STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **PRIMO COFFEE, 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 September 1, 2004 through May 31, 2007.	:	DETERMINATION DTA NO. 823096

Petitioner, Primo Coffee, 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 September 1, 2004 through May 31, 2007.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, One Penn Plaza, New York, New York, on May 5, 2010, at 10:30 A.M., with all briefs to be submitted by September 17, 2010, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Hodgson Russ LLP (Timothy P. Noonan, Esq. and Joseph N. Endres, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUES

I. Whether the audit methodology utilized by the Division of Taxation in its audit of Primo Coffee, Inc., had a rational basis and was reasonably calculated to reflect the taxes due.

II. Whether the amount of tax assessed as the result of the application of the methodology used in this case was erroneous.

III. Whether penalties asserted against petitioner should be abated.

FINDINGS OF FACT

1. Petitioner, Primo Coffee, Inc., was selected for a sales and use tax audit for the period September 1, 2004 through May 31, 2007 (audit period). During the audit period, Primo Coffee, Inc., owned and operated three retail food locations in Penn Station, New York, New York.

2. In 2004, petitioner purchased the three retail food locations from Patricia Reilly Food Concepts, Inc. (PRFC). Prior to 2004, PRFC had entered into leases for the three locations with National Railroad Passenger Corporation (Amtrak). As part of petitioner's purchase of the three locations, petitioner assumed the leases previously negotiated by PRFC and Amtrak.

3. Two of petitioner's locations consisted of fixed-location storefronts within Penn Station (Primo 1 and Primo 2). The third location was a mobile food cart situated in the middle of a concourse in Penn Station (Primo Cart). During the audit period, Primo 1 and Primo 2 were open for business from 6:00 A.M. to 10:00 P.M. on weekdays and stayed open until 1:00 A.M. on weekends. Primo Cart was open during weekdays from 7:00 A.M. to 7:00 P.M.

4. Primo 1 is approximately 750 square feet and is located on the concourse level in Penn Station, across from the main train schedule board and a large seating area for commuters. Primo 2 is approximately 775 square feet and is located approximately 150 feet away from Primo 1. Both Primo 1 and Primo 2 have counters with three or four barstools that customers can use. Primo Cart is approximately 50 square feet and located in the middle of the concourse level, below Primo 1 and Primo 2.

5. During the audit period, all three locations sold virtually identical products, consisting primarily of coffee, muffins, bagels and other beverages. These items were sold primarily to

commuters traveling through Penn Station. Only Primo 1 and Primo 2 sold sandwiches and salads, and only Primo 2 sold wine and beer, in single-serve portions.

6. For each year during the audit period, Primo 1 reported higher sales than either Primo 2 or Primo Cart. This is consistent with the sales figures provided by PRFC to petitioner prior to petitioner's purchase of the locations. In 2006, Amtrak renovated the area near Primo 2, opening up a new concourse and ticketing booth for the New Jersey Transit trains adjacent to Primo 2. In 2005, petitioner's sales records for Primo 2 indicate $536,585.00 in sales, while in 2007, petitioner's sales records indicate $968,752.00. Petitioner's sales tax returns and sales records indicate a steady increase in overall sales from 2004 through 2009.

7. During the audit period, petitioner managed its business records using accounting software. Petitioner's records included, in part, a general ledger, a profit and loss statement, trial balances and a statement of transaction detail by account that recorded items of income and expenditure in a given period. However, petitioner did not maintain cash register tapes as part of its business records. Following the audit, and having been informed of the need to maintain cash register tapes, petitioner invested in a new, computerized point-of-sale system that electronically records and stores every transaction made at Primo 1 and Primo 2.

8. After assuming the leases for the three locations from PRFC, petitioner began making rent payments to Amtrak. Pursuant to the lease provisions, petitioner paid a fixed annual base rent for each location. In addition to the base rent, the leases obligated petitioner to pay additional rent amounts for each location when annual gross sales exceeded a predetermined threshold amount (breakpoint).

9. According to petitioner's records provided to Amtrak, each location's annual base rent and breakpoint figures during the audit period were as follows:

	PRIMO 1	
Lease Term	**Annual Base Rent**	**Annual Breakpoint**
5/1/04 - 4/30/05	$66,000.00	$825,000.00
5/1/05 - 4/30/06	$66,000.00	$825,000.00
5/1/06 - 4/30/07	$72,600.00	$907,500.00
5/1/07 - 4/30/08	$72,600.00	$907,500.00

	PRIMO 2	
Lease Term	**Annual Base Rent**	**Annual Breakpoint**
10/1/03 - 9/30/04	$ 95,000.00	$1,900,000.00
10/1/04 - 9/30/05	$ 95,000.00	$1,900,000.00
10/1/05 - 9/30/06	$100,000.00	$2,000,000.00
10/1/06 - 9/30/07	$100,000.00	$2,000,000.00

	PRIMO CART	
Lease term	**Annual Base Rent**	**Annual Breakpoint**
8/1/04 - 7/31/05	$12,000.00	$240,000.00
8/1/05 - 7/31/06	$14,400.00	$288,000.00
8/1/06 - 7/31/07	$14,400.00	$288,000.00

10. During the audit period, Primo 1's base rent-to-breakpoint ratio was 12.5. That is, Primo 1's breakpoint was 12.5 times greater than its base rent. Primo 2 and Primo Cart had different base rent-to-breakpoint ratios. For all periods covered by the leases, Primo 2’s and Primo Cart’s base rent-to-breakpoint ratio was 20, meaning that Primo 2’s and Primo Cart’s breakpoints were 20 times greater than their base rents.

11. In order to determine whether the breakpoint threshold had been reached and additional rent was due, petitioner submitted gross sales figures to Amtrak on a monthly basis for

each location, pursuant to the lease agreement. According to the definition of "gross sales" contained in the lease agreements, the gross sales figures did not include any sales tax paid. For the years at issue, petitioner reported the following sales to Amtrak and sales per returns:

PERIOD	Sales reported to Amtrak	Sales reported per returns
9/1/04 - 12/31/04	$ 465,298.00	$ 431,320.00
1/1/05 - 12/31/05	$1,512,925.00	$1,445,606.00
1/1/06 - 12/31/06	$1,810,027.00	$1,703,422.00
1/1/07 - 2/28/07	$ 325,215.00	$ 311,860.00

No explanation was provided by petitioner as to the discrepancy between the amounts of gross sales reported to Amtrak and the amounts of gross sales reported on its sales and use tax returns.

12. According to an e-mail dated April 24, 2008 from Amtrak's leasing agent, in response to a request from petitioner, Amtrak expected food establishment tenants in Penn Station to generate average sales of $1,300.00 per square foot of space leased. Petitioner's 2007 sales, as reported to Amtrak, are somewhat consistent with the amount of sales determined by applying this formula to petitioner's locations (***see*** Finding of Fact 4).[1]

13. During the audit period, based on the amounts petitioner reported to Amtrak, only Primo 1 had achieved sales in excess of its breakpoint figure. Consequently, under the lease agreement, petitioner was required to pay excess rent for Primo 1 exclusively. During the audit period, petitioner did not pay any excess rent for Primo 2 or Primo Cart.

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[1] For example, Primo 1 reported to Amtrak $1,066,827.00 in sales; sales per the e-mail would be $975,000.00 (750 x $1,300.00). Primo 2 reported $968,752.00 in sales; sales per the e-mail would be $1,007,500.00 (775 x $1,300.00). Primo Cart reported $55,127.00 in sales; sales per the e-mail would be $65,000.00 (50 x $1,300.00).

14. Petitioner did not negotiate the leases that were in effect during the audit period. Petitioner did, however, subsequently negotiate the extension of the leases for both Primo 1 and Primo 2. When Primo 2's lease was renewed in 2007, it had reported sales to Amtrak ranging from $519,011.00 to $772,158.00 during the previous four calendar years. However, Amtrak set Primo 2's revised breakpoint at more than $2.3 million. In 2010, Primo 1's renegotiated annual base rent more than tripled to $300,300.00 and its annual breakpoint figure increased to $6,606,000.00.

The setting of breakpoints in petitioner's leases was never based upon expected sales at the particular locations. Instead, the breakpoint was based upon "a mathematical formula tied to the amount of Base Rent a tenant agrees to pay." The higher the base rent, the higher the breakpoint. Thus, the breakpoint for Primo 2 from 2004 through 2007 was higher than the breakpoint for Primo 1 because the base rent for Primo 2 was approximately a third higher than the base rent for Primo 1. Amtrak's preference is to receive a high guaranteed annual Base Rent rather than rely on the contingent breakpoint methodology. A more aggressive and competitive bid would have a higher annual base rent and a correspondingly high annual breakpoint.

15. On February 12, 2007, the Division of Taxation (Division) sent a letter to petitioner stating that a sales and use tax field audit of the business operation was to be conducted for the period March 1, 2004 through February 28, 2007. The Division's letter requested that all of petitioner's books and records pertaining to the sales tax liability for the audit period be available for review. Among the records specifically requested in an attached list of requested records were petitioner's sales tax returns, New York State corporation tax returns, sales invoices, exemption documents, fixed asset purchase and sales invoices, expense purchase invoices, bank

statements, cash receipts journal, cash disbursements journal, federal income tax returns and depreciation schedules for the entire audit period.

On October 29, 2007, the Division sent a second letter to petitioner stating that the audit period had been expanded to September 1, 2004 through May 31, 2007. The Division's letter requested that all of the business's books and records pertaining to the sales tax liability for the additional period be made available for review as well. A records requested list similar to the one sent on February 12, 2007 was attached to this second letter.

16. Petitioner provided the auditor most of the requested records, including sales tax returns and worksheets, cancelled checks, federal income tax returns, most New York income tax returns, a general ledger, a general journal with closing entries, a chart of accounts, fixed asset purchase records, expense and merchandise purchase invoices for the entire audit period, bank statements, a cash receipts journal, a cash disbursements journal and depreciation schedules. Petitioner did not make available detailed cash register tapes or other source documentation from which the auditor could verify petitioner's sales as reported on the sales and use tax returns.

17. The Division's audit was conducted primarily by an auditor and her supervisor. A field audit occurred at petitioner's accountant's office from June 11, 2007 to June 14, 2007, during which time the auditor reviewed petitioner's records. On June 19, 2007, the auditor observed petitioner's locations during a field visit to Penn Station, met with a store manager and obtained sample copies of a price list and cash register "Z" tapes.

18. Based upon the lack of detailed cash register tapes, the auditor determined that petitioner's records were inadequate and opted to use an indirect audit methodology to determine the amount of petitioner's sales during the audit period. After initially reviewing the documentation provided by petitioner, the Division attempted to perform a purchase markup

audit of Primo 2. The auditor concluded that Primo 2's markups on beer, wine, soda and bottled water seemed reasonable.

19. Shortly thereafter, the Division obtained a portion of the NYC Restaurant Resource for 2000, a study detailing various aspects of the restaurant industry in New York City. The Division used this publication to create two methodologies for estimating petitioner's sales. The first was a "cost of goods sold" methodology where the Division applied a figure from the publication to petitioner's food purchases to determine its sales. The second methodology was an "occupancy" methodology where the Division applied a percentage obtained from the publication to the amounts petitioner paid in rent to estimate its sales.

20. The Division determined that the cost of goods sold factor was not reliable as there was no way to verify that the auditor had been provided with all of petitioner's cash payments. According to the Division, while the cash payment information that was provided was verified through third-party confirmations, there was no documentation, such as a cash disbursements journal, to verify all the vendors that had sold to petitioner. In addition, a detailed analysis of daily cash purchases of perishables from the only vendor supplying such items showed gaps in such purchases. At the hearing, the Division's witness conceded that petitioner had, in fact, supplied a cash disbursements journal to the auditor during the audit process.

21. Having determined that petitioner's records were unreliable to perform the methodology based upon purchases, the Division next proceeded using the occupancy methodology. Based upon this methodology, the Division issued a Statement of Proposed Audit Changes to petitioner in April 2008. Following a review of the complete NYC Restaurant Resource, petitioner's accountant pointed out to the Division several problems with using the publication to estimate petitioner's sales liability, including the fact that the publication analyzed

full-service restaurants where the average business maintained 120 seats in the dining area, 31 seats in the bar area and 46 seats for private dining. Moreover, the restaurants detailed in the publication maintained numerous waiters, hosts and hostesses, bus boys, executive chefs, sous chefs, sommeliers, floor managers, general managers and other employees not utilized in petitioner's business operation. Following its review of the complete publication and the conversation with petitioner's accountant, the Division decided not to use the publication to estimate petitioner's sales.

22. After abandoning the occupancy methodology, the Division decided to utilize a "rent factor" methodology where the auditor used petitioner's lease agreements to estimate petitioner's sales. Upon request, petitioner's accountant provided the Division with copies of the leases, the amount of rent petitioner paid to Amtrak, its sales reported to Amtrak and a copy of an e-mail from Amtrak concerning average annual sales figures per-square-foot of leased space for food service tenants in Penn Station (***see*** Finding of Fact 12). The Division also issued a subpoena to Amtrak to obtain additional information and to verify the sales amounts reported by petitioner to Amtrak for each location.

The Division then employed a new methodology to determine petitioner's sales based upon the amount of base rent and breakpoint rent figures contained in the lease agreements. The rent factor methodology was based upon the assumption that each Primo location met its breakpoint figures because Amtrak would not set a breakpoint figure far removed from a tenant's sales.

23. The Division first totaled each location's breakpoint rent figure to determine petitioner's gross base sales. To determine the sales that the locations made in excess of their breakpoints, the Division totaled the rent paid to Amtrak for all three locations for each year

under audit and compared that figure to the base rent required to be paid to Amtrak under the leases. For the years in which the rent paid exceeded the base rent amount, the Division assumed that the sales for all three locations exceeded their corresponding breakpoints and assigned these additional sales to each location. The Division then added the base sales amount to the sales computed based on the excess rent payments to arrive at petitioner's total gross sales. After subtracting petitioner's reported sales and applying the taxable ratio contained in its sales tax returns, the Division determined that petitioner made an additional $4,334,385.00 in taxable sales, resulting in additional sales tax due of $364,840.35.

24. According to the audit supervisor, it was reasonable to assume that each location met its breakpoint total because Amtrak would not set an unattainable figure. The supervisor admitted that the Division's assumption that breakpoints were tied to sales was not based on any personal experience he had with Amtrak leases. The assumption was not based upon any industry study or other research indicating that breakpoints in Amtrak leases would correlate to a tenant's sales.

25. Petitioner or its representative signed four consents extending period of limitations for assessment of sales and use taxes under Article 28 and 29 of the Tax Law, which together extended the limitation for assessing the period September 1, 2004 through March 31, 2006 to April 20, 2009.

26. On March 19, 2009, the Division issued to petitioner a Notice of Determination assessing tax due of $364,840.35, plus penalty and interest. The Division stipulated at the hearing that the tax liability should be reduced to $337,967.16, plus penalty and interest.

27. Petitioner submitted proposed findings of fact numbered 1 through 27, with respect to which the following rulings are made:

a) proposed facts 1, 2, 3, 4, 8, 9, 10, 12, 13, 16, 19, 21, 23, 24, 25 and 27 are accepted as accurate and have been incorporated in the Findings of Fact.

b) proposed facts 5, 6, 20 and 22 have been modified as to that portion deemed not being entirely supported by the record.

c) proposed facts 7, 14, 17, 18 and 26 have been modified as to that portion deemed not being relevant to this determination.

d) proposed fact 11 has been modified as to those portions deemed conclusory in nature and as to those portions deemed inaccurate.

e) proposed fact 15 is not relevant to this determination and has been excluded.

CONCLUSIONS OF LAW

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

> a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (***see***, Tax Law §§ 1138[a]; 1135; 1142[5]; ***see***, ***e.g.***, ***Matter of Mera Delicatessen***, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained 'shall include a true copy of each sales slip, invoice, receipt, statement or memorandum' (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, 'the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ' (Tax Law § 1138[a]; ***see, Matter of Chartair, Inc. v. State Tax Commn.***, 65 AD2d 44, 411 NYS2d 41, 43).
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> When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (***Matter of Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869); exactness is not required (***Matter of Meyer v. State Tax Commn***., 61 AD2d 223, 402 NYS2d 74, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025; ***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (***Matter of***

Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451).

B. In this case, the record establishes the Division's clear and unequivocal written request for books and records of petitioner's sales (***see Matter of Harmukh, Inc.***, Tax Appeals Tribunal, September 30, 2010). Although petitioner produced most of the records requested, petitioner did not make available detailed cash register tapes or other source documentation from which the auditor could verify petitioner's sales as reported on the sales and use tax returns. The Division reasonably concluded that petitioner did not maintain or have available books and records that were sufficient to verify gross and taxable sales for the audit period including, most tellingly, any records of sales.

Having established the unavailability of required books and records, the Division was clearly entitled to resort to the use of indirect methods of audit, including the use of a rent factor methodology, to determine petitioner's sales and sales tax liability. In fact, the Division's authority to do so has been consistently sustained (***see Matter of Del's Mini Deli, Inc. v. Commissioner of Taxation & Fin***, 205 AD2d 989, 613 NYS2d 967 [1994]; ***Matter of Sarantopoulos v. Tax Appeals Trib.***, 186 AD2d 878, 589 NYS2d 102 [1992]; ***Matter of Vebol Edibles v. State of N.Y. Tax Appeals Trib.***, 162 AD2d 765, 557 NYS2d 678 [1990]) and the use of a rent factor has been specifically addressed and approved (***see Matter of Constantini***, Tax Appeals Tribunal, January 10, 2008; ***Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003; ***Matter of Bitable on Broadway, Inc.,*** Tax Appeals Tribunal, January 23, 1992). In view of the foregoing, the only questions presented in this case are whether petitioner has established that the audit method employed was unreasonable and whether the amount of tax assessed as the result of the application of the method used in this case was erroneous (***Matter of Surface Line Operators Fraternal Organization v. Tully***).

C. It is petitioner's position that a review of the entire record in this matter establishes that the Division's use of the lease breakpoints to estimate taxable sales lacked a rational basis and therefore was not a reasonable method to estimate petitioner's sales. Petitioner further claims that there must be a connection between the breakpoints used in the leases and petitioner's sales, citing ***Matter of Edelweiss International, Ltd.*** (Tax Appeals Tribunal, November 23, 2005 [Tribunal cancelled an assessment on rational basis grounds where the Division used an index for souvenir shops to estimate the sales of a delicatessen]) and ***Matter of Negat, Inc.*** (Tax Appeals tribunal, April 9, 1992 [Tribunal held that the Division could not use sales records from an unrelated business to estimate sales for a business under audit without demonstrating that there was some connection between the two]).

D. Petitioner also cites the Tax Appeals Tribunal case of ***Matter of Fokos Lounge, Inc.*** (March 7, 1991) in support of its position. In ***Matter of Fokos Lounge, Inc.***, the Division used the taxpayer's utility bills to estimate its sales in an audit of a tavern. The Division employed an industry chart that related bar and tavern utility usage to gross sales at such locations, resulting in a determination that, generally, utility usage represented 2.35% of a tavern's gross sales. The Division applied this percentage to the disco taxpayer's utility bills to arrive at an estimated sales figure.

During the course of the hearing, the taxpayer provided evidence and expert testimony regarding how its utility bills were calculated. It was established at the hearing that the utility company had provided the taxpayer with a "demand meter, suitable for heavy industries with a constant demand for electricity. During a single month, the meter registered the peak demand placed on the system, and the taxpayer was billed as though that peak was the constant demand throughout the billing period."

The Tribunal concluded that the taxpayer had presented sufficient evidence at the hearing to establish that the demand metering system utilized at the premises did not in any way correlate to the level of actual business activity at the tavern. The Tribunal cancelled the assessment, holding that the taxpayer had shown that the use of the audit methodology, as applied to the business, was totally unreasonable where a direct relation between utilities and gross sales was utterly lacking. Thus, the utility audit was without a rational basis. (***Id***.)

E. The Division's audit in the instant case was devised based upon the theory that there existed a connection between the breakpoints set in petitioner's leases with Amtrak and the sales levels at each location. However, in an affidavit, Amtrak's leasing agent stated that breakpoints were never designed to correlate to sales and further explained that breakpoints were instead set pursuant to a mathematical formula tied to the amount of base rent a tenant agrees to pay. The higher the base rent, the higher the breakpoint. Thus, the breakpoint for Primo 2 from 2004 through 2007 was higher than the breakpoint for Primo 1 because Primo 2's base rent was approximately a third higher than the base rent for Primo 1, rather than on account of Primo 2's projected sales. The affidavit further explained that Amtrak's preference was to receive a high guaranteed annual base rent rather than to rely on the contingent breakpoint rent revenue. Consequently, according to the affidavit, a more aggressive and competitive bid would have a higher annual base rent and a correspondingly high annual breakpoint. The affidavit is consistent with the leasing agent's April 24, 2008 e-mail, which stated that Amtrak's expectations for gross sales at Penn Station locations average $1,300.00 in sales per square foot. This figure is consistent with the annual rent paid by petitioner, but is not consistent with the breakpoint figures contained in the leases for the period at issue or the subsequent leases negotiated by petitioner.

Further support for petitioner's position includes the lease extensions, signed by petitioner for Primo 1 and Primo 2, which illustrate the lack of connection between breakpoints and sales. When Primo 2's lease was renewed in 2007, it had reported sales to Amtrak ranging from $519,011.00 to $772,158.00 during the previous four calendar years. However, Amtrak set Primo 2's revised breakpoint at more than $2.3 million. In 2010, Primo 1's renegotiated annual base rent more than tripled to $300,300.00 and its annual breakpoint figure increased to $6,606,000.00, a ratio of 20 times its base rent. Both renegotiated leases illustrate that the breakpoints are tied to the base rent, and not to expected sales, as the breakpoint ratio remained at 20%, as it had been both before and after the lease renegotiation.

Based on the evidence in the record, petitioner has established that the lease breakpoints bear no relation to gross sales, and therefore, the audit is without a rational basis. Therefore, as the audit method is not "logically and empirically related to the subject of the tax[,]" the underlying assessment must be annulled (***Matter of Abbasi***, Tax Appeals Tribunal, June 12, 2008; ***see also Matter of Fokos Lounge, Inc.***).

F. Issues II and III are rendered moot.

G. The petition of Primo Coffee, Inc., is granted, and the Notice of Determination dated March 19, 2009 is cancelled.

DATED: Troy, New York
March 3, 2011

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE