

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WINNERS GARAGE, INC. :
for Revision of a Determination or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period March 1, 2001 through February 29, 2004. : DETERMINATION
821662,
821663 AND 821664

In the Matter of the Petitions :
of :
RUTH WOLKOWICKI AND LEV WOLKOWICKI :
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period December 1, 2001 through February 29, 2004. :

Petitioner Winners Garage, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2001 through February 29, 2004.

Petitioners Ruth Wolkowicki and Lev Wolkowicki 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 December 1, 2001 through February 29, 2004.

A consolidated hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, that commenced on July 1 and 2, 2008, continued at the same location on March 4, 5 and 6, 2009 and

July 20, 21, 22 and 23, 2009, and continued until conclusion at the same location on December 3, 2009, with all briefs to be submitted by November 22, 2010, which date began the six-month period for issuance of this determination. By letter dated April 20, 2011, this six-month period was extended for an additional three months (Tax Law § 2010[3]). At hearing, Lev Wolkowicki appeared pro se and on behalf of the corporation and Ruth Wolkowicki. Andrew B. Schultz, Esq., appeared for petitioners on the briefs. The Division of Taxation appeared by Mark F. Volk, Esq. (Michael Glannon, Esq., of counsel).

ISSUES

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

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

FINDINGS OF FACT

1. Petitioner Winners Garage, Inc. (Winners Garage), at all relevant times herein, was a taxicab agent licensed by the New York City Taxi and Limousine Commission (Taxi and Limousine Commission) that operated a fleet of New York City medallion taxicabs. Winners Garage owned or managed the taxicabs and leased the medallions from their respective owners. In turn, Winners Garage leased the medallions attached to taxicabs to drivers. Winners Garage managed and maintained the medallion taxicabs from its Woodside, New York, business location.

2. Winners Garage was incorporated on November 15, 1989 and elected to be treated as a federal S corporation effective the same date. Petitioner Ruth Wolkowicki at all relevant times at issue, was president and 100% shareholder of Winners Garage. Petitioner Lev Wolkowicki at all

relevant times was vice president of Winners Garage. At the hearing, they admitted that they were responsible persons of the corporation.

3. During the audit period at issue, consisting of three years running from March 1, 2001 through February 29, 2004, Winners Garage reported on its sales tax returns total gross sales and total taxable sales in the same amount of \$2,156,490.00. As follows:

Sales tax quarter ending	Sales reported
May 31, 2001	\$169,890.00
August 31, 2001	174,720.00
November 30, 2001	171,780.00
February 28, 2002	169,260.00
May 31, 2002	169,260.00
August 31, 2002	170,310.00
November 30, 2002	181,860.00
February 28, 2003	189,000.00
May 31, 2003	189,420.00
August 31, 2003	188,790.00
November 30, 2003	191,100.00
February 29, 2004	191,100.00
Total	\$2,156,490.00

4. On February 5, 2004, the Division of Taxation (Division) assigned an auditor, Linda L. Vera, to conduct a sales and use tax field audit of Winners Garage for the period March 1, 2001 through November 30, 2003. Ms. Vera sent an appointment letter to Winners Garage, dated February 5, 2004, which stated that its sales and use tax records for the period March 1, 2001 through November 30, 2003 had been scheduled for a field audit beginning March 1, 2004 at the corporation's office. The letter further advised that all books and records pertaining to Winners

Garage's sales and use tax liability for the audit period must be available on the appointment date, and a "Records Requested List," containing a "detailed list of all records required to be available for audit on the appointment date," was attached to the letter. Among the records specifically requested in the Records Requested List were the corporation's sales tax returns, federal income tax returns, New York State corporation tax returns, general ledger, sales invoices, exemption documents, fixed asset purchase and sales invoices, expense purchase invoices, merchandise purchase invoices, bank statements, cash receipts journal, cash disbursements journal, and depreciation schedules for the entire audit period.

5. On February 20, 2004, the audit was reassigned to an experienced auditor in the Division's Queens District Office, David Perl, who immediately called Winners Garage regarding the appointment date listed in Ms. Vera's February 5, 2004 letter. During the February 20, 2004 telephone call, Mr. Perl spoke with Renee, a corporate employee, who indicated that she had not received the letter and that she would have the owner call the auditor the next week.

6. Subsequently, on February 26, 2004, Mr. Perl called Winners Garage and the first audit appointment was scheduled for March 16, 2004. The auditor also prepared an appointment letter dated February 26, 2004, in which he confirmed that the field audit of Winners Garage's sales and use tax records for the period March 1, 2001 through November 30, 2003 was scheduled to begin on March 16, 2004 at the corporation's office. The letter further advised that all books and records pertaining to Winners Garage's sales and use tax liability for the audit period must be available on the appointment date, and a Records Requested List containing a list with the same items requested in the February 5, 2004 letter was also attached to this letter.

7. The audit to be commenced March 16, 2004 was a follow-up audit to one conducted by Steven Cassel, an auditor in the Division's Queens District Office, for the earlier period of

September 1, 1994 through August 31, 1997. The prior audit resulted in the Division's determination of additional tax due in the amount of \$238,849.00, which was reduced by a settlement set forth in a Stipulation of Discontinuance filed with the Division of Tax Appeals in November 2002.

8. On March 1, 2004, Harold Kriegsman, CPA, the corporation's former accountant, left a voice mail message requesting a postponement of the March 16, 2004 field audit appointment. Subsequently, on March 2, 2004, the auditor called Mr. Kriegsman to discuss the postponement request. During that telephone conversation, Mr. Kriegsman requested a postponement of the March 16, 2004 appointment because of tax season and his need to get the corporation's records together. The field audit appointment was rescheduled for May 3, 2004 at Winners Garage's office. During the telephone call, the auditor informed Mr. Kriegsman that the audit period would be updated to include the period December 1, 2003 through February 29, 2004 and requested a letter explaining the reasons for the postponement of the field audit appointment.

9. On March 2, 2004, Mr. Perl sent a second letter to Winners Garage stating that the audit period had been expanded to include the corporation's sales and use tax records for the subsequent period, December 1, 2003 through February 29, 2004, and that a field audit to review the additional records was scheduled for May 3, 2004 at Winners Garage's offices. This letter further advised that, in addition to the records previously requested for audit, all books and records pertaining to the sales and use tax liability for the updated audit period must be available on the appointment date, and a Records Requested List was attached to the letter. This list for the amended audit period March 1, 2001 through February 29, 2004 contained a detailed list of the same records requested for the original audit period.

10. On May 3, 2004, a field audit was conducted at Winners Garage's business location. Present at this audit were Mr. Wolkowicki, Mr. Kriegsman, the auditor and his former team leader, Theodore Bernstein. Books and records made available and reviewed at this appointment included sales tax worksheets, federal income tax returns for the years 2001 and 2002, bank statements for part of the audit period, a printout of the computerized general ledger's revenue accounts for the period December 5, 2003 through January 7, 2004, the daybook for the period December 5, 2003 through January 7, 2004, and medallion leases for the period December 1, 2003 through February 29, 2004.

11. At the May 3, 2004 audit appointment, Messrs. Wolkowicki and Kriegsman explained that Winners Garage purchased and capitalized cars that it leased to drivers. They further explained that the sales reported on each of the sales tax returns, filed for the period March 1, 2001 through February 29, 2004, did not include medallion sales, and that the sales tax reported due on each quarterly sales tax return was computed in the following manner. For each of the 13 weeks in a quarter, the number of cars in Winners Garage's weekly inventory was multiplied by the base amount of \$210.00 resulting in the weekly amount of taxable sales. Then, the sum of the 13 weekly amounts of taxable sales was multiplied by the applicable sales tax rate (i.e., 8.25% or 8.625%). Winners Garage did not report any taxable sales subject to the special tax on passenger car rentals (i.e., 5%) on the sales tax returns that it filed for the period March 1, 2001 through February 29, 2004. No backup documentation was provided to the auditor regarding the sales reported on the sales tax returns for that period. Messrs. Wolkowicki and Kriegsman also explained that sales reported on Winners Garage's federal S corporation income tax return included medallion rental revenue, and that the corporation's federal S corporation income tax return for the year 2003 was on extension.

12. During the initial audit appointment, the auditor suggested that a test period of December 1, 2003 through February 29, 2004 be used to review sales and expenses. The auditor reviewed medallion leases for that period and found them to be in order. He was advised that Winners Garage had contracts with 75 drivers during the period December 1, 2003 through February 29, 2004. The auditor's handwritten field audit visit notes for May 3, 2004 indicate that Winners Garage computed and paid sales tax on its sales (contracts) for 70 cars during the period December 1, 2003 through February 29, 2004. To ascertain why Mr. Wolkowicki claimed that Winners Garage had contracts with 75 drivers during the period December 1, 2003 through February 29, 2004 but reported sales tax due on its sales for only 70 cars for that period, the auditor requested AM/PM dispatch sheets. However, he was advised that Winners Garage did not have any dispatch sheets. Mr. Bernstein's notes for May 3, 2004 indicate that the printout of the corporation's computerized general ledger for the period December 5, 2003 through January 7, 2004 did not separate out car revenue and medallion revenue.

13. During the May 3, 2004 field audit appointment, the auditor also reconciled deposits per Winners Garage's day book to deposits per bank statements and sales per general ledger for the period December 5, 2003 through January 7, 2004. Subsequently, on May 4, 2004, after performing a deposit analysis for the period December 5, 2003 through January 7, 2004, the auditor determined that further review was unwarranted because bank deposits were in substantial agreement with Winners Garage's books and records. The next field audit appointment was scheduled for June 3, 2004.

14. In a letter dated May 4, 2004, the auditor advised Mr. Kriegsman that the following items were still required for Winners Garage's sales tax audit for the period March 1, 2001 through February 29, 2004:

- 1) Copies of Federal income tax returns - 2001 - 2003
- 2) Bank statements - 4/5/02 - 12/5/02, 2/7/03 - 5/6/03, 8/7/03 - 9/5/03
- 3) Fixed asset invoices - audit period
- 4) Expense invoices - audit period (suggested test period: 12/1/03 - 2/29/04):
 - a. Utilities
 - b. Office
 - c. Auto Parts
 - d. Equipment Repairs
 - e. Maintenance
- 5) Sales per books - audit period
- 6) Lease contracts for drivers - audit period (suggested test period per discussion on 5/3/04)

The letter further requested that all of the items be available at the next appointment scheduled for June 3, 2004.

15. On June 1, 2004, Mr. Kriegsman called the auditor and requested a postponement of the June 3, 2004 audit appointment. Subsequently, on June 3, 2004, the second field audit appointment was rescheduled to July 7, 2004 at Winners Garage's business location.

16. On June 16, 2004, after reviewing the prior audit findings, the auditor discussed the findings with his former team leader and the prior auditor, Mr. Cassel. During that discussion, Mr. Cassel recommended reviewing the contracts with the drivers for the inclusion of the following information: the dates covered by the contract, car model information and any rate changes. He also recommended reviewing the insurance for the cars for unnamed or named drivers and the rate cards for that information as well. Assuming the contracts with drivers were long-term leases, Mr. Cassel recommended checking to see if the tax was paid up front (at the beginning of the term of the contract). A notation in Mr. Bernstein's handwritten audit notes indicates that the prior audit used approximately \$390.00 (the amount varied by year) as the car rental.

17. The auditor, the former team leader and Mr. Kriegsman were present at the second field audit appointment conducted on July 7, 2004. Business records presented for review included a bank statement for the period August 7, 2003 through September 5, 2003, fixed asset invoices, expense invoices for the period December 1, 2003 through February 29, 2004, 18 contracts with the drivers for the period December 1, 2003 through February 29, 2004, some rate cards, some insurance documentation and computer printouts of one driver's profile and payment history. No cash receipts were presented during this audit appointment. The auditor found that all 18 contracts with drivers were similar; most of the contracts did not have named drivers; and all of the contracts did not have dates or stated rates. Therefore, the auditor was unable to tie the reviewed contracts to the sales tax return filed for the period December 1, 2003 through February 29, 2004. The examination of the rate cards presented revealed that multiple drivers were listed for different periods. The auditor did not make a list of the 18 contracts reviewed. However, a photocopy of one contract was made.

18. Subsequently, in September 2004, the auditor prepared audit work papers summarizing his findings to date, and concluded additional information was needed to complete the audit. At that time, lists of the medallions managed by Winners Garage on February 26, 2001, October 7, 2002 and March 4, 2004 were also obtained by the Division from the Taxi and Limousine Commission. Information on these lists included, among other things, each specific medallion managed by Winners Garage, along with the year and vehicle identification number of the vehicle to which each medallion was affixed. The Taxi and Limousine Commission records indicated that Winners Garage managed 85 medallions on February 26, 2001, 77 medallions on October 7, 2002 and 77 medallions on March 4, 2004.

19. On November 17, 2004, the auditor called Mr. Kriegsman and scheduled a third field audit appointment for December 21, 2004. On the same date, the auditor prepared and sent a letter to Mr. Kriegsman advising that the following items were still required for Winners Garage's sales tax audit for the period March 1, 2001 through February 29, 2004:

- 1) Copies of Federal income tax returns - 2003
- 2) Bank statements - 4/5/02 - 12/5/02, 2/7/03 - 5/6/03
- 3) Test period agreement for expenses
- 4) Sales per books - audit period
- 5) Lease contracts for drivers - audit period (suggested test period: 12/1/03 - 2/29/04)

The letter further advised that “[t]o date, you have provided approximately one fifth of lease contracts for the suggested test period of 12/1/03 - 2/29/04. We must review all contracts for the test period (if not for the audit period as a whole).” It also requested that all items be available at the next appointment scheduled for December 21, 2004, so that the audit could be completed at that time.

20. At the third field audit appointment, the auditor reviewed the corporation's 2003 federal income tax return and the daily summary report of cash receipts. Neither the bank statements for the periods April 5, 2002 through December 5, 2002 and February 7, 2003 through May 6, 2003, nor the remaining contracts with drivers for the period December 1, 2003 through February 29, 2004 were presented. To determine whether the contracts with drivers for the period December 1, 2003 through February 29, 2004 were long-term leases, the auditor selected January 12, 2004 through January 16, 2004 to trace the drivers to the cars that they were using. No documentation associating the drivers to the cars was provided by Messrs. Kriegsman and Wolkowicki at that time. As a result, the auditor was unable to complete his analysis of the contracts with drivers for the period December 1, 2003 through February 29, 2004.

21. Although requested by the auditor, Winners Garage failed to provide sales books and invoices, all contracts with all drivers, and complete bank statements. The auditor found all 18 contracts with drivers presented to be incomplete because they did not have contract term dates or stated rates, and many failed to have the drivers' names on them as well. Therefore, the auditor concluded that Winners Garage's sales record were inadequate and he resorted to external audit resources to conduct an estimated audit to determine whether the correct amount of sales taxes owed by Winners Garage for the period March 1, 2001 through February 29, 2004 had been paid.

22. To determine rental revenue from the leasing of vehicles to drivers during the audit period, the auditor used the method previously agreed to by the Metropolitan Taxicab Board of Trade and the Division and later adopted by the Tax Appeals Tribunal in *Matter of Best Taxi Management, Inc.* (January 24, 2002, *confirmed sub nom Matter of Statharos v. Tax Appeals Trib. of State of N.Y.*, 306 AD2d 650, 760 NYS2d 777 [2003]). First, the auditor calculated individual taxicab revenue as follows: \$24.00 per 12-hour shift was multiplied by 2 shifts per day, resulting in \$48.00 daily rental revenue. This amount was multiplied by 7 days per week, resulting in \$336.00 weekly rental revenue per taxicab. \$336.00 was multiplied by 13 weeks per sales tax quarter, resulting in \$4,368.00 of quarterly rental per vehicle. Based upon records obtained from the Taxi and Limousine Commission, the auditor determined that Winners Garage managed 85 medallions during the period March 1, 2001 through August 31, 2002 and 77 medallions during the period September 1, 2002 through February 29, 2004. For each of the first 6 quarters in the audit period, the auditor multiplied quarterly revenue per taxi in the amount of \$4,368.00 by 85 medallions and determined quarterly rental revenue to be \$371,280.00. For each of the last 6 quarters in the audit period, the auditor multiplied quarterly revenue per taxi in the

amount of \$4,368.00 by 77 medallions and determined quarterly rental revenue to be \$336,336.00. The auditor determined total quarterly rental revenue to be \$4,245,696.00 for the period March 1, 2001 through February 29, 2004. After allowing 16.40% for downtime, the auditor determined adjusted taxable sales in the amount of \$3,549,402.00 for the audit period. Then, he subtracted \$2,156,490.00, total reported taxable sales for the audit period, from \$3,549,402.00, and determined additional taxable sales to be \$1,392,912.00. After applying the appropriate sales tax rate for each quarter (8.25% for the quarters ending May 31, 2001 through May 31, 2003 and 8.625% for the quarters ending August 31, 2003 through February 29, 2004) to additional taxable sales determined, the auditor determined that \$115,937.00 in additional sales tax was due for the period March 1, 2001 through February 29, 2004.

23. Since Winners Garage never provided adequate proof during the audit that its leases of taxicabs to drivers were long-term leases, the auditor concluded that all of its rentals of vehicles to drivers for the period March 1, 2001 through February 29, 2004 were subject to the 5% special tax on passenger car rentals because they were short-term vehicle rentals. The auditor multiplied \$3,549,402.00, the adjusted taxable sales determined for the audit period, by the 5% tax rate on passenger car rentals and determined \$177,470.10 in sales tax due on passenger car rentals for the period March 1, 2001 through February 29, 2004.

24. During the December 21, 2004 field appointment, Winners Garage's former representative executed a Test Period Audit Method Election (Form AU-377.12) agreeing to the use of a test period audit of Winners Garage's recurring expense purchase records. The test period utilized was the sales tax quarter December 1, 2003 through February 29, 2004. Based upon his review of Winners Garage's recurring expense records, the auditor determined that additional taxable recurring expense purchases, consisting of a fire extinguisher, brake cleaner,

glass cleaner and glue, totaling \$6,450.00 were subject to use tax for the test period. The auditor multiplied \$6,450.00 (the additional taxable recurring expense purchases for the test quarter December 1, 2003 through February 29, 2004) by 12 (the number of quarters in the audit period), and determined that Winners Garage's additional taxable recurring expense purchases totaled \$77,400.00, with additional use tax due of \$6,458.10 for the period March 1, 2001 through February 29, 2004.

25. Based upon his review of Winners Garage's asset acquisition records, the auditor determined the records were adequate and concluded that no additional tax was due on the fixed asset purchases of vehicles (taxis) for resale.

26. The Division subsequently issued to Winners Garage a Statement of Proposed Audit Change for Sales and Use Tax dated December 28, 2004, which asserted additional tax due on sales and expenses as noted above and thereby asserted a total of \$299,865.48, plus penalty and interest. The auditor sent the statement and supporting work papers, including the medallion management lists obtained from the Taxi and Limousine Commission, to Winners Garage and its former representative, Mr. Kriegsman.

27. Winners Garage never provided the auditor with any of the supporting documentation used to prepare its sales tax returns filed for the period March 1, 2001 through February 29, 2004 prior to the issuance of the Statement of Proposed Audit Change.

28. On February 8, 2005, Mr. Kriegsman called the Division's Queens District Office and spoke with the auditor's former team leader. During that telephone conversation, Mr. Kriegsman advised that he disagreed with the audit findings and would submit an appeal on Winners Garage's behalf. At that time, Mr. Bernstein reminded Mr. Kriegsman of Winners Garage's

protest and appeal rights. No additional information was provided to the auditor after the issuance of the Statement of Proposed Audit Change.

29. Winners Garage executed two consents extending the period of limitations for assessment of sales and use taxes under articles 28 and 29 of the Tax Law that collectively extended the period in which to assess sales and use taxes due for the period March 1, 2001 through February 28, 2004 to June 20, 2005. Ruth Wolkowicki and Lev Wolkowicki, as responsible persons of Winners Garage, each executed a consent extending the period of limitations for assessment of sales and use taxes due from Winners Garage for the period September 1, 2001 through May 31, 2002 to June 20, 2005.

30. As a result of the audit, the Division issued to Winners Garage, a Notice of Determination, dated March 18, 2005, asserting additional sales and use taxes due for the period March 1, 2001 through February 29, 2004 in the amount of \$299,865.48, plus penalty and interest.

On March 21, 2005, the Division also issued two additional notices of determination, one to Lev Wolkowicki, as an officer or responsible person of Winners Garage, and one to Ruth Wolkowicki, as an officer or responsible person of Winners Garage, for additional sales and use taxes due for the period December 1, 2001 through February 29, 2004 in the amount of \$217,491.23.

31. At the hearing, Lev Wolkowicki testified about Winners Garage's day-to-day operations during the audit period, and its responsibilities as a taxicab agent licensed by the Taxi and Limousine Commission. According to Mr. Wolkowicki, if Winners Garage did not follow the rules and regulations of the Taxi and Limousine Commission, it would lose its taxicab agent license. When Winners Garage enters into a medallion management agreement with a medallion

owner, it must submit all required documentation related to the medallion; the medallion owner; its designation as agent for the medallion owner; the car to which the medallion is affixed and any assigned drivers, to the Taxi and Limousine Commission immediately. The Taxi and Limousine Commission must be notified of any subsequent replacement of the vehicle to which that medallion is attached. It also must be notified of the termination of the medallion management agreement that Winners Garage had with that medallion owner. In order to drive a medallion taxicab managed by Winners Garage, a driver must have a valid New York State Driver's License and a valid Vehicle Operator's License issued by the Taxi and Limousine Commission.

32. In 1992, Spyros Drakos created a software program still being utilized by Winners Garage for its computerized business records. Since that time, Mr. Drakos has provided technical computer support to Winners Garage as needed. All information contained in Winners Garage's computerized records was and continues to be inputted by Winners Garage's employees.

33. Winners Garage's Woodside, New York, location, sustained fire damage on August 7, 2002. The only evidence submitted regarding that fire was a copy of a check that the landlord received from an insurance company for the damaged building. According to Mr. Wolkowicki, all of the corporation's original records were destroyed by that fire and, as a result, Winners Garage only has computer records for dates prior to August 7, 2002.

34. At all relevant times, Winners Garage did not own the medallions affixed to the vehicles. Rather, it leased each medallion from its owner pursuant to a four-page Medallion Management Agreement (agreement). Under the terms of this agreement, Winners Garage, as agent, was given the exclusive right to manage the medallion for a specified period of time, to

collect all lease payments on behalf of the medallion owner, to pay the owner a specified amount per month per medallion from the collected funds and to retain all amounts above that payment as a management fee and for general expenses. The terms of this agreement, among other things, also required Winners Garage to “provide a vehicle without additional expense” to the owner of each medallion and to “[e]nter into leases on behalf” of the medallion owner “with drivers who are duly licensed by the [Taxi and Limousine Commission].” The terms of this agreement required, among other things, the medallion owner to pay all federal, state and local taxes associated only with the medallion and lease payments to the owner for the medallion.

35. The record includes documentation submitted to the Taxi and Limousine Commission for one medallion (number 7B64) managed by Winners Garage between March 1, 2001 and February 29, 2004. This documentation included, among other things, copies of two executed medallion agreements for the management of medallion number 7B64, and a copy of a Taxi Medallion Agent Designation form. The record also includes a summary of all expenses that Winners Garage paid with respect to medallion number 7B64 from May 31, 2001 through March 1, 2004. This summary, printed from Winners Garage’s computerized business records, lists the following information for each expense payment: the check number, the medallion number, the check date, the named payee and the amount.

36. As their Exhibit 96, petitioners submitted documentation consisting of copies of, among other items, a “Sign-Up Sheet” and a two-page “Contract” for 140 taxi drivers who were either new drivers, restarting as drivers or changing medallion taxicabs during the period January 3, 2003 through June 3, 2004.¹ The contract between a driver and a medallion owner (contract

¹ Documentation was submitted for a total of 142 drivers. However, the documentation for one of the additional drivers included a copy of only the second page of the contract. While the other drivers’ documentation did not include a copy of a contract at all.

with driver) contained 21 typewritten paragraphs. A review of the terms of this contract indicates that the medallion owner leased “to the driver said medallion together with a car for a 53 week period during the hours of 5:00 A.M. to 5:00 P.[M.] OR 5:00 P.M. to 5:00 A.M. seven days a week” (paragraph 1). Further review of this contract indicates that it remained in effect and covered “all cars driven by The Driver” (paragraph 18). In addition, while the agreement was in effect, the medallion owner reserved “the right to change lease prices for any type of shift at any time,” upon providing two weeks advance notice to the driver (paragraph 21). Fill-in lines were provided in the contract for the driver’s name; the medallion owner (name or medallion number); the weekly consideration for the lease; the designated payday for the lease payment; the signature of the driver, along with the date of such signing, and the signature of Winners Garage, as agent for the medallion owner (name or medallion number). No fill-in lines were provided for the year and vehicle identification number of any car referenced in the contract. Additionally, there was no fill-in space for the beginning and ending dates of the contract. At the hearing, Mr. Wolkowicki explained that the contract covered all cars driven by the driver because a driver might be promoted to a better (i.e., newer) car or leave for a period of time due to an emergency, an extended vacation or license suspension. According to Mr. Wolkowicki, a returning driver must wait in line for the next available medallion taxicab.

37. A review of all 140 contracts with drivers indicated that the typewritten contents of each one were the same and that the second page had the number “3” at the top. However, further review of these contracts revealed that all 140 were incomplete because one or more of the following fill-in items were left blank: the driver’s name; the medallion owner’s name or medallion number; the amount of the weekly lease payment; the designated payday; the date the driver signed the contract; and Winners Garage’s signature as agent for the medallion owner.

Additionally, approximately 60% of these contracts bore only a stamp “Winners Garage, Inc., 34-14 64th Street, Woodside, NY 11377, Tel (718) 458-7000, Fax. (718) 458-0468” as the agent’s signature for an unidentified medallion owner. It is noted that none of the contracts contained beginning and ending dates or any identifying information (the year and vehicle identification number) for cars.

38. During the hearing, Mr. Wolkowicki admitted that Winners Garage was acting as an agent for the medallion owners in entering into the contracts with drivers.

39. As one of their exhibits, petitioners submitted the payment histories for 97 drivers printed from Winners Garage’s computerized records. The payment history for each driver lists payments by date and time, the amount due, the amount paid, the balance due and receipt number. None of the payment histories contain any information regarding vehicle leases.

40. The record includes the affidavits of 47 drivers who allegedly leased “taxicab vehicles from medallion owners or vehicle owners managed by Winners [Garage]” for periods exceeding 53 weeks. None of these affidavits contain the vehicle identification numbers for the vehicles allegedly leased or the dates of such leases. No exhibits were attached to any of these affidavits.

41. Documents in the record indicate that some medallions managed by Winners Garage were affixed to vehicles owned by third parties, including, among others, Winners Service & Management, Inc. (Winners Service), during the period March 1, 2001 through February 29, 2004.

42. The record does not include any lease agreements between third-party vehicle owners and Winners Garage for the period March 1, 2001 through February 29, 2004. It also does not include copies of cancelled checks paid to third-party vehicle owners by Winners Garage for its leasing or its management of their vehicles for the period March 1, 2001 through February 29,

2004. A list of third-party owned vehicles leased to or managed by Winners Garage during the audit period is not part of the record.

43. The record includes copies of seven checks drawn on Winners Service's checking account in payment of sales taxes due for the periods December 1, 2000 through November 30, 2001 and March 1, 2002 through November 30, 2002. Neither copies of the sales tax returns filed by Winners Service for the periods December 1, 2000 through November 30, 2001 and March 1, 2002 through November 30, 2002, nor the supporting documentation for such returns are part of the record.

44. Depreciation on vehicles owned by Winners Garage was deducted as part of the cost of goods sold from gross sales reported on each of the corporation's federal income tax returns for the years 2001, 2002 and 2003. Attached to each of these federal income tax returns was a depreciation and amortization report that contained information regarding each asset being depreciated, including, among other things, its description, acquisition date, the life of the asset, the unadjusted cost or basis, the basis for depreciation and the amount of depreciation. Each separately listed asset was merely described as transportation vehicles on the depreciation and amortization report. The number of transportation vehicles acquired on a specific date was not included on the depreciation and amortization report. For the year 2001, depreciation was claimed on transportation vehicles acquired by Winners Garage on various dates between March 1, 1999 and November 16, 2000. For the year 2002, depreciation was claimed on transportation vehicles acquired on various dates between March 1, 1999 and November 13, 2002. For the year 2003, depreciation was claimed on transportation vehicles acquired on various dates between February 10, 2000 and April 01, 2003.

45. On June 30, 2003, Winners Garage purchased a used 2003 Ford Crown Victoria from Peekskill Lincoln Mercury. The purchase price of \$18,030.00 was paid by a check drawn on Winners Garage's checking account. Winners Garage was listed as the owner of this vehicle on its Certificate of Title. This vehicle purchase was not listed on the depreciation and amortization report attached to Winners Garage's 2003 federal income tax return. At the hearing, Mr. Wolkowicki admitted that he did not know if all of the vehicles owned by Winners Garage were listed on the depreciation and amortization reports attached to the corporation's federal income tax returns for the years 2001, 2002 and 2003. No itemized inventory of the specific vehicles owned by Winners Garage during the audit period is part of the record.

46. One of the reports printed from Winners Garage's computerized records and submitted into the record was the "Daily Totals Summary Report" for the period December 1, 2003 through February 29, 2004. Information on this report indicates that payments from drivers were processed for 77 medallions during the period December 1, 2003 through February 29, 2004.

47. In support of their position that Winners Garage properly reported the sales tax due on its sales (contracts with drivers) during the period March 1, 2001 through February 29, 2004, petitioners submitted into evidence 142 exhibits, many of which were hundreds of pages long.

48. The record does not include the supporting documentation used to prepare Winners Garage's sales tax returns for the period March 1, 2001 through February 29, 2004.

SUMMARY OF PETITIONERS' POSITION

49. Petitioners claim that they duly provided or made available all relevant records requested by the Division. They maintain that the provided records were adequate to verify taxable receipts and conduct a complete audit of Winners Garage's sales. According to petitioners, by obtaining third-party information from the Taxi and Limousine Commission and

considering the application of the *Best Taxi* formula to determine taxable sales before completing review of the records, the Division prejudged the adequacy of the corporation's books and records.

50. Petitioners maintain that during the audit period, Winners Garage conducted its business operations in a manner very different from the manner in which Best Taxi conducted its operations. They further contend that the Division's use of the *Best Taxi* formula was far less favorable to Winners Garage than its own detailed records. Petitioners assert that Winners Garage paid sales tax for vehicles as to which it was titleholder during the twelve-quarter period from March 1, 2001 through February 29, 2004. They maintain that documentation in the record clearly indicates that Winners Garage was titleholder of 65 vehicles in 2001, of which about 63 were in operation during that year. They further maintain that Winners Garage paid sales tax on about 63 cars during the year 2001. However, the exact number of cars varied slightly from quarter to quarter during that year. During the period of 2002, 2003 and until February 29, 2004, petitioners maintain that the number of cars subject to sales tax varied slightly between 62 and 70 cars, and the taxes paid by Winners Garage reflect such variations. As for the \$210.00 weekly per car lease charge used by Winners Garage in its computations of sales tax due for the audit period, petitioners point out that the prior auditor's handwritten audit notes acknowledge that Winners Garage paid approximately \$210.00 weekly to Winners Service for each vehicle that Winners Garage leased from Winners Service during the earlier audit period of September 1, 1994 through August 31, 1997.

51. Petitioners contend that documents in the record clearly show that Winners Garage utilized "53 week" contracts with drivers during the audit period, and thus petitioner should not

be subject to the additional 5% sales tax on short term leases of the taxicabs to drivers as claimed by the Division.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a)² imposes a sales tax on the receipts from every “retail sale” of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A “retail sale” is “[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . .” (Tax Law § 1101[b][4][i]). Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices” (Tax Law § 1138[a][1].) When acting pursuant to section 1138(a)(1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

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

To determine the adequacy of a taxpayer’s records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, [102 AD2d 352, 477 NYS2d 858] *supra*) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978) the taxpayer’s books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (*Matter of Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255; *Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576, 456

² Pursuant to Tax Law § 1165, the special tax of five percent imposed on passenger car rentals under Tax Law § 1160(a) “shall be administered and collected in a like manner as and jointly with the taxes imposed by [Tax Law § 1105].”

NYS2d 138; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *see also, Matter of Hennekens v. State Tax Commn.*, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is ‘virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit’ (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43; *Matter of Christ Cella, Inc. v. State Tax Commn., supra*), ‘from which the exact amount of tax due can be determined’ (*Matter of Mohawk Airlines v. Tully*, 75 AD2d 249, 429 NYS2d 759, 760).

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

C. In this case, the record establishes the Division’s clear and unequivocal written requests for books and records of Winners Garage’s sales. Although Winners Garage produced some of the records requested, it did not make available sales books and invoices, all contracts with drivers, complete bank statements or other source documentation from which the auditor could verify Winners Garage’s taxable sales as reported on the sales and use tax returns. Only 18 contracts with drivers were made available and those were incomplete because they did not have contract term dates or stated rates, and many failed to have the driver’s names on them. The Division reasonably concluded that the books and records provided for the audit period were incomplete and inadequate to verify Winners Garage’s taxable sales and conduct a complete

audit from which the exact amount of tax due could be determined. Accordingly, it was proper for the Division to resort to the use of external indices (*Matter of Karay Restaurant Corp. v. Tax Appeals Tribunal*, 274 AD2d 854, 711 NYS2d 853 [2000], *lv denied* 96 NY2d 702, 722 NYS2d 794 [2001]; *Matter of Sarantopoulos v. Tax Appeals Tribunal*, 186 AD2d 878, 589 NYS2d 102 [1992]). It was certainly reasonable for the Division to utilize the number of medallions managed by Winners Garage obtained from the Taxi and Limousine Commission to determine the number of vehicles leased to drivers during the audit period since Winners Garage leased the medallions attached to taxicabs to the drivers. In addition, the Division's use of the method previously agreed to by the Metropolitan Taxicab Board of Trade and the Division and later adopted by the Tribunal in *Matter of Best Taxi*, an industry precedent case, to determine the rental revenue from the leasing of vehicles to drivers was reasonable.

D. Initially, petitioners claim that the Division did not follow the long established procedure to determine the accuracy of the corporation's books and records. According to petitioners, because the Division obtained third-party information from the Taxi and Limousine Commission and considered the application of the *Best Taxi* formula to determine taxable sales before completing review of the corporation's books and records, the Division cannot resort to indirect audit methodologies to determine the tax due from petitioners. Petitioners contend that this request indicated that the Division predetermined that the corporation's books and records were inadequate.

The purpose of the request and examination of a taxpayer's books and records is to ensure that a taxpayer who maintains records as required will have those records examined by the Division on audit. As the court in *Matter of Chartair, Inc. v. State Tax Commn.*, stated, "[t]he honest and conscientious taxpayer who maintains comprehensive records as required has a right

to expect that they will be used in any audit to determine his ultimate tax liability” (*id.* at 47). Consequently, an indirect audit methodology cannot be used unless a taxpayer’s records are so insufficient that its sales cannot be verified or such records are unavailable (*see Matter of Christ Cella, Inc. v. State Tax Commn.*). Only after the Division has requested and thoroughly reviewed a taxpayer’s records and determined them to be inadequate can the Division use an indirect audit method. The limited documentation made available on audit included federal income tax returns for the years 2001, 2002 and 2003, bank statements for part of the audit period, a printout of the computerized general ledger’s revenue accounts for the period December 5, 2003 through January 7, 2004, the daybook for the period December 5, 2003 through January 7, 2004, medallion leases for the period December 1, 2003 through February 29, 2004, 18 contracts with drivers for the period December 1, 2003 through February 29, 2004, some insurance documentation, some rate cards and a printout of one driver’s profile and payment history. Medallion revenue and car revenue were not separated out in the corporation’s computerized general ledger revenue accounts. The 18 contracts with drivers were incomplete. Winners Garage did not produce sales books and invoices, all contracts with drivers, complete bank statements or other source documentation regarding taxable sales. Given the limited books and records provided in response to the Division’s requests, the Division was justified in employing an indirect audit methodology.

E. Since it has been concluded that the Division’s estimate of sales tax due was reasonable in the first instance, petitioners must shoulder the burden to establish by clear and convincing evidence that both the method used to arrive at the tax assessment and the assessment itself are erroneous (*Matter of Sol Wahba, Inc. v. State Tax Commn.*, 127 AD2d 943, 512 NYS2d 542 [1987]). As noted above, the Division determined that additional sales tax was due on adjusted

taxable sales for Winners Garage's leasing of vehicles to drivers; that those adjusted taxable sales were subject to the 5% special tax on passenger car rentals; and that additional use tax was due on taxable recurring expense purchases for the audit period.

F. Petitioners contend that the Division's use of the number of medallions managed by Winners Garage, obtained from the Taxi and Limousine Commission, in its computations of taxable sales for the audit period was erroneous. Petitioners maintain that Winners Garage managed some medallions for third-party vehicle owners during the audit period. They further maintain that sales tax was paid for all vehicles as to which Winners Garage was the title holder during the audit period. In support of their position, petitioners rely on documents in the record. Petitioners' argument is without merit. While documents in the record clearly show that some medallions managed by Winners Garage during the audit period were affixed to vehicles owned by third parties, the record does not include any lease agreements with third-party vehicle owners, or any copies of cancelled checks paid to third-party vehicle owners by Winners Garage for its leasing or management of their vehicles during the audit period. There is also no evidence that Winners Service collected, reported or paid sales tax on its alleged rentals of vehicles to Winners Garage during the audit period. Additionally, the only evidence submitted regarding the number of vehicles owned by Winners Garage during the audit period were the depreciation and amortization reports attached to the corporation's federal income tax returns for the years 2001, 2002 and 2003. Given Mr. Wolkowicki's admission at the hearing that he did not know if all vehicles owned by Winners Garage were listed on those depreciation and amortization reports, I do not find those documents to be reliable. As such, I find no adjustment is warranted to the Division's determination that Winners Garage had taxable sales for 85 medallion taxicabs in

each of first six quarters of the audit period and taxable sales for 77 medallion taxicabs in each of the remaining six quarters of the audit period.

G. Petitioners also contend that the Division's use of the *Best Taxi* formula to determine weekly per car rental revenue of \$336.00 was erroneous. They maintain that the \$210.00 per car weekly base amount used by Winners Garage in its computation of taxable sales during the audit period was valid. Petitioners point out that the prior auditor's handwritten audit notes clearly acknowledge that Winners Garage paid approximately \$210.00 weekly to Winners Service for each vehicle that Winners Garage leased from Winners Service during the earlier audit period of September 1, 1994 through August 31, 1997. Petitioners' argument is without merit. The documentation submitted in support of their position is woefully inadequate. Other than a notation in the prior audit's work papers, there is no supporting documentation to establish a \$210.00 weekly per car lease rental. Although Winners Garage admitted that it leased cars from third-party owners, including Winners Service, during the audit period, it did not submit any lease agreements with third-party owners or any copies of cancelled checks paid to third-party vehicle owners by Winners Garage for its leasing or management of their vehicles.

It is noted that the auditor in his computations made an allowance for 16.40% downtime when he calculated adjusted taxable sales for the audit period. If the weekly per car rental revenue determined by the auditor in the amount of \$336.00 was adjusted by 16.40% to reflect downtime, weekly per car rental revenue would be \$280.90. As such, no adjustment is warranted to the Division's determination of weekly per car rental revenue.

H. Petitioners contend that the auditor erroneously concluded that all of Winners Garage's rentals of vehicles to drivers during the audit period were short-term vehicle rentals subject to the 5% special tax on passenger car rentals (Tax Law § 1160[a][1]). They point out that Tax Law §

1111(i)(A) provides, in relevant part, that this 5% special tax on passenger car rentals shall not apply “with respect to any lease for a term of one year” for a motor vehicle, including a passenger car mentioned in Tax Law § 1160. Petitioners also point out that any lease that covers a period of one year or more is included in the definition of a lease for a term of one year or more for the purposes of the taxes imposed on leases of motor vehicles (20 NYCRR 527.15[b][1][i]). They claim that documentation, including 140 contracts with drivers, the payment histories for 97 drivers and the affidavits of 47 drivers, clearly establishes Winners Garage’s utilization of “53 week” contracts for its leasing of vehicles to drivers during the audit period. After carefully and thoroughly reviewing the documentation presented, I find that the Division correctly determined that Winners Garage’s leasing of vehicles to drivers were short-term leases subject to the special tax on passenger car rentals. Each of the 140 contracts with drivers is an incomplete contract or lease between the driver and Winners Garage, as agent for the medallion owner, not the owner or manager of the leased vehicles on which the sales tax is owed. None of these contracts state beginning and ending dates for a “53 week” lease term, or specifically identify the car referenced in the contract. In addition, the terms of the contract specifically state that it covers all cars driven by the driver. At the hearing, Mr. Wolkowicki admitted Winners Garage was acting as an agent for the medallion owners in entering into the contracts with drivers. Although the payment histories for the 97 drivers contain detailed information regarding dates and amounts of lease payments, none contained any information regarding vehicle leases. As for the affidavits of the 47 drivers, who allegedly leased taxicab vehicles from medallion owners or vehicle owners managed by Winners Garage for periods exceeding 53 weeks, they were extremely vague and lacked detailed information regarding the vehicles allegedly leased. In addition, none of these affidavits had any supporting documentation. Furthermore, I have carefully and thoroughly

reviewed all of the remaining documents presented by petitioners and I do not find any evidence establishing long-term leases of vehicles to drivers during the audit period. Therefore, I find that the Division properly determined that Winners Garage was subject to the 5% special tax on passenger car rentals on the leases of the medallion taxicabs to drivers during the period March 1, 2001 through February 29, 2004.

I. As noted above, Winners Garage's former representative executed a test period election for the audit of Winners Garage's recurring expense purchases. Based upon his review of Winners Garage's recurring expense purchases for the test period December 1, 2003 through February 29, 2004, the auditor determined that certain recurring expense purchases totaling \$6,450.00 were subject to use tax for that period. Thereafter, he determined that Winners Garage's recurring expense purchases subject to use tax totaled \$77,400.00 for the period March 1, 2001 through February 29, 2004. Petitioners have not raised any challenge to the Division's determination that additional recurring expense purchases were subject to use tax during the audit period.

J. In sum, petitioners have failed to prove by clear and convincing evidence that the audit method was unreasonable or that the amount of tax assessed was incorrect (*Matter of Surface Line Operators Fraternal Org. v. Tully*).

K. The petitions of Winners Garage, Inc., Ruth Wolkowicki and Lev Wolkowicki are denied, and the Notice of Determination dated March 18, 2005 issued to Winners Garage, Inc., and the notices of determinations dated March 21, 2005 issued to Ruth Wolkowicki and Lev Wolkowicki are sustained.

DATED: Troy, New York
August 11, 2011

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE