

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

TERRENCE AND CANDACE REVERE :

for Redetermination of a Deficiency or for Refund of
Personal Income Tax under Article 22 of the Tax Law for
the Years 1997 through 2001. :

DECISION
DTA Nos. 820904
AND 820905

In the Matter of the Petition :

of :

CANDACE REVERE :

for Redetermination of a Deficiency or for Refund of
Personal Income Tax under Article 22 of the Tax Law for
the Year 2002. :

Petitioners, Terrence and Candace Revere, and the Division of Taxation each filed exceptions to the determination of the Administrative Law Judge issued on July 19, 2007.

Petitioners appeared by Kestenbaum & Mark (Bernard S. Mark, Esq.). The Division of Taxation appeared by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel).

Petitioners filed a brief in support of their exception and a brief in opposition to the Division of Taxation's exception. The Division of Taxation filed a brief in support of its exception and in opposition to petitioners' exception. The Division of Taxation filed a letter brief in lieu of a formal reply brief. Oral argument, at the request of both parties, was held on June 11, 2008 in New York, New York.

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

ISSUES

I. Whether the Division of Taxation properly denied petitioners' credit for tax shown as withheld on the W-2 forms submitted with their amended personal income tax returns for the years in issue.

II. Whether petitioner Terrence Revere has established entitlement to relief from the tax liability asserted by the Division of Taxation as an innocent spouse.

III. Whether the Division of Taxation has demonstrated that fraud penalty is warranted in this matter.

IV. Whether petitioners have established a basis for abatement of negligence penalty in this matter.

FINDINGS OF FACT

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

Petitioners, Terrence and Candace Revere, were employees of Revco Construction Company ("Revco") during the years in issue: 1997, 1998, 1999, 2000, 2001 and 2002. Only Candace Revere's liability for tax is in issue for 2002.

In or about 2003, the Division of Taxation ("Division") performed a withholding tax audit of Revco, precipitated by employees who had received forms W-2 from Revco in 1998 with no corresponding withholding tax returns filed or remittance of taxes made by the company.

Candace Revere was the president and sole shareholder of the corporation, and Terrence Revere was an employee who managed its day-to-day affairs, calculated bids for projects, created

blueprints and supervised the company's construction projects. While Candace Revere had little experience in the construction field and performed only bookkeeping and administrative functions of the business, Terrence Revere possessed the knowledge and background in the industry which made Revco a highly profitable enterprise. Apparently, Candace Revere was made president of the company to avoid conflicts with union rules over ownership of companies by union workers.

The withholding tax audit of Revco revealed significant amounts of income to Candace and Terrence Revere during the years in issue. The auditor reviewed the only records provided to her on audit, i.e., bank statements and canceled checks. The auditor discovered checks made payable to Candace Revere and cash that the auditor determined to be payroll, or wage income. In particular, the auditor discovered checks to Candace Revere, that were not consistent with paychecks, and that were issued in large, whole-dollar amounts like \$5,000.00 and \$10,000.00. However, this additional income had not been paid as wages; no withholding tax had been withheld and reported on W-2's or withholding tax returns by Revco. In fact, on audit, the auditor did see some withholding tax returns and lists of some employees of Revco. However, petitioners were not listed as employees, and only withholding tax returns filed for other employees indicated withholding tax withheld. The auditor did not disallow the withholding tax claimed on those returns.

As a result of the Revco audit, the Division assessed the company \$606,043.00 in withholding tax for the period January 1, 1997 through June 30, 2003. A partial payment of \$50,000.00 was noted by the Division in its Income Tax Report of Audit for Revco. In addition, Candace Revere was assessed as a responsible officer of the corporation. Revco agreed to the tax

determined to be due and its representative, the same person who represents petitioners herein,¹ prepared withholding tax returns for all periods under audit, with amended returns filed for periods previously filed, corporation tax returns and W-2's for the years 1997 through 2002. These returns were checked against the canceled checks and bank statements provided by Revco. Again, there was no evidence that the withholding taxes set forth on the W-2's and determined to be due had ever been withheld or paid.

In addition, unbeknownst to the auditor, the representative prepared and filed amended New York State personal income tax returns for petitioners for the years 1997, 1998, 1999 and 2001 which incorporated the additional income to petitioners found in the Revco audit, reflecting the information on the amended W-2's. On these amended personal income tax returns, petitioners took full credit for the withholding tax set forth on the amended W-2's issued by Revco after its audit. By letter, dated February 24, 2004, petitioners' representative sent four checks to the Division which he stated represented full payment of tax due for the years 1997, 1998, 1999 and 2000 in the sums of \$642.00, \$11,429.00, \$14,270.00 and \$4,744.00, respectively.

For the years 1997 through 2001, the amended returns reflected additional income to petitioners as follows:

Year	Additional Income per Amended Returns
1997	\$ 187,150
1998	1,433,393
1999	1,291,346
2000	1,192,647

¹James S. Maney, CPA, appeared before the Administrative Law Judge.

2001	1,098,423
TOTAL	\$5,202,959

The audit of Revco ended with a closing conference on December 5, 2003, and the audit of petitioners began on December 10, 2003. After several unsuccessful discussions, the case was closed by the Division on September 29, 2004.

Petitioners timely filed their original personal income tax returns for the years 1997, 1998, 1999, 2000 and 2001. Candace Revere filed her personal income tax return for 2002 on March 12, 2004. Petitioners filed separate returns for the year 2002, and only Candace Revere's return is in issue.

The amended personal income tax returns prepared and filed pursuant to the audit reflected the auditor's findings in the Revco audit. The information supplied on the returns is summarized in the chart below.

YEAR	DATE FILED	W-2 INCOME	NYS TAX	Withheld
1997	6/11/2003	\$297,912.00	\$19,333.00	\$18,790.00
1998	8/18/2003	\$1,552,075.00	\$105,282.00	\$93,927.00
1999	8/18/2003	\$1,533,116.00	\$103,661.00	\$82,979.00
2001	6/11/2003	\$1,237,984.00	\$83,747.00	\$83,562.00

The Division had no record of an amended return filed for the year 2000. However, at hearing, petitioners submitted a copy of an amended New York State personal income tax return, unsigned and undated, which set forth total wage income of \$1,335,111.00 and total tax withheld of \$84,406.00.

On August 12, 2004, the Division issued to Candace and Terrence Revere, five statements of personal income tax audit changes for the years 1997 through 2001, which set forth the

corrected tax liability for each year, gave credit for tax paid and asserted penalties and interest due. The amounts for each year were as follows:

Year	Net Tax Liability	Penalties	Interest (9/9/04)	Total Due
1997	\$13,454	\$6,064	\$7,095	\$26,613
1998	\$98,867	\$27,777	\$42,283	\$168,927
1999	\$89,503	\$22,355	\$29,591	\$141,449
2000	\$77,976	\$20,616	\$17,843	\$116,435
2001	\$75,689	\$10,671	\$11,721	\$98,081

On each of the statements there was an explanatory statement which read:

You have not been able to verify that the NYS tax withheld on your amended W-2 forms from Revco Construction has been paid. Accordingly, these amounts have not been accepted and are disallowed. Candace Revere is the Responsible Person for Revco Construction and is also the sole corporate shareholder.

Candace Revere filed her income tax return for 2002 on or about March 11, 2004. On her return she took credit for the withholding taxes resulting from the Revco audit. On August 19, 2004, a Statement of Personal Income Tax Audit Changes was issued to Candace Revere for the year 2002, which asserted additional net tax liability of \$105,767.00, plus penalty of \$19,349.00 and interest of \$9,267.00 for a total due of \$134,383.00. The same statement set forth above appeared on this statement as well.

On October 18, 2004, the Division issued to petitioners a Notice of Deficiency for the years 1997 through 2001 which set forth additional personal income tax due of \$355,489.00, penalty pursuant to Tax Law § 685(b)(1) and (2) of \$88,908.99, interest of \$111,430.62, less a credit for taxes paid of \$16,815.00, for a total due of \$539,013.61.

Also on October 18, 2004, the Division issued to petitioner Candace Revere a Notice of Deficiency which asserted additional personal income tax due of \$105,767.00, penalty of \$20,247.72 and interest of \$10,006.79, for a total amount due of \$136,021.51.

In each of the three audit reports in evidence, the Division cited as its reason for assessing penalties that petitioners did not remit withholding tax, did not file returns, knew the tax had not been remitted and claimed the credit for withholding tax with knowledge that the corporation had not remitted said tax. In each case, the Division emphasized the fact that nonremission of tax was one of its bases for the assessments.

However, in its audit summary contained in the audit report and again at hearing, the Division stated that it refused to accept the withholding tax credits taken by petitioners because there was no evidence that the tax had ever been actually withheld or remitted and that petitioners knew this fact. Discrepancies in the Division's basis for the assessments appear throughout the record.

In the auditor's log, form DO-220.5, it was noted in an entry, dated April 30, 2004, that the assessment on the amended personal income tax returns would be based on the withholding tax credit taken by petitioners because the funds had not been remitted.

Petitioners filed amended income tax returns with the Internal Revenue Service for the years in issue and transcripts of petitioners' accounts for those years indicate that revised withholding credits were incorporated into the computations of adjusted tax due for the years 1997 through 2002. However, no Federal tax returns were submitted into evidence and there was no evidence of a Federal audit of either Revco or petitioners.

Although petitioner Candace Revere did not testify at the hearing, it was established that she had an account at Harrah's Casino of Atlantic City, New Jersey and Las Vegas, Nevada, which indicated the following winnings and losses:

1997	\$36,850.00
1998	(\$259,610.00)
1999	(\$351,080.00)
2000	(\$310,400.00)
2001	(\$106,200.00)
2002	(\$132,300.00)

Petitioners submitted an unsworn letter by Heiko Ganzer, a certified clinical social worker who specializes in addictions and gambling treatment. The social worker stated in his letter of March 15, 2004 that Candace Revere was a problem gambler resulting from a mental disorder which clouded her financial judgment and ability to manage financial affairs.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that during the withholding tax audit of Revco, the Division became aware of the large payments made to Candace Revere that were characterized as wage income. The Division's auditor worked with petitioners' representative² to determine the proper amount of withholding taxes due on the omitted wages. Withholding tax returns and W-2 forms were prepared and filed, and Revco and its sole officer and shareholder, Candace Revere, received assessments for the unpaid tax.

However, the Administrative Law Judge noted that lost in the fiction of the withholding tax returns and W-2's prepared on audit is the fact that petitioners received large sums of money

²James S. Maney, CPA, was petitioners' representative at audit and before the Administrative Law Judge.

from Revco from which no tax had been withheld. The mere fact that petitioners' representative created withholding tax returns for the corporation that accurately set forth the tax due, and then generated W-2's that indicated the same amount, did not change the reality that these taxes had not been withheld.

The Administrative Law Judge noted that failure of an employer to meet its obligation to withhold income tax does not lessen the obligation of an employee to pay income tax (*citing, Church v. Commissioner*, 810 F2d 19 [1987]). While the Division may pursue the employer for the full amount that should have been withheld, the employee must still report his entire income, whether subject to withholding or not, and may claim a credit against the tax due on this sum only in the amount the employer *actually withheld* (*see, Matter of Campbell*, Tax Appeals Tribunal, January 13, 2000). Therefore, the Administrative Law Judge found that since Revco did not actually withhold tax, petitioners erred in claiming the credit against tax for the withholding taxes set forth on the W-2's created by their representative during the Revco audit.

Next, petitioners claimed that since the Division assessed Candace Revere as a responsible person of Revco, it conceded that the withholding tax had been paid. This claim is based on a footnote in *Devoll v. IRS* (82 AFTR 2d 98-6458 [1988]) which stated that the withholding tax penalty imposed on a "responsible person" is a means to collect the taxes withheld and not paid. The Administrative Law Judge rejected this claim, noting that *Devoll* has no application to these facts, since no taxes were actually withheld by Revco. Tax Law § 673 provides that tax actually deducted and withheld is deemed paid by the person from whom withheld and credit allowed. Since Revco did not withhold the tax, the Administrative Law Judge found that petitioners were not entitled to the credit and the Division's disallowance was justified for both notices of deficiency at issue herein.

Petitioner, Terrence Revere, claimed status as an “innocent spouse” and therefore, not liable for the additional tax (Tax Law § 651(former[b][5][A])). The Administrative Law Judge found that Terrence Revere failed to show one of the crucial requirements for innocent spouse status, i.e., that he did not know or have reason to know of the understatements in income when he signed the income tax returns for the years in issue (*Matter of Rubin v. Tax Appeals Tribunal*, 29 AD3d 1089 [2006]). The Administrative Law Judge concluded that Terrence Revere did not substantiate his claim for innocent spouse relief.

The Administrative Law Judge viewed as incredible Mr. Revere’s assertions that he created a construction company, managed its day-to-day operations, bid its jobs and had an intimate understanding of its income, yet would choose to ignore all aspects of the company’s finances. Mr. Revere claimed that his wife hired an accountant with whom he was not acquainted, but he nonetheless chose to ignore the income tax forms prepared on his behalf. He claimed that he had never filed the income tax returns, but alleged that the original filings were completed by his wife and he never questioned their preparation, accuracy or filing until years later. The Administrative Law Judge found that Mr. Revere’s assertions of ignorance and disinterest in the investment or disposal of the profits that he knew or should have known that Revco was producing, defied common sense and were not credible.

Petitioners also claimed that Candace Revere was a gambling addict during the years in issue, which caused her to spend Revco’s profits. Mr. Revere testified that he was aware that his spouse gambled, but had no knowledge of the depth of the problem. The Administrative Law Judge noted that even if Candace Revere had suffered from a gambling affliction, it remained that Terrence Revere should have made some effort to insure that the personal income tax returns filed on his behalf were accurate.

The Division argued that petitioners should be held liable for fraud penalty pursuant to Tax Law § 685(e)(1). The Administrative Law Judge disagreed and found that the Division had failed to show that petitioners' actions were willful, knowledgeable and intentional wrongful acts that resulted in deliberate nonpayment or underpayment of taxes due and owing. While there were sizeable omissions over a five-year period resulting in large understatements of income, the Administrative Law Judge found little evidence in the record to support a finding of intent. The Administrative Law Judge noted that when additional withholding taxes were found due from Revco, the Division and petitioners worked together to prepare the amended forms W-2 and withholding tax returns. The Division knew at that juncture of the additional income to petitioners and that it had been characterized as wage income.

The Administrative Law Judge noted that, upon audit, the Division's auditor and petitioners' representative worked together to establish the correct amount of additional withholding tax and wages and accept the amended returns as filed. The Administrative Law Judge declined to sustain the fraud penalty.

Since it was found that the argument upon which petitioners based their claim for the withholding tax credit was in error, the Administrative Law Judge found petitioners liable only for the negligence penalty under Tax Law § 685(b)(1) and (2), because they knew the withholding taxes had not been withheld and had no right to the credit they claimed. The Administrative Law Judge found petitioners' erroneous assumption, that because the tax had not been remitted they were entitled to the credit, to be an adequate basis for finding willful neglect.³

³The Administrative Law Judge directed the Division to apply the payments made by petitioners in the four checks submitted to it on February 24, 2004 by their representative, if credit therefor has not already been applied. Further, in order to avoid the double collection of the withholding taxes herein, the Administrative Law Judge directed that the Division credit petitioners for any payments on the withholding taxes paid by Revco for the periods

ARGUMENTS ON EXCEPTION

On exception, petitioners argue, as they did below, that they were entitled to take a credit on their income tax returns for the amounts appearing on their filed forms W-2 as taxes were properly withheld. Since the Division's auditor and petitioners' then-representative agreed on the proper amount of tax to have been withheld, petitioners argue, they were entitled to take the credit. Petitioners also argue that Terrence Revere was an innocent spouse and had no financial responsibilities for Revco. Petitioners also urge that the Division has failed to show that they are liable for fraud penalties. Moreover, petitioners argue that the Division failed to prove that they filed joint income tax returns and, finally, that the State of New York is trying to double dip by collecting tax from Revco and from petitioners individually.

The Division argues that the Division properly denied petitioners a credit for tax claimed on W-2 forms that was never actually withheld. The Division argues that the fact that the parties agreed on the amount to be withheld did not mean that it was actually withheld. The Division argues that petitioners have failed to carry their burden that taxes were withheld, noting that the only documents available on audit were bank statements and cancelled checks. In addition, the Division states, it was petitioners burden to show that they timely filed proper returns, maintained proper business records, and that the proper taxes had been withheld. The Division also contends that petitioners never offered proof to show that the Division's files were incorrect in showing that petitioners filed joint returns, except for 2002 when they filed separately. The Division acknowledges that it can only collect the tax asserted once, but argues that petitioners have not yet shown that the tax was paid even once.

in issue herein and credit petitioners for any future payments of withholding taxes for the years in issue herein received on behalf of Revco pursuant to any payment plan reached with the company or its officer.

Finally, the Division argues that the Administrative Law Judge erred in not sustaining fraud penalties based on this record.

OPINION

Tax Law § 685(e) provides that if any part of a deficiency of income tax is due to fraud, a penalty of 50% of the deficiency shall be added to the tax in lieu of the negligence penalties imposed by Tax Law § 685(a) or (b).

In *Matter of Ellett* (Tax Appeals Tribunal, December 18, 2003), we stated:

For the Division to establish fraud by a taxpayer, it must produce "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (*Matter of Sener*, Tax Appeals Tribunal, May 5, 1988; *see also*, *Schaffer v. Commissioner*, 779 F2d 849, 86-1 USTC ¶ 9132; *Matter of Cousins Serv. Sta.*, Tax Appeals Tribunal, August 11, 1988).

The Division need not establish fraud by direct evidence, but can establish it by circumstantial evidence by surveying the taxpayer's entire course of conduct in the context of the events in question and drawing reasonable inferences therefrom (*Plunkett v. Commissioner*, 465 F2d 299, 72-2 USTC ¶ 9541; *Biggs v. Commissioner*, 440 F2d 1, 71-1 USTC ¶ 9306; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989, citing *Korecky v. Commissioner*, 781 F2d 1566, 86-1 USTC ¶ 9232).

Among the factors that have been considered in finding fraudulent intent are consistent and substantial understatement of taxes (*Foster v. Commissioner*, 391 F2d 727, 68-1 USTC ¶ 9256; *Merritt v. Commissioner*, 301 F2d 484, 62-1 USTC ¶ 9408). Understatement alone is not sufficient to prove fraudulent intent but, where other factors indicate fraudulent intent, the size and frequency of the omissions are to be considered in determining fraud (*see, Foster v. Commissioner, supra*).

The Administrative Law Judge found that petitioners were not liable for the fraud penalty pursuant to Tax Law § 685(e)(1). The Administrative Law Judge appeared to give much weight to the fact that taxpayers' representative was cooperative during the Revco audit and in arriving at the taxes due. We reverse the Administrative Law Judge on this issue.

Terrence Revere testified that Revco was structured so that he, a person with extensive knowledge and experience in the construction industry, could profit from the corporation, manage its operations, work in the field and remain a union member. In order to satisfy union rules at the time, he held no ownership interest or office in the corporation. Terrence Revere testified that it was he who prepared the bids on the jobs, giving him an accurate and intimate estimate of the profits from jobs, which he said was 100%. Since successful bidding involves the accurate projection of costs and a determination of profit, the Administrative Law Judge found that he was well informed of the substantial income Revco earned during 1997, 1998, 1999, 2000 and 2001.

The withholding tax audit of Revco showed that the only records available for audit were bank records and cancelled checks and a few withholding tax returns showing additional employees, but not including petitioners. Petitioners did not maintain business records or withholding tax records.

Candace Revere, a person with little knowledge of the construction industry, was named sole owner and president of Revco for Mr. Revere's convenience and to satisfy union requirements. After the audit determined the proper amount of withholding taxes due on the omitted wages, withholding tax returns and W-2 forms were prepared and filed by the taxpayers' representative, and Revco and its sole officer and shareholder, Candace Revere, received assessments for the unpaid tax. However, despite filing the amended withholding tax returns, petitioners never proved that tax had been withheld on amounts paid to them. We also note that Ms. Revere did not testify in this proceeding.

We also reject petitioners' claim that, because the Division agreed to the *amounts* shown on their amended returns and amended W-2 forms, the Division necessarily conceded that the tax was properly withheld.

When the auditor reviewed Revco's cancelled checks, it became apparent that large amounts were being paid to Candace Revere and Terrence Revere, even though they were not listed as employees of Revco. They did not pay tax on this personal income nor file amended personal income tax returns reflecting this income, until they were caught in the withholding tax audit of Revco in 2003. Terrence Revere, a joint filer, would have us believe that this was all a surprise to him. We find it incredible, given the extent of Mr. Revere's admitted involvement in the company, that millions of dollars of the company's profits could find its way into his income stream without his knowledge and participation. To place all of the blame on his spouse is not merely ungallant, but unbelievable. Among the factors that have been considered in finding fraudulent intent are consistent and substantial understatement of taxes (*Foster v. Commissioner, supra*). In this regard, the Division determined that petitioners had unreported additional income of \$ 5,202,959.00 for the years 1997, 1998, 1999, 2000, 2001 and 2002, and that it had been characterized as wage income. We also find as other indicia of fraud: that petitioners, joint taxpayers except for 2002, both had income from Revco, Revco did not withhold tax from these monies and petitioners knowingly did not report this income or pay tax on it, that this pattern of conduct continued for a period of years, and when petitioners finally filed amended withholding tax returns and forms W-2 reflecting this wage income, they also filed amended personal income tax returns, which took the withholding tax credit even though they *knew* such tax had not been withheld.

The auditor, at the time of audit, originally asserted negligence penalties. Fraud penalties were only asserted later. Nevertheless, we find no bar to the assertion of fraud penalties, in lieu thereof, where supported by the facts. Fraud need not be established by direct evidence, but can be established by circumstantial evidence by surveying the taxpayer's entire course of conduct in the

context of the events in question and drawing reasonable inferences therefrom (*Plunkett v. Commissioner, supra*). We find it reasonable to conclude based on this record that petitioners engaged in a “willful, knowledgeable and intentional” wrongful course of conduct that resulted in deliberate nonpayment or underpayment of taxes due and owing and that fraud penalties are applicable (Tax Law § 685[e][1]).

The Administrative Law Judge found that when additional withholding taxes were found due from Revco in 2003, the Division and petitioners worked together to arrive at the correct amount to be shown on the amended W-2 forms and withholding tax returns. Even if petitioners at that point were cooperating, their cooperation at the time of the audit is irrelevant to their conduct during the years at issue.

The Administrative Law Judge also cited as a reason for not sustaining fraud penalties, the auditor’s log, form DO-220.5, wherein it states that the assessment is based on petitioners taking the withholding tax credit even though the funds had not been “remitted.” In the audit summary, the reason is stated as being because there was no evidence that the tax had ever been actually “withheld or remitted” and that petitioners knew this fact. We would agree that this might be a valid reason for declining to sustain fraud penalties if it resulted in confusion on the part of the taxpayers or their representative. However, we see no such confusion here. Rather, the transcript shows that the taxpayers’ representative knew clearly that withholding was the issue and was trying to confuse the auditor. At the hearing, on cross examination, petitioners’ representative repeatedly asked the auditor as to the basis for imposing penalties. In response to the question she stated, in pertinent part, that:

A. . . . There is no evidence that it was withheld.

* * *

Q. So I ask you again: It is it (sic) your position that the taxes were in fact withheld but not remitted?

A. No.

Q. So is it your position that the taxes were withheld but not withheld? (Tr., pp. 65-66).

Similar attempts at this sort of questioning were met by the objection of Division's counsel and stopped by the Administrative Law Judge as repetitive.

Accordingly, we reverse so much of the Administrative Law Judge's determination as imposed a negligence penalty under Tax Law § 685(b)(1) and (2). And, instead, impose a fraud penalty pursuant to Tax Law § 685(e)(1). We find that petitioners knew that the withholding taxes had not been withheld and that they had no right to take a credit on their amended personal income tax returns. Petitioners' knowledge of the facts contraindicates a finding of negligence and sustain a finding of fraud.

Therefore, except as otherwise provided above with regard to the fraud penalty, we affirm the determination of the Administrative Law Judge to the extent consistent with this decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Terrence and Candace Revere 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 that we find that fraud penalties were properly imposed, but is otherwise affirmed;

4. The petitions of Terrence and Candace Revere are denied; and
5. The Notices of Deficiency dated October 18, 2004 are sustained.

DATED:Troy, New York
December 11, 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