STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GRAND CENTRAL JT. VT.	:	DETERMINATION DTA NO. 824273
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 2005 through May 31, 2008.	:	

Petitioner, Grand Central JT. VT., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2005 through May 31, 2008.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 1384 Broadway, 19th Floor, New York, New York, on June 26, 2012, at 10:30 A.M., with all briefs to be submitted by January 18, 2013, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael J. Hall).

ISSUE

Whether petitioner has established entitlement to a refund of the amount of sales tax it agreed to and paid following an audit.

FINDINGS OF FACT

1. Petitioner, Grand Central JT. VT., a family-run business established in 1923, operates a number of retail locations making both taxable and nontaxable sales of various bakery items and prepared foods such as breads, cakes, bagels, muffins and other sweets, pizza, frankfurters, coffee, sodas, juices and the like. During the period in question, petitioner operated four locations in Grand Central Terminal, two in Pennsylvania Station, and one each in the Port Authority, Parkchester and Cross County, New York.

2. On July 15, 2008, the Division of Taxation (Division) mailed a letter to petitioner scheduling a field audit pertaining to petitioner's sales and use tax liability for the period September 1, 2005 through May 31, 2008. The audit was to commence on August 4, 2008. The appointment letter stated that "[a]ll books and records pertaining to the sales and use tax liability, for the audit period, must be available on the appointment date." Accompanying this audit appointment letter was a Records Requested List, further specifying the records required to be made available for review as including, among other items, sales tax returns, worksheets, canceled checks, federal income tax returns, New York State corporation tax returns, general ledger, general journal and closing entries, sales invoices, exemption documents, chart of accounts, fixed asset purchase and sale invoices, expense purchase invoices, bank statements, depreciation schedules, lease contracts, utility bills, guest checks and cash register tapes. The initial audit appointment date of August 4, 2008 was subsequently changed to September 4, 2008.

3. Petitioner's sales are recorded on cash registers at each of its locations. During the period in question, the registers recorded the dollar amount of each individual item sold, as well as the total amount of the sale, the payment amount tendered, and the amount of change returned

to the purchaser. The cash registers did not identity each individual item sold (e.g., coffee, bagel, muffin, cookies, etc.), but rather simply listed the dollar amount of each item purchased as either a taxable or a nontaxable sale. The registers also produced daily summary totals ("Z" amounts).

4. In preparation for the audit, petitioner's vice-president of finance forwarded petitioner's cash register tapes, general ledgers and tax returns to petitioner's then-representative at his Westchester office, where the Division's auditors met with such representative. The auditor's log of what transpired during the audit states, with respect to the cash register tapes, that petitioner "Claim[s] to have some register tapes, only have taxable & n/t listed." The log notes further that petitioner's sales tax returns are prepared using an estimation of taxable sales based on prior audits. Testimony at hearing further explained that petitioner's returns are prepared and filed upon the basis of a formula, using estimates of taxable and nontaxable sales calculated by petitioner from a review of its cash register tapes, purchase records, and the history of sales at each store, to determine what portion of its sales are taxable versus nontaxable.[1]

5. Petitioner's sales tax returns, as filed, listed taxable sales but not gross sales. The Division's auditor reconciled petitioner's gross sales, per its general ledger, to sales reported per petitioner's federal income tax returns, and accepted such gross sales as accurate. However, the Division did not accept the cash register tapes, lacking identification of the individual items sold, as adequate to substantiate that petitioner accurately recorded its taxable sales at the time of sale and, thereafter, accurately reported the same on its returns.

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[1] Petitioner's witness at hearing claimed that all records were forwarded to petitioner's former representative in Westchester and were presented for review by the Division's auditors. Petitioner's witness was not present at the time of such examination and petitioner's former representative did not testify at hearing. Thus, the record does not support the claim that petitioner's former representative made all records, including all cash register tapes, available for review upon audit.

6. Comparing petitioner's reported taxable sales to its gross sales revealed that petitioner reported 24.33% of its gross sales as taxable sales. The auditor and his team leader suggested performance of an analysis of petitioner's taxable purchases, in combination with an observation of sales at one of petitioner's locations, in order to verify the accuracy of petitioner's taxable sales as reported. Petitioner rejected the proposal of an observation of sales, and the Division's auditor continued the review of purchases. Thereafter, the parties (including petitioner's president, its then-representative, the Division's auditor and his team leader) met. After negotiation, the parties arrived at 29% as the estimated portion of petitioner's gross sales that were subject to tax. Applying this percentage to petitioner's gross sales ($47,181,419.00) resulted in taxable sales of $13,682,l612.00, or an increase of $2,167,818.00 over taxable sales reported. Subjecting this additional amount of taxable sales to tax resulted in additional sales tax due in the amount of $181,554.83 for the period under audit. The audit also included an examination of petitioner's fixed (capital) asset acquisitions and taxable expense purchases, and resulted in additional tax due on such items in the amounts of $7,822.44 and $6,711.65, respectively.

7. On the basis of the forgoing audit, the Division prepared and issued to petitioner a Statement of Proposed Audit Change for Sales and Use Tax dated June 10, 2009, setting forth a proposed additional tax liability for the period September 1, 2005 through May 31, 2008 in the amount of $196,088.92, plus interest. On June 23, 2009 petitioner, by its president, Stuart Zaro, signed the Statement of Proposed Audit Change, agreeing thereto and consenting to the liability set forth thereon, but reserving the right to contest the same upon payment and the filing of a claim for refund within the applicable period of limitations. The liability (tax plus interest) set forth on the Statement of Proposed Audit Change was, in turn, paid in full.

8. On December 29, 2010, the Division received from petitioner an Application for Credit or Refund of Sales or Use Tax, seeking a refund of tax in the amount of $196,088.92, plus interest, representing the tax consented to and paid by petitioner following the audit described above. This claim was filed some one and one-half years after the foregoing consent, and upon the advent of a subsequent audit of petitioner by the Division. A letter from petitioner's current representative, filed in connection with petitioner's refund claim, sets forth the allegation that petitioner maintained full and complete sales records from which an exact amount of tax could have been determined, and that the Division erred in its determination upon audit that petitioner's sales records were inadequate.

9. On February 8, 2011, the Division responded to petitioner's refund application by a letter advising that records sufficient to substantiate the amount of the claimed refund were required to be submitted. A comprehensive list of the records required to be furnished for review, specifying essentially the same records as were previously requested in connection with the audit of petitioner, accompanied this letter.

10. Subsequent correspondence between petitioner and the Division reveals that petitioner was not willing to provide any records, but rather requested that the Division simply deny the refund request in full such that petitioner could then proceed with an appeal of that denial. In turn, by a letter dated March 16, 2011, the Division denied petitioner's refund claim in full.[2]

11. At hearing, petitioner provided the testimony of its vice-president of finance, detailing his review of the tapes from petitioner's cash registers at certain of petitioner's locations,

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[2] As noted, the audit included an examination of petitioner's fixed (capital) asset acquisitions and taxable expense purchases, and resulted in additional tax due on such items in the amounts of $7,822.44 and $6,711.65, respectively (***see*** Finding of Fact 6). These amounts, as well as the additional amount of tax on sales set forth above, have been paid by petitioner. At hearing, petitioner specified that the amounts of tax found due on capital acquisitions and on expense purchases have been conceded and are not at issue in this proceeding.

including Grand Central, Pennsylvania Station and Parkchester, on certain dates. More specifically, the review covered the Grand Central locations on May 15, 2008, May 23, 2008, September 18, 2009 and March 17, 2010, the Pennsylvania Station locations on April 21, 2008, September 18, 2009 and March 17, 2010, and the Parkchester location on March 17, 2010. A total of 16 rolls of register tapes was reviewed. No reason was specified for choosing the particular dates noted above.[3]

12. In reviewing the tapes for the above-noted dates petitioner attempted to determine, by reference to the dollar amounts of the individual transactions recorded on the tapes in comparison to the price of various items set forth on a price list of items sold at one of petitioner's locations, which of the listed transactions were subject to tax and which were not so subject. In turn, petitioner's comparison of taxable sales, as so determined, to total sales, resulted in various taxable percentages of sales for the various locations. In each instance, save for the location identified as Parkchester 1, the taxable sales percentage was lower than the 29% consented to at the time of audit, and lower than the 24.33% calculated on the basis of petitioner's sales tax returns, as filed.[4]

13. Petitioner admitted that it could not produce cash register tapes for the full period in question because, after the parties concluded the audit by agreement and consent but before petitioner filed its claim for refund, petitioner discarded such tapes. Petitioner claimed to have

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[3] It appears that there was more than one register at certain locations, such that the number of rolls of tapes exceeds the number of locations and review dates. It is noted that four rolls of tape pertained to dates that fell within the last two months of the audit period (4/21/08, 5/15/08 and 5/23/08). It is further noted that while 11 of the rolls of tape, including the four rolls that fell within the audit period, identified only taxable versus nontaxable sales but not particular items sold, five of such rolls (all of which pertained to dates after the audit period) identified the particular items sold. This distinction was not noted on the record at hearing, or otherwise addressed, and is presumed to be the result of petitioner's purchase of replacement cash registers of a more sophisticated nature over time.

[4] The taxable percentage for the Parkchester 1 location, as calculated by the noted method, was 85.7%. However, it appears the primary item sold at that location was pizza by the slice, a taxable item.

done so because it did not have adequate storage space to maintain such records. It is noted that, with the exception of the dates April 21, 2008, May 15, 2008 and May 23, 2008, the register tapes provided at hearing pertained to dates after the audit period. In addition, a portion of the tapes submitted at hearing as part of petitioner's review are illegible. Finally, the store location and date (or effective period) for the price list used in petitioner's review are not specified on the price list or otherwise disclosed.

CONCLUSIONS OF LAW

A. It is well established that any person making taxable sales is a "vendor" under Tax Law § 1101(b)(8), and is therefore "required to maintain complete, adequate and accurate books and records regarding [their] sales tax liability and, upon request, to make the same available for audit by the Division" (***Matter of AGDN, Inc.***, Tax Appeals Tribunal, February 6, 1997). The records required to be maintained "include a true copy of each sales slip, invoice, receipt, statement or memorandum" (Tax Law § 1135[a]; 20 NYCRR 533.2[b][1]).

B. 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 an audit methodology reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the audit methodology or the amount of the assessment was erroneous (***see Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003).

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

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

D. The record is clear that, upon the commencement of the audit, the Division made an unequivocal written request for petitioner's books and records for the entire audit period. Petitioner claims to have sent all of its cash register tapes, general ledgers and sales tax returns to its then-representative for presentation and review by the Division's auditors. While there is some question as to whether all of such records were in fact presented to and reviewed by the auditors, there is no dispute that the register tapes did not identify the particular items sold, but rather only indicated the dollar amounts of the items sold. There is no claim that, at the time of audit, petitioner's then-representative provided any additional evidence from which the taxable status of the individual items sold could, on audit review, be discerned. In addition, it is undisputed that in preparing and filing its sales tax returns, petitioner employed an estimated method, utilizing a formula based on the cash register tapes, its purchases, and the historical sales at petitioner's various store locations. Under these circumstances, the auditors advised petitioner that its records were not adequate for the purpose of conducting a detailed audit, and discussed

with petitioner utilizing an alternative method to determine the correct amount of sales tax liability for the audit period.

E. In the face of the foregoing circumstances, the parties held discussions as described and, ultimately, arrived at a negotiated understanding and agreement that 29% of petitioner's gross sales would be considered taxable sales. The June 10, 2009 Statement of Proposed Audit Changes setting forth this result was issued to petitioner and, in turn, petitioner executed the same consenting to the tax set forth thereon, though petitioner did retain the right to file a claim for refund as described. In turn, petitioner filed such a claim, and contends it has established, by the evidence presented at hearing, that its records were complete and adequate and that it is entitled to a refund of the tax consented to and paid.[5]

F. ***Matter of SICA Electrical & Maintenance Corp.*** (Tax Appeals Tribunal, February 26, 1998), provides the following guidance relevant to the circumstances presented here, as follows:

> Having signed the Statement of Proposed Audit Adjustment, the tax asserted became finally and irrevocably fixed. Therefore, a notice of determination under section 1138(a) was not required to be issued and no notice was issued in this case. We conclude that the signature on the consent to tax rendered the use tax fixed and final (***Matter of BAP Appliance Corp.***, Tax Appeals Tribunal, May 28, 1992; ***Matter of Rosemellia***, Tax Appeals Tribunal, March 12, 1992) and established the rational basis for the assessment.

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[5] In its brief, petitioner seems to imply that the Division was inconsistent in its review of records by its acceptance of petitioner's gross sales as "complete and adequate (based upon the taxpayer's books and records)," while it's "[s]ales records were deemed to be inadequate because taxpayer did not maintain register tapes." In fact, petitioner's sales tax returns did not report gross sales. The Division reviewed and reconciled petitioner's general ledger and its federal income tax returns, and based thereon accepted petitioner's gross sales as accurate, i.e., accepted that petitioner was not failing to accurately account for its gross sales. What the Division did (and does) dispute is petitioner's claim that it accurately reported the portion of such gross sales that was subject to tax. Specifically, the Division maintains that petitioner did not provide as requested, either at the time of audit or thereafter in connection with its refund claim, records that were sufficient to verify the taxable or nontaxable status of the individual sales made by petitioner so as to establish that the amount of tax reported and paid with its returns was correct or that petitioner (by virtue of agreeing to a 29% taxable ratio) has in fact overpaid its liability and is entitled to a refund of the amount of additional tax to which it consented.

> Having signed the consent, the audit method and audit computation ceased being an issue. Further, the threshold issue of "rational basis" that might otherwise be present in an audit case under Tax Law § 1138(a) was no longer present. The Division was relieved of the burden of showing a rational basis because petitioner's signature on the consent established that there was a rational basis.
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> We agree with the Administrative Law Judge that petitioner, even after signing the consent and paying the tax, still has the opportunity to prove it is entitled to a refund. However, in order to be entitled to a refund, petitioner must demonstrate by clear and convincing evidence that the tax asserted is erroneous (***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 Ad2d 858, 446 NYS2d 451), i.e., petitioner's actual tax liability was less than that set forth in the signed consent (***Matter of BAP Appliance Corp., supra; Matter of Rosemellia, supra; Matter of Philipp Bros.***, Tax Appeals Tribunal, June 4, 1992).
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> Once a taxpayer or a taxpayer's representative is provided an opportunity to review the audit papers and proposed consent to tax and, thereafter, signs a section 1138(c) consent, the burden of going forward and of proving that the tax is erroneous and a refund is due shifts to the taxpayer. A petitioner, under the facts here, can prevail upon a refund claim only by proof that the correct amount of tax is less than the amount set forth in the consent to tax.

G. For whatever reasons, including the claim that it did not wish to risk the possibility of a higher assessment and the imposition of penalties, petitioner declined the Division's offers of alternative methods of verifying the accuracy of petitioner's returns (e.g., an analysis of purchases coupled with an on-premises observation of sales) in favor of negotiating, arriving at, accepting and ultimately consenting to an agreed percentage of gross sales as taxable sales. By proceeding in this manner, and notwithstanding its current protests to the contrary, petitioner clearly submitted to the presumption of correctness of the Division's proposed assessment (***Matter of SICA Electrical & Maintenance Corp.***).

H. Petitioner's subsequent filing of an application for refund of the tax consented to on audit imposes upon petitioner the obligation of substantiating the amount of tax it has overpaid. Petitioner's attempt to do so by its claim that its records were adequate and that the Division

erred in its assessment of such adequacy on audit is unavailing. In point of fact, at no time has petitioner established that its records of individual sales, and specifically its cash register tapes, were of a type that would enable the Division, upon audit, to identify the particular items sold and the taxable status thereof, so as to be able, upon a detailed review of such records, to arrive at the amount of sales tax due for the period in issue. In this regard, not only is it undisputed that the register tapes in question did not identify individual items sold, but there has been no showing that there existed other records of such individual sales from which the taxable status of each sale could be determined.

I. As described, petitioner submitted at hearing a sample of register tapes and an accompanying analysis thereof (***see*** Findings of Fact 11 and 12). Petitioner maintains that by comparing the *prices* of the items sold, as shown on the register tapes, to the *prices* of the items shown on the price list, one can "price match" and thereby discern the particular items represented (though not specifically identified) on the tapes and verify the correctness of the taxable or nontaxable status of such items as rung in by petitioner's employees at the time of sale. As an initial observation, the majority of the register tapes included in this sample and analysis pertain to periods post-audit. Furthermore, the record does not specify the time period for which the price list was in effect. Moreover, several of the items on the price list carry the same prices. Hence, it is not possible to establish if such same-priced (but not specifically identified) items sold were in fact correctly rung up on the registers at the time of sale as taxable or nontaxable. More importantly, petitioner has admitted that its sales tax returns were not filed based upon the results of the allegedly accurate register tapes, but rather were filed upon the basis of a formula derived from an analysis of the tapes, petitioner's purchases, and the sales histories of the various retail locations operated by petitioner (***see*** Finding of Fact 4). Having thus used an

estimation method in filing its returns, petitioner is hard pressed to find acceptance of a complaint that the Division would seek to use an indirect or estimation methodology in its audit review when faced with uncertainty as to the accuracy of the records offered in support of such returns (***see Matter of Albanese Ready Mix***, Tax Appeals Tribunal, June 15, 1989).

J. In addition to the foregoing, not only were the register tapes during the period insufficient for purposes of verifying the accuracy of petitioner's reported taxable sales and sales tax remitted, as described, but the same were discarded after the audit was finished and prior to the filing of petitioner's claim for refund covering the same period as the audit. By consenting to an amount of tax due and then disposing of the cash register tapes upon which it would rely to negate such consent and establish the correctness of its returns, petitioner placed itself in the untenable position of presenting the claim that its sales records were complete and accurate without the ability to present the records upon which it allegedly relies. In this regard, the assertion in petitioner's refund claim that full and complete records exist (***see*** Finding of Fact 8) is belied by the undisputed fact that the cash register tapes had been discarded before the refund claim was filed (***see*** Finding of Fact 13). More to the point, agreeing to and paying an amount of tax and then disposing of one's records is at best inconsistent with reserving the right to contest, by reliance upon such records, the accuracy of the amount of tax agreed to as due.

K. Petitioner continues to assert that the Division incorrectly determined upon audit that its records, and most specifically its cash register tapes, were insufficient to verify the taxable status of the individual items sold by petitioner. As described, petitioner attempts to support this position, contrary to its consent and to its subsequent disposal of the very records it now claims were adequate, upon an analysis of a small number of days that arrives at taxable percentages of sales that are less than the negotiated 29% taxable ratio agreed to upon audit and, interestingly,

less than the 24.33% taxable ratio per petitioner's sales tax returns as filed. The desired conclusion appears to be that since petitioner's analysis arrives at percentages of taxable sales that are less than that consented to and less than that reported by petitioner's returns, then petitioner's liability was likely overstated on its returns and supports a refund of the additional tax consented to and paid on audit. If nothing else, such an analysis merely serves to highlight the lack of precision in the methods employed and the results derived therefrom. In sum, not only does petitioner employ an estimation method in the preparation and filing of its returns, but it now seeks to require the Division to accept an indirect method, or more specifically, to accept petitioner's indirect method (its unweighted analysis of sales per tapes for a small number of days the majority of which fall outside of the period in issue) as sufficient to establish the accuracy of petitioner's estimation method under which its returns were filed. Accepting this methodology and line of reasoning would penalize the Division by forcing it to accept estimates in lieu of substantiating records and, moreover, and would effectively render the requirement to maintain complete and adequate records a nullity.

L. The petition of Grand Central JT. VT. is hereby denied and the Division's March 16, 2011 denial of petitioner's claim for refund is sustained.

DATED: Albany, New York
July 3, 2013

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE