

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
of	:	
<b>GULZAR A. KHAN</b>	:	DETERMINATION
<b>AND</b>	:	DTA NOS. 820701
<b>ISHTIAQ KHAN</b>	:	AND 820702
for Revision of Determinations or for Refund of	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 2001	:	
through February 28, 2003.	:	

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Petitioners, Gulzar A. Khan, 38-26 Little Neck Parkway, Little Neck, New York 11363-1428, and Ishtiaq Khan, 80-58 Little Neck Parkway, Floral Park, New York 11004, each filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2001 through February 28, 2003.

A consolidated hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 8, 2006 at 1:00 P.M., with all briefs to be submitted by January 31, 2007, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). Petitioners appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

***ISSUES***

I. Whether the Division of Taxation's audit methodology utilized in arriving at the determination that 7<sup>th</sup> Avenue Service Station, Inc., owed additional sales tax, plus interest and penalties, was proper and should be sustained.

II. Whether petitioners have established any basis warranting reduction or elimination of penalties imposed.

***FINDINGS OF FACT***

1. During the period September 1, 2001 through February 28, 2003, 7<sup>th</sup> Avenue Service Station, Inc. (“the Corporation”), operated a gasoline service station located on Hylan Boulevard, Staten Island, New York. The Corporation sold gasoline, cigarettes and other miscellaneous items, and performed automotive inspection and repair services. Petitioners, Ishtiaq Khan and Gulzar A. Khan, have conceded that they were officers and shareholders of the Corporation and thus were “persons” required to collect and remit taxes on behalf of the Corporation within the contemplation of Tax Law §§ 1131(1) and 1133(a) during the period in issue.

2. By a letter dated May 9, 2003, the Division of Taxation (“Division”) advised the Corporation that a sales tax field audit of its business operations for the period spanning September 1, 2000 through February 28, 2003, would commence on June 4, 2003.<sup>1</sup> This audit appointment letter, and an accompanying Records Requested List, advised the Corporation that all of its books and records pertaining to the audit period, including cash receipts and disbursement journals, general ledgers, sales invoices, purchases invoices, cash register tapes, Federal income tax returns, bank statements, canceled checks and the like should be available for the auditor’s review. The letter also advised the Corporation that additional records and information might be required during the course of the audit.

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<sup>1</sup> The audit period was subsequently shortened to span September 1, 2001 through February 28, 2003 since 145<sup>th</sup> Street Service Station, Inc., a predecessor corporation also owned by the Khans, had operated a gasoline service station at the same location during the period September 1, 2000 through August 31, 2001 and had filed sales tax returns for such period.

3. On or about May 19, 2003, petitioner Ishtiaq Khan contacted the Division's auditor to request a meeting. Mr. Khan and the auditor met thereafter on May 30, 2003, at which time Mr. Khan requested that the audit be cancelled since the Corporation had not been engaged in business for three years, was allegedly doing poorly, and that petitioners had personal problems which would make it difficult to participate in the conduct of the audit. No records were provided at this meeting. The Division's auditor declined to cancel the audit, requested that the Corporation's bank records be provided to him within one week, and also allowed an additional two months for petitioners to gather and present the Corporation's records for review.

4. When the requested bank records were not furnished within one week, as had been agreed, the auditor contacted Mr. Khan by telephone on June 16, 2003. He was advised that petitioners' mother was ill in their home country of Pakistan and that petitioners had forgotten about the records but would provide the same soon. Subsequent telephone contacts on July 18, 2003 and on August 12, 2003, resulted in the same outcome such that neither the bank records nor any other records were produced for the auditor to review.

5. On August 28, 2003, the auditor attempted to contact Mr. Khan by telephone, but learned that the telephone number had been disconnected. The auditor, in turn, mailed a second audit appointment letter and records request to petitioners on September 8, 2003. When no response was received the auditor directed one of the Division's investigators, who had previously conducted a preaudit field visit to the Corporation's premises, to conduct another field visit to the Corporation's premises to gather any available information to conduct the audit. On December 2, 2003, the auditor received the investigator's report, which revealed that the Corporation was closed and that the gasoline station was being operated by a new corporation.

The investigator's report also confirmed that Mr. Khan's telephone number had been disconnected and that no forwarding information was available.

6. In light of the lack of response and availability of records, the Division's auditor determined to utilize available information to conduct the audit. The initial, preaudit report by the Division's investigator revealed that the Corporation made sales of fuel (gasoline), sales of miscellaneous nonfuel items including cigarettes, and sales of motor vehicle repairs. The auditor calculated the Corporation's sales and its sales tax liability on the basis of available information, for each of these three areas of sales.

#### Gasoline Sales

The auditor utilized a combination of information reported by the Corporation on its sales tax returns together with information available from the Oil Pricing Information System ("OPIS"), which maintains a database of the actual price of regular gasoline purchased with credit cards at many gasoline service stations including, specifically, the Corporation.

The Corporation filed sales tax returns for all six of the sales tax quarterly periods covered by the audit, on which it reported the number of gallons of gasoline sold by grade (i.e., regular grade, mid-grade, and super-grade). For all six quarterly periods, the auditor accepted the number of gallons of gasoline sold as reported by the Corporation on its sales tax returns. The auditor obtained the OPIS selling price per gallon for regular grade of gasoline for the Corporation for the last four quarterly periods in issue, to wit, \$1.550 (quarterly period ended 05/31/02), \$1.629 (quarterly period ended 08/31/02), \$1.672 (quarterly period ended 11/30/02) and \$1.716 (quarterly period ended 02/28/03). During the August 8, 2002 preaudit visit to the Corporation's premises, the Division's investigator noted that there was a ten cent per gallon difference between the price of regular gasoline and mid-grade gasoline, and a sixteen cent per

gallon difference between the price of regular gasoline and super-grade gasoline. The auditor added these differences in price to the OPIS price for regular grade gasoline to arrive at the prices for the three different grades of gasoline. OPIS prices were not available for the first two quarterly periods of the audit, and the auditor calculated audited gasoline sales for such periods by using an error rate computed by comparing reported gasoline sales to audited gasoline sales for the quarterly period ended May 31, 2002.

To compute audited gasoline sales for the quarterly periods spanning March 1, 2002 through February 28, 2003, the auditor multiplied gallons sold by the audited price per gallon. To compute audited gasoline sales for the first two quarterly periods, the auditor compared reported gasoline sales for the quarterly period ended May 31, 2002 (\$2,191,421.00) with audited taxable gasoline sales for the same quarterly period (\$2,838,965.10), resulting in an error rate of 29.49%. This error rate was then applied to the reported gasoline sales for each of the first two quarterly periods in issue.

By the foregoing method, the auditor calculated additional tax due on gasoline sales in the amount of \$368,220.16 for the audit period. The auditor did not allow any credit for claimed prepaid sales tax on gasoline purchases because the Corporation did not provide any records to substantiate such credit.

#### Nonfuel Sales

Cigarette Sales: The auditor divided the amount of claimed prepaid sales tax on cigarettes, as reported on the Corporation's sales tax returns, by the prepaid tax rate to determine the number of packs of cigarettes sold. He then multiplied the number of packs of cigarettes sold (1,330) by an estimated selling price of \$5.00 per pack, based upon his and the Division's prior audit experience, to determine total cigarette sales of \$6,650.00. As with gasoline sales, no

credit was allowed for prepaid cigarette tax because the Corporation provided no records to substantiate the credits claimed.

Automotive Repair Sales: The auditor relied upon information gathered by the Division's investigator, who reported that the Corporation's premises included two repair bays and that there were sufficient employees present to operate both bays on a full-time basis. Based on prior Division audit experience, the auditor estimated that each bay generated sales in the amount of \$130.00 per hour, comprised of a labor rate of \$65.00 per hour and a combined parts cost and profit amount of \$65.00 per hour. Thus, total hourly sales of \$260.00 were multiplied by eight hours of operation per day and, in turn, by six days of operation per week when the repair shop was open. Quarterly repair sales were calculated by multiplying weekly repair sales by the thirteen weeks per quarterly period. By this method, total audited repair sales for the audit period was computed to be \$648,960.00.

The auditor compared cigarette sales (\$6,650.00) and automotive repair sales (\$648,960.00), totaling together \$655,610.00, to reported nonfuel sales of \$42,770.00, resulting in an error rate of 1,432.87%. Applying this error rate to reported nonfuel sales for each of the quarterly periods resulted in audited sales tax due on nonfuel sales in the amount of \$88,088.34.

7. Audited sales tax due on gasoline sales (\$368,220.16) and on nonfuel sales (\$88,088.34) totaled \$456,308.50. After allowing credit for sales tax reported with its returns, the auditor calculated that the Corporation owed additional sales tax in the amount of \$423,541.10, plus interest and penalties (including the additional penalty pursuant to Tax Law § 1145[a][1][vi] imposed where a taxpayer omits from its returns an amount in excess of 25% of the amount of tax required to be shown thereon).

8. On February 12, 2004, based upon the foregoing audit results, the Division issued identical notices of determination to Ishtiaq Khan and to Gulzar Khan assessing sales tax due for the period September 1, 2001 through February 28, 2003 in the amount of \$423,541.10, plus interest and penalties (including the penalty per Tax Law § 1145[a][1][vi]) against each as a person responsible to collect and remit sales tax due on behalf of the Corporation.<sup>2</sup>

9. Petitioners protested the notices of determination by filing requests for conciliation conferences with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). Petitioners provided no records of the Corporation's business activities at their BCMS conference, but were allowed an additional two weeks, post-conference, to supply records to the Division's auditor. On January 7, 2005 and January 11, 2005, petitioners provided some gasoline purchase invoices, some shift printouts, and some records of automotive inspections performed by the repair shop.

10. The shift printouts provided were not explained with any specificity by petitioners, nor did the printouts show any sales prices per gallon of gasoline. Review of the shift printouts provided reflects, *inter alia*, fuel purchase information including "hose volumes" (in gallons and dollars) dispensed into the Corporation's tanks, tank delivery volumes and temperature information, tank reconciliations (beginning inventory plus deliveries less gallons dispensed to arrive at ending inventory), low tank alarm histories, and gross sales information (broken into cash sales and credit card sales). The shift printouts also show dollar sales of "other merchandise," i.e., nonfuel sales. Shift printouts were missing for the months of December 2001, February 2002, March 2002 and August 2002.

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<sup>2</sup> It appears that a Notice of Determination was also issued against the Corporation. The record does not disclose whether the Corporation, in turn, protested the same.

11. While the records furnished were not complete records for the entire audit period, and did not suffice to allow the conduct of a detailed audit, the auditor nonetheless concluded that the records supplied did support a reduction of the assessment originally issued. In this regard, the purchase invoices supported the claim that credit should be allowed for prepaid sales tax with respect to gasoline and cigarette purchases. The auditor also accepted that the amount of tax assessed on automotive repair sales should be adjusted based on the Corporation's performance of nontaxable automobile inspections. The auditor utilized the additional information supplied by petitioners as follows:

#### Gasoline Sales

\_\_\_\_\_ While all gasoline purchase invoices for the entire audit period were not submitted, the auditor nonetheless concluded that since such purchases were made from an "established distributor" (Amoco) the same, in combination with the gasoline volume information from the shift printouts, were sufficient to accept as substantiated and allow a reduction for the amount of credit for prepaid sales tax on gasoline purchases as was reported on the Corporation's sales tax returns.<sup>3</sup> On this basis, the auditor reduced sales tax due on gasoline sales by some \$256,765.83 in prepaid sales tax, thus arriving at \$121,668.97 in net additional sales tax due on gasoline sales.

#### Repair Sales and Other Nonfuel Sales

Motor vehicle inspection slips were provided for the quarterly period ended November 30, 2002 showing that 149 vehicle inspections had been performed resulting in nontaxable receipts in the amount of \$5,140.00. Accordingly, the auditor reduced the dollar amount of repair sales per quarterly period, as calculated on audit (\$162,240.00) by such nontaxable amount to arrive at

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<sup>3</sup> Complete purchase invoices were provided only for the month of September 2002 with some, but not all, purchase invoices provided for the balance of some of the other months within the audit period.

quarterly audited repair sales of \$157,500.00. The auditor utilized the shift printouts for the same period to arrive at quarterly nonfuel sales (other than repair sales) of \$21,073.98, and thereafter calculated total nonfuel sales (i.e., audited repair sales plus audited other nonfuel sales) of \$178,173.98.<sup>4</sup> Comparing audited total nonfuel sales (\$178,173.98) to reported taxable nonfuel sales (\$11,564.00) resulted in an error rate of 1,440.7643 percent. Applying this error rate to reported nonfuel taxable sales (\$69,656.00) for the audit period resulted in audited nonfuel taxable sales of \$1,073,234.78, with sales tax due thereon in the amount of \$88,541.87.

12. The auditor's review resulted in a recomputation such that the amount of sales tax due totaled \$210,210.84 (consisting of \$121,668.00 on gasoline sales plus \$88,541.87 due on nonfuel sales). This amount was reduced by \$32,767.40 of sales tax paid with returns, to arrive at net sales tax due in the amount of \$177,443.44, plus interest and penalties (including the penalty imposed pursuant to Tax Law § 1145[a][1][vi]). The recomputed amount due was reflected in a Conciliation Order issued to petitioners by BCMS on April 22, 2005.

### ***SUMMARY OF THE PARTIES' POSITIONS***

13. At hearing, petitioners sought adjustments to the amount of tax assessed, as reduced and remaining at issue, as well as cancellation of the penalties imposed. More specifically, petitioners seek to reduce the amount of tax due on gasoline sales by \$27,759.20, that is, from \$121,668.97 to \$93,909.77. Petitioners utilized the same information and amounts utilized by the auditor in his calculations including, specifically, gallons sold and prepaid sales tax amounts. Petitioners' calculation differs from the Division's method only by its application of lower prices per gallon for each grade of gasoline sold than was used by the auditor, thus resulting in a lower

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<sup>4</sup> The auditor eliminated the sales tax amount included in nonfuel sales (other than repair sales) as set forth in the shift printouts in arriving at quarterly nonfuel sales of \$21,073.98.

total amount of taxable gasoline sales and a lesser amount of sales tax due thereon. Petitioners calculated the selling prices for each grade of gasoline based on handwritten looseleaf notebook sheets listing daily selling prices for each grade of gasoline sold. These sheets were allegedly prepared by Ishtiaq Khan or, in his absence, by his cashier at the station, and were allegedly completed on a daily basis. Petitioners' method utilized these lower daily selling prices to arrive at a monthly average selling price per gallon for each grade of gasoline, which was then applied to the number of gallons of each grade of gasoline sold. No notebook pages were provided for the months of December 2001, February 2002, March 2002 and August 2002. It is noteworthy that the notebook pages reflect prices on both sides of each sheet, but that the front and back sides of each do not follow in a monthly sequential manner.<sup>5</sup> No explanation or reason was offered with regard to this manner of nonsequential recording of prices. Finally, petitioners would seek to reduce the amount of sales tax due on gasoline sales by the amount of sales tax paid with the Corporation's sales tax returns (\$32,767.40), so as to arrive at additional sales tax due in the amount of \$61,142.37.<sup>6</sup>

14. The second reduction sought by petitioners concerns repair sales and is premised upon the assertion that the Division's estimates of the scope and extent of the repairs performed and the amount of time the repair bays were operated were excessive. Petitioners maintain that only one employee worked in the repair shop and that no major repairs were performed. To support

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<sup>5</sup> Thus, for instance, the front side of one sheet lists prices for the month of September 2001, while the reverse side of the same sheet does not follow with prices for October 2001 as might be expected but rather lists prices for the month of January 2001. In this manner, the front and back of the balance of each of the notebook sheets reflect the following months: September 2001 with January 2003, December 2002 with February 2003, April 2002 with June 2002, May 2002 with October 2002, October 2001 with July 2002, and November 2001 with November 2002.

<sup>6</sup> Petitioners apparently overlook the fact that credit has already been afforded for sales tax paid with the Corporation's returns (\$32,767.40) in both the auditor's initial calculations and in his revised calculations (*see*, Findings of Fact "7" and "12").

this contention, petitioners submitted some parts and supplies purchases for the six-month period spanning September 2001 through February 2002, showing parts and supplies purchases in the aggregate amount of \$17,777.32 for this period. Presumably, petitioners' argument is that such a small amount of parts and supplies purchases is entirely insufficient to support the estimated repair sales volume determined by the Division's auditor, and petitioners allege that the Corporation's repair sales (\$69,656.00) and sales tax liability thereon (\$5,746.62) were correctly reported on the Corporation's sales tax returns and should be accepted as such. Petitioners alleged that the balance of repair parts purchase invoices, as well as all of the corporation's repair sales invoices and its inspection sales records (other than those submitted for the quarterly period ended November 2002 as described above) were lost or destroyed during the course of renovations at the station.

15. Petitioners also claim that the Corporation's license to sell cigarettes was revoked as the result of having made sales of cigarettes to underage purchasers at some point shortly after the beginning of the audit period, and that any credits claimed for prepaid tax on cigarettes were taken in error on the Corporation's sales tax returns. Petitioners could not recall the date of the alleged revocation, but maintain that the assessment should be reduced to the extent cigarette sales are included therein. In contrast, the record includes a copy of an application for a retail license to sell cigarettes (Form DTF-716), dated August 18, 2000, and a copy of an application to renew such a license (Form DTF-719) for the period January 1, 2003 through December 31, 2003 together with a renewal payment check dated September 20, 2002.

16. Petitioners challenge the assertion of penalties in this matter, noting that at the time the sales tax audit notice was received their parents were hospitalized in very serious condition in Pakistan. Petitioners made trips to Pakistan to be with their parents over the ensuing months,

during which period petitioners' father passed away. Petitioners returned to Pakistan again thereafter in order to settle family matters. Petitioners also note that during the subject time frame, Amoco (the Corporation's gasoline supplier) merged with B.P. and a resulting major renovation was undertaken at the premises, allegedly resulting in the loss or destruction of many of the Corporation's business records including, specifically, repair shop records.

17. Petitioners owned a service station which operated at the same location immediately prior to the period at issue herein. Petitioners have also been involved with or owned at least three other corporations which operated other gasoline service stations in New York City. The Division provided the reports of its investigator, who visited the Corporation's premises on August 8, 2002 and November 30, 2003. The investigator's reports describe a "busy service station with a two bay repair shop" and four employees working at the premises.

### ***CONCLUSIONS OF LAW***

A. The standard for reviewing a sales tax audit where indirect audit methodologies were employed in the determination of sales tax liability is well established, and was set forth in ***Matter of AGDN, Inc.*** (Tax Appeals Tribunal, February 6, 1997), as follows:

a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (*see*, Tax Law §§ 1138[a]; 1135; 1142[5]; *see, e.g., Matter of Mera Delicatessen*, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained 'shall include a true copy of each sales slip, invoice, receipt, statement or memorandum' (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, 'the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ' (Tax Law § 1138[a]; *see, Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (***Matter of Grant Co. v.***

*Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869); exactness is not required (*Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451).

B. In this case, the record establishes the Division's clear and unequivocal written requests for books and records of the Corporation's sales, as well as the Corporation's repeated failures to produce such books and records for the Division's review or to communicate with the Division's auditor. In turn, the auditor reasonably concluded that the Corporation did not maintain or have available books and records that were sufficient to verify its gross and taxable sales for the audit period. Having established the unavailability of the Corporation's books and records, the Division was clearly entitled to resort to the use of indirect methods to determine the Corporation's fuel sales and, further, to resort to estimates based on audit experience to determine sales of cigarettes and of vehicle repair services. In fact, the Division's authority to do so has been consistently sustained (*see, Matter of Del's Mini Deli, Inc. v. Commissioner of Taxation and Finance*, 205 AD2d 989, 613 NYS2d 967; *Matter of Sarantopoulos v. Tax Appeals Tribunal*, 186 AD2d 878, 589 NYS2d 102; *Matter of Marte*, Tax Appeals Tribunal, August 5, 2004), including resort to the use of estimates based on experience gained from audits of similar businesses (*Matter of Oak Beach Inn Corp. v. Wexler*, 158 AD2d 785, 551 NYS2d 375). Hence, the only issue is whether petitioners have established that the amount of tax assessed as the result of the application of the methods used in this case was erroneous.

C. Petitioners, in essence, appear to take issue with the Division's audit result because it is imprecise or, more to the point, results in a large tax liability. As a general proposition, any

imprecision in the results of an audit arising by reason of a taxpayer's own failure to keep and maintain records of all of his sales as required by Tax Law § 1135(a)(1) must be borne by that taxpayer (*Matter of Markowitz v. Sate Tax Commission, supra., Matter of Meyer, supra.*). In this instance, petitioners specifically complain that the selling price per gallon of gasoline, as used by the auditor, was too high, and that the estimated volume and nature of repair sales was likewise too high. As to fuel sales, the main difference between the parties' positions stems from petitioners' request for the use of a significantly lower per gallon selling price, based on a series of notebook pages allegedly listing actual daily selling prices for each grade of gasoline. It is undoubtedly possible that fuel prices may have been, at times, different from those used by the auditor in his calculations. At the same time, it remains that the OPIS price per gallon for regular gasoline was the actual price per gallon charged by this station, and that the differentials between the OPIS per gallon price for regular gasoline and for mid-grade and premium gasoline employed by the auditor were based on the actual pump price differentials as observed at the Corporation's premises. In contrast, the nature of the notebook listings, including the unexplained fact that the same do not follow sequentially from month to month, as well as the fact that not all months are provided, calls into question the accuracy and veracity of this source of information regarding pump prices and undermines its evidentiary value. Moreover, the method proposed by petitioners for pricing itself involves resort to averaging on a monthly basis. In short, petitioners' evidence and their proposed method of calculation falls far short of that necessary to support petitioners' claim and override the results of the audit as based on the Corporation's own reported sales volume amounts, per sales tax returns filed, coupled with observed selling prices and differentials.

D. Similarly, petitioners' assertion that the Division's estimated repair sales were too high is simply unsubstantiated. The submission of receipts for repair parts purchased over a period of six months provides no means of ascertaining whether the same were the only parts purchased. Ultimately, petitioners' failure to maintain or provide any verifiable records of repair sales leaves no basis for changing the Division's audit results, save for the reduction afforded, post-BCMS conference, based upon the submission of the nontaxable inspection reports. Finally, petitioners' claim that the Corporation lost its license to sell cigarettes shortly after the beginning of the audit period is inconsistent with and belied by the claim for credit for prepaid tax on cigarettes as reflected on the Corporation's sales tax returns as well as by the submission of an application to "renew" such a license (*see*, Paragraph "15").

E. Petitioners have not provided evidence which would support reduction or abatement of the penalties imposed, and the same are, therefore, sustained. In establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained that "[b]y first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]" (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992). Here, the Corporation neither maintained nor produced records as required. It is also highly significant that even if petitioners' own (best case) recalculation of liability were to be accepted, the same still results in a substantial underreporting of sales and underpayment of sales tax due (*see*, Paragraph "13").

F. Petitioners, Ishtiaq Khan and Gulzar Khan, have admitted that they were owners of the Corporation, were responsible for the sales tax collection, reporting and payment obligations of

the Corporation at all times, and have neither challenged nor provided any evidence or argument to refute the Division's assessments against them in this regard. Accordingly, they were properly held responsible for the liability, including penalties and interest, assessed against Corporation (Tax Law §§ 1131[1], 1133[a]; ***Lorenz v. Division of Taxation***, 212 AD2d 992, 623 NYS2d 455, *affd* 87 NY2d 1004, 642 NYS2d 621).

G. The petitions of Ishtiaq Khan and Gulzar Khan are hereby denied and the notices of determination dated February 12, 2004, as recomputed and reduced in accordance with the Conciliation Order dated April 22, 2005, together with interest and penalties, are sustained.

DATED: Troy, New York  
July 19, 2007

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE