

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>WHAT A DIFFERENCE CLEANING, INC.</b>	:	<b>DETERMINATION</b>
		<b>DTA NO. 820745</b>
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
period September 1, 1997 through August 31, 2003.	:	

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Petitioner, What A Difference Cleaning, Inc., 7471 Moonvalley Drive, Liverpool, New York 13088, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1998 through August 31, 2003.<sup>1</sup>

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 13, 2006 at 10:30 A.M., with all briefs to be submitted by November 3, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared by Bertrand, Arno, Welch & Putzer (Daniel J. Arno, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Osborne K. Jack, Esq., of counsel).

***ISSUES***

I. Whether the Division of Taxation properly determined additional sales and use taxes due from What A Difference Cleaning, Inc.

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<sup>1</sup> The notices of determination at issue in this proceeding cover the period September 1, 1997 through August 31, 2003. In the caption of its petition, petitioner incorrectly identified the period for which it is seeking review as June 1, 1998 through August 31, 2003.

II. Whether the Division of Taxation has established that petitioner was properly subject to the imposition of fraud penalties on a Notice of Determination dated September 30, 2004.

III. Whether petitioner has established facts or circumstances warranting the reduction or abatement of penalties imposed.

### ***FINDINGS OF FACT***

1. Petitioner, What A Difference Cleaning, Inc. (hereafter “petitioner” or “What A Difference”) was incorporated on or about September 17, 1991. The corporation, doing business as Personal Touch Cleaning Services, was registered as a sales tax vendor by the Division of Taxation (“Division”) on November 27, 1991. Since its incorporation, Tom Glamcevski has been an officer and shareholder of What A Difference.

2. During the period September 1, 1997 through August 31, 2003, What A Difference provided cleaning and maintenance services, including, but not limited to, carpet and upholstery cleaning, floor and window cleaning, and housekeeping and janitorial services, to residential and commercial customers located in Onondaga County, New York.

3. On or about August 1, 2003, the Division assigned an auditor, Shannon Colonnese, to conduct a sales and use tax field audit of What A Difference for the period September 1, 1997 through May 31, 2003. Petitioner was selected for audit because an audit of an unrelated corporation, Tactair Fluid Controls (“Tactair”), indicated that What A Difference collected sales tax on housekeeping services provided to that corporation, and a routine check of What A Difference’s filing status indicated that it was not filing sales tax returns.

4. An appointment letter dated August 5, 2003 and setting an appointment for September 10, 2003 was sent by Ms. Colonnese to What A Difference. 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 Sales Journal if applicable)
- Cash Disbursement Journal for the 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.

5. A review of the Tax Field Audit Record ("audit log") indicates that, after receiving the appointment letter, Mr. Glamcevski contacted the auditor by telephone on August 18, 2003 and requested the audit appointment be rescheduled for September 17, 2003 at the Division's Syracuse District Office. Further review of the audit log entry for that date indicates that during his telephone conversation with the auditor, Mr. Galmcevski explained that the corporation does not issue invoices and nothing is computerized. In the same audit log entry, the auditor noted that the Division had copies of computerized invoices issued by the corporation from another audit.

6. On August 19, 2003, Mr. Galmcevski contacted the auditor by telephone to confirm the audit appointment for September 17, 2003. During that telephone conversation, Mr. Glamcevski

explained that petitioner had been collecting sales tax on one account for the past three years and not remitting it to the Division. He also asked what petitioner should do about the nonremitted sales tax. During the same telephone conversation, the auditor told Mr. Galmceviski that the Division would pick up the nonremitted sales tax as part of the audit. The audit log entry for that date does not identify the specific customer from whom petitioner collected tax or the amount of tax collected and not remitted to the Division.

7. On September 17, 2003, Mr. Galmceviski and his accountant, Walter Nendza, met with the auditor and a team leader, Richard Ayoub. During this meeting, Mr. Glamceviski explained that the corporation's bank deposits equaled its gross sales for Federal income tax purposes. He also explained that tax was included in the net sales amount listed on several invoices. At this meeting, Mr. Glamceviski provided the following records: What A Difference's Federal income tax returns (forms 1120) for the period August 1, 1997 through July 31, 2002, i.e., the fiscal years ending July 31, 1998, July 31, 1999, July 31, 2000, July 31, 2001 and July 31, 2002; What A Difference's bank statements for the months of September 1997 through July 2003; some job work orders issued under the trade name Personal Touch Cleaning Services by petitioner to its customers, bearing dates within the months of September 1997 through July 2003; and selected expense purchase invoices for the years 2001 and 2002. However, Mr. Glamceviski did not provide, among other things, the corporation's general ledger, an asset depreciation schedule or any backup for items being depreciated on the corporation's Federal income tax returns for the period September 1, 1997 through May 31, 2003. The auditor retained the records for further review and the team leader gave Mr. Glamceviski a receipt for the records. At this meeting, the auditor gave Mr. Glamceviski a sales tax registration kit because he stated that petitioner never registered to collect sales tax.

8. During the September 17, 2003 meeting, the Division extended the audit period to September 1, 1997 through August 31, 2003 and orally requested, among other things, petitioner's records, including job work orders, for the period June 1, 2003 through August 31, 2003. Mr. Glamcevski agreed to provide the corporation's records for the updated audit period at this meeting.

9. Immediately after the September 17, 2003 meeting, the auditor began reviewing the records provided. Using the corporation's bank statements and Federal income tax returns, the auditor prepared a spreadsheet to compare deposits reported on the bank statements to the gross sales reported on the Federal income tax returns. The auditor found the total deposits for the period September 1, 1997 through July 31, 2002 to be only \$1,207.09 greater than the gross sales reported on the corporation's Federal income tax returns for the period August 1, 1997 through July 31, 2002.<sup>2</sup> Her initial review of the job work orders and invoices ("sales invoices") indicated that petitioner billed sales tax on some sales, but did not remit the collected tax, and did not charge sales tax on some taxable sales. The auditor found that the dated and legible sales invoices were filed in date order. She also found that the prenumbered sales invoices were issued to every customer. The auditor prepared a spread sheet summarizing all sales invoices provided to date. She also reviewed and summarized the expense purchase invoices provided to date.

10. On September 19, 2003, during a telephone conversation with Mr. Glamcevsi, the auditor requested the job work orders for the period September 1, 1997 through August 31, 2003. During this same conversation, Mr. Glamcevski stated that he would bring the job work orders

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<sup>2</sup> In her comparison of bank deposits to gross sales reported on the corporation's Federal income tax returns, the auditor made an adjustment for the missing August 1997 bank deposits because that month was prior to the beginning of the audit period.

for the period June 1, 2003 through August 31, 2003 and the equipment purchase invoices for the period September 1, 1997 through August 31, 2003 to the District Office the following week.

He further stated that he did not think he had any additional job work orders for the audit period, but he would look. Mr. Glamcevski also explained that any job work order that did not have sale information on it was merely an estimate to provide services, which the customer had not accepted. He further explained that there were two different kinds of invoices because the corporation's supplier sent a different kind once.

11. On October 1, 2003, Mr. Glamcevski dropped off some job work orders for the period June 1, 2003 through August 31, 2003. Review of the audit log entry for that date indicates that Mr. Glamcevski informed the auditor that she had the asset invoices because they were included with the expense purchase invoices previously provided.

12. On October 6, 2003, the auditor left a message for Mr. Glamcevski concerning missing job work orders. On October 8, 2003, during a telephone conversation with the auditor, Mr. Glamcevski requested the return of his job work orders as soon as possible. The audit log entry for that date indicates that the auditor again asked Mr. Glamcevski if he had provided all of the corporation's job work orders for the period September 1, 1997 through August 31, 2003. Mr. Glamcevski responded that if any invoices were missing, it was because they were estimates for services to be provided that were cancelled and the paperwork was thrown away. During this same telephone conversation, Mr. Glamcevski also stated that the corporation's bank deposits were composed entirely of sales. Later that same day, the auditor left a message for Mr. Glamcevski regarding items depreciated on the corporation's Federal income tax returns.

13. During an October 14, 2003 telephone conversation with Mr. Glamcevski, the auditor asked for a listing of assets for each fiscal year that the corporation depreciated equipment on its

Federal income tax returns. The audit log entry for that date indicates that Mr. Glamcevski responded that he would check with his accountant. On or about October 14, 2003, Mr. Glamcevski picked up What A Difference's documents at the District Office.

14. The auditor reviewed all records provided by the corporation and determined that the records were inadequate for the performance of a detailed audit. Specifically, What A Difference did not provide all of its sales invoices for the audit period, nor did it provide depreciation schedules for assets acquired during the audit period. Additionally, What A Difference did not provide any general ledger for the audit period.

15. The auditor reviewed the Federal income tax returns, bank statements and the sales invoices provided by the corporation. A reconciliation performed by the auditor indicated that total bank deposits for the audit period exceeded the total amount of sales reported on the job work orders and invoices, i.e., sales invoices, provided for the audit period by \$233,281.37.

16. The auditor sent a letter dated October 29, 2003 to Mr. Glamcevski requesting an explanation of the \$233,281.37 discrepancy between total bank deposits for the audit period and the total amount of sales reported on the job work orders and invoices provided by the corporation. In the same letter, the auditor also requested the corporation's records for the period September 1, 1997 through August 31, 2003. A spreadsheet analysis of the discrepancy accompanied this letter.

17. By letter dated November 10, 2003, Mr. Glamcevski and his accountant, Mr. Nendza, responded to the auditor's October 29, 2003 letter regarding the corporation's sales tax audit and the missing work orders. In their letter, Messrs. Glamcevski and Nendza wrote:

Work orders were never used to account for the profit and loss of the corporation. Since all receipts of the corporation are deposited intact, the total income was computed from bank deposits and total expenses from checks written. Therefore,

work orders were never considered a critical part of the accounting and many were misplaced or lost.

To arbitrarily assume the missing work orders to be totally taxable would be highly unjust. Since the corporation [sic] contracts are fairly consistent from year to year, the total taxable to non-taxable ratio would remain the same. At best, the taxable portion of the missing work orders would be approximately the same ratio as the work orders you examined.

The purpose of an audit is to arrive at a fair and just tax which we are will [sic] to pay. To call the missing work orders totally taxable would be unfair and unjust.

The search for the missing work orders has been exhausted and no additional orders have been located.

18. On or about November 12, 2003, Mr. Galmcevski faxed to the Division a copy of an exempt organization certificate for the Liverpool Fire Department, Inc., as well as information pertaining to the amounts paid by the Liverpool Fire Department to the corporation for cleaning services rendered from May 2000 through November 5, 2003. Notations in the audit log indicate that the auditor removed sales to this customer from work papers detailing taxable sales because the sales were to a tax exempt organization. Subsequently, on or about January 12, 2004, the auditor mailed to Mr. Galmcevski work papers detailing her audit findings of taxable sales transactions, taxable expense purchases and taxable purchases of fixed assets for the period September 1, 1997 through August 31, 2003 and requested that he respond to these work papers by February 9, 2004.

19. On or about January 26, 2004, Mr. Glamcevski provided additional job work orders to the auditor who subsequently reviewed and summarized them in her work papers. Her review of the additional job work orders revealed that total bank deposits for the audit period exceeded the total amount of sales reported on the job work orders and invoices provided by the corporation for the audit period by \$152,176.32. The auditor then reviewed the summary of taxable sales and removed all sales made to exempt organizations during the period September 1, 1997

through August 31, 2003. She also reviewed the summary of taxable expense purchases made by the corporation during the audit period and removed the use tax that she had computed on the corporation's purchases of Scotch guard because it remains with the customer. On February 20, 2004, the auditor mailed to Mr. Glamcevski updated work papers detailing her audit findings of tax due on sales, expense purchases and fixed asset purchases made by the corporation during the period September 1, 1997 through August 31, 2003 and requested that he provide backup information for any transaction which he believed should be adjusted.

20. On or about March 5, 2004, What A Difference appointed Philip E. Pellizzari, CPA, to act as its representative with respect to the audit. On March 23, 2004, the auditor met with Messrs. Pellizzari and Glamcevski at Mr. Pellizzari's office. At this meeting, the auditor and Messrs. Pellizzari and Glamcevski discussed the audit findings set forth in the updated work papers. At the conclusion of this meeting, Messrs. Glamcevski and Pellizzari requested and received additional time to submit further documentation.

21. Petitioner did not submit any additional documentation regarding sales, expense purchases or fixed asset purchases that it made during the period September 1, 1997 through August 31, 2003. However, its representative sent a letter dated March 23, 2004 to the auditor requesting that penalties be waived and minimum interest be imposed on the ultimate tax liability determined to be due. In his letter, petitioner's representative asserted that any underpayment of sales tax by the corporation was not the result of negligence or intentional disregard of the Tax Law. Rather, the representative contended that Mr. Glamcevski, the corporation's owner, relied upon his outside accountant to prepare all tax returns and keep him informed of all filing requirements. The representative also claimed that Mr. Galmcevski was now aware of his responsibilities regarding collecting and remitting sales tax and filing timely

sales tax returns. He further asserted that Mr. Glamcevski now maintained appropriate record keeping to be in compliance with the Tax Law.

22. On June 8, 2004, the auditor and her team leader, Thomas Afhammer, met with Messrs. Pellizzari and Glamcevski for a further discussion of the updated work paper analysis of taxable transactions, i.e., sales, expense purchases and fixed asset purchases, made by the corporation during the period September 1, 1997 through August 31, 2003. During this meeting, Messrs. Pellizzari and Glamcevski explained that the corporation only purchased supplies and assets from three vendors, and items subject to depreciation on the corporation's Federal income tax returns would have been listed in the expense purchase invoices previously supplied to the auditor. At that meeting, the auditor agreed to remove capital items because any purchase that was not taxed would have been picked up under expense purchases. During the same meeting, in response to Mr. Pellizzari's request, the auditor also agreed to apply a 53 percent taxable ratio to the bank deposit discrepancy.

23. Subsequent to the June 8, 2004 meeting, petitioner's representative sent a letter dated June 11, 2004 to the auditor's team leader requesting that no penalties be assessed and the application of simple interest on any tax determined to be due on out-of-state purchases, unidentified bank deposits and taxable sales (job work orders) on which the corporation failed to charge sales tax. In support of this request, petitioner's representative asserted that Mr. Glamcevski relied totally on his accountant, Mr. Nendza, for advice and counsel in relation to income tax and sales tax matters.

24. Although a number of written and oral requests were made for all of the corporation's books and records pertaining to its sales and use tax liability for the audit period, the corporation presented bank statements, Federal income tax returns for the period August 1, 1997 through

July 31, 2002, some sales invoices, some tax exemption certificates and some expense purchase invoices. The corporation did not provide any general ledgers, sales journals, cash disbursement journals, fixed asset purchase invoices, depreciation schedules, any resale certificates, or any capital improvement certificates for the audit period. After reviewing the documents received during the audit, the auditor broke the audit into four areas and concluded that additional sales or use tax was due in each area.

25. The first area of the audit was the auditor's determination of additional tax due on bank deposits. After reviewing the sales records provided, the auditor determined they were inadequate. After comparing total bank deposits for the audit period to the total amount of sales reported on the job work orders and invoices (sales invoices) for the audit period provided by the corporation, the auditor determined that total bank deposits exceeded the total amount of sales reported on the sales invoices by \$152,176.32. During the audit, Mr. Glamcevski informed the auditor that all monies deposited into the corporation's bank account were from the corporation's sales. Since no explanation was provided for the difference between the total amount of bank deposits for the audit period and the total amount of sales reported on the sales invoices provided for the audit period, the auditor concluded that the entire difference, \$152,176.32, was additional sales for the audit period. The auditor then determined a taxable ratio of 53 percent by dividing taxable sales per the records provided and reviewed, \$328,745.00, by gross sales per records provided and reviewed, \$615,703.00. Thereafter, the auditor applied the taxable ratio of 53 percent to the additional sales, i.e., the excess bank deposits of \$152,176.32, and determined additional taxable sales to be \$80,653.44 and additional sales tax due in the amount of \$5,647.35 for the period September 1, 1997 through August 31, 2003.

26. As part of the second and third areas of the audit, the auditor reviewed and summarized all job work orders and invoices provided by the corporation for the audit period. The auditor found that the sales invoices were filed in date order. She also found that every customer was issued a prenumbered sales invoice, which was dated and legible. Based upon her review of the sales invoices provided, the auditor determined that the corporation had failed to provide approximately 71 percent of the sales invoices for the audit period.

27. The second area of the audit was the auditor's determination of the amount of sales tax collected by petitioner during the audit period, which it did not remit to the Division. Shortly after the commencement of the audit and prior to her review of the corporation's books and records for the audit period, Mr. Glamcevski informed the auditor that the corporation had collected sales tax from one of its customers for the prior three years and failed to remit the collected tax to the Division. During the September 17, 2003 opening meeting with Mr. Glamcevski and his accountant, Mr. Glamcevski also informed the auditor that tax was included in the net sales amount on several invoices. The auditor's review of the job work orders and invoices provided by the corporation revealed that sales tax was separately stated on the majority of invoices on which sales tax was collected. However, in some instances, she found that the sales invoices contained either the statement "tax included," or calculations indicating that sales tax was included in the net invoice amount. Based upon her review of the job work orders and invoices provided, the auditor determined that petitioner collected a total of \$18,781.73 in sales tax on \$268,310.42 in sales made by it during the period September 1, 1997 through August 31, 2003, which it failed to remit to the Division. The auditor also determined that these sales taxes were collected by petitioner on both taxable and nontaxable sales during the audit period.

28. The third area of the audit was the auditor's determination of the additional sales tax due, but not collected, on taxable sales made by the corporation during the period September 1, 1997 through August 31, 2003. Based upon her review of the job work orders and invoices provided by the corporation, the auditor found that the corporation rendered taxable services such as floor cleaning and waxing, window washing, general maintenance, janitorial services, bathroom cleaning and dusting during the audit period, but failed to charge sales tax. She determined that additional sales tax in the amount of \$4,211.19 was due on \$60,164.14 in additional taxable sales made by the corporation during the period September 1, 1997 through August 31, 2003. The auditor did not include the corporation's sales of carpet and upholstery cleaning services in her determination of the corporation's additional taxable sales for the audit period.

29. The last area of the audit was the auditor's determination of the use tax due on the corporation's purchases of supplies from an out-of-state vendor during the period September 1, 1997 through August 31, 2003. During the audit, petitioner provided expense purchase invoices from one supplier, Jon-Don, for the period September 1, 1997 through August 31, 2003. Although the auditor requested asset records for the audit period, the corporation failed to provide any asset purchase invoices and asset depreciation schedules. During the audit, Mr. Glamcevski claimed that asset purchase invoices were filed with the expense purchase invoices provided to the auditor. The auditor reviewed all expense purchase invoices provided and found that petitioner purchased supplies from Jon-Don, an out-of-state vendor, who did not charge sales tax on its invoices. She considered cleaning supplies that remained with petitioner's customers to be purchases for resale and she did not assess tax on those purchases. The auditor determined that petitioner's additional taxable expense purchases totaled \$37,876.00, and

additional use tax due on these purchases totaled \$2,651.34 for the period September 1, 1997 through August 31, 2003.

30. As a result of the audit, the auditor found the corporation's gross sales to be \$767,879.32 and determined total taxable sales to be \$409,128.00, with additional sales tax due of \$28,640.57 for the period September 1, 1997 through August 31, 2003. She also determined the corporation's additional taxable expense purchases to be \$37,876.00, with additional use tax due of \$2,651.34 for the period September 1, 1997 through August 31, 2003.

31. During the audit, the auditor searched the Division's computer database for information concerning the corporation's status as a sales tax vendor and the filing of any sales tax returns. The Division's records indicated that the corporation became registered as a sales tax vendor on November 15, 1991, but its sales tax filing status became inactive on February 7, 1995. The records also indicated that the corporation failed to file sales and use tax returns for the period September 1, 1997 through August 31, 2003.

32. During the audit, Mr. Glamcevski submitted a copy of a letter dated January 3, 2000 that he had received from Patricia Rapasadi, a Tax Compliance Agent II assigned to the Division's Syracuse District Office, regarding assessments issued to him as a responsible person of What A Difference Cleaning, Inc., for the sales tax quarters ending November 30, 1994 and February 28, 1995. In her letter, Ms. Rapasadi stated that "[t]he assessments issued against [Mr. Glamcevski] as a responsible person of [What A Difference Cleaning, Inc.] are in the process of being canceled. Carpet cleaning is not a taxable service."

33. On July 13, 2004, three statements of proposed audit change for sales and use tax were issued to What A Difference. The first Statement of Proposed Audit Change for Sales and Use Tax proposed additional tax due in the amount of \$5,647.35, plus penalty and interest. This

statement reflected the auditor's determination of additional sales tax due on the bank deposit discrepancy, i.e., additional sales, outlined above. A review of this statement indicates that the auditor determined additional tax to be due in the quarters ending August 31, 1998, August 31, 1999, August 31, 2000, August 31, 2001, August 31, 2002, May 31, 2003 and August 31, 2003. The second Statement of Proposed Audit Change for Sales and Use Tax proposed additional tax due in the amount of \$18,781.73, plus penalties and interest. This statement reflected the auditor's determination of the amount of sales tax that the corporation collected from its customers during the audit period, but failed to remit to the Division, as outlined above. A review of this statement indicates that the auditor determined additional tax was due in all quarters of the audit period except for the quarter ending November 30, 2002, i.e., 23 of the 24 quarters constituting the audit period. The last Statement of Proposed Audit Change for Sales and Use Tax proposed additional tax due in the amount of \$6,862.83, plus interest. This statement reflected the auditor's determination of additional sales tax due (\$4,211.19), but not collected on taxable sales made by the corporation during the period September 1, 1997 through August 31, 2003, plus additional use tax due (\$2,651.34) on taxable expense purchases made by the corporation during the same period, as outlined above. A review of the audit log indicates that the statements of proposed audit change for sales and use tax and the final supporting work papers were provided to petitioner's representative and Mr. Glamcevki at their July 13, 2004 meeting with the auditor's team leader.

34. On or about August 5, 2004, the corporation appointed Daniel J. Arno, Esq., to act as its representative with respect to the audit. In his letter dated August 5, 2004, Mr. Arno stated that the corporation disagreed with the proposed audit adjustments for a variety of reasons. However, none of the reasons were set forth in his letter. On September 2, 2004, the auditor

spoke with Mr. Arno concerning the proposed audit adjustments. The audit log entry for that date indicates that during their conversation, Mr. Arno informed the auditor that he had no additional information to provide at that time.

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

36. On September 30, 2004, the Division issued the following notices of determination to What A Difference Cleaning, Inc.:

a. Notice of Determination (Notice No. L-024542188-3) asserting additional sales and use taxes due in the amount of \$5,647.35 for the quarters ending August 31, 1998, August 31, 1999, August 31, 2000, August 31, 2001, August 31, 2002, May 31, 2003 and August 31, 2003, plus penalties of \$1,663.30 and interest of \$2,113.85, for a current balance due of \$9,424.50. The computation section of this Notice of Determination contained the following explanation: "Since you have not submitted adequate records for audit, as required under sections 1135 and 1142 of the Tax Law, we determined that you owe tax, interest, and any applicable penalties, under sections 1138 and 1145 of the Tax Law, based upon available records and information." Penalties were assessed pursuant to Tax Law § 1145(a)(1)(i) on this notice because the corporation's records were inadequate and it had unsubstantiated bank deposits, i.e, additional sales, for the audit period.

b. Notice of Determination (Notice No. L- 024542189-3) asserting additional sales and use taxes due in the amount of \$18,781.73 for the period September 1, 1997 through August 31, 2002 and December 1, 2002 through August 31, 2003, plus penalties of \$14,33.17 and interest of \$9,884.49, for a current balance due of \$42,999.39. The computation section of this Notice of Determination contained the following explanation: "Based on our audit of your records, we

determined that you owe tax, interest, and . . . penalties, under sections 1138 and 1145 of the Tax Law. We added fraud penalty of 50% of the tax you owe, plus 50% of the statutory interest, under section 1145 of the Tax Law.”

c. Notice of Determination (Notice No. L-024542190-3) asserting additional sales and use taxes due in the amount of \$6,862.83 for the period September 1, 1997 through August 31, 2003, plus interest of \$1,998.09, for a current balance due of \$8,860.92. The computation section of this 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.”

37. The Division imposed fraud penalties on one of the notices of determination for the following reasons:

a. petitioner admitted collecting sales tax from one customer during the audit period and not remitting the collected tax to the Division;

b. petitioner, a registered sales tax vendor, failed to file sales tax returns, report or remit any tax due for the entire six-year audit period, i.e., a total of 24 sales tax quarters;

c. corporate records, provided during the audit to the Division, showed that petitioner collected and failed to remit sales tax in every quarter of the audit period except for the quarter ending November 30, 2002, i.e., 23 of the 24 quarters constituting the audit period;

d. there was a substantial underreporting of tax due, i.e., the Division determined that petitioner collected and failed to remit \$18,781.73 in sales tax during the audit period;

e. petitioner continued to collect sales tax on nontaxable transactions even after it was notified by the Division that those services were not taxable; and

f. petitioner failed to maintain adequate records of sales that it made during the audit period.

38. During the audit, the auditor reviewed and prepared a detailed summary of all job work orders and invoices provided by the corporation. As part of her preparation of this summary, the auditor assigned record numbers to all sales invoices. Thereafter, some of the job work orders and invoices were photocopied by Division personnel and the auditor wrote the appropriate record number in the upper left corner of each photocopy. As noted above, prior to the conclusion of the audit, all job work orders and invoices provided by petitioner were returned to Mr. Glamcevski, petitioner's owner.

39. The final supporting work papers for each audit area are part of the record. In her audit work papers, the auditor summarized the details of each job work order and invoice that she determined was subject to tax because the corporation either collected sales tax and did not remit it, or did not charge sales tax on a taxable sale. Specifically, for each sales transaction subject to tax, the work paper schedules included, among other things, the record number assigned by the auditor, customer name, invoice date, invoice number, invoice amount, taxable amount and comments summarizing the description of work performed as stated on the particular sales invoice. Summaries of the transactions included, but were not limited to, "tax collected / not rem," "tax collected / not remitted - janitorial services for," "tax collected / not remitted - total apartment cleaning," "tax collected / not remitted - cleaning services for," "tax collected / not remitted - housekeeping services for," "taxable - cleaning services for," "taxable- janitorial services for," "taxable - stripped and waxed floors," and "taxable - window washing."

40. At the hearing, the job work orders and invoices photocopied by the Division during the audit were received into evidence as the Division's Exhibit "K," which exhibit consisted of

approximately 358 sales invoices bearing various dates throughout the period September 1, 1997 through August 31, 2003. Each of these sales invoices contained, among other things, the name, address and telephone number of the customer to whom the invoice was issued, a description of the work performed and the amount charged for such work. On many invoices, the sales tax due on such work was listed as a separate amount and then the total amount due was listed. Multiple invoices were issued to the same customers. Sometimes, petitioner stated only a net amount due on invoices issued to regular customers. As noted above, if the auditor observed a pattern where the sales tax had been separately stated and included in the total amount due on one or more invoices issued to a particular customer and then the same total amount was stated as due on another invoice issued to the same customer, she assumed that the net invoice amount due included sales tax. The auditor noted the pattern of separately stating the tax on the invoice in question by listing the record number of the invoice or invoices on which the sales tax had been separately stated for that particular customer. Further review of the sales invoices in the record indicates that the word "paid" was stamped or handwritten on almost all of these sales invoices. While a handwritten circled letter "p," either alone or in combination with the handwritten word "paid," appeared on some of the sales invoices.

41. A review of the schedule detailing the sales on which tax was collected and not remitted indicates that the auditor also made note of her determination that the corporation collected sales tax on multiple invoices issued to particular customers based on patterns discovered from review of other sales invoices issued to the same customers.

42. Mr. Glamcevski, a high school graduate, began doing business as Personal Touch Cleaning Services sometime in 1987. The Division's records indicate that he became registered as a sales tax vendor using the trade name Personal Touch Cleaning Services on January 1, 1988

and his filing status became inactive on May 1, 1992. As noted above, What A Difference doing business as Personal Touch Cleaning Services became registered as a sales tax vendor on November 27, 1991. Mr. Glamcevski, as president of What A Difference, signed the sales tax certificate of registration that the corporation filed with the Division in November 1991.

43. Petitioner used job work orders to provide estimates to potential customers and also as bills after the services were performed. Job work orders were issued to both residential and commercial customers. Invoices were issued monthly by petitioner to some commercial customers. Mr. Glamcevski prepared all job work orders and invoices issued by petitioner during the period September 1, 1997 through August 31, 2003. He also prepared all proposals for work submitted by petitioner to potential customers.

44. A review of the job work orders and invoices in the record reveals that petitioner continued to collect sales tax on both taxable and nontaxable services that it rendered to customers after January 3, 2000. Many job work orders contain a detailed description of the work performed by petitioner. According to the job work orders and invoices, the services that petitioner performed for its customers included, but were not limited to, carpet and upholstery cleaning, janitorial services, housekeeping services, window cleaning, stripping and waxing floors, buffing floors, dusting, vacuuming and cleaning bathrooms and kitchens.

45. The record includes job work orders issued to The Meadows at Westbrook for “total apartment cleaning” of various units by petitioner during the audit period. A review of these job work orders indicates that petitioner separately stated and collected tax on the vast majority of these job work orders.

46. The record includes job work orders and invoices issued to Evergreen Manufacturing (“Evergreen”) throughout the audit period. Job work orders were issued as bills for “janitor

services” or “janitorial services” rendered by petitioner during the preceding month. Shortly before the end of the audit period, invoices were issued to Evergreen for “cleaning services” rendered by petitioner during the preceding month. A review of these job work orders and invoices indicates that petitioner charged sales tax on janitorial services billed on some job work orders, but did not charge sales tax on other job work orders or invoices.

47. Petitioner’s commercial customers included Young & Franklin, Inc. (Young & Franklin”) and its affiliate Tactair. The record includes some monthly invoices issued between February 3, 2003 and August 30, 2003 by petitioner to Young & Franklin for housekeeping services performed by petitioner at the Young & Franklin building and the guesthouse. Each of these invoices references “P.O. Number 56435,” and sales tax is separately stated on most of the invoices. Young & Franklin purchase order number 56435 is not part of the record. The record also does not include any contract between Young & Franklin and petitioner. A number of documents related to petitioner’s business relationship with Tactair are part of the record. First, the record includes petitioner’s proposal dated April 18, 2000 to provide janitorial services to Tactair’s office areas in accordance with a contract for the sum of \$60,000.00 per year to be billed at rate of \$5,000.00 plus tax per month. Second, it includes a purchase order (purchase order number 42064) that Tactair issued on August 27, 2001 for housekeeping services to be rendered by petitioner. It is noted that the Tactair purchase order references a “Housekeeping Contract for Office Areas,” dated April 14, 2000 and the proposal dated April 18, 2000. The April 14, 2000 contract is not part of the record. Lastly, the record includes some monthly invoices, bearing various dates in 2002 through August 30, 2003, issued to Tactair for housekeeping services that petitioner performed at the Tactair building. Each of these invoices references “P.O. Number 42064.” Further review of these invoices reveals that sales tax was

separately stated on some of the invoices and included in the net amount billed on other invoices. It is noted that petitioner separately stated and collected sales tax on the invoices issued to both Young & Franklin and Tactair on August 30, 2003.

48. At the hearing, petitioner presented the testimony of George Powers, an accountant, who reviewed the final audit work papers and the copies of the sales invoices which are part of the Division's records pertaining to this audit, i.e., Division's Exhibit "K," and prepared two schedules of his findings. Although Mr. Powers asked Mr. Glamcevski for the records that the corporation had provided to the auditor during the audit, they were not provided to him because Mr. Glamcevski said they were unavailable. The two schedules were submitted into evidence

49. The record does not include any of the Federal income tax returns filed by the corporation for the fiscal years ending July 31, 1998, July 31, 1999, July 31, 2000, July 31, 2001, July 31, 2002, July 31, 2003 or July 31, 2004. Nor does the record include any tax return filed by the corporation after the close of the audit period, i.e., after August 31, 2003. The record also does not include What A Difference's general ledger or bank statements for the period September 1, 1997 through August 31, 2003.

50. At the hearing, petitioner did not submit any of the job work orders or invoices issued to customers during the period September 1, 1997 through August 31, 2003 into the record. It also did not submit any exempt organization certificates, any resale certificates, or any capital improvement certificates into the record. The record does not include any service contracts between petitioner and any customers.

51. Petitioner submitted into evidence a four-page list of cleaning supplies. The record does not include any purchase invoices for supplies or equipment that petitioner purchased from Jon-Don or any other vendor during the period September 1, 1997 through August 31, 2003.

52. Petitioner submitted into the record a letter dated March 1, 2006 written by Walter J, Nendza, the individual who prepared Federal and New York State returns for both Mr. Glamcevski and petitioner.

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

A. Tax Law § 1135(a)(1) provides that:

[e]very person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately.

These records must be kept in a manner suitable to determine the correct amount of tax due and must be available for the Division's inspection upon request (Tax Law § 1135[e]; 20 NYCRR 533.2[a][2]). The sales records required to be maintained include, among other things, sales slips, invoices, receipts, statements or other memoranda of sale, guest checks, cash register tapes and any other original sales documents (*see*, 20 NYCRR 533.2[b][1]).

B. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, "or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ." (Tax Law § 1138[a][1].) When acting pursuant to section 1138(a)(1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see, Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

C. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice, Inc. (supra)*, as follows:

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

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

D. In this case, the Division made several written and oral requests for What A Difference's books and records for the entire audit period. In the initial appointment letter dated August 5, 2003, the Division requested petitioner's books and records for the period September 1, 1997 through May 31, 2003. At the September 17, 2003 opening meeting with petitioner, the

Division extended the audit period to September 1, 1997 through August 31, 2003. At this same meeting, the Division orally requested records for the updated audit period. By letter dated October 29, 2003, the Division requested petitioner's records for the updated period. In addition, throughout the performance of the audit, the Division made numerous oral requests for petitioner's records for the entire audit period. After reviewing the records produced, the auditor reasonably concluded that petitioner's records were insufficient to conduct a detailed audit to verify its gross and taxable sales for the audit period.

The corporation provided bank statements for the period September 1, 1997 through August 31, 2003, Federal income tax returns for the period August 1, 1997 through July 31, 2002, some sales invoices, some tax exemption certificates and some expense purchase invoices. The corporation did not provide any general ledgers, sales journals, cash disbursement journals, fixed asset purchase invoices, depreciation schedules, resale certificates, or any capital improvement certificates for the audit period. After comparing total bank deposits to the total amount reported on the sales invoices provided for the audit period, the auditor determined that total deposits exceeded the total amount of sales reported on the sales invoices by \$152,176.32. During the audit, Mr. Glamcevski advised the auditor that the corporation's bank deposits equaled its gross sales for Federal income tax purposes. Given the inadequacy of petitioner's record keeping with respect to its sales and the discrepancy between the total bank deposits versus the total amount of sales reported on its sales invoices, the Division properly resorted to a bank deposit analysis to determine the sales tax due on additional taxable sales. Since no explanation was provided for the difference between the total amount of bank deposits and the total amount of sales reported on the sales invoices, it was reasonable and proper for the auditor to conclude that the entire difference, \$152,176.32, was additional sales for the audit period. It

was also reasonable for the auditor to use petitioner's actual sales invoices to determine the taxable sales ratio of 53 percent that was applied to the additional sales to determine the additional taxable sales for the audit period. Shortly after the commencement of the audit and prior to her review of the corporation's books and records, Mr. Glamcevski informed the auditor that the corporation had collected sales tax from one of its customers during the audit period and had failed to remit the collected tax to the Division. During the September 17, 2003 opening meeting, Mr. Glamcevski also advised the auditor that sales tax was included in the net sales amount listed on several invoices. The auditor's review of the job work orders and invoices provided by the corporation revealed that sales tax was separately stated on the majority of the invoices on which sales tax was collected. However, in some instances, she found that the sales invoices contained either the statement "tax included," or calculations indicating that sales tax was included in the net invoice amount. The auditor also found that the corporation provided taxable services, but failed to charge sales tax on many of the job work orders and invoices provided for the audit period. The auditor's utilization of the actual job work orders and invoices provided by the corporation during the audit to determine the amount of sales tax collected, but not remitted to the Division during the audit period and the additional sales tax due, but not collected on taxable sales during the audit period was reasonable and proper.

The auditor's utilization of the actual purchase invoices, issued for the period September 1, 1997 through August 31, 2003 by Jon-Don, to determine whether petitioner paid sales tax on its expense purchases was reasonable and proper. The auditor's conclusion that petitioner's purchases of cleaning supplies that remained with its customers were purchases for resale and were not subject to use tax was also reasonable and proper.

E. 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 Your Own Choice, Inc., supra*; *Matter of Meskouris Bros. v. Chu, supra*).

F. As noted above, the Division determined that additional sales tax was due on excess bank deposits and also on taxable sales on which no sales tax was charged for the period September 1, 1997 through August 31, 2003. Petitioner contends that the Division incorrectly determined that 53 percent of its sales were taxable during the audit period. It asserts that the job work orders and invoices, used by the auditor to determine the additional sales tax due on excess bank deposits and taxable sales on which no sales tax was charged, do not accurately describe the services that it performed for customers during the audit period. Petitioner claims that Mr. Glamcevski did not specifically itemize the services provided on each invoice because he believed that the services provided were mostly nontaxable services. Petitioner also claims that its larger commercial customers, such as Young & Franklin and Tactair, hired it for carpet cleaning and maintenance. What A Difference contends that approximately 90 percent of the services provided to its customers between 1998 and 2002 were tax exempt carpet and upholstery cleaning or construction cleanup services. For the years 2002 and 2003, petitioner claims that approximately 80 percent to 90 percent of the services provided to customers were tax exempt carpet and upholstery cleaning or construction cleanup services. Therefore, petitioner contends that adjustments should be made to more accurately reflect the nontaxable sales that it made during the period September 1, 1997 through August 31, 2003.

G. I do not find that any adjustments are warranted. As part of her bank deposit analysis, the auditor used the corporation's bank statements, job work orders and invoices for the period September 1, 1997 through August 31, 2003, which records were provided to her by petitioner. Since no explanation was provided for the difference between the total amount of bank deposits and the total amount of sales reported on the sales invoices provided, the auditor concluded that the entire difference, \$152,176.32, was additional sales for the audit period. Using the records provided, i.e., the job work orders and invoices, the auditor determined a taxable ratio of 53 percent, applied same to the additional sales (excess bank deposits) of \$152,176.32, and determined additional taxable sales to be \$80,653.44 and additional sales tax due in the amount of \$5,647.35 for the period September 1, 1997 through August 31, 2003. In her determination of additional sales tax due on taxable sales on which no sales tax was charged, the auditor used the job work orders and invoices provided by the corporation and found that the corporation rendered taxable services such as floor cleaning and waxing, window washing, general maintenance, janitorial services, bathroom cleaning and dusting during the audit period, but failed to charge sales tax. The auditor determined that additional sales tax in the amount of \$4,211.19 was due on \$60,164.14 in additional taxable sales made by the corporation during the period September 1, 1997 through August 31, 2003. At the hearing, petitioner did not submit into the record any bank statements, any job work orders, any invoices, or any exempt organization, resale or capital improvement certificates to support its position that almost all of its sales were nontaxable during the audit period. Rather, petitioner relied on Mr. Glamcevski's testimony at the hearing. I find Mr. Glamcevski's testimony to be evasive and contradicted by documents in the record. Mr. Glamcevski testified that the corporation did not provide janitorial services, or any kind of general maintenance services during the audit period. However, my

review of the job work orders and invoices in the record indicates that petitioner billed at least two customers for janitorial services and paper products on a regular basis during the audit period. Mr. Glamcevski also testified that only general descriptions of the work performed appeared on the job work orders and invoices that he prepared during the audit period. My careful review of the job work orders and invoices in the record reveals that a detailed description of the work performed appeared on most of them and the services provided were in fact taxable. I have also compared the descriptions of the services provided set forth on the job work orders and invoices included in the record to the auditor's summaries of the same job work orders and invoices contained in her work papers, and I find that she accurately summarized the transactions memorialized on those sales invoices. My review of the audit work papers also confirms the auditor's testimony that she did not include the corporation's sales of carpet and upholstery cleaning in her determination of the corporation's additional taxable sales for the audit period. As for Mr. Glamcevski's testimony that the corporation was providing carpet maintenance services to Young & Franklin and Tactair, documents in the record clearly establish that petitioner provided housekeeping services to both companies. While a few sales invoices stated that petitioner either provided construction related cleanup services to some customers, or washed and waxed floors for customers of other cleaning companies, petitioner did not submit any capital improvement certificates, or any resale certificates related to these sales transactions. Given Mr. Glamcevski's evasive and unreliable testimony and petitioner's failure to submit any bank statements, any sales invoices, any exempt organization certificates, any resale certificates, any capital improvement certificates or any other source documentation, I find no adjustments are warranted for alleged nontaxable sales.

H. The Division also determined that petitioner collected a total of \$18,781.73 in sales tax on \$268,310.42 in sales made by it during the period September 1, 1997 through August 31, 2003. Although petitioner admits that it collected and failed to remit sales tax during the audit period, it contends that the auditor incorrectly concluded that the net amount stated on many invoices included sales tax. Petitioner argues that the amount collected and not remitted was only \$6,600.00. In support of this argument, petitioner presented the testimony of Mr. Glamcevski and Mr. Powers, as well as two documents prepared by Mr. Powers. Petitioner's argument is without merit. I find Mr. Glamcevski's testimony on this point to be unreliable. The record clearly establishes that shortly after he received the initial audit appointment letter, Mr. Glamcevski advised the auditor that petitioner had collected and failed to remit an unspecified amount of sales tax from an unidentified customer during the audit period. However, at the hearing, Mr. Glamcevski denied that he had ever made that statement to the auditor. The record also clearly shows that during the audit, Mr. Glamcevski advised the auditor that sales tax was included in the net amount stated on some invoices. Yet, at the hearing, Mr. Glamcevski claimed that sales tax was not included in the net invoice amount stated on some invoices. Petitioner's reliance on Mr. Powers's testimony is also misplaced. As the Division correctly notes, Mr. Powers was retained by Mr. Glamcevski after the audit period ended merely to review the audit work papers and the sales invoices photocopied by the Division during the audit. At the hearing, Mr. Powers testified about his review of the Division's audit records and the two documents that he prepared as a result of that review. These two documents, which merely summarize his findings, are insufficient to prove that only \$6,600.00 in sales tax was collected and not remitted by petitioner during the audit period. Additionally, I have carefully reviewed the audit work papers, job work orders and invoices, i.e., sales invoices, submitted into

the record by the Division, and I find that the auditor meticulously summarized these transactions. Indeed, the auditor noted patterns where petitioner separately stated and collected sales tax on invoices issued to particular customers and then included the sales tax in the net amount stated on other invoices issued to the same customers. Furthermore, documents pertaining to petitioner's business relationship with Tactair clearly show that petitioner collected sales tax on the housekeeping services that it provided to Tactair on a monthly basis, even on those invoices that stated only a net invoice amount due. Given the unreliability of Mr. Glamcevski's testimony and the limited usefulness of Mr. Powers's testimony and the documents he prepared, I find that no adjustment in the Division's determination of the amount of sales tax collected, but not remitted to the Division, is warranted.

I. The Division assessed use tax in the amount of \$2,651.34 on petitioner's purchases of supplies from Jon-Don, an out-of-state vendor, during the period September 1, 1997 through August 31, 2003. Petitioner contends that the Division improperly subjected these purchases to use tax because all supplies and equipment purchased from Jon-Don during the audit period were used by it to perform carpet and upholstery cleaning services. In support of this contention, petitioner presented the testimony of Mr. Glamcevski and a four-page list of cleaning supplies. I have already found Mr. Glamcevski's testimony concerning the type of services provided by petitioner to be unreliable. I do not find his testimony concerning the corporation's purchases of supplies and equipment to be any more reliable. As for the four-page list of cleaning supplies, it merely lists many products, tools and pieces of equipment used for cleaning. Petitioner did not submit any purchase invoices issued by Jon-Don, or any documentation concerning supplies and equipment purchased during the audit period into the record. The record clearly shows that the auditor did not assess use tax on cleaning supplies that remained with petitioner's customers

because they were purchases for resale. The absence of any source documentation makes it impossible for me to make any further adjustments for supplies used to perform carpet and upholstery cleaning. Petitioner has failed to meet its burden of proof, and the Division's determination that use tax was due on petitioner's purchases of supplies from Jon-Don during the audit period was proper (*see*, Tax Law § 1132[c]).

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

If the failure to pay or pay over any tax to the commissioner of taxation and finance within the time required by this article is due to fraud, in lieu of the penalties and interest provided for in subparagraphs (i) and (ii) of paragraph one of this subdivision, there shall be added to the tax (i) a penalty of fifty percent of the amount of the tax due, plus (ii) interest on such unpaid tax . . . .

K. Whether a taxpayer fraudulently failed to pay sales tax to the Division or filed willfully false or fraudulent returns with the intent to evade payment of tax are questions of fact to be determined upon consideration of the entire record (*Matter of Sona Appliances*, Tax Appeals Tribunal, March 16, 2000). The Division bears the burden of proving fraud by clear and convincing evidence (*Matter of Drebin*, Tax Appeals Tribunal, March 27, 1997, *confirmed* 249 AD2d 716, 671 NYS2d 565; *Matter of Sona Appliances, supra*). A finding of fraud requires the Division to show "clear, definite, and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (*Matter of Sona Appliances, supra*). In order for the Division to satisfy its burden of proof, there must be evidence of a specific intent to deliberately evade payment of taxes which are due and owing in addition to proof of underreporting (*see, Matter of Flanagan*, Tax Appeals Tribunal, June 14, 1990). Significant factors evidencing intent include a consistent and substantial understatement of tax, the amount of the deficiency, a pattern of repeated

deficiencies, the taxpayer's course of conduct and the taxpayer's failure to maintain adequate records (*Matter of Waples d/b/a Jack's Restaurant*, Tax Appeals Tribunal, January 11, 1990; *see, Matter of AAA Sign Co.*, Tax Appeals Tribunal, June 22, 1989). Since direct proof of a taxpayer's intent is rarely available, fraud may be proved by circumstantial evidence, including the taxpayer's course of conduct (*Intersimone v. Commissioner*, 53 TCM 1073; *Korecky v. Commissioner*, 781 F2d 1566, 86-1 US Tax Cas ¶ 9232).

L. The Division has sustained its burden of proof of establishing that the imposition of the fraud penalty was appropriate. The Division's audit established a substantial underreporting of sales tax over a long and continuous period of time. The auditor determined that petitioner collected and failed to remit \$18,781.73 in sales tax during the audit period. Based on her review of the corporation's records, the auditor determined that petitioner collected and failed to remit sales tax in every quarter of the audit period except for the quarter ending November 30, 2002, i.e., 23 of the 24 quarters constituting the audit period. Petitioner, a registered sales tax vendor, failed to file sales tax returns, report or remit any tax due for the entire six-year audit period.

Petitioner maintains that its owner, Mr. Glamcevski has been open, honest and forthcoming with the Division and that its collecting and not remitting tax was merely inadvertent throughout the period September 1, 1997 through August 31, 2003. It contends that after Mr. Glamcevski received the January 3, 2000 letter from the Division that stated carpet cleaning was a nontaxable service, sales tax was no longer collected on sales of carpet cleaning services. However, the record clearly establishes that petitioner continued to collect sales tax on the very services that it was advised were nontaxable and failed to remit same to the Division. The record also establishes that after January 3, 2000, petitioner continued to collect sales tax on

other services that it performed and failed to remit the tax to the Division. During the audit, petitioner admitted collecting sales tax from one customer during the audit period and not remitting the collected tax. However, the auditor determined that petitioner collected sales tax from many customers during the audit period and failed to remit the sales tax to the Division. Petitioner also failed to maintain adequate records of its sales. Despite numerous written and oral requests for petitioners's books and records, petitioner only produced bank statements for the audit period, some job work orders and invoices issued during the audit period and some exempt organization certificates. In sum, the circumstances of this case, viewed in their entirety, provide convincing evidence that petitioner knowingly and willingly failed to remit sales taxes as required and clearly support the imposition of the fraud penalty.

M. Penalties were imposed pursuant to Tax Law § 1145(a)(1)(i), which states that any person failing to file or pay over any sales or use tax to the Commissioner of Taxation and Finance ("the Commissioner") "shall" be subject to a penalty. This penalty may be canceled if the Commissioner determines that the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Commissioner's regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1[a][1]). "By 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 [*Matter of F&W Oldsmobile v. Tax Commn. Of the State of New York*, 106 AD2d 792, 484 NYS2d 188]" (*Matter of MCI Telecommunications, Corp.*, Tax Appeals Tribunal, January 16, 1992). The taxpayer faces the "onerous task" of establishing reasonable cause as

well as the absence of willful neglect (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993).

N. Petitioner contends that penalties imposed herein should be abated because its owner, Mr. Glamcevski, acted in a prudent manner and reasonably relied on his accountant's advice. It asserts that Mr. Glamcevski, a high school graduate, relied on his accountant, Mr. Nendza, to advise him regarding the filing of necessary tax returns and the payment of any tax by the corporation. Petitioner further asserts that Mr. Glamcevski used the January 3, 2000 letter from the Division as a basis, along with his accountant's advice, for not filing sales tax returns. Petitioner maintains that Mr. Glamcevski contacted the Division's hotline on different occasions and was informed that carpet cleaning services were not taxable. In addition, petitioner points out that when Mr. Glamcevski met with the auditor, he asked for guidance as to what to do with the tax collected and was told by the auditor that any additional tax would be picked up by the audit. Petitioner avers that these factors are proof that Mr. Glamcevski acted reasonably to ascertain the extent, if any, of the corporation's tax liability.

Petitioner has failed to establish reasonable cause or an absence of willful neglect in the instant matter. As noted, petitioner claims that Mr. Glamcevski reasonably relied on professional advice. However, the March 1, 2006 letter from Mr. Nendza submitted by petitioner does not support a finding that Mr. Nendza ever advised Mr. Glamcevski about sales tax matters. In his letter, Mr. Nendza clearly stated that he limited his business to Federal and State income tax matters and prepared Federal and New York State personal and corporate income tax returns for Mr. Glamcevski. As for Mr. Glamcevski's reliance on the Division's January 3, 2000 letter as a basis for petitioner's failure to file sales tax returns, it is misplaced. This letter did not state that sales tax returns need not be filed. Rather, it stated that carpet

cleaning was not a taxable service. Furthermore, there is no evidence to support Mr. Glamcevski's claim that he contacted the Division's hotline a number of times to ascertain the taxability of certain services provided by petitioner to customers. Additionally, petitioner's failure to maintain adequate sales records and to file a single sales tax return during the entire six-year audit period supports the imposition of penalties (*see, Matter of Marte*, Tax Appeals Tribunal, August 4, 2004).

O. The petition of What A Difference Cleaning, Inc. is denied and the notices of determination dated September 30, 2004 are sustained.

DATED: Troy, New York  
May 3, 2007

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE