

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions :  
of :  
**SILVER SADDLE DELI GROCERY, INC.** : DETERMINATION  
**AND AMIR MUSAED** : DTA NOS. 827058  
: AND 827059  
for Revision of Determinations or for Refund of :  
Sales and Use Taxes under Articles 28 and 29 of the :  
Tax Law for the Periods September 1, 2011 through :  
November 30, 2011 and December 1, 2011 through :  
May 31, 2014. :  
\_\_\_\_\_ :

Petitioners, Silver Saddle Deli Grocery, Inc., and Amir Musaed, filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the periods September 1, 2011 through November 30, 2011 and December 1, 2011 through May 31, 2014.

A hearing was held before Barbara J. Russo, Administrative Law Judge, in New York, New York, on November 15, 2016, at 10:30 A.M., with all briefs to be submitted by June 26, 2017, which date commenced 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. (Osborne K. Jack, Esq., of counsel).

***ISSUES***

I. Whether the audit methodology utilized by the Division of Taxation in its audit of Silver Saddle Deli Grocery, Inc., had a rational basis and was reasonably calculated to reflect the taxes due.

II. Whether penalties asserted against petitioners should be abated.

***FINDINGS OF FACT***

1. Petitioner, Silver Saddle Deli Grocery, Inc., (Silver Saddle) operated a small grocery store in upper Manhattan, New York, selling items such as cigarettes and cigars, beer, soda, energy drinks, candy, gum, pet food, household items such as cleaning products, soap and detergent, paper items, phone cards, and nontaxable food and grocery items. Petitioner, Amir Musaed, was the owner and president of Silver Saddle.

2. On July 31, 2014, the Division of Taxation (Division) sent a letter to Silver Saddle stating that the business's sales and use tax returns had been scheduled for an audit for the period September 1, 2011 through May 31, 2014, and scheduled the initial audit appointment for August 25, 2014. This was a follow-up audit, as the business was previously audited for earlier periods.

The letter further explained that all books and records pertaining to sales and use tax liability for the audit period must be available on the appointment date. Among the records specifically requested, in an attached Information Document Request (IDR), were sales tax returns, worksheets and canceled checks showing taxes paid; federal income tax returns; New York State corporation tax returns; general ledger; general journal and closing entries; sales invoices; exemption documents supporting non-taxable sales; chart of accounts; fixed asset purchase/sales invoices; bank statements, canceled checks and deposit slips for all accounts; cash receipts journal and sales journal; cash disbursement journal and purchase journal; the corporate book, including minutes, board of directors and articles of incorporation; depreciation schedules; lease/rental agreements; state liquor authority licenses; and lease contracts, utility bills, guest checks and cash register tapes for the entire audit period.

3. On August 8, 2014, the Division's auditor performed a survey of the business and spoke with Mr. Musaed. Mr. Musaed provided daily Z tapes for the period April 20, 2014

through June 14, 2014, and informed the auditor that his attorney, Jacqueline S. Antonious, would be representing petitioners. The Z tapes were not itemized and did not list the items sold. During the audit period, petitioners were equipped with a cash register machine that was not capable of itemizing the type of goods sold. During the hearing, Mr. Musaed testified that he could not remember how his accountant determined the amount of sales tax to report on the business's sales tax returns.

4. On August 13, 2014, the Division received a power of attorney for petitioners from Ms. Antonious.

5. On August 21, 2014, the Division forwarded to petitioners' representative the audit appointment letter and IDR dated July 31, 2014. Upon Ms. Antonious's request, the audit appointment was rescheduled to September 8, 2014. The auditor also sent third-party verification letters to HLA distributor, Pepsi, Coca-Cola and Jetro requesting information to determine whether these vendors had made sales to petitioners during the audit period. Coca-Cola and HLA distributor responded stating that petitioners were not customers of those vendors.

6. A field audit was conducted on September 8, 2014 at the representative's office. During the appointment, the representative provided the Division with some of Silver Saddle's bank statements, Forms 1099-K (Merchant Cards and Third Party Network Payments) for 2011 and 2013, a statement from Amsterdam Tobacco, and sales tax returns for the audit period.

7. The Division sent a second IDR, dated September 10, 2014, to petitioners' representative, requesting federal income tax and New York State corporation tax returns; general ledger; general journal and closing entries; monthly sales summary of taxable, non-taxable sales and tax collected for the audit period; exemption documents; chart of accounts; fixed asset purchase/sales invoices; expense purchase invoices; merchandise purchase invoices;

missing bank statements; cash receipts and sales journals; cash disbursement and purchase journals; corporate books; depreciation schedules; lease/rental agreements and contracts; its state liquor authority license; utility bills; Form 1099-K for 2012; cash register tapes; a schedule of cigarette purchase invoices and invoices to substantiate credits for prepaid tax on cigarettes; sales tax examination, responsible person questionnaire and escalation letter; and daily Z cash tape details of sales for the period April 20, 2014 through May 31, 2014.

8. A second audit appointment was conducted at the representative's office on October 3, 2014. The representative provided additional bank statements; however statements were missing for May through July 2013, January 2014, and March through April 2014. Purchase invoices were provided for Amsterdam Tobacco for the period December 2011 through May 2014, and a purchase summary was provided for Manhattan Beer Distribution for the period September 1, 2011 through May 5, 2014. During the appointment, the auditor gave petitioners' representative Form AU-2.10, Consent to Extension of Time (Consent to Extension), requesting that petitioners agree to extend the statute of limitations for assessment of sales and use tax for the period September 1, 2011 through May 31, 2012.

9. On October 7, 2014 the auditor sent third-party verification letters to Krasdale, and on October 8, 2014, to North Shore Bottling Company, Beehive Beer Distributors, and the Beverage Works of New York in an attempt to obtain information regarding petitioners' purchases during the audit period.

10. On October 16, 2014, petitioners' representative informed the auditor that petitioners would not sign the Consent to Extension. The Division sent a letter to petitioners explaining that they may be subject to certain record keeping penalties for their failure to provide records requested by the Division.

11. Because the time in which to assess for the period of September 1, 2011 through November 30, 2011 was about to expire, and petitioners did not provide a Consent to Extension or all requested records, the auditor attempted to calculate the appropriate amount of tax for that period using available information. The auditor initially reviewed third-party information from the New York State database of beer, beverage and cigarette purchases, third-party information obtained in response to information requests, and cigarette purchase information provided by petitioners, in an attempt to estimate taxable sales for the audit period. The auditor initially computed petitioners' tax liability for this audit period applying a 37.93% mark-up taken from the Almanac of Business and Industrial Financial Ratios (Almanac) and determined audited taxable sales of \$892,991.66 and additional tax due of \$73,393.71.

The auditor's section head and program manager reviewed the file and the auditor's calculations. The program manager determined that the estimate was incomplete because it only included information for beer, beverage and cigarette purchases and did not include other items sold in the store such as household items, phone cards, candy, and other taxable items. Because the Division was not provided with complete purchase records, the auditor and her supervisors determined that it was necessary to use another audit methodology to calculate taxable sales. The Division decided to obtain the business's lease agreement or canceled rent checks in order to calculate taxes based on a rent factor.

12. The Division also sent additional IDRs to petitioners' representative on October 16, 2014 and November 19, 2014, requesting Silver Saddle's books and records for the audit period that had been previously requested but not provided, including complete bank statements and the lease or rental agreement for the entire audit period.

13. On November 25, 2014, petitioners' representative sent additional bank statements for Silver Saddle from May through July 2013, January 2014, and March through April 2014. Deposits from food stamp transactions were reflected on the bank statements as "Efunds." The deposits reflected in the bank statements were lower than gross sales reported on Silver Saddle's sales tax returns. The auditor transcribed the bank statements provided by petitioners, including food stamp deposits.

14. Because petitioners did not provide a copy of the business's lease in response to the previously issued IDRs, the auditors requested that the Division's investigator obtain a copy of lease. The investigator obtained a copy of the business's lease from petitioners' landlord.

15. As a result of the pending expiration of the statute of limitations for the first sales tax quarter of the audit period and the inadequacy of petitioners' records, the Division's auditors decided to use IRS financial ratios contained in the IRS Corporate Financial Ratios, 29<sup>th</sup> Edition (IRS Ratios) and the business's rent expense information obtained from the lease in order to determine if there was additional tax due for that period. The Division determined that it was necessary to use the IRS Ratios rather than the Almanac because the Almanac required information regarding deductible expenses, such as bad debts, maintenance and repairs, which was not provided to the Division by petitioners.

16. The auditor employed the IRS Ratios industry index to compute the gross sales of Silver Saddle using the rental information obtained from the lease. The publication is based on statistical data derived from a sample of over 145,000 corporation tax returns filed with the IRS with accounting periods from July 2011 through June 2012. The information is grouped by the North American Industry Classification System (NAICS), which groups businesses with similar characteristics together, such as food and beverage stores. Ratios are shown for various size

classifications based on total assets, defined as: 1) \$1,000.00 to \$999,999.00; 2) \$1 million to \$24.999 million; 3) \$25 million to \$99.999 million; and 4) \$100 million or more. The classes are further separated based on profit or loss.

The Division's auditor selected the rent expense to sales ratio in the food and beverage stores category for petitioners' business. Within this category, the auditor selected the category for profitable businesses with assets values between \$1,000.00 and \$999,999.00. The auditor determined that the business was profitable because the third party purchase information obtained indicated that purchases exceeded the taxable sales reported on the business's sales tax returns. The rent factor listed for this category in the IRS Ratios and used by the auditor is 3.94.

After determining the rent factor, the auditor divided the total rent paid by petitioners for the quarter ending November 30, 2011 (\$12,537.54) by the rent factor of 3.94 to determine gross sales of \$318,211.68 for that quarter. The auditor then subtracted food stamp sales of \$10,573.37 from gross sales to determine audited taxable sales of \$307,638.31. The auditor then subtracted reported taxable sales for the quarter of \$25,998.00, resulting in additional taxable sales of \$281,640.31 and additional tax due of \$24,995.58. The auditor also disallowed cigarettes credit of \$524.00, resulting in tax due for the period September 1, 2011 through November 30, 2011 in the amount of \$25,519.58.

17. On December 2, 2014, the auditor conducted a third field audit appointment at petitioners' representative's office. No additional documentation was provided by petitioners at that time.

18. The Division sent an additional IDR to petitioners' representative on December 2, 2014, requesting Silver Saddle's books and records for the audit period that had been previously

requested but not provided. No additional documentation was provided by petitioners in response.

19. The Division issued a notice of determination (L-042253394), dated December 5, 2014, to Silver Saddle, asserting tax due in the amount of \$25,519.58, plus penalties of \$11,207.71 and interest for the period September 1, 2011 through November 30, 2011.

20. The Division issued a notice of determination (L-042258305), dated December 8, 2014, to Amir Musaed as a responsible person of Silver Saddle, asserting tax due in the amount of \$25,519.58, plus penalties of \$11,207.71 and interest for the period September 1, 2011 through November 30, 2011.

21. On December 22, 2014, the Division sent a letter to petitioners' representative explaining that because petitioners did not provide the appropriate books and records to conduct a detailed sales and use tax audit, the Division would perform an observation of petitioners' sales and business activities.

22. By letter dated December 29, 2014, petitioners' representative informed the Division that petitioners did not consent to an observation of the business.

23. The auditor attempted to obtain consents to extend the statute of limitations for assessment of sales and use tax for the remaining quarters of the audit period, but petitioners did not sign the consents.

24. Following her review of the available documentation, the auditor concluded that petitioners' sales records were inadequate to conduct a complete audit for the remaining audit period because petitioners did not provide the required books and records. The Division determined that the lack of original source documents detailing petitioners' sales precluded the

Division from tracing any transaction back to the initial sale or forward to the amount of sales reported.

25. Due to the inadequacy of petitioners' records, the Division determined that it was necessary to estimate the sales tax for the remaining audit period using an indirect audit methodology. To determine petitioners' sales tax liability for the period December 1, 2011 through May 31, 2014, the Division used the same method that had been used to determine petitioners' sales tax liability for the period September 1, 2011 through November 30, 2011, namely a rent factor.

26. Based on petitioners' lease agreement, the Division determined that Silver Saddle paid \$130,709.26 in rent for the period December 1, 2011 through May 31, 2014. The auditor divided this amount of rent by the rent factor of 3.94, obtained from the IRS Ratios for food and beverage stores with profitable businesses and assets values between \$1,000.00 and \$999,999.00, resulting in audited gross sales of \$3,317,493.91. The auditor then subtracted food stamp sales of \$86,196.02 to determine audited taxable sales of \$3,231,297.88. The auditor next subtracted taxable sales reported by petitioners of \$469,788.00 to determine additional taxable sales of \$2,761,509.88, and additional tax due of \$245,084.00 for the period December 1, 2011 through May 31, 2014.

27. The Division issued a notice of determination (L-042535621), dated February 24, 2015, to Silver Saddle, asserting tax due in the amount of \$245,084.01, plus penalties of \$140,415.49 and interest for the period December 1, 2011 through May 31, 2014.

28. The Division issued a notice of determination (L-042538736), dated February 25, 2015, to Amir Musaed as a responsible person of Silver Saddle, asserting tax due in the amount

of \$245,084.01, plus penalties of \$140,451.49 and interest for the period December 1, 2011 through May 31, 2014.

29. The notices of determination at issue asserted statutory penalties pursuant to Tax Law § 1145, omnibus penalties based on omissions over 25% of the tax required to be shown on the sales tax returns, and penalties for failure to produce books and records.

30. The Division determined that petitioners were entitled to prepaid cigarette credits in the amount of \$6,383.00. Petitioners filed a refund claim for this amount. During the hearing the Division stipulated that the credit should be netted against petitioners' final liability, or if it is determined that petitioners owe no additional tax for the period at issue, petitioners would be entitled to a full refund of \$6,383.00.

31. Petitioners submitted unnumbered proposed findings of fact which consist of compound factual proposals in paragraph form, interspersed with legal argument. As a result, they cannot be ruled on directly. Instead, in accordance with the State Administrative Procedure Act § 307 (1), portions of petitioners' proposed findings of fact have been consolidated, condensed, combined, reordered and generally incorporated herein, with the exception of the fourth and fifth sentences of paragraph one, as they contain argument; the sixth and seventh sentences of paragraph one, as they are not supported by the record; the second through last sentence of paragraph two, as they are not relevant to the audit period at issue and not supported by the record; the first sentence of the third paragraph, as it is contrary to the evidence in the record; the last sentence of the third paragraph, as it contains arguments and conclusions; the second through last sentence of paragraph four, as they are not relevant to the period at issue; the first, fifth, and last sentences of paragraph five, as they contain legal argument and are not supported by the record; the second to last sentence of paragraph six, as it is not relevant to

period at issue; the last three sentences of paragraph seven, as they contain argument; and the eleventh through fifteenth paragraphs, as they contain argument.

### **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 include a “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” (*Id.*; 20 NYCRR 533.2 [b] [1]).

B. Tax Law § 1138 (a) (1) provides, in relevant part, that if a sales tax return is not filed, “or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the [Division of Taxation] from such information as may be available. 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 an audit methodology reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the audit methodology 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 an indirect audit methodology has been employed in the determination of sales tax liability is well established, and was set forth in *Matter of AGDN, Inc.* (Tax Appeals Tribunal, February 6, 1997), as follows:

“a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (*see*, Tax Law §§ 1138[a]; 1135; 1142[5]; *see, e.g., Matter of Mera Delicatessen*, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained ‘shall include a true copy of

each sales slip, invoice, receipt, statement or memorandum' (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, 'the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . .' (Tax Law § 1138[a]; *see, Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (*Matter of Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869); exactness is not required (*Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451)."

D. In this case, the record establishes the Division's clear and unequivocal written requests for books and records of petitioners' sales, as well as petitioners' failure to produce such books and records. Based on the lack of records provided, the Division reasonably concluded that petitioners did not maintain or have available books and records that were sufficient to verify gross and taxable sales for the audit period. Indeed, petitioners concede that its records were insufficient for the period at issue. Having established the unavailability of required books and records, the Division was clearly entitled to resort to the use of indirect methods, including the use of a rent factor, to determine petitioners' sales and sales tax liability. In fact, the Division's authority to do so has been consistently sustained (*see Matter of Del's Mini Deli, Inc. v Commissioner of Taxation and Fin.*, 205 AD2d 989 [3d Dept 1994]; *Matter of Vebole Edibles v Tax Appeals Trib.*, 162 AD2d 765 [3d Dept 1990]; *Matter of Sarantopoulos v Tax Appeals Trib.*, 186 AD2d 878 [3d Dept 1992]) and the use of a rent factor has been specifically addressed and approved (*see Matter of Constantini*, Tax Appeals Tribunal, January 10, 2008; *Matter of*

*Your Own Choice, Inc.; Matter of Bitable on Broadway, Inc.*, Tax Appeals Tribunal, January 23, 1992, *confirmed* 199 AD2d 633 [1993]).

E. The rent factor, or the method by which occupancy costs are used to estimate a taxpayer's gross sales, is a method that has been considered and approved by the Tax Appeals Tribunal. In *Matter of Bitable on Broadway, Inc.*, the Tribunal approved the use of a rent factor in the absence of adequate records. In approving the use of the rent factor, the Tribunal concluded that it was sufficient for the Division to identify the statistical report on which its calculations were based since the report was publicly available and the taxpayer would thus be able to introduce evidence challenging the soundness or applicability of the report. The decision specifically distinguishes "those cases where the audit methodology is based on facts that are peculiarly within the knowledge of the Division, e.g., audits of similar establishments, where the Division has the obligation to describe these facts in response to the petitioner's inquiries at hearing" (*id.*, citing *Matter of Basileo*, Tax Appeals Tribunal, May 9, 1991; *see also Matter of Abbasi*, Tax Appeals Tribunal, June 12, 2008). Here, the Division not only identified and introduced into the record the statistical report on which its calculations were based, but described and responded to petitioners' inquiries at hearing as to how the IRS Ratios publication was used in the audit of petitioners. Further, during cross-examination wherein petitioners' representative questioned why the Division used the IRS Ratios as opposed the Almanac, the Division's auditors explained that because petitioner provided insufficient books and records, the Division did not have information required to use the Almanac. Due to the limited information the Division was able to obtain, it determined that the use of the rent factor from the IRS Ratios was an appropriate method. In view of the foregoing, the Division's use of the rent factor was appropriate.

F. Petitioners have the burden of establishing that the audit method employed was unreasonable or that the amount of tax assessed as the result of the application of the method used in this case was erroneous (*see Matter of Surface Line Operators Fraternal Org. v Tully*). Petitioners have not met this burden. Petitioners' argument that the Division should have used a different audit methodology is unpersuasive. For the period in question, petitioners did not maintain adequate records of sales as required by the Tax Law.

Petitioner did not present any invoices, itemized cash register tapes, guest checks or other source documentation that could be used to establish the correct amount of sales tax due. Indeed, Mr. Musead admitted that he did not even know how his accountant determined the amount of tax to report on Silver Saddle's sales tax returns. Having established the inadequacies of a taxpayer's records, the Division is under no obligation to utilize one indirect method of audit as opposed to another, but rather must only select a method of audit reasonably calculated to determine the amount of tax due (*see Matter of Grant Co. v Joseph*). Petitioners presented no evidence to show that the rent factor utilized by the Division was unreasonable. Under these circumstances, the Division's resort to a rent factor to determine sales for the audit period was entirely reasonable (*cf. Matter of Fokos Lounge, Inc.*, Tax Appeals Tribunal, March 7, 1991 [where taxpayer proved through an expert witness that the utilities factor was without a rational basis as applied to its business]). Furthermore, as a general proposition, any imprecision in the results of an audit arising by reason of a taxpayer's own failure to keep and maintain records of all of its sales as required by Tax Law § 1135 (a) (1) must be borne by that taxpayer (*see Matter of Markowitz v State Tax Commn.*; *Matter of Meyer v State Tax Commn.*).

G. Petitioners raise a number of meritless arguments in opposition to the Division's audit method. First, petitioners argue the failure to submit books and records was not willful. Such

argument is contradicted by the evidence in the record, which shows that the Division made numerous requests for petitioners' records, and petitioners failed to adequately comply.

Petitioners further argue that the Division did not provide a reasonable basis for not using a third-party mark-up method rather than the rent factor computation. Contrary to petitioners' argument, the Division's auditors clearly described the use of the rent factor and the reason why they chose that methodology. The auditor explained that the estimate based on a third-party mark-up was incomplete because it only included information for beer, beverage and cigarette purchases and did not include other items sold in the store such as household items, phone cards, candy, and other taxable items sold. Because the Division was not provided with complete purchase records, the auditor and her supervisors determined that it was necessary to use another audit methodology to calculate taxable sales. The auditor further explained that the use of the IRS Ratios for the rent factor, as opposed to the Almanac, was necessary because the Division did not have information from petitioner that the Almanac required. Moreover, as noted above, the Division is under no obligation to utilize one indirect method of audit as opposed to another, but rather must only select a method of audit reasonably calculated to determine the amount of tax due (*see Matter of Grant Co. v Joseph*) and any imprecision in the results of an audit arising by reason of a taxpayer's own failure to keep and maintain records of all of its sales as required by Tax Law § 1135 (a) (1) must be borne by that taxpayer (*see Matter of Markowitz v State Tax Commn.; Matter of Meyer v State Tax Commn.*).

Petitioners also argue that the Division's assessment makes no reasonable allowance for any ordinary nontaxable sales, other than food stamps purchases. The Division allowed a deduction as nontaxable sales for food stamp purchases, based on the information contained in the bank statements. Petitioners did not provide any additional documentation, such as itemized

cash register tapes, in order to determine nontaxable sales, nor did petitioner consent to an observation so that the Division could estimate nontaxable sales. As such, petitioners' argument is without merit.

H. Petitioners also argue against the imposition of penalties, contending that any omissions in tax were due to reasonable cause, and not willful neglect. In establishing reasonable cause for the abatement of penalty, the taxpayer faces an onerous task (*see Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). In *Philip Morris* it was explained that “[b]y first requiring the imposition of penalties (rather than merely allowing them at the Commissioner’s discretion), the Legislature evidenced its intent that filing returns and paying the tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]” (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978 [3d Dept 1993]). Here, petitioners failed to make adequate books and records available for audit and substantially underreported and underpaid the tax due. Petitioners’ contention that they began to maintain records for periods subsequent to the audit period is irrelevant and does not establish reasonable cause for the period at issue. Under these circumstances, the waiver of penalties is not justified.

I. The petitions of Silver Saddle Deli Grocery, Inc., and Amir Musaed are denied, and the notices of determination dated December 5, 2014, December 8, 2014, February 24, 2015, and February 25, 2015, as modified by Finding of Fact 30, are sustained.

DATED: Albany, New York  
December 21, 2017

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE