STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DAVIDOFF OF GENEVA (NY), INC.	:	DETERMINATION DTA NO. 822752
for Revision of a Determination or for Refund of Tobacco Products Tax under Article 20 of the Tax Law for the Period January 1, 2002 through July 31, 2004.	:	

Petitioner, Davidoff of Geneva (NY), Inc., filed a petition for revision of a determination or for refund of tobacco products tax under Article 20 of the Tax Law for the period January 1, 2002 through July 31, 2004.

A hearing was commenced before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, One Penn Plaza, New York, New York, on April 21, 2010, at 10:30 A.M., and was held to conclusion at the same location on June 30, 2010, at 10:00 A.M., with all briefs to be submitted by December 20, 2010, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Hutton & Solomon LLP (Stephen L. Solomon, Esq. and Kenneth I. Moore, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Herbert M. Friedman, Jr., Esq., and Michelle M. Helm, Esq., of counsel).

ISSUE

Whether petitioner, Davidoff of Geneva (NY), Inc., has established that the wholesale price of cigars purchased from Davidoff of Geneva (CT), Inc., and third-party suppliers was lower than the purchase price of such cigars.

FINDINGS OF FACT

The parties entered into a stipulation of facts, which is incorporated into the findings of fact herein.

1. During the audit period involved, January 1, 2002 through July 31, 2004, petitioner sold tobacco products at retail from its store located at 535 Madison Avenue, New York, New York.

2. Originally incorporated in 1986 as Davidoff of Geneva, Inc., under the laws of the State of New York, in 1991 petitioner changed its name to Davidoff of Geneva (NY), Inc., although it continued to do business as Davidoff of Geneva, Inc., as well as Davidoff of Geneva (NY), Inc.

3. Petitioner maintains its corporate mailing address and general business office at 550 West Avenue, Stamford, Connecticut, the address of its corporate parent, Davidoff of Geneva (USA), Inc., and the address of Davidoff of Geneva (CT), Inc.

4. Petitioner is licensed under Article 20 of the Tax Law as a wholesale dealer of tobacco products.

5. Petitioner holds a certificate under Article 28 of the Tax Law as a retail dealer for cigarettes and tobacco products.

6. On March 19, 1990, petitioner was appointed by the Division of Taxation (Division) as a distributor of tobacco products as defined by Tax Law § 470(12) and was a distributor at all relevant times.

7. Petitioner timely filed distributor of tobacco products tax returns, Form MT-203, for the audit period.

8. The Davidoff brand tobacco business, headquartered in Switzerland, was started in 1911 by Zino Davidoff. The business was acquired by the Swiss based Oettinger Group in 1970. The combined company, now known as the "Oettinger-Davidoff Group," developed the Davidoff brand into a world-famous brand of high quality, premium (i.e., hand-rolled) cigars.

9. The chief operating entity of the Oettinger-Davidoff Group is Oettinger IMEX AG (IMEX), which is headquartered in Basel, Switzerland.

10. IMEX's manufacturing subsidiaries: Cidav Corp., Inc.; OK Cigar Corp., Inc.; Tabacos Dominicanos S.A.; Corporacion Zona Franca Palmarejo S.A.; and Occidental Cigar Corp. (hereinafter collectively referred to as Davidoff of the Dominican Republic), are located in Santiago, Dominican Republic. They manufactured premium cigars predominantly for IMEX.

11. IMEX purchases the Davidoff brand cigars from Davidoff of the Dominican Republic.

12. Except for its sale to unrelated third parties, IMEX consigns all the Davidoff brand cigars purchased from Davidoff of the Dominican Republic either to its wholly-owned distributors located in Europe or to Davidoff of Geneva (CT), Inc., its American distributor.

13. Davidoff of Geneva (CT), Inc., based in Stamford, Connecticut, is a subsidiary of Davidoff of Geneva (USA), Inc., a holding company for all of IMEX's U.S. based subsidiaries.

14. Neither IMEX, Davidoff of Geneva (USA), Inc., nor Davidoff of Geneva (CT), Inc., has been appointed as a distributor or a licensed dealer by the Division under Article 20 of the Tax Law, nor are they registered vendors or licensed dealers under Article 28 of the Tax Law, nor do they file distributor of tobacco product tax returns (Form MT-203) with New York.

15. The Davidoff brand cigars manufactured by Davidoff of the Dominican Republic that are sold to IMEX and consigned by IMEX to Davidoff of Geneva (CT), Inc., are shipped by air

or sea transport directly from the Dominican Republic into the United States. These sales are invoiced to IMEX.

16. There are several ports of unlading in the United States, including John F. Kennedy International Airport, through which Davidoff brand cigars enter the United States.

17. The landed Davidoff brand cigars are delivered to Davidoff of Geneva (CT), Inc., by common carrier.

18. All charges for freight and federal excise tax attributable to the landed Davidoff brand cigars are the expense of IMEX.

19. Davidoff of Geneva (CT), Inc., maintains a warehouse in Connecticut for the Davidoff brand cigars consigned by IMEX.

20. Davidoff of Geneva (CT), Inc., charges IMEX for the warehousing of IMEX's inventory.

21. Davidoff of Geneva (CT), Inc., subsequently sells these products to wholesalers and retailers (including petitioner) throughout the United States.

22. All returns of Davidoff brand cigars sold by Davidoff of Geneva (CT), Inc., to wholesalers and retailers (including petitioner) are returned to IMEX's inventory in the warehouse maintained by Davidoff of Geneva (CT), Inc.

23. Davidoff of Geneva (CT), Inc., maintains a single price list for sales to all retailers.

24. Petitioner is an importer into New York of Davidoff brand cigars consigned by IMEX to Davidoff of Geneva (CT), Inc.

25. Petitioner purchases Davidoff brand cigars from Davidoff of Geneva (CT), Inc., for sale at retail and possibly wholesale.

26. Petitioner pays the same price to Davidoff of Geneva (CT), Inc., for Davidoff brand cigars as do unrelated retailers.

27. During the audit period, approximately 72% of the cigars purchased by petitioner were Davidoff brand cigars purchased from Davidoff of Geneva (CT), Inc. The balance were purchased from independent third-party wholesale suppliers located outside of New York, some of which are licensed or appointed as "distributors" or "wholesale dealers" in New York.

28. During the audit period, petitioner's purchases of Davidoff brand cigars from Davidoff of Geneva (CT), Inc., constituted, on average, less than 6% of all Davidoff brand cigar sales made by Davidoff of Geneva (CT), Inc.

29. The Division conducted an audit of petitioner's tobacco products tax returns covering the period January 1, 2002 through July 31, 2004.

30. The Division reviewed petitioner's returns and found that except as discussed below, there were no significant errors in the accountability of its purchases or in the reporting of nontaxable exports.

31. Petitioner maintains that it had available at the time of the Division's original audit (and when the auditor returned for a subsequent review on March 24 and 25, 2010, and continues to have available) copies of the invoices for the sales of Davidoff brand cigars sold by Davidoff of the Dominican Republic to IMEX and imported into the United States. The Division does not to dispute this assertion.

32. Petitioner maintains that it had available at the time of the Division's original audit (and when the auditor returned for a subsequent review on March 24 and 25, 2010, and continues to have available) copies of the invoices for the sales of Davidoff brand cigars sold by IMEX to Davidoff of Geneva (CT), Inc. The Division does not dispute this assertion.

33. Petitioner maintains that it had available at the time of the Division's original audit, (and when the auditor returned for a subsequent review on March 24 and 25, 2010, and continues to have available) the invoices for petitioner's purchases of Davidoff brand cigars from Davidoff of Geneva (CT), Inc. The Division does not dispute this assertion. From these invoices, and its own books and records, petitioner determined the total cost of such purchases for the period under review.

34. For the period under review, petitioner had determined that the average manufacturer's invoice price charged by Davidoff of the Dominican Republic to IMEX was A%[1] of the amount that Davidoff of Geneva (CT), Inc., had charged petitioner for the same cigars. This A% ratio was used in determining its wholesale price for filing its tobacco products tax returns.

35. Petitioner maintains that it had available at the time of the Division's original audit, (and when the auditor returned for a subsequent review on March 24 and 25, 2010, and continues to have available) the invoices for petitioner's purchases of cigars from third-party wholesale suppliers. From these invoices, and its own books and records, petitioner determined the total cost of such purchases for the period under review.

36. At the time of filing its returns, petitioner used the same ratio (A%) that it had used to determine the manufacturer's selling price of Davidoff brand cigars in determining the manufacturers' selling price for those cigars that it had purchased from third-party wholesale suppliers.

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[1] The actual percentages are not being used because petitioner wishes to protect the confidential nature of this information. Letters are being used to represent these number percentages.

37. The Division's auditor conducted his own examination of petitioner's documents to determine the wholesale price for the Davidoff brand cigars purchased from Davidoff of Geneva (CT), Inc., as defined by Tax Law § 470(6).

38. During his audit, the Division's auditor stated in his field audit record that he reviewed the "manufacturer to parent price list to determine if the markdown to cost ratio used on the NY returns [A%] is appropriate."

39. In his audit, the Division's auditor found that the markdown to cost ratio for selected items purchased from Davidoff of Geneva (CT), Inc., was "approximately [B%]." By proposed audit adjustment dated October 29, 2004, the Division's auditor advised petitioner that as a result of his test, "we were able to verify that applying this [A%] cost factor accurately reflects the wholesale price of the product purchased from Davidoff of Geneva (CT)." Shortly thereafter, the Division's auditor informed petitioner that this statement had been given in error because the Division's position was that it could not use the manufacturer's selling price as the basis for the Article 20 tax on cigars.

40. As stated in the field audit record, the Division's auditor was subsequently advised that "another NYS attorney questioned the determination of the wholesale price" and that he was seeking an opinion of counsel to formally address the issue. As reported in the field audit record, an opinion was subsequently received that disagreed with petitioner's interpretation of wholesale price.

41. On or about November 4, 2004 (before the issuance of a statutory notice), the Division's auditor telephoned petitioner and informed the corporation that the October 29, 2004 proposed audit adjustment was issued in error. The auditor issued a new schedule to petitioner

on November 5, 2004, increasing the tax base to 100% of petitioner's purchase price from Davidoff of Geneva (CT), Inc.

42. The auditor revised his findings with respect to petitioner's purchases of Davidoff brand cigars from Davidoff of Geneva (CT), Inc., and asserted that petitioner's purchase price from Davidoff of Geneva (CT), Inc., was the wholesale price as defined by the Tax Law and thus the correct basis for measuring the tax, rather than the selling price from Davidoff of the Dominican Republic to IMEX.

43. On January 28, 2005, the Division issued a Notice of Determination (assessment number L-024993358) to petitioner assessing tobacco products taxes pursuant to Tax Law § 471-b on the purchase price paid by petitioner to all of its wholesale suppliers, including Davidoff of Geneva (CT), Inc., for the audit period. The notice asserted tax due of $470,328.40, plus interest of $50,441.36, for a total amount due of $528,769.76. No penalties were assessed. Petitioner had reported total wholesale prices of $1,315,971.00 for the audit period, while the Division had determined total wholesale prices for the audit period of $3,291,255.00.

44. Petitioner submitted the affidavit of the president of the Cigar Association of America, Inc. (CAA). The CAA is the national trade association of cigar manufacturers, importers and distributors as well as major suppliers to the industry. Among its purposes is providing government and public relation services to the industry; acting as an information clearinghouse for the cigar industry; and providing statistical services to the cigar industry.

The affidavit explained that since 1983, the CAA has been conducting a confidential annual survey of its members that are manufacturers and importers of large cigar sales by state (units and dollar value). For each of the years 2002, 2003 and 2004, each member of the CAA was mailed a letter and survey questionnaire requesting that they participate in the annual survey.

The information in the survey results reflects the factory selling price (for domestic manufacturers) or the invoice price (for importers) of large cigars, divided between popular price and premium cigars. The participating members are asked to identify themselves on the survey forms by the code numbers assigned to them by the CAA. The members are directed to complete and return the survey forms to an independent, certified public accountant. The accountant is the only individual who sees the individual company data (identified by code number only) and everyone else, including the participants and CAA staff see only the composite results. During the years 2002, 2003 and 2004, the companies participating in the annual survey accounted for approximately 95% of the large cigars sold each year in the United States.

45. The survey revealed the total units shipped of premium large cigars to be 162,568,441 in 2002; 177,197,066 in 2003 and 195,778,361 in 2004. In addition, the survey indicated the total value (factory selling price) of premium large cigars sales to be $297,080,587.00 for 2002; $324,995,692.00 for 2003 and $360,315,459.00 for 2004 and an average factory selling price per premium cigar of $1.83.

46. Petitioner furnished to the auditor (prior to the hearing) and introduced into the record of this matter a ten-month compilation, using four months in 2002, three months in 2003 and three months in 2004, of purchases from third-party out-of-state distributors and wholesalers. Using the price paid to the suppliers and the amount of cigars purchased, petitioner was able to calculate that the average purchase price per cigar was $2.59.

SUMMARY OF THE PARTIES' POSITIONS

47. Attached to petitioner's brief was a 2006 budget bill and memorandum, which had been denied admission into evidence as irrelevant (the bill never became law). Petitioner's brief contained argument based upon such bill and memorandum.

At issue is the "wholesale price" of cigars purchased by petitioner during the audit period, as defined by Tax Law § 470(6). Petitioner maintains that the wholesale price of the cigars petitioner purchased from Davidoff of Geneva (CT), Inc., as defined by Tax Law § 470(6), is the price paid by IMEX to the manufacturer, Davidoff of the Dominican Republic. Petitioner further maintains that it may use statistical data furnished by the Cigar Association of America, Inc., in determining the wholesale price of the cigars petitioner purchased from third-party wholesale suppliers.

48. The Division maintains that the wholesale price of cigars petitioner purchased from Davidoff of Geneva (CT), Inc., and third-party wholesale suppliers, as defined by Tax Law § 470(6), is the purchase price paid by petitioner to them.

CONCLUSIONS OF LAW

A. Tax Law § 471-b(1) imposes a tobacco products tax on all tobacco products possessed in this state by any person for sale. During the audit period, the tax was initially calculated at the rate of 20 percent and then 37 percent of the wholesale price of the product.[2] The distributor is liable for payment of the tax on tobacco products which he "imports or causes to be imported into the state. . ." (Tax Law § 471-b[2]).

Tax Law § 470(6) defines the term "wholesale price" as follows:

> The established price for which a manufacturer sells tobacco products to a distributor, before the allowance of any discount, trade allowance, rebate or other reduction.
>
> In the absence of such an established price, a manufacturer's invoice price of any tobacco product shall be presumptive evidence of the wholesale price of such tobacco product, and in its absence the price at which such tobacco products were

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[2] On July 2, 2002, the tax rate was increased from 20 percent to 37 percent for the remainder of the audit period (L 2002, ch 85).

> purchased shall be presumed to be the wholesale price, unless evidence of a lower wholesale price shall be established or any industry standard of markups relating to the purchase price in relation to the wholesale price shall be established.
>
> Pursuant to 20 NYCRR 89.2(2), the Division:
>
> may determine the wholesale price of any tobacco product based upon such evidence as may be presented by any person with an interest therein or such information as may be otherwise available. The [Division] may require any appointed distributor of tobacco products . . . to submit a schedule containing the description, trade/brand name and wholesale price of every tobacco product imported or caused to be imported into this State for sale, manufactured in this State or sold, shipped or delivered to any person within the State by such distributor. . . .

B. It is well established that the interpretation given to a statute by the agency authorized with its enforcement should generally be given weight and judicial deference if the interpretation is not irrational, unreasonable or inconsistent with the statute (***Matter of Trump-Equitable Fifth Avenue Co. v. Gliedman***, 62 NY2d 539, 478 NYS2d 846 [1984]). However, in addition, the statutory language must be construed in a practical fashion with deference to the legislative intent (***see Majewski v. Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 673 NYS2d 966 [1998]; ***Matter of Qualex, Inc***., Tax Appeals Tribunal, February 23, 1995). To determine legislative intent, courts must first look at the literal reading of the act itself (***see*** McKinney's Cons Laws of NY, Book 1, Statutes § 92). As stated by the Court of Appeals in ***Kurcsics v. Merchants Mut. Ins. Co.*** (49 NY2d 451, 459, 426 NYS2d 454, 458 [1980]; ***see also Matter of Stuckless***, Tax Appeals Tribunal, August 16, 2006), "[w]here . . . the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency . . . ."

C. Statutory rules of construction provide that "[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to

its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Where the statute is clear, the courts must follow the plain meaning of its words, and "there is no occasion for examination into extrinsic evidence to discover legislative intent . . ." (McKinney's Cons Laws of NY, Book 1, Statutes § 120; ***see Matter of Raritan Dev. Corp. v. Silva***, 91 NY2d 98, 667 NYS2d 327 [1997]; ***Matter of Schein***, Tax Appeals Tribunal, November 6, 2003). Where, as here, words of a statute have a definite and precise meaning, it is not necessary to look elsewhere in search of conjecture so as to restrict or extend that meaning (***Matter of Erie County Agricultural Society v. Cluchey***, 40 NY2d 194, 386 NYS2d 366 [1976]). As the language of the statute is clear, it is appropriate to interpret its phrases in their ordinary, everyday sense (***Matter of Automatique v. Bouchard***, 97 AD2d 183, 470 NYS2d 791 [1983]).

D. Tax Law § 470(6) provides for a series of alternatives as to what constitutes the wholesale price for purposes of the tobacco products tax. Pursuant to the statute, the first measure for determining the "wholesale price" is "[t]he established price for which a manufacturer sells tobacco products to a distributor . . . ." Where the established price is absent, the statute directs that the "manufacturer's invoice price" is considered to be presumptive evidence of the wholesale price of such tobacco product. Absent the manufacturer's established price and the manufacturer's invoice price, the price at which the product is purchased is presumed to be the wholesale price. In addition, the statute goes on to provide that where the manufacturer's invoice price or purchase price is presumed to be the wholesale price, the presumption can be rebutted by establishing either a lower wholesale price or any industry standard of markups relating to the purchase price in relation to the wholesale price. Thus, the statute presents a number of alternative transactions and methods by which to establish the

wholesale price of tobacco products. As the parties agree that an established price is not available with regard to petitioner's purchases from Davidoff of Geneva (CT), Inc., it is necessary to look to the next alternative, the manufacturer's invoice price, to determine the "wholesale price" (Tax Law § 470[6]).

E. At the time of the audit, the Division examined the manufacturer's invoice prices between Davidoff of the Dominican Republic and IMEX. Originally, the auditor found the invoice prices acceptable, but the Division subsequently changed its position as to whether the invoice prices between Davidoff of the Dominican Republic and IMEX were properly considered to be the wholesale price of the tobacco products at issue because the businesses involved were affiliated entities. In response, petitioner contends that the Davidoff of the Dominican Republic manufacturer's invoice prices are presumptive evidence of the wholesale price, and the Division has failed to produce any evidence to rebut the presumption.

The Division argues that the manufacturer's invoice prices should be disregarded because Davidoff of the Dominican Republic is a wholly-owned subsidiary of IMEX, and therefore the selling prices do not necessarily reflect arm's-length transactions. The Division further contends that the wholesale price list of Davidoff CT undermines petitioner's argument that the price paid by IMEX is the wholesale price because the prices paid by third-party retailers for wholesale tobacco products are similar to the prices listed in the wholesale price list.

The Division's position is not supported by the language of the statute, which refers to manufacturer's established price or manufacturer's invoice price. Davidoff of Geneva (CT), Inc., is not a manufacturer. The manufacturers of the tobacco products at issue are the entities collectively referred to herein as Davidoff of the Dominican Republic. Petitioner had in its possession, and presented to the auditor for review, the manufacturers' invoices of the tobacco

products sold by Davidoff of the Dominican Republic to IMEX, and later purchased by petitioner from Davidoff of Geneva (CT), Inc. Under these circumstances, the statute grants to petitioner the presumption that the manufacturer's invoice prices are the wholesale prices. It is noted that there is no evidence in the record that the selling prices between Davidoff of the Dominican Republic and IMEX are not arm's-length transactions. Furthermore, the statute makes no distinction between affiliated and nonaffiliated entities. Therefore, petitioner is entitled to the presumption that the manufacturer's invoice prices between Davidoff of the Dominican Republic and IMEX are the wholesale prices.

In addition, and in support of its position, petitioner introduced into evidence a transfer price analysis for the years 2004, 2005 and 2006, performed by KPMG, that established that the sales prices between IMEX and Davidoff of Geneva (CT), Inc., were at arm's length. The Division points out that the analysis does not relate to the pricing between Davidoff of the Dominican Republic and IMEX, and that the period involved in the study correlates to only part of the audit period. The analysis is relevant, however, in that it establishes that pricing between some of the related entities involved herein can be at arm's length, and serves to undermine the Division's position that the mere fact that IMEX controls the manufacture and distribution of its branded merchandise means that the price at which the manufacturer sells its product is not a fair, arm's-length price.

In consideration of the above, it is determined that the manufacturer's invoice prices between Davidoff of the Dominican Republic and IMEX are the "wholesale price" as defined in Tax Law § 470(6) regarding petitioner's purchases of tobacco products from Davidoff of Geneva (CT), Inc.

F. With respect to petitioner's purchases from third-party suppliers, the record does not contain either established prices for which a manufacturer sells the tobacco product or any manufacturer's invoice prices that would be considered presumptive evidence of the wholesale price of such tobacco product. Tax Law § 470(6) provides that under such circumstances, the next alternative to be considered the wholesale price is the price at which such product was purchased, unless evidence of a lower wholesale price shall be established or any industry standard of markups relating to the purchase price in relation to the wholesale price shall be established. The Division has concluded that the price paid by petitioner to the third-party suppliers is the wholesale price of such tobacco products for purposes of Tax Law § 470(6).

It is petitioner's initial position that the Division has in its possession information sufficient to establish a lower wholesale price for the purchases from third-party suppliers. Petitioner first points to the Division's regulation, 20 NYCRR 89.2(b)(2), that provides that the Division may determine the wholesale price on any information available, and also that the Division is able to obtain the manufacturer's invoice prices of the products purchased by petitioner from the third-party suppliers. Petitioner adds that the auditor had available to him, through previous audits and tax returns filed by petitioner's out-of-state third-party suppliers, the purchase price paid for tobacco products later resold to petitioner. According to petitioner, this information would have provided evidence of a lower wholesale price. Unfortunately, such a position would reverse and place the burden of proof on the Division, in contravention of Tax Law § 471-b(1) and 20 NYCRR 3000.15(d)(5).

However, the regulation, considered in combination with the statute, is instructive as to what information could be provided by a taxpayer to establish a lower wholesale price. The statute provides the alternatives of a manufacturer's established price, the manufacturer's invoice

price, the purchase price, evidence establishing a lower wholesale price or evidence establishing any industry standard of markups relating to the purchase price in relation to the wholesale price. These alternatives in Tax Law § 470(6) as to what constitutes the wholesale price allow for numerous options for both the Division and the taxpayer to determine what is to be considered the wholesale price of a particular tobacco product. In addition, the alternatives provided in the statute exhibit an intent to allow the establishment of a wholesale price that reflects as closely as possible the price at which a manufacturer sells the product involved. The first two alternatives in determining the wholesale price are the manufacturer's established price and the manufacturer's invoice price. The statute then refers to the purchase price paid by the taxpayer, but also adds two additional opportunities to reduce the purchase price to a lower wholesale price.

The regulation, 20 NYCRR 89.2(b)(2), states that the Division "may determine the wholesale price of any tobacco product based upon such evidence as may be presented by any person with an interest therein or such information as may be otherwise available." Under this regulation, the Division can require distributors of tobacco products to submit wholesale price information relating to the tobacco products imported or caused to be imported into the state for sale, tobacco products manufactured in this state or tobacco products sold, shipped or delivered to any person within the state. The regulation is quite broad in its reference to the information and the source of the information to be considered in establishing a wholesale price, and again, exhibits an intent to provide a taxpayer with the opportunity to establish the wholesale price as closely as possible to the actual manufacturer's price. Here, petitioner argues that a comparison of the results of its analysis of purchases from third-party suppliers and the CAA survey results provides evidence of a lower wholesale price.

G. The CAA survey has been conducted since 1983 and contains information that reflects the factory selling price for domestic manufacturers or the invoice price for importers of, among other items, premium cigars. The survey results provided for 2002, 2003 and 2004 account for approximately 95% of the large cigars sold each year in the United States. For the three-year period, the survey presented information on 535,543,868 premium cigars shipped at a total factory selling price of $982,391,738.00, an amount far in excess of the $1,315,971.00 amount reported by petitioner as its total wholesale price for the audit period. Dividing the factory selling price by the number of cigars shipped results in an average manufacturer's selling price of $1.83. This selling price is below the $2.59 purchase price calculated by petitioner in its own ten-month compilation of purchases from out-of-state suppliers, establishing a lower wholesale price than the purchase price used by the Division.

H. The Division argues that the CAA survey should not be given any weight in this determination. The Division states that the individual preparer of the survey was not present to testify at the hearing, that the sole foundation for the admission of the survey was from an individual who did not prepare or compile the data comprising the survey, that the proportion of the survey results attributable to petitioner is unknown and the CAA survey is not an independent, unbiased expert report because the CAA represents cigar companies.

Initially it is noted that affidavits as to relevant facts are admissible into the record of the hearing and may be considered for whatever value they have (20 NYCRR 3000.15[d]). Furthermore, petitioner's total wholesale prices for the audit period are less than 1% of the total factory prices for premium cigars contained in the surveys for 2002, 2003 and 2004. Finally, the Division, pursuant to 20 NYCRR 89.2(b)(2), has the authority to obtain from every tobacco products distributor a schedule of the description, trade/brand name and wholesale price of every

tobacco product imported or caused to be imported into this state for sale, manufactured in this state or sold, shipped or delivered to any person within this state. Although the Division does not have the burden of establishing the wholesale price for a taxpayer, where, as here, the taxpayer produces credible evidence of a lower wholesale price, it was incumbent on the Division to come forward with some evidence refuting the taxpayer's evidence. Here, the Division speculates as to possible weaknesses of the CAA survey, but has produced no evidence refuting its results. Therefore, it is determined that petitioner has produced evidence of a lower wholesale price than its purchase price from third-party suppliers, as permitted by Tax Law § 470(6).

I. The Tax Appeals Tribunal has established a firm policy of not allowing the submission of evidence after the record is closed. In ***Matter of Saddlemire*** (Tax Appeals Tribunal, June 14, 2001), the Tribunal stated:

> [w]e have held that in order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record (***Matter of Emerson***, Tax Appeals Tribunal, May 10, 2001; ***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991).

As previously noted, the 2006 budget bill and memorandum were denied admission into evidence during the course of the hearing. It was improper for petitioner to submit such documentation with its brief, and, accordingly, no part thereof was considered for purposes of this determination.

J. The petition of Davidoff of Geneva (NY), Inc., is granted, and the Notice of Determination dated January 28, 2005 is canceled.

DATED: Troy, New York
May 26, 2011

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE