STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
CRESCENT BEACH, INC. **JEFFREY BARRY** **SERENA BARRY** **DOROTHY SANNA**	:	DECISION DTA Nos. 822080, 822081, 822082 and 822083
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2002 through November 30, 2005.	:	

Petitioners, Crescent Beach, Inc., Jeffrey Barry, Serena Barry and Dorothy Sanna, filed an exception to the determination of the Administrative Law Judge issued on July 15, 2010. Petitioner appeared by Dibble & Miller, P.C. (Gerald W. Dibble Esq., and John J. Jakubek, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioners filed a letter brief in lieu of a formal reply brief. Oral argument, at petitioners' request, was heard on March 23, 2011 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner Crescent Beach, Inc., maintained and produced upon request, adequate books and records for the performance of a detailed audit of its sales and use tax liability for the period December 1, 2002 through November 30, 2005 and whether the Division of Taxation thoroughly examined said records.

II. Whether the Division of Taxation properly determined additional sales and use taxes due from Crescent Beach, Inc., for the audit period, utilizing an indirect audit methodology.

III. Whether petitioners Jeffrey Barry, Serena Barry and Dorothy Sanna were persons responsible for the collection and payment of sales and use taxes during the audit period on behalf of Crescent Beach, Inc.

IV. Whether petitioners have demonstrated reasonable cause for the abatement of penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

During the period December 1, 2002 through November 30, 2005 (the audit period), petitioner Crescent Beach, Inc., operated a restaurant in Rochester, New York, primarily making sales of food and beverages.

On or about May 20, 2005, the Division of Taxation (Division) mailed petitioner[1] the first appointment letter and a request for books and records for the period December 1, 2002 through May 31, 2005 with respect to petitioner's sales and use tax liability. The letter included a

[1] Hereinafter, the term petitioner shall refer to Crescent Beach, Inc.

"Records Requested List," which specifically requested that the following books and records be available for inspection on the appointment date: sales tax returns, worksheets and cancelled checks; federal income tax returns; New York State corporation tax returns; the general ledger; general journal and closing entries for the entire audit period; sales invoices; exemption documents; chart of accounts; fixed asset purchase and sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips; cash receipts journal; cash disbursements journal; corporate book; financial statements; power of attorney; depreciation schedules; copies of leases; guest checks and cash register tapes; SLA license; and computer generated files.

The letter also specifically recommended that an "owner, officer or employee with personal knowledge of the business operations attend the opening conference, even if a representative [was to be] present," because a firsthand explanation would help eliminate possible misunderstandings and provide quick answers that would help establish the initial audit plan.

After postponements of the initial appointment by both the Division and petitioner's representative, Thomas Petrella, CPA, the auditor met with Mr. Petrella on October 4, 2005 to review petitioner's records, approximately four and one half months after petitioner was apprised of the impending audit and the records requested. No one from the business was present.

Mr. Petrella was hired by petitioner in July 2005 and continued his representation until on or about October 2005 when his firm decided to refer the matter to a firm he believed was better suited to handle the audit. Mr. Petrella interviewed Jeffrey and Serena Barry with respect to his engagement and was told that petitioner had not filed its New York corporation franchise tax

returns or any federal income tax returns except the one for the period May 1, 2001 to April 30, 2002.

Although Mr. Petrella had been communicating with the Division since August 8, 2005 on behalf of petitioner, and received its books and records with respect to the sales tax audit a week before the auditor came to his office, he never went through any of the more than 32 boxes that petitioner had delivered to him and did not know what documentation they contained. Mr. Petrella was unaware of how petitioner prepared its sales tax returns or if they were accurate.

Ms. Barry explained that the business kept its records in these boxes, generally using one box per month. Records kept included guest checks for cash and credit sales, daily sheets, bank statements, credit card batch statements, vendor receipts and invoices. Although Ms. Barry stated that a general ledger was provided to Mr. Petrella for the audit, none was produced to the auditor or introduced at hearing. Mr. Christopher Klee, petitioner's expert, who analyzed its records for the hearing, did not review a general ledger, vaguely recalling only a "cash log."[2] Mr. Klee's testimony agrees with the auditor's conclusion that petitioner did not maintain a general ledger, after repeated requests for one proved fruitless.

Mr. Petrella was hired to assist on the sales tax audit and as a consultant on a hotel and spa project being considered on an adjoining parcel, and he was unaware that petitioner had not filed its corporation franchise and income tax returns.

The auditor met with Mr. Petrella at his office on October 4, 2005 and began her review of the records provided. She returned on October 5 and 6, 2005 to continue her review. No one from the restaurant was present on any of the three days. The auditor found register tapes, bank

[2] The cash log was not produced at hearing.

statements, sales tax returns, daily summary sheets, expense invoices and a handwritten list of capital assets. During the time the auditor was at Mr. Petrella's office, petitioner had additional boxes of records delivered, containing exemption certificates and more daily summary sheets. After reviewing the records for two days, the auditor asked Mr. Petrella for specific information: how many registers were at the restaurant; how were the sales and use tax returns prepared; whether there were separate tapes for the bar and cash sales; and where the substantiation of cash sales were recorded, since the register tapes produced only recorded credit card sales.

On October 6, 2005, the auditor returned to Mr. Petrella's office for a third day and brought a second auditor, Mr. Fischer, to assist. Although both reviewed the records in an effort to identify cash sales, neither was able to do so, since the register tapes only recorded credit card sales.

Petitioner maintained two credit card transaction terminals, which had the ability to record all the credit card sales and make a tape of the same. One was for the party sales and gift certificates and was located in the office. The other was in the restaurant/bar area. There were two pre-check machines that generated the guest checks and sent orders to the kitchen, but they generated no tape. There was a register at the bar, which was used to close out all checks for each table. However, this register also did not produce a tape, and this is where cash sales would have been recorded on a tape.

On the same day, the auditors made a brief visit to the restaurant where they spoke with petitioner Dorothy Sanna and an employee named John Cole. They observed four registers but were told that only three were used at one time, while the fourth register was reserved for use when one of the others broke down. Ms. Sanna told the auditor that petitioner Serena Barry and Mr. Cole performed all the accounting functions, but Mr. Cole was unable to answer the most

rudimentary of questions about the bookkeeping done for the business. In addition, the auditor was unable to acquire a menu while at the restaurant and was not aware that a menu was available on petitioner's web site. She noted in her report that the business was a large restaurant and party house and that "catered" events took place outside in a tent during the summer. The auditor also mentioned that one of the extra cash registers may have been used outside for "catered" tent events. Apparently, the auditor construed parties held in tents on the property as "catered" events, a term that does not appear on petitioner's web site.

The auditors returned to Mr. Petrella's office and completed the review of records, at which time Mr. Petrella was informed that the register tapes lacked a record for cash sales and the bank records were inadequate for substantiating them, as well.

Subsequent to the October 6, 2005 visit to Mr. Petrella's office, the auditor discussed the case with her supervisor, Mr. Daniel Cardwell. Given the lack of substantiation of cash sales, the two discussed the possibility of using an estimated audit methodology to determine petitioner's taxable sales for the audit period. Specifically, it was suggested that the Division utilize the only federal income tax return filed with other external indices to determine the tax due.

On October 28, 2005, the auditor received a letter from Thomas A. Walter, CPA, indicating that he would be representing petitioners and, after several communications including one in which the auditor informed Mr. Walter what additional documentation was needed, a meeting was held on January 10, 2006. Again, no one from the restaurant was present. Mr. Walter was unprepared to proceed with the audit at that time and the auditor informed him that cash register tapes and bank records reflecting cash sales were still outstanding and also made a general inquiry about QuickBooks accounting software records for the business. However, Mr.

Walter informed the auditor that the QuickBooks records were unavailable, having never been prepared for the period in issue, and would not be forthcoming.

A second meeting was held with Mr. Walter and his associate, Mr. Bergstresser, on January 23, 2006. No one from the restaurant attended this meeting. Mr. Walter left this meeting after 42 minutes and did not know with specificity when the auditors left his office, other than to conclude that office policy was "not to leave them alone." Other than an analysis by Mr. Bergstresser of a few days of the three-year audit period, from which he concluded the records were tied to the daily summaries, Mr. Walter had no knowledge of what records petitioner maintained and never personally reviewed the records produced by petitioner for this audit, stating that he believed cash sales were substantiated by "a tape." Mr. Walter stated that his knowledge of the restaurant's operation was largely through a description provided by Jeffrey Barry, and that he believed that Mr. John Cole was a manager and Linda Knauf was a bookkeeper. He lacked knowledge of the roles played by Dorothy Sanna and Serena Barry, but recalled that Serena Barry called him to discontinue his firm's representation on the audit.

The Division determined that petitioner prepared its sales and use tax returns by taking the sales from the manually prepared daily sheets, which listed restaurant sales, party sales, bar sales and miscellaneous sales (gift certificates, party deposits and paid house charges), totaling them and multiplying by the tax rate. The collection of records and the preparation of daily sheets were tasks performed by any employee who was in the office at the time, but no specific individual was identified by Ms. Sanna or Mr. Barry, each providing the same answer when asked pointedly who prepared the daily sheets: "Whoever was in the office at that time." Serena Barry said that petitioner's accountant for the audit period, one "Ray," may have prepared the summaries from the boxes of records kept by petitioner for each month. However, there was no

employee whose only job was bookkeeping and the preparation of the daily sheets, from which the sales tax returns were prepared.

Mr. Barry, Ms. Barry and Ms. Sanna gave three different answers when asked who prepared the sales tax returns. Ms. Sanna, the president, said it was "whoever was working in the office that day." Mr. Barry said the sales tax returns were prepared from the daily sheets and that's how "they pay the sales tax," "they took the numbers off the daily sheets to pay the sales tax. They add the numbers up and that's how they pay the sales tax." Serena Barry believed petitioner's accountant prepared the sales tax returns.

By letter dated January 25, 2006, the Division made a second request for records to Dorothy Sanna and petitioner Crescent Beach, Inc., extending the audit period such that it was now the period December 1, 2002 through November 30, 2005. The request included the same records requested in the original request. No additional records were supplied.

The Division made a determination of the sales and use taxes due for the updated audit period based on an estimated audit methodology due to what it considered inadequate records produced by petitioner. The Division did not believe that Crescent Beach, Inc., adequately substantiated its cash sales, since deposit slips inspected on audit, i.e., those produced to the auditor, only indicated one deposit of cash during the period May 2004 through April 2005.[3] The Division found no audit trail for non-credit card sales, and petitioner's failure to produce a register tape or general ledger that would have indicated the cash sales made a detailed audit of

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[3] Petitioner submitted deposit tickets with its petition that indicated deposits of cash into its bank account on October 13, 2004 in the sum of $1,000.00 (electronically transferred from another of its accounts at the same bank); on October 18, 2004 in the sum of $1,370.00; and on February 1, 2005 in the sum of $2,000.00 (for which the deposit slip did not indicate a cash deposit). Six of the 20 deposits represented by the deposit slips in Exhibit K to the four petitions in evidence were identified as electronic transfers from another of petitioner's accounts at the same bank. One, dated November 25, 2003, for $1,000.00, did not bear a stamp indicating that the deposit had been processed. Therefore, for the entire audit period, there were 12 cash deposits of about $18,000.00.

petitioner's sales records impossible. In sum, petitioner lacked internal controls to ensure the accuracy and completeness of all transactions.

On or about April 20, 2006, the Division issued to petitioner a Statement of Proposed Audit Change for Sales and Use Tax, which set forth additional sales and use taxes due for the updated audit period of $129,983.71, plus penalty and interest.

The tax was determined using petitioner's federal income tax return for the period May 1, 2001 through April 30, 2002 (the only federal or state corporation tax return filed on behalf of petitioner as of that date) and the 2002 National Restaurant Association/Deloitte and Touche Restaurant Industry Operations Report. The report describes itself as a "unique study of operating results of restaurants in 2001 [which] includes specific financial information on full service restaurants segregated by [size of] average checks. The auditor determined that petitioner best fit a middle range of $15 to $24.99 per meal per patron, based on her own experience at the restaurant and the experience of coworkers. The menu in evidence appears to substantiate this assumption, indicating that appetizers cost between $4.25 and $10.99; entrees between $13.99 and $28.99 and up.[4] In addition, the report broke down sales by sales volume and the cost of sales for restaurants with varying ranges for sales volume.

Petitioner's federal income tax return for the period May 1, 2001 through April 30, 2002 indicated a sales volume between $1,000,000.00 and $1,999,000.00. The report listed three figures for cost of sales percentages for full service restaurants with sales in petitioner's range and an average check per patron of between $15.00 and $24.99. The values were categorized as lower, median and upper quartiles. The auditor chose to use the median quartile for petitioner's

[4] These prices appear to be from a holiday menu. Another menu from the web site, also undated, listed appetizers from $1.50 to $8.99; sandwiches from $9.99 to $11.99; and entrees from $13.99 to $28.99.

value, which the report said were middle values, with half of all values collected above and half below. In this case, the median value was listed as 33.7%. When the cost of goods sold stated by petitioner in its federal income tax return for the period May 1, 2001 through April 30, 2002, $687,104.00, was divided by 33.7%, the result was an estimate of audited sales of $2,038,884.27. From this projection, reported sales per the sales tax returns were subtracted, leaving additional taxable sales of $557,544.27. Dividing additional taxable sales by audited sales resulted in an error rate of 27.3456%, which was applied to the reported taxable sales for each quarter in issue, resulting in total additional taxable sales of $1,245,585.23, and additional tax due of $101,707.35.

During the audit, petitioner had not filed its sales and use tax return for the quarter ended August 31, 2003, and the Tax Compliance Division issued an estimated assessment to petitioner in the amount of $13,948.40, which petitioner paid. However, during the audit, an unfiled return for the quarter ended August 31, 2003 was discovered, which reported sales tax due in the sum of $41,308.33. The auditor subtracted the amount paid for the quarter pursuant to the deficiency and determined additional tax due of $27,359.93. At or before the hearing, petitioner provided proof that the remaining amount, $27,359.93, had been paid and the Division stipulated and agreed to reduce the additional tax determined to be due on audit by said amount.

Also, the auditor determined additional tax due on expense purchases. After reviewing expense invoices provided for the period May 1, 2003 through April 30, 2005, additional tax due of $91.43 was found. By dividing this number by audited sales for the same period, an error rate of .0031% was established. After applying this to taxable sales for the audit period,[5] additional

[5] The auditor's workpapers revealed that her computation of additional sales tax due on expense purchases found on page 61 of Exhibit 1 utilized a taxable sales amount of $382,274.00 for the quarter ended November 30, 2005 and not the amount listed on the return filed by petitioner. The additional tax due on expense purchases for that

tax due on expense purchases was determined to be $142.22 for the audit period.

An examination of $9,384.49 in fixed asset purchases provided to the Division on a handwritten list, disclosed the purchase of various assets for which there were no invoices. The Division assumed no tax had been paid and assessed $774.22 in additional tax.

Based on these calculations, the Division issued to Crescent Beach, Inc., a Notice of Determination, dated May 18, 2006, which asserted additional sales and use taxes due of $129,983.71 plus penalty and interest. The notice indicated that the tax had been computed using available records and information, since petitioner had not submitted adequate records for an audit.

When the auditor sent the Statement of Proposed Audit Change to Mr. Walter on February 17, 2006, she requested that he submit a responsible person questionnaire for every individual "that is part of the office and decision making at Crescent Beach, Inc." Specifically, the auditor asked that questionnaires be provided for Jeffrey Barry, Serena D'Angelo Barry, John Cole and Linda Knauf. Although the auditor cautioned Mr. Walter that failure to provide the questionnaires would mandate that she fill them out based on information she had collected, no additional questionnaires were ever submitted.

Dorothy Sanna was the president and sole shareholder of Crescent Beach, Inc., during the period in issue. She had the authority to manage the business, sign checks, act on behalf of the business in all its affairs, hire and fire employees, negotiate loans, borrow money and pay and direct payments of credits. She actually signed the lease on behalf of Crescent Beach, Inc., in December 2000 and signed all the sales and use tax returns filed during the audit period.

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quarter attributable to the $32,302.00 differential was $1.00.

According to Ms. Sanna, any actions taken by Serena and Jeffrey Barry on behalf of Crescent Beach, Inc., were taken with her authorization and at her direction.

Ms. Sanna worked in the kitchen as a cook during the period in issue and had held that position with the same restaurant for two years prior to her acquisition of the business from the Barry family on an undisclosed date in 2000. She prepared fruit trays, vegetable trays, meats and food orders and also helped with inventory.

Ms. Sanna had no personal knowledge or recollection of when she purchased the restaurant, how much she paid for the business or how she financed the purchase. She participated in the office work, including supervision of the employees who prepared the daily sheets. However, although she claimed responsibility for paying the employees, she was not clear on how withholding taxes were accounted for. Ms. Sanna was unable to answer many questions on cross-examination and appeared confused about names and dates.

Other than speaking with the auditor at the restaurant, Ms. Sanna had no involvement with the audit and did not recall the accountants, Mr. Petrella or Mr. Walter, hired by Crescent Beach to represent it in this audit. She also could not recall John Cole, an employee at Crescent Beach, or his association with the restaurant, even though he and Ms. Sanna spoke to the auditor during her field visit in October of 2005.

Ms. Sanna, 83 years old at the time of the hearing, has experienced a decline in her health in recent years and has experienced some issues with her memory. However, her infirmities did not prevent her from listening to and comprehending questions with respect to the audit and delivering cogent responses based upon her recollection of events and facts, if she was able to recall events that occurred between four and seven years earlier. Ms. Sanna concedes her responsibility for the collection and payment of sales and use taxes on behalf of petitioner for the

audit period as the sole owner, president and person with full managerial control over the corporation.

Ms. Barry had been employed at the restaurant since 1998. Her job duties included taking reservations, being a hostess, booking parties and weddings, assisting Ms. Sanna, at her direction, in issuing checks and operating the business when Ms. Sanna was otherwise busy in the kitchen, including communications with the Division concerning tax matters. She helped create and maintain the website for Crescent Beach.

She was a co-signatory with Dorothy Sanna on four different bank accounts in the name of Crescent Beach, Inc., which had been opened in June 2000. She did this as a convenience to Ms. Sanna who was often in the kitchen and chose to delegate some of her responsibilities in running the business.

Ms. Barry applied for an automobile loan with Chrysler Financial Services in December of 2005 in which she stated that she had worked at Crescent Beach Hotel for seven years and listed her occupation as business manager.

On various dates between April 2002 and November 2005, the Tax Compliance Division was in contact with Crescent Beach, Inc., with respect to outstanding assessments. The communications reflected in a case tracking log by several compliance employees described contacts with John Cole and Serena Barry and at times referred to both as managers and to Ms. Barry as a responsible person. However, on several occasions the log specifically mentioned Ms. Sanna as the owner of the business and president, who had been absent due to a hip replacement surgery.

Between July 2004 and February 2006, four articles appeared in the print media that described a hotel and spa project, which had been proposed for land adjoining that leased by

Crescent Beach, Inc. The articles alleged that the project was proposed to the Monroe County Industrial Development Agency and the Greece Planning Board by Crescent Beach Restaurant and attributed statements to Serena Barry, described as the manager of the restaurant, which she denied in sworn testimony. One of the articles from the Rochester Democrat and Chronicle, dated February 19, 2006, noted without citing any source that Serena and Jeffrey Barry were in charge of the day-to-day operations of Crescent Beach, Inc.

Although suggested by at least one of the articles, the hotel project was an independent venture by Serena Barry that was not connected with the restaurant operation and was meant to be held in her name alone - - a fact that Ms. Barry reiterated in sworn testimony at the hearing.

The Barry family had opened the restaurant in 1942, giving Mr. Barry a detailed knowledge of its history and operations, although he worked there only briefly in the 1980s. However, under Dorothy Sanna's management, Jeffrey Barry had worked for Crescent Beach, Inc., since 2000 and performed maintenance functions, served parties, washed dishes and worked in the kitchen during the audit period and did not recall being a paid employee during that time frame. Mr. Barry had experienced a divorce and custody battle that convinced him it was not the time for him to become involved in the operation of the business. He and his spouse, Serena Barry, survived on Ms. Barry's salary, loans from relatives and credit card charges that he estimated to be approximately $100,000.00. Much of Mr. Barry's time was spent caring for his three young children during the years in issue, making a steady job with the restaurant an impossibility.

From his time spent at the restaurant, Mr. Barry had a detailed working knowledge of the operation of the restaurant, including its method of accounting for sales from point of sale to

sales tax return; its antiquated registers; its bookkeeping procedure; and fixed assets. However, he claimed to have no involvement with the financial affairs of the corporation.

Petitioner had an independent accountant, Mr. Christopher Klee, review its records for the period in issue to determine if they were adequate to perform a detailed audit for the period in issue. In addition, Mr. Klee reviewed the audit performed by the Division. It was his opinion that the records were adequate and tied into the sales tax returns filed by petitioner for the audit period.

Mr. Klee noted that he was presented with approximately 36 boxes of materials that related to each of the months in the audit period. In the few boxes that he examined, those for August 2003, November 2004, October 2004 and September 2004, he claimed to have found daily, bundled receipts for each day of the month including credit card receipts and cash guest slips, credit card tapes generated by the credit card machines, and folders for party sales. Mr. Klee noted that there was no register tape that recorded cash sales as there was for credit card sales.

Mr. Klee claimed that he was able to tie in all of the daily records in the box for the month of September 2004 to the manually generated daily sheets and then to the sales tax return filed for that period.

In his analysis, Mr. Klee determined that the Division's audit led to the conclusion that petitioner demonstrated a credit card usage, or credit card sales, of about 49%, which he believed from his experience was low. Mr. Klee believed that the petitioner's credit card use was between 65% and 75%, and 71.33% for the month of September 2004.

Mr. Klee speculated that he believed the Division double-counted the credit card sales from the party sales and the sales paid for by Simply Certificates, a form of gift certificate. His

conclusion was based on the fact that if you subtracted these from the Division's computations, the result was very close to his conclusion.

With respect to the Division's use of the National Restaurant Association's 2002 Restaurant Industry Operations Report, Mr. Klee noted that he believed petitioner was best characterized as a mid-range to high-end restaurant based on menu prices. However, he conceded on cross-examination that he had not examined the menu for the period in issue but had a general idea from the size of guest checks he viewed and a visit he made to the restaurant.

Mr. Klee analyzed the bank statements for petitioner's operating account, not the actual deposit slips, and came to the conclusion that the bank deposits tied in to the sales reported on the daily sheets, which were manually prepared by someone in the office.

Mr. Klee did not know if he had been provided with all the books and records of petitioner for the audit period, but was convinced that the records provided did tie in to the daily sheets and the sales tax returns. This conclusion was based on his assumption that all the guest checks were in the box and that none were missing, but he did not verify that they were in sequence, despite the fact that he was aware that they were numbered. Mr. Klee also did not attempt to see if they were verified by any other record, such as register tapes or a general ledger. He did state that he reviewed QuickBook records, but was not aware that they did not exist until after the audit was performed. He also said that he reviewed a cash log with "general ledger sequences," but it was not apparent that this document was different from the QuickBooks records he was provided by petitioner. Mr. Klee could not recall if the cash log entries he saw covered only the four months he reviewed or the entire period.

Mr. Klee also determined that the auditor, in her analysis of the month of September 2004, made errors in reconciling the daily sheets with the register receipts. His conclusion was that the

auditor had double counted party sales paid by credit card and restaurant sales paid by Simply Certificates. When he subtracted the erroneously included sales, there was a differential of only $37.97. However, this error did not address cash sales or the auditor's issue with substantiation for same.

Ms. Barry testified that a general ledger had been provided in response to the Division's request for books and records, but the auditor denied that a general ledger was produced after two written requests for it. Further, none of petitioner's representatives mentioned that they had reviewed a general ledger in connection with the audit and none was produced at the hearing.

An antiquated Panasonic computer system operated the two pre-check terminals and the register behind the bar, which closed out all checks. A fourth, reserve register was part of this system in the event of a breakdown. The system broke down frequently, according to Larry Nobles, a computer consultant to petitioner, a fact that was also confirmed by Serena Barry and Jeffrey Barry. The system was generally considered unreliable, crashed frequently and contained no backup in the event of a crash, calling into question its efficacy in assisting in tracking guest checks for audit purposes.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that the Division made a proper request and, upon review, properly determined that the records were insufficient to conduct a full audit due to insufficient documentation of petitioner's cash sales. As a result, the Administrative Law Judge held that the Division was authorized to use an estimated audit method, so long as such method was reasonably calculated to reflect the taxes due. The Administrative Law Judge noted that, in the absence of cash sales records, the Division properly resorted to external indices and the resulting audit was supported by a rational basis.

The Administrative Law Judge observed that the burden rested with petitioner to present clear and convincing evidence that the audit method chosen by the Division led to unreasonably inaccurate results or that the amount of tax assessed was wholly inaccurate. The Administrative Law Judge noted that exactness in the outcome is not required and that considerable latitude is given an auditor's method of estimating sales under the particular circumstances of each case. The Administrative Law Judge determined that petitioner failed to meet its burden of proving that the audit method was erroneous or the amount assessed inaccurate.

The Administrative Law Judge determined that as Dorothy Sanna was the president of the corporation and conceded her duty to collect and remit sales taxes on behalf of petitioner, she was, in fact, a responsible officer. The Administrative Law Judge concluded that Jeffrey Barry and Serena Berry were not persons responsible for the collection and remittance of tax during the audit period.

With respect to the imposition of penalties, the Administrative Law Judge found that petitioner did not establish that its failure to pay the correct amount of tax was due to reasonable cause and accordingly determined that the penalties imposed by the Division should not be abated.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to portions of the Administrative Law Judge's determination. Specifically, it argues that: (a) petitioner met its statutory obligations because it provided a complete set of records to the auditor, who failed to conduct a sufficient investigation; (b) the notice was arbitrary and capricious because the Division lacked proper grounds to estimate petitioner's tax liability; and (c) the auditor failed to provide credible testimony with regard to petitioner's audit.

The Division argues that the determination of the Administrative Law Judge should be affirmed in all respects. Specifically, the Division points out that the Administrative Law Judge determined the auditor to be credible, rejecting petitioner's critiques of the audit. It also contends that these arguments are ineffectual because they do not cure petitioner's failure to maintain any source documentation such that the reported sales could be verified. As the accuracy of the records could not be confirmed, the Division contends that it was properly entitled to estimate petitioner's tax liability. The Division further notes that petitioner failed to present any reasonable cause that would permit the abatement of penalties.

OPINION

We affirm the determination of the Administrative Law Judge.

We have often restated the standard for reviewing a sales tax audit where the Division estimates sales tax liability. In ***Matter of Your Own Choice*** (Tax Appeals Tribunal, February 20, 2003), we stated as follows:

> To determine the adequacy of a taxpayer's records, the Division must first request (***Matter of Christ Cella, Inc. v. State Tax Commn.***, ***supra***) and thoroughly examine (***Matter of King Crab Rest. v. Chu***, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109).
>
> The purpose of the examination is to determine, through verification drawn independently from within these records (***Matter of Giordano v. State Tax Commn.***, 145 AD2d 726, 535 NYS2d 255; ***Matter of Urban Liqs. v. State Tax Commn.***, 90 AD2d 576, 456 NYS2d 138; ***Matter of Meyer v. State Tax Commn.***, 61 AD2d 223, 402 NYS2d 74, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025; ***see also***, ***Matter of Hennekens v. State Tax Commn.***, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is "virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit" (***Matter of Chartair, Inc. v. State Tax Commn.***, 65 AD2d 44, 411 NYS2d 41, 43; ***Matter of Christ Cella, Inc. v. State Tax Commn.***, ***supra***), "from which the exact amount of tax due can be determined" (***Matter of Mohawk Airlines v. Tully***, 75 AD2d 249, 429 NYS2d 759, 760).

> Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (***Matter of Urban Liqs. v. State Tax Commn.***, ***supra***). The estimate methodology utilized must be reasonably calculated to reflect taxes due (***Matter of W.T. Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (***Matter of Scarpulla v. State Tax Commn.***, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451; ***Matter of Cousins Serv. Station***, Tax Appeals Tribunal, August 11, 1988). In addition, "[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case" (***Matter of Grecian Sq. v. New York State Tax Commn.***, 119 AD2d 948, 501 NYS2d 219, 221).

Tax Law § 1138(a)(1) provides that if "a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by [the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ." This language has been interpreted to provide that "[t]he honest and conscientious taxpayer who maintains comprehensive records as required has a right to expect that they will be used in any audit to determine his ultimate tax liability" (***Matter of Chartair, Inc. v. State Tax Commn.***, 65 AD2d 44, 47 [1978]).

Petitioner's argument that a complete set of records was made available to the auditor and that the auditor failed to conduct a sufficient audit is unfounded. The record proves that the auditor, her supervisor, and a second auditor spent four days at Mr. Petrella and Mr. Walter's offices reviewing records produced by petitioner. We also note that neither Mr. Petrella nor Mr. Walter reviewed any of petitioner's records including sales tax returns. Further, petitioner did not have an owner, officer or person with knowledge of the business available at the first

meeting, making it difficult to review the records produced. The auditor also asked Mr. Petrella to substantiate petitioner's cash sales, but neither a general ledger nor a cash log was produced either on audit or at the hearing. Accordingly, we reject petitioner's contention that complete and accurate records were provided to the Division.

There is no question that the Division properly requested petitioner's records for review during the sales tax audit. However, petitioner did not present books and records sufficient to allow the Division's auditors to perform a detailed audit. Petitioner provided register tapes, bank statements, sales tax returns, daily summary sheets, expense invoices, a handwritten list of capital assets and exemption certificates. The Division was unable to verify the accuracy of these records absent a general ledger, register tape recording cash sales, or other record of its cash sales or sequentially numbered guest checks (***see Matter of Vebol Edibles v. Tax Appeals Trib.***, 162 AD2d 765 [1990], ***lv denied*** 77 NY2d 803 [1991]; ***Matter of Club Marakesh v. State Tax Commn.***, 151 AD2d 908 [1989], ***lv denied*** 74 NY2d 616 [1989]). We conclude that the Division was entitled to resort to external indices to determine petitioner's sales and use tax liability.

We next address petitioner's argument that the resort to an alternative method of determining taxable sales was arbitrary, capricious, lacked a rational basis and was improper. Petitioner 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 You Own Choice, supra***). We find that the Division's resort to the 2002 Restaurant Industry Report, information taken from petitioner's only filed federal income tax report and information about the restaurant known to the Division's audit staff to estimate petitioner's taxable sales was reasonable. Further, we find that the evidence presented by petitioner fails to show by clear and convincing evidence that the audit results are inaccurate. Petitioner and Mr.

Klee's testimony at the hearing is not a substitute for verifiable books and records as required by the statute. Although Ms. Barry testified that she provided a general ledger, one was never brought forth during the audit or at the hearing. Petitioner's arguments do not constitute evidence. Any imprecision in the audit results arises by reason of petitioner's failure to maintain adequate books and records as required by Tax Law § 1135(a)(1) and must be borne by the taxpayer (***see Matter of Markowitz v. State Tax Commn., supra***).

We find petitioner's continued reliance on ***Matter of King Crab Rest. v. Chu, supra*** does not aid its cause. In ***King Crab***, the auditor determined that the records were inadequate due to the lack of cash register tapes and that guest checks were not in chronological order. Upon appeal, the Court concluded that the auditor did not conduct a sufficient investigation to justify that the records were not capable of supporting a complete audit. In ***King Crab***, the auditor was given a general ledger, cash disbursement journal, guest checks, bank statements and purchase invoices for the entire audit period except for the first seven months. In the present matter, petitioner's fatal error was that it never produced a general ledger or cash disbursements journal that would enable the Division to trace its cash transactions through to the sales reported on the sales tax returns. Accordingly, petitioner's claim that its books and records were adequate for a detailed audit is unfounded.

We also find that the Administrative Law Judge properly determined that Ms. Sucy's testimony at the hearing was credible. It is the role of the Administrative Law Judge to determine the relevance and credibility of evidence and provide the proper weight in making his or her determination (***see Matter of Gray v. Adduci***, 73 NY2d 741 [1988]; ***Matter of Flanagan v. New York State Tax Commn.***, 154 AD2d 758 [1989]). Here, the Division's witness testified to facts in the audit file. Petitioner presents the same argument here as below. The

Administrative Law Judge weighed these arguments and found Ms. Sucy's audit report consistent with her testimony to be credible and relevant. We defer to the Administrative Law Judge, as petitioner has not pointed to any facts sufficient to override our deference (***see Matter of Spallina***, Tax Appeals Tribunal, February 27, 1992; ***see also Matter of Burke***, Tax Appeals Tribunal, June 2, 1994).

We also conclude that the Administrative Law Judge properly determined that petitioner, Dorothy Sanna, was a responsible officer of petitioner, Crescent Beach, Inc. Dorothy Sanna conceded her responsibility for the collection and payment of sales and use taxes during the period at issue. Petitioner failed to raise any meritorious argument that would warrant reconsideration of this conclusion. Accordingly, we affirm this portion of the Administrative Law Judge's determination.

We hold that the Administrative Law Judge properly upheld the penalty asserted because petitioners failed to provide reasonable cause for the non-payment of sales tax due (Tax Law §1145[a][1][iii]; ***see Matter of MCI Telecom. Corp.***, Tax Appeals Tribunal, January 16, 1992; ***Matter of Philip Morris***, Tax Appeals Tribunal, April 29, 1993).

We have considered the remaining arguments raised by petitioners and find them either properly resolved by the Administrative Law Judge or unsupported by the record.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Crescent Beach, Inc., Jeffrey Barry, Serena Barry and Dorothy Sanna is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Crescent Beach, Inc., and Dorothy Sanna are granted to extent

indicated in finding of fact "19" of the Administrative Law Judge's determination, but are otherwise denied;

4. The petitions of Jeffrey Barry and Serena Barry are granted;

5. The Notice of Determination issued to Crescent Beach Inc. and Dorothy Sanna, dated May 18, 2006 and May 19, 2006, respectively, are sustained; and

6. The Notices of Determination issued to Jeffrey Barry and Serena Barry dated May 19, 2006, are cancelled.

DATED: Troy, New York
September 22, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner