

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RYWIN, INC.	:	
for Revision of a Determination or For Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods September 1, 1999 through	:	
February 29, 2000 and June 1, 2000 through	:	
February 28, 2002.	:	DETERMINATION
		DTA NOS. 820268 AND
		820269

In the Matter of the Petition	:	
of	:	
GARY A. RYDER	:	
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, 2000 through	:	
February 28, 2002.	:	

Petitioner Rywin, Inc., 818 Carman Avenue, Westbury, New York 11590-6428, 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 periods September 1, 1999 through February 29, 2000 and June 1, 2000 through February 28, 2002.

Petitioner Gary A. Ryder, 1984 Lilac Drive, Westbury, New York 11590-5923, 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, 2000 through February 28, 2002.

A consolidated hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on

October 17, 2005 at 10:15 A.M and continued to completion on October 18, 2005, with all briefs to be submitted by June 22, 2006, which date began the six-month period for the issuance of this determination. Petitioners appeared by De Graff, Foy, Kunz & Devine, LLP (James H. Tully, Jr., Esq., of counsel) The Division of Taxation appeared by Mark F. Volk, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Rywin, Inc. and its owner, Gary A. Ryder.

II. Whether penalties imposed pursuant to Tax Law § 1145(a)(1)(i) and (vi) should be sustained.

III. Whether the Notice of Determination issued to petitioner Gary A. Ryder is barred by the statute of limitations.

FINDINGS OF FACT

1. Petitioner Rywin, Inc. ("Rywin"), doing business as Wine Warehouse, operates a retail wine and liquor store located at 816-18 Carman Avenue, Westbury, New York. Located in a strip mall in a middle class neighborhood, the Wine Warehouse sells wine, liquor, ice and lottery tickets. All wine and liquor inventory offered for sale is displayed on shelves and in boxes in the 2,506 square-foot double-size store because the store does not have a basement for storage. There is a small office located at the rear of the store. The store has one cash register. Petitioner Gary A. Ryder, president and sole shareholder of Rywin, has operated the wine and liquor store for over 30 years.

2. Prior to and during the period September 1, 1999 through May 31, 2002, Rywin maintained two checking accounts at Bank of New York for the business. The first business link

checking account, titled “Rywin Inc., Wine Warehouse” (“operating checking account”), was used as Rywin’s operating account and the other business link checking account, titled “Rywin Inc., Wine Warehouse, Lottery Account” (“Lottery checking account”), was used for payments due the Lottery.

3. Great House of Wine, Inc. (“GHW”), a Florida corporation, was in the business of providing distribution and fulfillment services for small west coast wineries which sold wines to out-of-state customers via the mail, the telephone and the Internet. It had a New York State wine wholesale license and leased warehouse space at 437 Railroad Avenue in Westbury, New York from Allied Cold Storage Warehouse. Sometime in the fall of 1998, James Mattson, president of GHW, approached Mr. Ryder with a business proposition concerning the sale and shipment of out-of-state wines to New York State customers. GHW proposed to pay Rywin a commission on sales of out-of-state wines to New York State consumers, if Rywin would: take legal possession of the wine, although physical delivery of the wine would be to GHW’s warehouse located a little over a mile from Rywin’s retail location; verify that the number of boxes of wine on the truck matched the number of items listed on the bill of lading prior to arrival of the shipment at GHW’s warehouse; direct deliveries to GHW’s warehouse; ensure that the boxes of wine were properly refrigerated in the warehouse and mail undeliverable, damaged and returned boxes of wine to the originating wineries. In addition to the commission payments, GHW proposed to remit the sales tax receipts collected from the New York State consumers by the wineries to Rywin which would then remit same to the New York State Department of Taxation and Finance. On or about November 1, 1998, GHW and Rywin entered into a business relationship. However, the two-page document dated November 1, 1998 entitled “NEW YORK CONTRACT” was never executed by the parties.

4. During the period September 1, 1999 through February 28, 2002, wine transactions involving GHW, Rywin and the New York State retail customer were conducted as follows. New York customers would place orders for wine with out-of-state wineries. GHW would pick up the wine orders from the wineries and deliver the wine to a GHW warehouse located near the Napa, California county airport. Each week a temperature controlled truck would leave this warehouse and travel to the northeast with wine shipments repacked in Styrofoam shippers, labeled for delivery to the customer and palletized by state. Some of the wine was shipped to Rywin in New York. The shipper, Garrison Transportation Services, took the shipment to Rywin's place of business, 816-18 Carman Avenue, Westbury, New York, where, after checking the load and the paperwork, either Mr. Ryder or a Rywin employee would sign the bill of lading which bore the "ship to" address of Wine Warehouse, 816-18 Carman Avenue, Westbury, NY 11590-6428. The wine was not off-loaded at Rywin's retail establishment. Rather, the driver was directed by either Mr. Ryder or a Rywin employee to deliver the wine shipments to GHW's warehouse located at 437 Railroad Avenue, in Westbury, New York. After the wine shipments were delivered to GHW's Westbury, New York warehouse, a common carrier such as UPS would pick up the boxed wine and deliver it to the retail customer.

5. During the period September 1, 1999 through May 31, 2002, each box of wine picked up by the common carrier at GHW's Westbury, New York warehouse had a shipping label which listed, among other things, the shipper's name and address as Wine Warehouse, i.e., Rywin's business name, 816-18 Carman Avenue, Westbury, NY 11590-1560, the recipient's name and address and that a minimum 21 years-of-age adult's signature was required for delivery of the box of wine. The New York retail customer also received a sales invoice which listed Wine Warehouse as the retailer. If the common carrier was unable to deliver the wine or the customer

refused delivery, it was returned to Rywin's place of business. Any broken or spoiled bottles of wine were also returned by the retail customer to Rywin's place of business. Mr. Ryder would forward all returns back to the originating wineries and notify GHW of the returns.

6. During the period September 1, 1999 through May 31, 2002, GHW issued sales invoices to Rywin for the wines shipped from the out-of-state wineries to New York retail customers. On these sales invoices, Rywin was charged the same amount for the wine as the retail customer had paid to the out-of-state wineries for it. Each sales invoice listed, among other things, the number of cases purchased, the number of bottles in a case, the names of the wine and the winery from which the purchase was being made as well as the retail customer name or names, the rate paid by the retail customer per case and the total amount due. While these bills did reflect the total amount due for each shipment of wine to Wine Warehouse, they also reflected that the shipments were prepaid.

7. During the period September 1, 1999 through May 31, 2002, New York retail wine customers would prepay their orders, including shipping and sales tax to the out-of-state wineries. The wineries would forward the sales tax receipts to GHW and GHW would remit the sales tax to Rywin. GHW would also send schedules recapping the taxable sales and sales tax to be reported by Rywin.

8. GHW paid Rywin a commission for services which it rendered. Those services included, among other things, handling deliveries of the wine and reporting the out-of-state wine sales and sales tax due on those sales on its sales tax returns. The commission was \$2.00 on each case of wine sold to a New York customer. Beginning in August 2000, Rywin began receiving an additional \$5.00 per package returned to the Wine Warehouse and then reshipped

by it to the originating winery, retroactive to the October 1999 returns. GHW made the commission payments by check.

9. On December 5, 2000, Mr. Ryder sent a letter to Cindy Brown-Guthrie, the chief operations officer of GHW, regarding issues arising from Rywin's business relationship with GHW. In that letter, Mr. Ryder wrote, in pertinent part, as follows:

The accountant I have dealt with for the past 25 years has been expressing concern regarding some issues arising from transactions with your company. There are several snags from an accounting standpoint which need to be resolved.

First of all, the wholesale purchases of your wines, which is [sic] required by law, is [sic] only noted on your weekly data sheet. These items are never "purchased" by me and are never reflected in my books. The same holds true for sales which relate to these purchases. Since I do not receive cash payment from you for these sales, they are not reflected on my corporate books although they are reported on my sales tax returns. Therefore, my sales tax returns indicate a large volume of sales while my corporate books only reflect the sales made at my retail establishment. I am still attempting to come up with a reasonable procedure which will aid in developing consistent reporting. However, your input would be helpful, and I am agreeable to a plan that may be working with one of your other accounts.

Secondly, it is imperative that the sales tax payments you send to me be in the form of a check payable to Rywin, Inc., Wine Warehouse. If you send me a check payable to New York State, I must remit your check along with one of my own covering my in-store liability. The practice of sending two checks may raise eyebrows at the Sales Tax Bureau. Such red flags can be eliminated by having you make out the check to Rywin Inc., Wine Warehouse. In addition, due to the large volume of sales, the state is requiring me to file future sales tax returns on a monthly basis rather than quarterly as I had in the past. I must have your sales tax check by the 10th of each month so that I can deposit the check into my account, allow enough time for it to clear, and issue one check to New York State by the filing date of the 20th of each month. Failure to file on a timely basis will result in a 10% penalty which can be avoided by sending your checks to me by the 10th of each month. Please note, also, that my commission checks should also be made payable to Rywin Inc., Wine Warehouse.

Until these two issues are resolved, my accountant has refused to continue in that capacity. As I mentioned, the long-standing relationship I have developed with my accountant is not one I would like to jeopardize, and I would like to resolve these issues as quickly as possible. Please let me know if you can be of help with regard to the wholesale purchases situation, as I am sure other companies you

deal with have had similar problems. Also, I would appreciate it if you would confirm, in writing, that you will comply with my request to have sales tax checks made payable to my Corporation and remitted to me by the 10th of each month . . .

10. On December 11, 2000, Ms. Brown-Guthrie sent Mr. Ryder a "Fax" regarding sales tax which stated, in pertinent part, as follows:

Thanks so much for your call Friday night. I am thrilled you found the Kistler order. If you get me a revised list today of returns I will have Helene work on them to clean you out.

More importantly, I think you could tell by my tone last week I was taken a little off guard by your letter and realizing the tax was due next week for NY. I had in my mind it was due in January. As you can see our October was huge as was November and I am still collecting money from the wineries on receivables. I will only have about half this week to forward to you. Jim and I agreed we will simply forward the money to you once a week until we get the debt paid off, and of course incur any penalty that will arise. He also suggested we submit the services sales tax so that you do not have to worry about that burden from now on since we are allowed to do so as we have had this discussion with NY sales tax authorities several times. It was simply convenient to pass that through you as well. We do not have a problem writing the check out to you as Rywin Inc, as long as you sign your contract. At this point Gary we have been working together to the specifications of the contract for several years. It benefits you as well as us. I would like to get you a cashier's check made out to Rywin on Monday, so you wouldn't have to worry about it clearing and it gives me time to collect throughout the week I would overnight it next day UPS so you would have it. I want to get you as much as I can so we have less penalty to pay. I will pay you the remaining sales tax as soon as possible as we do not want to pay more than absolutely necessary on the penalty side for obvious reasons.

I am also attaching the revised recaps not inclusive of services sales tax for you and your accountant so that you can see the wine sales tax amounts you need to submit are slightly less and we will submit our own services.

I tried calling you and know you are busy. I will be in all day today to discuss this further. In the future I will get the money to you by the 10th and you will have these recaps by the 10th of each month if you find this to be more beneficial.

We will pay your commission once we pay off the sales tax debt as well as pay you for any returns outstanding

Further review of the Fax indicates that a total of seven pages were transmitted by facsimile transmission to Mr. Ryder on December 11, 2000.

11. On or about December 16, 2000, GHW sent a cashier's check payable to Rywin in the amount of \$30,000.00 in partial payment of the sales tax due for the months of October and November 2000.

12. Even though there were large sales of out-of-state wines to New York customers in the months of September, October and November 2000 and a total of \$95,017.44 in sales tax had been collected by the wineries, GHW was only able to remit \$30,000.00, i.e., the amount paid by cashier's check as noted above, of the total amount of New York sales and use tax due for those months. As such, Rywin agreed to pay the sales tax to New York State, in the amount of \$65,017.44. In a note dated January 20, 2001, GHW agreed to repay this amount to Rywin.

13. At first, GHW remitted sales tax to Rywin by check payable to New York State Department of Taxation and Finance. However, after Rywin objected to this method of payment in Mr. Ryder's December 5, 2000 letter, GHW began remitting the sale tax to Rywin via wire transfer deposits into Rywin's Lottery checking account. In addition to wire transfers, at times, GHW remitted the sales tax via checks payable to Rywin.

14. On or about October 10, 2002, James Mattson, as president of GHW, executed a two - page Promissory Note and Memorandum of Agreement ("promissory note and agreement") and forwarded this document to Mr. Ryder, as Rywin's president, for his execution as well. Under the terms of the promissory note which superceded all promissory notes prior to April 1, 2002 (the date listed on this promissory note) between GHW and Rywin, for value received, GHW promised to pay Rywin the sum of \$65,000.00, together with interest at the rate of 10 percent per

annum on the unpaid balance, in four installments, on June 20, 2002, September 20, 2002, December 20, 2002 and March 31, 2003.

15. The two-page Promissory Note and Memorandum of Agreement also required Rywin to agree

to continue providing the following services to Great House of Wine, Inc., pursuant to the contract between the parties dated November 1, 1998, for the period of six years ending August 31, 2004, with the following clarifications of RYWIN, INC.'s duties and compensation.

a) RYWIN, INC., shall accept and confirm weekly alcoholic beverage shipments from Great House of Wine, Inc., a licensed New York alcoholic beverage wholesaler, utilizing a maximum of 250 square feet of air-conditioned, indoor floor area for temporary storage of said wines returned to RYWIN, INC., as undeliverable to New York customers; and

b) RYWIN, INC., shall assist New York purchasers of said alcoholic beverages from Great House of Wine, Inc., who contact RYWIN, INC., and to responsibly convey said purchasers' concerns and needs to Great House of Wine at its Florida or California office, as appropriate

c) RYWIN, INC., agrees to continue the compensation agreement with Great House of Wine dated November 1, 1998. Great House of Wine, Inc., shall pay such agreed sums to RYWIN, INC., for its duties of accepting and confirming shipments, re-labeling and re-shipping returned goods on a weekly basis, administrative expenses, vehicle and delivery expenses, and labor costs. Great House of Wine, Inc., shall pay said agreed compensation to RYWIN, INC., in addition to New York sales taxes, monthly or quarterly depending on RYWIN, INC.'s reporting period to the State of New York.

It is noted that the compensation agreement dated November 1, 1998 referenced above is not part of the record.

16. Mr. Ryder never executed the Promissory Note and Memorandum of Agreement. However, the parties continued their business relationship after October 2002.

17. On February 11, 2003, GHW filed a voluntary petition under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court, Southern District of Florida, Fort Lauderdale Division. As part of its bankruptcy proceeding, GHW filed a schedule of creditors

holding unsecured priority claims which listed Rywin as a creditor owed \$65,017.44. GHW listed the date this claim was incurred as December 31, 2000 and the consideration for the claim as “New York Sales Taxes, to be reported and paid by Rywin, Inc., in exchange for promissory note from debtor.”

18. On or about April 28, 2003, Rywin filed a proof of claim in GHW’s bankruptcy proceeding seeking payment in the total amount of \$16,269.86 on the April 1, 2002 promissory note. The basis of its claim was services performed and taxes. Rywin attached a copy of the Promissory Note and Memorandum of Agreement executed by Mr. Mattson to its proof of claim. It also included an “Interest Statement” on which it stated the terms of payment by the debtor, the interest rate and the receipt by Rywin of two payments of \$25,000.00 each in May and June 2002. On the same date, Rywin also filed a proof of claim in GHW’s bankruptcy proceeding seeking payment for services performed in the total amount of \$5,424.73.

19. During the period September 1, 1999 through May 31, 2002, Rywin reported on its sales tax returns total gross sales of \$2,718,785.00 and total taxable sales of \$2,670,265.00 as follows:

Sales tax quarter ending	Gross sales reported	Taxable sales reported	Nontaxable sales reported
11/30/1999	\$ 492,933.00	\$ 487,737.00	\$ 5,196.00
02/29/2000	163,958.00	160,249.00	3,709.00
05/31/2000	736,539.00	730,694.00	5,845.00
08/31/2000	74,762.00	72,175.00	2,587.00
11/30/2000	180,959.00	177,243.00	3,716.00
02/28/2001	118,744.00	115,595.00	3,149.00
05/31/2001	130,464.00	128,528.00	1,936.00
08/31/2001	123,963.00	118,266.00	5,697.00

11/30/2001	338,210.00	332,557.00	5,653.00
02/28/2002	173,889.00	170,720.00	3,169.00
05/31/2002	<u>184,364.00</u>	<u>176,501.00</u>	<u>7,863.00</u>
Totals:	\$2,718,785.00	\$2,670,265.00	\$48,520.00

20. During the period September 1, 1999 through May 31, 2002, Rywin filed sales tax returns on a part-quarterly basis, i.e., it filed monthly sales tax returns, and on a quarterly basis. On the sales tax return which it filed for the quarter ending November 30, 1999, Rywin reported net sales tax due of \$41,307.65, a sales tax payment of \$69,659.77 and a net overpayment of sales tax in the amount of \$28,352.12. On the sales tax return which it filed for the quarter ending February 29, 2000, Rywin reported sales tax in the amount of \$13,621.17 less credits totaling \$28,502.12, consisting of the net overpayment of sales tax from the quarter ending November 30, 1999 in the amount of \$28,352.12 plus a vendor collection credit of \$150.00, for a net sales tax due of negative \$14,880.95. On the sales tax return which it filed for the quarter ending May 31, 2000, Rywin reported sales tax in the amount \$62,108.99 less credits totaling \$15,030.95, consisting of the remainder of the net overpayment of sales tax from the quarter ending November 30, 1999 in the amount of \$14,880.95 plus a vendor collection credit of \$150.00, for a net sales tax due of \$47,078.04, a payment of \$55,759.00 and a net overpayment of sales tax in the amount of \$8,690.96. On the sales tax return which it filed for the quarter ending August 31, 2000, Rywin reported sales tax in the amount of \$6,134.88 less credits totaling \$8,736.95, consisting of an overpayment of sales tax from the quarter ending May 31, 2000 in the amount of \$8,635.90 plus a vendor collection credit of \$101.50, for a net sales tax due of negative \$2,602.07. On the sales tax return which it filed for the quarter ending November 30, 2000, Rywin reported sales tax in the amount of \$15,065.65 less credits and

prepaid sales tax totaling \$3,908.50, consisting of an overpayment of sales tax from the quarter ending May 31, 2000 in the amount of \$2,602.05 plus prepaid sales tax in the amount of \$1,156.45 plus a vendor collection credit of \$150.00, for a net sales tax due of \$11,157.15 and a sales tax payment of \$11,157.15.

21. On or about May 9, 2002, the Division of Taxation ("Division") assigned an auditor, Karel A. Ezegelian, to conduct a sales tax field audit of Rywin for the period September 1, 1999 through May 31, 2002. An appointment letter dated May 22, 2002 and setting an appointment for June 19, 2002 was sent by Ms. Ezegelian to Rywin. The letter included a Records Requested List which requested the following records to be available for audit on the appointment date:

- Sales Tax Returns, Worksheets and Canceled Checks for entire audit period
- Federal Income Tax Returns (1120's or 1065's or 1040's) for entire audit period
- NYS Corporation Tax Returns for entire audit period
- General Ledger for the entire audit period
- General Journal and Closing Entries for entire audit period
- Sales Invoices for entire audit period
- All Exemption Documents Supporting Non-taxable Sales for entire audit period ***
- Chart of Accounts for entire audit period
- Fixed Asset Purchase/Sales Invoices for entire audit period
- Expense Purchase Invoices for entire audit period
- Merchandise Purchase Invoices for entire audit period
- Bank Statements, Canceled Checks and Deposit Slips for All Accounts for entire audit period
- Cash Receipts Journal for entire audit period (also Purchase Journal if applicable)
- The Corporate Book (Minutes, Board of Directors, Articles of Incorporation) for entire audit period
- Depreciation Schedules for entire audit period

***This includes resale, exempt use, exempt organization, capital improvement certificates as well as any other necessary documentation to prove non-taxable sales.

22. A review of the Tax Field Audit Record ("audit log") indicates that Rywin's officer, Gary Ryder, scheduled a June 3, 2002 appointment at the Division's Nassau District Office with the auditor to discuss the business, to ask what records were needed from the records list and to request a postponement of the field audit appointment. Further review of the audit log indicates

that at the June 3, 2002 meeting, the auditor told Mr. Ryder “to keep all cash register tapes, general ledger, all invoices, fixed asset receipts,” to have all sales tax returns available for review, to make copies of the Federal income tax returns for the Division to keep and to put his request for a postponement of the field audit appointment in writing. On or about June 17, 2002, the auditor received Mr. Ryder’s letter requesting a postponement of the audit appointment until sometime in August.

23. On June 20, 2002, Mr. Ryder, as president of Rywin, Inc., executed a consent extending the statute of limitations for the assessment of sales and use taxes for the period September 1, 1999 through May 31, 2000 to any time on or before June 20, 2003.

24. Using a database of liquor suppliers maintained by the Division, the auditor prepared and mailed 111 third-party liquor supplier letters on or about June 10, 2002. Each of these letters requested the liquor supplier to advise the Division of the dollar amount of Rywin’s purchases of wine and liquor during the period September 1, 1999 through May 31, 2002. Over time, the auditor received responses from numerous liquor suppliers concerning Rywin’s purchases of wine and liquor during the period September 1, 1999 through May 31, 2002.

25. In a letter dated September 16, 2002, the Division made a second request to schedule an appointment to conduct an audit of Rywin’s sales and use tax records for the period September 1, 1999 through May 31, 2002 at Rywin’s offices on October 2, 2002. This letter requested that all books and records pertaining to the sales and use tax liability for the period September 1, 1999 through May 31, 2002 be available on the appointment date. The Records Requested List attached to this letter contained a detailed list of the same records requested by the initial appointment letter dated May 22, 2002.

26. On September 18, 2002, during a telephone conversation with the auditor, Mr. Ryder inquired whether the Division had received his letter requesting a further postponement of the first audit appointment until January 2003. The audit log entry for that date indicates that the auditor explained to Mr. Rywin that it would be impossible to postpone the first audit appointment again because the June appointment had been rescheduled at his request but she indicated that she would speak with her team leader and let him know. During a subsequent telephone conversation initiated by Mr. Ryder on September 18, 2002, the team leader informed Mr. Ryder that the audit would commence on October 2, 2002 and all cash register tapes, daily logs and bank statements should be available for review on that date. During that same telephone conversation, Mr. Ryder informed the team leader that the cash register tapes were compiled and recorded in a daily log.

27. On October 2, 2002, Mr. Ryder brought a box of Rywin's records to a meeting with the auditor at the Division's District Office. The records presented to the auditor by Mr. Ryder included Rywin's general ledgers and cash disbursements journal, Rywin's Federal income tax returns (form 1120's) for 1999 (fiscal year April 1, 1999 through March 31, 2000), 2000 (fiscal year April 1, 2000 through March 31, 2001) and 2001 (fiscal year April 1, 2001 through March 31, 2002) and some bank statements for Rywin's operating checking account. The auditor retained the records for further review and gave Mr. Ryder a receipt for the records.

28. During the October 2, 2002 meeting, the auditor asked Mr. Ryder how the gross sales were determined on the sales tax returns and why credits for sales tax prepaid were reflected on some sales tax returns. However, Mr. Ryder was unable to answer her questions and stated that he would have to get that information for her. During this meeting, Mr. Ryder mentioned GHW

and explained that he held the wines for this company and collected and remitted sales tax for GHW.

29. On November 16, 2002, the auditor sent a letter to GHW asking for information regarding its sales to Rywin during the period September 1, 1999 through May 31, 2002.

30. During a December 11, 2002 telephone conversation with Mr. Ryder, the auditor requested Rywin's operating checking account bank statements for the months of September 1999 through November 2000, February 2001, June 2001, January 2002, February 2002, April 2002 and May 2002, all Lottery checking account bank statements for the period September 1, 1999 through May 31, 2002 and an explanation of Rywin's work with GHW.

31. As a followed-up to their December 11, 2002 telephone conversation, the auditor sent a letter dated December 16, 2002 to Mr. Ryder requesting Rywin's operating checking account bank statements for the months of September 1999 through November 2000, February 2001, June 2001, January 2002, February 2002, April 2002 and May 2002, all of Rywin's Lottery checking account bank statements for the period September 1, 1999 through May 31, 2002, a written explanation of Rywin's business with GHW (purchases and sales) and a copy of any contract between Rywin and GHW.

32. On January 29, 2003, Mr. Ryder met with the auditor at the District Office. Although Mr. Ryder brought additional bank statements for Rywin's operating checking account, he would not leave them with the auditor because he had not photocopied them. Mr. Ryder did not bring any bank statements for the Lottery checking account to the meeting. During the meeting, the auditor requested sales invoices from GHW but Mr. Ryder explained that he never received any sales invoices from GHW and GHW electronically deposited money, i.e., Rywin's commissions and sales taxes, into Rywin's Lottery checking account. At this meeting, Mr. Ryder also

informed the auditor that GHW would probably be going into bankruptcy and Rywin would not get the commission which it was owed.

33. On January 23, 2003, GHW faxed the sales schedule for the period September 1, 1999 through May 31, 2002 to the Division. A review of the sales schedule indicates that GHW reported making sales totaling \$5,582,496.45 to Rywin during the period September 1, 1999 through May 31, 2002. Further review of this sales schedule reveals that GHW reported making zero sales to Rywin during the months of September 1999 through April 2000. Subsequently, on February 10, 2003, the auditor made an oral request to GHW for copies of sales invoices reflecting its sales to Rywin during the period September 1, 1999 through May 31, 2002. On February 24, 2003, the auditor received copies of sales invoices issued by GHW to Rywin for the month of May 2002.

34. On February 3, 2003, the Division subpoenaed copies of Rywin's Bank of New York operating checking account and Lottery checking account bank statements for the period September 1, 1999 through May 31, 2002 and the signature cards and account opening information for those accounts. Subsequently, on March 13, 2003, the Division received copies of the signature cards and checking account bank statements for Rywin's operating checking and Lottery checking accounts for the period September 1, 1999 through May 31, 2002 from the Bank of New York.

35. On or about March 7, 2003, Rywin appointed James B. Tully, Jr., Esq., to act as its representative with respect to the audit. On April 3, 2003, Mr. Tully executed a consent on behalf of Rywin extending the time for determination of sales and use taxes for the period September 1, 1999 through November 30, 2000 until December 20, 2003. Subsequently, on October 16, 2003, Mr. Tully executed a consent on behalf of the corporation extending the time

for determination of sales and use taxes for the period September 1, 1999 through February 28, 2001 until March 20, 2004.

36. During a March 12, 2003 telephone conversation with Mr. Ryder, the auditor requested bank deposit records, bank statements, cash register tapes and any other source documentation for the audit period.

37. On April 14, 2003, the Division sent a letter to Rywin's representative, Mr. Tully, setting forth its analysis of the information presented by Rywin, i.e., general ledgers and bank statements, or its suppliers to date and requesting the following records be produced for review:

1. All records regarding business relationship with Great House of Wine - including initial contract, purchase invoices, receiving documents, distribution documents, commission received, etc. . . .
2. Daybook for entire audit period.
3. All purchase invoices for all suppliers for the fiscal year ended 3/31/02.
4. All sales invoices and exemption documents supporting nontaxable sales for the audit period.
5. All cancelled checks for all bank accounts for the audit period.
6. Personal income tax returns for Mr. Gary Ryder filed for 2000 and 2001.

38. On May 29, 2003, the Division received copies of GHW's promissory note to Rywin and GHW's bankruptcy papers from Mr. Tully. On June 17, 2003, Mr. Ryder called the auditor to confirm which documents from the April 14, 2003 letter to Mr. Tully were needed. During the June 17, 2003 telephone conversation, Mr. Ryder informed the auditor that Rywin did not maintain a day book and the original source documents were the cash register tapes. During the same conversation, the auditor requested that Mr. Ryder bring the cash register tapes and all other documents to the District Office before the end of June 2003, which request Mr. Ryder stated he would comply with after his June 23, 2003 meeting with Mr. Tully.

39. On July 11, 2003, Mr. Ryder dropped off a box containing original operating checking account bank statements and cancelled checks for the months of September 1999 through

January 2001, March 2001 through December 2001, February 2002, March 2002 and May 2002 and cancelled checks for the month of January 2002; purchase invoices related to Rywin's retail store's purchases for the quarter ending August 31, 2001, nontaxable sales invoices without exemption certificates and copies of Mr. and Mrs. Ryder's personal income tax returns. On July 15, 2003, the Division received a one-page worksheet entitled "Analysis of Sales and Sales Tax" for Rywin ("sales tax worksheet") for the period September 1, 1999 through May 31, 2002 from Mr. Ryder. This sales tax worksheet listed Rywin's retail store's gross, taxable and exempt sales, GHW's taxable sales, total taxable sales (retail store taxable sales plus GHW's taxable sales), the retail store's sales tax, GHW's sales tax and the total sales tax due for each month during the audit period. Mr. Ryder's handwritten notation on the sales tax worksheet indicated that the numbers listed for the retail store sales and the retail store exempt sales were taken from Rywin's general ledger and the numbers listed for GHW's sales and sales tax were taken from Rywin's sales tax returns.

40. The auditor reviewed the general ledgers, bank statements and Federal corporate income tax returns provided by the corporation. A reconciliation performed by the auditor indicated that gross sales reported on the corporation's sales tax returns were \$1,561,304.38 greater than the gross sales reported in the general ledger. The auditor found that the amount recorded in the corporation's general ledger sales tax accrual account was less than the amount of sales tax reported on the corporation's sales tax returns. After reviewing the operating checking account and Lottery checking account bank statements provided by Bank of New York, the auditor compared the net bank deposits compiled from those bank statements, i.e., \$1,748,947.77, with the gross sales reported on the corporation's general ledger, i.e., \$1,202,480.62, and found that bank deposits exceeded sales reported on the general ledger.

41. Although numerous written requests were made for all of the corporation's books and records pertaining to its sales and use tax liability, the corporation presented general ledgers, a cash disbursement journal, some bank statements and some exempt sales invoices. While the corporation claimed to have all cash register tapes for the audit period, it did not maintain a day book or any summary of daily sales. There were no records of the corporation's transactions with GHW and no records pertaining to sales tax credits taken on the corporation's sales tax returns for the quarters ending February 29, 2000 and August 31, 2000. The sales records provided by the corporation did not allow the auditor to trace any transaction back to the original source or forward to a final total. After reviewing the records provided by the corporation, the auditor determined the records to be inadequate.

42. After discussing the matter with her section head, the auditor decided to perform a markup audit of Rywin's purchases. The auditor sent third-party information requests to the suppliers listed in the corporation's cash disbursements journal. She reconciled the purchase information contained in the suppliers' responses to the purchase information recorded in the corporation's cash disbursements journal and found that the corporation failed to record \$33,372.99 in purchases for its retail store in its cash disbursements journal. The auditor also found that the corporation had no records of its purchases from GHW in its cash disbursements journal. The auditor went to the store and gathered shelf prices of the inventory to use in the markup test. After performing an analysis of the corporation's sales, applying a markup percentage and computing taxable sales for the audit period, the auditor determined an additional tax due in the amount of \$654,110.36.

43. A Statement of Proposed Audit Change for Sales and Use Tax (form AU-346) was issued to Rywin on October 28, 2003 that proposed additional tax due in the amount of

\$654,110.36 plus penalties and interest. A review of the audit log indicates that the auditor mailed the pertinent work papers and the statement to the corporation's representative.

44. Mr. Tully disagreed with the proposed audit change. He insisted that the corporation did not take possession of the merchandise and was not a customer of GHW. During a November 3, 2003 telephone conversation with Mr. Tully, the auditor informed him that she had never received any information from Mr. Ryder concerning GHW and its business relationship with Rywin. December 3, 2003 was set as the date for an office appointment to discuss the audit findings.

45. On November 10, 2003, the Division received copies of the Promissory Note and Memorandum of Agreement between GHW and Rywin dated April 1, 2002 and the Schedule D-Creditors Holding Secured Claims from GHW's bankruptcy proceeding from Mr. Tully.

46. On November 26, 2003, Mr. Tully contacted the auditor and requested that the appointment be rescheduled because Mr. Ryder would be very busy at the store for the next week. The auditor rescheduled the appointment for December 18, 2003 at the District Office. During that telephone conversation, the auditor informed Mr. Tully that the corporation's exempt sales would be discussed at the appointment. She also informed Mr. Tully that he should bring any additional information pertinent to the audit to that meeting.

47. On December 18, 2003, the auditor, her team leader, Mr. Tully and Mr. Ryder had a conference at which the audit findings were discussed. During the conference, Messrs. Tully and Ryder explained that the warehouse in which the wine was stored was not part of the corporation's business and presented an affidavit from Peter Griffith, an officer and part owner of Allied Cold Storage Warehouse. The auditor and team leader showed Messrs. Tully and Ryder work papers which indicated that there were additional deposits into Rywin's operating

checking account which were unexplained. Mr. Ryder explained that he received money from GHW and took part as commissions and the rest as sales tax due. At the conference, the auditor and team leader asked Mr. Ryder to try to obtain copies of GHW checks which had been deposited into Rywin's operating checking account during the audit period so that they could see the amounts of money received from GHW. Mr. Ryder brought exemption certificates and sales invoices for exempt sales to the conference. The auditor acknowledged receiving the exemption certificates and nontaxable sales invoices from Mr. Ryder. He also brought some of the audit period's cash register tapes to the conference. Mr. Tully suggested that a test period analysis of Rywin's retail store sales be conducted using cash register tapes, nontaxable sales invoices and the related exemption certificates. At the conclusion of the conference, the auditor provided Mr. Tully with copies of the work papers.

48. A review of the audit record indicates that the auditor received a letter from Mr. Tully which contained additional explanations of Rywin's business with GHW on December 23, 2003. Rywin never supplied the copies of the GHW checks deposited into Rywin's operating checking account during the audit period which the auditor had requested during the December 18, 2003 conference.

49. Subsequently, the auditor examined the sales invoices presented for nontaxable sales and found the handwritten notation "not rung up" on numerous invoices presented for audit. Based upon this information, the auditor determined it to be unproductive to examine the cash register tapes since all sales were not recorded on those tapes.

50. After reviewing the documents received during the audit, the auditor broke the audit into three components and concluded that additional sales tax was due in each component. The first component was the Division's disallowance of sales tax credits taken from Rywin on its

sales tax returns for the quarters ending February 29, 2000 and August 31, 2000. During the audit, Mr. Ryder had explained that GHW had sent him checks payable to New York State Department of Taxation and Finance and had not separated his commission. Therefore, Mr. Ryder took a credit on his sales tax returns because he felt part of those monies were his commissions. The auditor determined additional sales tax in the amount of \$36,988.02, i.e., \$28,352.12 plus \$8,635.90, was due on the disallowed sales tax credits taken by Rywin on its sales tax returns for the quarters ending February 29, 2000 and August 31, 2000.

The second component of the audit was the determination of the sales tax payments made by GHW to Rywin. First, the auditor reviewed the electronic transfer of funds made by GHW into Rywin's Lottery checking account during the period March 1, 2001 through May 31, 2002 and determined that electronic transfers from GHW totaled \$230,450.19 during that period. Then, the auditor subtracted the commissions from GHW reported in Rywin's general ledger, \$85,517.47,¹ from the \$230,450.19 and determined that Rywin received \$144,932.72 in sales tax from GHW during the period March 1, 2001 through May 31, 2002. Next, using the sales tax worksheet submitted by Mr. Ryder, the auditor determined that Rywin had made sales tax payments on behalf of GHW in the amount of \$32,054.99 during the period March 1, 2001 through May 31, 2002. The auditor then subtracted \$32,054.99, the sales tax payments made by Rywin on behalf of GHW, from \$144,932.72, the sales tax received by Rywin from GHW, and determined additional sales tax to be due in the amount of \$112,177.72, which amount Rywin failed to report on its sales tax returns.

¹ Rywin reported receipt of commission income from GHW in its general ledger as follows: \$4,875.00 in March 2001, \$68,081.97 in March 2002, \$12,560.50 in April 2002 and zero income in May 2002.

The final component of the audit was a bank deposit analysis of Rywin's operating checking account. After making adjustments for transfers from the Lottery checking account, loans, check reversals and returned checks, the auditor determined that the net deposits in the operating checking account totaled \$1,462,370.00 for the period September 1, 1999 through May 31, 2002. Then, the auditor subtracted \$1,192,492.49, the total sum of the gross sales receipts plus the sales tax for the period September 1, 1999 through May 31, 2002 reported on the sales tax worksheet, from \$1,462,370.00, the net deposits in the operating account for the audit period, determined additional taxable receipts in the amount of \$269,877.51 and additional sales tax due in the amount of \$22,939.58.

51. The auditor determined additional sales tax was due in each quarter of the audit period in the following amounts:

Quarter Ending	Additional Sales Tax Due from Disallowed Sales Tax Credit	Quarterly Net Sales Tax received from GHW	Sales Tax Due from Additional Bank Deposits	Total Additional Sales Tax Due
November 1999		\$0.00	\$443.24	\$443.24
February 2000	\$28,352.12	0.00	2,593.04	30,945.16
May 2000		0.00	-854.58	-854.58
August 2000	8,635.90	0.00	188.85	8,824.75
November 2000		0.00	2,548.22	2,548.22
February 2001		0.00	3,222.34	3,222.34
May 2001		54,807.09	150.63	54,957.72
August 2001		19,448.77	1,170.34	20,619.11
November 2001		30,948.96	3,613.77	34,562.73
February 2002		48,061.99	4,989.55	53,051.54
May 2002	<u> </u>	<u>-40,389.08</u>	<u>4,874.18</u>	<u>-35,514.90</u>
TOTAL	\$36,988.02	\$112,877.73	\$22,939.58	\$172,805.33

For the quarter ending May 31, 2002, the auditor determined that the net sales tax received from GHW was negative \$40,389.08. This determination was based upon the finding that electronic deposits from GHW into Rywin's Lottery checking account totaled \$3,818.33 and commissions from GHW per the general ledger totaled \$68,081.97 in March 2002. Subtracting \$68,081.97 from \$3,818.33 resulted in negative \$64,263.64 in sales tax received from GHW in March 2002.

52. A Statement of Proposed Audit Change for Sales and Use Tax (form AU-346) was issued to Rywin on January 7, 2004 that proposed additional tax due in the amount of \$172,805.33, plus penalties and interest. A review of the audit log indicates that the auditor mailed the statement to the corporation's representative.

53. The auditor accepted the loans in the amount of \$7,500.00 noted on Rywin's operating checking account bank statements. At no point after learning that a bank deposit analysis had been performed by the auditor on Rywin's operating checking account and receiving the proposed audit changes, did either Mr. Tully or Mr. Ryder claim that there were any additional loans made to the corporation by Mr. Ryder or family friends during the period September 1, 1999 through May 31, 2002. Messrs. Tully and Ryder also did not claim that the Lottery sales were deposited into Rywin's operating checking account. Nor did they claim that a check was drawn on Rywin's operating checking account once a week for the amount owed for Lottery transactions and then deposited into Rywin's Lottery checking account.

54. On each of the sales tax returns which it filed during the period September 1, 1999 through May 31, 2002, Rywin claimed a vendor collection credit. A review of the audit work papers indicates that the auditor made no adjustments to the vendor collection credit claimed by Rywin on those returns.

55. In a letter dated January 21, 2004, Rywin's representative disagreed with the proposed audit adjustment. With respect to the additional sales tax imposed on bank deposits, Mr. Tully asserted that it was inappropriate because there was no indication that bank deposits represented taxable sales. He further asserted that the corporation had complete records, and exemption certificates had been provided to the auditor. With regard to the sales tax received from GHW, Mr. Tully enclosed a fax from Mr. Ryder's accountant indicating commission income for the year ending March 31, 2001 in the amount of \$10,531.00. With regard to penalties, Mr. Tully wrote:

the reason Rywin got involved in this matter was in trying to remit sales tax for the Great House of Wines [sic], payments for the taxes and the commissions were put in the same check. Mr. Ryder didn't think the State was out any money because the wineries were supposedly collecting the tax. It's a very confused situation.

The fax referenced in Mr. Tully's letter is not part of the record.

56. No further documentation was provided to the auditor prior to the issuance of the notices of determination at issue in this proceeding.

57. On February 9, 2004, the Division issued to Rywin, Inc., a Notice of Determination (Notice No. L-023517766-8) asserting additional sales and use taxes due in the amount of \$172,805.33 for the period September 1, 1999 through February 29, 2000 and June 1, 2000 through February 28, 2002, plus penalties of \$68,499.85 and interest of \$71,134.18, for a current balance due of \$312,439.36. The computation section of the Notice of Determination contained the following explanation: "Based on our audit of your records, we determined that you owe tax, interest and any applicable penalties, under sections 1138 and 1145 of the Tax Law."

On March 4, 2004, the Division also issued to Gary A. Ryder, a Notice of Determination (Notice No. L-023520971-4) asserting additional sales and use taxes due in the amount of

\$130,898.54 for the period December 1, 2000 through February 28, 2002, plus penalties of \$52,036.65 and interest of \$47,792.20, for a current balance due of \$230,727.39. The explanation section stated that this notice was issued to Mr. Ryder as a responsible officer of Rywin, Inc.

58. Each of the statutory notices herein assessed penalties pursuant to Tax Law § 1145(a)(1)(i) and (vi). Both statutory and omnibus penalties were assessed because the additional tax due is more than 25 percent of the audited tax due.

59. Shortly after receiving the Notice of Determination issued to it, Rywin filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services. By letter dated March 9, 2004, Dawn M. Walsh, Principal Audit Clerk in the Division's Bureau of Conciliation and Mediation Services ("BCMS") informed Mr. Ryder that because the corporation had previously filed a formal protest to its assessment and BCMS had received information that the Division had recently issued Notice No. L023520971 to him, his status as a responsible person for the liability of Rywin would be considered at the BCMS conference to be scheduled. A review of this letter indicates that it was addressed to "Gary A. Ryder, 1984 Lilac Drive, Westbury, NY 11590-5923," referenced Department Notice No. L023520971 and the period December 1, 2000 through February 28, 2002.

60. On or about June 30, 2004, Mr. Ryder appointed James H. Tully, Jr., Esq., as his representative with regard to all matters before the New York State Department of Taxation and Finance.

61. A conciliation conference in the matter of the request of Rywin, Inc. was held on September 30, 2004. At that conciliation conference, the status of Mr. Ryder as an alleged responsible officer of Rywin, Inc. was also considered despite his representative's claim that Mr.

Ryder had never been properly served with the Notice of Determination dated March 4, 2004. Subsequently, a conciliation order was issued to Rywin, Inc. on November 19, 2004 sustaining the Notice of Determination (Notice No. L-023517766). A conciliation order was also issued to Gary A. Ryder on November 19, 2004 sustaining the Notice of Determination (Notice No. L-023520971).

62. Both petitioners filed petitions with the Division of Tax Appeals on November 26, 2004. In its petition, Rywin asserted that it was neither a vendor receiving products from GHW, nor an agent of GHW. Rather, Rywin asserted that it was to perform services for GHW including replacing any damaged product, handling customer complaints and remitting to New York State sales taxes indicated to be payable by GHW on sales to New York customers which sales were arranged by GHW through California wineries and on which GHW collected the sales tax due. In the petition, it further asserted that it correctly collected and remitted all sales tax due on its retail store's sales; all of its cash register tapes, sales invoices and exempt certificates were available to the auditors and that portion of the assessment was based on retail store sales which Rywin had not made. In his petition, Mr. Ryder asserted that any assessments for periods prior to the quarter ending November 30, 2001 were barred by the statute of limitations because he was never served with the Notice of Determination, "nor did he sign any waivers of said service." The remaining assertions in Mr. Ryder's petition were identical to those asserted by Rywin in its petition. It is noted that Mr. Ryder's petition lists his address as 1984 Lilac Drive, Westbury, NY 11590-5923.

63. A hearing was held before Administrative Law Judge Winifred M. Maloney on October 17, 2005 and continued to completion on October 18, 2005. At the hearing, Rywin's president, Gary A. Ryder, testified.

64. Mr. Ryder concedes that he is a responsible officer of Rywin, Inc.

65. On the Federal income tax return that it filed for the fiscal year ending March 31, 2000 (1999 corporate tax return), Rywin reported Lottery commission income in the amount of \$6,730.00. Rywin reported receiving commission income in the amount of \$10,531.00 and \$72,157.00 in the fiscal years ending March 31, 2001 (2000 corporate tax return) and March 31, 2002 (2001 corporate tax return), respectively, on the Federal income tax returns filed for those fiscal years. In the same corporate income tax returns, Rywin reported that loans received from shareholders increased by \$11,716.00 and \$989.00 in the fiscal years ending March 31, 2000 and March 31, 2001, respectively, and decreased by \$7,044.00 in the fiscal year ending March 31, 2002.

66. On or about August 12, 2005, Rywin filed its Federal income tax return for the fiscal year April 1, 2002 through March 31, 2003 (2002 corporate tax return). On that corporate tax return, Rywin reported commission income in the amount of \$87,890.00. It also reported that loans from shareholders decreased by \$2,732.00 during the fiscal year ending March 31, 2003. Rywin also listed under "other liabilities" that \$10,000.00 was due to A. Knorowski at both the beginning and ending of the fiscal year. However, Rywin did not report the existence of the liability to Mr. Knorowski on the corporate tax returns filed for the prior three fiscal years, i.e., the 1999, 2000 and 2001 corporate tax returns. Mr. Ryder could not recall the date on which Mr. Knorowski lent the money to Rywin or the date on which Rywin repaid him. Neither a note memorializing the loan nor a check in repayment of the loan was produced at the hearing.

67. Rywin did not maintain a day book or any book summarizing its daily retail establishment sales. Rather the daily sales came off of the cash register tapes. Sales to tax exempt organizations were not rung up on Rywin's cash register because the cash register

automatically calculated tax on all sales rung up on it. For a sale to a tax exempt organization, an official sales invoice would be written up on which the exempt organization, its tax exempt number, the merchandise purchased and the total sale were listed. The representative of the exempt organization was required to sign the sales invoice. The notation "not rung up" was placed on the sales receipt by either Mr. Ryder or the Rywin employee who made the sale. At the end of the month, Mr. Ryder would staple all nontaxable sales invoices together along with an adding machine slip which listed the total sales from those sales invoices. Rywin also maintained a file of exemption certificates provided by the organizations at the time of their purchases.

68. During the audit, cash register tapes for some months in the audit period were provided to the auditor. Rywin did not retain its cash register tapes for all of the months in the audit period. None of the cash register tapes were produced at the hearing.

69. During the audit, sales invoices for exempt sales were presented to the auditor who allowed all exempt sales reported on Rywin's sales tax returns for the period September 1, 1999 through May 31, 2002. Rywin did not produce any sales invoices for nontaxable sales or exemption certificates related to those sales at the hearing.

70. During the period September 1, 1999 through May 31, 2002, Rywin's operating checking account was its everyday account. The money deposited into that operating checking account basically came from taxable and nontaxable sales made at Rywin's retail establishment. Weekly Lottery sales were also deposited regularly into the operating checking account. Once a week, a check would be drawn on the operating checking account for the amount owed for Lottery transactions and it would be deposited into the Lottery checking account. Rywin did not produce any documentation concerning Lottery sales which it made during the period September

1, 1999 through May 31, 2002 at the hearing. The record does not include any checks drawn on the operating checking account and deposited into the Lottery checking account which represent the transfer of funds for Lottery payments during the period September 1, 1999 through May 31, 2002.

71. When necessary, Mr. Ryder lent money to Rywin to purchase inventory. Those loans in the form of Mr. Ryder's personal checks were deposited into Rywin's operating checking account. Once the inventory was sold, Rywin would repay the loan. The record does not include any checks drawn on the personal checking account of Mr. Ryder or a family friend for loans made to Rywin during the period September 1, 1999 through May 31, 2002. The record also does not include an analysis of loans made to Rywin by any individuals during the period September 1, 1999 through May 31, 2002.

72. Rywin's operating checking account had a check stub style checkbook which Mr. Ryder maintained and kept at Rywin's retail establishment. No check stubs for the operating checking account for the period September 1, 1999 through May 31, 2002 were produced at the hearing.

73. During the period September 1, 1999 through May 31, 2002, Mr. Ryder provided Rywin's accountant with cash register tapes, all sales invoices for tax exempt sales, check stubs from the operating checking account and deposit receipts for a given month in a bag on which the particular month and year were marked. Mr. Ryder also included his notes concerning GHW's sales, and the sales tax and the commissions which Rywin received from GHW during the given month.

74. The accountant used the cash register tapes and the sales invoices for the tax exempt sales to record the retail store's sales in Rywin's general ledger. At times, the accountant

recorded the amount of the retail store's daily sales as a daily amount in Rywin's general ledger. While at other times, the accountant recorded the daily sales of the retail store as a weekly total amount only. GHW sales were not recorded in the general ledger. Rywin's general ledgers for the period September 1, 1999 through May 31, 2002 are not part of the record.

75. The accountant prepared Rywin's sales tax returns using the cash register tapes, the sales invoices for tax exempt sales and Mr. Ryder's notes concerning GHW's sales and the sales tax remitted to Rywin by GHW on those sales. It is unclear whether the accountant prepared all of the sales tax returns filed by Rywin during the period September 1, 1999 through May 31, 2002 or whether sales tax returns filed for the period January 2002 and beyond were prepared by Mr. Ryder.

76. A few weeks after receiving the bagged information from Mr. Ryder, the accountant would return the bags to him along with any tax documents that needed to be signed. Mr. Ryder would sign the documents and also prepare and sign any checks which had to accompany the tax documents being filed.

77. In accordance with an oral agreement between Mr. Ryder, as Rywin's president, and Mr. Mattson, as GHW's president, Rywin provided services for GHW which included, among other things, collecting and remitting to New York State the sales tax which Rywin received from GHW, in exchange for commissions.

78. At the hearing, Mr. Ryder admitted that Rywin received some delivery slips listing sales, tax and handling charges for out-of-state wines sales at the very beginning of the period September 1, 1999 through May 31, 2002. Rywin did not produce any delivery slips for out-of-state wine sales at the hearing.

79. According to Mr. Ryder, the commission which GHW orally agreed to pay Rywin was allegedly 20 percent of GHW's sales to New York customers. It was Mr. Ryder's understanding that both Rywin's commission and the sales tax due on the sales of out-of-state wines to New York customers were included in the GHW checks, payable to either New York State Department of Taxation and Finance or Rywin, which GHW sent Rywin as payments and also in the wire transfers made by GHW into Rywin's Lottery checking account during the period September 1, 1999 through May 31, 2002. Therefore, since the 20 percent commission was greater than the applicable sales tax rate of $8\frac{3}{4}$ percent and GHW's payment included both Rywin's commission and the sales tax to be remitted to New York State, he determined that approximately two-thirds of each payment represented his commission and the remainder was the sales tax which was required to be remitted to New York State for the sales of the out-of-state wines. The corporation never received anything in writing from GHW which stated that the GHW checks payable to the New York State Department of Taxation and Finance included both sales tax and Rywin's commissions.

80. As noted above, after December 2000, GHW began sending the sales tax to be remitted by Rywin through wire transfers into Rywin's Lottery checking account but also continued making some sales tax payments to Rywin by checks payable to Rywin. Even if a check sent to Rywin by GHW bore the notation "sales tax" or a similar notation referencing specific months and the words "sales tax" on the bottom of the check, Mr. Ryder still deducted Rywin's commission from the amount listed on the check and remitted the balance as sales tax due on the sales of out-of-state wines to New York customers. The corporation never received anything in writing from GHW which stated that GHW checks payable to Rywin or wire

transfers by GHW into Rywin's Lottery checking account included both the New York sales tax due and Rywin's commissions.

81. According to Mr. Ryder, small checks sent by GHW to Rywin represented payments for doing returns and were additional payments above Rywin's commissions.

82. GHW sent Rywin a check payable to New York State Department of Taxation and Finance in the amount of \$69,659.77 for the sales tax due for the period September 1, 1999 through November 30, 1999. Mr. Ryder submitted that check along with Rywin's sales tax return which it filed for the quarter ending November 30, 1999. On that sales tax return, Rywin reported a net overpayment of sales tax in the amount of \$28,352.12. On the sales tax return which it filed for the quarter ending February 29, 2000, Rywin claimed a credit totaling \$28,502.12, consisting of the net overpayment of sales tax from the quarter ending November 30, 1999 in the amount of \$28,352.12 plus a vendor collection credit of \$150.00. GHW sent Rywin a check payable to New York State Department of Taxation and Finance in the amount of \$55,759.00 for the sales tax due for the period March 1, 2000 through May 31, 2000. Mr. Ryder submitted that check along with Rywin's sales tax return which it filed for the quarter ending May 31, 2000. On that sales tax return, Rywin reported a net overpayment of sales tax in the amount of \$8,690.96. On the sales tax return which it filed for the quarter ending August 31, 2000, Rywin claimed credits totaling \$8,736.95, consisting of an overpayment of sales tax from the quarter ending May 31, 2000 in the amount of \$8,635.90 plus a vendor collection credit of \$101.50. Mr. Ryder made the decision to take a sales tax credit in the amount of \$28,352.12 and \$8,635.90 for the period December 1, 1999 through February 29, 2000 and June 1, 2000 through August 31, 2000, respectively. Mr. Ryder deducted the credits on the corporation's sales tax returns in order to reflect Rywin's 20 percent commission which he believed was due from

GHW. The record does not include either GHW check submitted to the Division by Rywin, with its sales tax returns for the quarters ending November 30, 1999 and May 31, 2000.

83. At the hearing, Mr. Ryder denied receiving the Notice of Determination allegedly issued to him on March 4, 2004. To prove that he did not receive the Notice of Determination allegedly issued to him on March 4, 2004, Mr. Ryder submitted into evidence a copy of Request for Delivery Information/Return Receipt After Mailing (PS Form 3811-A) which he received from the Division in the mail. A review of the PS Form 3811-A indicates that delivery information was requested for certified service to Gary A. Ryder, 1984 Lilac Dr. Westbury, N.Y. 11590-5923, Article Number 7104 1002 9730 0404 2163, mailing date 03/04/04 by the N.Y.S. Tax Dept. (Office of Counsel), W.A. Harriman Campus BLDG #9, Albany, N.Y. 12227. This form bears a Pitney Bowes postage meter date stamp of January 18, 2005 with \$3.50 postage paid. Further review of this Request for Delivery Information/Return Receipt After Mailing form reveals that in the section of the form entitled "For Delivery Office Use Only" a delivery date of "11-12-04" was handwritten. Attached to the PS Form 3811-A is the response, dated January 27, 2005, received from the U.S. Postal Service which shows that certified mail number "7104 1002 9730 0404 2163" was delivered on "11/12/2004 at 10:14 A.M.," in "Shelter Island, NY 11964." Further review of the response shows the scanned signature of a different man above the handwritten name of that man, and the address of the recipient has been written as "PO Box 788."²

84. At the hearing, in support of its proof of mailing of the Notice of Determination dated March 4, 2004 to Gary A. Ryder, the Division submitted the affidavit dated March 25, 2005 of Geraldine Mahon, with attached photocopies of a 58-page certified mail record, a Notice of

² The identity of the individual whose scanned signature appears in the response is not being disclosed to protect his confidentiality.

Determination and associated Mailing Cover Sheet; the affidavit dated March 25, 2005 of Bruce Peltier and the affidavit dated May 1, 2005 of Heidi Corina, with an attached response dated March 25, 2005 of Gary Chiboucas. Ms. Mahon, Mr. Peltier and Ms. Corina are all Division employees.

85. The affidavit of Geraldine Mahon, Principal Clerk of the Division's CARTS (Case Resource and Tracking System) Control Unit, described the regular practices of her unit regarding the general procedure for the issuing and mailing of notices of determination to taxpayers. Notices of determination, such as the one at issue herein, are computer generated and are predated with the anticipated date of mailing and each statutory notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page "Mailing Cover Sheet" (form DTF-997) which also bears, among other things, a bar code and the taxpayer's mailing address. Each batch of statutory notices is accompanied by a computer printout entitled "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE" (hereinafter "certified mail record" or "CMR"). The CMR lists each statutory notice in the order that the notices are generated in the batch. The certified control numbers appear on the CMR under the first heading, entitled "CERTIFIED NO." The assessment numbers are listed under the second heading, entitled "REFERENCE NO." The names and addresses of the taxpayers are listed under the third heading, entitled "NAME OF ADDRESSEE, STREET AND PO ADDRESS," and the remaining headings list appropriate postage and fees. Each CMR and associated batch of statutory notices are forwarded to the Division's Mail Processing Center together.

86. The CMR for the block of statutory notices allegedly issued on March 4, 2004, including the Notice of Determination allegedly issued to Gary A. Ryder, consists of 58

connected pages. All pages are connected when the document is delivered into the possession of the United States Postal Service (“USPS”) and the pages remain connected when it is returned to the CARTS Control Unit.

87. Attached to Ms. Mahon’s affidavit as Exhibit “A” are the 58 pages of the CMR containing a list of notices allegedly issued by the Division on March 4, 2004 (hereafter the “March 4, 2004 CMR”) which she asserts bears the information relating to Mr. Ryder’s notice and is a true and accurate copy of the original CMR. Attached to Ms. Mahon’s affidavit as Exhibit “B” is a copy of a Notice of Determination addressed to petitioner, Ryder-Gary A., 1984 Lilac Dr., Westbury, NY 11590-5923 and bearing assessment identification number L-02352097-4 and the associated Mailing Cover Sheet addressed to Ryder-Gary A., 1984 Lilac Dr., Westbury, NY 11590-5923 and bearing certified control number 7104 1002 9730 0404 2163. Page 38 of the March 4, 2004 CMR shows an article of certified mail, certified control number 7104 1002 9730 0404 2163, notice number L 023520971, addressed to petitioner, RYDER-GARY A., 1984 LILAC DR, WESTBURY, NY 11590-5923. The certification and notice numbers on the March 4, 2004 CMR correspond with those found on the Notice of Determination and the associated Mailing Cover Sheet.

On this copy of the March 4, 2004 CMR, there are 11 entries per page except for page 58, which contains 2 entries. Portions of Exhibit “A” have been redacted to protect the confidentiality of other taxpayers. Each of the 58 pages of the March 4, 2004 CMR contains columns labeled “CERTIFIED NO,” “REFERENCE NO” and “NAME OF ADDRESSEE, STREET, AND P.O. ADDRESS.” The certified control numbers listed in the vertical column on the left side of each page do not run consecutively. In the upper left hand corner starting on page one and each subsequent page of the CMR is the Run which signifies the date and time the CMR

was produced by year, Julian day of the year and military time of day. The original date and time of “20040541734” was the date and time that the entire March 4, 2004 CMR was printed. The CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for mailing by the Division’s Mail Processing Center. In the upper left hand corner of page one of the March 4, 2004 CMR, an illegible handwritten notation including the number 4 appears. Ms. Mahon states that in the upper left hand corner of page one of the March 4, 2004 CMR, the date the notices were mailed was handwritten by personnel in the Division’s Mail Processing Center to conform with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS. It is noted that in the upper left corner of page 58, the handwritten notations “3/04” and “JOB-1” appear.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative. The postal service representative then affixes his or her initials or signature or a U.S. postmark to a page or pages of the CMR. In this case, each of the 58 pages bears a postmark of March 4, 2004 from the Albany, New York General Mail Facility of the United States Postal Service (“USPS”) except for page 58 which bears illegible handwritten initials or signature next to the postmark. Ms. Mahon stated that the USPS postmark appearing on each page of the CMR on which the notice at issue appeared, confirmed that such notice was sent on March 4, 2004. In addition, Ms. Mahon stated that, in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

It is noted that on page 58 of the March 4, 2004 CMR, the phrases “TOTAL PIECES AND AMOUNTS” and “TOTAL PIECES RECEIVED AT POST OFFICE” appear. On that page, the number 629 is stated to be the number of pieces listed on the CMR. However, the total number of pieces received at the Post Office is blank. It is also noted that the total fee of \$1,446.70 listed on page 58 is consistent with the mailing of 629 pieces of mail at a fee of \$2.30.

88. The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Division’s Registry Unit, described the procedures for delivery of outgoing mail to branch offices of the USPS. After a Notice of Determination is placed in an area designated for “Outgoing Certified Mail,” a member of the Mail Processing Center staff weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk also performs a random review of up to 30 pieces of certified mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area where a postal employee will then affix a postmark or his initials or signature to the CMR indicating receipt of the mail listed on the CMR and the CMR itself. The CMR is the Division’s record of receipt by the USPS for the pieces of certified mail listed on it. The CMR is then picked up at the USPS the following day by a member of the Mail Processing Center staff who delivers it to the CARTS Control Unit.

As to the CMR delivered to the USPS on March 4, 2004, Mr. Peltier’s review of the March 4, 2004 CMR confirmed that a USPS employee initialed or signed page 58 of the CMR and affixed a postmark to each page of the CMR.

89. Heidi Corina is a Legal Assistant 2 in the Division's Office of Counsel and has been employed by the Division since April 2000. As part of her duties, Ms. Corina prepares a Request for Delivery Information/Return Receipt After Mailing (PS Form 3811-A) which is a form used by the mailer to request return receipts after mailing and can be used for registered, certified, insured and express mail. While Ms. Corina avers in her affidavit that she prepared a Request for Delivery Information/Return Receipt After Mailing (PS Form 3811-A) for Gary Ryder and mailed it to Gary Chiboucas, Claims and Inquiry Clerk of the U.S. Postal Service-General Mail Facility, 30 Old Karner Rd., Albany, NY 12288, a copy of the prepared PS Form 3811-A is not attached to her affidavit. Attached to Ms. Corina's affidavit as Exhibit "A" is the response from Gary Chiboucas, dated March 3, 2005, which indicates that a piece of certified mail bearing number 7104 1002 9730 0404 2163 was delivered on "03/10/04 at 11:42 AM" in "WESTBURY, NY 11590." The response also shows the scanned signature image of the recipient "G. Ryder" which was above the handwritten name "Gary Ryder" and the address of the recipient was written in as "1984 Lilac Dr."

90. While at the District Office on October 2, 2002, Mr. Ryder filled out and signed a Sales Tax Bureau Responsible Person Questionnaire (form AU-431) for Rywin on which he listed his home address as 1984 Lilac Drive, Westbury, NY.

91. At the hearing, Mr. Ryder admitted that he was residing at 1984 Lilac Drive, Westbury, New York in March 2004. He further admitted that the 1984 Lilac Drive address was the address listed on the personal income tax returns which he filed for the years 2002, 2003 and 2004. Copies of Mr. Ryder's New York State personal income tax returns for the years 2002, 2003 and 2004 are not part of the record. The record is silent as to when Mr. Ryder filed his New York State personal income tax returns for the years 2002, 2003 and 2004.

92. At the hearing, Mr. Ryder denied that he signed for a piece of certified mail bearing certified control number 7104 1002 9730 0404 2163 on March 10, 2004. He also denied that the scanned signature was his signature.

93. At the hearing, the Division claimed that it used certified control number 7104 1002 9730 0404 2163 twice, once when it was assigned to the Notice of Determination issued to Gary A. Ryder on March 4, 2004 and a second time when it was assigned to a statutory notice issued to PO Box 788, 23 N Ferry Street, Shelter Island, New York 11964-0788 on November 8, 2004.

94. In support of the position that its policy for assigning certified control numbers to items of certified mail containing tax notices changed during 2004, the Division submitted the unsworn statement of Mary Beth Maschewski, an Associate Computer Programmer employed by the Division.³

95. In support of its position that certified control number 7104 1002 9730 0404 2163 was assigned to a statutory notice issued to a different taxpayer on November 8, 2004, the Division submitted the affidavit dated October 17, 2005 of Geraldine Mahon, with an attached photocopy of three pages of a CMR and the affidavit dated October 18, 2005 of Bruce Peltier.

96. The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Division's Registry Unit, described the procedures for delivery of outgoing mail to branch offices of the USPS. After a statutory notice is placed in an area designated for "Outgoing Certified Mail," a member of the Mail Processing Center staff weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of mail listed on the CMR against the information contained on the CMR. The clerk also performs a

³ Ms. Maschewski's statement is labeled "AFFIDAVIT." However, her signature is unsworn because the notary public, James J. Della Porta, failed to sign the document.

random review of up to 30 pieces of certified mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area where a postal employee will then affix a postmark or his initials or signature to the CMR indicating receipt of the mail listed on the CMR and the CMR itself. The Mail Processing Center has requested that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the CMR. The CMR becomes the Division's record of receipt by the USPS for the items of certified mail. The CMR is then picked up at the USPS the following day by a member of the Mail Processing Center staff who delivers it to the CARTS Control Unit.

On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. Peltier concluded that on November 8, 2004, an employee of the Mail Processing Center delivered a piece of certified mail addressed to "P.O. BOX 788, 23 N FERRY ST., SHELTER ISLAND, NY 11964-0788." In addition, based on his review of the CMR attached to Ms. Mahon's affidavit, Mr. Peltier confirmed that a USPS employee affixed a postmark to each page of the CMR and also determined that a member of his staff obtained a copy of the postmarked CMR delivered to and accepted by the USPS on November 8, 2004 for the records maintained by the CARTS Control Unit of the Division. He concluded that the regular procedures comprising the ordinary course of business for the staff of the Mail Processing Center were followed in the mailing of the item of certified mail to the P.O. Box 788, 23 N Ferry St., Shelter Island, New York address on November 8, 2004.

97. The affidavit of Geraldine Mahon, Principal Clerk of the Division's CARTS Control Unit, described the general procedure for issuing and mailing statutory notices. As part of her

duties, Ms. Mahon supervises the processing of notices of deficiency, notices of estimated determination and notices of determination (“statutory notices”) prior to shipment to the Division’s Mail Processing Center for mailing. In the course of these duties, she routinely receives a batch of statutory notices generated by CARTS. The computer generated statutory notices are predated with the anticipated date of mailing and each statutory is assigned a certified control number. The certified control number for each notice appears on a separate one-page “Mailing Cover Sheet” (form DTF-997) which also bears, among other things, a bar code and the taxpayer’s mailing address. Each batch of statutory notices is accompanied by a computer printout entitled “CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE” (hereafter “certified mail record” or “CMR”). The CMR lists each statutory notice in the order the notices are generated in the batch. The certified control numbers appear on the certified mail record under the first heading, entitled “CERTIFIED NO.” The assessment numbers are listed under the second heading, entitled “REFERENCE NO.” The names and addresses of the taxpayers are listed under the third heading, entitled “NAME OF ADDRESSEE, STREET AND PO ADDRESS.” Each certified mail record and associated batch of statutory notices are forwarded to the Mail Processing Center together.

Ms. Mahon averred that the CMR pertaining to the mailing on November 8, 2004 consisted of 974 connected pages and included a Notice of Determination mailed to P.O. Box 788, 23 N Ferry St., Shelter Island, NY 11964-0788. She described the CMR as having all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected until otherwise requested by Ms. Mahon.

98. Attached to Ms. Mahon’s affidavit, as Exhibit “A,” is a copy of pages 1, 712 and 974 of the original CMR issued by the Division on November 8, 2004. The CMR includes an item

mailed to P.O. Box 788, 23 N. Ferry St., Shelter Island, NY 11964-0788. There are 11 entries on each page with the exception of page 974 which contains 10 entries. Ms. Mahon noted that portions of the certified mailing record, which are attached to her affidavit, have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. In the upper left hand corner starting on page 1 and on each subsequent page of the CMR the Run which signifies the date and time the CMR was produced by year, Julian day of the year and the military time of day. The original date and time of "20043031731" was the date and time that the entire certified mail record was printed. The CMR was printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for mailing by the Division's Mail Processing Center. In the upper left hand corner of page 1 of the CMR, the date the notices were mailed was handwritten by personnel in the Division's Mail Processing Center. In the upper left hand corner of page 1 of the CMR, the handwritten date "11/08/04" appears. This change was made in order to ensure that the date on the certified mail record conformed with the actual date that the statutory notices and the certified mail record were delivered into the possession of the U.S Postal Service.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative. The postal service representative then affixes his or her initials or signature or a U.S. postmark to a page or pages of the CMR. Ms. Mahon stated that in this instance a Postal Service representative affixed a postmark to each of the 974 pages.

Ms. Mahon averred that page 712 of the CMR indicated that a Notice of Determination with "Notice Number L-024705981" was sent to "P.O. Box 788 N. Ferry St., Shelter Island, NY

11964-0788” by certified mail using control number “7104 1002 9730 0404 2163.” Ms. Mahon further averred that a USPS postmark on pages 1, 712 and 974 of the CMR confirmed that the forgoing Notice of Determination was sent on November 8, 2004. In addition, Ms. Mahon stated that, in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

Ms. Mahon concluded that the procedures followed and described were the normal and regular procedures of the CARTS Control Unit on November 8, 2004.

99. As noted, in conjunction with the affidavit of Ms. Mahon, the Division offered three pages of a certified mail record. A review of the certified mail record shows that the first sheet is labeled “NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,” “CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE.” The upper right hand corners of the pages are numbered 1, 712 and 974, respectively. The upper left hand corner of each page contains a run date and time of “20043031731.” On the first page, the date of “11/08/04” was handwritten above the original printed run date and time. Each of the pages contains columns labeled “CERTIFIED NO,” “REFERENCE NO,” and “NAME OF ADDRESSEE, STREET, AND P.O. ADDRESS.” The certified numbers listed in a vertical column on the left side of each page do not run consecutively. Page 712 shows an article of certified mail, certified control number 7104 1002 9730 0404 2163, addressed to PO BOX 788 23 N FERRY ST, SHELTER ISLAND, NY 11964-0788. On page 976, “TOTAL PIECES AND AMOUNTS” is stated to be 10,713 but “TOTAL PIECES RECEIVED AT POST OFFICE” is blank. It is noted that the total fee of \$24,639.90 listed on page 976 is consistent with the mailing of 10,713 pieces of mail at a fee of \$1.35. A stamp of the Albany, New York General

Mail Facility of the United States Postal Service appears on each of three pages of the certified mail record which accompanied the affidavit of Geraldine Mahon.

100. The Division did not submit a redacted copy of the statutory notice, bearing the address of P.O. Box 788, 23 N. Ferry St., Shelter Island, NY 11964-0788, allegedly issued on November 8, 2004.

101. Shortly before the hearing, Gwendolyn Cole, the team leader who supervised the auditor during the Division's audit of Rywin's books and records, used the Internet and accessed the track and confirm search feature of the United States Postal Service website. The Division submitted into the record a copy of Ms. Cole's search results.

102. At the time of the hearing, Mr. Ryder was receiving medical care for a right acoustic neuroma which was affecting his hearing. At that time, he was contemplating options including brain surgery and Gamma Radiation. The record is silent as to when Mr. Ryder first learned he had a tumor, or how long he may have had the tumor before the diagnosis.

CONCLUSIONS OF LAW

A. As a result of a sales tax field audit of Rywin's books and records, the Division issued two notices of determination. The first notice, issued to Rywin, assessed sales and use taxes in the amount of \$172,805.33 for the period September 1, 1999 through February 20, 2000 and June 1, 2000 through February 28, 2002. The second notice of determination, issued to Gary A. Ryder as a responsible officer of Rywin, assessed sales and use taxes in the amount of \$52,036.65 for the period December 1, 2000 through February 28, 2002. These assessments were based on the Division's determination that Rywin owed additional sales taxes on its business transactions with Great House of Wine ("GHW"), and its retail wine and liquor store sales. With respect to Rywin's business transactions with GHW, the assessments reflect the

Division's disallowance of sales tax credits in the total amount of \$36,988.02 taken by Rywin on sales tax returns filed for the periods ending February 29, 2000 and August 31, 2000, and its determination that Rywin received additional sales tax payments in the amount of \$112,877.73 from GHW and failed to report same on its sales tax returns for the period March 1, 2001 through May 31, 2002. With respect to Rywin's retail wine and liquor store sales, the assessments reflect the Division's determination that additional sales tax of \$22,939.58 was due on additional taxable receipts totaling \$269,877.51 for the period September 1, 1999 through February 28, 2002. Petitioners are challenging the Division's determination that Rywin owes additional sales tax as a result of either its business relationship with GHW, including the disallowance of the sales tax credits taken on Rywin's sales tax returns, or its retail wine and liquor store sales.

B. 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).

C. In this case, the Division made four written requests and numerous oral requests for Rywin's books and records, including, *inter alia*, those pertaining to Rywin's transactions with GHW and the sales tax credits taken by Rywin on its sales tax returns filed for the quarters ending February 29, 2000 and August 31, 2000, for the period September 1, 1999 through May 31, 2002. In response to the Division's numerous requests, certain records were produced. However, these records were inadequate to determine the amount of tax due with respect to either Rywin's transactions with GHW or Rywin's retail store sales. These records were also inadequate to substantiate the sales tax credits taken by Rywin on its sales tax returns for the quarters ending February 29, 2000 and August 31, 2000.

The corporation provided general ledgers, a cash disbursements journal, some bank statements for the corporation's operating checking account, Federal corporate income tax returns for fiscal years ending March 31, 2000, March 31, 2001 and March 31, 2002, purchase invoices related to Rywin's retail store's purchases for the quarter ending August 31, 2001, some cash registers tapes for its retail store and some exempt sales invoices for its retail store. Petitioners did not produce a day book or any summary of daily sales for its retail establishment. Indeed, Mr. Ryder advised the auditor that Rywin did not maintain a day book or any summary of its daily sales for its retail store. Rather, Mr. Ryder advised the auditor that Rywin's retail store sales records consisted of the cash register tapes generated by the retail store's cash register and the sales invoices for nontaxable sales made by the retail store to tax exempt organizations. Petitioners did not produce a complete set of cash register tapes for its retail store. After examining the sales invoices for nontaxable sales made by Rywin's retail store and finding the

handwritten notation “not rung up” on numerous invoices presented for audit, the auditor reasonably concluded that it would be unproductive to examine the cash register tapes provided since all of Rywin’s retail store sales were not recorded on those tapes. While the accountant used the cash register tapes and sales invoices for nontaxable sales provided on a monthly basis by Mr. Ryder as the source for the retail store sales amounts recorded in Rywin’s general ledger, daily total sales from Rywin’s retail store were not recorded consistently as a daily amount in the corporation’s general ledger. Instead, at times, only a weekly total amount was recorded in the general ledger. In addition, the auditor reconciled the purchase information contained in the suppliers’ responses to the purchase information recorded in the corporation’s cash disbursements journal and found that the corporation failed to record \$33,372.99 in purchases for its retail store in its cash disbursements journal. The auditor also found that the corporation had no records of its purchases from GHW in its cash disbursements journal. Given the inadequacy of Rywin’s record keeping with respect to its retail store’s sales and the discrepancy between the purchase data provided by Rywin’s suppliers versus the amounts recorded in the corporation’s books, the auditor properly resorted to a bank deposit analysis of Rywin’s operating checking account to establish Rywin’s sales tax liability on its retail store sales.

While Mr. Ryder admitted to the auditor that, as a result of its business relationship with GHW, Rywin received both sales tax and commissions payments from GHW and those payments were made to Rywin by GHW via wire transfers into Rywin’s Lottery checking account, the Lottery checking account bank statements were not provided to the auditor. No GHW sales were recorded in the general ledger provided to the auditor. Rather, the only records provided concerning Rywin’s transactions with GHW were a one-page sales tax worksheet which included, among other things, an analysis of GHW’s sales and sales tax based on

information taken from the sales tax returns which Rywin filed during the period September 1, 1999 through May 31, 2002, and copies of GHW's promissory note to Rywin and GHW's bankruptcy papers. Given the inadequacy of the records provided by Rywin with respect to its business relationship with GHW, the auditor's utilization of Lottery checking account bank statements, which she subpoenaed from Bank of New York, and the sales tax worksheet, provided by Mr. Ryder, to determine the amount of sales tax payments which Rywin received from GHW but failed to report on its sales tax returns was reasonable and proper.

As to the sales tax credits taken by Rywin on the sales tax returns filed for the quarters ending February 29, 2000 and August 31, 2000, repeated requests were made for substantiation for the credits taken by Rywin on those returns. Mr. Ryder advised the auditor that Rywin received checks from GHW payable to the New York State Department of Taxation and Finance in the amounts of \$69,659.77 and \$55,759.00, as payments for the quarters ending November 30, 1999 and May 31, 2000, respectively, which checks included both Rywin's commission and the sales tax due on GHW's sales of out-of-state wines to New York customers. Mr. Ryder further advised that, since Rywin's commissions were included in GHW's checks payable to the New York State Department of Taxation and Finance, he remitted the checks with Rywin's sales tax returns for the quarters ending November 30, 1999 and May 31, 2000 and took Rywin's commissions as sales tax credits in the amounts of \$28,352.12 and \$8,635.90 on the sales tax returns which Rywin filed for the quarters ending February 29, 2000 and August 31, 2000, respectively. Petitioners did not produce any records pertaining to the sales tax credits taken on the corporation's sales tax returns for the quarters ending February 28, 2000 and August 31, 2000. Based on Mr. Ryder's admission that the two GHW checks submitted by Rywin with its sales tax returns for the quarters ending November 30, 1999 and May 31, 2000 were payable to

the New York State Department of Taxation and Finance and petitioners' failure to substantiate their claim that those checks included payments of both sales tax and Rywin's commission, the auditor reasonably determined that additional sales tax in the amount of \$36,988.02, i.e., \$28,352.12 plus \$8,635.90, was due. As such, the auditor's disallowance of sales tax credits in the amounts of \$28,352.12 and \$8,635.90 taken on Rywin's sales tax returns filed for the quarters ending February 29, 2000 and August 31, 2000, respectively, was proper.

In sum, since the books and records provided by Rywin were clearly not adequate to substantiate either the sales reported on its sales tax returns for the period September 1, 1999 through May 31, 2002 or the sales tax credits taken on the sales tax returns which Rywin filed for the quarters ending February 29, 2000 and August 31, 2000, the Division was justified in estimating the corporation's sales tax liability using indirect audit methodologies in this case.

D. When the Division adopts an audit method which is reasonably calculated to determine the amount of tax due, the burden of proof shifts to the taxpayer to demonstrate by clear and convincing evidence that the audit method or amount of tax assessed is unreasonable (*Matter of AGDN, supra; Matter of Meskouris Bros. v. Chu, supra*).

E. Petitioners contend that the Division's disallowance of sales tax credits totaling \$36,988.02 was improper. They maintain that the disallowed sales tax credits in the amounts of \$28,352.12 and \$8,635.90 for the quarters ending February 29, 2000 and August 31, 2000, respectively, actually represent the 20 percent commissions due Rywin for the quarters ending November 30, 1999 and May 31, 2000 pursuant to its oral agreement with GHW. Petitioners assert that Mr. Ryder selected this means of receiving the commissions due to his concerns stemming from GHW's failure to disclose the volume of out-of-state sales to New York customers despite numerous requests for that information. I find that the Division properly

disallowed sales tax credits in the amounts of \$28,352.12 and \$8,635.90 taken on Rywin's sales tax returns filed for the quarters ending February 29, 2000 and August 31, 2000. At the hearing, Mr. Ryder admitted that GHW sent Rywin checks payable to the New York State Department of Taxation and Finance in the amounts of \$69,659.77 and \$55,759.00 for the quarters ending November 30, 1999 and May 31, 2000, respectively. He further admitted that he remitted those checks with Rywin's sales tax returns for the quarters ending November 30, 1999 and May 31, 2000 and claimed overpayments on both those returns to reflect the commissions that he believed were due Rywin, which overpayments were subsequently claimed as credits on the sales tax returns filed by Rywin for the quarters ending February 29, 2000 and August 31, 2000. While he testified that the amounts reflected in those checks included both sales tax due New York State and the commissions due Rywin under the oral agreement, he admitted that GHW had not sent anything in writing stating that to be the case. It is clear from the manner in which the two GHW checks were drawn, i.e, payable to the New York State Department of Taxation and Finance, that GHW intended these checks as payments of sales tax due New York State. As such, Rywin improperly claimed overpayments on its sales tax returns for the quarters ending November 30, 1999 and May 31, 2000. Therefore, the Division's disallowance of sales tax credits for the quarters ending February 29, 2000 and August 31, 2000 in the total amount of \$36,988.02 was proper.

F. As noted above, the Division assessed \$112,877.73 in additional sales tax based on its determination that Rywin received additional sales tax payments in the amount of \$112,877.73 from GHW which Rywin failed to report on its sales tax returns. Petitioners contend that the Division erroneously determined that Rywin was required to collect sales tax from the sales of out-of-state wines to New York State retail customers arranged by GHW. Petitioners argue that

the record clearly demonstrates that they merely provided fulfillment services for GHW as described in Tax Law § 1101(b)(18). They claim that Rywin was not a retailer for GHW as Mr. Ryder did not accept delivery of GHW wines into his retail store for resale, nor did he sell or offer for sale any of the wines handled by GHW. Additionally, they claim that Rywin did not partake in receiving sales tax from GHW customers. Petitioners aver that Mr. Ryder simply agreed to verify the number of boxes of wine in the shipment before the wines were received at GHW's Westbury, New York leased warehouse space. They further aver that Mr. Ryder had no communication with GHW's New York State customers. Rather, petitioners contend that Rywin's principal duty with regard to GHW was to return undeliverable, unwanted or damaged wines to the California wineries.

G. Petitioners' contention that they merely acted as a fulfillment provider for GHW is without merit. I find that Rywin acted as the retail vendor for the sale of out-of-state wines to New York State consumers. While Rywin and GHW never executed a written contract, it is clear that the parties' contractual relationship began in the fall of 1998 and continued beyond the period in issue. In the fall of 1998, GHW, a licensed New York State wholesaler, offered to pay Rywin, a licensed New York State retailer, a commission on sales of out-of-state wines to New York State consumers, if Rywin agreed to take legal possession of the wine, although physical delivery of the wine would be to GHW's warehouse located a little over a mile from Rywin's retail location; verify that the number of boxes of wine on the truck matched the number of items listed on the bill of lading prior to arrival of the shipment at GHW's warehouse; direct deliveries to GHW's warehouse; ensure that the boxes of wine were properly refrigerated in the warehouse; mail undeliverable, damaged and returned boxes of wine to the originating wineries and remit to

New York State the sales tax which it received from GHW. Rywin agreed to perform these services if paid a commission.

The record clearly indicates that the parties acted in accordance with the contractual relationship. New York consumers placed prepaid orders for wines with out-of-state wineries. GHW picked up the wine orders from the wineries and delivered the wine to its Napa, California warehouse, where the orders were repacked in Styrofoam shippers, labeled for delivery to the customer and palletized by state. Some of that wine was shipped to Rywin. Each box of wine being shipped to a New York consumer bore a shipping label which listed, among other things, the shipper's name and address as Wine Warehouse, i.e., Rywin's business name, 816-18 Carman Avenue, Westbury, NY 11590-1560. The New York retail customer also received a sales invoice which listed Wine Warehouse as the retailer. The shipper took the wine shipment to Rywin's retail store where, after verifying that the number of boxes listed on the bill of lading were actually on the truck, either Mr. Ryder or a Rywin employee signed the bill of lading. The wine was not off-loaded at Rywin's retail store. Rather, the driver was directed by Mr. Ryder or a Rywin employee to deliver the wine shipments to GHW's Westbury, New York leased warehouse space. After the wine shipments were delivered to GHW's Westbury, New York warehouse space, a common carrier such as UPS picked up the boxed wine and delivered it to the retail customer. Mr. Ryder periodically visited GHW's Westbury, New York warehouse space to ensure that the boxes of wine were being properly refrigerated. Rywin received all undeliverable, damaged or returned items from New York customers at its retail store. Mr. Ryder repackaged the items and reshipped them to the originating wineries and notified GHW of the returns. GHW issued sales invoices to Rywin for the purchases of the out-of-state wines. However, because the New York retail customers had prepaid their orders, Rywin did not pay for

the wines. While Rywin did not collect the sales tax directly from the consumers, the corporation did receive the tax indirectly from them. The sales tax was paid to the wineries, which forwarded the sales tax to GHW, which then remitted the sales tax to Rywin. GHW remitted payments of sales tax to Rywin by check or wire transfer directly into Rywin's Lottery checking account. GHW also paid Rywin commissions.

The manner in which GHW and Rywin conducted their contractual relationship enabled out-of-state wineries to distribute and sell their wines to New York State retail customers in compliance with the applicable New York State alcoholic beverage control laws (Alcoholic Beverage Control Law §§ 78; 79; 102[1][c], [d]). Indeed, it was Rywin's status as a retail vendor of wine and liquor which enabled the sales of out-of-state wines to New York retail customers to take place. Rywin received commissions from GHW on the New York sales of out-of-state wines. GHW also remitted the sales tax due on the sales of out-of-state wines to New York retail customers to Rywin. Rywin reported sales of out-of-state wines on its sales tax returns filed for the period September 1, 1999 through May 31, 2002. It also remitted sales tax received from GHW with those returns. Clearly, Rywin recognized that it was the retail vendor for the sales of out-of state wines to New York customers during the period September 1, 1999 through May 31, 2002. As a retail vendor, Rywin was required to remit to the State all sales tax remitted or collected (*see*, Tax Law § 1137). Therefore, the Division correctly determined that Rywin was liable for the additional sales tax payments which it received from GHW.

H. Petitioners assert that, in her computation of the additional sales tax payments which Rywin received from GHW but failed to report on its sales tax returns for the period March 1, 2001 through May 31, 2002, the auditor failed to allow all commission income earned by Rywin and reported on its Federal corporate income tax returns. They claim that the auditor allowed a

commission payment deduction of \$4,875.00 for the fiscal year ending March 31, 2001 although Rywin reported commission income in the amount of \$10,531.00 on its Federal corporate income tax return for that same fiscal year. Petitioners argue that since Rywin reported receiving \$10,531.00 on its Federal corporate income tax return for the fiscal year ending March 31, 2001, an additional deduction of \$5,476.00 should be allowed. For the fiscal year ending March 31, 2002, the auditor allowed a commission payment deduction of \$68,081.97. Petitioners assert that the auditor should have allowed \$72,157.00, the amount reported by Rywin on its Federal corporate income tax return for the fiscal year ending March 31, 2002. For the period April 1, 2002 through May 31, 2002, the auditor allowed a commission payment deduction of \$12,560.50. Petitioners point out that Rywin reported commission income in the amount of \$87,890.00 for the fiscal year ending March 31, 2003. Petitioners argue that an additional \$50,000.00 should be allowed to reflect GHW's two payments, i.e., \$25,000.00 in May 2002 and \$25,000.00 in June 2002, on the April 1, 2002 promissory note given by GHW to Rywin. Petitioners argue that the \$25,000.00 payment made by GHW in June 2002 should be allowed as a deduction because the amount was taken from the Lottery account before the end of the audit period. Therefore, petitioners claim that the additional sales tax which Rywin received from GHW but failed to report should be reduced by a total of \$59,551.03. The auditor's analysis of Lottery checking account deposits began with GHW's March 2001 wire transfers into that account. A review of the audit work papers indicates that Rywin reported receipt of commission income from GHW in the amount of \$4,875.00 in March 2001 in its general ledger. Further review of the audit work papers indicates that the auditor allowed a deduction for that commission income. Ms. Ezegelian credibly testified that Rywin reported receipt of both Lottery income and commission income from GHW in its general ledgers. She further testified

that she transcribed the relevant portions of Rywin's general ledger and those transcriptions are reflected in her work papers. Her audit work papers reflect the dates on which Rywin reported its receipt of commission income from GHW. It is clear from the record that the auditor deducted all commission income from GHW reported by Rywin in its general ledgers during the period March 1, 2001 through May 31, 2002. It is noted that petitioners did not submit Rywin's general ledgers into the record at the hearing. As for petitioners' argument that an additional \$50,000.00 should be deducted to reflect the payments made by GHW on its April 1, 2002 promissory note to Rywin, it is meritless. The record clearly indicates that on January 20, 2001 GHW gave Rywin a promissory note in the amount of \$65,017.44, i.e., the amount of sales tax remaining due on sales of out-of-state wines made during the period September 1, 1999 through November 30, 2000, because Rywin agreed to pay that amount of sales tax to New York State. The record further indicates that GHW's April 1, 2002 promissory note superceded all previous promissory notes and continued to reflect GHW's promise to repay amounts owed to Rywin for the sales taxes paid by Rywin. As such, the \$25,000.00 payment made by GHW in May 2002 is not commission income but is merely a repayment of moneys previously advanced by Rywin on GHW's behalf. Moreover, as the Division correctly points out, Rywin filed its Federal corporate income tax return for the fiscal year ending March 31, 2003 on or about August 12, 2005, shortly before the hearing in these matters. Therefore, I do not find any further adjustment to the auditor's computation of additional sales tax payments received from GHW is warranted.

I. Petitioners contend that the Division's use of a bank deposit analysis of Rywin's operating checking account to estimate its retail store's sales tax liability was improper. They maintain that Rywin possessed all necessary records for an audit of its retail store's sales. Petitioners assert that cash register tapes, sales invoices for exempt sales, general ledgers and

purchase invoices were provided to the auditor. They further assert that the corporation's representative asked the Division a number of times to select a representative test period or periods of the cash register tapes for review because the records were voluminous, which requests were declined. Petitioners also claim that all purchase invoices were available at the time of the audit. The record clearly indicates that Rywin did not provide the auditor with all source documentation necessary for her review of the corporation's retail store's sales. Rywin did not maintain a day book or any book summarizing the retail store's daily sales. Rywin did not provide the auditor with a complete set of cash register tapes for the audit period. At the hearing, Mr. Ryder admitted that he did not provide on audit all cash register tapes for the audit period. The auditor reviewed the sales invoices for nontaxable sales provided to her and found the notation "not rung up" on numerous invoices. Based on the notation appearing on the sales invoices for exempt sales, the auditor concluded that the cash register tapes did not reflect all daily sales made in the corporation's retail store and she did not review the cash register tapes provided. At the hearing, Mr. Ryder testified that the corporation's cash register automatically calculated and added the sales tax to each sale and that was why the sales to exempt organizations were not recorded on the cash register tapes. Rywin did provide the general ledgers to the auditor for review. Petitioners claim that the general ledgers accurately reflect the retail store's taxable and nontaxable sales for the period September 1, 1999 through May 31, 2002. Since the record does not include the cash register tapes, sales invoices for nontaxable sales or the corporation's general ledgers, it is impossible for me to determine the validity of that claim. In addition, at the hearing, Mr. Ryder admitted that daily store sales were not consistently recorded in Rywin's general ledger. Rather, according to Mr. Ryder, at times, only a weekly total amount was recorded in the general ledger. Rywin supplied its cash disbursements journal

to the auditor. However, contrary to Rywin's claim, it did not produce all purchase invoices for the retail store on audit. The record clearly indicates that only purchase invoices for the quarter ending August 31, 2001 were provided to the auditor. Based upon the information concerning Rywin's retail store sales available to the Division at the time the notice was issued, I find that the audit method utilized by the Division, i.e., a bank deposit analysis of Rywin's operating checking account, for review of the retail store sales was reasonable (*Matter of Continental Arms Corp. v. State Tax Commn.*, 72 NY2d 976, 534 NYS2d 362; *Matter of Northern States Contracting Co.*, Tax Appeals Tribunal, February 6, 1992).

J. As noted, the auditor performed a bank deposit analysis of Rywin's operating checking account and determined that additional sales tax in the amount of \$22,939.58 was due on additional taxable retail store sales in the amount of \$269,877.51. Petitioners contend that the Division's conclusion that the additional deposits in the corporation's operating checking account were additional taxable sales from Rywin's retail store was incorrect. They assert that Lottery sales receipts and loans made by Mr. Ryder and a family friend to the corporation were also deposited into Rywin's operating checking account during the period September 1, 1999 through May 31, 2002. Petitioners maintain that, once a week, a check would be drawn on the operating checking account for the amount owed for Lottery transactions and it would be deposited into Rywin's Lottery checking account. They claim an adjustment should be made to reflect the Lottery transactions. Petitioners further maintain that, at various times, Mr. Ryder made loans to the corporation which enabled the corporation to purchase inventory for the retail store and was repaid by the corporation after the inventory was sold. Petitioners also claim a family friend made a loan to the corporation. They aver that loans to the corporation are reflected on the corporation's Federal income tax returns for the fiscal years ending March 31,

2000, March 31, 2001, March 31, 2002 and March 31, 2003 and an adjustment should be made to reflect those loans.

I do not find any adjustments are warranted. My review of the audit work papers indicates that, in her bank deposit analysis of Rywin's operating checking account, the auditor's computations included adjustments for transfers from the Lottery checking account, loans in the amount of \$7,500.00, check reversals and returned checks. The record clearly indicates that, at no point after learning that a bank deposit analysis of Rywin's operating checking account had been performed and receiving the proposed audit changes, did either the corporation's representative or Mr. Ryder claim that additional loans from Mr. Ryder or family friends to the corporation and Lottery sales receipts were reflected in the operating checking account deposits during the period September 1, 1999 through May 31, 2002. It is also clear from the record that neither the corporation's representative nor Mr. Ryder informed the auditor that a check was drawn on Rywin's operating checking account once a week for the amount owed for Lottery transactions and then deposited into Rywin's Lottery checking account. At the hearing, petitioners did not submit into the record any documentation concerning Rywin's Lottery sales or cancelled checks drawn on the operating account reflecting the alleged transfers of amounts owed for Lottery transactions to Rywin's Lottery checking account during the period September 1, 1999 through May 31, 2002. Rather, they rely on Mr. Ryder's testimony at the hearing. While Mr. Ryder did generally testify that Lottery sales were regularly deposited in the corporation's operating checking account and, once a week, a check was drawn on that account in the amount owed for Lottery transactions and deposited into corporation's Lottery checking account, he was unable to recall any specifics concerning the corporation's weekly Lottery sales or the weekly amounts owed on those Lottery transactions. Given the vagueness of Mr. Ryder's

testimony concerning the Lottery transactions and the lack of any documentary evidence to support his testimony, I do not find that any adjustment to the auditor's computations is warranted for the Lottery transactions. The record clearly indicates that the auditor accepted and made an adjustment for loans in the amount of \$7,500.00 noted on Rywin's operating checking account bank statements. At the hearing, Mr. Ryder generally testified that, at various times, he wrote personal checks to Rywin which enabled the corporation to purchase inventory for the retail store and the corporation repaid those loans by check after the inventory was sold. The record does not include any of Mr. Ryder's personal checks memorializing these loans, Rywin's operating checking account checks in repayment of these loans or any summary of the amount and date of such loans. Rather, petitioners rely on the loans amounts reflected on the corporation's Federal income tax returns for the fiscal years ending March 31, 2000, March 31, 2001, March 31, 2002 and March 31, 2003. On the Federal income tax return filed by the corporation for the fiscal year ending March 31, 2000, the corporation reported that loans from shareholders increased by \$11,716.00. On the Federal income tax return filed by the corporation for the fiscal year ending March 31, 2001, the corporation reported that loans from shareholders increased by \$989.00. On the Federal income tax return filed by the corporation for the fiscal year ending March 31, 2002, the corporation reported that loans from shareholders decreased by \$7,044.00. On the Federal income tax return filed, in August 2005, by the corporation for the fiscal year ending March 31, 2003, the corporation reported that loans from shareholders decreased by \$2,732.00 and \$10,000.00 was due A. Knorowski. Although Mr. Ryder testified that Mr. Knorowski, a family friend, had lent Rywin \$10,000.00, he could not recall the date on which the loan was made or when the corporation repaid it. The record does not include any check from Mr. Knorowski to the corporation, a note executed by Rywin to evidence the

indebtedness or Rywin's check in repayment of the debt to Mr. Knorowski. Mr. Ryder was unable to recall whether loans to the corporation were reflected in the corporation's general ledger. The record does not include Rywin's general ledgers. Given Mr. Ryder's vague testimony and the absence of source documentation for the loan amounts reported on the corporation's Federal income tax returns, I find that no further adjustment is warranted for alleged loans.

K. Petitioners contend that Mr. Ryder is not personally liable for that portion of the assessment related to the additional sales tax determined to be due on GHW's wire transfers of sales tax payments into Rywin's Lottery checking account. They argue that Mr. Ryder was not under a duty to act for GHW with regard to the sales tax moneys GHW failed to remit to New York because he was not an officer, director or employee of GHW. Petitioners' argument is meritless. I have already concluded that Rywin was a vendor required to collect and remit sales tax due on the sales of out-of-state wines. The wire transfers made by GHW into Rywin's Lottery checking account were payments of sales tax due on those sales of out-of-state wines to New York customers. I have also concluded that Rywin was liable for the additional amount of sales tax determined to be due on sales tax payments which it received from GHW but failed to report. Since Mr. Ryder concedes that he is a responsible officer of Rywin, he is liable for the additional sales tax determined to be due on sales tax payments which Rywin received from GHW but failed to report.

L. Penalties were imposed pursuant to Tax Law § 1145(a)(1)(i) which authorizes the imposition of penalties for failure to pay any tax imposed under Articles 28 and 29 of the Tax Law. Tax Law § 1145(a)(1)(iii) provides that if the failure or delay was due to reasonable cause and not due to willful neglect, penalty and additional interest shall be remitted.

Petitioners contend that the penalties should be abated because Mr. Ryder's head tumor affected his ability to conduct the corporation's business affairs during the period September 1, 1999 through May 31, 2002 and continue to affect his business operations to this day. They also contend that the penalties should be abated because their failure to remit the correct amount of sales tax due on the sales of out-of-state wines to New York State consumers was the direct result of GHW's failure to supply Rywin with accurate reports concerning the amount of sales tax due on sales of out-of-state wines. Petitioners claim that they made good faith efforts to determine the appropriate amount of sales tax and did in fact pay some monies - the amount which Mr. Ryder estimated was due based in his limited access to information.

I find that the Division properly assessed penalties in this matter. Although it is clear that Mr. Ryder is currently receiving treatment for his medical condition, there has been no showing that his medical condition caused or led to Rywin's sales tax problems. When Rywin began its contractual relationship with GHW, Rywin had been operating the Wine Warehouse for over 23 years. It is clear from Mr. Ryder's December 5, 2000 letter to GHW's chief operations officer that Mr. Ryder was fully aware that Rywin was acting as the retail vendor for the sales of out-of-state wines to New York State retail customers. It is also clear from that letter that GHW was sending Rywin weekly data sheets listing the sales of out-of-state wines to New York retail customers but Mr. Ryder made the decision not to record those sales in Rywin's books. The record also clearly establishes that GHW sent Rywin sales invoices for Rywin's purchases of the out-of-state wines. Furthermore, GHW deposited the sales tax due on the sales of out-of-state wines to New York customers directly into Rywin's Lottery checking account, using the account number supplied by Rywin. The corporation was aware of the exact amount of each Rywin payment made by wire transfer directly into Rywin's Lottery checking account because it

received a monthly bank statement for the Lottery checking account from Bank of New York. Clearly, the corporation's failure to ascertain its proper tax liability was the result of its failure to maintain the proper source records, i.e., purchase invoices issued by GHW to Rywin and weekly sales data sheets sent by GHW to Rywin, for the sales tax payments received from GHW as required under Tax Law § 1135. Penalties are also appropriate in this case because of the substantial discrepancy between the amount of the reported taxable sales and the amount of tax determined on audit (*see, Matter of S.B.H. Super Markets v. Chu*, 135 AD2d 1048, 522 NYS2d 985; *Matter of Himed Deli Corp.*, Tax Appeals Tribunal, March 20, 2000).

Petitioners have also been assessed penalty pursuant to Tax Law § 1145(a)(1)(vi) for omission of greater than 25 percent of the tax due. Since the initial issue of penalties assessed pursuant to Tax Law § 1145(a)(1)(i) has been determined against petitioners, this additional penalty must also be sustained in the absence of a showing of reasonable cause.

M. The last issue to be addressed is the validity of the Notice of Determination, dated March 4, 2004, issued to Gary A. Ryder, as a responsible officer of Rywin, which assessed sales and use taxes determined to be due from the corporation for the period December 1, 2000 through May 31, 2002. Petitioners claim that Mr. Ryder never received the Notice of Determination issued to him. They further contend that Mr. Ryder first became aware of the issuance of a Notice of Determination to him when his representative was orally informed of such issuance at the September 30, 2004 BCMS conciliation conference held because of the corporation's timely request for such conference. Petitioners argue that the three-year statute of limitations for assessment of sales and use taxes for the periods December 1, 2000 through February 28, 2001, March 1, 2001 through May 31, 2001 and June 1, 2001 through August 31,

2001 expired prior to the Division's issuance of the Notice of Determination to Mr. Ryder and assessments for those periods must be cancelled.

N. The statute of limitations for assessment of taxes is an affirmative defense which is waived unless affirmatively raised by the taxpayer (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, 828 *lv denied* 71 NY2d 806, 530 NYS2d 109; *Matter of Servomation Corp. v. State Tax Commn.*, 60 AD2d 374, 400 NYS2d 887; *Matter of Pittman*, Tax Appeals Tribunal, February 20, 1992). To establish this defense, the taxpayer must prove the date on which the limitations period begins, the expiration date of the statutory period and the receipt or mailing of the notice after the running of the period (*see, Amesbury Apts. v. Commr.*, 95 TC 227; *Robinson v. Commr.*, 57 TC 735; *Matter of Pittman, supra*; *Matter of Jencon*, Tax Appeals Tribunal, December 20, 1990). Where the taxpayer has satisfied this initial burden, the burden of going forward with the evidence shifts to the Division to demonstrate that the bar of the statute is not applicable (*see, Amesbury Apts. v. Commr., supra*; *Adler v. Commr.*, 85 TC 535). The Division must then proceed with the countervailing evidence that the statutory notice was timely mailed (*see, Coleman v. Commr.*, 94 TC 82; *Matter of Pittman, supra*).

O. Under this analysis, the first issue to be resolved is whether petitioners established a *prima facie* case that the statutory notice issued to Mr. Ryder was not mailed before the period of limitation for the mailing of the notice of determination expired (*Matter of Pittman, supra*). I find that they did.

The record clearly establishes that Rywin timely filed its sales tax returns for the periods December 1, 2000 through February 28, 2001, March 1, 2001 through May 31, 2001 and June 1, 2001 through August 31, 2001. While the record does not include the sales tax returns which Rywin filed for the periods ending February 28, 2001, May 31, 2001 and August 31, 2001, the

audit work papers include a summary of each sales tax return filed by Rywin during the audit period. A review of the audit work papers indicates that Rywin claimed a vendor collection credit on each of the sales tax returns which it filed for the quarterly periods ending February 28, 2001, May 31, 2001 and August 31, 2001. Further review of the audit work papers indicates that the auditor made no adjustment to the vendor collection credits claimed by Rywin on those three quarterly returns. In addition, the last consent executed by Rywin's representative on October 16, 2003 extended the time for determination of sales and use taxes for the period September 1, 1999 through February 28, 2001 until March 20, 2004. Although the exact date of filing of each sales tax return is not part of the record, it may be concluded as a matter of law that the sales tax return for the quarter ending February 28, 2001 was filed no earlier than March 20, 2001, the sales tax return for the quarter ending May 31, 2001 was filed no earlier than June 20, 2001 and the sales tax return for the quarter ending August 31, 2001 was filed no earlier than September 20, 2001 (Tax Law §§ 1136[b]; 1137[b]). Thus, the period of limitation for the mailing of a notice of determination for the periods December 1, 2000 through February 28, 2001, March 1, 2001 through May 31, 2001 and June 1, 2001 through August 31, 2001 expired on March 20, 2004, June 20, 2004 and September 20, 2004, respectively (*see*, Tax Law § 1147[b]). Petitioner made at least a *prima facie* showing that a notice of determination was not mailed to Mr. Ryder before the latest of those dates, i.e., September 20, 2004. Petitioners presented the testimony of Mr. Ryder who stated that he never received a notice of determination and submitted into evidence a PS Form 3811-A which Mr. Ryder received from the Division in the mail. Information on this PS Form 3811-A, which was completed by the USPS on January 27, 2005, clearly shows that an item of certified mail, number 7104 1002 9730 0404 2163, addressed to Gary A. Ryder, 1984 Lilac Dr., Westbury, N. Y. 11590-5923, was delivered by the USPS in

Shelter Island, New York on November 14, 2004. To rebut Mr. Ryder's proof of nonreceipt of the Notice of Determination, the Division submitted the March 3, 2005 response from Gary Chiboucas, Claims and Inquiry Clerk of the Albany, New York USPS - General Mail Facility, which indicates that a piece of certified mail bearing certified mail number 7104 1002 9730 0404 2163 was delivered by the USPS in Westbury, New York on March 10, 2004. The response also shows the scanned signature image of the recipient, G. Ryder, above the handwritten name Gary Ryder and the address of the recipient as 1984 Lilac Dr. The Division asserts that Mr. Chiboucas's response clearly establishes that the Notice of Determination issued to Mr. Ryder was actually mailed to him. It further asserts that the PS Form 3811-A submitted into the record by petitioners merely reflects the Division's use of the certified control number a second time for the issuance of a statutory notice to another taxpayer residing in Shelter Island, New York on November 8, 2004. Given the contradictory information supplied by the United States Postal Service and the Division's claim that it assigned the certified control number to statutory notices issued to different taxpayers on two separate dates in 2004, I find there is sufficient evidence to shift the burden of proof to the Division to show that the notice was issued before the expiration of the statutory period (*Matter of Pittman, supra*; *Coleman v. Commr., supra*). The Division must also prove that it assigned the certified control number to a statutory notice issued to another taxpayer on November 8, 2004.

P. Tax Law § 1147(a)(1) provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." This section further provides that the mailing of such a notice "shall be presumptive evidence of the receipt of the

same by the person to whom addressed.” However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced, and the burden of proving proper mailing rests with the Division (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

Q. The Division is not required to produce employees who personally recall the mailing of each individual notice of determination. Rather, the act of mailing may be proven by evidence of the Division’s standard mailing procedure, corroborated by direct testimony or documentary evidence of actual mailing (*e.g., Matter of Roland*, Tax Appeals Tribunal, February 22, 1996; *Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992; *Matter of Novar TV & Air Conditioner Sales & Serv.*, *supra*). A properly completed Postal Service form 3877, reflecting Postal Service receipt of the item listed on the form, represents direct documentary evidence of the date and fact of mailing (*Matter of Air Flex Custom Furniture, supra; see also, Coleman v. Commr., supra, Wheat v. Commr.*, 63 TCM 2955). The United States Tax Court has held that precise compliance with the postal service Form 3877 mailing procedures serves two purposes. “A properly completed postal service Form 3877 . . . reflects compliance with IRS established procedures for mailing deficiency notices. . . . [and the properly completed form] raises a presumption of official regularity in favor of [the Internal Revenue Service]” (*Wheat v. Commr., supra*, 63 TCM at 2958). When the Internal Revenue Service (“IRS”) is entitled to a presumption of official regularity, the burden of going forward is shifted to the taxpayers, and to prevail, they must affirmatively show that the IRS failed to follow its established procedures. If there is no fully completed Form 3877, the IRS may still prove, by documentary or direct evidence, the fact and date of mailing. However, it would not be entitled to the presumption of official regularity.

The Tax Appeals Tribunal has also held that a properly completed Postal Service Form 3877 represents documentary evidence of the date and the fact of mailing, shows the Division's compliance with its own procedures and creates a presumption of official regularity in favor of the Division (*Matter of Air Flex Custom Furniture, supra*). As with the IRS, a failure to comply precisely with the Form 3877 mailing procedure need not be fatal to the Division's case "if the evidence adduced is otherwise sufficient to prove mailing" (*Coleman v. Commr., supra*, 94 TC at 91). Further, the Tax Appeals Tribunal has found that a properly completed certified mail record is substantively the same as the Postal Service Form 3877 (*see, Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

R. The Division's proof of issuance of the Notice of Determination to Gary A. Ryder at his last known address consists of the affidavits of Ms. Mahon and Mr. Peltier, which were offered to establish the general procedure for generating and issuing (mailing) notices of determination, and copies of the Notice of Determination allegedly issued to Mr. Ryder and the computer generated certified mail record, which were offered to establish that the procedure was followed in this instance.

The Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Peltier, employees of the Division who are involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination. However, the Division's proof of mailing is deficient since the March 4, 2004 CMR does not indicate the number of pieces of mail received at the post office (*see, Matter of Cal-Al Burrito Co.*, Tax Appeals Tribunal, July 30, 1998; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Roland, supra*). Specifically, on page 58 of the March 4, 2004 CMR, the phrases "TOTAL PIECES AND AMOUNTS" and "TOTAL PIECES

RECEIVED AT POST OFFICE” appear. On that page, the number 629 is stated to be the number of pieces listed on the CMR. However, the total number of pieces received at the Post Office is blank. Since no one completed the second line, there is no proof that the number of items listed and the number of items received were identical. As such the March 4, 2004 CMR does not give rise to a presumption of regularity inasmuch as the document is not complete.

S. Where the presumption of official regularity does not arise, the Division may present proof of actual mailing of the notice, including circumstantial evidence (*see, Matter of Snyder*, Tax Appeals Tribunal, December 11, 1997; *see also, Coleman v. Commr., supra*). To prove the actual mailing of the notice, the Division introduced into evidence the USPS response to a Request for Delivery Information/Return Receipt After Mailing form (PS Form 3811-A) prepared by Ms. Corina, a Division employee. While the USPS response, dated March 3, 2005, from Mr. Chiboucas, the Claims and Inquiry Clerk of the Albany, New York USPS - General Mail Facility, does indicate that a piece of certified mail bearing certified mail control number 7104 1002 9730 0404 2163 was delivered by the USPS in Westbury, New York on March 10, 2004, petitioners introduced rebuttal evidence in the form of a PS Form 3811-A completed by the USPS on January 27, 2005 which clearly indicates that an item of certified mail, certified control number 7104 1002 9730 0404 2163, addressed to Gary A. Ryder, 1984 Lilac Dr., Westbury, N. Y. 11590-5923, was delivered by the USPS in Shelter Island, New York on November 14, 2004. Petitioners argue that their rebuttal evidence clearly establishes that the Division’s routine office practices were performed so carelessly that it would be unreasonable to assume that the Notice of Determination was mailed to Mr. Ryder. The Division claims that its policy for assigning certified control numbers to items of certified mail containing tax notices changed during 2004, and it began reusing certified control numbers. The Division further

claims that the PS Form 3811-A presented by petitioners actually reflects its assignment of certified control number 7104 1002 9730 0404 2163 to a statutory notice issued to PO Box 788, 23 N Ferry Street, Shelter Island, New York 11964-0788 on November 8, 2004 and the Postal Service's delivery of that notice. Given the Division's claim that its policy change was the reason for the conflicting responses received from the United States Postal Service, the Division was required to establish the specifics of its 2004 policy change and prove that a statutory notice was issued to a Shelter Island, New York taxpayer on November 8, 2004.

T. In support of its claims that the certified control number was reused and assigned to a statutory notice issued to a different taxpayer on November 8, 2004, the Division submitted the unsworn statement of Mary Beth Maschewski, an Associate Computer Programmer employed by the Division, the affidavit dated October 17, 2005 of Geraldine Mahon, with copies of pages 1, 712 and 974 of the original CMR issued by the Division on November 8, 2004 attached as Exhibit "A" and the affidavit dated October 18, 2005 of Bruce Peltier.

I find the evidence submitted by the Division to support its claims of reuse of the certified control number for the issuance of a statutory notice to a different taxpayer on a subsequent date in 2004, to be deficient in many respects.

First, the unsworn statement of Ms. Maschewski is insufficient to prove that the Division's policy for assigning certified control numbers to items of certified mail containing tax notices changed during 2004.

Second, although the Division has introduced adequate proof of its standard procedures for generating and issuing (mailing) notices of determination through the affidavits of Ms. Mahon and Mr. Peltier, the Division failed to submit a redacted copy of the statutory notice allegedly issued to PO Box 788, 23 N Ferry Street, Shelter Island, New York 11964-0788. Therefore, it is

impossible to determine if the Division actually generated the statutory notice which was to be issued to the Shelter Island, New York taxpayer as Ms. Mahon avers in her affidavit.

Third, exhibit “A” of Ms. Mahon’s October 17, 2005 affidavit contains three pages of what purports to be a longer multi-page computer-generated certified mail record. This certified mail record was offered to establish that the Division’s mailing procedure was followed on November 8, 2004. Exhibit “A” of Ms. Mahon’s October 17, 2005 affidavit fails to show that the procedure articulated by the Division’s affiants was followed. The Division’s affiants describe a procedure which allows each page of the certified mail record to be associated with the other pages, i.e., the pages are connected when they are delivered to the USPS and remain connected when they are returned to the unit which generated the certified mail record (the CARTS Control Unit). Moreover, the number of pieces of mail listed on the certified mail record is totaled at the bottom of the last page and a postal employee either circles or enters the actual number of items received by the USPS. The entries at the end of the certified mail record demonstrate that each item listed on the certified mail record was delivered to the custody of the USPS on the date stamped on the certified mail record. This procedure, as described by the Division’s affiants, seeks to establish that the Division has a method “to ensure the integrity of the certified mail record is maintained from the time that the document is generated, delivered to the Postal Service and returned to the custody of the Division” (*Matter of Greene Valleys Liquors*, Tax Appeals Tribunal, November 25, 1992). However, the truncated certified mail record submitted as exhibit “A” of Ms. Mahon’s October 17, 2005 affidavit does not establish that the articulated procedure was followed in this case.

Page 712, where the address of the taxpayer to whom the statutory notice was allegedly issued appears, cannot be associated with pages 1 or 974 of exhibit “A ” of Ms. Mahon’s

October 17, 2005 affidavit. The handwritten date of 11/18/04 appears on page 1 but that date does not appear on either page 712 or page 974. The three pages of exhibit “A” of Ms. Mahon’s October 17, 2005 affidavit are not physically connected; and the pages are not consecutively numbered. As a result, it cannot be positively determined that pages 1, 712 and 974 are from the same certified mail record. Neither the Division’s attorney nor its affiants explain the reason for submitting abstracts from the original certified mail record or offer a method of associating the various pages of exhibit “A” of Ms. Mahon’s October 17, 2005 affidavit.

Page 712 of exhibit “A” of Ms. Mahon’s October 17, 2005 affidavit, standing alone, is insufficient to show that the items of mail listed on that page were actually delivered to the USPS. Prior cases of the Tax Appeals Tribunal establish that the presence of a USPS postmark on a selected page of a longer certified mail record is not sufficient to prove that an item listed on that page was delivered to the USPS on the postmark date. In *Matter of Roland (supra)*, a USPS postmark appeared on each page of the certified mail record, including the page bearing the subject taxpayer’s name and address; nonetheless, the Division’s proof was found inadequate to prove that the item of mail addressed to Roland was actually delivered to the USPS. Delivery of a particular item listed on the certified mail record is proven when an employee of the USPS acknowledges receipt of the items listed by completing the form as it is designed, i.e., by entering the number of pieces of mail received in the space provided for that entry. A USPS date stamp placed on one or more pages of the certified mail record is not sufficient (*see, Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Cal-Al Burrito Co., supra*; *see also, Matter of Roland, supra*; *Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995).

Finally, on page 974 of the November 8, 2004 CMR, the phrases “TOTAL PIECES AND AMOUNTS” and “TOTAL PIECES RECEIVED AT POST OFFICE” appear. On that page, the number 10,713 is stated to be the number of pieces listed on the CMR. However, the total number of pieces received at the Post Office is blank. Since no one completed the second line or circled the number of pieces listed, there is no proof that the number of items listed and the number of items received were identical.

In summary, the Division’s proof of mailing of a statutory notice to a taxpayer on Shelter Island, New York fails in three ways. First, exhibit “A” of Ms. Mahon’s October 17, 2005 affidavit does not demonstrate that the standard procedure for maintaining the integrity of the certified mail record was followed in this case. Second, exhibit “A” of Ms. Mahon’s October 17, 2005 affidavit does not prove that an item addressed to a taxpayer on Shelter Island, New York was delivered to the USPS on November 8, 2004 because the page listing that taxpayer’s address cannot be associated with the first and last pages of exhibit “A” of Ms. Mahon’s October 17, 2005 affidavit. Third, the November 8, 2004 CMR does not indicate the number of pieces of mail received at the post office (*see, Matter of Cal-Al Burrito Co., supra; Matter of Brager, supra; Matter of Roland, supra*). As a consequence, the Division has not proved mailing of a Notice of Determination to PO Box 788, 23 N Ferry Street, Shelter Island, New York 11964-0788 on November 8, 2004.

U. As noted above, to prove actual mailing, the Division introduced the USPS response, dated March 3, 2005, which indicated that a piece of certified mail bearing certified control number 7104 1002 9730 0404 2161 was delivered by the USPS in Westbury, New York on March 10, 2004. To rebut the presumption of receipt of the Notice of Determination issued to Mr. Ryder, petitioners submitted a PS Form 3811-A completed by the USPS on January 27,

2005 which indicated that an item of certified mail, certified control number 7104 1002 9730 0404 2163, addressed to Gary A. Ryder, 1984 Lilac Dr., Westbury, N. Y. 11590-5923, was delivered by the USPS in Shelter Island, New York on November 14, 2004. The Division also submitted a printout of the result of the team leader's search of the track and confirm feature of the USPS website. It claims that Ms. Cole's search result provides additional support for Mr. Chiboucas's March 3, 2005 response and confirms that a piece of certified mail was delivered by the USPS in Westbury, New York on March 10, 2004. Based on petitioners' rebuttal evidence and the Division's failure to prove either its alleged 2004 policy change concerning the reuse of certified control numbers or its alleged reuse and assignment of certified control number 7104 1002 9730 0404 2163 to a statutory notice issued to PO Box 788, 23 N Ferry Street, Shelter Island, New York 11964-0788, I find that the Division performed its office practices so carelessly that it is unreasonable to assume that the Notice of Determination issued to Gary A. Ryder was mailed (*see, Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97; *see also, Nassau Ins. Co. v. Murray*, 46 NY2d 828, 830, 414 NYS2d 117; *cf. Matter of Ruggerite, Inc. v. State Tax Commn.*, 64 NY2d 688, 485 NYS2d 517). Since the Division failed to prove that a Notice of Determination was issued to Gary A. Ryder, the three-year statute of limitations for assessment of sales and use taxes for the periods December 1, 2000 through February 28, 2001, March 1, 2001 through May 31, 2001 and June 1, 2001 through August 31, 2001 expired, on March 20, 2004, June 20, 2004 and September 20, 2004, respectively, before Mr. Ryder received notice on September 30, 2004 that a Notice of Determination had been issued to him. Therefore, that portion of the Notice of Determination (notice No. L- L-023520971-4) issued to Gary A. Ryder, as responsible officer of Rywin, Inc. must be canceled for the period December 1, 2000 through August 31, 2001.

V. The petitions of Rywin, Inc. and Gary A. Ryder are granted to the extent in Conclusion of Law “U ” and in all other respects are denied. Notice of Determination dated February 9, 2004 (Notice No. L-023517766-8) is sustained; and Notice of Determination dated March 4, 2004 (Notice No. L-023520971-4) is modified in accordance with Conclusion of Law “U ” and in all other respects is sustained.

DATED: Troy, New York
December 21, 2006

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE