

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
20-20 MARKET, INC. :
for Revision of Determinations or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period September 1, 2009 through :
August 31, 2012. :

DETERMINATION
DTA NOS. 826363
AND 826364

In the Matter of the Petition :
of :
ABDUL GHANI NAGI :
for Revision of Determinations or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period September 1, 2010 through :
August 31, 2012. :
:

Petitioner 20-20 Market, 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 September 1, 2009 through August 31, 2012.

Petitioner Abdul Ghani Nagi 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 September 1, 2010 through August 31, 2012.

A hearing was held before Herbert M. Friedman, Jr., Administrative Law Judge, in New York, New York, on August 12, 2015, with all briefs to be submitted by February 4, 2016, which

date commenced the six-month period for the 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. (Nicholas A. Behuniak, Esq., of counsel).

ISSUES

I. Whether the audit method employed by the Division of Taxation was reasonable or whether petitioner 20-20 Market, Inc., has shown error in either the audit method or result.

II. Whether petitioners have established any facts or circumstances warranting the reduction or abatement of penalties imposed.

FINDINGS OF FACT

1. Petitioner 20-20 Market, Inc.,¹ operated a convenience store and deli in Mount Vernon, New York, during the period September 1, 2009 through August 31, 2012. Its hours of operation were from 6:00 a.m. to 12:00 a.m. Petitioner's store sold many of the items typically found in a convenience store, such as beer, cigarettes, soda, milk, juice, and candy. The store also sold dry goods, such as laundry detergent, phone and greeting cards, aluminum foil, and paper products. Additionally, the store sold cold sandwiches, as well as meats and cheeses by the pound. A sign in the store advertised that sandwiches on a roll were sold for \$2.00, while a larger hero cost \$3.00. Additional items, such as an egg or extra meat, could be added to a sandwich at increased cost.

2. Petitioner Abdul Ghani Nagi was the president of petitioner at all relevant times. Petitioner Nagi concedes that he was a responsible person required to collect and pay sales and use taxes under Tax Law §§ 1131(1) and 1133(a) on behalf of petitioner during the audit period.

¹ The term petitioner, when used alone, refers to 20-20 Market, Inc.

3. The store did not have a working cash register and did not provide receipts to its customers. In addition, it only accepted cash and food stamps as payment. Food stamps could be used to purchase taxable or nontaxable items.

4. The store averaged \$5,000.00 to \$6,000.00 in food stamp sales per month. It is unclear from the record how much of these sales were comprised of otherwise taxable items. The food stamps received by petitioner were deposited into petitioner's business bank account.

5. An audit of petitioner's business was commenced by the Division of Taxation (Division) by letter dated October 17, 2012. At that time, petitioner was advised of the audit and directed to provide to the Division all books and records pertaining to its sales and use tax liability for the audit period, i.e., September 1, 2009 through August 31, 2012. Records requested by the Division included sales tax returns, worksheets and canceled checks, federal income tax returns, New York State corporation tax returns, a general ledger, a general journal and closing entries, sales invoices, exemption documents, fixed asset purchase and sales invoices, expense purchase invoices, merchandise purchase invoices, bank statements with canceled checks and deposit slips for all bank accounts, cash receipts journal, cash disbursement journal, depreciation schedules, guest checks and cash register tapes. On that same date, the Division's auditor visited the store to survey its operation and contents. He noted in his records that the store appeared very busy.

6. In response to the Division's written request, petitioner provided federal income tax returns, various bank statements, and selective food purchase invoices. Guest checks or cash register tapes were not provided.² The food stamp information provided was incomplete. As a

² Petitioner eventually provided the Division with "Z" tapes, which lacked detail of particular sales, from after the audit period.

result, the records provided were reviewed by the Division's auditor and deemed to be inadequate in order to perform a direct audit. Petitioner does not dispute the inadequacy of the records provided.

7. As a result of the scant records provided by petitioner, by letter dated January 8, 2013, the Division requested permission to perform an observation test. That request was denied by petitioner by letter dated February 8, 2013.

8. On February 10, 2013, a Division investigator informally visited the store and reported her findings to the auditor. The relevant portions of her report are contained in Finding of Fact 1.

9. The auditor also reviewed the bank deposits provided by petitioner but found them insufficient to reasonably identify petitioner's sales.

10. Unable to perform an observation test, the Division performed a different indirect audit to calculate the amount of taxable sales. The indirect method chosen was a markup of the cost of goods sold during 2011 to determine total sales during the audit period. At the outset, the auditor requested third-party vendor verification of goods purchased by petitioner. Based on the responses of the various third-party vendors solicited, and the select purchase records provided by petitioner, the Division determined that the most complete set of records existed for the year 2011. Hence, using the information from that year, the Division calculated petitioner's total cost of goods sold during the audit period.

11. First, the Division calculated that petitioner's 2011 beer purchases were \$237,173.36 from information supplied by its third-party vendors and from New York State records.³ The Division also used petitioner's own records to calculate that its 2011 cigarette purchases were

³ The auditor did not exclusively rely on the state's records. He expressed concerns that the beer purchase amounts the Division received from beer wholesalers might be less than the actual amount of total beer purchased by petitioner because not all wholesalers report their sales accurately to the Division.

\$153,454.75 and Pepsi product purchases were \$2,511.00. The auditor had noted on his field visit that other non-Pepsi brand soda products (Coke products) were sold at the store, which he estimated were equal in quantity to the Pepsi products. Therefore, he estimated that the Coke products were purchased for \$2,511.00 and included that figure in his calculation. Consequently, the Division calculated that petitioner's 2011 beer, cigarette and soda purchases were \$395,650.11.

12. The Division accounted for and provided petitioner pre-paid cigarette tax credits for all such credits that petitioner reported on its filed tax returns for the audit period.

13. Based on the auditor's field visit and the later investigation, it was discovered that petitioner's store also sold paper and other dry goods. The Division estimated that these items constituted an additional 20% of the taxable items sold at the store. Hence, the Division multiplied \$395,650.11 (the purchase price of beer, cigarettes, and soda) by 120% to arrive at \$474,780.13, reflecting petitioner's beer, cigarette, soda, and additional taxable dry goods purchases for 2011.

14. The auditor then employed an industry index entitled Dun & Bradstreet Industry & Financial Consulting Services, "Industry Norms & Key Business Ratios" (D&B Guide), 2010-2011 edition, to compute the estimated taxable sales of petitioner from the total cost of goods sold. The publication contains financial and operating statistics on over 800 lines of business, was used by others in the auditor's office, and he himself was familiar with the use of the index.

15. The D&B Guide listed four categories of applicable businesses that were considered by the auditor. They were "Variety Stores," "Miscellaneous General Merchandise Stores," "Food Stores," and "Grocery Stores."

16. The auditor applied a 36.43% markup to petitioner's 2011 beer, cigarette, Pepsi, Coke and other product purchases. He arrived at that markup percentage by applying the category entitled "Food Stores" from the D&B Guide, which he determined most closely matched petitioner's business. One compelling factor for choosing that category was that petitioner sold prepared food. Additionally, the auditor selected "Food Stores" rather than "Variety Stores" or "Miscellaneous General Merchandise Stores" as "Food Stores" yielded the lowest markup percentage, which he found to be most reasonable under the circumstances. Meanwhile, the auditor disregarded the category of "Grocery Stores" as inapplicable based on the nature of petitioner's business.

17. In order to reach the applicable markup, the auditor took the sales of 100% for "Food Stores," and subtracted the gross profit of 26.7%, resulting in a cost of goods sold of 73.3%. Subsequently, the auditor divided the gross profit of 26.7% by the cost of 73.3% to arrive at the markup of 36.43% for the "Food Stores" category. Hence, the auditor took petitioner's 2011 beer, cigarette, Pepsi, Coke and other product purchases, calculated to be \$474,780.13, and multiplied it by the markup of 136.43% to arrive at \$647,742.53 for petitioner's estimated 2011 taxable sales of beer, cigarettes, Pepsi, Coke and other product purchases.

18. The auditor did an additional analysis for petitioner's 2011 sandwich sales. Petitioner informed the Division that its bread purchases from JJ Cassone in 2011 equaled \$9,357.12. The auditor followed up by contacting JJ Cassone, and discovered that the average price per roll paid by petitioner was 20 cents. Hence, the auditor divided the total dollar amount of roll purchases made by petitioner in 2011 by the purchase price of each roll to determine the number of rolls purchased, or 46,785.60. Despite the presence of a sign that priced sandwiches at a range from

\$2.00 to \$3.00,⁴ the auditor estimated the price of \$5.00 per sandwich in order to account for additional available ala carte toppings. As a result, the auditor multiplied the number of rolls purchased by \$5.00 in order to reach \$233,928.00 in estimated sandwich sales for 2011.

19. Ultimately, the auditor combined \$647,742.53 for petitioner's estimated 2011 taxable sales of beer, cigarettes, Pepsi, Coke and other product purchases with \$233,928.00 in estimated sandwich sales for 2011 to determine petitioner's 2011 estimated taxable sales of \$881,670.53. After subtracting petitioner's reported taxable sales of \$143,319.67, the Division estimated that petitioner had additional unreported taxable sales of \$738,350.86, resulting in an error rate of 5.15%. Extrapolating the error rate to the \$393,631.00 in taxable sales reported by petitioner over the entire audit period resulted in additional taxable sales of \$2,027,898.82, and additional sales tax due of \$169,836.53.

20. On December 5, 2013, the Division issued Notice of Determination number L-040508345 to petitioner 20-20 Market, Inc., which assessed additional sales and use tax due of \$13,840.41, plus penalties and interest, for a total amount due of \$26,781.71, for the period September 1, 2010 through November 30, 2010. The penalties reflected petitioner's failure to keep proper records and underreporting sales tax in excess of 25%.

21. On December 5, 2013, the Division also issued Notice of Determination number L-040514342 to petitioner Nagi, which assessed additional sales and use tax due of \$13,840.41, plus penalties and interest, for a total amount due of \$26,781.71, as a responsible person for petitioner 20-20 Market, Inc. for the period September 1, 2010 through November 30, 2010.

⁴ The record is unclear as to whether the sandwich price included sales tax.

22. On February 27, 2014, the Division issued Notice of Determination number L-040794902 to petitioner 20-20 Market, Inc., which assessed additional sales and use tax due of \$37,859.00, plus penalties and interest, for a total amount due of \$80,352.05, for the period September 1, 2009 through August 31, 2010. The penalties again reflected petitioner's failure to keep proper records and underreporting sales tax in excess of 25%.

23. On February 27, 2014, the Division issued Notice of Determination number L-040794966 to petitioner 20-20 Market, Inc., which assessed additional sales and use tax due of \$118,137.12, plus penalties and interest, for a total amount due of \$209,780.71, for the period December 1, 2010 through August 31, 2012. The penalties again reflected petitioner's failure to keep proper records and underreporting sales tax in excess of 25%.

24. On February 28, 2014, the Division issued Notice of Determination number L-040797619 to petitioner Nagi, which assessed additional sales and use tax due of \$118,137.12, plus penalties and interest, for a total amount due of \$209,804.73, as a responsible person for petitioner 20-20 Market, Inc. for the period December 1, 2010 through August 31, 2012.

25. Petitioner did not place into evidence any guest checks, detailed register tapes, or other original sales records from the audit period. The Z tapes previously provided to the Division, however, were placed into the record.

26. Petitioner submitted proposed findings of fact in unnumbered paragraph form. As a result, they cannot be ruled on directly. Instead, in accordance with State Administrative Procedure Act § 307(1), petitioner's proposed findings of fact have been generally incorporated in this determination.

27. The Division submitted 23 proposed findings of fact, all of which are accepted and incorporated herein.

SUMMARY OF THE PARTIES' POSITIONS

28. Petitioner concedes that its records were inadequate for the audit period and that the Division had a right to resort to external indices. Nevertheless, petitioner argues that the Division made several errors that caused it to reach an unreasonable conclusion. First, petitioner maintains that the auditor failed to competently review and apply actual data in the records available for the entire audit period. Additionally, petitioner states that the assessments include estimated taxable purchases that are unsupported by the record. Moreover, petitioner asserts that the auditor chose a mark-up index without any understanding of the underlying publication or the selected category. Petitioner adds that there is no reasonable support for the prepared foods portion of the assessment and that it was improper for the auditor to completely disregard the food stamp purchases. Finally, it argues that the auditor failed to include prepaid cigarette credits in his calculation.

29. The Division asserts that petitioner failed to prove by clear and convincing evidence that its method of estimation of the sales tax due was unreasonable. The Division also argues that petitioner has not demonstrated reasonable cause justifying the abatement of the assessed penalties.

CONCLUSIONS OF LAW

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

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

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

B. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the [Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ” (Tax Law § 1138[a][1]). When acting pursuant to section 1138(a)(1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

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

“To determine the adequacy of a taxpayer’s records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, [102 AD2d 352]) 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 the present matter, it is undisputed that, based on the lack of records provided by petitioner, the Division properly resorted to external indices to estimate the tax due. The Division accomplished its indirect audit by using petitioner’s purchase figures obtained from third-party vendors and petitioner itself and performing a markup based on the profit index from the D&B Guide. Use of guides such as this has been upheld by the Tax Appeals Tribunal as a valid tool in the conduct of an indirect audit methodology (*see e.g. Matter of SRS News, Inc.*, Tax Appeals Tribunal, September 12, 2002; *Matter of Bitable on Broadway*, Tax Appeals Tribunal, January 23, 1992).

E. As noted above, petitioner has the burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (*see Matter of Your Own Choice, Inc.*). Petitioner offers several arguments in an attempt to meet this burden. First, petitioner argues that the auditor failed to competently review and apply the actual data in the records for the audit period. Instead, petitioner maintains, the Division used an unnecessary error rate. The fault with this argument,

however, is that petitioner did not provide complete records for the entire audit period, as required by law (*see* Tax Law § 1135[a][1]). Indeed, the Division only received select purchase records for segments of the audit period from various vendors and petitioner, and found that the records were most complete for 2011. The Division did not receive the detailed or comprehensive sales records that would have supported petitioner's claim. As a result, the Division did not improperly ignore pertinent records, but crafted its estimate from the most complete set of records available, which happened to be for the year 2011. It is well settled that exactness in the outcome of the audit method is not required when it is the taxpayer's failure to maintain proper records that prevents it (*see Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023 [1976], *affd* 44 NY2d 684 [1978]).

F. Additionally, petitioner maintains that the assessment included estimated taxable purchases that had no evidentiary basis. In particular, petitioner points to the additional Coke product purchases estimation at \$2,511.00 and the "other taxable items" markup of 20% as especially egregious. Contrary to petitioner's assertions, though, both the auditor and the Division's investigator, after their survey of the store, noted the presence of Coke products and unaccounted for taxable dry goods. The auditor based his estimate of additional dry goods at 20% on his observation as well as his familiarity with similar stores. These observations certainly serve as a rational basis for the Division's estimation, particularly in the absence of evidence to the contrary.

G. Likewise, petitioner's assertion that the auditor chose a mark-up index without any understanding of the publication or designated category is rejected. At hearing, the auditor and his supervisor explained the Division's use of the D&B Guide in similar situations, their review of the applicable categories, and the analysis used to arrive at "Food Stores" as the appropriate

category in this case. Although the auditor did consider the ultimate mark-up results in making his decision, his choice of that category was reasonable given the facts presented. In fact, his choice of category inured to the benefit of petitioner, as it gave the lowest mark-up of the three applicable categories. Meanwhile, petitioner has offered no persuasive evidence to support its conclusion that the Division should have instead used the “Grocery Stores” category, which may have produced a lower assessment.

H. Petitioner further argues that an adjustment for tax-exempt food stamp sales is warranted. 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]). It was the responsibility of petitioner to retain records of food stamp sales and substantiate any claimed exemption, exclusion, or exception (see Tax Law § 1135; 20 NYCRR 533.2(d)(7); *see also Matter of Sheridan Hollow Incorporated*, Tax Appeals Tribunal, July 13, 2006). The bank records proffered by petitioner do not constitute such records. Moreover, they do not identify any particular sales or distinguish between taxable and nontaxable sales in which food stamps were used. Clearly, petitioner fails to meet its burden on this issue (*see Matter of 88-02 Deli Grocery Corp.*, Tax Appeals Tribunal, September 13, 2012).

I. Another error petitioner alleges concerns the Division’s failure to provide petitioner with reported prepaid cigarette tax credits in its computation. This position becomes untenable, however, upon a review of the Division’s audit worksheet. The Division reached its estimated additional taxable sales by multiplying reported taxable sales by the 5.1% error rate. The additional taxable sales were then converted into additional tax due by applying the local tax rate. The prepaid cigarette tax credits sought by petitioner were already included in the tax reported

and credited along with the reported taxable sales. The notices at issue created a new assessment of tax based on the additional taxable sales. The additional taxable sales created a new tax liability against which petitioner has offered no evidence of the entitlement to a prepaid cigarette tax credit (*see Matter of Sheridan Hollow Incorporated*). In short, petitioner already received the credits it seeks.

J. Petitioner does, however, make a compelling argument that the Division's prepared foods estimate is unreasonable. The record contains uncontroverted evidence that petitioner priced its sandwiches at \$2.00 to \$3.00 and that the auditor was aware of that fact. Solely based on speculation of the hunger of potential customers and the availability of ala carte toppings, but contrary to the aforementioned advertised prices, the Division increased the price per sandwich sold to \$5.00 in creating its estimated 2011 taxable sales of sandwiches of \$233,928.00. This method is acknowledged as questionable by the Division itself in its brief, where it agrees to lower the estimated cost per sandwich to \$3.25. Given the record presented, that concession is insufficient. It is concluded that petitioner has met its burden on this issue, and the price per sandwich to be used by the Division in creating its estimate should be \$3.00 rather than \$5.00.⁵ This change reduces the estimated amount of 2011 sandwich sales to \$140,356.80, a figure which must be applied in the Division's calculations. As a result, the Division is directed to adjust its estimate of taxable sales of sandwiches and the notices of determination accordingly.

K. In its brief, petitioner alternatively offered its own analysis of additional tax due using different measurements from the D&B Guide and the Division's Publication 509.⁶ In it,

⁵ Petitioner has not demonstrated a breakdown of sales of its sandwiches between its two advertised prices. Thus, it is appropriate to apply the highest established price to all.

⁶ Publication 509 is entitled "Minimum Wholesale and Retail Cigarette Prices."

petitioner unsurprisingly came up with a lower tax due. Petitioner, however, cannot invalidate the Division's audit simply by offering its own "estimate" of tax liability as a substitute for the Division's (see *Matter of 33 Virginia Place*, Tax Appeals Tribunal, December 23, 2009; *Matter of Albanese Ready Mix*, Tax Appeals Tribunal, June 15, 1989; *Matter of Sol Wahba, Inc. v. New York State Tax Commn.*, 127 AD2d 943 [1987]). Moreover, petitioner's analysis lacked guest checks, detailed register tapes, or other source records as support, thereby suffering from the same problem that gave rise to the indirect audit.

L. In sum, petitioner's challenge must fail because it provided no source documentation, either upon audit or at hearing, that would establish the actual amount of its sales. Moreover, petitioner did not clearly and convincingly demonstrate that the audit method was unreasonable. Petitioner's arguments, its unpersuasive witness, and scattered third-party records do not provide grounds for changing the Division's audit results. Thus, as petitioner failed to carry its burden, it is concluded that the audit results were reasonable (see *Matter of La Naj Home Furnishings, Inc.*, Tax Appeals Tribunal, January 31, 2013).

M. Petitioners also seek abatement of all penalties. Tax Law § 1145(a)(1)(i) imposes a penalty upon persons who fail to timely file a return or timely pay the tax imposed by Articles 28 and 29 of the Tax Law. Moreover, the Division may assess an omnibus penalty pursuant to Tax Law § 1145(a)(1)(vi) for omission of an amount in excess of 25% of the amount of taxes required to be shown on its tax return. These penalties and additional interest may be waived if "such failure or delay was due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). The taxpayer faces the "onerous task" of establishing reasonable cause as well as the absence of willful neglect (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993).

Petitioner has offered no evidence upon which a finding of reasonable cause could be made. As the Division points out, it did not produce the source records that it was required by law to maintain. In fact, it flaunted the Tax Law by failing to provide receipts to its customers or even have a working register to maintain such records. From the evidence presented, it appears that petitioner ran its business and responded throughout the audit in a manner designed to avoid proper taxation.

Petitioner Nagi also asserts his difficulty in speaking and understanding English as a factor supporting a finding of reasonable cause. This contention is rejected. Any such language difficulties notwithstanding, the record shows that petitioner Nagi was well aware of the corporation's obligation to file returns and to pay tax, as demonstrated by the sales tax returns and payment checks in the record. Moreover, he had the wherewithal to obtain representation throughout this proceeding, but provided no evidence that he sought similar advice when confronted with difficulties in tax compliance. Accordingly, the penalties assessed herein are sustained.

N. The petitions of 20-20 Market, Inc., and Abdul Ghani Nagi are granted to the extent indicated in Conclusion of Law J, and the Division of Taxation is directed to modify the notices of determination issued to petitioners accordingly. In all other respects, the petitions are denied.

DATED: Albany, New York
July 7, 2016

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE