STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
T. MANAGEMENT, INC.	:	DETERMINATION DTA NO. 816662
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 March 1, 1989 through August 31, 1993.	:	

Petitioner, T. Management, Inc., 4 Centre Drive, Orchard Park, New York 14127, 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 March 1, 1989 through August 31, 1993.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 77 Broadway, Buffalo, New York, on March 26, 1999 at 9:30 A.M., with petitioner's reply brief received on October 5, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by Gary M. Kanaley, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Brian J. McCann and Dennis A. Fordham, Esqs., of counsel).

ISSUES

Whether the Division of Taxation properly asserted fraud penalties against petitioner.

FINDINGS OF FACT

1. On June 30, 1997, the Division of Taxation ("Division") issued a Notice of Determination, notice number L-013784096, to petitioner in the amount of $179,143.48 in tax, $271,649.60 in interest and $180,965.92 in penalty, for a total due of $631,759.00. The "Current

Balance Due" as of the date of the notice was $452,507.51 which reflected the following payments: $100,000.00 on January 4, 1995; $10,000.00 on April 13, 1994; $24,000.00 on April 28, 1994; and $45,251.49 on August 31, 1994 for total payments of $179,251.49. The notice was for the period March 1, 1989 through August 31, 1993. It appears from the notice that the payments made by petitioner were approximately equal to the amount of tax due and that the Division applied such payments, pursuant to petitioner's instructions, to the tax due for each sales tax quarterly period listed on the notice.[1]

2. The notice states that calculation of tax due was based upon petitioner's records and that "fraud penalties of 50 percent of the amount of the tax due plus statutory interest have been added pursuant to section 1145(A)(2) of the New York State Sales and Use Tax Law."

3. Petitioner requested a conciliation conference regarding the notice and on May 15, 1998 a conciliation order sustaining the notice was issued. Petitioner then filed the petition that is the subject of the current proceedings with the Division of Tax Appeals.

4. Douglas Wittmeyer is the president and sole owner of petitioner, as he was during the period at issue. Petitioner's business during that period consisted of selling jewelry. Mr. Wittmeyer testified that at some point the business changed from selling jewelry at wholesale to selling it at retail.

5. On November 3, 1993 the Division sent petitioner an appointment letter stating that petitioner had been scheduled for a field audit of its returns on November 16, 1993. The letter was signed by Mr. Andrew Kucharski, Tax Auditor. The appointment letter listed the period under audit as September 1, 1990 through August 31, 1993.

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[1]Petitioner paid $108.01 more than the amount of tax due, which was applied by the Division to the remainder due (penalties or interest) for the initial sales tax quarter listed on the notice of March 1, 1989 through May 31, 1989.

6. The Division's audit was initiated through a Federal information match program which compared petitioner's gross sales as reported on its Federal form 1120 to its gross sales as reported on its sales tax returns. Petitioner had reported higher gross sales on its Federal form 1120 than on its sales tax returns for a comparable period.

7. On November 10, 1993 Mr. Wittmeyer called the auditor and requested that the appointment be postponed because the time before Christmas was the busiest season of the year for his business. The appointment was rescheduled for January 5, 1994, and petitioner submitted a consent to extend the statute of limitations for the period September 1, 1990 through February 28, 1991, to June 20, 1994.

8. During the time between when he received the appointment letter and the appointment on January 5, 1994, Mr. Wittmeyer reviewed the records of petitioner for the period September 1, 1990 through August 31, 1993. Based upon that review Mr. Wittmeyer prepared a schedule entitled "Sales Tax Deficit" which was provided to the auditor when the auditor appeared at petitioner's place of business for the scheduled appointment on January 5, 1994.[2] The schedule showed sales tax collected of $200,405.27, sales tax paid of $68,508.00 and sales tax due of $133,891.99. At the time petitioner provided this document to the auditor, a check in the amount of $100,000.00 was also provided to the auditor.

9. Mr. Wittmeyer testified that during the audit period petitioner was in a difficult financial situation and that as soon as monies were received they were used to pay bills. With regard to his preparation of petitioner's sales tax returns he stated:

> When I did the sales tax returns, there's one fact here that I did not know at the time, which I learned later, which I have used in subsequent years, lately in the

[2]Accompanying the auditor was Mr. Jeff Eimer, the auditor's supervisor.

> last few years I have had to do this a few times, and if you look back at the quarters, you would see it; I did not know, at that time, in 1989 through 1993, that you could fill out a sales tax return and how much money you owe and send it in without the money. That, I did not know that fact; I believed that you had to send in the money to equal the sales tax return. Well, I never had the money available to me because we were so strapped all the time, so when I would do the sales tax returns, I would just look at my checkbook, and whatever money that was there that day, I would send that out. I did not say to myself, what can I afford; as was insinuated earlier; what I did is, I did what I could do at the moment, knowing I would have to face it later; but I did not know how to fill the sales tax return out correctly. That's an error on my part; that's all it is, it's an error. I did not know the proper way to do it. (Tr. pp. 101, 102.)

Mr. Wittmeyer explained on cross examination that he would start with the amount of funds he had available at the time the sales tax return was due and from that number calculate the amount of sales to report. Therefore, Mr. Wittmeyer knew, prior to the initial audit appointment, that he owed additional sales tax for the period at issue, causing him to prepare the schedule. He was however, surprised by the amount of taxes due after completing the schedule.

10. During the initial appointment on January 5, 1994, the auditor prepared a schedule that compared sales as set forth in petitioner's books for the period January 31, 1990 through December 31, 1993, to sales as reported on petitioner's sales tax returns for the same period. With regard to the audit period as set forth in the appointment letter, i.e., September 1, 1990 through August 31, 1993, the auditor found additional tax due pursuant to petitioner's own books and records of $134,281.22. This amount is basically equal to the amount set forth in the schedule provided by Mr. Wittmeyer on the same day (the Division's calculations resulted in $389.23 more in tax due). On January 7, 1994, the auditor compared petitioner's gross sales to its bank statements and prepared a schedule. This was also done at petitioner's place of business.

11. The auditor then prepared a Referral of Possible Fraud, which was dated January 24, 1994. This referral indicates that a detailed audit was done using petitioner's own books and

records. This information when compared with the sales tax returns as filed by petitioner indicated that petitioner was aware of the amount of sales tax due at the time the tax returns were filed and simply filed returns and paid a lesser amount.

12. According to the Division's Office of Tax Enforcement ("OTE"), this case was referred to it on March 3, 1994. OTE subpoenaed the records of petitioner for the period June 1, 1989 through November 30, 1993. The subpoenaed records (25 boxes) were provided to OTE through petitioner's attorneys on May 2, 1994, May 17, 1994 and May 18, 1994. An audit of these records was undertaken and an audit report was issued by Mr. David Gehring, the OTE auditor, on December 8, 1994. The audit report concluded that petitioner knew the correct sales tax due at the time the returns were filed. Furthermore, the report concluded that petitioner's voluntary payment of $179,000.00 in taxes, after first being informed an audit would be conducted, was an admission of guilt. The audit report also concluded that Mr. Wittmeyer, as president and sole stockholder of petitioner, repeatedly offered false tax returns for filing. The OTE auditor recommended this case be prosecuted criminally. Another OTE document dated December 8, 1994 (a memorandum from a Mr. James Zientek to Mr. Daniel Jaroszewski) related similar facts and reached the same conclusion.

13. By letter dated January 5, 1996, the Division was informed that the Erie County District Attorney's Office was "unwilling and unable to dedicate the time and resource [sic] right now to accept this matter for prosecution." The letter further explained that it was understood that the Attorney General's Office would be handling the prosecution.

14. A felony complaint signed on June 24, 1996 by James Zientek, Revenue Crimes Investigator of the Division, was filed in the Town of Orchard Park Town Court against petitioner and Mr. Wittmeyer individually. The defendants were charged with one count each of

grand larceny in the fourth degree (Penal Law § 155.30[1]) and filing a false sales tax return (Tax Law § 1817[b][2]). The grand larceny charge alleged that the defendants stole property in the amount of $179,143.48 in sales tax owed to New York State. The filing a false sales tax return charge was for the period ending December 1993.

15. On May 13, 1997, Mr. Wittmeyer pleaded guilty to the filing a false sales tax return charge and was given a conditional discharge, the conditions being that he lead a law-abiding life and reimburse the Division for whatever legal liabilities were owed.

16. On May 14, 1997, a Superior Court Information was filed in the Supreme Court, Erie County charging petitioner with grand larceny in the fourth degree and alleging that between September 20, 1989 and December 20, 1993 petitioner stole $179,143.48 "in sales tax trust funds owed to New York State."

On the same day, petitioner pleaded guilty to this charge in Erie County Supreme Court, the Honorable Justice Christopher J. Burns presiding. The record of those proceedings was submitted by the Division. During the course of those proceedings petitioner appeared by Mr. Wittmeyer and was represented by Michael S. Taheri, Esq. Petitioner's representative in the present matter, Gary M. Kanaley, Esq., was also present and participated in the proceedings. Assistant Attorney General Richard Goodell appeared for the State of New York. Petitioner first waived its right to an indictment by a grand jury. The judge then explained the charge that petitioner had stolen $179,143.48 in sales tax trust funds owed to the State of New York between September 20, 1989 and December 20, 1993. The judge asked petitioner whether anyone had coerced or in any way influenced petitioner to plead guilty against its own will, to which petitioner responded no; and whether it had enough time to discuss this matter with its attorney and whether it was voluntarily making this guilty plea to which petitioner responded yes. Then,

through a series of questions, the judge asked petitioner whether it realized that it was waiving its right to a jury trial, its right to have the prosecution's witnesses testify against it and have its attorney cross examine such witnesses; that a plea of guilty was the same as a conviction after trial and whether it understood the charges against it. Petitioner responded in the affirmative to each of these inquiries. Petitioner and the representatives from both sides told the judge that they were not aware of any promises having been made with regard to sentencing in return for the guilty plea. The judge explained that he would not allow the corporation to plead guilty unless it was in fact guilty, and Mr. Wittmeyer responded in the affirmative when asked if petitioner had stolen $179,143.48 in sales tax trust funds owed to the Sate of New York. When asked to explain in his own words what happened, Mr. Wittmeyer stated:

> The company, the company was in extreme debt at that point, debt in excess of over $970,000.00, which caused, which caused an error in judgment on my part. The funds were never removed from the premises, they were tied up in a tremendous, tremendous onslaught of inventory which was not handled correctly on the corporate tax returns, which I was later informed about and it caused the situation. The money was never taken. I personally did not take the money. The corporation did not use the money for other things. The money was tied up in a very nasty financial situation which I — in inventory, in debt inventory which, which in our case we found out later could have been written down on a corporate federal level on an annual basis which was never done by my accountant and I was forced, I was forced to have to make very nasty financial decisions which obviously have come out this way. However, I have done everything in my power to correct that situation since and I, when this audit occurred I told the state the truth at the point of occurrence, it was not uncovered later, I told them the truth the day they walked in the door, I explained the situation I was in and I handed them a check the day they walked in the door from Christmas receipts on January 4th, 1994 for $100,000.00 and I explained to them that I owed them the money and I was willing to pay the money but during the years prior to that I could not do it because I was in a very nasty financial situation.

When Judge Burns inquired of Assistant Attorney General Goodell what his proof would be if the matter went to trial, Mr. Goodell responded that the proof would show petitioner reported and paid less sales tax than was due resulting in the total amount due set forth in the

information. He went on to state that the Division was pleased by the actions of petitioner when the audit was commenced in that petitioner produced accurate records and allowed the audit to proceed promptly. He further stated that, "with the exception of penalties, interest and other sorts of sanctions that may be imposed civilly," he understood that the amount of tax due had been paid. While not making a sentence recommendation, the State did say that a conditional discharge would not be an unreasonable result. Petitioner's representative asked the court for a conditional discharge, the condition being: "that he will comply with any civil fines, penalties and interest that are appropriate under the circumstances." The judge imposed a conditional discharge requiring that the company comply with the law regarding payment of sales taxes in the future and that it "abide by any determination with regard to any civil penalties and fines that may be imposed and pay those promptly."

17. Petitioner's version of the events that transpired, as told through Mr. Wittmeyer's testimony during the plea proceedings and the hearing in this matter, may be summarized as follows. Petitioner started out in the wholesale jewelry business. Petitioner got into financial trouble in this business because it would provide retailers with inventory and the retailers were not paying for the inventory. Petitioner did not have the resources to extend this type of credit to the retailers. This situation put petitioner in serious debt. At some point the business began changing into a retail jewelry business to alleviate this problem. Also, petitioner called back the inventory that was at the retailers and began to auction it off to raise money to pay off its debts. While the exact time periods are difficult to ascertain, it was Mr. Wittmeyer's testimony that the audit period corresponded to this period of financial turmoil. He testified that he had considered filing for bankruptcy, but chose to try to reorganize his business and keep it going. Mr. Wittmeyer testified that during the audit period when it was time to file petitioner's sales tax

returns, he would pay as tax whatever was in the checkbook and basically would calculate his sales tax returns backwards from that number. Mr. Wittmeyer was sincerely upset that the Division's witnesses had testified that he had told them he had paid what he could afford, which was to him different from paying whatever was in his checkbook. He wanted to make clear that he did not utilize sales tax funds for personal use or live an extravagant lifestyle. He testified that had he known he could have filed the returns showing the correct amount of tax due and remitting a lesser amount, he would have filed the returns that way. Therefore, Mr. Wittmeyer believed petitioner had simply made a mistake and had not committed fraud.

SUMMARY OF THE PARTIES' POSITIONS

18. The Division asserts that having pleaded guilty to grand larceny in the 4th degree for failure to pay over sales tax, petitioner is estopped from contesting the fraud penalty in these proceedings. The Division argues that the type of larceny involved with failure to pay over sales tax is embezzlement, which requires the intention to commit fraud. Furthermore, the Division asserts that petitioner's claim that the guilty plea entered in the criminal matter was for the sake of expediency is inconsistent with Mr. Wittmeyer's statements on the record at the plea proceedings.

The Division argues that petitioner's own admissions are enough for the Division to prove that petitioner willfully, knowingly and intentionally filed false tax returns and underpaid tax. The Division points to the facts that petitioner knew the correct liability when the returns were filed and simply chose to file returns and pay less than what was due. The Division asserts that neither petitioner's later cooperation nor the stressful financial situation petitioner was in at the time the returns were filed serves to vitiate the fraud that was committed.

19. Petitioner asserts that the facts in the present matter are distinguishable from prior fraud cases where there was a prior guilty plea in a related criminal matter in that: petitioner entered its plea over three years from when the audit was commenced and almost three years after having paid the tax due; the guilty plea was entered for the purpose of concluding the matter in that the Division had given no indication that it intended to assert the fraud penalties; fraud penalties were not asserted until over a month after the guilty plea had been entered; and, petitioner pleaded guilty to grand larceny in the 4th degree which does not include fraud as a necessary element. Therefore, petitioner asserts that it should not be estopped from challenging the fraud penalty in this proceeding.

Petitioner also argues that the Division has not proven fraud in that there was no willing intent to violate the Tax Law only a mistake caused by inexperience and stress caused by the break up of Mr. Wittmeyer's marriage and the financial problems of the business. Petitioner argues that understating tax by itself does not establish fraud and that petitioner's underreporting of tax was inadvertent in that Mr. Wittmeyer did not realize his correct liability at the time the returns were filed. Petitioner asserts as further evidence of its lack of willful intent to violate the Tax Law, its immediate cooperation with the Division once it realized its error, including payment of the tax due, its keeping of complete books and records, the timely filing of returns and lack of any irregular banking practices or evidence of a lavish lifestyle on the part of Mr. Wittmeyer. It is petitioner's argument that the Division cannot meet its burden of proof because there is no evidence of fraud, only a mistake made by an inexperienced business man under pressure at the time.

20. In its reply the Division asserts that petitioner misstated the facts in its brief. In particular the Division notes that the testimony of Mr. Wittmeyer indicates that he did know the

proper amount of tax due at the time the returns were filed and simply calculated his returns backwards by starting with the amount of money he had available at the time. Furthermore, the testimony indicated that Mr. Wittmeyer knew his conduct was fraudulent and that petitioner was utilizing sales taxes collected to pay other bills. Therefore, the Division asserts it has met its burden with regard to proving petitioner's conduct was fraudulent.

CONCLUSIONS OF LAW

A. Tax Law § 1145(a)(2) provides for civil penalties in a case where failure to pay tax is the result of fraud. The burden of showing that such failure occurred as a result of fraud rests with the Division (***Matter of Ilter Sener d/b/a Jimmy's Gas Station***, Tax Appeals Tribunal, May 5, 1988). While fraud is not defined in the statute, a finding of fraud requires the Division to show:

> clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing. (***Matter of Ilter Sener***, ***supra***, citing, ***Matter of Shutt***, State Tax Commn., July 13, 1982.)

The Division argues that based upon petitioner's guilty plea in the related criminal proceedings, petitioner is estopped from contesting the fraud penalty at issue here, and that therefore, the Division has met its burden.

B. For the doctrine of estoppel to apply, petitioner must have had a fair opportunity to litigate the same issues during the prior proceeding (***see***, ***Kuriansky v. Professional Care***, 158 AD2d 897, 551 NYS2d 695). This means that:

> the party seeking the benefit of collateral estoppel (here, the State) has the burden of demonstrating the identity of the issues and the necessity of their having been decided, and the party opposing its use (here, petitioner [Sokol]) has the responsive burden of establishing the absence of a full and fair opportunity to

> litigate the issue in the prior action. (***State of New York v. Sokol***, 113 F3d 303, 306 [2d Cir 1997][citations omitted].)

The issues in the criminal proceedings were the same as the issues to be determined in this matter. Furthermore, the criminal proceedings required such issues to be decided. Petitioner pleaded guilty to grand larceny in the fourth degree. The Superior Court Information charged that petitioner stole sales taxes from the State of New York. The record of the plea proceedings makes clear that petitioner was being charged with intentionally underreporting and underpaying sales taxes for the period at issue. Petitioner kept books and records from which accurate sales tax returns could have been filed. These books and records were adequate enough to be the primary source relied upon by the Division in calculating the amount of tax due as set forth in the information. The existence of these records alone indicates that petitioner knew the correct amount of tax due at the time the returns were filed. Furthermore, when asked at the plea hearing whether petitioner had stolen $179,143.48 in sales tax trust funds owed to the State of New York, Mr. Wittmeyer responded yes. Petitioner knowingly and intentionally filed false sales tax returns resulting in underpayment of sales tax. These actions not only constitute the crime of grand larceny in the fourth degree under the penal code, but also subject petitioner to fraud penalties pursuant to Tax Law § 1145(a)(2) (***see***, ***Matter of DeFeo***, Tax Appeals Tribunal, April 22, 1999). Petitioner's argument that the criminal proceedings did not involve identical issues because a charge of grand larceny does not involve the same elements as tax fraud simply fails when applied to the facts of this case (***see also***, ***Matter of DeFeo***, ***supra***).

C. Since the Division has shown that the same issues were involved in the criminal proceedings, and that those same issues had to be decided in the criminal matter in order for petitioner to plead guilty, it is petitioner's burden to show that it did not have a "full and fair

opportunity to litigate" (***State of New York v. Sokol***, ***supra***) those issues during the criminal proceeding. Petitioner did not meet its burden on this issue. During the plea proceedings in the criminal case, Mr. Wittmeyer appeared on behalf of petitioner. He was questioned by the judge as to whether anyone had coerced or in any way influenced petitioner to plead guilty to the criminal charge, to which he responded no. Mr. Wittmeyer responded affirmatively when questioned by the judge as to whether petitioner had enough time to discuss the matter with counsel, whether the guilty plea was being entered into voluntarily, and whether petitioner understood that it was waiving its right to have the witnesses against it testify and be subject to cross examination. His responses indicate that petitioner understood the charges against it and that a guilty plea was the same as a conviction after trial. Mr. Wittmeyer and his representative told the judge that they were not aware of any promises having been made in exchange for the guilty plea. The court informed petitioner that it would not accept a plea of guilty unless petitioner was in fact guilty of stealing sales tax trust funds owed to the State of New York. Petitioner then admitted it was guilty and pleaded guilty to grand larceny in the fourth degree. Petitioner now argues that it did not have an opportunity to fairly and completely litigate the issue of guilt because the guilty plea was entered only for expediency. Petitioner asserts that at the time the plea was entered it had no indication that fraud penalties would be assessed[3] in the future, and it merely wished to put an end to the matter. Even if petitioner had entered into this plea only for purposes of expediency, that was petitioner's choice and does not negate the fact that a full and fair opportunity to litigate was available to petitioner (***see***, ***Drebin v. Tax Appeals Tribunal***, 249 AD2d 716, 671 NYS 2d 565, ***Matter of N.T.J. Liquors***, Tax Appeals Tribunal,

[3]It is clear from the record of the plea proceedings that the issue of the assessment of civil penalties remained open.

May 7, 1992). Furthermore, both petitioner and Mr. Wittmeyer individually faced the prospect of a criminal trial and, had they been found guilty, criminal penalties. The weighing of the prospect of criminal penalties against the ramifications of a guilty plea, was again a legitimate choice to be made by petitioner and does not preclude the application of the doctrine of estoppel in these proceedings (***see***, ***Drebin v. Tax Appeals Tribunal***, ***supra***; ***Matter of N.T.J. Liquors***, ***supra***).

Petitioner is estopped from arguing that the fraud penalty in this matter was improperly asserted (***see***, ***Plunkett v. Commr.***, 465 F2d 299 [7th Cir 1972]); ***Matter of DeFeo***, ***supra***; ***Matter of N.T.J. Liquors***, ***supra***; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989).

D. Even if petitioner was not estopped from contesting the fraud penalty at issue, the Division has met its burden to prove that fraud was committed during the audit period based upon petitioner's own testimony. Petitioner argues in its brief that the facts show that petitioner did not know the correct amount of tax due at the time the returns were filed, and corrected the deficiencies as soon as Mr. Wittmeyer became aware of them (i.e., upon review of petitioner's books and records prior to the initial audit appointment).

Relevant to this inquiry is the request of petitioner's representative that a specific finding of Mr. Wittmeyer's credibility be made in this determination. On the whole Mr. Wittmeyer was a credible witness. In this case it was primarily his books that were used by the Division to calculate tax due indicating that he did keep accurate records. Furthermore, it appears he truthfully reported petitioner's gross sales on its Federal returns, apparently initiating the Division's inquiry into the discrepancy between those returns and petitioner's sales tax returns. Mr. Wittmeyer cooperated with the Division as soon as it initiated the audit and paid the total amount of tax due in a relatively short period of time. The Attorney General at the time of

petitioner's plea proceedings stated on the record that the State had found Mr. Wittmeyer extremely cooperative. Mr. Wittmeyer's demeanor at the hearing in the present proceeding gave no cause to doubt the veracity of his testimony.

Having found Mr. Wittmeyer a credible witness, I find that the characterization of the facts in petitioner's brief is incongruous with Mr. Wittmeyer's testimony. Mr. Wittmeyer admitted that he prepared petitioner's sales tax returns by utilizing the amount of the funds available in the check book at the time the sales tax returns were filed as the amount of tax due and calculating the returns backwards from that figure. He further testified that he knew it would catch up to him some day indicating that he was aware that he was reporting the incorrect amounts. When asked at the plea hearing whether petitioner had stolen $179,143.48 in sales tax trust funds owed to the State of New York, Mr. Wittmeyer responded yes. Therefore, while I find Mr. Wittmeyer's testimony for the most part credible, his testimony was that petitioner did know the amount of tax due at the time the returns were filed and chose to file false returns.

Petitioner is correct that merely understating tax due does not require a finding of fraud (***Matter of AAA Sign Company***, Tax Appeals Tribunal, June 22, 1989). However, petitioner in this case admits the fraudulent conduct occurred at the time the returns were filed — this was an intentional understatement of tax. Petitioner's actions after the commencement of the audit, while laudable, cannot excuse the fraudulent conduct at the time of filing (***see***, ***Sansone v. United States***, 380 US 343, 13 L Ed 2d 882; ***Matter of Alteri***, Tax Appeals Tribunal, August 20, 1998).

In conclusion, regardless of petitioner's cooperation after being contacted by the Division, at the time the returns in question were filed petitioner committed fraud by willfully filing false sales tax returns resulting in underpayment of sales tax (***Matter of Ilter Sener***, ***supra***).

E. The finding of fraud contained herein renders moot the issue of whether the Notice of Determination was issued outside the statute of limitations (***see***, ***Tax Law*** § 1147[b]).

F. The petition of T. Management, Inc. is denied and the notice of determination issued on June 30, 1997 is sustained.

DATED: Troy, New York
March 16, 2000

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE