STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AHMED ABDO AHMED D/B/A THREE STAR DELI	:	DETERMINATION DTA NO. 826311
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2009 through August 31, 2012.	:	

Petitioner, Ahmed Abdo Ahmed d/b/a Three Star Deli, 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 December 1, 2009 through August 31, 2012.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in New York, New York, on August 18, 2015, with all briefs due by January 29, 2016, which date began the six-month period for issuance of this determination. Petitioner appeared by the Antonious Law Firm (Jacqueline S. Kafedjian, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie M. Scalzo, Esq., of counsel).

ISSUES

I. Whether either or both of the notices of determination at issue herein should be cancelled based upon petitioner's claimed nonreceipt thereof.

II. Whether either or both of the foregoing notices of determination should be canceled based upon the Division of Taxation's failure to have issued copies of the same to petitioner's representative.

III. Whether the foregoing notices, if not canceled as above, should be sustained as

properly assessing additional sales and use taxes against petitioner.

IV. Whether, assuming the additional tax assessed as above is sustained, petitioner has nonetheless established any bases warranting reduction or cancellation of the penalties imposed in connection therewith under Tax Law § 1145(a)(1)(i) and (vi).

FINDINGS OF FACT

1. Petitioner, Ahmed Abdo Ahmed, owned and operated, as a sole proprietor, a delicatessen and grocery business known as Three Star Deli, located in Jamaica, New York. Petitioner made sales of, among other things, beer, soda, other hot and cold beverages, cigarettes, sandwiches, chips, prepared foods, cold cuts, candy, cookies, telephone cards, and household products. A portion of petitioner's sales are food stamp sales (EBT transactions), the proceeds of which are deposited daily in petitioner's business bank account as "Efunds."

2. Petitioner was registered as a vendor for sales and use tax purposes and filed a New York State and Local Sales and Use Tax Return (Form ST-100) for each of the sales tax quarterly periods spanning December 1, 2009 through August 31, 2012 (the audit period), reporting thereon the following amounts of gross and taxable sales:

Period Covered by Return	Gross Sales Reported	Taxable Sales Reported
December 1, 2009 - February 28, 2010	$38,944.00	$6,249.00
March 1, 2010-May 31, 2010	$65,487.00	$12,440.00
June 1, 2010-August 31, 2010	$64,857.00	$12,688.00
September 1, 2010-November 30, 2010	$63,244.00	$13,008.00
December 1, 2010-February 28, 2011	$55,463.00	$12,890.00
March 1, 2011-May 31, 2011	$65,149.00	$13,512.00
June 1, 2011-August 31, 2011	$63,481.00	$13,659.00
September 1, 2011-November 30, 2011	$62,645.00	$13,147.00

December 1, 2011-February 29, 2012	$64,580.00	$13,590.00
March 1, 2012-May 31, 2012	$65,752.00	$19,743.00
June 1, 2012-August 31, 2012	$16,638.00	$16,638.00
Total	$626,240.00	$147,564.00

3. By a letter dated November 21, 2012, the Division of Taxation (Division) advised petitioner that a sales tax field audit of his books and records for the audit period would commence on December 10, 2012. This audit appointment letter, together with an enclosed Information Document Request (IDR), advised that all books and records pertaining to petitioner's sales and use tax liability for the audit period should be available for review on the audit appointment date. The IDR 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, canceled checks 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; cash register tapes, and capital asset list.

4. On January 3, 2013 the auditor assigned to the audit made a field visit to petitioner's premises, and was advised by an employee that purchase information had been mailed to her. Petitioner's spouse further advised the auditor, by telephone, that petitioner was, at that time, out of the country.

5. Petitioner's business has been audited twice before. The first of such prior audits

covered the period spanning September 1, 2004 through May 31, 2007 and resulted in petitioner's consent to an additional tax liability in the amount of $38,103.26 (excluding penalty and interest). This first audit was based upon the Division's observation of sales made by the business between 7:00 a.m. and 8:30 p.m. on October 23, 2007. The data collected identified the time of day in half-hour increments, the items sold, the prices and taxable or nontaxable status of such items, and whether food stamps were used to purchase the items. The second of such prior audits was also based upon the data collected during the foregoing October 23, 2007 observation of sales, and resulted in petitioner's consent to an additional tax liability in the amount of $116,147.90 (excluding penalty and interest).

6. In the matter at hand, the auditor initially obtained and reviewed bank statements for the audit period, noting that most bank deposits were from food stamps, and that sales reported, per sales tax returns, were greater than bank deposits. The auditor concluded, from this, that not all cash receipts were being deposited in petitioner's bank account. With no other records having been furnished by petitioner, as requested in the IDR, the auditor mailed letters to petitioner's suppliers, requesting information as to purchases made by petitioner. On February 20, 2013, the auditor mailed a second IDR to petitioner, seeking essentially the same records as were requested via the initial IDR.

7. On February 26, 2013, the auditor received purchase information from some of petitioner's suppliers. However, no sales records, including cash register tapes or sales invoices were provided by the petitioner. Petitioner's spouse advised the auditor, by telephone, that cash register tapes were not maintained for the audit period, that a day book and purchase invoices would be submitted, and that petitioner's return to the United States was expected by the end of March.

8. On March 18, 2013, the auditor received a power of attorney, by facsimile, from Attorney Jacqueline Kafedjian (the representative) appointing her to represent petitioner. This appointment was confirmed by petitioner's spouse, by telephone, on March 19, 2013.

9. On April 15, 2013, the auditor met with the representative and was furnished with samples of petitioner's merchandise purchase records for Pepsi-Cola Bottling Company, Espinoza Corporation and PIYA Enterprise, Inc. None of the other records requested in the Division's IDRs were provided, including any records such as cash register tapes or sales invoices that would specifically pertain to petitioner's sales. The representative confirmed that petitioner did not have day books covering the entire audit period, did not maintain cash payout records, and did not have complete purchase invoices for the audit period. In this latter regard, the incomplete purchase records petitioner supplied with respect to his cigarette purchases from Espinoza Corporation included a purchase statement, but no sales information.

10. On April 15, 2013, the auditor issued a third IDR requesting petitioner's federal income tax returns, merchandise purchase information (for items including telephone cards, bread and rolls, hot cups, and cold cuts), lease contracts, a completed Sales Tax Examination Questionnaire and an Initial Audit Interview Report.

11. The auditor subsequently telephoned the representative to inquire as whether more records would be forthcoming. The representative responded that she had not yet received the information from petitioner.

12. On May 17, 2013, the auditor mailed a penalty intent letter to the representative and to petitioner stating, in relevant part, that petitioner's records, as submitted, were not adequate to conduct an audit, and that petitioner had 30 days to provide the Division with adequate records in order to avoid the imposition of penalties. The letter specified that failure to provide the

requested records within the noted 30 day time period would result in a penalty of up to $1,000.00 for the first quarterly period covered by the audit, and up to $5,000.00 for each of the quarterly periods thereafter covered by the audit. The letter explained that the penalty is imposed on taxpayers who have not maintained or made available the records necessary for the verification of the amount of sales and their taxability through sales receipts and purchase records. The letter noted that records in "auditable form" meant that books and records are adequate and organized so that the auditor can reconcile all receipts, invoices, or other source documents with the information reported on sales and use tax returns. The auditor followed up with a telephone call to the representative on May 20, 2013, leaving a message that the penalty intent letter had been mailed.

13. On May 31, 2013, the auditor mailed a Statement of Proposed Audit Change (Form AU-346) to petitioner advising that because petitioner had not submitted adequate records for audit, a notice of determination would be issued imposing penalties. On the same date, the auditor left telephone messages with the representative advising that she had mailed the Statement of Proposed Audit Change. On July 1, 2013, the representative advised the auditor, by telephone, that petitioner would protest the above-described penalties.

14. By letter dated May 31, 2013, the auditor informed the representative that an in-store observation of petitioner's sales would take place at the business premises. By a letter in response dated June 15, 2013, the representative furnished bank statements for the entire audit period, an updated power of attorney form, and advised that petitioner would not consent to an in-store observation of sales.

15. As of mid-June, 2013, the only records that had been presented to the auditor on petitioner's behalf were federal income tax returns, bank statements, and some (incomplete)

purchase invoices. Lacking complete books and records with which to perform a detailed audit, coupled with the inability to perform an observation, as described above, the auditor determined that resort to the use of another indirect audit methodology would be necessary to estimate gross and taxable sales.

16. The Division issued to petitioner a Notice of Determination, dated July 23, 2013 and bearing assessment number L-039591074, assessing penalties in the amounts of $1,000.00 for the first sales tax quarterly period covered by the audit (i.e., the quarterly period ended February 28, 2010) and $5,000.00 for each of the subsequent ten sales tax quarterly periods covered by the audit (i.e., for the quarterly period ended May 31, 2010 through the quarterly period ended August 31, 2012), for an aggregate penalty assessment of $51,000.00.

17. On July 11, 2013, and in light of petitioner's refusal to consent to an in-store observation (***see*** Finding of Fact 14), the auditor performed an observation outside petitioner's premises using a head count method. This head count observation covered the period spanning 7:00 a.m. to 2:30 p.m. The auditor initially entered the business premises and noted there was no cash register visible, that not every sale was recorded, that the average menu prices for prepared food items (mainly sandwiches) ranged from $3.00 to $3.50 to $5.50, and that the average menu prices for hot beverages ranged from $0.75 to $1.00. As observed from outside of the premises, some 234 patrons purchased prepared food items between 7:00 a.m. and 12:30 p.m. An additional 35 patrons purchased prepared food items and 5 patrons purchased hot beverages between 12:30 and 2:30 p.m.[1] The observation was ended at 2:30 p.m. because business had become very slow, and because the auditor's review of the observation results from the earlier

[1] The observation notes indicate that the weather on the day of the observation was "sunny and hot." The notes do not indicate any number of patrons purchasing hot beverages between 7:00 a.m. and 12:30 p.m.

audit had revealed significantly reduced prepared food sales after 11:00 a.m., and no prepared food sales after 5:00 p.m.

18. The auditor utilized the results of the foregoing head count observation to calculate audited taxable prepared food and hot beverage sales as follows:

a) prepared foods and hot beverages: the auditor determined the estimated average selling price per sandwich as $3.67,[2] and multiplied the same by the 269 patrons who purchased prepared food items, as observed, to arrive at observed daily prepared food sales of $987.23. Similarly, the auditor determined the estimated average selling price per hot beverage as $0.80,[3] and multiplied the same by the five patrons who purchased hot beverages, as observed, to arrive at observed daily hot beverage sales of $4.00. In turn, the auditor extrapolated such amounts by the number of days in the audit period to determine audited taxable prepared food sales of $988,217.00 and audited taxable hot beverage sales of $4,004.00.

The auditor computed audited taxable sales of other items based upon a markup audit methodology, as follows:

b) beer, soda and other taxable products: the auditor determined beer and soda sales for the audit period based upon applying a markup percentage to petitioner's beer purchases, soda purchases and other taxable products purchases (e.g., candy), per purchase records she obtained from petitioner's suppliers. Specifically, beer purchases totaled $363,066.08, soda purchases totaled $107,857.83, and other taxable products purchases totaled $16,938.44. The auditor

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[2] The $3.67 average price per sandwich was calculated, net of sales tax, by totaling the three sandwich prices ($3.00 plus $3.50 plus $5.50) to arrive at $12.00, then dividing such amount by three to arrive at a $4.00 average price per sandwich, and further dividing such amount by the sales tax rate (1.08875).

[3] The $0.80 average price per hot beverage was calculated, net of sales tax, by totaling the two hot beverage prices ($0.75 plus $1.00) to arrive at $1.75, then dividing such amount by two to arrive at $0.875 average price per hot beverage, and further dividing such amount by the sales tax rate (1.08875).

reduced total soda purchases by ten percent to allow for nontaxable soda sales, thus leaving adjusted soda purchases totaling $97,072.05. The auditor applied a 31 percent markup[4] to each of the foregoing purchase totals to arrive at audited taxable beer sales of $475,617.00, audited taxable soda sales of $127,164.00, and audited other taxable products sales of $22,189.00.

c) cigarettes: the auditor determined audited cigarette sales for the audit period based upon applying a markup percentage to petitioner's cigarette purchases from Espinoza Corporation, per records compiled and maintained in the Division's database of sales records as reported by cigarette suppliers, including Espinoza Corporation. Specifically, petitioner's cigarette purchases totaled $157,870.25, to which the auditor applied the seven percent state minimum markup percentage for cigarettes, to arrive at audited taxable cigarette sales of $168,921.00.

19. The audited taxable sales amounts determined above for prepared foods, hot beverages, beer, soda, other taxable products, and cigarettes totaled $1,786,112.00. This amount was reduced by petitioner's reported taxable sales of $147,564.00, resulting in additional (unreported) taxable sales of $1,638,548.00 with additional tax due thereon in the amount of $145,421.11. The auditor disallowed petitioner's claimed vendor collection credit of $452.00,[5] resulting in additional tax due, per audit, in the amount of $145,873.11.

20. On July 23, 2013, the auditor received from the representative excerpts from petitioner's daybook covering nine months of the audit period (the months of December 1, 2009

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[4] The 31% markup percentage for beer and soda was calculated based upon comparable stores where operating costs represented 76.4% of operating income (thus leaving a 23.6% profit), as set forth in the industry index reference entitled Almanac of Business and Industrial Ratios (Commerce Clearing House, 42nd Edition, 2011). Specifically, the auditor divided such profit percentage (23.6) by the operating cost percentage (76.4), and arrived at a markup of 31%.

[5] A 5% credit against tax liability (vendor collection credit) is available to vendors where their returns are timely filed and fully paid. This claimed credit was disallowed upon the auditor's conclusion that petitioner's liability had not been fully paid, as reflected by the results of the audit.

through June 30, 2010, and July 1, 2012 through August 31, 2012). No such daybook information was provided for the period spanning July 1, 2010 through June 30, 2012, and the representative conceded that such information was not maintained by petitioner. The daybook excerpts, showing only a total dollar amount for each day (presumably indicating total receipts for each such day), were deemed inadequate because they did not cover the entire audit period, provided no sales details, and were not tied to or supported by any source documents, such as cash register tapes or sales invoices. The auditor's further review of petitioner's bank statements revealed that the same could not be reconciled with petitioner's sales tax returns or federal income tax returns. The auditor noted that deposits per bank statements were lower than sales as reported per sales tax returns, and that most of the bank deposits resulted from Efund (food stamp) deposits. Petitioner did not provide cash payout records to substantiate or reconcile the differences. Petitioner also provided a number of purchase invoices from Espinoza Corporation, including cigarette purchase information. However, the dates on these invoices were illegible, and it was not possible to determine whether all of such invoices fell within the audit period. Petitioner did not and does not dispute that his records were insufficient and concedes the Division's right to have proceeded via indirect audit methodologies.

21. On August 26, 2013, the auditor mailed a Statement of Proposed Audit Change (Form AU-346) to petitioner indicating a proposed assessment of tax due in the amount of $145,873.11, plus interest and penalties, together with work papers in support thereof. On the same date, the auditor left telephone messages with the representative advising that she had mailed the Statement of Proposed Audit Change. On October 7, 2013, following discussions between the auditor and the representative, wherein the representative indicated her disagreement with the audit actions and results, the auditor received a return copy of the Statement of Proposed Audit

Change reflecting petitioner's disagreement therewith.

22. After issuing the foregoing Statement of Proposed Audit Change, and receiving back petitioner's disagreement therewith, the auditor reviewed the case with her supervisors. This review resulted in a decision to revise the portion of the assessment concerning sales of prepared food and hot beverages, using the data collected from the prior (October 23, 2007) audit observation (***see*** Finding of Fact 5), rather than the head count observation performed by the auditor (***see*** Findings of Fact 17, 18-a, and 19). Specifically, the auditor multiplied the average selling prices, net of sales tax, of sandwiches ($2.79), prepared rolls ($0.89), prepared bagels ($2.68), and hot beverages ($0.72), by the number of each of such items sold during the observation period, to arrive at audited daily taxable sales of sandwiches ($220.41), prepared rolls ($23.14), prepared bagels ($34.84) and hot beverages ($60.48). In turn, the auditor extrapolated such amounts by the number of days in the audit period to determine audited taxable prepared food sales of $278,668.00 and audited taxable hot beverage sales of $60,540.00.

23. The audited taxable sales amounts determined above for prepared foods and hot beverages, as reduced (***see*** Finding of Fact 22), plus audited taxable sales for beer, soda, and other taxable products, and cigarettes, as previously determined (***see*** Finding of Fact 18-b and c), totaled $1,133,099.00, representing a decrease of $653,013.00 based on the recalculation of the previously determined amounts of audited taxable sales of prepared foods and hot beverages (***compare*** Findings of Fact 18-a and 22). This revised audited taxable sales amount of $1,133,099.00 was reduced by petitioner's reported taxable sales of $147,564.00, resulting in additional (unreported) taxable sales of $985,535.00, with additional tax due thereon in the amount of $87,466.29. As above, the auditor also disallowed petitioner's claimed vendor collection credit of $452.00 (***see*** Finding of Fact 19), resulting in additional revised tax due, per

audit, in the amount of $87,918.29.

24. On November 8, 2013, the auditor mailed a revised Statement of Proposed Audit Change to petitioner indicating a revised and reduced proposed tax due in the amount of $87,918.29, plus interest and penalties, together with work papers in support thereof. On the same date, the auditor left telephone messages with the representative and with petitioner advising that she had mailed the Statement of Proposed Audit Change reflecting the reduced amount of tax as described above. On November 18, 2013, the auditor received a return copy of the Statement of Proposed Audit Change reflecting petitioner's disagreement therewith and reflecting the statement "Disagreed-Arbitrary & capricious."

25. The Division issued to petitioner a Notice of Determination, dated November 22, 2013 and bearing assessment number L-040435249, assessing sales tax for the sales tax quarterly periods spanning December 1, 2009 through August 31, 2012 in the initially calculated amount of $145,873.11, plus interest and penalties (including omnibus penalties 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 returns).[6]

26. The auditor's log of contacts and comments (Form DO-220.5) includes an entry for December 4, 2013 stating: "Notice of Determination letter to Ahmed Abdo Ahmed, Karrine Montaque, previous POA were returned to sender." Subsequent entries on December 5, 2013 and December 24, 2013 indicate, respectively, that the reduction adjustment described in Findings of Fact 23 and 24 had not been initially posted to the assessment (Notice of

[6] The November 22, 2013 Notice of Determination reflects the tax amount as initially calculated on audit, and not the reduced tax amount calculated upon revision of the initial audit findings with respect to prepared food and hot beverages sales, as set forth on the November 8, 2013 Statement of Proposed Audit Change. This difference, and the fact that the November 22, 2013 Notice of Determination does not reflect the noted tax reduction, is presumably attributable to the closeness of the respective stated dates of issuance of the two documents.

Determination L-040435249) but was thereafter corrected. Thereafter, an entry for January 2, 2014 reflects that a Consolidated Statement of Tax Liabilities (Form AU-243.3) was sent to petitioner and to the representative by both regular and certified mail. Finally, entries for January 7, 8 and 9, 2014 state, respectively, that the representative had not been served with a copy of the Notice of Determination (Assessment L-040435249) and requested the same, that a copy of such notice was sent to her and to the petitioner, by certified mail, and that such notice was, in turn, received by both petitioner and the representative.

27. Petitioner challenged the foregoing notices of determination by requesting a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). Conciliation conferences were conducted on January 16, 2014 (with respect to the "penalty-only" Notice of Determination L-039591074), and on April 23, 2014 (with respect to the "tax" Notice of Determination L-040435249). In turn, Conciliation Orders numbered CMS 258818 and CMS No. 260318 were issued on April 18, 2014 (with respect to Notice L-039591074), and on May 23, 2014 (with respect to Notice L-040435249), sustaining each Notice of Determination.

28. Petitioner timely challenged the Conciliation Orders by filing a petition with the Division of Tax Appeals contesting the Notices of Determination.[7] The petition raises challenges to:

> a) the propriety of the Division's issuance and service of the notices of determination upon petitioner and upon the representative;
>
> b) the Division's application of the indirect auditing methods and the

[7] The petition specifies the amount of tax determined as $87,918.29, which is the reduced amount calculated by the auditor and set forth on the Statement of Proposed Audit Change dated November 8, 2013 (***see*** Findings of Fact 23 and 24). The Division does not dispute that it is this reduced amount of tax that is currently at issue.

external index used in calculating the amount of tax due;

c) the Division's failure to make (i) an adjustment allowing credit for prepaid cigarette tax, (ii) a 10% allowance for tax exempt food stamp purchases similar to the allowance made in one of the previous audits, and (iii) an allowance to eliminate sales for days when the business was allegedly closed;

d) the Division's imposition of penalties (including the penalty separately assessed under Notice L-039591074).

29. In order to establish proper issuance of notices of determination L-039591074 and L-040435249 to petitioner, the Division submitted the affidavits of Mary Ellen Nagengast and Bruce Peltier, detailing the regular process by which the Division creates and thereafter effects the issuance of notices of determination by delivery of the same, properly addressed and with appropriate postage affixed into the custody of the United States Postal Service (USPS) for mailing via certified mail. Each affiant avers to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as those at issue herein, as well as the subsequent issuance of such notices by mailing (via delivery to the USPS). The facts set forth hereinafter concerning the preparation and issuance of the subject notices are taken from such affidavits, as verified by the documents included therewith.

30. Included with the affidavits were copies of certified mail records (CMRs) for the block of notices issued by the Division on July 2, 2013 and on November 22, 2013, including the notices of determination issued to petitioner on such dates. Each CMR has been properly and fully completed and each bear USPS date stamps confirming the articles listed thereon were delivered and accepted into the custody of the USPS for mailing, via certified mail, on the dates claimed, as follows:

a) Notice L-039591074 (the "penalty-only notice"): the 16 page CMR for the block of notices issued on July 2, 2013 reflects 11 entries on each of its pages except for page 16 (the final page) on which there are 6 entries, for a total of 171 entries, and this total is preprinted on the last page of the CMR. The date on which the CMR was printed (its "run" date) appears as "20131761700" (the year, Julian day of the year and military time of the year) in the upper left corner of the CMR. This run date is approximately 10 days in advance of the anticipated date of mailing of the notices set forth therein, so as to provide adequate time for such notice to be manually reviewed and processed for postage by the Division's mail room personnel. In the upper right corner of the first and last pages of the CMR the date July 2, 2013, on which the notices were actually delivered into the custody of the USPS, is handwritten by Division mail room personnel in order to ensure that the date on the CMR conforms with the actual date of mailing. Each page of the CMR bears a USPS postmark dated July 2, 2013, and the initials of the USPS employee receiving the items being mailed. In addition, the number "171" is handwritten and circled on the last page of the CMR, to indicate that the 171 pieces of mail set forth on the CMR were delivered to and received by the USPS for mailing. Page nine of the CMR reflects that Notice L-039591074 was sent by certified mail under certified mail control number 7104 1002 9730 0019 5337 to petitioner, Ahmed Abdo Ahmed, c/o Three Star Deli, 16401 89th Ave, Jamaica, NY 11432-5137. This address and certified control number appear on the mailing cover sheet accompanying Notice L-039591074, and the same address appears on such Notice, as well as on the balance of documents in the record concerning petitioner.

b) Notice L-040435249 (the "tax notice"): the 21-page CMR for the block of notices issued on November 22, 2013 reflects 11 entries on each of its pages except for page 21 (the final page) on which there is 1 entry, for a total of 221 entries, and this total is preprinted on the last page of the CMR. The date on which the CMR was printed (its "run" date) appears as "20133191700" (the year, Julian day of the year and military time of the year) in the upper left corner of the CMR. This run date is approximately 10 days in advance of the anticipated date of mailing of the notices set forth therein, so as to provide adequate time for such notice to be manually reviewed and processed for postage by the Division's mail room personnel. In the upper right corner of the first and last pages of the CMR the date November 22, 2013, on which the notices were actually delivered into the custody of the USPS, is handwritten by Division mail room personnel in order to ensure that the date on the CMR conforms with the actual date of mailing. Each page of the CMR bears a USPS postmark dated November 22, 2013, and the initials of the USPS employee receiving the items being mailed. In addition, the number "221" is circled on the last page of the CMR, to indicate that the 221 pieces of mail set forth on the CMR were delivered to and received by the USPS for mailing. Page nine of the CMR reflects that Notice L-040435249 was sent by certified mail under certified mail control number 7104 1002 9730 0100 9428 to petitioner, Ahmed Abdo Ahmed, c/o Three Star Deli, 16401 89th Ave, Jamaica,

NY 11432-5137. This address and certified control number appear on the mailing cover sheet accompanying Notice L-040435249, and the same address appears on such Notice, as well as on the balance of documents in the record concerning petitioner.

31. A one-page form (Form DTF-974) was included with the documents sent to petitioner as described above. This form states that the Division's records indicate that a power of attorney was on file with the Division appointing Karrine Montaque, CPA, to represent petitioner, and that a copy of each of the notices at issue was forwarded to this representative. The record, however, includes no evidence concerning the appointment of this representative or of the mailing of such notices to this representative. Notwithstanding the foregoing, there is no dispute, and the auditor acknowledged, that Ms. Kafedjian represented petitioner in this matter pursuant to a power of attorney executed by petitioner in her favor and provided to the Division by facsimile as early as March 18, 2013, with a copy of the power of attorney form provided to the Division thereafter on June 5, 2013, i.e., prior to the issuance of the subject notices.[8] The record includes no mailing evidence, as set forth above (***see*** Finding of Fact 30-a and b), establishing that the subject notices of determination were issued to the representative in the same manner by which they were issued to petitioner.

32. For each notice, petitioner submitted a USPS printout in response to an online request made by the representative for tracking information, based on the certified mail control numbers utilized by the Division in issuing the notices of determination to petitioner. The USPS printout for the penalty-only notice (L-039591074) states that, "The Postal Service could not locate the tracking information for your request. Please verify your tracking number and try again later."

[8] The Form POA-1 (Power of Attorney) executed by petitioner in favor of Ms. Kafedjian (f/k/a Ms. Antonious) clearly provides, at Item 4 thereof, that execution of such form appointing a representative revokes all prior powers of attorney previously executed and filed with the Division, absent explicit advice to the contrary.

Petitioner provided no evidence of any subsequent attempts to obtain tracking information concerning this mailing, as suggested in the USPS printout. The USPS printout for the tax notice (L-040435249) indicates, and the Division does not dispute, that the same was delivered back to the Division's Queens, New York office on November 29, 2013.[9]

33. No sales records beyond the incomplete daybook pages, as described, were provided by petitioner or entered into the record. Petitioner testified at hearing that he kept cash register tapes, but was unable to locate the same in connection with the subject audit.

34. The record includes a July 19, 2013 letter from the auditor to the representative stating as follows:

> "During the course of the audit . . . , we have determined that the taxpayer is entitled to a refund of prepaid cigarette tax which was not claimed in the Sales Tax returns. The credit information is based on the available information in [the] file which has been notified to you on 04/15/2013. We had requested you to file the form AU-11, 'Application for Credit or Refund of Sales or Use Tax' and the supporting documents for the formal processing of cigarette tax credit.
>
> However, we have not received the form AU 11 and the supporting documents to date.
>
> If the form AU 11 is filed and processed, the cigarette tax credit will be applied to offset any tax liabilities arising out of this audit.
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> If we do not receive the form AU 11 and the supporting documents by 8/20/13, the case will be closed without the application of [the] cigarette tax credit."[10]

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[9] Petitioner's attempt to obtain information concerning the subject notices from the USPS, as described, may be distinguished from the use of USPS Form 3811-A, (Request for Delivery Information/Return Receipt After Mailing), which commences a formal process whereby post-mailing, return receipt delivery confirmation information may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail.

[10] Reference to the auditor's log entry for April 15, 2013 clearly reveals that the "available information in [the] file" is the third-party information showing the amounts and costs of petitioner's cigarette purchases from his cigarette vendor (Espinoza Corporation), including the amounts of prepaid tax therein, as reported to the Division by such cigarette vendors, maintained by the Division within its own database of records, and obtained and used by the auditor in computing the portion of the assessment concerning audited taxable cigarette sales (***see*** Finding of Fact 18-c). It is noted that the cigarette purchase records supplied to the auditor by petitioner were, in contrast, incomplete and illegible (***see*** Findings of Fact 9, 15 and 20).

35. Petitioner submitted unnumbered proposed findings of fact in narrative form as part of his post-hearing brief. Given the manner in which such proposed findings of fact are presented, the same are not readily susceptible to being ruled on individually (***see*** State Administrative Procedure Act § 307[1]). Moreover, many of the facts asserted are conclusory in nature. To the extent such proposed findings of fact are supported by the record, they are included in the foregoing findings of fact.

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]). 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."

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 [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. . . " (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] ***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)."

D. In this case, the record is clear that the Division made proper requests for petitioner's books and records, that petitioner supplied nearly no books and records in response, and that those records provided were clearly inadequate for the Division to perform a detailed audit. It is

equally clear that the Division was well within its rights to resort to indirect auditing methods, including therein the use of an external index, to estimate sales tax due (***Matter of Urban Liqs. v. State Tax Commn.***). In turn, where as here the Division has established its entitlement to resort to 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 (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 815 [1988]; ***Matter of Surface Line Operators Fraternal Org. v. Tully***). Petitioner does not dispute these facts. Rather, petitioner's challenges focus on the propriety of the Division's issuance of the notices in question, the fact that the Division did not allow certain adjustments, afforded during the audits of petitioner for earlier periods that would have served to reduce the amount of tax assessed herein, and upon the Division's imposition of penalties. Petitioner claims that such alleged errors, taken together, support a conclusion that the Division carried out an unreasonable audit, so as to have, consequently, reached an unreasonable result thereby warranting cancellation of the assessments.

E. Petitioner argues first that the notices of determination should be cancelled because the same were not properly issued and were not, in turn, received by petitioner, and because the Division failed to send copies of said notices to petitioner's representative. These arguments are rejected. With respect to the issuance of notices of determination, Tax Law § 1138(a)(1) provides, in pertinent part, that "[n]otice of such determination shall be mailed to the person or persons liable for the collection or payment of the tax. A notice of determination shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state."

Tax Law § 1147(a)(1) further provides:

> "Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. *The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed.* Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice" (italics added).

F. The initial inquiry under the foregoing statutory framework is whether the Division has carried its burden of demonstrating proper issuance of the notice being challenged by mailing the same, by certified or registered mail, to petitioner's last known address (Tax Law § 1138[a][1]; ***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). A statutory notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (***Matter of Air Flex Custom Furniture***, Tax Appeals Tribunal, November 25, 1992). To prove the fact and the date of mailing of a statutory notice, the Division must make the following showing:

> "first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question" (***Matter of United Water New York, Inc.***, Tax Appeals Tribunal, April 1, 2004; ***see Matter of Katz***).

G. When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (***Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (***id***; ***see also Matter of***

Ruggerite, Inc. v. State Tax Commission, 97 AD2d 634 [1983], ***affd*** 64 NY2d 688 [1984]).

H. Careful review of the documents and affidavits, in light of the foregoing requirements, establishes both the general process by which the Division issues notices, such as those herein, by delivery of the same, properly addressed and with appropriate postage affixed, into the custody of the USPS, and that the foregoing process was carried out in this case. Here, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing statutory notices (***see Matter of Victory Bagel Time***, Tax Appeals Tribunal, September 13, 2012). Further, the Division has also presented sufficient documentary proof, i.e., the CMRs, to establish that the notices of determination at issue were mailed by certified mail addressed to petitioner on July 2, 2013 and November 22, 2013, respectively. The CMRs have been properly completed and provide highly probative proof of mailing of the notices in accordance with the process detailed (***see*** Finding of Fact 30 a and b; ***Matter of Rakusin***, Tax Appeals Tribunal, July 26, 2001). Establishing proper issuance of the notices serves to toll the generally applicable three-year period of limitations (i.e., absent instances of nonfiling of a return) within which the Division may issue an assessment (Tax Law § 1147[b]), and in turn to trigger the 90-day period within which a taxpayer may challenge such a notice by filing a petition (Tax Law § 1138[a][1]) for a hearing before the Division of Tax Appeals, or a request for a conciliation conference (Tax Law § 170[3-a][a]) with BCMS. The Division's proper issuance of a notice of determination by mailing also gives rise to a rebuttable presumption that the assessment made by the notice was received by the taxpayer in due course (Tax Law § 1147[a][1]; ***Matter of Azzato***, Tax Appeals Tribunal, May 19, 2011; ***Matter of Shanghai Pavilion, Inc.***, Tax Appeals Tribunal, June 10, 2010; ***Matter of Sugranes***, Tax

Appeals Tribunal, October 3, 2002).[11]

I. In this case, petitioner has argued for cancellation of both notices upon his claim that he did not receive either of the notices. With respect to one of the notices (the "penalty-only" notice) petitioner's claim consists of his allegation of nonreceipt, coupled with the USPS printout stating that the USPS could not locate tracking information with respect thereto (***see*** Finding of Fact 32). With respect to the other notice (the "tax" notice), petitioner's claim likewise consists of his allegation of nonreceipt, but is coupled with evidence that this notice was returned to the Division's office in Queens, New York, on November 29, 2013 (***see*** Finding of Fact 32). The record clearly shows, and it is undisputed by the Division, that petitioner did not initially receive the tax notice, and that the same was returned the Division. As detailed hereinafter, petitioner's

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[11] The applicable statute in ***Sugranes*** was Tax Law § 1138(a)(1) (as amended by L 1996, ch 267). Such amendment, which became effective for tax years beginning January 1, 1997, provides for the "mailing," rather than the former "giving" of notice of determinations of tax due to persons responsible for collection or payment thereof (***see*** Tax Law former § 1138[a][1]). The language of this amendment and its legislative history indicate an intent to bring the notice provisions of the sales tax law into conformity with those of the personal income tax law where receipt of a notice of deficiency is not a part of the service requirement (***compare*** Tax Law § 681; ***see Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990; ***see*** June 26, 1996 letter to Governor Pataki in support from Owen Johnson, Vice President Pro Tempore ["The legislation conforms the service requirements for sales tax to those required for income tax."]; ***see also*** Senate Memorandum in Support ["The bill provides that service by proper mailing is sufficient to assess tax."]). Significantly, however, the legislation did not amend Tax Law § 1147(a)(1), which, as noted above, provides that the mailing of a notice of determination shall be "presumptive evidence of receipt." The Division of Budget's Budget Report on the bill, dated June 25, 1996, noted the changes to Tax Law § 1138 and the lack of any amendment to Tax Law § 1147 and commented "if this bill were to become law it would be unclear as to which rules apply."

In ***Matter of Ruggerite v. State Tax Commn.*** (64 NY2d 688 [1984]), a case decided under Tax Law former § 1138[a][1], the Court of Appeals found that the language of Tax Law § 1147(a)(1) "makes 'receipt' part of the procedural equation, and by characterizing mailing as only 'presumptive evidence' establishes the taxpayer's right to rebut the presumption" (***id.*** at 690). The Court in ***Ruggerite*** held that the proper mailing of a notice of determination to a taxpayer at his or her last known address creates a presumption of receipt which may be rebutted with proof that the notice was never received. Under this reasoning, where the presumption of receipt is successfully rebutted, the 90-day time period for requesting a conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) or a hearing before the Division of Tax Appeals is not triggered, and a petitioner would be entitled to a conference or a hearing (***Matter of Ruggerite, Inc. v. State Tax Commn.; Matter of Karolight, Ltd.***, Tax Appeals Tribunal, February 8, 1990). In addition, and under this reasoning, where it cannot be established that notice was properly given prior to expiration of the period of limitations on assessment, the assessment must be canceled as untimely. (***Id***.) Given this holding, the Tribunal properly found a rebuttable presumption of receipt in ***Sugranes***, notwithstanding the amendments to Tax Law § 1138(a)(1) enacted by Laws of 1996 (ch 267) (***accord Matter of Azzato***; ***Matter of Shanghai Pavillion, Inc.***).

arguments in favor of cancellation of the notices are rejected.

J. First, and as to the penalty-only notice, petitioner seeks cancellation based upon his allegation of nonreceipt of such notice. However, petitioner has not rebutted the applicable presumption of receipt that attaches to a properly issued notice of determination. On this score, petitioner's argument with respect to the purported USPS tracking information, as described at Finding of Fact 32, has been considered and rejected. The document offered by petitioner in this regard lacks any foundational affidavit or evidentiary explanation whatsoever. Thus, it is no more than a bare assertion that the USPS could not locate tracking information in one instance for item number 7104 1002 9730 0019 5337. There is no indication of the time period searched or if the tracking number was reused by the USPS. It also does not state that the document was not delivered. Petitioner's challenge thus simply amounts to a bare claim of nonreceipt of the notice to be juxtaposed against the Division's proof of proper issuance by mail. Such a bare assertion is unavailing in the face of the evidence of proper mailing produced by the Division (***see Matter of T.J. Gulf. v. State Tax Commn.***, 124 AD2d 314 [1986]). Under such circumstances of proper issuance with no rebuttal of the presumed receipt of the notice thereafter, petitioner had 90 days from the date of issuance (July 2, 2013) within which to file either a petition or a request for a conciliation conference to challenge such notice (Tax Law §§ 1138[a][1]; 170[3-a][a]). The Division has not alleged that petitioner's challenge was not filed within 90 days after issuance of the penalty-only notice, or that such challenge was therefore untimely. Accordingly, petitioner was entitled to have the merits of the penalty-only assessment addressed, and that is what has occurred in this matter.

K. Turning to the tax notice, and notwithstanding the fact that the Division properly issued the same, the presumption of receipt that accompanies a properly issued notice has been rebutted

based on the evidence included in the record (***see*** Finding of Fact 32).[12] Where (as here) the presumption of receipt has been rebutted, case law instructs that the 90-day period of limitations within which to file a petition or to file a request for a conciliation conference is not triggered by such proper mailing, but rather is tolled until such time as actual notice of the assessment is received by the taxpayer (***see Matter of Hyatt Equities, LLC***, Tax Appeals Tribunal, May 22, 2008; ***Matter of Riehm v. Tax Appeals Tribunal***, 179 AD2d 970 [1992], ***lv denied*** 79 NY2d 759 [1992]), whereupon the time within which to file a protest then commences, unless issuance of the assessment itself is precluded as time-barred by operation of the period of limitations thereon (Tax Law § 1147[b]; ***see Matter of Agosto v. Tax Commission of the State of New York***, 68 NY2d 891 [1986], ***revg*** 118 AD2d 894 [1986]; ***Matter of Rosen***, Tax Appeals Tribunal, July 19, 1990; ***Matter of Ruggerite Inc. v. State Tax Commn.***). As above, the Division raises no claim that petitioner's challenge, initiated by the filing of a request for a conciliation conference, did not occur within 90 days after petitioner's actual receipt of notice of the tax assessment, or that petitioner is not entitled to have the merits of such assessment addressed, as has happened herein (***Matter of Shanghai Pavilion, Inc.***).[13]

L. Petitioner has also argued that the Division's failure to have served copies of the

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[12] In ***Matter of American Cars "R" Us, Inc. v. Chu*** (147 AD2d 797 [1989]), the taxpayer was unable to rebut the presumption of receipt of the notice where certified mail was returned to the taxing authority marked "Refused," and the evidence indicated that the USPS had followed proper procedures, but the taxpayer's manager refused to accept delivery. The Court held that a taxpayer cannot deliberately avoid service of a statutory notice. The record in this case does not disclose the reason for nondelivery and return of the properly mailed notice of determination to the Division (e.g., delivery refused, mail unclaimed, mail undeliverable, etc.). Accordingly, it cannot be determined whether, for example, there was any USPS error involved in petitioner not receiving or claiming his mail, or that petitioner simply chose not to pick up his mail from the post office, or any other particular reason for nondelivery.

[13] Contrary to petitioner's claim, the Division is under no obligation to issue a separate notice of determination memorializing a reduction to the amount of tax assessed initially, as here, via a properly issued notice of determination. As noted, there is no dispute that the Division recalculated and reduced the amount of tax initially and properly assessed, and it is such reduced amount of assessed liability that remains at issue (***see*** Finding of Fact 28, n 7).

notices that were issued to petitioner upon the representative must result in cancellation of such notices. The Division's failure to establish proper issuance of copies of such notices to a taxpayer's duly appointed representative, as required, does not result in cancellation of such notices but rather, as above, results in a tolling of the limitations period within which to file a petition or request a conciliation conference (***id.; see Matter of Multi Trucking, Inc.,*** Tax Appeals Tribunal, October 6, 1988). Petitioner, and the representative, clearly received actual notice within the period of limitations on assessment, in turn requested and received a conciliation conference, and are currently exercising petitioner's due process rights before the Division of Tax Appeals. Hence, there is no resulting prejudice or other basis upon which to cancel the subject notices due to the Division's failure to have initially served copies of the same upon the representative.

M. Turning to the merits of petitioner's challenge, and having determined that the Division was entitled to resort to indirect auditing methods, including the use of an external index, the only questions remaining are whether the method of audit was reasonable and, if so, whether petitioner has shown error in the results of the Division's application thereof. On these issues, petitioner has raised no sustainable challenges. Petitioner has conceded that his records were inadequate for purposes of conducting a detailed audit thereof, and has agreed that the Division was entitled to resort to the use of indirect auditing techniques. There is no serious claim that the audit methods employed herein were unreasonable, and in fact the same (observation of sales, application of an index markup to purchases) have been employed and upheld as reasonable on numerous occasions (***see e.g. Matter of Marte***, Tax Appeals Tribunal, August 5, 2004; ***Matter of SRS News, Inc.***, Tax Appeals Tribunal, September 12, 2002; ***Matter of Bitable On Broadway***, Tax Appeals Tribunal, January 23, 1992). In fact, petitioner's

challenges to the audit itself consist essentially of requests for three adjustments, as follows:

(i) an adjustment allowing credit for prepaid cigarette tax;

(ii) a 10% allowance for tax exempt food stamp purchases similar to the allowance made in one of the previous audits; and

(iii) an allowance to eliminate sales for days when the business was allegedly closed.

N. As to the first requested adjustment, petitioner is entitled to receive credit for prepaid cigarette tax in the amount of $8,714.00. Review of the Division's audit reveals that both the amount of petitioner's cigarette purchases subjected to tax on audit by the Division, as well as the amount of tax prepaid by petitioner to his supplier at the times of such cigarette purchases, were established based on the Division's review of the purchase information provided to it by petitioner's cigarette supplier (Espinoza Corporation), as maintained and reflected in the Division's own database of such information (***see*** Findings of Fact 18-c and 34). The record establishes that petitioner did not claim any credit for tax on cigarette purchases on the sales tax returns that were filed. The Division advised petitioner of the amount of such available credit for prepaid tax, and requested that petitioner file Form AU-11 with substantiating cigarette sales information in order to claim the credit. Petitioner did not do so and the Division did not reduce the assessment of tax to reflect credit for prepaid cigarette tax. The volume and amount of audited taxable cigarette sales determined in this case result simply from the auditor applying a markup percentage (the state minimum of 7%) to the exact volume and cost of the cigarettes purchased by petitioner, as reflected in petitioner's supplier's records, including therein the amount of tax prepaid by petitioner at the time of purchase. Thus, in result, petitioner has paid (prepaid) tax both at the time of his purchase of cigarettes (to his supplier) and, via audit, has been subjected to tax on the marked-up selling price of such cigarettes (including therein the

amount of tax prepaid at the time of purchase), with no credit for the prepaid tax having been claimed or afforded to petitioner. Accordingly, the assessment is to be adjusted and reduced by $8,714.00 to reflect credit for prepaid sales tax on cigarette purchases.[14]

O. Petitioner also maintains that an adjustment to recognize alleged tax-exempt food stamp sales is warranted, essentially premised upon the arguments that such an adjustment is reasonable and that a 10% adjustment was allowed on the earlier audits of petitioner. These arguments are rejected. Tax Law § 1132(c) presumes that all of petitioner's sales were subject to tax and it is petitioner's burden to establish otherwise (***see Matter of On the Rox Liqs. v. State Tax Commn. of State of NY***, 124 AD2d 402 [1986], ***lv denied*** 69 NY2d 603 [1987]). While it is true that certain items purchased using food stamps are exempt from tax (***see*** Tax Law § 1115[k]), it is also true that other items, such as hot sandwiches, are not likewise exempt even if purchased using food stamps (20 NYCRR 528.27[b], [c][4]). It was the responsibility of petitioner to retain records of sales, including food stamp sales, and substantiate any claimed exemption, exclusion or exception by which any portion of such sales would not be subject to tax (***see*** Tax Law § 1135[a][1]; 20 NYCRR 533.2[d][7]; ***see also Matter of Sheridan Hollow Incorporated***, Tax Appeals Tribunal, July 13, 2006). The bank records provided by petitioner do not constitute such records, and do not identify any particular sales or distinguish between taxable and nontaxable sales in which food stamps were used. Thus, petitioner has failed to meet

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[14] In the ordinary course, taxable sales as reported on petitioner's sales tax returns would include therein petitioner's receipts for taxable cigarette sales made at retail (with substantiation as required). In turn, petitioner would be entitled to claim a credit on such returns for paid tax to his vendor at the time of his purchase of the cigarettes. The net impact would thus be the payment of tax (with his returns) only on the retail markup (differential) imposed to arrive at the (taxable) retail selling price of the cigarettes. Here, by virtue of the method of its audit, the Division has established the retail selling price (petitioner's cost including prepaid tax plus seven percent markup) and the amount of petitioner's taxable cigarette sales, has included the same in audited taxable sales, and has subjected the same to tax as part of audited taxable sales (i.e., total audited taxable sales less reported taxable sales). In this calculation, no credit was afforded for the tax the Division admits was prepaid by petitioner at the time of his purchases of cigarettes (***see*** Finding of Fact 34).

his burden on this issue (***see Matter of 88-02 Deli Grocery Corp.***, Tax Appeals Tribunal, September 13, 2012). Furthermore, the fact that adjustments were allowed in prior audits does not mandate their continued allowance in subsequent audits on the basis that such allowances might be reasonable. This is especially true given petitioner's continued pattern of abject failure to maintain records.

P. Petitioner's third requested adjustment concerns the claim that the business was closed on certain days, to wit, December 24 and 25, 2009 and January 1, 2010. The evidence supporting this claim, however, is at best inconsistent. The daybooks submitted by petitioner list such dates as "closed." However, the reliability of such daybooks is seriously impugned by the fact that the same were not provided, and admittedly were not maintained, for two years out of the nearly three-year period covered by the audit. Further, the daybooks that were submitted lacked any detail beyond a handwritten statement of a daily dollar amount of sales. Finally, petitioner testified that he did not typically close the business on the holidays noted above. This testimony is inconsistent with the daybook indication of closed days. On balance, the evidence provided does not support the requested adjustment based on days when the business was allegedly closed and the same is, therefore, denied.

Q. Finally, the Division assessed 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]). 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.

R. Petitioner has not provided evidence or arguments sufficient to constitute reasonable cause to support abatement or cancellation of penalties. Petitioner's arguments fail as the record clearly shows that petitioner entirely ignored his obligation to keep detailed sales records (or simply chose not provide detailed records to the Division for review). Such blatant disregard, especially given that petitioner has been audited on two prior occasions, cannot be countenanced. Accordingly, the imposition of penalties is sustained.

S. The petition of Ahmed Abdo Ahmed d/b/a Three Star Deli is hereby granted to the extent that the amount of tax assessed per the Notice of Determination dated November 22, 2013, as reduced by the Division from $145,873.11 (as issued) to $87,918.29 (***see*** Findings of Fact 24 and 28, n 7) shall be further reduced, in accordance with Conclusion of Law N, to reflect a cigarette tax credit in the amount of $8,714.00, and the notices of determination issued on November 22, 2013 (as reduced) and on July 2, 2013 are, together with penalties and interest, sustained.

DATED: Albany, New York
July 21, 2016

/s/ Dennis M. Galli her
ADMINISTRATIVE LAW JUDGE