STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MURRAY HILL GREENERY & FLORIST, LTD.	:	AMENDED DETERMINATION DTA NO. 814875
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, 1989 through February 29, 1992.	:	

Petitioner, Murray Hill Greenery & Florist, Ltd., c/o Barry Kaplan, 222 East 35th Street, Apt. 3H, New York, New York 10016, 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, 1989 through February 29, 1992.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 16, 1997 at 9:00 A.M., with all briefs to be submitted by October 14, 1997, which date began the six-month period for the issuance of this determination. Petitioner appeared by Edmund J. Mendrala, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Gary R. Palmer, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation made an adequate request for petitioner's books and records, thereby allowing the Division to resort to the indirect audit methodology utilized.

II. Whether the indirect audit methodology utilized by the Division of Taxation was reasonable.

III. Whether the evidence produced at hearing by petitioner requires any adjustments to the audit results.

FINDINGS OF FACT

1. Petitioner operated a florist shop located at 557 Third Avenue in New York City during the audit period. Mr. Barry Kaplan became the owner of petitioner in 1983. Since that time and until the discontinuance of petitioner's business at approximately the end of February in 1992, Mr. Kaplan was the sole stockholder, president and only officer of petitioner. Prior to Mr. Kaplan's ownership of petitioner, it had operated as Third Avenue Greenery, an inexpensive plant store. Under Mr. Kaplan's operation the store carried not only plants, but a better line of cut flowers, and in general catered to a more upscale clientele. Mr. Kaplan testified that he ventured into importing flowers and operating as a wholesaler with other florists after a trip to Europe in 1988. The store closed in February of 1992, after the costs of operating at that location proved to be prohibitive.

2. The Division of Taxation's ("Division") auditor [1] sent an appointment letter to petitioner on June 22, 1992. The letter was addressed to Murray Hill Greenery & Florist Ltd. at 557 3rd Avenue, New York, New York 10016. The letter explained that a field examination of petitioner's sales tax returns for the period June 1, 1989 through May 31, 1992 had been scheduled for July 20, 1992 at the Queens District Office of the Division. The letter stated:

> All books and records pertaining to your Sales Tax liability for the period under audit should be available on the appointment date. This would include journals,

[1]Testifying on behalf of the Division at the hearing was Mr. Joseph Moore currently employed by the Division as a Tax Auditor 2. Mr. Moore was the auditor assigned to this case from its inception on June 22,1992 until February 12, 1993 when the case was assigned to another auditor, Ms. Kathleen Cuevas. Mr. Moore continued to be involved with the case, as a "team leader" or supervisor, after Ms. Cuevas's assignment. All references to the auditor in this determination refer to either Mr. Moore or Ms. Cuevas, depending on the date, and any reference to auditors refers to actions taken by both of them together.

> ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates. Exemption certificates not made available may be disallowed in which case you will be held liable for the tax on the transaction.
>
> During the course of the audit, you may be required to furnish additional records and/or information.

The letter asked for petitioner to sign and date a copy of the letter and return it in the enclosed envelope to confirm the appointment. Enclosed with the letter was a page entitled "RECORDS REQUESTED FOR SALES TAX AUDIT" which requested the following records for the period June 1, 1989 through May 31, 1992: general ledger; cash receipts journal; cash disbursement journal; Federal income tax returns (for the past two years); sales tax returns and canceled checks; sales, purchase and expense invoices; fixed asset invoices; resales, exempt and capital improvement certificates supporting nontaxable sales; guest checks and register tapes; and bank statements for the audit period. The enclosure also noted that additional information might be required. No response was received to this letter.

3. Since no response was received, the auditor obtained further information from the county clerk's office and a better address from the post office, and a second appointment letter was mailed to petitioner on July 30, 1992.[2] This letter was virtually identical to the first letter, including the enclosure regarding the records, except that the appointment was set for September 3, 1992, and the period under audit was changed to September 1, 1989 through May 31, 1992. Again, no response was received.

A third appointment letter was mailed to petitioner on September 30, 1992. This letter was identical to the second letter, including the enclosure regarding the records, except that the

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[2]As noted in Finding of Fact "1", it was later determined that petitioner had gone out of business at approximately the end of February of 1992.

appointment was set for October 21, 1992. The contact sheet of the field audit report and the auditor's testimony indicate that this letter was sent by certified mail. The contact sheet of the field audit report and the auditor's testimony also indicate that the second and third appointment letters were sent to a corrected address which was Mr. Kaplan's address at 222 East 35th Street, New York, New York 10016. However, the address set forth for petitioner on both the July 30, 1992 and September 30, 1992 letters is petitioner's previous business address of 557 3rd Avenue. It is presumed that petitioner received at least the September 30, 1992 letter in that petitioner's representative contacted the auditor by telephone on November 4, 1992 (after the scheduled October 21, 1992 appointment date) and established an appointment at his office for December 4, 1992.

4. On December 4, 1992 the auditor went to the office of petitioner's representative and reviewed the records available: Federal tax returns; cash disbursements journal; and worksheets for sales and purchases. The worksheets were monthly figures for sales and purchases with no source documentation. The auditor scheduled another appointment for January 12, 1993 and provided petitioner's representative with a handwritten list of additional records requested as follows: bank statements for the audit period; sales invoices, daybook, register tapes and exemption certificates for nontaxable sales for 1991; Florafax statements for the audit period[3]; credit card statements for the audit period; invoices for the June 1, 1990 purchase of a truck and a telephone system; and proof that withholding was paid to New York State for 1990 and 1991.

On January 11, 1993 petitioner's representative contacted the auditor by telephone and requested that the appointment be postponed since petitioner had not yet supplied the records and

[3]The purpose for reviewing the Florafax statements is that pursuant to 20 NYCRR 526.7(e)(3) when a florist receives an out-of-state or in-state wire order (incoming) it is not taxable. When a florist receives an order to send out-of-state or in-state by wire (outgoing) it is taxable to the florist.

another week was needed. On January 20, 1993 the auditor contacted petitioner's representative by telephone. The representative explained that petitioner had not yet located the records and requested that the auditor contact him in the beginning of February to reschedule a date for the appointment since petitioner was still attempting to locate the required records. On February 4, 1993 the auditor contacted petitioner's representative and established another appointment for February 22, 1993.

5. Both auditors went to petitioner's representative's office on February 22, 1993. Additional records available at that time were bank statements for 1991 and 169 scattered invoices for the audit period.[4] Another handwritten request for additional documentation was left with the representative on this date. This request was for: bank statements for the remainder of the audit period; sales invoices, daybook, register tapes and exemption certificates for nontaxable sales for the audit period; Florafax and other wire service statements for the audit period; credit card statements for the audit period; invoices for the June 1, 1990 purchase of a truck and a telephone system; and proof that withholding was paid to New York State for 1990 and 1991. The auditors returned to the representative's office on March 23, 1993 to review any additional information. There was no additional information available.

6. The auditor then requested the Florafax wire service statements for the audit period directly from Florafax. Florafax asked that the auditor speak with Mr. Kaplan and have him request the statements. The auditor contacted Mr. Kaplan and he obtained the required statements and on April 21, 1993 the auditors returned to the representative's office to review them. Statements were available for only 21 months of the 30-month audit period. The auditors

[4]The auditor indicated that the invoices were considered scattered because it would expected that there would be several thousand invoices for the audit period. This was corroborated by simple mathematics, in that 169 invoices for a 30-month audit period results in fewer than six invoices per month.

prepared a schedule of incoming and outgoing orders to give petitioner credit for the incoming orders. For each of the 9 months for which there were no statements, the auditor used the figure of $1,189.44, the average of the other 21 months.

7. On April 6, 1993 the auditor prepared a subpoena for the bank statements for the audit period addressed to Bank Leumi.[5] On May 10, 1993 the auditors received the bank statements in response to the subpoena. From the bank statements the auditor calculated monthly, quarterly and calendar year deposit totals. The deposit totals were comprised of petitioner's regular deposits and petitioner's Florafax deposits. The auditor then took the calendar year totals for 1990 and 1991[6] and compared those figures to gross sales as shown on petitioner's Federal returns for those years with the following results:

Calendar Year 1990		*Calendar Year 1991*	
Gross sales per deposits	$598,721.26	Gross sales per deposits	$485,747.02
Gross sales per Federal return	$593,745.00	Gross sales per Federal return	$473,503.00

8. Since petitioner's bank deposits so closely matched gross sales as reported on petitioner's Federal returns, the auditor determined to utilize petitioner's bank deposits as its sales for the audit period. Then the auditor subtracted nontaxable (incoming) Florafax orders to arrive at taxable sales. The auditor then subtracted out those taxable sales previously reported by petitioner on its sales tax returns to calculate additional taxable sales and applied the applicable

[5]Bank statements had been provided by petitioner for the calendar year 1991 only.

[6]Since the Federal returns were filed on a calendar year basis, for an accurate comparison the auditor had to use deposits as calculated on the same basis, and 1990 and 1991 were the only two complete years within the audit period.

sales tax rate of 8.25% to arrive at tax due. These calculations resulted in a tax due of $79,980.21, calculated as follows:

Taxable sales per deposits	$1,367,251.55
Nontaxable sales allowed (Florafax)	- $35,683.23
Taxable sales reported on sales tax returns	- $362,111.00
Additional taxable sales	$969,457.32
Sales tax rate	x 8.25%
Tax due	$79,980.23

This tax due was reflected in a statement of proposed audit adjustment issued to petitioner on July 9, 1993.[7] The Division, having received no further information in response to the statement, issued a Notice of Determination to petitioner on September 3, 1993. The Notice of Determination reflected the tax due of $79,980.21, interest of $30,382.50 and penalty of $31,751.28, for a total current balance due of $142,113.99.

9. Petitioner filed a request for a conciliation conference and a conciliation order was issued on December 22, 1995 sustaining the statutory notice. On March 21, 1996 petitioner filed a petition with the Division of Tax Appeals protesting the conciliation order.

10. On March 3, 1997 petitioner submitted to the Division additional information concerning nontaxable sales. The auditor testified at the hearing that no adjustments were made on the basis of this additional information because: 1) The schedule of resale certificates and certificates did not include invoices to show what was sold to the customers on the certificates during the audit period; 2) The summary of wholesale sales had invoices attached, but over half the invoices were dated before the audit period and the ones that were dated within the audit period had no corresponding certificates; 3) The wholesale purchase information was not

[7]The tax due as shown on the statement and then the notice of determination is $79,980.21. The two cent difference is due to rounding in the Division's quarterly calculations.

relevant; and 4) The exempt organization certificates were again merely certificates without invoices to show what was sold to these customers during the audit period.

11. Petitioner introduced these same documents at the hearing and Mr. Kaplan provided testimony relating to the documents. The first group of documents consisted of two pages, the first being a summary page of the second, which was a copy of three bank deposit slips. The slips listed customers and those customers petitioner claimed were exempt organizations were circled.

12. The second group of documents consisted of copies of 80[8] exempt organization certificates, two invoices and one check stub. Mr. Kaplan provided general testimony that midtown Manhattan was an "international area" and many charitable organizations were located there, together with many diplomatic missions and the United Nations.

Of the 80 exempt organization certificates, Mr. Kaplan was able to specifically testify regarding only 34 of those certificates. Of those 34 certificates 6 were duplicates, 1 involved a sale for resale situation, and, for 5 of the certificates, while Mr. Kaplan testified as to how much might have been spent by a customer, he neglected to testify as to the frequency of the purchases. For 22 of the 80 certificates, Mr. Kaplan was able to testify both as to how much he thought that particular customer spent and the frequency of those purchases. Several examples of this testimony are: CARE - purchases at Christmas time for decorations in the amount of $600.00 to $1000.00; Volunteer Services for Children - probably $300.00 over the course of a year; Avraham Marom - one purchase probably less than $200.00; Consulate of the Republic of Germany - probably well over $1000.00 per year; and Amit Women, Inc. - purchases of approximately $2,000.00 to $2,500.00 per year for two years. With regard to Amit Women, Inc.,

[8]This number includes one exempt organization statement from a public school.

Mr. Kaplan indicated that his representative had canceled checks and invoices for these purchases. No canceled checks or invoices for this customer were entered into evidence.

Of the two invoices submitted, one of the invoices had no year included in the date and the other was not within the audit period. The check stub could not be tied into any of the exempt organization certificates.

13. The next group of documents submitted were presented in support of petitioner's position that it was an importer of flowers and operated as a wholesaler with regard to a great majority of the flowers imported. The records consisted of documentation of payments to Sky-Sea International. Sky-Sea International was the broker who received the flowers from Europe, arranged for their inspection, paid any required duty, and arranged for transport of the flowers into the city from the airport. The records established that $19,694.11 was spent by petitioner on commissions to Sky-Sea International. Mr. Kaplan testified that the broker's fee was seven to ten percent of the amount of the actual flower order. Mr. Kaplan also testified that approximately 15% of the imported flowers were retained and sold by petitioner, the other 85% being wholesaled to other florists. This would mean that petitioner would have purchased anywhere between $196,694.00 and $281,344.00 in imported flowers during the audit period, and of that amount would have had flowers costing between $167,190.00 and $239,142.00 to be utilized in wholesale sales. Mr. Kaplan testified that the mark-up for the wholesale flowers would involve doubling the price. Utilizing the previous calculations, this would give petitioner wholesale sales during the audit period of $334,380.00 to $478,284.00. Mr. Kaplan testified that using a figure of

$150,000.00 in imported flower purchases, then doubling it, means petitioner had $300,000.00 in nontaxable sales for resale during the audit period.[9]

14. Mr. Kaplan also testified that it was not feasible that petitioner could have sold all of the imported flowers, first, because it simply did not have that many sales and second, the amount of boxes delivered at one time would have taken up about half of petitioner's retail space and these flowers must be sold within two to six days at the most. Therefore, petitioner simply could not have sold all of these flowers.

15. Petitioner also introduced records concerning wholesale sales. This documentation consisted of: a summary with 39 invoices, 2 checks, 4 check stubs, and 3 wire service documents; and a summary with 14 resale certificates. With regard to two invoices for the Hard Rock Cafe, Mr. Kaplan testified that these were centerpieces used by the cafe in catering events and that the cafe would charge the sales tax to the customers. On cross examination Mr. Kaplan stated that he believed he had the resale certificate for the Hard Rock Cafe at home, but no certificate was introduced into evidence. With regard to page four of the invoices Mr. Kaplan testified that what looked like "ggo" was Grammercy Park Flowers. He explained that the amount of $1,154.60 (invoice dated October 30, 1989) was an amount typical of sales for resale of the imported flowers.

There are in the record resale certificates for Grammercy Park Flowers, Seaport Flowers and Park Florist. There are audit period invoices for each of theses customers in the record as follows: Grammercy Park Flowers - October 30, 1989 in the amount of $1,154.60; Seaport Flowers - October 13, 1989 in the amount of $439.00 and October 19, 1989 in the amount of

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[9]It is unclear where the $150,000.00 derives from. While not specifically stated it appears to be an estimate of the cost of the imported flowers sold at wholesale.

$149.50; and Park Florist - September 12, 1989 the amount of the invoice is illegible, but the summary lists the amount of the invoice as $250.90.

With regard to the resale certificates, Mr. Kaplan testified concerning 5 out of the 14 certificates. His testimony was similar to that he gave with regard to the exempt organization certificates in that he attempted to estimate what he thought each customer purchased and the frequency of their purchases.

16. Petitioner listed its business as a resale and wholesale florist on a majority of its sales tax returns filed during the audit period.

17. Petitioner was located in approximately 2,000 square feet in a building dating from the 1800s. Basement space was utilized for storage of supplies and paperwork. As noted previously petitioner closed in February of 1992. Also in that month Mr. Kaplan had arranged a lease for a new business to be located approximately five blocks away. However, the new location would not be ready until spring. At that point petitioner's landlord presented an additional charge over and above rent for approximately $5,000.00 for New York City water charges.[10]. Being unable to afford these additional charges, and the new space not being available yet, Mr. Kaplan simply left the building in the middle of the night, leaving everything there, and worked out of a friend's building until the new leased space was ready.

It was during this move that Mr. Kaplan first noticed the records stored in the basement had been effectively destroyed. This was due to water seepage from a hose located in the florist shop. If the hose was not turned off carefully it "would result in seepage through the floor to the basement" (tr., p.55). Mr. Kaplan never perceived a problem with the records because there was

[10]Rent had varied from $3,500.00 under a previous owner to $10,000.00 monthly at the time the store closed.

never a flood, it was a gradual seepage and the papers in the basement absorbed the water and were eventually worthless. Mr. Kaplan testified that he threw out the records that were useless. Those records still available were taken in the move and later stored in an upstate storage facility. Mr. Kaplan testified that the records submitted at the hearing as petitioner's Exhibit 1, were found "buried in one of the closets in my apartment" (tr., p. 111). He testified that the records that would have been kept in storage in Newburgh were the records provided to the auditor (bank statements, the 169 invoices, etc.) and that they were not complete. He further testified that those records "were representative of what's in the boxes on the desk right now."(Tr., p. 60.)[11]

Mr. Kaplan testified that petitioner was paid up on the rent at the time of the move, but that the landlord claimed charges of approximately $20,000.00 in flood damages.

On cross examination Mr. Kaplan was asked what records would have been stored in the basement. He responded with an explanation of his record-keeping procedures. Mr. Kaplan explained there was an office on the main floor of the store. Records were kept in file cabinets in the office "and after they were dated approximately a year old, they were moved downstairs." (Tr., p.110.) Mr. Kaplan then repeated that as the records aged past a year, they were put in cartons and moved downstairs for storage. He stated that it was other staff that removed the records to the basement, and that since he had not personally moved the records he was not aware of the water problem until the move in February of 1992.

SUMMARY OF THE PARTIES' POSITIONS

18. Petitioner explains that the Division cannot resort to an estimated audit methodology unless it has made an adequate request for books and records for the entire audit period, and if a

[11]Other than looseleaf copy of the records petitioner had previously provided to the Division, there were no other documents introduced at hearing from "the boxes" or otherwise.

taxpayer has complete books and records, the taxpayer's consent is required to perform an estimated audit. Petitioner does not appear to argue that the Division did not make an adequate request for books and records. Furthermore, "It is conceded that petitioner did not have available at the time of the examination adequate books and records upon which to base a determination." (Petitioner's brief, p. 3.) Rather, petitioner notes that its consent to an estimated audit does not appear in the record, that it did maintain adequate books and records but that they were destroyed by the water seepage in petitioner's basement.

Petitioner explains that when adequate books and records are not available, the Division may estimate tax liability, but that such estimate must be reasonable. Petitioner argues that the basis of this audit was unreasonable because the Division did not take into account the evidence submitted at the hearing and that petitioner met its burden of proof through the evidence presented at the hearing with regard to proving wholesale sales, sales to tax exempt organizations and sales for resale. Specifically, petitioner argues that it was unreasonable to not account for wholesale sales during the audit period since the evidence at the hearing justified the exclusion of approximately $300,000.00 annually[12] in wholesale sales of imported flowers. Petitioner argues that the Division's assumptions were incorrect and therefore the audit methodology was unreasonable.

19. The Division argues that a proper request for petitioner's books and records for the audit period was made, and that the records provided were examined by the auditor. Based on the limited records provided by petitioner, the auditor correctly determined that petitioner did not have available records that would allow for a detailed audit, and it was proper for the Division to

[12]This appears to be a change from petitioner's position at the hearing that $300,000.00 represented the wholesale sales for the entire audit period (see, Finding of Fact "13").

estimate the proper amount of tax due. The Division argues that the methodology employed of using petitioner's bank deposits for sales was reasonable in that the bank deposits closely matched gross sales as reported on petitioner's Federal returns for the corresponding periods. The Division points out that the audit method employed must be reasonable based on what was provided to the auditor at the time of the audit.

The Division then argues that all sales are presumed to be taxable and petitioner had the burden of proving any sales for resale or sales to exempt organizations, and it failed to meet this burden. The Division argues that Mr. Kaplan's testimony that 85% of the flowers imported were sold to other florists and that in any event the volume of the import purchases was impossible for petitioner to either sell or store, is insufficient absent the direct proof of resale required by Tax Law § 1132(c)(1).

Finally, the Division in its brief states that with regard to the October 13, 1989 sale to Seaport Flowers for $439.00 and the October 19, 1989 sale to Seaport Flowers for $149.50, petitioner has met its burden of proof (i.e., there is a resale certificate for this customer in evidence and these invoices are from the audit period.) The Division also states that while there is a resale certificate and an audit period invoice for Park Florist, the amount of the invoice is illegible.

CONCLUSIONS OF LAW

A. There is no dispute that the audit methodology utilized in this matter was an indirect methodology not based solely on the books and records of petitioner. In order for the Division to utilize an indirect methodology, it must show that it made an adequate request for books and records for the audit period (***see***, ***Matter of Christ Cella v. State Tax Commn.***, 102 AD2d 352, 477 NYS2d 858), and that it reviewed the records provided in order to determine that the records

were inadequate for the purposes of conducting a complete audit (***see***, ***Matter of King Crab Rest. v. Chu***, 134 AD2d 51, 522 NYS2d 978).

The Division in this matter sent three original appointment letters to petitioner in an attempt to originate the audit. While there is some confusion as to the address used for petitioner on these letters, it is clear that at least one of the letters was received by petitioner since petitioner's representative contacted the Division by telephone to schedule an appointment at his office. All three of these letters contained enclosures requesting books and records for the period September 1, 1989 through May 31, 1992[13] pertaining to petitioner's sales tax liability, and in particular requested journals (including cash receipts and disbursements journals), ledgers (including a general ledger), sales invoices, guest checks, cash register tapes, Federal income tax returns for the past two years, sales tax returns with canceled checks, purchase and expense invoices, fixed asset invoices, exemption certificates (including resale, exempt organization and capital improvement certificates supporting nontaxable sales), and bank statements. Furthermore, during the audit process the Division provided several different handwritten requests for records to petitioner's representative. Additional records requested included: bank statements for the audit period; sales invoices, daybook, register tapes and exemption certificates for nontaxable sales for the audit period; Florafax statements for the audit period; credit card statements for the audit period; invoices for the June 1, 1990 purchase of a truck and a telephone system; and proof that withholding was paid to New York State for 1990 and 1991.

[13]The original June 22, 1992 appointment letter additionally requested records for June, July and August of 1992. This request was dropped from the subsequent appointment letters and those months are not part of the audit period.

The request by the Division for petitioner's records was clear and repeated. The request included the entire audit period. Furthermore, the record does not reflect any assertion by petitioner that the Division did not make a proper request for records.

The only records provided in response to this request were Federal tax returns, a cash disbursements journal, monthly figures for sales and purchases, bank statements for 1991, wire transaction statements and 169 scattered invoices for the audit period. The Division also obtained bank statements for the remainder of the period. Pursuant to Tax Law § 1135(a)(1), petitioner was required to keep records of every sale it made and the tax payable on each sale. The only records submitted by petitioner on audit resembling such source documentation were the 169 scattered invoices, which averaged out to approximately 6 invoices per month. It was reasonable for the Division to conclude that these limited records were insufficient to conduct a detailed audit of petitioner's business. Therefore, it was acceptable for the Division to calculate petitioner's tax liability based on estimated or indirect audit methods.

Petitioner in its brief concedes that it did not have adequate books and records available at the time of the audit. Therefore, petitioner's argument on this point is somewhat confusing. If petitioner is arguing that it had maintained adequate books and records but that these records were destroyed by water seepage and therefore that the Division had to obtain petitioner's consent to conduct an estimated audit, petitioner is simply incorrect (***see***, ***Harry's Exxon Serv. Station***, Tax Appeals Tribunal, December 6, 1988). If petitioner is arguing that because its records were destroyed the Division was required to base its estimate on the records available, the argument makes no sense because that is what the Division did in this matter. The taxable sales as calculated by the Division were taken from petitioner's Federal returns, bank statements and wire transaction statements. These were the records available to the Division at the time of

the audit. If petitioner is arguing that the Division is required to take into account the information provided by petitioner regarding sales for resale, sales to exempt organizations and the petitioner's purchase records, that was not possible, because there is nothing in the record that reflects that any of this information was provided to the Division until March 3, 1997, approximately one year after the petition in this matter was filed.

In any event, petitioner has not proven that its records were destroyed by water seepage damage. First, other than the testimony of Mr. Kaplan alleging that this was the case, petitioner has presented no evidence that its records were destroyed. Mr. Kaplan did testify that the landlord was asserting damages in the amount of $20,000.00 for the water damage. However, no documents were submitted to support this assertion. Second, on cross examination Mr. Kaplan explained what records were kept in the basement. He testified that records were kept in an office in the store for one year and that then the records were put in cartons and the workers carried them downstairs to the basement. Mr. Kaplan repeated this testimony twice. If this were the case, petitioner should have been able to provide the Division with complete books and records for at least the last year of the audit period. Petitioner made no attempt to explain this contradictory testimony. I therefore find that petitioner has not proven that it had adequate books and records or that they were destroyed by water seepage. (***Cf***., ***Matter of House of Audio of Lynbrook***, Tax Appeals Tribunal, January 2, 1992 [petitioner provided extensive credible testimony and documentary evidence establishing that its records were destroyed and that the destruction was not the petitioner's fault].)

B. The next issue is whether petitioner has met its burden of proof in showing that the Division's determination of tax due based on an indirect audit method was unreasonable. Petitioner has not met its burden on this issue.

While the Division may resort to an estimated or indirect audit method to calculate sales tax due where a taxpayer has failed to present books and records adequate for the Division to conduct a detailed audit (***see***, ***Matter of Urban Liquors v. State Tax Commn.***, 90 AD2d 576, 456 NYS2d 138), the method chosen by the Division must be reasonable (***see***, ***Matter of House of Audio of Lynbrook***, ***supra***). The determination of whether the method chosen by the Division was reasonable is based on the information available to the Division at the time of the issuance of the notice ***(see***, ***Matter of Continental Arms Corp. v. State Tax Commn.***, 72 NY2d 976, 534 NYS 2d 362; ***Matter of Northern States Contracting Co.***, Tax Appeals Tribunal, February 6, 1992). In the present case the Division reviewed petitioner's Federal income tax returns and bank statements. For the two full-year periods of the audit period the Division compared the amount of gross sales as reported by petitioner on its Federal returns, to the amount of deposits petitioner made to its bank account. The difference in these figures was minimal. Therefore, the Division determined that petitioner's bank deposits for the audit period would accurately reflect petitioner's sales for the audit period. The Division took an additional step since it was aware that petitioner conducted some wire service business. The Division reviewed the wire service transaction statements received from Florafax, to determine the amount of wire service orders received during the audit period.[14] The Division had statements for only 21 months of the audit period, so for the 9 missing months it used an average for the 21 months. The orders received were then totaled to arrive at petitioner's nontaxable sales. The amount of sales previously reported by petitioner was subtracted from this amount to arrive at additional taxable sales and the applicable sales tax rate was applied to this figure to arrive at tax due. At the time of the audit

[14]Pursuant to 20 NYCRR 526.7(e)(3) wire service orders received are not subject to sales tax, whereas wire orders sent are taxable.

petitioner did not provide the Division with any books or records regarding alleged sales to exempt organizations, or the wholesale aspect of its business. The Division utilized the records available to it to determine petitioner's tax liability in a reasonable manner.

If it is petitioner's argument that due to the volume of petitioner's wholesale business the Division should have at least known of the wholesale business, and factored that into its calculations, that was not possible in this case. While the Division should have been aware that petitioner operated some type of wholesale business, since it filed most of the returns for the audit period listing its business as a retail and wholesale florist, petitioner provided no information at the time of the audit for the Division to have given petitioner any credit for its wholesale business. Furthermore, petitioner was no longer in business making it impossible for the Division to observe petitioner's daily operations (***see***, ***Matter of Bernstein-on-Essex St.***, Tax Appeals Tribunal, December 3, 1992; ***Matter of Reference Lib. Guild***, Tax Appeals Tribunal, August 4, 1988.)

C. The final issue is whether petitioner is entitled to any adjustments in the audit figures based upon the evidence petitioner presented at hearing. Tax Law § 1132(c)(1) creates the presumption that all petitioner's receipts were taxable unless petitioner can prove otherwise. Furthermore, petitioner in this matter is claiming that adjustments to the audit results are required due to sales to exempt organizations and sales of imported flowers for resale. Tax Law former § 1132(c)(1) specifically requires direct proof of such sales as follows:

> Except as provided in subdivision (h) of this section, unless (1) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale certificate in such form as the tax commission may prescribe, signed by the purchaser and setting forth his name and address and, except as otherwise provided by regulation of the tax commission, the number of his registration certificate, together with such other information as said commission may require, to the effect that the property or

> service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, . . . or (2) the purchaser, not later than ninety days after delivery of the property or rendition of the service, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the tax commission may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail.

Petitioner submitted numerous exempt organization and resale certificates. Petitioner's difficulty is in proving the amount of the sales to these customers during the audit period.

D. On the question of whether petitioner has proven adjustments are required for sales to exempt organizations, I find that no adjustments are required. Introduced into evidence were 80 exempt organization certificates. Documents introduced by the petitioner to prove that sales were made to these organizations during the audit period consisted of two invoices and one check stub. One of the invoices had no year included in the date and the other was not within the audit period. The check stub could not be tied into any of the exempt organization certificates.

Mr. Kaplan testified that petitioner was located in an area with many diplomatic missions, charitable organizations and the United Nations. He also attempted to testify concerning the exempt organization certificates as to the amount of purchases during the audit period from each. Of the 80 certificates Mr. Kaplan was able to specifically testify as to only 34. Of those 34 certificates the testimony regarding 5 spoke only to how much the customer might spend and not how many times the customer would have spent it during the audit period, 6 certificates were duplicates and 1 involved a sale for resale. Therefore for only 22 of the certificates was Mr. Kaplan able to testify as to how much a customer spent and how many times that customer would have made a purchase during the audit period. Mr. Kaplan utilized words such as "probably" when referring to the amounts spent and wide ranges when estimating those amounts, including phrases such as "probably well over $1000.00 per year."

Petitioner was required to obtain certificates from these purchasers and retain invoices as to the amounts sold to these customers. Petitioner did not submit any invoices from within the audit period. Furthermore, while Mr. Kaplan referred several times to documents such as invoices and check stubs in the possession of petitioner's representative, none of these documents were submitted into evidence.

The number of exempt organization certificates presented and the general testimony of Mr. Kaplan indicate that there probably were sales to exempt organizations. However, this evidence is insufficient to even enable an estimate of the amount of such sales. This is not a case where petitioner has proven the audit methodology unreasonable and need not prove the amount of any adjustments (***see***, ***Matter of Bernstein-on-Essex St.***, ***supra***) The audit methodology in this matter was reasonable based on the information provided to the Division at the time of the audit. Petitioner must therefore, prove the amount of any adjustment and it has failed to do so.

E. The next question concerns the evidence presented by petitioner intended to prove that it operated a wholesale business together with the retail florist business and therefore had a large volume of sales for resale. First, petitioner introduced purchase records that established $19,694.11 was paid to Sky-Sea International during the audit period. This amount represented a brokerage fee for the company arranging for the receipt, inspection, customs requirements and transportation to the city from the airport of the flowers petitioner imported. This commission represents 7 to 10% of the actual amount paid for the flowers purchased. Mr. Kaplan also testified that approximately 15% of the imported flowers were retained and sold by petitioner the other 85% being wholesaled to other florists. This would mean that petitioner would have purchased anywhere between $196,694.00 and $281,344.00 in imported flowers during the audit period, and would have had between $167,190.00 and $239,142.00 in inventory available for

wholesale sales. Mr. Kaplan testified that the mark-up for the wholesale flowers would involve doubling the price giving petitioner wholesale sales during the audit period of $334,380.00 to $478,284.00. Petitioner asserts that using a figure of $150,000.00[15] for purchases, then apparently ignoring the 15% retained for sale by petitioner, and doubling it, means petitioner had $300,000.00 in nontaxable sales for resale during the audit period. These are petitioner's calculations presented during testimony at the hearing. In its brief, petitioner alleges $300,000.00 per annum during the audit period should be allowed without explanation. These estimates are simply not enough to base an adjustment on. The figures themselves range from petitioner's original estimate of $300,000.00 for the audit period to $750,000.00 based on petitioner's last calculation of $300,000.00 per annum for the audit period. Their unreliability is self-evident. Furthermore, petitioner cannot prove the amount of its wholesale business through the use of its own estimates (***see***, ***Matter of Albanese Ready Mix***, Tax Appeals Tribunal, June 15, 1989). Again petitioner must prove with some certainty the amount of any adjustment it is entitled to and this information provides no certainty, only perhaps an indication that petitioner did operate some type of wholesale business together with the retail florist business.

Also in support of petitioner's contention that sales for resale were made during the audit period petitioner introduced the following documentation: summary sheet and 14 resale certificates, summary sheet and 39 invoices, 2 checks, 4 check stubs, and 3 wire service documents. Mr. Kaplan testified regarding the Hard Rock Cafe that he would sell them centerpieces for their catering business, which in turn were sold to the catering customer. He also stated that he believed he had an exempt certificate for the Hard Rock Cafe at home, but no time was asked for the introduction of this certificate after the close of the hearing, nor was any

[15]It is unclear where the $150,000.00 derives from.

certificate submitted. Mr. Kaplan testified that the customer "ggo" appearing on invoices was Grammercy Park Flowers. Mr. Kaplan testified with regard to 5 out of the 14 resale certificates. His testimony was similar to that he gave with regard to the exempt organization certificates in that he simply estimated what he thought each customer purchased and the frequency of their purchases.

As discussed in Conclusion of Law "D" regarding sales to exempt organizations, petitioner must prove the amount of any adjustment to the audit results that it is entitled to. Again, the general testimony presented does not meet petitioner's burden of proving the amount of any sales for resale.

F. As noted in Finding of Fact "19" the Division stated that with regard to the invoices made out to Seaport Flowers on October 13, 1989 in the amount of $439.00 and October 19, 1989 in the amount of $149.50 petitioner has met its burden of proof. I agree in that there are resale certificates and invoices for these transactions. However, I also find that petitioner has met its burden with regard to the September 12, 1989 sale to Park Florist in the amount of $250.90. While the Division is correct that the amount of the transaction on the copy of the invoice submitted is not legible, the amount as listed on petitioner's summary sheet of $250.90 is accepted. Finally, also accepted is petitioner's explanation that what appears to be "ggo" listed as the business name on several invoices, is in reality Grammercy Park for which petitioner has a resale certificate. The transaction dated October 30, 1989 for Grammercy Park in the amount of $1,154.60 is also allowed. This is the only invoice for Grammercy Park within the audit period.

G. Petitioner did not present any arguments on the issue of the penalties, and therefor the issue will not be addressed in this determination.

H. The petition is granted to the extent set forth in Conclusion of Law "F", but is in all other respects denied. The Notice of Determination dated September 3, 1993, as modified by Conclusion of Law "F", is sustained.

DATED: Troy, New York
April 30, 1998

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE