STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **LAWRENCE FELDMAN** **OFFICER OF** **T. I. CONSTRUCTION CORPORATION** 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, 1988 through February 28, 1993.	:	DETERMINATION DTA NO.816158

Petitioner, Lawrence Feldman, 351 Mill River Road, Oyster Bay, New York 11771-2731, 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, 1988 through February 28, 1993.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 15, 2000 at 11:15 A.M., with all briefs to be submitted by August 10, 2000, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect and remit sales and use taxes on behalf of T. I. Construction Corporation who failed to do so and thus is personally liable for such unpaid taxes, plus penalty and interest thereon.

FINDINGS OF FACT

1. In August 1993, the Division of Taxation ("Division") commenced a sales tax field audit of the operations of T. I. Construction Corporation ("T. I."). T. I., a domestic corporation with offices at 2001 Marcus Avenue, Lake Success, New York, was formed to perform construction work at two office buildings located, respectively, at 2001 Marcus Avenue, Lake Success, New York and 98 Cutter Mill Road, Great Neck, New York. These two buildings were managed by a company known as Jennie Management, Inc., and were owned, respectively, by Triad I Associates and Atrium Associates, limited partnerships controlled by petitioner's father, Edward Feldman, and Irving Feldman. Petitioner owned ten percent of the shares of T. I., as did Michael Zerner and Stanley Grey, while petitioner's father, Edward Feldman, owned T. I.'s remaining shares. Petitioner was also an officer of T. I., as were the other three shareholders, although the particular offices held by each are not specified in the record. T. I. was not registered as a vendor for sales tax purposes, had not obtained a Certificate of Authority, and did not file any sales tax returns.

2. The Division's audit commenced with the auditor's issuance of an audit appointment letter and request for books and records dated August 12, 1993 stating, "all books and records pertaining to your Sales Tax liability for the period [6/1/90 through 8/31/93] are to be available on the [9/9/93] appointment date. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates." This letter also noted that additional information might be required during the course of the audit.

3. No response to the audit appointment letter was received from or on behalf of T. I. In turn, a second letter, dated December 7, 1993, was issued to T. I. This second letter set an audit appointment date for December 27, 1993 and provided, in relevant part, as follows:

> Due to the lack of cooperation and the information that you have not registered or filed returns for the Sales Taxes, your audit is being updated to include the period 6/1/88 - 11/30/93.
>
> Information on file indicates that returns should have been filed and taxes collected and reported to the Sales Tax Department. If the information required by law is not submitted to us, the law enables us to issue assessments based upon the information available to us.

4. T. I. did not respond to the second audit appointment letter or furnish any records or other information to the auditor. Thus, the auditor resorted to third-party information and estimation techniques in his determination of T. I.'s sales tax liability. In this regard, the auditor had obtained information from audits of Hunter Real Estate Management Corporation and Hunter Construction Company, each of which was owned by other members of the Feldman family and each of which had provided requested records during their audits. The auditor assumed that these entities were engaged in the same or similar business as T. I. In addition, the auditor obtained two annual sales tax returns filed by Jennie Management Company reporting gross annual sales of $7,272,441.00.

5. The auditor assumed that because T. I. performed construction work as needed by Jennie Management Company on the two buildings managed by Jennie for Atrium and Triad I, and that because T. I. did not file any sales tax returns, its gross annual sales were equal to Jennie Management Company's gross annual sales. Accordingly, the auditor divided Jennie Management Company's annual sales by four to arrive at average quarterly sales of $1,818,110.30 for Jennie Management Company and, by extension, for T. I. In turn, the auditor

divided the sales tax due per quarter from Hunter Construction Company as determined on audit of Hunter Construction Company ($8,500.44) by T. I.'s average quarterly sales ($1,818,110.30) to arrive at an error rate of .00468 in sales tax due per quarter. The auditor applied such error rate to T. I.'s gross sales per quarter to calculate sales tax due from T. I. for the period June 1, 1988 through February 28, 1993 in the amount of $172,527.71. The auditor also imposed interest and penalty, including omnibus penalty, because T. I. was engaged in business without obtaining a Certificate of Authority and because T. I. had issued resale certificates notwithstanding that it was not registered as a vendor for sales tax purposes. The audit work papers include a number of invoices showing purchases of carpeting by T. I. Construction and also include a resale certificate issued by T. I. with respect to the vendor who sold such carpeting. The invoices do not reflect the payment of sales tax on the carpeting purchased.

6. On July 21, 1997 the Division of Taxation issued to petitioner, Lawrence Feldman, a Notice of Determination assessing sales tax due for the period June 1, 1988 through February 28, 1993 in the amount of $172,527.71, plus penalty and interest. This notice states that petitioner was assessed as a person required to collect and remit sales and use taxes on behalf of T. I. who is responsible for the unpaid sales tax owed by T. I. as determined upon audit. Petitioner timely challenged the notice by filing a petition with the Division of Tax Appeals.

SUMMARY OF PETITIONER'S POSITION

7. Petitioner alleges that he was a minority shareholder who did not participate in the management or operation of T. I. and thus should not be held liable for any taxes owed by T. I. In this regard, petitioner claims that from 1988 through 1997, all of his working time was consumed with a major development project in Manhattan and with another project in Connecticut, that his office was relocated to the project in Manhattan, and that he had no time to

be involved with T. I. or anything to do in connection with its operation. Petitioner also alleges that foreclosure proceedings were instituted with regard to the two office buildings, and that receivers were appointed to manage the buildings, leaving him with no ability to control matters in any event. Petitioner maintains, in his petition, that T. I. went into bankruptcy in 1990 and ceased to exist. Finally, petitioner alleges that the audit was flawed in that it proceeded on a series of inaccurate assumptions, including the assumption that Hunter Construction Corporation was engaged in business comparable to T. I.'s business. Petitioner claims that Hunter Construction Corporation was formed, owned and operated by his uncle and his cousin following an acrimonious family business split in or about 1985. Petitioner also asserts that the partnerships owning the two buildings at which T. I. performed construction work rather than T. I. should be held responsible for any sales tax due.

8. Petitioner did not submit any documents specifically concerning T. I. at or after the hearing. Petitioner did submit, in connection with his assertion concerning foreclosure proceedings and the appointment of receivers for the two buildings, copies of orders dated March 19, 1991 and December 14, 1990 appointing receivers for the properties owned by Atrium Associates and Triad I Associates, respectively, during the pendency of foreclosure proceedings.

CONCLUSIONS OF LAW

A. Where a taxpayer's records are insufficient, unreliable and inadequate to verify, upon audit, the amount of sales and use taxes due for the period under examination, the Division is authorized to estimate such tax liability on the basis of external indices (Tax Law § 1138[a][1]; ***see, Matter of Ristorante Puglia, Ltd. v. Chu,*** 102 AD2d 348, 478 NYS2d 91, 93; ***Matter of Surface Line Operators Fraternal Org. v. Tully,*** 85 AD2d 858, 446 NYS2d 451, 452). In this

case, T. I. did not respond to the audit letters and submitted no records as requested for audit. Thus it was clearly appropriate for the Division to resort to an indirect auditing methodology and estimate sales tax due on the basis of external indices. Where, as here, the Division seeks to determine a taxpayer's sales tax liability on the basis of an indirect audit method, the methodology selected must be reasonably calculated to reflect the taxes due (***Matter of Ristorante Puglia, Ltd. v. Chu, supra; Matter of W.T. Grant Co. v. Joseph,*** 2 NY2d 196, 159 NYS2d 150, 157, ***cert denied*** 355 US 869). However, exactness in the outcome of the audit method is not required (***Matter of Markowitz v. State Tax Commn.,*** 54 AD2d 1023, 388 NYS2d 176, 177, ***affd*** 44 NY2d 684, 405 NYS2d 454; ***Matter of Lefkowitz,*** Tax Appeals Tribunal, May 3, 1990). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (***Matter of Meskouris Bros. v. Chu,*** 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully, supra)***.

B. Although an audit methodology such as that employed in this case is certainly not immune from attack, petitioner has proven no error in either the audit method utilized or the results derived from its application. Petitioner has not shown that the methodology was in any manner incorrect or unreasonable. No records were made available to the auditor in response to the audit appointment letters, and petitioner has not come forward with any documents, including any records of sales or purchases by T. I. or by any of the multitude of apparently related entities, to refute the information and assumptions relied upon by the auditor in arriving at the assessment. Instead, petitioner simply offers a series of claims that the audit and its results are flawed in a number of ways. On this score, petitioner alleges that both of the limited partnerships owning the office buildings, Atrium and Triad I, were effectively removed from

control of operation of the buildings upon the appointment of receivers on March 19, 1991 and December 14, 1990, respectively, in connection with foreclosure proceedings undertaken by institutional lenders. Following the appointment of such receivers, petitioner maintains that none of the shareholders and officers of T. I. could have had any control over the books and records of T. I. or over the payment of any taxes on its behalf. Petitioner also states that there would have been no sales taxable receipts by T. I. since the receivers would not, as a matter of common practice, have used T. I. to perform any construction activities on the buildings. Petitioner further claims that Hunter Construction Corporation was not comparable to T. I., and that T. I. was simply an arm of the two entities owning the office buildings thus leaving such entities and not T. I. responsible for sales tax.

C. With respect to the issue of comparability between Hunter and T. I., the Division is clearly entitled to rely on its own audit experience and information in its estimation process, particularly in light of a taxpayer's failure to supply any reliable records or information concerning its operations (***Matter of Convissar v. State Tax Commn.***, 69 AD2d 929, 415 NYS2d 305; ***Matter of Giordano v. State Tax Commn.***, 145 AD2d 726, 535 NYS2d 255). Petitioner has provided nothing other than a bare assertion to establish that Hunter and T. I. were not comparable. With regard to the claim that the owning limited partnerships rather than T. I. should be responsible for any sales tax, petitioner overlooks the fact that T. I. was itself a separate entity. According to petitioner, T. I. was set up as such in order to minimize the risk of exposing the buildings' owners (i.e., the general partners of Atrium and Triad I) to liability from slip and fall claims. The fact of such independence in setup clearly undermines the claim that T. I. was somehow not under any obligations with regard to sales and use taxes. In sum, the audit method employed had a rational basis, the result derived therefrom is presumed to be correct in

the absence of any credible evidence challenging such result and the same is, therefore, sustained (***Matter of Hammerman,*** Tax Appeals Tribunal, August 17, 1995; ***Matter of Fashana,*** Tax Appeals Tribunal, September 21, 1989).

D. Turning to the amounts found due upon audit, it remains that petitioner's claims, set forth above, are not sufficient to defeat the audit, its results or the imposition of liability against him for the tax, penalty and interest found due. Petitioner has offered no documents establishing the actual scope or amount of construction work performed by T. I. Petitioner's arguments consist of bare assertions not supported by any documentary evidence other than the orders showing that receivers were in fact appointed with respect to the two buildings. In turn, and notwithstanding the issuance of such orders, there is no evidence that T. I. itself was at any time involved in bankruptcy proceedings, ceased operations including the performance of construction work on the two buildings, or that it did no work at all or was precluded from doing any work by the appointed receivers or by anyone else. There is no evidence that the receivers either directly or indirectly took control of T. I. at any time, or that T. I. was not able to function. Specifically with respect to the allegation that the auditor made erroneous assumptions regarding Hunter Construction Company versus T. I., it remains that no records of T. I.'s activities were ever made available to the auditor. Petitioner's testimony about the setup and operation of T. I., as well as the myriad other entities involved, in many regards lacked specifics and, again, was supported by no documentary evidence. It may well be that T. I. simply stopped functioning upon the appointment of the receivers. However, it is equally possible that T. I. was retained by the receivers to continue to perform construction work at the two buildings. The record simply lacks any credible specific evidence from which to make any conclusion refuting the assumptions relied upon by the auditor. In fact, the record contains no evidence with respect to

the work performed by T. I. prior to the appointment of the receivers. In sum, the evidence submitted by petitioner does not meet the burden of refuting the assumptions upon which the audit was based, or the results of the audit.

E. Turning to the issue of petitioner's personal responsibility for the tax, penalty and interest in question, Tax Law §§ 1131(1) and 1133(a), together with numerous cases decided thereunder, have focused on a number of factors relevant to the issue of personal liability. These factors include whether the individual had authorization to sign corporate tax returns, had responsibility for maintaining corporate books and records and was involved in managing the affairs of the corporation. Other factors include the individual's status as an officer, director or shareholder, his authority to write checks on behalf of the corporation, and whether he signed checks, tax returns and other documents on behalf of the corporation. The individual's involvement with and knowledge and control over the financial and operational affairs of the corporation is relevant, as is whether the individual derived substantial income from the corporation and owned stock in the corporation ***(see, Matter of Autex Corp,*** Tax Appeals Tribunal, November 23, 1988; ***Matter of Pais***, Tax Appeals Tribunal, July 18, 1991).

F. Petitioner has offered only the bare assertion that he was not a person responsible to collect and remit taxes on behalf of T. I., and this assertion is rejected as entirely unsupported by any evidence. Petitioner admitted to being a ten percent shareholder in T. I. and to holding corporate office. As for any other evidence imposing or negating personal responsibility, it must be noted that no books or records for T. I. were provided or made available. As above, petitioner's claim that the responsibilities of managing other projects effectively precluded him from dealing with any matters on behalf of T. I. does nothing to answer the question of his position of responsibility in the first instance and, moreover, would not serve to absolve him of

the duty to assure that taxes were collected and remitted. In the same vein, petitioner's claim that three other individuals also owned shares of stock in T. I. and held corporate officer titles, does not negate petitioner's own responsibility for the amounts in issue (***see, Matter of Phillips,*** Tax Appeals Tribunal, May 11, 1995; Tax Law § 1133[a]). The record contains no evidence to establish that petitioner lacked authority to act on T. I.'s behalf as an officer and shareholder, or that he was thwarted or prevented from acting through no fault of his own. Accordingly, the Division's assessment of personal liability for the amounts at issue herein against petitioner is sustained.

G. The petition of Lawrence Feldman is hereby denied and the Notice of Determination dated July 21, 1997 is sustained.

DATED: Troy, New York
January 11, 2001

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE