STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **NEW T&L BEER & SODA, 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, 2010 through August 31, 2015.	:	DETERMINATION DTA NO. 827761

Petitioner, New T&L Beer & Soda, 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, 2010 through August 31, 2015.

On March 8, 2019, respectively, petitioner, appearing by Sim & Record, LLP (Sang J. Sim. Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Adam Roberts, Esq., and Eric R. Gee, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by September 13, 2019, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner, as a bulk sale purchaser under Tax Law § 1141 (c), is liable for sales and use taxes due from the bulk sale seller.

FINDINGS OF FACT

1. In June 2013, the Division of Taxation (Division) commenced a sales tax audit of

Loupat Enterprises, Ltd., (Loupat) for the period September 1, 2010 through May 31, 2013. Loupat ran a wholesale and retail beer and soda business located in Freeport, New York.

2. On June 20, 2013, the Division sent a letter to Loupat advising it 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 (IDR) 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, canceled checks and deposit slips; cash receipts journal; cash disbursements journal; the corporate book, including minutes, board of directors, and articles of incorporation; depreciation schedules and lease contracts.

3. At the initial audit appointment, Loupat provided the Division's auditor with bank statements, general ledger, federal income tax returns, sales tax returns, and documentation verifying that the business location suffered damage as result of Hurricane Sandy. No sales information for periods prior to Hurricane Sandy was provided as this information was destroyed by the storm. At this appointment, the Division was informed that Loupat's sales tax returns were prepared based upon the assumption that 80% of its sales were wholesale and 20% were retail. Gross sales were reported using bank deposits. Loupat did not maintain retail sales receipts, retail sales journals, sales invoices or delivery reports. In addition, exemption documents for periods prior to Hurricane Sandy had been destroyed.

4. At a subsequent audit appointment, Loupat provided retail and wholesale worksheets with daily sales totals for the quarters ended February 28, 2013 and May 31, 2013. The Division's auditor was unable to reconcile these worksheets to the amounts reported on the sales tax returns for those quarters.

5. During the course of the audit, the audit period was extended to August 31, 2015. Consistent therewith, the auditor made written requests for all sales records for the updated audit period.

6. On September 14, 2015, while the audit was ongoing, Loupat executed a bill of sale transferring its business assets to New T&L Beer & Soda, Inc., (petitioner) for a purchase price of $700,000.00. Of that amount, $75,000.00 was allocated to tangible personal property while the remaining $625,000.00 was allocated to goodwill.

7. On the sale date, petitioner executed a notification of sale, transfer, or assignment in bulk (bulk sale notification). The bulk sale notification indicated that $50,000.00 of the purchase price was deposited with an escrow agent. The September 14, 2015 bulk sale notification was received by the Division on September 18, 2015.

8. On September 21, 2015, the Division's bulk sales unit sent petitioner and the escrow agent a notice of claim. The notice of claim advised petitioner and the escrow agent to not pay monies to the seller until the Division issued a bulk sales notice of release. The notice of claim further advised the parties to place the entire consideration paid into escrow pending resolution of the Division's claim. On September 24, 2015, the Division sent a letter to petitioner advising it that it could be held liable for Loupat's sales tax liabilities. The letter reiterated that the entire purchase proceeds should be placed in escrow pending the resolution of the Division's claim.

9. After numerous audit appointments, the auditor determined that Loupat's books were

inadequate. As a consequence, the auditor utilized the financial ratios for retail and wholesale businesses in the beer, wine, and distilled beverage industry sector contained in the publication IRS Corporate Financial Ratios, 29th Edition (IRS Ratios). Using Loupat's purchases as recorded in its general ledger for the audit period, gross sales were estimated based on cost of operations as a percentage of sales. Specifically, the auditor divided Loupat's purchases of $29,646,952.34 by 79.70%, the average cost of sales operations percentage for retail and wholesale businesses found in IRS Ratios, to arrive at $37,198,183.61 in audited gross sales. From that amount, the auditor subtracted reported gross tax exempt sales of $26,248,762.00 to arrive at taxable sales of $10,949,421.67. The auditor then subtracted the taxable sales originally reported of $5,950,383.00 to arrive at additional taxable sales of $4,999,038.61 and additional tax due of $431,167.11.

10. On December 7, 2015 the Division issued of a notice of determination to Loupat asserting $431,167.11 of sales tax plus penalties and interest.

11. The following day, December 8, 2015, the Division issued a notice of determination to petitioner which asserted $431,167.11 in tax due, representing the tax asserted against Loupat. The notice stated that "[t]his notice is issued because you are liable as a bulk sale purchaser for taxes determined to be due in accordance with Sections 1141 (c) and 1138 (a) (3) of the New York State Tax Law." Neither penalties nor interest were asserted in this notice of determination.

12. Loupat protested the notice of determination issued to it by filing a petition with the Division of Tax Appeals. On September 14, 2018, the Division and Loupat executed a stipulation for discontinuance of proceeding wherein the Division and Loupat settled for tax of $98,000.00, plus $53,844.82 of interest. Accompanying the stipulation was a spreadsheet

detailing agreed upon tax and interest broken down by quarter.

13. The Division acknowledges that the September 8, 2015 notice of determination issued to petitioner should be adjusted to reflect the amounts settled upon by Loupat and the Division in the September 14, 2018 stipulation for discontinuance of proceeding.

CONCLUSIONS OF LAW

A. Tax Law § 1141 (c) requires the purchaser in a bulk sale transaction to give notice of such sale to the Division at least 10 days before taking possession of, or making payment for, the business assets of the selling company. The purpose of Tax Law § 1141 (c) is to preserve the Division's "indisputable right to collect taxes which could otherwise be extinguished by the simple expedient of a taxpayer transferring its assets" (***Harcel Liqs. v Evsam Parking***, 48 NY2d 503, 507 [1979]; ***see also Spandau v United States of Am.***, 73 NY2d 832 [1988]). Upon receipt of a timely notice of sale, the Division is required to inform the purchaser of any potential claims for sales and use taxes that may still be owed by the seller of the business (***see*** 20 NYCRR 537.0 [c] [3]). If the purchaser fails to withhold funds from the seller or fails to file a proper and timely notice of bulk sale with the Division, then such purchaser becomes personally liable for the sales and use taxes determined to be due from the seller (***see*** 20 NYCRR 537.4 [a] [1]). The liability of the purchaser is limited to the greater of the purchase price or the fair market value of the business assets sold or transferred (***see*** 20 NYCRR 537.4 [c]).

B. Petitioner does not dispute that it failed to comply with the bulk sale notification requirements and that it is liable for the seller's outstanding sales tax liabilities but takes issue with the amount thereof. Specifically, petitioner contends that it should not be held liable for the interest and penalties asserted against Loupat and also takes issue with the tax amount that Loupat and the Division eventually settled upon. Petitioner's arguments are rejected.

C. First, addressing petitioner's argument concerning penalty and interest, the liability of a bulk sale purchaser does not include the seller's penalty and interest (***see Matter of Velez v Dept. of Taxation & Fin.*** (152 AD2d 87 [3d Dept 1989] [where the court held that a bulk purchaser liable for the seller's taxes pursuant to section 1141(c) of the Tax Law could not be held liable for the penalty and interest assessed against the seller]; ***see also*** 20 NYCRR § 537.4 [e]). In this case, the notice of determination issued to petitioner asserts neither interest nor penalties. Petitioner, as purchaser, is only liable for the $98,000.00 in tax owed by Loupat plus the interest and penalties which have accrued on this liability commencing on December 13, 2015, which is five days after the date of issuance of the notice of determination to petitioner (***see*** Tax Law §§ 1141 [c], 1145 [a]; 20 NYCRR § 537.4 [e]).

D. Next, petitioner contends that the notice of determination, as adjusted, should be cancelled because it cannot determine how the settled amount of $98,000.00 was determined. Contrary to petitioner's argument, it is the original audit method and the resulting assessments which, if shown by clear and convincing evidence to be erroneous, would warrant cancellation thereof, not the amount subsequently settled for by the Division and Loupat (***see Matter of Petak's of New York***, Tax Appeals Tribunal, September 9, 1993, ***confirmed Matter of Petak v Tax Appeals Trib.,*** 217 AD2d 807 [3d Dept 1995]). As a consequence, it is the propriety of the original audit methodology that must be examined; other than reducing petitioner's derivative liability as bulk sale purchaser, the subsequent settlement entered into by Loupat and the Division has no bearing on this matter.

E. Addressing the original audit, section 1135 (a) (1) of the Tax Law requires every person required to collect tax to keep records of every sale and all amounts paid and of the sales

tax payable on such sales in the form of true copies of the sales slips, invoices, receipts, or statements reflecting such sales of tangible property subject to sales tax (***see*** also 20 NYCRR 533.2). Tax Law § 1138 (a) (1) provides that if a sales and use tax return is not filed or is incorrect, the Division may resort to other means of determining the amount of tax due from the taxpayer. This includes the use of external indices to estimate the amount of sales and use tax due where the taxpayer's records are insufficient to accurately determine the amount of sales and use tax that should have been shown on the taxpayer's return (***id.***). However, the Division must first request the taxpayer's sales records and determine their adequacy for purposes of a sales tax audit for the period at issue (***see Matter of Christ Cella, Inc. v State Tax Commn***, 102 AD2d 352 [3d Dept 1984]). Upon finding that the available records are insufficient for purposes of determining the amount of tax due, the Division may resort to an alternative audit method (***Matter of Urban Liqs. v State Tax Commn.***, 90 AD2d 576 [3d Dept 1982]). It is incumbent upon the Division to choose a method of estimating taxable sales that is reasonably calculated to reflect the sales and use taxes due (***Matter of Ristorante Puglia v Chu***, 102 AD2d 348 [3d Dept 1984]; ***Matter of W.T. Grant Co. v Joseph***, 2 NY2d 196, 206 [1957], ***rearg denied*** 2 NY2d 992 [1957], ***cert denied*** 355 US 869 [1957]). However, a taxpayer challenging the reasonableness of the method used to estimate sales and use tax due bears the burden of showing that such method lacks a rational basis (***see Matter of King Crab Rest. v Chu***, 134 AD2d 51 [3d Dept 1987]). Exactness in the amount of the determination resulting from the use of an external index is not a requirement where it is the taxpayer's own failure to maintain adequate records that prevented exactness in the proposed assessment (***see Matter of Shurky v Tax Appeals Tribunal,*** 184 AD2d 874 [3d Dept 1992]; ***Matter of Meyer v State Tax Commn.***, 61 AD2d 223,

228 [3d Dept 1978], ***lv denied*** 44 NY2d 645 [1978]). In this case, the record clearly shows that the Division made adequate requests for records and that the records provided in response to said requests were incomplete to do a detailed audit. Accordingly, the Division was within its rights to use an estimated methodology. The use of IRS Ratios to estimate sales is an acceptable method (***see Matter of Silver Saddles***, Tax Appeals Tribunal, April 25, 2019). Petitioner has offered nothing by way of evidence or argument to support the position that the original audit methodology was flawed, or that there should be further reduction of tax.

F. The petition of New T&L Beer & Soda, Inc., is denied and the December 8, 2015 notice of determination, as modified (***see*** finding of fact 13), is sustained.

DATED: Albany, New York
March 12, 2020

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE