STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GRAND CENTRAL JT VT	:	
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 June 1, 2008 through August 31, 2010.	:	
	:	DETERMINATION DTA NOS. 824560 AND 825201
In the Matter of the Petition	:	
of	:	
GRAND CENTRAL JT VT	:	
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 June 1, 2009 through August 31, 2010.	:	
	:	

Petitioner, Grand Central JT VT, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2008 through August 31, 2010.

A hearing was held before Herbert M. Friedman, Jr., Administrative Law Judge, in Albany, New York, on September 11, 2013, at 10:30 A.M., with all briefs to be submitted by May 1, 2014, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael J. Hall).

ISSUES

I. Whether it was appropriate for the Division of Taxation to use an indirect audit methodology.

II. Whether, assuming the use of an indirect audit methodology was proper, petitioner has shown error in the audit method or result.

III. Whether petitioner has established any facts or circumstances warranting the reduction or abatement of penalties.

FINDINGS OF FACT

1. Petitioner, Grand Central JT VT, operates a number of retail locations in New York City, making both taxable and nontaxable sales of various bakery items, prepared foods and beverages. During the relevant period, petitioner's outlets included several located in Grand Central Terminal, Pennsylvania Station, and the Port Authority.

2. Petitioner was the subject of a sales and use tax audit by the Division of Taxation (Division) for the period September 1, 2005 through May 31, 2008 (First Audit). In the First Audit, the Division determined that the records provided by petitioner were inadequate to perform a detailed audit. As a result, after discussion, petitioner executed a consent form in which the parties agreed that, as a proper indirect method and estimate, 29% of petitioner's gross sales were subject to tax, rather than the 24.33% figure used on the filed sales tax returns. Using this methodology, the Division made an adjustment that resulted in additional sales tax due in the amount of $196,088.92 for the period.[1] On June 23, 2009, petitioner, by its president, signed the Statement of Proposed Audit Change and paid the liability in full.

---

[1]The actual adjustment based on additional sales was an increase in liability of $181,554.83. The remainder of the assessed amount emanated from additional capital asset acquisitions and taxable expense purchases.

3. On December 7, 2010, the Division mailed a letter to petitioner scheduling a field audit pertaining to petitioner's sales and use tax liability for the subsequent period, i.e., June 1, 2008 through August 31, 2010 (Second Audit). The Second Audit was to commence on December 28, 2010. The appointment letter stated that "[y]ou must show ***all*** your sales and use tax books and records to the auditor" (emphasis in original). Accompanying this audit appointment letter was a Records Requested List, further identifying the records sought for review, including, among other items, sales tax returns, worksheets, canceled checks, federal income tax returns, New York State corporation tax returns, general ledger, general journal and closing entries, sales invoices, exemption documents, chart of accounts, fixed asset purchase and sale invoices, expense purchase invoices, bank statements, cash receipts and disbursement journals, depreciation schedules, lease contracts, utility bills, guest checks and cash register tapes. The meeting between petitioner and the Division's auditor did not occur as scheduled based on petitioner's request, and the requested records were not provided.

4. On December 29, 2010, the Division received a refund claim from petitioner for the First Audit seeking a refund of tax in the amount of $196,088.92, plus interest. This refund claim was denied by the Division, and petitioner filed a petition with the Division of Tax Appeals in April 2011 (Grand Central I). The substance of petitioner's claim in Grand Central I was that it maintained full and complete sales records from which an exact amount of tax could have been determined, and that the Division erred in its determination that petitioner's sales records were inadequate. In support of its claim, however, petitioner did not introduce many records from the First Audit period as they had been destroyed. Instead, at the hearing held on June 26, 2012, it offered register tapes from three dates during the Second Audit period (September 18, 2009, March 17, 2010 and May 17, 2010), some of which were illegible.

Ultimately, the petition in Grand Central I was denied and the refund denial sustained by determination of Administrative Law Judge Dennis M. Galliher (***see Matter of Grand Central JT. VT.***, Division of Tax Appeals, July 3, 2013). In Grand Central I, the administrative law judge specifically found petitioner's records to be inadequate and the Division's audit method of estimating taxable sales as a percentage of gross sales to be reasonable. Petitioner did not file an exception to Grand Central I, making it a final determination pursuant to Tax Law § 2010(4).[2]

5. On February 11, 2011, a second field audit appointment letter was sent to petitioner with regard to the Second Audit, rescheduling the meeting for March 9, 2011 and requesting the same materials. Again, this meeting was canceled at the request of petitioner, and the records were not provided.

6. A third and final field appointment letter was sent to petitioner on April 5, 2011. This letter rescheduled the meeting for April 20, 2011 and reiterated the document request. On April 6, 2011, petitioner's representative, Michael Buxbaum, sent a letter to the Division seeking another postponement of the meeting and agreeing to execute a waiver extending the statute of limitations for the Second Audit. In seeking the postponement, Mr. Buxbaum explained that the First and Second Audits were related and, pursuant to the Division's Audit Guidelines, a delay was warranted as the First Audit was the subject of a pending hearing.

7. On April 21, 2011 petitioner was provided with a letter from the Division informing it that the records provided to date were inadequate to allow for a sales and use tax audit. Consequently, if adequate records were not provided within 30 days of the letter, the Division

---

[2] Pursuant to State Administrative Procedure Act § 306(4), "[o]fficial notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency." A court may take judicial notice of its own prior proceedings (***Matter of Kolovinas***, Tax Appeals Tribunal, December 28, 1990; ***see e.g. Matter of A.R.***, 309 AD2d 1153 [2003]; CPLR 4511). Hence, official notice is taken of the determination in ***Matter of Grand Central JT VT***.

stated that penalties would be imposed pursuant to Tax Law § 1145(i) for petitioner's failure to maintain or provide records necessary to verify tax liability. Petitioner's response again centered around the need for delay based on the hearing involving the First Audit and did not provide the requisite books and records.

8. A waiver was signed by petitioner on May 16, 2011 and extended the statute of limitations for issuance of an assessment in the Second Audit to June 20, 2012.

9. The Division requested on September 23, 2011 that an observation test be permitted because petitioner had failed to provide the requisite books and records. On that same date, petitioner, by letter from Mr. Buxbaum, refused to permit such a test.

10. Petitioner's sales tax returns for the period September 1, 2008 through August 31, 2010, as filed, listed taxable and gross sales. The taxable ratio reported on these returns varied between 22.48% and 25.67% of gross sales. The Division's auditor accepted the reported gross sales from petitioner's sales tax returns and federal income tax returns as accurate. Absent adequate records from petitioner, however, the Division could not verify petitioner's reported taxable sales figures. Hence, the Division used an indirect method and applied the same 29% figure, which had been agreed upon as reasonable by petitioner in the First Audit, to the gross sales reported during the Second Audit period in order to estimate taxable sales.

11. Petitioner's sales tax returns for the quarter June 1, 2008 through August 31, 2008, however, did not report any gross sales. Consequently, the Division estimated that gross sales for that quarter were the average of those reported on petitioner's sales tax returns for the remaining quarters during the Second Audit period.

12. Applying the 29% ratio to petitioner's gross sales after making the adjustment described in Finding of Fact 11 resulted in total taxable sales of $11,465,960.00, or an increase of

$2,037,446.00 over taxable sales reported. Subjecting this additional amount of taxable sales to tax resulted in additional sales tax due in the amount of $175,857.99 for the Second Audit period.

13. On the basis of the Second Audit, the Division issued to petitioner Notice of Determination number L-037026097-7, dated December 8, 2011, setting forth additional tax liability for the period June 1, 2008 through August 31, 2010 in the amount of $175,857.99, plus penalties pursuant to Tax Law §1145(a)(1)(i) and (vi), and interest.

14. In addition, the Division issued to petitioner a Notice and Demand dated August 11, 2011, seeking penalties pursuant to Tax Law § 1145(i) in the amount of $21,000.00 for the period June 1, 2009 through August 31, 2010 for failure to maintain or make available adequate records.[3] This notice was canceled by the Division on September 29, 2011 and replaced by Notice of Determination number L-036671264-9, dated September 30, 2011, asserting the same penalty.[4]

15. At hearing, petitioner provided the testimony of its accountant, Danny Stanton, CPA, detailing his review of various tapes from petitioner's cash registers at several stores at Grand Central Terminal, including one called Market Place. The review covered sales at the Grand Central locations on September 2, 3, 5 and 8, 2008. A total of five rolls of register tapes from those dates were reviewed and submitted into evidence, along with an undated price list from one of petitioner's locations, and Mr. Stanton's written summary and estimate. No reason was specified for choosing the particular dates noted above. This material was also first provided to

---

[3] Tax Law § 1145(i) became effective April 7, 2009. Thus, the quarter beginning June 1, 2009 was the first in which such penalty was available.

[4] It appears the Division initially issued a notice and demand, rather than a notice of determination, due to a computer programming error. The September 30, 2011 Notice of Determination corrected that error.

the Division on or about August 29, 2013, approximately two weeks prior to the hearing in the instant case. Petitioner did not introduce any additional register tapes, guest checks, invoices, or other source records into evidence.

16. Mr. Stanton acknowledged that petitioner's actual taxable ratio of gross sales for the Second Audit period was higher than what was reported on its sales tax returns. In reviewing the tapes for the above-noted dates, Mr. Stanton attempted to determine the taxability of each transaction by reference to the dollar amounts of the individual transactions recorded on the tapes in comparison to the price of various items set forth on a price list of items sold at one of petitioner's locations. Based on his review, he estimated that the correct taxable ratio was probably about 25% to 26% of gross sales, rather than 29%. Part of his rationale was that Market Place did not sell taxable goods, a fact he claimed was ignored by the Division.

17. Mr. Stanton also testified that petitioner's sales tax returns were prepared, not based on source records such as guest checks or invoices, but from an analysis of the register tapes, petitioner's purchases, and the sales histories of the various retail locations operated by petitioner. Mr. Stanton added that petitioner had been preparing its sales tax returns using this estimating method for many years, including those involved in the First Audit.

18. Petitioner maintains that it produced the cash register tapes for the Second Audit period to the Division as part of its presentation at the hearing for Grand Central I and, thus, was compliant. Nonetheless, none of the register tapes presented in Grand Central I were placed in evidence in the instant matter. In lieu of the actual tapes, petitioner placed into evidence two photographs, each depicting numerous unidentifiable rolled cash register tapes in several boxes, all purporting to be from the Second Audit period. As noted, petitioner placed into the record the five register tapes referenced in Finding of Fact 15.

19. At hearing, the Division offered the testimony of its auditor, Yao Djatsou, and his supervisor, Ramon Vasquez. Both Messrs. Djatsou and Vasquez testified that petitioner failed to provide adequate books and records to the Division during the course of the Second Audit. They added that the register tapes submitted at hearing in Grand Central I did not adequately identify the items sold or the taxable nature of each sale to allow for verification of petitioner's returns.

SUMMARY OF THE PARTIES' POSITIONS

20. Petitioner asserts that it provided the requested books and records, but that the Division chose to ignore them. Additionally, petitioner maintains that an accurate taxable ratio should have been achieved by identifying taxable and nontaxable items off the cash register tapes by matching their pricing on a price list. Thus, petitioner argues that the Division's methodology was arbitrary, capricious and totally flawed. Finally, petitioner alleges misconduct on the part of the auditors, going so far as to claim that they "lied" under oath at the hearing in Grand Central I by denying receipt of adequate books and records.

21. The Division states that despite numerous requests, petitioner failed to provide adequate books and records. Consequently, the Division had to resort to an estimate, based on Grand Central I, which was reasonable under the circumstances. Last, the Division states that petitioner has failed to demonstrate reasonable cause for the abatement of penalties.

CONCLUSIONS OF LAW

A. It is well established that any person making taxable sales is a "vendor" under Tax Law § 1101(b)(8), and is therefore "required to maintain complete, adequate and accurate books and records regarding [their] sales tax liability and, upon request, to make the same available for audit by the Division" (***Matter of AGDN, Inc***., Tax Appeals Tribunal, February 6, 1997). The

records required to be maintained "include a true copy of each sales slip, invoice, receipt, statement or memorandum" (Tax Law § 1135[a][1]; 20 NYCRR 533.2[b][1]).

B. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return is not filed, "or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices. . . ." (Tax Law § 1138[a][1]). When acting pursuant to section 1138(a)(1), the Division is required to select an audit methodology reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the audit methodology or the amount of the assessment was erroneous (***see Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003).

C. The standard for reviewing a sales tax audit where external indices are 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).

D. It is clear, based upon this record, that the Division made numerous and comprehensive written requests for petitioner's books and records for the Second Audit period. In response, petitioner stalled, canceling three separate meetings with the auditor, and did not provide the requested records. Whatever records from the Second Audit period were provided as evidence in Grand Central I were found inadequate by the administrative law judge in that case as they did not identify the particular items sold or taxable status, but rather only indicated the dollar amounts of the items sold. Similarly, the five register tapes from the Second Audit period placed into evidence in the matter at hand lacked sufficient detail to permit determination of taxable status. Meanwhile, petitioner's attempt to somehow present adequate books and records through two photographs of rolled register tapes in several boxes is fruitless. Simply put, despite being given numerous opportunities to substantiate its sales tax returns for the Second Audit period, petitioner failed to provide, either during the audit or at the hearing, the records it was mandated by law to maintain and produce upon request.

E. Lacking adequate records for the purpose of conducting a detailed audit, the Division was entitled to use an alternative method to determine the correct amount of sales tax liability for the audit period (Tax Law § 1138[a][1]). As a result, the Division properly relied upon the 29% of gross sales ratio from the First Audit, which was agreed upon as reasonable by petitioner and determined as reasonable by the administrative law judge in Grand Central I (***see Matter of Burbacki***, Tax Appeals Tribunal, February 9, 1995). Since the audit method was reasonable, petitioner has the burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (***see Matter of Your Own Choice, Inc.***). Petitioner has offered little in the way of evidence or argument to disturb that finding. Its bald claim that the records actually provided were adequate

and that the Division erred in its evaluation of such adequacy on audit is unpersuasive and, without effective supporting evidence, is insufficient to allow petitioner to meet its burden.

On this issue, petitioner suffers from the same problems that it faced in Grand Central I. In that case, as here, petitioner submitted a sample of register tapes and an accompanying price list at hearing. Petitioner claims that by comparing the prices of the items sold on the register tapes to the prices of the items shown on the price list, one can "price match" and discern the particular items represented (though not specifically identified) on the tapes and verify the correctness of the taxable or nontaxable status of such items. As a threshold concern, however, the record does not clearly specify that the price list was in effect or remained unchanged throughout the Second Audit period. Moreover, several of the items on the price list carry the same prices. Additionally, some of the tapes in evidence are illegible. Hence, it is not possible to establish if such same-priced (but not specifically identified) items sold were in fact correctly entered on the registers at the time of sale as taxable or nontaxable.

F. Furthermore, at the hearing in this matter, petitioner admitted that its sales tax returns were not filed based upon the results of the allegedly accurate register tapes, but rather were filed upon the basis of a formula derived from an analysis of the tapes, petitioner's purchases, and the sales histories of the various retail locations operated by petitioner. In an attempt to undermine the Second Audit, petitioner, through the work of Mr. Stanton, alternatively offered its own analysis and estimate of the percentage of gross sales that were taxable and unsurprisingly came up with a lower tax due. Petitioner, however, cannot invalidate the Division's audit simply by offering its own estimate of tax liability as a substitute for the Division's (***see Matter of 33 Virginia Place***, Tax Appeals Tribunal, December 23, 2009; ***Matter of Albanese Ready Mix***, Tax Appeals Tribunal, June 15, 1989; ***Matter of Sol Wahba, Inc. v. New York State Tax Commn.***,

127 AD2d 943 [1987]). Moreover, Mr. Stanton's analysis lacked guest checks, invoices, detailed (or even legible) register tapes, or other source records as support, thereby suffering from the same concern that initially gave rise to the indirect methodology employed by the Division in the Second Audit and prior determination in Grand Central I. In sum, petitioner's alternative calculation does not sufficiently demonstrate error in the results of the Second Audit and must be disregarded.

G. As further argument, petitioner asserts that the notices should be canceled as at least one member of the Audit Division "lied" under oath during the hearing at Grand Central I by testifying that petitioner failed to provide adequate books and records during the First Audit. This position is unsupported by the evidence. A close examination of the testimony of Messrs. Djatsou and Vasquez gives the impression that they were credible witnesses that relayed what actually occurred. Additionally, it is unclear how testimony in Grand Central I involving the petitioner's compliance (or lack thereof) in the First Audit affected petitioner's ability to comply with the Division's requests for records in the Second Audit, much of which pre-dated Grand Central I. What is clear is that the record in the instant matter is devoid of sufficient books and records to allow for substantiation of petitioner's returns.

H. Petitioner insists that the penalties assessed pursuant to Tax Law § 1145(i)[5] should be canceled as it demonstrated reasonable cause for any noncompliance under 20 NYCRR 2392.1(d)(4). That regulation provides that reasonable cause may exist where a taxpayer is involved in a pending action or proceeding involving the same taxable period. Petitioner claims it cooperatively insisted on a waiver of the statute of limitations for assessment to allow for

[5] In its brief, petitioner erroneously identifies this section of the Tax Law as "1145(j)." It is clear from its argument, though, that petitioner intended to reference section 1145(i).

completion of Grand Central I prior to continuation of the Second Audit. It further maintains that the Division's own guidelines call for such a delay when there is a pending petition.

The evidence in the record speaks to the contrary. Tax Law § 1145(i) provides for a penalty where a taxpayer that is required to maintain records under Article 28 fails to maintain or make such records available to the Division. Petitioner was provided with no fewer than three opportunities over an eight-month period prior to issuance of the subject notice to meet with the Division's auditors and provide the necessary books and records. Crucially, five of those months preceded filing of the petition in Grand Central I. Instead of compliance, petitioner met the Division's requests with dilatory letters and a dearth of records. Petitioner certainly could have provided adequate copies of records from the Second Audit period, either prior to or after the start of Grand Central I, but chose not to. It must be held responsible for that failure ***(see Matter of Rosemellia***, Tax Appeals Tribunal, March 12, 1992; ***see also Matter of Shukry v. Tax Appeals Tribunal***, 184 AD2d 874 [1992]).

I. Petitioner alternatively argues that the Notice of Determination assessing penalties under Tax Law § 1145(i) should be canceled as, initially, the Division issued the wrong notice (a notice and demand). Despite petitioner's protests to the contrary, this error was timely corrected (***see Matter of New Intrigue Jewelers, Inc.***, Tax Appeals Tribunal, March 6, 2014), and petitioner was not prejudiced by the error as it had full opportunity to challenge the replacement notice of determination (***cf. Matter of Harry's Exxon Serv. Sta.***, Tax Appeals Tribunal, December 6, 1988). Thus, the penalties assessed pursuant to section 1145(i) are sustained.

J. In addition, petitioner argues for abatement of the remaining penalties asserted pursuant to Tax Law §§ 1145(a)(1)(i) and (vi). These penalties also may be waived if "such failure or delay was due to reasonable cause and not due to willful neglect" (Tax Law §

1145[a][1][iii]). In determining whether reasonable cause and good faith exist, the regulations provide several specific grounds and also a catch-all, which provides for a finding of reasonable cause based upon any "ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay," demonstrating an "absence of willful neglect" (20 NYCRR 2392.1[d][5]). The taxpayer bears the burden of establishing that its actions constitute reasonable cause and not willful neglect (***see Matter of Philip Morris***, Tax Appeals Tribunal, April 29, 1993; ***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992, ***confirmed*** 193 AD2d 978 [1993]).

Petitioner has offered no evidence warranting a finding of reasonable cause. Despite ample opportunity, both during the Second Audit and hearing in this case, the evidence shows that it simply did not produce the source records required. Instead, petitioner argues that the Division's auditors failed to conduct themselves properly, an assertion that does not match the proof in the record. Accordingly, the penalties assessed under sections 1145(a)(1)(i) and (vi) are also sustained.

K. The petitions of Grand Central JT VT are hereby denied and the notices of determination dated September 30, 2011 and December 8, 2011 are sustained.

DATED: Albany, New York
October 30, 2014

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE