STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
EDWARD DARCEY AND JOAN DARCEY	:	
for Revision of Determinations or Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1997 through May 31, 2002.	:	DETERMINATION DTA NOS. 820079 AND 820080

Petitioners, Edward Darcey and Joan Darcey, filed petitions for revision of determinations or refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1997 through May 31, 2002.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 17, 2008 at 10:30 A.M., with all briefs submitted by August 29, 2008, which date began the six-month period for the issuance of this determination. Petitioner appeared by Thomas A. Lopresti, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUES

I. Whether purchases of materials and supplies from out-of-state vendors by Elegant Carpet Center, Inc., of which petitioners were persons responsible for the collection and payment of sales and use taxes, were properly subject to use tax.

II. Whether the audit of Elegant Carpet Center, Inc., for the period December 1, 1999 through May 31, 2002 was properly conducted by the Division of Taxation.

FINDINGS OF FACT

Petitioners submitted 111 proposed findings of fact which have been incorporated into the Findings of Fact below, except for proposed findings 8, 67, 75, 88 and 94 which did not accurately reflect the record; proposed findings 58, 59, 60, 68, 69, 78, 84, 85, 86, 92 and 93 which constituted argument; proposed findings 53, 55, 66, 71, 76, and 77 which were irrelevant; proposed findings 25, 26, 27, 28, 95, 96 and 97 which merely recited procedural matters; proposed findings 44, 45, 46, 47, 48, 49, 50, and 51 which were modified, in part, for brevity and relevance and otherwise included; and those proposed findings which included charts have been eliminated and the pertinent facts therein summarized in the narrative.

1. Elegant Carpet Center, Inc. (Elegant) was a corporation that carried on business from 1972 until about June 1, 2004 and was owned in equal shares by Joan Darcey and Edward Darcey (petitioners). At all times pertinent herein, Edward Darcey was the president of Elegant and Joan Darcey was secretary and treasurer. Petitioners conceded that they were personally liable for the collection and payment of sales and use taxes on behalf of Elegant.

2. Elegant was located in Rocky Point, New York, and was in the business of selling and installing carpet, vinyl tile, sheet goods, ceramic tile, laminates and wood flooring.

3. Joan Darcey was responsible for and oversaw the company's paperwork, including ordering flooring materials, handling taxes and accounting and insurance matters. She was also responsible for maintaining a cash receipts journal, sales invoices, purchase invoices, a general ledger and check books.

4. During the period March 1, 1997 through May 31, 2002 (the audit period), Elegant sold floor coverings purchased from third-party vendors on an installed and uninstalled basis. Sales were made to in-state and out-of-state retail customers, for resale and to tax exempt

organizations. However, all purchases of materials and supplies at issue herein were used by Elegant in capital improvement projects. This was stipulated by the parties and referred to throughout the record including in the statement of issues, and was explicitly set forth in the calculation of additional taxes (Division's Exhibit AA).

5. At no time during the audit period did Elegant own or operate a manufacturing or processing facility which transformed materials it purchased into different products or products with a different identity from the floor coverings it purchased.

6. A sales and use tax audit of Elegant was conducted by an auditor of the Division of Taxation, Robert Defilippis, for the period March 1, 1997 through August 31, 1999 (first audit), the result of which was the issuance of notices of determination on May 21, 2001 to Joan and Edward Darcey for the period March 1, 1998 through August 31, 1999[1] asserting tax in the sum of $46,572.00 plus penalty and interest. Petitioners were represented by David Newton, CPA.

7. Subsequently, during the hearing on the second audit, covering the period September 1, 1999 through May 31, 2002, the Division agreed to waive all penalties asserted against petitioners for the first and second audit periods. In addition, the Division and petitioners agreed to reduce the additional tax due on sales ($10,194.00) and purchases ($26,357.00) in the first audit to $36,551.00. The materials purchases subject to use tax for the period March 1, 1997 through August 31, 1999 were agreed to be $438,885.00, or $266,717.00 after eliminating the time-barred quarters. In addition, the Division found $52,755.00 in supply purchases subject to use tax for the period March 1, 1998 through August 31, 1999. Thus, additional tax due on

[1]The periods ended May 31, 1997, August 31, 1997, November 30, 1997 and February 28, 1998 were canceled because the assessments for those periods were deemed untimely.

material and supply purchases for the remaining periods in the first audit period was determined to be $26,357.00.

8. The parties stipulated that 58% of the materials purchases and 31% of supplies purchases for the period March 1, 1998 through August 31, 1999 were from out-of-state vendors. If such purchases were deemed to be nontaxable, only the remaining materials and supplies purchases would be subject to tax, or, 42% of total materials purchases and 69% of supplies purchases for the period March 1, 1998 through August 31, 1999. If the out-of-state purchases are nontaxable, the adjusted tax due on in-state purchases of supplies and materials would be $12,245.00 and the revised sales tax due would be $22,439.00.

9. While petitioners' matter with respect to the period March 1, 1997 through August 31, 1999 was pending, a second audit of Elegant was commenced by the Division and its auditor, Mr. Hani Elbayar, with the issuance of a letter, dated August 23, 2002, requesting all books and records pertaining to Elegant's sales and use tax liability for the period September 1, 1999 through May 31, 2002 (the second audit).

10. At times both prior and subsequent to the commencement of the second audit, Joan Darcey suffered from life threatening diseases and was undergoing treatment. Her condition prevented her from assisting her representative, David Newton, CPA, in the second audit of Elegant through February 2003. Edward Darcey did not have the financial skills necessary to assist Mr. Newton, having devoted most of his time in the business to sales and installations. Additionally, he spent most of his time caring for Joan Darcey and running the business.

11. Joan Darcey requested Mr. Newton to have the audit postponed until she was better, and Mr. Newton requested a six-month postponement on the basis that the first audit was before

the Division of Tax Appeals and that the administrative law judge in that matter had postponed the matter for six months due to the illness of Elegant's owner.

12. On September 30, 2002 and October 21, 2002, the auditor requested that Mr. Newton send him a power of attorney, a written request for the postponement and a properly executed "waiver," or consent extending the period of limitations on assessment, to protect the Division's rights with regard to any assessment for quarters that were about to expire.

13. Mr. Newton called the auditor on October 23, 2002 and stated that neither he nor his client would sign a waiver. Mr. Newton never sent a written request for the postponement.

14. In order to prevent losing the period ended November 30, 1999, the auditor utilized the first audit to estimate tax due for the quarter and issued a Statement of Proposed Audit Changes, dated October 24, 2002, which asserted additional tax due of $7,809.00 plus penalty and interest. On November 18, 2002, the Division issued notices of determination to each of the petitioners which asserted the same tax due as that determined for Elegant for the quarter ended November 30, 1999 ($7,809.00) plus penalty and interest.

15. By letter of December 5, 2002, the auditor recounted the events between October 21, 2002 and December 5, 2002, specifically the requests for the waiver, a written request for the postponement and the reason therefor, and the power of attorney. The auditor referenced the notice that was issued for the quarter ended November 30, 1999 due to the expiration of the time to assess additional tax for that period, and he once again requested records for the second audit period.

16. By letter of December 6, 2002, Mr. Newton responded to the auditor's letter of December 5, 2002, stating that the factual allegations in the auditor's letter were incorrect and

requesting a new auditor, who, unlike Mr. Elbayar, would be unbiased, professional and perform the audit of Elegant without "lies, mistakes and half truths."

17. By letter of December 17, 2002, the auditor's supervisor, Mr. William H. Sparke, informed Mr. Newton that he had reviewed the case file and determined that Mr. Elbayar had acted appropriately in his attempts to commence the audit or obtain the documentation necessary to grant a postponement, which the Division had indicated it would grant. However, Mr. Newton and petitioners had not submitted a written request for the postponement and signed a waiver. Mr. Sparke defended Mr. Elbayar's professionalism and denied the request to transfer the matter to another auditor. Mr. Sparke offered Mr. Newton and petitioners another opportunity to present the previously requested books and records or, in the alternative, submit a written request for a postponement and an executed extension of the statute of limitations. Finally, Mr. Sparke volunteered to accompany Mr. Elbayar if an audit was commenced, but cautioned Mr. Newton that his failure to respond in some way by January 10, 2003 would obligate the Division to utilize the prior audit to estimate taxes due for the remainder of the second audit period.

18. Mr. Newton responded to Mr. Sparke by letters, dated December 20, 2002 and January 6, 2003, in which he requested a meeting in the "New Year" to discuss the sales tax audit issues of Elegant, the latter letter stating that Mr. Sparke's comments were inaccurate and self-serving.

19. By letter, dated January 10, 2003, from Mr. Sparke to Mr. Newton, Mr. Sparke recounted a telephone conversation with Mr. Newton on January 6, 2003, in which Mr. Newton expressed his objection to Mr. Elbayar's presence at any audit conference and his demand that the assessment for the period ended November 30, 1999 be canceled as a condition for requesting a postponement and signing a waiver. Mr. Sparke explained that the assessment could not be

canceled because no records had been produced to establish the accuracy of the return or the correction of Elegant's record keeping shortcomings as demonstrated in the prior audit.

Mr. Sparke further explained that due to petitioners' failure to produce records for the second audit period or request a postponement, and the impending expiration of the statute of limitations with respect to the second quarter in the audit period, December 1, 1999 through February 29, 2000, the Division had prepared a statement of proposed audit change for the remainder of the second audit period based on the prior audit results and Elegant's tax returns for the second period. Mr. Sparke informed Mr. Newton that he could still execute a consent extending the period of limitations on assessment and request a postponement or produce the requested books and records. Failing to act would result in the issuance of assessments on January 31, 2000.

20. On January 22, 2003, Mr. Sparke wrote to Mr. Newton, whose January 6, 2003 letter had been received by Mr. Sparke on January 21, 2003, which indicated that he had reserved time for him and Mr. Elbayar to meet with Mr. Newton at his office on January 31, 2003 at 9:30 A.M. Mr. Sparke told Mr. Newton that failure to keep the appointment and submit a waiver would result in issuance of an assessment based on the statement of proposed audit change previously sent to him.

21. Mr. Newton responded by letter, dated January 24, 2003, in which he stated that he was not available on January 31, 2003, would not meet with Mr. Elbayar and that Mr. Sparke should contact his office to schedule another appointment within 30 days.

22. By letter, dated January 30, 2003, Mr. Sparke informed Mr. Newton that the assessment was being issued consistent with the statement of proposed audit change and that the action was required due to Mr. Newton's failure to execute a waiver.

23. Notices of determination were issued to Edward Darcey and Joan Darcey, dated March 13, 2003, which asserted additional sales and use taxes due of $58,431.91 plus penalty and interest for the period December 1, 1999 through May 31, 2002. The notices were issued for the entire second audit period, even though only the period ended February 29, 2000 was in jeopardy of being lost due to the expiration of the period of limitations on assessment.

24. The parties stipulated to an adjustment in the additional taxes due on the second audit, which included the separately assessed quarter ended November 30, 1999, which provided that the Division now asserts additional sales tax due of $15,350.00 and tax due on purchases of materials and supplies of $37,160.00 for a total of $52,510.00 for the period September 1, 1999 through May 31, 2002.

25. The use tax due was predicated on the material and supply analysis performed in the first audit, where it was determined that material purchases comprised 83.5% of total purchases and supply purchases constituted 16.5% of total purchases. When applied to total purchases made in the second audit period this translated to $421,085.00 in material purchases and $83,208.00 in supply purchases, and resulted in tax due of $41,604.00. After allowing for use tax payments of $4,444.00, the additional tax due was $37,160.00.

26. The parties further stipulated that 58% were purchases of materials from vendors located out of state, while 42% were in-state purchases. The parties agreed that 31% of supply purchases were from out-of-state vendors, while 69% were purchased from in-state vendors. Therefore, based upon the total material and supply purchases in the second audit period as set

forth above, total in-state material purchases would be $176,856.00 (42% of $421,085.00) and total in-state supply purchases would be $57,414.00 (69% of $83,208.00).[2]

SUMMARY OF THE PARTIES POSITIONS

27. Petitioners contend that they are not liable for use tax on purchases of materials and supplies from out-of-state vendors which were then incorporated into capital improvement projects. Petitioners argue that the purchases were strictly for resale to third parties as part of its projects.

Petitioners believe that Elegant's purchases of materials and supplies from out-of-state vendors were not purchased at retail and therefore fail to satisfy that requirement for the imposition of use tax under Tax Law § 1110(a)(A). Petitioners argue that purchases for resale are excluded from retail sales by definition. Further, petitioners maintain that Elegant did not manufacture, process or assemble the tangible personal property and then offer it for sale as such in the ordinary course of its business or use such property or incorporate it into a structure, building or real property. Therefore, Elegant's out-of-state purchases of materials and supplies were not subject to the use tax pursuant to the terms of Tax Law § 1110(a)(B).

Although they concede that Elegant, and themselves as responsible officers of same, were liable for the payment of sales tax on the purchase of materials and supplies from in-state vendors which were incorporated into its capital improvement projects, they contend that the Division of Taxation had no authority to impose a sales tax on those purchases from out-of-state vendors, which had no nexus with the State of New York.

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[2]If it is determined that the out-of-state purchases of materials and supplies were not subject to use tax, then the only amount of use tax due would be the tax on in-state purchases of materials and supplies, less the use tax already paid.

28. Petitioners contend that, with respect to the second audit, they were not afforded proper audit rights under the Tax Law, inasmuch as the Division failed to conduct a proper audit of Elegant's books and records by not ascertaining whether adequate books and records were maintained by the company. Further, petitioners charge that the Division prematurely resorted to an estimated audit methodology to determine the sales and use taxes due for the second audit period thereby causing an assessment to be issued which was both arbitrary and capricious and without a rational basis.

29. The Division of Taxation argues that Elegant's purchases of materials and supplies from out-of-state vendors were indeed retail sales and were not excepted from the definition of retail sale as purchases for resale, since petitioner conceded it was a contractor using its materials and supplies to erect, construct, repair, maintain and service real property and property. Therefore, since the materials and supplies purchased out-of-state by Elegant were not otherwise subject to sales tax, and were used within the state, they were subject to use tax under Tax Law § 1110.

30. The Division of Taxation contends that petitioners' failure to produce complete and sufficient books and records for the second audit period after a clear and unequivocal request therefor by the Division, provided sufficient basis for resort to an estimated audit methodology, i.e., reliance on the prior audit. Further, the Division urges that the record supports its good faith efforts to work with petitioners, all of which were thwarted by petitioners' representative.

31. In their reply, petitioners continue to argue that Elegant's purchases were for resale in their original form and not for incorporation into some other structure and then sold as part of a completed project to a third party.

CONCLUSIONS OF LAW

A. Tax Law § 1110(a) provides, in pertinent part:

> Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state . . . [A] of any tangible personal property purchased at retail. . . .

B. It is undisputed that Elegant was, during the period in issue, a contractor as defined in 20 NYCRR 541.2(e) that purchased materials and supplies from out-of-state vendors which were incorporated into capital improvements for customers in New York State. The Division of Taxation determined that these purchases of materials and supplies were retail sales for which Elegant and petitioners, as responsible officers, are liable for use tax.

A retail sale is defined in the Tax Law as a sale of tangible personal property to any person for any purpose other than for resale as such and includes the sale of tangible personal property to a contractor for use or consumption in adding to, altering, improving, maintaining, servicing or repairing real property, property or land, regardless of whether the tangible personal property is to be resold as such before it is used or consumed. (Tax Law § 1101[b][4].)

The regulation at 20 NYCRR 541.1(b) states:

> The principal distinguishing feature of a sale to a contractor, as compared to a sale to other vendors who purchase tangible personal property for resale, is that the sale of tangible personal property to a contractor for use or consumption in construction is a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair.

Therefore, Elegant's purchases of materials and supplies from out-of-state vendors constituted retail sales and, despite petitioners' contentions to the contrary, they were not purchases for resale. By definition, such purchases are deemed to be made without the expectation of a resale of the items. (Tax Law § 1101[b][4][i]; ***Matter of Aldrich v. State Tax***

Commission, 42 AD2d 385, 348 NYS2d 384 [1973], ***lv denied*** 34 NY2d 516, 357 NYS2d 1026 [1974].) When Elegant purchased the supplies and materials it intended for use in its capital improvements, it anticipated its own use of the materials and not reselling the items to customers.

Any contractor who makes a capital improvement must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property (20 NYCRR 527.7[b][5]). Since Elegant used or consumed the materials and supplies it purchased from out-of-state vendors to perform capital improvements, it was liable for tax on such purchases in accordance with Tax Law § 1101(b)(4)(i). These purchases are not distinguishable from the New York State purchases of supplies and materials which petitioners conceded were subject to tax and the Division's assertion of additional tax on the purchases is sustained.

C. Petitioners' have challenged the propriety of the audit with respect to the period December 1, 1999 through May 31, 2002 on the basis that the Division did not perform a proper audit. They argue that the auditor did not: safeguard their rights to a proper audit as required under the Tax Law; conduct a proper audit of Elegant's books and records, including ascertaining whether the corporation maintained adequate books and records to perform a detailed audit; and conduct a detailed audit prior to resorting to an estimated audit methodology. As a result of this behavior, petitioners believe the resulting notice of determination lacked a rational basis.

Much of petitioners' argument is based upon the interplay between their representative and the Division's auditors. While petitioners believe that Mr. Newton complied fully with the Division on the second audit, the facts indicate otherwise.

The second audit began with a written request for all of Elegant's books and records pertaining to its sales and use tax liability for the period September 1, 1999 through May 31, 2002. At this time, Joan Darcey was suffering from life-threatening illnesses which prevented

her from participating in the audit. Since she was responsible for and most familiar with the financial aspects of the business and the maintenance of books and records pertaining to sales and use taxes, her absence from the audit process severely limited Elegant's ability to present its case to the Division. Understanding the circumstances, Joan Darcey requested Mr. Newton to obtain a postponement of the audit until such time that she could assist in the audit process. Mrs. Darcey's condition previously had been the reason for a six-month delay in proceedings before the Division of Tax Appeals.

Mr. Newton made Mrs. Darcey's request known to the Division's auditors and was informed that the Division would grant the request if Mr. Newton would put the request for the postponement in writing and execute a consent to extend the period of limitations on assessment for the quarter or quarters that were about to expire. The Division's written requests were made on September 30, 2002, October 21, 2002, December 17, 2002 and January 10, 2003, but none were successful in convincing Mr. Newton to formally request the postponement and execute a consent to extent the period of limitations on assessment for the quarters in jeopardy.

Instead, Mr. Newton engaged in flagrant dilatory tactics, first informing and then actually refusing to sign the consent in October 2002; accusing the auditor in a letter, dated December 6, 2002, of being biased, unprofessional and untruthful; requesting a meeting with the auditor's supervisor in the new year in a letter, dated December 20, 2002, but also charging that the supervisor's letter to him was inaccurate and self-serving; demanding in a January 6, 2003 telephone conversation with the supervisor that the notice issued for an expiring quarter be canceled before he would sign a consent or request a postponement; and, by letter of January 24, 2003, informing the supervisor that he would not take part in a meeting with the auditor and that the date proposed was inconvenient. In all instances, Mr. Newton was inconceivably reluctant to

submit the request for a postponement of the audit as requested by his client and either reluctant, defiant or evasive about signing the consent to extend the period of limitations on assessment.

The reasons for Mr. Newton's strategy will forever be a mystery. Although he attempted to provide books and records with respect to the first audit period, March 1, 1997 through August 31, 1999, he made no attempt to provide records or request a postponement of the second audit. Although petitioners argue that the Division's auditors "pressured" Mr. Newton to commence the audit, the facts recited above clearly belie such a claim.

D. Petitioners also argue that the Division overstepped its authority because its own field audit guidelines prohibited issuing a notice of determination for the remaining quarters in the audit period and not just the quarter that was expiring. Petitioners cited a former sales tax audit guideline, which may or may not have been in effect during the audit (former § 10.1.5.8[d] renum 105.8[D]) which stated that "the auditor's decision to issue an estimated assessment must be based upon the circumstances of each case and the assessment must cover only the expiring period(s)." [3] The language of the sales tax audit manual was revised and removed the restriction on which periods could be assessed in favor of an emphasis on the unique circumstances of each case. The current guideline also provides that the determination "should be issued and should cover any periods that the liability can be determined, and must include the expiring period(s)." (Sales and Use Tax Field Audit Guideline § 105.8[A].) The use of the permissive "should" rather than the mandatory "must," provides the Division with greater latitude and discretion in dealing with the circumstances of each case, such as the behavior of Mr. Newton over the course of five

[3]This version was issued March 1, 1998. Subsequently, the guideline at section 105.8(D) was revised at an unknown date and now reads: "The auditor's decision to issue an estimated determination must be based upon the circumstances of each case. All estimated determinations should be discussed with the Team Leader, Section Head, Program Manager and/or District Office Manager prior to issuance."

months, and appears to better serve the underlying goal of the section: to address a taxpayer's refusal to execute a consent to an extension in a manner which comports with the discrete circumstances of each case.

Since petitioners have not demonstrated that the current guideline's language was not in effect during the applicable periods herein, its reliance on the excised language (that permitting only the assessment of the expiring period) was misplaced. Further, the revised version of the guidelines correspond to the auditor's and team leader's actions in this matter and suggest that the current guidelines were in effect during the Division's audit in late 2002 and early 2003. While the Tax Appeals Tribunal has determined that audit guidelines which were in effect and therefore applicable to a specific audit period may be relevant for limited purposes (***see Matter of Veeder***, Tax Appeals Tribunal, January 20, 1994 [criticism of audit methodology]; ***Matter of Tweed***, Tax Appeals Tribunal, May 23, 1996 [aid in interpretation of statutory term], it has not elevated reliance on them above other, more authoritative sources. The guidelines are indications of policy (Webster's Ninth New Collegiate Dictionary 541 [1983]) and do not have the legal force and effect of a statute or regulation.

An example is found in Tax Law § 3030(c)(5)(B)(iii), which provides, in pertinent part:

> the position of the commissioner shall be presumed not to be substantially justified if the department, inter alia, did not follow the applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

Clause (iv) further provides:

> the term 'applicable published guidance' means (I) regulations, declaratory rulings, information releases, notices, announcements, and technical services bureau memoranda, and
>
> (II) any of the following which are issued to the taxpayer: advisory opinions and opinions of counsel.

Notably missing from this list of guidance were the Division's audit guidelines, which the Legislature did not hold in the same regard as a published source of guidance in administrative proceedings.

The revised policy guideline did not modify the provision which stressed the importance the circumstances of each case played in the auditor's decision to issue an estimated assessment. Given the extraordinary behavior of Mr. Newton over the course of the audit, from August 23, 2002 through January 30, 2003, including the necessity of issuing an assessment to preserve the quarter ended November 30, 1999 because of Mr. Newton's inexplicable inaction, the Division was imminently justified in believing that there would be no forthcoming cooperation. With this knowledge, it issued an assessment for the remainder of the audit period. To require the Division to bear the heavy administrative burden and cost of issuing assessments for one quarter at a time would be to reward the recalcitrant, belligerent and obfuscating behavior of petitioners' representative herein. For this reason, it is concluded that the circumstances of this matter clearly dictated and justified the Division's course of action.

E. Petitioners do not dispute that the Division of Taxation has the right to employ an estimated audit methodology using external indices as provided for in Tax Law § 1138(a)(1), but argue that the Division must first perform a full and complete examination of petitioners' books and records. Since such an examination did not occur here, petitioners argue the Division should not have resorted to the estimated methodology.

The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of Your Own Choice, Inc***. (Tax Appeals Tribunal, February 20, 2003), as follows:

To determine the adequacy of a taxpayer's records, the Division must first request ***(Matter of Christ Cella, Inc. v. State Tax Commn.***, [102 AD2d 352, 477 NYS2d 858]) and thoroughly examine (***Matter of King Crab Rest. v. Chu***, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (***Matter of Giordano v. State Tax Commn.***, 145 AD2d 726, 535 NYS2d 255; ***Matter of Urban Liqs. v. State Tax Commn.***, 90 AD2d 576, 456 NYS2d 138; ***Matter of Meyer v. State Tax Commn.***, 61 AD2d 223, 402 NYS2d 74, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025; ***see also***, ***Matter of Hennekens v. State Tax Commn.***, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is "virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit" (***Matter of Chartair, Inc. v. State Tax Commn.***, 65 AD2d 44, 411 NYS2d 41, 43; ***Matter of Christ Cella, Inc. v. State Tax Commn.***, ***supra***), "from which the exact amount of tax due can be determined" (***Matter of Mohawk Airlines v. Tully***, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (***Matter of Urban Liqs. v. State Tax Commn.***, ***supra***). The estimate methodology utilized must be reasonably calculated to reflect taxes due (***Matter of W.T. Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (***Matter of Scarpulla v. State Tax Commn.***, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451; ***Matter of Cousins Serv. Station***, Tax Appeals Tribunal, August 11, 1988). In addition, "[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case" (***Matter of Grecian Sq. v. Tax Commn.***, 119 AD2d 948, 501 NYS2d 219, 221).

In the matter at hand, there is no doubt that the Division made several adequate, unequivocal and clear requests for all of petitioners' records related to their sales tax liability for the period September 1, 1999 through May 31, 2002 (the second audit). Petitioners did not heed the requests made by the Division and now argue that a full and complete examination of their

records was never performed prior to resorting to an estimated audit methodology. As such, petitioners believe the resulting assessment is invalid, arbitrary and capricious. This argument is without merit and must fail in light of the undisputed facts of this matter and the well-established precedent cited above in ***Matter of Your Own Choice, Inc***. In refusing to produce books and records and otherwise to cooperate with the Division, petitioners forfeited the right to debate the adequacy of Elegant's records.

Further, since it has been established that the Division was justified in resorting to an estimated audit methodology, its use of prior audit information was justified. (***See Matter of Mustafa,*** Tax Appeals Tribunal, December 27, 1991; ***Matter of Cronos Enterprises, Inc.,*** Tax Appeals Tribunal, December 13, 2007.)

F. The petitions of Edward Darcey and Joan Darcey are granted consistent with Findings of Fact 7, 8, 24, 25 and 26, but in all other respects are denied, and the notices of determination dated May 21, 2001, November 18, 2002 and March 13, 2003 issued to Edward Darcey and notices of determination dated May 21, 2001, November 18, 2002 and March 13, 2003 issued to Joan Darcey are sustained as so modified.

DATED: Troy, New York
February 26, 2009

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE