item mailed to P.O. Box 788, 23 N. Ferry St., Shelter Island, NY 11964-0788. There are 11 entries on each page with the exception of page 974 which contains 10 entries. Ms. Mahon noted that portions of the certified mailing record, which are attached to her affidavit, have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this

proceeding. In the upper left hand corner starting on page 1 and on each subsequent page of the CMR the Run which signifies the date and time the CMR was produced by year, Julian day of the year and the military time of day. The original date and time of “20043031731” was the date and time that the entire certified mail record was printed. The CMR was printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for mailing by the Division’s Mail Processing Center. In the upper left hand corner of page 1 of the CMR, the date the notices were mailed was handwritten by personnel in the Division’s Mail Processing Center. In the upper left hand corner of page 1 of the CMR, the handwritten date “11/08/04” appears. This change was made in order to ensure that the date on the certified mail record conformed with the actual date that the statutory notices and the certified mail record were delivered into the possession of the U.S Postal Service.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative. The postal service representative then affixes his or her initials or signature or a U.S. postmark to a page or pages of the CMR. Ms. Mahon stated that in this instance a Postal Service representative affixed a postmark to each of the 974 pages.

Ms. Mahon averred that page 712 of the CMR indicated that a Notice of Determination with “Notice Number L-024705981” was sent to “P.O. Box 788 N. Ferry St., Shelter Island, NY 11964-0788” by certified mail using control number “7104 1002 9730 0404 2163.” Ms. Mahon further averred that a USPS postmark on pages 1, 712 and 974 of the CMR confirmed that the forgoing Notice of Determination was sent on November 8, 2004. In addition, Ms. Mahon stated

that, in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

Ms. Mahon concluded that the procedures followed and described were the normal and regular procedures of the CARTS Control Unit on November 8, 2004.

As noted, in conjunction with the affidavit of Ms. Mahon, the Division offered three pages of a certified mail record. A review of the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE," "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE." The upper right hand corners of the pages are numbered 1, 712 and 974, respectively. The upper left hand corner of each page contains a run date and time of "20043031731." On the first page, the date of "11/08/04" was handwritten above the original printed run date and time. Each of the pages contains columns labeled "CERTIFIED NO," "REFERENCE NO," and "NAME OF ADDRESSEE, STREET, AND P.O. ADDRESS." The certified numbers listed in a vertical column on the left side of each page do not run consecutively. Page 712 shows an article of certified mail, certified control number 7104 1002 9730 0404 2163, addressed to PO BOX 788 23 N FERRY ST, SHELTER ISLAND, NY 11964-0788. On page 976, "TOTAL PIECES AND AMOUNTS" is stated to be 10,713 but "TOTAL PIECES RECEIVED AT POST OFFICE" is blank. It is noted that the total fee of \$24,639.90 listed on page 976 is consistent with the mailing of 10,713 pieces of mail at a fee of \$1.35. A stamp of the Albany, New York General Mail Facility of the United States Postal Service appears on each of three pages of the certified mail record which accompanied the affidavit of Geraldine Mahon.

The Division did not submit a redacted copy of the statutory notice, bearing the address of P.O. Box 788, 23 N. Ferry St., Shelter Island, NY 11964-0788, allegedly issued on November 8, 2004.

Shortly before the hearing, Gwendolyn Cole, the team leader who supervised the auditor during the Division's audit of Rywin's books and records, used the Internet and accessed the track and confirm search feature of the United States Postal Service website. The Division submitted into the record a copy of Ms. Cole's search results.

At the time of the hearing, Mr. Ryder was receiving medical care for a right acoustic neuroma which was affecting his hearing. At that time, he was contemplating options including brain surgery and Gamma Radiation. The record is silent as to when Mr. Ryder first learned he had a tumor, or how long he may have had the tumor before the diagnosis.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner Rywin did not maintain adequate books and records, since the record indicated that there were numerous sales that were not rung up on its cash register, it did not maintain a day book and daily sales at its retail store and sales were not recorded consistently in its general ledger. Moreover, Rywin did not provide all cash register tapes to the auditor. In addition, it was found from an examination of information obtained from Rywin's suppliers that purchases were not recorded in Rywin's cash disbursements journal. Accordingly, the auditor's use of Rywin's checking account to estimate sales tax liability on retail store sales was reasonable and appropriate.

With respect to the claims of Rywin that some part of the amounts included in checks drawn by GHW and payable to the Division were appropriately credited to the sales tax account of Rywin was not supported by the evidence in the record. The Administrative Law Judge also

rejected Rywin's assertion that it was merely providing fulfillment services described in Tax Law § 1101(b)(18) to GHW and that it was not a "vendor" as defined in Tax Law § 1101(b)(8).

Accordingly, Rywin was a person responsible for the collection and payment of sales taxes on purchases of the customers of GHW. The determination states in part as follows:

The manner in which GHW and Rywin conducted their contractual relationship enabled out-of-state wineries to distribute and sell their wines to New York State retail customers in compliance with the applicable New York State alcoholic beverage control laws (Alcoholic Beverage Control Law §§ 78; 79; 102[1][c], [d]). Indeed, it was Rywin's status as a retail vendor of wine and liquor which enabled the sales of out-of-state wines to New York retail customers to take place.

With respect to funds sent by GHW to Rywin, the Administrative Law Judge determined that the auditor properly calculated the portion of those amounts constituting sales taxes which had been collected from mail order customers and the portion constituting compensation to Rywin for services rendered.

The Administrative Law Judge sustained the imposition of penalties since Rywin was aware of its responsibilities under the Tax Law and its failure to comply with those duties was not due to reasonable cause.

Finally, the Administrative Law Judge reviewed the circumstances surrounding the issuance of the Notice of Determination dated March 4, 2004 to Gary A. Ryder, including the apparent reuse of the certified mail control number for a mailing to another taxpayer on November 8, 2004 and the fact that the certified mail record dated March 4, 2004 does not indicate the number of pieces of mail received at the post office. Based on this factual review, it was determined that the Division performed its office practices so carelessly that it would be unreasonable to assume that the Notice of Determination was mailed. Accordingly, the notice was cancelled for the period December 1, 2000 through August 31, 2001.

ARGUMENTS ON EXCEPTION

On its exception, petitioners assert that Rywin was not a “vendor” as defined in Tax Law § 1101(b)(8) and 20 NYCRR 526.10 since it did not take ownership of the merchandise or engage in other activities referred to in those provisions. Instead, Rywin was simply rendering “fulfillment services” within the meaning of Tax Law § 1101(b)(18), which are expressly excluded from the definition of vendor under Tax Law § 1101(b)(8)(ii)(A) and the obligation to collect and remit sales taxes under Tax Law § 1131(1).

Petitioners also claim that a portion of the amounts received from GHW and treated as sales taxes owed to the Division were, in fact, commissions received for services rendered by Rywin. As such, these amounts were properly claimed as a credit to Rywin’s account with the Division or as a reduction in the assessed additional sales tax due. Petitioners assert that the amounts shown on Rywin’s income tax returns as compensation income should be controlling in this determination. With respect to additional sales taxes based on estimated sales at Rywin’s retail store, petitioners assert that Rywin maintained and made available to the auditor adequate and sufficient records and, accordingly, the use of an estimate based on bank deposits was improper.

Petitioners argue that the Division did not demonstrate the timely mailing of the Notice of Determination to Gary A. Ryder because (1) Mr. Ryder testified that he never received the notice and that the signature “G. Ryder” on the postal receipt is not his and (2) the presumption of receipt that would arise from normal mailing procedures is inapplicable because the same control number was used for a mailing to a different taxpayer eight months later.

Finally, petitioners assert that penalties should be inapplicable because Rywin was not a vendor within the meaning of the Tax Law and, accordingly, is not subject to penalties under

section 1145 of the Tax Law. Also, in light of Mr. Ryder's medical condition, any failure to pay should be viewed as due to reasonable cause and not due to willful neglect and therefore penalties should be abated.

The Division asserts in support of its exception that the reuse of the certified mail number eight months after the mailing of the Notice of Determination to Mr. Ryder on March 4, 2004 is in no way inconsistent with the evidence of mailing of the notice. Also, the receipt of postal delivery receipt on Form 3811-A overcomes the failure of the mail log to provide the total number of items received by the post office since it establishes independently that the notice was mailed. The Division also argues in opposition to the exception of petitioners that the record demonstrates that Rywin received from GHW funds representing sales taxes collected from New York customers, which it failed to pay over to the Division. In addition, Rywin's failure to maintain and make available adequate records, including cash register tapes and a day book, supports the Division's estimate of Rywin's taxable sales based on its bank records. Finally, the Division asserts that petitioners have not presented evidence that Mr. Ryder's health was a reasonable cause for Rywin's failure to pay the sales taxes due.

OPINION

The sales taxes at issue in this case arise from two activities conducted by petitioner Rywin, Inc.—the operation of a retail liquor store in Westbury, New York and activities facilitating mail order sales of wine by California vintners to retail customers located in New York. The latter activities were conducted through a business arrangement with GHW as described above. It appears from the record that Rywin's activities were limited to monitoring the delivery of wine shipments to GHW's warehouse in New York, occasionally assisting in the return of undeliverable merchandise to GHW, and serving as a conduit for payment to the

Division of sales taxes collected by the California vintners from New York customers. The Administrative Law Judge determined that this arrangement enabled out-of-state wineries to sell wines to New York retail customers in compliance with the New York Alcoholic Beverage Control Law.

In the present case, Rywin did not engage in making sales to the New York customers of the California vintners or engage in solicitation or other activities that would cause it to be treated as a “vendor” within the meaning of section 1101(b)(8) of the Tax Law. Rywin apparently had no contact with the New York retail customers and did not take physical possession of the wine except in the limited circumstance in which an undeliverable order was sent to its shop to be returned to California. Rywin was accordingly, not a “person required to collect tax” within the meaning of section 1131(1).

Rywin nevertheless received funds representing New York sales tax collected by out-of-state vendors from New York customers. That tax was “paid to the person required to collect it as trustee for and on account of the state” (*see*, Tax Law § 1132[a][1][third sentence]) and Rywin was obligated to remit those funds to the Division. Thus in *City of New York v. Advance Trading Corp.*, 202 Misc 208 (App Term 1st Dept 1952) the court stated as follows:

The sum of \$34.72 sued for represents payment of sales taxes which the defendant received with knowledge that said sum represented payment of city sales taxes. Such moneys were the property of the plaintiff, the City of New York, and the defendant was under a legal obligation to pay the same to the city. It is settled law that where one receives money that rightfully belongs to another the law creates a debt and implies a promise on the part of the person who has received the money to pay it over to the rightful owner (*Cohen v. City Co. of New York*, 283 NY 112-115).

In light of this obligation, we conclude that, to the extent Rywin did not timely pay the tax funds received from GHW Rywin was a “person failing . . . to pay or pay over any tax to the

commission” within the meaning of the penalty and interest provisions of section 1145, even though it did not fall within the definition of “vendor” or “person required to collect tax” with respect to sales by California vintners. While the terms “vendor” and “person required to collect tax” are constrained by the statutory definitions found in sections 1101(b)(8) and 1131(1), the phrase “person failing to . . . pay over any tax” found in section 1145 seems to be more general in scope and to apply without regard to the origin of the obligation to pay over. Moreover, section 1145(a)(7) states that “the penalties and interest may be determined, assessed, collected and enforced in the same manner as the tax imposed by this article.”

In determining the portion of the funds received from GHW that constituted sales taxes, the Division’s auditor credited petitioner with reasonably determined amounts drawn from Rywin’s general ledger. Given the lack of substantiation and petitioners’ financial incentive to treat higher amounts as commission income, we are not persuaded by petitioners’ assertion that the amounts constituting commissions should be controlled by the entries on Rywin’s income tax returns. Also, in light of the failure of Rywin to maintain adequate books and records, including a day book and complete cash register receipts for the audit period, the Division was justified in relying on banking records to determine the amount of Rywin’s sales from its retail shop.

The Administrative Law Judge found that the Division performed its office practices so carelessly that it is unreasonable to assume that the Notice of Determination dated March 4, 2004 issued to Gary A. Ryder as responsible officer of Rywin was mailed and accordingly canceled the assessment for the period December 1, 2000 through August 31, 2001 as barred by the statute of limitations. This part of the determination is based on two defects in the evidence of mailing presented by the Division. *First*, it appears that the certified control number for the mailing of the Notice of Determination dated March 4, 2004 was reused for Division mailing to another

taxpayer on November 8, 2004. *Second*, the certified mail record attached to the affidavit of the Division's employee involved in the processing of such mailings is complete in all respects save one—*viz.* the final entry, marked “total pieces received at post office,” is left blank. The immediately preceding entry, marked “total pieces and amounts” indicates that 629 pieces of mail are listed on the 58 pages of the record. All of the pages of the record bear the date stamp of the United States Postal Service.

Unlike the Administrative Law Judge, we do not believe that the reuse of certified control numbers eight months after the use involved in this case has probative value in determining whether the notice here was mailed on March 4, 2004. We think instead, that our finding on this issue should be based solely on the circumstances attending the alleged March 4 mailing.

As described in detail in the findings of fact set forth above, the Division introduced in evidence affidavits of three of its employees: Geraldine Mahon, Principal Clerk of the CARTS Control Unit (Division's Exhibit LL), Bruce Peltier, Mail and Supply Supervisor (Division's Exhibit MM), and Heidi Corina, Legal Assistant 2 in the Office of Counsel (Division's Exhibit NN). The first affidavit provides a detailed description of the Division's mailing procedures. Attached to the affidavit is a copy of the CMR which appears to have been punctiliously prepared except for the omission of the entry for the number of pieces of mail delivered to the post office. The second affidavit provides further details about the delivery of the mail to the post office. The third affidavit describes the filing of Postal Service Form 3811-A, Request for Delivery Information/Return Receipt After Mailing, and the response received from the post office which is attached. The attached letter dated March 3, 2005 confirms that item 7104 1002 9730 0404 2163 was delivered on March 10, 2004 at 11:42 am in Westbury, New York and reproduces a scanned receipt.

In several cases, we have found that a certified mailing record failed to establish the mailing of documents by the Division where the entry “Total Number of Pieces Listed by Sender” was filled in, but the entry “Total Number of Pieces Received at Post Office” was left blank (*see, e.g., Matter of Cal-Al Burrito Co.*, Tax Appeals Tribunal, July 30, 1998; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996; *Matter of Dattilo*, Tax Appeals Tribunal, May 11, 1995; *Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Sabando Auto Parts, Inc.*, Tax Appeals Tribunal, March 9, 1995; *Matter of Auto Parts Center, Inc.*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995).

In *Brager*, the Tribunal’s decision stated in part as follows:

We are dealing here with the right accorded taxpayers under the laws of this State to contest an asserted tax deficiency through the hearing process. We balance this right of the taxpayer against the "difficulty" imposed upon the Division by law, to prove that it informed a taxpayer of this right to contest the deficiency. Our decisions require nothing more of the Division than the Tax Court requires of the IRS and this Tribunal requires of its own employees in connection with the certified mailing of Administrative Law Judge determinations and Tribunal decisions -- that is to see to it that all the requirements of a proper mailing occur. We ask only that the Division insure, as does the IRS and this Tribunal, that the certified mail record its employee receives back from the postal employee is complete. If the Division fails to do that, we require, as do the Federal courts, evidence other than a flawed certified mail record and affidavit of habit to prove that the notice was mailed.

The decision noted that the Division was relying only on the flawed certified mail record and affidavits of office practice and distinguished other cases, in which there was other evidence of mailing such as testimony of a postal employee, an original envelope or evidence that other notices listed in the certified mail record had been delivered. In the present case, the record

includes the confirmation of the United States Postal Service that the piece of certified mail in question was delivered on March 10, 2004. In our view, this constitutes “evidence other than a flawed certified mail record and affidavit of habit” which provides a sufficient basis for concluding that the Notice of Deficiency was mailed to Mr. Ryder (*see, Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992; *Matter of Kropf*, Tax Appeals Tribunal, March 21, 1991).

Like the Administrative Law Judge, we find that petitioners have not established that the failure to pay tax was due to reasonable cause and not due to willful neglect. Particularly telling in this regard is petitioners’ diversion of portions of funds included in checks payable to the Division, and presumably consisting of taxes collected from New York mail-order customers, by crediting those amounts to Rywin’s account. If petitioners thought that Rywin was entitled to a further commission from GHW, payment should have been demanded from GHW. Resorting to self help by taking a credit which could then be used to cover sales at Rywin’s shop would, if permitted, leave the Division in the same position as if the vendor used tax collections to pay its service providers or other creditors. We accordingly conclude that the imposition of penalties under section 1145 should be sustained.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rywin, Inc. and Gary A. Ryder is denied;
 2. The exception of the Division of Taxation is granted;
 3. The determination of the Administrative Law Judge is reversed to the extent indicated in paragraph "2" above, but is otherwise affirmed;
 4. The petition of Rywin, Inc. and Gary A. Ryder is denied;
 5. The Notice of Determination dated February 9, 2004 issued to Rywin, Inc. is sustained;
- and

6. The Notice of Determination dated March 4, 2004 issued to Gary A. Ryder is sustained.

DATED: Troy, New York
April 24, 2008

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

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

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