

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
CRESCENT BEACH, INC.	:	DETERMINATION
JEFFREY BARRY	:	DTA NOS. 822080, 822081,
SERENA BARRY	:	822082 AND 822083
DOROTHY SANNA	:	
	:	
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for	:	
Period December 1, 2002 through November 30, 2005.	:	

Petitioners, Crescent Beach, Inc., Jeffrey Barry, Serena Barry and Dorothy Sanna, 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, 2002 through November 30, 2005.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 130 West Main Street, Rochester, New York, on January 27 and 28, 2009 and continued until conclusion at 500 Federal Street, Troy, New York, on May 19, 2009 at 10:30 A.M., with all briefs due by January 20, 2010, which date began the six-month period for the issuance of this determination. Petitioners appeared by Gerald W. Dibble, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUES

I. Whether petitioner Crescent Beach, Inc., maintained and produced upon request, adequate books and records for the performance of a detailed audit of its sales and use tax

liability for the period December 1, 2002 through November 30, 2005 and whether the Division of Taxation thoroughly examined said records.

II. Whether the Division of Taxation properly determined additional sales and use taxes due from Crescent Beach, Inc., for the audit period, utilizing an indirect audit methodology.

III. Whether petitioners Jeffrey Barry, Serena Barry and Dorothy Sanna were persons responsible for the collection and payment of sales and use taxes during the audit period on behalf of Crescent Beach, Inc.

IV. Whether petitioners have demonstrated reasonable cause for the abatement of penalties.

FINDINGS OF FACT

1. During the period December 1, 2002 through November 30, 2005 (the audit period), petitioner Crescent Beach, Inc., operated a restaurant in Rochester, New York, primarily making sales of food and beverages.

2. On or about May 20, 2005, the Division of Taxation (Division) mailed petitioner¹ the first appointment letter and a request for books and records for the period December 1, 2002 through May 31, 2005 with respect to petitioner's sales and use tax liability. The letter included a "Records Requested List," which specifically requested that the following books and records be available for inspection on the appointment date: sales tax returns, worksheets and cancelled checks; federal income tax returns; New York State corporation tax returns; the general ledger; general journal and closing entries for the entire audit period; sales invoices; exemption documents; chart of accounts; fixed asset purchase and sales invoices; expense purchase

¹Hereinafter, the term petitioner shall refer to Crescent Beach, Inc.

invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips; cash receipts journal; cash disbursements journal; corporate book; financial statements; power of attorney; depreciation schedules; copies of leases; guest checks and cash register tapes; SLA license; and computer generated files.

The letter also specifically recommended that an “owner, officer or employee with personal knowledge of the business operations attend the opening conference, even if a representative [was to be] present,” because a firsthand explanation would help eliminate possible misunderstandings and provide quick answers that would help establish the initial audit plan.

3. After postponements of the initial appointment by both the Division and petitioner’s representative, Thomas Petrella, CPA, the auditor met with Mr. Petrella on October 4, 2005 to review petitioner’s records, approximately four and one half months after petitioner was apprised of the impending audit and the records requested. No one from the business was present.

4. Mr. Petrella was hired by petitioner in July 2005 and continued his representation until on or about October 2005 when his firm decided to refer the matter to a firm he believed was better suited to handle the audit. Mr. Petrella interviewed Jeffrey and Serena Barry with respect to his engagement and was told that petitioner had not filed its New York corporation franchise tax returns or any federal income tax returns except the one for the period May 1, 2001 to April 30, 2002.

5. Although Mr. Petrella had been communicating with the Division since August 8, 2005 on behalf of petitioner, and received its books and records with respect to the sales tax audit a week before the auditor came to his office, he never went through any of the more than 32 boxes

which petitioner had delivered to him and did not know what documentation they contained. Mr. Petrella was unaware of how petitioner prepared its sales tax returns or if they were accurate.

Ms. Barry explained that the business kept its records in these boxes, generally using one box per month. Records kept included guest checks for cash and credit sales, daily sheets, bank statements, credit card batch statements, vendor receipts and invoices. Although Ms. Barry stated that a general ledger was provided to Mr. Petrella for the audit, none was produced to the auditor or introduced at hearing. Mr. Christopher Klee, petitioner's expert, who analyzed its records for the hearing, did not review a general ledger, vaguely recalling only a "cash log."² Mr. Klee's testimony agrees with the auditor's conclusion that petitioner did not maintain a general ledger after repeated requests for one proved fruitless.

6. Mr. Petrella was hired to assist on the sales tax audit and as a consultant on a hotel and spa project being considered on an adjoining parcel, and he was unaware that petitioner had not filed its corporation franchise and income tax returns.

7. The auditor met with Mr. Petrella at his office on October 4, 2005 and began her review of the records provided. She returned on October 5 and 6, 2005 to continue her review. No one from the restaurant was present on any of the three days. The auditor found register tapes, bank statements, sales tax returns, daily summary sheets, expense invoices and a handwritten list of capital assets. During the time the auditor was at Mr. Petrella's office, petitioner had additional boxes of records delivered, containing exemption certificates and more daily summary sheets. After reviewing the records for two days, the auditor asked Mr. Petrella for specific information: how many registers were at the restaurant; how were the sales and use tax returns prepared;

²The cash log was not produced at hearing.

whether there were separate tapes for the bar and cash sales; and where the substantiation of cash sales were recorded, since the register tapes produced only recorded credit card sales.

8. On October 6, 2005, the auditor returned to Mr. Petrella's office for a third day and brought a second auditor, Mr. Fischer, to assist. Although both reviewed the records in an effort to identify cash sales, neither was able to do so, since the register tapes only recorded credit card sales.

Petitioner maintained two credit card transaction terminals, which had the ability to record all the credit card sales and make a tape of the same. One was for the party sales and gift certificates and was located in the office. The other was in the restaurant/bar area. There were two pre-check machines that generated the guest checks and sent orders to the kitchen, but they generated no tape. There was a register at the bar, which was used to close out all checks for each table. However, this register also did not produce a tape, and this is where cash sales would have been recorded on a tape.

9. On the same day, the auditors made a brief visit to the restaurant where they spoke with petitioner Dorothy Sanna and an employee named John Cole. They observed four registers but were told only three were used at one time, while the fourth register was reserved for use when one of the others broke down. Ms. Sanna told the auditor that petitioner Serena Barry and Mr. Cole performed all the accounting functions, but Mr. Cole was unable to answer the most rudimentary of questions about the bookkeeping done for the business. In addition, the auditor was unable to acquire a menu while at the restaurant and was not aware that a menu was available on petitioner's web site. She noted in her report that the business was a large restaurant and party house and that "catered" events took place outside in a tent during the summer. The auditor also mentioned that one of the extra cash registers may have been used outside for

“catered” tent events. Apparently, the auditor construed parties held in tents on the property as “catered” events, a term which does not appear on petitioner’s web site.

10. The auditors returned to Mr. Petrella’s office and completed the review of records, at which time Mr. Petrella was informed that the register tapes lacked a record for cash sales and the bank records were inadequate for substantiating them as well.

11. Subsequent to the October 6, 2005 visit to Mr. Petrella’s office, the auditor discussed the case with her supervisor, Mr. Daniel Cardwell. Given the lack of substantiation of cash sales, the two discussed the possibility of using an estimated audit methodology to determine petitioner’s taxable sales for the audit period. Specifically, it was suggested that the Division utilize the only federal income tax return filed with other external indices to determine the tax due.

12. On October 28, 2005, the auditor received a letter from Thomas A. Walter, CPA, indicating that he would be representing petitioners and, after several communications including one in which the auditor informed Mr. Walter what additional documentation was needed, a meeting was held on January 10, 2006. Again, no one from the restaurant was present. Mr. Walter was unprepared to proceed with the audit at that time and the auditor informed him that cash register tapes and bank records reflecting cash sales were still outstanding and also made a general inquiry about QuickBooks accounting software records for the business. However, Mr. Walter informed the auditor that the QuickBooks records were unavailable, having never been prepared for the period in issue, and would not be forthcoming.

13. A second meeting was held with Mr. Walter and his associate, Mr. Bergstresser, on January 23, 2006. No one from the restaurant attended this meeting. Mr. Walter left this meeting after 42 minutes and did not know with specificity when the auditors left his office,

other than to conclude that office policy was “not to leave them alone.” Other than an analysis by Mr. Bergstresser of a few days of the three-year audit period, from which he concluded the records were tied to the daily summaries, Mr. Walter had no knowledge of what records petitioner maintained and never personally reviewed the records produced by petitioner for this audit, stating that he believed cash sales were substantiated by “a tape.” Mr. Walter stated that his knowledge of the restaurant’s operation was largely through a description provided by Jeffrey Barry, and that he believed Mr. John Cole was a manager and Linda Knauf was a bookkeeper. He lacked knowledge of the roles played by Dorothy Sanna and Serena Barry, but recalled that Serena Barry called him to discontinue his firm’s representation on the audit.

14. The Division determined that petitioner prepared its sales and use tax returns by taking the sales from the manually prepared daily sheets, which listed restaurant sales, party sales, bar sales and miscellaneous sales (gift certificates, party deposits and paid house charges), totaling them and multiplying by the tax rate. The collection of records and the preparation of daily sheets were tasks performed by any employee that was in the office at the time, but no specific individual was identified by Ms. Sanna and Mr. Barry, each providing the same answer when asked pointedly who prepared the daily sheets: “Whoever was in the office at that time.” Serena Barry said petitioner’s accountant for the audit period, one “Ray,” may have prepared the summaries from the boxes of records kept by petitioner for each month. However, there was no employee whose only job was bookkeeping and the preparation of the daily sheets, from which the sales tax returns were prepared.

Mr. Barry, Ms. Barry and Ms. Sanna gave three different answers when asked who prepared the sales tax returns. Ms. Sanna, the president, said it was “whoever was working in the office that day.” Mr. Barry said the sales tax returns were prepared from the daily sheets and

that's how "they pay the sales tax," "they took the numbers off the daily sheets to pay the sales tax. They add the numbers up and that's how they pay the sales tax." Serena Barry believed petitioner's accountant prepared the sales tax returns.

15. By letter dated January 25, 2006, the Division made a second request for records to Dorothy Sanna and petitioner Crescent Beach, Inc., extending the audit period such that it was now the period December 1, 2002 through November 30, 2005. The request included the same records requested in the original request. No additional records were supplied.

16. The Division made a determination of the sales and use taxes due for the updated audit period based on an estimated audit methodology due to what it considered inadequate records produced by petitioner. The Division did not believe Crescent Beach, Inc., adequately substantiated its cash sales, since deposit slips inspected on audit, i.e., those produced to the auditor, only indicated one deposit of cash during the period May 2004 through April 2005.³ The Division found no audit trail for non-credit card sales, and petitioner's failure to produce a register tape or general ledger that would have indicated the cash sales made a detailed audit of petitioner's sales records impossible. In sum, petitioner lacked internal controls to ensure the accuracy and completeness of all transactions.

17. On or about April 20, 2006, the Division issued to petitioner a Statement of Proposed Audit Change for Sales and Use Tax which set forth additional sales and use taxes due for the updated audit period of \$129,983.71, plus penalty and interest.

³Petitioner submitted deposit tickets with its petition that indicated deposits of cash into its bank account on October 13, 2004 in the sum of \$1,000.00 (electronically transferred from another of its accounts at the same bank); on October 18, 2004 in the sum of \$1,370.00; and on February 1, 2005 in the sum of \$2,000.00 (for which the deposit slip did not indicate a cash deposit). Six of the 20 deposits represented by the deposit slips in Exhibit K to the four petitions in evidence were identified as electronic transfers from another of petitioner's accounts at the same bank. One, dated November 25, 2003, for \$1,000.00, did not bear a stamp indicating that the deposit had been processed. Therefore, for the entire audit period, there were 12 cash deposits of about \$18,000.00.

The tax was determined using petitioner's federal income tax return for the period May 1, 2001 through April 30, 2002 (the only federal or state corporation tax return filed on behalf of petitioner as of that date) and the 2002 National Restaurant Association/Deloitte and Touche Restaurant Industry Operations Report. The report describes itself as a "unique study of operating results of restaurants in 2001 [which] includes specific financial information on full service restaurants segregated by [size of] average checks. The auditor determined that petitioner best fit a middle range of \$15 to \$24.99 per meal per patron, based on her own experience at the restaurant and the experience of coworkers. The menu in evidence appears to substantiate this assumption, indicating that appetizers cost between \$4.25 and \$10.99; entrees between \$13.99 and \$28.99 and up.⁴ In addition, the report broke down sales by sales volume and the cost of sales for restaurants with varying ranges for sales volume.

18. Petitioner's federal income tax return for the period May 1, 2001 through April 30, 2002 indicated a sales volume between \$1,000,000.00 and \$1,999,000.00. The report listed three figures for cost of sales percentages for full service restaurants with sales in petitioner's range and an average check per patron of between \$15.00 and \$24.99. The values were categorized as lower, median and upper quartiles. The auditor chose to use the median quartile for petitioner's value, which the report said were middle values, with half of all values collected above and half below. In this case, the median value was listed as 33.7%. When the cost of goods sold stated by petitioner in its federal income tax return for the period May 1, 2001 through April 30, 2002, \$687,104.00, was divided by 33.7%, the result was an estimate of audited sales of \$2,038,884.27. From this projection, reported sales per the sales tax returns were subtracted, leaving additional

⁴These prices appear to be from a holiday menu. Another menu from the web site, also undated, listed appetizers from \$1.50 to \$8.99; sandwiches from \$9.99 to \$11.99; and entrees from \$13.99 to \$28.99.

taxable sales of \$557,544.27. Dividing additional taxable sales by audited sales resulted in an error rate of 27.3456%, which was applied to the reported taxable sales for each quarter in issue, resulting in total additional taxable sales of \$1,245,585.23, and additional tax due of \$101,707.35.

19. During the audit, petitioner had not filed its sales and use tax return for the quarter ended August 31, 2003, and the Tax Compliance Division issued an estimated assessment to petitioner in the amount of \$13,948.40, which petitioner paid. However, during the audit, an unfiled return for the quarter ended August 31, 2003 was discovered, which reported sales tax due in the sum of \$41,308.33. The auditor subtracted the amount paid for the quarter pursuant to the deficiency and determined additional tax due of \$27,359.93. At or before the hearing, petitioner provided proof that the remaining amount, \$27,359.93, had been paid and the Division stipulated and agreed to reduce the additional tax determined to be due on audit by said amount.

20. Also, the auditor determined additional tax due on expense purchases. After reviewing expense invoices provided for the period May 1, 2003 through April 30, 2005, additional tax due of \$91.43 was found. By dividing this number by audited sales for the same period, an error rate of .0031% was established. After applying this to taxable sales for the audit period,⁵ additional tax due on expense purchases was determined to be \$142.22 for the audit period.

21. An examination of \$9,384.49 in fixed asset purchases provided to the Division on a handwritten list, disclosed the purchase of various assets for which there were no invoices. The Division assumed no tax had been paid and assessed \$774.22 in additional tax.

⁵The auditor's workpapers revealed that her computation of additional sales tax due on expense purchases found on page 61 of Exhibit 1 utilized a taxable sales amount of \$382,274.00 for the quarter ended November 30, 2005 and not the amount listed on the return filed by petitioner. The additional tax due on expense purchases for that quarter attributable to the \$32,302.00 differential was \$1.00.

22. Based on these calculations, the Division issued to Crescent Beach, Inc., a Notice of Determination, dated May 18, 2006, which asserted additional sales and use taxes due of \$129,983.71 plus penalty and interest. The notice indicated that the tax had been computed using available records and information since petitioner had not submitted adequate records for an audit.

23. When the auditor sent the Statement of Proposed Audit Change to Mr. Walter on February 17, 2006, she requested that he submit a responsible person questionnaire for every individual “that is part of the office and decision making at Crescent Beach, Inc.” Specifically, the auditor asked that questionnaires be provided for Jeffrey Barry, Serena D’Angelo Barry, John Cole and Linda Knauf. Although the auditor cautioned Mr. Walter that failure to provide the questionnaires would mandate that she fill them out based on information she had collected, no additional questionnaires were ever submitted.

24. Dorothy Sanna was the president and sole shareholder of Crescent Beach, Inc., during the period in issue. She had the authority to manage the business, sign checks, act on behalf of the business in all its affairs, hire and fire employees, negotiate loans, borrow money and pay and direct payments of credits. She actually signed the lease on behalf of Crescent Beach, Inc., in December 2000 and signed all the sales and use tax returns filed during the audit period. According to Ms. Sanna, any actions taken by Serena and Jeffrey Barry on behalf of Crescent Beach, Inc., were taken with her authorization and at her direction.

25. Ms. Sanna worked in the kitchen as a cook during the period in issue and had held that position with the same restaurant for two years prior to her acquisition of the business from the Barry family on an undisclosed date in 2000. She prepared fruit trays, vegetable trays, meats and food orders and also helped with inventory.

26. Ms. Sanna had no personal knowledge or recollection of when she purchased the restaurant, how much she paid for the business or how she financed the purchase. She participated in the office work, including supervision of the employees who prepared the daily sheets. However, although she claimed responsibility for paying the employees, she was not clear on how withholding taxes were accounted for. Ms. Sanna was unable to answer many questions on cross-examination and appeared confused about names and dates.

27. Other than speaking with the auditor at the restaurant, Ms. Sanna had no involvement with the audit and did not recall the accountants, Mr. Petrella or Mr. Walter, hired by Crescent Beach to represent it in this audit. She also could not recall John Cole, an employee at Crescent Beach, or his association with the restaurant, even though he and Ms. Sanna spoke to the auditor during her field visit in October of 2005.

28. Ms. Sanna, 83 years old at the time of the hearing, has experienced a decline in her health in recent years and has experienced some issues with her memory. However, her infirmities did not prevent her from listening to and comprehending questions with respect to the audit and delivering cogent responses based upon her recollection of events and facts, if she was able to recall events that occurred between four and seven years earlier. Ms. Sanna concedes her responsibility for the collection and payment of sales and use taxes on behalf of petitioner for the audit period as the sole owner, president and person with full managerial control over the corporation.

29. Ms. Barry had been employed at the restaurant since 1998. Her job duties included taking reservations, being a hostess, booking parties and weddings, assisting Ms. Sanna, at her direction, in issuing checks and operating the business when Ms. Sanna was otherwise busy in

the kitchen, including communications with the Division concerning tax matters. She helped create and maintain the website for Crescent Beach.

She was a co-signatory with Dorothy Sanna on four different bank accounts in the name of Crescent Beach, Inc., which had been opened in June 2000. She did this as a convenience to Ms. Sanna who was often in the kitchen and chose to delegate some of her responsibilities in running the business.

30. Ms. Barry applied for an automobile loan with Chrysler Financial Services in December of 2005 in which she stated that she had worked at Crescent Beach Hotel for seven years and listed her occupation as business manager.

31. On various dates between April 2002 and November 2005, the Tax Compliance Division was in contact with Crescent Beach, Inc., with respect to outstanding assessments. The communications reflected in a case tracking log by several compliance employees described contacts with John Cole and Serena Barry and at times referred to both as managers and to Ms. Barry as a responsible person. However, on several occasions the log specifically mentioned Ms. Sanna as the owner of the business and president, who had been absent due to a hip replacement surgery.

32. Between July 2004 and February 2006, four articles appeared in the print media that described a hotel and spa project, which had been proposed for land adjoining that leased by Crescent Beach, Inc. The articles alleged that the project was proposed to the Monroe County Industrial Development Agency and the Greece Planning Board by Crescent Beach Restaurant and attributed statements to Serena Barry, described as the manager of the restaurant, which she denied in sworn testimony. One of the articles from the Rochester Democrat and Chronicle,

dated February 19, 2006, noted without citing any source that Serena and Jeffrey Barry were in charge of the day-to-day operations of Crescent Beach, Inc.

Although suggested by at least one of the articles, the hotel project was an independent venture by Serena Barry that was not connected with the restaurant operation and was meant to be held in her name alone - - a fact Ms. Barry reiterated in sworn testimony at hearing.

33. The Barry family had opened the restaurant in 1942, giving Mr. Barry a detailed knowledge of its history and operations, although he worked there only briefly in the 1980s. However, under Dorothy Sanna's management, Jeffrey Barry had worked for Crescent Beach, Inc., since 2000 and performed maintenance functions, served parties, washed dishes and worked in the kitchen during the audit period and did not recall being a paid employee during that time frame. Mr. Barry had experienced a divorce and custody battle that convinced him it was not the time for him to become involved in the operation of the business. He and his spouse, Serena Barry, survived on Ms. Barry's salary, loans from relatives and credit card charges that he estimated to be approximately \$100,000.00. Much of Mr. Barry's time was spent caring for his three young children during the years in issue, making a steady job with the restaurant an impossibility.

34. From his time spent at the restaurant, Mr. Barry had a detailed working knowledge of the operation of the restaurant, including its method of accounting for sales from point of sale to sales tax return; its antiquated registers; its bookkeeping procedure; and fixed assets. However, he claimed to have no involvement with the financial affairs of the corporation.

35. Petitioner had an independent accountant, Mr. Christopher Klee, review its records for the period in issue to determine if they were adequate to perform a detailed audit for the period in issue. In addition, Mr. Klee reviewed the audit performed by the Division. It was his opinion

that the records were adequate and tied into the sales tax returns filed by petitioner for the audit period.

36. Mr. Klee noted that he was presented with approximately 36 boxes of materials that related to each of the months in the audit period. In the few boxes he examined, those for August 2003, November 2004, October 2004 and September 2004, he claimed to have found daily, bundled receipts for each day of the month including credit card receipts and cash guest slips, credit card tapes generated by the credit card machines, and folders for party sales. Mr. Klee noted that there was no register tape that recorded cash sales as there was for credit card sales.

37. Mr. Klee claimed he was able to tie in all the daily records in the box for the month of September 2004 to the manually generated daily sheets and then to the sales tax return filed for that period.

38. In his analysis, Mr. Klee determined that the Division's audit led to the conclusion that petitioner demonstrated a credit card usage, or credit card sales, of about 49%, which he believed from his experience was low. Mr. Klee believed that the petitioner's credit card use was between 65% and 75%, and 71.33% for the month of September 2004.

39. Mr. Klee speculated that he believed the Division double-counted the credit card sales from the party sales and the sales paid for by Simply Certificates, a form of gift certificate. His conclusion was based on the fact that if you subtracted these from the Division's computations, the result was very close to his conclusion.

With respect to the Division's use of the National Restaurant Association's 2002 Restaurant Industry Operations Report, Mr. Klee noted that he believed petitioner was best characterized as a mid-range to high-end restaurant based on menu prices. However, he

conceded on cross-examination that he had not examined the menu for the period in issue but had a general idea from the size of guest checks he viewed and a visit he made to the restaurant.

40. Mr. Klee analyzed the bank statements for petitioner's operating account, not the actual deposit slips, and came to the conclusion that the bank deposits tied in to the sales reported on the daily sheets, which were manually prepared by someone in the office.

41. Mr. Klee did not know if he had been provided with all the books and records of petitioner for the audit period, but was convinced that the records provided did tie in to the daily sheets and the sales tax returns. This conclusion was based on his assumption that all the guest checks were in the box and that none were missing, but he did not verify that they were in sequence, despite the fact that he was aware that they were numbered. Mr. Klee also did not attempt to see if they were verified by any other record, such as register tapes or a general ledger. He did state that he reviewed QuickBook records, but was not aware they did not exist until after the audit was performed. He also said that he reviewed a cash log with "general ledger sequences," but it was not apparent that this document was different from the QuickBooks records he was provided by petitioner. Mr. Klee could not recall if the cash log entries he saw covered only the four months he reviewed or the entire period.

Mr. Klee also determined that the auditor, in her analysis of the month of September 2004, made errors in reconciling the daily sheets with the register receipts. His conclusion was that the auditor had double counted party sales paid by credit card and restaurant sales paid by Simply Certificates. When he subtracted the erroneously included sales, there was a differential of only \$37.97. However, this error did not address cash sales or the auditor's issue with substantiation for same.

42. Ms. Barry testified that a general ledger had been provided in response to the Division's request for books and records, but the auditor denied that a general ledger was produced after two written requests for it. Further, none of petitioner's representatives mentioned that they had reviewed a general ledger in connection with the audit and none was produced at the hearing.

43. An antiquated Panasonic computer system operated the two pre-check terminals and the register behind the bar, which closed out all checks. A fourth, reserve register was part of this system in the event of a breakdown. The system broke down frequently, according to Larry Nobles, a computer consultant to petitioner, a fact that was also confirmed by Serena Barry and Jeffrey Barry. The system was generally considered unreliable, crashed frequently and contained no backup in the event of a crash, calling into question its efficacy in assisting in tracking guest checks for audit purposes.

SUMMARY OF THE PARTIES' POSITIONS

44. Petitioner argues that the auditor's testimony was rife with contradictions and vague with respect to several areas that were crucial to the audit. Petitioner urges that these shortcomings warrant complete disregard of all her testimony.

45. Petitioner contends that it produced sufficient books and records for a detailed audit but the Division failed to thoroughly examine them because they were too voluminous or did not include all register tapes. Therefore, petitioner believes that the resort to an audit methodology based on an external index was not warranted and said audit and the resulting determination of additional tax should be annulled.

46. Serena Barry argues that she was not a person responsible for the collection and payment of sales tax on behalf of Crescent Beach, Inc. She avers that she held no corporate

office, owned no stock and exercised managerial authority only at the request of Dorothy Sanna. She concedes that she was a co-signatory on the four business bank accounts, but only as a convenience and courtesy to Ms. Sanna, who was often too busy in the kitchen. Although she did look into opening a hotel and spa on land adjacent to the restaurant, she maintains that it was a separate and independent project that had no nexus with the restaurant. She admits that some people confused her duties as managerial, but explained it by her omnipresence on the floor of the restaurant in her hostess duties. In addition, her testimony was corroborated by that of Ms. Sanna.

47. Jeffrey Barry contends that he was not a person responsible for the collection and payment of sales tax on behalf of Crescent Beach, Inc. He maintains that he was not an officer or director and owned no stock in petitioner and derived no income from the restaurant during the audit period. Mr. Barry argues that he was a laborer, maintaining machinery and performing repairs, with no responsibility for the management of the business. He believes his uncontroverted testimony should carry more weight than a newspaper article, which characterized him as running the day-to-day operations of the restaurant.

48. The Division argues that petitioner did not produce adequate records, although requested to do so. The Division avers that it reviewed the records produced over several days at two different accountants' offices and on each occasion saw no satisfactory documentation for cash sales. Therefore, the Division argues that it was justified in resorting to an indirect audit methodology to determine petitioner's sales and use tax liability for the audit period. It contends that the methodology chosen was reasonable and accepted by both the Tax Tribunal and the courts. Further, the Division argues that petitioner has failed to show that the audit and the resulting assessment were erroneous.

49. The Division believes that Ms. Barry and Mr. Barry were persons responsible for the collection and payment of sales tax on behalf of Crescent Beach, Inc., due to the fact that they both had in-depth knowledge of the business operations of the restaurant. The Division points to Ms. Barry's describing herself as a manager on her auto loan application and to Mr. Barry's hiring Mr. Petrella and Mr. Walter, petitioner's accountants, and then discussing the scope of their representation.

50. The Division contends that petitioner has not established reasonable cause for the abatement of penalties. The failure to produce records to substantiate cash sales was enough to prove a failure to maintain proper records and sustain penalty.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) 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 is 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]) 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 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. Tax Commn.*, 119 AD2d 948, 501 NYS2d 219, 221).

C. In the matter at hand, there is no doubt that the Division made at least two written, adequate, unequivocal and clear requests for all of petitioner's records related to its sales tax liability for the entire audit period on May 20, 2005 and January 25, 2006. Regardless of the number of contacts and telephone calls made to petitioner, petitioner ultimately produced its

records at the office of its accountant, Thomas Petrella, on October 4, 2005. Mr. Petrella never examined any of the more than 32 boxes of materials delivered a week earlier to his office by petitioner, made no attempt to organize them or even keep them in one location in his office and was of little help to the auditor in her review. Further, although requested to do so in the May 20, 2005 appointment letter, petitioner did not have an owner, officer or person with knowledge of the business operations available at the first meeting. This last point was a critical error on petitioner's part in this matter because the records produced were not as easy to review as petitioner suggests throughout its arguments.

Mr. Petrella was able to confirm that the auditor and another Division employee he could not identify were at his office for several days reviewing the boxes of materials. Although Mr. Petrella never bothered to look at petitioner's books and records himself, he stated to petitioner's subsequent accountant, Mr. Thomas Walter, that the Division's auditor was "extremely lazy," a curious conclusion to draw in light of the circumstances and one which is rejected by this forum.

While at Mr. Petrella's office, the auditor requested that he ask petitioner how many registers were at the restaurant; how the sales tax returns were computed; whether there were separate tapes for the bar and cash sales; and where the cash sales were reported in light of the fact that the "Z" tapes appeared to show only credit card sales. However, before Mr. Petrella could get the answers to these questions he terminated his representation of petitioner. The auditor, in her request for information on October 6, 2005, pinpointed the issue that would form the basis of her conclusion that petitioner's records were inadequate for a detailed audit, realizing that none of the tapes provided contained cash sales and that there was the strong possibility that cash sales were not recorded on any register tape or ledger. Thus, the concern from the time the

auditor first reviewed the records was that there was no audit trail available for non-credit card/cash sales.

It is specifically determined that the auditor, Ms. Rhonda Sucy, credibly testified about her work on a difficult audit, which was performed under poor conditions and without the benefit of meaningful assistance from the taxpayer. Although she was unable to recollect all details of events that took place several years prior to the hearing, and used the word “cater” to describe events held in outdoor tents, her overall demeanor was sincere and her audit report consistent with her testimony, especially with respect to the issue of unsubstantiated cash sales.

D. When the auditor met with Mr. Walter for the first time at his office on January 10, 2006, she informed him of what she had reviewed and discussed the missing cash register tapes, cash deposits and bank statements. She was informed at this meeting that QuickBooks would not be available for review since they were just being prepared. At the auditor’s second meeting with Mr. Walter at his office on January 23, 2006, she continued to review records with her team leader, Mr. Daniel Cardwell. Once again, the Division informed petitioner through its representative that the records were not adequate because there was no audit trail to review for cash sales and there appeared to be very few cash deposits in the bank accounts. In fact, only 20 deposit slips indicating a cash deposit were produced for the entire three-year audit period. Six were electronic transfers from another account at the bank, one was not denominated a cash deposit at all, and another did not appear to have been processed. The remaining 12 deposit slips totaled about \$18,000.00. This is a very small, and dubious number considering petitioner’s claim that it had over \$27,000.00 in cash sales for the month of September 2004 alone.

Mr. Walter, like Mr. Petrella, did not review any of petitioner’s records, including the sales tax returns, but had a staff accountant look at a “few days” of the audit period to see if the daily

sheets were tied to the records produced. However, he never completed the analysis before being fired from his representation of petitioner.

When directly asked what constituted the basis of his conclusion that there was a record of cash sales contained in the records made available to him by petitioner, Mr. Walter could only manage the response, “A tape, I would imagine.” This was an odd response given the fact that no register at the restaurant generated a tape that recorded cash sales, indicating that Mr. Walter had no idea what was in the boxes of records and if they indeed supported the sales tax returns filed. Very little weight can be accorded his testimony for this reason. His firm completed no analysis of petitioner’s sales and lacked the foundation for making the claim under oath, as Mr. Walter did, that the documentation provided by petitioner was adequate to trace a cash transaction from its inception to the sales tax return.

E. Petitioner’s witness, Mr. Christopher Klee, was an accountant hired to examine the records for the audit period, presumably the ones presented to the auditor, and determine whether they substantiated the sales tax returns filed. Once again, the focus was on the cash sales and whether there were adequate records of cash sales to justify the amount included on the daily sheets and ultimately on the returns.

There is no dispute about the number of registers and their purpose and capabilities. There were two pre-check machines, which generated the guest checks and sent orders to the kitchen. There were two credit card machines, one on the floor of the restaurant and one in the office. These were used to swipe customers’ credit cards and produce tapes of their transactions. There was a third register behind the bar, which was used to “close” all guest checks and was the only register with a cash drawer. This machine generated no register tape. The cash sales were

assumed to be those guest checks for which there were no corresponding credit card receipts. The problem which this created was that there existed no internal control or check on cash sales.

First, no general ledger was ever produced to the auditor despite numerous requests. Ms. Barry testified that she produced one at some undisclosed time, but did not produce one at hearing, despite the fact that it was glaringly apparent by the end of the second day of the hearing that the general ledger had tremendous importance to petitioner's case vis-a-vis the verification of cash sales.

Second, when Mr. Klee was directly asked if he reviewed a general ledger, a record which would have recorded all the transactions of petitioner's business for the audit period and corroborated the cash sales claimed, he responded that he reviewed a "cash log," and could not recall if it was split into pages pertinent to a month or a year. In any event, since Mr. Klee testified that he reviewed four months, it would have been very easy to produce this document, which would have confirmed the cash transactions petitioner claims to have had during any given month in the audit period. Unfortunately, it was not produced. Further, since Mr. Barry, Ms. Barry and Ms. Sanna had yet to testify, there was ample opportunity for one of those persons to have understood the issue with regard to the substantiation of cash sales and come forward with the general ledger, often referred to as the most important business record a business keeps. In the alternative, having had the benefit of Mr. Klee's testimony and his prehearing analysis performed at petitioner's request, Ms. Barry, Mr. Barry or Ms. Sanna could have offered the cash log spoken of by Mr. Klee.

Interestingly, a cash log would have been strong evidence of the cash transactions claimed by petitioner since it would have recorded a date for the receipt of the funds, a specific amount and presumably a description of the service rendered and specific disposition of the funds.

Third, the value of a general ledger was magnified by Mr. Klee's admission that he did not look to see if the guest checks he examined were sequentially numbered. In fact, no one who testified examined the guest checks for sequential numbering. Only Mr. Barry testified that such an examination was unnecessary because all the guest checks had to be closed out by the register at the bar or the register would not have permitted another check to be opened for the same table.

The error in this logic is that if a check was closed out and then went "uncounted" and the cash misplaced, there is no other record which could substantiate that the transaction ever took place. The "other guest checks" representing non-credit card transactions would simply be counted and transferred to the daily sheet without any internal control to assure that all transactions were included. Hence, as thought by the auditor in her initial examination of the records at Mr. Petrella's office, there was no valid audit trail for the cash transactions which could be reviewed on audit.

It is also incredible that a computer system, which an expert described as old, prone to break downs on a frequent basis, lacking a backup capability and at its "maximum" of memory, would be relied upon by a prudent business person to consistently produce sequentially numbered guest checks and properly close out all sales in the restaurant.

Finally, further underscoring the importance of the audit trail for the cash transactions was the determination by the auditor of very few cash deposits as indicated by the deposit slips for the operating account at the bank. After subtracting the electronic transfers and undocumented deposits,⁶ only about \$18,000.00 in cash deposits as evidenced by the deposit tickets existed for the entire audit period. Since the deposit slips upon which this determination was made were

⁶ There was no explanation of the genesis and purpose of the electronic transfers.

attached to the petitions in evidence, it can not be discerned what was produced to the auditor on audit.

Mr. Klee's conclusion that there were cash sales for September 2004 of \$27,000.00 and resulting cash bank deposits in the same month of roughly \$16,000.00 (after reduction for cash tips) highlights the problems petitioner has in justifying its claim that all cash sales were accounted for in light of the fact that deposits slips for the entire audit period totaled only about \$18,000.00. Mr. Klee did not rely on deposit slips, rather he assumed cash deposits to be cash sales that did not fall into the categories of credit card and party payments. From that number he allowed for the cash payment of tips and arrived at his cash "deposit" figure of approximately \$16,000.00. However, as mentioned above, the fallacy in his analysis is that the non-credit card guest checks represented all cash sales, a conclusion not reached herein.

F. Petitioner argues that the facts presented herein are analogous to the situation in *Matter of King Crab Rest. v. Chu*, where the Division failed to conduct an adequate investigation to determine if it could have conducted a complete audit. In *King Crab*, the Division conducted an audit of a restaurant that did not maintain cash register tapes. After a brief review, the auditor noted that the guest checks were not in chronological order. Based upon the lack of cash register tapes and his brief review of the guest checks, the auditor determined that the records were inadequate to conduct a complete audit. Upon review, the Court concluded that the use of a test period was inappropriate because the auditor did not conduct a sufficient investigation to justify the conclusion that the records were not capable of supporting a complete audit.

Here, it was evident from the auditor's examination of the records produced at Mr. Petrella's office that there was no way to verify cash sales. Unlike the facts in *King Crab*, where the auditor was presented with a general ledger, a cash disbursements journal, guest checks, bank

statements and purchase invoices for the entire audit period except the first seven months, petitioner herein never produced a general ledger or cash disbursements journal that would have provided some internal control and verification of its cash sales. Thus, the auditor here did make a sufficient investigation of the records made available to her to justify her conclusion that the records produced were incapable of supporting a complete audit.

G. Tax Law § 1135(a) provides that every person required to collect tax shall keep records of every sale, the amounts paid on those sales and the tax due thereon. The regulations promulgated thereunder at 20 NYCRR 533.2(b)(1) dictate that the sales records required by Tax Law § 1135(a) *must* contain the sales slip, invoice, receipt, contract, statement or other memorandum of sale (20 NYCRR 533.2[b][1][i]), cash register tapes and any other original sales documents (20 NYCRR 533.2[b][1][iii]). In addition, the regulations require that where no written document is given to the customer, the seller shall keep daily records of all cash and credit sales in a day book or similar book (20 NYCRR 533.2[b][1][iii]). These provisions bear witness to the spirit and intention of Tax Law § 1135(a), which was to insure that the records required to be kept provide sufficient detail to independently determine the taxable status of each sale and the amount of tax due and collected thereon or be substantiated by an analysis of supporting records (20 NYCRR 533.2[b][2]).

Petitioner's failure to maintain a general ledger or register tape or other record of its cash sales does not comply with the letter or spirit of Tax Law § 1135(a) and the regulations promulgated thereunder. Without such a documentary check, coupled with the petitioner's failure to establish that the guest checks it assumes to be all its cash sales were sequentially numbered to insure accounting for all cash sales, petitioner has failed to meet its duty to maintain adequate records of every sale and its burden to show that the proper tax was paid on each such

sale. It is clear from the record that the Division reviewed the records presented by petitioner and correctly concluded that they were not adequate to do a complete audit since there was insufficient documentation of petitioner's cash sales (*see Matter of Vebol Edibles v. State of New York Tax Appeals Tribunal*, 162 AD2d 765, 557 NYS2d 678, *lv denied* 77 NY2d 803, 567 NYS643; *Matter of Club Marakesh v. Tax Commn. of State of New York*, 151 AD2d 908, 542 NYS2d 881, *lv denied* 74 NY2d 616, 550 NYS2d 276). Failure to produce a general ledger, register tapes or other proof of an internal control over the guest checks made an accurate audit of cash sales impossible. The auditor's review of the boxes produced indicated that documentation of cash sales was insufficient, a fact that remained after the audit and the hearing.

Petitioner's claim that the Division did not thoroughly review the records provided was unfounded. The auditor, her supervisor and a second auditor spent four days in the field looking at records produced at Mr. Petrella's and Mr. Walter's offices. While neither of those gentlemen thought it was important to review the documentation themselves in order to best represent their client and assist in the audit, they did attest to the fact that at least one person from the Division was at their offices reviewing materials produced by petitioner for four days. Further, as mentioned above, the auditor identified the problem with substantiation of cash sales and internal controls while at Mr. Petrella's office and asked for backup materials at that time. From the totality of the circumstances, it must be concluded that a thorough examination of the books occurred.

H. Having established that the records were so insufficient that it was virtually impossible to verify taxable sales by means of a complete audit (*Matter of Chartair, Inc. v. State Tax Commn.*), the Division was entitled to resort to an estimate of petitioner's sales, as long as the method was reasonably calculated to reflect the taxes due. (*Matter of Grant v. Joseph*, 2 NY2d

196, 159 NYS2d 150, *cert denied* 355 US 869.) This was accomplished with the use of the 2002 Restaurant Industry Report and information gleaned from petitioner's only filed federal income tax report and information about the restaurant known to the Division's audit staff.

Use of the report has been upheld by the Tax Appeals Tribunal (*see e.g. Matter of Bitable on Broadway*, Tax Appeals Tribunal, January 23, 1992; *Matter of 33 Virginia Place, Inc.*, Tax Appeals Tribunal, December 23, 2009 [Tribunal approved use of such a report but disagreed with the application by Division]) as a valid tool in the conduct of an indirect audit methodology. In this matter, the Division also used information from petitioner's federal corporation income tax return (form 1120) for the fiscal year May 1, 2001 to April 30, 2002 to establish applicable parameters for the application of the report to the facts of this matter. Specifically, the report provided data on full service sit down restaurants, like petitioner's, broken down by gross sales and then by average guest checks. Gross sales were taken from the form 1120 and the average guest check figure was established from personal experience of the auditor at the restaurant as a patron and the experience of other Division audit staff.⁷

Petitioner fell within the range of restaurants between \$1,000,000.00 and \$1,999,999.00 with an average guest check of between \$15.00 and \$24.99. For such restaurants the report stated that the cost of goods sold should be 33.7% of total sales, or \$2,038,884.27. After giving credit for gross sales reported, the Division established additional sales which, when divided by audited sales yielded an error rate which was then applied to taxable sales reported. The result was additional taxable sales and tax due of \$101,707.35.

⁷The menu which was submitted into evidence from petitioner's web site indicated that the estimate used by the auditor was appropriate and that the recollection of Mr. Klee from his review of guest checks was generally below the menu prices in evidence.

I. Petitioner had the burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (*see Matter of Your Own Choice, Inc.*). Petitioner failed to meet this burden as it offered no credible evidence to refute the audit results. Only Mr. Klee's vague memory of what he recalled of the guest checks during his four-month review was offered to dispute the average price range of a guest check used by the auditor. However, that price range, garnered from her personal experience at the restaurant and the experience of other Division audit staff, was supported by the menu in evidence, which contained no prices for alcoholic beverages.

Mr. Klee also testified that the Division's assessment of \$1.2 million in sales would result in a cash sales to credit sales ratio of 49.48%. Mr. Klee testified that this seemed low to him and was not in line with a one-page article published by the National Restaurant Association he had read on the subject, which said restaurants with an average check of \$25.00 or more reported credit card use representing a median of 80% of sales.

While it may well be that the Division's methodology does not result in a cash sales to credit sales ratio which exactly matches the range cited in the National Restaurant Association article cited by Mr. Klee, exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*). As noted, considerable latitude is given an auditor's method of estimating sales under the particular circumstances of each case (*Matter of Grecian Sq. v. Tax Commn.*). Here, the Division's audit method resulted in a cash to credit sales ratio about 10 percentage points below the median range cited by the NRA article, which although deserving of respectful consideration, is far short of an authoritative standard which would have the effect of proving the audit was erroneous by clear and convincing evidence.

J. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

Generally, the resolution of whether a person is responsible to collect and remit sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacy v. State Tax Commn.*, 82 Misc 2d 181, 183, 368 NYS2d 448).

As recited in the facts, Dorothy Sanna was the president of the corporation and conceded her duty to collect and remit sales and use taxes on behalf of petitioner. However, the facts are far less clear with respect to Serena and Jeffrey Barry.

Jeffrey Barry credibly testified with regard to his personal circumstances during the audit period, which prevented him from taking a job that would have interfered with caring for his three young children. He survived on the largesse of relatives and credit cards, while doing odd jobs around the restaurant. His family had owned the restaurant since 1942, and his knowledge of its history and operations was intimate. It was only logical that he would be able to describe its operations to professionals like Mr. Petrella and Mr. Walter, but such knowledge is not the basis for finding personal responsibility for the collection and remittance of sales and use taxes. Likewise, one newspaper article which described him as a manager does not establish a duty to act on behalf of the corporation. Dorothy Sanna's credible testimony made it clear that only she had this duty by virtue of her corporate office and her policy of specific delegation of duties. Mr. Barry was not delegated meaningful control over the finances of petitioner, he held no corporate

office, and derived no income from the business. He had no authority to sign checks, hire and fire employees, sign tax returns or order and pay for inventory. He did not own stock or have any responsibility for preparing tax returns.

For these reasons, it is determined that Jeffrey Barry was not a person responsible for the collection and remittance of tax during the audit period herein.

K. Serena Barry was a signatory on all four of petitioner's bank accounts during the years in issue. However, she did this at the request, and for the convenience, of Dorothy Sanna, who spent much of her time in the kitchen and needed to have a subordinate able to pay vendors and issue other checks in her absence.

Like her husband, Serena Barry held no corporate office, owned no stock, had no meaningful authority over the finances of the business without Dorothy Sanna's permission, did not prepare or sign tax returns, and did not have a significant financial stake in the company other than her wages. Her credible testimony indicated she was a hostess who performed many duties which Dorothy Sanna specifically authorized her to do, such as communicating with the Tax Department on occasion and hiring and firing employees. However, she was adamant that she was not the manager of the business.

During the course of the audit period, Ms. Barry looked into building a hotel and spa on land adjacent to the restaurant as a personal venture with her husband. She investigated and applied for assistance from the County of Monroe Industrial Development Agency and the Town of Greece Planning Board. Several newspaper articles written about this venture noted that she was the manager at the restaurant, but Ms. Barry credibly denied having supplied that information to the articles' authors.

Ms. Barry also noted on an automobile loan application that she was the business manager of the restaurant. However, this is accorded little weight because Ms. Barry was never asked why she offered this information or what duties the titled entailed, if any. Since she credibly testified that Dorothy Sanna had delegated many business functions to her to be carried out under Ms. Sanna's authority, it may well be that this was a title she believed best described her function while at the same time bolstering her chances of acquiring a loan. In any event, in and of itself, it does not establish that Ms. Barry was a person responsible for the collection and payment of sales and use tax on behalf of the company.

Finally, it is noted that the Division's audit report contained several e-mails from an investigator with the Division who was trying to establish whether or not Serena and Jeffrey Barry were responsible persons. However, the information he gained from various former employees was double hearsay contained in unsworn electronic mailings and worthy of little weight. Further, as pointed out by petitioner's representative at hearing, the information was not available to the auditor until after the notices of determination had been issued to Jeffrey and Serena Barry.

L. In order to abate penalties, a taxpayer must show that the failure to comply with the law was due to reasonable cause and not due to willful neglect (Tax Law § 1145[a][1][iii]). Here, petitioner has not established that its underreporting of sales resulted from anything other than its own failure to maintain accurate records of sales and, therefore, as there has been no showing of reasonable cause and the absence of willful neglect for its failure to pay the sales and income taxes, there is no basis for abating the penalties assessed (*Matter of Rosemellia*, Tax Appeals Tribunal, March 12, 1992.)

M. The petition of Crescent Beach, Inc. is granted to the extent set forth in finding of fact 19, but in all other respects is denied, and the Notice of Determination, dated May 18, 2006, is sustained; the petition of Dorothy Sanna is granted to the extent set forth in finding of fact 19, but in all other respects is denied, and the Notice of Determination, dated May 19, 2006, is sustained; the petition of Serena Barry is granted and the Notice of Determination, dated May 19, 2006, is canceled; and the petition of Jeffrey Barry is granted and the Notice of Determination, dated May 19, 2006, is canceled.

DATED: Troy, New York
July 15, 2010

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE