

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**3152 RESTAURANT, INC.** :

for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period December 1, 2008 through August 31, 2011. :

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In the Matter of the Petition :

of :

**ON THE BOARDWALK CAFÉ, INC.** :

DETERMINATION  
DTA NOS. 827174, 827175,  
827176 AND 827177

for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law for :  
the Period December 1, 2008 through May 31, 2011. :

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In the Matter of the Petition :

of :

**TATIANA VARZAR** :

for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law for :  
the Period December 1, 2010 through May 31, 2011. :

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In the Matter of the Petition :  
of :  
**LEV BLINDER** :  
for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law for :  
the Period December 1, 2010 through August 31, 2011. :

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Petitioner, 3152 Restaurant, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2008 through August 31, 2011.

Petitioner, On the Boardwalk Café, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2008 through May 31, 2011.

Petitioner, Tatiana Varzar, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2008 through May 31, 2011.

Petitioner, Lev Blinder, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2008 through August 31, 2011.

A consolidated hearing was held before Kevin R. Law, Administrative Law Judge, in New York, New York, on January 31, 2017 and February 1, 2017, with all briefs due by June 30, 2017, which date began the six-month period for issuance of this determination. Petitioners appeared by the Gabor & Marotta (Richard M. Gabor, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (M. Greg Jones, Esq., of counsel).

***ISSUES***

I. Whether the Division of Taxation properly determined additional sales and use taxes due from petitioner 3152 Restaurant, Inc.

II. Whether the Division of Taxation properly determined additional sales and use taxes due from petitioner On the Boardwalk Café, Inc.

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

IV. Whether petitioner Lev Blinder was a person responsible for the collection and remittance of sales tax of 3152 Restaurant, Inc.

V. Whether petitioner Tatiana Varzar was a person responsible for the collection and remittance of sales tax of On the Boardwalk Café, Inc.

***FINDINGS OF FACT***

1. Petitioner, 3152 Restaurant, Inc., (the Restaurant) operated a restaurant and nightclub named Tatiana located on the boardwalk in Brighton Beach, New York.

2. Petitioner, On the Boardwalk Café (the Café), operated a casual restaurant called Tatiana Grill next door to the Restaurant.

3. The Division of Taxation (Division) commenced an audit of the Restaurant in 2011. On May 25, 2011, prior to an appointment letter being sent to the Restaurant, the auditor performed a survey of the premises and had lunch there. The auditor observed that the restaurant was large, having approximately 90 tables with seating for 250. Upon receiving her guest check after having lunch, she took a photograph it. The guest check noted the date and time and listed the menu items purchased, and their respective prices, as well an itemization for sales tax and an automatic gratuity amount of ten percent added in. The order number appearing on the guest check was 742.

4. By letter dated September 30, 2011, the Restaurant was advised of the audit and directed to provide the Division with all books and records pertaining to its sales and use tax liability for the audit period December 1, 2008 through August 31, 2011. The Division requested 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 entry sales invoices, exemption documents, chart of accounts, fixed asset purchase/sales invoices, expense purchase invoices, merchandise purchase invoices, bank statements, canceled checks, and deposit slips for all accounts, cash receipts journal, cash disbursement journal, the corporate book, including minutes, a list of the board of directors, and articles of incorporation, depreciation schedules, liquor license, lease contracts, utility bills, guest checks, and cash register tapes.

5. At the initial audit appointment, the auditor reviewed sales tax returns and sales summary worksheets, bank statements, credit card sales receipts and purchase invoices for the audit period. Using the Restaurant's bank statements, the auditor reconciled deposits per the bank statement to the gross sales reported on the Restaurant's tax returns. After backing out the applicable sales tax rate and a tip amount of ten percent, the auditor determined that the bank deposits totaled less than petitioner's reported sales for the period. Based on this reconciliation the auditor determined that taxable sales had been under reported by at least \$758,122.82 for the audit period.

6. A series of consents extending the period of limitations within which to assess tax were executed during the course of the audit extending the period against the Restaurant to September 20, 2014.

7. Subsequently the Restaurant provided a CD containing its electronic sales record from its Point of Sale System (the POS system). Upon review, the auditor was unable to locate an

entry corresponding to her May 25, 2011, lunch. After she provided her order number to the Restaurant, it produced a receipt which did not correspond to her purchase. She then provided her check amount, \$37.75, and another receipt was produced. Although the receipt listed the items ordered and had the identical date listed matching what was listed on the auditor's receipt, the produced receipt was not an exact copy. Specifically, the order number appearing on the receipt had changed from "742" to "715." The auditor would not provide a copy of her guest check to the Restaurant's then-representative, or seek an explanation as to why the order number had changed; nor did she do any further investigation as to whether the Restaurant was compressing its sales records.

8. Based on the discrepancy in the order numbers, the auditor deemed the Restaurant's records to be unreliable and proceeded to use an estimated methodology. Specifically, the auditor utilized gross sales the Restaurant consented to in a proceeding before the Division's Bureau of Conciliation and Mediation Services (BCMS) for a prior audit period. Using the consented to gross sales, she obtained the rent amounts claimed during that prior period to back into a rent factor of 4%. Taking the Restaurant's rent expense from its federal income tax returns for the current audit period, she applied the 4% rent factor to estimate gross sales. Based on this methodology, the auditor determined that the Restaurant had under reported its taxable sales by \$6,307,267.57.

9. On February 19, 2014, the Division issued a notice of determination (notice number L-040780934) to the Restaurant asserting tax of \$552,415.83 plus penalty and interest.

10. On February 21, 2014, the Division issued a notice of determination (notice number L-0407854940) to Mr. Blinder as a responsible person of the Restaurant for the period December 1, 2010 through May 31, 2011. The Division's records indicate that Mr. Blinder was the

Restaurant's manager. Mr. Blinder had signed the Restaurant's sales tax returns and had checking signing authority on behalf of the Restaurant.

11. During the same time the audit of the Restaurant was occurring, the auditor was also auditing the Café for the period December 1, 2008 through May 31, 2011. As with the audit of the Restaurant, the auditor performed a survey and made a lunch purchase at the Café. Upon receipt of her guest check, she took a photograph of it. Thereafter, she requested the Café's books and records. Upon receiving the Café's POS system, she located a copy of her guest check. Accordingly, the auditor deemed the Café's record to be reliable. However, after reconciling the Café's POS sales records with its sales tax returns, the auditor found additional, unreported sales in the amount of \$254,214.01.

12. On February 20, 2014 the Division issued a notice of determination (notice number L-040783254) to the Café asserting tax of \$22,074.46 plus penalties and interest.

13. On February 26, 2014, the Division issued a notice of determination (notice number L-040793289) to Ms. Varzar as a responsible person of the Café for the period December 1, 2010 through May 31, 2011. The Division's records indicate that Ms. Varzar was the Café's sole shareholder and she had signed its sales tax returns.

14. Ms. Varzar testified on behalf of the Restaurant, indicating that she was its president as well as a shareholder. Ms. Varzar indicated that she had never agreed to use the estimated methodology utilized by the auditor. When questioned about the Restaurant, she was unfamiliar with its operations, claiming that she never used the POS system. She further claimed she never inquired about the Restaurant's sales.

15. Mr. Blinder also testified on behalf of the Restaurant identifying himself as its manager. Like Ms. Varzar, Mr. Blinder also testified that he had never agreed to the use of the methodology utilized by the auditor to estimate sales. On cross-examination, Mr. Blinder

claimed he did not know who relayed sales information to the accountant for sales tax returns nor was he able to name the software used at the Restaurant or identify who had access to the Restaurant's electronic sales records. Mr. Blinder testified that every customer received a printed guest check at the end of their meal, and that the server forwarded the printed guest check to the Restaurant's office, either directly or through him. Mr. Blinder could not identify anyone who worked in the office, and did not have information on guest check disposal.

16. The Restaurant presented the testimony of Andrey Belyayev. Mr. Belyayev is the owner of Super PC Systems, an independent dealer of the Adelo POS System that the Restaurant used in its business. Mr. Belyayev examined the guest check given to the Division and the receipt provided by the Restaurant during the audit, after which he noted several differences. The differences include customized identifiers for gratuity and sale location. Other differences included the sale being marked as settled, which he explained was logical since the auditor had yet to pay the bill when she took her photograph. Despite the differences, Mr. Belyayev was certain that the orders were identical based on the time created, the final amount, the same items being ordered, the same number of guests, the same station number, the same table number and the same server name. Mr. Belyayev explained that the Order Number had changed because any orders preceding her order could have been cancelled by a server if a customer had changed his or her order. The Order Number of all subsequent records would then have been changed when the database containing the electronic sales record was compacted. Mr. Belyayev explained that Adelo recommended the database be compacted periodically. Database compaction shrinks the size of a database for faster data processing by removing missing order numbers and renumbering all others. Mr. Belyayev also explained that the electronic sales record also could have been corrupted. Upon cross examination, Mr. Belyayev conceded that the electronic sales record could be deleted by utilizing a tool called the Adelo Database Manager.

17. Vadim Bulanov testified on behalf of the Restaurant. His sole responsibility was to “look after the computer systems.” Mr. Bulanov removed test sales admitted from the electronic sales record but denied ever removing actual sales. Mr. Bulanov indicated that he compacted the Restaurant’s electronic sales record database every two to four weeks.

18. Robert Martin, an employee of petitioners’ representative, testified on behalf of the Restaurant. Mr. Martin reviewed the electronic sales records from the Restaurant's POS system. He offered his belief that the electronic sales record was tamperproof, but revealed that his instruction on the software was given by the Restaurant's “computer guy.” Mr. Martin indicated that, based upon his review, the Restaurant had under reported \$932,689.31 in sales during the audit period.

19. Finally, Gary Rosen, a partner at Marcum, LLP, testified on behalf of the Restaurant. Mr. Rosen is a certified public accountant licensed in New Jersey and was qualified as an expert. Mr. Rosen is a certified valuation analyst and is certified in financial forensics by the American Institute of Certified Public Accountants (AICPA). Mr. Rosen is also a certified fraud examiner and a charter global management accountant through the AICPA. He was engaged to examine the Division's rent factor. Mr. Rosen consulted the MicroBilt database to evaluate the Restaurant’s rental expense as a percentage of sales. The MicroBilt database contains data on 4.5 million establishments and is used to benchmark various entities within their particular industry standard code. Mr. Rosen ran a search of restaurants with sales between \$2.5 and \$5.5 million. His search resulted in 1,235 restaurants. Rent as a percentage of sales for these 1,235 restaurants averaged 7.1%. Mr. Rosen opined that the 4% factor used by the Division overestimated the Restaurant’s sales and went on further to conclude that based upon the Restaurant’s location in New York, rent expressed as a percentage of sales should be higher than the 7.1% average from the MicoBilt search.



***SUMMARY OF THE PARTIES' POSITIONS***

20. Petitioners, focusing solely on the notice of determination issued to the Restaurant, contend that the Restaurant's records were adequate and reliable as the auditor's purchase was there and that it was inappropriate to resort to an estimated methodology. Petitioners further assert that the methodology chosen is inappropriate as the auditor could not explain how it was arrived at when questioned.

21. The Division asserts that it was justified in relying on a estimated methodology to estimate the Restaurant's gross sales because the auditor could not find her order in the electronic records and further contends that to the extent that it was there, the records bears out that other orders had been deleted from the Restaurant's sales records. With respect to the notices of determination issued to the Café and to Mr. Blinder and Ms. Varzar, the Division asserts that since these petitioners have not mounted any challenge to the presumption of correctness accorded the respective notices, these notices must be sustained.

***CONCLUSIONS OF LAW***

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

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

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

B. Tax Law § 1138 (a) (1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax

may be estimated on the basis of external indices . . .” (Tax Law § 1138 [a] [1]). When acting pursuant to section 1138 (a) (1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

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

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

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

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

D. In the present matter, the record shows that the Division made written requests for the Restaurant's books and records. Upon examining the electronic sales records, the auditor could not find a record of the lunch she purchased when she surveyed the restaurant, so she deemed the Restaurant's records unreliable and resorted to a rent factor. At hearing, the Restaurant demonstrated that the auditor's lunch purchase had not been deleted from its electronic sales records but that the order number had changed from "742" to "715." Although Mr. Belyayev explained that the change in order numbers arises from compacting the database as a result of changed orders, there is some credence to the Division's concern that the ability to delete orders and renumber guest checks impinges upon the reliability of the records as a whole. Nonetheless, there is no evidence in the record that sales had actually been compressed. In this case, the Restaurant was not given a copy of the auditor's guest check at the time of audit so that an explanation could have been proffered. Additionally, the auditor did not make any further investigation as to whether sales had been eliminated by the Restaurant from its sales records before she deemed the Restaurant's records to be unreliable and resorting to the use of an estimated audit methodology. Here, under this set of circumstances, it was incumbent upon the Division to make further inquiry or investigation before deeming the sales records to be unreliable.

E. Regardless of whether the use of an estimated methodology was justified or not, the method employed by the auditor to estimate sales lacks a rational basis. In this case the auditor backed into a rent factor utilizing a gross sales amount agreed to at BCMS for a prior audit period. First, the use of gross sales amounts settled upon at a conciliation conference is prohibited absent agreement by the taxpayer to the use of such in any other audit period.

Moreover, the conciliation conference process is a settlement forum (*see* 20 NYCRR 4000.5 [c]), and discussions and proposed adjustments made at conciliation conferences are in the nature of settlement negotiations and may not be considered as precedent or be given any force or effect in any subsequent administrative proceeding (Tax Law § 170 [3-a] [f]; *see Matter of Petak v Tax Appeals Tribunal*, 217 AD2d 807 [3d Dept 1995]; *Matter of Sandrich, Inc.*, Tax Appeals Tribunal, April 15, 1993). Accordingly the auditors use of same is improper. In addition, upon cross-examination, the auditor was unable to detail how the settlement figures were derived or whether they were derived from an index. As stated by the Tribunal in *Matter of Basileo* (Tax Appeals Tribunal, May 9, 1991):

“While it is true that ‘considerable 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), certain limitations have been placed on this principle. It is necessary that the record contain sufficient evidence to allow the trier of fact to determine whether the audit has a rational basis (*Matter of Grecian Sq. v. New York State Tax Commn.*, *supra*) and, further, that the record contain specific information identifying the external index employed by the Division in estimating the taxpayer’s liability (*Matter of Fashana*, Tax Appeals Tribunal, September 21, 1989).

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[t]he Division must at hearing, through witnesses or documents, be able to respond meaningfully to inquiries regarding the nature of the audit performed. Such information is necessary in order to provide petitioner with an opportunity to meet its burden of proving such methodology unreasonable (*Matter of Fokos Lounge*, Tax Appeals Tribunal, March 7, 1991).

F. While there is no serious dispute that the Restaurant under reported its tax based upon the auditor’s analysis of credit card deposits and the Restaurant’s own concession that the gross sales per its representative’s analysis of the electronic records, there is simply no way to tell whether the resulting audit determination has a rational basis. Accordingly, the notices of determination issued to the Restaurant, and to Mr. Blinder as responsible person of the Restaurant, are cancelled.

G. Next, addressing the audit of the Café, and the resulting notice of determination issued to it, the Café has presented no evidence or testimony to sustain its burden of proving that the amount of tax determined is erroneous or that the penalties imposed thereon should be abated. Accordingly, the notice of determination issued to the Café is sustained.

H. Tax Law § 1133 (a) imposes personal liability upon any person required to collect the tax imposed by article 28 of the Tax Law for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with any requirement of article 28 (Tax Law § 1131 [1]). The personal liability imposed on individuals pursuant to Tax Law § 1133 (a) is joint and several (*see Matter of Tafeen*, Tax Appeals Tribunal, January 3, 2002).

I. Petitioner Tatiana Varzar bears the burden of proof to show, by clear and convincing evidence, that she was not a person required to collect tax of the Café under Tax Law §§ 1131 (1) and 1133 (a) (*see Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998).

J. Whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (*see Matter of Cohen v State Tax Commn.*, 128 AD2d 1022 [3rd Dept 1987]). We look to various factors in making this factual determination. The holding of corporate office is one such factor, but personal liability under Tax Law § 1131 (1) is not limited to individuals holding official titles (*see Matter of Ianniello*, Tax Appeals Tribunal, November 25, 1992, confirmed 209 AD2d 740 [3rd Dept 1994]; *see also Chevlowe v Koerner*, 95 Misc 2d 388 [Sup Ct, Queens County 1978]). Other relevant factors include the individual's authority to sign corporate checks; the individual's economic interest in the corporation; and the individual's knowledge of and control over the financial affairs of the corporation (*see Matter of*

*Constantino*, Tax Appeals Tribunal, September 27, 1990). The relevant consideration is “petitioner’s authority and responsibility to exercise control over the corporation, not [her] actual assertion of such authority (citations omitted)” (*Matter of Coppola v Tax Appeals Trib.*, 37 AD3d 901 [3rd Dept 2007]).

K. In this case, petitioner Tatiana Varzar did not contest the determination she was a person responsible for the collection and remittance of sales tax on behalf of the Café. Accordingly, the notice of determination issued to her as responsible person is sustained.

L. The petitions of 3152 Restaurant, Inc., and Lev Blinder are granted; the petitions of On the Boardwalk Café, Inc., and Tatiana Varzar are denied. The notices of determination issued to 3152 Restaurant, Inc., and Lev Blinder are cancelled. The notices of determination issued to On The Boardwalk Café, Inc., and Tatiana Varzar are sustained.

DATED: Albany, New York  
December 28, 2017

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE