

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**NATIONAL JANITORIAL CONTRACTING, INC.** :  
for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period June 1, 2000 through November 30, 2004. :

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In the Matter of the Petition :  
of :  
**ANDREW SHIELDS** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NOS. 821485,  
and Use Taxes under Articles 28 and 29 of the Tax Law : 821488 AND 821833  
for the Period December 1, 2002 through November 30, :  
2004. :

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In the Matter of the Petition :  
of :  
**NATIONAL JANITORIAL CONTRACTING OF** :  
**LONG ISLAND, INC.** :  
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, 2000 through November 30, 2004. :

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Petitioner National Janitorial Contracting, Inc., filed a petition for revision of a  
determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for  
the period June 1, 2000 through November 30, 2004.

Petitioner Andrew Shields filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2002 through November 30, 2004.

Petitioner National Janitorial Contracting of Long Island, Inc., 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, 2000 through November 30, 2004.

A consolidated hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 27, 2007 at 10:30 A.M., with all briefs to be submitted by April 7, 2008, which date began the six-month period for the issuance of this determination. Petitioners appeared by Paul Kalker, Esq., P.C. (Paul Kalker, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Jennifer A. Murphy, Esq., of counsel).

### ***ISSUES***

I. Whether petitioner National Janitorial Contracting, Inc., provided sufficient books and records to enable the Division of Taxation to conduct a detailed audit.

II. If not, whether the audit method employed by the Division of Taxation was reasonable or whether petitioner National Janitorial Contracting, Inc., has shown error in either the audit method or the result.

III. Whether penalties assessed against National Janitorial Contracting, Inc., should be abated.

IV. Whether petitioner National Janitorial Contracting of Long Island, Inc., was a bulk sale purchaser under Tax Law § 1141(c) and, as such, is liable for sales and use taxes due from National Janitorial Contracting, Inc., the bulk sale seller.

V. If so, whether the bulk sales tax liability of National Janitorial Contracting of Long Island, Inc., was properly calculated.

VI. Whether petitioner Andrew Shields was personally liable for the sales and use taxes due on behalf of National Janitorial Contracting, Inc., as a person required to collect and pay such taxes under Tax Law § 1131(1) and §1133(a).

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

1. National Janitorial Contracting, Inc. (NJC) was engaged in the business of performing janitorial services for businesses and homeowners. Both taxable (floor cleaning) and nontaxable (carpet cleaning) janitorial services were performed by NJC. The Division of Taxation (Division) commenced an audit of NJC in May 2003 as a result of alleged underreporting of gross sales in 2000, as well as a dramatic fluctuation in reported nontaxable sales throughout the period at issue.

2. Initially, the audit period selected was the period June 1, 2000 through February 28, 2003. On May 22, 2003, the auditor sent a letter to NJC which scheduled a field audit at NJC's office on June 13, 2003. Attached to the appointment letter was a Records Requested List which requested the following records for the audit period: sales tax returns, worksheets and canceled checks; federal income tax returns; New York State corporation tax returns; a general ledger; general journal and closing entries; sales invoices; exemption documents; chart of accounts; fixed asset purchase and sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips; cash receipts journal; cash disbursements journal; corporate book; and depreciation schedules.

3. The auditor went to NJC's place of business on June 13, 2003, but was told by the secretary that she had not received the auditor's letter, so she made copies of the letter and list of

records requested which were faxed to the company's accountant. A new appointment was scheduled for July 15, 2003, and another appointment letter and Records Requested List were sent to the accountant, with a copy to Andrew M. Shields, on June 18, 2003.

On July 15, 2003, the auditor, after receiving a power of attorney appointing Gary Cusenza, CPA, as NJC's representative, reviewed federal income tax returns and sales tax returns. He transcribed sales, deposits, purchases and expense accounts.

On July 16, 2003, the auditor sent a letter to Mr. Cusenza advising him that the following books and records would be needed for the next audit appointment: cash receipts journal, sales invoices and any additional exemption certificates for the nontaxable sales of \$97,009.00 reported on the sales tax return for the quarter ended November 30, 2002; purchase invoices for purchases recorded in the months of September through November 2002 pertaining to certain accounts; purchase invoices for fixed assets acquired during the audit period; and all books and records previously made available.

On June 30, 2004, after reviewing certain documentation provided, the auditor sent another letter to Mr. Cusenza indicating that the following were needed to complete the audit: missing purchase invoices for purchases recorded in the months of September through November 2002; the balance of the purchase invoices or complete leases for fixed assets acquired during the audit period; the missing sales invoices pertaining to the test of sales in the period September through November 2002; and documentation to reconcile the difference in total deposits which exceeded sales per records, such as loans, personal funds deposited, amounts from credit lines, etc.

4. On June 23, 2005, the audit period was expanded to include the period March 1, 2003 through November 30, 2004 by a letter to Andrew M. Shields, president of NJC. The letter scheduled an appointment for review of records on July 14, 2005. A new Records Requested

List was attached seeking the same records previously requested; however, the new list also requested records for the updated audit period.

5. NJC provided general ledgers, bank statements, some sales invoices and purchase invoices for expenses and fixed assets as well as federal income tax returns, New York State sales tax returns and New York State corporation tax returns. A review of the federal income tax returns revealed that on each of the returns for the audit period, NJC listed its business activity as “maintenance” and its product or service as “floor waxing.”

It did not provide the auditor with a sales journal, a cash receipts journal, cash register tapes or a complete set of sales invoices for the entire audit period. After reviewing the books and records provided by NJC, the auditor determined that such books and records were inadequate to perform a detailed audit of the company.

6. Upon its review of the books and records provided, a \$311,366.00 discrepancy was found between NJC’s reported gross sales (on its sales tax returns) and the gross sales found on its general ledger for the entire audit period.

For the original audit period (June 1, 2000 through February 28, 2003), gross sales per records exceeded reported gross sales by \$298,326.00. Since no explanation was provided by NJC and no substantiation was offered to prove that the sales were exempt, tax in the amount of \$25,067.89 was assessed on these sales.

7. For the updated audit period, March 1, 2003 through November 30, 2004, NJC’s reported gross sales were accepted by the auditor because they were in substantial agreement with gross sales per the general ledger. He applied a taxable ratio to these sales to arrive at audited taxable sales. This taxable ratio was determined to be 30%.

The 30% taxable ratio was calculated by taking NJC's gross sales, per its records, for the period September 1, 2002 through February 28, 2003<sup>1</sup> (\$286,643.00) and subtracting its sales to one of its major tax exempt customers, Federation Employment and Guidance Service, Inc. (FEGS) for the period (\$153,729.00). The auditor stated that this subtraction was made because there would not be sales tax included on these invoices. The balance, after subtraction of the FEGS sales, was \$132,914.00.

Pursuant to a test of sales for the period September 1 through November 30, 2002, the auditor determined that 35% of NJC's sales for the period were either exempt sales (20%) or out-of-state sales (15%). Applying this 35% to the \$132,914.00 (\$46,5520.00) and subtracting this amount from the \$132,914.00 resulted in audited taxable sales in the amount of \$86,394.00 for the period September 1, 2002 through February 28, 2003. When the \$86,394.00 was divided by gross sales per NJC's records for this period (\$286,643.00), the result was a taxable ratio of 30%.

For the updated audit period (March 1, 2003 through November 30, 2004) NJC reported gross sales of \$1,036,707.00. Sales tax collected (\$11,550.00) was deducted, thereby leaving adjusted gross sales in the amount of \$1,025,157.00. The auditor applied the 30% taxable ratio previously determined to the \$1,025,157.00, which resulted in audited taxable sales of \$307,547.00. Additional cash payouts of \$115,000.00 during the period ended November 2003 were then included as additional taxable sales because NJC's books indicated that the cash payouts were derived from sales receipts. Instead of depositing the \$115,000.00 into the bank, NJC used the cash to buy supplies and chemicals and to pay rent and advertising. The auditor then deducted from the total audited sales of \$422,547.00 (\$307,547.00 + \$115,000.00) the sum

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<sup>1</sup> The auditor indicated that this period was selected because NJC began doing business with FEGS in September 2002.

of \$155,014.00 which NJC reported as taxable sales for the period, leaving additional taxable sales of \$267,533.00, with sales tax due thereon in the amount of \$23,326.06 for the period March 1, 2003 through November 30, 2004.

8. Tax was also assessed on \$15,004.00 worth of fixed assets in the amount of \$1,253.22 on which NJC could not document that it had paid tax.

9. On March 14, 2006, a Tax Compliance Agent from the Division's Suffolk District Office reported to the Division's Central Sales Tax Bulk Sale Unit, a possible unreported bulk sale from NJC to National Janitorial Contracting of Long Island, Inc. (NJCLI). The agent had been attempting to locate Mr. Andrew Shields of NJC when she noticed that the business had added "Long Island" to the original owner's door sign. The agent observed that the new business had the same employees as NJC and was informed by a secretary at NJCLI (the secretary had previously been employed by NJC) that NJCLI had a new Internal Revenue Service identification number and that the owner of the new business was Christopher Bigelow. The agent spoke with Andrew Shields who claimed that his estranged wife had forced him out of the business and that she was currently running the business.

On March 16, 2006, a notice was sent by the Division to NJCLI which indicated that the Division had received information that a possible bulk sale transaction had occurred. The notice stated that under the New York State sales and use tax law, a Notification of Sale, Transfer, or Assignment in Bulk was required to be filed 10 days prior to the date of sale (a copy of the form was enclosed and NJCLI was instructed to return the form within 20 days of the date of the notice). On April 14, 2006, another letter was sent by the Division to NJCLI which indicated that no response had been received from the March 16, 2006 letter and advised NJCLI that

failure to complete the form could result in assessments being issued as a purchaser in a bulk sale transaction.

A Notification of Sale, Transfer, or Assignment in Bulk (form AU-196.10) was filed by Christopher Bigelow of NJCLI in May 2006.<sup>2</sup> The Notification of Sale, Transfer, or Assignment in Bulk indicated that NJCLI had purchased the janitorial/cleaning business of NJC, that there had been no selling price and no contract of sale, that manufacturing equipment, tools and supplies in the amount of \$64,904.00 had been sold to NJCLI and the scheduled date of sale had been September 2004.

On May 12, 2006, the Division issued a Notice of Claim to Purchaser to NJCLI which advised, in part, as follows:

You are hereby notified that, in spite of any provisions contained in the sales contract, except as indicated in condition number two listed below, no distribution of funds or property, to the extent of the amount of the state's claim, may be made before the following conditions have been met:

1. The Department of Taxation and Finance had determined the seller's liability, if any.
2. Payment of such liability has been made to the department (payment may be made from the funds being withheld in accordance with Section 1141(c) of the Tax Law.
3. This office has authorized you to release the funds or property.

As a result of the transfer of the assets totaling \$64,904.00 to NJCLI, sales tax was assessed against NJC in the amount of \$5,679.10 (\$64,904.00 x .0875) on this sale.

10. Accordingly, on September 16, 2005, the Division issued a Notice of Determination to NJC in the amount of \$55,326.27, plus penalty and interest, for a total amount due of

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<sup>2</sup> The document was signed by Christopher Bigelow on May 22, 2006.



\$101,196.11 for the period June 1, 2000 through November 30, 2004. The tax assessed includes the amounts computed in Findings of Fact 6 through 9. Penalties, both statutory and omnibus, were assessed against NJC pursuant to Tax Law § 1145(a)(1)(i) and (vi).

Previously, consents extending the period of limitation for assessment of sales and use taxes were executed by NJC's representative and the Division whereby it was agreed that taxes for the period June 1, 2000 through November 30, 2002 could be determined at any time on or before December 20, 2005.

11. For each of the years 2000, 2001, 2002 and 2003, NJC issued a Schedule K-1, Shareholder's Share of Income, Credits, Deductions, etc., to petitioner Andrew Shields. On each such schedule, Mr. Shields was listed as a 50% shareholder in the company.

On the 2003 U.S. Income Tax Return for an S Corporation filed by NJC, the signature line contained the typed name of Andrew Shields. Andrew Shields, as president, signed NJC's sales tax returns for each sales tax quarter during the audit period.

On the Notification of Sale, Transfer, or Assignment in Bulk filed with the Division in connection with the sale of the business by NJC to NJCLI, the seller listed thereon was Andrew Shields. Mr. Shields also signed, on behalf of NJC as president, a Lease Agreement with VA Resources, Inc., of Garland, Texas, for the lease of certain equipment in December 2000. Mr. Shields also signed, on behalf of NJC as president, an Equipment Lease Agreement with Fidelity Leasing in April 2002 and also signed a check on behalf of NJC for the payment of the first and last month's lease payment to Fidelity Leasing.

In September 2001, Mr. Shields signed, as president and CEO, a Lease Agreement with All-Lines Leasing of Plymouth, Massachusetts, for the lease of certain equipment.

Andrew Shields also signed on behalf of NJC, as president, a 2002 and 2003 New York S Corporation Franchise Tax Return. On each return, Mr. Shields was listed as a 50% shareholder of NJC.

At the request of the Division, Andrew Shields completed a form AU-431, Responsible Person Questionnaire, on which he indicated that he was responsible for preparing or supervising the preparation of sales tax returns and ensuring the remittance of tax on behalf of NJC. Mr. Shields also indicated on the questionnaire that: he participated in making significant business decisions; was responsible for maintaining and managing the business; owned corporate and voting stock; derived substantial income or had a substantial economic stake in the business; and had the authority to pay or direct payment of credits, sign checks, sign consents on behalf of the business, hire and fire employees, negotiate loans, borrow money or guarantee business loans and that he was 100% in control of financial affairs of the business.

12. On March 27, 2006, the Division issued a Notice of Determination to Andrew Shields which assessed tax in the amount of \$29,482.66, plus penalty and interest, for a total amount due of \$50,540.93 for the period December 1, 2002 through November 30, 2004. The Notice of Determination stated that the Division's records indicated that Mr. Shields was an officer or responsible person of NJC. The amounts assessed for each quarter were identical to the amounts assessed against NJC for that quarter.

At the hearing, petitioners' representative raised the issue as to whether Andrew Shields was properly held to be an officer or responsible person of NJCLI as well as NJC. While the record contains a sales tax return for the period December 1, 2006 through February 28, 2007 for NJCLI which was signed by Andrew Shields, as president, the only Notice of Determination issued to Andrew Shields indicated that he was being assessed as an officer or responsible person

of NJC. Therefore, since there is no assessment against Mr. Shields pertaining to alleged personal responsibility on behalf of NJCLI, that issue will not be addressed herein.

13. As a result of the bulk sale from NJC to NJCLI (*see* Finding of Fact 9), the Division, on May 25, 2006, issued a Notice of Determination to NJCLI which assessed tax in the amount of \$67,972.05, with a payment or credit of \$3,410.04, for a total amount due of \$64,562.01. Of the amount assessed, \$55,326.27 represents tax due from NJC as a result of the field audit (*see* Finding of Fact 10). The remaining seven assessments, issued as a result of the failure of NJC to remit the tax stated to be due on the returns filed, were as follows:

Assessment ID No.	Period Ended	Tax Assessed
L-026982315-2	11-30-04	\$247.45
L-026982316-1	08-31-04	\$1,709.42
L-026982317-9	05-31-04	\$2,018.98
L-026982318-8	02-29-04	\$2,124.94
L-026982319-7	11-30-01	\$3,888.91
L-026982320-7	02-28-03	\$484.59
L-026982321-6	05-31-02	\$2,171.49

In its brief, the Division stated that the amounts assessed in Notice Nos. L-026982316-1, L-026982317-9, L-026982318-8, L-026982320-7 and L-026982321-6 have been paid in full or have been canceled. Therefore, in addition to the tax assessed as a result of the field audit of NJC (\$55,326.27), only Notice Nos. L-026982315-2 (\$247.45) and L-026982319-7 (\$3,888.91) remain at issue as to petitioner NJCLI.

14. No testimony or documentary evidence was offered by petitioners at the hearing held herein.

***SUMMARY OF PETITIONERS' POSITION***

15. Petitioners contend as follows:

- a. The sales records provided along with the cooperation of the corporate accountant constituted sufficient support for reported sales;
- b. The extrapolation of conclusions drawn from the test period to the audit period was both unreasonable and flawed;
- c. The decrease in reported sales was the result of significant decreases in taxable sales and increases in sales to not-for-profit exempt organizations, in particular, FECS;
- d. The auditor misinterpreted the adjusting entry to the general journal of the \$115,000.00 which was intended to decrease sales to reflect loans and advances to the business and to decrease expenses which should have been characterized as loan payback;
- e. NJC's business involved a substantial amount of carpet cleaning, a nontaxable service. The auditor failed to verify whether the percentage of carpet cleaning during the test period was representative of the entire audit period;
- f. The auditor should have accepted the accountant's explanation that the allegedly underreported receipts were cash advances to an insolvent business as opposed to taxable sales;
- g. With respect to the bulk sale, NJC transferred to NJCLI the corporate assets of a business in distress. No sales price was paid and the transferred assets had no monetary or goodwill value. Although the book value of the assets was reflected on the bulk sale notice, the fair market value of such assets was zero and the value of any assets on the books is far exceeded by debt associated with such assets and assumed by NJCLI; and

h. All sales tax computations, filing requirements and payments were made on a timely basis by NJC and any inadvertent failure to compute or pay was not due to willful intent to disobey the Tax Law. Therefore, penalties should be abated.

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

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every “retail sale” of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A “retail sale” is “[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . .” (Tax Law § 1101[b][4][i]). 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).

B. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice, Inc.*, 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).

C. As indicated in Findings of Fact 2 through 4, the Division made four separate written requests for the books and records of NJC (May 22, 2003, June 18, 2003, July 16, 2003 and June 30, 2004) and, when the audit period was expanded to include the period March 1, 2003 through November 30, 2004, another letter and a Records Requested List was sent to NJC on June 25, 2005 to request the company’s books and records for this period as well.

However, NJC failed to provide a complete set of sales invoices for the audit period and also failed to provide a sales journal, cash receipts journal and cash register tapes. A review of the records provided by the company also disclosed that NJC’s gross sales per its general ledger

were \$2,053,113.00 while the gross sales reported on its sales tax returns were \$1,741,747.00, a discrepancy of \$311,366.00.

Based upon the failure to provide a sales journal, cash receipts journal, cash register tapes and complete sales invoices for the audit period, it is hereby found that the Division's auditor properly found the books and records of NJC to be inadequate for the performance of a detailed audit. Accordingly, the Division's resort to an indirect method, i.e., external indices was proper in this case.

D. Where the Division has established entitlement to the use of indirect auditing methods, the burden is on the taxpayer to prove, by clear and convincing evidence, that the audit method was unreasonable (*Matter of Surface Line Operators Fraternal Org. v. Tully*) or that the amount of the assessment is erroneous (*Matter of Scarpulla v. State Tax Commn.*).

For the original audit period, June 1, 2000 through February 28, 2003, a detailed analysis of NJC's books and records was performed (not an estimate), which disclosed that gross sales per its general ledger exceeded gross sales as reported on its sales tax returns by \$298,326.00 for which no explanation was provided by NJC. As a result, the auditor held this amount to be taxable, with tax due thereon in the amount of \$25,067.89. At the hearing held in this matter, no testimony or documentary evidence was presented from which it could be found that any of the \$298,326.00 represented exempt or nontaxable sales.

For the updated audit period, March 1, 2003 through November 30, 2004, NJC's gross sales as reported on its sales tax returns were accepted by the auditor because they were in substantial agreement with gross sales per its general ledger. Since adequate books and records were not provided from which taxable sales could exactly be determined, the auditor had to resort to an estimate of the taxable sales. As indicated in Finding of Fact 7, the auditor calculated

a taxable ratio of 30% by dividing audited taxable sales by gross sales per the taxpayer's records for the period September 1, 2002 through February 28, 2003. The auditor utilized this period because NJC began doing business with FECS in September 2002. Additional cash payouts of \$115,000.00 during the period ended November 2003 were also included as additional taxable sales because NJC's books indicated that the cash payouts were derived from sales receipts. Reported taxable sales were subtracted and, after determining that additional taxable sales for the updated period totaled \$267,533.00, tax in the amount of \$23,326.06 was assessed.

At the hearing and in its brief, NJC claimed that the auditor misinterpreted the adjusting entry to the general journal of the \$115,000.00, which was intended to actually decrease sales to reflect loans and advances to the business. However, other than argument put forth by NJC's counsel, no testimony or documentary evidence was provided to substantiate NJC's claim. No one testified that loans or advances were made to the business, and no documents evidencing such loans or advances were provided. While general claims were made by NJC's counsel that use of the test period was unreasonable and flawed, no evidence was presented to substantiate these claims.

NJC also claimed that it had a significant decrease in taxable sales and a corresponding increase in nontaxable sales for the updated audit period because of its sales to FECS. However, by first subtracting NJC's sales to FECS for the period (\$153,729.00) because sales tax would not have been included on the sales to FECS, before calculating the 30% taxable ratio utilized for the updated period, the auditor properly took into account NJC's FECS sales.

Finally, NJC claims that its business involved a substantial amount of carpet cleaning, a service which is not subject to tax. As previously noted, on each of its federal income tax returns filed during the audit period, NJC listed, as its product or service, floor waxing which, pursuant



to Tax Law § 1105(c)(3) and 20 NYCRR 527.5(a)(3) is a taxable service. Furthermore, no books and records or testimony by a person familiar with the business operation of NJC was produced at the hearing.

Accordingly, as to the portion of the assessment against NJC resulting from the audit conducted, \$25,067.89 for the original audit period, \$23,326.06 for the updated audit period and \$1,253.22 for tax assessed on fixed assets, it must be found that NJC failed to prove, by clear and convincing evidence that the audit methods were unreasonable or that the amount of this portion of the assessment was erroneous, and therefore, this portion of the assessment is sustained in its entirety.

E. The Division asserted penalty herein pursuant to Tax Law § 1145(a)(1)(i) and (vi). Tax Law § 1145(a)(1)(i) states that any person failing to file a return or pay over any sales or use tax “shall” be subject to a penalty. This penalty may be canceled if the failure was “due to reasonable cause and not due to willful neglect” (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Division’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]).

Tax Law § 1145(a)(1)(vi) states that any person who omits from the total amount of tax required to be shown on a sales tax return an amount which is in excess of 25 percent of such total amount “shall be subject to a penalty equal to ten percent of the amount of such omission.” Like the penalties imposed under Tax Law § 1145(a)(1)(i), penalties imposed under section 1145(a)(1)(vi) must be remitted if the failure was due to reasonable cause and not due to willful neglect.

As to penalties assessed upon NJC, it asserts that all of its sales tax computations, filings and payments were made on a timely basis and that any inadvertent failure to compute or pay was not due to willful intent to disobey the Tax Law.

First, as shown in Finding of Fact 13, NJC did not remit the tax stated to be due on the returns filed during portions of the audit period. Second, penalties are appropriate in this matter because there is a substantial discrepancy between the sales tax reported on the returns filed for the audit period and the sales tax found to be due on audit (*see Matter of S.H.B. Super Markets, Inc. v. Chu*, 135 AD2d 1048, 522 NYS2d 985 [1987]).

Since NJC failed to sustain its burden of proving that its failure to ascertain, report and pay the correct amount of sales tax due was due to reasonable cause and not willful neglect, the penalties assessed must be sustained.

F. Tax Law § 1141(c) requires the purchaser in a bulk sale transaction to give notice of such sale to the Division at least 10 days prior to taking possession of or making payment for the business assets. If the purchaser fails to file a proper and timely notice of bulk sale, then such purchaser becomes personally liable for the sales and use taxes due from the seller. The liability of the purchaser is limited to the greater of the purchase price or the fair market value of the business assets sold (*see* 20 NYCRR 537.1[c][2]).

The term “bulk sale” is defined in 20 NYCRR 537.1(a)(1) as:

any sale, transfer or assignment in bulk of any part or the whole of business assets, other than in the ordinary course of business, by a person required to collect tax and pay the same over to the Department of Taxation and Finance.

Petitioners contend that all that was transferred by NJC to NJCLI was the corporate assets of a business in distress. No sales price was paid by NJCLI and the value of any assets transferred was far exceeded by debt associated with such assets and assumed by NJCLI.

In *Matter of Peconic Bay Motors, Inc.* (Tax Appeals Tribunal, September 26, 1991), the Tribunal addressed a similar situation as the matter at issue. In that case, the seller received no monetary consideration for the sale of its business assets; the sole value received by the seller was relief from its debt obligations. The Tribunal held, nevertheless, that even where the sole consideration received was debt relief, Tax Law § 1141(c), the bulk sales tax provision, is applicable.

Since, pursuant to the Notification of Sale, Transfer, or Assignment in Bulk filed by NJCLI in May 2006, the sale by NJC of manufacturing equipment, tools and supplies to NJCLI was valued at \$64,904.00 (there was no selling price in this transaction) sales tax was properly assessed against NJC on the fair market value of the assets sold. The tax was assessed in the amount of \$5,679.10, which represents a tax rate of 8.75%.

G. As to NJCLI, the bulk sale purchaser, it is clear that NJCLI failed to comply with the provisions of Tax Law § 1141(c) which require a purchaser in a bulk sale transaction to give notice of such sale to the Division at least 10 days prior to taking possession of or making payment for the business assets. On the Notification of Sale, Transfer, or Assignment in Bulk filed by NJCLI in May 2006, it listed the date of sale as September 2004. Therefore, pursuant to Tax Law § 1141(c), by failing to timely file the Notification of Sale, Transfer, or Assignment in Bulk until more than one and one-half years after the sale, the bulk sale purchaser, NJCLI, became personally liable for the sales and use taxes due from the seller, NJC. Since there is no

proof that there was a purchase price paid, the liability of the purchaser is limited to the fair market value of the business assets sold, to wit, \$64,904.00.

As noted in Finding of Fact 13, the Division assessed tax against NJCLI for the total sales tax due from NJC as a result of the audit (\$55,326.27) plus other assessments for amounts resulting from NJC's failure to remit the amounts shown on various sales tax returns filed during the audit period. Since the total tax assessed was \$64,562.01, an amount which is less than the fair market value of the assets transferred by NJC to NJCLI, it is hereby found that this assessment against NJCLI was, in all respects, proper. Subject to the amounts which have since been paid in full or canceled (*see* Finding of Fact 13), such assessment must, therefore, be sustained.

H. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax includes "any officer, director or employee of a corporation . . . who as such officer, director, [or] employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28] . . ." (Tax Law § 1131[1]).

Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities such that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of the case (*see Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 1023, 513 NYS2d 564, 565 [1987]). The ultimate question to be resolved in any responsible officer case is:

whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

I. Specific factors to consider when determining responsible officer status under Article 28 are the authorization to hire and fire employees (*Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536 [1986], *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027 [1987]); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation (*Matter of Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862 [1979]; *Matter of Stern*, Tax Appeals Tribunal, September 1, 1988); the duties and functions of the officers and directors as outlined in the certificate of incorporation, corporate bylaws and minutes of corporate meetings, and the preparation and filing of sales tax forms and returns (*Matter of Vogel v. New York State Dept. of Taxation & Fin.*); the individual's economic interest in the corporation and whether he had authority to sign tax returns for the corporation (*Matter of Martin v. Commissioner of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239 [1990]); the payment, including the authorization to write checks on behalf of the corporation, of creditors other than the State of New York and the United States (*Matter of Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427 [1978]). Another factor is the individual's simultaneous status as an officer, director and shareholder (*Matter of Cohen v. State Tax Commn.*); and in a closely-held corporation, as in the present matter, the individual's knowledge of the affairs of the firm and the firm's profits (*Matter of Vogel v. New York State Dept. of Taxation & Fin.*; *Matter of Blodnick v. New York State Tax Commn.*).

A proper analysis of responsible person status is not simply a matching of the traditional indicia of responsibility to a person's surface acts. A consideration of the circumstances is required:

Thus the pertinent inquiry in a responsible officer case is not whether a person was an officer or performed the duties traditionally associated with such a position, but rather, whether the person in fact had authority to control the performance of the duties he performed (*see, Matter of Hall*, [Tax Appeals Tribunal, March 22, 1990]; *Matter of Constantino, supra.*). In other words, our analysis takes into account whether the person's acts were ministerial rather than evidence of actual authority (*Matter of Taylor*, Tax Appeals Tribunal, October 24, 1991).

J. On the Schedules K-1, issued by NJC to petitioner Andrew Shields for each of the years 2000, 2001, 2002 and 2003, he was listed as a 50% shareholder in the company. On the Notification of Sale, Transfer, or Assignment in Bulk filed when NJC transferred business assets to NJCLI, Andrew Shields was listed as the seller. Mr. Shields signed, as president of NJC, lease agreements and checks on behalf of the business during the audit period. He signed, as president, each sales tax return filed by NJC during the audit period and also signed New York S corporation franchise tax returns filed by the corporation for 2002 and 2003.

On a Responsible Person Questionnaire, Mr. Shields indicated that he was responsible for preparing or supervising the preparation of sales tax returns and ensuring remittance of tax due on behalf of NJC. He further acknowledged that he participated in significant business decisions, maintained and managed the business, owned corporate and voting stock, derived substantial income from the business, had the authority to pay or direct payment of corporate obligations, could hire and fire employees, negotiate loans, borrow money and that he was 100% in control of the financial affairs of NJC.

Clearly, therefore, the Division properly assessed sales and use taxes against Andrew Shields as a person responsible for and under a duty to act for NJC and such assessment is sustained in its entirety.

K. The petitions of National Janitorial Contracting, Inc., Andrew Shields and National Janitorial Contracting of Long Island, Inc., are denied and the notices of determination issued by the Division of Taxation to National Janitorial Contracting, Inc., on September 16, 2005, to Andrew Shields on March 27, 2006 and to National Janitorial Contracting of Long Island, Inc., on May 25, 2006, as modified by Finding of Fact 13, are hereby sustained.

DATED: Troy, New York  
October 2, 2008

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE