STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	DETERMINATION DTA NO. 817629
ALI N. DHALAI	:	
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, 1993 through November 30, 1996.	:	

Petitioner, Ali N. Dhalai, 977 Sycamore Street, Buffalo, New York 14212, 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, 1993 through November 30, 1996.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 77 Broadway, Buffalo, New York, on November 28, 2000 at 9:30 A.M., with all briefs to be submitted by March 30, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared by Duke, Holzman, Yaeger & Photiadis LLP (Gary M. Kanaley, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether the audit methodology employed by the Division of Taxation was reasonably calculated to reflect tax due.

II. Whether the Division of Taxation has met its burden to show that the imposition of the fraud penalty pursuant to Tax Law § 1145 (a)(2) was proper.

III. Whether the assessment of sales and use taxes against petitioner was barred by the statute of limitations.

IV. Whether the Notice of Determination was properly issued to petitioner by the Division of Taxation.

FINDINGS OF FACT

1. From the middle of 1993 until April or May of 1999, Ali N. Dhalai ("petitioner") operated a mini-mart at 977 Sycamore Street, Buffalo, New York at which certain food items, cigarettes, beer and soda were sold.

2. In March 1997, Thomas C. Klein, Tax Auditor I with the Division of Taxation ("Division"), sent a letter to Nagi A. Awas, petitioner's bookkeeper and tax preparer, scheduling a field audit of petitioner's books and records pertaining to sales and use tax liability for the period December 1, 1993 through November 30, 1996. The letter asked that the following records be made available for examination: financial statements; journals; ledgers; sales invoices; purchase invoices; cash register tapes; sales and use tax returns; Federal income tax returns; and exemption certificates.

At the scheduled meeting between the auditor and petitioner's representative, sales tax returns and related worksheets and Federal income tax returns and related worksheets were produced for the entire audit period. Bank statements and purchase records for certain periods were made available to the auditor (no records for December 1993, January 1994, February 1994, April 1994 and February 1995 were produced). The only sales record made available to the auditor was a sales sheet which recorded daily sales; no cash register tapes or other source documents were provided. Petitioner's sales record contained no breakdown of taxable and

nontaxable sales. The auditor made additional requests for records to Mr. Awas at various meetings; however, no additional records were ever provided.

3. The auditor determined that the books and records provided by petitioner were insufficient to perform a detailed audit. This determination was based upon the fact that there were no source sales documents such as cash register tapes or sales invoices and that purchase records were incomplete. A review of petitioner's check disbursements revealed that checks written for purchases were substantially less than petitioner own purchase invoices. Accordingly, the auditor concluded that petitioner made purchases in cash or, in the alternative, paid for purchases from a bank account, the records from which were not made available by petitioner. In addition, the auditor was unable to reconcile petitioner's purchase records with his Federal income tax returns.

4. In an attempt to verify petitioner's beer purchases, the auditor sent out letters to beer distributors in the Buffalo area. He did not seek third-party verification of other taxable items sold by petitioner. Petitioner's records indicated total beer purchases for the audit period in the amount of $88,142.13. The information obtained from the beer distributors disclosed beer purchases totaling $236,335.12 for the period.

In order to determine petitioner's total purchases of taxable items, the auditor added the beer purchases obtained from the beer distributors to petitioner's claimed purchases of other items (soda, cigarettes and food). Since petitioner had no purchase records for five months of the audit period (***see***, Finding of Fact "2"), the auditor calculated a monthly average of purchases of soda, cigarettes and food from petitioner's purchase records for the other 31 months to determine purchases for the 5 months for which no purchase records existed. Total purchases of taxable

items calculated by the auditor, $563,415.30, exceeded the amount of taxable sales reported by petitioner for the audit period ($493,674.00).

Initially, the Division issued a Statement of Proposed Audit Adjustment, dated May 14, 1998, to petitioner which asserted additional tax due of $67,278.00, plus penalty (including fraud penalty) and interest, for a total amount due of $149,884.39. This Statement of Proposed Audit Adjustment was sent to petitioner at 977 Sycamore Street, Buffalo, New York 14212. A copy of the Statement of Proposed Audit Adjustment was also sent to petitioner's then representative, Nagi A. Awas. Mr. Awas raised some issues concerning State lottery moneys and cash purchases and, as a result of the auditor's discussions with Mr. Awas, these computations were revised.

From petitioner's Federal income tax returns, the auditor was able to compute a markup percentage of 23.32 percent (gross profit of $156,635.00 divided by ending inventory of $671,740.00) which when applied to petitioner's purchases ($563,415.30) resulted in audited taxable sales of $694,803.75. Petitioner's reported taxable sales ($493,674.00) were subtracted to arrive at additional taxable sales in the amount of $201,129.75 (an error rate of 40.74 percent). By applying the sales tax rate in Erie County (8 percent), additional tax due in the amount of $16,089.82 was determined.[1] On August 21, 1998, a second (and revised) Statement of Proposed Audit Adjustment was issued to petitioner at 977 Sycamore Street, Buffalo, New York 14212 which asserted additional tax due in the amount of $16,089.83, plus penalty (including fraud penalty) and interest, for a total amount due of $36,596.81 for the audit period. A copy of the

[1] In computing additional sales tax due, credit for prepaid cigarette tax was given by the auditor where documentation showing payment thereof was provided.

August 21, 1998 Statement of Proposed Audit Adjustment was also sent to petitioner's representative, Nagi A. Awas. When no response was received, the auditor closed the case.

5. On October 19, 1998, a Notice of Determination was issued to petitioner in the amount of $16,089.83, plus penalty of $13,597.11 (which included fraud penalty) and interest of $7,429.74, for a total amount due of $37,107.68 for the audit period.[2] The Notice of Determination was sent to Ali N. Dhalai, Sycamore Variety Store, 32 17th Street, Buffalo, NY 14213-2611. The Division did not send a copy of the Notice of Determination to petitioner's representative, Nagi A. Awas.

The 32 17th Street address was obtained from the Division's Taxpayer Indicative Data ("TID") System. Prior to April 1998, petitioner's address was listed in the TID System as 977 Sycamore Street. This address was entered into the TID System in July 1993 and originated from the Certificate of Authority issued to petitioner. While a vendor is responsible for notifying the Division of a change of address, the information in the Division's TID System can also be changed by employees of the Division if they receive information from the vendor or from other sources that there is a new address. As of April 22, 1998, petitioner's address in the TID System was changed to 32 17th Street.

6. The Notice of Determination which was issued to petitioner on October 19, 1998 and which was sent to 32 17th Street was returned to the Division as undeliverable. As a result thereof, the Division made a request to the United States Postal Service for residential information on petitioner and to verify his address; the reply indicated that petitioner had moved

[2] A Consent Extending Period of Limitation for Assessment of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law (form AU-2.10) was signed by petitioner and by a representative of the Division on May 13, 1997 and May 14, 1997, respectively, whereby it was agreed that taxes due for the period December 1, 1993 through November 30, 1994 could be assessed at any time on or before December 20, 1997.

and had left no forwarding address. When asked if petitioner ever lived at 32 17th Street during the time that he knew and performed work for petitioner, his representative, Nagi A. Awas, replied, "Not that I know of."

7. Fraud penalty was imposed by the Division for the following reasons:

a. Consistent and substantial underreporting of sales and sales tax due over a period of 3 years or 12 sales tax quarters;

b. A failure or refusal to produce complete purchase records, bank statements and source documents to substantiate sales;

c. Audited taxable purchases were greater than petitioner's reported taxable sales;

d. Petitioner's check disbursements did not match his purchase records, i.e., checks written for purchases were considerably less than his own purchase invoices indicated;

e. Petitioner's purchases were substantially underreported on his Federal income tax returns; and

f. Petitioner controlled all aspects of the business yet he failed to provide any explanation for the consistent and substantial underreporting.

8. Nagi A. Awas is in the business of tax preparation and accounting; he is not, however, a certified public accountant or a public accountant. He does not possess a degree in accounting although he took accounting courses in college. Mr. Awas collected the information from petitioner and prepared his sales tax returns from such information as was provided. He performed this service for petitioner ever since the business began in the middle of 1993. Mr. Awas did not receive a copy of the Notice of Determination issued to petitioner on October 19, 1998 and, since petitioner did not furnish him with a copy, does not believe that petitioner ever received the Notice of Determination.

On May 10, 1999, the Division issued a Collection Notice to petitioner. This notice was sent to 977 Sycamore Street, Buffalo, NY 14212-1423. Petitioner gave the Collection Notice to Mr. Awas soon thereafter. This was the first time that Mr. Awas was made aware of the assessment.

Petitioner kept track of his sales by counting the cash in the cash register and writing down the daily (and monthly) totals. Mr. Awas told petitioner that he needed to keep "more proper" records.

Petitioner's business was located in a low-income area where shoplifting was prevalent. Mr. Awas estimated that 10 to 15 percent of petitioner's inventory was pilfered, but petitioner maintained no records to substantiate that percentage nor did he ever prosecute anyone suspected of theft.

Petitioner maintained two bank accounts into which deposits were made. Petitioner's representative explained that one account was to provide State-authorized payment to customers who receive public assistance. For the audit period, deposits of $1,097,170.78 were made into one account (Account No. 13890421) and deposits of $7,656,227.95 were made into the second account (Account No. 10496867).

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner alleges as follows:

a. Pursuant to Tax Law § 1147(b), assessment of additional tax must be made within three years from the date of filing a return. Petitioner executed a consent which extended the statute of limitations for assessment for the period December 1, 1993 through November 30, 1994 until December 20, 1997. However, the Notice of Determination was not issued until October 19, 1998. Accordingly, the Division may not assess additional

tax against petitioner for the sales tax quarters from December 1, 1993 through August 31, 1995;

b. Since the Division mailed the Notice of Determination to the wrong address (32 17th Street), an address at which petitioner never resided, rather than to his proper address, 977 Sycamore Street (where the Division had always contacted petitioner), petitioner never received the Notice of Determination. In addition, the Division, admittedly, did not mail a copy of the Notice of Determination to Mr. Awas, petitioner's representative. Other than the testimony of the auditor and his supervisor, the Division failed to introduce mailing documents to substantiate proper mailing of the Notice of Determination. As a result of the Division's failure to mail the notice to the proper address and to mail a copy to his representative, petitioner never received notice of the assessment until the issuance of a Collection Notice on May 10, 1999;

c. Petitioner contends that the assessment is excessive by virtue of the failure by the Division to allow for a pilferage or shoplifting allowance of 10 to 15 percent. In addition, it is contended that petitioner is entitled to additional credit for prepaid tax on his cigarette purchases.

d. The Division, in an attempt to circumvent the three-year statute of limitations, asserted fraud which, if proven, would permit the assessment of additional tax at any time. Petitioner maintains that the Division has failed to meet its burden of proving fraud on the part of petitioner. It is contended that petitioner's business is located in a low income, high crime area, that petitioner is a man of limited education and English-speaking ability and that his representative, Mr. Awas, has had a difficult time in getting petitioner to understand the level of record keeping which is required.

10. The position of the Division may be summarized as follows:

a. Since petitioner failed to maintain adequate books and records, the Division was within its rights to employ external indices to determine petitioner's tax liability;

b. Petitioner has failed to prove that the audit methodology or the amount of the assessment was erroneous;

c. The Division has established, by clear and convincing evidence, that petitioner was properly subject to the fraud penalty. If, however, the fraud penalty is not sustained, the Division asserts that petitioner is liable for the negligence penalties as set forth in Tax Law § 1145(a)(1).

d. Because petitioner is asserting the statute of limitations as an affirmative defense, he has the burden of proof on this issue. The record herein contains no evidence that petitioner did not receive the Notice of Determination when it was mailed. The Division contends that the notice was properly mailed to petitioner at his last known address. However, even if the notice was not properly issued, the assessment is timely because the returns filed by petitioner were fraudulent and there is, therefore, no statute of limitations for assessment of tax.

CONCLUSIONS OF LAW

A. It is well established that every person required to collect tax must maintain and make available for audit upon request records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Failure to maintain and make available such records, or the maintenance of inadequate records, will result in the Division's estimating tax due (Tax Law § 1138[a]; ***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). To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment. The purpose of such an examination is to determine whether the records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit ***(Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109; ***Matter of King Crab Rest. v. State Tax Commn.***, 134 AD2d 51, 522 NYS2d 978).

B. Petitioner received an audit appointment letter specifying the sales tax records requested for audit review. The auditor met with petitioner's representative, Nagi A. Awas, who prepared his sales tax returns. The auditor never met petitioner. The only records made available to the auditor were sales tax returns and related worksheets, Federal income tax returns and related worksheets, incomplete bank statements and purchase records (no records were provided for five months of the audit period) and a sales sheet which recorded daily sales. No cash register tapes, sales invoices or other source documents to substantiate sales were provided to the auditor. Given the clear, written request for records, and the response thereto by petitioner through his tax preparer, it was entirely appropriate for the Division's auditor to conclude that petitioner's records were inadequate and insufficient for purposes of conducting a detailed audit of such records to verify taxable sales and sales tax due. Despite the fact that the auditor made additional requests to Mr. Awas for additional books and records, none were ever provided. Accordingly, the auditor's decision to go forward with an indirect auditing methodology and estimate sales tax due on the basis of external indices is sustained.

C. 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, 2 L Ed 2d 75). 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)***.

In the present matter, since petitioner had no purchase records for five months of the audit period, the auditor calculated a monthly average of purchases of soda, cigarettes and food from petitioner's own purchase records for the other 31 months of the audit period to determine purchases for these five months for which no purchase records existed. In essence, petitioner's own purchase records were utilized to arrive at total soda, cigarettes and food purchases. With respect to beer purchases, the auditor sent out letters to beer distributors in the Buffalo area and used the information provided by these distributors to determine petitioner's purchases of beer for the audit period. This audit methodology is clearly reasonable, especially in light of the fact that petitioner has offered no evidence whatsoever that such methodology was flawed.

In order to determine tax due, the auditor computed a markup percentage which was obtained from petitioner's Federal income tax return (***see***, Finding of Fact "4") and applied this percentage to audited taxable sales. Petitioner's reported taxable sales were subtracted and the applicable tax rate (8 percent) was applied to the resulting amount of additional taxable sales ($201,129.75) to arrive at additional tax due in the amount of $16,089.83. As previously noted, petitioner has produced no evidence to refute these audit findings. Despite contentions that

petitioner is entitled to a 10 to 15 percent theft or pilferage allowance, no evidence, other than the estimate of petitioner's tax preparer, Mr. Awas, was presented to substantiate the amount of theft or pilferage. The same is true for petitioner's assertion that he is entitled to an additional credit for prepaid tax on cigarette purchases. Petitioner was, in fact, given credit for prepaid sales tax on his cigarette purchases where records evidencing payment thereof were presented to the auditor. What petitioner now seeks is an additional credit for sales tax allegedly prepaid on cigarettes for which no purchase records were provided.

While it is possible that petitioner is entitled to additional credits or allowances, he has the burden of proving entitlement thereto and the correct amount for such credits and allowances (***Matter of Ristorante Puglia v. Chu***, 102 AD2d 348, 478 NYS2d 91; ***Matter of Oggi Restaurant, Inc.,*** Tax Appeals Tribunal, November 30, 1990).

Accordingly, since petitioner has produced no evidence to warrant any adjustments herein, the results of the audit must be sustained.

D. Tax Law § 1147(b) provides that, "except in the case of a willfully false or fraudulent return with intent to evade the tax no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return." Accordingly, if petitioner is found to properly be subject to the fraud penalty, the three-year statute of limitations is not applicable and the tax may be assessed by the Division at any time. Therefore, before considering petitioner's contentions that the Division's assessment of additional tax is time barred, it must first be determined whether the fraud penalty was properly imposed.

E. Tax Law § 1145(a)(2) provides, in pertinent part, as follows:

> 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 . . . .

F. 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).
>
> 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]).

In ***Matter of Waples*** (Tax Appeals Tribunal, January 11, 1990), the Tribunal summarized some of the relevant considerations as follows:

> Because the sales tax penalty provisions are modeled after Federal penalty provisions, Federal statutes and case law are properly used for guidance in ascertaining whether the requisite intent for fraud has been established (***Matter of Uncle Jim's Donut and Dairy Store, Inc***,. Tax Appeals Tribunal, October 5, 1989; ***Matter of Ilter Sener***, ***supra***). Factors found to be significant include consistent and substantial understatement of tax, the amount of the deficiency itself, 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. Commr.***, 301 F2d 484; ***Bradbury v. Commr.***, T.C. Memo 1971-63; ***Webb v. Commr***., 394 F2d 366; ***see also***, ***Matter of AAA Sign Co.***, Tax Appeals Tribunal, June 22, 1989). Because direct proof of the taxpayer's intent is rarely available, fraud may be proved by circumstantial evidence, including the taxpayer's entire course of conduct (***Intersimone v. Commr***., T.C. Memo 1987-290; ***Stone v. Commr.***, 56 T.C. 213, 223-224; ***Korecky v. Commr***., 781 F2d 1566). Fraud may not be presumed or imputed, but rather must be established by affirmative evidence (***Intersimone v. Commr.***, ***supra***). Hence, a finding of fraud should not be sustained where the attendant circumstances create at most only a suspicion of fraud (***Goldberg v. Commr.***, 239 F2d 316). 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. Commr.*** T.C. Memo 1986-389; ***see***, ***Matter of AAA Sign Co.***, ***supra***).

G. For the following reasons, it is hereby determined that the fraud penalty was properly imposed by the Division:

(1) Petitioner substantially underreported taxable sales and sales tax due. Petitioner's purchase records indicated that total beer purchases were in the amount of $88,142.13. Information obtained by the auditor from local beer distributors reveals that beer purchases for the audit period totaled $236,335.12. When these beer purchases are added to petitioner's other purchases of taxable items (the amounts of which were obtained from petitioner's own records), total purchases for the audit period ($563,415.30) exceeds reported taxable sales ($493,674.00). In addition, it is uncontroverted that petitioner reported his sales based upon cash on hand and since he also made cash purchases, it is obvious that he had knowledge that cash on hand could not and did not accurately reflect sales. This clearly is substantial underreporting and while, as petitioner correctly points out (***see***, ***Matter of Yel-Bom's Service Center, Inc.***, Tax Appeals Tribunal, May 10, 1990), substantial underreporting alone is not enough to establish fraud, it is strong evidence of fraud (***Matter of Cousins Service Station, Inc.***, ***supra***; ***Merritt v. Commr.***, ***supra***);

(2) Petitioner's substantial underreporting began at or about the time that the business was opened in 1993 and continued for the entire audit period, a period of three years. As noted by the Tax Court in ***Intersimone v. Commr.*** (***supra)***, consistent and substantial understatement of large amounts of taxable income over a period of years in and of itself is strong evidence of fraud;

(3) Petitioner failed to maintain books and records. As previously noted, he computed sales by totaling cash on hand at the end of each day. His purchase invoices and bank deposit records were incomplete. He failed to maintain or produce for inspection by the auditor, any source documentation to substantiate sales. While the auditor, in computing the amount of the assessment at issue, chose to accept petitioner's purchase records for all taxable items except beer, the mere fact that his records relating to beer purchases were so inadequate and incomplete leads to a reasonable inference that petitioner's purchase records for other items sold were incomplete as well. The failure of a taxpayer to maintain a complete and accurate set of records is evidence of fraud (***Matter of Lefkowitz***, Tax Appeals Tribunal, May 3, 1990);

(4) Petitioner made substantial purchases in cash or, in the alternative, paid for such purchases from a bank account the records of which were not provided to the auditor. Moreover, petitioner's purchases could not be reconciled with his Federal income tax returns. He thereafter calculated his sales by counting the cash in the cash register each day when it was clear that after making cash purchases, such a method could not reflect an accurate amount of sales. Petitioner had the opportunity to appear at the hearing and to testify concerning his intent; however, he chose not to do so. The Tax Appeals Tribunal

noted that petitioner's failure to appear and to offer an explanation for the absence of records "is additional support for the finding of fraud." (***Matter of Waples***, ***supra***);

(5) In an attempt to explain the reason why petitioner failed to appear to testify at the hearing and, in addition, to account for his failure to maintain complete books and records to document his purchases and sales, petitioner's tax preparer, Nagi. A. Awas, testified that petitioner is a person of limited education and English speaking ability. However, this record contains no proof to support these contentions since neither the auditor nor this Administrative Law Judge was given the opportunity to meet and observe petitioner. Mr. Awas prepared petitioner's sales tax returns from the information provided, i.e., summaries of sales based upon the amount of cash in the cash register at the end of each day. Petitioner did not provide Mr. Awas with sales invoices, cash register tapes or other source documents to substantiate sales. Mr. Awas admitted that he had informed petitioner that more complete books and records were needed. Failure to supply an accountant (or other tax preparer) with all the necessary information pertaining to a taxpayer's various transactions has also been found to be an indication of an intention to evade tax ***(Intersimone v. Commr.***, ***supra***; ***Stoltzfus v. U.S.***, 398 F2d 1002 ***cert denied*** 393 US 1020).

H. In summary, after surveying petitioner's entire course of conduct, the only reasonable conclusion that can be reached is that he willfully, knowingly and intentionally underpaid the sales and use taxes due and owing. The substantial and consistent underreporting of taxable sales and sales tax due, failure to maintain or produce for audit complete and accurate books and records, his transaction of business in cash (making purchases in cash and then determining sales by counting cash on hand thereby knowing that cash on hand could not be an accurate reflection

of sales), failure to provide his tax preparer with necessary information to properly prepare tax returns and failure to appear to offer any explanation for his course of conduct constitute strong evidence that petitioner deliberately underreported and underpaid his sales tax liability. Accordingly, the Division's imposition of the fraud penalty pursuant to Tax Law § 1145(a)(2) was proper.

I. While it is clear that, for some of the sales tax quarters at issue in this matter, the Division assessed taxes against petitioner more than three years after the returns for such quarters were filed (or the period covered by the consent expired), by virtue of Conclusions of Law "G" and "H", the assessment of sales and use taxes against petitioner was not barred by the statute of limitations since, pursuant to Tax Law § 1147(b), assessment of such taxes could be made at any time.

J. Issue IV is hereby rendered moot. Even assuming, *arguendo,* that the Division failed to mail the Notice of Determination "by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state" (Tax Law § 1138[a]) and that petitioner never received notice of the assessment until he received the Collection Notice which was issued on May 10, 1999 (receipt of this notice is admitted), it is clear that petitioner received notice of the assessment. Since it has heretofore been determined that the fraud penalty was properly imposed, the assessment of tax against petitioner could be made at any time.

K. The petition of Ali N. Dhalai is denied and the Notice of Determination issued October 19, 1998 is hereby sustained.

DATED: Troy, New York
September 27, 2001

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE