

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
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of	:	
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<b>BABU WINE &amp; LIQUOR, INC.</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 830277</b>
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, 2015 through May 31,	:	
2018.	:	

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Petitioner, Babu Wine & Liquor, 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, 2015 through May 31, 2018.

A hearing was held before Nicholas A. Behuniak, Administrative Law Judge, in Brooklyn, New York, on May 15, 2024, with the final brief to be submitted by September 27, 2024, which date began the six-month period for the issuance of this determination. Petitioner appeared by its employee, Kuldip Madan. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel).

***ISSUE***

Whether petitioner has established reasonable cause and not willful neglect for its failure to maintain and provide proper books and records pursuant to Tax Law § 1145 (i) and its failure to maintain and provide records in electronic format pursuant to Tax Law § 1145 (k).

### ***FINDINGS OF FACT<sup>1</sup>***

The Division of Taxation (Division) submitted 52 proposed findings of fact pursuant to SAPA § 307 (1) and 20 NYCRR 3000.15 (d) (6). The Division's proposed findings of fact 5, 13, 17, 19, 27 and 39 are supported by the record, and have been consolidated, condensed, combined, renumbered, and substantially incorporated herein. The Division's proposed findings of fact 2 through 4, 11, 12, 16, 22 through 26, 28, 30 through 35, 37, 38, 41 through 43, and 48 through 50 have been modified to more accurately reflect the record and/or accepted in part and rejected in part as conclusory, irrelevant and/or not supported by the record; to the extent accepted they have been consolidated, condensed, combined, renumbered, and substantially incorporated herein, as modified. The Division's proposed findings of fact 1, 6 through 10, 14, 15, 18, 20, 21, 29, 36, 40, 44 through 47, 51 and 52 are rejected as conclusory, irrelevant, already included in another fact and/or not supported by the record.

1. The Division conducted a sales and use tax audit of petitioner, Babu Wine & Liquor, Inc., for the period, September 1, 2015 through May 31, 2018. The Division had previously conducted a sales and use tax audit of petitioner for a three-year period ending August 2015 (prior audit). As a result of the prior audit, the Division assessed petitioner additional tax in the amount of \$112,646.66, plus interest. During the prior audit, petitioner provided only bank statements and check stubs in response to a records request. The Division found that petitioner failed to maintain source documents, such as sales records and cash register tapes, and that its records were not computerized. Petitioner agreed with the Division's assessment of additional tax and represented that it would thereafter use an electronic point of sale (POS) system to

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<sup>1</sup> Official notice of the record of the proceedings in ***Matter of Singh*** (Tax Appeals Tribunal, June 3, 2024) is taken pursuant to State Administrative Procedure Act (SAPA) § 306 (4). Sukhwinder Singh was a responsible officer of petitioner herein. The audit performed by the Division in ***Matter of Singh*** is the same audit at issue in this case.

account for its sales going forward. As a result of this representation, and because petitioner had no prior audit history, the Division did not assess petitioner penalties for either failing to remit the proper amount of tax due or for failure to maintain proper books and records for the prior audit period.

2. The Division sent petitioner an appointment letter, dated June 21, 2018, informing petitioner of the audit for the current period at issue requesting that petitioner make its relevant books and records available to the Division. The letter stated that all documentation to support the filed tax returns must be provided in “auditable form and electronic form (if available).” Attached to the appointment letter was an information document request (IDR No. 1) that specified a detailed list of records required for the audit period. The records requested included: sales tax returns, worksheets and cancelled checks; federal income 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, cancelled checks and deposit slips; cash receipts journal; cash disbursements journal; the corporate book, including minutes, board of directors, and articles of incorporation; depreciation schedules; lease contracts; State Liquor Authority licenses; utility bills; guest checks; and cash register tapes. In response to IDR No. 1, petitioner provided its federal income tax returns, a limited number of merchandise purchase invoices, bank statements and utility bills but, otherwise, failed to provide the information requested.

3. During the audit, a representative for petitioner indicated that petitioner’s sales tax returns were completed based upon its bank statements. Soon after the audit commenced, petitioner’s representative informed the Division that the POS system was damaged due to

flooding. The Division informed petitioner's representative that petitioner should hold onto the POS system hardware so that the Division could attempt to conduct a "POS extraction" whereby the Division would attempt to obtain necessary sales information from the damaged POS system hardware. Petitioner agreed to such an arrangement.

4. On November 15, 2018, the Division sent petitioner a second IDR (IDR No. 2) requesting the documentation included in IDR No. 1 that had not been provided to the Division. In response to IDR No. 2, petitioner indicated that additional documentation would be forthcoming to the Division; however, no additional documentation was provided at that time.

5. On February 12, 2019, the Division sent petitioner a third IDR (IDR No. 3) requesting the documentation included in IDR No. 1 and IDR No. 2 that had not been provided to the Division. In addition, on February 12, 2019, the Division sent petitioner a penalty intent letter explaining that the records it had provided were inadequate and the Division was allowing petitioner an additional 30 days to provide the requested records or penalties would be imposed.

6. On March 21, 2019, the Division sent petitioner a statement of proposed audit change, form AU-346, proposing \$106,000.00 in penalties for its failure to maintain and provide proper books and records. The \$106,000.00 represented penalties asserted of \$5,000.00 for each quarter in the period at issue, except for the first quarter in which the penalties asserted were \$1,000.00, for the failure to maintain appropriate records and make them available to the commissioner, and \$5,000.00 for each quarter in the period at issue for the failure to make records available and accessible in electronic format.

7. On March 27, 2019, after petitioner's failure to provide the electronic POS records, the Division advised petitioner's representative that it wanted to extract the records from the POS system that was allegedly damaged by flooding.

8. On April 30, 2019, petitioner informed the Division that it did have the POS system functioning and would provide the requested information.

9. On May 14, 2019, petitioner presented the Division with reports from its POS system (POS summary reports) that only provided the gross total quarterly sales, exempt sales, taxable sales, tax collected and total number of transactions for the quarters ending November 2015, February 2016 and May 2016.

10. On June 11, 2019, the Division sent petitioner a second form AU-346 proposing \$106,000.00 in penalties for the failure to maintain proper books and records.

11. The Division determined that it was unable to perform a detailed audit based upon the documentation that petitioner provided. Instead, it estimated the tax due based on, among other items, a mark-up of petitioner's purchases, information from federal income tax returns, and the Division's third-party database for beer, wine and liquor stores.<sup>2</sup> The Division issued notice of determination number L-050141457, dated June 27, 2019, asserting penalties of \$106,000.00 for petitioner's failure to maintain proper books and records.

12. The audit records indicate that, on September 12, 2019, petitioner provided the Division additional POS summary reports for the quarters ended November 2015, February 2016, May 2016, August 2016, November 2016, February 2017, May 2017, August 2017, November 2017, February 2018 and May 2018.

13. Petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of notice of determination number L-

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<sup>2</sup> Based on its estimate, the Division assessed additional sales tax, penalties and interest against petitioner for the period at issue. That assessment is not at issue in this case as it was not part of the petition for this matter.

050141457. By order, dated October 30, 2020 (CMS No. 000314400), notice of determination number L-050141457 was sustained by BCMS.

14. On November 30, 2020, petitioner timely filed a petition challenging CMS No. 000314400.<sup>3</sup>

15. At the hearing in *Matter of Singh*, Althea Alexander, sales tax auditor, testified for the Division and discussed the audit of petitioner. Kuldip Madan testified on behalf of petitioner about its operations. Mr. Madan testified that a flood had damaged petitioner's POS system but that it had been repaired. At the hearing in *Matter of Singh*, there was no explanation provided for what happened to petitioner's other records including its purchase and sales invoices and receipts, general ledgers or cash register tapes. On exception before the Tribunal, the taxpayer in *Matter of Singh* alleged that petitioner's books and records were destroyed by flooding.

16. At the hearing for the current matter, Ms. Alexander again testified for the Division and discussed the audit of petitioner. She reiterated that the Division was never given access to petitioner's POS system and never received any of petitioner's purchase and sales invoices or receipts, general ledgers, or cash register tapes in hard copy or in an electronic format.

17. Mr. Madan also testified for petitioner at the hearing for the current matter and asserted that petitioner had the POS system repaired and, subsequently, it provided all the information requested by the Division. At the hearing, petitioner submitted into evidence: a copy of spreadsheet pages prepared by the Division which appear to summarize information obtained from petitioner's POS summary reports; a copy of certain pages of a statement of proposed audit change for sales and use taxes issued by the Division; a copy of certain pages of a consolidated

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<sup>3</sup> The petition listed multiple parties as petitioners. The petition was bifurcated and separate DTA numbers were assigned. The current matter involves only petitioner and conciliation order CMS No. 000314400 and notice of determination number L-050141457.

statement of tax liabilities issued by the Division; and, what appears to be a copy of certain POS summary report pages.<sup>4</sup>

18. Petitioner alleges that, during the audit, its officers and accountant were incapacitated by the COVID-19 pandemic and were unable to fully respond to the Division's audit requests. Petitioner also asserts that all of its relevant financial books and records and detailed POS reports have already been provided to the Division.

19. Other than the documents noted in finding of fact 17, petitioner did not offer into evidence any additional financial books or records, including any detailed POS reports or the POS system hardware itself. At the hearing, petitioner failed to offer proof that it provided the Division additional books or records beyond what was accepted into evidence in the *Matter of Singh*.

### **CONCLUSIONS OF LAW**

A. Petitioner bears the burden of proof to overcome the presumed correctness of the Division's assessment (*see Matter of Mera v Tax Appeals Trib.*, 204 AD2d 818, 821 [3d Dept 1994]; *see also Matter of Blodnick v New York State Tax Commn.*, 124 AD2d 437, 438 [3d Dept 1986], *appeal dismissed* 69 NY2d 822 [1987]).

B. 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.”

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<sup>4</sup> The name “Freeport Wine & Liquor Busters” is listed on the top of the POS summary report pages submitted into evidence. Neither party identified the relationship between that entity and petitioner.

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

C. The Division asserted penalties pursuant to Tax Law § 1145 (i) and (k). Tax Law § 1145 (i) provides in relevant part:

“Any person required to make or maintain records under this article (but not including the records required under section eleven hundred forty-two-A of this part) who fails to make or maintain or make available to the commissioner these records is subject to a penalty not to exceed one thousand dollars for the first quarter or part thereof for which the failure occurs and not to exceed five thousand dollars for each additional quarterly period or part thereof for which the failure occurs. This penalty is in addition to any other penalty provided for in this article but may not be imposed and collected more than once for failures for the same quarterly period or part thereof. If the commissioner determines that a failure to make or maintain or make available records in any quarter was entirely due to reasonable cause and not to willful neglect, the commissioner must remit the penalty imposed for that quarter”

Tax Law § 1145 (k) provides in relevant part:

“Any person who, having elected to maintain in an electronic format any portion or all of the records he or she is required to make and maintain by this article, fails to present and make these records available and accessible to the commissioner in electronic format, is subject to a penalty not to exceed five thousand dollars for each quarterly period or part thereof for which these electronic records are not presented and made available and accessible upon request, notwithstanding that the records may also be maintained and available in hard copy format. This penalty is in addition to any other penalty provided for in this article, but may not be imposed and collected more than once for a failure for the same quarterly period or part thereof. Provided, however, nothing in this subdivision will prevent the separate imposition, if applicable, of any penalty imposed by subdivision (i) or (j) of this section for the same quarterly period or part thereof. If the commissioner determines that the failure to present and make electronically maintained records available and accessible for a quarterly period was entirely due to reasonable cause and not to willful neglect, the commissioner must remit the penalty imposed for that quarter. . . . For purposes of the penalty imposed by this subdivision, a failure to present and make available and accessible a record maintained in electronic format includes not only the denial of access to the requested records that were maintained electronically, but also the failure to make available to the commissioner the information, knowledge, or means necessary to



access and otherwise use the electronically maintained records in the inspection and examination of these records.”

In this case, petitioner failed to maintain and supply the Division with the documentation required under the Tax Law. Petitioner asserts that it has already supplied such documentation to the Division, however, the record does not support this assertion. Moreover, petitioner had implemented an electronic POS system. Petitioner’s POS system was allegedly damaged by flooding and the Division requested the opportunity to retrieve the financial information itself from the POS system. Petitioner agreed to this request. However, the Division was never provided access to the system. Furthermore, petitioner’s witness testified that its POS system had subsequently been repaired and the relevant financial information was provided to the Division. The POS summary report pages list the gross amounts of quarterly information and are not a substitute for access to the POS system itself or what is required to be maintained as books and records for a business (*see Matter of Singh*). Petitioner failed to establish that it provided the Division with any additional substantive financial data from the POS system (*see* finding of fact 19).

D. Petitioner claims that its books and records were destroyed by a flood. The destruction of petitioner’s business records by a flood may constitute reasonable cause where the casualty is documented, and the taxpayer establishes that the records were damaged or destroyed (*see Matter of Singh* citing 20 NYCRR 2392.1 [d] [2] [i]). In this case, the record lacks any evidence of the casualty, such as the date the event occurred, the extent of any damage or whether the business continued to operate after the event in question. Petitioner provided no documentary or corroborating proof to establish the extent of the alleged damage and destruction of its business records and the POS system. Moreover, petitioner claims it already provided all the subject records to the Division. However, the record does not contain any of the detailed

records petitioner claims it provided the Division and petitioner fails to provide any proof that such records were ever sent to the Division. Petitioner's unsupported and conflicting claims strain credulity and are given little weight.

E. Petitioner now claims that it could not timely respond to the Division's request for records because certain relevant parties were affected by the COVID-19 pandemic. Although illnesses may justify slower response times to the Division's records requests, ultimately petitioner was still obligated to provide the relevant books and records at some point. In this case, years have passed since the audit was completed by the Division and petitioner failed to provide the relevant records. Accordingly, the Division's assessment of penalties pursuant to Tax Law § 1145 (i) and (k) was appropriate.

F. As noted, the penalties imposed pursuant to Tax Law § 1145 (i) and (k) may be abated upon a showing of reasonable cause and an absence of willful neglect. 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).

Petitioner has not established reasonable cause for abatement of penalties in the present matter. Although losing records due to flooding may be a circumstance warranting the abatement of penalties, petitioner's failure to provide the Division access to the damaged POS system was unexplained. Even after the POS system was allegedly repaired, petitioner failed to provide the Division with access to the hardware for the system. Moreover, as noted, petitioner fails to establish that a flood destroyed its books and records.

Furthermore, petitioner now makes unsubstantiated claims that it already provided the Division with all the records requested. Such actions are indicative of a willfulness to thwart the

requirements of the Tax Law. Under such circumstances, petitioner failed to establish that the Division improperly imposed penalties in this matter.

G. The petition of Babu Wine & Liquor, Inc., is denied, and the notice of determination number L-050141457, dated June 27, 2019, is sustained.

DATED: Albany, New York  
March 27, 2025

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE