

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**KURT D. WILMARTH D/B/A ECHO TONE MUSIC** : DETERMINATION  
DTA NO. 824936

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, 2006 through February 28, 2010. :

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Petitioner, Kurt D. Wilmarth d/b/a Echo Tone Music, 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, 2006 through February 28, 2010.

On July 24, 2013, petitioner, appearing pro se, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Michael B. Infantino, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by December 6, 2013, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

***ISSUES***

I. Whether the Division of Taxation properly issued a Notice of Determination assessing sales and use taxes due for the period December 1, 2006 through February 28, 2010.

II. Whether petitioner has established that reasonable cause exists for penalties imposed to be abated.

***FINDINGS OF FACT***

1. Petitioner, Kurt D. Wilmarth d/b/a Echo Tone Music, was a retail business making sales of small musical instruments and equipment. The store offered music lessons and repair services for most musical instruments and equipment. Located adjacent to the store were practice rooms that were rented on a monthly basis.

2. On October 27, 2010, the Division of Taxation (Division) began an audit of petitioner's sales and use taxes for the period December 1, 2006 through February 28, 2010. On this date, a letter was sent to petitioner scheduling an audit appointment and, further, a request for all of petitioner's documents related to its business for the audit period was made.

3. After a review of the documents provided, the Division determined that petitioner's books and records were insufficient to conduct a detailed audit. The Division determined that the sales records were inadequate for the audit period since petitioner did not maintain any detailed invoices, guest checks or cash register tapes. The only records maintained were tapes from the credit card machine and a summary sales sheet for each year by month. The credit card tapes were incomplete since there were gaps in the numerical invoice numbers on the tapes provided.

Gross sales records were incomplete and could not be reconciled to any tax returns. The sales tax returns were reconciled to the federal income tax returns, which resulted in substantial differences in all years reviewed.

4. The Division relied on petitioner's bank records in order to reconcile the amounts reported on the tax returns. The auditor prepared a deposit summary, a bank deposit analysis and a deposit detail, all of which showed a substantial underreporting of sales and sales tax due when compared to the amounts deposited in the bank. In preparing his workpapers, the auditor did not

include verified amounts attributable to practice/rehearsal room rental and music lessons, because neither are subject to sales tax.

5. The sales deemed for room rental were removed by the auditor based on petitioner's own unverifiable spreadsheets that he provided for all of 2009 through August 2010. Petitioner refused to provide the actual room rental contracts, yet the auditor accepted the unverifiable sheet and calculated an average of such sales per month of \$4,097.55, which amount was rounded up to \$4,100.00 per month and then projected over all the quarters in the audit period.

6. The auditor was also faced with unverifiable amounts for music lesson sales, which the auditor also allowed as nontaxable and credited petitioner with an average of \$2,400.00 per month. It is noted that both the credits given for room rentals and music lessons were not founded on any verifiable documentation despite the auditor's giving petitioner credit for these amounts.

7. Lastly, the auditor accepted, without verifiable documentation, that petitioner had deposited all collected sales tax into the bank. Thus, the auditor removed such amounts from the bank deposits. This resulted in a determination of additional taxable sales of \$137,418.77 with sales tax due in the amount of \$10,993.50.

8. Statutory and omnibus penalties were imposed herein based upon the fact that the records produced for audit were inadequate, there was a substantial underreporting of sales tax due by more than 25% and petitioner presented no evidence of any reasonable cause for his failure to properly report the sales tax due.

9. The Division issued Notice of Determination # L-036180064, dated June 2, 2011, to Kurt D. Wilmarth d/b/a Echo-Tone Music, asserting additional sales and use taxes due in the

amount of \$10,933.50 plus penalties and interest. This notice was modified by a conciliation order issued on February 10, 2012, to a reduced tax liability of \$7,274.80 plus penalties and interest.

10. Petitioner did not submit any evidence or argument in support of his petition filed herein.

### **CONCLUSIONS OF LAW**

A. 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 [1984]) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51 [1987]) the taxpayer's books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776 [1987], *lv denied* 71 NY2d 806 [1988]). 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 [1988]; *Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576 [1982]; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223 [1978] *lv denied* 44 NY2d 645 [1978]; *see also*, *Matter of Hennekens v. State Tax Commn.*, 114 AD2d 599 [1985]), 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, 46 [1978]; *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, 251 [1980]).

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 [1957], *cert denied* 355 US 869 [1957]), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023 [1976], *affd* 44 NY2d 684 [1978]; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989).

B. Petitioner's failure to maintain and produce adequate records in order for the Division to perform a detailed audit resulted in the Division's use of an audit methodology to determine tax liability (Tax Law § 1138[a]; *Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44 [1978]). Petitioner has the burden to prove by clear and convincing evidence, that the method of audit used or the amount of tax assessed was erroneous (*Matter of Meskouris v. Bros. Chu*, 139 AD2d 813 [1988]; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858 [1981]). A taxpayer cannot successfully challenge the Division's determination of taxable sales merely by offering its own estimate of its tax liability (*see Matter of Meskouris Bros. v. Chu*). All sales and repairs of musical instruments, equipment and accessories are taxable (*see* Tax Law § 1105[d]; § 1132[c]) and, as such, a presumption of correctness attached to the subject Notice of Determination when it was issued (*Tavolacci v. State Tax Commn.*, 77 AD2d 759 [1980]).

C. Petitioner has failed to sustain his burden of proof to show that the amount of tax assessed was erroneous. Petitioner did not submit any documentation to support his petition and did not present any argument establishing that the auditor made any mistakes or that any of the assertions made by the Division were inaccurate. Therefore, petitioner has failed to establish that the basis for the liability asserted in the notice was in error.

D. The petition of Kurt D. Wilmarth d/b/a Echo Tone Music is denied and the Notice of Determination, L-036180064, dated June 2, 2011, as modified by the conciliation order, is sustained.

DATED: Albany, New York  
June 5, 2014

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE