STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of WILLIAM G. LOMBARD, OFFICER OF CONTROL SYSTEMS ASSOCIATES, INC. for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1986 through August 31, 1991.	DTA NO. 812266

Petitioner, William G. Lombard, officer of Control Systems Associates, Inc., 4211 State Route 13, Truxton, New York 13158, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1986 through August 31, 1991.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 24, 1994 at 9:15 A.M. All briefs and additional documentation were filed by July 14, 1995, and this date commenced the six-month period for issuance of this determination pursuant to Tax Law § 2010(3). Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Kathleen D. Church, Esq., of counsel).

ISSUES

I. Whether the Division of Tax Appeals properly determined additional sales and use taxes due from Control Systems Associates, Inc. and its president, petitioner herein.

II. Whether the Division of Taxation made a proper request for the books and records of Control Systems Associates, Inc. for the period in issue.

III. Whether William G. Lombard was a person responsible for the collection and payment of sales and use taxes on behalf of Control Systems Associates, Inc. for the period December 1, 1986 through August 31, 1991.

FINDINGS OF FACT

Control Systems Associates, Inc. ("Control") was a New York corporation incorporated on November 17, 1986. Control's primary business was selling computerized and noncomputerized controls, which were used to control and monitor heating and ventilation equipment and processes. Some of the company's work was monitoring software for customers who could not do the same for themselves and this work was often done under contract. The company also did troubleshooting for customers who experienced environmental changes which entailed modifying software programs to solve such problems. The Division of Taxation ("Division") characterized Control as a heating, ventilation and air conditioning ("HVAC") contractor.

In a petition for an Advisory Opinion filed by a successor corporation to Control, but allegedly carrying on the same business, petitioner, William G. Lombard, president of Control and the successor corporation, characterized the business as one which installs and modifies custom software in industrial and commercial applications. The software managed energy and controlled processes under specific environmental rules and

conditions. The software needed to be modified on a continual basis whenever conditions changed or when requested by a customer.

Since its incorporation, William G. Lombard was the president of the company. He was the sole shareholder until he took on a partner, Mr. David Robinson, pursuant to the terms of an agreement, dated July 12, 1989, and pursuant to which Mr. Robinson became a 50% owner of the business.

However, Mr. Lombard signed various tax returns between 1988 and 1992, indicating on each one that he was the president of Control. He had the authority to sign corporate checks (although a payroll company was engaged to issue payroll checks), corporate documents and contracts and tax returns. He also had the authority to purchase inventory, hire and fire employees and make business decisions on behalf of the company.

Mr. Lombard hired a manager, Elaine Divita, to whom he delegated the management of the day-to-day operations of the business, and David Robinson, prior to his obtaining an ownership interest in the business. However, Mr. Lombard had a working knowledge of the business affairs of Control, its cash flow and difficulties and always participated in the major business decisions made on behalf of Control. Mr. Lombard was partly responsible for maintaining the books and records of the business, but delegated the majority of that responsibility to his office manager, Ms. Divita. She was responsible for the preparation of tax returns, in conjunction with Control's accountants, which task was executed and the returns submitted

to Mr. Lombard for his signature.

Mr. Lombard delegated the authority for paying creditors to Ms. Divita. Although some actions were taken without Mr. Lombard being consulted, he was never precluded from reviewing the books and records.

The Division conducted a field audit between October of 1991 and April of 1992. As a result of an examination of the books and records of Control, which were determined to be inadequate for part of the audit period, the Division found additional tax due on recurring purchases of $9,819.09, additional tax on fixtures and equipment of $91.00 and additional sales tax of $10,862.11 on unsubstantiated exempt sales, for a total tax deficiency for the audit period December 1, 1986 through August 31, 1991 of $20,772.20.

In addition to penalty and statutory interest, Control was assessed omnibus penalty for operating without a certificate of authority. Control did not register for sales tax purposes until September 1, 1991 even though invoices indicated that it had collected sales tax on some sales. The omnibus penalty is not in issue herein.

The Division issued a Notice of Determination, dated August 24, 1992, to William G. Lombard, as officer of Control, which set forth additional taxes due of $20,772.20, plus penalty and interest, for a total of $34,483.02. Petitioner protested the notice and the matter went to the Bureau of Mediation and Conciliation Services. After the conference, held on February 12, 1993, the tax assessed was adjusted, based on additional

documentation submitted. The Conciliation Order, dated June 25, 1993, recomputed the tax due based upon the accepted additional documentation, arriving at an adjusted tax due of $18,859.62, plus penalty and interest.

This was the amount in issue when the case reached the Division of Tax Appeals. However, since formal hearing on August 24, 1994, additional documentation submitted by petitioner to the Division has resulted in further adjustments to the statutory notice. The Division has agreed that the amount now in issue is $9,509.03, plus penalty and interest.

At hearing, petitioner was afforded time to produce further documentation with respect to sales and expense purchases. In fact, documentation was produced and reviewed by the Division. Initially, the Division credited Mr. Lombard with $2,603.69 based upon the material received from petitioner in September of 1994, pursuant to a memorandum from Robert L. Dean, auditor, to Kathleen D. Church, Esq., dated October 11, 1994. Subsequently, the Division made a further adjustment of $507.99 to the assessment to petitioner based upon documentation submitted to the Division in November 1994, pursuant to a memorandum sent by Mr. Dean to Ms. Church, dated November 30, 1994.

Finally, the adjustments made by the Division were incorporated into a letter and attached workpapers, dated March 6, 1995, from Mr. Dean to Mr. Lombard, which indicated that the tax due had been reduced to $15,747.94 as a result of the documentation submitted by petitioner.

As referred to above, after further discussions with Mr. Lombard and a review of his documentation, the Division reduced the additional tax due to $9,509.03, as more fully set forth in attachments to a letter from Mr. Dean to Ms. Church, dated June 27, 1995.

During the audit period, Control was located at 72 Albany Street, Cazenovia, New York. Its two owners were William Lombard and David Robinson. The original auditor, Ms. Jan Krisak, described the business of Control as "construction" and the principal service as installing and servicing heating and cooling systems for commercial properties.

As mentioned above, the Division began the audit in October of 1991. However, Ms. Krisak did not send an appointment letter with a written request for records or specifically define the term of the audit period. The only mention of a request for books and records from Ms. Krisak was the entry in her log for October 4, 1991, which stated as follows:

> "10/4 Bookkeeper called: more in depth detail of what books & records available & what I will want to see. Directions to audit."

There is no other reference in the audit report of any other request for books and records.

When the Administrative Law Judge asked Mr. Dean, the second auditor assigned to the matter, whether there had ever been a written request for books and records, his answer was no, other than a March 13, 1992 letter to the taxpayer from Mr. Dean asking for additional exemption certificates.

The audit was transferred to Mr. Dean from Ms. Krisak in or about January of 1992. There is no reference in the log after that point of a request for books and records or an entry which would have clearly informed petitioner of the period under audit. Further, Mr. Dean specifically stated that he based his opinion that Control's records were inadequate primarily on Ms. Krisak's report, and therefore in reliance on her request for books and records (tr., p. 55). Mr. Fred Brissette, supervisor of both Ms. Krisak and Mr. Dean, stated at the hearing that the majority of the audit work was performed by Ms. Krisak, that she had performed all the workup through the initial audit results, and that he had attended the final conference with her on January 6, 1992, where the audit results were presented and explained to Mr. Lombard. In fact, under cross-examination, Mr. Brissette confirmed that Ms. Krisak was the only auditor who performed an "in-house" audit of Control's books and records and that she made the initial decision as to what tax was due based upon the audit information she left with the district office when she left. There were many instances in the hearing transcript where Mr. Lombard stated that he had produced records for Ms. Krisak and that she had reviewed them. However, he contended that "if [Mr. Dean] you'd requested them, you would have been shown them at any time" (tr., p. 46). This statement, the numerous references by petitioner that he continually had to ask what books and records the Division wanted to examine, and the statement that there had been no written request or clear evidence of an oral request for books and records by Ms. Krisak,

combined to raise the issue of whether there had been an adequate request for books and records, if not framed in quite the traditional manner by a pro se taxpayer.

Thirty percent of the audit findings were due to a projection of missing invoices. In addition, Mr. Dean stated that the books and records were generally inadequate for the entire audit period.

At many times throughout the hearing, petitioner raised the point that some of his records were computerized and that Ms. Krisak was made aware of this fact. However, both Mr. Dean and Mr. Brissette denied any knowledge of computerized records which were not also available in hard copy. There is no reference to computerized records in Ms. Krisak's log.

As set forth above, Control was not registered as a vendor for sales tax purposes during the period under audit, December 1, 1986 through August 31, 1991. An examination of the books and records made available on audit were complete for some periods and incomplete for others. The Division was able to perform a detailed audit for approximately 70% of the audit period and a projection method for the remaining period where invoices were missing.

On the detailed portion of the audit, the Division inspected invoices which indicated tax collected and not remitted totalling $2,885.87; tax due on sales of repairs and maintenance totalling $3,084.50; and tax due on purchase of materials, from out-of-state and in-state suppliers for the installation of heating and cooling systems, totalling $8,141.40. Some of these

latter sales were demonstrated to be capital improvements, in which case the auditor looked to the purchase side of the transaction to determine if the tax had been paid on the purchase of the material.

The estimated portion of the audit concerned missing invoices for the years 1987, 1990 and 1991. The Division used the cash receipts journals from the years 1988 and 1989, which were complete, to estimate the taxable portion of gross receipts as reported on the Federal tax returns. An analysis of the cash receipts journal for 1988 and 1989 resulted in a 9.4% taxable sales ratio. The actual invoices the auditors saw for those years were deducted from the totals to prevent double taxing, and the remainder were considered the taxable sales for those years. The total additional tax for the estimated portion was $4,747.85.

All of these figures have been adjusted to reflect the modifications made at conference, which reflect a decrease from the original notice which assessed $9,910.09 in additional use tax and $10,862.11 in additional sales tax, or a total deficiency of $20,772.20. The modifications resulted from the submission of additional documentation at conference.

The Division also noted that Control made exempt sales for which it was given credit where it demonstrated its right to the exemption. However, many certificates were rejected because they were improperly completed, omitting the buyer or seller, or were issued by an unregistered vendor.

The Division also held as taxable many sales of what Control

described on its invoices as repair and maintenance to installed equipment, seasonal on-line changes to temperature settings (sometimes done via modem), and troubleshooting heating and cooling systems. The Division made this determination despite petitioner's protestations that the receipts from the sale of custom software and the receipts from updating and modification services are exempt from sales tax, consistent with Tax Law § 1101(b)(14), a Technical Services Bureau memorandum (TSB-M-93[3]S [March 1, 1993]), and New York State Department of Taxation and Finance Sales Tax Newsletter, Vol. 19, No. 1, March, 1992.

The Division asserted penalty and statutory interest as well as omnibus penalty pursuant to Tax Law § 1145(a)(3)(i) for operation without a certificate of authority. As stated above, the omnibus penalty does not appear on the Notice of Determination and is not an issue herein.

Petitioner has tried to establish his true tax liability by submitting additional documentation since February of 1992. He has been given ample opportunity on audit, at conference and in the proceedings in the Division of Tax Appeals. Briefly, with regard to the tax remaining in issue, petitioner contends that he does not owe the additional tax remaining in issue because of the following:

(a) the additional tax found due by the Division was calculated from projections for the years with the missing invoices;

(b) several invoices were erroneously marked as

repairs or service by the Division interns who transcribed them;

(c) some of the invoices inspected and and marked "overlap audit" were not removed or credited;

(d) the Division taxed invoices petitioner characterized as consulting and evaluating and the installation of custom software and computer equipment;

(e) petitioner believed that the Division double taxed him on some purchases which were incorporated into capital improvements;

(f) petitioner contended that the billings to Corp Center, Hidden Valley Apts., CIM-POB, and 550 Harrison were in fact billed to either Sutton Real Estate or Sutton Management Co., who refused to provide petitioner with a resale certificate;

(g) items purchased for stock were erroneously taxed even though they eventually were taxed as part of other sales;

(h) invoices for projects relating to Jamesway stores allegedly billed to out-of-state contractors who have since gone out of business and are unable to produce resale certificates;

(i) an expense purchase paid directly by Sutton Management to DETCO Ind.;

(j) duplicate billing for an expense purchase from Novar Controls on invoice numbers 72317, dated July 2, 1990, and 72318, dated January 30, 1990 in the invoice amount of

$7,862.50 and tax due of $550.38;

(k) various invoices for which petitioner was not able to obtain resale certificates, to wit, all invoices billed to Pioneer Development relating to Business Park II project, and Ward Contols and Ward Supply Co., Inc.;

(l) reference numbers 482 and 475 were allegedly duplicates relating to an item which was a negotiated rental arrangement;

(m) reference numbers 599, Novar Pcess custom software package for Pioneer Development relating to Business Park II and also reference number 572 for a Novar Pcess custom software package for Burts of Endicott; and

(n) a credit for two variable frequency drives that went into the J.C. Penney project at Carousel Mall that petitioner contended was determined to be exempt.

Petitioner's records were not in auditable form. The fact that the invoices were not available with substantiation of exemption indicated that petitioner's poor records were the primary reason for the Division's inability to determine if tax had been properly collected or not collected.

Petitioner made a motion for summary determination at hearing which was based upon the facts adduced at hearing and documentation submitted subsequent to the hearing. Mr. Lombard contends that the proof demonstrated that he paid all taxes due and owing and is owed a refund (tr., pp. 191-192). The Administrative Law Judge took the motion under advisement and reserved decision until determination.

CONCLUSIONS OF LAW

A. Petitioner's motion for summary determination is denied. A successful motion for summary determination must show that there are no material issues of fact and that the only issues involve questions of law (see, 20 NYCRR 3000.5[c]). Such showing can be made by "tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegard v. New York University, 64 NY2d 851, 853, 487 NYS2d 316, 317, citing Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595). The evidence adduced at trial of this matter presented issues of fact for the determination of the Administrative Law Judge. Further, the motion was based upon facts not before the Administrative Law Judge at the time it was made and was therefore premature. Since the determination will now resolve all issues of law and fact based upon all of the evidence, the motion also is moot.

B. An issue that neither party raised per se, but which both parties addressed at hearing, was whether the Division made an adequate request for books and records.

Tax Law § 1138(a)(1) provides that if "a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by [the Division of Taxation] from such information as shall be available. If necessary, the tax may be estimated on the basis of external indices . . . ." This language has been interpreted to provide that "[t]he honest and conscientious taxpayer who maintains comprehensive records as required has a

right to expect that they will be used in any audit to determine his ultimate liability" (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41).

To determine the adequacy of a taxpayer's records, the Division must first request (Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859) and thoroughly examine (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978, 979-980) the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109). The request for records must be explicit and not "weak and casual" (Matter of Christ Cella, Inc. v. State Tax Commn., supra; Matter of Scholastic Specialty Corp. v. Tax Appeals Tribunal, 198 AD2d 684, 603 NYS2d 357, lv denied 83 NY2d 751, 611 NYS2d 133).

The purpose of the examination is to determine, through verification drawn independently from within these records (Matter of Giordano v. State Tax Commn., 145 AD2d 726, 535 NYS2d 255, 256-57; Matter of Urban Liqs v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138, 139; Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 76, lv denied 44 NY2d 645, 406 NYS2d 1025; see also, Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208, 209), that they are, in fact, so insufficient that it is "virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit" (Matter of Chartair, Inc. v. State Tax Commn., supra, 411 NYS2d at 43), "from which the exact amount of tax can

be determined" (Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (Matter of Urban Liqs v. State Tax Commn., supra). It is determined that the Division did not follow the procedure in this case.

No written request for books and records appears in this case. At best, a weak and casual oral request may have been made. Therefore, any effort to determine the adequacy of petitioner's records is, in essence, speculation of what petitioner would have provided if he had been asked to produce records at the time of the audit. Such speculation places petitioner in the untenable position of proving that he could have produced records that could have satisfied a request by the Division that has never been made or defined. It is concluded that such a burden would eviscerate the right of taxpayers who maintain comprehensive records to have such records utilized to determine their tax liability (Matter of Chartair, Inc. v. State Tax Commn., supra).

In the instant matter, there is no evidence that the auditor, Ms. Krisak, made a request for books and records. She made no entry in her log of such a request except for a vague notation that in a conversation with the bookkeeper she was told the scope of the books and records available and "what I will want to see." As in Matter of Todaro (Tax Appeals Tribunal, July 25, 1991), the Division did not conduct the audit in a

manner which provided petitioner with an adequate, meaningful opportunity to produce his books and records for a sales tax audit and was therefore inconsistent with the principles underlying the decision in Christ Cella, where a weak and casual request for books and records was insufficient to justify a resort to an estimated audit.

Although Mr. Dean sent a letter to petitioner on March 13, 1992 requesting information on exempt purchases, it came after the main audit had been performed and initial results calculated by the Division. There was no definition of the audit period and it did not specify with clarity the books and records missing in every area of the audit. In short, the request by Mr. Dean nearly 5½ months after the initial contact with petitioner, and two months after the case was assigned to him, did not cure the failure of the Division to make a proper request at the inception of the audit. Time after time Mr. Lombard stated that he asked what the Division needed but was never given an adequate response. Without the testimony of Ms. Krisak, and given her sparse notes, the record supports the conclusion that a proper request was never made. Further, Mr. Brissette, Ms. Krisak's and Mr. Dean's supervisor, testified that the majority of the audit work was done by Ms. Krisak, who did the "in-house" audit. Mr. Dean stated that he based his opinion that Control's records were inadequate on Ms. Krisak's report. The Division is therefore precluded from estimating tax for those periods it determined did not have adequate books and records, i.e., 1987, 1990 and 1991.

C. If a proper request was not made, then the only periods left in issue are the two years for which the Division conceded adequate books and records and performed a detailed audit, i.e., the years 1988 and 1989. For those two years, the Division looked at the invoices (1) on which tax had been collected and not remitted; (2) for sales for which invoices were observed and taxes not collected because petitioner believed that they were exempt rather than repairs and maintenance to installed equipment; (3) which indicated seasonal changes to temperature settings done by modem; (4) and for time spent troubleshooting heating and cooling systems. The final area looked at in detail by the Division for the years 1988 and 1989 was materials purchases on which sales tax was due but not paid. These materials were taxable equipment and supplies used in the installation of heating and cooling systems, capital improvements.

In some cases, petitioner was able to produce capital improvement certificates. In others, the Division was able to determine that the projects were capital improvements without certificates. The invoice description dictated whether the sale was taxable. Where the project or service was not documented it was considered a taxable repair or service, following the presumption of taxability set forth in Tax Law § 1132(c).

Petitioner has not raised a defense to his collection of but failure to pay over the tax as set forth on invoices examined by the Division. Therefore, those items were properly assessed in the sum of $2,555.99, as revised, June 27, 1995

(see, Finding of Fact "4").

The underpinnings of this matter lie in petitioner's records, or lack thereof. Tax Law § 1132(c) creates a presumption that the receipts from the sale of tangible personal property or for certain enumerated services are subject to tax until the contrary is established and the burden of proving that any receipt is not taxable is upon the person required to collect tax. The statute shifts the burden of proving that a receipt is not taxable solely to the customer if the "vendor, not later than 90 days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe" (Tax Law § 1132[c]). It is determined that petitioner's records were deficient both in quality and quantity and, despite this shortcoming, the Division permitted exemptions for capital improvements where the only evidence was the invoice that the auditors believed indicated a project that met the definition of a capital improvement as set forth in Tax Law § 1101(b)(9)(i). Tax Law § 1105(c)(3)(iii) excepts from tax the services of installing tangible personal property which "when installed, will constitute an addition or capital improvement to real property, property or land." In other words, if the Division believed the end result of the services was a capital improvement, it held the services to be nontaxable (see, 20 NYCRR 527.7[b][4]).

Petitioner was given a credit for capital improvements where he was able to produce a properly completed exemption

certificate or where the job or project was obviously a capital improvement to the Division. No sales tax was assessed in those circumstances, but the Division examined the purchases of materials used in those projects to see whether tax had been paid, because tax must be paid on materials used in capital improvements by the last person to purchase the materials (the ultimate consumer) before they are installed (see, 20 NYCRR 527.7[b][5]).

Petitioner contends that he should be given credit for invoices which were marked "overlap audit" by the Division, or, in the alternative, they should be omitted. It is noted that the audit of petitioner began as a result of the audit of one of its customers, Hoyts, and the audit report notes that any additional tax due on petitioner's invoices was held taxable in the customer's audit. However, the referenced invoices to which petitioner objects indicate no additional tax due. Therefore, no adjustment is justified due to the overlap.

D. Petitioner has the burden of proof in any case where he claims an exemption (Tax Law § 1132[c]). He must adequately document his claim as well (Matter of Airport Industrial Park, Tax Appeals Tribunal, April 11, 1991). Once the Division has identified receipts for property or services of the types indicated for which tax has not been paid, Tax Law § 1132(c) does not impose on the Division a further burden to show that each of the taxpayer's receipts are in fact taxable (see, Matter of Koren-DiResta Constr. Co. v. State Tax Commn., 138 AD2d 909, 526 NYS2d 654, lv denied 72 NY2d 805, 532 NYS2d 755; Matter of

Mendon Leasing Corp. v. State Tax Commn., 135 AD2d 917, 522 NYS2d 315, lv denied 71 NY2d 805, 529 NYS2d 276; Matter of On the Rox Liquors v. State Tax Commn., 124 AD2d 402, 507 NYS2d 503, lv denied 69 NY2d 603, 512 NYS2d 1026; Matter of DACS Trucking Corp., Tax Appeals Tribunal, March 21, 1991). In the instant matter, petitioner has submitted purchase invoices and testimony of exempt sales and purchases. Petitioner was given more than a fair opportunity to prove his claims of exempt sales, taxes paid in error and exempt purchases, and was able to substantiate said claims to all but $9,509.03 in additional tax due. He did this between October 1991 and June of 1995 and accomplished it despite the poor bookkeeping and lack of records available. The law is clear with regard to petitioner's duty in this area, to wit, the requirements of Tax Law § 1135(a)(1) which provides that persons required to collect tax keep records of all sales made, and the Division's regulations which require vendors who accept an exemption certificate to maintain a method of associating a sale made for exempt purposes with the certificate on file (20 NYCRR 533.2[b][4]; see, Matter of King Catering Corp., Tax Appeals Tribunal, April 8, 1993; Matter of On the Rox Liquors, Ltd. v. State Tax Commn., supra). In short, petitioner herein did not keep these records or did not keep these records in auditable form and was fortunate that he had the ample opportunity afforded him to assemble proof acceptable to the Division over a 3½-year period. Therefore, petitioner is liable for the additional tax due of $9,509.03, less the periods for which taxes were estimated.

E. Petitioner cited an Advisory Opinion he received from the Taxpayer Services Bureau, dated October 4, 1993, on behalf of his new corporation, Control Systems Assoc. of CNY, Inc., which petitioner contends conducts the same business as the corporation in issue herein, which advised him that the receipts from the sale of custom software and from updating and modification services are not subject to sales and use taxes. The Division contends that the invoices referred to by petitioner were not such tax-exempt services but taxable sales and repairs to real property.

The regulation at 20 NYCRR 527.7(b)(4) provides:

> "The imposition of tax on services performed on real property depends on the end result of such service. If the end result of the services is the repair or maintenance of real property, such services are taxable. If the end result of the same service is a capital improvement to the real property, such services are not taxable."

The problem in the instant matter is that petitioner characterizes the transactions in issue as consistent with the Advisory Opinion he received from Taxpayer Services. Petitioner contends that the available invoices do not accurately reflect the transactions either because they were inartfully drafted by Elaina Divita, his manager, or erroneously transcribed by the Division's interns.

Petitioner was unable to produce substantiating documentation for the invoices which the Division refused to accept as nontaxable or exempt. Petitioner did not have resale certificates, exemption certificates, proof of Industrial Development Authority projects or other sales to exempt

organizations, or contracts. Under these circumstances, the Division was entitled to rely on the presumption of taxability in Tax Law § 1132(c) for these sales (Matter of Savemart, Inc. v. State Tax Commn., 105 AD2d 1001, 482 NYS2d 150, appeal dismissed 64 NY2d 1039, 489 NYS2d 1029).

Petitioner's allegations of errors by the Division in its audit, set forth in his letter to the Administrative Law Judge, dated July 11, 1995, and summarized in Finding of Fact "11", essentially allege that invoices do not accurately describe the underlying transaction; that the transactions are exempt pursuant to an Advisory Opinion received by petitioner with regard to the sale of custom software or modifications to custom software; that customers would not or could not produce resale certificates; items were double taxed as stock and as part of other sales; items related to a negotiated rental arrangement (reference numbers 482 and 475); duplicate billings for expense purchases from Novar Controls; and an expense purchase paid by Sutton Management directly to Detco Ind. However, petitioner was unable to rebut the presumption of taxability with regard to these transactions (Tax Law § 1132[c]) and the Division does not bear the burden of demonstrating that each of the rejected invoices were taxable (Matter of Koren-DiResta Constr. Co. v. State Tax Commn., supra).

Without more evidence, it cannot be discerned from the record what was the actual nature of the transactions in issue. For this reason, it is determined that petitioner has not carried his burden of proof and the assessment is sustained.

This conclusion is reached even though petitioner testified that the business of Control was identical to the business of the successor corporation whose transactions with respect to the installation and modification of custom software was found nontaxable by the Division. Petitioner testified that this was the nature of the transactions in issue, but his testimony was in conflict with the description of services on the invoices issued by Control and therefore under his ultimate control. Therefore, it is determined that his testimony was not as credible as the invoices, given all of the facts and circumstances of this matter (cf., Matter of Donohue, Tax Appeals Tribunal, December 8, 1994 [where the Tribunal evaluated the record and decided to give the taxpayer's testimony more weight than the documents which were inconsistent with the testimony]).

F. If the request for books and records had been adequate, then the Division's resort to a projection for the years with inadequate records based on the taxable percentage from the years with adequate records was justified and reasonable and petitioner would owe the entire $9,509.03, consistent with Conclusion "D" above.

Tax Law § 1135(a) provides that:

> "[e]very person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately" (emphasis added).

"Where the taxpayer's own failure to maintain proper records prevents exactness in determination of sales tax liability, exactness is not required" (citing Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 78, lv denied 44 NY2d 645, 406 NYS2d 1025), and estimates by the Division regarding a taxpayer's liability are acceptable, as long as rationally based (see, Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219; Matter of Fashana, Tax Appeals Tribunal, September 21, 1989).

While "[c]onsiderable latitude is given an auditor's method of estimating sales" where the taxpayer's records are inadequate to prove the amount of sales (Matter of Grecian Sq. v. New York State Tax Commn., supra, 501 NYS2d 219, 221), there is a limit placed on deference to the auditor's method (see, Matter of Fashana, supra). This limit is that the record must contain sufficient evidence to allow the trier of fact to determine whether the audit had a rational basis (Matter of Grecian Sq. v. State Tax Commn., supra; Matter of Shop Rite Wines & Liqs., supra; Matter of Fashana, supra).

G. Tax Law § 1133(a) places personal liability for taxes imposed, collected or required to be collected under Article 28 upon a "person required to collect such tax." Tax Law § 1131(1) defines this term as:

> "any officer, director or employee of a corporation . . . who as such officer . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]."

It is a settled matter that the holding of corporate office does not result in the per se tax liability of an officeholder

(Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427). Rather, finding a person to be an individual responsible for collecting and paying over sales and use taxes must turn on the particular facts of each case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564). "The question to be resolved in any particular case is whether an individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee" (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). Factors to consider in determining responsibility include:

> "the individual's status as an officer, director or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation [citations omitted]" (Matter of Constantino, supra).

The record indicated that petitioner was a responsible officer of Control Systems Associates, Inc. for the period in issue. In fact, the record contains no evidence to the contrary.

H. The petition of William J. Lombard, officer of Control Systems Associates, Inc., is granted to the extent set forth in Conclusion of Law "B" above, but in all other respects is denied, and the Notice of Determination, dated August 24, 1992, as modified by the Division as set forth in the auditor's letter

of June 27, 1995 and this determination, is sustained.

DATED: Troy, New York
December 7, 1995

/s/ Joseph W. Pinto, Jr.

ADMINISTRATIVE LAW JUDGE