STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHMOND ALUMINUM LLC	:	DETERMINATION DTA NO. 831273
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, 2019 through May 31, 2022.	:	
	:	

Petitioner, Richmond Aluminum LLC, 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, 2019 through May 31, 2022.

A formal hearing was held by videoconference before Anita K. Luckina, Administrative Law Judge, on January 15, 2026, at 10:30 A.M., with the final brief to be submitted by May 22, 2026, which date began the six-month period for the issuance of this determination. Petitioner, appeared by Anthony Bonelli and Associates, LLC (Anthony Bonelli, EA). The Division of Taxation appeared by Amanda Hiller, Esq. (Kaitlyn Smith, Esq., of counsel).

ISSUES

I. Whether petitioner has established that the Division of Taxation improperly resorted to an estimated audit methodology to determine petitioner's sales and use tax lability for the period at issue.

II. Whether the audit methodology utilized by the Division of Taxation had a rational basis and was reasonably calculated to reflect the tax due.

III. Whether the Division of Taxation properly imposed penalties pursuant to Tax Law § 1145.

IV. Whether petitioner has shown reasonable cause for the abatement of penalties.

FINDINGS OF FACT

1. Petitioner, Richmond Aluminum LLC, is a building contractor with a business address of 3801 Victory Blvd. Suite F, Staten Island, New York, 10314. Petitioner primarily performed capital improvement services for homeowners and also performed some noncapital improvement services to real property and made some retail sales of tangible property, i.e., building materials, without performing any services.

2. The Division of Taxation (Division) commenced an audit of petitioner (taxpayer identification number 824272522) in August 2022 for the period March 1, 2019 through May 31, 2022 (audit period). On August 22, 2022, the audit was assigned to the Division's auditor, Brandon Jarczewski. During a pre-audit analysis, the auditor determined that petitioner was a construction contractor that appeared to be performing a mix of taxable jobs and exempt capital improvements. The auditor also discovered that petitioner had provided a form ST-120, resale certificate (resale certificate), to a supplier (***see*** finding of fact 3) and that petitioner had not reported any purchases subject to tax on its New York State sales tax returns (sales tax returns) during the audit period. In addition, petitioner late filed its sales tax returns for seven quarters during the audit period.

3. The resale certificate was a "blanket certificate" issued to Provia by petitioner at petitioner's business address in Staten Island, New York. The resale certificate was completed by petitioner, in relevant part, as follows:

"**Purchaser information** – *please type or print*

I am engaged in the business of home improv. supplies and services and principally sell windows, doors, siding, gutter

***

Part 1 – To be completed by registered New York State sales tax vendors
I certify that I am:

X a New York State vendor … . My valid *Certificate of Authority* number is 82-4272522

***

I am purchasing:
X **A**. Tangible personal property (other than motor fuel or diesel motor fuel)

- for resale in its present form or for resale as a physical component part of tangible personal property;
- for use in performing taxable services where the property will become a physical component part of the property upon which the service will be performed, or the property will actually be transferred to the purchaser of the taxable service in conjunction with the performance of the services"

The resale certificate advises that "[c]ontractors may not use this certificate to purchase materials and supplies." It also includes a certification attesting that "the above statements are true, complete, and correct, and that no material information has been omitted" and is signed by petitioner's president, Richard J. Eldredge, and dated April 12, 2018.

4. On August 24, 2022, the auditor sent an audit notification letter to petitioner stating that its sales and use tax records had been selected for audit for the period March 1, 2019 through May 31, 2022. The letter advised that the Division would review petitioner's books and records to ensure compliance with applicable tax laws. Enclosed with the letter were audit questionnaires and an information document request (IDR) particularly requesting the following: (1) sales tax returns, worksheets and cancelled checks showing taxes paid; (2) federal income tax returns; (3) New York State corporation tax returns; (4) general ledger; (5) year-end trial balance; (6) year-end financial statements; (7) general journal and closing entries; (8) sales invoices; (9) all exemption documents supporting non-taxable sales (including: resale, exempt

use, exempt organization, capital improvement certificates and any other documentation necessary to prove non-taxable sales); (10) chart of accounts; (11) fixed asset purchase/sales invoices; (12) expense purchase invoices; (13) merchandise purchase invoices; (14) bank statements, cancelled checks and deposit slips for all accounts; (15) cash receipts journal (including sales journal, if applicable); (16) cash disbursement journal (including purchase journal, if applicable); (17) the corporate book (including minutes, board of directors and articles of incorporation); (18) depreciation schedules; (19) lease/rental agreements; and (20) job cost sheets for contracts for the entire audit period. The IDR indicates that the response was due by September 16, 2022.

5. On September 15, 2022, the auditor spoke with petitioner's representative, Anthony Bonelli. The parties discussed the records to be provided. Petitioner asked for an extension of time to provide the records and the auditor requested that petitioner sign a waiver extending the time that the Division would have to audit the records.

6. On September 16, 2022, the auditor created a New York MySend account for petitioner to facilitate the secure, electronic transfer of communications and documents. On that same date, the auditor sent petitioner a form AU-2.10, consent to extension of time (waiver), allowing the Division until March 20, 2023, to determine any additional tax due for the period March 1, 2019 to February 29, 2020, and requested that the waiver be signed and returned by September 26, 2022. The auditor also requested that petitioner provide, by October 1, 2022, the following records for the period June 1, 2021 through May 31, 2022 (test period): sales invoices and or electronic line transaction detail, exemption certificates supporting exempt sales, expenses/material general ledger detail (accounts to be selected from chart of accounts) and expenses/materials corresponding to the general ledger detail for the selected accounts. The

request also included the following for the audit period: fixed asset listing, fixed asset invoices corresponding to the listing, bank statements, New York State and federal income tax returns, total gross sales per month, sales tax returns and backup/supporting schedule/worksheets/workpapers and a chart of accounts.

7. In the months after September 16, 2022, the auditor received some of the requested items, including: sales invoices and contracts; expense/materials general ledger detail and some corresponding invoices, bank statements, New York State and federal income tax returns and sales tax returns.[1]

8. The auditor reviewed the sales invoices and contracts for the test period and determined that petitioner performed primarily capital improvements and that the tax collected reconciled to the tax reported. There was no additional tax asserted due on petitioner's sales.

9. The auditor reviewed capital purchases in detail and determined that tax was paid on taxable capital purchases. There was no additional tax asserted due on petitioner's capital purchases.

10. The auditor initially reviewed expense records for the test period. The auditor reviewed the sales job invoices in conjunction with the materials and expense purchase records provided for the test period, noted exceptions, and determined that many of the materials and expense purchase records were not provided. The auditor's review also indicated that tax had not been paid on materials used in capital improvement jobs.

11. On February 9, 2023, the auditor advised petitioner that another waiver to extend the time for review for the audit period had been mailed to petitioner on February 2, 2023. The auditor also provided petitioner with preliminary workpapers regarding the expense exceptions

[1] The auditor received petitioner's executed waiver on October 21, 2022. The waiver was signed by Richard J. Eldredge, and he listed his title as "member."

for the test period. The auditor requested that petitioner provide general ledger detail for the remainder of the audit period, i.e., March 1, 2019 through May 31, 2021, by March 10, 2023, for the following accounts: cost of goods sold, materials and supplies, and job supplies.

12. On February 14, 2023, the auditor spoke with petitioner and advised that an estimated assessment must be issued if the waiver is not received.

13. On February 16, 2023, the auditor advised petitioner that the waiver had not been received. The auditor also created an assessment using the records that petitioner provided for the period June 1, 2021 through May 31, 2022 and taxable expenses reported on petitioner's federal income tax returns (also, federal returns) for the period March 1, 2019 through May 31, 2021.

14. Because the expense purchase records provided were inadequate to conduct a detailed audit for the audit period, the auditor used, in part, an indirect audit method. The auditor used the detailed expense purchase records provided by petitioner for the period June 1, 2021 through May 31, 2022 to determine tax due on expenses for that period in the amount of $39,754.54. The auditor used expense purchases reported by petitioner on its federal returns for the years 2019, 2020 and 2021 to determine tax due in the amount of $132,511.20 for the period March 1, 2019 through May 31, 2021. Specifically, the auditor totaled for each year of 2019, 2020 and 2021 the following expense types: materials/cost of goods sold, contractors, office supplies, rubbish removal, vehicle expenses, and computer and internet. The auditor then calculated a monthly allocation amount for each year. For 2019, the auditor calculated an annual expense amount of $672,463.00 and a monthly amount of $56,038.58. For 2020, the auditor calculated an annual expense amount of $661,204.00 and a monthly amount of $55,100.33. For 2021, the auditor calculated an annual expense amount of $651,588.00 and a monthly amount of

$54,299.00. Tax due was calculated at the rate of 8.875% on each detailed expense purchase and each monthly allocation amount, resulting in total taxable expense purchases for the audit period in the amount of $1,941,024.01 and total tax due on expense purchases of $172,265.74.[2]

15. A summary of the total tax due is as follows:

Quarter ending	Tax due
05/31/2019	$14,920.26
08/31/2019	$14,920.26
11/30/2019	$14,920.26
02/29/2020	$14,753.72
05/31/2020	$14,670.45
08/31/2020	$14,670.45
11/30/2020	$14,670.45
02/28/2021	$14,528.23
05/31/2021	$14,457.12
08/31/2021	$12,137.63
11/30/2021	$7,957.38
02/28/2022	$10,164.39
05/31/2022	$9,495.14
Total	$172,265.74

16. A summary of the penalty computations is as follows:

[2] Calculating tax due on the aggregated expense purchases total of $1,941,024.01 results in tax due of $172,265.88, a slight rounding error.

S-1 – statutory penalty	$48,240.92
S-5 – fraud issue/resale exempt certificate	$16,374.55[3]
T-4 – under report tax excess of 25%	$17,226.59
Total	$81,842.06

17. On February 24, 2023, the Division issued to petitioner a notice of determination, bearing assessment number L-057718654, asserting tax due in the amount of $172,265.74, plus penalties and interest (notice). The notice advised petitioner that applicable penalties were imposed pursuant to New York State Tax Law § 1145.

18. On March 9, 2023, the auditor sent correspondence to petitioner advising it to be aware of its deadline to protest its assessment. Included with that correspondence was a copy of the notice and the audit workpapers. On that same date, the auditor and petitioner discussed the basis for the assessment and additional documentation needed to adjust the assessment. The auditor also advised petitioner to revoke any resale certificates it may have on file with its vendors and to pay tax on its material purchases going forward.

19. On May 3, 2023, the auditor sent petitioner an IDR requesting that petitioner provide, by June 2, 2023, general ledger detail for the period March 1, 2019 through May 31, 2021, for the following accounts: cost of goods sold, job supplies and materials and supplies. The IDR also requested materials purchase invoices showing tax paid corresponding to the general ledger detail requested for those accounts.[4]

[3] S-5 penalty was imposed only for the period June 1, 2021 through May 31, 2022.

[4] Additional audit log entries indicate that on June 2, 2023, petitioner advised the auditor that it was working on gathering the requested records; and on June 22, 2023, the auditor had not received any additional records, and the audit was closed.

20. On April 5, 2023, petitioner timely filed a petition with the Division of Tax Appeals in protest of the notice. In response to "Section VIII Reason(s) for Dispute," petitioner asserts the following:

> "some of the sales tax has been recorded and paid. not recorded on assessment,
> what to review the mythologies [sic] and calculations.
> sales tax assessment not on proper cost."

21. Prior to the hearing, the auditor reviewed additional documentation provided by petitioner to the Division through its then-attorney, Brandon Batch. The auditor's review of that documentation resulted in adjusted tax due in the amount of $155,767.53, plus penalties and interest (***see*** finding of fact 26).

22. At the hearing, the auditor, Mr. Jarczewski, testified on behalf of the Division. Mr. Jarczewski testified that he conducted the audit of petitioner and authenticated the Division's audit file and post-audit workpapers (***see*** finding of fact 30).

23. Mr. Jarczewski testified about his review of the records provided by petitioner and his calculation of tax due on petitioner's expense purchases.

24. Mr. Jarczewski testified that the Division assessed penalties against petitioner because "[r]easonable cause was not established by the [p]etitioner." Mr. Jarczewski explained his summary of the penalty computation workpaper as "a summary of penalties that were issued for this notice, it contains S-1 penalty which is a statutory penalty, S-5 is the improper use of a resale certificate and then T-4 is underreported tax in excess of 25%."

25. Mr. Jarczewski testified that the resale certificate "was information in the [d]epartment's hands" and that "[i]t could have been provided from another potential audit or provided from a third party source." Mr. Jarczewski testified that he did not recall confirming or otherwise discussing this resale certificate with petitioner. Mr. Jarczewski noted that, per the

audit log, he had a discussion with petitioner on March 9, 2023, about the need to revoke any outstanding resale certificates, but he did not recall whether he mentioned the Provia resale certificate specifically.

26. Mr. Jarczewski testified about his post-audit determinations. Mr. Jarczewski testified that he communicated with petitioner and kept the audit open for a period of time after the notice was issued to receive additional records. Mr. Jarczewski testified that after the audit was finally closed and the petition was filed, additional documentation was provided to the Division's then-attorney Mr. Batch, and that documentation was forwarded to him. Mr. Jarczewski testified that all the documentation that was forwarded to him was contained in the Division's post-audit adjustments and documentation exhibit along with its post-audit tax calculations and adjustments (***see*** finding of fact 30). Mr. Jarczewski testified that the documentation included purchase invoices, purchase orders and corresponding sales documents showing resale to various customers. Mr. Jarczewski stated that he reviewed all the documentation provided looking for "tax [that] was paid on those corresponding sales documents showing resale to customers because this would reflect that potentially materials were potentially in some instances being resold to those customers." Mr. Jarczewski determined that "the sum of the tax detailed on the corresponding additional invoices and purchase orders that were provided" was $29,694.46, but he could only give petitioner credit for $16,498.21, because the remaining invoices were dated outside the audit period. Mr. Jarczewski explained that the invoices for which he provided credit were highlighted in yellow in the post-audit adjustments and documentation workpapers. Mr. Jarczewski explained that he subtracted the post-audit credit of $16,498.21 from the tax due of $172,265.74 asserted by the notice to determine recomputed tax due of $155,767.53, plus penalties and interest.

27. In response to petitioner's questions regarding the documentation that petitioner provided after the notice was issued, Mr. Jarczewski confirmed that he reviewed all the documentation that he received post-audit and that documentation was contained in the Division's post-audit adjustments and documentation exhibit. Mr. Jarczewski acknowledged that in his post-audit determinations he included an item in the amount of $4,555.89 in the audit period even though it was undated and assigned it to the last quarter of the audit period because "I was giving [petitioner] the benefit of the doubt there." Mr. Jarczewski also explained that he did not use petitioner's reported gross receipts on its federal returns to determine tax due on petitioner's sales. That is, he did not use gross receipts as the basis subject to tax and calculate tax due on that basis. As such, subtracting the post-audit adjustment tax credit of $16,498.21 from the tax asserted due of $172,265.74 was the only post-audit adjustment that was needed.

28. In response to petitioner's questions regarding whether petitioner could have reported use tax as sales tax on its sales tax returns, Mr. Jarczewski testified that he could not make that determination for petitioner. Mr. Jarczewski explained that sales tax collected by petitioner on its sales and reported on its sales tax return is not the same as use tax that petitioner should have paid on its materials and expense purchases. Mr. Jarczewski also noted that, based on the gross sales receipts reported on petitioner's federal tax returns for the audit period, petitioner was significantly underreporting its gross sales for sales tax purposes.

29. In response to questions about how and why expense items were selected from petitioner's federal returns as expense purchases, Mr. Jarczewski responded that he selected expense items "where you know we often see taxable items or potentially use tax due." Mr. Jarczewski testified that he used the expense items that petitioner reported on its federal returns during the audit period because he did not receive any records for the period March 1, 2019

through May 31, 2021. He further testified that if he had received the general ledger detail he "could potentially make a determination as to the individual taxability of each line transaction."

30. At the hearing, the Division submitted documents into the record, including the audit file, petitioner's sales tax returns for the audit period and the Division's post-audit adjustments and documentation.

31. At the hearing, Mr. Eldredge testified on behalf of petitioner. Mr. Eldredge testified that he "worked [at petitioner] for over 40 years before I took it over." Mr. Eldredge testified that petitioner sells primarily on an installed basis to homeowners in Staten Island but also has sales to contractors and homeowners who do their own installation. Mr. Eldredge testified that the mix of capital improvement sales and other sales changed over the years but in "the years we're talking about here for the audit was about 85% installed capital improvement jobs and 15% about just supplying it to people."

32. Mr. Eldredge acknowledged that petitioner could have issued a resale certificate to Provia. Mr. Eldredge testified that petitioner's accountant had advised petitioner to issue resale certificates.

33. Mr. Eldredge stated that he could provide additional documentation. He testified that "[b]ack when we started the audit we had a hard time getting that information." Mr. Eldredge testified that petitioner had experienced a storm-related flood that "knocked out the server and ruined [the] point of sale," but some information has since been recovered. Mr. Eldredge also testified that he "handed over the business" and documents were not retained.

34. Petitioner did not introduce any documentation at the hearing.[5]

[5] The record was held open, until February 13, 2026, to allow petitioner to submit documents relevant to the Division's determination of tax due on expenses for the audit period. The Division had until March 13, 2026, to respond.

35. On February 13, 2026, petitioner submitted additional documentation, including: payroll records, rent and vehicle expenses, utility expenses, material expenses and bank records. Mr. Eldredge's cover letter accompanying the post-hearing documentation acknowledged that "I made a mistake" and "I know I owe something."

36. On March 10, 2026, the Division submitted its response to petitioner's post-hearing documentation, including: an affidavit of Brandon Jarczewski, the Division's auditor, sworn to on March 9, 2026, and attachments consisting of revised audit workpapers.

37. The auditor's affidavit details his review of petitioner's post-hearing documentation and the corresponding adjustments he made to the audit workpapers. The affidavit also explains the adjustments that were not made. The auditor avers that "[b]ased on my review of [p]etitioner's post-hearing documentation, [n]otice of [d]etermination L-057718654-3 has been recomputed to tax of $129,795.06 plus penalties and interest."

38. The Division, in its brief, argues that it properly assessed tax on petitioner's materials and expense purchases. The Division asserts that it properly requested petitioner's books and records for the audit period and petitioner failed to provide adequate books and records for the entire audit period. As such, the Division's audit, which used only petitioner's available records, was reasonable. Further, the Division properly recomputed tax due when petitioner provided additional records, both after the audit and after the hearing, and petitioner has failed to prove that the recomputed notice is incorrect. The Division also argues that penalties were properly imposed and that petitioner "incorrectly used a ST-120 resale certificate to purchase materials from its suppliers without paying tax."

39. Petitioner did not file a brief.

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 [Tax Law § 1132 (c)] requires that tax be separately stated" (***id***.). The Division's regulations further provide that "[i]f the records of a taxpayer are determined to be incorrect or insufficient, the return filed on the basis of information obtained from such records may be deemed to be incorrect or insufficient" (20 NYCRR 533.2 [g]). If a sales tax return "when filed is incorrect or insufficient, the amount of tax due shall be determined . . . on the basis of external indices . . ." (Tax Law § 1138 [a] [1]). When acting pursuant to Tax Law § 1138 (a) (1), the Division must select an audit methodology that is reasonably calculated to reflect the tax due. The burden then rests on the taxpayer to demonstrate by clear and convincing evidence that the audit results are unreasonable or the amount of the assessment is erroneous (***see Matter of Your Own Choice***, Tax Appeals Tribunal, February 20, 2003).

B. The standard for reviewing a sales tax audit where external indices were employed is as follows:

> "The Division must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment. The purpose of the examination is to determine through verification drawn independently from within these records whether they are in fact so insufficient that it is virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit from which the exact amount of tax due can be determined. Where the Division follows this procedure, and thereby demonstrates that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax. The estimate methodology utilized must be reasonably calculated to reflect tax due, but exactness in the outcome of the audit method is not required. The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous or that the audit methodology is unreasonable. In addition, considerable

> latitude is given an auditor's method of estimating sales under such circumstances as exist in each case" (***Matter of Abbasi***, Tax Appeals Tribunal, June 12, 2008, citing ***Matter of Your Own Choice***; ***Matter of AGDN, Inc***., Tax Appeals Tribunal, February 6, 1997).

C. Here, the record establishes that the Division made a clear and unequivocal written request for books and records for the audit period. Petitioner provided some records, including sales invoices and contracts and materials and expense purchases invoices for the period June 1, 2021 through May 31, 2022. The auditor reviewed the records provided and observed that tax was not paid on materials and expense purchases. The auditor's preaudit analysis had already discovered that petitioner did not report any purchases subject to tax on its sales tax returns for the audit period. Thus, the auditor requested additional expense purchases records, particularly general ledger detail.[6] The auditor advised petitioner that the Division would have to issue an assessment using available information unless another waiver was executed extending the time the Division had to conduct the audit. Petitioner did not execute a waiver or provide any more books and records. Accordingly, it was reasonable for the Division to conclude that petitioner either did not have or did not want to provide more books and records. In fact, petitioner has acknowledged that it did not have and could not have made available the requested records (***see*** finding of fact 33).

Because the books and records provided were inadequate to determine in detail petitioner's liability for the entire audit period, the Division was entitled to use an indirect method to determine petitioner's tax liability (***see Matter of Del's Mini Deli v Commissioner of Taxation and Fin***., 205 AD2d 989, 991 [3d Dept 1994]. The Division used the detailed records that petitioner provided for the period June 1, 2021 through May 31, 2022. For the remainder of

[6] The auditor's review established to his satisfaction that no additional tax was due on petitioner's sales or capital expenses for the audit period and he requested no further records related thereto (***see*** findings of fact 8 and 9).

the audit period, to wit, March 1, 2019 through May 31, 2021, the Division reasonably used only those expenses that petitioner reported on its federal returns that the Division, in its experience, had determined are "taxable items or potentially [have] use tax due." The reasonableness of the audit is based on the information that the Division has at the time the notice is issued (***see Matter of Aum Sidhdhy Vinayak, LLC***, Tax Appeals Tribunal, December 8, 2011).

D. Because the audit method was reasonable under the circumstances, petitioner has the burden of proof to show, by clear and convincing evidence, that the audit results were unreasonable or that the amount of tax assessed was erroneous (***see Matter of Sarantopoulos***, Tax Appeals Tribunal, February 28, 1991). Petitioner failed to meet its burden. While it is true that the expense items selected by the auditor may not have been entirely taxable, exactness in the outcome of the audit method is not required (***see Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 1023 [1976], ***affd*** 44 NY2d 684 [1978]). Any imprecision in the audit results arising from a taxpayer's own failure to maintain and make available records as required by the Tax Law must be borne by the taxpayer (***id***.; ***see also Matter of Meyers v. State Tax Commn***., 61 AD2d 223, 228 [3d Dept 1978], ***lv denied*** 44 NY2d 645 [1978]). Moreover, while "credible testimony that specifically establishes that the amount of tax imposed is incorrect may itself be sufficient to require a reduction to the assessment, without corroborating documentary evidence," petitioner's general testimony about its estimated percentages of taxable and nontaxable sales without more is insufficient (***Matter of Pay TV of Greater New York, Inc.***, Tax Appeals Tribunal, July 14, 1994). Petitioner failed to produce any evidence to show that the audit results were patently unreasonable or erroneous, despite ample opportunity to do so.

The Division at all times during and after the audit reasonably considered additional documentation as petitioner made it available and adjusted its assessment accordingly. The

Division finally adjusted the notice based on documentation provided by petitioner after the hearing. The auditor provided a detailed affidavit and revised workpapers explaining its reasons for adjusting the notice to tax due of $129,795.06, plus penalties and interest, and petitioner presented no subsequent arguments challenging the Division's determinations.

E. It is well settled that considerable latitude is given an auditor's method of estimating tax due under such circumstances as exists in each case (***see Matter of Grecian Sq. v State Tax Commn.***, 119 AD2d 948, 950 [3d Dept 1986]). When selecting an audit method, the Division is required to select an audit methodology that is reasonably calculated to reflect the tax due. The reasonableness of the audit method is based on the information that the auditor has available at the time that the notice is issued (***see Matter of Aum Sidhdhy Vinayak, LLC***). Petitioner failed to show here that the audit method selected, which used petitioner's own available records, was unreasonable or that the results were erroneous. Further, petitioner was afforded ample opportunity to provide additional documentation challenging the Division's determinations. Petitioner has not met its burden to prove by clear and convincing evidence that either the audit methodology or its results were unreasonable or erroneous.

F. Having concluded that the Division properly utilized an indirect audit method and that petitioner failed to establish that its result were unreasonable or erroneous, it must be determined whether petitioner has established reasonable cause to abate penalties. The Division imposed penalties against petitioner pursuant to Tax Law § 1145 (a) (1) (i) and (vi) and Tax Law § 1145 (a) (5).

Tax Law § 1145 (a) (1) (i) provides that penalties shall be imposed for the failure to file a return or pay tax due within the time required by the Tax Law. Tax Law § 1145 (a) (1) (vi) provides that penalties shall be imposed for the failure to report and pay sales tax in an amount in

excess of 25 percent of the amount required to be shown on the return. Both penalties shall be abated for reasonable cause (***see*** Tax Law § 1145 [a] [1] [iii] and [vi]; 20 NYCRR 536.2 and 2392.1).

Specifically, Tax Law § 1145 (a) (1) (iii) provides:

> "If the commissioner of taxation and finance determines that such failure or delay was due to reasonable cause and not due to willful neglect, he shall remit all of such penalty and that portion of such interest that exceeds the interest that would be payable if such interest were computed at the underpayment rate set by the commissioner of taxation and finance pursuant to [Tax Law § 1142]. The commissioner shall promulgate rules and regulations as to what constitutes reasonable cause."

Tax Law § 1145 (a) (1) (vi) provides that the underreporting in excess of 25 percent penalty shall be abated where the omission was due to reasonable cause and not willful neglect, where the omission is attributable to tax treatment for which there is substantial authority, or where any item with respect to which the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return. Petitioner has not argued nor established that there was substantial authority for its tax treatment of the items resulting in its underreporting, or that it disclosed its tax treatment of such items in its returns or an attached statement.

In establishing reasonable cause for the abatement of penalties, the taxpayer faces an onerous task (***see Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 2013). Referring to the mandatory language of Tax Law § 1145 (a) (1) (i), the Tax Appeals Tribunal (Tribunal) has held that "the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation" (***id.***, ***Matter of MCI Telecom. Corp.***, Tax Appeals Tribunal, January 16, 1992). Petitioner has not met its

burden to establish by clear and convincing evidence that the penalties should be abated due to reasonable cause.

G. The Division also imposed penalties pursuant to Tax Law § 1145 (a) (5). Tax Law § 1145 (a) (5) provides that:

> "[a]ny person who issues a false or fraudulent resale or other exemption certificate or document with intent to evade tax shall, in addition to any other penalty imposed by this chapter, be subject to a penalty of one hundred percent of the tax that would have been due had there not been a misuse of such certificate or document and a penalty of fifty dollars for each such certificate or document."

The Division advanced no argument that petitioner issued a false or fraudulent resale certificate with intent to evade tax.[7] The Division argued only that "[p]etitioner incorrectly used a ST-120 resale certificate to purchase materials from its suppliers without paying tax." The auditor's only explanation for the imposition of penalties here was that "[r]easonable cause was not established by the [p]etitioner."[8] Further, the record does not clearly support sustaining an argument that petitioner issued a false or fraudulent resale certificate with intent to evade tax.

The facts indicate that the auditor, as part of his preaudit analysis, discovered a single resale certificate of unclear origin seemingly issued by petitioner. The resale certificate does not necessarily appear to be facially false or fraudulent, even assuming it was incorrectly used in whole or part, and the Division did not explain why it is.[9] The resale certificate was fully and legibly completed, identified petitioner by correct name,

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[7] It bears noting that the Division never particularized the authority for its imposition of this penalty, i.e., Tax Law § 1145 (a) (5), instead referring to the penalty as the S-5 penalty.

[8] Reasonable cause does not apply to this penalty (***see*** Tax Law § 1145 [a] [5]; 20 NYCRR 2392.1).

[9] In ***Matter of MediaBuss Sys., Inc.*** (Tax Appeals Tribunal, March 18, 2014), the Tribunal concluded that fraudulent intent was established, in part, for purposes of Tax Law § 1145 (a) (2), where the petitioner issued resale certificates *falsely indicating* that it had a certificate of authority.

address and certificate of authority number, and was signed and dated by petitioner's president. The auditor never attempted to determine the existence of other resale certificates, even after receiving invoices from petitioner's suppliers. The auditor never discussed the resale certificate with petitioner nor attempted to confirm its use. At the conclusion of the audit, the auditor simply advised petitioner that it should revoke any resale certificates it had on file with its suppliers and pay tax on materials going forward, to which petitioner agreed. Petitioner has acknowledged making mistakes.

Moreover, the Division has not established that the penalty was properly computed. Tax Law § 1145 (a) (5) provides that the penalty shall be one hundred percent of the tax that would have been due. Here, the Division never explained why it imposed this penalty for only the period June 1, 2021 through May 31, 2022, and in an amount less than one hundred percent of the tax that would have been due for that period per the audited tax due (***see*** findings of fact 15 and 16). Again, the only explanation offered for the imposition of penalties was that "[r[easonable cause was not established by the [p]etitioner."

In sum, the Division has presented no argument that petitioner issued a false or fraudulent resale certificate with intent to evade tax, and the facts do not support the imposition of that penalty here. The Division further failed to establish that the penalty was properly computed. Accordingly, this penalty is cancelled.

H. The petition of Richmond Aluminum LLC is granted to the extent indicated in conclusions of law D and G and is otherwise denied; and the notice of determination dated February 24, 2023, is modified in accordance with conclusions of law D and G and is otherwise sustained.

DATED: Albany, New York
November 19, 2026

/s/ Anita K. Luckina
ADMINISTRATIVE LAW JUDGE