STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MAJESTIC DELI GROCERY, INC.	:	DETERMINATION DTA NOS. 825624 AND 825625
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2009 through November 30, 2011.	:	
In the Matter of the Petition	:	
of	:	
AHMED ALAMRANI	:	
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2009 through November 30, 2011.	:	

Petitioner Majestic Deli Grocery, Inc., filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2009 through November 30, 2011.

Petitioner Ahmed Alamrani filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2009 through November 30, 2011.

A consolidated hearing was held before Winifred M. Maloney, Administrative Law Judge, on November 6, 2014 at 10:55 A.M., in New York, New York, and continued to completion on February 26, 2015 at 10:15 A.M., in New York, New York, with all briefs to be submitted by

September 3, 2015, which date began the six-month period for issuance of this determination. Petitioners appeared by the Antonious Law Firm (Jacqueline S. Kafedjian, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined additional sales taxes due from petitioner Majestic Deli Grocery, Inc., for the period March 1, 2009 through November 30, 2011, or whether petitioners have shown error in the audit method or results.

II. Whether penalties imposed under Tax Law § 1145(a)(1)(i) and (vi) should be abated.

FINDINGS OF FACT

1. During the period in issue, petitioner Majestic Deli Grocery, Inc. (Majestic Deli Grocery) owned a deli and grocery store located at 3520 Broadway, at 144th Street, in Harlem. The business had four employees, was open 24 hours a day, 7 days per week, and provided 24-hour delivery service with a minimum purchase.

2. Majestic Deli Grocery was incorporated on December 13, 2007. Petitioner Ahmed Alamrani at all relevant times was the president and a shareholder of Majestic Deli Grocery. Mr. Alamrani, as president, signed Majestic Deli Grocery's Application for Registration as a Sales Tax Vendor (form DTF-17). He was also responsible for signing and filing the corporation's sales tax returns.

3. Majestic Deli Grocery reported $314,110.00 in gross sales for 2009, $466,583.00 in gross sales for 2010, and $478,260.00 in gross sales for 2011 on its federal income tax returns.

4. During the audit period at issue, consisting of 11 sales tax quarters (a period of 2 years and 9 months), Majestic Deli Grocery reported on its sales tax returns total gross sales of $1,202,746.00 and total taxable sales of $223,957.00. It also claimed total prepaid cigarette tax

credits of $4,295.00, and total vendor collection credits of $989.00 for the period March 1, 2009 through November 30, 2011.

5. By letter dated December 21, 2011, the Division of Taxation (Division) advised Majestic Deli Grocery that a sales tax field audit of its books and records for the period March 1, 2009 through November 30, 2011 would commence on January 13, 2012. This audit appointment letter advised Majestic Deli Grocery 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 Information Document Request 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 and deposit slips; cash receipts journal; cash disbursements journal; the corporate book, including minutes, board of directors, and articles of incorporation; depreciation schedules; State Liquor Authority license; lease contracts; utility bills; guest checks; and cash register tapes.

6. On December 21, 2011, the auditor sent third-party letters to some suppliers. According to the Tax Field Audit Record (Audit Log), the auditor received a total of eight third-party responses on various dates between December 23, 2011 and January 30, 2012.

7. On January 10, 2012, the auditor received a faxed power of attorney appointing Jacqueline S. Antonious, Esq., as Majestic Deli Grocery's representative. Mr. Alamrani, as president of Majestic Deli Grocery, executed this power of attorney.

8. On January 25, 2012, the auditor made a 15-minute field survey of Majestic Deli

Grocery, a deli and grocery store located in a mixed residential and commercial area.[1] She noted that lottery tickets were sold, ATM services were available in the store, credit cards (Visa and Master Card) and food stamps were accepted, take-out was advertised, and take-out menus were available that indicated the store was open 24 hours a day. The auditor observed that there was one cash register (sales were not rung up), food was sold in a heated state, cigarettes were sold (cigarette prices per pack of $10.25 and $11.50 noted), and the store had a 14-door refrigerator for the taxable beverages and one open refrigerator for juice and milk. The auditor further observed that the premises was busy, with "about 10 customers within 15 min. 4 - 5 of them from prepared food." Taxable items sold included phone cards, candy, household products, gum, hot beverages, prepared food, soda and beer. Nontaxable items sold included ice cream, cake, "news," juice, crackers, chips, milk, nuts, and cold cuts by the pound. During the field survey, the auditor also obtained a menu from the business.

9. At the request of Ms. Antonious, the field audit appointment was rescheduled for March 19, 2012. On February 9, 2012, the auditor left a message for Ms. Antonious and requested that all purchase invoices be available for review at the March 19, 2012 appointment.

10. On March 19, 2012, the auditor, Miranda Chung, met with Ms. Antonious who produced the corporation's federal income tax returns for the years 2009 and 2010; New York State corporation tax returns for the years 2009 and 2010; some merchandise purchase invoices for the years 2010 and 2011; the corporation's monthly checking account statements for the periods January 1, 2009 through September 30, 2011, and November 1, 2011 through November 30, 2011; and sales tax returns for the period March 1, 2009 through November 30, 2011.

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[1] Riverbank State Park, which has athletic fields and picnic areas, is located across Riverside Drive from the business.

Neither sales source documents, such as cash register tapes or a day book, nor the general ledger, cash receipts journal and cash disbursements journal for the audit period at issue were provided to the auditor during the March 19, 2012 appointment. The Audit Log entry for March 19, 2012 noted, among other things, that the corporation did not maintain any sales records, such as cash register tapes or a day book, for the audit period. During the appointment, the auditor asked Ms. Antonious how the sales tax returns were prepared, and Ms. Antonious stated bank deposits plus purchase information. Ms. Antonious also stated that Majestic Deli Grocery had a promotion for a free soda with the purchase of a sandwich. The auditor was advised by Ms. Antonious that the responsible person and sales tax examination questionnaires would be provided on the following day, i.e., March 20, 2012.

11. During the March 19, 2012 field audit appointment, the auditor reviewed the bank deposits and performed a gross sales reconciliation between the bank deposits and the sales tax returns for the audit period at issue, and found that the gross sales reported on the sales tax returns were higher. She also performed a gross sales reconciliation between the federal income tax returns and the sales tax returns, and found that the gross sales reported on the sales tax returns were higher. In addition, the auditor reviewed the available merchandise purchase invoices, and found them to be incomplete and in no particular order. She transcribed purchase information from Beehive Beer Distributing (Beehive Beer) invoices bearing dates between May 19, 2010 and November 23, 2011, and Losito Provisions invoices bearing dates between May 17, 2010 and November 28, 2011. With respect to the cigarette purchase invoices, the auditor was unable to perform a test of the prepaid cigarette tax because the cigarette purchase invoices provided were incomplete.

12. Subsequently, the auditor made a number of oral (telephone) requests to Ms.

Antonious regarding the provision of the responsible person and sales tax questionnaires to the auditor. During an April 20, 2012 telephone call, the auditor made an oral request for the corporation's books and records for the audit period at issue, Ms. Antonious responded that she had provided everything available at the first audit appointment. During this same telephone call, the auditor explained that Majestic Deli Grocery had not provided cigarette purchase invoices in auditable condition at the first audit appointment.

13. The auditor reviewed the records provided to her to date and determined that they were inadequate for a detailed audit. On April 26, 2012, the auditor prepared preliminary computations of additional tax due for the period March 1, 2009 through November 30, 2011 based upon available information on file (the corporation's taxable third-party purchases). To compute taxable sales of beer, soda, other beverages, and phone cards, the auditor used purchase information from third-party suppliers, and applied a markup of 141.42% (average markup per federal income tax returns for the years 2009 and 2010). To determine taxable sales of cold cuts and prepared sandwiches, the auditor applied a markup of 141.42% to Losito Provisions invoices for the period May 17, 2010 through November 28, 2011 (7 quarters) plus projected cold cut purchases for March 1, 2009 through April 30, 2010 (4 quarters). The auditor estimated prepared food (coffee) at $45.00 per day, then multiplied that amount by 7 days per week, 13 weeks per quarter, for 11 quarters. To determine taxable cigarette sales, the auditor applied a markup of 118.72% (markup using the Division's Publication 509 selling prices) to Amsterdam Tobacco's third-party information for the quarters ending May 31, 2009, August 31, 2009, November 30, 2009, November 30, 2010 and February 28, 2011, plus projected cigarette purchases for the quarters ending February 28, 2010, May 31, 2010, August 31, 2010, May 31, 2011, August 31, 2011 and November 30, 2011. Based upon her computations, the auditor determined total

audited taxable sales to be $1,736,854.00 and quarterly taxable sales to be $157,896.00. The auditor subtracted reported taxable sales of $223,957.00 from audited taxable sales of $1,736,856.00, and computed additional taxable sales to be $1,512,899.00, with tax due on such additional taxable sales to be $133,047.51, then disallowed vendor collection credits in the amount of $989.00, and determined total additional tax due in the amount of $134,036.51. A schedule of additional tax due per purchases was prepared that detailed the auditor's preliminary computations. This schedule was mailed to Ms. Antonious for review and further discussions to resolve the pending issues.

14. During an April 27, 2012 conference call with her team leader and Ms. Antonious, the auditor explained that due to Majestic Deli Grocery's inadequate books and records for the audit period, additional tax due was calculated based upon available information on file (taxable third-party purchases), i.e., the schedule of additional tax due per purchases detailed above. Ms. Antonious stated again that Majestic Deli Grocery did not maintain any sales records, such as cash register tapes or a day book, for the entire audit period. During this conference call, the auditor requested that corporation and responsible person waivers be executed to extend the statute of limitations for the period March 1, 2009 through November 30, 2009, in order to give the Division time to finish the case. Ms. Antonious stated that she would speak with the vendor.

15. On April 27, 2012, Ms. Antonious executed a consent on behalf of the corporation extending the time for determination of sales and use taxes for the period March 1, 2009 through November 30, 2009 until December 20, 2012, such executed consent was received by the auditor on April 30, 2012.

16. During the course of the audit, Ms. Antonious verbally stated that Mr. Alamrani was the responsible person for the corporation. On April 30, 2012, the auditor received an individual

power of attorney, executed by Mr. Alamrani, appointing Ms. Antonious as his representative. On May 1, 2012, the auditor spoke with Ms. Antonious via the telephone and requested the responsible person waiver, the sales tax examination questionnaire and the responsible person questionnaire be returned to her. Ms. Antonious stated that Mr. Alamrani had all the forms and she would get them the next day. Despite numerous requests for the submission of an executed responsible person waiver, Mr. Alamrani refused to execute the responsible person waiver (consent) to extend the time for assessing tax for the period March 1, 2009 through August 31, 2009.

17. No other books and records were provided to the auditor. The auditor reviewed the records provided to her and determined that they were inadequate for a detailed audit. Source documents such as cash register tapes, day book and cash payout schedules were not maintained for the audit period. The absence of source sales documents made it impossible for the auditor to trace any transaction back to the original source or forward to a final total. Therefore, the auditor determined an observation of the business was necessary. By letter dated May 11, 2012, the auditor informed Ms. Antonious that an observation of Majestic Deli Grocery's place of business would take place in the next six weeks because the corporation failed to provide appropriate books and records necessary for the auditor to conduct a detailed sales and use tax audit. By letter dated June 4, 2012, Ms. Antonious advised that the corporation refused to allow an observation.

18. In lieu of an observation, the auditor obtained third-party information from some of Majestic Deli Grocery's suppliers. In addition, the auditor obtained third-party information from the Division's own databases that are maintained to assist in audits.

19. Due to an expiring statute of limitations, and Mr. Alamrani's refusal to sign a consent

to extend the period of limitations, two separate audit computations were performed.

20. For the period March 1, 2009 through August 31, 2009, the auditor reviewed purchases of beer, soda, other beverages, and phone cards, all of which are taxable. Using the third-party purchase information available to her for those items, and since Majestic Deli Grocery provided no information to determine an exact markup percentage for each item, the auditor determined an overall markup of 41.42%, derived from a two-year average of the markup shown on the corporation's 2009 and 2010 federal income tax returns.[2] She applied that markup percentage to the total purchases of those items for the two quarters.

In addition, for cigarette purchases, the auditor used Majestic Deli Grocery's cigarette purchases listed in the Division's database for five months, March 2009 through July 2009, to which she applied the 22% markup percentage listed in the Division's Publication 509, Minimum Wholesale and Retail Cigarette Prices.[3] The auditor used the markup percentage listed in Publication 509 instead of the prices she observed during her survey of the business on January 25, 2012, because she felt it would be unfair to use a later, higher price for an earlier period. From the cigarette invoices provided by the corporation, the auditor was unable to determine the number of packs purchased or the total amount of the prepaid cigarette tax. There was no sales information to substantiate the incomplete information provided to the auditor. Moreover, no evidence of prepaid tax on cigarettes was provided to substantiate the credit taken on the returns. Nevertheless, the auditor allowed the amounts of prepaid cigarette tax claimed by

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[2] To determine the 41.42% markup, the auditor first divided gross profit by cost of goods sold reported on the corporation's federal income tax returns for the years 2009 and 2010 to determine the markup for each such year, i.e., 42.15% (93,141/220,969) for the year 2009 and 40.69% (134,947/331,636) for the year 2010. She then added 42.15% and 40.69%, divided the sum of 82.84% by 2, and determined the average markup to be 41.42%.

[3] The auditor used the highest price per pack listed in Publication 509 (4/09) for sales within New York City of $9.61 for three months, and the highest price per pack listed in Publication 509 (8/09) for sales within New York City of $9.63 for two months.

Majestic Deli Grocery on its returns for the quarters ended May 31, 2009 and August 31, 2009, i.e., $196.00 and $193.00, respectively.

21. The auditor computed additional tax due for the first period, March 1, 2009 through August 31, 2009 as follows: third-party purchases for beer ($86,179.41), soda and other beverages ($26,709.60), and phone cards ($6,981.90) amounted to a total of $119,870.91, to which the 41.42% markup was applied, and total sales of those items were determined to be $169,522.00 for that period. Additionally, cigarette purchases for the five months totaled $86,091.45 for 10,810 packs of cigarettes, to which the 22% markup was applied, resulting in cigarette sales of $105,032.00 for the period March 1, 2009 through August 31, 2009. The auditor added total taxable sales of beer, soda and other beverages, and phone cards in the amount of $169,522.00 and total cigarette sales of $105,032.00, and determined audited taxable sales to be $274,554.00 and quarterly taxable sales to be $137,277.00. For the quarter ending May 31, 2009, the auditor subtracted reported taxable sales of $11,032.00 from quarterly taxable sales of $137,277.00, computed additional taxable sales in the amount of $126,245.00, applied the tax rate of 8.375%, and determined tax due of $10,573.02. For the quarter ending August 31, 2009, the auditor subtracted reported taxable sales of $11,362.00 from quarterly taxable sales of $137,277.00, computed additional taxable sales in the amount of $125,915.00, applied a tax ratio of 8.542%,[4] and determined tax due of $10,755.66. The auditor added total disallowed vendor collection credits of $95.00 to total tax due in the amount of $21,328.68 ($10,573.02 plus $10,755.66), and determined total additional tax due in the amount of $21,423.68 for the period

[4] The tax rate in effect for the months of June 2009 and July 2009 was 8.375%. However, the tax rate changed to 8.875%, effective August 2009 (***see*** Chapter 200 of the Laws of 2009). The auditor divided the sum of the rates in effect for each month in the quarter ending August 31, 2009, 8.375% + 8.375% + 8.875% = 25.625%, by 3, and determined a taxable ratio of 8.542% for the quarter ending August 31, 2009.

March 1, 2009 through August 31, 2009.

The auditor did not review prepared food, cigars, coffee, or taxable household items for the period March 1, 2009 through August 31, 2009.

22. The Division subsequently issued to Majestic Deli Grocery a Statement of Proposed Audit Change for Sales and Use Tax, dated May 18, 2012, asserting additional tax due of $21,423.68 as noted above for the period March 1, 2009 through August 31, 2009, plus interest and penalty. The statement and the supporting schedules of additional tax due were sent to Ms. Antonious. However, she did not respond to these proposed audit changes for the period March 1, 2009 through August 31, 2009.

23. For the period September 1, 2009 through November 30, 2011, the auditor reviewed purchase information for the same taxable items, i.e., beer, soda, other beverages, and phone cards, and in addition, she reviewed purchases of cigars, candy, and household products. The auditor applied the markup percentage of 41.42% from the 2009 and 2010 federal income tax returns to the purchase information for those items. For cigarettes, specifically, the auditor had only seven months of purchase information from the database, and very limited information from Majestic Deli Grocery, so projections were made for 19 of the 20 months missing information.[5] She applied an 18% markup based upon an average selling price per her survey of $10.88, (an average of $10.25 and $11.50), and she allowed the prepaid cigarette tax credits, totaling $3,906.00, reported on the sales tax returns filed for the period September 1, 2009 through November 30, 2011.

For prepared foods, the auditor intended to perform an observation to determine taxable

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[5] In each of the 19 months, the auditor projected purchases in the amount of $16,420.00 for 1,923 packs of cigarettes. For the month of November 2010, no information or projection is listed in the auditor's supporting audit work paper entitled "Cigarette, Candy, Cigar - 3rd Party from Albany (9/1/09 - 11/30/11)."

sales, but Majestic Deli Grocery and its representative refused to allow an observation. The auditor had no other information concerning prepared food sales. However, during her January 25, 2012 survey of the premises, the auditor observed 4 - 5 prepared food customers in a 15-minute period, and she had obtained a copy of the menu. To be fair, the auditor used 4 customers every 15 minutes, or 16 customers per hour for prepared foods. Despite the business being open 24 hours per day, based upon her audit experience, the auditor used only a 2-hour period for breakfast, a 3-hour period for lunch, and a 3-hour period for dinner. She estimated prepared food customers for the period September 1, 2009 through November 30, 2011 (9 quarters) as follows: breakfast (4 customers every 15 minutes for 2 hours): (4 x 4 x 2 x 7 [days] x 13 [weeks] x 9 [quarters]) = 26,208; lunch (4 customers every 15 minutes for 3 hours): (4 x 4 x 3 x 7 x 13 x 9) = 39,312; and dinner (4 customers every 15 minutes for 3 hours): (4 x 4 x 3 x 7 x 13 x 9) = 39,312. Using the selling prices of items listed on Majestic Deli Grocery's menu, the auditor computed an average selling price of $2.90 for 21 breakfast items, and an average selling price of $4.07 for 59 lunch/dinner items. In her computations of the average selling prices, the auditor did not include extra charges. The auditor then computed estimated taxable sales of prepared foods for the period September 1, 2009 through November 30, 2011 as follows: breakfast - 26,208 x $2.09 = $76,003.00; lunch - 39,312 x $4.07 = $160,000.00; and dinner - 39,312 x $4.07 = $160,000.00.[6]

24. The computation of additional tax for the period September 1, 2009 through November 30, 2011 was made as follows: third-party purchases for beer ($377,366.00), soda and other beverages ($95,714.00), phone cards ($48,021.00), and cigars, candy and other taxable

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[6] Daily taxable sales of prepared foods totaled $483.52, i.e., breakfast totaled $92.80 (4 x 4 x 2 x $2.90); lunch totaled $195.36 (4 x 4 x 3 x $4.07); and dinner totaled $195.36 (4 x 4 x 3 x $4.07).

items ($8,391.00 [based upon third-party information and projections for missing quarters]) amounted to a total of $529,492.00, to which the 41.42% markup was applied, and total sales of those items were determined to be $748,808.00. Cigarette purchases for 26 months totaled $422,294.00, to which an 18% markup was applied, resulting in cigarette sales of $499,050.00 for the period September 1, 2009 through November 30, 2011. Prepared food sales for breakfast ($76,003.00), lunch ($160,000.00) and dinner ($160,000.00) totaled $396,003.00. The auditor calculated total audited taxable sales in the amount of $1,643,861.00 ($748,808.00 + $499,050.00 + $396,003.00), and audited quarterly taxable sales of $182,651.00. However, total audited taxable sales were reduced by $2.00 to $1,643,859.00 ($182,651.00 x 9 quarters), due to computer rounding. The auditor subtracted reported taxable sales of $201,563.00 from $1,643,859.00, and computed additional taxable sales in the amount of $1,442,296.00 and tax due of $128,003.77. Then, she added total disallowed vendor collection credits of $894.00 to tax due of $128,003.77, and determined total additional tax due in the amount of $128,897.77 for the period September 1, 2009 through November 30, 2011.

25. The Division subsequently issued to Majestic Deli Grocery a Statement of Proposed Audit Change for Sales and Use Tax, dated August 1, 2012, asserting additional tax due of $128,897.77, plus interest and penalty. The auditor sent the statement and supporting audit schedules of additional tax due to Ms. Antonious.

26. No further books and records were provided to the auditor. During a September 4, 2012 telephone conversation with the auditor, Ms. Antonious verbally disagreed with the audit findings for the period September 1, 2009 through November 30, 2011.

27. The Division issued a Notice of Determination (L-037908929-3) to Majestic Deli Grocery, Inc., dated May 25, 2012, asserting additional sales and use taxes due in the amount of

$21,423.68 for the period March 1, 2009 through August 31, 2009, plus interest and penalty. Notice of Determination (L-038579311-8), dated September 19, 2012, was also issued to Majestic Deli Grocery, Inc., asserting additional sales and use taxes due in the amount of $128,897.77 for the period September 1, 2009 through November 30, 2011, plus interest and penalty. Each of the statutory notices assessed penalties pursuant to Tax Law § 1145(a)(1)(i) and (vi). The penalties were imposed based upon the corporation's failure to provide sufficient books and records, and the omnibus penalty was assessed based upon the failure to report and pay an amount in excess of 25% of the amount of tax required to be shown on the return.

28. The auditor determined Mr. Alamrani to be a responsible person of Majestic Deli Grocery for the period March 1, 2009 through November 30, 2011, because he signed the corporation's Application for Registration as a Sales Tax Vendor, Ms. Antonious stated that he was the responsible person, and Mr. Alamrani signed the power of attorney on behalf of Majestic Deli Grocery.

29. The Division issued two notices of determination against Ahmed Alamrani, as an officer or responsible person of Majestic Deli Grocery, Inc. The first, Notice of Determination (L-037915738-8), dated May 29, 2012, asserted sales and use tax due in the amount of $21,423.68 for the period March 1, 2009 through August 31, 2009, plus interest and penalty. The second, Notice of Determination (L-03858253-8), dated September 20, 2012, asserted sales and use tax due in the amount of $128,897.77 for the period September 1, 2009 through November 30, 2011, plus interest and penalty. At the hearing, Mr. Alamrani conceded that he was president of Majestic Deli Grocery, signed the corporation's sales tax returns, and signed the power of attorney on behalf of the corporation. He did not contest his responsible person status for the period March 1, 2009 through November 30, 2011.

30. Petitioners filed their petitions dated April 19, 2013, contesting the notices of determination issued herein. The petitions assert that the Division arbitrarily assessed sales tax without a reasonable basis and failed to make proper adjustments. Petitioners also allege that penalties should be abated due to reasonable cause.

31. At the hearing, the auditor testified concerning the performance of the audit, the determinations made, and the basis for those determinations. She identified the initial appointment letter and the request for books and records, described the documents that were produced, and identified the documents that were not provided to her. She also detailed the deficiencies in the records provided and explained her basis for determining that the books and records were inadequate for a detailed audit. The auditor stated that the representative never provided any information concerning sales. She noted that although deposits in the form of electronic fund transfers (EFT) by Efunds Corporation resulting from food stamp purchases were shown on bank statements presented during the audit, there were no source sales documents to substantiate what items the EFT amounts represented, only the total amounts. The auditor had not reviewed nontaxable food items, and in the absence of any sales records, she was unable to determine whether taxable items, not subject to tax when purchased with food stamps, were sold. Therefore, no adjustment was made for food stamp purchases of particular items exempt pursuant to Tax Law § 1115(k) and 20 NYCRR 528.27. The auditor acknowledged that if documentation was provided to support receipts as nontaxable, she would adjust the assessments, or allow an allowance of 5 - 10% on food stamp sales for nontaxable sales based upon office audit experience.

32. At the hearing, petitioners submitted Majestic Deli Grocery's checking account statements for the periods January 1, 2009 through September 30, 2011, and November 1, 2011

through November 30, 2011. Numerous direct deposits made by Efunds Corporation were listed on each of these checking account statements. Petitioners also submitted a 2011 Form 1099-K, Merchant Card and Third Party Network Payments, issued by Efunds Corporation to Ridgewood Convenience Deli Grocery Inc.[7] On this Form 1099-K, Efunds Corporation reported the total gross amount of merchant card/third-party network payments made in 2011, and the gross amount of merchant card/third-party network payments made in each month of the calendar year.

33. The record does not include any cash register tapes, receipts, books or records that show what items were purchased with food stamps (taxable and nontaxable) during the period March 1, 2009 through November 30, 2011.

34. During the period March 1, 2009 through November 30, 2011, Majestic Deli Grocery purchased cigarettes, cigars, candy, and other taxable household products from Amsterdam Tobacco. At the hearing, petitioners submitted a 22-page composite exhibit that included the affidavit of Marvin Gutlove, dated October 13, 2014, an executive of Amsterdam Tobacco; a 12-page Amsterdam Tobacco Summary Invoice Register, “History File 01/03/09 to 11/30/11 Active Invoices and Credit Memos” for Majestic Deli Grocery, dated January 12, 2012; 8 Amsterdam Tobacco invoices issued to Majestic Deli Grocery, bearing dates between June 23, 2008 and November 21, 2008; and one Amsterdam Tobacco invoice dated June 28, 2010.

35. Mr. Gutlove’s affidavit contained a summary report of Majestic Deli Grocery’s purchases of cigarettes for the period March 1, 2009 through November 30, 2011. Mr. Gutlove averred that Majestic Deli Grocery’s cigarette purchases totaled $735,681.87 and prepaid cigarette sales tax paid totaled $41,623.20 for the period March 1, 2009 through November 30,

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[7] This Form 1099-K bore Majestic Deli Grocery’s taxpayer identification number, Efunds account number, and address.

2011. Mr. Gutlove's affidavit also listed total monthly packs purchased in each of the 33 months of the period at issue.

36. Petitioners' sole witness was petitioner Ahmed Alamrani. Mr. Alamrani conceded that he had no sales records for the period March 1, 2009 through November 30, 2011 and no records to show total sales, nontaxable sales, the taxable ratio, the selling price of items, or to determine a markup percentage for the period at issue. He claimed that the daily sales total was written on a piece of paper at the end of the day, but that paper was then discarded. Mr. Alamrani also confirmed that purchases were being made in cash.

37. At the hearing, Mr. Alamrani offered two example cash register receipts. Each receipt is dated November 16, 2012, and although he asserted that one receipt was for cigarettes and the other for soda, the receipts did not identify the items sold. Mr. Alamrani acknowledged that the cash register receipts do not show the particular items sold and whether they are taxable, and further, that individual receipts were not given to customers except upon request. He later admitted that that type of cash register receipt (tape) was not even used during the period March 1, 2009 through November 30, 2011.

38. At the hearing, Mr. Alamrani conceded that Majestic Deli Grocery's sales tax returns did not report any cigarette sales made during the period March 1, 2009 through November 30, 2011. He claimed that his accountant's practice was not to report cigarette sales and not to claim the credit for the prepaid cigarette tax on Majestic Deli Grocery's quarterly sales tax returns.

39. The record includes the Majestic Deli Grocery menu obtained by the auditor during the audit. Review of this menu indicates that Majestic Deli Grocery offered many items for sale including, among other items, hot prepared food, cold sandwiches, salads, cold cuts by the pound, cheese by the pound, and phone cards. At the hearing, Mr. Alamrani admitted that Losito

Provisions was not the supplier of certain taxable prepared food components such as eggs, rolls, bread, tuna or vegetables sold as salads.

40. At the hearing, petitioners submitted, as separate exhibits, original invoices issued to Majestic Deli Grocery by the following suppliers: Losito Provisions, Anheuser-Busch Distributors of New York, Inc. (Anheuser-Busch); Manhattan Beer Distributors (Manhattan Beer); Beehive Beer; Oak Beverages; and Pepsi-Cola (Pepsi). Each supplier's invoices bore various dates within the years 2010 and 2011, and were not in chronological order. Petitioners submitted original invoices issued to Majestic Deli Grocery by Amsterdam Tobacco that bore dates within and without the audit period at issue, and were not in chronological order. In addition, petitioners submitted summary purchase information and reports from Losito Provisions, Manhattan Beer, Beehive Beer, Oak Beverages and Pepsi.

41. In the period between the first and second days of the hearing, the auditor was able to review petitioners' exhibits, and create a 37-page detailed analysis that was submitted into the record. All of the information in those pages of analysis was already in evidence, and part of the record. The first two pages of the auditor's analysis are bank statement information, and pages 3 through 23 list suppliers' invoices submitted into evidence at the hearing by petitioners. Those invoices were issued by Losito Provisions, Beehive Beer, Manhattan Beer, Oak Beverage, Anheuser-Busch, Pepsi, and Amsterdam Tobacco. Page 24 of the analysis is a comparison table. The first column of the comparison table lists invoices provided by petitioners at the hearing. The second column lists the third-party information that the Division obtained, with projections for missing information, as compiled during the audit. The third column consists of information in the statements and summaries provided by Majestic Deli Grocery's suppliers, in evidence at the hearing. The auditor stated that a comparison between column 2 (information used on audit)

and column 3 (Majestic Deli Grocery's suppliers' summaries) of the comparison table reveals a significant difference between the purchase information the Division used during the audit, and petitioners' own evidence. Specifically, that Majestic Deli Grocery's suppliers report purchases in excess of the purchase amounts used by the auditor in her markup audit. The auditor further stated that indicated the Division had underassessed tax.

SUMMARY OF PETITIONERS' POSITION

42. Petitioners contend that the following fundamental errors render the auditor's methodology irrational and warrant cancellation of the notices of determination: the auditor failed to do a complete review of the corporation's records provided at audit; the auditor improperly applied markup indices, in order to artificially inflate the computation of tax due; the auditor improperly used a data deficient survey to assess prepared foods; and the auditor ignored information in the records provided at audit regarding adjustments for prepaid cigarette tax and tax exempt food stamp sales.

43. In the alternative, petitioners propose modifications to the notices of determination, using all available taxpayer records, supplementing any missing information with the auditor's third-party information, and applying the following corrections to the auditor's fundamental errors outlined above. With respect to the markup on beer and other taxable beverages, petitioners contend that based upon cost data contained in the beer and soda invoices, Mr. Alamrani's testimony, and the cash register receipt submitted at the hearing, the average markup for beer and soda is 20% and 38%, respectively, not the average markup of 41.42% used by the auditor. With respect to the markup on cigarettes, petitioners contend that the auditor misapplied the data from Publication 509 to compute markups of 22% and 18%, for the periods March 1, 2009 through August 31, 2009, and September 1, 2009 through November 30, 2011,

respectively. They maintain that Mr. Alamrani testified that the high taxes in New York City have yielded little or no profit on cigarettes for the corporation. Petitioners assert that the presumed markup of 7% contained in page 2 of Publication 509 should be used for both periods. With respect to prepared foods, petitioners claim the auditor should have used the Losito Provisions invoices and summary report provided at audit and applied the average markup of 41.42% from her preliminary computations of tax due. With respect to the credit for food stamp sales, petitioners contend the corporation's bank statements clearly show that the business transacts about $10,000.00 a month in food stamp sales. They further contend that Mr. Alamrani credibly testified that 50% of Majestic Deli Grocery's prepared food sales are sold via food stamp EFT. In addition, petitioners assert that Majestic Deli Grocery transacted other types of tax exempt sales, such as offering free sodas with every purchase, and by selling cold cuts by the pound at the deli. With respect to the prepaid cigarette tax credit, petitioners contend that the Amsterdam Tobacco invoices submitted at audit clearly showed the amount of prepaid cigarette tax paid by Majestic Deli Grocery on its cigarette purchases. They further contend that Mr. Gutlove's affidavit clearly shows the corporation's entitlement to a prepaid cigarette tax credit of $41,623.20 on its cigarette purchases of $735,681.87 for the period March 1, 2009 through November 30, 2011.

Petitioners' summary of the proposed additional tax due is set forth in their brief at pages 25 and 26. Specifically, petitioners' proposed computations result in additional taxable sales of $1,415,449.53, and additional tax due of $125,033.16, less additional prepaid cigarette tax credit of $37,328.20, plus disallowed vendor credit of $989.00, for total additional tax due of $88,693.96.

44. Lastly, petitioners request that, in the interest of justice, penalties be abated, because

any omissions or miscalculations were due to Mr. Alamrani's misunderstanding of the law. They claim that Mr. Alamrani was incorrectly advised by his accountant that, upon prepaying the cigarette tax to the cigarette supplier, retail cigarette sales should not be reported on the corporation's quarterly sales tax returns. Petitioners contend that this discrepancy is the primary reason for the margin of error in the reported taxable sales and in the taxable ratio. In addition, they claim that the business now has a new point of sale system (cash register) to comply with the Tax Law and the regulations.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every "retail sale" of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A "retail sale" is a "sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101 [b][4][i]).

B. 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]). When no written document is given to the customer, the seller is required to keep a daily record of all such cash and credit sales in a day book or similar book (20 NYCRR 533.2[b][1]).

C. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, "or if a return when filed [was] 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 . . . ." 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).

D. 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] ***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).
>
> 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)."

E. In this case, the Division made a clear and unequivocal request for Majestic Deli Grocery's books and records by its letter, dated December 21, 2011. At the field audit appointment with petitioners' representative, on March 19, 2012, the auditor was provided with the corporation's federal income tax returns for the years 2009 and 2010; New York State corporation tax returns for the years 2009 and 2010; some merchandise purchase invoices for the years 2010 and 2011; the corporation's monthly checking account statements for the periods January 1, 2009 through September 30, 2011, and November 1, 2011 through November 30, 2011. No cash register tapes or sales records, no general ledger, cash receipts journal or cash disbursements journal were provided at the March 19, 2012 appointment. During an April 20, 2012 telephone call with Ms. Antonious, the auditor made an oral request for the corporation's books and records for the audit period at issue. No further books and record were provided to the auditor. Petitioners contend that the auditor failed to completely review the purchase invoices provided to her at audit. That contention is meritless. The record clearly reflects that the auditor reviewed the available purchase records for the years 2010 and 2011 and found them to be incomplete and in no particular order. On two occasions during the audit, petitioners' representative orally advised the auditor that the corporation did not maintain any sales records, such as cash register tapes or day book, for the audit period. Given the limited information provided and the corporation's failure to maintain cash register tapes or any source documents to substantiate sales for the audit period, the auditor was justified in estimating the corporation's sales tax liability in this case (***see Matter of Urban Liqs. v. State Tax Commn.***).

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

As noted above, due to an expiring statute of limitations, and Mr. Alamrani's refusal to sign a consent to extend the period of limitations, two separate audit computations were performed. For the period March 1, 2009 through August 31, 2009, the auditor reviewed purchases of beer, soda, other beverages and phone cards, and obtained third-party purchase information for each of those items. She applied a 41.42% markup percentage, derived from a two-year average markup shown on the corporation's 2009 and 2010 federal income tax returns, to total purchases of beer, soda, other beverages, and phone cards for the two quarters. To estimate cigarette sales, the auditor used the corporation's third-party purchases listed in the Division's data base for five months to which she applied the 22% markup percentage listed in Publication 509. The auditor allowed the amounts of prepaid cigarette tax claimed by Majestic Deli Grocery on its returns for the quarters ended May 31, 2009 and August 31, 2009. For the period September 1, 2009 through November 30, 2011, the auditor obtained third-party information for beer, soda, other beverages, phone cards, cigars, candy, and other taxable products. The auditor applied the markup percentage of 41.42% to the third-party purchase information for those items. For cigarettes, the auditor had only seven months of purchase information from the database, and very limited information from Majestic Deli Grocery, so projections were made for 19 of the 20 months missing information. She applied an 18% markup based upon the average selling price of $10.88 (per her January 25, 2012 survey) to the 26 months of estimated cigarette purchases, and allowed the prepaid cigarette tax credits reported on the sales tax returns filed for the period September 1, 2009 through November 30, 2011. To estimate sales of prepared foods for the period September 1, 2009 through November 30, 2011, the auditor intended to perform an observation to determine taxable sales, but Majestic Deli Grocery and its representative refused to allow an observation. The auditor used her January 25, 2012 survey, the menu obtained at that time, and her audit experience to estimate taxable sales of prepared foods for the period September 1, 2009 through November 30, 2011.

G. Petitioners contend that the Division's audit methodology was flawed and unreasonable for a number of reasons. Petitioners contend that the auditor failed to adequately review all of Majestic Deli Grocery's available records before resorting to the use of third-party information regarding its purchases. Petitioners maintain that the original invoices issued by Losito Provisions; Anheuser-Busch; Manhattan Beer Distributors; Beehive Beer; Oak Beverages; Pepsi; and Amsterdam Tobacco, as well as summary purchase information and reports from Losito Provisions; Manhattan Beer; Beehive Beer; Oak Beverages; Pepsi; and Amsterdam Tobacco, submitted at the hearing, were all available for review by the auditor during the audit and she failed to completely review the same. Petitioners' contention is rejected. The record clearly shows that on March 19, 2012, the auditor reviewed all available purchase records and found them to be incomplete and in no particular order. At the March 19, 2012 audit appointment, the auditor transcribed purchase information from Beehive Beer invoices bearing dates between May 19, 2010 and November 23, 2011, and Losito Provisions invoices bearing dates between May 17, 2010 and November 28, 2011. During an April 20, 2012 telephone conversation with petitioners' representative, the auditor explained that Majestic Deli Grocery had not provided cigarette purchase invoices in auditable condition at the first audit appointment. No cash register tapes or sales records, no general ledger, cash receipts journal or cash disbursements journal were provided during the audit. Indeed, on two occasions during the audit, petitioners' representative indicated that Majestic Deli Grocery had not maintained cash register tapes or any sales source records during the period March 1, 2009 through November 30, 2011. Moreover, at the hearing, Mr. Alamrani conceded that Majestic Deli Grocery did not have any sales records for the period March 1, 2009 through November 30, 2011. It is noted that most of the invoices submitted at the hearing were not in auditable condition, and not even organized. In addition, some of the invoices, submitted at the hearing, were for purchases not even in the audit period. The auditor credibly testified that she was seeing many of the invoices and all of the summary purchase information and reports from the suppliers for the first time at the hearing. Since the books and records provided by the corporation on audit were incomplete, and no sales records were provided, the Division was justified in using third-party information to estimate sales of beer, soda, other beverages, phone cards, cigars, candy, other taxable items, and cigarettes (***see Matter of Roebling Liqs. v. Commissioner of Taxation & Fin.***, 284 AD2d 669 [2001], ***lv dismissed*** 97 NY2d 637 [2001], ***cert denied*** 537 US 816 [2002]; ***see also Matter of Sona Appliances***, Tax Appeals Tribunal, March 16, 2000; ***Matter of Morano's Jewelers of Fifth Avenue***, Tax Appeals Tribunal, January 2, 1992).

Petitioners claim that the markup percentage used by the auditor to estimate sales of beer and nonalcoholic beverages was unreasonable. They assert that the 41.42% markup used by the Division, derived from an average of the markups on Majestic Deli Grocery's 2009 and 2010 federal income tax returns, was wrong because the federal returns used in the audit did not recognize that nontaxable goods have a higher mark up. They further assert that the auditor failed to use Majestic Deli Grocery's beer and soda purchase records available to her at audit to make a direct markup computation for those items. Based upon computations set forth in their brief, petitioners assert that the average markup on beer was 20% and the average markup on soda was 38% during the period March 1, 2009 through November 30, 2011. Petitioners' assertions are meritless. At the time of the audit, Majestic Deli Grocery provided some purchase invoices. No sales records were provided at audit. Majestic Deli Grocery provided the auditor with its federal income tax returns for the years 2009 and 2010, on which the corporation reported the amounts of gross sales, cost of goods sold, and gross profit for such years. In her calculations of the 41.42% markup, the auditor used information reported by Majestic Deli Grocery on its federal income tax returns for the years 2009 and 2010. It was reasonable for the Division to use information that was available. With respect to petitioners' computations of the average markups for beer and soda, they are based upon the unorganized, incomplete suppliers' purchase invoices submitted at the hearing, Mr. Alamrani's vague testimony regarding the selling prices for bottles of beer and soda, and a sales receipt dated November 16, 2012 that did not identify the item sold. Majestic Deli Grocery did not provide the auditor at the time of the audit, nor have petitioners yet provided, any sales records to show a more exact markup average or a markup on specific items.

Petitioners argue that the markup used by the auditor to estimate cigarette sales for each period was unreasonable. They claim that for the period March 1, 2009 through August 31, 2009, the auditor computed a 22% markup by applying the highest per pack retail sales prices of $9.61 and $9.63 from Publication 509. Petitioners further claim that the auditor gave no consideration to the entire range of available retail sales prices outlined in the publication, ranging from $7.52 to $9.63 per pack. They maintain that the range is classified from the cigarette purchase invoices by the cost-per-pack, which could have been gleaned from the cigarette purchase invoices provided by Majestic Deli Grocery at the audit. For the period September 1, 2009 through November 30, 2011, petitioners argue that the auditor failed to make an average calculation of the cost per pack of cigarettes directly from the actual cigarette purchase invoices provided at audit. They further argue that the amount of the total purchases and total packs the auditor used was inaccurate, and far lower than the actual amounts of cigarettes purchased. Petitioners assert that the auditor computed an average selling price of $10.88, applied it to the inaccurate purchase information, and found a mark up of 18%. In their brief, petitioners argue that the presumed markup of 7% contained in page 2 of Publication 509 should be used for both periods. Petitioners' arguments are meritless. The cigarette purchase invoices provided at audit were incomplete and not in auditable condition. No sales records were provided to the auditor at the time of the audit. The auditor observed prices per pack of cigarettes of $10.25 and $11.50, during her survey of the business on January 25, 2012. For the period March 1, 2009 through August 31, 2009, the auditor used the price per pack (the markup percentage) listed in the Division's Publication 509, Minimum Wholesale and Retail Pricing, instead of the prices she observed during her survey, because she felt it would be unfair to use a higher price for an earlier period. It was reasonable for the auditor to use the published pricing information in the Division's Publication 509 in her calculation of cigarette sales for the period March 1, 2009 through August 31, 2009 (***see Matter of Iftzkhar Ahmed***, Tax Appeals Tribunal, April 14, 2011). In calculating cigarette sales for the period September 1, 2009 through November 30, 2011, the auditor used an 18% markup based upon an average selling price of $10.88 per her survey (an average of $10.25 and $11.50). Since no sales records were provided at audit, it was reasonable for the auditor to use the average of the cigarette pack prices observed at the business in her calculation of cigarette sales for the period September 1, 2009 through November 30, 2011. As for petitioners' claim in their brief that the presumed markup of 7% contained in page 2 of Publication 509 should be used for both periods, the record does not include page 2 of Publication 509. Mr. Alamrani's vague, unsubstantiated testimony that the high taxes in New York City have yielded little or no profit on cigarettes for the corporation is insufficient to prove that the cigarette prices used in either period were unreasonable. Indeed, at the hearing, Mr. Alamrani conceded that he had no records to show the selling prices of items, or to determine a markup percentage during the period March 1, 2009 through November 30, 2011. Majestic Deli Grocery did not provide the auditor at the time of the audit, nor have petitioners yet provided, any sales records to show the selling prices of the cigarettes, or the markups on the same during the period March 1, 2009 through November 30, 2011.

H. Petitioners also claim that the auditor improperly used a data deficient survey to determine additional tax due on sales of prepared foods. They contend that several key factors are missing from the auditor's survey, including an exact tally of customers, the type of goods purchased, the prices of the goods purchased, and whether such purchase was tax exempt. Petitioners further contend that the auditor's assessment of "usual" peak hours for breakfast, lunch and dinner is wholly unsubstantiated by any measurable index. In addition, they contend that the average menu prices computed were based upon sales prices outside the audit period. Petitioners also contend that the auditor should have used the Losito Provisions invoices and summary report provided on audit to compute prepared food sales. During the audit, Majestic Deli Grocery provided a limited amount of Losito Provisions invoices bearing dates between May 15, 2010 and November 28, 2011. Neither the corporation's sales records nor the Losito

Provisions summary report were provided to the auditor at the time of the audit. Although the auditor did make a preliminary sales computation for cold cuts and prepared sandwiches using the limited Losito Provisions invoices provided, she again reviewed the records provided to her, concluded they were inadequate to conduct a detailed audit, and determined that an observation of the business was necessary. Majestic Deli Grocery and its representative refused to allow an observation of the business, so an observation never took place. While that was the corporation's privilege, it cannot argue that the survey was deficient because it did not include all the elements of an observation. Since no sales records had been provided to her, the auditor had no other information concerning prepared foods. However, during her survey, the auditor obtained a menu and information regarding prepared food customers. While the auditor observed 4 to 5 prepared food customers in a 15-minute period during her survey, she used only 4 customers every 15 minutes, or 16 customers per hour for prepared foods. Despite the business being open 24 hours per day, based upon her audit experience, the auditor used only a 2-hour period for breakfast, a 3-hour period for lunch, and a 3-hour period for dinner. Such experience has been upheld as rational in the absence of reliable records (***Matter of Oak Beach Inn Corp. v. Wexler,*** 158 AD2d 785 [1990]; ***Matter of Ronnie's Suburban Inn, Inc.***, Tax Appeals Tribunal, May 11, 1989). The auditor used the selling prices of items listed on Majestic Deli Grocery's menu, obtained during the survey, to compute an average selling price of $2.90 for 21 breakfast items, and an average selling price of $4.07 for 59 lunch/dinner items. The auditor did not include extra charges in her computations of the average selling prices. As for petitioners' contention that the average selling prices computed were based upon sales prices outside the audit period, Majestic Deli Grocery did not provide the auditor at the time of the audit, nor have they yet provided, any evidence regarding what the selling prices were during the period September 1, 2009 through

November 30, 2011. The auditor's use of the average menu selling prices was fair and reasonable (***Matter of Cronos Enterprises, Inc.***, Tax Appeals Tribunal, January 26, 2006).

I. Petitioners argue that the audit was unreasonable because the auditor ignored information in the records provided at audit regarding adjustments for prepaid cigarette tax. They claim that the prepaid cigarette tax is itemized on the Amsterdam Tobacco purchase invoices submitted at the hearing, and that such purchase invoices were available to the auditor at the time of the audit, but she wrongfully ignored them at that time. Petitioners' argument is rejected. No cigarette sales information was provided to the auditor at the time of the audit. Majestic Deli Grocery provided on audit some Amsterdam Tobacco purchase invoices. However, they were not in auditable condition and not in any kind of order. No evidence of prepaid tax on cigarettes was provided to the auditor to substantiate the prepaid cigarette tax credit taken on Majestic Deli Grocery's sales tax returns for the period March 1, 2009 through November 30, 2011. Nevertheless, in the absence of other, reliable information, the auditor accepted as reported $4,295.00 in prepaid cigarette tax credits claimed by Majestic Deli Grocery on its sales tax returns for the period March 1, 2009 through November 30, 2011.

At the hearing, petitioners submitted the affidavit of Marvin Gutlove, an executive of Amsterdam Tobacco. Petitioners maintain that Mr. Gutlove's affidavit confirms that during the audit period March 1, 2009 through November 30, 2011, Majestic Deli Grocery made total cigarette purchases of $735,681.87 from March 1, 2009 through November 30, 2011, and that the corporation paid a total of $41,623.20 in prepaid cigarette tax on those cigarettes during the audit period. They claim that Mr. Gutlove's affidavit confirms Majestic Deli Grocery's entitlement to a total prepaid cigarette tax credit of $41,623.20 for the period March 1, 2009 through November 30, 2011. Petitioners further claim that Majestic Deli Grocery is entitled to an additional prepaid cigarette tax credit in the amount of $37,328.20 ($41,623.20 - $4,295.00), and that the corporation is due an adjustment to any tax due of $37,328.20. Petitioners' arguments are rejected. Petitioners' evidence is insufficient to establish entitlement to any additional prepaid cigarette tax. There is no receipt, cash register tape, or other evidence that would link the purchases from Amsterdam Tobacco to any sales of cigarettes during the audit period. Additionally, Mr. Alamrani, at the hearing, conceded that Majestic Deli Grocery did not report any cigarette sales on its sales tax returns for the period March 1, 2009 through November 30, 2011. Mr. Gutlove's affidavit does not establish sales, use, or any other condition that would entitle petitioners to additional cigarette tax credit. Absent clear and convincing records of sales, I find petitioners are not entitled to any additional cigarette tax credit (***see Matter of 88-02 Deli Grocery Corp.***, Tax Appeals Tribunal, September 13, 2012).

J. Petitioners argue that the audit was unreasonable because the auditor ignored information in the corporation's checking account statements provided at audit regarding adjustments for tax exempt food stamp sales. Petitioners' argument is rejected. Majestic Deli Grocery's checking account statements presented to the auditor at audit showed deposits in the form of electronic fund transfers by Efunds Corporation resulting from purported food stamp sales. However, no sales information was provided to the auditor at the time of the audit. The auditor was unable to make any adjustments for exempt food stamp sales because there was no sales source documents to substantiate what items were purchased using food stamps.

Petitioners also argue that the store is located in a poor area, that 50% of its sales were food stamp sales and that it should be entitled to an adjustment for items purchased using food stamps. In support of this position, petitioners presented Mr. Alamrani's testimony, and submitted the corporation's checking account statements for the periods January 1, 2009 through

September 30, 2011, and November 1, 2011 through November 30, 2011, and a 2011 Form 1099-K, Merchant Card and Third Party Network Payments, issued by Efunds Corporation. Petitioners' argument is without merit. With respect to Mr. Alamrani's testimony that 50% of the corporation's sales were food stamp sales, he conceded that he had no records to identify items purchased with food stamps, and no records upon which to determine percentages of food stamp sales, or otherwise nontaxable sales. As such, his testimony, without more, is insufficient to sustain his burden of proof. The EFT deposits listed in the corporation's checking account statements and the payments listed on the Form 1099-K are not records of food stamp sales (Tax Law § 1135; 20 NYCRR 533.2[d][7]), nor do they contain any information that would demonstrate the taxability of any particular sales. Absent clear and convincing evidence of what items were purchased with food stamps, I find that petitioners are not entitled to an adjustment for food stamp sales (***Matter of 88-02 Deli Grocery Corp.***).

K. In their brief, petitioners included an estimate of the tax due for the period March 1, 2009 through November 30, 2011. However, petitioners cannot invalidate the Division's audit by offering their own estimate of tax liability as a substitute for the Division's (***see Matter of Albanese Ready Mix***, Tax Appeals Tribunal, June 15, 1989; ***see also Matter of Sol Wahba, Inc. v. New York State Tax Commn.***, 127 AD2d 943 [1987]). Petitioners cannot satisfy their burden of proving that the method used or the tax asserted was erroneous by failing to provide adequate books and records and then offering their own estimate of the tax due (***Matter of AGDN, Inc.***, Tax Appeals Tribunal, February 6, 1997). Any imprecision in the audit results is the direct result of the corporation's failure to keep and maintain records of all of its sales as required by Tax Law § 1135(a)(1).

L. Since Majestic Deli Grocery's books and records were inadequate, the Division was required to select an audit method reasonably calculated to reflect the taxes due, and upon their challenge to the assessments petitioners bore the burden to establish 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***). Petitioners have failed to sustain their burden of proving that either the audit method or the amount of tax assessed was erroneous.

M. The Division asserted penalty herein pursuant to Tax Law § 1145(a)(1)(i) and (vi). Tax Law § 1145(a)(1)(i) states that any person failing to file a return or pay over any sales or use tax "shall" be subject to a penalty. This penalty may be canceled if the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Division's regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1[a][1]).

Tax Law § 1145(a)(1)(vi) states that any person who omits from the total amount of tax required to be shown on a sales tax return an amount which is in excess of 25 percent of such total amount "shall be subject to a penalty equal to ten percent of the amount of such omission." Like the penalties imposed under Tax Law § 1145(a)(1)(i), penalties imposed under section 1145(a)(1)(vi) must be sustained unless the failure was due to reasonable cause and not due to willful neglect.

N. Petitioners have not provided evidence or arguments sufficient to constitute reasonable cause or support abatement or cancellation of penalties. In establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). Referring to the mandatory language of Tax Law § 1145(a)(1)(i), the Tribunal stated that "the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation" (***Matter of MCI Telecommunications Corp***., Tax Appeals Tribunal, January 16, 1992, ***confirmed*** 193 AD2d 978 [1993]).

Petitioners' request for abatement of the penalties rest solely upon their claim that any omissions or miscalculations were due to Mr. Alamrani's misunderstanding of the law, where he was incorrectly advised that, upon prepaying sales tax to the cigarette vendor, retail cigarette sales should not be reported on the quarterly sales tax returns. The record in this matter does not support petitioners' claim that Mr. Alamrani acted in good faith and misunderstood the law. At the hearing, Mr. Alamrani vaguely testified that his accountant's practice was not to report cigarette sales and not to claim the credit for the prepaid cigarette tax on Majestic Deli Grocery's sales tax returns. However, Majestic Deli Grocery claimed a prepaid cigarette tax credit on each of the sales tax returns filed for the period March 1, 2009 through November 30, 2011, which sales tax returns were signed by Mr. Alamrani. At no point during the audit was it disclosed that cigarette sales were not reported on the corporation's sales tax returns. Rather, Mr. Alamrani disclosed the corporation's failure to report cigarette sales on its sales tax returns at the hearing. In addition, the record establishes that Majestic Deli Grocery was guilty of willful neglect in its reporting of sales tax for the period March 1, 2009 through November 30, 2011. Majestic Deli Grocery failed to maintain adequate records for purposes of verifying taxables sales. Penalties cannot be waived where a taxpayer's failure to maintain accurate records resulted in underreporting of sales tax due (***see Matter of Shukry v. Tax Appeals Trib.***, 184 AD2d 874 [1992]; ***see also Matter of Rosemellia***, Tax Appeals Tribunal, March 12, 1992). Penalties are also appropriate in this case because of the substantial discrepancy between the amount of the reported taxable sales and the amount of tax determined on audit (***see Matter of S.H.B. Super***

Markets v. Chu, 135 AD2d 1048 [1987]; ***Matter of Himed Deli Corp.***, Tax Appeals Tribunal, March 30, 2000). During the audit period March 1, 2009 through November 30, 2011, Majestic Deli Grocery reported taxable sales of $223,957.00 and the Division on audit determined taxable sales to be $1,918,413.00, a deficiency of $1,694,456.00.[8] Majestic Deli Grocery's failure to maintain accurate records and the large deficiency resulting from the audit are evidence of willful neglect and dictate against abatement of the penalties herein.

O. The petitions of Majestic Deli Grocery, Inc., and Ahmed Alamrani are denied, and the notices of determination issued to petitioner Majestic Deli Grocery, Inc., on May 25, 2012 and September 19, 2012, and to petitioner Ahmed Alamrani on May 29, 2012 and September 20, 2012 are sustained.

DATED: Albany, New York
March 3, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

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[8] For the period March 1, 2009 through August 31, 2009, Majestic Deli Grocery reported taxable sales of $22,394.00 and the Division on audit determined taxable sales to be $252,160.00. For the period September 1, 2009 through November 30, 2011, Majestic Deli Grocery reported taxable sales of $201,563.00 and the Division determined taxable sales to be $1,643,859.00.