STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ASHLEY JARWOOD, OFFICER OF WIZARD PETROLEUM, INC.	:	DETERMINATION DTA NO. 811098
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, Ashley Jarwood, 200 East 62nd Street, New York, New York 10021-8209, 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 held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on July 13, 1994 at 9:30 A.M. In a letter dated August 22, 1994 petitioner was given until November 9, 1994 to serve and file a reply brief which commenced the six-month period for issuing this determination. Petitioner filed a brief on September 20, 1994. The Division of Taxation filed a brief on October 17, 1994 and petitioner filed a reply brief on November 8, 1994. Petitioner appeared by Norman R. Berkowitz, Esq. The Division of Taxation appeared by William F. Collins, Esq. (John Matthews, Esq., of counsel).

ISSUES

I. Whether petitioner is barred by the doctrine of collateral estoppel from litigating certain issues which were resolved in Matter of Wizard Petroleum, Inc. (Tax Appeals Tribunal, March 24, 1994).

II. Whether the assessment of sales and use taxes was barred by the statute of limitations.

III. Whether the audit method employed by the Division of Taxation was reasonably calculated to determine taxes due.

IV. Whether Ashley Jarwood was a person required to collect and pay over sales tax on behalf of Wizard Petroleum, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) during the period in issue.

V. Whether the Division of Taxation carried its burden of proof to show that any failure to pay sales taxes due resulted from fraud.

FINDINGS OF FACT

At the hearing on the petition of Ashley Jarwood, the Division of Taxation ("Division") offered as an exhibit the transcript of the hearing and documents which were offered at the hearing on the petition of Wizard Petroleum, Inc. On the basis of the same transcript and exhibits, the same facts found by the Tax Appeals Tribunal are found herein as follows:

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]

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

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 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.

"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."

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 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

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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.

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 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

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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.

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 left-hand 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.

The petition of Wizard was signed by Norman Berkowitz, Esq., as petitioner's representative. The power of attorney which appointed Mr. Berkowitz to represent Wizard was signed by Mr. Trevor Wisdom.

The Division issued to petitioner, Ashley Jarwood, three notices of determination and demands for payment of sales and use taxes due, each dated July 20, 1990. The first notice assessed sales and use taxes due for the period June 1, 1986 through July 30, 1987 in the amount of $4,204,879.96, plus penalty of $2,102,439.98 and interest of $2,159,125.64, for a total amount due of $8,466,445.58. The second notice assessed sales and use taxes for the period June 1, 1987 through September 30, 1987 in the amount of $234,707.39, plus penalty of $117,353.70 and interest of $93,583.82, for a total amount due of $445,644.91.

On each of the foregoing notices, a box was checked next to the statement: "THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(a)(1) OF THE TAX LAW." The notices also contained the following statement:

> "You are liable individually and as Officer of Wizard Petroleum Inc. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law. In addition, fraud penalties of 50 percent of the amount of tax due plus interest have been added pursuant to Section 1145(a)(2) of the Tax Law."

The third notice assessed penalty only for the period June 1, 1986 through November 30, 1987 in the amount of $443,958.72. The notice explained that:

> "The following penalties are being imposed pursuant to Section 1145 of the Tax Law. This notice is in addition to Notice number S900720803M & S900720804M."[4]

Since Wizard's inception, the firm of Seller, Stein and Doloboff has provided accounting

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[4] The explanation refers to the notices described in Finding of Fact "3".

services to Wizard. Mr. Doloboff was the partner in charge of Wizard's account. For the period at issue, Wizard's accounting firm prepared sales and use tax returns for Wizard contemporaneously with the due dates for filing. When the accounting firm did not have a return envelope from the taxing authority, it was the practice of the accounting firm to prepare an envelope for filing the return. Mr. Doloboff never prepared envelopes for sales tax to be remitted to Holtsville, New York.

During the period in issue, Wizard's sales and use tax returns did not report any taxes due. During the same period, Wizard filed, among other returns, Federal excise tax returns, corporate income tax returns and truck mileage tax returns. Other than the sales tax returns, none of the returns have been questioned as not timely filed. In most instances, the returns included tax payments.

The New York motor fuel tax liability of Wizard during the audit period was between three and four million dollars. To the best of Mr. Doloboff's knowledge, all of Wizard's motor fuel tax returns during the audit period were timely filed and paid. The Federal excise tax liability of Wizard would have been approximately $6,000,000.00. Mr. Doloboff believes that these taxes were also timely filed and paid.

In Mr. Doloboff's experience, if tax returns were not filed for a period of time the company would receive a notice and then a visit from someone involved in tax compliance. Mr. Doloboff was never notified that sales tax returns were not timely filed and paid, and Wizard never advised Mr. Doloboff that it received a notice that returns were not filed.

After preparing the tax returns, Mr. Doloboff's office gave the returns with the envelopes to the bookkeeper for processing.

It was the practice of Mr. Doloboff's firm to give Wizard an original and a copy of the tax returns it prepared. Wizard, in turn, maintained copies of the returns in its files.

Wizard shared offices with several related corporations -- On-Site Petroleum Unlimited, Inc., Janus Corporation, and Terminelle Corporation. Returns for each of the foregoing

corporations were prepared by Mr. Doloboff's office. In each instance, Mr. Doloboff's firm provided the taxpayer with an original return, a copy of the return and a pre-addressed envelope. Mr. Doloboff never received a notice that the returns were filed late.

Sylvia Frank, was the bookkeeper for the related group of corporations. When Mr. Doloboff gave Ms. Frank returns for a particular month, he would look in a folder and observe that there were no unfiled returns. On those tax returns on which no tax was due, the corporate officer only had the responsibility of signing the returns and returning the material to Ms. Frank.

Petitioner provided an affidavit from Sylvia Frank which stated that she had been employed by Janus Petroleum, Inc. and its related corporations, including Wizard, since 1985. Ms. Frank states that each month she reviews with the accountants which returns must be filed that month and how much tax is due for each return. She then obtains an officer's signature on each return and a check for the appropriate amount. According to Ms. Frank, she attaches the appropriate payment check to the proper tax return and inserts the return and check, if any, in the pre-addressed envelope provided by the accounting firm. The proper amount of postage is then placed on the pre-addressed envelopes.

Ms. Frank states that she checks the tax return to be filed against the list of tax returns previously reviewed with the corporation's accountants to verify that all of the returns are ready for mailing. Ms. Frank avers that she provides the mail clerk with the paid pre-addressed envelopes, containing the tax returns, for mailing. Each month she verifies with the corporation's mail clerk that all of the tax returns were properly and promptly mailed. On the basis of the foregoing, Ms. Frank concludes that she is certain that the sales tax returns for the period June 1, 1986 through November 30, 1987 were timely filed.

To the best of Mr. Doloboff's knowledge, Wizard corporation kept accurate books and records. He was never advised that Wizard's books and records were inadequate. In addition, he was never given a list of the books and records that the Division wanted for an audit and was not even aware that a sales tax audit of Wizard was in progress.

Mr. Doloboff never filed a power of attorney form authorizing him to appear on Wizard's behalf.

All City was a customer of Wizard which issued a resale certificate to Wizard. Once it reviewed the sales tax exemption certificate, Wizard did not collect sales tax from All City.

Mr. Doloboff visited the premises of Wizard once a month. Most of the time when he was there, someone from the Division was there.

It was Mr. Doloboff's understanding that the exemption certificate from All City was a valid certificate and he advised the officers of Wizard that it was a valid certificate.

Petroleum is stored in tanks on the premises of a terminal. Each tank can hold hundreds of thousands of gallons. There are separate tanks for different types of gasoline - regular, unleaded and hi-test. Although the different types of gasoline are not commingled, gasoline from different customers was stored in the same tank.

At the hearing, Mr. Doloboff explained that when a transfer of ownership of product was called for, it was a common practice at Terminelle Corporation to make transfers from one company to another through entries on records rather than the physical transfer of the product. In this manner, Wizard would make transfers to its related companies - Janus and On-Site. Wizard considered these activities to be book transfers and not sales since the gasoline would be replaced or replenished by the associated corporation when it bought products. Wizard did not charge the related company when the transfer of gasoline occurred. There was also no charge for sales tax or excise tax. When Janus or On Site repaid Wizard by pumping products back, there was no counter charge or charge for sales tax.

All City provided Wizard with a registration for tax-free transactions under the Internal Revenue Code. Mr. Doloboff did not believe that Wizard collected excise tax from All City because the registration meant that the purchaser would be paying tax directly to the Federal government.

It was Mr. Doloboff's understanding that All City may have been exporting more than it was selling in New York. Mr. Doloboff states that he and the people at Wizard relied in good

faith on the exemption certificate. Further, he advised Wizard that the exemption certificate was appropriate, valid and proper. No one from the Division ever told Mr. Doloboff that it was not a proper certificate.

Ms. Jarwood held the title of treasurer. In this capacity she bought and sold product and oversaw the running of the office. She signed checks which were made payable to creditors and had access to the company records.

As the secretary-treasurer of Wizard, petitioner signed an Application for Registration as Distributor of Gasoline and Similar Motor Fuels. The application, which listed petitioner as the owner of one-third of Wizard's stock, led to Wizard's being mailed a certificate on July 8, 1985. Wizard's Application for Motor Fuel Tax and Sales and Use Tax Reregistration, which was received by the Division on June 16, 1987, shows that petitioner had increased her stock ownership to 50%.

Ms. Jarwood was not compensated by Wizard for her services because the company was young and could not afford to pay her.

Tax returns were presented to petitioner by Ms. Frank with paper clips on the pages which required signatures. The envelopes were attached by paper clips to those papers. Ms. Jarwood just went to those pages that had paper clips on them and returned the papers to Ms. Frank. In the course of business, Ms. Jarwood would ask Ms. Frank if the tax returns were mailed on time.

According to Ms. Jarwood, she relied on Mr. Doloboff's explanation that the exemption certificate from All City was valid and proper. Further, the Division's employees never told petitioner that the exemption certificate from All City was improper.

It is Ms. Jarwood's testimony that all of the appropriate sales tax returns for the period in issue were filed by Wizard. Neither Ms. Jarwood nor anyone from Wizard ever received a notice that tax returns were not filed.

Ms. Jarwood was never told that the Division had commenced a sales tax audit of Wizard. No one from the Division ever discussed the results of the audit with her.

SUMMARY OF THE PARTIES' POSITIONS

In her brief, petitioner argues that she is entitled to a clear, full and fair hearing with respect to the issues in this matter. It is maintained that the Division seeks to prevent this by invoking the principle of collateral estoppel. Petitioner takes the position that collateral estoppel is inapplicable because she was not a party to the previous hearing.

Petitioner contends that the Division has failed to meet its burden of proof with respect to showing willful fraud on her part. It is further argued that the period permitted to assess additional taxes expired. Petitioner directs attention to the testimony of Mr. Doloboff and petitioner as well as the affidavit of Ms. Frank to show that the sales and use tax returns were filed. It is also contended that reliance upon the Division's computer runs is misplaced and that there is no direct evidence that the sales and use tax returns were not filed. Petitioner also notes that many other tax returns involving substantial tax liability were filed.

According to petitioner, the Division has not proven that petitioner was an officer under a duty to act for the corporation. Petitioner next maintains that Wizard's books and records were sufficient to permit an audit of its tax returns. It is submitted that since no attempt was made to audit Wizard's book's and records, the use of estimated methods and outside sources was improper. As a result, it is contended that the notices must be voided. Lastly, petitioner submits that the acceptance of an exemption certificate in good faith by Wizard and petitioner relieved petitioner of any duty to collect sales tax from the purchaser.

In its brief, the Division argues that petitioner is collaterally estopped from relitigating those issues which were decided in the corporate proceeding. In furtherance of this position, the Division submits that petitioner is in privity with Wizard and that there is an identity of issues in the present litigation and the prior litigation. The Division contends that issues on the following topics were necessarily decided by the prior litigation: audit methodology, statute of limitations, facial default in the notice and petitioner's involvement in the fraudulent conduct. According to the Division, petitioner has not met the burden of demonstrating that Wizard did not have a full and fair opportunity to contest the issues raised at the hearing on Wizard's

petition. Lastly, the Division contends that the evidence establishes that petitioner was a responsible officer of Wizard during the audit period.

Petitioner filed a reply brief which reiterated the positions it took in its initial brief.

CONCLUSIONS OF LAW

A. As noted, the Division contends that petitioner is collaterally estopped from relitigating those issues which were decided in Matter of Wizard Petroleum, Inc. (Tax Appeals Tribunal, March 22, 1994). In response, petitioner submits that collateral estoppel is inapplicable because petitioner was not a party in the previous matter.

In Matter of Planit (Tax Appeals Tribunal, February 7, 1991) the Tax Appeals Tribunal explained the doctrine of collateral estoppel as follows:

> "The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action an issue clearly raised in a prior action and decided against that party or those in privity with that party (Matter of Choi v. State of New York, 74 NY2d 933, 550 NYS2d 267, 269; Ryan v. New York Tel. Co., 62 NY2d 494, 478 NYS2d 823, 826). In order to invoke this doctrine there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action and there must have been a full and fair opportunity to contest the prior decision (Staatsburg Water Co. v. Staatsburg Fire Dist., 72 NY2d 147, 531 NYS2d 876, 878; Schwartz v. Public Adm'r of County of Bronx, 24 NY2d 65, 298 NYS2d 955, 960). The party seeking the benefit of collateral estoppel must meet the burden of showing the identity of the issues in the present litigation and the prior determination (Kaufman v. Eli Lilly & Co., 65 NY2d 449, 492 NYS2d 584, 588)." (See also, Matter of Sterling Bancorp, Tax Appeals Tribunal, November 18, 1993.)

B. Petitioner objects to invoking the doctrine of collateral estoppel because she was not a party to the prior preceding. In discussing the need for the same parties, Professor Siegel explains the pertinent considerations as follows:

> "Collateral estoppel, or 'issue preclusion', can often be used today by one who was not a party to the first action. An earlier rule known as 'mutuality of estoppel' had held otherwise but has since been abandoned. But the law is adamant that the doctrine may not be used against one who was not a party to the first action because that would deny that person a hearing and raise issues of due process.
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> * * *
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> "If the party to be estopped in action two was not a party to action one, he must at least be shown to be in 'strict privity' with the party who lost in the first action. Privity as used in this sense means a relationship of a kind that enables the court to be perfectly comfortable in visiting the consequences of the first action on the party to the second one. Some of these relationships are obvious, such as

> decedent/representative, trustee/beneficiary, guardian/ward, committee/incompetent, and the like: clearly a judgment rendered in an action involving the pre-hyphen party is binding on the post-hyphen one in a later action. But even less obvious situations may be found to involve at base a relationship sufficient to invoke this 'privity' concept, or whatever else one would call it. Control of the earlier litigation is the key feature. The Second Restatement holds bound one who, although not a party to the earlier action, 'controls or substantially participates in the control' of the case presented by a party to the first action. Whether the participation or control is ample enough to invoke the estoppel is at root a sui generis question and will be decided as such. Where an executor in the second action, for example, was found to have in fact controlled the first action, although not technically a party to it, he was bound by its judgment. Control therefore satisfies as 'privity' in the collateral estoppel sense [footnotes omitted]." (Siegel, NY Prac § 458, at 693-694 [2d ed].)

Privity may also be found if there is a merger of interests. Thus, a corporation may be bound in a second action if a party to the earlier action was the sole or main shareholder and a court is convinced that one is doing the bidding of the other. (Id., at 694.)

C. The record shows that the petition of Wizard Petroleum, Inc. was signed by Norman Berkowitz, Esq., as Wizard's representative. The power of attorney appointing Mr. Berkowitz was signed by Mr. Trevor Wisdom. There is no indication that petitioner had any control over the prior litigation. Accordingly, it is concluded that the record does not establish privity between petitioner and Wizard and petitioner is not barred from raising issues which were argued in the hearing on the petition of Wizard. It should be noted that although collateral estoppel is not appropriate, the principle of stare decisis may be applied where appropriate.

D. Petitioner's claim that, because the doctrine of collateral estoppel is inapplicable, the records of the prior administrative hearing should not have been admitted into evidence is without merit. Simply because a document was admitted at one hearing does not make it inadmissible at a subsequent hearing. An agency is permitted to avail itself of records and documents in its possession (State Administrative Procedure Act § 306[2]). The Tribunal's Rules of Practice and Procedure do not limit or modify this right.

E. The next question presented is whether petitioner has established that the assessments were barred by the statute of limitations.

Section 1147(b) of the Tax Law requires that an assessment of sales and use taxes be

made within three years of the date of the filing of the return. When a return is filed before the last date prescribed for filing a return or before the last day of an extension of time for filing, the return is deemed filed on the last day (Tax Law § 1147[b]).

In Matter of Richards (Tax Appeals Tribunal, December 3, 1991), the Tribunal set forth the following standard for analyzing a statute of limitations defense:

> "It is well established that the statute of limitations defense is waived unless affirmatively raised by the taxpayer (see, Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of Convissar v. State Tax Commn., 69 AD2d 929, 415 NYS2d 305; Matter of Servomation Corp. v. State Tax Commn., 60 AD2d 374, 400 NYS2d 887). To establish this defense, the taxpayer 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 notice after the running of the period (see, Amesbury Apts., Ltd. v. Commissioner, 95 TC 227; Robinson v. Commissioner, 57 TC 735; Matter of Jencon, Tax Appeals Tribunal, December 20, 1990). Where the taxpayer has satisfied this initial burden, the burden of going forward with the evidence shifts to the Division to demonstrate that the bar of the statute is not applicable (see, Amesbury Apts., Ltd. v. Commissioner, supra; Adler v. Commissioner, 85 TC 535). The Division must then proceed with countervailing evidence that the statutory notice was timely mailed (see, Coleman v. Commissioner, 94 TC 82)."

F. Here, the testimony of Mr. Doloboff and petitioner as well as the affidavit of Ms. Frank show that Wizard had a procedure for the preparation and filing of tax returns. However, there is no evidence shown that this procedure was followed with respect to the sales and use tax returns at issue herein. Accordingly, it is concluded that petitioner has not established that the sales and use tax returns for the period in issue were filed before November 10, 1987 (see, Matter of Mutual Life Ins. Co. v. State Tax Commn., 142 AD2d 41, 534 NYS2d 565 [where the taxpayer showed compliance with its procedure for mailing returns through presentation of a carbon copy of the check involved and a copy of the voucher which was necessary for the drawing of the original check]) and that the assessments were barred by the statute of limitations. It is noted that petitioner's record of filing other tax returns is irrelevant. The remaining arguments are rejected because petitioner may not shift the burden of proof to the Division to show that tax returns were not filed.

G. Petitioner contends that the audit method was unreasonable because there was no written request to examine Wizard's books and records for the audit period and there is no entry

in the field audit record indicating that an oral request was made for such records. Petitioner submits that the Division did not offer any evidence or argue that Wizard's books and records were not sufficient to verify and audit its tax returns. It is contended that since no attempt was made to audit Wizard's books and records, the use of estimated methods and outside sources is improper. It is further argued that the failure to request Wizard's books and records precludes the Division from resorting to estimates and outside sources to determine tax due.

H. The same arguments regarding the audit at issue herein were presented to the Tribunal in Matter of Wizard Petroleum, Inc. (supra). As noted earlier, although the doctrine of collateral estoppel does not apply, the principle of stare decisis remains applicable.

I. As found by the Tribunal, the record clearly establishes that Mr. Yeates requested Wizard's books and records for the entire audit period. Mr. Doloboff has not presented any evidence which contradicts this finding. The request for books and records was made to Ms. Jarwood and not Mr. Doloboff. Since Mr. Doloboff was not an authorized representative of Wizard, there is no reason to expect that he should have been aware that a sales tax audit was in progress. It is noted that Ms. Jarwood's testimony that she was unaware that a sales tax audit was in progress is unconvincing. The request for sales and purchase invoices, cancelled checks, sales tax returns plus supporting documentation and schedules should have put Ms. Jarwood on notice that a sales tax audit was underway.

J. Petitioner's arguments with respect to the scope of the audit were also rejected by the Tribunal in Matter of Wizard Petroleum, Inc. (supra). As noted therein, the record does not support petitioner's claim that the amount of tax assessed was estimated. Rather, "[t]he amount assessed . . . was based entirely on petitioner's own calculation of sales tax prepayments due on its import of motor fuel. The Division's only adjustment was to disallow the credit claimed on each return for purported sales for immediate export" (Matter of Wizard Petroleum, Inc., supra, quoting the determination of the Administrative Law Judge). Since petitioner has not presented evidence or argument that the statement on the notices that the tax was estimated prejudiced petitioner, the notices are considered valid (see, Matter of Pepsico, Inc. v. Bouchard, 102 AD2d

1000, 477 NYS2d 892). It was also noted therein that the taxpayer bears the burden of establishing entitlement to a credit. There is no authority which requires the Division to always conduct a full and complete audit and which prohibits the Division from limiting its audit to requesting evidence establishing that a taxpayer is entitled to the credits which it claimed.

K. Petitioner's claim that the Division should have conferred with petitioner at the conclusion of the audit does not warrant modifying the audit results. Petitioner has not presented any evidence which would lead one to conclude that the failure to conduct a post-audit conference prejudiced petitioner in any manner or would have led to a different result.

L. Petitioner submits that the acceptance of the exemption certificate in good faith by Wizard relieved petitioner of a duty to collect sales tax from the purchaser. The record does not support petitioners claim that the exemption certificate was accepted in good faith. As noted in Matter of Wizard Petroleum, Inc. (supra), 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 by petitioner was outdated and did not contain all of the information required by a Statement of Exportation of Motor Fuel by Purchaser.

Petitioner presented evidence that the book transfers of gasoline between companies were merely loans which were repaid in kind. This explanation fails to address the difficulty presented herein. That is, the series of book transfers shows that, contrary to petitioners explanation, all of the motor fuel was not sold to All City for export. Petitioner's explanation was also contradicted by the fact that most of the motor fuel which entered the Terminelle terminal eventually was trucked out, primarily by vehicles owned by Janus. The foregoing facts belie petitioner's claim that Wizard accepted and acted upon the certificate from All City in good faith.

M. Petitioner maintains that the Division has not proved that petitioner was an officer under a duty to act for the corporation. It is submitted that the Division had no idea who the officers of Wizard were. This argument is also meritless.

First, petitioner has impermissibly attempted to shift the burden of proof. Contrary to petitioner's argument, the burden was on petitioner to show that the notices were inaccurate (see, Matter of Park Row Electronics & Camera, Tax Appeals Tribunal, July 3, 1991).

The relevant factors to consider when determining whether a person has a duty to act for the corporation are whether the person is authorized to sign the corporation's tax returns or is responsible for maintaining the corporate books, or responsible for the corporation's management (20 NYCRR 526.11[b][2]). Other factors which have been examined include: the authority to hire and fire employees, the derivation of substantial income from the corporation or stock ownership, and the authority to write checks on behalf of the corporation (see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988).

N. Applying the foregoing criteria to the facts of this case leads to the conclusion that petitioner was properly found to be a person required to collect tax. The record shows that petitioner signed an application for registration of Wizard as a distributor of gasoline and similar motor fuels. The application, which led to a certificate being mailed on July 8, 1985, listed petitioner's title as secretary-treasurer and indicated that she owned one-third of the stock of Wizard.

Wizard's Application for Motor Fuel Tax and Sales and Use Tax Reregistration, which was received by the Division on June 16, 1987, shows that petitioner had increased her stock ownership to 50%. At the hearing, petitioner acknowledged that she bought and sold petroleum and oversaw the running of the office. Further, petitioner signed checks which were made payable to creditors, signed tax returns and had access to Wizard's books and records. Under these circumstances, there is ample evidence to conclude that petitioner is responsible for the taxes due from Wizard.

O. 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 Waples, Tax Appeals Tribunal, January 11, 1990; Matter of Uncle Jim's Donut and Dairy Store, 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 Sener, Tax Appeals Tribunal, May 5, 1988, quoting Matter of Shutt, State Tax Commn., July 13, 1982; see also, Matter of Waples, supra).

In Matter of Waples (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)."

P. As was the case in Matter of Wizard Petroleum, Inc. (supra), the record contains clear and convincing evidence that petitioner participated in a scheme to evade payment of sales tax. Petitioner was a principal of both Wizard and Terminelle and was familiar with each corporation's activities. As previously noted, Wizard made transfers of motor fuel to companies other than All City. Therefore, the Division has shown that Ms. Jarwood's explanation that all of Wizard's sales were made to All City was a fabrication. Further, contrary to Ms. Jarwood's explanation, All City did not export all of the product it purchased from Wizard. Some motor fuel was transferred to other companies using the Terminelle terminal. As the Tribunal noted in

affirming the earlier determination "because of Mrs. Jarwood's and Mr. Wisdom's day-to-day involvement with both Wizard and Terminelle, they must have been aware that all of Wizard's sales were not made to All City and that All City did not immediately export all the motor fuel it purchased" (Matter of Wizard Petroleum, Inc., supra).

Q. The petition of Ashley Jarwood, officer of Wizard Petroleum, Inc., is denied and the notices of determination and demands for payment of sales and use taxes due, dated July 20, 1990, are sustained together with such penalties and interest as may be lawfully due.

DATED: Troy, New York
May 4, 1995

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE