STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RJB SLICK'S, INC. **N/K/A RKB VENTURES, INC.**	:	DECISION DTA NO. 825079
For Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2004 through February 28, 2007.	:	

Petitioner, RJB Slick's, Inc. n/k/a RKB Ventures, Inc., filed an exception to the determination of the Administrative Law Judge issued on May 12, 2016. Petitioner appeared by Hogan Willig (Steven M. Cohen, Esq., and Amanda R. Wyzykiewicz, Esq., of counsel) on brief and by Rudolph J. Bersani, president, at oral argument. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York on August 10, 2017, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner has demonstrated that the Division of Taxation's audit methodology was unreasonable.

II. Whether petitioner is entitled to a refund of sales and use taxes paid.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact 4, 9, 11 and 14, which we have modified to more accurately reflect the record. As so modified, the findings of fact appear below.

1. Petitioner, RJB Slick's, Inc. n/k/a RKB Ventures, Inc., operated a sports bar, known as Slick Willie's, in a medium-sized strip mall in Tonawanda, New York, during the period March 1, 2004 through February 28, 2007 (audit period). Slick Willie's featured two large serving bars for drinks.

2. Rudolph Bersani was the sole stockholder of petitioner during the audit period. He was involved in all operations of the bar. He was responsible for completing the sales tax questionnaire and the bar fact forms sent to him by the Division of Taxation (Division). Slick Willie's was not his first business venture that required the collection and payment of New York State sales and use taxes.

3. The Division commenced a sales tax field audit of petitioner. On March 8, 2007, the Division sent an appointment letter to petitioner and requested its books and records for the audit period.

4. Petitioner provided z tape summaries,[1] comp sheets (i.e., daily records of free drinks), incomplete bank statements, handwritten day sheets and incomplete purchase invoices. After a review of the documents submitted, the auditor concluded that they were inadequate to conduct a

[1] Although petitioner made z tape summaries for the entire audit period available for review, the auditor's workpapers include copies of z tapes for only two days in the audit period (October 29 and 30, 2006). Petitioner did not submit any z tapes into evidence.

detailed audit. Therefore, by correspondence dated May 9, 2009, an additional request for necessary books and records, including cash register tapes, was made.

5. The auditor determined that the z tapes were insufficient since they did not demonstrate individual sales, but rather, summarized daily activity. Since there was no record of individual sales, there was no way to determine the drink type sold, the quantity or the serving size, which made it impossible to verify. The auditor claimed that the day sheets provided to him did not reconcile with the z tapes. He stated that he was unable to verify that every item sold had been entered into the register or whether every transaction made was displayed on the z tapes. Without evidence of individual sales, the auditor was unable to determine the price or number of items sold. Sales could not be traced through to a general ledger or the day sheets.

6. On June 21, 2007, the auditor met with Mr. Bersani and his representative at the bar. The auditor reviewed the physical layout and overall area, and noted that the business operated from 11:30 a.m. to 4:00 a.m., seven days a week. The auditor also viewed photos of signs advertising specials, but noted that there were no dates or information from actual records concerning the specials advertised. At this meeting, the auditor was given the completed audit questionnaires and the bar fact forms.

7. The auditor concluded that the records produced were insufficient for the conduct of a detailed audit. Therefore, he reviewed purchases of beer and liquor for a test period of September 1, 2008 through November 30, 2008. This quarterly period was chosen based upon the availability of, and the ability to verify, the records produced. The auditor reviewed purchase information provided by Mr. Bersani as well as third-party purchase information obtained. The auditor computed a markup percentage for beer and liquor using Mr. Bersani's bar price list of

December 4, 2006, because this price list was the closest in time to the test quarter. It listed prices and specials, and the auditor had all the purchases for that quarter. Although the comp sheets showed higher prices than those reflected on the bar price list and none of the prices were able to be verified, the auditor used the bar price list in an attempt to be reasonable.

8. The auditor determined markup percentages of 2.92 on beer and 3.27 on liquor. Application of the markup percentages to purchases and projection over the entire audit period, resulted in a determination of additional sales and use taxes due. Expense purchases and capital acquisitions were reviewed in detail, and the additional tax in the amounts of $2,869.57 and $164.02, respectively, were determined. Penalties were originally imposed based on petitioner's failure to maintain and provide proper records and upon the underreporting of tax due.

9. The initial audit findings were sent to petitioner's representative in February of 2008. The auditor continued to work with petitioner and made many adjustments to his original audit findings. These adjustments included the following:

- removal of Bison purchases during the test period;

- adjustment for Red Bull and other mixers;

- happy hour and 3-for-2 Sunday specials;

- Crown Royal specials;

- 50-50 split per bottle for mixed drinks/shots with regular shot size granted at 1 ounce and shot size for mixed drink granted at 1 ½ ounces regardless of type;

- an overall 15% allowance (reduction) for comps, spillage and specials that could not be otherwise quantified;

- snacks were not assessed; and

- soda was not marked up or included in the computations.

10. Ultimately, by letter of October 31, 2008, the representative stated that petitioner was in agreement with the audit findings as long as the imposed penalties were abated. This agreement, including the waiver of penalties, was confirmed by discussion with the representative. By letter dated November 12, 2008, the Division mailed a statement of proposed audit change for sales and use tax (statement of proposed audit change or consent) to petitioner and his representative, along with audit schedules showing additional tax and interest due by quarterly periods. The auditor noted that, for settlement purposes only, no penalty was included and only minimum interest had been applied. The statement of proposed audit change set forth the tax amount due of $79,441.78, plus minimum interest. All penalties were abated.

11. Petitioner failed to return the executed statement of proposed audit change or make payment by the agreed upon date. The auditor followed up with a telephone call to the representative. The representative directed the auditor to meet Mr. Bersani at the place of business in order to retrieve the executed statement of proposed audit change. On November 17, 2008, petitioner executed the form and agreed to the tax amount of $79,441.78 plus interest in the amount of $24,375.10 for the audit period March 1, 2004 through February 28, 2007. The preprinted language on the statement of proposed audit change, directly above Mr. Bersani's signature, by which petitioner agreed to the assessment, states, in pertinent part, as follows:

> "I consent to the assessment of the tax and penalties, if any, and accept the determination of any amount to be credited or refunded as shown above, plus any interest provided by law. By signing this consent, I understand that: (1) I am waiving my right to have a Notice of Determination issued to me, and I am also waiving my right to have a hearing to contest the validity and amount of the tax, interest, and any applicable penalties determined and consented to. (2) If I later wish to contest the findings in this agreement, I must first pay the full amount shown due, and file an application, within the time provided by law, for a credit or

> refund. . . . I may consider these findings final unless I hear from the department to the contrary within 60 days after the department's receipt of this signed consent."

12. On November 19, 2008, petitioner's representative forwarded a check to the auditor for the amount agreed upon. The letter accompanying the check indicates that the representative was pleased that the parties were able to resolve the matter without a formal hearing.

13. On December 9, 2008, a notice and demand L-031169376 was issued to petitioner that assessed sales and use tax in the amount of $79,411.78 plus interest in the amount of $24,375.10. The notice reflected payment of $103,816.88 by showing a zero balance due.

14. An application for refund, dated November 17, 2010, was filed on behalf of petitioner that alleged the audit method was unreasonable. Although the refund claim form purports to seek the entire $103,816.88 amount paid by petitioner in November 2008, the explanation of the claim expressly excludes $3,033.59 of tax due in connection with the "expense portion" of the audit (i.e., $2,869.57 in tax due on expense purchases plus $164.02 in tax due on capital purchases) and requests that the refund be reduced accordingly. The original auditor was assigned the refund claim for his review.

15. The auditor reviewed the letter and attachments that comprised the application for refund. The auditor determined that no additional records or information were submitted to substantiate the claim. The auditor found that the calculations used to support the application for refund were unsupported by documents. In fact, the auditor recomputed the tax determined due by using the prices listed on the bartender comp sheets in place of the tax determined on audit and the tax determined from using the comp sheets exceeded the tax determined on audit.

16. By letter dated July 25, 2011, the Division denied the refund claim since petitioner

presented no additional records and provided no reasonable basis that warranted any adjustment to the additional sales tax due on audit. The denial letter by the Division noted that an alternate analysis conducted by the auditor using petitioner's own records (i.e. the comp sheets) actually resulted in a higher tax liability than that determined on audit and set forth in the statement of proposed audit change.

17. Thereafter, petitioner timely filed its petition with the Division of Tax Appeals contesting the denial of its refund claim. In its petition, petitioner alleges that the statement of proposed audit change had been executed by Mr. Bersani under duress and he was misled by the Division. Petitioner also claims that the audit methodology was unreasonable and the result erroneous. A formal hearing ensued.

18. At the hearing, the Division presented the auditor as a witness. He testified concerning the performance of the audit, the determinations made and the basis for the determination of tax due. The auditor described the request for books and records and which documents were not provided from the requested list. The auditor testified to the inadequacies and unexplained discrepancies in the records that were produced, including the lack of reliable and complete sales records and the inconsistencies between the comp sheets and the bar price lists. The auditor testified to the deficiencies in the z tapes that made reliance on them impossible.

19. The auditor reviewed affidavits that were provided by bartenders who were employed by Mr. Bersani during the audit period. The auditor noted that information contained within the affidavits were unsubstantiated and in contradiction to information provided by Mr. Bersani on audit. Furthermore, the auditor noted that the prices listed on the comp sheets were not

consistent with statement made within the affidavits. In addition, the auditor reasoned that the sales of specials could not be quantified based upon the information presented, due to the fact that it was not possible to know what dates particular specials had been in effect. Nevertheless, the auditor testified that he did make allowances for specials listed on the bar price sheets.

20. The auditor described how he determined the amount of additional tax assessed. The Division submitted into evidence the audit log, audit report, and audit workpapers, which included the schedules for computation of additional tax. The auditor described in detail the negotiations and adjustments made to his calculations and the circumstances surrounding the execution of the statement of proposed audit change.

21. Mr. Bersani also testified at the hearing. Mr. Bersani was questioned regarding his execution of the statement of proposed audit change. He did confirm that his representatives had continuing discussions and negotiations with the auditor throughout the audit. It was clear from his testimony that the auditor did not exert any pressure on him and that at no point was he under any duress to execute the agreement.

22. Mr. Bersani explained the business operations as well as his recollection of the drink specials. He explained that the manager of the business during the audit period was Mary Wagoner. The other employees were bartenders. Petitioner did not prepare food or have wait staff.

23. Mr. Bersani testified that he was involved with setting drink prices along with his manager. However, Ms. Wagoner was solely responsible for entering and altering the drink prices in the cash register system. With respect to drink specials, Mr. Bersani claimed that Ms. Wagoner and other employees would apprise him of the types of specials being offered by

similar establishments in the area. Mr. Bersani would discuss this with Ms. Wagoner and offer drink specials in order to remain competitive with the other businesses. In order to advertise the drink specials offered by petitioner, Mr. Bersani created drink cards that would entitle the holder of the card to obtain his or her first drink for free. Mr. Bersani stated that using the cards was a cheaper alternative to print advertisements.

24. Mr. Bersani testified to extensive renovations to the business that were completed during the audit period. Petitioner introduced several pictures of the bar that showed the renovations completed. He detailed the types of renovations and was questioned regarding the impact of the renovations on his business. Although he mentioned that the clientele increased and, in turn, purchased more upscale drinks, his testimony was general in nature and was based upon his recollection and not on specific documentation reflecting an increase in sales or in more expensive drink purchases.

25. Mary Wagoner was present to testify as to her employment by petitioner as well as her job duties during the audit period. Originally hired as a bartender, she was promoted to manager and held that position throughout the audit period. Included in her duties at the business were making daily deposits and the hiring and firing of employees, as well as taking any disciplinary actions that arose. Ms. Wagoner was the exclusive programmer for the cash registers used by the business. She would make decisions regarding which vendors to use in order to acquire the best pricing for Mr. Bersani.

26. During the audit of petitioner, Mr. Bersani and his representatives did not inform the auditor that Ms. Wagoner was the person who was in charge of programming the cash registers. Moreover, although Mr. Bersani testified that he never performed any bartending duties and that

Ms. Wagoner was present during the auditor's visit to petitioner, Mr. Bersani and his representatives did not have Ms. Wagoner conduct the pour demonstration. During the hearing, Ms. Wagoner was asked repeatedly about her programming of the cash registers. She was questioned regarding her notes for programming and why the documents relating to the cash registers were not produced during audit. Her testimony was that she was never asked by Mr. Bersani or petitioner's representatives to produce the documents despite being the sole employee charged with programming the cash register with pricing details throughout the audit period.

27. The documents demonstrating the cash registers and the items programmed into the registers are exhibits 8 and 9. None of the documents are dated. Each page is a replica of a cash register grid. The represented grids have 16 columns and 10 rows. The seven pages that comprise exhibit 9 contain minimal pricing information. Exhibit 8 also has 16 columns and 10 rows. The column headings are different on both exhibits. Also, it is noted that the second column is entitled "DETL FEED." However, it was not utilized by petitioner throughout the audit period to provide a detail of sales on the register tapes.

28. Ms. Wagoner testified about specials offered by petitioner throughout the audit period. She discussed ladies' night specials and game specials for both Buffalo Bills and Buffalo Sabres games. There was documentation submitted regarding a "Spin the Wheel" promotion at the bar that accompanied certain drink specials as well as information taken from petitioner's web site. Ms. Wagoner referenced posters that were hung at the establishment during the years in issue that reflected certain drink specials. However, there were no specific dates for any of the specials promoted by petitioner during the years under audit. Furthermore, there was no evidence presented that could verify the quantity sold or cost per drink during the audit period.

29. Petitioner also presented the testimony of David Gross, who is a sales tax consultant. He was not involved with the audit of petitioner, but was retained by Mr. Bersani to review the auditor's workpapers in this matter after remittance of payment pursuant to the statement of proposed audit change. Basically, Mr. Gross performed an analysis that utilized an alternative markup method to that utilized by the auditor to render his own estimate of petitioner's liability. At no point did Mr. Gross testify that he reviewed accurate books and records of petitioner for the audit period. In fact, Mr. Gross acknowledged that his estimation was performed by using estimates as a starting point.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that, under the Tax Law, the audit herein is properly deemed to have a rational basis as a consequence of petitioner's consent to the proposed assessment as set forth in the statement of proposed audit change. The Administrative Law Judge thus rejected petitioner's argument that the audit method lacked a rational basis. Given petitioner's consent to the assessment, the Administrative Law Judge determined that petitioner had the burden to prove its correct sales tax liability to establish entitlement to a refund. The Administrative Law Judge found that the evidence presented was insufficient to meet petitioner's burden because such evidence merely purports to show that the Division should have used a different method of estimation. The Administrative Law Judge thus denied the petition.

SUMMARY OF ARGUMENTS OF EXCEPTION

Petitioner continues to argue that the Division's use of a test period audit method lacked a rational basis. Petitioner asserts, contrary to the Administrative Law Judge's factual findings and legal conclusions, that its records were sufficient to perform a detailed audit and that,

accordingly, the Division's use of a test period purchase mark-up method was improper.

Petitioner also contends that the audit method employed by the Division was unreasonable and cites several purported errors in the methodology. Specifically, petitioner contends that the mark-up improperly included non-alcohol items; that the auditor failed to account for promotions; that the auditor used incorrect numbers for both purchases and sales; that the assertion of additional tax due on expense purchases was in error; and that the auditor failed to take into account other available price lists (apart from the December 4, 2006 price list that was used). Petitioner contends that the combination of these errors resulted in an erroneous determination of tax due. Petitioner also contends, as it did below, that an observation audit method would have been more appropriate. In accordance with its arguments regarding purported audit mistakes, petitioner asserts that the Administrative Law Judge made many erroneous findings of fact and requests findings of fact consistent with such arguments.

Petitioner also requests several findings of fact related to the circumstances surrounding Mr. Bersani's execution of the statement of proposed audit change. According to petitioner, the Division pressured Mr. Bersani to sign the statement and Mr. Bersani did so without a full appreciation of the consequences.

The Division contends that Mr. Bersani's execution of the statement of proposed audit change established the rational basis for the assessment and that, accordingly, the audit method and audit computations are no longer issues in this matter. The Division further asserts that petitioner had the burden to prove that its actual tax liability was less than that to which it agreed in the statement of proposed audit change and that petitioner failed to meet this burden.

The Division also contends that petitioner failed to demonstrate coercion or duress in the

execution of the consent. The Division notes that petitioner was represented throughout the audit by its accountant and attorneys, and that the assessment amount in the statement of proposed audit change was the result of negotiations between petitioner's representatives and the Division. The Division asserts that petitioner's claim that Mr. Bersani was coerced into signing the statement of audit change is without factual support in the record. In the absence of any such coercion to nullify the consent, the Division asserts that there is no basis to contest the audit method.

Turning to the audit, the Division contends that petitioner failed to produce adequate books and records and that the Division was, therefore, entitled to estimate petitioner's sales tax liability. The Division further contends that petitioner failed to prove that the purchase mark-up audit method was unreasonable. The Division takes specific issue with petitioner's various claims of error in the audit process.

Finally, the Division contends that petitioner failed to meet the requirements for a refund. That is, the Division asserts that petitioner has failed to provide sufficiently detailed records for the Division to verify its taxable sales and thereby determine its exact tax liability. The Division observes that petitioner did not present a compilation of its total sales during the audit period.

OPINION

We address first the facts and circumstances surrounding Mr. Bersani's execution of the statement of proposed audit change and the legal consequences thereof. The record unequivocally shows that petitioner's then-representatives, both attorneys, sought to conclude the audit pursuant to a negotiated settlement and that the agreed terms of the settlement were contained in the statement of proposed audit change. Specifically, the October 31, 2008 and

November 19, 2008 letters from the representatives demonstrate their assent to the amount of the proposed assessment and their understanding that the execution of the consent, along with Mr. Bersani's payment, would end the audit. The record also makes clear that the assessment was negotiated. That is, the Division agreed to some audit adjustments (***see*** finding of fact of 9) and to forbear from asserting penalties (***see*** finding of fact 10) in exchange for petitioner's consent to the assessment. Considering that the October 31, 2008 letter plainly expresses agreement with the terms of the consent, it is clear that petitioner had ample opportunity to discuss the consequences of signing the statement of proposed audit change with his representatives before he actually executed the document on November 17, 2008. Additionally, the November 19, 2008 letter makes no complaint that the auditor induced Mr. Bersani to sign the consent against his representatives' advice; rather, the letter indicates satisfaction with the audit process. Under such circumstances, we agree with the Administrative Law Judge's finding that Mr. Bersani was not under any duress or subject to any coercion by the Division when he signed the consent (***see Matter of BAP Appliance Corp***., Tax Appeals Tribunal, May 28, 1992).

In reaching the foregoing conclusion, we accept the Administrative Law Judge's finding that the check in payment of the assessment was sent to the auditor as indicated in the November 19, 2008 letter, notwithstanding other evidence in the record suggesting that the check was given to the auditor by Mr. Bersani. Considering that the parties had agreed to conclude the audit, the precise details regarding how and when the payment was made are trivial. Far more significant are the clear facts in the record establishing that petitioner's representatives and the Division resolved the audit through a negotiated settlement and that the consent reflected that negotiation. Furthermore, we disagree with petitioner's contention that the conflicting evidence on this point

impugns the auditor's credibility.

We also find insufficient evidence in the record to conclude that the auditor told Mr. Bersani that a tax warrant would be filed if the consent was not signed. As the Division noted in its brief, Mr. Bersani did not raise this point in his testimony at the hearing on September 18, 2014, during which he extensively discussed the circumstances surrounding his execution of the statement of proposed audit change and the payment. Rather, he first made this contention in his testimony on April 28, 2015, when the hearing was continued.[2] In our view, this circumstance weighs against the credibility of this claim. Moreover, the auditor denied ever having made such a statement. In any event, even if petitioner proved this factual claim, considering the context, i.e., that Mr. Bersani was signing the consent on the advice of petitioner's representatives, such a statement could not, in our view, reasonably give rise to a claim of duress or coercion.

By Mr. Bersani's execution of the consent to the tax and interest as set forth in the statement of audit change, such tax and interest was assessed against petitioner pursuant to Tax Law § 1138 (c) (***see Matter of SICA Elec. & Maintenance Corp.***, Tax Appeals Tribunal, February 26, 1998). The Division thus did not issue a notice of determination to petitioner pursuant to Tax Law § 1138 (a). Accordingly, given the consent and the payment of the assessment, petitioner necessarily protested the liability by filing a claim for refund pursuant to Tax Law § 1139 (a) (***see also*** 20 NYCRR 534.1 [b] [1]). The Division's denial of petitioner's refund claim gave rise to a right to file a petition in the Division of Tax Appeals (Tax Law § 1139 [b]).

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[2] The hearing before the Administrative Law Judge began on September 18, 2014, continued on April 28, 2015 and concluded on April 29, 2015.

The fact that the present matter is contested as a refund claim denial under Tax Law §1139 (b) following a consent to assessment under Tax Law §1138 (c) is significant. This procedural posture means that the rational basis of the assessment has been established and that petitioner has effectively conceded the reasonableness of the audit method and audit computations (***see Matter of SICA Elec. & Maintenance Corp.*** ["We conclude that the signature on the consent . . . established the rational basis for the assessment . . . [and] the audit method and audit computation ceased being an issue."]).[3]

Although audit issues are no longer in play, petitioner may nonetheless prevail in the present matter if it can prove, by clear and convincing evidence, that its actual sales tax liability was less than that to which it consented and thereby establish its right to a refund (Tax Law § 1139 [c]; 20 NYCRR 534.1 [b]; ***see also Matter of SICA Elec. & Maintenance Corp.***). Here, this means that petitioner must provide records sufficient to fairly and accurately substantiate its taxable sales (and thus its sales tax liability) during the audit period (***see Raemart Drugs, Inc. v Wetzler***, 157 AD2d 22, 24 [3rd Dept 1990]; 20 NYCRR 534.2 [a] [2] [i] [h]).

Petitioner has clearly failed to meet its burden.

Considering that petitioner's refund claim seeks the amount of additional tax on sales to which it consented, it would appear that petitioner asserts that its sales tax returns were correct as filed. The record, however, fails to disclose how such returns were prepared. Furthermore, as

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[3] We reach this conclusion notwithstanding that the parties framed the first issue in this matter as whether the audit method was reasonable (***see*** "***Issues***" ***infra***). We note also that the present matter contrasts with the more common situation following a sales tax audit where a petitioner protests a notice of determination issued under Tax Law §1138 (a). In that circumstance, the propriety of the audit method (including whether such method has a rational basis) and the reasonableness of the audit result are often fundamental issues (***see e.g. Matter of Majestic Deli Grocery, Inc.***, Tax Appeals Tribunal, April 14, 2017). By signing the consent, petitioner "gave up its right" to raise these issues (***Matter of SICA Elec. & Maintenance Corp.***).

the Division correctly notes, petitioner has not, at any point in this proceeding, offered any computation of its asserted "correct" taxable sales during the audit period. Rather, as noted previously, petitioner asserts that the use of a test period purchase markup lacked a rational basis and that, accordingly, such audit method was unreasonable. Petitioner cites several purported errors in the methodology and argues that an observation audit method would have been more appropriate. As discussed previously, however, under this Tribunal's holding in ***Matter of SICA Elec. & Maintenance Corp.*** petitioner has conceded these issues. Moreover, even if the audit method was properly at issue, we agree with the Administrative Law Judge and the Division on exception and find that petitioner's claims of errors in the audit are unfounded.

Petitioner also contends that its records were sufficient to perform a detailed audit. If proven, petitioner could thereby establish its total sales during the audit period and its corresponding tax liability. This claim is unsupported by the record, however, as petitioner did not maintain or make available records of individual sales, such as cash register tapes, as required pursuant to Tax Law § 1135 (a) and 20 NYCRR 533.2 (b). Petitioner's z tapes, which merely summarize daily sales activity and which were made available to the auditor, are not sufficient to substantiate petitioner's taxable sales (***see Matter of Evangelista***, Tax Appeals Tribunal, September 27, 1990). As noted, the z tapes provide no information regarding the type of drink sold, the quantity of a particular drink sold, or the serving size of a drink; they were insufficient to verify that all items sold had been entered into the register; and they were insufficient to determine the price of specific items sold (***see*** finding of fact 5). Moreover, contrary to petitioner's contention, the requirement to maintain records of individual sales remains, even where all sales are taxable (***see Matter of Evangelista***). In any event, the record contains z tapes

for only two days in the audit period (***see*** finding of fact 4). Accordingly, even if the z tapes were sufficient, petitioner failed to submit them in evidence.

Finally, we find that we lack jurisdiction to consider whether petitioner is entitled to a refund of that portion of the assessment attributable to expense and capital purchases (***see*** finding of fact 8). This portion of the assessment was expressly excluded from petitioner's refund claim (***see*** finding of fact 14). As petitioner did not request a refund with respect to this portion of the assessment, there is no refund denial giving rise to petition rights in the Division of Tax Appeals (***see*** Tax Law § 1139 [b]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of RJB Slick's, Inc. n/k/a RKB Ventures, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of RJB Slick's, Inc. n/k/a RKB Ventures, Inc. is denied; and

4. The denial of petitioner's claim for refund, dated July 25, 2011, is sustained.

DATED: Albany, New York
February 8, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner