STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CLIFTON LIQUOR CORP.	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2001 through February 29, 2004.	:	DETERMINATION DTA NOS. 821405 AND 821560
In the Matter of the Petition	:	
of	:	
JOSE CEPEDA	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2001 through February 29, 2004.[1]	:	

Petitioners, Clifton Liquor Corp. and Jose Cepeda, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2001 through February 29, 2004.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 25, 2007 at 10:30 A.M., and continued at the same location on March 13, 2008 and July 8, 2008, with all briefs to be submitted by February 2, 2009, which date began the six-month period for the issuance of this determination. Petitioners appeared by Leonard L. Fein, CPA. The Division

[1] Since consents extending the statute of limitations were not executed by petitioner Jose Cepeda for the period June 1, 2001 through August 31, 2002, the Division of Taxation concedes it does not have authority to pursue the tax for these periods from Mr. Cepeda.

of Taxation appeared by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., and Anita K. Luckina, Esq., of counsel).

*ISSUE*S

I. Whether the audit methodology used by the Division of Taxation was reasonably calculated to determine the sales tax liability for Clifton Liquor Corp. and its owner Jose Cepeda during the period in issue.

II. Whether the Division of Taxation properly imposed penalties in this matter.

FINDINGS OF FACT

1. Petitioner Clifton Liquor Corp. (Clifton Liquor), doing business as Rand Liquor, is a liquor store located at 1029 Bedford Avenue, Brooklyn, New York. Located on a corner, the physical size of the store is approximately 20 feet by 80 feet, and two people were observed by a Division of Taxation employee to be working in the store. All of the liquor and the cash register are surrounded by glass walls, such that they cannot be touched by the public. Petitioner Jose Cepeda, a native of the Dominican Republic who spoke little English, was an officer of the corporation during the period in issue. There is no dispute as to his status as a responsible officer. Although the Division of Taxation's (Division) audit of Clifton Liquor focused on the sales of liquor, petitioners' representative disclosed at the hearing that petitioners' primary business was a check-cashing business, with liquor sales as a secondary business.

2. The Division sent correspondence to petitioners, dated February 25, 2004, scheduling a field audit appointment for March 11, 2004 at petitioners' place of business. The appointment letter requested that all books and records pertaining to petitioners' sales and use tax liability for the period under audit, June 1, 2001 through November 30, 2003, be available for review. A list of records to be presented included sales tax returns, worksheets and canceled checks, federal

income tax returns and New York State corporation franchise tax returns, general ledger, general journal and closing entries, sales invoices and all exemption documents supporting nontaxable sales, a chart of accounts, fixed asset purchases and expense purchase invoices, bank statements, canceled checks and deposit slips for all accounts, cash disbursements journal, cash register tapes and guest checks for the entire audit period. The letter also advised petitioners to have:

> an owner, officer or employee with personal knowledge of your business operations attend the opening conference, even if a representative will be present. A firsthand explanation will help to eliminate possible misunderstandings and will provide quick answers to help establish the initial audit plan.

3. The Division of Taxation (Division) then sent correspondence to petitioner Clifton Liquor, dated June 30, 2004, scheduling a field audit appointment for July 8, 2004 at its place of business. The appointment letter requested that all books and records pertaining to petitioner's sales and use tax liability for the period under audit, June 1, 2001 through February 29, 2004, be available for review. A list of records to be presented included the same records previously requested.

4. In response to the Division's request for books and records, Clifton Liquor provided some of its bank statements for the period December 18, 2001 through January 16, 2002, bank deposits for October 17, 2001 through November 16, 2001, the general ledger for 2001 and merchandise inventory for 2003. The Division later received a sheet listing some expenses, without actual bills, a few monthly bank statements and about 80 canceled checks, many of which were for large sums of money ranging from $10,000.00 to $100,000.00, payable to a variety of individuals who were not identified. The Division's auditor could not reconcile these checks with any of the scant business records. The Division's auditor made a determination that the books and records were insufficient to conduct a detailed audit.

5. The Division submitted into evidence a schedule of returns filed, based upon sales tax returns filed for Clifton Liquor during the audit period. Gross sales, equal in this case to taxable sales, for the period June 1, 2001 through February 29, 2004, as reported by petitioners were $2,420,434.00, with sales tax paid in the amount of $200,379.77.

6. At the commencement of an audit, as a part of its routine practice of auditing liquor stores, and the practice it followed in this case, the Division issued letters to known wholesale wine and liquor suppliers who provided wine and liquor to Clifton Liquor, requesting that they provide the Division with the amount of beverages purchased by the corporation during the period in issue.

7. The third-party liquor vendors contacted by the Division provided the following information between March and June 2004 as to sales made to Clifton Liquor during the audit period:

Third-party vendor	**Purchases during the audit period**
Royal	$15,992.00
Paramount Eber	520,400.00
Peerless	3,941,342.00
5 Star Fine	15,093.00
OPICI Wine	57,636.00
Grant & Son	32,931.00
Premier Gallo Wine	1,276,706.00
Charmer	3,692,910.00
Batavia	17,175.00
TOTAL	**$9,570,184.00**

8. When it became apparent that the Clifton Liquor's books and records were inadequate to perform a detailed audit, the Division used the third-party supplier information to estimate Clifton liquor's taxable wine and liquor sales for the audit period. The Division determined that petitioner's total purchases of wine and liquor during the period in issue were $9,570,184.00. The Division calculated a markup percentage from the liquor store industry average gross profit (29.7%), derived from the Robert Morris Associates Annual Statement Studies (Financial Ratio Benchmarks for 2002-2003), for a business with sales in a range equivalent to petitioners' business during the audit period. The Division applied the calculated markup percentage of 29.7% to these purchases, to arrive at estimated taxable sales of $12,412,528.65, from which the Division subtracted petitioner's reported taxable sales of $2,420,434.00, resulting in additional taxable sales of $9,992,094.65, and additional sales tax due of $827,913.85. The Division additionally assessed both statutory and omnibus penalties based upon the significant underreporting of sales.

9. A Consent Extending the Period of Limitations for Assessment of Sales and Use Taxes was executed by Clifton Liquor Corp. to cover the taxable periods June 1, 2001 through February 29, 2004, and determine an assessment of tax on or before December 20, 2005. A similar consent, however, was not executed by petitioner Jose Cepeda.

10. The Division issued a Notice of Determination, dated March 7, 2005, which assessed additional sales and use taxes in the amount of $827,913.85, plus penalties and interest, for a total of $1,777,503.94, for the period June 1, 2001 through February 29, 2004 (Assessment ID L-025107506-6) to petitioner Clifton Liquor. The Division issued a Notice of Determination, dated December 5, 2005, which assessed additional sales and use taxes in the amount of $827,913.85,

plus penalties and interest, for a total of $1,982,674.89, for the period June 1, 2001 through February 29, 2004 (Assessment ID L-025107506-6) to petitioner Jose Cepeda (see footnote 1).

11. Petitioner submitted into evidence what was described as a physical inventory listing taken by Clifton Liquor employees on December 31, 2003, listing inventory totaling $2,009,457.79. No invoices supporting purchases of this inventory or other documents supporting the same were submitted.

12. In order to support petitioners' assertion that the markup on wine and liquor was considerably less than the 29.7% determined by the Division, petitioners' representative introduced 15 purchase invoices predominantly from 2007, with several from 2005 and 2006, of liquor purchases by Clifton Liquor. Sales documentation was introduced that included register tapes that petitioners created several days before the hearing on October 23 and 24, 2007. The register tapes bearing Clifton Liquor's name and address, identified the liquor, size of the bottle, and a selling price, in addition to bearing the words "For Quotation, NOT For Sales." By determining the number of bottles purchased from these invoices and utilizing the sales prices on the register tapes previously described, petitioners calculated total sales generated from the 15 purchase invoices to be $430,428.26. Also generated from the 15 invoices was the total purchases for the same liquor, $397,280.20, the difference of which represented the gross profit from these invoices of $33,148.06. Petitioners divided the gross profit by the total purchases to determine the markup on the liquor of 8.3%.

13. No purchase invoices or sales records from the audit period were submitted.

14. Common practice in the liquor industry during the audit period was a practice referred to as "bill and hold." Companies such as Clifton Liquor would take advantage of special pricing in a particular month, but not necessarily take delivery at the same time. The vendors

would store the purchases in their warehouses and generally prepare invoices, but leave the invoices open for some period of time.

15. The Division submitted into evidence correspondence dated December 7, 2004, addressing the value of goods put into storage with Charmer by Clifton Liquor during 2003. The letter stated, "The total value of goods put into storage in 2003 was $100,126.13." Attached to the letter was a printout of liquor and wine items placed in storage between April 30, 2003 and December 31, 2003, with a listing of the per case and total pricing, showing a grand total of $101,126.13. No other information concerning the bill and hold policy, or the date until which the product was held, was submitted with this information.

16. Atlantic Wines and Spirits, a division of Empire Merchants, issued a statement concerning its bill and hold policy as it concerns petitioners. Prepared June 30, 2008, it states:

> This letter is to confirm and verify that Clifton Liquor Corp. DBR [*sic*] Rand Liquor at 1029 Bedford Avenue, Brooklyn, New York 11205 stored cases of liquor in our licensed warehouse in accordance of our Bill & Hold policy prior to February 28, 2004. The cases purchased by Rand Liquor (Peerless Customer # 026263) cost in excess of $1,643,319.00 were store [*sic*] in our warehouse at 16 Bridgewater Street, Brooklyn, New York 11222 and had not yet been delivered to Rand Liquor. At that time the invoices were open and had not been paid.

17. After the first day of the hearing in this matter, petitioners requested subpoenas from the administrative law judge for several of the third-party vendors' records and in order to elicit testimony clarifying the purchases relied upon for the assessment. The administrative law judge prepared subpoenas for Empire Merchants (the successor to Peerless and Charmer), Premier Wine & Spirit (the successor to Premier Gallo Wine), and Southern Wine and Spirits (the successor to Eber's product line and later to Gallo). Petitioners' representative offered proof of service of such subpoenas.

18. On the second day of the hearing, March 13, 2008,[2] Rosemarie Mills of Southern Wine and Spirits (Southern), appeared in response to one of the subpoenas to testify. She established that Gallo became Premier Wine and Spirits (Premier), which was later purchased by Southern. Ms. Mills further established that as to the third-party verified purchases by Clifton Liquor, any volume discounts permitted by the vendor were reflected in the amount provided, and there were no bill and hold or other storage charges that were not taken into account in the amounts as reported by the company, since during the audit period any storage was charged by an outside company and separately billed.

19. Approximately two weeks after the second day of hearing concluded, a package was delivered to the administrative law judge with documents which were the subject of a subpoena issued by petitioners to Empire Merchants, the successor to Charmer Industries and Peerless Importers, Inc., two of the vendors from whom Clifton Liquor purchased product during the audit period. There was no cover letter or explanation of the contents. The records appeared to be a listing of purchases by Clifton Liquor during the audit period, as well as for periods outside the audit time frame. Since these documents were mislaid in transit from Empire, petitioners were given an opportunity to offer the documents into the record, time to obtain an affidavit of explanation from Empire or request that the hearing be reopened for testimony from an official of Empire familiar with the documents. Petitioners' representative opted to have the hearing re-opened and issued another subpoena to Empire in order to elicit an explanation of a discrepancy between the documents mailed pursuant to the prior subpoena and the vendor information obtained directly from each of the companies in 2004. At the reopened hearing, no representative from Empire appeared to clarify the documents, and they were submitted as

[2] This matter was rescheduled twice at the request of petitioners' representative due to eye surgery and resulting complications.

mailed, without explanation, showing purchases by Clifton Liquor during the audit period of approximately $2.7 million.

SUMMARY OF THE PARTIES' POSITIONS

20. Petitioners maintain that the third-party information is not verified and should not be used to estimate petitioners' liability; that the markup percentage applied to liquor sales was overstated and thus incorrect to estimate the tax due; that the markup should be 8.3% as suggested by petitioners; that no credit was given for the ending inventory taken on December 31, 2003; and that the liquor purchased subject to bill and hold should result in a reduction in the purchases used to compute sales, and ultimately the sales tax due and owing.

21. The Division argues that for the period assessed petitioners failed to produce complete books and records to enable a detailed audit to be conducted. Having established the records were insufficient, the Division properly resorted to an indirect audit methodology. The Division agrees that its method of audit must be reasonable, but it is not required to utilize the most exact method of audit when petitioners' records are inadequate. The Division contends that petitioners failed to substantiate any of their claims, and in the absence of complete books and records, they cannot meet their burden of proving that the audit method was unreasonable or erroneous. The Division asserts it properly imposed penalties in this case.

CONCLUSIONS OF LAW

A. Under Tax Law § 1135(a), "[e]very person required to collect tax shall keep records of every sale . . . in such form as the commissioner of taxation and finance may by regulation require." These records must be kept in a manner suitable to determine the correct amount of tax due and must be available for the Division's inspection upon request (Tax Law § 1135[g]; 20 NYCRR 533.2[a][2]). The regulations provide that among the sales records required to be

maintained are "sales slip, invoice, receipt, contract, statement or other memorandum of sale, . . . guest check, . . . cash register tape and any other original sales document" (20 NYCRR 533.2[b][1]).

In this case, petitioners did not produce cash register tapes, sales invoices or any other original sales or purchase documentation to verify the amount of sales for the period in question. There were no purchase records, journals or ledgers were incomplete or nonexistent for the period in issue, and about 80 canceled checks and only a few bank statements were offered with no explanation. Petitioners did not appear at the hearing to testify or provide the proper records. Petitioners' representative alleged for the first time at the hearing that the liquor sales were not petitioners' primary business, but rather that Clifton Liquor was a check-cashing business, and offered this as an explanation of why there was only a modest markup on the liquor. In addition, since petitioners' check-cashing business was under investigation, petitioners' representative was allegedly not permitted to gain access to the books and records to exonerate petitioners. However, petitioners' representative produced no documentation, affidavits or witnesses that could substantiate his claim, or otherwise prove that the Division should have taken a different course of action with this audit.

B. There is no dispute that the audit methodology utilized in this matter was an indirect methodology based on purchase information acquired from petitioners' third-party vendors and, a markup percentage calculated from a financial data source the Division commonly employs. The standard for reviewing a sales tax audit where external indices are employed was set forth in ***Matter of Your Own Choice, Inc***. (Tax Appeals Tribunal, February 20, 2003), as follows:

> To determine the adequacy of a taxpayer's records, the Division must first request ***(Matter of Christ Cella, Inc. v. State Tax Commn.***, [102 AD2d 352, 477 NYS2d 858]) and thoroughly examine (***Matter of King Crab Rest. v. Chu***, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period

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

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

The original appointment letter sent by the Division to petitioners constituted an adequate request for books and records and covered the entire audit period in issue. This was followed by other requests for records, telephone conversations, messages discussing the providing of records and meetings wherein records were requested. The records provided by petitioner during the audit were scant at best. Accordingly, the Division made a proper determination that petitioners' records were inadequate for purposes of conducting a complete

and accurate audit (Tax Law § 1135; 20 NYCRR 533.2), and properly resorted to an estimated methodology.

C. Pursuant to Tax Law § 1132(c)(1), petitioners bear the burden of proving by clear and convincing evidence that the tax assessed was erroneous (***Matter of Rizzo v. Tax Appeals Tribunal***, 210 AD2d 748, 621 NYS2d 115 [1994]; ***Matter of Mobley v. Tax Appeals Tribunal***, 177 AD2d 797, 799, 576 NYS2d 412 [1991], ***appeal dismissed*** 79 NY2d 978, 583 NYS2d 195 [1992]; ***Matter of Surface Line Operators Fraternal Organization v. Tully***). Furthermore, a presumption of correctness attaches to a notice issued by the Division, and the taxpayer must overcome this presumption (***see Matter of Suburban Carting Corporation***, Tax Appeals Tribunal, May 7, 1998, citing ***Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759, 431 NYS2d 174 [1980]; ***Matter of Leogrande***, Tax Appeals Tribunal, July 18, 1991, ***confirmed*** 187 AD2d 768, 589 NYS2d 383 [1992], ***lv denied*** 81 NY2d 704, 595 NYS2d 398 [1993]).

Petitioners maintain that the third-party supplier information should not be utilized unless it can be verified and attempt to discredit the vendors supplying the greatest amount of wine and liquor, Peerless and Charmer. Petitioners' argument is rejected. When the Division solicited sales to petitioners in 2004 from the third-party suppliers, Peerless and Charmer, both in business at the time, responded with a listing of each of its own sales to petitioners during the audit period, in the amount of $3,941,339.00 and $3,692,910.00, respectively. By the time the records of Peerless and Charmer were subpoenaed in 2008, Empire had become the successor company. Empire responded to the subpoena with a ledger listing of what appeared to be purchases by Clifton Liquor for the audit period in the amount of $2.7 million, nearly $5 million less than the purchases previously reported by the companies separately, presumably covering the records of both companies. On this basis, petitioners' representative seeks a reduction of purchases used in

the computation, and attempted to discredit the third-party records in their entirety. However, a closer look at the monthly listing of purchases provided by Empire shows that they approximated the monthly sales reported by Charmer alone. It appears as though the Peerless sales did not get included in the Empire material. Although there is no way to know for sure which of the records are more accurate, it seems reasonable that the separate reporting from each of the companies in 2004 was likely to be more reliable than the records now in the possession of a successor company for years gone by. Furthermore, Empire did not comply with the subpoena to the extent that any explanation of the documents was provided at the hearing, and petitioners did not pursue such information, given ample opportunity to do so. Accordingly, the original third-party vendor information will be utilized without adjustment should it be determined that the estimated methodology is proper.

D. Petitioners sought to further discredit the audit performed with attacks on a variety of its components. In the present case the auditor, having received virtually no records from petitioners, chose to use third-party liquor vendor information and a markup percentage developed from Robert Morris Associates indices to estimate petitioners' underreported sales. Petitioners dispute the accuracy of the markup percentage employed by the Division to ultimately determine the sales tax due and owing and offer their own calculation of the markup percentage at less than 1/3 of the markup determined by the Division. Petitioners' calculation is flawed, however, for a variety of reasons. The purchase invoices used for this calculation are from years outside the audit period and are not in any way complete records representative of a particular period. The sales prices were depicted by sales register tapes that indicate their creation for something other than a sale, do not correspond with the timing of many of the purchase invoices used, and are simply unreliable documentation to substantiate the sales prices of liquor relating to

the audit period. Petitioners were not present to testify to the accuracy of the amounts used or the calculation of the markup percentage. Petitioners' representative offered the argument that petitioners were not concerned with making a profit on the liquor sales, since the bulk of petitioners' business was in check cashing, where an interest factor was charged for check cashing services. This assertion was made by the representative for the first time at the hearing, with no supporting evidence, absent bank statements, which could not be reconciled, showing the flow of large sums of money. Petitioners' representative created this calculation and offered his view as to its accuracy. However, no weight is accorded this information, since the testimony of petitioners' representative was evasive and incomplete, thus making it unreliable without additional documentation. Although the explanation provided by petitioners' representative may be plausible, there was simply too little documentation and supporting information to consider it convincing proof that an alternative calculation should be considered. Accordingly, the Division's calculation of the markup percentage will not be altered.

Petitioners were critical of the fact that they were not given credit for an ending inventory as of December 31, 2003 of over $2 million. However, petitioners failed to provide any books and records, failed to produce a copy of their filed federal tax returns for 2003 showing the same, or any source documentation substantiating the purchases made. In the absence of such records, the Division made an assumption that whatever was purchased was sold and accounted for no ending inventory. Although the result is harsh, petitioners' own failure to maintain or produce even a sampling of records from the audit period that may have assisted in such substantiation, allowed the Division the latitude to disregard a physical inventory that may or may not have been an honest depiction of Clifton Liquor's stock at that time. Accordingly, the Division did not err in ignoring the ending inventory for one year offered by petitioners.

Petitioners also maintained that Clifton Liquor was not given credit for its "bill and hold" items. Petitioners point to the letter from Charmer Industries (***see*** Finding of Fact 15), which speaks to items that were put into storage, at a value of $100,126.13, and argue they should be given a reduction from amounts shown as purchases, from which sales and ultimately sales tax was calculated, for such items. Petitioners, however, did not clarify the correspondence with testimony (which they attempted to subpoena) or any other documentation, to explain, for example, whether the bill and hold items were still in storage at the end of the audit period on February 29, 2004. Thus, the Division did not in err in refusing any proposed adjustment to the assessment for the Charmer bill and hold items during 2003.

Petitioners maintain that the bill and hold correspondence from Atlantic Wines and Spirits, formerly Peerless and now a division of Empire (***see*** Finding of Fact 16), should result in a reduction in the purchases used to compute the underreported sales and sales tax due. During 2003, Peerless sold petitioners $1,877,656.00 of wine and liquor, as reported by the company when the Division issued letters requesting such information from third-party vendors in 2004. When Atlantic was later contacted to clarify the amounts subject to bill and hold, the company reported that in excess of $1,643,319.00 was stored in its warehouse, and as of February 28, 2004 had not been delivered to petitioners, who had open and unpaid invoices with Peerless as a result. It certainly seems to follow that the amounts held in storage as the end of February 2004 were part of the purchases reported by the vendor to the Division for that year. Since Clifton Liquor is an accrual basis taxpayer, who should not have included in inventory items not delivered and in its possession, it would stand to reason that the $1.6 million of product stored should not be considered purchases during the audit period and used in the calculation of tax due. However,

petitioners failed to provide proof that these assumptions are correct and failed to show any attempts to acquire the same, in order to secure such adjustments in the computation.

Petitioners further argue that discounts shown on the purchase invoices from 2005, 2006 and 2007 show that the vendors offered Clifton Liquor discounts on its purchases, and it is unclear whether the amounts reported as purchases by Clifton Liquor during the audit period were at their gross amount or net of the discounts offered. On this basis, petitioners additionally attacked the use of the third-party vendor information. This argument is also rejected, for two reasons. It was petitioners' responsibility to maintain the records to show whether the discounts were accounted for. Secondly, although it related to only one company, the testimony of Rosemarie Mills from Southern Wine and Spirits of New York indicated that all discounts were taken into account, making the reporting of purchases by her vendor at net. Although the same assumption cannot be made for the other vendors, there is no proof otherwise.

Lastly, petitioners' representative suggested, again, for the first time at the hearing, that petitioners were purchasing liquor for resale, since petitioners were in a position to do so at deep discounts, unlike other smaller vendors. Although the magnitude of purchases seemed out of line for this modestly sized establishment, petitioners did not provide any documentation or substantiation of sales for resale.

Without a doubt, sufficient evidence exists in this record to conclude that the Division had a rational basis for this audit (***Matter of Grecian Sq. v. New York State Tax Commn.***). It was incumbent upon petitioners to show by clear and convincing evidence that the audit method in all other aspects was unreasonable (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679, 681 [1988]), and petitioners simply did not carry this burden.

E. Tax Law § 1145(a)(1)(i) imposes a penalty upon persons who fail to timely file a return or timely pay the tax imposed by Articles 28 and 29 of the Tax Law. The penalty and additional interest may be waived if "such failure or delay was due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). In determining whether reasonable cause and good faith exist, the regulations provide several specific grounds and also a catchall which provides for a finding of reasonable cause based upon any ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay, demonstrating an absence of willful neglect (20 NYCRR 2392.1[d][5]). The taxpayers bear the burden of establishing that the actions were based upon reasonable cause and not willful neglect (***see Matter of Philip Morris***, Tax Appeals Tribunal, April 29, 1993; ***Matter of MCI Telecommunications Corp***., Tax Appeals Tribunal, January 16, 1992, ***confirmed*** 193 AD2d 978, 598 NYS2d 360 [1993]; 20 NYCRR 3000.15[d][5]). Petitioners have not offered any information that would allow for an abatement of penalties, and therefore, have not carried this burden.

F. The petitions of Clifton Liquor Corp. and Jose Cepeda are denied; the Notice of Determination dated March 7, 2005 to Clifton Liquor Corp. is sustained; and the Notice of Determination dated December 5, 2005 to Jose Cepeda is sustained but modified in accordance with footnote 1 for sales tax quarters outside the consent extending the statute of limitations.

DATED: Troy, New York
July 23, 2009

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE