

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PETER FALDETTA	:	DETERMINATION
for Revision of a Determination or for Refund of Sales	:	DTA NO. 823265
and Use Taxes under Articles 28 and 29 for the Period	:	
December 1, 2000 through February 28, 2005.	:	

Petitioner, Peter Faldetta, filed a petition 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, 2000 through February 28, 2005.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on April 19, 2016 at 10:45 A.M., in New York, New York, with all briefs to be submitted by April 7, 2017, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

ISSUES

I. Whether petitioner has demonstrated that the audit methodology utilized by the Division of Taxation in its audit of 110 Boot and Leather Inc. lacked a rational basis and was not reasonably calculated to reflect the tax due.

II. Whether assessed penalties should be abated

FINDINGS OF FACT

1. Pursuant to a field audit of 110 Boot and Leather Inc. (110 Boot and Leather), which

commenced in January 2008, the Division of Taxation (the Division), on February 29, 2008, issued a notice of determination to the corporation asserting additional sales and use taxes due in the amount of \$308,097.00 for the period December 1, 2000 through February 28, 2005, plus penalty and interest.

2. On March 3, 2008, the Division issued a notice of determination to petitioner Peter E. Faldetta asserting additional sales and use taxes due in the amount of \$308,097.00 for the period December 1, 2000 through February 28, 2005, plus penalty and interest. This notice indicated that “[o]ur records indicate that you are/were an Officer/Responsible Person of: 110 BOOT AND LEATHER INC.”

3. On October 17, 2006, the Division’s Suffolk District Office, Tax Compliance Division (TCD) agent Patricia Caruso made a field visit to 110 Boot and Leather at its 1284 Route 110, Farmingdale, New York, place of business. According to an October 19, 2006 entry in the Division’s “CARTS - TAXPAYER EMPLOYEE NOTIFICATION CASE CONTACT” (case contact), during her October 17, 2006 field visit, Ms. Caruso observed that 110 Boot and Leather was a “well stocked store” that sold boots, leather clothing, jewelry, and accessories, i.e., helmets, hats, etc.

4. On March 14, 2007, TCD agent Caruso made a field visit to the Farmingdale place of business, where she met with petitioner to discuss 110 Boot and Leather’s outstanding sales tax liabilities and the consequences of failing to pay the total outstanding sales tax liability, i.e., the possibility of a seizure of the business. Ms. Caruso’s March 15, 2007 case contact entry indicates that during her March 14, 2007 field visit, she observed that 110 Boot and Leather had a large stock of leather jackets; western, motorcycle and work style boots; western and leather hats; and

NASCAR clothing and accessories.

5. TCD agent Caruso met with petitioner at the Suffolk District Office on March 21, 2007.

At that time, Ms. Caruso received a \$400.00 payment from petitioner to be applied to 110 Boot and Leather's outstanding sales tax liabilities. Petitioner also showed Ms. Caruso copies of current sales tax returns for 110 Boot and Leather, and the "other store in Bayshore [sic] Long Island Boot and Leather Inc." that he stated were paid timely by mail. Ms. Caruso's March 21, 2007 case contact entry also noted that she gave petitioner certain tax forms because he indicated that he was consolidating 110 Boot and Leather with the corporation "in Bayshore [sic] store." Ms. Caruso's March 21, 2007 entry further noted that she advised petitioner he must file a final sales tax return for 110 Boot and Leather.

6. On March 16, 2007, TCD sent an email to the Division's Suffolk District Office District Audit Manager with a copy to, among others, Suffolk District Office Sales Tax Section Head Allan Korenstein, recommending 110 Boot and Leather for an audit. This email recommendation (i) summarized the observations of TCD agent Caruso who visited the business premises; and (ii) described 110 Boot and Leather's filing history, i.e., 110 Boot and Leather began renting space at the Farmingdale, New York, location two years and three months prior to seeking a certificate of authority on April 11, 2003; 110 Boot and Leather had filed multiple zero tax due returns; and review of the corporation's filed quarterly sales tax returns suggested that the gross and taxable sales were being underreported when compared to the monthly rent of \$6,000.00 being paid to the landlord. Subsequently, Mr. Korenstein made a request for an audit assignment regarding 110 Boot and Leather.

7. Review of the Tax Field Audit Record (audit log) indicates that Joseph M. Miller, a sales

tax auditor II in the Suffolk District Office, Sales Tax Section, was assigned the audit of 110 Boot and Leather on November 15, 2007. Further review of the audit log indicates that on December 13, 2007, Mr. Miller, among other things, reviewed the file, noted the data from TCD, and printed and proofed the digest of the corporation's sales tax returns. He also noted the late filed or not filed returns, and that consents extending the period of limitations were required by March 20, 2008.

8. After reviewing the file on January 4, 2008, Mr. Miller prepared and mailed an appointment letter, dated January 4, 2008, addressed to 110 Boot and Leather at the Route 110, Farmingdale, New York, address, which stated that its sales and use tax records for the period December 1, 2000 through August 31, 2007 had been scheduled for a field audit beginning January 24, 2008 at 110 Boot and Leather's office. The letter further advised that all books and records pertaining to 110 Boot and Leather's sales and use tax liability for the audit period must be available on the appointment date. It also requested a written response within 10 days confirming the audit appointment scheduled for January 24, 2008. Records specifically requested in an attached Records Requested List included the corporation's 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/sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips for all accounts; cash receipts journal and sales journal; cash disbursements journal and purchase journal; the corporate books, including minutes, board of directors and articles of incorporation; depreciation schedules; leases, lease contracts, and utility bills; and cash register tapes for the entire audit period. Additional attachments to the audit appointment letter included "Publication 130F," a "Sales Tax

Questionnaire,” a “Responsible Person Questionnaire,” and a “Computer Audit Feasibility Questionnaire.”

9. According to the audit log entry for January 24, 2008, Mr. Miller went to the 1284 Route 110, Farmingdale, New York, address, and found that 110 Boot and Leather was no longer at that location. Rather, a new furniture store was having its “[g]rand [o]pening” at the location. This audit log entry further states that upon returning to the District Office, Mr. Miller searched the Division’s “e-MPIRE” database, and printed “various results.” He “found 2 responsible persons and extensive log entries from TCD.” In addition, Mr. Miller emailed a request to investigator Linda Caracappa “for data from the landlord, second location (?) & etc.”

10. The audit file includes a printout, dated “01/24/2008,” of 110 Boot and Leather’s e-MPIRE Business Profile Inquiry Address Summary that lists a current address of 1284 Route 110, Farmingdale, NY 11735-3910, with an effective date / time stamp of “04/11/2003 11.24.14” for tax types: corporation tax, sales tax and taxpayer. It also includes a printout dated “01/24/08,” of 110 Boot and Leather’s case contacts from August 16, 2004 through November 19, 2007.

11. The auditor sent a second request letter, dated January 24, 2008, to schedule an audit appointment of 110 Boot and Leather’s sales and use tax records.¹ The correspondence scheduled an appointment for February 8, 2008, at 9:30 A.M., at the Suffolk District Office located in Hauppauge, New York, and again requested that all books and records pertaining to the sales and use tax liability for the period December 1, 2000 through August 31, 2007, be available on the appointment date. Attached to the correspondence was a records requested list, listing the same items as requested in the January 4, 2008 correspondence. The additional enclosures to the January

¹ This second request letter is addressed to 110 Boot and Leather at the Route 110, Farmingdale, New York, address.

24, 2008 letter were the same as those attached to the January 4, 2008 letter. According to the January 24, 2008 audit log entry, Mr. Miller mailed the second request letter to “RP - Peter Faldetta at his home address w/all enclosures.”

12. The audit log entry for February 8, 2008 indicates that 110 Boot and Leather did not appear for the audit appointment, and “did not call, write, or respond in any manner.” In this entry, Mr. Miller also noted that “our mail has not been returned by the post office - assume delivery & receipt at store and home address. Assume mail at store was properly forwarded.” This audit log entry also notes that Mr. Miller had a discussion with his supervisor, Mr. Korenstein, and researched external indices. Because 110 Boot and Leather had not responded to requests to initiate the audit, Mr. Miller then used a rent factor to compute tax due and prepared the “AU-346 w/penalties for all potentially expiring quarters.”

13. Mr. Miller used a rent factor audit method for the period December 1, 2000 through February 28, 2005. A monthly rent of \$6,000.00 per information obtained by TCD was used for each month in the period December 1, 2000 through February 28, 2005. A rent factor of 8% was obtained from the CCH Almanac of Business and Industrial Financial Ratios for the year 2005 for businesses described as clothing and clothing accessories stores. The auditor utilized the column for assets of less than \$500,000.00 because there were no tax returns that he could reference to determine whether or not 110 Boot and Leather had income.

14. The auditor divided the monthly rent of \$6,000.00 by .08, resulting in audited monthly sales of \$75,000.00. He then multiplied the audited monthly sales of \$75,000.00 by three to arrive at quarterly audited taxable sales of \$225,000.00. For each of the quarters ended February 28, 2001

through August 31, 2003, and February 29, 2004 through February 28, 2005 (a total of 16 quarters),² the auditor multiplied quarterly audited taxable sales of \$225,000.00 by the sales tax rate in effect for the particular quarter to determine additional tax in the amount of \$309,375.00. After subtracting tax paid in the amount of \$1,278.00 for the quarter ended February 28, 2005, the auditor determined additional tax due in the amount of \$308,097.00.

15. The auditor also determined that several penalties were warranted. He imposed the statutory penalty (Tax Law § 1145[a][1][i]) in each of the 16 quarters because there was no reasonable cause shown for the failure to file/pay, as well as an additional penalty for substantial underreporting, i.e., underreporting in excess of 25% (Tax Law 1145[a][1][vi]), for the quarters ending August 31, 2004, November 30, 2004, and February 28, 2005. In addition, the auditor imposed the penalty for operating a business without a Certificate of Authority (Tax Law § 1145[a][3][i]) for the quarter ending February 28, 2001, because the business was in operation for over two years before an application for registration as a sales tax vendor was filed in May, 2003; and a penalty for failure to display a Certificate of Authority (Tax Law § 1145[a][4]) for nine quarters, i.e., the quarters ending February 28, 2001 through February 28, 2003, that 110 Boot and Leather operated prior to registering as a sales tax vendor.

16. After Mr. Miller computed the additional tax due with interest and penalties, he prepared a Statement of Proposed Audit Change for Sales and Use Tax (AU-346), dated February 8, 2008, which asserted additional tax due in the amount of \$308,097.00 for the period December 1, 2000 through February 28, 2005, plus penalty and interest. The following was stated as the basis for the

² The period September 1, 2003 through November 30, 2003 was not open to assessment because 110 Boot and Leather had filed a return for that quarter and the statute had expired on November 30, 2007. The auditor determined total additional taxable sales in the amount of \$3,600,000.00 for the 16 quarters.

statement:

“This statement is one of multiple statements we either have issued, or will issue, concerning this audit case. Since you have not submitted records adequate to prove your liability as required by section 1142 of the Tax Law, tax was determined due in accordance with section 1138 of the Tax Law and is based on available records and information.”

It further stated that “[i]f you fail to either agree or disagree with this Statement of Proposed Audit Change by 02/15/2008 Form DTF-963, Notice of Determination will be issued.” This statement was addressed to “110 Boot and Leather Inc., 1284 Route 110, Farmingdale NY 11735-3910.”

17. According to the audit log entry for February 8, 2008, Mr. Miller mailed the Statement of Proposed Audit Change and consents extending the period of limitations to petitioner at his home address via certified mail. The February 8, 2008 entry also indicates that Mr. Miller had a discussion with investigator Caracappa about the new operator at the Route 110, Farmingdale, New York, address. Specifically, that the furniture store had been there for two or three weeks; and that the new operator had moved into an empty store and had no information about the former tenant. The February 8, 2008 entry ends with the notation that Ms. “Caracappa will contact the landlord for better information.”

18. The auditor did not receive a response to the Statement of Proposed Audit Change by February 15, 2008. Mr. Miller’s audit log entry for February 15, 2008 indicates that he “[v]erified carts, tid, associations & etc.. Prepared upload to assess expiring periods - corp. & officers per TX 106’s.” He also prepared the “upload review checklist, case contact screens & etc.,” and then submitted all the information to Mr. Korenstein for approval.

19. The audit file includes a printout, dated February 15, 2008, of the e-MPIRE Business Profile Inquiry, Client to Client Association List (association list) for 110 Boot and Leather. The

association list contains two primary individual associations. The first, Tricia A. Waring, as a responsible person for sales tax with an effective date of April 1, 2003; and the second, Peter E. Faldetta, as a responsible person for sales tax with an effective date of May 5, 2003. No address is listed on this printout for either Ms. Waring or Mr. Faldetta.

20. A subsequent entry in the audit log indicates that on February 19, 2008, Mr. Miller had “to revise TID associations for rpa’s,” and then the upload was released by Mr. Korenstein. Mr. Miller also wrote “[w]ill see if [110 Boot and Leather] responds.” In addition, he also noted in this February 19, 2008 entry that investigator Caracappa was “looking for the other location believed to be in Bay Shore,” and would advise the auditor “when data is secured.” The audit file includes Ms. Caracappa’s typed summary, dated February 21, 2008, of her investigative findings related to 110 Boot and Leather, consisting of, among other things, information obtained from the landlord regarding the length of time the company leased the premises (January 2001 to July 2007), the monthly rent (\$6,000.00 per month), the present location of 110 Boot and Leather (on Sunrise Highway in Bay Shore), and the results of her field visit to 1520 Sunrise Highway in Bay Shore (certificate of authority registered to Long Island Boot and Leather Inc.).

21. As noted in Finding of Fact 1, a notice of determination, dated February 29, 2008, was issued to 110 Boot and Leather asserting additional sales and use taxes due in the amount of \$308,097.00 for the period December 1, 2000 through February 28, 2005, plus interest in the amount of \$311,097.00, and penalty in the amount of \$108,656.95, for a current balance due in the amount of \$728,221.80. The computation section of the notice stated that:

“Since you have not submitted adequate records for audit, as required under sections 1135 and 1142 of the Tax Law, we determined that you owe tax, interest, and any applicable penalties, under sections 1138 and 1145 of the Tax Law, based upon available records and information.

This Notice is one of multiple Notices we either have issued, or will issue, concerning this audit case.”

The notice of determination issued to 110 Boot and Leather bore the Route 110, Farmingdale, New York, address.

22. As noted in Finding of Fact 2, the Division issued a notice of determination, dated March 3, 2008, to petitioner, as an officer or responsible person of 110 Boot and Leather, for additional sales and use taxes due in the amount of \$308,097.00 for the period December 1, 2000 through February 2005, plus interest in the amount of \$312,181.03 and penalty in the amount of \$108,656.95, for a current balance due in the amount of \$728,934.98. This notice was addressed to petitioner at a Shore Road, Amityville, New York, address.

23. On March 3, 2008, a notice of determination was also issued to Tricia A. Waring, as an officer or responsible person of 110 Boot and Leather, for additional sales and use taxes due in the amount of \$308,097.00 for the period December 1, 2000 through February 2005, plus interest in the amount of \$312,181.03 and penalty in the amount of \$108,656.95, for a current balance due in the amount of \$728,934.98. The record is silent as to the address listed on the notice of determination issued to Ms. Waring.

24. The Statement of Proposed Audit Change was returned, as unclaimed, to the Suffolk Office Sales Tax Section on March 5, 2008. The audit file includes a copy of the returned envelope, and a review of the same reveals, among other things, the following: (i) the envelope was originally hand addressed to Mr. Peter Faldetta, c/o 110 Boot & Leather, Inc., at a Shore Road, Amityville, New York address; (ii) the large envelope was sent certified mail, with a PS Form 3811, Domestic Return Receipt, attached, and bore a Pitney Bowes metered stamp dated February 11, 2008; (iii) the USPS sticker dated “02/13/08” was attached beneath the handwritten address, and

the sticker stated “NOTIFY SENDER OF NEW ADDRESS FALDETTA’ PETER PO BOX [XXXX] AMITYVILLE NY 11701-0900”; (iv) “UNCLAIMED” was stamped on the bottom right corner of the sticker; and (v) a box, containing three sections labeled “FIRST NOTICE”; “SECOND NOTICE”; and “RETURN,” was stamped to the right of the original handwritten address on the envelope, and handwritten entries of “2-14”; “2-19”; and “2-29” appeared in the respective sections of the box.

25. Subsequently, the notice of determination issued to 110 Boot and Leather was returned by the USPS to the Suffolk District Office Sales Tax Section on March 6, 2008. The envelope, containing the notice of determination, bore a “NIXIE” label dated “03/05/08” that stated “RETURN TO SENDER ATTEMPTED - NOT KNOWN UNABLE TO FORWARD.”

26. On March 12, 2008, the auditor received a telephone call from petitioner regarding the responsible person assessment he received. During that call, petitioner indicated that he had just returned from Florida; confirmed the post office box address; and provided his telephone number to the auditor. Petitioner also claimed to have abandoned the business premises the previous summer. During that same telephone call, the auditor explained the Division’s attempts to initiate the audit and petitioner’s protest rights. In addition, the auditor explained the audit process and set an appointment for March 27, 2008, in the Suffolk District Office, “to start the audit.” According to the March 12, 2008 audit log entry, the auditor “[r]emailed Albany’s assessment” and his “mail to Faldetta to the new address.”

27. Petitioner met with the auditor on March 27, 2008 at the Suffolk District Office. During that meeting, the auditor explained the assessment as issued and reviewed the audit process. At that time, petitioner signed corporate and personal consents to extend the period of limitations for

assessment for the taxable periods December 1, 2000 through November 30, 2005 to December 20, 2008.³ The auditor gave petitioner consents for extending period of limitations for Ms. Waring to sign and return. During that meeting, petitioner claimed that Ms. Waring was not a responsible person of the corporation, and was not sure why she was listed on the corporation's registration application for sales tax. Petitioner indicated that his accountant may know why Ms. Waring was listed on the same. Petitioner requested and received time to gather his accounting records, and an appointment was set for May 8, 2008, at the Suffolk District Office.

28. Although petitioner appeared at the Suffolk District Office on May 8, 2008, he did not have any records with him. The auditor gave petitioner and his accountant additional time to assemble 110 Boot and Leather's records from "boxes of information available," with an appointment date of June 12, 2008 set to begin review. According to the audit log entry for May 8, 2008, the auditor searched corporate, personal and sales tax returns "via imaging," and printed the DTF-17, Application for Registration as a Sales Tax Vendor for 110 Boot and Leather, various sales tax returns and notices of nonreceipt of sales tax returns during the audit period. In this entry, the auditor noted that 110 Boot and Leather's Application for Registration as a Sales Tax Vendor listed Ms. Waring as president and sole officer and was signed by her as president. He also noted that no results were found for petitioner's social security number. However, personal income tax returns were found for Ms. Waring for the years 2003 through 2006.

29. The audit file includes a copy of Ms. Waring's timely filed resident income tax return for the year 2006 that listed her address as Silas Road, Manorville, New York.

30. When no information was supplied to the auditor by July 8, 2008, he called petitioner and

³ When he signed 110 Boot and Leather's consent extending period of limitations for assessment, petitioner indicated his title was president.

set an appointment in the Suffolk District Office for July 25, 2008, at 10:00 A.M. Subsequently, the auditor sent a letter, dated July 15, 2008, to petitioner, as president of 110 Boot and Leather, at the Amityville, New York, post office box address, confirming the scheduled field audit of 110 Boot and Leather's sales and use tax records beginning on July 25, 2008, at 10:00 A.M. at the Suffolk District Office. The letter further advised that all books and records pertaining to 110 Boot and Leather's sales and use tax liability for the audit period December 1, 2000 through August 31, 2007 must be available on the appointment date. In addition to all items previously requested in the auditor's correspondence of January 4, 2008 and January 24, 2008, the attached Records Requested List also requested a power of attorney properly executed for the entire audit period (if a representative was going to handle the audit).

31. Mid-afternoon on July 25, 2008, petitioner appeared at the Suffolk District Office, but he had none of 110 Boot and Leather's "accounting records" with him. At that time, the auditor advised petitioner that he would be sending him a Statement of Proposed Audit Change for 110 Boot and Leather that would require a response by August 25, 2008. Petitioner indicated that he and his accountant would respond and produce records by then. On the same date, the auditor assembled work papers and computed tax due for the period March 1, 2005 through August 31, 2007, i.e., the remaining quarters in the audit period, using the same basis as the quarters previously assessed. He then prepared a Statement of Proposed Audit Change for Sales and Use Tax dated July 25, 2008, which asserted additional tax due in the amount of \$189,043.75 for the period March 1, 2005 through August 31, 2007, plus penalty and interest. Although the statement of proposed audit change was addressed to 110 Boot and Leather Inc., at the Route 110, Farmingdale, New York, address, the cover letter, transmitting the same and audit schedules, was addressed to

petitioner, president of 110 Boot and Leather, at the Amityville, New York, post office box address.

32. Petitioner disagreed with the proposed audit change for the period March 1, 2005 through August 31, 2007, and filed a copy of the AU-346 on August 21, 2008 with the following explanation: "THE ASSESSMENTS ARE INCORRECT."

33. Petitioner and Ms. Waring protested the notices of determination issued to them on March 3, 2008 by filing requests for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). BCMS conferences scheduled for September 18, 2008, regarding requests filed by him and Ms. Waring, were postponed at the request of petitioner.

34. In August 2008, the auditor contacted 110 Boot and Leather's former landlord, Carconk Co., Inc. (owner), and requested copies of available leases and the history of the corporation at the location. By letter dated August 25, 2008, the former landlord responded, in pertinent part, as follows:

"As per your request, enclosed find copy of lease with Maximum Footwear, Inc., d/b/a Bootleggers Leather & Footwear. They also used the name of 110 Boot and Leather. Please note the lease was never signed and they occupied the premises on a month to month basis for the period January 1, 2001 to July 1, 2007.

Mr. Peter Faldetta, President of Maximum Footwear, Inc. was always late paying his rent and also gave us many checks which came back because of insufficient funds. He was always behind in his payments and when he left the premises he left owing us a good sum of money."

35. Under the terms of the enclosed unsigned lease between the owner and Maximum Footwear, Inc., d/b/a Bootleggers Leather and Footwear, a New York corporation having an address of Merrick Road, Amity Harbor, New York, the owner leased the building located at Route 110, Farmingdale, New York, measuring approximately 2,474 sq. ft., to Maximum Footwear, Inc., d/b/a Bootleggers & Footwear, for the period January 1, 2001 through December 31, 2003.

Pursuant to Exhibit "B" to the lease, the monthly payments were: \$5,000.00 for the period January 1, 2001 through December 31, 2002, and \$5,250.00 for the period January 1, 2003 through December 31, 2003. In addition to the unsigned lease, the landlord also included copies of two letters advising of increases in the monthly rent for the Route 110, Farmingdale, New York, premises. Specifically, a letter, dated November 6, 2003, addressed to Maximum Footwear, Inc., 110 Boot and Leather, advised that as of January 1, 2004, the monthly rent was increased by \$250.00 to \$5,500.00; and a letter, dated October 25, 2005, addressed to Maximum Footwear, Inc., d/b/a Route 110 Boot and Leather, advised that as of January 1, 2006, the monthly rental was increased by \$500.00 to \$6,000.00.

36. In September 2008, 110 Boot and Leather and petitioner were referred for a multi-tax audit because there were indications of substantial underreporting of sales tax due and failure to file corporate and personal income tax returns. Thereafter, the Division's income tax unit initiated an audit of petitioner.

37. On October 16, 2008, petitioner met with two income tax auditors and Mr. Miller at the Suffolk District Office. Mr. Miller's audit log entry for that date indicates that petitioner presented the following items at the meeting: "responsible person questionnaire, NY Dept. Of State filing receipt for 110 Boot & Leather, Inc. w/exist date of 04/04/2003, Warrant re: PE 02/28/07, & copies of STX returns from 12/01/04 through 02/28/07." During the meeting, petitioner signed corporate and personal consents extending period of limitations for assessment for the period December 1, 2000 through May 31, 2006 to June 20, 2009. The audit log entry also stated that petitioner insisted that he was the sole officer of the corporation, and that Ms. Waring's signature on the application for registration as a sales tax vendor was not in her handwriting. The notation further stated that

petitioner believed his accountant may have submitted that form, and he would follow up with the accountant.

38. On January 30, 2009, the income tax auditors secured bank statements for Maximum Footwear Inc. from 110 Boot and Leather's then-representative, William Bernstein, Esq.⁴ Subsequently, the income tax auditors gave Mr. Miller copies of the bank statements, and an excel file of their transcripts of bank deposits and checks written. These records were of limited relevance to Mr. Miller as it appeared that petitioner operated three entities, i.e., Maximum Footwear Inc., Maximum Sounds & Security, and 110 Boot and Leather, under one or two bank accounts during the audit period.

39. The auditor met with Mr. Bernstein and petitioner at Mr. Bernstein's office on May 1, 2009. Petitioner provided bank statements for 110 Boot and Leather, and data related to the insurance settlement for the theft at Maximum Footwear Inc. on February 24, 2001. The audit log entry for this meeting indicates that the provided data included a "complaint listing to Police and an inventory report dated April 2001 which purports to approximate items stolen on [February 24, 2001]." In addition, the entry noted that petitioner executed corporate and personal consents extending the period of limitations to December 20, 2009.⁵ The entry further noted that petitioner was given consents extending the period of limitations for Ms. Waring to sign and return to Mr. Miller.

40. The audit file includes a transcript of deposits into Maximum Footwear, Inc.'s Fleet Bank, and Bank of New York accounts during various months between August 31, 2001 and

⁴ Mr. Bernstein was also petitioner's then-representative.

⁵ The audit file does not include copies of those consents.

December 31, 2006. It also includes a transcript of deposits into 110 Boot and Leather's Fleet Bank, Bank of America and Bank of New York accounts during various months between September 30, 2003 and May 31, 2007.

41. Subsequently on May 4, 2009, Mr. Miller met with Mr. Korenstein and an assigned income tax auditor to discuss the data received on May 1. The income tax auditor was given data to copy. The audit log entry for the meeting indicates that Mr. Miller was to request audit assignments for Maximum Footwear Inc. and Long Island Boot and Leather Inc. In addition, Mr. Miller was to request bank signatory cards for all corporations, and to itemize all credit card companies from the bank statements to see if sales data could be obtained from the credit card companies. The audit log entry for May 4, 2009 ended with the following notation: "[w]ill cancel and/or reduce the assessments on 110 Boot in accordance w/the lease data, bank data, TCD data, and the bank statements / corp. filing w/the Dept. of State."

42. On or about May 28, 2009, and before an assessment could be issued to 110 Boot and Leather for the period March 1, 2005 through August 31, 2007, the case was transferred to the Division's criminal unit, the Special Investigations Unit (SIU).⁶

43. On March 17, 2009, BCMS conferences were held for petitioner and Ms. Waring for the assessments issued against them as officers or responsible persons of 110 Boot and Leather for the period December 1, 2000 through February 28, 2005. By Conciliation Order (CMS No. 223318), dated July 3, 2009, the notice of determination issued to petitioner was sustained in full. The notice of determination issued to Ms. Waring was canceled by BCMS on an unknown date.

44. Petitioner timely filed a petition challenging the notice of determination issued to him, and

⁶ Subsequently, on an unknown date, SIU became the Criminal Investigations Unit.

said petition was received by the Division of Tax Appeals on September 28, 2009. In his petition, petitioner asserts that “[t]he Commissioner over estimated the amount of taxable sales and did not give taxpayer credit for exempt sales.”

45. This matter was scheduled for hearing on March 23, 2011. However, by letter dated March 8, 2011, petitioner’s former representative, Alvan Bobrow, Esq., requested an adjournment of this matter because, among other reasons, petitioner was the subject of an ongoing criminal investigation, which pertained to the same issues as those in the present matter. By letter dated March 8, 2011, the undersigned administrative law judge granted petitioner’s adjournment request. This matter was held in abeyance while the criminal investigation was ongoing. The Division notified then-Supervising Administrative Law Judge Daniel J. Ranalli, by correspondence dated April 20, 2015, that the criminal investigation related to this matter had concluded, and requested that the Division of Tax Appeals proceed with this matter.

46. In April 2015, 110 Boot and Leather’s audit case was returned to the Suffolk District Sales Tax Unit for closing. Because the original auditor, Mr. Miller, had retired from the Division, 110 Boot and Leather’s audit case was assigned to auditor Linda Esposito, and Team Leader Nancy Rohrs, for closing, under the original Section Head, Mr. Korenstein. Ms. Esposito prepared the Field Audit Report (audit report) for 110 Boot and Leather for the audit period December 1, 2000 through August 31, 2007. In the additional information section of the audit report, Ms. Esposito stated, in part, as follows:

“Due to the amount of time that has passed while this case was with the Criminal Investigations Unit, and the fact that the Statute of Limitations on 7 of the 10 quarters that had not previously assessed, have expired, it was decided that no additional assessments would be issued at this time, nor would any additional audit work be performed, other than to assemble the case file, and close it.”

47. At the hearing conducted on April 19, 2016, the Division presented the testimony of Mr. Korenstein, Mr. Miller's supervisor during the audit of 110 Boot and Leather in 2008.

48. During the hearing, the Division conceded that a downward adjustment of the assessment issued to 110 Boot and Leather was warranted (along with a corresponding downward adjustment of the assessment issued to petitioner), based upon several factors explained by Mr. Korenstein:

a. subsequent to the February 29, 2008 issuance of the assessment to 110 Boot and Leather for the period December 1, 2001 through February 2005, the Division received additional information from the landlord regarding the rents 110 Boot and Leather was obligated to pay during the period at issue, i.e., \$5,000.00 per month beginning January 1, 2001 through December 31, 2002, then \$5,250.00 per month beginning January 1, 2003 through December 31, 2003, and then \$5,500.00 per month from January 1, 2004 through February 28, 2005;

b. a review of the file upon its return from SIU, and in preparation for the hearing, lead to the discovery that 110 Boot and Leather had filed documentation regarding one of the quarters at issue, i.e., March 1, 2003 through May 31, 2003, that should be treated as a tax return,⁷ resulting in the statute of limitations having been expired prior to the commencement of the audit and no additional tax due; and

c. for the quarter ending February 28, 2001, only two months were relevant because the business operations started on January 1, 2001.

⁷ The Division issued to 110 Boot and Leather a Notice of Non-Receipt of Sales Tax Return (Quarterly ST-565), dated August 26, 2003, for the sales tax period March 1, 2003 through May 31, 2003. Petitioner, as president of 110 Boot and Leather, responded on August 22, 2003 by indicating on this notice that 110 Boot and Leather's total gross taxable activity was \$0.00, because the corporation was a "start up" and "we will file next 1/4." A \$50.00 check in payment for late filing was submitted with the ST-565.

49. Applying the factors outlined in Finding of Fact 48 and the rent factor of .08, Mr. Korenstein recomputed the additional tax due in the amount of \$244,563.56 for the period December 1, 2000 through February 28, 2005 in the following manner. For the period ended February 28, 2001, the monthly rent of \$5,000.00 was divided by .08, the quotient, audited monthly sales of \$62,500.00, was multiplied by two months, resulting in quarterly taxable receipts in the amount of \$125,000.00. For each of the seven quarters in the period March 1, 2001 through November 2002, the monthly rent of \$5,000.00 was divided by .08, then the quotient of \$62,500.00 was multiplied by three months to arrive at quarterly taxable receipts of \$187,500.00. For the quarter ended February 28, 2003, the sum of a monthly rent of \$5,000.00 for one month plus a monthly rent of \$5,250.00 for two months was divided by .08 to arrive at quarterly taxable receipts of \$193,750.00. For two quarters, i.e., the period March 1, 2003 through August 31, 2003, the monthly rent of \$5,250.00 was divided by .08, then the quotient of \$65,625.00 was multiplied by three months to arrive at quarterly taxable receipts of \$196,850.00. For the period December 1, 2003 through February 28, 2004, the sum of a monthly rent of \$5,250.00 for one month plus a monthly rent of \$5,500.00 for two months was divided by .08 to arrive at quarterly taxable receipts of \$203,125.00. For the remaining four quarters, i.e., the period March 1, 2004 through February 28, 2005, the monthly rent of \$5,500.00 was divided by .08, then the quotient of \$68,750.00 was multiplied by three months to arrive at quarterly taxable receipts in the amount of \$206,250.00. Mr. Korenstein then multiplied the quarterly taxable receipts computed in each of the 16 quarters by the sales tax rate in effect in each particular quarter and determined additional tax due in the amount of \$262,573.81.⁸ After subtracting tax paid in the amount of \$1,278.00 for the quarter ended February

⁸ Mr. Korenstein computed total additional taxable receipts in the amount of \$3,053,075.00 for the 16 quarters.

28, 2005, and additional tax due in the amount of \$16,732.25 computed by him for the quarter ended May 31, 2003 from \$262,573.81, Mr. Korenstein computed additional tax due in the amount of \$244,563.56 for the period December 1, 2000 through February 28, 2005.

At the hearing, the Division conceded that the additional tax originally assessed to 110 Boot and Leather should be reduced to \$244,563.56 based upon Mr. Korenstein's computations set forth above.⁹

50. At the hearing, petitioner explained that shortly after taking possession of the Route 110, Farmingdale, New York, building, a burglary occurred at the location, where the thieves "cleared out the business, computer, circumvented the alarm." Petitioner acknowledged that an issue with the records slowed the settlement process with the insurance company. However, a check from the insurance company was received in December 2002.

51. Documents in the record indicate that as a result of a burglary and theft that occurred on February 24, 2001 at the Route 110, Farmingdale, New York, building, Maximum Footwear Inc., as the insured and claimant, received a check, dated December 6, 2002, in the amount of \$68,000.00 from the Harleysville Worcester Insurance company.¹⁰

52. Petitioner claimed, at the hearing, that the landlord accepted implied rent payments, not the stated rent for the Route 110, Farmingdale, New York, building.

53. The record includes three letters, bearing dates of June 19, 2003, November 20, 2003, and February 19, 2004, from Carconk Co., Inc. regarding delinquencies in Maximum Footwear, Inc. d/b/a Bootleggers Leather & Footwear's rent account. Review of these delinquency letters

⁹ Mr. Korenstein's computations are set forth in the Division's Exhibit G.

¹⁰ One of the documents submitted regarding the insurance claim for the burglary and theft refers to the insured as "Maximum Footwear Inc. (dba [sic] 110 Bootery)."

indicates that the landlord billed the stated monthly rent of \$5,250.00 due in 2003 or \$5,500.00 due in 2004, and accepted installments payments on the unpaid billed balances. Petitioner did not submit any proof as to the actual amount of rent paid during the period January 1, 2001 through February 28, 2005.

54. Petitioner testified that in addition to the retail boot and leather business, he conducted additional businesses, i.e., the NASCAR Store, 110 Wireless and/or Long Island Wireless, and Argyle Construction, out of the Route 110, Farmingdale, New York, building during the period January 1, 2001 through February 28, 2005. The record includes a number of invoices related to 110 Wireless, Long Island Wireless, Argyle Construction,¹¹ and Argyle Fence and Construction. Only two payment detail [commission] statements issued by E. R. C. Inc. to 110 Wireless,¹² and one payment statement issued by Carco Group, Inc. Insurance Division for vehicle photo inspections performed by 110 Wireless bore dates within the audit period of December 1, 2000 through February 28, 2005.

55. The record includes business cards for “The NASCAR Store,” and 110 Wireless, each of which lists the Route 110, Farmingdale, New York, address. At the hearing, petitioner was unable to state when “The NASCAR Store,” 110 Wireless, and Long Island Wireless came into being. Petitioner believed that 110 Boot and Leather was the main business and “The NASCAR Store,” 110 Wireless and Long Island Wireless were each a d/b/a of 110 Boot and Leather. He also acknowledged that any revenue from “The NASCAR Store,” 110 Wireless, and Long Island Wireless was combined with 110 Boot and Leather’s revenue.

¹¹ According to petitioner, Argyle Construction was a d/b/a of his real estate company, Shamus Realty Corp.

¹² Neither of the invoices issued by E. R. C. Inc. contain an address for 110 Wireless.

56. The record includes an Application for Registration as a Sales Tax Vendor for Long Island Boot and Leather Inc. (Long Island Boot and Leather), Sunrise Highway, Bay Shore, New York, filed on November 10, 2006. On this application, the sole owner/officer listed was Ms. Waring, president. Long Island Boot and Leather's major business activity was listed as "Boots & Leather - Retail," and the date the business was to begin in New York State was listed as October 26, 2006.

57. According to petitioner, he moved 110 Boot and Leather into the Bay Shore building where Long Island Boot and Leather was located. He could not recall the exact date that 110 Boot and Leather vacated the Route 110, Farmingdale, New York location.

58. According to petitioner, his real estate company, Shamus Realty Corp, owned Merrick Road, Amity Harbor, New York, a mixed use building, containing a store and an office,¹³ that was rented to third parties on unknown dates. In addition, Shamus Realty Corp. purchased the Sunrise Highway, Bay Shore, building on an unknown date. As of the date of the hearing, Shamus Realty Corp. continues to own the building, where Long Island Boot and Leather continues to conduct business.

59. The record includes a copy of 110 Boot and Leather's Application for Registration as a Sales Tax Vendor received by the Division on May 5, 2003. On this application, 110 Boot and Leather's primary business activity was listed as "RETAIL - BOOTS, SHOES, LEATHER," the time spent on the business activity was listed as "100%," and the date the business was to begin business in New York was listed as April 1, 2003.

60. The record includes 110 Boot and Leather's timely filed quarterly sales and use tax

¹³ According to petitioner, the office was converted to an apartment on an undisclosed date.

return for single jurisdiction (Form ST-102) for the period December 1, 2004 through February 28, 2005. On this sales tax return, 110 Boot and Leather reported gross sales in the amount of \$14,602.00, taxable sales in the amount of \$14,602.00 and sales and use tax due on the same in the amount of \$1,277.68. 110 Boot and Leather claimed a vendor credit of \$21.72 on this sales and use tax return, and remitted sales and use tax in the amount of \$1,255.96.

61. Review of the "Schedule of Returns Filed" prepared by Mr. Miller indicates that 110 Boot and Leather reported 100% of its sales as taxable on each of the sales and use tax returns filed for the quarters ended May 31, 2005; August 31, 2005; February 28, 2006; May 31, 2006; August 31, 2006; November 30, 2006; and February 28, 2007.

62. At the hearing, petitioner admitted that 110 Boot and Leather did internet sales, and credit card sales. Other than some of 110 Boot and Leather's bank statements, the record does not include any of its books, purchase or sales records for the period December 1, 2000 through February 28, 2005.

63. The audit file includes a printout, dated April 27, 2015, of the Division's e-MPIRE Taxpayer Summary for petitioner. The Taxpayer Summary section entitled "Address - Physical Mailing" listed, among other things, petitioner's address as Silas Carter Road, Manorville, New York, with a "Notify Date" of "09/05/2012," a "Posted Date" of "09/13/2012," and an "Address Sequence Number of "008."

64. A printout, dated April 27, 2015, of the Division's e-MPIRE Taxpayer Summary for Ms. Waring is also part of the audit file. The Taxpayer Summary section entitled "Address - Physical Mailing" listed, among other things, Ms. Waring's address as Silas Carter Road, Manorville, New York, with a "Notify Date" of "04/17/2012," a "Posted Date" of "04/19/2012," and an "Address

Sequence Number of "004."

65. The record includes page 1 of 13 quarterly sales and use tax returns filed by Long Island Boot and Leather for the period December 1, 2011 through February 28, 2015, and three quarterly ST-100 sales and use tax web filed returns filed by Long Island Boot and Leather for the period March 1, 2015 through February 29, 2016.

SUMMARY OF PETITIONER'S POSITION

66. Petitioner admits that he was an officer and responsible party of 110 Boot and Leather. However, he claims that the Division's assessment of sales tax does not reflect the sales made by 110 Boot and Leather during the period at issue. Petitioner asserts that he was not given the opportunity to supply 110 Boot and Leather's books and records prior to the assessment being issued. He maintains that he was not properly notified that an audit of the corporation was started and then completed without his knowledge. Petitioner further maintains that no letter, regarding the audit of 110 Boot and Leather for the period December 1, 2000 through February 28, 2005, was received at the store or his residence. He claims that everyone knew (including the landlord) that he had moved the business to Sunrise Highway, Bay Shore, New York. Petitioner further claims that no correspondence was sent to the Bay Shore store, even though the Division's "case paperwork" makes reference to Ms. Caracappa's visit to the Bay Shore store.

67. Petitioner also contends that there are flaws in the Division's use of the rent factor method to determine 110 Boot and Leather's additional taxable sales and the additional sales tax due on the same. First, petitioner asserts that the landlord frequently changed the terms for the rental of the Farmingdale, New York, building and accepted partial payments. Therefore, no actual base rent was established. Second, he claims that four different and distinct businesses used the

Farmingdale, New York, building - “[o]ffice space for construction and contracting business, a wireless store, the sale of nascar t shirts and decals, an insurance inspection location and sales of boots and footwear, hats and leather goods.” Petitioner further claims that the rent factor used had no relationship to taxable sales because the total rent paid covered the four different business entities as well as two storage containers behind the building. Lastly, petitioner asserts that the Division failed to give 110 Boot and Leather any credit for exempt sales, returns filed or the seasonal nature of the business.

68. Petitioner argues that the evidence presented by the Division was hearsay evidence because no one with personal knowledge of the audit was present at the hearing. He also argues that reasonable cause exists to abate the penalties assessed. In addition, petitioner maintains that the accrued interest should be reduced because he could not proceed with the present matter while the criminal investigation was pending and he did not hear from the Tax Department for over four years.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every “retail sale” of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A “retail sale” is a “sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . .” (Tax Law § 1101[b][4][i]). Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed was 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. . . .” (Tax Law § 1138[a][1]). When acting pursuant to section 1138(a)(1), the Division is required to select a

method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

B. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice, Inc.*, as follows:

“To determine the adequacy of a taxpayer’s records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, [102 AD2d 352, 477 NYS2d 858] *supra*) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978) the taxpayer’s books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (*Matter of Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255; *Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *see also, Matter of Hennekens v. State Tax Commn.*, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is ‘virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit’ (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43; *Matter of Christ Cella, Inc. v. State Tax Commn.*, *supra*), ‘from which the exact amount of tax due can be determined’ (*Matter of Mohawk Airlines v. Tully*, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (*Matter of Urban Liqs. v. State Tax Commn.*, *supra*). The estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W. T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451; *Matter of Cousins Serv. Station*, Tax Appeals Tribunal, August 11, 1988). In addition, ‘[c]onsiderable latitude is given an auditor’s

method of estimating sales under such circumstances as exist in [each] case’
(*Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501
NYS2d 219, 221).”

C. It is clear from the record that the Division did not conduct the audit of 110 Boot and Leather for the period December 1, 2000 through February 28, 2005 in a manner which provided petitioner with an adequate opportunity to produce the corporation’s books and records for the sales tax audit for such period. The Division commenced the audit of 110 Boot and Leather by sending an audit appointment letter dated, January 4, 2008, that requested all books and records pertaining to 110 Boot and Leather’s sales and use tax liability for the period December 1, 2000 through February 28, 2005 be available for review at a field audit scheduled for January 24, 2008 at the corporation’s Route 110 Farmingdale, New York, office. On January 24, 2008, the auditor went to 110 Boot and Leather’s location, but the business was no longer there. Upon returning to the District Office that day, the auditor searched the Division’s e-MPIRE database, and found two responsible persons and extensive case contact entries from TCD. Then, the auditor prepared a second audit appointment letter, dated January 24, 2008, scheduling a field audit of the corporation’s books and records for the audit period at the Suffolk District Office on February 8, 2008. While the January 24, 2008 audit log entry states that the auditor mailed the second audit appointment letter with enclosures to petitioner “at his home address,” the record does not disclose the actual address to which the second audit appointment letter was sent (*see* Finding of Fact 11). In addition, on January 24, 2008, the auditor contacted a Division investigator, Ms. Caracappa regarding the collection of additional information from the landlord, including a possible second location for 110 Boot and Leather. Petitioner did not appear at the February 8, 2008 audit appointment. He also did not call, write or respond in any manner to this letter. Because the letters were not returned by the

USPS, the auditor assumed that the audit appointment letters were delivered at the store and petitioner's "home address," and that the "mail at the store was properly forwarded" (*see* Finding of Fact 12). Because 110 Boot and Leather had not responded to requests to initiate the audit and consents extending the period of limitations had not been signed, the auditor determined the corporation's books and records to be inadequate and resorted to the use of an indirect audit method, i.e., the rent factor method, to estimate sales for the period December 1, 2000 through February 28, 2005. While the auditor prepared a statement of proposed audit change, dated February 8, 2008, which asserted additional sales and use tax due in the amount of \$308,097.00 for the period December 1, 2000 through February 28, 2005, plus penalty and interest, this statement was not issued until February 11, 2008. Subsequently, the Division issued a notice of determination to 110 Boot and Leather on February 29, 2008. Notices of determination, dated March 3, 2008, were issued to petitioner and Ms. Waring, as officers or responsible persons of 110 Boot and Leather. It is not petitioner's denial of receipt of either of the audit appointment letters that leads to the conclusion that Division's requests for 110 Boot and Leather's books and records were weak and casual. Rather, it was the auditor's failure to identify the specific address to which the second audit appointment letter was sent, coupled with the absence of a printout of the Division's e-MPIRE Taxpayer Summary for petitioner, containing his Taxpayer Summary section entitled "Address - Physical Mailing," dated prior to the issuance of the notice of determination to him. Although the auditor's review of the Division's internal records revealed two responsible persons, the second audit appointment letter was sent only to petitioner. It is clear from the record that the auditor was concerned about the statute of limitations for some quarters due to expire on March 20, 2008. However, the urgency of issuing an assessment does not justify the Division's weak and casual

requests for 110 Boot and Leather's books and records for the period December 1, 2000 through February 28, 2005 (*see Matter of Christ Cella, Inc. v. State Tax Commn.*). Clearly, 110 Boot and Leather was not afforded a reasonable opportunity to produce its books and records for the period December 1, 2000 through February 28, 2005 before the Division determined them to be so inadequate to verify 110 Boot and Leather's taxable sales and conduct a complete audit from which the exact amount of tax could be determined. Accordingly, it was improper for the Division to resort to the use of an indirect audit method to estimate 110 Boot and Leather's tax liability, and correspondingly petitioner's tax liability, for the period December 1, 2000 through February 28, 2005.

D. Based upon Conclusion of Law C, Issue II is rendered moot.

E. The petition of Peter Faldetta is granted, and the Notice of Determination, dated March 3, 2008, is hereby cancelled.

DATED: Albany, New York
October 5, 2017

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE