STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EMERALD INTERNATIONAL HOLDINGS, LTD.	:	DECISION DTA NO. 827189
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 December 1, 2009 through November 30, 2011.	:	

Petitioner, Emerald International Holdings, Ltd., filed an exception to the determination of the Administrative Law Judge issued on August 10, 2017. Petitioner appeared by its president, Otu A. Obot. The Division of Taxation appeared by Amanda Hiller, Esq. (M. Greg Jones, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a letter brief in opposition to the exception. Petitioner filed a brief in reply. Oral argument was not requested. The six-month period for the issuance of this decision began on October 10, 2017, the date that petitioner's reply brief was received.

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

ISSUES

I. Whether the Division of Taxation's general denial of petitioner's allegations, as set forth in its answer to the petition, constituted a failure to comply with the requirements of 20 NYCRR

3000.4 (b) (2) (i), such that any of petitioner's allegations of material fact in the petition must be deemed admitted.

II. Whether petitioner has established that it filed a claim for refund on March 4, 2013, and if so, whether the Division of Taxation's failure to have granted or denied that claim within six months thereafter, pursuant to Tax Law § 1139 (b), constituted a default requiring the Division of Taxation to grant petitioner's refund claim.

III. Whether, if not by default as above, petitioner has nonetheless established that it is entitled to a refund of the additional amount of sales tax calculated upon audit by the Division of Taxation, notwithstanding petitioner's consent to and payment of such additional tax prior to the issuance of a notice of determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except finding of fact 9, which we have modified to more fully reflect the record. The findings of fact, so modified, are set forth below.

1. Petitioner, Emerald International Holdings, Ltd., owned and operated a retail wine and liquor store located in Williamsville, New York.

2. Petitioner was the subject of a desk audit conducted by the Casual Sales Unit of the Division of Taxation (Division). In its audit, the Division calculated petitioner's audited sales, and in turn its additional taxable sales, based on comparing petitioner's reported sales, per its sales tax returns, to information provided by suppliers (distributors) from whom petitioner purchased alcoholic beverages, as follows:

> a) the Division first calculated the purchase cost of petitioner's inventory of alcoholic beverages available for sale for each of the years 2010 and 2011, based upon inventory amounts set forth on petitioner's corporation franchise tax returns, as follows:

	01/01/10 - 12/31/10	01/01/11 - 12/31/11
Cost of purchases (per distributors' reports)	$77,855.59	$87,367.08
plus: beginning inventory (per returns)	89,826.00	83,626.00
equals: Inventory available for sale	$167,681.59	$170,993.08
minus: ending inventory (per returns)	(83,626.00)	(76,530.00)
Cost of goods sold (alcoholic beverages)	$84,055.59	$94,463.08

b) the Division next calculated petitioner's estimated total sales receipts by applying a cost of operations ratio of 78.4% to petitioner's cost of alcoholic beverages sold, as follows:[1]

	01/01/10 - 12/31/10	01/01/11 - 12/31/11
Cost of goods sold (alcoholic beverages)	$84,055.59	$94,463.08
divided by: cost of operations (percentage)	.784	.784
Estimated total sales	$107,214.00	$120,489.00

c) the Division compared the total estimated sales for the two years, as above ($227,703.00), to reported total sales per petitioner's sales tax returns for the same period ($137,954.00), and determined a sales difference (increase) of $89,749.00. The Division viewed this difference as additional unreported taxable sales, and subjected the same to tax at the applicable tax rate (8.75%), to arrive at additional tax due in the amount of $7,853.00.

d) the Division divided additional tax due ($7,853.00) by the "base amount" of reported total sales per petitioner's sales tax returns ($137,954.00), to arrive at an error rate of .0569. This error rate was applied to petitioner's reported sales for each of the sales tax quarterly periods spanning December 1, 2009 through

[1] The source of the 78.4% cost of operations ratio used by the Division was the 42nd Annual Edition of the Almanac of Business and Industrial Financial Ratios (Leo Troy, Ph.D., Commerce Clearing House, Table I, Beer, Wine and Liquor Stores [Retail Trade 445310]). In letters dated December 5, 2012, January 22, 2015, and February 13, 2015, the Division responded to petitioner's queries regarding the use of that edition of the Almanac as opposed to later versions thereof. The Division noted that at the time of audit, the 42nd Edition of the Almanac was the latest volume (and hence the latest information) then available. The Division also noted that the cost of operations ratios set forth in later versions of the same Almanac (75.5% for the 2013 Almanac and 74.6% for the 2014 Almanac), are lower than the cost of operations ratio used on audit (78.4%). As pointed out by the Division, applying such lower amounts would result in higher sales markup percentage amounts (32% for 2013 and 34% for 2014), than the markup percentage resulting on audit (27.55%), and hence would result in higher estimated sales amounts with correspondingly higher amounts of tax liability. The calculation method supporting this result (utilizing the above-set forth dollar amounts from the year 2010 to illustrate) follows:

a) cost of goods sold ($84,055.59) ÷ percentage cost of operations (78.4%) = calculated sales ($107,214.00).
b) calculated sales ($107,214.00) - cost of goods sold ($84,055.59) = profit ($23,158.41).
c) profit ($23,158.41) divided by cost of goods sold ($84,055.59) = percentage markup on costs (27.55%).

November 30, 2011, resulting in additional sales tax due in the amount of $7,849.57.

3. Based upon the foregoing calculations, the Division issued to petitioner a statement of proposed audit change for sales and use tax (proposed statement), dated December 3, 2012, proposing a sales tax liability for the period December 1, 2009 through November 30, 2011 (audit period) in the amount of $7,849.57, plus interest of $2,702.82, and penalty of $2,247.25, for a then-current balance due (if paid by January 1, 2013) of $12,799.64.

4. The proposed statement was accompanied by a letter dated December 5, 2012, detailing the method by which the proposed liability was calculated. The letter advised that if petitioner agreed with the proposed liability, the proposed statement was to be signed and dated by an authorized signatory and returned with remittance of the full amount shown as due on the proposed statement. The letter further advised that if petitioner did not agree, then petitioner was required to submit its books and records for the audit period to substantiate the amounts reported on its sales and use tax returns, together with the name and telephone number of a contact person and an explanation for the disagreement. The December 5, 2012 letter included the following list of items to be submitted for audit review within 30 days of the date of the letter:

> "a. A complete copy of your 2010 & 2011 federal returns, including all related schedules and attachments.
> b. Sales invoices, guest checks and/or cash register tapes for each sale.
> c. Cash receipts journal (also sales journal if applicable).
> d. Bank statements and deposit slips.
> e. All purchase invoices for the audit period.
> f. Disbursement or Purchase journal.
> g. General Ledger.
> h. All exemption documents supporting non-taxable sales."

5. The lower portion of the proposed statement specified that it was to be returned, in either case, to the following address:

"NYS Department of Taxation and Finance
Audit Division-Transaction Desk Audit Bureau
Sales Tax Section
Wade Road-Casual Sales-WA Harriman Campus
Albany NY 12227-0163"

6. Petitioner responded to the proposed statement by a letter dated December 29, 2012, describing various medical conditions faced by petitioner's president, Otu A. Obot, the impact of these conditions on the operation of petitioner's business, and requesting a waiver of the penalty and interest set forth on the proposed statement. This letter was addressed as follows:

"Scott Mastroianni, Technician[2]
Audit Bureau Sales Tax Section
NYS Department of Taxation and Finance
WA Harriman Campus, Albany, New York 12227-0163"

7. Petitioner's letter bears a stamp, affixed by the Division, indicating the following:

"RECEIVED
Dept. Of Taxation & Finance
Sales Tax - Desk Audit

Jan 08 2013"

8. The Division responded to the foregoing letter and request by issuing to petitioner a second proposed statement, dated December 31, 2012. The second proposed statement is identical to the above-described first proposed statement, except for revisions reducing the amount of interest and eliminating the imposition of penalty. This second proposed statement thus indicated a tax liability in the amount of $7,849.57, plus interest of $1,366.35, and no penalty, for a then-current balance due (if paid by January 30, 2013) of $9,215.92.

9. Petitioner returned the second proposed statement, dated as signed by its president, Mr. Obot, on January 4, 2013. The portion of the proposed statement indicating petitioner's

[2] Scott Mastroianni was the person who performed the desk audit calculations described above (***see*** finding of fact 2).

agreement (consent) to the liability set forth thereon appears directly above Mr. Obot's signature, and specifically sets forth the following:

> "**If you agree** that sales and/or use tax, as summarized above, is due and payable to the commissioner of Taxation and Finance please sign and return one copy of this statement postmarked by 01/30/2013.
>
> 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. If the Tax Department denies my application in whole or in part, I may then contest the amount denied, within the time provided by law, in the Bureau of Conciliation and Mediation Services, or in the Division of Tax Appeals, or both. (3) If the Tax Department conducted a limited scope audit, it may later, within the time provided by law, determine that I owe additional tax. 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." (emphasis in original)

Petitioner submitted payment of $9,215.92 to the Division with the signed proposed statement, which was stamped as received by the Division on January 28, 2013.

10. Petitioner filed with the Division an application for credit or refund of sales or use tax (form AU-11), seeking a refund of the foregoing amount of tax and interest paid ($9,215.92). This application is dated as signed by petitioner's president, Mr. Obot, on July 9, 2014, and bears a stamp indicating the following:

"RECEIVED
Department of Taxation & Finance
Transaction Desk Audit Bureau
July 14, 2014
Sales Tax"

11. Every form AU-11 received by the Division is assigned processing identification information and numbers. The upper center area of the foregoing refund application includes a

label setting forth the following processing identification information and numbers assigned by the Division to such application:

"Claim #: 2014-07-0456
Carts #: X 469841390
Emerald Int'l Holdings, Ltd
TP Id#: 161470560
Batch Code: D"

12. The foregoing claim for refund was reviewed by the Division's Sales Tax Desk Audit Refund Unit. This refund claim was also forwarded to the Division's Casual Sales Unit, which had conducted the desk audit of petitioner's business, for review and recommendation in connection therewith. Following such review, the Division denied petitioner's claim for refund. Petitioner was advised of this denial by a letter dated September 5, 2014.

13. Petitioner challenged the foregoing denial by filing a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS), dated November 28, 2014. A conciliation conference was held on April 29, 2015, and on June 19, 2015, a conciliation order (CMS No. 264229) was issued denying petitioner's request and sustaining the Division's denial of petitioner's claim for refund.

14. Petitioner challenged the conciliation order and refund denial by filing a timely petition with the Division of Tax Appeals. Section (6) of the petition states: "[p]etitioner has enumerated (45) forty five facts regarding this case - see, attached." Consistent therewith, the petition includes an attachment setting forth some 45 enumerated items, including assertions of fact, assertions of error allegedly made by the Division, statutory and regulatory references, and conclusions drawn by petitioner therefrom.

15. On October 21, 2015, the Division filed its answer to the petition. Paragraphs 1 and 2 of the answer state:

> "1. ADMITS the allegations in the petition to the extent that the petitioner signed a Statement of Proposed Change for Sales and Use Tax, filed for a refund, and was denied said refund, the denial of which was sustained by Conciliation Order.
>
> 2. DENIES any and all of the other allegations contained in the petition, inclusive of paragraphs 1 through 45."

The remaining ten separately numbered paragraphs of the answer set forth affirmative statements in support of the Division's denial of petitioner's claim for refund.

16. Included among the attachments to the petition is a copy of a form AU-11, requesting a refund of the amount of tax and interest paid ($9,215.92). This form AU-11 is identical to the form AU-11 described above, but for the fact that it is: a) dated as signed by petitioner's president, Mr. Obot, on March 4, 2013, rather than July 4, 2014, and b) does not reflect any indication of receipt by the Division, including any dated receipt stamp, or any processing identification information or numbers thereon (***see*** finding of fact 10).

17. The record includes a copy of a letter from petitioner, dated March 4, 2013, addressed to "Scott Mastroianni, Technician, Audit Bureau Sales Tax Section, NYS Department of Taxation and Finance, WA Harriman Campus, Albany, New York 12227-0163." The fourth paragraph of this letter states: "[w]e are requesting a refund of nine thousand two hundred and fifteen dollars and ninety-two cents ($9,215,92). This was the amount we paid in reliance on your unverified estimates and determination." Petitioner's president stated in testimony that this letter was a cover letter sent to Mr. Mastroianni, and was accompanied by the form AU-11 dated March 4, 2013 (***see*** finding of fact 16).

18. The record does not include any proof of mailing, e.g., certified or registered mailing receipts, with regard to either the claimed filing of the form AU-11, dated March 4, 2013, or the described cover letter of the same date. Petitioner's president, Mr. Obot, claimed at hearing that

he filed the foregoing cover letter and form AU-11, dated March 4, 2013, by regular (first class) mail on or about March 4, 2013. Mr. Obot further stated that when he realized there had been no response to the filing, he contacted Mr. Mastroianni, who explained that he works in a unit other than the refund unit, and stated that he did not have any record of receiving the form AU-11 dated March 4, 2013. According to Mr. Obot, Mr. Mastroianni advised him that in order to avoid being barred from claiming a refund due to expiration of the period of limitations thereon, petitioner should file another form AU-11. In turn, petitioner filed the form AU-11, dated as signed on July 9, 2014, and received thereafter by the Division on July 14, 2014 (***see*** finding of fact 10).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by addressing petitioner's motion for summary determination. The Administrative Law Judge explained that it was not possible to address the merits of petitioner's motion before the hearing on November 9, 2016, and therefore the motion was preserved and renewed at the hearing to be addressed in the determination.

The Administrative Law Judge described the argument made in petitioner's motion for summary determination as a claim for relief based on the Division's failure to comply with the Tax Appeal Tribunal's Rules of Practice and Procedure (Rules) in its answer to the petition, specifically alleging that the Division failed to set forth separately numbered paragraphs in its answer corresponding to the separately numbered paragraphs in the petition. According to petitioner, the Division's answer inadequately responded to the petition and thus the allegations set forth in the petition must be deemed admitted and the petition should be granted.

The Administrative Law Judge found that the Rules do not require the Division to deny or admit each allegation of fact made in a petition individually to put petitioner on notice of the

matters in controversy and the basis for the Division's position. Furthermore, the Administrative Law Judge determined that to the extent that petitioner's assertions of errors made by the Division consisted of references to law and regulations, they did not require answers or denials by the Division in its answer. Thus, the Administrative Law Judge rejected petitioner's argument that its refund claim must be granted on this basis.

The Administrative Law Judge next turned to petitioner's argument that its petition must be granted because the Division failed to respond to its refund claim within six months of filing it with the Division as required under the Tax Law. The Administrative Law Judge observed that petitioner argues that its refund claim must be deemed to have been granted by default due to the Division's failure to deny it within the six month period following its filing.

According to the Administrative Law Judge, petitioner's argument is premised on establishing the fact and date of filing of a refund claim and the Division's failure to act on its refund claim within the six months provided for under the Tax Law. The Administrative Law Judge examined the evidence petitioner submitted in support of its position and found that it did not confirm a filing date of March 4, 2013 for its refund claim or its receipt by the Division. The Administrative Law Judge concluded that petitioner did not prove the fact and date of mailing of the refund claim and thus the ensuing response period provided for under the Tax Law was never triggered. As such, the Administrative Law Judge rejected petitioner's argument that its refund claim should be granted for the Division's failure to respond.

Lastly, the Administrative Law Judge addressed petitioner's argument that its refund claim dated July 9, 2014 should be granted because the statement of proposed audit changes signed by petitioner's president and returned to the Division did not constitute a valid consent to assessment for purposes of Tax Law § 1138 (c). Petitioner argued that the audit methodology

used in determining the amount of tax asserted in the statement of proposed audit changes was unreasonable and inaccurate. The Administrative Law Judge rejected petitioner's argument, observing that Tax Law § 1138 (c) provides the method to voluntary consent to assessment of sales tax, which petitioner invoked by having its president sign and date the statement of proposed audit changes and returning the same to the Division. The Administrative Law Judge reasoned that once petitioner consented to the proposed audit changes, the proposed amount of tax and additions became fixed and final. Thus, according to the Administrative Law Judge, it was petitioner's consent to the audit changes that provided the rational basis for the assessment of additional sales tax for the periods at issue and the reasonableness of the audit methodology ceased to be an issue.

The Administrative Law Judge stated that petitioner was entitled to make a refund claim only by demonstrating by clear and convincing evidence that its actual tax liability was less than that to which it consented. However, according to the Administrative Law Judge, petitioner failed to bear its burden in showing that it ultimately owed less than the amount to which it consented. Thus, the Administrative Law denied the petition and sustained the Division's denial of petitioner's refund claim.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner argues that its president's signing and dating the consent section of the proposed statement of audit changes and returning the same to the Division did not result in a fixed and final assessment of additional tax. Petitioner also argues that the methodology used by the Division in arriving at the amount of additional sales tax was unreasonable. Petitioner asserts that it should be granted the claimed refund due to the Division's failure to deny the claim within

six months. Petitioner also argues that the Division failed to comply with our Rules in its answer to the petition, which renders the Division's answer defective.

The Division argues that petitioner's consent to the statement of proposed audit changes rendered the amount asserted therein as a fixed and final assessment. According to the Division, once consented to, such an assessment is unassailable with regard to the underlying methodology. The Division also argues that it substantially complied with our Rules in its answer and therefore the same is not defective. Finally, the Division argues that petitioner has not borne its burden of demonstrating through clear and convincing evidence that the amount of additional sales tax assessed was erroneous.

OPINION

We begin with petitioner's motion for summary determination based on its assertion that the Division failed to comply with the Tax Appeals Tribunal's Rules by not separately and individually setting forth in its answer to the petition an admission or denial to each of the numbered paragraphs contained therein (***see*** 20 NYCRR 3000.4 [b] [2]). The Rules require the Division to serve an answer to the petition that advises the petitioner and the Division of Tax Appeals of its defense (20 NYCRR 3000.4). 20 NYCRR 3000.4 (a) explains that the purpose of the pleadings is to "give the parties and the Division of Tax Appeals fair notice of the matters in controversy and the basis for the parties' respective positions. All pleadings shall be liberally construed so as to do substantial justice." Material allegations set forth in the petition not expressly admitted or denied in the answer shall be deemed to be admitted (20 NYCRR 3000.4 [b] [3]).

Petitioner takes exception to the Administrative Law Judge's conclusion that the Division's answer complied with our procedural Rules. Petitioner maintains that its allegations contained in

the petition must be deemed admitted due to the Division's failure to separately respond to each of the numbered paragraphs in the petition. We agree with the Administrative Law Judge that the general denial given by the Division in its answer was sufficient to comply with our Rules by putting petitioner and the Division of Tax Appeals on fair notice of the matters in controversy and its position regarding its denial of petitioner's refund claim (***see*** 20 NYCRR 3000.4 [a]). We find that the Division's denial contained in its answer was sufficient for these purposes where it specified all of the allegations in the petition by reference to their paragraph numbers. Furthermore, we agree with the Administrative Law Judge that some of petitioner's numbered allegations consisted of mixed statements of law and legal conclusions drawn from facts. In such an instance, the Division need only address material allegations of fact and is not required to address such mixed statements in its answer (***see*** 20 NYCRR 3000.4 [b] [3]).

We now turn to petitioner's argument that the Administrative Law Judge erred in concluding that Tax Law § 1139 (b) did not require the granting of petitioner's refund claim dated March 4, 2013 due to the Division's failure to deny the same within six months. Tax Law § 1139 (b) provides, in relevant part:

> "[i]f an application for refund or credit is filed with the commissioner of taxation and finance as provided in subdivision (a) of this section, the commissioner of taxation and finance shall grant or deny such application in whole or in part within six months of receipt of the application in a form which is able to be processed and shall notify such applicant by mail accordingly."

From the outset, we note that petitioner bears the burden of showing its entitlement to the refund it claimed (***see*** 20 NYCRR 3000.15 [d] [5]; ***Matter of 475 Associates, et al***, Tax Appeals Tribunal, April 27, 2006). Thus, as a threshold matter, petitioner must establish that it filed the refund claim dated March 4, 2013. However, we agree with the Administrative Law Judge that the record does not support such a finding. The form AU-11 dated March 4, 2013 bears no indication that it was mailed to or received by the Division. We find unconvincing petitioner's

assertion that the cover letter dated March 4, 2013 supports a finding that the refund claim was filed on that date. As noted by the Administrative Law Judge, there is no evidence in the record that petitioner filed the refund claim via a method of mailing that allows confirmation of the fact and date of such mailing. We have held in our prior cases that "[w]here a taxpayer uses ordinary mail, the taxpayer bears the risk that a postmark may not be timely fixed by the postal service or that the document may not be delivered at all." (***Matter of Sipam***, Tax Appeals Tribunal, March 10, 1988; ***see also Matter of Harron's Electric Service***, Inc., Tax Appeals Tribunal, February 19, 1988). As we are unable to ascertain whether the refund claim dated March 4, 2013 was ever filed with the Division, we must concur with the Administrative Law Judge that petitioner has not met its burden of proving entitlement to the refund claim dated March 4, 2013. Without being able to ascertain when the refund claim was filed, if at all, we cannot impute to the Division an obligation of responding to that refund claim within six months of March 4, 2013. We thus do not reach petitioner's argument that the Division's failure to respond with a refund denial within six months of March 4, 2013 entitles petitioner to the refund it claimed.

Lastly, we address petitioner's argument that it established entitlement to the refund claim dated July 9, 2014 after returning a statement of proposed audit changes, signed and dated in the consent section of the notice, to the Division on January 4, 2013. Tax Law § 1138 (c) provides in relevant part:

> "a person liable for collection and payment of tax (whether or not a determination assessing a tax pursuant to Tax Law § 1138 [a] has been issued) shall be entitled to have a tax due assessed prior to the 90-day period referred to in Tax Law § 1138 (a) by filing . . . a signed statement in writing, in such form as the commissioner shall prescribe, consenting thereto."

We find that the language contained on the statement of proposed audit changes inviting taxpayers to agree to the proposed audit changes complied with the statutory requirements

regarding filing a signed statement, in such form as the Division requires, consenting to assessment pursuant to Tax Law § 1138 (c). The consent language contained in the paragraph that Mr. Obot signed and dated in his capacity as president of petitioner unambiguously put petitioner on notice that the amount of additional tax proposed in the statement of proposed audit changes would become an assessment and that petitioner was waiving its right to a pre-payment hearing (***see*** finding of fact 9). We agree with the Administrative Law Judge that the assessment became fixed and final upon petitioner's consent to assessment.

As we stated above, a taxpayer bears the burden of proving error in the Division's denial of a refund claim (***see Matter of 475 Associates***). Thus, where a taxpayer has consented to a proposed assessment and requested a refund, the taxpayer must establish entitlement to the refund claim by showing that the amount of additional tax it consented to was erroneous (***see*** Tax Law § 1139 [c]; 20 NYCRR 534.1 [b]; ***Matter of SICA Electrical and Maintenance Corp.***, Tax Appeals Tribunal, February 26, 1998). A taxpayer's consent to a proposed assessment contained in a statement of proposed audit changes provides the rational basis necessary for the assessment and finally resolves the issue of whether the audit methodology was reasonable (***see*** Tax Law § 1138 [c]; ***Matter of Rosemelia***, Tax Appeals Tribunal, March 12, 1992; ***Matter of BAP Appliance Corp.***, Tax Appeals Tribunal, May 28, 1992; ***Matter of SICA***; ***Matter of RJB Slick's n/k/a RKB Ventures, Inc.***, Tax Appeals Tribunal, February 8, 2018).

Here, petitioner argues that the amount of additional sales tax proposed in the statement of proposed audit changes was erroneous because the audit methodology itself was flawed. However, after petitioner's consent to the amount of additional sales tax, the audit methodology employed by the Division in arriving at the additional tax due ceased being an issue (***id.***). Petitioner's consent to the assessment means that the only way it can prevail on its refund claim

of July 9, 2014 is by affirmatively establishing the accuracy of its sales tax returns as filed (***see e.g. Matter of RJB Slick's n/k/a RKB Ventures, Inc.***). As petitioner submitted no evidence supporting the accuracy of its sales tax returns, we conclude that petitioner has failed to meet its burden (***see Raemart Drugs, Inc. v Wetzler***, 157 AD2d 22 [3d Dept 1990]). We thus affirm the determination of the Administrative Law Judge and sustain the Division's denial of petitioner's refund claim dated July 9, 2014.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Emerald International Holdings, Ltd. is denied;

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

3. The petition of Emerald International Holdings, Ltd. is denied; and

4. The Division's refund denial dated September 4, 2014 is sustained.

DATED: Albany, New York
April 5, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner