STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
SPARKLE WINE AND SPIRITS CORP.	:	DETERMINATION
AND		DTA NOS. 819440
HADASSA AZIZI	:	AND 819441
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1997 through February 29, 2000.	:	

Petitioner Sparkle Wine and Spirits Corp., 1851 Sunrise Highway, Bayshore, New York 11706, and petitioner Hadassa Azizi, 13 Gilbert Road, Great Neck, New York 11024, each filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1997 through February 29, 2000.

A hearing was commenced 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 3, 2003 at 10:30 A.M., and was continued to conclusion before the same Administrative Law Judge at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on January 8, 2004 at 1:00 P.M., with all briefs to be submitted by June 21, 2004, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Jay Oher, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Robert A. Maslyn, Esq., of counsel).

*ISSUE*S

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Sparkle Wine and Spirits Corp. and its owner, Hadassa Azizi.

II. Whether petitioners have established any facts or circumstances warranting the reduction or abatement of penalties imposed.

FINDINGS OF FACT

1. Petitioner Sparkle Wine and Spirits Corp. ("Sparkle"), owned by petitioner Hadassa Azizi, operated a retail liquor store in Bayshore, New York during the period in issue. The store's physical layout consisted of one story, with shelves for merchandise along each of the side walls and across the rear wall of the premises. During the period in question, Sparkle was open for business six days per week from 9:00 A.M. until 8:00 P.M. Sparkle's operation was run, on a day-to-day basis, by one David Shirin. One or two other employees also worked at the store from time to time.

2. On May 18, 2000, an auditor for the Division of Taxation ("Division") sent a letter to Sparkle scheduling an appointment for July 27, 2000 on which to commence a sales and use tax field audit of Sparkle's business for the period spanning June 1, 1997 through February 29, 2000. The Division's letter requested that all of Sparkle's books and records for the audit period be available for review. Among the records specifically requested were the general ledger, cash receipts journal, Federal income tax returns, purchase invoices, sales invoices, guest checks, cash register tapes, bank statements, financial statements and exemption documents.

3. The Division's auditor met with Sparkle's accountant on July 27, 2000. Sparkle's accountant provided sales tax returns, Federal income tax returns, depreciation schedules, an incomplete general ledger, incomplete purchase invoices, canceled checks and bank deposit

slips. Additional written requests for records were made by the auditor on July 27, 2000, December 21, 2000 and January 5, 2001. However, no cash register tapes, sales journal, sales invoices, daybook of sales or complete set of purchase invoices were ever provided. After reviewing the records presented, the Division's auditor determined that the same were not sufficient to allow the conduct of a detailed audit and concluded that the use of indirect auditing methods, based on purchase information to be provided by Sparkle's suppliers, would be appropriate.

4. The Division requested and obtained information as to Sparkle's purchases of liquor and wine from its suppliers, and compared this information to Sparkle's reported sales and to the purchase entries in Sparkle's general ledger for such suppliers. Purchases per Sparkle's suppliers ($1,475,433.39) were greater than Sparkle's reported sales ($1,266,892.00). In addition, purchases per Sparkle's suppliers ($1,475,433.39) exceeded purchases as recorded in Sparkle's general ledger ($787,595.89) by some $687,837.50. Comparing such $687,837.50 difference to Sparkle's purchases per its general ledger ($687,837.50 ÷ $787,595.89) resulted in an 87.33 percent margin of error on purchases.

5. The records supplied by petitioner did not include general ledger purchases after 1999. Accordingly, the auditor divided total general ledger purchases for the year 1999 by 12 to arrive at estimated general ledger purchases per month for the remaining months of the audit period and, in turn, to arrive at general ledger purchases of $958,688.06 for the entire audit period. The auditor thereafter reduced such total general ledger purchases for the audit period by an inventory increase of $36,690.00,[1] to arrive at net general ledger purchases of $921,998.06.

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[1] This figure reflects the net inventory increase from the beginning to the end of the audit period, and represents unsold merchandise inventory.

Application of the 87.33 percent margin of error on purchases to such net purchases amount results in additional unreported purchases of $805,180.94. In turn, net general ledger purchases ($921,998.06) plus unreported purchases ($805,180.94) results in total audited purchases of $1,727,179.00. The auditor reduced such total audited purchases by a two percent allowance for pilferage, to arrive at net purchases of $1,692,635.41.

6. In light of the absence of source records of sales, the auditor determined to calculate petitioner's taxable sales and use tax liability using a markup audit methodology. Specifically, the auditor calculated a markup percentage by comparing wholesale costs (as shown on purchase invoices) to actual shelf selling prices of merchandise determined during a personal observation at Sparkle's premises made on December 6, 2000 in conjunction with a list of selling price information provided by Sparkle's accountants. Using this information, the auditor determined an overall markup on liquor purchases to be 16.3 percent, and an overall markup on wine purchases to be 41.25 percent.

7. The auditor determined the store's inventory to be approximately one-third liquor and two-thirds wine, based on her observation of the allocation of merchandise to shelf space when she visited the store premises. The auditor calculated a straight average purchase markup of 28.78 percent (16.3% + 41.25% = 67.55% ÷ 2 = 28.78%), as opposed to using a weighted average markup based on the two-thirds to one-third observed wine to liquor shelf space allocation. The auditor explained that using a weighted average markup (i.e., more heavily weighting the higher markup item [wine] based on the two-thirds to one-third ratio) would have resulted in a higher markup percentage and, consequently, higher sales subject to tax. The auditor noted further that the 28.78% markup was within the norm based on Division office experience and on the auditor's own experiences in liquor store audits. Ultimately, applying the

28.78 percent markup to net purchases of $1,692,635.41 resulted in audited sales of $2,179,775.88. Such amount was reduced by substantiated exempt sales of $1,803.07, and by reported taxable sales of $1,266,892.00, to arrive at additional taxable sales of $911,080.81, with sales tax due thereon in the amount of $75,159.32.

8. The auditor's detailed review of fixed asset acquisitions resulted in additional tax due in the amount of $559.35 on Sparkle's lease of a cash register.

9. Upon the basis of the foregoing audit results, the Division issued to Sparkle a Notice of Determination dated August 13, 2001, assessing additional sales tax due for the period June 1, 1997 through February 29, 2000 in the amount of $75,718.67, plus interest and penalties including omnibus penalty. The Division also issued to petitioner Hadassa Azizi a Notice of Determination dated September 4, 2001, assessing additional sales tax due in the amount of $52,880.76, plus interest and penalties including omnibus penalty, for the period June 1, 1998 through February 29, 2000.[2] The Division based its determination that Hadassa Azizi was a responsible officer of Sparkle on, among other things, her status as president, sole owner and shareholder of Sparkle. In addition, the Division noted that she signed the application for Sparkle's liquor license, and signed power of attorney forms on behalf of Sparkle, and also signed the bank signature card for Sparkle. She provided the money to start Sparkle's business, hired its manager, David Shirin, visited the premises from time to time, and was not barred from doing so or from reviewing Sparkle's books and records.

10. Petitioner Hadassa Azizi was born in Israel, and thereafter moved to Tehran, Iran where, at the age of 16, she entered into an arranged marriage. In or about 1978, she and her

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[2] The tax period covered by the notice issued to Hadassa Azizi is shorter than the period covered by the notice issued to Sparkle because Sparkle executed consents to extend the period of limitations on assessment while Hadassa Azizi did not.

husband moved to the United States. Mrs. Azizi's husband operated a rug business, and Mrs. Azizi raised the couple's three children, until Mr. Azizi's death in 1991. At some point after her husband's death, Mrs. Azizi desired to go into some kind of business and contacted David Shirin, who was described as a "trusted friend." Mr. Shirin apparently advised Mrs. Azizi that she should open a liquor store, and she did so, hiring Mr. Shirin to be the manager who would operate Sparkle's business.

11. Mr. Shirin managed the daily operation of Sparkle's business, including ordering and receiving deliveries of liquor and wine for the store, and paying for such inventory. Mrs. Azizi did not work at the store premises, but visited from time to time in an effort to find out how the business was progressing. On these visits she inquired about the business and expressed her willingness to work at the store, but was advised by Mr. Shirin that everything was fine and that there was no need for her to be involved at the business. Mrs. Azizi received wage and tax statements (forms W2) indicating that she received a salary of $350.00 per week. Mrs. Azizi did not receive such amount, but rather was given small amounts of cash periodically by Mr. Shirin when she visited Sparkle's premises. The record provides no information as to the frequency or specific dollar amounts of such cash payments.

12. Mr. Shirin admitted that during some of the period of time during which he was managing Sparkle, he removed some of Sparkle's inventory to a smaller liquor store he owned. He sold this merchandise at his liquor store but did not pay Sparkle for this inventory. When pressed, he refused to describe his activities as stealing, but rather adamantly referred to this practice as "helping" the other store. He could not recall the time period during which he operated in this manner, other than to describe the same as "a few years." Further, although he admitted to this practice of taking Sparkle's inventory, including both liquor and wine, on a

regular ongoing basis, he gave no firm or clear information on the dollar amount, volume or particular types of merchandise involved. He claimed that most of the inventory (about 60 to 65 percent) sold by Sparkle was liquor, as opposed to wine, but he could not recall how many shelves in the store were devoted to displaying liquor as opposed to wine, or otherwise particularize the amount of space, comparatively, dedicated to liquor versus wine. Mr. Shirin admitted to forging Mrs. Azizi's name to the lease for the cash register used by Sparkle, but denied signing any other documents with her name. On this score, Mr. Shirin's testimony was largely unclear and evasive in nature as opposed to forthright.

13. Petitioners provided copies of advertising flyers showing various prices for wines and liquors, some of which reflected prices lower than those found in the prices observed and recorded by the auditor or provided by Sparkle's accountant. These advertising flyers were described as promoting periodic special discount prices on different wines or liquors offered by a small group of liquor stores located in Sparkle's general geographic area, including Sparkle. The term used in this context was "Price Cutter" to refer to the group of advertising liquor stores and the special prices carried on the flyers.

14. Petitioners offered a copy of a check made payable to Sparkle in the amount of $8,821.00, dated February 2, 2000, and drawn on the account of Merchants and Businessmen's Mutual Insurance Co. This check indicates an August 17, 1999 "date of loss" and reflects claim number "19991775." An accompanying cover letter dated February 4, 2000 under the letterhead of Fenner and Gravitz, Inc., Adjusters and Professional Loss Consultants, is addressed to Mr. David Ariel and Karem Liquors, and references a "Burglary Loss 8/17/99." David Shirin admitted that Karem Liquors was a store he owned at the time, and claimed that he did not know who David Ariel was. He stated that the check was in payment of a loss suffered when an

outside storage container at Sparkle's premises was broken into. No further evidence of the loss was provided, including a copy of the insurance claim, a listing or specification of the items lost, or a copy of any police report filed in connection with the matter.

15. Review of Sparkle's Federal income tax returns for the years 1997, 1998 and 1999 reveals the following:

YEAR	1997	1998	1999
Gross Receipts	$652,504.00	$405,701.00	$429,708.00
Cost of Goods Sold	494,093.00	277,537.00	328,873.00
Gross Profit	158,411.00	128,164.00	100,835.00
Markup Percentage[3]	32%	46%	31%

16. On the initial hearing date (December 3, 2003) petitioners attempted to offer in evidence a preliminary report allegedly prepared by a document examiner concerning the authenticity of signatures, particularly Mrs. Azizi's signature, appearing on various documents such as Sparkle's sales and use tax returns, power of attorney forms, and the like. Since the document examiner was not present or available to testify on the initial hearing date, petitioner requested a continuance for the purpose of providing such testimony and then offering the report. The hearing was continued for such purpose to January 8, 2004. However, petitioner did not appear on such date and the record was, accordingly, closed.

SUMMARY OF PETITIONERS' POSITION

17. Petitioners do not dispute the absence of source documentation, such as cash register tapes, sales invoices or a day book of sales, to support or substantiate the amount of Sparkle's taxable sales for the audit period. In the same manner, petitioners do not dispute that the

[3] Markup percentage is calculated as Gross Profit divided by Cost of Goods Sold.

Division was authorized to resort to indirect auditing methodologies, in general, or to the specific methodology used herein, to determine Sparkle's taxable sales and its tax liability.

18. In contrast to the Division's audit, petitioners prepared and submitted revised calculations, employing the same general methodology (markup of purchases), but utilizing significantly lower markup percentages (8.8 % for liquor and 11.52 % for wine). Petitioners' calculation (like the Division's) also includes the two percent allowance for pilferage, but also goes on to provide a specific reduction in the amount of $8,821.00 based on the insurance recovery check detailed in Finding of Fact "14". The resulting net purchases figure ($1,420,168.31), comprised of liquor purchases ($837,899.30) and wine purchases ($582,269.01) were marked up at 8.8% and 11.52%, respectively, to arrive at gross profit amounts of $73,735.14 for liquor and $67,077.39 for wine. Adding such gross profit amounts to net purchases results in total gross sales (net of substantiated exempt sales) of $1,559,177.77, tax due thereon in the amount of $128,632.17 and, after reduction for tax paid by Sparkle, an underpayment of tax in the amount of $25,089.17. The markup percentages utilized by petitioners in their reconstruction were apparently based on Sparkle's accountants' analysis of inventory purchase costs versus selling prices, including those special or discount prices set forth in the Price Cutter advertisements.

CONCLUSIONS OF LAW

A. The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of AGDN, Inc*** . (Tax Appeals Tribunal, February 6, 1997), as follows:

> a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (***see***, Tax Law §§ 1138[a]; 1135; 1142[5]; ***see***, ***e.g.***, ***Matter of Mera Delicatessen***, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained 'shall include a true copy of each sales slip, invoice, receipt, statement or memorandum' (Tax Law § 1135). It is equally well established that where

> insufficient records are kept and it is not possible to conduct a complete audit, 'the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ' (Tax Law § 1138[a]; ***see, Matter of Chartair, Inc. v. State Tax Commn.***, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (***Matter of Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869); exactness is not required (***Matter of Meyer v. State Tax Commn.***, 61 AD2d 223, 402 NYS2d 74, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025; ***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451).

B. In this case, the Division requested an opportunity to examine Sparkle's books and records. In response, certain records were produced. However, these records were inadequate to determine the amount of sales tax due. Specifically, petitioners did not offer a complete set of cash register tapes, sales invoices, a day book, or any other source documentation concerning Sparkle's sales. This inadequacy in record keeping, together with the significant discrepancy between the purchase data provided by Sparkle's suppliers versus the amounts recorded in Sparkle's books, to wit, in excess of one-half million dollars, clearly justified the use of indirect audit methodologies (***Matter of Roebling Liquors v. Commissioner of Taxation & Finance***, 284 AD2d 669, 728 NYS2d 509, 512, ***appeal dismissed,*** 97 NY2d 637,735 NYS2d 493, ***cert denied,*** 537 US 816, 154 L Ed 2d 20). Petitioners, for their part, do not dispute either the absence of sales records or the Division's authority to resort to indirect audit methodologies in this case. In fact, the use of a markup audit method to calculate taxable sales of a liquor store, in the face of incomplete and inadequate records, has been consistently sustained (***see, Matter of Murphy***, Tax Appeals Tribunal, March 17, 1994; ***Matter of Robritt Liquor Store***, Tax Appeals Tribunal, December 27, 1991). Hence, the only issue is whether petitioners have established that the amount of tax assessed as the result of application of such method was erroneous.

C. Petitioners' first complaint is that the auditor incorrectly estimated that sales of wine represented two-thirds of Sparkle's revenue and sales of liquor represented one-third of Sparkle's revenue. The auditor's estimate was based upon her observation of the amount of shelf space allocated to liquor and wine, respectively, at the premises. It was not unreasonable to conclude that the amount of shelf space allocated to types of items was a reflection of the relative percentage of items sold. While petitioners dispute the accuracy of such estimate their witness, Mr. Shirin, the person who managed the store, could not recollect the number of shelves in the store, or provide any specific information concerning sales beyond the general claim that the store sold more liquor than wine. Moreover, notwithstanding her observation of the ratio of wine to liquor, the auditor did not use a weighted average to calculate Sparkle's markup, but rather utilized a straight average of the two markup percentages to arrive at a combined markup percentage (***see***, Finding of Fact "7"). Given the estimate that wine sales were two-thirds of Sparkle's total sales and that the markup on wine was determined to be 41.25 percent, versus liquor sales at one-third of Sparkle's total sales at a markup of 16.3 percent, the use of a straight average markup versus a weighted markup is relatively favorable to petitioners and results, ultimately, in lower total sales.

D. Petitioners also complain that the markup percentages used by the auditor were too high. Petitioners asserted that the markup amounts were actually lower based on its sales of certain items at cut rate prices as advertised in the Price Cutter flyers. However, the auditor's markup, calculated in the absence of sales records, was based in part on product prices she observed at the store and, in part, upon product prices reflected on a list supplied to the auditor

by Sparkle's accountants.[4] Accepting advertised sales prices, that is, special discounted prices, as normal or everyday prices is in fact counterintuitive to the concept of advertized "special" prices. Moreover, petitioners' claim that competition with other area liquor stores caused prices to be generally lower than those used by the auditor is simply insufficient to meet petitioners' burden of proof. Ultimately, any imprecision in the audit and its result stems from Sparkle's failure to keep records of sales, and must weigh against petitioners (***Matter of Meyer v. State Tax Commn., supra.; Matter of Markowitz v. State Tax Commn., supra.***).

E. Petitioners also seek an increase to the two percent pilferage allowance afforded upon audit by the Division. In this regard, petitioners point to Sparkle's manager David Shirin, who testified at hearing that he removed merchandise ordered and delivered to Sparkle to another, smaller liquor store he owned and then sold the merchandise there. Beyond the admission that he took merchandise, Mr. Shirin's testimony was at best vague and evasive. When pressed for details, Mr. Shirin was entirely nonspecific about the amounts taken and the period over which merchandise was taken. In fact, he steadfastly refused to admit that he "stole" the merchandise, but rather termed the taking as "helping out" his other store. Given the nature of the activity, it is not surprising that there are no records of the amounts taken, or that Mr. Shirin would not admit directly to theft. As a result, however, it is not possible to conclude that this activity amounted to such a significant taking that the two percent pilferage allowance granted by the Division, as calculated against the full inventory purchases amount computed on audit (i.e.,

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[4] Petitioners have questioned the source of the list of prices utilized by the auditor. The auditor testified that the list was supplied by petitioners' "power of attorney," clearly meaning petitioners' representative at the time of audit. Petitioners' witness, a partner in the accounting firm representing Sparkle on audit, could neither confirm nor deny that such list was provided by his firm, noting that he was not personally involved in that aspect of the audit of Sparkle and was "not sure" as to who gave the price list information to the auditor. Absent any other evidence concerning the price list, it is concluded that the same was, as indicated by the auditor, supplied by petitioners' representatives at the time of audit.

audited total purchases as opposed to inventory purchases recorded per Sparkle's books), is insufficient or should be increased. Petitioners bear the burden not only of establishing entitlement to an allowance for theft and breakage, but also must establish the correct amount of such allowance (***Matter of Oggi Restaurant, Inc.***, Tax Appeals Tribunal, November 30, 1990). Petitioners have simply not established that the breakage and theft of merchandise, including the theft of merchandise by Mr. Shirin, was not adequately provided for in the two percent amount allowed on audit.

F. Petitioners further seek a specific reduction based on the insurance payment check in the amount of $8,821.00 (***see***, Finding of Fact "14"), alleging that such check was in reimbursement of the value of inventory stolen from an outside storage container at Sparkle's premises. However, as noted, while the check was payable to Sparkle, it was addressed and sent to one David Ariel, an unidentified person, at Karem Liquors, a store formerly owned and operated by David Shirin. There is no explanation of why the check was sent to Karem Liquors as opposed to Sparkle, nor any explanation of who David Ariel might be other than the possibility that the name was an erroneous spelling or listing for David Shirin. More importantly, the record includes no other information surrounding the alleged theft, such as a police report, a copy of the insurance claim filed seeking reimbursement, or a list of the merchandise allegedly stolen. As a result, the specific nature of the insurance loss and recovery is not described other than via the testimony of David Shirin, which itself ranged from very general to outright evasive. In light of these circumstances, including most specifically the lack of any other evidence corroborating the specifics of the insurance claim, an adjustment reducing sales based on the insurance check submitted in evidence is not warranted.

G. Finally, petitioners' reconstruction or recasting of the audit results as described in Finding of Fact "18" is not accepted. The main differences between the Division's results and petitioners' results stems from petitioners' application of dramatically lower markup percentages, derived in large part from the use of sales or special pricing situations as the norm, against a ratio of wine to liquor sales which is the reverse of that found upon audit. It is undoubtedly certain that advertised sales prices offered from time to time by Sparkle were lower than some of the prices observed by and supplied to the auditor at the time of the audit and used in her calculation of the markup percentages. It is also possible that the composition of sales of wine versus liquor could be different than that determined by the auditor based on her observation of the allocation of store shelf space. At the same time, however, the acceptance of sale prices as the everyday normal prices has been rejected (***see***, Conclusion of Law "D"), while the more beneficial composition of sales sought by petitioners (60% liquor to 40% wine) comes mainly from the very general testimony of David Shirin. More to the point, and as the Division points out, the results of petitioners' reconstruction are at odds with Sparkle's other tax filings. That is, Sparkle's gross profit amounts derived from petitioners' recalculation total $140,812.53 for the entire audit period, an amount which is some $246,597.47 less than the amount of gross profit ($387,410.00) reported on Sparkle's Federal income tax returns for the years covered by the audit period (***see***, Finding of Fact "15"). Furthermore, the markup percentages used in petitioners' calculations (8.8% and 11.52%) are dramatically lower than those determined by the auditor (16.3% and 41.25%) as well as, most tellingly, those determined from a review of Sparkle's Federal income tax returns, to wit, 32% for 1997, 46% for 1998 and 31% for 1999

(***see***, Finding of Fact "15").[5] This inconsistency in gross profit amounts and in comparative markup percentages bears out a conclusion that the markup percentages sought by petitioners are unrealistically low and undermines the reliability and validity of petitioners' reconstruction. Finally, it is not insignificant that petitioners' own recalculation, with its use of such markup percentages, nonetheless still results in a sales tax liability (underreporting) of some $25,089.17.

H. Treated next is the issue of whether petitioner Hadassa Azizi falls within the status of a "person" properly subject to liability for the unpaid sales and use taxes, and attendant penalty and interest, owed by Sparkle. Exposure to such liability arises under Tax Law § 1133(a), which states that:

> Every person required to collect any tax imposed by this article [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article. . . .

Tax Law § 1131(1), in turn, defines "persons required to collect tax" and a "person required to collect any tax imposed by this article [Article 28]" to include any officer or employee of a corporation who, as such officer or employee, is "under a duty to act for such corporation in complying with any requirement of [Article 28]."

I. The mere holding of corporate office does not, *per se*, impose sales tax liability upon an officeholder (***see, Vogel v. New York State Dept. of Taxation & Fin.***, 98 Misc 2d 222, 413 NYS2d 862; ***Chevlowe v. Koerner***, 95 Misc 2d 388, 407 NYS2d 427, 430; ***Matter of Unger***, Tax Appeals Tribunal, March 24, 1994, ***confirmed*** 214 AD2d 857, 625 NYS2d 343, ***lv denied*** 86 NY2d 705, 632 NYS2d 498). Rather, whether a person is an officer or employee liable for tax must be determined based upon the particular facts of each case (***see, Matter of Cohen v. State***

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[5] In fact, the average markup percentage used by the auditor (28.78%) is itself lower than any of those derived from reviewing the amounts reported on Sparkle's Federal income tax returns.

Tax Commn., 128 AD2d 1022, 513 NYS2d 564; ***Stacey v. State***, 82 Misc 2d 181, 368 NYS2d 448; ***Chevlowe v. Koerner, supra***, 407 NYS2d at 429; ***Matter of Hall***, Tax Appeals Tribunal, March 22, 1990, ***confirmed*** 176 AD2d 1006, 574 NYS2d 862; ***Matter of Martin***, Tax Appeals Tribunal, July 20, 1989, ***confirmed*** 162 AD2d 890, 558 NYS2d 239; ***Matter of Autex Corp.***, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]). As summarized in ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990):

> [t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (***Cohen v. State Tax Commn.***, ***supra***, 513 NYS2d 565; ***Blodnick v. State Tax Commn.***, 124 AD2d 437, 507 NYS2d 536,538, ***appeal dismissed*** 69 NY2d 822, 513 NYS2d 1027; ***Vogel v. New York State Dept. of Taxation & Fin.***, ***supra***, 413 NYS2d at 865; ***Chevlowe v. Koerner***, ***supra***, 407 NYS2d at 429; ***Matter of William D. Barton***, [Tax Appeals Tribunal, July 20, 1989]; ***Matter of William F. Martin***, ***supra***; ***Matter of Autex***, ***supra***).

J. Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (***Matter of Constantino, supra; Matter of Chin***, Tax Appeals Tribunal, December 20, 1990). In order to prevail, petitioner "was required to establish by clear and convincing evidence that [she] was not an officer [or employee] having a duty to act on behalf of the corporation, i.e.,

that [she] lacked the necessary authority or [she] had the necessary authority, but [she] was thwarted by others in carrying out [her] corporate duties through no fault of [her] own [citations omitted]" (***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998).

K. The facts in this case indicate that Mrs. Azizi was properly held a person responsible for the unpaid taxes of Sparkle. She owned 100 percent of the shares of the corporation and she was its president. She is listed as having received a salary from the store and, in fact, she did receive some cash on a periodic basis, although allegedly not the full amount of $350.00 per week as listed. She visited the store on an ongoing basis, and offered to work there. Although her offers were apparently rebuffed, she was not precluded from visiting the premises. She provided by personal investment all of the funds by which Sparkle's business was started, and she signed the necessary paperwork to obtain a liquor license on behalf of the corporation. In sum, petitioner possessed sufficient authority over the affairs of the corporation to be considered a responsible person. Petitioner consented to an arrangement whereby David Shirin was responsible to operate her business, and she exercised no oversight in how this arrangement was carried out. Such an arrangement does not excuse Mrs. Azizi from responsibility (***see, Matter of LaPenna***, Tax Appeals Tribunal, March 14, 1991).[6] This case is similar to ***Matter of Tafeen*** (Tax Appeals Tribunal, January 3, 2002), where that petitioner whose late husband operated a retail liquor store, entered into an arrangement with another person who agreed to operate the liquor store if petitioner maintained the liquor license. Petitioner did not work at the store, hire

[6] Petitioners have alleged that Mrs. Azizi did not, in fact, sign many of the documents, including sales tax returns, on which her name appears, urging that such signature was a forgery affixed by either David Shirin or some other person. Even accepting that assertion that Mrs. Azizi signed none of the questioned documents does not change the outcome herein. While the affixation of one's signature is an indication of responsibility, the same is only one such factor and is by no means dispositive. In fact, the absence of an otherwise responsible person's signature or the affixation of such signature by another person (whether by stamp or even by forgery) can, as here, be simply indicative of an unreasonable delegation of responsibility or of simple benign indifference, neither of which provides insulation or absolution from liability.

or fire employees, order inventory or review the store's bank accounts or other records. She gave the store manager check-signing authority, after which she did not sign any checks on behalf of the business. In ***Tafeen***, as in this matter, abdicating responsibility for operating a business does not absolve one of liability for the taxes which should have been collected and remitted. The fact that petitioner failed to exercise her responsibility does not excuse her from liability, for a corporate officer is not at liberty to disregard her duty and simply leave it to someone else to complete (***Matter of Blodnick v. State Tax Commn., supra; Matter of Martin***, Tax Appeals Tribunal, July 20, 1989, ***confirmed*** 162 AD2d 890, 558 NYS2d 239; ***accord, Capoccia v. State Tax Commn.***, 105 AD2d 528, 529, 481 NYS2d 476, 477).

L. Petitioners have not provided evidence which would support reduction or abatement of the penalties imposed, and the same are, therefore, sustained. Sparkle failed to maintain and provide records as required, and its sales were underreported by nearly one million dollars. It is also significant to note that even if petitioners' own (best case) recalculation of liability were to be accepted, the same still results in a significant underreporting of sales and underpayment of sales tax (***see***, Finding of Fact "18").

M. The petitions of Sparkle Wine and Spirits Corp. and Hadassa Azizi are hereby denied and the notices of determination dated August 13, 2001 (regarding petitioner Sparkle) and September 4, 2001 (regarding petitioner Hadassa Azizi), together with penalties and interest thereon, are sustained.

DATED: Troy, New York
December 2, 2004

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE