STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WIZARD PETROLEUM, INC.	:	DETERMINATION DTA NO. 809923
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, 1986 through November 30, 1987.	:	

Petitioner, Wizard Petroleum, Inc., 52-00 Second Street, Long Island City, New York 11101, 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, 1986 through November 30, 1987.

A hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 30, 1992 at 9:45 A.M. and continued to completion on October 1, 1992. Petitioner and the Division of Taxation filed simultaneous briefs and reply briefs on January 20, 1993 and February 22, 1993, respectively. Petitioner appeared by Norman R. Berkowitz, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the assessments of sales and use taxes were barred by the statute of limitations found at Tax Law § 1147(b).

II. Whether petitioner has established that the sales tax audit method used by the Division of Taxation was unreasonable or resulted in an incorrect assessment of sales tax.

III. Whether the Division of Taxation carried its burden of proof to show that any failure to pay sales taxes due resulted from fraud or, in the alternative, that such failure resulted from willful neglect and not from reasonable cause.

FINDINGS OF FACT

During all periods pertinent to this determination, petitioner, Wizard Petroleum, Inc.

("Wizard"), was registered as a motor fuel distributor under article 12-A of the Tax Law. The Division of Taxation ("Division") issued to Wizard three notices of determination and demands for payment of sales and use taxes due, each dated July 20, 1990. The first notice assessed sales tax due for the period June 1, 1986 through July 31, 1987 in the amount of $4,204,879.96, plus fraud penalties equal to 50 percent of the tax and interest, for a total due of $8,466,445.58. A box was checked on this notice next to the following statement: "THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(a)(1) OF THE TAX LAW." The notice also contains the following statement:

> "The following 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. In addition, fraud penalties of 50 percent of the amount of the Tax plus Interest have been added pursuant to Section 1145 of the Tax Law."

The second notice of determination issued to Wizard assessed sales tax due for the period August 1, 1987 through September 30, 1987, in the amount of $234,707.39, plus fraud penalty and interest, for a total due of $445,644.91. The third notice assessed penalty only for the period June 1, 1986 through November 30, 1987 in the amount of $443,958.72.[1]

The notices of determination were issued as a result of a combined motor fuel tax and sales tax field audit commenced by the Division in April 1986. At the time the audit was begun, the Division was working jointly with the Internal Revenue Service ("IRS"). On July 8, 1986, the Division's auditor, Richard Yeates and an IRS auditor, provided Wizard with a written document request, asking for copies of 1984 and 1985 motor fuel tax returns, sales invoices for 1984 and 1985 and purchase invoices for the same period and other related records. Mr. Yeates began his audit by preparing summary worksheets of information received from Wizard and

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[1]Penalties were assessed pursuant to Tax Law § 1145(a)(1)(vi) which states, in part:

> "Any person required by this article 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 shall be subject to a penalty equal to ten percent of the amount of such omission."

analyzing that information.

Motor fuel imported by Wizard entered New York through a terminal operated by Terminelle Corporation ("Terminelle"), a Wizard affiliate. Terminelle also serviced Janus Petroleum, Inc. ("Janus") and On-Site Petroleum, Inc. ("On-Site") which are also affiliated with Wizard. Terminelle and Wizard shared offices located at 364 Maspeth Avenue, Brooklyn where the audit was conducted. Two of Wizard's corporate officers, Ashley Jarwood and Trevor Wisdom, were principals of Terminelle during all periods under discussion.

Terminal operators, like Terminelle, are required by Tax Law § 286 (see also, 20 NYCRR 418.3) to file monthly fuel inventory reports showing, among other things, the identity of the person for whom motor fuel is stored, the identity of the person transporting the fuel to and from the storage facility, and the identity of the person to whom motor fuel is released from storage. According to Mr. Yeates's handwritten log (prepared in connection with the motor fuel tax audit), he began cross-checking the monthly fuel inventory reports filed by Terminelle with Wizard's motor fuel tax returns in March 1987.

In June 1987, Mr. Yeates visited Wizard's offices where he spoke with Ashley Jarwood. According to his contact sheet, he requested copies of sales and purchase invoices and cancelled checks. The period covered by this request is not indicated. On July 7, 1987, Mr. Yeates returned to Wizard's offices and notified Wizard that sales invoices were missing. The terminal operator reports filed by Terminelle showed book transfers of motor fuel from Wizard to Janus and On-Site for which no invoices were provided.[2] Wizard provided whatever information it had available and asked for additional time to gather the other information requested by the auditor.

Mr. Yeates's supervisor, James Hika, asked one of the Division's management units to provide him with information regarding Wizard's sales tax filing record. In response to that

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[2]A book transfer involves the transfer of motor fuel from the books of one corporation to the books of another corporation, without any actual movement of the fuel.

request, he received a computer printout generated on November 4, 1987, summarizing the Division's records

regarding Wizard's filing of tax returns. The printout shows that Wizard filed returns for the months of November 1985, December 1985 and March 1986 without payment of tax shown as due on those returns. In November 1986, Wizard gave the Division's auditor two certified checks in the amounts of $7,407.64 and $228,690.90 as payment for tax due for the months of December 1985 and March 1986 respectively. The Division later issued an assessment for tax due for the month of November 1985 in the amount of $122,588.24. The computer printout also showed that Wizard filed no sales tax returns after May 1986.

On November 10, 1987, Mr. Hika and Mr. Yeates met with Ms. Jarwood and requested copies of sales tax returns (forms FT-945, Sales Tax Prepayment on Motor Fuel) for the period May 1986 through September 1987, plus supporting documentation and schedules. In response to this request, Ms. Jarwood gave the Division copies of returns purportedly filed with the Division. Each of the returns shows substantial amounts of motor fuel imported into New York by Wizard, and a credit equal to the amount of the prepaid sales tax due, resulting in a zero tax liability. Ms. Jarwood told the auditors that Wizard sold all of the product it imported into New York during this period to All City Gas Sales, Inc. ("All City") for export out of New York.

Both auditors testified that Ms. Jarwood told them that Wizard had previously filed the sales tax returns provided on audit with the Division by mailing them to Holtsville, New York. The Division has no offices in Holtsville, New York. Ms. Jarwood did not testify at hearing, but in an affidavit she stated:

> "I have no recollection of stating to an auditor of the New York State Department of Taxation and Finance that any tax returns of Wizard Petroleum, Inc. were sent to Holtsville, N.Y."

Ms. Jarwood provided the auditors with a copy of a "Certificate for Sales Tax Exemption on Purchase of Certain Fuels" for All City. It bears the signature of Peter Strauss and is dated May 28, 1986. Entries on the certificate indicate that it is a blanket certificate and

that fuel was purchased exclusively for immediate export to New Jersey. The certificate, which bears the print date "10/83" was not authorized for use after June 1985.

The auditors compared Wizard's filed motor fuel tax returns, the sales tax returns provided on audit and Terminelle's monthly report of fuel inventory. This comparison disclosed the following information.

Wizard's motor fuel tax returns for the months of June 1986 through September 1987 show no credits taken for sales to out-of-state customers or for transfers out of state. Thus, Wizard's motor fuel returns, which show no exports of motor fuel, were found to be in complete conflict with the sales tax returns which show that all of its fuel was sold for export.

Terminelle's reports show book transfers of motor fuel to entities other than All City, including Janus, On-Site, and companies identified as "Dome", "Rack Sales, Inc.", and others. This is contrary to Wizard's claim that it sold all of the motor fuel it imported to All City. Terminelle's reports also show book transfers of motor fuel from All City to Janus and others, indicating that all fuel purchased by All City was not immediately exported. The reports also show that the motor fuel which entered the Terminelle terminal eventually was trucked out, primarily by vehicles owned by Janus.

Terminelle's reports were signed by Trevor Wisdom as vice-president. Mr. Wisdom also signed Wizard's motor fuel tax returns and some of the sales tax returns provided to the auditors.

The following information is typical of information contained in Terminelle's monthly fuel inventory report.

One report (placed in evidence) is for the month of July 1987. It is signed by Trevor Wisdom as vice president of Terminelle. Attached to the report are six individual customer reconciliations. The first reconciliation is for "ACP" (All City).[3] It shows a beginning

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[3]Where the name "All City" is spelled out on the reconciliations, the customer motor fuel registration number is shown as "5199". This is the same number shown where the abbreviation "ACP" is used.

inventory of 12,621,727 gallons of motor fuel, and book transfers totalling 2,214,336 gallons of motor fuel from Wizard to All City. It then shows book transfers of 2,456,910 gallons of motor fuel from All City to "Tun-Yung". The summary of withdrawals section shows no delivery or transportation of motor fuel out of the terminal. Other reconciliations show book transfers of motor fuel from Wizard to Janus and the withdrawal and trucking of that fuel from the terminal; book transfers from Wizard to On-Site (also trucked out of the terminal). A reconciliation for Tun-Yung shows book transfers of motor fuel from All City to Tun-Yung and from Tun-Yung to Sun-Light and again no actual withdrawals of fuel from the terminal.

Based upon the facts uncovered on audit, Mr. Hika recommended that the audit results be transferred to the Division's Petroleum, Alcohol and Tobacco Bureau for possible criminal investigation. After meeting with representatives of that bureau, Mr. Hika was instructed to hold the audit in abeyance until the criminal investigation was completed. In June 1990, the auditors were instructed to proceed with the audit by assessing any tax determined to be due.

The amount of tax assessed by the Division for each month of the assessment period is the amount shown as due on each sales tax return provided to the auditors. No adjustments were made except that the credit claimed on each return was disallowed. The fraud penalty was imposed on all tax assessed. An additional penalty was imposed under Tax Law § 1147(a)(7) for the period June 1, 1986 through September 30, 1987. Worksheets prepared by the Division and provided to petitioner show that this penalty was calculated on a monthly basis (as was the tax assessment) for the months of June 1986 through September 1987, although the notice of determination assessing the penalty indicates that the penalty was determined for the sales tax quarterly period ending November 30, 1987.

All of the sales tax returns provided to the auditors in November 1987 bear the following imprint in the upper lefthand corner "FT-945 (5/85)". Form FT-945 was revised in May 1985, June 1986 and September 1987. The returns provided to the auditors were completed on obsolete forms. According to the affidavit of James J. Morris, Jr., a Division

employee whose office is in charge of revising these forms, revised forms are distributed to registered motor fuel distributors on a monthly basis.

Chapter 44 of the Laws of 1985 made significant amendments to New York's motor fuel tax law. The "First Import Act," as it came to be called, provided for the imposition of the motor fuel tax and the prepayment of sales tax at the time of importation or production, rather than at the time of sale. The Division introduced into evidence three publications of the Division which explained to motor fuel distributors their obligations under the First Import Act. Among other things these publications explain that a purchaser buying for immediate export would be required to file a properly completed Form FT-936, "Statement of Exportation of Motor Fuel by Purchaser." The publications also explain that purchases of motor fuel for immediate export do not qualify for exemption from taxation, although a refund or credit would be allowed for tax paid or passed through if certain conditions were met. The FT-936 differs from the All City sales tax exemption certificate provided by Wizard in several important respects.

The FT-936 requires attachment of a copy of the purchaser's "valid distributor/dealer license" or a letter from the state in which the dealer operates certifying his status as a distributor/dealer of motor fuel. The FT-936 requires the purchaser to identify the location of the out-of-state facility to which the fuel will be transported and to identify the mode of transportation and the name of the transporter (if different from the purchaser). Finally, the FT-936 asks the purchaser to state the number of gallons of motor fuel purchased. The sales tax exemption certificate contains none of these requirements.

Wizard entered into evidence several documents which demonstrate that the Division's recordkeeping system contained an error with regard to Wizard's sales tax payment record.

Mr. Yeates received a certified check from Wizard in the amount of $228,690.90 as payment for sales tax due for the period ended March 31, 1986. In a letter to Wizard's attorney, Norman Berkowitz, dated March 16, 1990, the Division correctly advised that no sales tax was due for that period, but also advised that penalty and interest totalling $126,269.62 remained

due. The Division issued to Wizard a Notice and Demand dated June 1, 1992, requesting payment of penalty and interest in connection with the late payment of tax for the period ended March 31, 1986. By this time, the penalty and interest amounted to $145,155.15. There is no proven error in these documents; however, attached to the Notice and Demand is a Consolidated Statement of Tax Liabilities which asserts that the tax assessment for the period ended March 31, 1986 in the amount of $228,690.90 was not paid and is subject to collection action by the State.

Wizard also entered in evidence a letter signed by Joseph M. Fiano as Director of the Division's Tax Compliance Division which states, in pertinent part:

> "Your client's return for the period ending November 30, 1985 was received timely on December 20, 1985, without payment. Due to a systems problem, our Processing Division was unable to issue an assessment for this unpaid tax until February 27, 1989, however, your client could have made voluntary payment at any time. We have no record that any payments were received for this period. The balance now due is $229,412.30 which consists of $122,588.24 in tax, $36,776.42 in penalty and $70,047.64 in interest."

Petitioner's purpose in introducing this letter is to show that the Division's computer system is flawed and, as a consequence, that the Division's assertion that no sales tax returns were filed for periods after May 31, 1986 is unreliable.

Benet Doloboff, Wizard's accountant during the periods at issue, testified concerning accounting work done by him or his staff for Wizard. He stated that he or a member of his firm prepared Wizard's monthly motor fuel tax returns and sales tax prepayment returns at the same time. The completed returns were given to Wizard's bookkeeper with instructions for payment of the tax shown as due on the returns. The returns were prepared from information provided by Wizard. Mr. Doloboff did not maintain Wizard's books and records but relied on the records provided. He testified that, to the best of his knowledge, all returns he prepared were filed.

When Mr. Doloboff was asked the basis for his belief that All City was exporting motor fuel he stated: "I had a resale certificate." He admitted under cross-examination that book transfers of motor fuel do not constitute an export of fuel and also admitted he had no personal knowledge as to whether All City actually exported motor fuel.

Mr. Doloboff was asked to explain why Wizard claimed no credit for out-of-state sales on its motor fuel tax returns for the subject period, but claims that all of its purchases were sold for export for sales tax purposes. He responded as follows:

> "We had in our possession this export resale certificate for export, and were never given any sort of resale certificate for excise taxes. Since we had no certificate in our files, we -- and the taxpayer said they were going to try and get that, we felt that it was prudent that they file the excise tax return, and if and when we were able to receive a certificate of exemption we could always file for a refund." (Tr., pp. 294-295.)

All City provided Wizard with a Federal Registration for Tax-Free Transactions Under Chapters 31 and 32 of the Internal Revenue Code, dated May 5, 1986.

The Division had in its audit files a copy of a New York State Export Certificate for article 13-A petroleum business taxes. It is a blanket certificate, showing All City as the buyer and Wizard as the seller of petroleum purchased for immediate export for use outside New York. Apparently, it was received from Wizard during the audit.

The Division offered in evidence a sample invoice showing a sale by Wizard of 167,412 gallons of gasoline to All City for $120,536.64, plus an 8% State "gross receipts tax" of $3,463.30, for a total due of $123,999.94. Mr. Doloboff testified that the invoice is typical of those issued by Wizard to All City. He also testified that he used Wizard's sales invoices to prepare its motor fuel and sales tax returns. Mr. Doloboff testified that Wizard maintained adequate books and records for the audit period.

CONCLUSIONS OF LAW

A. Petitioner claims that the three-year statute of limitation for assessment of sales and use taxes (Tax Law § 1147[b]) expired before the Division issued notices of determination dated July 20, 1990 for the period June 1, 1986 through May 31, 1987. Petitioner asserts that the weight of the evidence shows that the sales tax returns provided to the Division on audit were previously filed on a timely basis. It is petitioner's contention that the tax assessed was "estimated" as indicated on one of the three notices of determination. With this as a premise, petitioner argues that the Division improperly resorted to an estimating procedure to determine tax due, although Wizard maintained adequate books and records of its transactions. Petitioner

also asserts that the Division failed to make a request for those books and records. Finally, petitioner claims that it is "relieved of its duty to collect sales tax from All City" because it accepted an exemption certificate from All City in good faith.

The Division asserts that the burden of proof to support a statute of limitations defense is on the party asserting the defense. It further claims that petitioner has failed to establish timely mailing of sales tax returns for the assessment period and thus has not met its burden. The Division maintains that petitioner has not carried its burden of proof to show that either the audit method or results obtained were in error. Furthermore, the Division contends that Wizard's officers had actual knowledge that the motor fuel purchased by All City was not exported; consequently, petitioner did not receive the exemption certificate in good faith. Finally, the Division argues that it has met its burden of showing that petitioner's failure to file the required sales tax returns and pay over the tax required to be shown as due on those returns is due to fraud, or in the alternative is due to willful neglect.

B. Before addressing the arguments of the parties, I will briefly outline the motor fuel tax law and sales tax law as it applies in this case.

Prior to September 1, 1982, sales tax on motor fuel was imposed and required to be collected on each gallon of gasoline sold at retail service stations (Tax Law § 1111[former (d), (e)]). The tax was imposed at the combined State and local rate, if any, which was applied to the actual selling price. The individual retail service station was thus required to collect and remit the tax.

Beginning September 1, 1982, the retail sales tax on motor fuel was collected on sales by distributors to non-distributors (L 1982, chs 454 and 469). The 1982 legislation was aimed at protecting State and local revenue from evasion of taxes. Partly because it allowed distributors to buy and sell motor fuel to each other tax-free (see, 20 NYCRR former 410.7), this enactment proved inadequate to detect and deter tax evasion with respect to motor fuel taxes and sales taxes on motor fuel. To combat tax evasion in the motor fuel industry, the Legislature enacted what has been called the "First Import Act" (L 1985, ch 44). The Memorandum in Support of

chapter 44 discussed the large revenue loss caused by evasion of the taxes on motor fuel:

> "This bill is aimed at deterring tax evasion with respect to motor fuel sold in this State. This evasion has promoted unfair competition and erosion of the State and local tax bases for which the Governor's Task Force on Administration of Taxes on Petroleum Products and Businesses estimates an annual State local loss of at least $90 million. Industry estimates of the combined State and local revenue loss range as high as $200 million annually." (Memorandum in Support, Governor's Bill Jacket, L 1985, ch 44.)

Two methods of tax evasion were identified: (1) daisy chain schemes obfuscated liability for payment of the taxes due by setting up multiple tax-free sales of motor fuel between distributors, with the taxable event being the sale of motor fuel by a non-existent or insolvent distributor, and (2) bootlegging schemes simply involved the evasion of tax by failing to report the import and sale of motor fuel (see, Memorandum of James J. Lack, 1985 NY Legis Ann, at 55). The First Import Law (L 1985, ch 44) enhanced the enforcement of the motor fuel and sales tax laws through several complementary strategies. Tax Law § 284 was amended to impose the excise tax upon motor fuel imported into New York, thus establishing the taxable event as the first import rather than the first sale in New York and effectively eliminating tax-free sales between distributors (see, Memorandum in Support, Governor's Bill Jacket, L 1985, ch 44). Section 1102 was added to article 28. It requires motor fuel distributors to prepay the sales taxes imposed under articles 28 and 29 of the Tax Law upon importation and to pass the tax through to the purchaser unless the purchaser is exempt from the sales tax (Tax Law § 1102). There is no provision of the Tax Law exempting sales for export from the requirement that the tax be passed through to the purchaser. However, a credit is allowed a distributor or a purchaser for motor fuel which is immediately exported out of the state for sale outside the state when the following conditions are met: (1) the fuel must be "immediately shipped" to an identified facility outside New York and (2) the applicant must comply "with all requirements and rules and regulations of the tax commission, including evidentiary requirements, relating thereto" (Tax Law § 1120[e]). During the assessment period, sellers were allowed to make sales for immediate export without passing through the prepaid sales tax if they received a completed Form FT-936, Statement of Exportation of Motor Fuel by Purchaser (Form FT-936).

C. Tax Law § 1147(b) provides that:

> "except in the case of a willfully false or fraudulent return with intent to evade the tax no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return . . . ."

To establish a statute of limitations defense, the party raising the defense must go forward with a prima facie case showing the date on which the limitations period commences, the expiration of the statutory period and receipt or mailing of the statutory notice after the running of the period (see, Matter of Jencon, Tax Appeals Tribunal, December 20, 1990). Pursuant to Tax Law § 1147(b), the limitation period for assessment of sales and use taxes commences on the date of filing of the subject returns. Thus, to succeed in making a prima facie case, petitioner was required to establish both the fact and date of filing of the sales tax returns for the assessment period. It has not established that the returns in question were filed before they were given to the auditors on November 10, 1987. Mr. Doloboff's testimony may have succeeded in showing that it was his, or his staff's, custom to prepare monthly sales tax returns. It fell far short of showing that those returns were ever mailed or submitted to the Division. Petitioner's other arguments impermissibly attempt to shift the burden of proof to the Division to show that the returns were not filed in a timely manner.

D. The amount of tax assessed in this case was based entirely on petitioner's own calculation of sales tax prepayments due on its imports of motor fuel. The Division's only adjustment was to disallow the credit claimed on each return for purported sales for immediate export. Petitioner's claims with regard to the propriety of the audit method will be addressed individually.

Initially, petitioner claims that the sales tax assessed was estimated; however, it does not explain why it believes that the Division's method of calculating the tax due is an estimate; instead, it relies on the checkmark on one of the notices of determination indicating the same.[4]

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[4]Petitioner makes no claim that it was misled or prejudiced in any way by the statement that the tax was estimated; therefore, the validity of the assessment document is not called into question (see, Matter of A & J Parking, Tax Appeals Tribunal, April 9, 1992).

The Division accepted as accurate petitioner's calculation of the amounts of motor fuel it imported into New York as shown on sales tax returns. Furthermore, it must be remembered that the sales tax audit took place in conjunction with an audit of petitioner's motor fuel tax returns. The motor fuel tax returns were cross-checked against Terminelle's monthly inventory reports. By cross-checking the three monthly reports (or returns), the Division was able to verify the amount of motor fuel imported into New York during the audit period. The only issues that arose as a result of the sales tax audit were (1) whether petitioner had made payment of all tax shown as due on filed returns (it had not) and (2) whether there was adequate substantiation for the credits claimed on the sales tax returns provided to the auditors for the period June 1, 1986 through November 30, 1987. The scope of the audit was limited to these two issues, and the assessment was based on the disallowance of credits claimed by petitioner. Accordingly, petitioner's claim that the tax was estimated is not supported by the record as a whole and is rejected.

Petitioner claims that the Division failed to make a request for its books and records for the complete period of the assessment. The evidence introduced by the Division establishes otherwise. Mr. Yeates testified that he made repeated oral requests for books and records. His contact sheet

shows that he requested sales and purchase invoices together with cancelled checks on June 18, 1987. Other requests for documents were made on July 7, 1987 and July 8, 1987. On July 9, 1987, Mr. Yeates requested copies of cancelled checks to verify payments of sales tax. On November 10, 1987, Mr. Hika and Mr. Yeates met with Ms. Jarwood and requested copies of FT-945's (Prepayment of Sales Tax on Motor Fuel) for the assessment period and sales invoices to support the credits claimed on the FT-945's. In response to the auditors' requests, the Division was provided with some All City invoices and an exemption certificate from All City. Mr. Yeates testified that he requested books and records for the entire assessment period, and petitioner presented no evidence to challenge that testimony. Therefore, the record does not

support petitioner's claim that the Division failed to make an adequate request for books and records.

Petitioner claims that the Division was required to thoroughly examine its books and records for the entire period of the proposed assessment before issuing a notice of determination. A credit is a form of exemption from tax, and the taxpayer bears the burden of showing "a clear cut entitlement to the statutory benefit" (Matter of Golub Service Station v. Tax Appeals Tribunal, 181 AD2d 216, 585 NYS2d 864, 865, quoting Matter of Luther Forest Corp. v. McGuiness, 164 AD2d 629, 632, 565 NYS2d 570). In this case, the Division accepted petitioner's claims with regard to the amount of motor fuel it imported into New York for the periods of the assessment but asked for substantiation of the credits claimed. I know of no authority for the proposition that the Division must conduct a full and complete audit in every instance and is prohibited from limiting its audit by merely requesting evidence to establish a taxpayer's entitlement to claimed credits.

In sum, petitioner has failed to show that the audit method was unreasonable. Accordingly, petitioner has the burden of showing that the amount assessed is incorrect (Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451).

E. Petitioner claims that it is entitled to the credits it claimed because it accepted an exemption certificate from All City in good faith. This claim lacks any credibility. In order to sell motor fuel to All City without pass through of the prepaid sales tax, petitioner was required to obtain a Statement of Exportation of Motor Fuel by Purchaser (FT-936). The exemption certificate provided to the auditors by petitioner was not the correct form. Petitioner suggests that the distinction between the two documents is one of form rather than substance, but this is not the case. As stated above, during the assessment period there was no statutory exemption entitling All City to purchase motor fuel without pass through of the prepaid sales tax. Therefore, All City's claim, via the exemption certificate, that it was exempt from taxation had no statutory basis at the time it was offered. Moreover, the certificate of exemption does not contain all of the information required by a Statement of Exportation of Motor Fuel by

Purchaser. The certificate does not ask the purchaser (in this case All City) to identify the facility to which the motor fuel will be shipped or the mode of transportation to be employed as required by Tax Law § 1120(e). The Statement requires both pieces of information. The certificate does not ask for attachment of a copy of All City's New Jersey distributor license as does the Statement. The certificate is a "blanket certificate" purporting to cover all transactions between All City and Wizard. The Statement asks the purchaser to state the number of gallons of motor fuel purchased, clearly indicating that a Statement of Exportation is required for each transaction. In short, the sales tax exemption certificate fails to request or provide the information necessary to show entitlement to a credit against sales tax as provided in Tax Law § 1120(e), and for that reason it is inadequate on its face. Moreover, no one with personal knowledge testified on petitioner's behalf to explain the circumstances surrounding its purported good faith acceptance of the certificate. All that is known about the certificate is that it was provided to the auditors by Ms. Jarwood who claimed that all of petitioner's sales for the assessment period were made to All City. Terminelle's monthly reports establish that this claim is patently untrue. Under all of these circumstances, I cannot believe that petitioner accepted the exemption certificate in good faith.

In sum, petitioner has not proved entitlement to any of the credits claimed or shown any error in the Division's assessment of tax.

F. Tax Law § 1145(a)(2) provides for the imposition of a civil penalty if the failure to file a return or pay over any tax is due to fraud. The Division bears the burden of proving fraud by clear and convincing evidence (see, Matter of Sener, Tax Appeals Tribunal, May 5, 1988; Matter of Cinelli, Tax Appeals Tribunal, September 14, 1989). 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 Sener, supra, quoting Matter of Shutt, State Tax Commn., July 13, 1982; see, Matter of Cousins Service Station, Tax Appeals Tribunal, August 11, 1988). Thus, for a taxpayer to be

subject to the civil fraud penalty, willful intent is a critical element; the individual or the corporation, acting through its officers, must have acted deliberately, knowingly, and with the specific intent to violate the law (Matter of Cousins Service Station, supra).

As 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, Tax Appeals Tribunal, October 5, 1989; Matter of Sener, supra). 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 (Korecky v. Commr., 781 F2d 1566; Stone v. Commr., 56 TC 213, 223-224; Intersimone v. Commr., 53 TCM 1073). 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., 52 TCM 234; see, Matter of AAA Sign Co., Tax Appeals Tribunal, June 22, 1989).

The record in this case contains convincing evidence that petitioner intended to evade payment of sales tax by failing to file the prepayment on sales tax returns and then attempted to cover up the evasion by providing the auditors with tax returns, which it purported to have filed, and an exempt tax certificate. The record establishes the following facts which support a finding of fraud. Two of petitioner's corporate officers, Ashley Jarwood and Trevor Wisdom, were also principals of Terminelle. Wizard and Terminelle shared the same business offices, and Ms. Jarwood and Mr. Wisdom had day-to-day involvement in both Wizard and Terminelle. During the assessment period, Wizard made book transfers of motor fuel to Janus, On-Site and other companies, as well as All City. Thus, Ms. Jarwood's representation to the auditors that all of Wizard's sales were to All City has been shown to be untrue. The record also shows that All City did not immediately export all of the product it purchased from Wizard, but rather made

book transfers of some of that motor fuel to other companies using the Terminelle terminal. Because of the close association between Wizard and Terminelle, it is concluded that Wizard, Ms. Jarwood and Mr. Wisdom were aware that All City did not immediately export all of the product it purchased. Moreover, Wizard filed motor fuel tax returns which showed no exports of motor fuel or sales to out-of-state distributors during the assessment period. Thus, its filed motor fuel returns and the sales tax returns provided on audit are in direct conflict.

With regard to evidence offered by petitioner, two points are worth making. First, Mr. Doloboff, petitioner's only witness, offered testimony which was indirect, somewhat evasive and for the most part unconvincing. For instance, although he testified to preparing sales tax returns, he could not testify from his own knowledge as to whether returns were ever mailed to the Division. His attempt to reconcile petitioner's conflicting motor fuel tax and sales tax returns lacked any credibility. Second, although petitioner's attorney repeatedly challenged the credibility of the Division's witnesses and the reliability of its documentary evidence, petitioner offered almost no evidence of its own to refute the Division's case. Most damaging to petitioner's case is its failure to address the information taken from the Terminelle reports showing that Wizard made transfers of motor fuel to customers other than All City during the assessment period and that All City did not export all of the product it purchased from petitioner.

G. The petition of Wizard Petroleum, Inc. is denied, and the notices of determination issued on July 20, 1990 are sustained.

DATED: Troy, New York
April 22, 1993

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE