

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| LENORE GOLDAPPER | : | DETERMINATION |
| | : | DTA NO.816756 |
| 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, 1977 | : | |
| through August 31, 1983. | : | |

Petitioner, Lenore Goldapper, c/o Warren M. Burd, Esq., 475 Front Street, Hempstead, New York 11550, 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, 1977 through August 31, 1983.

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 December 6, 1999 at 10:30 A.M., with all briefs to be submitted by June 26, 2000, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). Petitioner appeared by Warren G. Burd, Esq. and by Stephen Sophir, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether petitioner has established that the Division of Taxation used an unacceptable audit method in conducting its audit of Jerry-Lee Service Center, Inc., or made errors in the

application of such audit method in arriving at the amount of tax due, so as to require cancellation or reduction of the amount of tax determined due upon audit.

II. Whether petitioner was a person required to collect and remit sales and use taxes on behalf of Jerry-Lee Service Center, Inc.

III. Whether the Division of Taxation has established that petitioner was properly subject to the imposition of a fraud penalty.

IV. Whether petitioner's claim that she did not receive the notices of determination at issue in this proceeding requires cancellation of the assessments made by such notices.

FINDINGS OF FACT

1. In April 1981 the Division of Taxation ("Division") commenced a sales tax field audit of the operations of Jerry-Lee Service Center, Inc. ("Jerry-Lee"). Jerry-Lee operated a gasoline and service station located on Northern Boulevard in Great Neck, New York. Jerry-Lee was open from 7:00 A.M. to 9:00 P.M., selling gasoline, oil, automobile repair services and related parts and miscellaneous items such as candy and cigarettes. It is undisputed that receipts from all of such items are subject to sales tax.

2. The Division's audit commenced with the auditor's observation of Jerry-Lee's physical premises, during which he saw petitioner at the premises attending to the cash register, taking money in payment for repair services and selling candy, cigarettes, and other miscellaneous items. The auditor observed a gas pump attendant at a booth near the gas pumps, but could not discern whether the attendant, as opposed to petitioner, was physically receiving payment for gasoline sold. The audit continued with the issuance of an audit appointment letter and request for books and records dated April 15, 1981, stating "all books and records pertaining to your Sales Tax liability for the period [6/1/78 through 2/28/81] should be available. This would

include journals, ledgers, Sales invoices, purchase invoices, cash register tapes, exemption certificates and all Sales Tax records. Additional information may be required during the course of the audit.”

3. Jerry-Lee’s appointed representative, Murray Marcus, CPA, sought and obtained delays totaling some eight months prior to meeting with the auditor. At their initial meeting, the only items produced by Mr. Marcus for the auditor to review were Federal corporate income tax returns for 1979 and 1980, one corporation franchise tax report, one wage reporting report and one canceled check for payment of withholding tax. At this initial meeting with Mr. Marcus, the auditor made a second request for records. This request was handwritten and was given to Jerry-Lee’s representative. However, no additional records, including records of sales or purchases, were provided to the auditor pursuant to this request.

4. In view of the near total lack of records made available, the auditor determined to resort to third-party information for audit review. Accordingly, he requested and received from Amoco Oil Co., Jerry-Lee’s supplier of gasoline and oil, a detailed listing of purchases of gasoline and oil made by Jerry-Lee during the audit period. The auditor’s review of this third-party information indicated that Jerry-Lee purchased over four million gallons of gasoline during the period September 1, 1978 through November 1, 1981 at a cost of \$3,318,276.00. In contrast, Jerry-Lee’s sales tax returns reported total sales of \$285,160.00 for the same period, and its Federal income tax returns for the years 1979 and 1980 reported expenses (purchases) substantially less in amount than the purchases of gasoline indicated on the Amoco reports.

5. Based on his observation of Jerry-Lee’s premises, his audit experience with similar gasoline service station audits and the information provided by Amoco Oil Co., the auditor calculated Jerry-Lee’s taxable sales for the period in issue as follows:

Gasoline Sales: The auditor used the base cost of the gasoline purchased by Jerry-Lee from Amoco, added to that cost four cents per gallon for Federal excise tax and ten cents per gallon for profit, with such latter amount based upon his office experience in auditing other gasoline and service stations in the surrounding area, to calculate gasoline sales. Audited taxable gasoline sales, thus calculated, totaled \$4,406,496.74.

Oil Sales: The auditor started with the base cost per gallon of oil from the Amoco information, and added thereto a markup of 100 percent, again based on his office experience as above. Audited taxable oil sales, thus calculated, totaled \$33,892.10

Miscellaneous Items: The auditor determined sales of candy, cigarettes and other miscellaneous items to be \$1,000.00 per month, based upon his observation of the inventory at the premises and upon his office audit experience. Audited taxable sales of miscellaneous items, thus calculated, totaled \$36,000.00

Repair Sales: The auditor calculated repair sales, on the basis of office audit experience, at \$2,000.00 per week per service bay multiplied by the two service bays in use at Jerry-Lee's. Audited taxable repair sales, thus calculated, totaled \$624,000.00

6. Audited taxable sales for the audit period June 1, 1978 through February 28, 1981, calculated as above, totaled \$5,100,388.84. This amount was reduced by reported taxable sales of \$285,160.00, leaving additional unreported taxable sales of \$4,815,228.84. The auditor divided such additional unreported taxable sales by reported taxable sales to arrive at a reporting error rate of 1,688.60 percent. This error rate was then applied to reported taxable sales per quarterly period to result in additional taxable sales, with sales tax due thereon in the amount of \$273,512.34.

7. The auditor concluded that petitioner Lenore Goldapper was a person responsible to collect and remit sales taxes on behalf of Jerry-Lee. This conclusion was based on the facts that she was listed as an officer on the corporation's sales tax Certificate of Registration, that she signed quarterly sales and use tax returns on behalf of Jerry-Lee, that her name was listed on the purchase information furnished by Amoco, that she signed, under the title of president, a power of attorney appointing Mr. Marcus to represent Jerry-Lee and also signed a consent extending

the period of limitations on assessment of tax on behalf of Jerry-Lee, and that she was observed at Jerry-Lee's business premises making sales and receiving money from customers.

8. The auditor also determined that a penalty for fraud was appropriate in this case. This determination was premised on the very substantial underreporting of sales and of sales tax by Jerry-Lee, as shown by the comparison of the Amoco purchase information to the information shown on Jerry-Lee's sales tax returns and corporate income tax returns. Specifically, the auditor noted this information revealed that Jerry-Lee's gasoline purchases exceeded four million gallons at a cost of \$3,818,276.00. Such amount alone, which does not include any factor for profit thereon, exceeded Jerry-Lee's reported sales of \$285,160.00 by a factor of over 13. Moreover, sales tax of \$298,704.65 calculated on such gasoline purchases (again with no factor for profit) exceeded, by more than ten times, the amount of sales tax reported by Jerry-Lee. The auditor observed that these differentials were calculated without consideration for any profit on gasoline sales and without including any amount of receipts for sales of oil, repairs or miscellaneous items. He also observed that this underreporting reflected a pattern that occurred consistently in each of the sales tax quarterly periods reviewed upon audit. Furthermore, the auditor concluded that a fraud penalty was warranted since he received essentially no books and records, including specifically source documentation of purchases and sales despite repeated requests therefor during the course of the audit or thereafter. He also noted that there was a pattern of lack of cooperation on audit, including numerous canceled appointments with Jerry-Lee's representatives as well as many unreturned telephone calls, and that he was not advised that Jerry-Lee was actively attempting to sell its business during the audit period. Further, Jerry-Lee filed no sales tax returns after the quarterly period ended February 28, 1982. While the Division concedes that due to a change in the Tax Law sales tax on gasoline was no longer

remitted by retailers but rather was remitted by distributors,¹ Jerry-Lee was nonetheless required to file sales tax returns and remit tax with respect to its other, non-gasoline sales (i.e., oil, repairs and miscellaneous items). In addition, the auditor's review of sales tax filings by the prior owner of Jerry-Lee's business revealed reported sales of approximately \$240,000.00 per quarterly period versus sales of approximately \$27,000.00 per quarterly period as reported by Jerry-Lee.

9. In addition and with respect to imposing the fraud penalty against petitioner, the auditor reviewed her income tax returns for the years 1979, 1980 and 1981. This review revealed that in 1979 petitioner deducted \$640.00 for sales tax paid on the purchase of a car, thus indicating the purchase of a car costing \$9,100.00, paid real property tax of \$4,122.00 but claimed no deduction for interest expense on a mortgage, and claimed additional personal deductions of \$8,646.00. These total expenditures (\$17,746.00) exceeded petitioner's reported income of \$14,775.00 for the year 1979. In addition, petitioner's 1979 income tax return reflected a claim for weatherproofing credits of \$2,550.00, indicating further spending in excess of her reported income. The auditor's comparison of petitioner's 1979 income tax return to her 1980 and 1981 income tax returns revealed increases in interest income and additional listings of stock holdings. Accordingly, on the basis of all of the foregoing items, the auditor concluded that the assessment of a fraud penalty was warranted.

10. A total of six separate notices of determination, covering the initial audit period, June 1, 1978 through February 28, 1981, and a subsequent audit period spanning March 1, 1981 through August 31, 1983, were initially challenged in this matter.² However, the Division has

¹ *See* Laws of 1982 (ch 454, eff. June 1, 1982).

² It appears that the results obtained on audit for the subsequent audit period followed consistently from application of the same methodology as was employed for the initial audit period.

conceded that the notices numbered L-006562387, L-006562388, and L-006572468, pertaining to the subsequent audit period, are no longer in issue. Accordingly, the notices numbered S-820419045, dated December 23, 1983, S-830620181, dated June 20, 1983, and S-831219003, dated December 23, 1983, which cover the period June 1, 1978 through February 28, 1981 and assess sales tax due in the amount of \$375,408.38, plus interest and fraud penalty remain in contest, as follows:

| <u>NOTICE NUMBER</u> | <u>PERIOD</u> | <u>TAX</u> | <u>NOTICE DATE</u> |
|--|-------------------|---------------------|--------------------|
| S 820419045N | 06/01/78-02/29/80 | \$273,512.34 | 04/20/82 |
| S 830620181C | 03/01/80-11/30/80 | 79,607.87 | 06/20/83 |
| S 831219003N | 12/01/80-02/28/81 | <u>22,288.17</u> | 12/23/83 |
| <u>Total (excluding penalty and interest).....</u> | | <u>\$375,408.38</u> | |

11. Following a conciliation conference in the Division's Bureau of Conciliation and Mediation Services ("BCMS"), a Conciliation Order (CMS No. 159679) dated July 24, 1998 was issued canceling the tax assessed for the first three quarterly periods covered by the notice numbered S-820419045 (the quarterly periods spanning 6/1/78 through 2/28/79). As a result, the amount of tax remaining at issue under such notice is \$115,570.83, plus interest and penalty for fraud.

12. Petitioner did not appear or give testimony at the hearing, and no documents in addition to those initially provided to the auditor have been produced. On August 17, 1999, the Division served a Notice to Admit on petitioner's representative, requesting the admission of some 18 separately numbered facts including, *inter alia*, an admission that petitioner: was an officer of Jerry-Lee who signed sales and use tax returns on its behalf for the sales tax quarterly periods December 1, 1978 through November 30, 1980 and March 1, 1981 through February 28, 1982; signed a consent dated August 12, 1981 to extend the period of limitations on assessment;

and signed a corporate power of attorney dated August 12, 1981. The notice also sought admission that petitioner failed to produce Jerry-Lee's books and records as requested for audit, that Amoco Oil Company was Jerry-Lee's supplier of gasoline and oil, that petitioner resided at 23 Florence Street, Great Neck, New York, that such residence as well as an automobile purchased by petitioner in 1979 were purchased without financing and that during the audit period petitioner was a shareholder of Jerry-Lee who received a salary, worked at the business and had access to its books and records.

13. On December 3, 1999, the Division filed its affirmation that petitioner had not responded to the notice to admit and requested the deemed admission of the truth of the items in the notice to admit. Petitioner made no argument in opposition or other response regarding the notice to admit or the request for deemed admission. Accordingly, the truth of the items contained in the notice to admit, including those specified hereinabove, is accepted.

14. With regard to petitioner's claim that the notices were not received, the auditor, per office standard policy at the time, would complete a worksheet directing preparation of notices of determination for issuance by certified mail, a clerk would type the notices and a mailroom clerk would issue the notices by certified mail. The auditor would have been the "return person" listed on the certified mailing with regard to petitioner and nothing (presumably none of the notices at issue) was returned to him.

15. In addition to the foregoing the Division also produced an affidavit made by Daniel LaFar, Principal Mail and Supply Clerk in the Division's Mail and Supply Room ("mailroom"), attesting to the standard mailing procedures for notices of determination sent by certified mail during the period in question (June 1983). Outgoing certified mail is weighed, sealed in its envelope and postage and fee amounts are affixed thereto by a member of the mailroom staff. A

mailroom clerk then counts the envelopes and verifies the names and certified mail numbers against the information on the mail record. Thereafter, a member of the mailroom staff delivers the sealed envelopes into the custody of the United States Postal Service (“USPS”).

16. The Division also produced an affidavit made by Charles Brennan, a mail clerk employed in the Division’s mailroom during the period in question, whose duties include delivering outgoing mail each morning and afternoon to the USPS. Mr. Brennan gives the items of certified mail to the USPS employee (postal clerk) who counts the envelopes of certified mail and checks the resulting figure against the information contained on the Division’s mail record. Attached to Mr. Brennan’s affidavit is Form AU-371.1, a one-page document entitled “Mailing Record-Notice of Determination-District Office Audit Bureau-Sales Tax-June 20, 1983.” The front of such document reflects a column headed “Notice Number,” under which appears a column of numbers, and a column headed “Total Amount,” under which appears a column of individual dollar amounts. Notice number S 830620181C is listed in the notice number column. To its immediate right appears the number “11-2437352,” the significance of which is not explained, followed by the listing “Lenore Goldapper, officer” and the dollar amount “\$147,879.15,” which appears in the total amount column. This dollar amount matches the total amount shown as assessed on notice number S 830620181C.³ The reverse side of this document contains two attestations providing as follows:

³ Names and information on the Form AU-371.1 pertaining to taxpayers other than petitioner have been redacted to preserve the confidentiality of such other taxpayers.

On [June 20, 1983], I delivered all notices identified on the reverse of this sheet to the Mail and Supply Section of the Department of Taxation and Finance, Albany, N.Y., and there witnessed the sealing and stamping of the envelopes in which they were enclosed. Each such notice was enclosed in an envelope addressed to the taxpayer named therein, at the address shown on the notice.

 [signature]
Audit Division

DISTRICT OFFICE AUDIT BUREAU-SALES TAX

Witnessed by: [signature]
Mail and Supply Section

Dated: [June 20, 1983]

On [June 20, 1983], I deposited in a branch of the United States Post Office of Albany, New York all notices described above, all enclosed in sealed postpaid envelopes.

Witnessed by: [signature]
Mail and Supply Section
 [signature]
Mail and Supply Section

Dated: [June 20, 1983]

The signatures appearing on the first affirmation are not legible. Those appearing on the second attestation are made by C. Brennan and by T.C. Paley, respectively.

17. The Division also provided an affidavit made by Norman Ayers, Project Manager for the Division's Sales Tax Field Audit Management Section. In June 1983, all notices of determination were sent via certified mail. The notices were prepared by sales tax field audit management clerks and the certified mail record listing taxpayers to whom the notices were to be mailed were prepared by keyboard specialists. After delivery of the notices to the USPS, the mailroom returned a copy of the certified mail record to the Sales Tax Field Management Office

with the two attestations on the back completed, signifying that the notices listed on the mail record had been accepted by the USPS.

18. The record contains no mailing evidence or affidavit references regarding the other two notices (S 820419045N and S 831219003N) at issue in this proceeding.

SUMMARY OF THE PARTIES' POSITIONS

19. Petitioner asserts in her brief that full books and records were maintained, that the Division therefore should not have resorted to an indirect audit method in determining the amount of tax due, and that the auditor overlooked or did not consider many factors in determining sales tax due. Petitioner also makes the allegation that she was not a person responsible to collect and remit taxes on behalf of Jerry-Lee. Petitioner maintains that the Division has failed to meet its burden of proof on the issue of the imposition of the fraud penalty and, further, that reasonable cause exists so as to warrant elimination of all penalties. Finally, petitioner claims that she never received the notices at issue and that, as a result, the 90-day period within which to protest the same was never triggered. Moreover, petitioner maintains that since she never received the notices, and since the Division has not met its burden of proof on the issue of fraud, the notices are barred by operation of the three-year statute of limitations on assessment.

20. The Division maintains, in contrast, that no reliable documents including source documents of sales or purchases, were provided to the auditor during the course of the audit, despite repeated requests for such records, and that no such records were supplied at any time thereafter up to and including the date of the hearing. Thus, the Division posits that its resort to the use of third-party supplier information together with estimates based on office audit experience was entirely reasonable in arriving at the dollar amount of the liability in question.

The Division goes on to point out that petitioner has offered no evidence to refute or overcome the use of such audit method or its results. The Division further maintains that petitioner was clearly a person responsible to collect and remit tax on behalf of Jerry-Lee. The Division also claims there is ample evidence, as detailed, supporting the imposition of the fraud penalty or, in the alternative and if the fraud penalty is not sustained, the penalty for negligence under Tax Law § 1145(a)(1). Finally, the Division notes that it did not contest the issue of the timeliness of the petition in this case, or petitioner's right to a hearing to contest the notices.

CONCLUSIONS OF LAW

A. Where a taxpayer's records are insufficient, unreliable and inadequate to verify, upon audit, the amount of the 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, Jerry-Lee and petitioner submitted essentially none of the records requested for audit, and thus it was clearly appropriate for the Division to resort to an indirect audit 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. In this case petitioner has shown 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. Petitioner has not come forward with any documents, including source records of sales or purchases, to refute the third-party (supplier) records and estimates based upon similar audit experience relied upon by the auditor in arriving at the assessments. While petitioner's post-hearing brief claims that records were available, there is no testimony by either petitioner or by the representative for Jerry-Lee which in any manner supports this claim nor, as stated above, were any such records offered in evidence. Petitioner's claim, by brief, that there was no formal request for records of Jerry-Lee's operations is belied by the evidence adduced at hearing, including both the auditor's testimony and the written requests for records (*see* Finding of Fact "2"). Finally, petitioner's miscellaneous claims regarding a lack of basis to support the auditor's calculations of sales of repair services (no specific observation of a parts inventory, mechanic on duty or review of payroll records to verify the number of employees) and of miscellaneous sales of candy, cigarettes and the like (simple reliance on office experience in auditing other gasoline service stations), do not warrant adjustments to these portions of the audit or the results thereof. Petitioner's claims simply are not supported by any evidence such as records of repair sales, payroll records or other employee information, or records of candy and cigarette purchases or sales to refute or establish with any certainty the dollar amounts of such sales or the inaccuracy of the amounts calculated by the auditor. The Division is clearly entitled to rely on its own audit experience in its estimation

process, particularly in light of a taxpayer's failure to supply any reliable records or information concerning its operations (*Convissar v. State Tax Commn.*, 69 AD2d 929, 415 NYS2d 305; *Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255). In sum, the audit method employed had a rational basis, the result derived therefrom is presumed to be correct in the absence of any evidence challenging such result and such result is, therefore, sustained (*Matter of Hammerman*, Tax Appeals Tribunal, August 17, 1995; *Matter of Fashana*, Tax Appeals Tribunal, September 21, 1989).

C. 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, her authority to write checks on behalf of the corporation, and whether she 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).

Petitioner has offered only the bare assertion that she was not a person responsible to collect and remit taxes on behalf of Jerry-Lee, and this assertion is rejected as entirely unsupported. In contrast, the Division has produced documentary evidence establishing that petitioner signed documents on behalf of Jerry-Lee, including the sales tax application for a

certificate of authority as well as numerous sales tax returns, under the title of president of the corporation. Further, the auditor observed petitioner at Jerry-Lee's premises collecting money and handling transactions. The fact that another person was listed as an officer of the corporation and was listed on the certificate of authority has no bearing on and offers no mitigation with regard to petitioner's liability for the taxes in question. In sum, the uncontroverted evidence clearly shows petitioner's involvement in Jerry-Lee's operations and establishes her personal responsibility to collect and remit tax on behalf of such entity. Accordingly, the Division's assessment of personal liability for the amounts at issue herein against petitioner is sustained.

D. Turning to the issue of the penalty for fraud, Tax Law § 1145(a)(2) provides in pertinent part:

If the failure to pay or pay over any tax to the commissioner of taxation and finance within the time required by this article is due to fraud, in lieu of the penalties and interest provided for in subparagraphs (i) and (ii) of paragraph one of this subdivision, there shall be added to the tax (i) a penalty of fifty percent of the amount of the tax due, plus (ii) interest on such unpaid tax

The Division admits that it bears the burden of proving fraud by clear and convincing evidence (*see, Matter of Drebin*, Tax Appeals Tribunal, March 27, 1997, *confirmed Matter of Drebin v. Tax Appeals Tribunal*, 249 AD 2d 716, 671 NYS2d 565; *Matter of Sener*, Tax Appeals Tribunal, May 5, 1988; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). Imposition of the fraud penalty requires "clear, definite, and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (*Matter of Sener, supra*). The issue of whether fraud with the intent to evade payment of tax has been established presents a question of fact to be determined upon

consideration of the entire record (*Jordan v. Commissioner*, 52 TCM 234; *Matter of Drebin, supra*). The sales tax penalty provisions are modeled after Federal penalty provisions, and thus Federal statutes and case law may properly provide guidance in ascertaining whether the requisite intent for fraud has been established (*Id.*; *Matter of Uncle Jim's Donut and Dairy Store*, Tax Appeals Tribunal, October 5, 1989). Relevant factors held to be significant include consistent and substantial understatement of tax, the amount of the deficiency itself, the existence of a pattern of repeated deficiencies, the taxpayer's entire course of conduct and the taxpayer's failure to maintain bank accounts or adequate records (*see, Merritt v. Commissioner*, 301 F2d 484, 62-1 US Tax Cas ¶ 9408; *Bradbury v. Commissioner*, 71 TCM 2775; *Webb v. Commissioner*, 394 F2d 366, 68-1 US Tax Cas ¶ 9341; *see also, Matter of AAA Sign Co.*, Tax Appeals Tribunal, June 22, 1989). Since direct proof of a taxpayer's intent is rarely available, fraud may be proved by circumstantial evidence, including the taxpayer's course of conduct (*Intersimone v. Commissioner*, 53 TCM 1073; *Korecky v. Commissioner*, 781 F2d 1566, 86-1 US Tax Cas ¶ 9232).

E. The Division has met its burden of establishing that the imposition of a penalty for fraud is warranted in this case. On this score, the Division's audit established an enormous level of underreporting of sales and sales tax over a substantial and continuous period of time. In fact and as noted by the Division, reported sales per Jerry-Lee's returns were less than the sales tax alone due on Jerry-Lee's purchases of gasoline per Amoco records, without any factor for profit on such purchases. Moreover, such gasoline purchases exceeded reported sales by a factor of over 13. Jerry-Lee failed to produce the records requested for audit, and in fact failed to produce any meaningful, relevant or reliable records for use in the conduct of the audit. There is no indication that Jerry-Lee or petitioner in any manner cooperated in the conduct of the audit.

Jerry-Lee filed no sales tax returns from the commencement of the audit through the time of the sale of the business. Finally, the auditor's review of petitioner's personal income tax returns, and specifically the deductions and expenditures shown thereon or derived therefrom indicated spending by petitioner in excess of her reported income. While this latter inconsistency could be explained in any number of ways, including the existence of a cash horde, paid-in-full mortgage, gifts from relatives or friends, it remains that another inference to be drawn is that petitioner received a stream of income from the unreported and unremitted sales tax owed by Jerry-Lee. In sum, the circumstances of this case, viewed in their entirety, and noting in particular the absence of any evidence to countermand the audit and its results, provide convincing evidence that petitioner knowingly and willingly participated in the failure to remit sales taxes as required and clearly support the imposition of a penalty for fraud.⁴

F. The final question presented involves the issue of timeliness. Petitioner claims that she did not receive the notices in question. Although not clearly articulated by petitioner, it would appear that this claim would lead to an argument that the time within which to file a petition challenging such notices had not commenced and that there could be no claim that the petition was not timely. Further, and again although not clearly articulated by petitioner, such a position could lead to a claim that the notices were not issued within the generally applicable three-year period of limitations on assessment, thus requiring cancellation of the notices. With regard to the former argument, the Division has not challenged the petitions as untimely filed, nor has it contested petitioner's right to a hearing. Hence, the question of the tolling of the period of

⁴ The Division has asserted in its answer and at hearing, in the alternative to and assuming the fraud penalty was not sustained, the penalty pursuant to Tax Law § 1145(a)(1). As described hereinabove, the evidence shows that petitioner's actions were intentional, willful and deliberate and resulted in the nonpayment or underpayment of sales taxes due and owing. Therefore, in the event the fraud penalty was not sustained, there is a clear basis to support the imposition of penalty under Tax Law § 1145(a)(1).

limitations on filing a petition is not at issue. Therefore, the only possible remaining issue is whether the Division properly mailed the notices to petitioner within the period of limitations on assessment.

G. With respect to the question of timely issuance of the notices, the Division correctly points out that there is no period of limitations where the assessment of fraud is involved (Tax Law § 1147[b]). Since fraud has been determined and fraud penalties as assessed have been upheld, the statutory notices are therefore not barred by the otherwise applicable three-year statute of limitations (Tax Law § 1147[b]). Accordingly, petitioner's argument that the notices should be cancelled because they were not received within such three-year period of limitations fails.

H. The petition of Lenore Goldapper is hereby denied and the notices of determination dated April 20, 1982 (S 820419045N) as modified pursuant to the conciliation order (*see* Finding of Fact "11"), June 20, 1983 (S 830620181C), and December 23, 1983 (S 83121900N), are sustained.

DATED: Troy, New York
December 14, 2000

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE