

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANTHONY DICAMILLO : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 825594
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 2009 through March 28, 2012. :

Petitioner, Anthony DiCamillo, 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 June 1, 2009 through March 28, 2012.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on August 30, 2016 at 11:15 A.M., in New York, New York, with all briefs to be submitted by April 20, 2017, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert Maslyn, Esq., of counsel).

ISSUE

I. Whether petitioner has demonstrated that the audit methodology utilized by the Division of Taxation in its audit of Tony D's of Medford, Inc. lacked a rational basis and was not reasonably calculated to reflect the tax due.

II. Whether penalties assessed should be abated.

FINDINGS OF FACT

1. Tony D's of Medford, Inc. (Tony D corporation) owned and operated a pizzeria/restaurant known as "Tony D's Pizzeria & Restaurant," located in a shopping center on

Route 112, Medford, New York, during the period June 1, 2009 through March 28, 2012. The pizzeria and restaurant was open seven days a week, had nine tables, and provided dine in, take out, delivery and catering services. It had six employees and two delivery persons, and averaged 100 customers per day.

2. On or about March 28, 2012, Tony D corporation sold its business assets to K & T Pizza Corp., for a consideration of \$125,000.00, in a transaction constituting a bulk sale.

3. A Notification of Sale, Transfer, or Assignment in Bulk (Form AU 196.10) (bulk sale notification) was received by the Division of Taxation (Division) on April 4, 2012. This bulk sale notification, dated March 29, 2012 from K & T Pizza Corp., provided information concerning the sale by Tony D corporation to it of the pizzeria located on Route 112, Medford, New York, for a total sales price of \$125,000.00, consisting of tangible personal property (furniture, fixtures, etc.) in the amount of \$17,000.00, "covenant not to compete" in the amount of \$30,000.00, "lease" in the amount of \$40,000.00, and intangible property (goodwill, etc.) in the amount of the \$38,000.00, as well as the amount of the escrow fund, \$5,000.00. The terms and conditions of the sale were stated as "\$95,000.00 cash payable at closing and \$30,000.00 by promissory note at 6% interest over 48 months." A mailing address and telephone number for the escrow agent, David B. Prokop, Esq., was listed on the bulk sale notification. Information provided on the bulk sale notification also indicated that Tony D corporation's mailing address was Route 112, Medford, New York, and its last day of business was March 28, 2012.

4. On April 13, 2012, Leo Kazanjian, a tax technician in the Division's Sales Tax Desk Audit, Bulk Sales Unit (auditor), was assigned the bulk sale case. The auditor prepared a Bulk Sale Screening worksheet to make an initial determination whether to conduct an audit of Tony D corporation's sales tax liability. His initial review of the purchase price listed in the bulk sale

notification, in comparison to reported sales, indicated that Tony D corporation was possibly underreporting its sales. In addition, Tony D corporation's reported taxable ratio of 41% to 75% was unusually low for a restaurant/pizzeria business. As a result of the auditor's initial review, Tony D corporation was selected for a sales tax desk audit on April 17, 2012.

5. On April 18, 2012, notices of possible claim for sales and use tax due from Tony D corporation were sent to the purchaser and the escrow agent.

6. By letter dated April 20, 2012, the auditor notified Tony D corporation that based upon its sales tax filing history, it was selected for a sales tax audit for the period June 1, 2009 through March 28, 2012. The letter further noted that the bulk sale purchaser had been advised "to release no funds" until the audit was resolved. In his letter, the auditor requested all of Tony D corporation's "business related books and records" for the period June 1, 2009 through March 28, 2012, including federal returns and all related schedules; sales invoices and/or cash register tapes for each sale; credit card sales information; purchase ledgers and invoices, cash disbursement journals; bank deposit slips and bank statements; and the lease agreement for the business location. The letter also stated that as the audit progressed, additional records and information might be requested. It further stated that "[f]ailure to respond to this request within 20 days from the date of this letter may result in a re-determination [sic] of your taxes based on available information in accordance with Sales Tax Law." An April 20, 2012 entry in the Division's "Audit Division - Central Sales Tax Section Case Contact Information" (case contact) for Tony D corporation noted that letters requesting all books and records for the audit period were sent to the business address and the responsible person, Anthony DiCamillo, at his Bethpage, New York, address listed on "Empire."

7. Subsequently, petitioner called the auditor about the audit letter and indicated that he would have his accountant send in a power of attorney. However, the auditor did not receive an executed power of attorney or books and records from Tony D corporation.

8. In the absence of adequate books and records, for the period June 1, 2009 through March 28, 2012, the auditor employed the Risk Management Association Annual Statement Studies, 2011 - 2012 Edition, that contained composite data from financial statements of numerous companies. The data is organized by the companies' type of business using their primary North American Industry Classification System (NAICS). In this case, the auditor used information listed under NAICS code 722211 (designated in the study as "Limited Service Restaurants"), a category consistent with the character of the business. The 2011 - 2012 Risk Management Association Annual Statement Studies contains common size balance sheets and income statements which are used to compute a series of ratios grouped into five principal categories: liquidity, coverage, leverage, operating, and expense to sales ratios. The study provides three figures for any given ratio: the upper, median and lower quartile. In this case, the auditor used a 3.3 ratio, the lower quartile sales to total assets ratio figure in a column headed "Current Data Sorted by Assets," which contains ratios derived from all companies under the NAICS code 722211, i.e., limited services restaurants, that reported to the study for the period April 1, 2009 through March 31, 2011.¹

9. The auditor multiplied the sales to total assets ratio of 3.3 by \$125,000.00, the selling price of the business assets, to determine estimated annual gross sales of \$412,500.00 and estimated quarterly gross sales of \$103,125.00. Because a new quarter began on March 1, 2012

¹ Use of a sales to total assets ratio of 3.7 under NAICS code 722110, i.e., full-service restaurants, would have resulted in a determination of a greater amount of sales and a higher amount of additional tax due.

and the business closed on March 28, 2012, the auditor multiplied .311, the quotient of 28 days divided by 90 days, by estimated quarterly gross sales of \$103,125.00 to determine estimated gross sales of \$32,071.88 for the partial month of March, 2012.

10. Tony D corporation had not provided any records from which a taxable sales ratio could be determined. Based upon his review of the menu and the taxable nature of the items listed thereon, and in the absence of any information or documentation of exempt sales, the auditor deemed 100% of sales to be taxable. For each of the quarters ended August 31, 2009 through February 29, 2012 (a total of 11 quarters), the auditor multiplied audited quarterly taxable sales of \$103,125.00 by a tax rate of 8.625% to arrive at quarterly tax due of \$8,894.53. For the period ended March 28, 2012, the auditor multiplied audited taxable sales of \$32,071.88 by a tax rate of 8.625% to arrive at tax due of \$2,766.20. Based upon his calculations, the auditor determined total tax due in the amount of \$100,606.04, subtracted tax paid for each quarter (total tax paid in the amount of \$15,632.00 for the 11 quarters), and determined total additional tax due in the amount of \$84,974.04 for the period June 1, 2009 through March 28, 2012.

11. The Division issued to Tony D corporation a Statement of Proposed Audit Change for Sales and Use Tax, dated May 11, 2012, which asserted additional tax due in the amount of \$84,974.03 for the period June 1, 2009 through March 28, 2012, plus penalty and interest. The following was stated as the basis for the statement:

“Since you have not submitted records adequate to prove your liability as required by section 1142 of the Tax Law, tax was determined due in accordance with section 1138 of the Tax Law and is based on available records and information.”

It further stated that “[i]f you fail to either agree or disagree with this Statement of Proposed Audit Change by 05/21/2012 Form DTF-963, Notice of Determination will be issued.” The

statement was mailed to Tony D corporation at the Route 112, Medford, New York, address, and a copy was mailed to petitioner at his Bethpage, New York, address.

12. On May 24, 2012, the auditor received a telephone call from petitioner. During that telephone call, the auditor explained that he had not received the power of attorney or books and records as requested. He further explained that an assessment had been created for the corporation, and petitioner's protest rights regarding the same.

13. The Division issued a notice of determination to Tony D corporation, dated May 30, 2012, asserting additional sales and use taxes due in the amount of \$84,974.03 for the period June 1, 2009 through March 28, 2012, plus interest in the amount of \$19,130.92 and penalty in the amount of \$19,997.67, for a total amount due of \$124,102.62. The computation section of the notice stated that:

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

The statutory penalty (Tax Law § 1145 [a] [1] [i]) was assessed based upon Tony D corporation's failure to provide sufficient books and records.

14. A May 31, 2012 case contact entry noted that “[p]urchaser assessment L-038017987 on carts with bill date 6/6/12 for \$84,974.03.”

15. The auditor determined petitioner to be a responsible person of Tony D corporation under Tax Law §§ 1131 (1) and 1133 for the period June 1, 2009 through March 28, 2012, because he signed sales tax returns listing himself as president of the corporation, he signed an application to register for a sales tax Certificate of Authority (form DTF-17) as president of the corporation, and he signed business checks in payment of sales tax.

16. The Division issued a notice of determination, dated June 8, 2012, to petitioner, as an officer or responsible person of Tony D corporation, for additional sales and use taxes due in the amount of \$84,974.03 for the period June 1, 2009 through March 28, 2012, plus interest in the amount of \$19,503.73, and penalty in the amount of \$19,997.67, for a current balance due in the amount of \$124,475.43. At the hearing, petitioner stated that he was not challenging his status as a responsible person.

17. On July 5, 2012, the auditor received a signed copy of the Statement of Proposed Audit Change disagreeing with the proposed change.² The explanation given for the disagreement was that the corporation “[p]aid all sales tax due on time” and it had “a lot” of credit card sales and nontaxable sales.

18. On July 6, 2012, following the issuance of the notices of determination, the auditor received a power of attorney appointing Frank Bromberg, CPA, as Tony D corporation’s representative. Mr. Bromberg requested an opportunity to provide books and records that had been requested but not provided on audit. A second written request for Tony D corporation’s books and records was issued on July 11, 2012. During a July 24, 2012 telephone call with Mr. Bromberg, the auditor advised that he would work with Mr. Bromberg to try to resolve Tony D corporation’s matter before the Bureau of Conciliation and Mediation Services (BCMS) conciliation conference. A follow-up fax transmittal memo, dated July 24, 2012, was sent to Mr. Bromberg requesting Tony D corporation’s books and records, including tax exempt certificates (ST-119.1), related invoices and proof of payment for any tax exempt sales, for the audit period.

19. On or before July 24, 2012, Tony D corporation protested the notice of determination issued to it by filing a request for a conciliation conference with BCMS. The record is silent as

² This statement was hand-dated and signed by petitioner, as president, on May 31, 2012.

to when petitioner may have protested the notice of determination issued to him by filing a request for a conciliation conference. However, an August 2, 2012 case contact entry indicated that a BCMS number was assigned to petitioner's request. On an unknown date, the statutory notice issued to Tony D corporation was sustained by BCMS. By conciliation order, dated November 23, 2012, the notice of determination issued to petitioner was sustained and the matter was dismissed, "[b]ased upon the determination reached in the associated matter of Tony D's of Medford, Inc."

20. In a letter, dated November 20, 2012, to Dan Arnold, a Division employee,³ Tony D corporation's representative advised that he was "sending various bank statements and several worksheets regarding the audit period 6/1/09-3/28/12." Mr. Bromberg, in his letter, further advised that "Mr. Dicamillo [sic] does not have register tapes nor other documentation except for the bank statements enclosed."

21. On November 26, 2012, the auditor received Mr. Bromberg's November 20, 2012 letter, along with various bank statements and several worksheets regarding the audit period. The auditor's case contact entry for November 28, 2012 noted that Tony D corporation's representative "provided some bank statements but did not have every month." As a result, the auditor did not have enough bank statements to make a determination. The auditor also noted that his review of what was supplied showed that very little cash was deposited. His review also found that the bank statements provided were inconsistent with reported sales.

22. On January 14, 2013, Tony D corporation's representative sent a letter to Mr. Arnold, which advised as follows.

³ The record does not include the specific Division bureau, section or unit in which Mr. Arnold was assigned.

“As per our phone conversation of today, I have enclosed the ‘cash register’ tapes for the period 6/1/09-3/28/12. Some of the days or quarters are missing. As best we could, we summarized the tapes. We appreciate your patience with this account.

Please review this information and if possible consider this when recalculating an adjustment to the audit findings.”

23. On January 23, 2013, the auditor received Mr. Bromberg’s January 14, 2013 letter, along with a box of register tapes and a recap spreadsheet for the period March 1, 2010 through February 29, 2012 (part of the audit period). The auditor’s January 23, 2012 case contact entry noted that the cash register tapes provided were consistent with the determination of additional tax and showed that Tony D corporation was underreporting both gross and taxable sales. His entry further noted that no documentation was provided to support any claim of exempt sales. Based upon his review of records provided post-assessment, the auditor concluded that no adjustments to the assessed tax were warranted. He also concluded that based upon the information provided, there was no reasonable cause for penalty abatement.

24. Petitioner filed a petition challenging the notice of determination issued to him, and said petition was received by the Division of Tax Appeals on December 10, 2012.⁴ In his petition, petitioner asserts, among other things, that he bought this business in June, 2008 for \$175,000.00 and sold it in March, 2012 for \$125,000.00, a loss of \$50,000.00. He further asserts that he “submitted all cash register receipts as well as credit card receipts.” Petitioner requests a reconsideration of Tony D corporation’s nontaxable sales. He further requests a redetermination of Tony D corporation’s sales, “as the business was being supported by numerous loans” and the

⁴ A petition was also filed by Tony D corporation, challenging the notice of determination issued to it, and said petition was received by the Division of Tax Appeals on December 10, 2012. The corporation’s petition, assigned DTA No. 825424, was originally associated with the instant matter. However, Tony D corporation’s petition was subsequently withdrawn.

“depletion of [his] entire savings account.”

25. During a pre-hearing conference call held on December 4, 2013, petitioner indicated to the undersigned administrative law judge that he had filed for personal bankruptcy and that the bankruptcy proceedings were still pending. This matter was held in abeyance by the Division of Tax Appeals until petitioner was discharged in bankruptcy in late 2015.

26. At the hearing, the Division submitted the bulk sale audit file for the sales tax audit performed on Tony D corporation for the period June 1, 2009 through March 28, 2012.⁵ The Division also submitted an affidavit of Mr. Kazanjian, the Tax Technician who performed the review and made the determinations in the sales tax audit of Tony D corporation for the period June 1, 2009 through March 28, 2012.⁶

27. The record contains pages of the 2011 - 2012 Risk Management Association Annual Statement Studies, which contain various ratios related to limited service restaurants. Included among such ratios is the 3.3 sales to total assets ratio used by the Division in its audit of Tony D corporation. The record also contains the cover and table of contents of the 2011 - 2012 Risk Management Association Annual Statement Studies, information about the Risk Management Association, and explanations of the source of the data and the ratios used in the study as noted in Finding of Fact 8.

28. In his affidavit, Mr. Kazanjian explained the use of the 2011 - 2012 Risk Management Association Annual Statement Studies, including the selection of the particular factor, the asset value employed, and the taxable ratio to determine the tax due. Mr. Kazanjian, in his affidavit,

⁵ The bulk sale audit file (Division’s Exhibit F) includes, among other things, audit work papers, and excerpts from the 2011 - 2012 Risk Management Association Annual Statement Studies.

⁶ Two additional pages from the 2011 - 2012 Risk Management Association Annual Statement Studies related to ratios for full-service restaurants (NAICS code 722110) were attached to Mr. Kazanjian’s affidavit (Division’s Exhibit E).

also explained the factors he used in determining petitioner to be a responsible person of Tony D corporation for the audit period, as well as his determinations regarding Tony D corporation's records submitted post-assessment.

29. Petitioner presented only himself as a witness. He claimed that his then-accountant provided Tony D corporations records, including boxes of cash register tapes to the auditor for review during the audit.

30. At the hearing, petitioner stated that he purchased the business from a third party for \$175,000.00 through the payment of an undisclosed amount of cash and the remainder by a note. He explained that the pizzeria and restaurant served pizza and dinner entrees from the time it opened on or about June 11, 2009.

31. At the hearing, petitioner indicated that sales were slow at the beginning, but picked up over time. Within six months of opening, the pizzeria and restaurant began accepting credit card payments. Petitioner claimed that crime in the area had a negative impact on sales. He further claimed that weekly sales never reached \$10,000.00 per week.

32. At the hearing, petitioner claimed that the business made tax exempt sales of pizza and other food items to the Sachem School District for its sporting events, the Pederson-Krag Institute, a local unidentified church, and other unidentified entities.

33. According to petitioner, Tony D corporation was never able to pay its obligations in a timely manner. Over time, Tony D corporation could not meet its expenses. Petitioner testified that he used his personal funds and personal credit cards to fund the business. In the latter part of 2011, petitioner decided to sell the pizzeria and restaurant business. Petitioner indicated that, initially, the business was listed for sale at \$175,000.00, and later reduced to an undisclosed price. After some negotiations, Tony D corporation sold its business assets to K & T Pizzeria

Corp., a third party, on or about March 28, 2011 for \$125,000.00 (*see* Finding of Fact 2).

34. Petitioner claimed that the money received from K & T Pizzeria Corp., on March 28, 2012, went to pay some of Tony D corporation's outstanding liabilities, including among other liabilities, amounts due the landlord. He also claimed that the \$125,000.00 sale price should be adjusted to reflect his expenses and the losses he sustained.

35. Petitioner did not offer any of Tony D corporation's books, records or any other documentation at the hearing. However, at the hearing, petitioner requested and received permission to submit the following books or records by November 1, 2016:

- a. the lease agreement for the business premises;
- b. tax exempt certificates and the associated records of the corporation's tax-exempt sales;
- c. the corporation's books and records;
- d. records of payments to the corporation's creditors; and
- e. the corporation's cash register tapes.

36. Petitioner failed to submit any of the corporation's books, records or documents post-hearing.

SUMMARY OF PETITIONER'S POSITION

37. Petitioner contends that Tony D corporation maintained proper and sufficient records of its sales for the period June 1, 2009 through March 28, 2012. He maintains that complete and sufficient records were provided during the audit. Those records included cash register tapes for the entire audit period, "as well as receipts and statements from the business's accountants representing how they prepared the tax returns for the restaurant during the relevant period."

Petitioner asserts that the auditor did not make a sufficient, thorough investigation of the records made available to him before concluding that the records were incapable of supporting a

complete audit. He further asserts that the estimate procedures adopted by the Division in its audit of Tony D corporation were arbitrary and capricious, and lacked a rational basis.

38. Petitioner maintains that he cannot financially afford to pay the sums now sought, and he has already proposed two different offers in compromise to resolve this matter that have been rejected by the Division. Petitioner claims that \$49,000.00 has been paid towards Tony D corporation's tax debt. He further claims that the \$49,000.00 already paid "would have more than covered the rightful amount of taxes due," had the Division used the records provided during the audit to determine the proper amount of tax due for the audit period. Petitioner requests that the assessment issued against him "be satisfied based upon the \$49,000.00 already paid."

CONCLUSIONS OF LAW

A. Tax Law § 1135 (a) (1) provides that:

"[e]very person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately."

The sales records required to be maintained include, among other things, sales slips, invoices, receipts, statements or other memoranda of sale, guest checks, cash register tapes and any other original sales documents (20 NYCRR 533.2 [b] [1]).

B. Tax Law § 1138 (a) (1) provides, in relevant part, that if a sales tax return was 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 a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

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

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

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

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

D. In this case, the record establishes the Division's clear and unequivocal written request for books and records of Tony D corporation's sales. Contrary to petitioner's claim, in his brief, that Tony D corporation maintained and provided sufficient records, the record clearly shows that Tony D corporation failed to provide any books and records during the audit. It also shows that after the notice of determination was issued, petitioner provided some of Tony D corporation's bank statements that were incomplete, inconsistent and inadequate, and cash register tapes for part of the audit period (*see* Findings of Fact 20 through 23). Accordingly, the Division was justified in using an external index, a sales to total assets ratio from the 2011 - 2012 Risk Management Association Annual Statement Studies, in estimating Tony D corporation's sales tax liability (*see Matter of Urban Liqs. v State Tax Commn.*; *see e.g. Matter of Shukry v Tax Appeals Tribunal*, 184 AD2d 874 [3d Dept 1992]; *Matter of 24 Hour Grocery & Candy*, Tax Appeals Tribunal, June 27, 1991; *Matter of MNS Cards & Gifts*, Tax Appeals Tribunal, May 7, 1992).

E. Where the Division uses such a methodology, the record must contain information identifying the external index used by the Division in order to establish a rational basis for the audit method (*see Matter of Fokos Lounge*, Tax Appeals Tribunal, March 7, 1991). The purpose of this requirement is to provide petitioner with access to the source of the external index used and therefore with the opportunity to challenge the soundness or applicability of the index (*see Matter of Bitable on Broadway*, Tax Appeals Tribunal, January 23, 1992). The chart or table which contains the index together with information that adequately identifies the source of the index is sufficient to meet this requirement (*see Matter of Framapac Delicatessen*, Tax

Appeals Tribunal, July 15, 1993).

F. Here, the record contains the pages from the 2011 - 2012 Risk Management Association Annual Statement Studies which contain various ratios related to limited service restaurants. Included among such ratios is the 3.3 sales to total assets ratio used by the Division in its audit (*see* Finding of Fact 8). The record also contains the cover and table of contents of the 2011 - 2012 Risk Management Association Annual Statement Studies, information about the Risk Management Association and explanations of the source of the data and the ratios used in the study (*see* Finding of Fact 27). The Division has thus adequately identified the source of the external index used on the audit herein under the standards set forth in the decisions of the Tax Appeals Tribunal cited above.

G. Where the Division has established entitlement to the use of indirect auditing methods, the burden of proof lies with the taxpayer to show clear and convincing evidence that the audit method was unreasonable or that the results were unreasonably inaccurate (*see Matter of Meskouris Brothers, Inc. v Chu*, 139 AD2d 813, 814 [2d Dept 1988]); *Matter of Surface Line Operators Fraternal Org. v Tully*).

H. Petitioner has failed to meet his burden to show error in the audit method or result. Petitioner first argues that the corporation provided adequate books and records and that the tax should have been determined based upon the books and records provided. The record clearly shows that no books and records were provided on audit, and the records submitted after the issuance of the notice of determination were incomplete and inadequate (*see* Findings of Fact 7, 8, 10, 20 through 23). Petitioner claims that his expenses and business losses should have been taken into account in the audit determinations. In this case, the Division applied a factor to the value of the business, as determined by an arm's length sale (*see* Findings of Fact 2, 33). At the

hearing, petitioner detailed how he initially listed the business for sale at \$175,000.00 (the price at which he purchased the business in June, 2009), but eventually lowered the price to that at which he sold it, i.e., \$125,000.00, which amount reflected the true market value of the business assets. The Division's application of the 3.3 sales to total assets ratio to the true market value of the business assets yielded a more accurate, and in fact, lower amount of sales than the original asking price would have. In addition, petitioner provided no evidence to show that the use of the 2011 - 2012 Risk Management Association Annual Statement Studies was irrational, nor did he provide any evidence to contest the data in the study. He also presented no evidence to show that the sales to total assets ratio selected was dissimilar or inapplicable, and no evidence to show that sales were overstated. As such, petitioner failed to sustain his burden of proving that the audit methodology was unreasonable.

I. At the hearing, petitioner also contended that Tony D corporation made exempt sales during the period June 1, 2009 through March 28, 2012, for which no credit was given. He claimed that Tony D corporation made sales to a number of tax exempt entities during the audit period. On its filed sales tax returns, Tony D corporation reported taxable ratios of 41% to 75% for a pizzeria and restaurant business that characteristically has a substantially higher percentage of taxable sales. In the absence of any books and records, the Division concluded that 100% of Tony D corporation's sales were taxable. Although petitioner was given the opportunity, post-hearing, to submit tax exempt certificates and associated sales records to substantiate his claim of nontaxable sales, he failed to do so. Petitioner's vague testimony regarding Tony D corporation's nontaxable sales, without supporting records of such nontaxable sales, is insufficient to sustain his burden of proof. As such, no adjustment to audited taxable sales, and the tax determined on the same, is warranted.

J. Petitioner also asserts that he cannot financially afford to pay the sums now sought, and he has already proposed two different offers in compromise to resolve this matter that have been rejected by the Division. He claims that \$49,000.00 has been paid towards Tony D corporation's tax debt. Petitioner further claims that the amount already paid would have more than covered the rightful amount of taxes due, had the Division used the records provided by Tony D corporation during the audit to determine the proper amount for the audit period. Petitioner requests that the assessment issued against him be satisfied based upon the amount already paid.

Petitioner's assertions are rejected. The record clearly shows that Tony D corporation provided no books and records to the Division on audit. Where a taxpayer's own failure to maintain adequate and accurate records results in resort to external indices, accuracy is not a prerequisite to issuance of an assessment (*see Matter of Convissar v State Tax Commn.*, 69 AD2d 929 [3d Dept 1979]) and any inaccuracy resulting therefrom weighs against petitioner (*see Matter of Meskouris Brothers, Inc. v Chu*). The limited records provided by Tony D corporation, after the notice of determination was issued, were reviewed by the Division and found to be incomplete and inadequate to warrant any adjustment in the amount of tax assessed (*see Findings of Fact 20 through 23*). At the hearing, petitioner did not submit any of Tony D corporation's books and records. Although he was afforded the opportunity post-hearing to submit Tony D corporation's books, records and documents, he failed to do so (*see Findings of Fact 35, 36*). Since Tony D corporation failed to provide adequate books and records, the Division was required to select an audit method reasonably calculated to reflect taxes due, and upon his challenge to the assessment petitioner bore the burden of establishing by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (*Matter of Surface Line Operators Fraternal Org. v Tully, supra*). Petitioner has failed to

sustain his burden of proving that either the audit method or the amount of tax assessed was erroneous.

K. Tax Law § 1145 (a) (1) (i) imposes a penalty upon persons who fail to timely file a return or timely pay the tax imposed by articles 28 and 29 of the Tax Law. The penalty and additional interest 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 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 the actions were based upon 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 [3d Dept 1993]).

Petitioner has offered no evidence that would support abatement of the penalties imposed, and the same are, therefore, sustained.

L. The petition of Anthony DiCamillo is denied, and the Notice of Determination, dated June 8, 2012, is hereby sustained.

DATED: Albany, New York
October 19, 2017

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE