

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**MAJESTIC DELI GROCERY, INC.** : DETERMINATION  
for Revision of Determinations or for Refund of Sales : DTA NOS. 827533  
and Use Taxes under Articles 28 and 29 of the Tax Law for : AND 827534  
the Period December 1, 2011 through August 31, 2014. :

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In the Matter of the Petition :  
of :  
**AHMED ALAMRANI** :  
for Revision of Determinations or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law for :  
the Period December 1, 2011 through August 31, 2014. :

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Petitioner Majestic Deli Grocery, Inc., filed a petition for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2011 through August 31, 2014.

Petitioner Ahmed Alamrani filed a petition for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2011 through August 31, 2014.

A consolidated hearing was held before Kevin R. Law, Administrative Law Judge, on November 7, 2017 at 10:30 a.m., in New York, New York, with all briefs to be submitted by May 18, 2018, which date began the six-month period for issuance of this determination.

Petitioners appeared by the Antonious Law Firm (Jacqueline S. Kafedjian, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

### ***ISSUES***

I. Whether the Division of Taxation properly determined additional sales taxes due from petitioner Majestic Deli Grocery, Inc. and petitioner Ahmed Alamrani as responsible person of Majestic Deli Grocery, Inc.

II. Whether penalties imposed under Tax Law § 1145 (a) (1) (i) and (vi) should be abated.

### ***FINDINGS OF FACT***

1. During the period in issue, petitioner Majestic Deli Grocery, Inc. (Majestic), owned a deli and grocery store located at 3520 Broadway, at 144th Street, in Harlem, New York, making sales of, among other things, soda, cigarettes, sandwiches, chips, prepared foods, cold cuts by the pound, fruit, potato chips, nuts, milk, juice and juice drinks, and yogurt. Majestic also sold beer but discontinued beer sales in or around July 2012. The business had four employees, was open 24 hours a day, weekdays, with abbreviated hours on weekends.

2. Majestic was incorporated on December 13, 2007. Petitioner Ahmed Alamrani was the president as well as a shareholder of Majestic. Mr. Alamrani does not contest his status as a person responsible to collect and remit sales and use taxes on behalf of Majestic.

3. In August 2014, an investigator from the Division of Taxation (Division) surveyed the business. The investigator observed that Majestic sold such things as chips, fruit, household items, personal care items, sandwiches, cigarettes, and phone cards. The investigator also noted there were 14 soda coolers and no beer coolers.

4. By letter dated November 20, 2014, the Division advised Majestic that a sales tax field audit of its books and records for the period December 1, 2011 through August 31, 2014 was

being scheduled. This audit appointment letter advised Majestic that all of its books and records pertaining to its sales and use tax liability for the audit period should be available for review on the audit appointment date. An attached Information Document Request specified a detailed listing of particular records that were to be available for the entire audit period, including sales tax returns; worksheets and canceled checks; federal income tax returns; New York State corporation tax returns; general ledger; general journal and closing entries; sales invoices; all exemption documents supporting nontaxable sales; chart of accounts; fixed asset purchase and sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements and deposit slips; cash receipts journal; cash disbursements journal; the corporate book, including minutes, board of directors, and articles of incorporation; depreciation schedules; State Liquor Authority license; lease contracts; utility bills; guest checks; and cash register tapes.

5. On November 26, 2014, the Division's auditor also made a survey of Majestic wherein he observed that Majestic sold prepared foods, cigarettes, soda, coffee, candy, household items, phone cards, meat and cheeses, milk, chips and fruit. He also observed that Majestic accepted food stamps, as well as credit cards.

6. On February 9, 2015, the Division's auditor met with petitioners' representative. At this appointment, Majestic's 2013 federal income tax return, purchase invoices, bank statements, and rolls of cash register tapes were produced. In addition, a one day z tape total for January 6, 2015 was also submitted for review.

7. The auditor reviewed the records presented and sorted out the cash register tapes. No cash register tapes were provided for the first quarter of the audit period, and tapes for March 2012 were incomplete. Tapes for the period after March, 2012, were not itemized, showing only the price but not identifying the item sold.

8. Subsequent to the first audit appointment, the auditor was provided with Majestic's 2012 and 2014 federal income tax returns. Majestic, however, did not provide a general ledger, cash receipts or cash disbursement journals, or fixed asset purchase invoices during the course of the audit.

9. The auditor compared purchase invoices provided by Majestic with third-party sales information maintained on the Division's database, as well as third party vendor requests made by the auditor. This review led the auditor to determine that petitioner did not provide all of its purchase invoices to him for the audit period.

10. The auditor inquired with the representative as to how the sales tax returns were prepared, as no worksheets for sales tax returns were provided. The representative did not know how the sales tax returns were prepared.

11. During the audit, the auditor orally requested additional purchase invoices, sales tax returns and worksheets, and fixed asset purchase invoices.

12. On April 24, 2015, the auditor made a written request for documents not previously provided.

13. Majestic did not submit cash register tapes for the first quarter of the audit period, and provided incomplete tapes for March 2012. Majestic had provided approximately 100 rolls of register tapes for the balance of the period and the auditor reviewed them to determine if any were itemized. None were itemized or detailed the items sold. The auditor prepared a transcript of a detailed review of tapes for June 2012 in the form of a total of each day sales, and a total of taxable sales and tax. Total sales were \$73,226.81, taxable sales were \$8,978.62 and tax charged was \$811.65. Gross sales reported for that month appeared to be consistent with gross sales reported on Majestic's sales tax return for the respective quarter.

14. The auditor reviewed the other tapes provided and determined that none of the register tapes indicated what was sold. In addition, the auditor could not reconcile bank deposits with gross sales reported on Majestic's sales tax returns, nor did purchase invoices tie into a general ledger or purchase journal as no such journals were provided.

15. During the course of the audit, the auditor also prepared a schedule of returns filed. This schedule showed that for the first eight quarters of the audit period, the taxable ratio was 20.94%, except for one quarter where it was 20.95%, the taxable percentage jumped to 58.82% and then fell to 42%.

16. By letter dated April 17, 2015, the auditor informed the representative that an observation of Majestic would take place. In response to the April 17, 2015 letter, the representative indicated that Majestic did not consent to an observation.

17. As a result of the pending expiration of the statute of limitations for the first sales tax quarter of the audit period and the auditor's determination that Majestic's sales records were inadequate, the auditor decided to use Internal Revenue Service (IRS) financial ratios contained in the IRS Corporate Financial Ratios, 29th Edition (IRS Ratios) and the business's rent expense information obtained from its federal tax returns in order to determine if there was additional tax due for that period.

18. The auditor employed the IRS Ratios industry index to compute Majestic's gross sales using the rental information obtained from Majestic's federal income tax returns. 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.

19. The Division's auditor selected the rent expense to sales ratio in the food and beverage stores category for Majestic. 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 based upon Majestic's federal tax returns. The rent factor listed for this category in the IRS Ratios and used by the auditor is 3.94%.

20. After determining the rent factor, the auditor divided the \$12,537.54 rent paid by Majestic as reflected on its federal income tax return for the first quarter of the audit period (December 1, 2011 through February 28, 2012) by the rent factor of 3.94% to determine gross sales of \$532,994.92 for that quarter. The auditor then subtracted reported taxable sales for the quarter and proposed additional tax due of \$44,181.96. The auditor did not factor in a nontaxable ratio when determining additional tax due because he claimed he could not determine a ratio based upon Majestic's records.

21. On February 27, 2015, the Division issued notice of determination L-042542919 to Majestic for the period December 1, 2011 through February 29, 2012 asserting tax of \$44,181.96 plus interest, and penalties pursuant to Tax Law § 1145 (a) (1) (i) and (vi).

22. On March 2, 2015, the Division also issued a notice of determination (notice L-042549585) to Mr. Alamrani as a person responsible to collect, account for and remit sales and use taxes on behalf of Majestic, for the period December 1, 2011 through February 29, 2012 asserting tax in the same amounts as the notice issued to Majestic, plus penalty and interest.

23. The auditor also employed the use of a rent factor from the IRS Ratios publication for

the period March 1, 2012 through August 31, 2014. Unlike the first quarter of the audit period, the auditor knew the amount of Majestic's food stamp sales as reflected on its bank statements and on 1099-k forms. After estimating gross sales by use of the rent factor for this period, the auditor subtracted out 100% of the food stamp sales to determine taxable sales. The auditor also gave petitioner credit for prepaid cigarette tax originally claimed by Majestic on its sales tax returns. This resulted in additional tax due of \$394,591.71. According to the auditor, he factored in sales of nontaxable items by giving Majestic full credit for food stamp sales even though Majestic could have accepted food stamps as payment for sales of items not eligible to be purchased with food stamps.

24. In addition, the auditor examined Majestic's capital purchases and noticed that assets reported on Majestic's 2014 federal income tax return increased by \$63,596.00. Since no purchase invoices had been provided during the audit, the auditor asserted \$5,644.15 in use tax for the assets reported as purchased in 2014.

25. On May 26, 2015, the Division issued a notice of determination (notice L-042923755) to Majestic for the period March 1, 2012 through August 31, 2014 that asserted tax of \$400,235.86, plus interest and penalties. Likewise, on May 28, 2015 the Division issued a notice of determination (notice L-042960834) asserting a like amount of tax plus interest and penalties to Mr. Alamrani as responsible person of Majestic for this period.

26. Following a conciliation conference in the Division's Bureau of Conciliation and Mediation Services, the notices issued to Majestic and to Mr. Alamrani were sustained by separate conciliation orders, each dated March 4, 2016, and this proceeding ensued.

27. At the hearing in this matter, Majestic submitted voluminous purchase invoices for purchases made during the audit period which are summarized in the following chart:

VENDOR	CUMULATIVE PURCHASES	ITEMS PURCHASED
Amsterdam Tobacco Co.	\$537,272.51	Cigarettes and candy
Anheuser Busch	\$4,257.85	Beer
Oak Beverages	\$7,734.60	Beer
Manhattan Beer	\$4,147.94	Beer
Beehive Distributors	\$6,665.17	Beer
Losito Provisions	\$289,413.70	Deli meats and cheeses
Tropicana	\$65,690.73	Juice and juice drinks
Jetro	\$28,803.57	Grocery items
Krasdale Snacks	\$73,913.34	Canned goods, pet food, household goods
Pepsi	\$78,453.88	Soda
Calip Dairies	\$42,022.00	Ice cream
Dannon	\$ 28,762.64	Yogurt
Frito Lay	\$ 72,282.82	Snacks
Ruba Snacks	\$ 41,824.84	Potato chips and peanuts

28. As noted in the chart above, Majestic purchased cigarettes and candy from Amsterdam Tobacco Company (Amsterdam). In addition to the invoices, Majestic also offered an affidavit from Amsterdam detailing the amount of Majestic's cigarette purchases during the audit period and the amount of prepaid sales tax paid by Majestic. Based upon these documents, the Division has conceded that Majestic is due an additional credit of \$22,912.30 over and above that originally claimed by Majestic on its sales tax filings.

29. Petitioners also submitted documentation substantiating that \$33,181.88 of food stamp sales were made during the first quarter of the audit period; the Division has conceded that the tax asserted for that quarter should be reduced by \$2,944.89 based upon these food stamp sales.



30. At the hearing, Majestic submitted an invoice showing the purchase of a point of sale (POS) system in 2014 for \$4,000.00 and sales tax of \$355.00 thereon. The Division has conceded that the asserted tax on capital purchases should be reduced to \$5,289.15 to reflect the \$355.00 of sales tax paid by Majestic.

31. During the audit, the auditor made transcriptions of various sales records he reviewed. Most of these transcriptions were not included in the audit file entered into the hearing record in this matter. The auditors explained that these workpapers were not included in the audit file because they were not used and therefore, according to him, not relevant.

32. Petitioners submitted unnumbered proposed findings of fact in narrative form as part of their post-hearing brief. Given the manner in which such proposed findings of fact were presented, it is not possible to make rulings on same (*see* State Administrative Procedure Act § 307 [1]). Moreover, many of the facts asserted are conclusory and argumentative in nature. To the extent such proposed findings of fact are supported by the record, they are included in the foregoing findings of fact.

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

33 Petitioners contend that the Division failed to thoroughly examine and review Majestic's sales records before resorting to the use of an estimated audit methodology. Petitioners also take issue with the use of IRS Ratios to estimate sales and the failure of the Division to factor in a portion of the estimated gross sales other than the food stamp sales as nontaxable. Finally, petitioners argue that, should the tax be upheld, penalty should be abated because any shortcomings in Majestic's tax filings were not willful.

34. The Division asserts that Majestic failed to prove by clear and convincing evidence that its method of estimation of the sales tax due was unreasonable and further argues that

Majestic's failure to maintain adequate books and records should not inure to petitioners' benefit. The Division also argues that petitioners have not demonstrated reasonable cause justifying the abatement of the assessed penalties.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1105 (a) imposes a sales tax on the receipts from every "retail sale" of tangible personal property except as otherwise provided in article 28 of the Tax Law. A "retail sale" is "a sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101 [b] [4] [i]). Tax Law § 1135 (a) (1) provides that "[e]very person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require."

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

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

"To determine the adequacy of a taxpayer's records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, [102 AD2d 352, 477 NYS2d 858] *supra*) and thoroughly examine (*Matter of King Crab Rest. v. Chu*,

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

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (*Matter of Urban Liqs. v. State Tax Commn.*, *supra*). The estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451; *Matter of Cousins Serv. Station*, Tax Appeals Tribunal, August 11, 1988). In addition, '[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case' (*Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219, 221)."

D. In this case, the record is clear that the Division made proper requests for Majestic's books and records. The record is equally clear that, contrary to petitioners' argument, the auditor examined the records petitioner's provided pursuant to the Divisions's request and found they were inadequate for the Division to perform a detailed audit. The cash register tapes were not itemized nor were complete purchase records provided at audit. Majestic did not provide a general ledger, purchase journal or cash disbursements journal. When the auditor inquired as to

how the sales tax returns were prepared, Majestic was unable to provide an explanation. Thus, it cannot be said the auditor failed to review Majestic's sales records prior to utilizing an indirect audit methodology or that Majestic had comprehensive records within the meaning of *Matter of Chartair, Inc. v State Tax Commn.*

E. Petitioners argue that, even if the auditor was justified in employing an external index in performing its audit, the use of IRS Ratios to estimate gross sales by use of a rent factor is arbitrary. 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 (Tribunal). In *Matter of Bitable on Broadway, Inc.*, (Tax Appeals Tribunal, January 23, 1992), 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 the statistical report on which its calculations were based into the record, but described how the IRS Ratios publication was used in the audit of petitioners. In view of the foregoing, the Division's use of the rent factor to estimate gross sales was appropriate.

F. Petitioners' assertion that the Division should have used a different audit methodology is unpersuasive. For the period in question, Majestic did not maintain adequate records of sales as required by the Tax Law. Majestic did not submit any itemized cash register tapes or other source documentation that could be used to establish the correct amount of sales tax due. Indeed, Mr. Alamrani admitted that he did not even know how his accountant determined the amount of tax to report on Majestic'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. 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 also assert that the auditor's failure to estimate a portion of the estimated gross sales, other than food stamp sales, as nontaxable, is arbitrary. In this case, the Division only factored in the food stamp purchases as nontaxable when determining the tax due despite the fact that both the auditor and the Division's investigator who surveyed Majestic observed nontaxable items for sale including milk, juice, fruit, chips, etc. At the hearing in this matter, petitioners submitted numerous purchase invoices for nontaxable items including milk, juice, yogurt, chips, snacks, etc. The Division's assertion that the auditor accounted for Majestic's nontaxable sales by allowing 100 percent of the food stamp sales as nontaxable is unavailing as

food stamp sales are not subject to tax and moreover, only constituted a portion of Majestic's total sales. To the extent the Division is arguing that Majestic could have accepted food stamps for sales of taxable items not allowed to be purchased with food stamps, this assertion is rejected as it is purely speculative with no evidentiary basis. Effectively, the Division's "allowance" of only food stamp sales as nontaxable results in a nontaxable ratio of 7%. The Division's arguments assume that, other than food stamp sales, Majestic made no other nontaxable sales. Although the Division begrudgingly admits that Majestic sold many nontaxable items, as observed when an investigator and auditor visited the premises during the course of the audit, the Division contends that pursuant to Tax Law § 1132 (c), there is a presumption that all items are subject to tax until the contrary is established. The Division argues that since Majestic did not have itemized register tapes specifically detailing what was sold, petitioners cannot rebut the presumption. This is the same position advocated by the Division in *Matter of Bernstein-on-Essex St.* (Tax Appeals Tribunal, December 3, 1992), wherein the Tribunal held that in applying the presumption of taxability to all sales where the auditor knew the presumption did not apply is not a method reasonably calculated to reflect the taxes due. In *Bernstein*, the Tribunal cancelled the resulting notice of determination, because that audit methodology was fundamentally flawed (*id.*). Like the petitioner in *Bernstein*, Majestic ". . . had sales records and it is not obvious that these records could not have formed a basis to estimate some rate of nontaxable . . . sales, even if the records were inadequate to support a detailed audit" (*id.*). Based upon the foregoing, notices of determination L-042542919 (Majestic) and L-042549585 (Alamrani) are cancelled; notice of determination L-042923755 (Majestic) and L-042960834 (Alamrani) are modified to cancel \$394,591.71 of tax asserted using this flawed audit methodology.

H. Although the tax asserted on unreported sales has been cancelled, there still remains

\$5,289.15 of tax at issue (*see* finding of fact 30) asserted on capital purchases. Other than the purchase invoice for the POS system purchased in 2014, petitioners have presented no other evidence or credible testimony to meet its burden of proving that that part of the assessment is erroneous. Accordingly, that part of the notice of determination assessing tax on capital purchases, as modified by the Division's concession, is sustained.

I. Finally, the Division assessed penalty herein pursuant to Tax Law § 1145 (a) (1) (i) and (vi). Tax Law § 1145 (a) (1) (i) provides that any person failing to file a return or pay over any sales or use tax shall be subject to a penalty. Omnibus penalties are imposed under Tax Law § 1145 (a) (1) (vi) for failure to report and pay sales tax in an amount in excess of 25% of the amount required to be shown on the return. Penalties may be abated upon the showing of reasonable cause and a lack of willful neglect (Tax Law § 1145 [a] [1] [iii], [iv]; 20 NYCRR 2392.1). Petitioners bear the burden of proving that penalties were improperly assessed (*Matter of LT&B Realty Corp. v New York State Tax Commn.*, 141 AD2d 185 [1988]). By virtue of the conclusions reached above, the only penalty amount remaining is that portion attributable to the tax asserted on capital purchases.

J. 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]). In this case, petitioners offered no compelling evidence or argument that penalty should be abated other than

to assert any under payments were not willful. This blanket assertion does not rise to the level to establish reasonable cause. Accordingly, penalties are sustained.

K. The petitions of Majestic Deli Grocery, Inc., and Ahmed Alamrani are granted in accordance with conclusion of law G, but otherwise denied; notices of determination L-042542919 and L-042549585 are cancelled; and notices of determination L-042923755 and L-042960834 are modified in accordance with conclusion of law G, but otherwise sustained.

DATED: Albany, New York  
November 15, 2018

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE