

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
THEODORE P. DEMETRIOU : DETERMINATION
for Revision of a Determination of for Refund of Sales and : DTA NOS. 824430
Use Tax Under Articles 28 and 29 of the Tax Law for the : AND 824431
Period March 1, 2002 through November 30, 2007. :

In the Matter of the Petition :
of :
NEW WINDSOR STABLES, INC. :
for Revision of a Determination or for Refund of Sales and :
Use Tax Under Articles 28 and 29 of the Tax Law for the :
Period September 1, 1999 through November 30, 2007. :

Petitioner Theodore P. Demetriou filed a petition for revision of a determination or for refund of sales and use tax under Articles 28 and 29 of the Tax Law for the period March 1, 2002 through November 30, 2007.

Petitioner New Windsor Stables, Inc., filed a petition for revision of a determination or for refund of sales and use tax under Articles 28 and 29 of the Tax Law for the period September 1, 1999 through November 30, 2007.

On December 27, 2012 and January 9, 2013, respectively, petitioners, appearing by Gus Mavroudis, EA, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel), waived a hearing and agreed to submit these matters for

determination based upon documents and briefs to be submitted by June 20, 2013, which date began the six-month period for issuance of this determination. After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined additional sales tax due from petitioner New Windsor Stables, Inc.

FINDINGS OF FACT

1. By letter dated August 4, 2005, the Division of Taxation (Division) advised New Windsor Stables, Inc. (New Windsor Stables) that a sales tax field audit of its books and records for the period September 1, 1999 through May 31, 2005 would commence on August 26, 2005. This audit appointment letter advised New Windsor Stables that all of its books and records pertaining to its sales and use tax liability for the audit period should be available for review on the audit appointment date. An attached Records Requested List specified a detailed listing of particular records that were to be available for the entire audit period, including sales tax returns; worksheets and canceled checks; federal income tax returns; New York State corporation tax returns; general ledger; general journal and closing entries; sales invoices; all exemption documents supporting nontaxable sales; chart of accounts; fixed asset purchase and sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips; cash receipts journal; cash disbursement journal; the corporate book, including minutes, board of directors, and articles of incorporation; and depreciation schedules.

2. A second appointment letter and Records Requested List was sent to the corporation's first representative, William McCallum, CPA, in care of the corporation, on August 29, 2005

confirming the scheduled field audit for the period September 1, 1999 through May 31, 2005 and the rescheduled appointment on October 17, 2005.

3. During the October 17, 2005 field audit appointment conducted at Mr. McCallum's office, the auditor reviewed and transcribed bank statements for part of the audit period,¹ sales of horses per the federal S-corporation income tax returns for the years 1999 through 2003, and sales per the general ledger for the period September 1, 1999 through December 31, 2003.² Then, the auditor reconciled bank deposits to the general ledger and the differences were noted. At that field visit, the auditor also received copies of the federal S-corporation income tax returns filed for the years 1999 through 2003. In the Tax Field Audit Record (audit log), the auditor noted that review of the federal S-corporation income tax returns indicated that the owner of the corporation at the beginning of the audit period was Peter Demetriou, the father of the current owner, Theodore Demetriou. The auditor further noted that review of the federal S-corporation income tax returns indicated that the change in ownership took place during the 2001 calendar year.

4. At the October 17, 2005 appointment, the auditor and Mr. McCallum discussed the nature of the business. Mr. McCallum indicated that the corporation is in the business of boarding horses, and that it "sells and races some horses in shows." Mr. McCallum also indicated that the stables are located on a large 12 to 13-acre area on Long Island.

5. Written requests for additional information were sent to Mr. McCallum on October 27, 2005, January 24, 2006 and February 22, 2006. Copies of the work papers prepared to date were

¹ The following bank statements were missing: the March, April, June and September 2000 statements, the October 2002 statement, the July 2003 statement, the November 2004 statement, and the January through May 2005 statements.

² The general ledger for the years 2004 and 2005 was missing.

enclosed with each letter. Some additional documentation was received by the auditor on February 26, 2006. During a second field audit appointment held on April 27, 2006, the auditor transcribed “horse and vet bills.”

6. On May 25, 2006, the auditor subpoenaed the corporation’s deposit ticket items, i.e., deposited checks and deposit slips, for the period January 1, 2003 through December 31, 2004. On June 23, 2006, the auditor received the subpoenaed information from the bank. After transcribing the deposit ticket items, the auditor reconciled them to bank deposits and noted the differences. Thereafter, updated work papers were prepared.

7. On August 9, 2006, a written request for additional information was sent to Mr. McCallum. Subsequently, the auditor spoke with Mr. McCallum on three separate dates (September 13, 2006, November 27, 2006 and December 7, 2006) regarding the additional information requested. On December 14, 2006, the auditor received additional information from Mr. McCallum’s office.

8. The audit period was updated and modified by a formal request for records, dated April 4, 2007, that informed New Windsor Stables that the audit period was being modified and would cover the period September 1, 1999 through February 28, 2007. New Windsor Stables was asked to produce all records previously requested and all records for the extended audit period as well.

9. Additional written requests for records for the amended audit period September 1, 1999 through February 28, 2007 were made on May 1, 2007, August 1, 2007 and October 8, 2007.

10. The auditor determined that New Windsor Stables operates a full service commercial horse stable boarding facility located in Old Brookville, New York. New Windsor Stables provides “boarding services” for horses, as well as “training for both the horses and riders.” In addition, the auditor determined that New Windsor Stables “enters the horses in horseshows [sic]

and sells the horses.” Since New Windsor Stables was considered a commercial horse boarding operation, the auditor did not review expense purchases because of the exemptions allowed for such purchases by a commercial horse boarding operation. On audit, the auditor did not note any additions or deletions to capital assets. However, the auditor classified the corporation’s sales into two categories: horse boarding sales and horse sales.

11. On May 2, 2007, the auditor sent a vendor application, form DTF-17, to New Windsor Stables and Mr. McCallum. Another vendor application form was sent to New Windsor Stables on October 5, 2007.

12. On May 2, 2007, the auditor subpoenaed New Windsor Stables’ bank statements for the updated audit period June 1, 2005 through February 28, 2007. Subsequently, the subpoenaed bank statements were received, reviewed and transcribed by the auditor.

13. In November 2007, a second representative, Michael DeStefano, CPA, was hired to represent New Windsor Stables. At a field audit appointment held on November 21, 2007, the auditor presented the audit findings to date to Mr. DeStefano and Theodore Demetriou. The need for additional information for the updated audit period and additional supporting documentation for the original audit period was discussed. Mr. DeStefano requested copies of the bank statements, invoices and federal S-corporation income tax returns that were part of the audit file. The auditor provided all requested information to Mr. DeStefano.

14. During a field appointment held on February 20, 2008, Mr. DeStefano provided detailed reconciliations for the years 2004 through 2006. The general ledger for the years 2004 through 2006 was also provided to the auditor for review.

15. In November 2007, New Windsor Stables submitted the form DTF-17 to the Division. On February 26, 2008, the auditor was advised by the second representative’s office that New

Windsor Stables would file its first New York sales and use tax return for the quarter ended February 29, 2008. The auditor noted in the audit log that the audit period would be updated through November 30, 2007.

16. The audit period was further updated and modified by a formal request for records, dated September 10, 2008, that informed New Windsor Stables that the audit period was being modified and would cover the period September 1, 1999 through November 30, 2007. New Windsor Stables was asked to produce all records previously requested and all records for the extended audit period as well. A field audit appointment was scheduled for October 7, 2008.

17. Mr. DeStefano prepared a detailed analysis of taxable and “not taxable” items listed on each of the numbered invoices issued by New Windsor Stables for horse boarding services for the years 2004 through 2006.³ This analysis listed the following as taxable items: board, grooming, lease, shipping, stall, other and laundry. “Not taxable” items listed in the analysis included, among other items, medication, schooling, lessons, commissions, and training. Based upon an average of his review of the actual invoices for the years 2004 through 2006, Mr. DeStefano determined that 43.62% of total sales (excluding horse sales) were assumed to be taxable for the years 2004 through 2006. For horse sales, Mr. DeStefano created a list of named horses sold during the period September 1, 1999 through December 31, 2006. Sale amounts reported on this list were reported under one of three types of sales: sold in New York State, sold out of state, and sold for breeding.

18. At the October 7, 2008 field audit appointment, the auditor received and reviewed draft federal S-corporation income tax returns for the years 2004 through 2006, the analysis of

³ This detailed analysis included the invoice number, invoice date, total amount on each invoice, and the amount of each taxable and nontaxable item listed on the invoice.

sales invoices issued for horse boarding services for the years 2004 through 2006, work papers summarizing Mr. DeStefano's method of calculating the percentage of total sales (excluding horse sales) that were assumed to be taxable for the years 2004 through 2006, and the list of named horses sold during the period September 1, 1999 through December 31, 2006. Neither the invoices for horse boarding services for the period September 1, 1999 through December 31, 2003 nor all of the supporting documentation used to prepare the list of named horses sold during the period September 1, 1999 through December 31, 2006 was provided to the auditor at this field appointment. In addition, no detailed information regarding the corporation's sales of either horse boarding services or horses for the year 2007 was provided to the auditor at this field appointment.

19. A discussion of the status of the audit took place between the auditor and Mr. DeStefano during the October 7, 2008 field appointment. Since the auditor was not provided with any sales invoices for horse boarding sales for the period September 1, 1999 through December 31, 2003, the corporation's sales records were deemed inadequate for that portion of the audit period. After reviewing Mr. DeStefano's method of calculating the taxable percentage of total horse boarding sales for the years 2004 through 2006, i.e., 43.62%, and the supporting analysis performed by Mr. DeStefano of the sales invoices for horse boarding sales for the years 2004 through 2006, the auditor found the method to be reasonable. To determine taxable horse boarding sales for the earlier portion of the audit period, September 1, 1999 through December 31, 2003, the auditor and Mr. DeStefano agreed that the rate of 43.62% should be applied to horse boarding sales for that period. For sales of horses during the period September 1, 1999 through December 31, 2006, the auditor reviewed the list created by Mr. DeStefano of such sales and the limited supporting documentation provided. After discussions with Mr. DeStefano, it

was determined that the auditor would test horse sales for the year 2006. Supporting documentation was requested for the claimed exempt sales of six named horses during the year 2006. The sale of each of these six named horses was categorized as “sold out of state” (five horses), or “sold for breeding” (one horse), on the list of named horses sold during the period September 1, 1999 through December 31, 2006. Prior to supplying any detail information for the years 2004 through 2007, Mr. DeStefano requested the use of the auditor’s figures to project the tax due on the sales of horses during the period September 1, 1999 through December 31, 2006.

20. In a letter to Mr. DeStefano, dated October 14, 2008, the auditor advised that “[b]ased on analysis of additional records provided, it was determined that your client’s records are considered inadequate.” The auditor also summarized the findings of the audit to date as follows:

Taxable Sales (excluding Horse Sales). At this time, a reasonable method was used to calculate additional sales. An analysis was performed and it was determined that approximately 43.62 percent of invoiced sales (excluding horses) were taxable. This rate was applied thru December 2006 and it resulted in assessing additional taxable sales of \$1,330,521.16 and additional tax due of \$114,724.81. (Note: Once the 2007 information is provided, the above percentage will be applied to those figures to obtain additional taxable sales for 2007.)

Taxable Sales (Horses). The records for horse sales were reviewed in detail thru 2006, which resulted in assessing additional taxable sales of \$2,944,587.00 and additional tax due of \$253,389.34. This includes both exempt and nonexempt horses sold, as backup documentation has not been provided to allow the exemption of those stated exempt horses.

Please provide backup documentation for the exempt highlighted horses on the enclosed schedule. The documentation should show that the horses were sold out of state or for breeding. If this review shows that these horses were sold out of state and/or for breeding, other years where exemptions are listed will be accepted as such. (Note: Once the 2007 information is provided, it will be analyzed.)

The letter also requested that the information be provided by November 17, 2008. Work papers prepared to date were also enclosed with this letter.

21. At a field appointment held on January 6, 2009, Mr. DeStefano provided horse boarding sales and horse sales information for the year 2007, and the supporting documentation for the exempt sales of the six named horses in 2006, i.e., the backup documentation requested in the auditor's October 14, 2008 letter.

22. After reviewing all of the information provided to date, the auditor completed her initial review of the audit, and found as follows. The auditor separated the corporation's sales into taxable sales (excluding horse sales) and taxable horse sales. For horse boarding sales (not the sales of horses), no sales records were provided for the years 1999 through 2003, so the auditor determined that records were inadequate for that period. She determined that the records were partially adequate for the remainder of the audit period. To estimate total taxable sales (excluding horse sales) for the audit period, the auditor first transcribed the total sales for the period September 1, 1999 through December 31, 1999, and the years 2000 through 2007 per the accountant's work papers. She then multiplied the total sales for the period September 1, 1999 through December 31, 1999, and each year's total sales by 43.62% (the assumed taxable percentage) and obtained total taxable amounts for the period September 1, 1999 through December 31, 1999, and each year. The auditor divided each year's total taxable sales by four and used that amount as the quarter's total taxable sales amount. A tax rate of 8.625% was applied to each quarterly total taxable sales amount in the audit period. For the period September 1, 1999 through November 30, 2007, the auditor determined that additional taxable sales (excluding horse sales) totaled \$1,532,219.68 and additional tax due of \$132,121.30.

For horse sales, Mr. DeStefano created a list of named horses sold during the period September 1, 1999 through November 30, 2007, which the auditor reviewed. Supporting documentation of New Windsor Stables' sales of horses for the entire audit period was not

provided. To test the exempt sales of horses reported on the list, i.e., sold out of state and sold for breeding, the auditor examined the backup documentation presented for the year 2006, and found that the six sales of named horses were exempt sales as stated on the list prepared by Mr. DeStefano. The auditor accepted the list as stated. After reviewing the list of named horses sold during the period September 1, 1999 through November 30, 2007, the auditor determined that all horses listed as "sold in New York" were taxable. She determined that there was \$2,023,330.00 in additional taxable sales of horses for the period September 1, 1999 through November 30, 2007, and additional tax due of \$173,865.82.

23. The auditor discussed the above findings of additional taxable sales and additional tax amounts due with Mr. DeStefano at the January 6, 2009 field appointment. Subsequently, New Windsor Stables retained a third representative, Gus Mavroudis, EA. The audit log indicates that the auditor also discussed the audit findings and the tax determined to be due with Mr. Mavroudis.

24. On October 22, 2009, the Division issued to New Windsor Stables, a form AU-346, Statement of Proposed Audit Change for Sales and Use Tax, for the period September 1, 1999 through November 30, 2007 that asserted tax due in the amount of \$305,987.12, plus interest of \$185,266.29. The tax was determined based upon additional taxable sales (excluding horse sales) of \$1,532,219.68, and additional taxable sales of horses of \$2,023,330.00. The total additional taxable sales was determined to be \$3,555,549.68, which yielded additional tax due of \$305,987.12. The following basis was listed on the statement: "[s]ince 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." The auditor sent the statement, a cover letter summarizing the

additional tax determined to be due, and the supporting work papers to Mr. Mavroudis, and to New Windsor Stables.

25. On November 18, 2009, the auditor received the disagreed Statement of Proposed Audit Change for Sales and Use Tax signed by Mr. Mavroudis, as well as, an undated two-page letter from Mr. Mavroudis. That letter stated the following reasons for disagreement with the proposed additional sales tax due:

1. Part one of the audit report indicates Taxable Sales (excluding Horse Sales) 43.62% of invoiced sales were considered taxable. We provided the auditor with a copy of TSB-M-00(8.1)S which amended the definition [sic] of a commercial horse boarding operation in Section 301 [of the Agriculture and Markets Law] which pertains to exemptions from State and local sales tax for certain property and services used in a commercial horse boarding operation. The conditions to qualify for this exemption is that the commercial horse farm meets the following criteria.

1. The size of the commercial horse boarding operation is at least 7 acres.
2. Boarding at least 10 horses.
3. Receives at least \$10,000 or more in gross receipts a year from fees generated through the boarding of horses and other services.

In addition, the invoices included amounts for professional services such as training for horse riding which would in any event be non-taxable. Since New Windsor Stables meets the above criteria, it would appear that any sales that exclude Horse Sales would be non-taxable events. We are therefore in disagreement with the assessing of additional taxable sales of \$1,532,219.68 and additional tax due of \$132,121.30 in the Audit Report.

2. Part Two of the Audit Report indicated Taxable Horse Sales based upon “an analysis of taxable and nontaxable horses were provided for the audit period.” This information was provided by the previous accountant and we are disputing the results of the information for the following reasons:

A. The report indicates a total of \$2,023,330 in horse sales. Our review indicated a lower total of \$1,789,197, a copy is attached of our review. Our review is not to establish sales tax due but to indicate that the proposed NYS sales tax due of \$173,865.82 in Part Two of the Audit Report is not accurate, our possible sales tax amount in Part Two is \$85,418.12.

We are questioning the entire amount of possible sales tax due on the issue that the audit did not examine the age of the horses involved, for example in TSB-M-

95(6)S seems to indicate that the sale of a horse less than 24 months [old] has the opportunity to be registered with certain organizations, as suchs [sic] as the National Steeplechase and Hunt Association which would render the sales non-taxable.

We are further disputing the proposed additional sales tax on issue of law. We would like an examination and review of the inconsistant [sic] treatment that NYS seems to apply between race horses and horse held for riding and breeding, since the asset in question, a horse, is the same in both situations.

26. The following documents were attached to the disagreement letter: Technical Services Bureau Memorandum, TSB-M-00(8.1)S (Amended Definition of Commercial Horse Boarding Operation), dated December 20, 2002, Technical Services Bureau Memorandum, TSB-M-95(6)S (Sales Tax Exemption for Purchases of Racehorses), dated February 6, 1995, and a two-page Sales Summary of horses sold by New Windsor Stables in the years 2004 through 2006. This Sales Summary listed the date on which each named horse was sold, the selling price, and the type of sale, i.e., New York sale, out-of-state sale, or sold for breeding. It also listed total gross sales of horses in the amount of \$1,789,197.00 and total sales of horses in New York State of \$990,355.00 for the years 2004 through 2006. No supporting documentation used to prepare this two-page Sales Summary was attached.

27. Based upon the responsible person questionnaire received during the audit, Theodore Demetriou was determined to be a responsible person of New Windsor Stables for the period January 1, 2002 through November 30, 2007.

28. On May 3, 2010, the Division issued a Notice of Determination to New Windsor Stables asserting additional sales and use tax due in the amount of \$305,987.12, plus interest of \$202,908.98 for the period September 1, 1999 through November 30, 2007. On the same date, the Division issued to Theodore Demetriou, as a responsible person of New Windsor Stables, a Notice of Determination that asserted additional sales and use tax due in the amount of

\$232,536.72, plus interest of \$123,502.29 for the period March 1, 2002 through November 30, 2007.

29. Petitioners filed petitions challenging the notices of determination issued as a result of the audit of New Windsor Stables. In their respective petitions, petitioners asserted that New Windsor Stables qualifies as a horse breeding farm and therefore, the fees generated through horse boarding and sales of horses would be exempt from taxation. Petitioners requested abatement of the additional sales tax, interest and any penalties assessed in the notices of determination. A copy of Technical Services Memorandum, TSB-M-00(8)S (Farmers and Commercial Horse Boarding Operations), dated September 13, 2000, was attached to each petition.

30. The parties agreed to proceed in these associated matters by written submission. Neither documents nor an initial brief were filed by petitioners. However, petitioners filed a response to the Division's memorandum of law. The following documents were attached to petitioners' reply brief: a copy of the second page of Mr. Mavroudis's undated disagreement letter, three copies of Technical Services Memorandum, TSB-M-00(8.1)S (Amended Definition of Commercial Horse Boarding Operation), dated December 20, 2002, a copy of the two-page Sales Summary of horses sold by New Windsor Stables in the years 2004 through 2006, and Technical Services Memorandum, TSB-M-95(6)S (Sales Tax Exemption for Purchases of Racehorses), dated February 6, 1995. It is noted that these same documents were included in the Division's documentary submission in these associated matters.

31. The record does not include all sales invoices for New Windsor Stables' horse boarding operations for the period September 1, 1999 through November 30, 2007. It also does not include any books or records detailing the breed, age, and intended use of each horse sold by

New Windsor Stables during the period September 1, 1999 through November 30, 2007.

32. The record does not include documentation related to any breeding activities allegedly conducted at New Windsor Stables during the period September 1, 1999 through November 30, 2007.

33. In 2000, the Division issued a Technical Services Bureau Memorandum addressing the amendments to the sales and use provisions of the Tax Law with respect to farm production and commercial horse boarding operations that took effect September 1, 2000, including the amendments enacted in 2000 and in 1999 (*see* TSB-M-00[8], dated September 13, 2000). This memorandum discussed, among other things, the definitions of farming (Tax Law § 1101[b][19]) and a commercial horse boarding operation (Tax Law § 1101[b][20]; Agriculture and Markets Law § 301[13]), exemptions for purchases of tangible personal property, whether or not incorporated into a building or structure, “when the property is used or consumed predominantly either in farm production or in a commercial horse boarding operation, or both” (Tax Law §§ 1115[a][6], [15] and [16]), and exemptions for purchases of the service of installing, maintaining, servicing or repairing tangible personal property, “provided the tangible personal property is used or consumed predominantly either in farm production or in a commercial horse boarding operation, or both” (Tax Law § 1105[c][3][vi]).

34. In 2002, the Division issued a Technical Services Bureau Memorandum addressing the amended definition of commercial horse boarding operation (*see* TSB-M-00[8.1]S, dated December 20, 2002). This memorandum stated that effective January 1, 2003, the minimum acreage required for an agricultural enterprise to qualify as a commercial horse boarding is reduced from ten acres to seven acres. It further stated that “[a]ll other information in TSB-M-00(8)S is still valid.”

CONCLUSIONS OF LAW

A. Tax Law § 1105 provides, in relevant part, as follows:

On or after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property, . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business, whether or not the services are performed directly . . . or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith except:

* * *

(vi) such services rendered with respect to tangible personal property for use or consumption predominantly either in the production for sale of tangible personal property by farming or in a commercial horse boarding operation, or in both, as such tangible personal property is specified in paragraph six of subdivision (a) of section eleven hundred fifteen of this article. . . .

B. Tangible personal property is “corporeal personal property of any nature having a material existence and perceptibility to human senses,” and includes, without limitation, animals (20 NYCRR 526.8[a][4]). The Division’s regulations, in relevant part, define “maintaining, servicing and repairing” as “all activities that relate to keeping tangible personal property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition” (20 NYCRR 527.5[a][3])

C. Tax Law § 1115 provides, in part, as follows:

(a) Receipts from the following shall be exempt from the tax on retail sales

imposed under subdivision (a) of section eleven hundred five . . . :

* * *

(6)(a) Tangible personal property whether or not incorporated in a building or structure, for use or consumption predominantly either in the production for sale of tangible personal property by farming or in a commercial horse boarding operation, or in both.

D. 20 NYCRR 528.7 provides, in relevant part, as follows:

(a) *Exemption.* (1) All tangible personal property, whether or not incorporated in a building or structure, for use or consumption predominantly either in the production for sale of tangible personal property by farming or in a commercial horse boarding operation (or in both) is exempt from the New York State and local sales and compensating use taxes. . . .

(2) The services of installing, maintaining, servicing, and repairing the tangible personal property specified as exempt in paragraph (1) of this subdivision are excluded from the State and local sales and compensating use taxes. (See section 527.5 of this Title for rules pertaining to installing, maintaining, servicing, and repairing tangible personal property.)

* * *

(b) *Farming and commercial horse boarding operation defined.* (1) The term *farming* means and includes the following types of farming and activities:

(i) agriculture, floriculture, horticulture, aquaculture, and silviculture;

(ii) stock, dairy, poultry, fruit, fur-bearing animal, truck, and tree farming;

* * *

(vii) raising, growing, and harvesting crops, livestock, and livestock products (see section 310[2] of the New York State Agriculture and Markets Law); and

* * *

(2) The term *commercial horse boarding operation* means an agricultural enterprise, consisting of at least seven acres and boarding at least ten horses, regardless of ownership, that receives \$10,000 or more in gross receipts annually

from fees generated either through the boarding of horses or through the production for sale of crops, livestock, and livestock products, or through both such boarding and such production. A commercial horse boarding operation does not include any operation whose primary on-site function is horse racing. (See section 310[13] of the New York State Agriculture and Markets Law.)

(c) *Production.* (1) the activities in farming may be classified as administration, production, or distribution.

(I) Administration includes activities such as sales promotion; general office work; credit and collection; purchasing; maintenance; transporting, receiving and testing of raw materials; and clerical work in production such as preparation of work production and time records. However, tangible personal property used or consumed in administrative activities that are related to farm production, as described in subparagraph (ii) of this paragraph, is considered to be used or consumed in farm production. This includes tangible personal property used in activities such as preparing animal feed, weight, and health records; and performing research related to farm production.

(ii) Farm production begins with the preparation of the soil or other growing medium, or, in the case of animals, from the beginning of the life cycle. Production ceases when the product is ready for sale in its natural state. For farm products that will be converted into other products, farm production ceases when the normal development of the farm product has reached a stage where it will be processed or converted into a related product.

* * *

(iii) Distribution includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping products that are ready for sale.

(2) Production ends for a specific producer (farmer or other person) when the product is in the form in which he will offer it for sale. However, production may again start for a specific purchaser when he gains ownership of the product, and production will continue until the product is in a form in which it, in turn, will be offered for sale.

* * *

(d) *Predominantly.* (1) *Predominantly* means that the tangible personal property must be used or consumed; the real property or land must be used or consumed; or the building, structure, or real property into which the tangible personal property

has been incorporated must be used, more than 50 percent of the time either in the production for sale of tangible personal property by farming or in a commercial horse boarding operation, or in both.

(e) *Exemption certificate.* (1) An appropriate and properly completed exemption certificate may be used by a farmer or by an operator of a commercial horse boarding operation to make exempt or excluded purchases of tangible personal property and services described in this section.

E. It is well established that every person required to collect tax must maintain and make available for audit upon request records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Failure to maintain and make available such records, or the maintenance of inadequate records, will result in the Division of Taxation's estimating tax due (Tax Law § 1138[a]). To determine the adequacy of a taxpayer's records, the Division of Taxation must first request and thoroughly examine 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 [1987], *lv denied* 71 NY2d 806, 530 NYS2d 109 [1988]; *Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978 [1987]). The purpose of such an examination is to determine whether the records are so insufficient as to make it virtually impossible to verify taxable sales receipts and conduct a complete audit. When estimating sales tax due, the Division must adopt an audit method that will reasonably calculate the amount of taxes due (*see Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150 [1975], *cert denied* 355 US 869, 2 L Ed 2d 75 [1957]). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679 [1988]; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451 [1981]). Whether the audit method used was "reasonably

calculated to reflect the taxes due” (*Matter of W.T. Grant Co. v. Joseph*, at 206) can only be determined based upon information made available to the auditor before the assessment is issued (*Matter of Queens Discount Appliances, Inc.*, Tax Appeals Tribunal, December 30, 1993; *Matter of House of Audio of Lynbrook*, Tax Appeals Tribunal, January 2, 1992).

F. Here, the Division made a written request for books and records for the entire audit period. In response, New Windsor provided general ledgers for the years 1999 through 2006, federal S-corporation income tax returns for the years 1999 through 2006, some bank statements for the early part of the audit period, and limited records of its sales of horse boarding services and horses for the entire audit period. For horse boarding sales, no sales invoices were provided for the period September 1, 1999 through December 31, 2003. Therefore, the Division determined that sales records were inadequate for that period. The Division determined that the sales records were partially adequate for the remainder of the audit period. A detailed analysis of invoices issued for horse boarding sales for the years 2004 through 2006 was performed by the second accountant. After reviewing the analysis provided, the Division estimated the taxable sales to be 43.62%, which rate was applied to total horse boarding sales (per the accountant’s work papers) throughout the audit period and additional total taxable horse boarding sales were determined to be due. For horse sales, the second accountant created a list of horses sold during the period September 1, 1999 through November 30, 2007. However, supporting documentation for New Windsor Stables’ sales of horses for the entire audit period was not provided. After reviewing supporting documentation provided for the sales of six named horses in the year 2006, the Division found that those six sales were exempt sales as stated on the list. The Division accepted the list as stated, and determined that all horses listed as “sold in New York,” during the period September 1, 1999 through November 30, 2007, were taxable. Since the books and

records provided by New Windsor Stables were not adequate to substantiate its sales, the Division was justified in using the information available to estimate the corporation's sales tax liability for the period September 1, 1999 through November 30, 2007.

G. As noted above, after reviewing all of the horse boarding sales records provided during the audit, the Division determined additional taxable horse boarding sales in the amount of \$1,532,219.68, and additional tax due in the amount of \$132,121.30 for the period September 1, 1999 through November 30, 2007. Petitioners maintain that the Division erroneously determined that the horse boarding services provided by New Windsor Stables during the audit period were taxable. They contend that New Windsor Stables is a commercial horse farm engaged in the production or sale of livestock and livestock products, i.e., horses, exempt tangible personal property under Tax Law § 1115(a)(6)(a). They further contend that New Windsor Stables provided boarding services for those horses during the audit period, which services are exempt from taxation pursuant to Tax Law § 1105(c)(3)(vi). Petitioners' contentions are meritless. On audit, the Division determined that New Windsor Stables provided boarding services for horses during the period September 1, 1999 through November 30, 2007. Boarding horses is considered the service of maintaining the horses, i.e., tangible personal property (20 NYCRR 526.8[a][4]). Pursuant to Tax Law § 1105(c)(3), maintaining and servicing of tangible personal property is subject to sales tax. Owners of horses used predominantly for purposes of breeding horses for sale are considered to be engaged in farming (*see* 20 NYCRR 528.7[b]). In order for New Windsor Stables' horse boarding sales to be exempt from taxation, the horses boarded there must be horses used predominantly for purposes of breeding horses for sale. The record does not contain any evidence that the horses boarded at New Windsor Stables during the audit period were used predominantly for purposes of breeding horses for sale. Petitioners failed to submit

any documentation, such as exemption certificates, from owners of horses allegedly boarded at New Windsor Stables for breeding purposes during the audit period. They also failed to submit the invoices issued by New Windsor Stables for horse boarding services for the period September 1, 1999 through November 30, 2007. The detailed analysis prepared by New Windsor Stables' second representative, of invoices issued by New Windsor Stables for horse boarding sales for the years 2004 through 2006, is part of the record. I have carefully reviewed that analysis and it does not contain any information related to horses allegedly boarded at New Windsor Stables for purposes of breeding of horses for sale. Petitioners failed to establish that New Windsor Stables provided boarding services to horses boarded at its facility for purposes of breeding horses for sale, i.e., exempt horses, during the audit period. As such, no adjustment in the Division's determination of taxable horse boarding sales for the period September 1, 1999 through November 30, 2007, is warranted.

H. For horse sales, New Windsor Stables' second representative created a list of named horses sold during the period September 1, 1999 through November 30, 2007, on which the amount and type of each sale was reported. On audit, the Division determined that all horses listed as "sold in New York" were taxable sales, and that there was \$2,023,330.00 in additional taxable sales of horses during the period September 1, 1999 through November 30, 2007. Petitioners assert that the taxable sales of horses for the audit period should be reduced by approximately 1/3 because horses less than three years old at the time of sale may be considered exempt from the imposition of sales tax pursuant to Tax Law § 1115(a)(29).

I. Tax Law § 1115(a)(29), in relevant part, provides exemption from sales and use taxes for:

a horse which is a racehorse registered with the jockey club, the United States

trotting association or the national steeplechase and hunt association (or such a horse during the first twenty-four months of its life if it is eligible to be so registered) which is purchased or used with the intent that it shall be entered in an event on which pari-mutuel wagering is authorized by law, except that the exemption provided for under this paragraph shall not apply to any such horse which is considered to be at least four years old and has never raced in any event on which pari-mutuel wagering is authorized by law. Provided, further, the purchaser of such racehorse must give to the seller a certification containing such information as the commissioner of taxation and finance shall require, which shall include a statement to the effect that the purchaser intends to enter such horse in events on which pari-mutuel wagering is authorized by law. Such certification shall be retained by such seller, together with documentary proof of age of such horse, for a three-year period. . . .

For purposes of this exemption, a “racehorse” includes thoroughbred, standardbred and quarter horses (20 NYCRR 527.14[b][1]).

J. Statutes creating tax exemptions are to be strictly construed (*see Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715 [1975], *lv denied* 37 NY2d 708, 375 nYS2d 1027 [1975]). The burden of demonstrating clear and unambiguous entitlement to the exemption claimed rests with the party seeking the exemption (*see Matter of Marriott Family Rests. v. Tax Appeals Tribunal*, 174 AD2d 805, 570 NYS2d 741 [1991], *lv denied* 78 NY2d 863, 578 NYS2d 877 [1991]).

K. During the audit, New Windsor Stables’ second representative created a list of named horses sold during the audit period. This list did not include any information about the type (breed), proof of age, or the purchaser’s intended use of the horse sold. After reviewing the supporting documentation for the sales of six named horses, listed as exempt sales, in the year 2006, the Division accepted the list as stated, and determined that all horses listed as sold in New York State during the audit period were taxable sales, with tax due on such sales. Prior to the conclusion of the audit, New Windsor Stables’ third representative, Mr. Mavroudis, raised the issue of the exemption for sales of horses less than 24 months old provided by Tax Law §

1115(a)(29). However, no documentation, indicating the type (breed), proof of age, and the purchaser's intended use, for each named horse sold in New York State during the audit period, was submitted to the auditor by Mr. Mavroudis. Rather, he submitted a two-page undated disagreement letter and a two-page Sales Summary of horses sold by New Windsor Stables during the years 2004 through 2006. In this proceeding, no documentation, including the type (breed), proof of age, and the purchaser's intended use, for the horses sold in New York State during the period September 1, 1999 through November 30, 2007, was submitted by petitioners. Rather, copies of the second page of Mr. Mavroudis's undated disagreement letter and the two-page Sales Summary were attached to petitioners' reply brief. Given petitioners' failure to provide any documentation regarding each horse sold in New York State during the period September 1, 1999 through November 30, 2007, it is impossible to determine how many, if any, of the horses sold by New Windsor Stables in New York during the audit period, were horses sold within the first 24 months of their respective lives that were eligible to be registered as racehorses "with the jockey club, the United States trotting association or the national steeplechase and hunt association," and that were intended to be entered by their respective purchasers in events on which pari-mutuel wagering was allowed. As such, none of the horses sold in New York by New Windsor Stables during the audit period at issue are exempt from sales tax. Therefore, no adjustment in the Division's determination of taxable sales of horses for the period September 1, 1999 through November 30, 2007, is warranted.

L. The petitions of Theodore Demetriou and New Windsor Stables, Inc., are denied, and the notices of determination, dated May 3, 2010, are sustained.

DATED: Albany, New York
December 12, 2013

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE