

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SUNDOWN MEAT, FISH AND LIQUOR CO., INC.:
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1981 :
through May 31, 1984. :

In the Matter of the Petition :
of :
DONNA AUTUORI, OFFICER OF :
SUNDOWN MEAT, FISH AND LIQUOR CO., INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1981 :
through May 31, 1984. :

DETERMINATION
DTA NOS. 802322,
802381, 802382
and 802383

In the Matter of the Petition :
of :
RAYMOND MURPHY, OFFICER OF :
SUNDOWN MEAT, FISH AND LIQUOR CO., INC.:
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1981 :
through May 31, 1984. :

In the Matter of the Petition :
of :
FRANK BOLOGNA, OFFICER OF :
SUNDOWN MEAT, FISH AND LIQUOR CO., INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1981 :
through May 31, 1984. :

Petitioner Sundown Meat Fish and Liquor Co., Inc., c/o Peter R. Newman, Esq., 700 Veterans Memorial Highway, Hauppauge, New York 11788, 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 June 1, 1981 through May 31, 1984.

Petitioner Donna Autuori, officer of Sundown Meat, Fish and Liquor Co., Inc., 826 Higbie Lane, West Islip, New York 11795, 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 June 1, 1981 through May 31, 1984.

Petitioner Raymond Murphy, officer of Sundown Meat, Fish and Liquor Co., Inc., 3 University Place, East Northport, New York 11731, 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 June 1, 1981 through May 31, 1984.

Petitioner Frank Bologna, officer of Sundown Meat, Fish and Liquor Co., Inc., 899 Fort Salonga Road, Northport, New York 11768, 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 June 1, 1981 through May 31, 1984.

A consolidated hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on June 21, 1990 at 10:30 A.M. and continued to conclusion at the same offices on September 12, 1990 at 9:15 A.M., with all briefs to be filed by January 28, 1991. A brief on behalf of Donna Autuori was filed on November 27, 1990 and a reply brief on her behalf was filed on January 25, 1991. A brief on behalf of Sundown Meat, Fish and Liquor Co., Inc., Raymond Murphy and Frank Bologna was filed. The Division of Taxation filed a letter and a brief on January 8, 1991. Petitioners appeared by Peter R. Newman, Esq., at the hearing on June 21, 1990. Petitioners Sundown Meat, Fish and Liquor Co., Inc., Raymond Murphy and Frank Bologna appeared by Peter R. Newman, Esq., at the hearing on September 12, 1990. Petitioner Donna Autuori appeared by Rogers and Cartier, P.C. (William J. Bernstein, Esq., of counsel) at the hearing on September 12, 1990. The Division of Taxation appeared by

William F. Collins, Esq. (Peter J. Martinelli, Esq., of counsel).

ISSUES

I. Whether the notices of determination issued to Donna Autuori, Raymond Murphy and Frank Bologna should be dismissed on the grounds that they were not sent to the individuals' last known addresses.

II. Whether the notice of determination issued to Donna Autuori should be dismissed because her name was misspelled on the notice.

III. Whether the Division of Taxation properly determined, on the basis of a markup test and an observation test, that Sundown Meat, Fish and Liquor Co., Inc. owed additional sales and use taxes.

IV. Whether the Division of Taxation properly imposed a penalty for fraud or whether, in the alternative, the Division established that petitioner was liable for a penalty for failure to pay tax when due.

V. Whether Donna Autuori was a person required to collect and pay over sales tax on behalf of Sundown Meat, Fish and Liquor Co., Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) during the period in issue.

FINDINGS OF FACT

Petitioner Sundown Meat, Fish and Liquor Co., Inc. ("Sundown") operated a bar named Sunshine's which provided music and dancing. The average age of Sundown's patrons was approximately 19 or 20. Petitioner Donna Autuori owned one-third of Sundown's stock and held the title of president. Donna Autuori's husband, Michael Autuori, worked as the general manager. Frank Bologna owned one-third of Sundown's stock and held the office of vice-president. Raymond Murphy owned the remaining stock and held the title of secretary.

In May 1984, the Division of Taxation ("Division") assigned an auditor to conduct an audit of Sundown. Thereafter, the Division mailed a letter scheduling an audit appointment at Sundown's premises on July 23, 1984 at 9:50 A.M. The letter requested that Sundown make available all books and records pertaining to its sales tax liability for the period under audit

including journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all sales tax records. A separate request was made that petitioner provide, for the audit period, its general ledger, cash receipts journal, cash disbursements journal, Federal income tax returns for the years 1982 and 1983, sales tax returns and cancelled checks for the quarters ended February 28, 1984 and May 31, 1984, sales invoices for the period June 1, 1983 through August 31, 1983, all fixed asset invoices for fixed assets acquired during the audit period, and resale, exempt and capital improvement certificates supporting nontaxable sales for the period June 1, 1983 through August 31, 1983.

On the scheduled appointment date, the auditor went to Sundown's premises and found that no one was present. The auditor returned during the afternoon of another day and met an individual who provided the name of Sundown's representative. Subsequently, the auditor met with Sundown's representative.¹ During this meeting, the auditor observed that the representative had the audit appointment letter in his possession. The representative was able to supply Federal income tax returns, the general ledger and records pertaining to cash receipts and cash disbursements. The Division's field audit report indicates that other records made available were depreciation schedules, purchase invoices and monthly bank statements. Since Sundown's cash registers did not use cash register tapes, Sundown was unable to supply this item. Further, Sundown was unable to supply guest checks because this item was not used.

During the audit, the Division found that gross sales reported on Sundown's corporate Federal income tax return for the fiscal year ended March 31, 1983 were \$184,940.19, whereas the sales on the sales and use tax returns for the same period were \$139,884.00. The Division also compared the sales reported on Sundown's sales and use tax returns with the sales shown on the general ledger. This examination disclosed an underreporting of sales on the sales tax returns of \$158,550.28 as follows:

Sales Per

¹Donna Autuori signed the power of attorney form which authorized the representative to appear on Sundown's behalf.

<u>Period Ended</u>	<u>Sales Per General Ledger</u>	<u>Sales and Use Tax Returns</u>	<u>Difference</u>
August 31, 1981	\$ 59,634.28	\$ 32,801.00	\$ 26,833.28
November 30, 1981	35,359.99	31,669.00	3,690.99
February 28, 1982	33,980.43	33,594.00	386.43
May 31, 1982	26,493.33	27,881.00	(1,387.67)
August 31, 1982	66,540.48	46,985.00	19,555.48
November 30, 1982	36,499.05	36,534.00	(34.95)
February 28, 1983	34,024.43	29,959.00	4,065.43

May 31, 1983	72,352.58	23,460.00	48,892.58
August 31, 1983	75,837.55	54,268.00	21,569.55
November 30, 1983	37,336.10	41,336.00	(3,999.90)
February 28, 1984	51,402.94	41,635.00	9,767.94
May 31, 1984	<u>70,619.12</u>	<u>41,408.00</u>	<u>29,211.12</u>
	\$600,080.28	\$441,530.00	\$158,550.28

The Division computed the markup on Sundown's purchases from the amounts reported on the corporation Federal income tax returns for the fiscal years ended March 31, 1983 and March 31, 1984. This disclosed markups of 109% and 169%, respectively. On the basis of the auditor's experience and the experience of those in his office, the auditor concluded that these markups were low.

An auditor met with Sundown's representative on approximately eight occasions. On each occasion, the representative was cooperative. In one meeting, Mr. Murphy and Mr. Bologna were also in attendance. During this meeting, the auditor recalled being told that Sundown had a \$1.00 admission charge at all times. The auditor was also told that Sundown did not employ any bartenders.

In order to determine the amount of sales and use taxes due, the Division decided to conduct an observation test and a markup test on beer and liquor purchases.

The Division's markup test on purchases of liquor began with the auditor's preparation of a worksheet based on Sundown's purchases in March 1984. The worksheet had columns which listed the supplier, the size of the bottle and the cost per bottle. Next the auditor calculated the number of drinks per bottle using a 1¼-ounce shot glass after a 15% allowance for spillage. The total number of drinks was calculated by multiplying the number of bottles purchased by the number of drinks per bottle. The auditor then determined the amount of Sundown's sales by multiplying the total number of drinks by the selling price per drink. Finally, the auditor divided the sales by the cost of the bottles and computed a markup on liquor of 7.0922.²

²In performing the foregoing analysis, the level of purchases was obtained from purchase invoices which were traced to the cash disbursements book. The amounts used for the selling price of drinks were obtained from Sundown.

In order to calculate the markup on beer, the Division utilized Sundown's purchases for the months of March, April and May 1984. Sundown's purchases and costs were determined from its invoices, and its selling prices were determined from information provided by Sundown. The level of sales was calculated by multiplying the selling price per bottle by the number of bottles purchased. The Division then divided the sales by the cost of the beer purchases to calculate a beer markup of 2.5654.

In the course of the audit, the Division determined that Sundown had promotions known as "ladies' night" and "2-for-1 night". On ladies' night, women were charged \$6.00 for admission and thereafter were permitted to drink beer and bar brand liquor without an additional charge. Women were charged \$1.00 for certain other brands of liquor. Men were charged \$3.00 for admission on ladies' night. On 2-for-1 nights, patrons were given two drinks for the price of one.

In order to take promotional events into account, the Division determined that of the 234 days that Sundown was in operation during the year, there were 104 ladies' nights, 104 2-for-1 nights and 26 nights when there was no promotional special. Upon translating the relative number of days into percentages, the Division then took the promotional events into account by marking up only one-half of the beer purchases and only one-half

of the wine and liquor purchases. Of the purchases of beer, wine and liquor which were marked up, 55.556% was marked up at the full calculated markup and 44.444% was marked up at one-half of the calculated markup. Utilizing this method, the Division computed taxable beer sales of \$145,946.27 and taxable wine and liquor sales of \$749,527.77. Since some drinks were sold for \$1.00 on ladies' night, the Division added an additional \$20.00 a week for each of the 156 weeks during the audit period on the premise that 10 drinks at \$1.00 a drink were sold during each of the two ladies' nights per week.

In calculating Sundown's taxable sales, the Division included the vendors' purchases of food at cost. This item increased taxable sales by \$38,118.81.

In order to determine the tax due on admission charges, the Division relied upon its findings during two observations of Sundown. During each observation, the Division found that between 200 and 250 people were in attendance. Therefore, the Division based its calculation of admission charges on the premise that 200 customers were in attendance each night and that one-half the patrons were men and one-half the patrons were women. The Division also considered that, at the time of the observations, the admission charge was \$3.00 a person and that, on ladies' night, women were charged \$6.00 for admission and men were charged \$3.00. Using this information, the Division determined that Sundown received \$468,000.00 in admission charges during the audit period as follows:

Thursdays and Saturdays -	
200 people a day at \$3.00 a person	\$ 1,200.00
Ladies' Night -	
Wednesday and Friday -	
100 men a day at \$3.00 a person	600.00
Wednesday and Friday -	
100 women a day at \$6.00 a person	<u>1,200.00</u>

\$ 3,000.00/week
x 156/weeks in audit period
\$468,000.00

On the basis of the foregoing audit, the Division found that petitioner had total audited taxable sales of \$1,404,712.85, while taxable sales reported were \$441,530.00, resulting in additional taxable sales of \$963,182.85. The additional taxable sales found during the audit were divided by the taxable sales reported on Sundown's sales and use tax returns to calculate a margin of error of 2.18147. The Division then multiplied the taxable sales reported on Sundown's quarterly sales and use tax returns by the margin of error to calculate an increase in taxable sales per audit of \$963,184.44. The taxable sales per audit were then calculated by adding the increase in taxable sales to the taxable sales reported by Sundown on its sales and use tax returns. The Division determined that the tax due on sales was \$101,052.05 by multiplying the tax rate by the total taxable sales from the audit. The Division also concluded that sales and use taxes were due on Sundown's purchase of fixed assets of \$5,954.27 upon which no tax was paid, resulting in additional tax due of \$431.71. Finally, the Division found that sales and use taxes were due on Sundown's purchases of beer and liquor which was subsequently given away. The last item resulted in tax due of \$1,115.06. The Division subtracted the sales and use taxes paid with the returns in the amount of \$23,966.52 from the total tax determined on audit of \$102,598.82 to calculate that the total tax due was \$78,632.30.

The Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated June 20, 1985, to Sundown Meat, Fish and Liquor Co., Inc. The notice assessed sales and use taxes for the period June 1, 1981 through May 31, 1984 in the amount of \$78,632.30, plus penalty of \$39,316.18 and interest of \$25,634.34, for a total amount due of \$143,582.82. The penalty was asserted for fraud pursuant to Tax Law § 1145(a)(2) because of the large discrepancy between the sales shown on the books and Federal income tax returns of Sundown as opposed to the sales which were shown on the sales tax returns.

The Division also issued notices, dated June 20, 1985, to Donna Autuori, Frank Bologna and Raymond Murphy, as president, vice-president and secretary of Sundown, respectively.

Each of the notices assessed the same amount of tax, penalty and interest which was assessed against Sundown. Further, each of the notices explained that, as officers of Sundown, they were personally liable for the taxes determined to be due.

Neither the notices issued to Sundown nor the notices issued to the individual officers indicated that the notices had been estimated in accordance with Tax Law § 1138(a)(1).

The notice intended for Donna Autuori spelled her surname as "Autuoria" and listed her address as "Lenox Road, Huntington Station, New York 11743". The notice issued to Frank Bologna listed his address as "7-5th Avenue, East Northport, New York 11731" and the notice issued to Raymond Murphy listed his address as "East Main Street, Huntington, New York, 11743". The addresses on the notices corresponded with the addresses for the individual petitioners in the Division's audit report.

One observation test occurred between 10:00 P.M. and 2:00 A.M. on Friday, March 1, 1985. On this night, the auditor paid \$3.00 for admission and found a crowded bar serviced by three barmaids. Thereafter, the auditor stood at various locations and counted the customers. As a result, the auditor concluded that a minimum of 200 people patronized Sundown's premises. During this period, the auditor observed that both men and women were drinking beer, but he could not ascertain how much beer was being drunk by men and how much was drunk by women. It was also possible for someone to have left the bar and returned without being noticed by the auditor. Lastly, as this was a ladies' night, it was possible for a woman to get a free drink and hand it to a male companion without being noticed.

At the hearing, one of the auditors who conducted the observation could not recall the decor of Sundown, whether there was more than one floor or whether there was a disc jockey. When asked to draw an outline of the bar, he drew a rectangular-shaped room.

Sundown was located adjacent to another bar frequented by college students known as Dock's End. Each establishment had a distinct decor. Dock's End was dimly lit and decorated with dark wood. Sundown was more colorful and had bright lighting. Unlike Dock's End, Sundown had a canopy above its bar that was 57 feet long. In addition, unlike Dock's End,

Sundown had a disc jockey on Friday nights.

Sundown and Dock's End had different physical configurations. Dock's End had a rectangular-shaped room. The premises of Sundown was on two levels. Patrons entered on the first level which contained a bar. This portion of Sundown was approximately 14 feet by 54 feet. The west half of Sundown was raised approximately three steps. This half was approximately 14 feet wide by 110 feet long. One could not see from one level of Sundown to the other level because the two levels were separated by a divider, window boxes and plants.

The amount which Sundown charged for admission varied during the night. At the start of an evening, when Sundown did not have many patrons, Sundown either charged nothing or \$1.00. As the establishment became busier, the admission charge increased to \$3.00.

During the period in issue, Donna Autuori was the executive vice-president of a public relations firm on Long Island. In this position she was required to work more than 40 hours a week. On many evenings, she was required to work at home or at other locations.

The funds for Donna Autuori's investment in Sundown were borrowed from her father. Since the Autuoris had not been married for a long period of time, it was decided that the stock ownership would be placed in Donna's name in order to protect her interests. Donna Autuori's father thought that she should hold the title of president for the same reason. Although Donna Autuori held the title of president, she was only at Sundown in the evening on approximately two occasions. Donna Autuori did not work at Sundown in any capacity, did not have any role in the decision-making process and did not have any input into decisions regarding the expenditure of funds. Although Donna Autuori was an authorized signatory on the corporation's checking account, she never signed any of Sundown's checks.

Sundown filed a U.S. Corporation Income Tax Return for the fiscal year ended March 31, 1983. The schedule E portion of this return entitled, Compensation of Officers, stated that each of the officers worked part time for the business. The names of the officers and their respective compensations were reported as follows:

Officer

Compensation

Donna Autuori	\$ 1,300.00 ³
Raymond Murphy	11,050.00
Frank Bologna	16,250.00

Sundown filed a U.S. Corporation

Income Tax Return for the fiscal year ended March 31, 1984. The schedule E portion of the return, entitled Compensation of Officers, stated that each of the officers worked part time for the business. The names of the officers and their respective compensations were reported as follows:

<u>Officer</u>	<u>Compensation</u>
Donna Autuori	\$ -0-
Raymond Murphy	13,700.00
Frank Bologna	13,700.00

In or about June 1984, the shareholders of Sundown filed an Election by Shareholders of a Small Business Corporation for New York State Personal Income Tax and Corporation Franchise Tax Purposes for the period April 1, 1984 through March 31, 1985. The form, which stated that Donna Autuori, Frank Bologna and Raymond Murphy each owned ten shares of stock, was signed by Raymond Murphy, as secretary. Donna Autuori's address was listed on this form as 434 Lenox Lane, Huntington Station, New York 11746. Frank Bologna's address was reported as 7 Fifth Avenue, East Northport, New York 11731, and Raymond Murphy's address was listed as 82 Main Street, Huntington, New York 11743.

CONCLUSIONS OF LAW

A. Petitioners first argue that the notices sent to each of the individual officers were deficient in that the notices were not sent to the officers' known addresses. The Tax Law provides that notice of an assessment of sales and use taxes shall be mailed as follows:

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him

3

At the hearing, Donna Autuori denied any recollection of having received these funds.

pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. The notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice" (Tax Law § 1147[a][1]).

This section of the Tax Law has consistently been interpreted as requiring the mailing of a notice to a taxpayer's last known address (see, Matter of Charlotte E. Lantz, Tax Appeals Tribunal, December 28, 1989; Matter of Robert G. Wilson & GSA Corporation d/b/a GSA Partners, Tax Appeals Tribunal, July 13, 1989). Here, the only evidence in the record of petitioners' addresses which predates the hearing notices is found in the audit report and the small business corporation election form. A comparison of the notices with these documents shows that, although the addresses on the notices could have been more specific, the addresses on the notices correspond with the audit report and election form. Therefore, on this record, it is concluded that petitioners have not sustained their burden of proof of establishing that the notices were not sent to their last known addresses at the time the notices were issued.⁴

It is noted that even if the notices had not been sent to the officers' last known addresses, no relief would have been warranted. In those instances where the notice is not received because of an incorrect address, the only remedy is to afford the taxpayer additional time to file a petition to protest the notice (see, Matter of Ruggerite, Inc. v. State Tax Commn., 97 AD2d 634, 468 NYS2d 945, affd 64 NY2d 688, 485 NYS2d 517). Since there is no issue with respect to the timeliness of the petitions, no further relief on this point is warranted.

B. The next argument raised by petitioners is that the notice of determination issued to Donna Autuori should be dismissed because her name was misspelled on the notice.

The foregoing argument is also without merit. When there is an error in the name of a taxpayer on a notice, the pertinent questions are whether the notice was correctly addressed, whether the notice was delivered to and accepted by the taxpayer and whether the taxpayer was

⁴Petitioners' representative's reliance on the power of attorney forms filed with the petition is misplaced because they are all dated after the notices were issued.

misled by the notice (see, McCarthy Co. v. Commr., 80 F2d 618 [1935], cert denied 298 US 655 [1936]). Here, although the address might have been more specific, the notice was properly sent to the last known address. Moreover, in view of the fact that a timely petition was filed, it may be inferred that the notice was delivered to and accepted by Donna Autuori and further that she was not misled by the slight misspelling.

C. When a return is incorrect or insufficient, the Division has the right to determine the amount of tax due from such information as may be available (Tax Law § 1138[a][1]). If the taxpayer maintains a complete set of books and records, the Division is restricted to the use of those records because "[t]he honest and conscientious taxpayer who maintains comprehensive records as required has a right to expect that they will be used in any audit to determine his ultimate tax liability" (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43). Conversely, the use of external indices is proper when the taxpayer does not produce the records needed to independently determine taxable sales and to conduct an audit (see, Matter of Licata v. Chu, 64 NY2d 873, 487 NYS2d 552; Matter of Club Marakesh v. Tax Commn. of the State of New York, 151 AD2d 908, 542 NYS2d 881, lv denied 74 NY2d 616, 550 NYS2d 276). In order to determine whether a taxpayer's records are adequate to conduct an audit or whether external indices are required, the Division must request and examine the taxpayer's books and records for the entire audit period (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of Christ Cella v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858).

D. Here, the Division requested an opportunity to examine Sundown's books and records. Sundown, however, was unable to present any original sales documents. Under these circumstances, the use of external indices was proper since it was impossible to independently verify taxable sales (see, Matter of 24 Hour Grocery & Candy, Inc., Tax Appeals Tribunal, June 27, 1991).

E. When the Division uses an indirect audit method, it is required to select a method

which is reasonably calculated to reflect the tax due (Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 206, 159 NYS2d 150, 157, cert denied 355 US 869; Matter of Urban Liquors, Inc. v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138, 139). If the Division uses such a method, petitioner bears the burden of proving by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858, 446 NYS2d 451).

F. At the hearing, petitioners asserted that one of the observers must have examined Dock's End rather than Sundown. This argument was based on several points. First, petitioners maintain that one of the auditors conducting the observation looked much older than Sundown's typical patron. Therefore, he would have stood out. Petitioners maintain that Sundown's principals were always on alert when an older person entered the bar because that person would either be suspected of being a police officer who was checking on whether Sundown was serving minors or an older person who had an unhealthy interest in younger companions. At the hearing, the manager did not recall seeing the auditor, leading to the argument that he was at the wrong bar. Petitioners also submit that the auditor was at the wrong bar because the outline of the bar he drew at the hearing did not correspond with Sundown. Further, the observer could not recall whether there was a disc jockey. Lastly, petitioners argue that it would have been impossible to fit 200 patrons into the lower level of Sundown.

G. Upon due consideration, petitioners' argument is rejected. First, strong inferences cannot be drawn from the auditor's lack of a clear recollection of Sundown's decor and layout given the five-year time span between the hearing and the observation. Secondly, it should be remembered that two auditors observed Sundown on different evenings and made similar findings. It is highly unlikely that both auditors would have gone to the wrong bar. Further, petitioners' argument that 200 people could not have fit into the lower level of Sundown is rejected for lack of documentary support.

A third factor also supports the inference that the first observer went to Sundown. It is undisputed that Sundown offered a disc jockey and, during the observations, charged a \$3.00

admission fee. It is also undisputed that Dock's End did not offer a disc jockey. In view of the proximity of the bars to each other, it is improbable that Dock's End would have had the same cover charge without a disc jockey as the bar next door which did have a disc jockey.

H. Petitioners' remaining arguments are also unpersuasive. Contrary to petitioners' position, the auditor's testimony was candid and forthright and the record does not present any basis to warrant questioning the auditor's credibility.

Petitioners' argument that the first observer could not have seen the number of people who entered the door at Sundown does not warrant an adjustment. The observer did not attempt to count the people as they entered the bar. Rather, he explained that he counted people once they were in the bar. Further, any mistake on the first observer's part which might have occurred in not recognizing that Sundown had a second level would only be to petitioners' advantage since it would imply that the observer overlooked a number of people and that the portion of the assessment based on admission charges is unduly low.

Petitioners' argument that the observer could not have kept track of the number of people having wine as opposed to those having beer must also be rejected. Obviously, the Division's calculations on this point are an estimate. However, it cannot be said, as a matter of law, that the estimate was unreasonable. Moreover, petitioners have not presented any testimonial or documentary evidence that a different percentage would be more accurate. In this regard, it is noted that it was petitioners' failure to present auditable records which necessitated the use of an estimate (see, Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, aff'd 44 NY2d 684, 405 NYS2d 454).

I. Tax Law § 1145(a)(2) provides for the imposition of a civil fraud penalty if the failure to file a return or pay over any tax is due to fraud. The Division has the burden of proving fraud by clear and convincing evidence (see, Matter of Michael T. Waples d/b/a Jack's Restaurant, Tax Appeals Tribunal, January 11, 1990; Matter of Uncle Jim's Donut and Dairy Store, Inc. a/k/a Dash's Donuts, Tax Appeals Tribunal, October 5, 1989). It has consistently been held that the imposition of the fraud penalty requires:

"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 Ilter Sener d/b/a Jimmy's Gas Station, Tax Appeals Tribunal, May 5, 1988, quoting Matter of Shutt, State Tax Commn., July 13, 1982; see also, Matter of Michael J. Waples d/b/a Jack's Restaurant, supra).

J. In Matter of Michael T. Waples d/b/a Jack's Restaurant (supra), the Tax Appeals Tribunal summarized some of the relevant considerations as follows:

"Because the sales tax penalty provisions are modeled after Federal penalty provisions, Federal statutes and case law are properly used for guidance in ascertaining whether the requisite intent for fraud has been established (Matter of Uncle Jim's Donut and Dairy Store, Inc., Tax Appeals Tribunal, October 5, 1989; Matter of Ilter Sener, supra). Factors found to be significant include consistent and substantial understatement of tax, the amount of the deficiency itself, a pattern of repeated deficiencies, the taxpayer's entire course of conduct and the taxpayer's failure to maintain bank accounts or adequate records (see, Merritt v. Commr., 301 F2d 484; Bradbury v. Commr., T.C. Memo 1971-63; Webb v. Commr., 394 F2d 366; see also, Matter of AAA Sign Co., Tax Appeals Tribunal, June 22, 1989). Because direct proof of the taxpayer's intent is rarely available, fraud may be proved by circumstantial evidence, including the taxpayer's entire course of conduct (Intersimone v. Commr., T.C. Memo 1987-290; Stone v. Commr., 56 T.C. 213, 223-224; Korecky v. Commr., 781 F2d 1566). Fraud may not be presumed or imputed, but rather must be established by affirmative evidence (Intersimone v. Commr., supra). Hence, a finding of fraud should not be sustained where the attendant circumstances create at most only a suspicion of fraud (Goldberg v. Commr., 239 F2d 316). The issue of whether fraud with the intent to evade payment of tax has been established presents a question of fact to be determined upon consideration of the entire record (Jordan v. Commr., T.C. Memo 1986-389; see, Matter of AAA Sign Co., supra)."

K. It is concluded that the record does not show clear, definite and unmistakable evidence of every element of fraud. It is well established that a consistent underreporting of tax liability is a significant indicia of fraud (see, e.g., Matter of Michael T. Waples d/b/a Jack's Restaurant, supra; Matter of A. Charles Cinelli, Tax Appeals Tribunal, September 14, 1989). Here, the record shows that Sundown did not consistently underreport its sales tax liability. Rather, Sundown underreported its tax liability in many quarters, but overreported its tax liability in other quarters. The inference which is drawn is not that Sundown knowingly underreported the amount of its sales, but that it was derelict in fulfilling its reporting responsibilities. Any inference to be drawn from petitioners' alleged misrepresentations to the auditor are also equivocal. It appears that Sundown's admission charges varied over the course of an evening. Therefore, there was room for misunderstanding over the amount of the

admission charge. Petitioners' representations with respect to the number of employees working at the bar is more troubling. However, this alone is not sufficient to sustain a finding of fraud.

L. In its answer, the Division asserted, in the alternative, the penalty pursuant to Tax Law § 1145(a)(1). When the Division waits until after the usual determination procedure to assert an alternative penalty, the burden of proof of establishing the propriety of the penalty is upon the Division (see, Matter of Ilter Sener, supra). That is, the Division must prove "that the taxpayer's failure or delay was due to willful neglect and was not due to reasonable cause" (Matter of Ilter Sener, supra).

It is concluded that the Division has established that the underpayment of tax was due to willful neglect and not due to reasonable cause. In many quarters, Sundown, without any explanation, reported far less than that shown on its own books. This underreporting is of particular concern because Mr. Autuori, Mr. Murphy and Mr. Bologna all had a role in preparing Sundown's books. In view of petitioners' apparent carelessness in complying with their sales and use tax obligations, the Division has shown that the failure to pay was due to willful neglect and the alternative penalty asserted pursuant to Tax Law § 1145(a)(1) is sustained.

M. In Matter of Autex Corporation (Tax Appeals Tribunal, November 23, 1988), the factors for determining whether an individual is a person or officer under a duty to act for a corporation were set forth as follows:

"The determination that an individual is a responsible officer depends upon the particular facts of each case (Stacy v. State, 82 Misc 2d 181, 183). Factors stated by the Division's regulations are whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

Other indicia developed by the case law are: the authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Blodnick v. State Tax Commn., 124 AD2d 437); the individual's possible shared status as an officer, director or stockholder (Cohen v. State Tax Commn., 128 AD2d 1022, 1023); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. NY Tax & Finance, 98 Misc 2d 222, 225-226); and the

payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (Chevlowe v. Koerner, 95 Misc 2d 388, 391). Within closely held corporations, 'an officer's knowledge of the corporate affairs and his benefits received from corporate profits (are) extremely important considerations' (Vogel v. NY Tax & Finance, supra, at 226)."

N. Donna Autuori has established that she was not a person under a duty to act for Sundown with respect to the sales and use taxes due. The record establishes that Donna Autuori was merely an officer in title. She was not responsible for managing or maintaining Sundown's books or permitted to generally manage the corporation. It is also significant that she did not have the right to hire or fire employees. Furthermore, Donna Autuori did not have any day-to-day responsibilities and did not have any control over the financial affairs and management of the corporation. Finally, her limited income from the corporation is an additional indication of her lack of authority over the financial affairs of Sundown.

O. In opposition to the foregoing analysis, the Division maintains that Donna Autuori should be estopped from denying that she was responsible for the taxes due from Sundown. In support of this argument, the Division points to the fact that Donna Autuori was identified as president and a shareholder on Sundown's U.S. corporation income tax returns. The Division also calls attention to the fact that Donna Autuori was listed as president on the New York State election form to treat Sundown as a small business corporation for New York State personal income tax and corporation franchise tax purposes.⁵ Lastly, the Division argues that Donna Autuori signed the power of attorney form which authorized a Mr. Leventhal to represent Sundown during the audit and to file a petition which stayed collection action against Sundown.

P. In order to determine whether an estoppel should be involved, the Tax Appeals Tribunal has utilized a three-part test which asks whether there was a right to rely on the representation, whether in fact there was such reliance and whether such reliance was to the detriment of the party who relied upon the representation (see, Matter of Harry's Exxon Service

⁵This is factually incorrect. The election form merely describes Donna Autuori as a stockholder.

Station, Tax Appeals Tribunal, December 6, 1988).

Q. In this instance, the Division has not established the first criterion which is that it had the right to rely on the representation that Donna Autuori was the president of Sundown in reaching the conclusion that she was responsible for the taxes due from Sundown. Therefore, the Division's attempt to invoke the doctrine of equitable estoppel is rejected. The fundamental flaw in the Division's argument is the failure to recognize that the holding of a corporate office does not, per se, impose personal liability for the taxes owed by the corporation (see, Matter of Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427). This principle is applicable to those who hold the office of president (see, e.g., Matter of Brahm, 52 Bankr 606, 85-2 US Tax Cas ¶ 9708). Thus, the fact that Donna Autuori held herself out as president on certain forms should not, in and of itself, have caused any detrimental reliance on the part of the Division.

The Division's argument that Donna Autuori signed the power of attorney form which appointed Sundown's representative during the audit does not alter the foregoing result. No authority has been advanced by the Division to support the position that only officers responsible for the remission of sales and use taxes may execute power of attorney forms. In view of the foregoing analysis, it is unnecessary to discuss the remaining elements of the estoppel doctrine.

R. Finally, the Division argues that all of Michael Autuori's acts were attributable to Donna Autuori because he was Donna Autuori's agent. This position is based on the argument that Michael Autuori had no formal connection to Sundown and, therefore, all of his actions were as an agent for Donna Autuori.

S. The foregoing argument is erroneous for at least two reasons. First, the record contains numerous references to the fact that Michael Autuori was Sundown's manager. Therefore, it is clear that Michael Autuori had a formal connection to Sundown. Second, an agent's authority is derived from that of the principal (see generally, 2 NY Jur 2d, Agency, § 71, p. 520). Here, the Division did not offer Sundown's articles of incorporation or bylaws to

substantiate the proposition that Donna Autuori had any authority in the first instance. Therefore, it cannot be concluded that Michael Autuori was acting as Donna Autuori's agent when he acted as Sundown's office manager.

T. The petition of Donna Autuori is granted and the Division is directed to cancel the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated June 20, 1985, which was issued to Donna Autuori. The petitions of Sundown Meat, Fish and Liquor Co., Inc., Raymond Murphy and Frank Bologna are denied and, except as set forth in Conclusions of Law "K" and "L", the notices issued to said petitioners, dated June 20, 1985, are sustained.

DATED: Troy, New York
October 10, 1991

ADMINISTRATIVE LAW JUDGE