

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**CPV STATEN ISLAND, INC.** :

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, 2012 through May 31, 2017. :

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In the Matter of the Petition :

of :

**VINCENZO PARRELLI** :

for Revision of Determinations or for Refund of Sales and :  
Use Taxes under Articles 28 and 29 of the Tax Law for :  
the Period December 1, 2012 through May 31, 2017. :

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In the Matter of the Petition :

of :

**GIULIA SALUMERIA CORP.** :

for Revision of a Determination or for Refund of Sales and :  
Use Taxes under Articles 28 and 29 of the Tax Law for :  
the Period September 1, 2013 through May 31, 2017. :

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DECISION  
DTA NOS. 829725,  
829729, 829730 AND  
829773

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In the Matter of the Petition :  
of :  
**VINCENZO PARRELLI** :  
for Revision of Determinations or for Refund of Sales and :  
Use Taxes under Articles 28 and 29 of the Tax Law for :  
the Periods September 1, 2013 through May 31, 2017. :

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Petitioners, CPV Staten Island, Inc., Giulia Salumeria Corp., and Vincenzo Parrelli, filed an exception to the determination of the Administrative Law Judge issued on June 8, 2023. Petitioners appeared by Gabor and Marotta LLC (Richard M. Gabor, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel).

Petitioners filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument was heard by teleconference on February 29, 2024, which date commenced the six-month period for the issuance of this decision.

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

***ISSUE***

Whether petitioners have sustained their burden of proving that the use of an external index to estimate tax was improper or erroneous and the resulting tax was improper.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except that we have modified findings of fact 15 through 18 and 23 to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact appear below.

1. Petitioner, CPV Staten Island, Inc. (CPV), is an Italian delicatessen/pork store located in Rosebank, Staten Island, New York and does business as Montalbano's of Rosebank.

2. Petitioner, Giulia Salumeria Corp. (Giulia), is an Italian delicatessen/pork store located in Rossville, Staten Island, New York and does business as Montalbano's of Rossville.

3. Petitioner, Vincenzo Parrelli, is the owner and president of both CPV and Giulia.<sup>1</sup>

4. CPV was registered as a vendor for sales tax purposes and filed New York sales tax returns for the period in issue. In contrast, Giulia was not a registered vendor for sales tax purposes and had not filed New York sales tax returns for the period in issue.

5. By letter dated July 10, 2017, the Division of Taxation (Division) advised CPV that a sales tax field audit of its books and records for the period December 1, 2012 through May 31, 2017, would commence on July 28, 2017. Also, by letter dated July 10, 2017, the Division advised Giulia that a sales tax field audit of its books and records for the period September 1, 2013 through May 31, 2017, would commence on July 26, 2017. The respective audit appointment letters advised CPV and Giulia that all of their respective books and records pertaining to their sales and use tax liability for the audit period specified should be available for review on the audit appointment date. Attached to both audit appointment letters were Information Document Requests (IDR) that specified a detailed listing of records that were to be available for the entire audit period, including sales tax returns; worksheets and cancelled 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, cancelled checks and deposit slips;

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<sup>1</sup> Petitioner Vincenzo Parrelli's status as a responsible person of CPV and Giulia is not at issue in this proceeding.

cash receipts journal; cash disbursements journal; the corporate book, including minutes, board of directors, and articles of incorporation; depreciation schedules; lease contracts; utility bills; guest checks; cash register tapes, and capital asset list.

6. During the audits, Richard Gabor represented both CPV and Giulia.

7. At the first meeting with CPV's representative, the Division's auditor only received Department of State incorporation information for CPV. The representative identified three of CPV's suppliers, but did not provide purchase invoices. Following the issuance of this first IDR, the Division issued two additional IDRs during the course of its audit of CPV. In response to the three IDRs, CPV only provided some bank statements, federal forms 1120 for the years 2013 through 2016 and copies of CPV's sales tax returns. No sales records were provided.

8. With respect to the audit of Giulia, Mr. Gabor provided one copy of a federal form 1120S and some bank statements. No sales records were provided to the auditor. Later in the audit, the representative provided Department of State incorporation information for Giulia and, subsequently, a listing of checks from the New York City Board of Education for catering performed by Giulia.

9. The Division was able to obtain CPV and Giulia's respective leases through the issuance of subpoenas directed to the entities' respective landlords.

10. On November 2, 2017, the auditor did a survey of Giulia. The log entry states in pertinent part as follows:

“the Auditor visited the place of business during the lunch time. And the place [sic] very busy and it is too small. They selling [sic] a lot of sandwiches, specially [sic] for police officers, They sell taxable items such as soda, sandwiches, beers, clearing [sic] and drinks.”

11. On January 19, 2018, the auditor also did a survey of CPV. The log entry states in pertinent part as follows:

“the Auditor visited the place of business during the lunch time. And the place [sic] very busy and it is [sic] good medium size store. They selling [sic] a lot of sandwiches, Hot Sandwiches, Soups, Fresh Salads, Gourmet Wraps, Panini Sandwiches and also they do Catering such as Pasta, Seafood, Vegetables, Carving Board and Endress and much more. Also they sell taxable items such as soda, Drinks and battle [sic] of water and clearing [sic] items.”

12. Included within the audit file is a combined menu for Montalbano’s of Rosebank (CPV) and Rossville (Giulia) (collectively Montalbano’s). Montalbano’s specifically references itself as “King of the Hero’s” [sic] on its menu. The menu consists of eight pages and lists ten different hot sandwiches, ten different cold sandwiches, sixteen different gourmet wraps, sixteen different panini sandwiches, thirteen different salads in small and large sizes, five soups in small and large sizes as well as a soup of the day. Two of the menu pages are dedicated to catering and list numerous pasta dishes, seafood dishes, vegetable dishes, carving boards (i.e., roast beef, ham, turkey, roasted pork loin, prime rib, and combinations thereof); cold cut platters, fresh mozzarella platters, cheese platters, fruit platters, sandwich, submarine and wrap platters, various hors d’oeuvres and desserts. The menu refers to both locations and describes itself as a pork store and an Italian food specialties store.

13. The Giulia audit file also included printouts from CPV and Giulia’s website indicating that they offer a variety of daily lunch specials in addition to the regular menu. One of the webpages states as follows:

“Montalbano’s is a Full Service Supplier of top quality meats, imported Italian products and the finest cheeses. We are not just a deli, we stock gourmet foods that are prepared daily! Along with our Fresh Mozzarella made daily.”

14. Lacking complete books and records to perform detailed audits, the auditor estimated both entities’ gross taxable sales by using an indirect audit methodology.

15. To compute estimated gross sales for Giulia, the auditor consulted the National Restaurant Association's Restaurant Industry Operations Report (RIOR) for 2013-2014. The

auditor obtained the median quartile occupancy costs of 6.5% for limited-service restaurants with a menu theme of sandwiches/subs/deli. The rental expense, as obtained from the lease agreement, was divided by the 6.5% occupancy cost to arrive at gross sales for the audit period. The auditor factored into this amount an estimate of 20% for nontaxable sales; i.e., sales of raw meat, cold cuts, frozen foods, cookies, juices, etc., to arrive at taxable sales. The auditor determined this estimate following the store surveys and a discussion with the auditor's section head. The auditor also factored in the amount of nontaxable catering sales Giulia made to the New York City Board of Education in arriving at taxable sales.

16. To compute audited gross sales for CPV, the auditor also consulted the RIOR for 2013-2014. The auditor obtained the median quartile occupancy costs of 6.5% for limited-service restaurants with a menu theme of sandwiches/subs/deli. The rental expense as obtained from the lease agreement was divided by the 6.5% occupancy cost to arrive at gross sales for the audit period. As with the audit of Giulia, the auditor factored into this amount an estimate of 20% attributable to nontaxable sales; i.e., sales of raw meat, cold cuts, frozen foods, cookies, juices, etc., in arriving at taxable sales.

17. A copy of the first page of the RIOR and the page from the RIOR for limited-service restaurants with a menu theme of sandwiches/subs/deli and the page where the auditor obtained the occupancy cost factor was included in the audit files of CPV and Giulia. Copies of these pages were provided to petitioners at the conclusion of the audit. In addition, the Division introduced a complete copy of the RIOR into the hearing record in this matter.

18. On July 9, 2018, the Division issued a statement of proposed audit changes to CPV asserting tax of \$284,138.65 plus interest, and penalties pursuant to Tax Law § 1145 (a) (1) (i) and (vi). On August 17, 2018, the Division issued another statement of proposed audit changes

to CPV to correct an error contained in the July 9, 2018 statement of proposed audit changes. The revised amount of tax asserted due in this statement of proposed audit changes was \$222,486.97.<sup>2</sup>

19. On August 2, 2018, the Division issued a statement of proposed audit changes to Giulia asserting tax of \$167,497.33 plus interest, and penalties pursuant to Tax Law § 1145 (a) (1) (i) and (vi).

20. On August 27, 2018, the Division issued notice of determination, notice number L-048716510, to Giulia for the period September 1, 2013 through May 31, 2017, which asserted sales tax due of \$167,497.33 plus interest, and penalties pursuant to Tax Law § 1145 (a) (1) (i) and (vi).

21. On August 29, 2018, the Division issued notice of determination, notice number L-048721109, to CPV for the period December 1, 2012 through May 31, 2017, which asserted sales tax due of \$222,486.97 plus interest, and penalties pursuant to Tax Law § 1145 (a) (1) (i) and (vi).

22. On August 30, 2018, the Division issued notice of determination, notice number L-048723655, for the period September 1, 2013 through May 31, 2017, to petitioner Vincenzo Parrelli, as responsible person of Giulia, which asserted sales tax due of \$167,497.33 plus interest, and penalties pursuant to Tax Law § 1145 (a) (1) (i) and (vi).

23. On August 31, 2018, the Division issued notices of determination, notice numbers L-048725811 and L-048725810, to petitioner Vincenzo Parrelli as responsible person of CPV. Together, those notices asserted sales tax due of \$222,486.97 plus interest, and penalties

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<sup>2</sup> A note in the audit workpapers indicates that the auditor did not subtract the amount of taxable sales reported by CPV in its filed sales tax returns for the period in issue, but that an adjustment would be made at a later date to account for the previously reported taxable sales. The Administrative Law Judge directed the Division to make this adjustment in conclusions of law F and H of the determination.

pursuant to Tax Law § 1145 (a) (1) (i) and (vi), for the aggregate period of December 1, 2012 through May 31, 2017.

24. At the hearing in this matter, petitioners presented the testimony of Pasquale Parrelli, the brother of petitioner Vincenzo Parrelli. Mr. Parrelli works for both CPV and for Giulia and is familiar with the operations of both stores. Pasquale Parrelli testified that both businesses are pork stores and that sandwiches and prepared foods were only offered to reduce spoilage and that they represented a small portion of the CPV's and Giulia's total sales. Mr. Parrelli testified that he views the two stores as butcher shops and stated that sandwiches and catering made up a very small percentage of CPV's and Giulia's business. In conjunction with Mr. Parrelli's testimony, copies of 27 photographs were introduced into the record. These photographs depict CPV's and Giulia's stores and show a variety of grocery items including cheeses, fresh meat, breadcrumbs, pastas, breads, olive oil, refrigerated coolers, a portion of a deli counter, and other miscellaneous grocery items. Although Mr. Parrelli claimed that the two stores are mirror images of one another, the auditor's log describes CPV as a medium-sized store while describing Giulia as small.

25. The Division did not present the testimony of the auditor who performed the audits of CPV and Giulia because, at the time of the hearing, he was retired. In his place, the Division presented the testimony of Tina Wong, another sales tax auditor whose testimony was based upon her review of the audit files of CPV and Giulia. During the hearing, Ms. Wong was questioned by petitioners' representative about the appearance of NAICS codes in various places in the audit file and whether, after reviewing the evidence submitted by petitioners, she would have used a rent occupancy factor for a convenience store or a grocery store. Ms. Wong was reluctant to answer the questions, explaining that without observing the establishments herself,



she could not state the rent factor chosen was incorrect. She further explained that she would have liked to have seen sales records in order to determine whether the establishments were limited-service restaurants or whether they were specialty food stores.

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

The Administrative Law Judge determined that petitioners did not show that the Division's use of a rent factor for limited-service restaurants as the basis for its estimates of the stores' sales was unreasonable. The Administrative Law Judge did not accept Mr. Parrelli's testimony that the stores sold sandwiches and prepared foods only as a way to reduce spoilage and that such sales represented a small portion of total sales. To the contrary, the Administrative Law Judge found that the menu, the marketing of the businesses as delis, and the auditor's visits to both locations where he observed busy lunch activity supported the Division's use of the limited-service restaurant rent factor. While acknowledging that the stores also sold nontaxable food items, the Administrative Law Judge noted that petitioners failed to provide any sales records to show that the stores were primarily food stores and not limited-service restaurants. The Administrative Law Judge thus sustained the assessments of sales tax and the imposition of penalties as asserted in the notices of determination. The Administrative Law Judge also directed that the assessments arising from the CPV audit be modified to account for sales tax remitted on taxable sales reported (*see* footnote 2).

#### ***ARGUMENTS ON EXCEPTION***

As they did below, petitioners concede that the Division had the right to estimate their sales tax liability using a rent factor and they acknowledge that they failed to maintain or make available records as requested. Petitioners contend, however, that the specific rent factor employed was erroneous. Petitioners thus assert that the audit method was unreasonable and

that, accordingly, the notices of determination must be cancelled. Petitioners continue to argue that their stores were not limited-service restaurants, but were primarily meat markets, with their next greatest category of revenue from groceries. Since they were not limited-service restaurants, petitioners assert, it is improper to use statistics derived from that kind of business to estimate their sales.

Petitioners contend that the audit report does not refer to the stores as limited-service restaurants, but does refer to them as other kinds of stores and does use other NAICS codes to describe them. Petitioners also note that the photos of the stores in the record show grocery items and do not show the stores to be limited-service restaurants.

Relying on the Mr. Parrelli's testimony, petitioners contend that the primary business of the stores was the sale of meat, chicken, veal, and holiday foods. Petitioners continue to assert that they sold cooked food only as a way to reduce waste and that they did only a little catering.

Petitioners also assert that the Division's use of data pertaining to 2013-2014 while the audit period ran from December 1, 2012 through May 31, 2017 was improper in the absence of any evidence indicating that economic conditions for the longer audit period were consistent with the shorter period covered by the RIOR. Petitioners thus contend that it is unreasonable to assume that the rental percentage would stay the same for those other years. Petitioners further contend that the RIOR sample size was too small, contrasting it with another, similar report that they submitted in evidence that they contend contains more reliable information.

Petitioners also argue that the 20% allowance for nontaxable sales shows that they were not in the limited-service restaurant business since this 20% is not limited-service restaurant revenue. Petitioners also contend that there is no evidence in the record to show that this 20% allowance had a rational basis.

Additionally, petitioners assert that the Division's witness, who was not the auditor and whose knowledge of this matter was based on a review of the audit reports, was unable to respond meaningfully to questions regarding the audit, contrary to Tribunal precedent. Accordingly, petitioners assert that the record lacks sufficient evidence to show that the audit has a rational basis.

The Division contends that its classification of the stores as limited-service restaurants with a sandwiches/subs/deli theme for purposes of the rent factor was reasonable. The Division notes that the auditor physically surveyed each store and observed that each location was preparing and selling taxable food. The Division also asserts that the stores' menus and website support the limited-service restaurant classification. The Division contends that it made the 20% allowance for nontaxable food sales because the auditor observed some nontaxable food for sale in the stores. The Division notes that petitioners did not provide any records of nontaxable sales, or, indeed, of any sales and that, therefore, its estimate of petitioners' taxable sales ratio was reasonable.

The Division also contends that petitioners' focus on the various NAICS codes in the audit file is irrelevant and demonstrates only that the Division did consider other possible NAICS codes to classify the stores, ultimately settling on the limited-service restaurant classification.

### ***OPINION***

Persons required to collect sales tax, including each of the petitioners herein, must "keep records of every sale . . . in such form as the commissioner of taxation and finance may by regulation require" (Tax Law § 1135 [a] [1]). Required sales records include copies of each "guest check . . . cash register tape and any other original sales document" (20 NYCRR 533.2 [b] [1]). These records must be (i) sufficient to verify all transactions; (ii) kept in a manner suitable

to determine the correct amount of tax due; and (iii) available for the Division's inspection upon request for a period of three years (Tax Law § 1135 [g]; 20 NYCRR 533.2 [a] [1], [2]).

Tax Law § 1138 (a) (1) provides, in relevant part, that if a sales tax return is not filed, “or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . .” The standard for the use of external indices (also referred to as an indirect or an estimated audit) is well established. The Division must first make an explicit request for the taxpayer's books and records (*Matter of Christ Cella, Inc. v State Tax Commn.*, 102 AD2d 352, 354 [3d Dept 1984]) for the entire period of the assessment (*Matter of Adamides v Chu*, 134 AD2d 776, 779 [3d Dept 1987], *lv denied* 71 NY2d 806 [1988]). The Division must then make a thorough review of the records so provided (*Matter of King Crab Rest. v Chu*, 134 AD2d 51, 53 [3d Dept 1987]). If such review indicates that the records are insufficient for the Division to verify taxable sales receipts and conduct a complete audit from which the exact amount of tax due can be determined, then the use of external indices, or an estimated audit method, is proper (*Matter of Giordano v State Tax Commn.*, 145 AD2d 726, 727 [3d Dept 1988]; *see also Matter of Coram Diner Corp.*, Tax Appeals Tribunal, March 12, 2015 [a failure to maintain or make available any sales records justifies a resort to external indices]).

The Division's use of external indices was clearly proper here, given petitioners' failure to produce any sales records in response to the Division's multiple requests (*see* findings of fact 7 and 8). As noted, petitioners do not contest this point.

Where, as here, a taxpayer fails to produce records sufficient to complete a sales tax audit, “the Division has the latitude to choose the method it feels best accomplishes its goal of

reasonably estimating petitioners' tax liability" (*Matter of 33 Virginia Place, Inc.*, Tax Appeals Tribunal, December 23, 2009; *see also Ristorante Puglia, Ltd. v Chu*, 102 AD2d 348, 350 [3d Dept 1984] [Division must "select a method of audit reasonably calculated to reflect the taxes due."]). While the Division is "not responsible for demonstrating the propriety of the assessment, including the basis for its audit" (*Matter of Blodnick v New York State Tax Commn.*, 124 AD2d 437, 438 [3d Dept 1986]), the record must contain sufficient evidence "to determine whether a rational basis existed for the auditor's computation" (*Matter of Grecian Sq. v New York State Tax Commn.*, 119 AD2d 948, 950 [3d Dept 1986]). Exactness in the outcome of an audit using external indices is not required, as the taxpayer's own failure to maintain records as required under Tax Law § 1135 (a) (1) prevents it (*see e.g. Matter of Constantini*, Tax Appeals Tribunal, January 10, 2008). The burden is on the taxpayer to demonstrate by clear and convincing evidence that the audit method employed was unreasonable or that the amount of the tax assessed is erroneous (*Matter of Meskouris Bros. v Chu*, 139 AD2d 813, 815 [3d Dept 1988]). If the taxpayer shows that the audit method was unreasonable, they have sustained their burden of proof and are not required to show the exact amount of tax due (*Matter of Majestic Deli Grocery*, Tax Appeals Tribunal, April 14, 2017).

It is well-established that where a taxpayer fails to maintain or produce adequate records, the Division may, under certain circumstances, estimate taxable sales based on a rent to sales ratio, commonly referred to as a rent factor (*see e.g. Matter of Henry Street Superior Deli Corp.*, Tax Appeals Tribunal, February 21, 2017 [deli]; *Matter of New Intrigue Jewelers, Inc.*, Tax Appeals Tribunal, March 6, 2014 [retail jewelry kiosk]; *Matter of J&L Donut Shop, Inc.*, Tax Appeals Tribunal, September 13, 2012 [restaurant]; *Matter of Constantini* [pizzeria]; *Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003

[grocery/convenience store]; *Matter of Bitable on Broadway*, Tax Appeals Tribunal, January 23, 1992, *confirmed* 199 AD2d 633 [3d Dept 1993] [bar and restaurant]; *Matter of Shukry*, Tax Appeals Tribunal, March 28, 1991 *confirmed* 184 AD2d 874 [3d Dept 1992] [television repair business]).

“[T]he 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 Henry Street Superior Deli Corp.*, citing *Matter of Bitable on Broadway*). 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.*). This requirement was met here as the RIOR was identified to petitioners at the conclusion of the audit and a complete copy of the RIOR was received in evidence at the hearing (*see* finding of fact 17).

We disagree with petitioners’ contention that the audit lacks a rational basis because the Division failed to produce a witness able to respond meaningfully to their questions regarding the audit. The Division has the obligation to produce such a witness in cases where “the audit method is based on facts that are peculiarly within the knowledge of the Division, e.g., audits of similar establishments” (*Matter of Bitable on Broadway*). As noted above, where, as here, the audit is based on a publicly available statistical report, the Division meets its obligation to show a rational basis for the audit by the identification of the report (*Matter of Henry Street Superior Deli Corp.*, citing *Matter of Bitable on Broadway*; *see also Matter of Abbasi*, Tax Appeals Tribunal, June 12, 2008).<sup>3</sup>

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<sup>3</sup> Petitioners cite *Matter of Abbasi* to support their argument on this point, but the language upon which they rely, although quoted in *Abbasi*, is from *Matter of Basileo* (Tax Appeals Tribunal, May 9, 1991). Contrary to petitioners’ contention, *Abbasi* notes with approval the distinction between audits using an identified publicly available report, such as *Bitable on Broadway*, where the report itself is sufficient to show a rational basis, and audits using facts peculiarly within the knowledge of the Division, such as *Basileo*, where the Division must do more, through a witness or documents, to show a rational basis.

Petitioners' primary objection to the audit is not the Division's use of a rent factor per se, but rather the Division's classification of the businesses as limited-service restaurants for purposes of the rent factor. The record, however, contains ample evidence to establish a rational basis, and hence the reasonableness, for the Division's use of that classification. Specifically, the auditor's descriptions of the stores following his visits (*see* findings of fact 10 and 11), the stores' menus, and the "King of the Hero's" [sic] nickname (*see* finding of fact 12) are indicative of limited-service restaurants with a menu theme of sandwiches/subs/deli. We have previously relied on an auditor's observation together with similar corroborative evidence in determining that a business operated more like a limited-service restaurant than a grocery store (*see Matter of Henry Street Superior Deli Corp.*).

Petitioners' contention that the businesses mostly sold meat and groceries, and was therefore not a limited-service restaurant, rests largely on the testimony of Pasquale Parrelli and photographs of the stores. Such evidence falls well short, however, of meeting petitioners' burden to show, by clear and convincing evidence, that the audit method was unreasonable (*Matter of Meskouris Bros. v Chu*, 139 AD2d at 815). We agree with the Administrative Law Judge that Mr. Parrelli's testimony is contradicted by the evidence noted above indicating that the stores were limited-service restaurants. We also agree with the Administrative Law Judge that the credibility of Mr. Parrelli's testimony is diminished by the lack of any sales records to corroborate his claims. The testimony thus amounts to "conclusory allegations of error" in the audit method and is insufficient to meet petitioners' burden of proof (*see Matter of Vebol Edibles v State of N.Y. Tax Appeals Trib.*, 162 AD2d 765, 766 [3d Dept 1990], *lv denied* 77 NY2d 803 [1991]). As to the photographs showing meat and groceries for sale in the stores, there is no dispute that the stores sold those items. To establish that the audit method was

unreasonable, petitioners must show that the stores *primarily* sold those items. The photos are of little probative value in proving that point.

Contrary to petitioners' contention, we find that the audit report's use of terms other than limited-service restaurant (or the NAICS code associated with limited-service restaurants) to describe the stores does not tend to refute the evidence indicating that the use of that classification for purposes of the rent factor was reasonable, i.e., the auditor's descriptions of the stores following his visits (*see* findings of fact 10 and 11), the stores' menus, and the "King of the Hero's" [sic] nickname (*see* finding of fact 12) (*see Matter of Laham*, Tax Appeals Tribunal, October 27, 2016 [for purposes of a rent factor audit the use of a NAICS code other than that reported by a taxpayer on federal returns is reasonable based on other evidence in the record]).

Petitioners' contention that the sample size of the RIOR from which the rent factor at issue was derived was too small challenges the soundness of the report. This claim, however, is unsupported by any evidence in the record and is thus another conclusory allegation of error insufficient to meet petitioners' burden of proof (*see Matter of Vebol Edibles v State of N.Y. Tax Appeals Trib.*, 162 AD2d at 766).

Petitioners' contention, also unsupported by any evidence, that a different survey would have provided a more reliable result is irrelevant where, as here petitioners have failed to prove by clear and convincing evidence that the chosen audit method was unreasonable (*Matter of Henry Street Superior Deli*). As noted previously, exactness in the outcome of an audit using external indices is not required, as the taxpayer's own failure to maintain records prevents it (*see e.g. Matter of Constantini*).

As noted, petitioners also contend that the Division's use of data pertaining to 2013-2014, while the audit period ran from December 1, 2012 through May 31, 2017, was improper in the



absence of any evidence indicating that economic conditions for the longer audit period were consistent with the shorter period covered by the RIOR. This contention amounts to an attempt to shift the burden of proof in the present matter to the Division. As noted, petitioners bear this burden and they have offered no evidence to show that the Division's use of such data was unreasonable. We note, too, that we have determined rent factor audits to be reasonable in many cases where the audit period and the period from which the data was compiled do not match precisely (*see e.g. Matter of Henry Street Superior Deli; Matter of J&L Donut Shop, Inc.; Matter of Constantini*).

Regarding the Division's estimate of a 20% allowance for nontaxable sales, we note first that such an allowance does not indicate error in the Division's selection of the limited-service restaurant classification, as petitioners contend. If anything, the allowance tends to support the Division's choice because it indicates that 80% of petitioners' sales were taxable. This is consistent with businesses that are primarily limited-service restaurants.

We also disagree with petitioners' contention that the Division's 20% allowance for nontaxable sales lacked a rational basis. The Division made this allowance following the auditor's visits to the stores and observation of the items sold and a discussion between the auditor and the auditor's supervisor (*see* finding of fact 15). The allowance was thus based on the auditor's observation of items in the stores and was therefore rational (*see Matter of Laham* [estimated taxable ratio based on auditor's observation and experience deemed reasonable]; *Matter of 751 Bergen Dely, Inc.*, Tax Appeals Tribunal, July 23, 2009 [estimated taxable ratio based on observation of items on display in store deemed reasonable]; *Matter of Your Own Choice, Inc.* [estimated taxable ratio based on audit experience deemed reasonable]).

Finally, we note that as petitioners' exception does not contest the imposition of penalties, we do not address that issue here.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of CPV Staten Island, Inc., Giulia Salumeria Corp., and Vincenzo Parrelli is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of CPV Staten Island, Inc., and Vincenzo Parrelli, as responsible person of CPV Staten Island, Inc., are granted to the extent indicated in paragraph 5 below, but are otherwise denied;
4. The petitions of Giulia Salumeria Corp., and Vincenzo Parrelli, as responsible person of Giulia Salumeria Corp., are denied;
5. The notices of determination issued to CPV Staten Island, Inc. and to Vincenzo Parrelli, as responsible person of CPV Staten Island, Inc. are modified to account for tax remitted on taxable sales reported (*see* footnote 2) and as so modified, such notices are sustained; and
6. The notices of determination issued to Giulia Salumeria Corp., and Vincenzo Parrelli, as responsible person of Giulia Salumeria Corp., are sustained.

DATED: Albany, New York  
May 23, 2024

/s/ Anthony Giardina  
Anthony Giardina  
President

/s/ Cynthia M. Monaco  
Cynthia M. Monaco  
Commissioner

/s/ Kevin A. Cahill  
Kevin A. Cahill  
Commissioner