STATE OF NEW YORK

DIVISION OF TAX APPEALS

| | | |
|---|---|---|
| In the Matter of the Petitions | : | |
| of | : | |
| **YONKERS WHOLESALE BEER DISTRIBUTORS, INC.** | : | DETERMINATION |
| **AND** | : | DTA NOS. 827276, 828078, 827554, 827616 AND 827931 |
| **RICHARD McDINE** | : | |
| for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods March 1, 2013 through February 28, 2014, March 1, 2015 through February 29, 2016, and June 1, 2010 through February 28, 2014, and for Review of a Notice of Proposed Revocation of a License, Permit or Registration dated August 18, 2016. | : | |

Petitioners, Yonkers Wholesale Beer Distributors, Inc. and Richard McDine, 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 March 1, 2013 through February 28, 2014, March 1, 2015 through February 29, 2016, and June 1, 2010 through February 28, 2014, and for review of a notice of proposed revocation of a license, permit or registration under article 28 of the Tax Law dated August 18, 2016.[1]

A hearing was held before Dennis M. Galliher, Administrative Law Judge, on September 19, 2017 at 10:30 A.M., in Albany, New York, with all briefs to be submitted by April 20, 2018, which date began the six-month period for issuance of this determination. Petitioner appeared by

[1] At the commencement of proceedings, the parties waived the provision by which an expedited determination would be issued in this matter with respect to the proposed revocation of Yonkers' certificate of authority (***see*** 20 NYCRR 3000.18 [a], [b]), and agreed that the issue of proposed revocation would be addressed as part of the determination as to all issues presented herein.

Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Nicholas A. Behuniak, Esq., of counsel).

## *ISSUES*

I. Whether petitioners have established that the Division of Taxation's assessment of additional sales tax, plus penalties and interest, was improper or erroneous.

II. Whether the Division of Taxation properly imposed penalties for petitioners' failure to have filed information returns required of alcoholic beverage wholesalers for the periods in issue.

III. Whether petitioner Yonkers Wholesale Beer Distributors, Inc., has established that the proposed revocation of its certificate of authority was improper and should be canceled.

## *FINDINGS OF FACT*[2]

1. Petitioner Yonkers Wholesale Beer Distributors, Inc. (Yonkers) is licensed as an alcoholic beverage wholesaler by the State Liquor Authority (SLA). In addition to being licensed as a wholesaler, Yonkers also operates a retail outlet for the sale of alcoholic beverages. Petitioner Richard McDine is Yonkers' president.

2. Pursuant to legislation enacted in 2009, every alcoholic beverage wholesaler licensed by the SLA that sells alcoholic beverages without collecting sales or use tax became required to file an annual transaction information return (information return) with the Division of Taxation (Division). The new filing requirement covered sales by alcoholic beverage wholesalers primarily to retail vendors for resale (Tax Law § 1136 [i]; ***see*** L 2009, ch 57, pt V-1, subpt G, eff

[2] The Division of Taxation submitted proposed findings of fact numbered 1 through 25. The latter portion of proposed fact 6, stating "but the Division did not receive appropriate support for the claimed non-taxable sales," and proposed fact 23, are rejected as setting forth conclusions of law. Proposed fact 10 is rejected as speculative. The balance of the proposed facts are supported by the record and have been incorporated within the Findings of Fact set forth herein.

April 7, 2009; ***Empire State Beer Distrib. Assn., Inc. ex rel. Alcoholic Beverage Wholesalers v Patterson,*** No. 09 CIV. 10339 DAB, SD NY [Mar. 1, 2010], 2010 WL 749828).

3. The first information returns required by Tax Law § 1136 (i) were due on or before September 20, 2009 and covered the period March 1, 2009 through August 31, 2009. The next information returns were due on or before March 20, 2010 and covered the period September 1, 2009 through February 28, 2010. All subsequent information returns were required to be filed on or before March 20th of each year, and covered the fiscal year period spanning March 1st of the previous year through February 28th or 29th of the then-current year.[3]

4. The annual information returns were (and are) required to be filed electronically through the Division's web site. The web site contains instructions describing how to file the "Annual Beer, Wine, & Liquor Wholesalers Transaction Information Return" by downloading an Excel spreadsheet template from a provided link, entering the necessary data, and then uploading the completed file to the Division's online tax system.

5. The Excel spreadsheet requires taxpayers to provide information for the period covered by the return with respect to each vendor located in New York State to whom the alcoholic beverage wholesaler made a sale without collecting sales or use tax, as follows:

a) the vendor's legal name;
b) the vendor's doing business as (DBA) name;
c) the vendor's SLA license address, including the city, state and zip code;
d) the vendor's telephone number;
e) the vendor's mailing address, including the city, state and zip code;
f) the vendor's SLA license number;
g) the vendor's Federal Tax Identification number (EIN);
h) the vendor's New York State Sales Tax Identification number;

---

[3] The fiscal year period with respect to which the required information returns are to be filed coincides with the full-year period of time encompassed by the four sales tax quarterly filing periods of March 1 through May 31, June 1 through August 31, September 1 through November 30, and December 1 through February 28 (or February 29 in leap years) (***see generally*** Tax Law §§ 1134, 1136).

i) the year and month of reported sales; and the total monthly net sales amount.

6. The Division uses the information returns to review the sale of alcoholic beverages by wholesalers, such as Yonkers, and to determine the accuracy of income and sales tax returns filed, in turn, by vendors to whom such sales are made. Since the information returns only report wholesale alcoholic beverage sales, the information report does not provide the Division with any pertinent information about a wholesaler's overall business, including its sales of nonalcoholic beverages.

7. Yonkers filed the required information returns for the tax periods ended August 31, 2009 and February 28, 2010, i.e. together comprising the initial fiscal cycle for which such returns were required, but did not file any subsequent information returns. Upon review, the Division concluded that the initial returns filed by Yonkers appeared to be inaccurate as understating Yonkers' taxable sales.

8. The Division's Audit Investigation Selection Unit reviews information returns. In instances of non-filing, or incorrect filing, of such returns, the Investigation Selection Unit attempts to contact taxpayers who have an information return filing requirement, such as in this case. After review, the Investigation Selection Unit may, as was done here, make audit referrals to the Division's Field Audit Management Unit for its use in determining whether further review procedures, including audit actions, should be undertaken. Such a referral was, in part, the genesis of the field audit undertaken in this case, as described hereinafter.

9. By an audit appointment letter dated April 18, 2013, the Division advised Yonkers that it would be conducting a sales tax audit of Yonkers' business for the period spanning June 1, 2010 through February 28, 2013. This audit, scheduled to commence on May 9, 2013, was

undertaken following Yonkers' failures to file information returns, as described above, and in light of the Division's review of Yonkers' quarterly sales and use tax returns (forms ST-100) that reported what appeared to be an "unusually" low taxable sales ratio.

10. The foregoing audit appointment letter was accompanied by an Information Document Request (IDR), listing the records required to be available for audit review. This comprehensive list, denominated IDR No. 1, included, but was not limited to, sales invoices, cash receipts journals, cash disbursements journals, cash register tapes, and all exemption documents supporting non-taxable sales (resale, exempt use and exempt organization certificates, and other documentation necessary to prove non-taxable sales).

11. At the July 22, 2013 initial field audit appointment, the only records that Yonkers provided to the auditor were bank statements, federal tax returns and a listing of fixed assets. The auditor reviewed the records provided, and left a written request for Yonkers to provide sales invoices, cash register tapes and sales logs, and have "all resale and other non-taxable certificates attached to each non-taxable sales [sic]." The auditor also specifically requested that Yonkers provide monthly purchase totals for the audit period, and advised that Yonkers needed to file the requisite annual information returns. The auditor observed that Yonkers utilized one cash register, and that all major credit cards were accepted. The auditor was advised of Yonkers' claim that its retail (taxable) sales were 20 percent of its total sales, and that the remaining 80 percent of its sales were mainly wholesale (non-taxable) sales.

12. No further records were provided by Yonkers. In turn, by a letter dated June 2, 2014, the Division advised Yonkers that it was expanding the period covered by the sales tax audit to include the period spanning March 1, 2013 through February 28, 2014. This letter was

accompanied by IDR No. 2, identical to IDR No. 1 and likewise specifying the records Yonkers was obligated to provide for the expanded audit period.

13. During the course of the audit, the Division's auditor made several requests for documents, including requests for records substantiating Yonkers' claimed non-taxable sales. By a letter dated November 25, 2014, the auditor specifically advised Yonkers that no records in addition to those initially provided (***see*** Finding of Fact 11) had been supplied, including records to substantiate non-taxable sales. The auditor again requested records in substantiation of Yonkers' sales, and attached IDR No. 3, once more specifying the records necessary for review, and requesting that the same be provided by December 19, 2014. Subsequent letters, dated January 13, 2015 and January 29, 2015, again requesting records were sent to Yonkers by the auditor. The January 29, 2015 letter specified that the requested records must be provided by February 9, 2015.

14. By a responding letter dated January 30, 2015, Yonkers stated that records would be provided "to demonstrate that its taxable ratio is de miminis [sic], as compared to its overall sales."

15. On June 3, 2015, the auditor received certain records from Yonkers, including sales tax returns, a general ledger, a cash disbursements journal, bank statements, a chart of accounts for the audit period, federal corporate income tax returns and New York State corporate franchise tax returns for the years 2010 through 2013, and some SLA certificates pertaining to Yonkers' customers. However, as noted in the auditor's log and confirmed in a July 8, 2015 letter, no detailed sales information, cash register tapes or sales invoices were provided, and none of the required information returns were filed. As a consequence, the Division advised Yonkers that its

records were not adequate for purposes of conducting an audit or verifying Yonkers' claimed non-taxable sales.

16. By a letter dated October 28, 2015, the Division advised Yonkers that the audit was completed, stating as follows:

> "During our audit, we reviewed the audit area pertaining to your sales and fixed asset acquisitions.
>
> We have found that you owe additional tax, as a result of errors you made in recordkeeping and reporting sales. An accounting system that records accurately and adequately all sales transaction (taxable and non-taxable) with an audit trail must be maintained and presented for review when requested. Furthermore, any other NYS taxes as well as information reporting returns that are required should be addressed by you promptly in compliance with reporting requirements. By correcting these errors in future filings you may avoid having to pay additional tax, penalty, and interest."

17. In response, Yonkers again asserted that its retail sales were 20% of its total sales, and that the other 80% of its total sales were wholesale sales. Yonkers attempted to substantiate its claimed non-taxable sales by providing copies of some exempt sale certificates and wholesale liquor licenses. However, the documents submitted did not include any information specifying the dollar amounts or quantities of goods sold to any of the purchasers, either as wholesale sales or as sales to otherwise claimed exempt purchasers, such that the same could be verified as non-taxable sales.

18. As noted, Yonkers filed the required information returns for the initial filing periods ended August 31, 2009 and February 28, 2010 (***see*** Finding of Fact 7). Each of those two information returns filed by Yonkers provided data as to the dollar amounts of Yonkers' reported monthly sales to third party purchasers, and those purchasers' respective names, addresses, individual SLA license numbers, and New York State Sales Tax identification numbers. No information returns were filed by Yonkers subsequent to the foregoing initial filings.

19. The Division compiled a schedule of Yonkers' own purchases of alcoholic beverages from third parties for the years 2009 through 2016, as reported to the Division by third party vendors.

20. The Division then compared Yonkers purchases, as compiled above, to taxable sales as reported on Yonkers' sales and use tax returns for the same period (March 2009 through February 2016), as a means of estimating Yonkers' claimed non-taxable sales for the noted period. In turn, the Division compared the foregoing estimate of Yonkers' claimed non-taxable sales with its third party sales, as reflected on the two information returns that were filed, as well as for the subsequent periods during which such information returns were not filed.[4] For the periods reviewed, the Division's calculations reflect unaccounted for sales in the amount of approximately $92,944,858.00. It appears to be Yonkers' position that all of such sales are non-taxable sales.

21. In calculating tax due on audit, the Division accepted Yonkers' gross sales, as reported, but was unwilling to accept Yonkers' estimated taxable ratio without proof in substantiation of the portion of its gross sales that were claimed as non-taxable sales, i.e., the difference between Yonkers' reported gross sales and reported taxable sales. It is these claimed non-taxable sales that the Division has held subject to tax.

22. As a consequence of its audit, the Division issued:

--one notice of determination (Notice No. L-043574844), dated August 26, 2015, assessing sales and use taxes, penalties,[5] and interest against Yonkers;

---

[4] For many of the reporting periods, Yonkers' reported third party sales were zero, since Yonkers' did not file information returns for those periods.

[5] Penalties were assessed under Tax Law § 1145 (a) (1) (i), for failure to file a return or pay over any sales or use tax, and Tax Law § 1145 (a) (1) (vi), for the omission of an amount which is in excess of 25 percent of the total amount of tax required to be shown on a return.

--one notice of determination (Notice No. L-043579134), dated August 27, 2015, assessing sales and use taxes, penalties and interest, as above, against Richard McDine, as a person under a duty and responsibility to collect and remit sales and use taxes and file required returns on behalf of Yonkers, pursuant to Tax Law §§ 1131 (1) and 1133 (a);[6]

--two notices of determination (Notice Nos. L-042498527 and L-045268175), each dated March 11, 2015, assessing penalties against Yonkers for failure to have filed the required annual information returns pursuant to Tax Law § 1136 (i),

--one notice of proposed revocation of a license, permit or registration, dated August 18, 2016, against Yonkers.

23. The foregoing notices at issue herein are summarized as follows:

| Petitioner | DTA No. | Assessment No. | Period | Amount[7] |
|---|---|---|---|---|
| Yonkers | 827554 | L-043574844 | 6/1/10 - 2/28/14 | $5,274,013.38 |
| R. McDine | 827616 | L-043579134 | 6/1/10 - 2/28/14 | $4,235,903.49 |
| Yonkers | 827276 | L-042498527 | 3/1/13 - 2/28/14 | $10,000.00 |
| Yonkers | 828078 | L-045268175 | 3/1/15 - 2/29/16 | $10,000.00 |
| Yonkers | 827931 | ----- | 8/18/16 | Proposed Revocation |

24. Yonkers did not file any of the required information returns in addition to those filed initially, i.e., for the tax periods ended August 31, 2009 and February 28, 2010. As a result of Yonkers' failure to file information returns for the noted subsequent periods, the Division determined and assessed penalty in the amount of $10,000.00 for the periods ended February 28,

[6] At the commencement of proceedings, petitioner Richard McDine conceded that he was not contesting his status as a person who was under a duty and responsible to collect and remit sales and use taxes and file required returns on behalf of Yonkers. The dollar amount of the assessment against Mr. McDine is less than the dollar amount of the assessment against Yonkers because the Division did not obtain waivers extending the statute of limitations on assessment, with respect to Mr. McDine, that covered the entire audit period. While the assessment as originally issued against Mr. McDine did include the full amount assessed against Yonkers, that amount was subsequently reduced by conciliation order (CMS No. 267821) to reflect the shorter available period of assessment pertaining to Mr. McDine.

[7] The dollar amounts set forth do not include penalties and interest with respect to DTA Nos. 827554 and 827616, and do not include interest with respect to DTA Nos. 827276 and 828078. Yonkers was afforded appropriate reductions in the Division's audit calculations for vendor collection credits and for sales tax paid with its returns as filed.

2014 and February 29, 2016, pursuant to Tax Law §§ 1136 (i) and 1145 (i). The computation section of the notices assessing these penalties provides, in pertinent part, the following explanation:

> "We're imposing a penalty on you because you haven't filed an information return as required by section 1136(i) of the Tax Law. Because you haven't provided us with your books and records, as we requested, it's necessary for us to estimate the amount of your penalty. Since we can't determine that you owe a lesser amount, we've imposed the maximum penalty allowed by law."

25. By a letter dated October 26, 2015, the Division advised Yonkers of its intent to commence the process of revoking Yonkers' certificate of authority unless the required annual information returns for the fiscal year spanning March 1, 2010 through February 28, 2011, and for the same fiscal year period for the ensuing years 2011 through 2015, were filed by November 30, 2015.

26. The Division's notice of proposed revocation of sales tax certificate of authority states that revocation is required pursuant to Tax Law § 1134 (a) (4) (A) because "[y]ou have willfully failed to file a New York State sales tax return as required by the Tax Law." The Division's answer to the petition affirmatively states that for the periods at issue, captioned as spanning March 1, 2009 through February 28, 2015, Yonkers "willfully failed to timely file the required returns and/or willfully filed returns, information or otherwise, which were false."

27. In its petition, Yonkers asserts that the tax assessments at issue are arbitrary and do not reflect the correct amount of tax due. At the hearing, Yonkers' representative made a general assertion that computer problems might have prevented the filing of the required information returns, but presented no evidence in support of this assertion.

## *CONCLUSIONS OF LAW*

A. Tax Law § 1136 requires the filing of certain returns with the Division. As it concerns this matter, Tax Law § 1136 (i) provides, in relevant part, as follows:

> "(1) The following persons must file, in addition to any other return required by this chapter, annual information returns with the commissioner providing the information specified below about their transactions with vendors, hotel operators, and recipients of amusement charges:
>
> * * *
>
> (C) Every wholesaler, as defined by section three of the alcoholic beverage control law, if it has made a sale of an alcoholic beverage, as defined by section four hundred twenty of this chapter, without collecting sales or use tax during the period covered by the return, except (i) a sale to a person that has furnished an exempt organization certificate to the wholesaler for that sale; or (ii) a sale to another wholesaler whose license under the alcoholic beverage control law does not allow it to make retail sales of the alcoholic beverage. For each vendor, operator, or recipient to whom the wholesaler has made a sale without collecting sales or compensating use tax, the return must include the total value of those sales made during the period covered by the return (excepting the sales described in clauses (i) and (ii) of this subparagraph) and the vendor's, operator's or recipient's state liquor authority license number, along with the information required by paragraph two of this subdivision . . . .
>
> (2) The returns required by paragraph one of this subdivision must also include, for each vendor, operator, or recipient about whom information is required to be reported under such paragraph, the name and address, and the certificate of authority or federal identification number, and any other information required by the commissioner. The commissioner may, in the commissioner's discretion, require the reporting of less than all the information otherwise required to be reported by this paragraph and paragraph one of this subdivision. . . .
>
> * * *
>
> (3) The returns required by paragraph one of this subdivision must be filed annually on or before March twentieth and must cover the four sales tax quarterly periods immediately preceding such date. Notwithstanding section three hundred five of the state technology law or any other law to the contrary, the returns must be filed electronically in the manner prescribed by the commissioner.
>
> (4) Any person required to file a return under paragraph one of this subdivision must, on or before March twentieth, give to each vendor, operator, or

> recipient about whom information is required to be reported in the return the information pertaining to that person. The commissioner may prescribe a form to be used to provide the information required to be given by this paragraph.
>
> (5) Nothing in this subdivision is to be construed to limit the persons from whom the commissioner can secure information or the information the commissioner can require from those persons pursuant to the commissioner's authority under section eleven hundred forty-three of this part or any other provision of law."

B. In this case, while Yonkers filed its quarterly sales and use tax returns (form ST-100), it did not file any of the information returns that were required to be filed pursuant to Tax Law § 1136 (i) for any periods after the initial returns it filed for the first fiscal year cycle (***see*** Findings of Fact 7, 18 and 24). Yonkers, an alcoholic beverage wholesaler licensed by the SLA, does not dispute that it failed to file information returns, notwithstanding that the Division asked repeatedly for such returns. Yonkers offered no explanation for its failures to have filed, save for the unsupported allegation, made at hearing, that such failures to file may have been the result of computer problems.

C. When a sales tax return is not filed, or is incorrect or insufficient, the amount of tax due can be determined from the information available, and may be estimated (Tax Law §1138 [a] [1]). The well-established standard for reviewing sales tax audits where estimates are employed was set forth in ***Matter of Your Own Choice, Inc***. (Tax Appeals Tribunal, February 20, 2003) 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)."

D. As detailed, the Division made numerous requests for Yonkers' records, including specifically records in substantiation and verification of Yonkers' claimed non-taxable sales. The Division also made continued requests that Yonkers complete and file the required information returns. In turn, and notwithstanding such ongoing requests over a significant period of time, none of such records were provided nor were the information returns filed. Given these circumstances, the Division accepted Yonkers' gross sales and taxable sales, as reported, but disallowed the claim that the balance of Yonkers' sales were non-taxable sales for lack of substantiation thereof. Accordingly, the Division issued the notices of determination numbered L-043574844 and L-043579134, based on Yonkers' failure to have provided any records or other basis upon which the Division could verify Yonkers' claim that 80 percent, or any other amount of its sales, were not, in fact, taxable sales.

E. Pursuant to Tax Law § 1132 (c) (1), Yonkers bore the burden of proving that the tax assessed was erroneous (***Matter of Rizzo v Tax Appeals Trib. of State of N.Y.***, 210 AD2d 748 [3d Dep 1994]; ***Matter of Mobley v Tax Appeals Trib. of State of N.Y.***, 177 AD2d 797 [3d Dept 1991]; ***appeal dismissed*** 79 NY2d 978 [1992]; ***Matter of Surface Line Operators Fraternal Org. v Tully***, 85 AD2d 858 [3d Dept 1981]). Furthermore, a presumption of correctness attaches to a notice issued by the Division, and the taxpayer must overcome this presumption (***see Matter of Suburban Carting Corp.***, Tax Appeals Tribunal, May 7, 1998, citing ***Matter of Tavolacci v***

***State Tax Commn.***, 77 AD2d 759 [3d Dept 1980]; ***Matter of Leogrande***, Tax Appeals Tribunal, July 18, 1991; ***confirmed*** 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]). In response to the Division's assessment of additional tax, Yonkers continued to maintain that the lion's share (allegedly 80 percent) of its sales were non-taxable wholesale sales. Yonkers, however, presented no additional documents to the Division in support of this claim. In turn, Yonkers did not provide any documents or present any witnesses at hearing to support either Yonkers' claimed 80 percent non-taxable ratio, or to verify that any portion of its sales were, in fact, non-taxable. It appears that Yonkers either failed to maintain, or failed to provide upon request, complete and accurate records of its sales, as required (Tax Law § 1135). In the absence of any such records, the Division is under no obligation to guess at the portion of a vendor's sales (if any) that are (or might possibly be) non-taxable (Tax Law § 1132 [c] [1]). Under the circumstances presented herein, the Division's audit method and result, including penalties and interest, must be upheld.

F. In addition to the foregoing, Tax Law §1145 (i) (1) imposes penalties on a person required to file an information return who fails to file such a return, or fails to provide any of the information required on the return, or fails to include information on the return that is true and correct, or fails to provide to each affected vendor (by a designated date), the statement that informs each vendor of the same information reported to the Division. Tax Law § 1145 (i) provides, in relevant part, as follows:

> "(1) Every person required to file an information return by subdivision (i) of section eleven hundred thirty-six of this part who (A) fails to provide any of the information required by paragraph one or two of subdivision (i) of section eleven hundred thirty-six of this part for a vendor, operator, or recipient, or who fails to include any such information that is true and correct (whether or not such a report is filed) for a vendor, operator, or recipient, or (B) fails to provide the information required by paragraph four

> of subdivision (i) of section eleven hundred thirty-six of this part to a vendor, operator, or recipient specified in paragraph four of subdivision (i) of section eleven hundred thirty-six of this part, will, in addition to any other penalty provided in this article or otherwise imposed by law, be subject to a penalty of five hundred dollars for ten or fewer failures, and up to fifty dollars for each additional failure.
>
> (2) Every person failing to file an information return required by subdivision (i) of section eleven hundred thirty-six of this part within the time required by subdivision (i) of section eleven hundred thirty-six of this part will, in addition to any other penalty provided for in this article or otherwise imposed by law, be subject to a penalty in an amount not to exceed two thousand dollars for each such failure, provided that the minimum penalty under this paragraph is five hundred dollars.
>
> (3) In no event will the penalty imposed by paragraph one, or the aggregate of the penalties imposed under paragraphs one and two of this subdivision, exceed ten thousand dollars for any annual filing period as described by paragraph three of subdivision (i) of section eleven hundred thirty-six of this part.
>
> (4) If the commissioner determines that any of the failures that are subject to penalty under this subdivision was entirely due to reasonable cause and not due to willful neglect, the commissioner must remit the penalty imposed under this subdivision. These penalties will be determined, assessed, collected, paid, disposed of and enforced in the same manner as taxes imposed by this article and all the provisions of this article relating thereto will be deemed also to refer to these penalties."

G. In the instant matter, the Division assessed penalties under Tax Law § 1145 (i) (1) because of Yonkers' failure to provide any of the items of information required to be shown on the required information returns, and under Tax Law §1145 (i) (2) because of Yonkers' failure to have filed the required information returns. Tax Law § 1145 (i) (1) provides for the imposition of a penalty of $500.00 for 10 or fewer failures, and up to $50.00 for each additional failure to provide required information, and Tax Law § 1145 (i) (2) provides for a penalty in an amount not to exceed $2,000.00 for each failure to file the required information returns (provided that the minimum penalty under Tax Law § 1145 (i) is $500.00). The aggregate fiscal year penalty for

the foregoing failures is capped at $10,000.00 (Tax Law § 1145 [i] [3]), and the same may be remitted if the failures upon which the penalties are premised are shown to be "entirely due to reasonable cause and not due to willful neglect." (Tax Law § 1145 [i] [4])

H. The Division could not discern how many individual failures to provide information were made by Yonkers, since Yonkers failed to file any information returns after its initial filings. Tax Law § 1145 (i) (4) provides that penalties will be determined in the same manner as taxes imposed by article 28. Thus, the principles that guide the determination of tax due when a return is not filed, is incorrect or is insufficient, should be similarly applied to the determination of penalties, including principles governing the methods of estimation of tax due. Under the present circumstances, the Division's inability to determine how many separate items of information had been omitted by Yonkers was directly caused by Yonkers' own failures to have filed, coupled with Yonkers' failure to provide any information to rectify such failures. The Division was plainly entitled to estimate the number of failures, and to compute the amount of penalty on that basis. Given the number of transactions and volume of sales reflected on the information returns filed by Yonkers for the first fiscal cycle (only), as well as the dollar volume of claimed non-taxable sales involved for the remaining periods (***see*** Finding of Fact 20), the Division's calculation and assessment of penalties at the greatest amount allowed by law, $10,000.00 per filing period, was reasonable. Yonkers offered no explanation for its failures to comply with the filing requirement, or to present the required information as requested.[8] Nothing in the record even hints that such failures should be excused as entirely due to reasonable cause

[8] In its reply brief, Yonkers states that "if the Division deemed all of the taxpayer's sales to be taxable then this taxpayer could not possibly be an alcohol [sic] beverage wholesaler and would then not be required to file the informational returns pursuant to Tax Law § 1136." This statement fails to recognize that the assessment at issue results from Yonkers' failure to have provided any documents or other evidence from which the claimed non-taxable status of any of its sales could be verified. It is also rejected as entirely disingenuous, given Yonkers' ongoing position that it is an alcoholic beverage wholesaler.

and not due to willful neglect, per Tax Law § 1145 (i) (4). Accordingly, the penalties imposed under Tax Law § 1145 (i) (1) and (2) are sustained.

I. Finally, Tax Law § 1134 (a) (4) (A) provides, in relevant part:

> "Where a person[9] who holds a certificate of authority (i) willfully fails to file a report or return required by this article, (ii) willfully filed, causes to be filed, give or causes to be given a report, return, certificate or affidavit required under this article which is false . . . (iv) willfully fails to prepay, collect, truthfully account for or pay over any tax imposed under this article or pursuant to the authority of article twenty-nine of this chapter . . . the commissioner may revoke or suspend such certificate of authority and all duplicates thereof." (***see*** 20 NYCRR 539.4)

J. In this matter, Yonkers filed two of the information returns required per Tax Law § 1136 (i), together spanning the fiscal year March 1, 2009 through February 28, 2010 (***see*** Finding of Fact 7), but admittedly did not file such required information returns for any of the subsequent fiscal year periods ended February 28, 2011 through February 28, 2016. Yonkers did not dispute its failures to have filed, nor was there any claim that Yonkers was unaware of its obligation to file, or that there was any specific reason for its failures to have complied with any of the required filings. Further, while Yonkers did file its initial information returns, thus evidencing its knowledge of the requirement to file and its ability to do so, Yonkers offered no argument or evidence as to why it ceased filing such returns after its initial filings, save only for its unsupported general allegation that computer problems may have prevented any later filings. For its part, the Division contacted Yonkers on several occasions in an attempt to provide assistance with such filings, to no avail. Prior to issuing its notice of proposed revocation of sales tax certificate of authority, dated August 18, 2016, the Division advised Yonkers by a letter dated October 26, 2015 that it was under an obligation to file the required information

[9] A "person" is defined to include a corporation (Tax Law § 1101).

returns. In light of all of these factors, Yonkers' failure to have filed the information returns was clearly knowing, deliberate and voluntary, was in no apparent manner accidental or in the nature of an omission by oversight, and is therefore properly held to be willful failure (***see Matter of Levin v Gallman***, 42 NY2d 32, 34 [1977]). Consequently, Yonkers' willful failure to file the required information returns for several years, including specifically the three separate fiscal year periods spanning, cumulatively, March 1, 2013 through February 29, 2016, fully supports the Division's notice of proposed revocation, and that notice is hereby sustained.

K. The petitions of Yonkers Wholesale Beer Distributors, Inc., and Richard McDine, are hereby denied, and the notices of determination, dated March 11, 2015, August 26, 2015 and August 27, 2015, as well as the proposed revocation of Yonkers' certificate of authority, dated August 18, 2016, are sustained.

DATED: Albany, New York
October 18, 2018

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE