

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JD'S TIRE & BATTERY 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 June 1, 2017 through :  
February 28, 2019. :

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DETERMINATION  
DTA NOS. 850449,  
850450, 850451 AND  
850452

In the Matter of the Petition :  
of :  
**JD'S TOWING & REPAIR INC.** :  
for Revision of Determinations or for Refund of :  
Sales and Use Taxes under Articles 28 and 29 of the :  
Tax Law for the Period March 1, 2016 through :  
February 28, 2017, and June 1, 2017 through :  
August 31, 2017. :

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In the Matter of the Petition :  
of :  
**JANICE DEFERRARI** :  
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 June 1, 2017 through :  
February 28, 2019. :

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In the Matter of the Petition :  
of :  
**JOHN DININO** :  
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 June 1, 2017 through :  
February 28, 2019. :  

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Petitioner, JD’s Tire & Battery 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 June 1, 2017 through February 28, 2019.

Petitioner, JD’s Towing & Repair Inc., filed a petition for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2016 through February 28, 2017 and June 1, 2017 through August 31, 2017.

Petitioner, Janice Deferrari, 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 June 1, 2017 through February 28, 2019.<sup>1</sup>

Petitioner, John Dinino, 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 June 1, 2017 through February 28, 2019.

A formal consolidated hearing was held before Barbara J. Russo, Administrative Law Judge, in Albany, New York, on May 28, 2025, at 10:30 a.m., with the final brief to be submitted by October 2, 2025, which date began the six-month period for the issuance of this

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<sup>1</sup> The record contains multiple spellings of Ms. Deferrari’s name, including Deferari, Deferrari and Deferrarri.

determination. Petitioners appeared by Shinder & Shinder, CPA's PC (Steve Shinder, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Salvatore Costanza, Esq., of counsel).

### ***ISSUES***

I. Whether petitioners have established that the Division of Taxation improperly resorted to an estimated audit methodology to determine petitioners' sales and use tax liability for the periods in 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 petitioners have shown reasonable cause for the abatement of penalties.

IV. Whether petitioner, John Dinino, was personally liable for the sales and use taxes due on behalf of JD's Tire & Battery Inc., as a person required to collect and pay such taxes under the Tax Law.

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

1. Petitioner, JD's Towing & Repair Inc. (JD's Towing), doing business as Jan's Med A Car Service, performed automotive towing and repair services, tire sales and New York State automobile inspections in Hillburn, New York.<sup>2</sup>

2. The Division of Taxation (Division) commenced an audit of JD's Towing on April 19, 2019. During a pre-audit analysis, the Division's auditor, Nina Antonova-Heiler, found that JD's Towing had not filed any income tax returns and had filed two New York State sales tax returns. JD's Towing was not registered to collect sales tax. On April 24, 2019, the auditor

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<sup>2</sup> According to information from the New York State Department of State contained in the record, JD's Towing changed its name to JD's Towing & Battery Center Inc., on May 29, 2012, and to JD's Tire & Battery Center Corp. on July 11, 2016. However, sales tax returns for the period March 1, 2017 through February 28, 2018, list the entity's name as JD's Towing & Repair Inc.

sent a letter to JD's Towing stating that its sales and use tax records had been scheduled for an audit for the period March 1, 2016 through February 28, 2019 and scheduled an initial audit appointment for June 17, 2019. The letter further explained that JD's Towing must provide all documents that support its sales and use tax returns for the audit period on the appointment date. Among the records specifically requested, in an attached information document request (IDR), were the following: sales tax returns, worksheets and canceled checks showing taxes paid; federal income tax returns; New York State corporation tax returns; general ledger; general journal and closing entries; sales invoices; exemption documents supporting non-taxable sales; chart of accounts; fixed asset purchase/sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips for all accounts; cash receipts journal and sales journal; cash disbursement journal and purchase journal; the corporate book, including minutes, board of directors and articles of incorporation; depreciation schedules; lease/rental agreements; repair invoice records; and waste tire management fee quarterly returns.

3. On May 9, 2019, the auditor spoke with JD's Towing's then-representative, James DeMinno, CPA, who informed her that JD's Towing was out of business and the owner's daughter, Janice Deferrari, was currently operating the business as JD's Tire & Battery Inc. (JD's Tire), with a new taxpayer identification number.

4. Petitioner, JD's Tire, was also doing business as Jan's Med A Car Service and performed automotive towing and repair services, tire sales and New York State automobile inspections in Hillburn, New York. JD's Tire was the successor to JD's Towing, operating at the same location as JD's Towing and providing the same services.

5. On May 22, 2019, the Division commenced an audit of JD's Tire. On that date, the auditor sent a letter to JD's Tire stating that its sales and use tax records had been scheduled for

an audit for the period June 1, 2013 through February 28, 2019, and scheduled an initial audit appointment for June 18, 2019. The letter further explained that JD's Tire must provide all documents that support its sales and use tax returns for the audit period on the appointment date. Among the records specifically requested, in an attached IDR, were the following: sales tax returns, worksheets and canceled checks showing taxes paid; federal income tax returns; New York State corporation tax returns; general ledger; general journal and closing entries; sales invoices; exemption documents supporting non-taxable sales; chart of accounts; fixed asset purchase/sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips for all accounts; cash receipts journal and sales journal; cash disbursement journal and purchase journal; the corporate book, including minutes, board of directors and articles of incorporation; depreciation schedules; lease/rental agreements; waste tire management fee returns; and repair invoice records.

6. Petitioners, JD's Towing and JD's Tire, filed power of attorney forms, dated June 10, 2019, appointing Michael J. Tedesco, Esq., and James DeMinno, CPA, as their then-representatives. The power of attorney forms were signed by petitioner, Janice Deferrari.

7. The auditor conducted an initial audit appointment of petitioners on June 17, 2019, and met with Mr. DeMinno. He informed her that the business started operating under JD's Tire's taxpayer identification number on June 17, 2017, that income tax returns for that entity were filed for 2017 and 2018 and were prepared using bank statements, and that sales tax returns had been filed for the quarters ending November 30, 2018 and February 28, 2019. No sales tax returns had been filed by JD's Tire for the period June 17, 2017 through August 31, 2018. Mr. DeMinno stated that he prepared the sales tax returns for JD's Tire using bank statements and that the owner wrote on the statements which transactions were taxable and which were not. He

stated that he did not examine invoices or review vendors or exemption certificates to prepare the returns. Because Mr. DeMinno was most familiar with the period of September through November 2018, he agreed to provide records for that period for JD's Tire. Regarding JD's Towing, Mr. DeMinno informed the auditor that he was not involved with filing sales tax returns or any other returns and did not have records for that entity. He stated the JD's Towing was dissolved by New York State for not filing income tax returns and that records were not available.

8. During the initial audit appointment, Mr. DeMinno provided the auditor with some of JD's Tire's bank statements from 2018 and income tax returns for 2017 and 2018.

9. The auditor met with Mr. DeMinno again on June 18 and 19, 2019. At that time, he provided JD's Tire's deposit details for September 2018 and some expense invoices.

10. The auditor sent a second, third and fourth IDR to JD's Tire, dated June 21, 2019, October 18, 2019 and September 11, 2020, respectively, requesting additional records.

11. The auditor sent a second IDR to JD's Towing, dated June 21, 2019, which was resent on August 12, 2019, and a third IDR, dated September 14, 2020, requesting additional records.

12. On August 12, 2019, the auditor sent a penalty intent letter to petitioner, JD's Tire, stating that it may be subject to penalties for failure to maintain or provide records.

13. On September 4, 2019, the auditor spoke with Mr. Tedesco, who stated he would work on providing records for the period September through November 2018 for JD's Tire. Because no records were available for JD's Towing, they agreed that the records for JD's Tire for that period would be used to calculate the sales tax for JD's Towing.

14. On September 12, 2019, Mr. Tedesco sent a letter to the auditor stating that

petitioners' prior certified public accountant, Steve Shinder, was not handling their filing obligations correctly and that he did not return records that were provided to him to address their filing and payment obligations.

15. During the course of the audits, some sales invoices and exemption certificates for the vendor, Agero, and a QuickBooks ledger were provided for JD's Tire for the period September through November 2018. The QuickBooks ledger did not have a detail of sales but was used to review expenses. Some expense invoices, credit card statements and waste tire management fee returns were also provided for JD's Tire. No sales invoices or exemption certificates were provided for other periods for JD's Tire. No records were provided for JD's Towing.

16. The auditor reviewed the records provided and determined that they were inadequate to conduct a detailed audit for the audit periods for JD's Towing and JD's Tire. She determined that JD's Towing had inadequate records because none were provided. She determined that the books and records for JD's Tire were inadequate because records were not provided for the entire audit period, the records provided were incomplete and the sales invoices provided did not reconcile with the bank deposits. Specifically, the invoices provided for JD's Tire for September 2018 totaled approximately \$12,000.00, while the bank deposits for the same month totaled more than \$90,000.00.

17. Due to the inadequacy of petitioners' records, the Division's auditor utilized an indirect audit methodology. To determine taxable sales for JD's Tire, the auditor used the bank statements and records provided. Because records were only provided for September through November 2018, the auditor used this timeframe as a test period. She compared the bank deposits with the exemption certificates and invoices provided and where an exempt sale could

be verified by an invoice or certificate, she removed that amount from taxable sales. She also removed sales for towing services that occurred outside of New York State and charges for state inspections from her calculation of taxable sales. The remainder of the sales that could not be verified were determined to be taxable. The auditor calculated taxable sales of \$221,827.91 and tax due of \$18,578.09 for the period September through November 2018 for JD's Tire. She then used a "straight line" methodology, wherein she applied the amount due from the test period to the other audit periods to calculate the sales tax due for the entire audit period for JD's Tire. The auditor determined total sales tax for JD's Tire for the period June 1, 2013 through February 28, 2019, in the amount of \$130,046.63, less sales tax paid with the sales tax returns in the amount of \$3,315.92, resulting in additional sales tax due of \$126,730.71.

18. To calculate tax due on expenses, the auditor reviewed the QuickBooks ledger detail and credit card statements provided by JD's Tire for the period September through November 2018. From the invoices provided, the auditor determined that sales tax was not paid on subscription services and printing services. The auditor determined additional tax due for expenses during the test period in the amount of \$10,054.41. The auditor used the "straight line" methodology for a projection calculation of expenses, in which she applied the expenses determined due for the test period to the other periods at issue, resulting in additional tax due from JD's Tire for this area in the amount of \$70,380.87 for the period June 1, 2013 through February 28, 2019.

19. To determine taxable sales for JD's Towing, the auditor used the bank statements and records provided by JD's Tire for the period September through November 2018, because no records were provided by JD's Towing, these were the only records available, and JD's Tire was the successor business to JD's Towing, providing the same services at the same location. Using

the amount of taxable sales and tax due calculated for JD's Tire for the period September through November 2018, the auditor used a straight line methodology to calculate the sales tax due for the audit period for JD's Towing. The auditor determined sales tax due for the period of March 1, 2016 through February 28, 2019 in the amount of \$90,080.64 for JD's Towing.

20. The auditor also calculated use tax on expenses and capital for JD's Towing using the records provided by JD's Tire. For expenses, the auditor reviewed the general ledger detail and credit card statements provided by JD's Tire for the period September through November 2018 and determined additional tax due for expenses during the test period in the amount of \$10,054.41. The auditor used the straight line methodology for a projection calculation of expenses, resulting in additional tax due from JD's Towing of \$50,272.05. For capital expenses, the auditor used a depreciation schedule provided by JD's Tire and determined tax due in the amount of \$27,135.00.

21. On July 28, 2020, Mr. DeMinno informed the auditor that petitioners were hiring a new attorney and Mr. Tedesco would no longer be representing them. The auditor received power of attorney forms, dated August 8, 2020, appointing Steve Shinder, CPA, as their representative.

22. The Division issued a statement of proposed audit change (statement), dated November 4, 2020, to JD's Tire asserting additional tax due of \$197,111.58, plus interest and penalty for the period June 1, 2013 through February 28, 2019.<sup>3</sup>

23. The Division issued five statements, each dated March 5, 2021, to JD's Towing, asserting the following: penalty in the amount of \$16,000.00 for the period March 1, 2016

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<sup>3</sup> Although the statement covered the period June 1, 2013 through February 28, 2019, no tax was asserted due for the period June 1, 2013 through May 31, 2017 for JD's Tire.

through February 28, 2017; tax in the amount of \$72,412.49, plus interest and penalty for the period March 1, 2016 through February 28, 2017; tax in the amount of \$40,217.64, plus interest and penalty for the period March 1, 2016 through February 28, 2017; tax in the amount of \$27,135.00, plus interest and penalty for the period March 1, 2016 through February 28, 2019,<sup>4</sup> and tax in the amount of \$27,722.56, plus interest and penalty for the period March 1, 2016 through February 28, 2019.<sup>5,6</sup>

24. The Division issued to petitioner JD's Tire a notice of determination, bearing assessment number L-052556206, dated December 15, 2020, asserting additional tax due of \$197,111.58, plus interest and penalty, for the period June 1, 2017 through February 28, 2019.

25. The Division issued to petitioner JD's Towing the following notices of determination, all dated May 26, 2020: assessment number L-051450316, asserting additional tax due of \$72,412.49, plus interest and penalty, for the period March 1, 2016 through February 28, 2017; assessment number L-051450332, asserting additional tax due of \$40,217.64, plus interest and penalty, for the period March 1, 2016 through February 28, 2017; assessment number L-051450327, asserting additional tax due of \$27,135.00, plus interest and penalty, for the period June 1, 2017 through August 31, 2017; and assessment number L-051450331, asserting additional penalties in the amount of \$16,000.00 for failure to maintain or provide records for the period March 1, 2016 through February 28, 2017.

26. The Division issued a notice of determination, bearing assessment number L-

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<sup>4</sup> Although this statement covered the period March 1, 2016 through February 28, 2019, tax was only asserted due therein for the period June 1, 2017 through August 31, 2017.

<sup>5</sup> Although this statement covered the period March 1, 2016 through February 28, 2019, tax was only asserted due therein for the period March 1, 2017 through May 31, 2017.

<sup>6</sup> The statements provide, "[i]f you fail to either agree or disagree with the Statement of Proposed Audit Change by 05/18/2020 Form DTF-963, Notice of Determination will be issued." There is no explanation in the record why the response due date precedes the date of the statements. Additionally, the notices of determination at issue herein for JD's Towing are dated May 26, 2020 (*see* finding of fact 25). There is no explanation why the notices of determination predate the statements.

052563914, dated December 17, 2020, to petitioner, Janice Deferrari, as an officer/responsible person of JD's Tire, asserting tax due in the amount of \$197,111.58, plus interest and penalty, for the period June 1, 2017 through February 28, 2019. Petitioners do not dispute the responsible person status of Ms. Deferrari.

27. The Division issued a notice of determination, bearing assessment number L-052563913, dated December 17, 2020, to petitioner John Dinino as an officer/responsible person of JD's Tire, asserting tax due in the amount of \$197,111.58, plus interest and penalty, for the period June 1, 2017 through February 28, 2019.

28. Petitioners timely filed requests for conciliation conferences with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices of determination. By conciliation order (CMS number 000328191), dated December 9, 2022, issued to JD's Tire for the period June 1, 2017 through February 28, 2019, the conciliation conferee sustained the statutory notice. By conciliation order (CMS number 000322055), dated December 9, 2022, issued to JD's Towing for the periods March 1, 2016 through February 28, 2017 and June 1, 2017 through August 31, 2017, the conciliation conferee recomputed notices of determination L-051450316, L-051450331 and L-051450332 to tax totaling \$112,630.13, plus penalty and interest, and cancelled notice of determination L-051450327. By conciliation order (CMS number 000330838), dated December 16, 2022, issued to Janice Deferrari for the period June 1, 2017 through February 28, 2019, the conciliation conferee sustained the statutory notice. By conciliation order (CMS number 000330839), dated December 9, 2022, issued to John Dinino for the period June 1, 2017 through February 28, 2019, the conciliation conferee sustained the statutory notice. Petitioners, thereafter, filed timely petitions with the Division of Tax Appeals.

29. At the hearing, the Division presented the testimony of Ms. Antonova-Heiler. She testified as to the conduct of the audit and the assessment of petitioners, Janet Deferrari and John Dinino, as responsible persons of JD's Tire.

30. Ms. Antonova-Heiler testified that Ms. Deferrari was assessed as a responsible person of JD's Tire because she was an owner and officer of the company and was listed on form DTF-17, application to register for a sales tax certificate of authority, as president of JD's Towing.

31. Ms. Antonova-Heiler testified that Mr. Dinino was assessed as a responsible person of JD's Tire because he was involved in the day-to-day affairs of the business operations, signed checks and sent handwritten notes on the business's bank statements with instructions to the tax preparer indicating what items were taxable and nontaxable sales for purposes of preparing sales tax returns. The Division introduced into the record bank statements from the account of JD's Tire, doing business as Jan's Med A Car Service, showing total deposits and additions of \$295,328.32 for the period September 1 through November 30, 2018, with handwritten notes indicating what items were taxable and nontaxable, and a sales tax report, signed and dated by Mr. Dinino on January 5, 2019, stating total sales of \$295,328.00 and taxable sales of \$12,271.42. Ms. Antonova-Heiler testified that the notes on the bank statements were written by Mr. Dinino. Ms. Antonova-Heiler also testified that Mr. Dinino signed JD's Tire's 2018 form 1120S, U.S. income tax return for an S corporation. The 2018 form 1120S for JD's Tire, introduced into the record by the Division, has the typed name "John Dinino" on the line for signature of officer, and lists his title as "President." The Division also introduced into the record, among other items, a 2018 schedule K-1, shareholder's share of income, deductions, credits, etc., for JD's Tire, listing Mr. Dinino as a shareholder; JD's Tire's form CT-6, New York

State election by a federal S corporation to be treated as a New York S corporation, dated January 4, 2019, which lists Mr. Dinino as the sole shareholder, holding 200 shares of stock acquired on June 19, 2017, and which was signed by Mr. Dinino as president; a New York State online services business account for JD's Tire created by Mr. Dinino on May 4, 2018; and numerous checks for JD's Tire, doing business as Jan's Med A Car Service, from September 28, 2018 through November 30, 2018, signed by Mr. Dinino.

32. During the hearing, Mr. Shinder testified on behalf of petitioners. Neither Ms. Deferrari nor Mr. Dinino was present at the hearing. Mr. Shinder admitted that Ms. Deferrari was a responsible person for JD's Tire but he claimed that Mr. Dinino was not. He testified that an amended 2018 schedule K-1 listed Ms. Deferrari as the 100% shareholder of JD's Tire and that it was his understanding that she received all the income from the business. Mr. Shinder did not know why Mr. Dinino's name, with the title of president, appeared on the 2018 form 1120S for JD's Tire and speculated that it could have been mistakenly listed. However, he admitted that he had no evidence to prove that Mr. Dinino's name was mistakenly listed on the form 1120S.

33. The only documentary evidence introduced by petitioners during the hearing was JD's Tire's form CT-6, dated July 1, 2017, which lists Ms. Deferrari as the sole shareholder, holding 200 shares of stock acquired on June 19, 2017, and which was signed by Ms. Deferrari as president. Petitioners offered no explanation for the discrepancy between the form CT-6, dated July 1, 2017, listing Ms. Deferrari as the sole shareholder, with 200 shares of stock acquired on June 19, 2017, and the form CT-6, dated January 4, 2019, listing Mr. Dinino as the sole shareholder with 200 shares also acquired on June 19, 2017 (*see* finding of fact 31).

**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 include a “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” (*id.*). Further, the Division’s sales tax regulations provide as follows:

“(b) Sales records.

(1) Every person required to collect tax, including every person purchasing or selling tangible personal property for resale must keep records of every sale . . . and all amounts paid, charged or due thereon, and of the tax payable thereon. The records must contain a true copy of each:

- (i) sales slip, invoice, receipt, contract, statement or other memorandum of sale;
- (ii) guest check, hotel guest check, receipt from admissions such as ticket stubs, receipt from dues; and
- (iii) cash register tape and any other original sales document.

Where no written document is given to the customer, the seller shall keep a daily record of all cash and credit sales in a day book or similar book” (20 NYCRR 533.2 [b]).

“If 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 is not filed, “or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the [Division] 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 Tax Law § 1138 (a) (1), the Division is required to select an audit methodology reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the audit methodology or the

amount of the assessment was 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 taxes 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. In this case, the record establishes the Division’s clear and unequivocal written requests for books and records of petitioners’ sales, including a request for sales invoices for the entire audit period. Petitioners produced partial records from JD’s Tire for only a three-month period, from September through November 2018. The Division’s auditor reviewed these records and determined that several invoices were missing from the limited records provided, and the invoices could not be reconciled with the bank deposits. Additionally, the QuickBooks ledger did not have a detail of sales.

As such, the Division reasonably concluded that petitioners did not maintain or have available books and records that were sufficient to verify gross and taxable sales for the audit period. Having established the inadequacy of required books and records, the Division was clearly entitled to resort to the use of indirect methods to determine petitioners’ sales and sales

tax liability (*see Matter of W.T. Grant Co. v Joseph*, 2 NY2d 196, 206 [1957], *cert denied* 355 US 869 [1957]; *Matter of Del's Mini Deli v Commissioner of Taxation and Fin.*, 205 AD2d 989, 991 [3d Dept 1994]; *Matter of Vebol Edibles v Tax Appeals Trib.*, 162 AD2d 765, 766 [3d Dept 1990, *lv denied* 77 NY2d 803 [1991]). It was reasonable for the Division to estimate petitioners' liability by utilizing the bank statements and limited records provided by petitioners (*see Matter of Beijing China Buffet*, Tax Appeals Tribunal, February 23, 2012). Since records were only provided for a three-month period from September through November 2018, the Division was justified in using this timeframe as a test period for the audit (*see Matter of Great Neck Serv. Sta.*, Tax Appeals Tribunal, May 26, 1988). Moreover, because petitioners did not provide any records for JD's Towing, and JD's Tire was a continuation of the same business under a new name, it was reasonable for the Division to extrapolate the audit results from JD's Tire to JD's Towing.

D. Since it is concluded that the audit method was reasonable, petitioners had the burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (*see Matter of Sarantopoulos*, Tax Appeals Tribunal, February 28, 1991). Petitioners failed to meet this fairly substantial burden (*see Matter of Center Moriches Monument Co. v Commr. of Taxation & Fin.*, 211 AD2d 947, 948 [3d Dept 1995]). Indeed, any imprecision in the results of an audit arising from a taxpayer's own failure to keep and maintain records of all of its sales as required by Tax Law § 1135 (a) (1) must be borne by that taxpayer (*Matter of Markowitz v State Tax Commn.*, 54 AD2d 1023 [3d Dept 1976], *affd* 44 NY2d 684 [1978]; *Matter of Meyer v State Tax Commn.* 61 AD2d 223, 228 [3d Dept 1978], *lv denied* 44 NY2d 645 [1978]). Petitioners failed to produce any documentary evidence or testimony to dispute the results of the Division's

audit or to show that the estimate was unreasonable. Petitioners' representative argues, in their post-hearing briefs, that the services were "warranty work" that was not subject to tax.

However, petitioners did not introduce any documents into the record to substantiate nontaxable sales and the representative's unsworn, unsubstantiated statements in the briefs are accorded no weight (*see Matter of Erdman*, Tax Appeals Tribunal, April 6, 1995). As such, petitioners have failed to meet their burden of proof.

E. The Division imposed penalties against JD's Tire and JD's Towing pursuant to Tax Law § 1145 (a) (1) (i) and (vi) and imposed additional penalties against JD's Towing pursuant to Tax Law § 1145 (i).

Tax Law § 1145 (a) (1) (i) provides for penalties 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 for additional penalties for 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.

Tax Law § 1145 (i) provides for the imposition of penalties for the failure to maintain and provide adequate records. Pursuant to Tax Law § 1145 (i), a person required to maintain records under article 28, who fails to maintain or make available those records to the Division, is subject to a penalty not to exceed one thousand dollars for the first quarter, and up to five thousand dollars for each additional quarter during which such failure occurs. For purposes of the penalty imposed by Tax Law § 1145 (i), a person will be considered to have failed to make or maintain the required records when the records made or maintained by that person for a quarterly period make it virtually impossible to verify sales receipts or the taxability of those receipts and to conduct a complete audit.

Both Tax Law § 1145 (a) and (i) provide for the abatement of penalties if the failure was due to reasonable cause and not due to willful neglect. Specifically, Tax Law § 1145 (a) (1) (iii) states:

“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 section eleven hundred forty-two. The commissioner shall promulgate rules and regulations as to what constitutes reasonable cause.”

Tax Law § 1145 (a) (1) (vi) provides for abatement of the 25 percent omission penalty where the omission was due to reasonable cause and not due to 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. Petitioners here have not shown, nor do they argue that there was substantial authority for their tax treatment or that they adequately disclosed such treatment in their returns or in an attached statement.

Tax Law § 1145 (i) similarly provides, in part, that “[i]f 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.”

In establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (*see Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained that “[b]y first requiring the imposition of penalties (rather than merely allowing them at the Commissioner’s discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation”

(*Matter of MCI Telecom. Corp.*, Tax Appeals Tribunal, January 16, 1992, [citations omitted], *confirmed* 193 AD2d 978 [3d Dept 1993]). Petitioners' failure to maintain records of their sales supports the imposition of penalties. Despite repeated requests by the Division's auditor for the records of JD's Tire and JD's Towing, petitioners provided records for only a three-month period for JD's Tire, and no sales records for JD's Towing. The only explanation petitioners gave for their failure was that the records were not available. Petitioners have failed to demonstrate reasonable cause for the failure to pay the taxes due and the failure to maintain records, and the imposition of penalties by the Division was justified (*see Matter of Miller v State Tax Commn.*, 94 AD2d 841, 842 [3d Dept 1983]). Petitioners have not met their burden of proving, by clear and convincing evidence, that penalties should be abated due to reasonable cause and the lack of willful neglect.

F. The Division assessed petitioners Janet Deferrari and John Dinino as responsible persons of JD's Tire. Petitioners do not dispute that Ms. Deferrari was personally liable for the sales and use taxes due on behalf of JD's Tire, as a person required to collect and pay such taxes under the Tax Law. Petitioners argue, however, that Mr. Dinino was not responsible for the payment of taxes due on behalf of JD's Tire.

It is well settled that more than one person can be held liable as a responsible person under Tax Law § 1133 (a) and liability is joint and several (*see Matter of Blodnick v State Tax Commn.*, 124 AD2d 437, 438 [3d Dept 1986]). Tax Law former § 1133 (a) provided, in part, that "every person required to collect any tax imposed by [article 28] shall be personally liable for the tax imposed, collected or required to be collected under [article 28]." Tax Law former § 1131 (1), in turn, defined a "person required to collect any tax imposed by [article 28]" to include, among others:

“any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of [article 28]; and any member of a partnership or limited liability company.”

Whether a person is an officer or employee liable for tax must be determined based upon the particular facts of each case (*see Matter of Coppola v Tax Appeals Trib.*, 37 AD3d 901, 903 [3d Dept 2007]; *Matter of Cohen v State Tax Commn.*, 128 AD2d 1022, 1023 [3d Dept 1987]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006 [3d Dept 1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890 [3d Dept 1990]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The pivotal question is whether the individual had or could have had sufficient authority and control over the affairs of the corporation (*Matter of Ianniello*, Tax Appeals Tribunal, November 25, 1992, *confirmed* 209 AD2d 740 [3d Dept 1994]). The Tax Appeals Tribunal has stated that:

“[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual’s status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual’s knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual’s economic interests in the corporation” (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990 [citations omitted]).

G. The evidence in the record shows that Mr. Dinino had or could have had sufficient authority and control over the affairs of JD’s Tire to be considered a responsible person. Mr. Dinino is listed as president on JD’s Tire’s 2018 form 1120S. He is listed as a shareholder on JD’s Tire’s 2018 schedule K-1. Mr. Dinino signed JD’s Tire’s form CT-6, dated January 4,

2019. The form CT-6 lists Mr. Dinino as the sole shareholder, holding 200 shares of stock acquired on June 19, 2017. Mr. Dinino created a New York State online services business account for JD's Tire on May 4, 2018. Additionally, Mr. Dinino instructed the business's accountant regarding the preparation of JD's Tire's sales tax returns. Specifically, he sent handwritten notes on the business's bank statements with instructions to the tax preparer indicating what sales were taxable and nontaxable for purposes of preparing sales tax returns and signed a sales tax report, dated January 5, 2019, stating total sales of \$295,328.00 and taxable sales of \$12,271.00 for the period September 1, 2018 through November 30, 2018. Additionally, Mr. Dinino signed numerous checks for JD's Tire from September 28, 2018 through November 30, 2018.

Neither Mr. Dinino, Ms. Deferrari, nor any employees or other officers of JD's Tire testified at the hearing. Petitioners' representative testified on their behalf and speculated that Mr. Dinino might have been mistakenly listed as an officer and shareholder on JD's Tire's 2018 form 1120S and 2018 schedule K-1, respectively. However, he admitted that he had no evidence to prove that Mr. Dinino's was listed in error. Further, he had no explanation for the inconsistency in the form CT-6 that was signed by Mr. Dinino, reporting that he was the sole shareholder, with 200 shares of stock acquired on June 19, 2017, and the form CT-6 petitioners introduced into the record, reporting Ms. Deferrari as the sole shareholder, holding 200 shares of stock, also acquired on June 19, 2017. In petitioners' post-hearing briefs, their representative made a number of unsworn, unsubstantiated assertions, arguing that Mr. Dinino was not a responsible person. Such unsworn assertions that have no support in the record are accorded no weight (*see Matter of Erdman*). As such, petitioners have failed to meet their burden of proving that Mr. Dinino was not a responsible person for JD's Tire.

H. The petitions of JD's Tire & Battery Inc., Janice Deferrari and John Dinino are denied, and the notices of determination, dated December 15, 2020 and December 17, 2020, are sustained. The petition of JD's Towing & Repair Inc. is denied, and the notices of determination, dated May 26, 2020, as modified by the conciliation order, dated December 9, 2022, are sustained.

DATED: Albany, New York  
April 2, 2026

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE