STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

WALKER EXPLORATION & PRODUCTION CORP. :

for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period December 1, 1986 :
through August 31, 1988.

In the Matter of the Petition :

of :

JOHN B. WALKER, OFFICER OF :
WALKER EXPLORATION & PRODUCTION CORP.

for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period December 1, 1986 :
through August 31, 1988.

In the Matter of the Petition :

of :

TEXAS MERIDIAN OPERATING CO., INC. :

for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period June 1, 1988 :
through November 30, 1989.

In the Matter of the Petition

of

JOSEPH A. REEVES, JR., OFFICER OF
TEXAS MERIDIAN OPERATING CO., INC. :

for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period June 1, 1988 :
through November 30, 1989.

DETERMINATION
DTA NOS. 809812,
809813, 809814,
809815 AND
809816

In the Matter of the Petition

of

MICHAEL MAYELL, OFFICER OF TEXAS MERIDIAN OPERATING CO., INC.

for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1988 through November 30, 1989.

Petitioner Walker Exploration & Production Corp., 15995 North Barkers Landing, Suite 300, Houston, Texas 77079, and petitioner John B. Walker, officer of Walker Exploration & Production Corp., 1221 Lamar, Suite 1600, Houston, Texas 77079, filed petitions, respectively, for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1986 through August 31, 1988.

Petitioners Texas Meridian Operating Co., Inc., and Joseph A. Reeves, Jr., and Michael Mayell, officers of Texas Meridian Operating Co., Inc., 15995 North Barkers Landing, Suite 300, Houston, Texas 77079, filed petitions, respectively, for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1988 through November 30, 1989.

A consolidated hearing was held at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 27, 1992 at 1:15 P.M., with all briefs to be filed by February 5, 1993. Petitioners' brief was received on November 19, 1992, and the answering brief of the Division of Taxation was received on January 14, 1993. Petitioners' reply brief was filed on February 5, 1993. Petitioners appeared by Zdarsky, Sawicki & Agostinelli, Esqs. (Gerald T. Walsh, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to determine if the corporate taxpayers charged and collected sales and use taxes on certain maintenance fees but failed to

remit these amounts to the State, and if it does, whether the corporate taxpayers failed to remit such taxes.

II. Whether the corporate taxpayers incurred expenses for providing maintenance services to gas wells without receiving payment for such services from various limited partners related to them who owned such wells so that there were no receipts subject to sales and use taxes.

III. Whether Tax Law § 1105-B precludes imposition of the State portion of sales and use taxes on maintenance services performed on gas wells.

IV. Whether maintenance services performed on gas wells were properly subject to the local portion of sales and use taxes.

V. Whether the Division of Taxation failed to credit the corporate taxpayers for late filing penalties previously remitted and for an amount deducted from a tax refund check.

VI. Whether the determinations of tax due by the Division of Taxation were erroneous and barred by the statute of limitations because tax allegedly due for maintenance services was initially and incorrectly characterized as use tax.

VII. Whether three individual petitioners may be personally liable for any sales and use taxes determined due if it is determined that tax returns were properly filed.

VIII. Whether the imposition of penalties and statutory interest was proper.

IX. Whether, if the three individual petitioners are determined to be persons responsible for the collection and payment of sales and use taxes due, they may also be liable for penalties and statutory interest added to such sales and use taxes.

FINDINGS OF FACT

Petitioner Walker Exploration & Production Corp. ("Walker Exploration & Production") operated natural gas wells located in western New York (Cattaraugus and Chautauqua Counties) owned by Walker Energy Operating, Ltd. According to the audit report, in July of 1988, Walker Exploration & Production was acquired by petitioner Texas Meridian Operating Co., Inc. ("Texas Meridian Operating Co."). At the same time, Walker Energy Operating, Ltd. was acquired by Texas Meridian Resources, Ltd.

The record contains very little information concerning the four above-mentioned entities. As noted above, according to the audit report, Walker Exploration & Production was acquired by Texas Meridian Operating Co. However, petitioners submitted an affidavit dated October 26, 1992 of J. Larry Mathews, the controller of Texas Meridian Resources Corporation (which he described as an "affiliate" of Texas Meridian Operating Co.), which stated that Texas Meridian Operating Co. "was formerly known as Walker Exploration and Production Corp." A photocopy of a "Certificate of Amendment of Application for Authority of Walker Exploration & Production Corporation" dated February 22, 1989 submitted by petitioners noted that Texas Meridian Operating Co. was a new name for Walker Exploration & Production. Both corporations were Texas corporations. The certificate of amendment also noted that the name change had "been effected under the laws of [Texas] on September 26, 1988."

It appears that at the time of the apparent name change and/or acquisitions by the successor entities, the actual management of the entity which operated and maintained the natural gas wells also changed. According to the audit report, the president and vice-president of Walker Exploration & Production were petitioner John B. Walker and Roger Heckman, respectively. The audit report referenced petitioner Michael Mayell as president and petitioner Joseph A. Reeves, Jr. as an officer (with no specified title) of Texas Meridian Operating Co., the entity which continued the operation and maintenance of the gas wells.

The Division of Taxation ("Division") issued four statements of proposed audit adjustment, all dated April 25, 1990, two to Walker Exploration & Production and two to Texas Meridian Operating Co. One statement issued to Walker Exploration & Production asserted sales and use taxes due of $65,438.02, plus penalty and interest, for the following sales tax periods:

Periods Ended	Sales and Use Taxes Due	Penalty	Interest
2/28/87	$ 6,368.84	$ 1,910.65	$ 2,974.73
5/31/87	15,837.68	4,751.30	6,705.26
8/31/87	17,120.93	5,136.28	6,522.63
11/30/87	8,534.87	2,560.46	2,904.23
2/29/88	7,009.76	2,102.93	2,111.40
5/31/88	6,275.56	1,882.67	1,647.01

8/31/88	4,290.38	1,287.11	964.66
Total	$65,438.02	$19,631.40	$23,829.92

This statement indicated that the assertion of tax due was based on an "audit of records". The second statement issued to Walker Exploration & Production asserted penalties due of $6,543.81, which were calculated at 10% of the sales and use taxes asserted as due in the first statement. This statement also indicated that it was based on an "audit of records".

One Statement of Proposed Audit Adjustment issued against Texas Meridian Operating Co. asserted additional sales and use taxes due of $31,781.89, plus penalty and interest, for the following sales tax periods:

Periods Ended	Sales and Use Taxes Due	Penalty	Interest
8/31/88	$ 1,771.75	$ 531.53	$ 398.36
11/30/88	6,069.32	1,638.72	1,145.56
2/28/89	6,946.86	1,667.25	1,070.47
5/31/89	6,029.37	1,266.17	721.81
8/31/89	5,627.21	1,012.90	485.97
11/30/89	5,337.38	800.61	290.07
Total	$31,781.89	$6,917.18	$4,112.24

This statement indicated that the assertion of tax due was based on an "audit of records". The second statement issued to Texas Meridian Operating Co. asserted penalties due of $3,178.20, which were calculated at 10% of the sales and use taxes asserted as due in the first statement. This second statement also indicated that it was based on an "audit of records". The record does not include copies of any statements of proposed audit adjustment that might have been separately issued against the individual petitioners.

Ten notices of determination and demands for payment of sales and use taxes due, all dated June 20, 1990, were issued by the Division against petitioners, two notices for each petitioner, respectively. The first notice of determination issued against Walker Exploration & Production asserted sales and use taxes due of $65,438.02, plus penalty and interest, which corresponded to the amounts shown on the Statement of Proposed Audit Adjustment described above. This notice indicated that the additional sales and use taxes "have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records." The second notice of determination issued against Walker Exploration & Production

asserted omnibus penalties due of $6,543.81 under Tax Law § 1145, which corresponded to the penalties shown on the second Statement of Proposed Audit Adjustment described above. The two notices of determination issued against John B. Walker, as president of Walker Exploration & Production, asserted sales and use taxes due, plus penalties and interest and omnibus penalties, which corresponded to the amounts asserted as due against the corporate petitioner. The notices against Mr. Walker indicated that he was "liable individually . . . under Sections 1131(1) and 1133 of the Tax Law . . ." and that the sales and use taxes were "determined to be due in accordance with Section 1138(a) of the Tax Law."

The first notice of determination issued against Texas Meridian Operating Co. asserted sales and use taxes due of $31,781.89, plus penalty and interest, which corresponded to the amounts shown on the Statement of Proposed Audit Adjustment described above. This notice indicated that the additional sales and use taxes "have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records." The second notice of determination issued against Texas Meridian Operating Co. asserted omnibus penalties due of $3,178.20 under Tax Law § 1145, which corresponded to the penalties shown on the second Statement of Proposed Audit Adjustment described above. The two notices of determination issued against Joseph A. Reeves, Jr., as officer of Texas Meridian Operating Co., and the two notices issued against Michael Mayell, as president of Texas Meridian Operating Co., asserted sales and use taxes, plus penalties and interest and omnibus penalties, which corresponded to the amounts asserted as due against the corporate petitioner. The notices indicated that Messrs. Reeves and Mayell, respectively, were "liable individually . . . under Sections 1131(1) and 1133 of the Tax Law . . ." and that the sales and use taxes were "determined to be due in accordance with Section 1138(a) of the Tax Law."

None of the notices issued against petitioners indicated that tax had been estimated. Rather, all of the notices indicated, as noted above, that they were based on an audit of records.

A review of the audit report discloses the following information concerning the auditor's determination that the corporate petitioners had additional taxable sales totalling $2,029,220.00,

with additional tax due of $77,910.52:

> "Sales tax collected for well maintenance acct. #8000.505 was recorded from vendors [sic] journals. Although the county rate only applies [,] vendor owed the total taxes collected for the audit period."

The audit report also noted that petitioners had additional taxable "purchases/expenses" of $276,079.00, with additional tax due of $19,309.39 and included the following explanation:

> "Use tax due is attributed to the waste disposal charges for the brine which is a result of the mining process of the gas wells."

The audit report showed a total for additional tax due of $97,219.91 ($77,910.52 plus $19,309.39) which was also the total amount of sales and use taxes asserted due against Walker Exploration & Production and Texas Meridian Operating Co. ($65,438.02 plus $31,781.89 equals $97,219.91). The audit report also noted that 10% omnibus penalty was imposed because "[t]ax omission is greater than 25% of audited tax due for periods ending 02/87-11/89."

The "auditor's contacts and comments" log included in the audit report shows that he had frequent contact with Martha Peddy, who was assigned by petitioners to assist the auditor during the audit.[1] The entry for March 7, 1990, in relevant part, provided as follows (with the auditor's punctuation and shorthand):

> "Called Martha Peddy told her of tax due on maint. charges subject to 3% or 4% county rate also hauling of waste subject to tax rate 7% or 8% . . . . Martha will divide activity into counties where wells are located."

The auditor testified at the hearing and explained the basis for his determination that sales and use taxes were due from petitioners. According to the auditor, Martha Peddy provided him with a chart of accounts which he reviewed and concluded that there were two accounts that had "any sales tax implication." The two accounts consisted of a well maintenance fee account #8000.500 and a brine disposal account #8000.540. An account described as a maintenance tax account #8000.505 showed "tax collected on it [well maintenance fees]." Included in the record, as part of the audit report, is a workpaper labeled "Account Analysis for

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[1]Copies of correspondence on the letterhead of Texas Meridian Resources, Ltd. from Martha Peddy to the auditor show her title as "Partnership Accountant" or "Partnership and Tax Accountant".

New York State Sales Tax Audit" dated March 2, 1990. It appears that this document was prepared by Ms. Peddy and provided to the auditor. This analysis was of the three accounts which provided the basis for the auditor's determination that sales and use taxes were due and showed the following:

Account Date	Maintenance Fee 8000.500	Maintenance Tax 8000.505	Brine 8000.540
12/86	$ 0.00	$ 0.00	$ 261.21
1/87	57,193.08	1,206.68	8,915.87
2/87	54,053.10	3,783.98	10,511.32
3/87	57,430.85	4,020.45	14,396.97

4/87	107,902.52	4,125.55	34,343.88
5/87	60,563.76	4,239.78	572.06
6/87	59,307.13	4,151.81	0.00
7/87	58,467.89	4,093.04	59,540.61
8/87	55,015.71	3,851.37	12,178.87
9/87	54,710.21	3,830.00	5,498.48
10/87	53,835.56	1,644.66	846.53
11/87	53,811.47	1,636.94	13,987.49
12/87	54,664.44	1,652.76	6,635.79
1/88	54,918.71	1,665.89	9,394.26
2/88	54,113.27	1,648.43	13,145.40
3/88	55,513.39	1,690.93	3,514.84
4/88	55,631.92	1,687.77	6,570.46
5/88	56,510.32	1,725.08	6,654.39
6/88	56,861.87	1,743.35	6,727.96
7/88	58,032.05	1,785.15	4,155.97
8/88	56,903.30	1,742.50	417.86
9/88	57,217.42	1,763.17	6,433.27
10/88	56,457.79	1,741.08	1,776.94
11/88	57,359.66	1,754.02	3,376.10
12/88	59,047.25	1,765.42	15,456.02
1/89	57,984.51	1,759.29	5,082.52
2/89	58,637.32	1,790.54	2,977.95
3/89	58,769.16	1,791.20	2,569.20
4/89	55,316.55	1,686.48	4,008.43
5/89	55,393.84	1,688.79	5,839.60
6/89	53,963.46	1,644.37	4,386.41
7/89	56,278.88	1,713.82	2,715.91
8/89	57,257.60	1,743.59	403.84
9/89	57,173.71	1,719.13	220.59
10/89	55,741.87	1,699.66	497.67
11/89	57,180.07	1,723.84	2,063.90
Total	$2,029,219.64	$77,910.52	$276,078.57

Also included in the audit report is a similar analysis for Cattaraugus County which shows the following totals: Maintenance Fee Account 8000.500, $37,718.56; Maintenance Account 8000.505, $1,665.76; and Brine Account 8000.540, $771.56. An analysis for Chautauqua County, the other county in western New York where the corporate petitioners operated gas wells, was not included in the record. It would appear that the major part of the operations were in Chautauqua County given the small amounts shown on the analysis for Cattaraugus County.

The auditor testified that Ms. Peddy "made the comment she was aware it [maintenance fee] was taxable and they had collected taxes on it." The auditor noted that only the county portion of sales and use tax of 3% was due, and that Walker Exploration & Production

overcollected tax by applying a 7% rate in 1987 during the months of February, March, May, June, July, August and September.

The auditor did not verify the amounts provided by Ms. Peddy for these three accounts. There is some conflicting evidence in the record whether there were invoices or source documents for the gas well maintenance fees. The auditor testified that petitioners did not have any "journals and invoices for the audit period" while a form included in the audit report, "Records Available/Requested During Audit", shows the availability of sales invoices. However, the auditor testified that the reference to the availability of sales invoices "would have been the information that was supplied by Martha Peddy from the two accounts. It's not actual sales invoices." Adding to the confusion in the record concerning the availability of records was the auditor's later testimony that there was limited documentation available "because the vendor's actual site was in western New York and I was doing the audit in Houston."

At the hearing, the auditor testified that after receiving additional information from petitioners, the Division reduced its determination of additional sales and use taxes by $19,271.49 for the audit period, which represented "use tax" which had been determined as due on "the disposal of their waste material which was brine from the maintenance of the wells." Although the record is not clear on this point, what the Division had once viewed as an expense of the corporate petitioners (the cost to dispose of brine) apparently was, according to the auditor's testimony, "the sale of the brine . . . to an exempt organization such as [a] municipality which would make that an exempt service [emphasis added]." The Division's representative referenced the Division's Exhibit "Q" as a "schedule of adjustments with respect to the brine disposal . . . ." It is observed that in addition to a reduction of $19,271.49, which Exhibit "Q" shows as use tax due on "disposal charges for Chautauqua County", the Division's concession would also apply to the use tax due of $37.90 on "disposal charges for Cattaraugus County." Therefore, the reduction in taxes asserted as due as a result of the Division's concession on the issue of brine disposal (or sale) is, in fact, $19,309.39 ($19,271.49 plus $37.90) which corresponds to tax calculated due on the additional taxable "purchases/expenses" of

$276,079.00 detailed in Finding of Fact "4".

Petitioners offered no testimony on their behalf at the hearing. Their case consisted of the introduction by their representative of the following documents. Petitioners' Exhibit "1" was a photocopy of a letter dated February 23, 1989 on the letterhead of Texas Meridian Resources, Ltd. from Gretchen Grimes, Tax Accountant, to a Barbara Weber, an employee in the Division's Buffalo District Office. Ms. Grimes wrote: "[W]e are an exempt business. We are in the oil and gas industry, strictly for resale." Ms. Grimes blamed "reorganization changes" for late-filed tax returns for the quarters ending May 31, 1988 and September 30, 1988. Her letter enclosed returns for such periods which show zero taxable sales. A check for $100.00 was also enclosed for payment of "the penalty [for late filing] of $50.00 for each return."

Petitioners' Exhibit "2" consists of a photocopy of a letter dated October 29, 1987 of Robert P. Mingoia, described as "Vice-President - Accounting" of Walker Energy, to the Tax Compliance Division. This letter enclosed tax returns for the quarters ending February 28, 1987, May 31, 1987 and August 31, 1987. A check for $467.69 was also enclosed for payment of the following: for the quarter ending February 28, 1987, $11.44 in sales and use taxes on reported taxable sales and services of $348.00 and a $50.00 late filing charge; for the quarter ending May 31, 1987, $143.00 in sales and use taxes on reported taxable sales and services of $4,667.00 and a $50.00 late filing charge; for the quarter ending August 31, 1987, $163.25 in sales and use taxes on reported taxable sales and services of $5,342.00 and a $50.00 late filing charge.

Petitioners' Exhibit "3" is a photocopy of a check dated March 14, 1989 in the amount of $50.00 for payment of a late filing charge for the sales and use tax return for the quarter ending February 29, 1988. Exhibit "3" also includes a photocopy of the return, dated March 14, 1989, which reported zero sales and use taxes.

The three sales and use tax returns included in petitioners' Exhibits "1" and "3" were signed by J. Larry Mathews as vice-president of Walker Exploration & Production. The three sales and use tax returns included in petitioners' Exhibit "2" were signed by Robert P. Mingoia

as vice-president - accounting of Walker Exploration & Production.

Petitioners' Exhibit "4" is a photocopy of a letter dated June 17, 1992 on the letterhead of the Audit Division - Central Sales Tax Section to Texas Meridian Operating Co. noting that $2,622.44 of its so-called "approved refund" had been applied to the following:

Assessment Number	Tax Type	Amount Applied
L004188259 9	Sales	$ 407.16
L004188258 1	Sales	2,215.28

A "Consolidated Statement of Tax Liabilities" attached showed the following additional details concerning these assessments:

Assessment Number	Tax Period Ended	Tax Amount Assessed	Interest	Penalty	Current Balance Due
L004188258-1	11/30/86	$1,000.00	$920.32	$300.00	$2,220.32
L004188259-9	11/30/88	204.06	104.21	100.00	408.27
Total:					$2,628.59

Petitioners' Exhibit "5" is an affidavit dated October 26, 1992 of J. Larry Mathews, described as "the controller of Texas Meridian Resources Corporation, an affiliate of petitioner Texas Meridian Operating Company, Inc., which was formerly known as Walker Exploration and Production Corp." Mr. Mathews in his affidavit denied that "the amounts set forth in the maintenance tax account adopted by the auditor were monies received and collected by the Taxpayer". He noted that the taxpayer accounts, entitled maintenance tax (8000.505) and maintenance fee (8000.500):

> "merely reflect amounts allocated to working interests held by Texas Meridian Resources, Ltd. ('TMR') a successor master limited partnership, of which the Taxpayer was a wholly owned division. As administrator for the master limited partnership and various limited partnerships which were never completely rolled into the partnership, TMR as majority working interest holder in effect allocated these expenses to itself."

Petitioners' Exhibit "6" was a photocopy of the "Certificate of Amendment Of Application For Authority" showing the change of name of Walker Exploration & Production to Texas Meridian Operating Co.

Finally, petitioners' Exhibit "7" is a photocopy of a transmittal letter dated May 26, 1992 of the Division's representative to petitioners' representative enclosing the "recomputations".

Total sales and use taxes asserted as due against Walker Exploration & Production were reduced by $15,254.40 from $65,438.02 to $50,183.62 and as against Texas Meridian Operating Co. by $4,054.99 from $31,781.89 to $27,726.90. The total reduction is $19,309.39, which corresponds to the amount noted in Finding of Fact "7".

At the hearing, petitioners' representative noted that there was "no issue as to the corporate officers being officers of the corporation [sic]."

SUMMARY OF THE PARTIES' POSITIONS

The Division contends that the corporate petitioners collected sales taxes and failed to pay them over. Tax Law § 1137(a)(iii) requires that sales tax collected be remitted to the State, and petitioners were properly assessed after an audit conducted in accordance with Tax Law § 1138. As a result, "the question of whether a taxable service was performed need not be reached in this matter." Nonetheless, the Division maintains that the corporate petitioners performed a taxable maintenance service within the meaning of Tax Law § 1105(c)(5). In short, the Division argues:

> "This is not a complicated audit . . . . We are talking about one account and transcription of numbers by the Audit Division. We relied on petitioner's account. It was listed as a taxable maintenance account, and the Audit Division took it at its word and accepted the numbers therein." (Tr., p. 39.)

Petitioners contend that the corporate taxpayers did not, in fact, collect the sales and use taxes reflected in the account for maintenance taxes. They argue that the auditor should have checked "the figures in the accounts he transferred to his audit worksheet against cash receipts or other relevant general ledger entries." Operating expenses which have not been reimbursed should not be treated as taxable receipts.

Petitioners also argue that the State portion of the sales and use taxes asserted as due may not be imposed under Tax Law § 1105-B(b) and (c) which exempt receipts from the sale of maintenance services rendered with respect to the production of natural gas and/or the operation of gas wells:

> "To the extent such State sales or use taxes were imposed for well maintenance services in the notices of determination, such determinations were erroneous . . . and the assessments for the periods May through September 1987

should be reduced by $15,983.99."

Petitioners also contend that the determinations were erroneous because the Division "originally described [taxes asserted as due] as use taxes." Further, citing Breezy Point Surf Club v. New York State Tax Commn. (110 AD2d 323, 494 NYS2d 505), petitioners argue that "the failure of a taxpayer to pay money to [the Division] pursuant to Tax Law § 1137" may not be the basis for the issuance of a Notice of Determination under Tax Law § 1138(a), and therefore the Division of Tax Appeals lacks jurisdiction.

Petitioners also make several other arguments including the following:

(1) If additional tax is determined due, "penalties and interest should be remitted due to the novel issues presented by the additional taxes claimed due . . ., and the record keeping difficulties attributable to the taxpayer's change of ownership in 1988";

(2) The Division failed to consider that "tax returns were filed for the majority of the periods involved, including appropriate late filing penalty payments . . .";

(3) Petitioners should receive credit for deductions made against a tax refund; and

(4) Officers cannot be held personally liable for the periods where tax returns were properly filed (citing Matter of Parsons v. State Tax Commn., 34 NY2d 190, 356 NYS2d 593).

In their reply brief, petitioners raise the additional argument that "penalty and interest assessments" may not be made against the corporate officers.

CONCLUSIONS OF LAW

A. The Division's position that "[t]his is not a complicated audit" is plainly true. As noted in Finding of Fact "6", the auditor was provided with a chart of accounts by petitioners. He reviewed the chart and concluded that only two accounts had sales tax implications. To make matters even simpler for him, a third account provided by petitioners tallied up the amount of sales tax supposedly collected on the well maintenance fee account. As noted in Finding of Fact "7", the Division has reduced its determination of additional tax so that only the tax collected on the well maintenance fee account remains at issue.

The auditor's testimony and his audit report provided a rational basis for his determination of tax due on well maintenance fees (see, Matter of Shukry, Tax Appeals Tribunal, March 28, 1991, confirmed 184 AD2d 874, 585 NYS2d 531; Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219).

B. The burden is therefore placed upon petitioners to show that "the result of the method used was unreasonably inaccurate or that the amount of the tax assessed is erroneous" (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679, 681). This burden must be shouldered "by clear and convincing evidence that the methodology was not merely imprecise but unreasonably inaccurate and the tax assessed erroneous [citations omitted]" (Shukry v. Tax Appeals Tribunal, 184 AD2d 874, 585 NYS2d 531, 532).

C. Petitioners have not sustained this burden. As noted in Finding of Fact "8", petitioners did not offer the oral testimony of any witnesses. Instead, petitioners relied on an affidavit dated October 26, 1992 of J. Larry Mathews to sustain their position that the corporate petitioners did not, in fact, collect the taxes reflected in the account for maintenance taxes and that such amounts represented unreimbursed operating expenses. An affidavit is clearly admissible in an administrative hearing (see, Matter of Sholly, Tax Appeals Tribunal, January 11, 1990; 20 NYCRR 3000.10[d]). However, the weight to be given an affidavit requires careful consideration because the evaluation of the credibility of a witness, an important part of the hearing process, is waived by use of an affidavit (cf., Stevens v. Axelrod, 162 AD2d 1025, 557 NYS2d 809). In the matter at hand, the "facts" set forth in Mr. Mathews' affidavit can be given little weight since they are the crucial, ultimate facts in this matter which were directly contradicted by the auditor's testimony and by statements of Ms. Peddy which the auditor referenced. Of course, the auditor's testimony concerning Ms. Peddy's statements is hearsay evidence. But, like affidavits, hearsay evidence is also clearly admissible in an administrative hearing (see, Flanagan v. State Tax Commn., 154 AD2d 758, 546 NYS2d 205; Mira Oil Company v. Chu, 114 AD2d 619, 494 NYS2d 458, lv denied 68 NY2d 602, 505 NYS2d 1026). Weighed against the auditor's testimony and the hearsay evidence relied upon by

the Division, Mr. Mathews' affidavit does not provide a basis to conclude that petitioners have shouldered their burden of proving, by clear and convincing evidence, that the audit finding that tax (in the amount shown in the maintenance account) was collected on well maintenance fees or that the corporate petitioners collected tax on well maintenance fees (in the amount shown on the maintenance tax account) was erroneous (cf., Matter of Orvis, Tax Appeals Tribunal, January 14, 1993).

D. The Division contends that Tax Law § 1137(a)(iii) requires that all of the tax shown as collected on the maintenance tax account should be remitted to the State. Tax Law § 1137(a)(iii) provides, in relevant part, as follows:

> "All moneys collected by such person, purportedly as tax imposed by this article or pursuant to article twenty-nine, with respect to any receipt . . . and all moneys collected with respect to any receipt . . . purportedly in accordance with a schedule prescribed by the tax commission[2] but actually in excess of the amounts stated in such schedule as the amount to be collected."

The Division maintains that under Tax Law § 1105(c)(3), sales tax is properly imposed on fees for the maintenance of gas wells because such services constitute the maintenance, service or repair of tangible personal property. The Division agrees with petitioners that these services were exempt from State, but not local, sales taxes because the tangible personal property upon which the services were performed was used directly and predominantly in production (Tax Law § 1105-B; 20 NYCRR former 527.14). However, since the maintenance tax account shows that the State portion of sales tax was collected by Walker Production & Exploration for the months of February through September 1987, the Division contends that under Tax Law § 1137(a)(iii) such "over collection" must also be remitted to the State. Petitioners argue that the Appellate Division's decision in Breezy Point Surf Club v. State Tax Commn. (110 AD2d 323, 494 NYS2d 505) prohibits "the determination of a tax based upon the failure of a taxpayer to pay money to respondent [the Division]" pursuant to Tax Law § 1137

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[2] Pursuant to Tax Law § 2006, this reference to the Tax Commission is deemed to refer to the Division or the Commissioner of Taxation and Finance.

and that the Division of Tax Appeals lacks jurisdiction to review a determination of additional tax based upon Tax Law § 1137. However, petitioners misapply the decision in Breezy Point Surf Club v. State Tax Commn. (supra). In that case, the taxpayers created "a contingency fund in case their efforts were unsuccessful in resisting the assessments" (which were based upon the State's position that the rental of cabanas was subject to sales tax) (Breezy Point Surf Club v. State Tax Commn., supra, 494 NYS2d at 506). After the taxpayer in Breezy Point Surf Club prevailed, the State issued a fresh determination that taxes were due in the amount of the contingency fund. The court noted:

> "Nothing contained in [Tax Law § 1138] can be construed as authorization for determination of a tax based upon the failure of a taxpayer to pay money to respondent pursuant to Tax Law § 1137" (Breezy Point Surf Club v. State Tax Commn., supra, 494 NYS2d at 507).

The matter at hand is distinguishable from the Breezy Point Surf Club scenario because here the determination of additional taxes was based upon an audit conducted in accordance with Tax Law § 1138. No such audit was conducted in Breezy Point Surf Club v. State Tax Commn. (supra). Therefore, the Division properly determined additional taxes based upon the amounts shown as collected on petitioners' maintenance tax account, and petitioners' contention that the Division of Tax Appeals lacks jurisdiction to review such determination of additional taxes is without merit.

E. Tax Law § 1145(a)(1)(i) provides for the imposition of penalty upon persons who fail to timely file a return or timely pay any tax under Articles 28 and 29. Statutory interest is imposed for such failure by Tax Law § 1145(a)(1)(ii). Under Tax Law § 1145(a)(1)(iii), such penalty and interest in excess of the minimum may be waived if "such failure or delay was due to reasonable cause and not due to willful neglect . . . ." Tax Law § 1145(a)(1)(vi) provides for the imposition of so-called "omnibus penalty" of 10% on any person required to file a return "who omits from the total amount of state and local sales and compensating use taxes required to be shown on a return an amount which is in excess of twenty-five percent of the amount of such taxes required to be shown on the return . . . ." This provision also contains a provision for

waiver of penalties if the omission "was due to reasonable cause and not due to willful neglect."

In MCI Telecommunications Corp. (Tax Appeals Tribunal, January 16, 1992, confirmed ___ AD2d ___, 598 NYS2d 360), the Tribunal emphasized that the very nature of this statutory framework for the imposition of penalties places a substantial burden upon the taxpayer to establish reasonable cause for the abatement of penalties:

> "By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citation omitted]."

Petitioners have not shouldered this substantial burden due to their failure to introduce adequate evidence of any such reasonable cause, and the imposition of penalties and statutory interest are therefore sustained.

F. As noted in Finding of Fact "2", the penalties imposed were calculated against taxes determined due. Therefore, petitioners' argument that the Division failed to credit the corporate taxpayers for late filing penalties previously remitted is without merit. Further, as noted in Finding of Fact "8", $2,215.28 deducted from a refund check to Texas Meridian Operating Co. was applied to an assessment for the tax period ended November 30, 1986, which is not at issue herein. The $407.16 was applied to the tax period ended November 30, 1988 which is part of the period at issue herein. However, it appears to have been applied to an unrelated assessment (compare amounts shown in Finding of Fact "8" to those shown for the same quarter in Finding of Fact "2").

G. Petitioners have raised a plethora of additional issues. None have merit:

(1) Persons personally liable for sales tax determined due may be held liable for penalty and interest (Dacs Trucking Corp., Tax Appeals Tribunal, March 21, 1991);

(2) Parsons v. State Tax Commn. (34 NY2d 190, 356 NYS2d 593) is inapplicable herein because correct tax returns were not filed. Therefore, the Division had authority to proceed administratively against officers. Moreover, Tax Law § 1138(a)(3)(B) (L 1985, ch 65, § 82, eff April 17, 1985, added subpar [B]), in effect, makes the decision in Parsons v. State Tax Commn. (supra) purely academic;

(3) Petitioners failed to establish any facts to support a conclusion that the local portion of sales and use taxes may not be imposed on maintenance services performed on gas wells;

(4) The facts do not bear out petitioners' contention that tax was incorrectly characterized as use tax. Moreover, as noted in Finding of Fact "3", the statutory notices referred to the taxes determined due as sales and use taxes. This contention appears to be little more than an attempt by petitioners to introduce unnecessary confusion into the analysis of its sales and use tax liability (cf., Matter of Fannon & Osmond Photography, Tax Appeals Tribunal, July 19, 1990, confirmed 176 AD2d 1014, 574 NYS2d 866, lv denied 79 NY2d 759, 584 NYS2d 447);

(5) Petitioners have failed to establish that the statute of limitations bars the determinations of tax due (see, Matter of Jencon, Tax Appeals Tribunal, December 20, 1990).

H. The petitions of (1) Walker Exploration & Production Corp., (2) John B. Walker, officer of Walker Exploration & Production Corp., (3) Texas Meridian Operating Co., Inc., (4) Joseph A. Reeves, Jr., officer of Texas Meridian Operating Co., Inc., and (5) Michael Mayell, officer of Texas Meridian Operating Co., Inc., are granted to the extent of the Division's concession concerning the issue of brine disposal (or sale) as detailed in Finding of Fact "7", but, in all other respects, are denied, and the notices of determination dated June 20, 1990 are to be so modified to conform.

DATED: Troy, New York
August 5, 1993

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE