STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**GRAND CENTRAL JT VT** :

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 June 1, 2008 through August 31, 2010. :

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DECISION
DTA NOS. 825201
AND 824560

In the Matter of the Petition :

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**GRAND CENTRAL JT VT** :

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 June 1, 2009 through August 31, 2010. :

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Petitioner, Grand Central JT VT, filed an exception to the determination of the Administrative Law Judge issued on October 30, 2014.[1] Petitioner appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument, at petitioner's request,

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[1] Petitioner did not file an exception to the order of the Administrative Law Judge issued on March 5, 2015, which denied petitioner's motion to reopen the record or for reargument. Therefore, such order is not addressed in this decision.

was heard on September 10, 2015, in Albany, New York, which date commenced the six-month period for the issuance of this decisions. Commissioner Tully took no part in the consideration of this decision.

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

## *ISSUES*

I. Whether it was appropriate for the Division of Taxation to use an indirect audit methodology.

II. Whether, assuming the use of an indirect audit methodology was proper, petitioner has shown error in the audit method or result.

III. Whether petitioner has established any facts or circumstances warranting the reduction or abatement of penalties or cancellation of the notices imposing such penalties.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except for findings of fact 10 and 14, which have been modified to more accurately reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. Petitioner, Grand Central JT VT, operates a number of retail locations in New York City, making both taxable and nontaxable sales of various bakery items, prepared foods and beverages. During the relevant period, petitioner's outlets included several located in Grand Central Terminal, Pennsylvania Station, and the Port Authority.

2. Petitioner was the subject of a sales and use tax audit by the Division of Taxation (Division) for the period September 1, 2005 through May 31, 2008 (First Audit). In the First Audit, the Division determined that the records provided by petitioner were inadequate to

perform a detailed audit. As a result, after discussion, petitioner executed a consent form in which the parties agreed that, as a proper indirect method and estimate, 29% of petitioner's gross sales were subject to tax, rather than the 24.33% figure used on the filed sales tax returns. Using this methodology, the Division made an adjustment that resulted in additional sales tax due in the amount of $196,088.92 for the period.[2] On June 23, 2009, petitioner, by its president, signed the statement of proposed audit change and paid the liability in full.

3. On December 7, 2010, the Division mailed a letter to petitioner scheduling a field audit pertaining to petitioner's sales and use tax liability for the subsequent period, i.e., June 1, 2008 through August 31, 2010 (Second Audit). The Second Audit was to commence on December 28, 2010. The appointment letter stated that "[y]ou must show ***all*** your sales and use tax books and records to the auditor" (emphasis in original). Accompanying this audit appointment letter was a records requested list, further identifying the records sought for review, 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, cash receipts and disbursement journals, depreciation schedules, lease contracts, utility bills, guest checks and cash register tapes. The meeting between petitioner and the Division's auditor did not occur as scheduled based on petitioner's request, and the requested records were not provided.

4. On December 29, 2010, the Division received a refund claim from petitioner for the First Audit seeking a refund of tax in the amount of $196,088.92, plus interest. This refund

[2] The actual adjustment based on additional sales was an increase in liability of $181,554.83. The remainder of the assessed amount emanated from additional capital asset acquisitions and taxable expense purchases.

claim was denied by the Division, and petitioner filed a petition with the Division of Tax Appeals in April 2011 (Grand Central I). The substance of petitioner's claim in Grand Central I was that it 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 that petitioner's sales records were inadequate. In support of its claim, however, petitioner did not introduce many records from the First Audit period, as they had been destroyed. Instead, at the hearing held on June 26, 2012, it offered register tapes from three dates during the Second Audit period (September 18, 2009, March 17, 2010 and May 17, 2010), some of which were illegible. Ultimately, the petition in Grand Central I was denied and the refund denial sustained by determination of Administrative Law Judge Dennis M. Galliher (***see Matter of Grand Central JT. VT.***, Division of Tax Appeals, July 3, 2013). In Grand Central I, the Administrative Law Judge specifically found petitioner's records to be inadequate and the Division's audit method of estimating taxable sales as a percentage of gross sales to be reasonable. Petitioner did not file an exception to Grand Central I, making it a final determination pursuant to Tax Law § 2010 (4).[3]

5. On February 11, 2011, a second field audit appointment letter was sent to petitioner with regard to the Second Audit, rescheduling the meeting for March 9, 2011 and requesting the same materials. Again, this meeting was canceled at the request of petitioner, and the records were not provided.

6. A third and final field appointment letter was sent to petitioner on April 5, 2011. This letter rescheduled the meeting for April 20, 2011 and reiterated the document request. On

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[3] Pursuant to State Administrative Procedure Act § 306 (4), "[o]fficial notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency." A court may take judicial notice of its own prior proceedings (***Matter of Kolovinas***, Tax Appeals Tribunal, December 28, 1990; ***see e.g. Matter of A.R.***, 309 AD2d 1153 [2003]; CPLR 4511). Hence, official notice is taken of the determination in ***Matter of Grand Central JT VT***.

April 6, 2011, petitioner's representative, Michael Buxbaum, sent a letter to the Division seeking another postponement of the meeting and agreeing to execute a waiver extending the statute of limitations for the Second Audit. In seeking the postponement, Mr. Buxbaum explained that the First and Second Audits were related and, pursuant to the Division's audit guidelines, a delay was warranted as the First Audit was the subject of a pending hearing.

7. On April 21, 2011 petitioner was provided with a letter from the Division informing it that the records provided to date were inadequate to allow for a sales and use tax audit. Consequently, if adequate records were not provided within 30 days of the letter, the Division stated that penalties would be imposed pursuant to Tax Law § 1145 (i) for petitioner's failure to maintain or provide records necessary to verify tax liability. Petitioner's response again centered around the need for delay based on the hearing involving the First Audit and did not provide the requisite books and records.

8. A waiver was signed by petitioner on May 16, 2011 and extended the statute of limitations for issuance of an assessment in the Second Audit to June 20, 2012.

9. The Division requested on September 23, 2011 that an observation test be permitted because petitioner had failed to provide the requisite books and records. On that same date, petitioner, by letter from Mr. Buxbaum, refused to permit such a test.

10. Petitioner's sales tax returns for the period September 1, 2008 through August 31, 2010, as filed, listed taxable and gross sales. The taxable ratio reported on these returns varied between 22.48% and 25.67% of gross sales. The Division's auditor accepted the reported gross sales from petitioner's sales tax returns and federal income tax returns as accurate. Absent adequate records from petitioner, however, the Division could not verify petitioner's reported taxable sales figures. Hence, the Division used an indirect method and applied the same 29%

figure, which had been agreed upon as reasonable by petitioner in the First Audit, to the gross sales reported during the Second Audit period in order to estimate taxable sales. The 29% taxable sales ratio was a negotiated percentage. The taxable sales ratio as calculated by the Division was originally higher, but it agreed to 29% to resolve the matter. The Division's original calculations were based upon an analysis of 2007 purchases prepared by the auditor and the auditor's opinion of the taxable ratio of certain of petitioner's stores, based upon his own personal observations of the stores, as well as the experience of the auditor's supervisor.

11. Petitioner's sales tax returns for the quarter June 1, 2008 through August 31, 2008, however, did not report any gross sales. Consequently, the Division estimated that gross sales for that quarter were the average of those reported on petitioner's sales tax returns for the remaining quarters during the Second Audit period.

12. Applying the 29% ratio to petitioner's gross sales after making the adjustment described in Finding of Fact 11 resulted in total taxable sales of $11,465,960.00, or an increase of $2,037,446.00 over taxable sales reported. Subjecting this additional amount of taxable sales to tax resulted in additional sales tax due in the amount of $175,857.99 for the Second Audit period.

13. On the basis of the Second Audit, the Division issued to petitioner notice of determination number L-037026097, dated December 8, 2011, setting forth additional tax liability for the period June 1, 2008 through August 31, 2010 in the amount of $175,857.99, plus penalties pursuant to Tax Law §1145 (a) (1) (i) and (vi), and interest (tax notice).

14. In addition, the Division issued to petitioner a notice and demand dated August 11, 2011, seeking penalties pursuant to Tax Law § 1145 (i) in the amount of $21,000.00 for the period June 1, 2009 through August 31, 2010 for failure to maintain or make available adequate

records (notice and demand).[4] The petition protesting the notice and demand was received by the Division of Tax Appeals on August 22, 2011. The petition protested the erroneous assessment of the Tax Law § 1145 (i) penalty by the issuance of a notice and demand. The petition asserted that as petitioner had not consented to the penalty, the Division was required to assess the penalty by means of a notice of determination.

On August 24, 2011, the Division of Tax Appeals, on its own initiative, and unbeknownst to petitioner, contacted the Division for a copy of the proper statutory notice. In a series of emails among Division personnel following this contact and occurring during August of 2011, it was determined by the Division that the notice and demand was issued in error. The Division described the error as the incorrect uploading of the information regarding the penalty in that the uploaded information indicated that petitioner had agreed to the penalty, which clearly the Division knew petitioner had not. The emails indicated that the various Division personnel involved agreed that the proper course of action was to cancel the notice and demand and issue a notice of determination. They further agreed that these actions could wait until the auditor returned from vacation in September.

This notice and demand was canceled by the Division on September 29, 2011 and replaced by notice of determination number L-036671264, dated September 30, 2011, asserting the same penalty (penalty notice). It was not until after receipt of the penalty notice, that the Division of Tax Appeals, by letter dated October 18, 2011, acknowledged to petitioner that it had received the petition on August 22, 2011.

[4] Tax Law § 1145 (i) became effective April 7, 2009. Thus, the quarter beginning June 1, 2009 was the first in which such penalty was available.

15. At the hearing, petitioner provided the testimony of its accountant, Danny Stanton, CPA, detailing his review of various tapes from petitioner's cash registers at several stores at Grand Central Terminal, including one called Market Place. The review covered sales at the Grand Central locations on September 2, 3, 5 and 8, 2008. A total of five rolls of register tapes from those dates were reviewed and submitted into evidence, along with an undated price list from one of petitioner's locations, and Mr. Stanton's written summary and estimate. No reason was specified for choosing the particular dates noted above. This material was also first provided to the Division on or about August 29, 2013, approximately two weeks prior to the hearing in the instant case. Petitioner did not introduce any additional register tapes, guest checks, invoices, or other source records into evidence.

16. Mr. Stanton acknowledged that petitioner's actual taxable ratio of gross sales for the Second Audit period was higher than what was reported on its sales tax returns. In reviewing the tapes for the above-noted dates, Mr. Stanton attempted to determine the taxability of each transaction 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. Based on his review, he estimated that the correct taxable ratio was probably about 25% to 26% of gross sales, rather than 29%. Part of his rationale was that Market Place did not sell taxable goods, a fact he claimed was ignored by the Division.

17. Mr. Stanton also testified that petitioner's sales tax returns were prepared, not based on source records such as guest checks or invoices, but from an analysis of the register tapes, petitioner's purchases, and the sales histories of the various retail locations operated by petitioner. Mr. Stanton added that petitioner had been preparing its sales tax returns using this estimating method for many years, including those involved in the First Audit.

18. Petitioner maintains that it produced the cash register tapes for the Second Audit period to the Division as part of its presentation at the hearing for Grand Central I and, thus, was compliant. Nonetheless, none of the register tapes presented in Grand Central I were placed in evidence in the instant matter. In lieu of the actual tapes, petitioner placed into evidence two photographs, each depicting numerous unidentifiable rolled cash register tapes in several boxes, all purporting to be from the Second Audit period. As noted, petitioner placed into the record the five register tapes referenced in finding of fact 15.

19. At the hearing, the Division offered the testimony of its auditor, Yao Djatsou, and his supervisor, Ramon Vasquez. Both Messrs. Djatsou and Vasquez testified that petitioner failed to provide adequate books and records to the Division during the course of the Second Audit. They added that the register tapes submitted at hearing in Grand Central I did not adequately identify the items sold or the taxable nature of each sale to allow for verification of petitioner's returns.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge explained that the Division utilized an indirect audit methodology to determine the amount of tax asserted as due in the tax notice. He further explained that in order for such a method to result in a valid assessment of tax, the Division first had to request petitioner's records, and then examine petitioner's records in order to determine whether they were adequate for the purpose of conducting a complete audit.

The Administrative Law Judge concluded that the Division had properly requested petitioner's records and that petitioner had failed to provide the Division with the records it was required by law to maintain. In reaching this conclusion, the Administrative Law Judge noted that: (1) petitioner provided no records during the Second Audit; (2) the records for the time period covered by the Second Audit that were produced at the hearing in Grand Central I

regarding the First Audit, and the five cash register tapes placed into evidence at the hearing held in the present matter were inadequate to determine the taxable status of the items sold; and (3) the photographs submitted into evidence by petitioner of rolled cash register tapes in boxes did not constitute the provision of records adequate to conduct an audit. The Administrative Law Judge also found petitioner's assertions regarding the truthfulness of the testimony of the Division's witnesses on the issue of whether records were produced by petitioner in Grand Central I to be unsupported by the record and not relevant to the issue of whether petitioner produced records in the present matter. Thus, the Administrative Law Judge concluded that the Division was entitled to estimate petitioner's taxable sales for the period covered by the Second Audit.

Having reached this conclusion, the Administrative Law Judge also concluded that the use of 29% of gross sales as the taxable sales ratio was reasonable in that petitioner initially agreed to this percentage in the First Audit, and in Grand Central I, the Administrative Law Judge found the 29% taxable sales ratio to be reasonable.

The Administrative Law Judge concluded that petitioner had failed to meet its burden to show that the Division's method of calculating its tax liability was unreasonable. The Administrative Law Judge found petitioner's argument that, by comparing the prices of the items sold listed on its cash register tapes to a price list, it was possible to determine what a particular item was, and therefore, whether the item was taxable or nontaxable, was not persuasive. The Administrative Law Judge explained that the record did not clearly reflect that the price list in evidence was in effect, or remained unchanged, throughout the Second Audit period. Furthermore, the Administrative Law Judge noted that there were only five cash register tapes introduced into evidence and some of those were illegible. The Administrative Law Judge

pointed out that the taxpayer did not even file its returns using the method it was espousing as an accurate method, but rather filed its returns utilizing a completely different estimated basis. Finally, the Administrative Law Judge found that the estimated liability offered by petitioner to show that the Division's estimated liability was incorrect was insufficient as a matter of law to overturn the Division's estimate of petitioner's tax liability.

With regard to the penalty asserted by the Division under Tax Law § 1145 (i) for failure to maintain or provide the Division with required records, the Administrative Law Judge found no reasonable cause for petitioner's failures. Furthermore, the Administrative Law Judge found the Division's incorrect issuance of a notice and demand to be harmless error in that the Division timely corrected its mistake by canceling the notice and demand and issuing the penalty notice. Therefore, the Administrative Law Judge concluded that petitioner had an opportunity to challenge the correct notice and was not prejudiced in any manner. With regard to the penalties imposed under Tax Law § 1145 (a) (1) (i) and (vi), the Administrative Law Judge found that petitioner had offered no evidence that would warrant reasonable cause to cancel these penalties.

***SUMMARY OF ARGUMENTS ON EXCEPTION***

Petitioner asserts, citing ***Raemart Drugs v Wetzler***, 157 AD2d 22 (1990), that it maintained and had available a complete set of books and records that would have enabled the Division to calculate an exact amount of tax due in Gand Central I, but that the Division refused to conduct such an audit because it would have been time consuming.

Petitioner also asserts that the method used by the Division to estimate petitioner's taxes, i.e., the taxable sales ratio utilized in Grand Central I, is not reasonable in that it is not possible for the Division of Tax Appeals to review the basis of the estimate because it was the result of a settlement negotiation.

Petitioner asserts that the failure of the Division to place the Second Audit on hold pending a final determination in the First Audit, and the Division's misconduct throughout both audits, prejudiced petitioner to such an extent that reasonable cause exists for the abatement of penalties assessed under Tax Law § 1145 (a) (1) (i) and (vi).

Finally, petitioner argues that the penalty assessed pursuant to Tax Law § 1145 (i) for failure to maintain or provide the Division with required records, should be canceled because the Division should not have required petitioner to produce records during the Second Audit when the First Audit was under appeal. Furthermore, petitioner argues that the penalty should be canceled because: (1) the proper notice asserting the penalty was not issued by the Division until after petitioner had filed a petition protesting the previous improper notice issued by the Division asserting the same penalty; and (2) that the proper notice was issued as a result of an improper ex parte communication between the Division of Tax Appeals and the Division.

The Division maintains that it was allowed to resort to an indirect audit method because petitioner produced no records during the Second Audit that could be used to verify petitioner's taxable sales. The Division argues that even if petitioner had produced the analysis and cash register tapes produced at the hearing during the First Audit, such tapes were also insufficient to verify taxable sales. The Division asserts that petitioner's reliance on ***Raemart Drugs v Wetzler*** is misplaced because petitioner in the present case did not submit other records that substantiated the amount of its taxable sales, and ***Raemart Drugs*** involved an arbitrary refusal to grant a refund where both parties agreed that petitioner had overpaid its taxes in the first place.

The Division argues that the mistaken issuance of a notice and demand rather than a notice of determination to assess the penalties regarding record keeping has not prejudiced petitioner in that petitioner received the relief it requested, i.e., the issuance of the proper notice and a hearing

on the merits of the penalty assessment. Furthermore, the Division argues that there were no improper ex parte communications between the Division of Tax Appeals and the Division because the Division of Tax Appeals had no jurisdiction over the notice and demand and, in any event, such communications pertained only to procedural details. The Division argues that such penalties were properly imposed because petitioner has offered no evidence to show that its failure to provide records to the Division on audit was due to reasonable cause.

Finally, the Division argues that the penalties assessed under Tax Law § 1145 (a) (1) (i) and (vi) for underreporting of sales tax due should be sustained because petitioner has not shown reasonable cause for its failure. Specifically, the Division asserts that lack of reasonable cause is exhibited by petitioner's submitting records at the hearing that were not provided during audit, and by petitioner's admission that it estimated the tax due on its filed returns. The Division asserts that even if it failed to follow its own audit guidelines by not holding the Second Audit in abeyance pending the final results of the First Audit, such a failure is not material to the penalty issue because the guidelines have no legal force or effect.

***OPINION***

There is no dispute that the audit methodology utilized in this matter was an indirect methodology not based solely on the books and records of petitioner. In order for the Division to utilize an indirect methodology, it must show that it made an adequate request for books and records for the entire audit period (***Matter of Christ Cella, Inc. v State Tax Commn.***, 102 AD2d 352 [1984]; ***Matter of Adamides v Chu***, 134 AD2d 776 [1987], ***lv denied*** 71 NY2d 806 [1988]). The Division must then make a through review of such records (***Matter of King Crab Rest. v Chu***, 134 AD2d 51 [1987]). If such review indicates that the records were so insufficient that it is virtually impossible for the Division to verify, in this case, the taxable amount of petitioner's

gross sales, and thus conduct a complete audit from which the exact amount of tax due can be determined, then the Division may resort to the use of external indices to estimate tax (***see Matter of Chartair, Inc. v State Tax Commn.***, 65 AD2d 44 [1978]).

Applying the foregoing principles to the facts herein makes clear that the Division's use of an indirect audit method was proper. As the record shows, the Division made several clear requests for petitioner's records. Pursuant to such requests, petitioner and its representative had several opportunities to produce records for the Division's review. On three separate occasions, meetings with the auditor were postponed at the request of petitioner's representative and no records were provided to the auditor. Petitioner was then provided with a letter from the Division stating that if adequate records were not provided within 30 days, penalties would be imposed pursuant to Tax Law § 1145 (i) for petitioner's failure to maintain or provide records adequate to verify petitioner's tax liability. Again, no records were provided to the auditor in response to this letter. The Division, having made an adequate request for petitioner's books and records for the period covered by the Second Audit, and having received no records in response thereto, was entitled to resort to the use of an indirect audit method. It is noted that the Division could not undertake any review of petitioner's records, much less a thorough review, as petitioner did not provide the Division with any records.

Indeed, we note that petitioner's assertions that it provided records to the Division, and that the Division failed to adequately review such records, are based upon the facts presented in Grand Central I and relate strictly to the First Audit. Accordingly, such arguments have no bearing on the Second Audit, which is the subject of the present case.

Having found that the Division's use of an indirect audit method was proper, we must next determine, consistent with sales tax audit principles, whether the method utilized by the

Division in the present matter was reasonably calculated to determine petitioner's sales tax liability (***see Matter of W.T. Grant Co. v Joseph***, 2 NY2d 196 [1957], ***cert denied*** 355 US 869 [1957]). We conclude that it was. The Division accepted the gross sales as reported on petitioner's sales tax returns and federal income tax returns as accurate. For the one sales tax quarter where petitioner's sales tax returns did not report any gross sales, the Division utilized an average of gross sales taken from petitioner's sales tax returns for the remaining quarters of the Second Audit period. Having received no information from petitioner that would assist it in determining the proper ratio of taxable sales, the Division requested that an observation test be permitted. Petitioner refused to permit such a test. The Division then determined petitioner's taxable sales by applying the 29% taxable sales ratio from the First Audit to petitioner's gross sales for the period covered in the Second Audit. The use of information from previous audits is an indirect audit method that has been approved in the past (***Matter of Burbacki***, Tax Appeals Tribunal [February 9, 1995] [use of observation test from previous audit]; ***Matter of C & L Systems, Inc.*** Tax Appeals Tribunal [August 11, 1994] [use of taxable sales ratio from previous audit]).

Petitioner argues that the tax notice should be canceled in its entirety based upon its assertions that the First Audit was conducted in an unfair manner. However, the only assertions that are relevant to the present matter have to do with how the 29% taxable sales ratio was calculated.[5] In this regard, petitioner, citing ***Matter of Abbasi***, Tax Appeals Tribunal (June 12,

[5] Petitioner's arguments regarding: whether records were made available to the Division during the First Audit; whether certain lease provisions affected the result of the First Audit; that petitioner agreed to the 29% taxable sales ratio under duress in the First Audit; that the Section Head (the auditor's supervisor's supervisor) would not personally review petitioner's records; and that the actions of the Division in general during the First Audit evidenced a prejudice toward petitioner, all would have been the proper subject of an exception filed with this Tribunal, had petitioner chosen to file an exception in Grand Central I. These arguments are not appropriately made in the present case dealing with the Second Audit and will not be addressed.

2008), argues that it was unreasonable to rely on the 29% taxable sales ratio from the First Audit because it was based solely on the auditor's personal experience, which is insufficient by itself to support the reasonableness of an audit. However, the evidence in the present matter shows that the 29% taxable sales ratio in the First Audit, while reached during settlement negotiations, was originally determined by the Division based upon an analysis of 2007 purchases prepared by the auditor, and the auditor's opinion of what he thought the taxable ratio of certain of petitioner's stores would be, based upon his own personal observations of those stores, as well as the experience of the auditor's supervisor. Furthermore, the 29% taxable sales ratio was originally agreed to by petitioner as a means of settling the First Audit. Petitioner, having thus agreed, and having provided the Division with no records in the Second Audit, cannot now claim that the Division's application of the 29% taxable sales ratio from the First Audit to the gross sales in the Second Audit is an irrational basis for the calculation of taxable sales in the Second Audit (***see Matter of SICA Electrical & Maintenance Corp.***, Tax Appeals Tribunal, February 26, 1998 ["petitioner's signature on the consent established that there was a rational basis"]).

Petitioner may, however, still show that the amount of tax due asserted in the tax notice was erroneous and that petitioner's tax liability was less than that asserted by the Division (***id***.). In this regard, petitioner placed into evidence five cash register tapes reflecting sales from several Grand Central locations on September 2, 3, 5 and 8, 2008. Mr. Danny Stanton, petitioner's accountant, testified regarding his review of these tapes, together with an undated price list from one of petitioner's locations, and his written summary and estimate prepared based upon such review. Mr. Stanton acknowledged that petitioner's sales tax returns were prepared using a different estimating method that petitioner had used for years. He also acknowledged that petitioner's taxable sales ratio was higher than the ratios reflected in petitioner's filed sales tax

returns. However, based upon his analysis of the five cash register tapes and the price list, he estimated that petitioner's correct taxable ratio was probably about 25% to 26% of gross sales rather than the 29% used as the basis for the tax notice.

Petitioner cannot prove that its tax liability is less than that estimated by the Division simply by presenting its own estimate (***Matter of Albanese Ready Mix***, Tax Appeals Tribunal, June 15, 1989). Furthermore, we agree with the Administrative Law Judge that there are issues with the limited analysis that Mr. Stanton completed. It is petitioner's contention that, by comparing the individual sale amounts on the cash register tape to the price list, one can determine what item is reflected by the amount listed on the cash register tape. The theory is that as the cash register tapes indicate taxable or nontaxable, once it is determined what an item is by comparing the price on the cash register tape to the price list, the Division would be able to verify the taxable/nontaxable status listed on the cash register tape because it would be able to determine exactly what was sold. However, as noted by the Administrative Law Judge, it is unclear if the price list was in effect during the period covered by the Second Audit at all, much less for the entire period. Furthermore, there are items on the price list that have the same prices. Additionally, some of the cash register tapes are illegible. Thus, petitioner's analysis falls far short of proving that the amount of tax asserted in the tax notice was erroneous or that petitioner's actual tax liability was less than that asserted in the tax notice.

Finally, we agree with the Division that petitioner's reliance on ***Raemart Drugs v Wetzler*** is misplaced. The unique circumstances in ***Raemart Drugs*** involved a taxpayer that had essentially double-paid its sales tax on its cigarette sales and had only collected the tax once from its customers (***see*** 157 AD2d at 23-26). This differs from the present case, wherein petitioner is attempting to prove that the amount of tax asserted due in the tax notice is erroneous (***id.*** at 26). Furthermore, the taxpayer in ***Raemart Drugs*** provided all of the records requested of it and the

only inadequacy in its records was the failure of the cash register tapes to identify each item sold (***id.*** at 25). This is clearly distinguishable from the present case, as petitioner provided no records during the Second Audit.

With regard to the imposition of penalties under Tax Law § 1145 (i) for failure to present and make available required records in an auditable form, petitioner asserts that the Division was required to follow its audit guidelines in this case and hold the Second Audit in abeyance pending the resolution of the First Audit. Based upon this premise, petitioner is apparently arguing that it was not required to provide its records to the Division for the period covered by the Second Audit until the First Audit was resolved. To begin with, the audit guidelines referred to by petitioner provide only that consents to extend the statute of limitations with regard to an audit period are generally not requested by the Division prior to physically examining a taxpayer's records. There are several exceptions to this guideline, one of which is the situation where there is ongoing litigation dealing with the same issues that are to be covered by the audit that the Division is about to commence. While we can understand the implication that petitioner takes from this language, there is nothing in this language that requires the Division to hold an audit in abeyance pending the resolution of litigation on the same issue. In any event, as noted by the Division, guidelines by definition only provide guidance and therefore cannot dictate a specific course of action (***Matter of Winners Garage***, Tax Appeals Tribunal, May 20, 2010 ["Division's audit guidelines do not have the force and effect of law or regulation and cannot supersede the requirements of the Tax Law"]). In this case, petitioner was required to maintain the records necessary to support its tax liability for the period covered by the Second Audit and have those records available to the Division for inspection (Tax Law § 1136). This statutory requirement cannot be negated by an audit guideline.

Petitioner is correct, however, in its assertion of an improper ex parte communication occurring between the Division of Tax Appeals and the Division regarding its petition protesting the notice and demand. It is uncontested that the Division was required to assess the Tax Law § 1145 (i) penalty by means of a notice of determination and not a notice and demand. Petitioner protested the notice and demand on this very basis and requested a hearing regarding this very issue. The proper procedure would have been for the Division of Tax Appeals to proceed through its normal process to hearing on this issue.

Instead, the Division of Tax Appeals contacted the Division requesting a copy of a proper statutory notice. The cancellation of the notice and demand and the issuance of the penalty notice by the Division were the direct result of this request. Although this may not be a technical violation of the Tribunal's rule regarding improper ex parte communications with Administrative Law Judges and Hearing Officers, neither does it fit within the exception to the rule that allows for ex parte communications for purposes of "clarification of procedural matters" (20 NYCRR 3000.10 [a]). The Division of Tax Appeals contacting the Division for a copy of a jurisdictional document clearly violates the spirit of the ex parte rule.[6]

The Division contends that pursuant to Tax Law § 173-a, the Division of Tax Appeals has no jurisdiction over the notice and demand. This is not the case. Tax Law § 173-a (3) specifically denies a taxpayer a right to a hearing before the Division of Tax Appeals "in cases of mathematical or clerical errors or failure to pay the tax due shown on the return or for any stamps purchased, and any interest or penalties related thereto." There is no question that the penalty

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[6] Under previous Division of Tax Appeals procedures, the Division of Tax Appeals would contact the Division when a petition was received without an apparently proper statutory notice. While this procedure was intended to assist petitioners in obtaining a copy of the proper statutory notice, it resulted in what this Tribunal has determined were improper ex parte communications. Accordingly, this procedure was discontinued in 2013. Petitioners are now provided with contact information to enable them to make their own requests to the Division for copies of proper statutory notices (***see*** State Administrative Procedure Act § 306 [4], "[o]fficial notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency.").

notice resulted from an audit of petitioner and is not the type of notice that denies petitioner a hearing before the Division under Tax Law § 173-a. Furthermore, petitioner specifically protested the issue of whether the Division could assess the Tax Law § 1145 (i) penalty through a notice and demand, and was entitled to a hearing on this issue.

The Division of Tax Appeals is "responsible for providing the public with a just system of resolving controversies with [such] department of taxation and finance and to ensure that the elements of due process are present with regard to such resolution of controversies" (Tax Law § 2000). This mission is accomplished through the administrative hearing process. Petitioner herein was denied the right to proceed through the administrative hearing process because of the actions of the Division of Tax Appeals. Under these specific circumstances, where an improper ex parte communication initiated by the Division of Tax Appeals directly lead to the Division's cancellation of the notice and demand and the issuance of the penalty notice, we find that petitioner was prejudiced by the actions of the Division of Tax Appeals.[7] Accordingly, we conclude that the only remedy available is to cancel the penalty notice issued as a replacement to the notice and demand.

With regard to the penalties asserted under Tax Law § 1145 (a) (1) (i) and (vi), petitioner has presented no arguments in support of its position that reasonable cause exists to cancel such penalties other than those that have already been addressed in this decision in regard to other issues. Furthermore, we agree with the Administrative Law Judge that petitioner has submitted no evidence that would support a finding of reasonable cause.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

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[7] We are specifically not addressing the issue as to whether the Division could, on its own initiative, either before or during the administrative hearing process, find and correct such a mistake, as those are not the circumstances before us (***see Matter of New Intrigue Jewelers***, Tax Appeals Tribunal, March 2, 2014).

1. The exception of Grand Central JT VT is granted to the extent that the notice of determination, numbered L-036671264 and dated September 30, 2011, is canceled, but is otherwise denied;

2. The determination of the Administrative Law Judge is reversed to the extent indicated in paragraph 1 above, but is otherwise affirmed;

3. The petition of Grand Central JT VT protesting the notice and demand numbered L-036503717 and dated August 11, 2011 (replaced by the Division of Taxation with the notice of determination numbered L-036671264 and dated September 30, 2011) is granted, and the petition of Grand Central JT VT protesting the conciliation order dated June 15, 2012 and relating to the notice of determination, numbered L-037026097 and dated December 8, 2011, is denied; and

4. The notice of determination, numbered L-036671264 and dated September 30, 2011, is canceled, and the notice of determination, numbered L-037026097, and dated December 8, 2011, is sustained.

DATED: Albany, New York
March 10, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner