

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
K&A GAS & GO MART, INC.	:	
AND KASSEM ABDO	:	DECISION
for Revision of Determinations or for Refund of Sales and	:	DTA Nos. 823020
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	and 823021
Period September 1, 2003 through August 31, 2006.	:	

Petitioners, K&A Gas & Go Mart, Inc. and Kassem Abdo, filed an exception to the determination of the Administrative Law Judge issued on February 17, 2011. Petitioner appeared by The Antonious Law Firm (Jacqueline S. Antonious, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq., (Lori Antolick, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request was heard on July 13, 2011 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation properly resorted to an estimated audit methodology to determine petitioners' sales and use tax liability for the period in issue.

II. Whether the Division of Taxation, using the cost markup audit method on petitioners' purchases of gasoline and convenience store items, properly determined petitioners' additional sales tax liability.

III. Whether petitioners have demonstrated reasonable cause for the abatement of penalties asserted by the Division of Taxation pursuant to Tax Law § 1145.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

K & A Gas & Go Mart, Inc. (petitioner) is a busy Sunoco gas station located in Brooklyn, New York, with a large attached convenience store where nonfuel items such as cigarettes, soda, candy, motor oil, detergent and sundry nontaxable items are sold. The gas station sells motor fuel, but has no diesel fuel sales and has no repair shop. Petitioner and its owner and sole shareholder, Kassem Abdo, are assessed in this case. Mr. Abdo's status as a responsible officer of the corporation under the Tax Law is not disputed.¹

The Division of Taxation (Division) conducted a sales tax audit of petitioner at the site of its business for the period September 1, 2003 through August 31, 2006 and determined that it had underreported its sales of fuel and nonfuel items.

The Division corresponded with petitioner on November 27, 2006 for the purpose of setting a mutually agreeable time for the audit of petitioner's sales tax returns. Correspondence addressed to petitioner dated December 6, 2006 confirmed the agreed upon date of December 14, 2006 to commence the field audit at petitioner's office. The "records requested list" attached to

¹ Since the asserted liability of the corporate petitioner is the basis for the asserted liability of both the corporation and its sole shareholder, the term "petitioner" applies to the corporation, but includes both taxpayers.

the December 6, 2006 letter included the following documents and information for the entire audit period: sales tax returns, related schedules and supporting work papers and schedules; FT-943 service station reports; inventory records; invoices from suppliers; fuel disbursements, both sales and self-use; cash register tapes; pump meter readings; daily shift sheets; worksheets and cancelled checks; federal corporate income tax returns and New York State corporation tax returns, with supporting work papers; cash receipts and cash disbursements journals; the general ledger; sales journals and invoices; checkbook registers; exemption documents; capital asset purchase and sales invoices; equipment listing; payroll records; daily pump prices; and charge card slips. At no time during the audit of petitioner were all of these records produced simultaneously for inspection.

At the time of the audit, petitioner submitted handwritten daily shift reports (ledger), on which the gas station manager, Khan Azmal, had recorded the number of gallons of the four different types of gasoline sold, the total gallons sold and total sales from the convenience store on each day. This ledger did not show dollar amounts for fuel sales and did not separate taxable and nontaxable nonfuel sales from the convenience store items. Petitioner also provided some purchase invoices for both fuel and nonfuel purchases. However, the Division's auditor was not able to confirm that the invoices represented all purchases.

On December 13, 2006, a Division investigator conducted an observation of petitioner's business. He took note of its operations, listed the taxable and nontaxable items sold in the convenience store, took some pictures of the pumps and storefront, and noted the cigarette price list as advertised on the same day. The investigator estimated that approximately 95% of the items sold in the convenience store were subject to the collection of sales tax.

Since the auditor did not receive records of sales of fuel and nonfuel products in dollar amounts and no source documentation was provided, petitioner's records were deemed inadequate. As a result, the auditor requested that petitioner agree to a test period method to complete the audit. On December 14, 2006, at the scheduled field audit appointment, petitioner agreed to and signed a Test Period Audit Method Election form. According to the election form, the test period selected was June 1, 2005 through August 31, 2006. The Division's auditor, however, chose six quarters to use as the test period; the five quarters in the agreed period of June 1, 2005 through August 31, 2006, plus the quarter June 1, 2004 through August 31, 2004.² He analyzed the quarters by looking at invoices or bills of lading to determine how many gallons of gasoline were purchased and how much was paid for it. The auditor determined that for the test period, the number of reported gallons of gasoline sold was very close to the number of gallons purchased. In addition, on the basis of the same invoices, the auditor was able to determine the purchase price per gallon including all the taxes.

In order to utilize petitioner's purchase records to determine sales, it was necessary for the Division's auditor to calculate markup percentages on the gasoline. Petitioner did not have sales records showing the sales per gallon, or totals, until it created daily shift tapes from its new registers, installed on or about July 6, 2006. The new register system did not delineate between taxable and nontaxable nonfuel sales. However, with information from the post-July 6, 2006 daily shift tapes and petitioner's cost records, the auditor was able to compute an average markup per gallon and a percentage of the cost per gallon of the two types of gasoline purchased (regular

² The use of the additional quarter in the test period was not disputed.

and premium), from which two other grades of gasoline were created and sold. Those markup percentages were 7.3% for regular gasoline and 8.7% for premium gasoline.

Using petitioner's invoices for gallons of gasoline purchased, the auditor accepted gallons purchased as gallons sold and extracted from those invoices the price per gallon. He applied the markup percentages he had computed on the two grades of gasoline, to arrive at an audited pump price. He multiplied the gallons sold by the audited pump price (not having the actual pump price) to arrive at gross fuel receipts. He compared gross fuel receipts to what was reported by petitioner and calculated additional gross receipts for the test period of \$378,336.00. He divided that result by the reported gross receipts for the same period in the amount of \$1,723,486.00, to arrive at an error rate of 22%.

The calculated error rate was applied to the audit quarters not covered by the test period, i.e., September 1, 2003 through May 31, 2005.³ Specifically the error rate of 22% was multiplied by the gross fuel receipts as reported by petitioner. This resulted in audited gross fuel receipts, which were then multiplied by the New York State excise tax rate of 8%. The excise tax was subtracted from gross fuel receipts to determine gross sales subject to sales tax. The appropriate sales tax rate for each quarter during the audit period (either 8.375% or 8.625%) was used to back out the sales tax in the gross amount to arrive at taxable fuel sales.⁴ The sales tax due was then identified as a separate amount. The prepaid tax on gasoline was calculated by applying the appropriate rate for each quarter, ranging from 10.9% to 17%, to the gallons reported sold by

³ The auditor explained that with a change in the Tax Law effective June 1, 2006, the sales tax is calculated differently than for the other four quarters used to determine the error rate. Thus, he did not use the test period quarter ending August 31, 2006 in his error rate calculation.

⁴ The auditor's work also reflected a change in the Tax Law effective June 1, 2006 for the quarter ended August 31, 2006 in his calculation of taxable fuel sales and fuel sales tax due for that quarter.

petitioner on its returns and for the quarters of the test period, to the gallons purchased. The sales tax due less the prepaid tax as calculated, less the tax already remitted with petitioner's service station reports (form FT-943) resulted in additional sales tax due from the audit pertaining to fuel sales in the amount of \$78,301.56.

In addition to the ledger described above, a second ledger was created and introduced into evidence by petitioner at the hearing. The auditor remembered reviewing the first ledger, but recalled seeing the second one only about a month before the hearing. The additional ledger listed the following for each day: total gallons sold, an amount deducted from gallons sold to account for 1% leakage, gross fuel sales, taxable nonfuel sales, gross nonfuel sales and gross receipts. This new ledger was provided to the Division in March 2008 when Ms. Antonious commenced her representation of petitioner. However, during its preparation, Ms. Antonious located an error in the calculation of the federal excise tax resulting in approximately \$30,000.00 of additional fuel tax due. The auditor did not take the additional ledger into account for the audit calculations because the sales could not be traced to any source documentation. The auditor also had difficulty tracing the sales figures to the electronic daily shift tapes that were available for the last two months of the audit period.

Petitioner also submitted into evidence the following documents in support of its position:

(a) Detailed monthly gasoline inventory records prepared by petitioner, showing changes in inventory of Ultra-93 and regular gasoline for each day of the month. It listed existing gasoline inventory, gallons delivered, gallons sold, book inventory and leakage, in gallons. However, it was not a complete record, leaving out different months and different types of gas.

(b) The daily Oil Price Information Service (OPIS) records. These are credit card records for the Brooklyn zip code where petitioner's business is located. The Division did not use OPIS, a third-party verification option, in this case, since OPIS identifies the pump price only for the last transaction of the day and only for regular grade gasoline, and the Division had decided upon a cost markup method in the alternative.

(c) The US Department of Energy & Statistics Data listing the retail pump price of gasoline for the New York City area for the respective quarters in the audit period.

(d) A portion of 2003, 2005 and 2006 third-party records of cigarette purchases by petitioner from a company referred to as HLA.

(e) A calculation of the daily average retail price per gallon of gasoline for the audit period. It was identified as information from petitioner's books and records.

The Division's auditor was given the retail price calculation a month before the hearing. He considered the computation of the retail price per gallon of gasoline and compared it to the data he extracted from petitioner's own actual daily cash register shift reports for July 6, 2006 through August 31, 2006. He divided total fuel sales on a particular day by the total gallons of gasoline sold of all grades. The average price per gallon on any given day computed from the daily shift reports did not agree with the daily price per gallon offer as computed in petitioner's price calculation.

The Division introduced a schedule of the monthly average gasoline price list for the New York City Metropolitan area as researched by the auditor.

Petitioner submitted its own calculation of adjusted taxable fuel sales and a computation of proposed additional tax due in the amount of \$30,537.00, taking into account errors conceded by petitioner. This submission was an attempt by petitioner to identify corrected gross receipts

from fuel sales, taking into account those calculation errors in reporting, resulting in additional tax due.

The Division's auditor gave consideration to the submission of adjusted taxable fuel sales and compared it to other information he had already obtained from petitioner during the audit, in order to determine the reliability of these calculations. He specifically compared the second daily ledger submitted by petitioner, which lists the gross fuel sales in both gallons and dollars for each day, with petitioner's submitted adjusted taxable fuel sales. The auditor tallied the amounts for five quarters, and none of them were equal (or close to equal) to the gross receipts used in petitioner's proposed recalculation of the additional tax due of \$30,537.00. This further confirmed the auditor's conclusion as to the lack of reliability of the accuracy of petitioner's books and records.

In order to determine whether nonfuel sales, i.e., cigarettes, soda, phone cards, motor oil and miscellaneous other items were properly reported, the auditor chose four quarters within the audit period (quarters ending 8/31/04, 5/31/05, 8/31/05 and 11/30/05) to test for sales other than fuel, from the convenience store. Based upon purchase invoices provided by petitioner for those periods, the auditor listed all taxable items, including cigarette purchases from HLA, petitioner's main supplier of cigarettes, and all corresponding cigarette prepaid tax data.

Utilizing the HLA invoices provided by petitioner for the test quarters, the auditor extracted the cigarette prepaid tax and compared it to that which was reported on petitioner's returns as prepaid tax. According to the available invoices, petitioner claimed more prepaid tax than to which it was entitled, and the auditor computed an error rate of 5.4% to reflect this fact.

In order to verify whether the sales of all items were reported, having no sales invoices or register tapes for the test period, the auditor performed a markup test on the purchases, to arrive

at audited gross sales. He first determined the markup percentages to be applied to each category of purchases. On December 13, 2006, when the investigator visited petitioner's business, he noted the price list of the cigarettes on that day. The average price per pack was approximately \$6.90, based on his list of 14 different brands. When the auditor computed cigarette sales for each of the four test quarters, he used \$65.00 as the estimated selling price per carton. Based upon the observation of the auditor during the field audit, he determined markup percentages on the cost of soda (100%), phone cards (18%), motor oil (50%) and miscellaneous items (30%). The auditor determined that for the four quarters, the additional gross sales of nonfuel items totaled \$35,752.00. Comparing the additional sales to the reported nonfuel sales for the test period (\$27,630.00), the auditor computed an error rate of 129.4%.

Using the two error rates, the auditor completed his computation of additional sales tax due on nonfuel items as follows:

a) He applied the 5.4% error rate to the prepaid cigarette tax as reported by petitioner on its tax returns for all the quarters except the test quarters (for which he used the amounts actually allowed or disallowed from the actual test), and determined an amount for disallowed prepaid cigarette tax.

b) He grossed-up reported nonfuel taxable sales per petitioner's returns to result in gross nonfuel sales, to which he applied the error rate of 129.4% to arrive at audited additional nonfuel gross sales.

c) He divided the amount in (b) by 1 plus the sales tax rate for each quarter, to arrive at audited additional taxable nonfuel sales, and then computed the sales tax due on those amounts.

d) To the sales tax due, he added the disallowed prepaid cigarette tax for which petitioner took credit (computed in [a] above), to arrive at tax due on audited nonfuel sales in the amount of \$8,116.69.

The nonfuel sales tax per audit (\$8,116.69) plus the fuel sales tax per audit (\$78,301.56) resulted in the total assessment of \$86,418.25. The Division issued a Notice of Determination to petitioner dated May 19, 2008, asserting additional sales tax due in the amount of \$86,418.25 plus penalty and interest for the period September 1, 2003 through August 31, 2006. A second assessment issued to Mr. Abdo as a responsible officer, dated June 2, 2008, asserted the same amount due for the same audit period.

Petitioner executed a Consent Extending the Period of Limitation for Assessment, dated March 12, 2008, which allowed the Division until December 31, 2008 to assess additional taxes for the period September 1, 2003 through November 30, 2005.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that the Division made a proper request for records and, upon review of the records provided, properly determined that petitioner had inaccurately calculated its tax liability and, its records were insufficient to confidently verify certain calculations made by it. The Administrative Law Judge made these conclusions because, in part, petitioner's fuel and nonfuel purchase invoices were lacking, the handwritten daily shift reports did not provide the dollar amount of sales, the register shift tapes provided only covered the period July 6, 2006 to the end of the audit period and there was no credible direct evidence substantiating the dollar amount at which fuel and other items were sold. The Administrative Law Judge pointed out that petitioner failed to provide a daily record of all cash and credit sales for the entire audit period, or general ledgers. As a result, the Administrative Law Judge held

that the Division was authorized to use an estimated audit method, so long as such method was reasonably calculated to reflect the taxes due.

The Administrative Law Judge noted that the Division chose to use a cost markup method that utilized the purchase records provided by petitioner for both the fuel and nonfuel sales. The Administrative Law Judge concluded that the Division properly resorted to an alternative method to calculate petitioner's tax liability and the resulting audit was supported by a rational basis.

The Administrative Law Judge observed that the burden rested with petitioner to present clear and convincing evidence that the result of the audit was unreasonably inaccurate or the that amount assessed was erroneous. The Administrative Law Judge determined that petitioner failed to meet this burden.

With respect to the imposition of penalties, the Administrative Law Judge found that petitioner did not establish that its underreporting of sales was due to reasonable cause and accordingly determined that the penalties imposed by the Division should not be abated.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to portions of the Administrative Law Judge's determination. Specifically, it argues that: (a) its daily ledgers and OPIS records are adequate to confirm taxable sales, and as such, the auditor's use of an alternative method to calculate its tax liability and the use of external indices was improper; (b) if an alternative method is necessary, the Division's method for determining the retail price per gallon based on a cost mark up was arbitrary and unreasonable; and (c) penalties and interest should be abated due to petitioner's error to account for the amount of tax on tax in its calculations.

The Division argues that petitioner's business books and records were not complete, did not reconcile with appropriate documentation and were inadequate to utilize to confirm

petitioner's asserted sales tax liability. The Division also argues that the limited evidence in the record is insufficient to overcome the presumptively correct Notices of Determination and that many of petitioner's assertions are inadequately supported by evidence in the record.

Furthermore, the Division argues that petitioner has failed to show by clear and convincing evidence that the Notices of Determination are erroneous or improper. The Division asks that the petition be denied and the Notices of Determination be sustained.

OPINION

We affirm the determination of the Administrative Law Judge.

We have often restated the standard for reviewing a sales tax audit where alternative methods were employed. In *Matter of AGDN, Inc.* (Tax Appeals Tribunal, February 6, 1997), we stated as follows:

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

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

Petitioner's argument that its daily ledgers and OPIS records were adequate to confirm taxable sales is insufficiently supported. Our review of the record reveals that the Division made a written request for all of petitioner's books and records related to its sales tax liability for the entire audit period. More specifically, the Division requested the following documents and information for the entire audit period: sales tax returns, related schedules and supporting work papers and schedules; FT-943 service station reports; inventory records; invoices from suppliers; fuel disbursements, both sales and self-use; cash register tapes; pump meter readings; daily shift sheets; worksheets and cancelled checks; federal corporate income tax returns and New York State corporation tax returns, with supporting work papers; cash receipts and cash disbursements journals; the general ledger; sales journals and invoices; checkbook registers; exemption documents; capital asset purchase and sales invoices; equipment listing; payroll records; daily pump prices; and charge card slips. However, petitioner did not present records sufficient to allow the Division's auditor to perform a detailed audit.

Tax Law § 1135(a) provides that every person required to collect tax shall keep records of every sale, the amounts paid on those sales and the tax due thereon. The regulations promulgated thereunder dictate that the sales records required by Tax Law § 1135(a) must contain the sales slip, invoice, receipt, contract, statement or other memorandum of sale (20 NYCRR 533.2[b][1][i]), cash register tapes and any other original sales documents (20 NYCRR 533.2[b][1][iii]). In addition, the regulations require that where no written document is given to the customer, the seller shall keep daily records of all cash and credit sales in a day book or similar book (20 NYCRR 533.2[b][1][iii]). These provisions provide that the records required to be kept by taxpayers either must provide sufficient detail to independently determine the taxable

status of each sale and the amount of tax due and collected thereon, or may be adequately substantiated by analysis of supporting records (20 NYCRR 533.2[b][2]).

At the time of the audit, petitioner produced incomplete fuel and nonfuel purchase invoices, handwritten daily shift reports that lacked the dollar amount of each sale, bank statements, tax returns and register shift tapes that only covered the period July 6, 2006 to the end of the audit period. The Division was unable to verify the accuracy of these records absent a daily record of cash and credit sales for the entire audit period, general ledgers, or sales invoices, complete purchase invoices or cash register tapes or any sales receipts or other source documentation to substantiate the fuel and nonfuel sales from its operations (*see Matter of Vebol Edibles v. Tax Appeals Trib.*, 162 AD2d 765 [1990], *lv denied* 77 NY2d 803 [1991]; *Matter of Club Marakesh v. State Tax Commn.*, 151 AD2d 908 [1989], *lv denied* 74 NY2d 616 [1989]).

During the audit, petitioner did not produce a general ledger, a ledger of shift reports sufficient to establish accurate sales, or any evidence of cash sales of fuel. It is unclear what records petitioner used to complete its sales tax returns, and no records could be reconciled with the returns provided. The bank statement could not be reconciled to amounts on the second ledger, such that they could substantiate petitioner's sales. Petitioner maintains that the shift reports it maintained were not only verifiable, but constituted comprehensive fuel and nonfuel general ledgers, alluding primarily to the second ledger created for the purpose of litigation, which is no more substantiated than the original handwritten ledger. However, the shift reports are general summaries of a day's operations, which include gross amounts for sales of fuel in gallons and dollars (in the case of the second ledger), and gross sales of convenience store items. The information contained in the reports was not itself auditable because there was no source documentation or other appropriate evidence underlying the data for the entries. There was no

breakdown of cash sales for fuel, no accounting for the substantial number of credit card sales, and no separation of taxable and nontaxable convenience store items. Although the second ledger contains a column for gross fuel sales by dollar, which was missing in petitioner's original ledger, there still remains no source documentation to verify the accuracy of the reported sales. Gross nonfuel sales are not separated, as required, into taxable and nontaxable. Although the gallons of gasoline sold from a total of four grades listed on the daily shift sheets of the ledger can be traced to the monthly inventory record of the gallons sold for two grades of gasoline, the issue of the lack of underlying source documentation to verify the accuracy of sales as reported still remains.

Petitioner's claim that the shift reports were an accurate record of its sales is not adequately substantiated. As part of its supporting evidence, petitioner pointed to its submission of bank statements for the audit period. However, the bank deposits could not be reconciled to the daily ledger or sales journal. Petitioner also submitted a third-party summary of cigarette purchase invoices from its vendor, HLA, for the period September 1, 2003 to August 31, 2006 in support of its alleged reliable record keeping. However, a comparison of the third-party information and purchase invoices for two quarters yields the following results: for the period June 1, 2004 through August 31, 2004, the HLA invoices provided by petitioner totaled \$7,550.00; according to the HLA sales receivable summary, for the same period, petitioner purchased an additional \$9,457.00 in cigarettes. For the period September 1, 2005 through November 30, 2005, the HLA invoices totaled \$7,689.00; the HLA sales receivable summary for the same period showed an additional \$11,656.00 in purchases. The discrepancy between the purchase invoices provided by petitioner and the third-party sales summary further establishes that petitioner's books and records are not reliable.

Under these circumstances, it was not possible for the Division to verify taxable sales and receipts and consider petitioner's records reliable. Accordingly, we hold that the Division was entitled to resort to external indices to estimate the amount of taxes due (*see Matter of Urban Ligs. v. State Tax Commn.*, 90 AD2d 576 [1982]).

The central question presented in this case is whether petitioner has established that the amount of tax assessed as the result of the application of the audit method used in this case was erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842 [1986]; *Matter of Surface Line Operators Fraternal Org. v. Tully, supra*). Specifically, petitioner takes issue with respect to the fuel assessment portion and the price per gallon. Petitioner argues that in this case, the auditor used the cost mark up method but instead should have used the OPIS credit card records. The auditor testified that he did not use OPIS pricing because he felt that his method (cost mark up) would be more reasonable because he used petitioner's own records to perform his calculation, rather than less reliable and general third-party sources.

We agree with the Administrative Law Judge's conclusion that OPIS pricing data is not source documentation. Petitioner never provided pump prices for each gallon of gasoline sold. Although petitioner provided purchase invoices showing the number of gallons purchased, it did not provide the corresponding dollar amount for related sales (Hearing Tr., pp. 31-33). We agree with the Administrative Law Judge that although the gallons of gasoline sold from a total of four grades listed on the daily shift sheets of the ledger can be traced to the monthly inventory record of the gallons sold for two grades of fuel, the issue of the lack of source documentation to verify the accuracy of sales as reported still remains. We note that "[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, 950 [1986]). Accordingly, we

find that there was insufficient documentation that would allow us to adequately trace a transaction from petitioner's purchase to the final sale transaction with the customer. Moreover, the taxpayer must make more than the assertion that the audit method used was not the best or most precise manner to estimate the true tax due. Rather, the taxpayer must show by clear and convincing evidence that the audit method was unreasonably inaccurate (*see Matter of Shukry v. Tax Appeals Trib.*, 184 AD2d 874 [1992]).

We find petitioner's arguments to be without merit because it failed to provide no source documentation to substantiate the fuel and nonfuel sales, a daily record of cash and credit sales for the entire audit period, general ledgers, or sales invoices, complete purchase invoices or cash register tapes. Absent sufficient records, petitioner's arguments do not provide any grounds for changing the Division's audit results. As such, petitioner has not carried its burden of showing any error and has provided no basis to either modify or cancel the Notices of Determination.

We also find that the Administrative Law Judge properly sustained the penalties assessed against petitioner. We have held that the failure to maintain and provide records is a reason to sustain the imposition of penalties (*see Matter of Shukry v. Tax Appeals Trib., supra; see also Matter of Rosemellia*, Tax Appeals Tribunal, March 12, 1992). In establishing reasonable cause for the abatement of penalties, the taxpayer faces an onerous task (*see* Tax Law § 1145[a][1][iii]; *Matter of Philip Morris*, Tax Appeals Tribunal, April 29, 1993). Petitioner bears the burden of showing reasonable cause such that the nonpayment of taxes was beyond the control of petitioner and due to no fault of its own (*Matter of F & W Oldsmobile v. State Tax Commn.*, 106 AD2d 792 [1984]). Providing all of the books and records a taxpayer maintains is meaningless where, as here, petitioner failed to maintain the source documents and other books and records, as required by law.

We have reviewed and considered petitioner's remaining arguments, and find that they lack support and merit. Therefore, we affirm the determination of the Administrative Law Judge. We find nothing in this record, nor in the arguments presented by petitioner on exception, that would justify our modifying the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of K&A Gas & Go Mart, Inc. and Kassem Abdo is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of K&A Gas & Go Mart, Inc. and Kassem Abdo are denied; and
4. The Notices of Determination dated May 19, 2008 and June 2, 2008, are sustained.

DATED:Troy, New York
December 29, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner