STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of ANTON'S CAR CARE CENTER, LTD. 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, 1978 through November 30, 1982.	DETERMINATION
In the Matter of the Petition of ANTON PARISI, OFFICER OF ANTON'S CAR CARE CENTER, LTD. 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, 1978 through November 30, 1982.	

Petitioner Anton's Car Care Center, Ltd., 345 Sunrise Highway, Rockville Centre, New York 11570, filed a petition 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, 1978 through November 30, 1982 (File Nos. 800529, 801466 and 802198).

Petitioner Anton Parisi, officer of Anton's Car Care Center, Ltd., 4080 Briarwood Avenue, Seaford, New York 11783, filed a petition 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, 1978 through November 30, 1982 (File Nos. 800841, 801467 and 802199).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, NewYork, on April 29, 1987 at 1:15 P.M., with all briefs to be submitted by September 30, 1987. Petitioners appeared by Kestenbaum & Mark, Esqs. (Richard S. Kestenbaum, Esq., of counsel). The Audit Division

appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether the Audit Division's determination and assessment of additional sales tax against petitioner Anton's Car Care Center, Ltd., following an audit, was proper.

II. Whether, if so, the imposition of a fraud penalty equal to 50 percent of the tax determined to be due upon audit was proper.

III. Whether, in the event the imposition of a fraud penalty is rejected, the Audit Division's alternative assertion of penalty pursuant to Tax Law former § 1145(a)(1) is proper and should be sustained.

IV. Whether petitioner Anton Parisi was a person responsible for the collection and remittance of tax on behalf of petitioner Anton's Car Care Center, Ltd. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

1. Petitioner Anton Parisi is the owner and sole shareholder of petitioner Anton's Car Care Center, Ltd. ("the corporation"). The corporation operates a gasoline service station performing automobile repairs and selling gasoline and other petroleum products. The station has eight service bays and six gasoline pumps. During the period at issue, the station was open from 6:00 A.M. to 12:00 midnight Monday through Saturday, and from 8:00 A.M. to 12:00 midnight on Sunday, for selling gasoline. The station was open from 8:00 A.M. to 5:00 P.M., Monday through Friday, for performing repair services.

2. On or about October 20, 1981, the Audit Division commenced an audit of the business operations of the corporation. The auditor requested all of the corporation's business records including, specifically, its general ledger, cash receipts journal, cash disbursements journal, Federal income tax returns, daily sheets, and sales and purchase invoices. The auditor received a cash receipts journal and a cash disbursements journal and Federal income tax returns for two of the years at issue, and was advised that some records were lost and that other records were with the corporation's accountant. The auditor did not receive a general ledger, nor any daily sheets,

nor a complete set of sales or purchase invoices. Based upon the records supplied, the auditor determined there were insufficient source documents available to perform a detailed audit, and thus decided to resort to indirect audit methodologies as a means of determining the accuracy of petitioners' taxable sales and sales tax liability as reported.

3. The auditor initially visited the corporation's premises on October 27, 1981. Thereafter, an observation of petitioners' business activities was conducted on the dates of May 12 and May 13, 1982. The auditors involved observed the corporation's eight repair bays as being in full use, and also observed repairs taking place outside of the garage bays. In addition, the auditors noted a posted labor rate for mechanics of $30.00 per hour on the dates of the observation.

4. Comparisons of those records made available by petitioners, together with third party information furnished to the Audit Division by Mobil Oil Corporation ("Mobil") detailing the corporation's purchases of gasoline and other petroleum products from Mobil, revealed large discrepancies. For example, when Federal income tax returns were compared to the corporation's sales tax returns, the income tax returns indicated sales for 1980 and 1981 of approximately $400,000.00 per year greater than sales as per the corporation's sales tax returns. In addition, Mobil's verification of petitioners' gasoline purchases reflects purchases of $1,928,000.00 for the period December 1, 1978 through August 31, 1981, whereas the corporation's sales tax returns reported taxable sales (gasoline and repairs) of only $1,171,000.00.

5. The auditor recalculated petitioners' gasoline sales by taking the total gasoline purchases per Mobil's records for the period December 1978 through August 1981 and marking up such purchases based on the selling price of gasoline observed at the corporation's location during the auditor's October 1981 visit.[1] This marked-up amount of gasoline sales, deemed audited taxable gasoline sales, totalled $2,137,159.71 for the period December 1978 through August 1981. The auditor's markup was based upon the assumption that the price from Mobil to petitioner, per Mobil's records, was exclusive of excise and sales taxes.

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[1]The markup was determined by comparing the October 1981 selling prices, as observed, with a purchase invoice for gasoline from December of 1981.

6. In addition to gasoline sales, the auditor determined repair sales by estimating that 5 mechanics each worked a 40-hour week at $25.00 per hour, with such $25.00 per hour rate utilized as opposed to the $30.00 per hour observed rate to allow for "down time". In addition, parts were estimated to be one-half of the labor rate, thus resulting in an equivalent of $37.50 per hour of repair income (labor plus parts) times 40 hours per week times 5 mechanics. This resulted in $1,072,500.00 of audited taxable repair sales for the period December 1, 1978 through August 31, 1981. Further, the auditor marked up petitioner's purchases of oil (per Mobil's information) at 100 percent of cost. Finally, the auditor estimated that petitioner provided "express lube" service (which provided an oil change and lubrication within 15 minutes without an appointment) to five customers per day. These two latter items (oil and express lube) resulted in audited taxable sales of $93,313.65.

7. After computing audited taxable sales, the auditor reviewed those exempt sales records provided for the month of June 1982 (the only records pertaining to exempt sales made available) and allowed a 10 percent reduction for exempt sales. The auditor thereafter applied the tax rate to the audited total taxable sales and, after allowing credit for tax paid with the corporation's sales tax returns, determined the amount of tax underpaid and assessed the same for the period December 1, 1978 through August 31, 1981.

8. Subsequent to the above-described activities, the Audit Division expanded the audit period to cover the periods extending through August 31, 1982. No additional field audit work was performed. Rather, the Audit Division applied the same error factors as were determined upon field audit to the additional audit period in calculating and assessing tax due. There was no evidence of any change in the corporation's business operations, nor were any additional records made available to the Audit Division pertaining to the extended audit period.

9. As a result of the aforementioned audit activity, the Audit Division issued to petitioner Anton's Car Care Center, Ltd. the following notices of determination and demands for payment of sales and use taxes due:

Date Issued	Notice Number	Period	Tax Due[2]
3/18/83	S830310043N	12/1/78-8/31/80	$93,440.12
9/20/83	S830906000N	9/1/80-5/31/81	36,542.81
6/20/84	S840613009N	6/1/81-8/31/81	11,057.33
11/14/84	S841114193C	9/1/81-11/30/82	59,265.39

Four additional such notices were issued to petitioner Anton Parisi, identical in all respects to those set forth above but for the notice number. These notices assessed Mr. Parisi as an officer responsible for the collection and remittance of taxes on behalf of petitioner Anton's Car Care Center, Ltd. Each of these notices included the assessment of interest, plus a fraud penalty equal to 50 percent of the tax assessed.

10. At hearing, petitioner Anton Parisi appeared and testified on behalf of petitioners, and submitted certain limited documentation including some records of the corporation for the period in question. These limited records were found among records of a service station previously owned by Mr. Parisi and located in Baldwin, New York. Mr. Parisi had sold this station in or about late 1977 or early 1978, shortly after he began operation of Anton's Car Care Center, Ltd.

11. Prior to the time Mr. Parisi started the corporation's business, the station location had been closed for five years and was in a "run down" condition. In view of these circumstances the corporation was charged no rent by Mobil during the corporation's initial years. The method of recordkeeping then employed by the corporation was that the bookkeeper for the corporation made daily summaries of the corporation's business activities. These summaries, together with the source records from which they were derived, were placed in a folder, given to the corporation's accountant for his use and later returned to the corporation. The records were kept in the stockroom at the station until the stockroom was filled, after which the records were thrown away. Mr. Parisi testified that he was unaware of what records, other than Department of Motor Vehicle inspection records, he was required to retain.

12. Petitioners offered in evidence one purchase invoice (delivery ticket) in support of the allegation that the price shown on the Mobil third party verification of the corporation's

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[2]Exclusive of penalty (Tax Law § 1145[a][2]) and interest.

purchases included excise and sales taxes.[3] This invoice reflected, beneath the listing of price per gallon and quantity, the following format:

"Taxes when not included in prices shown above.

- Federal Gas &/or Fuel _____
- Federal Oil &/or Grease _____
- State Gas &/or Fuel _____
- Sales or Occupational _____%"

There were no amounts filled in on any of the above areas on this one invoice with respect to taxes.

13. Mr. Parisi gave testimony that the corporation employed three mechanics on a full-time basis, and that some other employees also performed mechanical work on a part-time basis. At hearing, and by additional submission thereafter, Mr. Parisi provided summary records of the mechanics' work on a weekly basis. However, such records did not, in general or specifically, further break down the hours and types of repairs performed by the mechanics, but rather only listed a dollar amount of work performed. Repair orders or invoices were not offered at hearing, and Mr. Parisi noted that he did not keep such records because "at the time I wasn't aware that I needed them". Finally, Mr. Parisi noted, with respect to mechanical work, that the mechanics used more than one service bay at a time to avoid "down time" while waiting for parts.

14. Prior to commencing business via the petitioner corporation, Mr. Parisi had supervised various service station locations as a contract manager for Mobil Oil Corporation, and, as noted, owned and operated a service station in Baldwin, New York. Mr. Parisi has no formal accounting background, or specific course work in the preparation of tax returns and reports. Mr. Parisi admitted signing sales tax returns, noting that he "assumed they were correct".

15. At hearing, Mr. Parisi conceded that he was an officer responsible for the collection and remittance of taxes on behalf of the corporation during the period in issue.

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[3]Petitioners note that such inclusion would remove much of the discrepancy found between the sales tax returns and the Federal income tax returns as to dollar amount of sales.

SUMMARY OF PETITIONERS' POSITION

16. Petitioners assert that the 10 percent audit allowance for exempt sales is insufficient, and that a large portion of the corporation's repair work was performed for Warren Buick (an automobile dealership) on cars to be resold by Warren Buick. Mr. Parisi estimated, based on an analysis of those records available, including motor vehicle inspection records, that approximately 34 to 41 percent of the repair work performed at the corporation was nontaxable. Further, petitioners assert that the use of a weighted average markup method of determining gasoline sales is a far more equitable method, in petitioner's business operation, of calculating the true markup on gasoline and, hence, of determining, on audit, taxable sales. Finally, petitioners maintain that the audit results far overstate the amount of business done at the station.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a) provides, in part, that if a return required to be filed is incorrect or insufficient, the Tax Commission shall determine the amount of tax due on the basis of such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices.

B. That it is well settled that where a taxpayer does not maintain and/or make available such records, including source documents, as will allow the establishment of an audit trail and enable verification of the accuracy of returns filed, the Audit Division may resort to indirect audit methodologies in carrying out its audit function. However, in determining the amount of a sales tax assessment it is the duty of the Audit Division to select a method "reasonably calculated to reflect the taxes due" (Matter of Grant Co. v. Joseph, 2 NY2d 196, 206; Matter of Meyer v. State Tax Commn., 61 AD2d 223, 227, lv denied 44 NY2d 645). In turn, when the Audit Division employs such a method, it becomes incumbent upon the petitioner to establish error (Matter of Meyer v. State Tax Commn., supra).

C. That petitioners did not maintain or have available complete books and records, including source documents, from which the Audit Division could conduct an audit and verify the correctness of petitioners' sales and use tax returns. Accordingly, the Audit Division was

entitled to resort to the use of external indices in arriving at a determination of petitioners' tax liability. Also, with respect to the extension of the audit period (see Finding of Fact "8"), the Audit Division is not limited as to the length of an audit period as long as such period is not barred by the statute of limitations provided in section 1147(b) of the Tax Law. There is no evidence here that petitioners changed the nature of the business operations or the method of recordkeeping, or that any additional books and records were maintained or would be available concerning the updated period as would alter the audit results (Matter of Martin V. Stillwell formerly d/b/a Marty's Restaurant, State Tax Commn., April 23, 1987).

D. That in light of the limited records that were available to the auditor, and the limited information to be gleaned therefrom, the methods utilized herein by the Audit Division in arriving at the assessments were reasonable. In turn, petitioners have not provided such evidence as would refute the audit results or suffice to warrant reduction or abatement thereof. In this regard, petitioners' assertions center mainly on allegations of errors in audit estimates, which allegedly erroneous estimates petitioners would supplant with their own estimates. However, petitioners' estimates as brought forth through testimony were supported only by scant documentation and do not appear patently more reasonable than those utilized by the Audit Division. It would not be unreasonable, for instance, to expect more convincing proof on whether tax was or was not included on the Mobil computer printouts than the submission of one single delivery invoice. The inexactitude herein, resulting from petitioners' failure to have maintained and made available adequate and accurate records, must weigh against petitioners (see___ Sol Wahba, Inc. v. State Tax Commn., 127 AD2d 943).

E. That Tax Law § 1145(a)(2) was added by the Laws of 1975 (ch 287, § 1) and, during the period in issue, this paragraph provided:

> If the failure to file a return or to pay over any tax to the tax commission within the time required by this article is due to fraud, there shall be added to the tax a penalty of fifty percent of the amount of the tax due (in lieu of the penalty provided for in subparagraph (i) of paragraph one), plus interest...."

F. That Tax Law § 1145(a)(2) was enacted by the Legislature with the intention of having a penalty provision in the sales and use tax which was similar to that which already existed in the

Tax Law with respect to deficiencies of, inter alia, personal income tax (1975 NY Legis Ann, at 350). Thus, the burden placed upon the Audit Division to establish fraud at a hearing involving a deficiency of sales and use tax is the same as the burden placed upon the Audit Division at a hearing involving a deficiency of personal income tax. A finding of fraud at such a hearing "requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing" (Matter of Walter Shutt and Gertrude Shutt, State Tax Commn., June 4, 1982). The Audit Division need not prove that the entire amount of the deficiency is due to fraud, but only that some portion of the deficiency for each period at issue is due to fraud (Tax Law § 1145[a][2]).

G. That, while it is a close decision, upon review of all of the evidence presented it cannot be concluded with certainty that the imposition of a fraud penalty should be sustained. However, the Audit Division has asserted in the alternative the penalty provided for by Tax Law former § 1145(a)(1).

H. That, as noted above, the fraud penalty imposed by Tax Law § 1145(a)(2) is equal to 50 percent of the tax due and the Audit Division bears the burden of proving fraud. The penalty assessed pursuant to Tax Law former § 1145(a)(1) could not, during the period at issue, exceed a maximum of 25 percent of the tax due, and the taxpayer bears the burden of proof to show that failure to pay over any tax was due to reasonable cause and not due to willful neglect.

I. That in instances where the Audit Division initially imposes the 50 percent fraud penalty, and is unable to sustain its burden of proving fraud, there appears to be no clear statutory directive to substitute the 25 percent Tax Law former § 1145(a)(1) penalty for the 50 percent fraud penalty. However, the State Tax Commission consistently allowed alternative imposition of the Tax Law former § 1145(a)(1) penalty in lieu of the fraud penalty (see___ e.g., Matter of Abitt Wine and Liquor Corp., State Tax Commission, September 15, 1986; Matter of John J. Lopedito, State Tax Commission, August 31, 1987).

J. That notwithstanding the lack of a clear statutory directive to substitute the 25 percent

penalty for the fraud penalty, it is nevertheless concluded that it was proper for the Audit Division to assert the Tax Law former § 1145(a)(1) penalty against petitioners. When the Legislature enacted Tax Law § 1145(a)(2), it clearly intended to impose a greater penalty on those taxpayers whose failure to pay was due to fraud. Certainly it could not have been the Legislature's intention to impose no penalties in those instances where a taxpayer's failure to pay falls just short of fraud, but where such failure was clearly due to willful neglect. Such a strict interpretation of the Tax Law would, in almost all borderline cases, prevent the Audit Division from imposing the fraud penalty for fear of not sustaining its burden of proving fraud and of being precluded from alternatively asserting the 25 percent penalty. As such, this result would in effect thwart the intent of the Legislature.

K. That with respect to the assertion of the Tax Law former § 1145(a)(1) penalty and imposition of statutory interest charges, petitioners maintain that the failure to pay the proper tax was due to reasonable cause and not willful neglect. Testimony was offered to the effect that petitioners relied upon their accountant and also that petitioner Anton Parisi was unaware of what types of records needed to be prepared and maintained. However, there was evidence to the contrary on each of these points. Further, it is not insignificant in this vein that petitioner Anton Parisi worked as a contract manager for Mobil and had previously operated a gasoline service station. In sum, noting the lack of records, the fact that sales as reported were less than purchases, and the substantial underreporting of tax liability as determined upon audit, it becomes evident that while a fraud penalty may not have been clearly warranted, a pattern of conduct emerges which in no way indicates that the deficiency in question was due to reasonable cause and not due to willful neglect. Accordingly, the assertion of the Tax Law former § 1145(a)(1) penalty is sustained.

L. That the petitions of Anton's Car Care Center, Ltd. and Anton Parisi, officer of Anton's Car Care Center, Ltd., are granted to the extent indicated in Conclusion of Law "G"; that the Audit Division is directed to modify the notices of determination and demands for payment of sales and use taxes due by reducing the 50 percent fraud penalty to the Tax Law former

§ 1145(a)(1) penalty; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York
January 22, 1988

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ADMINISTRATIVE LAW JUDGE