STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HENRY STREET SUPERIOR DELI CORPORATION	:	
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2010 through November 30, 2012.	:	DECISION DTA NOS. 826222 AND 826223

In the Matter of the Petition	:	
of	:	
NAIFAHMED ABAD	:	
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2010 through November 30, 2012.	:	

Petitioners, Henry Street Superior Deli Corporation and Naifahmed Abad, filed exceptions to the determination of the Administrative Law Judge issued on March 17, 2016. Petitioner appeared by the Antonious Law Firm (Jaqueline S. Kafedjian, Esq., of counsel) and the Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie M. Scalzo, Esq., of counsel). Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. Oral argument was heard on August 18, 2016, in New York, New York, which date began the six-month period for the issuance of this decision.

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

ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due from petitioner Henry Street Superior Deli Corporation.

II. Whether penalties imposed under Tax Law § 1145 (a) (1) (i) and (vi) should be abated.

III. Whether the notices of determination issued to petitioner Naifahamed Abad should be canceled based upon petitioner's nonreceipt and the Division's failure to issue a copy to his representative.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except findings of fact 16, 18, 22 and 25, which we have modified to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. During the period in issue, petitioner Henry Street Superior Deli Corporation (Henry Street) owned and operated a business in New York, New York, making sales of, among other things, beer, soda, cigarettes, sandwiches, chips, prepared foods, cold cuts, fruits and vegetables, ice cream, cookies, cakes, detergents, and paper products.

2. Petitioner Naifahamed Abad at all relevant times was president and 100% shareholder of Henry Street. Mr. Abad does not contest his status as a person responsible to collect and remit sales and use taxes on behalf of Henry Street.

3. Henry Street was registered as a vendor for sales tax purposes and filed New York sales tax returns for the audit period, March 1, 2010 through November 30, 2012. Henry Street reported the following amounts of gross and taxable sales for the audit period:

Period Covered by Return	Gross Sales Reported	Taxable Sales Reported
March 1, 2010-May 31, 2010	$107,701.00	$44,157.00
June 1, 2010-August 31, 2010	$108,663.00	$45,645.00
September 1, 2010-November 30, 2010	$129,746.00	$51,902.00
December 1, 2010-February 28, 2011	$124,526.00	$49,814.00
March 1, 2011-May 31, 2011	$129,735.00	$51,898.00
June 1, 2011-August 31, 2011	$135,284.00	$54,118.00
September 1, 2011-November 30, 2011	$138,327.00	$55,335.00
December 1, 2011-February 28, 2012	$139,007.00	$55,605.00
March 1, 2012-May 31, 2012	$140,039.00	$57,419.00
June 1, 2012-August 31, 2012	$145,901.00	$59,819.00
September 1, 2012-November 30, 2012	$146,502.00	$62,997.00

4. By letter dated February 11, 2013, the Division of Taxation (Division) advised Henry Street that a sales tax field audit of its books and records for the audit period would commence on March 12, 2013. This audit appointment letter advised Henry Street that all of its books and records pertaining to its sales and use tax liability for the audit period should be available for review on the audit appointment date. An attached Information Document Request (IDR) specified a detailed listing of particular records that were to be available for the entire audit period, including sales tax returns; worksheets and canceled checks; federal income tax returns; New York State corporation tax returns; general ledger; general journal and closing entries; sales invoices; all exemption documents supporting nontaxable sales; chart of accounts; fixed asset purchase and sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips; cash receipts journal; cash disbursements journal; the corporate book, including minutes, board of directors, and articles of incorporation;

depreciation schedules; State Liquor Authority license; lease contracts; utility bills; guest checks; cash register tapes, and capital asset list.

5. On February 12, 2013 the auditor assigned to the audit made a field visit to Henry Street. One cash register was observed. During the visit, the auditor purchased a soft drink and was told the price was $1.00. He did not receive a receipt for his purchase and noted that none of the other customers in the business at the time received receipts for their purchases. He also observed that Henry Street sold beer and cigarettes. The auditor also observed five employees during his visit, to wit: two at the register, two at the deli counter, and one in an aisle. He further noted that Henry Street accepted food stamps. In his audit log detailing the visit, he referred to Henry Street as a deli.

6. On February 20, 2013 the Division's auditor received a power of attorney from Attorney Jacqueline Antonious (the representative) appointing her to represent Henry Street. The representative also faxed a power of attorney to the auditor on said date authorizing her representation of Mr. Abad. On February 27, 2013 Ms. Antonious requested that the March 12, 2013 audit appointment be rescheduled to April 2, 2013. The auditor informed the representative that he would reschedule the audit appointment to April 2, 2013 if waivers extending the statute of limitations for assessment were executed. The auditor sent a wavier for Henry Street to the representative. Under the belief that he did not have a power of attorney for Mr. Abad, the auditor mailed a waiver to Mr. Abad's home address.

7. On March 4, 2013 the auditor received a waiver extending the statute of limitations for refund or assessment from Henry Street. For the period March 1, 2010 through November 30, 2010, the period of limitations was extended to December 20, 2013. The auditor did not receive

a similar waiver on behalf of Mr. Abad.

8. On April 2, 2013 the auditor received Henry Street's bank statements, an Anheuser-Busch purchase report, a Boar's Head purchase report and a cigarette and candy purchase report. No other records requested in the Division's IDR were provided, including records specifically pertaining to Henry Street's sales.

9. On April 17, 2013 the auditor mailed another IDR requesting virtually the same records as requested in the February 11, 2013 IDR, except for bank statements, a capital asset list and corporate books.

10. On April 30, 2013 the auditor telephoned the representative to inquire as whether more records would be forthcoming. The representative responded that she had not yet heard back from Mr. Abad.

11. By letter dated May 13, 2013 the auditor informed the representative that an observation of Henry Street would take place. In response to the May 13, 2013 letter, the representative indicated that Henry Street did not consent to an observation.

12. Lacking complete books and records to perform a detailed audit, coupled with the inability to perform an observation of Henry Street, the auditor resorted to the use of an indirect audit methodology to estimate gross and taxable sales.

13. To compute audited gross sales the auditor consulted the National Restaurant Association's Restaurant Industry Operations Report (RIOR) for 2010, which was the most recent edition the Division had at the time of audit. Pursuant to this report, the auditor obtained the median quartile occupancy costs of 6.9% for limited service restaurants with a menu theme of sandwiches/subs/deli. Since petitioners did not provide a lease agreement or federal tax returns

as requested, the auditor consulted federal tax information contained in the Division's database to obtain the rental expense claimed by Henry Street for the 2010 tax year. The rental expense was divided by the 6.9% occupancy cost to arrive at gross sales of $3,156,521.74 for the audit period.

14. To compute the ratio of taxable sales to total sales (taxable ratio), the auditor subtracted cigarette and beer sales from reported gross sales. To arrive at the amount of beer sales, the auditor obtained Henry Street's beer purchases from the Division's third-party database and marked up those purchases by the national markup percentage of 26% as reflected by a memorandum from the National Association of Convenience Stores. To arrive at cigarette sales, the auditor used the cigarette purchase report obtained from Henry Street and applied the state minimum markup of 7% after backing out prepaid cigarette tax. The auditor reasoned that because beer and cigarettes are always taxable, he would subtract those sales from the gross sales as reported on Henry Street's sales tax returns to arrive at the nontaxable percentage of gross sales. Based upon this methodology he determined a taxable ratio of 66% (i.e., beer and cigarette sales constituted 66% of Henry Street's total sales). The 66% ratio was then applied to the audited gross sales based on the occupancy index. The auditor further reasoned that the taxable ratio took into account any nontaxable food stamp sales.

15. The Division issued notice of determination L-040028423-8 to Henry Street on August 30, 2013 for the period of March 1, 2010 through August 31, 2010, which asserted sales tax due of $20,123.52, plus interest, and penalties pursuant to Tax Law § 1145 (a) (1) (i) and (vi). Likewise, on October 11, 2013, the Division issued notice L-040202015-1 to Henry Street for the period September 1, 2010 through November 30, 2012, which asserted sales tax due of $89,449.91, plus interest, and penalties pursuant to Tax Law § 1145 (a) (1) (i) and (vi). The

respective notices indicate that copies of same were also sent to the representative,

16. On September 3, 2013 and October 16, 2013, respectively, the Division issued like notices of determination (notices L-040031256-1 and L-040226612-6) to Mr. Abad, as a person responsible to collect, account for and remit sales and use taxes on behalf of Henry Street, asserting tax, interest and penalties for the same periods and in the same amounts as the notices issued to Henry Street. These notices were sent to Mr. Abad's home address, where he has resided since 2003. Mr. Abad regularly received mail at his home address before, during and after the audit period at issue.

17. After a conciliation conference in the Division's Bureau of Conciliation and Mediation Services (BCMS), conciliation orders sustaining petitioners' respective notices of determination were issued on March 28, 2014.

18. In response to the conciliation orders, petitioners filed petitions with the Division of Tax Appeals and this proceeding ensued. The petitions alleged that "[t]he form and manner in which the auditor used external indices is arbitrary and capricious, and not reasonably calculated to determine the amount of tax due." The petitions also alleged that the notices issued to Mr. Abad were invalid because such notices were not properly issued to Mr. Abad or to his representative. Mr. Abad claimed that he and his representative only became aware of the notices of determination issued to him subsequent to Henry Street's request for a conciliation conference with BCMS and his representative only received copies of those notices after being faxed the same on March 3, 2015.

19. In order to prove proper issuance of notices of determination L-040031256-1 and L-040226612-6 to Mr. Abad, the Division submitted the affidavits of MaryEllen Nagengast and

Bruce Peltier detailing the regular process by which the Division effects the issuance of notices of determination by delivery of the same, properly addressed and with appropriate postage affixed into the custody of the United State Postal Service (USPS) for mailing via certified mail. Included with the affidavits were copies of certified mail records (CMRs) for the block of notices issued by the Division on September 3, 2013 and October 16, 2013, including the notices of determination issued to Mr. Abad on such dates. Each CMR has been properly completed and each bears USPS date stamps confirming that the articles listed thereon were mailed via certified mail on the dates claimed. Information from the USPS indicates that each of the notices was "unclaimed" by Mr. Abad and subsequently delivered to an address in Brooklyn, New York. Consistent with the USPS information, the auditor noted on September 30, 2013 that a notice of determination issued to Mr. Abad was returned to his office as unclaimed.

20. At the hearing, the auditor testified that he determined that Henry Street was a deli upon the basis of his visit to Henry Street and thus he applied the index in the RIOR applicable to delis. He further testified that although there were other indexes available to use, he used the RIOR because he was familiar with it and because it is an index commonly used in his office. The 2010 RIOR is based upon financial and operating data provided by 650 members of the National Restaurant Association and members of various state restaurant associations in 2008 as compiled and analyzed by Deloitte and Touche, LLP. One hundred forty of the survey respondents were categorized as limited service restaurants with 18.6% having a sandwiches/subs/deli menu theme. The RIOR was available and was used by petitioners' representative during cross-examination of the auditor. Under cross-examination, the auditor was steadfast in his determination that Henry Street was, in fact, a deli. He further acknowledged

that while Henry Street sold some non-deli items, such as fruits and vegetables, detergents, and paper products, Henry Street was primarily a deli and he made that determination when he surveyed it so that is why he used the rent index applicable to delis from the RIOR.

21. A series of pictures obtained by the auditor from the internet depict the exterior as well as portions of the interior of Henry Street. The exterior shows Henry Street's storefront windows covered with pictures of prepared food specials for items such as cheeseburgers, chicken sandwiches, chicken wings, chicken fingers, fried shrimp and assorted meal combinations of such items, with french fries and drinks. No grocery type items are visible in such storefront advertisements. Other pictures depict a large deli counter with menu board. The menu board lists various sandwiches and subs, as well as breakfast items and hot items consistent with the items advertised in the storefront windows. Deli meat was sold at $7.99 a pound, with no differentiation as to type of meat. Additional photos depicting Henry Street's shelf areas reflect items described earlier (***see*** finding of fact 1).

22. Mr. Abad testified at the hearing. His testimony was vague. He stated that Henry Street's sales tax returns were prepared by its accountant (whom he did not name), and that when asked he gave the accountant every document requested of him. He referred to Henry Street as a grocery store and estimated that only 25% of his sales were from the deli counter portion of the business. When questioned about the volume of fruits and vegetables Henry Street sold, he replied "not much" and "a little bit," respectively. He stated that Henry Street is currently in the process of installing a point of sale register system.

23. Petitioners submitted bank statements into the record for the audit period. The statements reveal a significant amount of deposits made by Efunds. Mr. Abad explained that

these were from food stamp purchases.

24. Petitioners offered into evidence a portion of the lease agreement for Henry Street's location. Mr. Abad is identified as the tenant of the leased premises. The lease indicates that the premises are to be used by the tenant as a "supermarket only." When questioned about what kind of business the lease allowed, Mr. Abad responded: "Like a grocery deli, you know, deli counter."

25. No sales or purchase records were entered into the record other than those purchase records available from third parties, namely partial beer and cigarette purchase records obtained pursuant to the audit.

26. At the hearing, petitioners introduced a schedule prepared by petitioners' representative that utilized the same audit methodology as that utilized by the auditor except that gross sales were computed using a rent factor applicable to food and beverage stores without assets, as taken from the 2015 Almanac of Business and Financial Ratios. Petitioners' estimate results in additional sales tax due of $2,470.63.

27. Petitioners submitted unnumbered proposed findings of fact in narrative form as part of their post-hearing brief. Given the manner in which such proposed findings of fact are presented, it is not possible to make rulings on same (***see*** State Administrative Procedure Act § 307 [1]). Moreover, many of the facts asserted are conclusory and argumentative in nature. To the extent that such proposed findings of fact are supported by the record, they are included in the foregoing findings of fact.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his analysis of the issues by citing to the relevant statutes under Article 28 of the Tax Law. He stated that except as otherwise provided, all retail sales of tangible personal property are subject to sales tax (Tax Law § 1105 [a]). Section 1135 of the Tax Law places an affirmative duty to keep records of each sale on every person required to collect the tax, in such form as required by the Division. If upon examination of the sales tax returns it becomes apparent that a person required to collect and pay over sales tax failed to keep records sufficient for the correct determination of tax under Article 28, Tax Law § 1138 (a) requires the Division to determine the amount of tax due from available information, including using external indices to estimate the amount of tax due. However, the Division is required to select a method reasonably calculated to reflect the amount of tax due. The Administrative Law Judge further stated that a taxpayer bears the burden of showing by clear and convincing evidence that the method employed in the determination of tax due was unreasonable or the amount determined to be due was erroneous.

Next, the Administrative Law Judge set forth the standard for reviewing a sales tax audit where the Division resorts to the use of an external index for its determination of tax due. First, the Division must request and examine the taxpayer's books and records for the period at issue and make a determination on the sufficiency of the records provided for purposes of making a determination of tax due. According to the Administrative Law Judge, if the records are found to be insufficient to verify taxable sales receipts, the Division may resort to external indices for estimating the amount of tax due. The Administrative Law Judge stated that while the estimation methodology must be reasonably calculated to reflect the amount of tax due, exactness in the

audit outcome is not required. Ultimately the taxpayer bears the burden of showing through clear and convincing evidence that the audit methodology was unreasonable or the amount determined was erroneous. The Administrative Law Judge noted that considerable latitude is given an auditor's method of estimating sales in light of the surrounding circumstances.

The Administrative Law Judge concluded that petitioners failed to meet their burden of proof in showing that the audit methodology was unreasonable. He found that the record established the insufficiency of petitioner Henry Street's records for purposes of a sales tax audit, and thus reasoned that the Division was justified in relying on an alternative audit method. He also found that the auditor's testimony was credible in describing the audit and the source for the external index that was eventually used to estimate petitioners' tax due. He further found that the business classification chosen for purposes of application of an external index, namely "deli," was supported by the auditor's direct observation of the business. The Administrative Law Judge rejected petitioner's contention that the choice of the source for an external index, the 2010 RIOR, was unreasonable, noting that while another source may have yielded different results, petitioner had not shown that the auditor's classification of the business as a deli was clearly erroneous.

The Administrative Law Judge next stated the standard for determining whether the Division's imposition of penalty additions to sales tax due was proper. He found that Tax Law § 1145 (a) (1) (i) requires imposition of a penalty on any person failing to file a return or pay over any sales or use tax. However, the penalty may be abated under the statute if petitioner shows reasonable cause for underpaying the tax due. Similarly, the Administrative Law Judge described the imposition of the penalty under Tax Law § 1145 (a) (1) (vi) as mandatory where

greater than 25% of the tax required to be shown on a return is omitted unless the taxpayer shows reasonable cause and not willful neglect for the underreporting of tax due. Based on lack of clear and convincing evidence in the record of petitioners' reasonable cause for the underreporting of tax due, the Administrative Law Judge concluded that petitioners failed to provide evidence sufficient to support the abatement or cancellation of the penalties imposed.

Lastly, the Administrative Law Judge determined that petitioner Abad's request to cancel the notices of determination issued to him as a responsible person was not the correct outcome where petitioner experienced no prejudicial effect. He found that the Division was able to show proper mailing to petitioner's address, and even if petitioner did not receive the notices, he was not prejudiced thereby as he was currently exercising his due process rights. The Administrative Law Judge concluded that tolling of the limitations period would be the proper result rather than cancelation where a petitioner's representative was not served with the statutory notices.

The Administrative Law Judge denied petitioners' petitions and sustained the notices of determination issued on August 30, 2013, September 3, 2013, October 11, 2013 and October 16, 2013.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner Abad first argues that the notices of determination the Division issued to him as a responsible person for collection and payment of sales tax should be canceled as they were not received by him or his representative within 90 days following the issuance of the same to Henry Street's representative. Petitioners also challenge the reasonableness of the Division's use of the 2010 RIOR restaurant rent factor based on the small number of respondents to the survey that provided the data and the auditor's ultimate classification of his business as a restaurant.

Petitioners posit that any underreporting of sales tax for the period in question was not due to willful neglect and therefore penalty additions to sales tax due should be abated.

The Division urges this Tribunal to affirm the Administrative Law Judge's determination and sustain the notices of determination. The Division maintains that mere non-receipt of a statutory notice is not enough to require cancellation of that statutory notice where proper mailing has otherwise been established. The Division also argues that the audit methodology was reasonable where petitioners left it no choice but to rely on an external index, as petitioners failed to maintain records sufficient to determine sales tax due. Finally, the Division urges this Tribunal to affirm the imposition of penalties on petitioners because they have not shown any evidence demonstrating that penalties should be abated.

OPINION

Section 1138 (a) (1) of the Tax Law provides that if a sales and use tax return is not filed or is incorrect, the Division may determine the amount of tax due from such information as may be available. After the Division makes a determination of additional tax due, "[a] notice of determination shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address . . ." (***id.***). Tax Law § 1147 (a) (1) provides that:

> "any notice . . . required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the last address given in the last return filed by him pursuant to the provisions of this article . . . or, if no return has been filed . . . then to such address as may be obtainable."

Taxpayers thus served with a statutory notice of determination generally have 90 days (or 150 days if outside the United States) from the date of issuance of the notice to protest the proposed assessment (Tax Law § 1138 [a] [1]).

New York taxpayers may designate a representative by executing a power of attorney naming a person to act in their stead in proceedings before the Division and this Tribunal (***see*** 20 NYCRR 2390.1). Once named, a qualified representative listed on a power of attorney is imbued with the power to receive the taxpayer's confidential information and perform all acts authorized by the taxpayer (***id.***). While the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer's representative, we have held that the 90-day period for filing a petition or request for conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice (***see Matter of Nicholson***, Tax Appeals Tribunal, June 12, 2003; ***Matter of Kushner***, Tax Appeals Tribunal, October 19, 2000; ***Matter of Multi Trucking***, Tax Appeals Tribunal, October 6, 1988, ***citing Matter of Bianca v Frank***, 43 NY2d 168 [1977]).

The Division bears the burden of showing proper mailing of a statutory notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (***Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990; ***cf. Matter of Ruggerite, Inc. v State Tax Commn., Dept. of Taxation & Fin. of State of N.Y.***, 97 AD2d 634 [1983], ***affd*** 64 NY2d 688 [1984]). The Division may meet this burden by offering evidence of its standard mailing procedure through direct testimony or documentary evidence of mailing (***see Matter of Montesanto***, Tax Appeals Tribunal, March 31, 1994; ***Matter of Accardo***, Tax Appeals Tribunal, August 12, 1993). Evidence of mailing must be shown by proof of a standard procedure used by the Division for the issuance of statutory notices by someone with knowledge of the relevant procedures and there must also be proof that such standard procedure was followed in this particular case (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991).

The presumption of receipt of a properly mailed statutory notice may be rebutted by the taxpayer (***Matter of Ruggerite, Inc.***).

Petitioner Abad argues that because he did not receive notices of determination L-040031256-1 and L-040226612-6 and because no such notices were even mailed to his duly appointed representative, those notices were improperly mailed and must be canceled. In support of his contention, petitioner cites to ***Matter of OfficeMax, Inc.*** (Tax Appeals Tribunal, March 24, 2005), which he claims requires cancellation of a notice that was not properly mailed to the last known address of a taxpayer within the 90-day statute of limitations.

We disagree. The facts here are clearly distinguishable from the facts in ***Matter of OfficeMax, Inc.*** In that case, the subject notices were addressed to a non-related entity and not received by the petitioner until after the expiration of both the 90-day limitations period for protesting the notice and the agreed-upon extension of the limitations period for the assessment of additional tax. This clearly contrasts with the instant case, where the Administrative Law Judge determined that the Division, through the affidavits of its employees and attached exhibits, bore its burden of showing its standard mailing procedure and that such procedure was followed with respect to the notices of determination served on petitioner Abad (***see*** findings of fact 16 and 19). The record shows that the subject notices were issued to petitioner Abad at his last known address on September 3, 2013 and October 16, 2013 (***id.***), leading to the conclusion that the same were properly mailed pursuant to Tax Law § 1147. The Division's showing of proper mailing gives rise to a rebuttable presumption of receipt (***see*** Tax Law § 1147 [a] [1]; ***Matter of Sugranes***, Tax Appeals Tribunal, October 3, 2002). Under the instant facts and circumstances, this presumption is not rebutted by the fact that the notice addressed to petitioner Abad was returned to the Division as unclaimed (***see*** finding of fact 19). Specifically, there is no indication

in the record that the USPS did not follow its delivery procedures (***see e.g. Matter of Ruggerite, Inc.***). Furthermore, considering that petitioner Abad stated in his affidavit that he received mail at his home address before, during and after the audit period, which is the same address on the statutory notices, it is reasonable, absent any evidence to the contrary, to equate petitioner Abad's unclaimed notice with a refusal to accept delivery and thus deem the notice as constructively received (***see Matter of New York City Billionaires Construction Corp.,*** Tax Appeals Tribunal, October 20, 2011; ***Matter of American Cars "R" Us, Inc. v. Chu***, 147 AD2d 797 [1989]).

However, due to the Division's failure to serve petitioners' representative with copies of the statutory notices relating to his liability for sales tax as a responsible person, the period of limitation for protesting those proposed assessments did not commence until his representative was served with copies of those notices (***see Matter of Nicholson***, ***Matter of Kushner***; ***Matter of Multi Trucking***). As the period of limitation for protesting statutory notices L-040031256-1 and L-040226612-6 was tolled until March 13, 2015 (***see*** finding of fact 18), our prior decisions dictate that the correct remedy is to provide a hearing for any protest filed before the expiration of the 90-day period following the issuance of the statutory notices to the representative. Furthermore, petitioners have provided no authority for their assertion that an unclaimed notice combined with the Division's failure to serve petitioners' representative requires cancellation of the statutory notices. Finally, we would point out that petitioners here have not been prejudiced in that they are currently exercising their due process rights.[1]

We next turn to the question of whether application of the 2010 RIOR rent index was a reasonable alternative audit method. Section 1135 (a) (1) of the Tax Law requires every person required to collect tax to keep records of every sale and all amounts paid and of the sales tax

[1] We note that petitioner Abad's right to protest the notices issued to him arose with petitioner Henry Street's timely filing of its request for a conciliation conference (***see*** Tax Law § 1138 [a] [3] [B]).

payable on such sales in the form of true copies of the sales slips, invoices, receipts, or statements reflecting such sales of tangible property subject to sales tax (***see also*** 20 NYCRR 533.2). Tax Law § 1138 (a) (1) provides that if a sales and use tax return is not filed or is incorrect, the Division may resort to other means of determining the amount of tax due from the taxpayer. This includes the use of external indices to estimate the amount of sales and use tax due where the taxpayer's records are insufficient to accurately determine the amount of sales and use tax that should have been shown on the taxpayer's return (***id.***). However, the Division must first request the taxpayer's sales records and determine their adequacy for purposes of a sales tax audit for the period at issue (***Matter of Christ Cella, Inc. v State Tax Commn,*** 102 AD2d 352 [1984]). Upon finding that the available records are insufficient for purposes of determining the amount of tax due, the Division may resort to an alternative audit method (***Matter of Urban Liqs. v State Tax Commn.***, 90 AD2d 576 [1982]). It is incumbent upon the Division to choose a method of estimating taxable sales that is reasonably calculated to reflect the sales and use taxes due (***Matter of Ristorante Puglia v Chu***, 102 AD2d 348 [1984]; ***Matter of W.T. Grant Co. v Joseph***, 2 NY2d 196, 206 [1957], ***rearg denied*** 2 NY2d 992 [1957], ***cert denied*** 355 US 869 [1957]). However, a taxpayer challenging the reasonableness of the method used to estimate sales and use tax due bears the burden of showing that such method lacks a rational basis (***Matter of King Crab Rest. v Chu***, 134 AD2d 51 [1987]). Exactness in the amount of the determination resulting from the use of an external index is not a requirement where it is the taxpayer's own failure to maintain adequate records that prevented exactness in the proposed assessment (***Matter of Shurky v Tax Appeals Trib. of State of N.Y.***, 184 AD2d 874 [1992]; ***Matter of Meyer v State Tax Commn.***, 61 AD2d 223, 228 [1978], ***lv denied*** 44 NY2d 645 [1978]).

In the instant case, petitioners posit that the auditor's application of the 2010 RIOR rent

index to estimate taxable sales was unreasonable due to the age and small sample size of the data used to calculate the index. Furthermore, petitioners argue that the use of a restaurant classification in determining which rent index to apply was irrational when the business at issue was a grocery-deli. Toward that end, petitioners illustrate some differences between limited service restaurants and grocery-delis in their brief in support of their exception, noting that Henry Street lacks several characteristics exhibited by limited service restaurants. Petitioners also posit that more up-to-date and accurate sources of external indices exist that more closely align with Henry Street's business model and that the auditor was unable to competently describe his rationale for choosing the particular method employed in the audit.

We do not agree with petitioners' assertion that the Administrative Law Judge incorrectly concluded that the Division's application of the 2010 RIOR rent index had a rational basis. As the Administrative Law Judge noted, the Division requested books and records from petitioners, but found that the records were insufficient to determine the amount of sales tax owed for the period (***see*** finding of fact 8). Thus, consistent with Tax Law § 1138 (a) (1) and our prior decisions, the Division was entitled to rely on what information may be available, including external indices, to determine the amount of sales tax due (***see Matter of Your Own Choice***, Tax Appeals Tribunal, February 20, 2003).

Petitioner Abad's testimony and exhibits do not show that the application of a rent index for a limited service restaurant category lacked a rational basis where the auditor was found to have given forthright and credible testimony based on his own observations that petitioner Henry Street operated as a deli (i.e., more like a limited service restaurant than a grocery). We have consistently held that the credibility of witnesses is a determination within the domain of the Administrative Law Judge who serves as the trier of fact and who has the opportunity to view the

witnesses first hand and evaluate the relevance and truthfulness of their testimony (***see Matter of MediaBuss Systems, Inc.,*** DTA 824207, Tax Appeals Tribunal, March 18, 2014). Here, the Administrative Law Judge found that the auditor made his determination that Henry Street was a deli based on the auditor's direct observation of the business, which was in turn supported by documentary evidence (***see*** findings of fact 20 and 21). While we are not bound by the credibility determination of an Administrative Law Judge, the record here does not support differing from his determination on that issue.

Where, as here, petitioner Abad failed in his duty to keep such records as would be sufficient to complete a sales tax audit, considerable latitude is given to the auditor's method of estimating sales tax and will only be upset by clear and convincing evidence that the method chosen was unreasonable (***see*** Tax Law § 1135; ***Matter of Grecian Sq. v New York State Tax Commn.***, 119 AD2d 948 [1986]; ***Matter of Cousins Serv. Sta.***, Tax Appeals Tribunal, August 11, 1988; ***Matter of Surface Line Operators Fraternal Org. v Tully***, 85 AD2d 858 [1981]). We have previously determined that the use of a rent factor to estimate taxable sales may be reasonable under certain circumstances (***see Matter of New Intrigue Jewelers, Inc.,*** Tax Appeals Tribunal, March 6, 2014; ***Matter of Constantini***, Tax Appeals Tribunal, January 10, 2008; ***Matter of Your Own Choice***). We have noted that the key to the approval of a rent factor in an audit is the identification in the record of the statistical report from which the rent factor is derived (***Matter of Bitable on Broadway***, Tax Appeals Tribunal, January 23, 1992, ***confirmed sub nom. Matter of Bitable on Broadway v Wetzler***, 199 AD2d 633 [1993]). This allows the taxpayer both the opportunity to review the report and the ability to introduce evidence to challenge the soundness or applicability of the report (***id.***). Here, the Administrative Law Judge noted the auditor's use of the 2010 RIOR, the most up-to-date version of that source at the time

of the audit, in determining the amount of gross sales based on the rent index for the category of limited service restaurants with a deli menu theme (***see*** finding of fact 13). The selection of the business category of limited service restaurant with a deli menu theme was supported by the auditor's direct observation of the business (***see*** findings of fact 20 and 21). The Administrative Law Judge also noted and described the auditor's application of Henry Street's available purchase data for beer and cigarettes in determining the taxable ratio of sales, taking into account nontaxable food stamp sales (***see*** finding of fact 14).

Petitioners' contention that a different source for estimating tax due would have provided different results is without import where petitioners have not carried their burden of showing by clear and convincing evidence that the audit methodology was unreasonable (***see Matter of Meyer v State Tax Commn.; Matter of Meskouris Bros. v Chu***, 139 AD2d 813 [1988]). We agree with the Administrative Law Judge that petitioners failed to meet their burden to show error in the audit method or result. Petitioners' assertion that application of a different index may have resulted in a different amount of tax due does not necessarily mean that use of a rent factor from a different source lacked a rational basis. As noted by the Administrative Law Judge, petitioners offered no books, records or other source documentation from which their sales tax liability could be established. Where, as here, any imprecision in the assessment resulting from a taxpayer's failure to make books and records available as required by Tax Law § 1135 must be borne by the taxpayer ***(see Matter of Ahmed***, Tax Appeals Tribunal, April 14, 2011; ***Matter of Markowitz v State Tax Commn.***, 54 AD2d 1023 [1976], ***affd*** 44 NY2d 684 [1978]).

Finally, we consider petitioners' argument that the penalties imposed in this case should be abated for reasonable cause. As described by the Administrative Law Judge in the determination below, Tax Law § 1145 (a) (1) (i) provides that a penalty shall be imposed upon

any person failing to file a return or pay over any sales or use tax. Tax Law § 1145 (a) (1) (vi) similarly states that any person who underreports greater than 25% of the total sales tax due shall be liable for a penalty. These penalties must be sustained unless the failure to pay or the underreporting of sales tax was due to reasonable cause and not due to willful neglect (***id.; see also*** 20 NYCRR 2392.1). Pursuant to Tax Law § 1131 (1), persons responsible for the collection and payment of sales tax include any officer, director or employee of a corporation who as such officer, director, or employee is under a duty to act for such corporation in compliance with Article 28 of the Tax Law. As mentioned above, taxpayers have an affirmative duty to retain such records as necessary for the Division to determine the amount of sales and use tax due (Tax Law § 1135; 20 NYCRR 533.2). The Administrative Law Judge found that petitioner Abad failed to provide such records as necessary to determine the amount of sales tax due (***see*** findings of fact 4, 8-12). We agree with the Administrative Law Judge that petitioners have not established reasonable cause for abatement of penalties and penalty interest in the present matter. The Division's regulations provide that "[i]n determining whether reasonable cause and good faith exist, the most important factor to be considered is the extent of taxpayer's efforts to ascertain the proper tax liability" (20 NYCRR 2392.1 [g] [2]). Petitioner Abad's failure to maintain records as required by Tax Law § 1135 (a) (1) is indicative of willful neglect and thus supports the imposition of penalties (***see Matter of Laham,*** Tax Appeals Tribunal, October 27, 2016; ***Matter of Lima Florists,*** Tax Appeals Tribunal, December 15, 1988). Despite recently beginning to upgrade his point-of-sales systems to better capture taxable sale amounts, petitioner Abad has not shown reasonable cause for his failure to keep reliable sales records, which failure led to his underreporting of sales tax due for the period at issue. Thus, we conclude that the

determination of the Administrative Law Judge to sustain imposition of penalties arising under Tax Law § 1145 on petitioners was not in error.

Accordingly, it is ORDERED, ADJUDGED and DECREED that;

1. The exception of Henry Street Superior Deli Corporation and Naifahmed Abad is denied;

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

3. The petitions of Henry Street Superior Deli Corporation and Naifahmed Abad are denied; and

4. The notices of determination, L-040028423-8, dated August 30, 2013; L-040202015-1, dated October 11, 2013; L-040031256-1, dated September 3, 2013; and L-040226612-6, dated October 16, 2013, are sustained.

DATED: Albany, New York
February 21, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner

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