

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JUNG SUNG CORPORATION** : DETERMINATION  
**D/B/A PRANZO** : DTA NO. 824952  
: :  
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 March 1, 2006 through February 28, 2009. :  
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Petitioner, Jung Sung Corporation d/b/a Pranzo, 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 March 1, 2006 through February 28, 2009.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on July 2, 2013 at 11:00 A.M., with all briefs to be submitted by October 25, 2013, which date began the six-month period for the issuance of this determination. Petitioner appeared by Minyeong Yang, President. The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

***ISSUES***

- I. Whether the audit methodology employed by the Division of Taxation was reasonable.
- II. Whether penalties imposed should be abated.

***FINDINGS OF FACT***

1. Petitioner, Jung Sung Corporation, operated a restaurant in New York, New York, during the audit period. It was a limited service restaurant, with no table service. The restaurant was owned by Minyeong Yang and her husband. Ms. Yang was the president of petitioner.

2. On or about February 2009, the Division of Taxation (Division) commenced an audit of petitioner. On March 4, 2009, the Division's auditor mailed an appointment letter to petitioner requesting copies of its books and records.

3. In response to the appointment letter, petitioner's then representative met with the Division and provided federal income tax returns, bank statements, incomplete purchase invoices, utility bills and a copy of the store lease. During this meeting, the representative informed the auditors that petitioner did not keep cash register tapes, because storage of the register tapes would consume too much space.

4. The Division reviewed the bank statements provided and determined that for a test period of August 26, 2008 through November 26, 2008, no checks were used for the corporation's purchases. Therefore, the Division concluded that, at least for this three-month period, all purchases were made using cash.

5. After reviewing the books and records provided by petitioner, the Division informed petitioner's then representative that they were inadequate and that the Division would resort to an audit methodology of either a utility factor or a rent factor in order to estimate the amount of tax due.

6. On December 16, 2009, the Division provided separate work papers to the representative demonstrating the Division's estimate of tax due using both the utility factor and the rent factor.

7. On January 20, 2010, the Division was informed that petitioner had hired a new representative, Mr. Hillard Kaufer. This representative informed the Division that he wanted an audit methodology that used a markup of purchases.

8. On May 12, 2010, a meeting was held between the Division and petitioner's representative wherein petitioner presented a markup analysis of its own. This estimate was rejected since the additional tax was computed from incomplete information. Specifically, the Division found that the markup analysis did not account for petitioner's beer and cigarette purchases and sales. Additionally, petitioner's analysis did not account for internet sales. The Division noted that petitioner's representative seemed unaware that petitioner sold beer and cigarettes and also made internet sales.

9. On July 20, 2010, the Division met again with petitioner's representative. At this meeting, the representative increased his estimate of additional tax owed by petitioner by 20%. The Division rejected this estimate and noted that, among other things, petitioner had not provided any records of its sales for the period in issue.

10. The Division determined that the only complete and reliable information provided by petitioner was the utility bills and the store lease. Thus, the Division used these records along with the Restaurant Industry Operations Report (Report) for 2006/2007 to calculate the tax due.

11. Based on a rent factor from the Report, the Division determined that petitioner owed additional tax of \$1,050,933.32. The Division also utilized a utility factor from the same report and determined additional tax due of \$882,840.84. It ultimately used the utility factor to determine tax due because it was a more reasonable amount.

12. In order to determine tax due using the report, the Division used the table set forth on the page entitled "Limited Service Restaurants Statement of Income and Expenses - Ratio to Total Sales." This table is broken down into two categories of an average guest check: under \$6.50 and \$6.50 and over. The auditor used the \$6.50 and over category for her utility factor based upon her determination that a sandwich and a drink cost more than \$6.50 at petitioner's

restaurant. The \$6.50 and over category is further broken down by lower quartile, medium and upper quartile. The auditor chose medium since she felt that would be most fair given the lack of documentation provided to her.

13. The Division applied the utility factor to petitioner's utility cost for the audit period (\$347,767.91) to determine estimated sales of \$12,224,477.33. After deducting taxable sales reported by petitioner of \$1,683,094.00, the Division determined additional taxable sales of \$10,541,383.33, and applying the sales tax (8.375%) resulted in additional tax due of \$882,840.85. Therefore, the Division issued a Notice of Determination dated September 20, 2010 assessing the additional tax due plus penalties and interest for the audit period.

This amount was further reduced to reflect a payment made by petitioner in the amount of \$30,797.55. Thus, after a conference was held at the Bureau of Conciliation and Mediation Services (BCMS), the amount of tax was reduced to \$852,043.30 plus penalties and interest.

14. At the hearing, petitioner admitted that she did not maintain adequate books and records and was unaware of what she was required to keep. She stated that, after the commencement of the audit, she began keeping the register rolls to reflect the daily sales.

#### ***CONCLUSIONS OF LAW***

A. Tax Law § 1135(a) requires that a taxpayer maintain and make available for audit upon request, such records as are sufficient to verify all transactions. The records required to be maintained "include a true copy of each sales slip, invoice, receipt, statement or memorandum" (Tax Law § 1135[a]; 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." The failure to

maintain adequate books and records will result in the Division estimating the amount of tax due (Tax Law § 1138[a]). When estimating the tax due, the Division is required to select an audit methodology reasonably calculated to reflect the tax due. The burden then rests with petitioner to demonstrate that the audit methodology or the amount of tax assessed is erroneous (*see Matter of Your Own Choice*, Tax Appeals Tribunal, February 20, 2003).

C. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice* 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]) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51) the taxpayer's books and records for the entire period of the proposed assessment. . . . The purpose of the examination is to determine, through verification drawn independently from within these records [citations omitted], that they are, in fact, so insufficient that it is "virtually impossible [for the Division] to verify taxable sales receipts and conduct a complete audit" [citations omitted], "from which the exact amount of tax due can be determined [citation omitted]."

It is undisputed that the Division made requests to petitioner for books and records. The documents provided to the Division were incomplete purchase invoices, incomplete bank statements, copies of petitioner's lease and copies of petitioner's utility bills. Petitioner admitted that no register rolls were maintained and, thus, no records reflecting individual sales were kept by petitioner during the audit period. As such, the Division was entitled to estimate the tax due.

D. The auditor testified that a utility factor was used since she had a copy of the store lease and all utility bills. The auditor explained how she arrived at the additional amount of sales and resulting sales tax due. Petitioner did not submit any evidence to demonstrate that this method of estimating tax using the utility bills was either

unreasonable or erroneous in any way. Therefore, the amount of additional sales tax assessed by the Division is sustained.

E. Tax Law § 1145(a)(1)(I) authorizes the imposition of a penalty for the failure to timely file a sales tax return or to pay any tax imposed under articles 28 and 29 of the Tax Law. Penalties may be abated if petitioner can show reasonable cause and a lack of wilful neglect for its failure to pay the sales tax. Petitioner did not make any argument for an abatement of the penalty imposed herein by the Division. Therefore, penalty is sustained.

F. The petition of Jung Sung Corporation d/b/a Pranzo is denied and the Notice of Determination dated September 20, 2010 is sustained as modified by the conciliation order.

DATED: Albany, New York  
April 24, 2014

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE