STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **FRIENDLY MOTORS, INC.** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1986 through November 30, 1990.	:	
In the Matter of the Petition of **GABRIEL AVINARI, OFFICER** 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, 1990.	:	DETERMINATION DTA NOS. 812960, 812961 AND 812962
In the Matter of the Petition of **ILANA AVINARI, OFFICER** 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, 1990.	:	

Petitioner Friendly Motors, Inc., 183-05 Jamaica Avenue, Jamaica, New York 11423-2301, 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, 1990.

Petitioners Ilana Avinari and Gabriel Avinari, officers, 15-30 208th Street, Bayside, New York 11360-1120, filed petitions for revision ofdeterminations 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, 1990.

A hearing was held before Carroll R. Jenkins, Administrative Law Judge,at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, commencing on May 10, 1995 at 11:00 A.M., and continuing to conclusion at the same location on July 24, 1995 at 10:00 A.M., with all briefs to be submitted by October 27, 1995, which date began the six-month period for the issuance of this determination. The brief of the Division of Taxation was received on October 5, 1995. No brief was filed by petitioners. Petitioners appeared by Michael Smith, CPA, and Murray Honig, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel).

On September 14, 1995 these matters were assigned to Frank Barrie, Administrative Law Judge, who renders the following determination.

ISSUES

I. Whether the Division of Taxation established a rational basis for the assessments.

II. Whether petitioners have introduced sufficient evidence to demonstrate that (i) certain sales of used cars were, in fact, sales for resale and (ii) any other part of the assessments was erroneous.

III. Whether petitioner Ilana Avinari, as a corporate officer and 40% shareholder, was a person required to collect tax under Tax Law § 1131(1) so that she is personally liable for sales tax determined due from Friendly Motors, Inc., and whether fraud penalty, which was imposed against the corporation and her husband, Gabriel Avinari, is also properly imposed against her.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a Notice of Determination dated July 3, 1992 against the corporate petitioner, Friendly Motors, Inc. ("Friendly Motors"), asserting tax, penalty and interest as follows:

Tax Period Ended	Tax Asserted	Interest	Penalty	Payments/ Credits	Balance Due
8/31/86	$ 6,886.41	$6,805.44	$ 7,423.87	$5,000.00	$16,115.72
11/30/86	7,097.86	6,708.22	7,506.21	------	21,312.29
2/28/87	6,355.50	5,646.24	6,541.31	------	18,543.05
5/31/87	7,358.18	6,123.10	7,372.45	------	20,853.73
8/31/87	6,712.39	5,219.36	6,547.36	------	18,479.11
11/30/87	5,092.30	3,692.86	4,838.63	------	13,623.79
2/29/88	30,000.00	20,230.35	28,115.17	------	78,345.52
5/31/88	8,401.07	5,246.20	7,560.41	------	21,207.68
8/31/88	8,105.23	4,669.24	7,101.14	------	19,875.61
11/30/88	9,073.63	4,805.67	7,742.29	------	21,621.59
2/28/89	7,739.63	3,754.03	6,429.76	------	17,923.42
5/31/89	9,597.53	4,230.61	7,756.31	------	21,584.45
8/31/89	7,648.58	3,043.23	6,019.55	------	16,711.36
11/30/89	5,422.36	1,934.09	4,159.99	------	11,516.44
2/28/90	4,245.04	1,346.27	3,173.89	------	8,765.20
5/31/90	5,735.95	1,594.03	4,186.54	------	11,516.52
8/31/90	4,806.79	1,152.83	3,418.45	------	9,378.07
11/30/90	2,529.46	514.23	1,755.80	------	4,799.49
TOTAL	$142,807.91	$86,716.00	$127,649.13	$5,000.00	$352,173.04

This notice included an explanation that the tax asserted due was estimated in accordance with provisions of Tax Law § 1138 and was "based on an audit of your records." In addition, the notice noted that pursuant to Tax Law § 1145(a)(2), fraud penalties of 50 percent of the amount of the tax due were imposed. Penalties for willful neglect to comply with the Tax Law were also imposed. Corresponding notices, each dated July 13, 1992, were issued against petitioner Ilana Avinari and petitioner Gabriel Avinari, respectively, which asserted the same amounts due for tax as specified above for Friendly Motors, but which asserted slightly larger amounts for interest and penalty because the notices issued against the individual petitioners were dated ten days later than the notice against Friendly Motors.

2. According to a sales tax audit report information sheet included in the field audit report (Division's Exhibit "J"), the business of Friendly Motors, which commenced in 1986, was described as a "used car dealership-export, wholesale, & retail" in the New York City borough of Queens. The audit report, at page 6 of 10 pages, also reveals that Friendly Motors went out of business on May 31, 1991 although the principals involved in Friendly Motors started "a new business in the same [Jamaica, Queens] location under a different name and I.D. number."

The Audit

3. By a letter dated June 6, 1989 (Division's Exhibit "I"), the auditor, Gairy Torrie, commenced his audit, which took 190 hours, by informing Friendly Motors that its sales tax returns "have been scheduled for a field examination". He requested that the corporation's books and records pertaining to its sales tax liability be made available for his review as follows:

> "Required documents include sales tax returns and accompanying workpapers, detailed sales book(s), sales journals, all sales invoices, documents supporting the nontaxable status of all untaxed sales (i.e. resale certificates, diplomatic and exempt certificates, shipping records), ledgers, cash register tapes and any type of memoranda prepared for consignment sales. Federal tax returns and New York State WRS-2 wage reporting forms should also be made available. Additional information may be required during the course of the audit."

4. The auditor testified that at his first meeting with petitioners' accountant, identified as an individual named Y. Bar-Chama, no sales invoices were produced because "all the sales invoices for the audit period will be too much to be produced by him" (tr., p. 41). Instead, Mr. Bar-Chama requested that the auditor select a test period.

5. The field audit report (Division's Exhibit "J"), at page 5 of 10, includes the following narrative that describes the test period audit conducted by Mr. Torrie:

> "Sales were tested for the quarters ending 2/29/88 and 5/31/88 respectively. Questionnaires were mailed out to the taxpayer's customers for those periods. The questionnaires mailed totalled one hundred and fifty-six (156). Sixty-nine (69) customers answered the questionnaires. The followings [sic] are the make-up of the questionnaires' responses. Total per taxpayer's taxable sales invoices equals $265,650. Total per customers' responses equal $391,446. This resulted in a difference of $125,796 and a margin of error on taxable sales of 47.35%. Questionnaires were also mailed out for resale customers denoted by taxpayers' records. Resale certificate with the name 'N & G Motors, Inc.' was provided as documentation to substantiate the non-taxability of certain sales. These sales were disallowed because 'N & G Motors, Inc.' could not be found. Investigation proved that this company did not exist. The telephone number was another business's telephone number. The address on the certificate was found to be fictitious because this company could not be found at this address. Therefore, all non-taxable sales in which resale certificate bearing 'N & G Motors, Inc.' were [sic] provided as documentation as proof of their non-taxability were disallowed.
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> These sales (N & G Motors, Inc.) tested totalled $40,300 but the customers' responses equal $45,550. This computed to a difference in non-taxable sales of $5,250. Therefore, non-taxable sales were increased by a margin of error of 13.03% and a disallowance margin of error of 7.96%."

The Division's Exhibit "M" at pages 15, 38, 73 and 149 show invoices claiming that individuals named Ferguson, Winley, Brown and Payne, respectively, purchased cars on behalf of N & G Motors, but investigator Tate's investigation proved otherwise that these customers purchased such cars for themselves.

6. Included in the auditor's work papers (Division's Exhibit "K") is a schedule labelled "Analysis of questionnaire's responses". This analysis also shows a margin of error on taxable sales of 47.35% based upon a difference of $125,796.00[1] between a total questionnaire response amount of $391,446.00 and a total sales invoice (as provided by petitioners) amount of $265,650.00 This analysis is based upon 63 transactions during December 1987 to May 1988 and shows 45 questionnaire responses which indicated a greater selling price than noted in Friendly Motors' sales invoices and 18 questionnaire responses where there were no variances from the sales invoices. It is observed that according to this analysis, "The questionnaire responses were netted of tax (8.25%) and handling fees of $100.00 [and] [t]he invoice amount is netted of all taxes and other charges." A second schedule labelled "Analysis of nontaxable sales" also included in the work papers shows a margin of error on nontaxable sales of 13.03% based upon 6 transactions during December 1987 to May 1988. Two of the six transactions show a greater selling price than noted on Friendly Motors' sales invoices. In addition this analysis shows a disallowance of nontaxable sales of 7.96% apparently based upon sales to N & G Motors, Inc., which as noted in Finding of Fact "5", were treated as taxable sales and disallowed as sales for resale.

7. In sum, after audit, Friendly Motors' gross sales were increased from the reported $5,726,433.00 to $6,952,939.00 and taxable sales from the reported $2,473,727.00 to $3,841,096.00 for the audit period at issue which consists of four and one-half years (June 1, 1986 through November 30, 1990).

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[1]In a letter dated February 20, 1992 (Division's Exhibit "N"), the auditor's supervisor indicated that this amount should be reduced to $123,344.00 resulting in a margin of error of 46.43%. The specific basis for this adjustment is unknown. The auditor testified that "the adjustment was gotten in review--partially in reviewing my responses and also in discussion with the investigator" (tr., p. 79).

8. The auditor testified that as a result of his uncovering the attempt by the "taxpayer" to control the way its customers completed the questionnaires, he referred the matter to "the investigation department" (tr., p. 52). The Division introduced into evidence as its Exhibit "M" an affidavit of Ruth Tate dated May 6, 1995, an investigator employed by the Office of Tax Enforcement of the New York City Department of Finance, who conducted a fraud investigation of petitioners. Attached to Ms. Tate's affidavit is an Exhibit "A" consisting of 220 pages which she described in her affidavit as "true and accurate copies of the materials prepared or assembled by me as part of my investigation of the [petitioners]". It appears that many of these documents are the questionnaires which the auditor had sent out to Friendly Motors' customers and which investigator Tate "assembled" into some coherent order.

9. On cross-examination of the auditor, petitioners' representative attempted to show mistakes in the difference between the total of Friendly Motors' sales invoices and the total based upon the customers' responses to the auditor's questionnaires. He questioned the auditor's calculation that there was a difference of $4,848.00 between a sales invoice of $1,000.00 which is included at page 22 of Exhibit "A" attached to investigator Tate's affidavit (Division's Exhibit "M") and a questionnaire amount of $5,848.00. A close review of pages 17-22 of Exhibit "A" of the affidavit shows that, according to a letter from the consumer loan department of Banco de Ponce dated May 23, 1989, Eric Harris had a balance due on a car loan of $5,184.91 which would lend support to the auditor's use of $5,848.00 as a questionnaire amount although the questionnaire was not introduced into evidence. Petitioners' representative then incorrectly focused on a transaction involving an individual named Leo Harris because as the auditor pointed out the sales invoice amount was $5,000.00 and the questionnaire response amount was also $5,000.00. Petitioners' representative proceeded to focus on page 23 of the Exhibit "A" attached to investigator Tate's affidavit which showed a difference of $419.00 between a customer's invoice and the invoice presented by Friendly Motors. He changed the subject apparently upon realizing that this difference was not included in the calculation of a margin of error. No other mistakes or errors concerning particular customers were noted during cross-

examination of the auditor although much attention was given to an incorrectly addressed mailing that was corrected by the responding customer.

10. At the continuation of the hearing approximately two and one-half months later, petitioners' attorney, in his closing argument, referenced certain transactions where the auditor's calculation of the difference in amount between the sales invoice produced by Friendly Motors and what was reported by a particular customer as a result of the third-party verification conducted by the auditor and/or investigator Tate reflected certain discrepancies to the disadvantage of petitioners. As noted in paragraph "18" below, the Division has conceded that it is prepared to reduce tax asserted due resulting from such discrepancies. The transactions specified by petitioners' attorney (in which the auditor apparently included sales tax in the amount of the invoice verified with the customer while excluding sales tax from the invoice provided by Friendly Motors) were the following:

Page Reference to Division's Exhibit "M"	Customer's Name	Amount Calculated as Difference by Auditor per Division's Exhibit "K"	Corrected Amount of Difference Based on Exhibit "M"
pp. 80-82	Diane Byard	$2,243.00	$1,600.00
pp. 97-100	Carolyn Chappell	1,731.00	1,250.00
pp. 113-116	Theobald Delfish	1,269.00	[2]
pp. 151-156	Lemuel Perry	6,800.00	2,950.00
pp. 217-220	Kevin Williams	1,506.00	1,350.00

11. Petitioners also focused on the auditor's finding that sales to N & G Motors should not be treated as sales for resale because such entity did not, in fact, exist. Petitioners introduced into evidence as their Exhibit "1", which was their only exhibit, a certified copy of a Facility Record of the New York State Department of Motor Vehicles dated July 6, 1995 which shows that N & G Motors Inc. of 4700 76 St., Elmhurst, New York was a used vehicle dealer of unknown size owned by an individual identified as Marco Goldenberg, which went out of business on December 28, 1988.

Fraud Penalty

[2]The photocopy of the Friendly Motors' invoice is unreadable so that a corrected amount cannot be determined.

12. As noted in Finding of Fact "1", the Division imposed a fraud penalty on each of the petitioners. As its Exhibit "U", the Division introduced into evidence a certified transcript of the plea allocution dated August 13, 1991 involving criminal pleas of petitioners Gabriel Avinari and Friendly Motors. These petitioners pleaded guilty to offering a false instrument for filing in the first degree. They admitted that they filed a sales and use tax return for the period December 1, 1987 to February 29, 1988 that contained false information concerning the true gross sales and taxable sales of Friendly Motors for such period. In addition, Gabriel Avinari executed affidavits of judgment by confession for himself as an individual and on behalf of Friendly Motors as its president in which judgment in favor of the Division in the amount of $30,000.00, exclusive of interest and penalties, was confessed as a debt justly due to the Division. Neither petitioner has paid any part of the $30,000.00 which was referred to as "restitution" to the Division although the plea agreement between the Attorney General of the State of New York and Gabriel Avinari and Friendly Motors required the payment of such amount within six months of the date of sentence. It is observed that in their response to the Divisions' notices to admit each dated April 20, 1995 (Division's Exhibit "E") which were served on the three petitioners, respectively, petitioners denied "that no part of the restitution referred to in a plea agreement has been paid" (Division's Exhibit "F"). However, petitioners offered no evidence to establish that any part of the $30,000.00 was, in fact, paid to the Division. The plea agreement also provided that any amounts of restitution paid by petitioners shall be credited by the Division towards any civil assessments issued against Friendly Motors or any of its officers. In addition, the plea agreement noted that petitioners agreed to pay a fine in the amount of $5,000.00.

13. Petitioners' representative specifically challenged the imposition of a fraud penalty against Ilana Avinari. He conceded that petitioners Gabriel Avinari and Friendly Motors admitted fraud "before Judge Adlerberg in Supreme Court in Manhattan" (tr., p. 29) and did not specifically challenge the imposition of fraud penalty on taxes asserted due for the sales tax quarters at issue herein which were not the subject of the criminal plea. Gabriel Avinari and

Friendly Motors admitted filing a false sales tax return for the period December 1, 1987 to February 29, 1988 while the period at issue covers June 1, 1986 through November 30, 1990. Further, in his closing remarks, petitioners' representative expressly stated: "It isn't a question of whether there is a fraud in this case by Gabriel Avinari" (tr., p. 183).

14. At the continuation of the hearing on July 24, 1995, petitioners' presentation consisted of the introduction of one exhibit only as described in Finding of Fact "10". No witnesses were presented. In response, the Division called Ilana Avinari as its witness. Mrs. Avinari testified that she was a "40 percent owner" of Friendly Motors and that she was either vice-president or treasurer of the corporation (tr., p. 159). She also testified that she was responsible for all bookkeeping for Friendly Motors during the audit period including the company's sales journal. She admitted that bills of sale were "recreated" because:

> "We were robbed a few times; the office was in shambles when we came back. A lot of bills of sale were missing; they could have been misfiled; whatever the reason was" (tr., p. 168).

It is noted that in response to questioning by the Division's representative, Ilana Avinari testified that certain handwritten pages she prepared, which were included in petitioners' bill of particulars (Division's Exhibit "D"), were her "best explanations of some of the transactions which were the subjects of this assessment" (tr., p. 161). However, no documents were introduced to support Mrs. Avinari's explanations.

15. In its brief, the Division pointed to its Exhibit "M" as supporting its claim that Ilana Avinari falsified records. For example, Ilana Avinari prepared and signed the bill of sale for the transaction involving customer Michael Ferguson (Division's Exhibit M, pp. 15-16). This bill of sale showed Ferguson purchasing the vehicle on behalf of N & G Motors, but Mr. Ferguson stated to investigator Tate that he purchased the vehicle for his own use and supplied the investigator with bank financing documents confirming his position. The Division pointed out many other examples of Ilana Avinari's falsification of records during the test period to which petitioners have not specifically responded.

SUMMARY OF THE PARTIES' POSITIONS

16. The Division's representative in his statement of the issues at the hearing held on May 10, 1995 indicated that petitioners were contesting the amount of sales tax that had been assessed.

17. Petitioners' representatives responded in their opening remarks at the hearing that the margin of error used by by the Division to calculate tax due should be recalculated and reduced "because of setoffs, trade-ins, lemon law refunds, bad debts, et cetera . . ." (tr., p. 28). Attorney Honig also indicated that sales by Friendly Motors to N & G Motors should be allowed as nontaxable resales based on petitioners' showing that the Division was incorrect to treat N & G Motors as a "nonentity" (tr., p. 28), and that petitioners should receive a credit against taxes asserted due for any payment made pursuant to the criminal plea bargain which required restitution to the State of $30,000.00. He conceded that fraud penalty was properly imposed upon Gabriel Avinari and Friendly Motors, but that "(a)ny determination for tax due against Ilana Avinari should certainly not include that fraud penalty. . . ." (tr., p. 29). In sum, attorney Honig concluded his opening remarks, "(W)e are not denying the existence of a deficiency; it's just a question of the amount of deficiency that has been determined to be arrived at" (tr., p. 30).

In his closing argument at the continuation of the hearing approximately two and one-half months after the commencement of the hearing, attorney Honig expanded upon petitioners' position by contending that the record disclosed discrepancies in the auditor's analysis of certain particular car sales which have been itemized in Finding of Fact "10". His complaint seems to be that the auditor included sales tax in sales amounts verified from customers while he did not include sales tax in the sales amounts claimed by Friendly Motors. He also complained that the auditor relied upon hearsay in determining tax due for certain transactions where the auditor did not have an invoice from the customer but rather relied on a notation made by investigator Tate or upon a letter from the customer to the auditor.

18. In its brief, the Division noted that "(n)ot one [Friendly Motors] invoice showing a purchase by N & G turned out to be truthful; all the alleged agents of N & G who could be located confirmed that they purchased the vehicles for their own use and not for resale"

(Division's brief, p. 6). The Division maintains that petitioners failed to show by clear and convincing evidence that the amount asserted due was erroneous. However, the Division made the following concession:

> "The petitioner's attorney did, however, refer to certain transactions in his summation. In some of these transactions, there does appear to be discrepancies between the differences used by the auditor to calculate margins of error [references to exhibits omitted] and the differences arrived at by a review of the underlying documentation contained in the Tate Affidavit. Some of these discrepancies resulted from the auditor comparing the purchase price shown in the [Friendly Motors produced] bill of sale to a figure in the customer-produced bill of sale which was the sum of the purchase price and other charges, including sales tax. To the extent such discrepancies are plainly evident and the net effect thereof would be a lower margin of error, the Division is prepared to concede any reduction resulting from such discrepancies" (Division's brief, pp. 13-14).

The Division argues that the auditor's use of hearsay evidence was acceptable and may also support a finding of fraud. Further, the Division contends that "the petitioners have not established any basis for the substantial reductions they sought at hearing" (Division's brief p. 19).

According to the Division, fraud penalty was properly imposed against Ilana Avinari because "(i)t is clear from her testimony that Ilana Avinari was very much aware of the financial workings of [Friendly Motors] and the record keeping by this corporation" (Division's brief, p. 23). In addition, the Division contends that Ilana Avinari falsified records.

CONCLUSIONS OF LAW

A. In light of petitioners' limited introduction of evidence to support their case, it is important to emphasize the standard concerning the burden of proof in matters before the Division of Tax Appeals. In Matter of Atlantic and Hudson Ltd. Partnerships (Tax Appeals Tribunal, January 30, 1992), the Tribunal provided the following guidance concerning the burden of proof in matters before the Division of Tax Appeals:

> "Although a determination of tax must have a rational basis in order to be sustained upon review (see, Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219), the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (see, Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174; Matter of Leogrande, Tax Appeals Tribunal, July 18, 1991). Evidence that both rebuts the presumption of correctness and indicates the irrationality of the audit may appear: on the face of

> the audit as described by the Division through testimony or documentation (see, Matter of Snyder v. State Tax Commn., 114 AD2d 567, 494 NYS2d 183; Matter of Fortunato, Tax Appeals Tribunal, February 22, 1990); from factors underlying the audit which are developed by the petitioner at hearing (see, Matter of Ristorante Puglia, Ltd. v. Chu, 102 AD2d 348, 478 NYS2d 91; Matter of Fokos Lounge, Tax Appeals Tribunal, March 7, 1991 [where the petitioner proved that its utility meter readings bore no relationship to its level of business activity]); or in the inability of the Division to identify the bases of the audit methodology in response to questions posed at the hearing (see, Matter of Basileo, Tax Appeals Tribunal, May 9, 1991; Matter of Fokos Lounge, Tax Appeals Tribunal, March 7, 1991; Matter of Shop Rite Wines & Liqs., Tax Appeals Tribunal, February 22, 1991; Matter of Fashana, Tax Appeals Tribunal, September 21, 1989). However, where, as here, petitioner has failed to make any inquiry into the audit method or calculation, the presumption of correctness raised by the issuance of the assessment provides the rational basis for the assessment. To hold otherwise would be in irreconcilable conflict with the principles that the Division does not have the burden to demonstrate the propriety of its assessment (see, Matter of A & J Gifts Shop v. Chu, 145 AD2d 877, 536 NYS2d 209, lv denied 74 NY2d 603, 542 NYS2d 518; Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Matter of Scarpulla v. State Tax Commn., 120 AD2d 842, 502 NYS2d 113) and that the petitioner has a heavy burden to prove the assessment erroneous (see, Matter of Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692)."

B. In the matter at hand, little evidence was introduced by petitioners to rebut the presumption of correctness raised by the issuance of the notices of determination. Furthermore, there is no evidence on the face of the audit, as there was in Matter of Fortunato (supra), to base a conclusion that the determination of tax due lacked a rational basis. Rather, petitioners requested a test period audit to be conducted, and the third-party verification procedure used by the auditor and the investigator was a reasonable methodology for determining tax due for a used car business that was substantially underreporting its taxable sales (see, Matter of Anthony, Tax Appeals Tribunal, November 30, 1995). However, although the evidence supports a conclusion that the determination of tax due had a rational basis, as noted in paragraph "18" and footnote "1", the Division has conceded certain errors in its calculations which should be corrected and will result in a reduction in the amount of tax determined due.

Furthermore, other than the adjustments conceded by the Division, petitioner has not established any other errors in the audit that require further adjustments. The written statement of petitioner Ilana Avinari, set forth in petitioners' bill of particulars, is insufficient to meet petitioners' burden of showing, by clear and convincing proof, additional errors on the part of

the Division. Bills of particulars are not evidentiary (see, Bardi v. Mosher, 197 AD2d 797, 602 NYS2d 974). In addition, the auditor's calculations, which were based upon notes or letters and not a questionnaire which had been returned by a customer of Friendly Motors, were still reasonable. An auditor's calculations may be based on hearsay evidence (see, Matter of Lancaster Auto Collision, Tax Appeals Tribunal, September 7, 1995). It is also noted that petitioners have not met their burden of proving that sales of cars were made to N & G Motors for resale. Their introduction of a single Exhibit "1" which seems to suggest that N & G Motors did, in fact, exist falls short of sufficient proof of resales. Rather, evidence in the record suggests that individuals, who petitioners claimed purchased cars on behalf of N & G Motors purchased such cars for themselves. Finally, petitioners have not proven payment of any part of the $30,000.00 noted in their plea allocation (cf., Matter of N. T. J. Liquors, Inc., Tax Appeals Tribunal, May 7, 1992).

C. Turning to petitioner Ilana Avinari's liability as an officer of Friendly Motors for the collection of any unpaid sales tax, it is concluded that there is sufficient evidence in the record to hold her personally liable for unpaid taxes. The determination of whether an individual is a person under a duty to act for a business operation is based upon an examination of the particular facts of the case. In Matter of Moschetto (Tax Appeals Tribunal, March 17, 1994), the Tribunal reaffirmed the standard articulated in Matter of Constantino (Tax Appeals Tribunal, September 27, 1990):

> "The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: 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 interests in the corporation" (Matter of Constantino, supra).

As noted in Finding of Fact "14", petitioner Ilana Avinari was a 40 percent owner of the corporation and was either vice-president or treasurer of the corporation. In addition, she was responsible for all bookkeeping for the corporation during the audit period including the

company's sales journal. Consequently, there is sufficient evidence to hold Mrs. Avinari personally liable for unpaid taxes.

D. In addition, given Ilana Avinari's active involvement in the business and her falsification of records, as noted in Finding of Fact "15", fraud penalty is properly imposed upon her.

In Matter of Cinelli (Tax Appeals Tribunal, September 14, 1989), the Tribunal provided the following guidance in determining whether a taxpayer may be subject to a civil fraud penalty:

> "The burden of showing fraud under § 1145(a)(2) has consistently been interpreted to reside with the Division (Matter of Ilter Sener d/b/a Jimmy's Gas Station, Tax Appeals Tribunal, May 5, 1988; Matter of Nicholas Kucherov d/b/a Nick's Marine, State Tax Commn., April 15, 1987, affd Kucherov v. Chu [147 AD2d 877, 538 NYS2d 339]). The standard of proof necessary to support a finding of fraud requires 'clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing.' (Matter of Ilter Sener, supra, citing, Matter of Walter and Gertrude Shutt, State Tax Commn., July 13, 1982).
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> "For a taxpayer to be subject to a 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 Tax Law (Matter of Cousins Service Station, Inc., Tax Appeals Tribunal, August 11, 1988). Fraud need not be established by direct evidence, but can be shown by surveying the taxpayer's entire course of business and drawing reasonable inferences therefrom (see, Korecky v. Commr., 781 F2d 1566 [11th Cir 1986]; Briggs v. Commr., 440 F2d 5 [6th Cir 1962])."

As noted in Finding of Fact "13", petitioners have conceded the imposition of fraud penalties against Gabriel Avinari and Friendly Motors. Nonetheless, it is noted that the criminal conviction for fraudulently filing a false sales tax return for the quarter ending February 29, 1988 "collaterally estops petitioner from challenging the civil fraud penalty imposed under Tax Law § 1145(a)(2)" (Matter of Ianniello, Tax Appeals Tribunal, November 25, 1992, confirmed 209 AD2d 740, 617 NYS2d 973). Furthermore, it is reasonable to view the fraudulent behavior for the quarter ending February 29, 1988 as a reflection of the nature of the business operation throughout the audit period in light of the concession by Gabriel Avinari and Friendly Motors regarding the imposition of fraud penalty for the entire audit period. However, Ilana Avinari

has not conceded that fraud penalty was properly imposed against her. Consequently, since the only proof of fraudulent behavior on her part is limited to certain activities during the test period and there is no evidence that such behavior then was reflective of the nature of her involvement throughout the audit period, the Division has not shouldered its burden to show that the fraud penalty was properly asserted against Mrs. Avinari for the entire audit period. As a result fraud penalty may be properly asserted against Mrs. Avinari for the test period, December 1, 1987 through May 31, 1988 only (see, Matter of Cianciosi, Tax Appeals Tribunal, January 31, 1991).

E. The petitions of Friendly Motors, Inc., Gabriel Avinari, officer and Ilana Avinari, officer are granted to the extent indicated in Conclusions of Law " B" and "D", and the notices of determination dated July 3, 1992 are to be modified to so conform, but, in all other respects, the petitions are denied.

DATED: Troy, New York
March 7, 1996

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE