

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

SAVORY KITCHEN, 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 September 1, 2013 through :
February 29, 2016. :

In the Matter of the Petition :

of :

SUSANNA S. YUEN :

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 September 1, 2013 through :
February 29, 2016. :

DETERMINATION
DTA NOS. 828648,
828747 AND 828748

In the Matter of the Petition :

of :

SAK K. LEE :

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 March 1, 2014 through :
February 29, 2016. :

Petitioner, Savory Kitchen, 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 September 1, 2013 through February 29, 2016. Petitioner, Susanna S. Yuen, 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 September 1, 2013 through February 29, 2016. Petitioner, Sak K. Lee, 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 March 1, 2014 through February 29, 2016.

A consolidated hearing was held in Albany, New York, on November 13, 2020, with all briefs to be submitted by April 22, 2021, which date began the six-month period for issuance of this determination. Petitioner, Savory Kitchen, Inc., appeared by Susanna S. Yuen its president. Petitioners, Susanna S. Yuen and Sak K. Lee, appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Mary R. Humphrey, Esq., of counsel). After reviewing the entire record in this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

ISSUES

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

II. Whether petitioners Sak K. Lee and Susanna S. Yuen were personally liable for the sales and use taxes due on behalf of Savory Kitchen, Inc, as persons required to collect and pay such taxes under the Tax Law.

III. Whether penalties imposed by the Division of Taxation should be abated.

FINDINGS OF FACT

1. The Division of Taxation (Division) conducted a sales tax audit of petitioner, Savory Kitchen, Inc. (Savory Kitchen), a restaurant, for the period of September 1, 2013 through February 29, 2016.

2. Savory Kitchen filed New York State sales and use tax returns for all of the audited quarters, September 1, 2013 through February 29, 2016. The subject returns reported sales as follows:

Sales Tax Quarter	Reported Gross Sales
September 1, 2013 – November 30, 2013	\$11,950.00
December 1, 2013 – February 28, 2014	\$21,878.00
March 1, 2014 – May 31, 2014	\$33,344.00
June 1, 2014 – August 31, 2014	\$35,139.00
September 1, 2014 – November 30, 2014	\$26,514.00
December 1, 2014 – February 28, 2015	\$31,705.00
March 1, 2015 – May 31, 2015	\$25,584.00
June 1, 2015 – August 31, 2015	\$36,899.00
September 1, 2015 – November 30, 2015	\$41,770.00
December 1, 2015 – February 29, 2016	\$51,015.00

3. The Division’s audit was initiated when its investigator performed an initial survey of Savory Kitchen on June 30, 2015. The investigator visited the restaurant unannounced and observed that the restaurant allowed only cash sales, contained seven tables with approximately 30 seats, the seating was available only for full-service dining, and take-out service was available. The investigator noted that there were approximately 300 items on the menu and free delivery was available for take-out orders of \$15.00 or more. The investigator ordered a menu

item for \$11.95 and was charged sales tax. The investigator noticed that the restaurant had two point of sale systems and when he asked for a receipt, he received a copy of the receipt and noticed that the original receipt was put on a “spike” located on the restaurant’s counter along with several other receipts also secured on the spike. The investigator stayed for approximately 30 minutes and noted the restaurant and surrounding area were busy. The investigator noted that the State’s computer system indicated that the restaurant was reporting significantly less sales to the State than appeared to be appropriate given his visit. The investigator recommended the restaurant should be subject to a more thorough audit. The investigator did not testify at the hearing.

4. The Division notified the restaurant by a letter dated January 29, 2016 of its intent to conduct a sales and use tax audit for the period of March 1, 2013 through November 30, 2015. The Division sent an information document request (IDR) dated January 29, 2016, requesting that Savory Kitchen provide its books and records including its general ledger, general journal, sales invoices, sales tax exemption documents, bank statements, sales journals, and lease/rental agreements. The Division sent an IDR dated February 1, 2016,¹ requesting Savory Kitchen provide its books and records including its general ledger, general journal, sales invoices, sales tax exemption documents, bank statements, sales journals, lease/rental agreements, guest checks, cash register tapes, and utility bills.

5. The Division notified the restaurant by a letter dated April 14, 2016 that the audit period would be expanded to March 1, 2013 through February 29, 2016. The Division sent an IDR dated April 14, 2016, requesting Savory Kitchen provide the previously requested books and records for the entire period under audit.

¹ The Division failed to provide any explanation why the second IDR was sent so soon after the first IDR was sent to the restaurant.

6. Savory Kitchen's accounting firm wrote a letter to the Division, dated October 27, 2016, wherein the accounting firm noted that the restaurant did not have adequate books and records and could not provide the Division records for an audit sampling.

7. Savory Kitchen's accounting firm wrote a letter to the Division, dated November 11, 2016, wherein the accounting firm asserted that petitioner, Mr. Sak K. Lee, was in charge of the kitchen and petitioner, Ms. Susanna S. Yuen, came in during the weekends to help with the business and also prepare the payroll and tax filings. The accounting firm noted that the restaurant permanently closed on September 30, 2016. The letter again noted that Savory Kitchen did not do an adequate job keeping records, it had no cash register or credit card machine, and it could not provide the detailed records the Division requested in its IDRs. The letter also noted that most of the restaurant's business was take-out orders.

8. Except as noted, petitioners provided the Division no detailed records for the business operations. Petitioners did provide the lease agreement for the restaurant and a few of the utility bills/invoices for the periods at issue. The lease agreement for the restaurant covered the period of August 1, 2013 through August 31, 2023.

9. The Division's auditor, Nathan Finkelshteyn, testified at the hearing. The Division considered estimating Savory Kitchen's sales based upon the use of a utility factor but determined that it had received an insufficient number of utility bills/invoices to accurately calculate sales based on that factor. The Division determined that the more reliable approach to estimate sales would be to utilize the more complete information it had for the restaurant's rent.

10. The Division utilized the Restaurant Operations Report, 2013-2014 edition, published by the National Restaurant Association in conjunction with Deloitte & Touche, LLP (the Report). Relevant pages of the Report were included in the audit report that was entered into evidence.

The Division utilized the median rent factor for full-service restaurants with average checks of between \$10.00 and \$14.99 from the Report. According to the auditor, in an attempt to be reasonable, the Division used the median rent factor as opposed to the upper quartile factor for that average check size from the Report. The Division considered utilizing the median rent factor for full-service restaurants with average checks of under \$10.00, however the resulting additional sales tax petitioners would have been liable for under that method was greater than using the median rent factor for full-service restaurants with average checks of between \$10.00 and \$14.99. Based upon the Division's investigator's findings of the prices of meals in the restaurant on the menu, that the minimum free delivery order had to be at least \$15.00, and that use of a lower average check would result in more taxes due, the Division decided to utilize the factor that resulted in the lower tax amount due. The Division divided the gross rent paid for the entire period at issue by the applicable rent factor from the Report to determine the estimated dollar amount of sales for the period at issue. The Division then subtracted the gross sales reported on Savory Kitchen's sales tax returns for the period at issue from the total estimated sales for the period. The Division then projected the additional sales out per applicable quarter and multiplied the additional sales by the applicable sales tax rate to determine the additional sales tax due by quarter. The resulting additional tax due was allocated to the periods at issue.

11. The Division issued Savory Kitchen notice of determination number L-046509318, dated May 26, 2017, for the tax amount of \$146,763.86, plus interest and penalty, for the period of September 1, 2013 through February 29, 2016. Savory Kitchen protested the notice to the Division's Bureau of Conciliation and Mediation Services (BCMS). BCMS issued an order on March 16, 2018 sustaining the notice. Petitioner filed a petition with the Division of Tax

Appeals on March 30, 2018. The petition for Savory Kitchen was signed on behalf of the corporation by Ms. Yuen and Mr. Lee.

12. On July 10, 2013, Ms. Yuen executed a New York State Application to Register for a Sales Tax Certificate of Authority (form DTF-17) on behalf of Savory Kitchen. On the application, Ms. Yuen indicated that her primary duties were handling all of the bookkeeping records and documents for the restaurant.

13. Savory Kitchen provided the Division a power of attorney form dated April 1, 2016; the power of attorney form had been executed by Ms. Yuen as “PRESIDENT/OWNER.” Savory Kitchen provided the Division a power of attorney form dated May 3, 2017; the power of attorney form had been executed by Mr. Lee as “PRESIDENT/OWNER.”

14. Savory Kitchen provided the Division a completed sales tax examination questionnaire (form DO-1632); the questionnaire was signed by Ms. Yuen as the owner of the restaurant and listed her name as the contact person for the audit. On the questionnaire, Ms. Yuen indicated that the restaurant generated about 100 sales invoices a year.

15. Ms. Yuen signed two consents to extend the statute of limitations for the audit of the restaurant on behalf of Savory Kitchen. Ms. Yuen executed several of Savory Kitchen’s New York State sales and use tax returns that were filed during the periods at issue.

16. Ms. Yuen signed a responsible person questionnaire (form AU-431) for Savory Kitchen on February 12, 2016. On the questionnaire Ms. Yuen indicated that she was an owner and a responsible person for Savory Kitchen, and that she was responsible for preparing the sales tax returns, that she derived substantial income or had a substantial economic stake in the business, that she managed the business, directed payment of the bills, acted on behalf of the business with the Division, signed power of attorneys for the business, and that she issued all checks when

necessary. Mr. Lee signed a responsible person questionnaire (form AU-431) on May 3, 2017, indicating that he was a responsible person of Savory Kitchen.

17. The Division determined that petitioners Mr. Lee and Ms. Yuen were each a responsible person of Savory Kitchen.

18. The Division issued petitioner Ms. Yuen notice of determination number L-046513882, dated May 30, 2017, for the tax amount of \$146,763.86, plus interest and penalty, for the period of September 1, 2013 through February 29, 2016.

19. The Division issued petitioner Mr. Lee notice of determination number L-046513881, dated May 30, 2017, for the tax amount of \$131,458.92, plus interest and penalty, for the period of March 1, 2014 through February 29, 2016.²

20. At the hearing in this matter, both Ms. Yuen and Mr. Lee testified under oath that they were responsible persons of Savory Kitchen.

21. The original hearing for the petitions was scheduled for October 1, 2019. That date was adjourned several times, in significant part, because petitioners indicated they would be obtaining legal representation. Petitioners never obtained a legal representative and a consolidated hearing for the petitions was held in Albany, New York, on November 13, 2020.

22. At the hearing, petitioners submitted documents relating to a federal lawsuit against Savory Kitchen. Petitioners asserted that the lawsuit pertained to an American with Disabilities Act (ADA) violation claim. Petitioners asserted that the lawsuit negatively impacted Savory Kitchen's business.

23. During the hearing, petitioners asserted that there was construction work done on Grand Street in New York City, the street Savory Kitchen was located on or near, and this construction

² The Division failed to provide any explanation why the liability periods for Ms. Yuen and Mr. Lee differed.

work resulted in Savory Kitchen having no business at all. The hearing record was left open until December 4, 2020, for the submission of evidence by petitioners relating to road work on Grand Street.

24. On December 1, 2020, petitioners sent three additional documents to the Division of Tax Appeals. The first is a one-page reconstruction newsletter from the Office of Community Outreach and Notification for the periods September 2014 through October 2014. The second is a one-page document entitled: "The City Record Online." The third is a 43-page document entitled: "Installation of Truck Water Mains along Grand Street Phase II." All three documents were accepted into the record as in compliance with the undersigned's order at the hearing to leave the record open until December 4, 2020 for certain evidence. The documents indicate that the City had undertaken construction along Grand Street in order to, among other things, rebuild the City's aging water distribution infrastructure, reconstruct the curbs and sidewalks, and reconstruct the roadway. The project was broken down into two phases. Each phase would address different segments of Grand Street. Phase one would take approximately two years and phase two would take approximately three years. The project would take place during portions of the periods at issue. However, the documents indicate that Grand Street would not be closed during the project; rather two-way traffic along portions of Grand Street would be re-routed into one-way traffic during phase two of the project. The documentation appears to indicate that the New York City subway station entrances close to the project would remain open, and bike and pedestrian lanes would remain open during project's duration. The documentation indicates that phase one of the Grand Street project began in April 2014.

25. Petitioners attempted to submit additional evidence on February 23, 2021 and again with their reply brief which was filed on April 21, 2021; such additional submissions were returned to petitioners.

SUMMARY OF THE PARTIES' POSITIONS

26. In their briefs, petitioners assert that Ms. Yuen should not be held liable as a responsible person of Savory Kitchen. Petitioners claim that the Division's estimate of additional sales tax due is wrong and should be less because of the ADA lawsuit and the New York City Grand Street construction project. Finally, petitioners claim their due process rights were violated because the Division's investigator did not testify at the hearing.

27. The Division asserts that given the lack of business records made available by petitioners, the Division was justified in utilizing an estimate to determine Savory Kitchen's sales and that use of the rent factor was reasonable under the circumstances. The Division asserts that Ms. Yuen already agreed that she was a responsible party and that the other evidence in the record supports this conclusion.

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).”

D. 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.*). The estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W. T. Grant Co. v Joseph*, 2 NY2d 196 [1957], *cert denied* 355 US 869), but exactness in the outcome of the audit method is not required (*Matter of*

Markowitz v State Tax Commn., 54 AD2d 1023 [3d Dept 1976], *affd* 44 NY2d 684 [1978]; *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 [3d Dept 1986]) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v Tully*, 85 AD2d 858 [3d Dept 1981]; *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 [3d Dept 1986]).

E. In the present matter, the record shows that the Division made several written requests for the restaurant's books and records. Petitioners maintained almost no business records and very little was provided in response to the Division's requests. Petitioners' own accountant admitted the restaurant maintained insufficient records. Because the restaurant provided almost no business records the Division properly determined that the records provided were inadequate and that use of external indices was appropriate. The Division considered using the limited utility bill information that had been provided but determined that more complete information had been provided for the restaurant's rental expenses for the period; accordingly, the Division determined to use a rent factor to estimate the restaurant's sales.

F. The Division's auditor utilized the Report to estimate the restaurant's sales based upon rent. The Report is widely available to the public. The Division explained that based upon a physical visit to the restaurant and a review of its menu it had determined that the restaurant was full-service, had a minimum take-out order of \$15.00 for free delivery and that average bills would be between \$10.00 and \$14.99 each. Petitioners argue that the average bills would be

less; however, as the auditor found, application of such a finding (i.e., average bills of less than \$10.00 each) would only increase the total estimated sales of the restaurant for the period. The Division considered this approach and chose the result that produced lower gross sales for the restaurant. The Division utilized the rent paid by the restaurant based upon the restaurant's actual lease agreement.

G. When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (*Matter of New Intrigue Jewelers, Inc.*, Tax Appeals Tribunal, March 6, 2014, citing *Matter of Grant Co. v Joseph*, 2 NY2d 196 [1957], *cert denied* 355 US 869 [1957]); exactness is not required (*Matter of New Intrigue Jewelers, Inc.*, citing to *Matter of Meyer v State Tax Commn.*, 61 AD2d 223 [3d Dept 1978], *lv denied* 44 NY2d 645 [1978]; *Matter of Markowitz v State Tax Commn.*, 54 AD2d 1023 [3d Dept 1976], *affd* 44 NY2d 684 [1978]). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (*Matter of New Intrigue Jewelers, Inc.*, citing *Matter of Meskouris Bros. v Chu*, 139 AD2d 813 [3d Dept 1988]; *Matter of Surface Line Operators Fraternal Org. v Tully*, 85 AD2d 858 [3d Dept 1981]).

H. Here, petitioners did not provide the requested books and records for the audit period. As such, the Division properly determined that petitioner failed to meet its statutory obligations under the Tax Law. Therefore, the Division was entitled to estimate petitioners' tax liability using an indirect audit methodology.

I. The use of a rent factor to estimate taxable sales is reasonable under appropriate circumstances (*see Matter of Constantini*, Tax Appeals Tribunal, January 10, 2008; *Matter of Your Own Choice*; *Matter of Bitable on Broadway*, Tax Appeals Tribunal, January 23, 1992,

confirmed Matter of Bitable on Broadway v Wetzler, 199 AD2d 633 [3d Dept 1993]; *cf Matter of Abbasi*, Tax Appeals Tribunal, June 12, 2008). As noted in *Matter of Bitable on Broadway*, the key to the approval of a rent factor audit is the identification in the record of the statistical report from which the rent factor is derived. This allows the taxpayer both the opportunity to review the relevant report and the ability to introduce evidence to challenge the soundness or applicability of the report. The Division identified and introduced into the record copies of the relevant pages of the Report on which its calculations were based. The Division's auditor testified about how the Report was used and his calculations were performed.

J. Whether the audit method used was reasonably calculated to reflect the taxes due can only be determined based on information made available to the auditor before the assessment is issued (*see Matter of Queens Discount Appliances*, Tax Appeals Tribunal, December 30, 1993; *Matter of House of Audio of Lynbrook*, Tax Appeals Tribunal, January 2, 1992). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*see Matter of Meskouris Bros. v Chu*; *Matter of Surface Line Operators Fraternal Org. v Tully*).

K. Petitioners challenge the average dollar amount of each sale that was used by the Division in its estimation. Petitioners claim the restaurant's average sale was between the \$5.00 and \$9.99 range. However, petitioners do not offer any compelling evidence for this finding; moreover, as noted above, such a conclusion would only increase the amount of the restaurant's estimated sales and accordingly the total tax due for the period at issue.

L. Petitioners aver that because of the ADA lawsuit and the Grand Street work project, their estimated sales should be much less.³ Petitioners do not articulate or provide compelling support for any reasonable number of how much less the estimated sales should be. It is petitioners' burden to establish by clear and convincing evidence how much less the estimated sales should be. The extremely broad-based assertions made by petitioners in this case are insufficient to meet their burden of proof. In essence, petitioners explain that there were potential mitigating factors that might justify a reduction in the estimated sales; however, petitioners do not offer compelling evidence of what the dollar amount of that reduction should be. Moreover, with regard to the Grand Street work project, the evidence in the record indicates that although there was work performed on the roadway in front of or near the restaurant, traffic routes remained open throughout the project. Furthermore, the Division's initial investigation of the restaurant took place on a day when the Grand Street work project was already underway, so arguably the Division's examination already took the project into consideration.

M. The Division has established that the audit method utilized to estimate the restaurant's sales for the period at issue was reasonable at the time the audit was conducted. Petitioners fail to meet their burden to show error in the audit method or that any subsequent adjustment should be made to the amount assessed. Petitioners offered insufficient evidence to show that the use of a rent factor lacked a rational basis, that the specific rent factor used herein was unreasonable or inaccurate or that subsequent adjustments to the estimated sales determined were necessary. Any imprecision or assessment resulting from a taxpayer's failure to make books and records

³ Mr. Lee asserts that the restaurant had no sales during the period the Grand Street work project was undertaken. However, the restaurant's own sales tax returns indicate that sales did in fact occur during the Grand Street work project.

available as required by Tax Law § 1135 must be borne by the taxpayer (*see Matter of Markowitz v State Tax Commn.*).

N. Petitioners Ms. Yuen and Mr. Lee bear the burden of proof to show, by clear and convincing evidence, that they were not persons required to collect tax of Savory Kitchen under Tax Law §§ 1131 (1) and 1133 (a) (*see Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998). 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 [3d Dept 1987]). Various factors are considered 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 [3d Dept 1994]). 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 [3d Dept 2007]).

In this case, at the hearing, both petitioners Ms. Yuen and Mr. Lee acknowledged that they were individuals responsible for the collection and remittance of sales tax on behalf of Savory Kitchen. In the briefs filed after the hearing, Ms. Yuen asserted she was not a responsible party. Mr. Lee did not challenge the representation he made at the hearing regarding

his status as a responsible person. Initially, it is noted that representations parties make at a hearing under oath may be given significant weight by an administrative law judge

Confirming her representations made at the hearing, throughout the audit period and subsequent thereto, Ms. Yuen took actions and made representations that justify finding her a responsible person for Savory Kitchen. She executed the New York State applications to register for sales tax for the restaurant; she signed a power of attorney form for Savory Kitchen indicating she was the president and owner; she signed a sales tax examination questionnaire as the owner and contact person of Savory Kitchen; she signed multiple consents to extend the audit of the restaurant; she filed out and signed a responsible person questionnaire indicating she was a responsible person of Savory Kitchen; she prepared sales tax returns; she derived substantial income or had a substantial economic stake in the business; she managed the business; directed payment of the bills; and issued all of the business' checks. Even absent the representations made at the hearing, the record more than adequately supports the finding that Ms. Yuen was a responsible person for Savory Kitchen. In order to prevail, petitioner is required to establish by clear and convincing evidence that she was not an officer having a duty to act on behalf of the corporation, i.e., that she lacked the necessary authority or she had the necessary authority, but he was thwarted by others in carrying out her corporate duties through no fault of her own (*see Matter of Goodfriend*). Petitioner, Ms. Yuen has failed in this regard.

O. Turning to the issue of penalty and interest abatement, the Division asserted penalties and interest herein pursuant to Tax Law § 1145 (a) (1) (i), (ii) and (vi). Subparagraph (i) requires a penalty for the failure to timely file a return or timely pay sales and use tax. Subparagraph (ii) requires the imposition of interest at a late-payment (or penalty) rate. Subparagraph (vi) requires a penalty for the failure to report and pay an amount in excess of 25% of the amount required to

be shown on a return. Such penalties may be abated upon a showing of reasonable cause and an absence of willful neglect (Tax Law § 1145 [a] [1] [iii] and [vi]). Interest exceeding that imposed at the underpayment interest rate set by the Commissioner of Taxation under Tax Law § 1142 (9) may be abated on the same basis (Tax Law § 1145 [a] [1] [iii]). Interest imposed at the underpayment rate pursuant to Tax Law § 1142 (9) generally may not be canceled (*cf.* Tax Law § 3008).

Petitioner bears the burden of establishing reasonable cause as well as the absence of willful neglect (*see Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). This is a difficult task because “[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 tax according to a particular timetable be treated as a largely unavoidable obligation [citation omitted]” (*see Matter of Laham*, Tax Appeals Tribunal, October 27, 2016, citing *Matter of MCI Telecommunications, Corp.*, Tax Appeals Tribunal, January 16, 1992).

Petitioners have not established reasonable cause for abatement of penalties and penalty interest in the present matter. Petitioners clear failure to maintain records as required by Tax Law § 1135 (a) (1) is indicative of willful neglect and thus supports the imposition of penalties (*see Matter of Lima Florists*, Tax Appeals Tribunal, December 15, 1988). Here, petitioners failed to make adequate books and records available for audit and substantially underreported and underpaid the tax due. Under such circumstances, the waiver of penalties is not justified.

P. Petitioners attempted to submit additional evidence for consideration on February 23, 2021, and again with their reply brief on April 21, 2021. As the record in this matter was closed on December 4, 2020 (*see* finding of fact 23), the additional evidence will not be considered (*see Matter of March*, Tax Appeals Tribunal, November 26, 2018; *see also Matter of Ippolito*, Tax

Appeals Tribunal, August 23, 2012, *affd sub nom Matter of Ippolito v Commissioner of N.Y. State Dept. of Taxation and Fin.*, 116 AD3d 1176 [2014]).

Q. Petitioners assert that their due process rights were violated because the Division's investigator did not testify at the hearing. Petitioners' argument that its due process rights were violated is without merit. Although the Division did not produce its investigator as a witness at the hearing for petitioners to cross-examine, the record indicates that petitioners did not make a request of this administrative law judge to subpoena either the investigator or any other witness, an action authorized by the State Administrative Procedure Act § 304 (2) and the Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.7).

As the Tax Appeals Tribunal noted in *Matter of Matson* (Tax Appeals Tribunal, March 10, 1988, citing *Eagle v Patterson*, 57 NY2d 831 [1982]):

“petitioners must request a witness pursuant to this section of the State Administrative Procedure Act in order for failure to produce such witness to offend petitioner's due process rights.”

Furthermore, the Division's auditor testified at the hearing and discussed the audit and application of the rent factor in detail. The Division's auditor was subject to petitioners' cross-examination. Petitioners failed to provide any clear and convincing evidence that challenged the investigator's or auditor's relevant findings.

R. The petitions of Savory Kitchen, Inc., Susanna S. Yuen and Sak K. Lee are denied, and notices of determination number L-0460509318, dated May 26, 2017; number L-046513882, dated May 30, 2017; and number L-046513881, dated May 30, 2017, are sustained.

DATED: Albany, New York
October 21, 2021

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE