STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **AUM SIDHDHY VINAYAK, LLC** 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, 2004 through August 31, 2007.	: : : : : :	DECISION DTA NO. 822732

Petitioner, Aum Sidhdhy Vinayak, LLC, filed an exception to the determination of the Administrative Law Judge issued on November 24, 2010. Petitioner appeared by Leon, Tarlowe & Saper CPAs (Barry Leon, CPA). The Division of Taxation appeared by Mark Volk, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a letter brief in lieu of a formal reply brief. Oral argument, at petitioner's request, was heard on June 15, 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 the "unit pricing" method was a permissible method of calculating and setting forth the sales tax liability on petitioner's room rental transactions.

II. Whether the Division of Taxation properly determined that petitioner's books and

records were inadequate to determine its sales tax liability for the audit period.

III. Whether the Division of Taxation utilized a reasonable and rational method to determine petitioner's sales tax liability.

IV. Whether petitioner carried its burden of proving that penalties should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "4," "5" and "8," which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Aum Sidhdhy Vinayak, LLC (petitioner), operated a motel, Econolodge Motel, in South Ozone Park, New York, during the period March 1, 2004 through August 31, 2007, the period in issue.

The Division of Taxation (Division) commenced a sales tax field audit of the books and records of the business by mailing an appointment letter dated January 25, 2007 to petitioner, informing petitioner that the Division was conducting a sales tax field audit of its records for the period March 1, 2004 through November 30, 2006. This audit appointment letter and an attached list of required books and records, advised petitioner that all of the business's books and records pertaining to the audit period, including cash receipts and disbursement journals, general ledgers, sales invoices, purchases invoices, cash register tapes, federal income tax returns, sales tax returns, bank statements, canceled checks and the like should be available for the auditor's review. The letter also advised that additional records and information might be required during the course of the audit.

Subsequently, by an appointment letter dated August 7, 2007, the Division extended the

audit period to March 1, 2004 through August 31, 2007, and requested books and records for the updated audit period. The same list of records requested by the Division in the first letter was also attached to this second one.

After receiving the first appointment letter, petitioner's representative informed the Division of the volume of records that would have to be transported and the seasonal peaks of petitioner's business. The Division's auditor in response offered to conduct a test period audit for one quarter of the audit period, but again based on the volume of records that would have had to be produced, petitioner's representative voiced an objection. The parties thereafter agreed to a one month test period audit of September 2006, which was the method utilized by the Division to review petitioner's sales records.[1]

We have modified finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> The initial records available included the sales tax returns, the federal income tax returns, the bank statements, and 963 registration/signature cards[2] for the test period, September 2006. The registration cards were intended to show that 38 rooms were rented a total of 963 times during that month. Petitioner also provided 20 invoices for the same period, showing the proper amount of tax charged. These represented room rental transactions where the customers requested receipts. Invoices corresponding to the remaining 943 did not exist.
>
> Although testimony referred to the number of registration cards as "963," the auditor's workpapers summarized transactions from 1,022 cards. In addition, the sales receipts entries on petitioner's Exhibit 5 indicate a total of 1,020 room rental transactions for the month of September 2006. No explanation of the

---

[1] Only after the audit calculations were submitted to petitioner was there an objection as to the use of September as a test month.

[2] The terms "registration cards" and "signature cards" were used interchangeably by the parties throughout the hearing and briefs; ultimately, such terms refer to the same object.

discrepancy between the testimony and the documents in evidence was provided.[3]

We have modified finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> The registration cards were divided into two colors: yellow for credit card sales and white for cash sales. The cards were designed to contain the name, address, date and the amount charged for the hotel room. The registration cards indicated a room rate; however, in contrast to the invoices, there was no entry for sales tax or hotel occupancy charges separately stated on the document. During the audit, petitioner indicated to the auditor that the registration cards only indicated one total dollar amount and such amount included the room charge and the sales and occupancy taxes therein. The auditor's log noted that the registration cards were not numbered and that the writing was sometimes illegible. The Division considered the registration cards inadequate proof that petitioner had paid the proper amount of sales tax.
>
> The invoices reviewed by the auditor contained the customer name, address, date, room charge, total charge for the stay, sales tax charged, and the hotel occupancy tax charged. The invoices were generally the sales receipts for customers who had made reservations and requested such documentation. If the documentation was not requested by a customer, petitioner did not routinely provide it.[4]

The Division's examination of the sales records revealed that the documents did not allow the opportunity for the Division to trace any transaction back to the original source or forward to a final total. The Division did not believe that there were adequate internal control procedures as to the sales operations of the business because there were no z-tapes or a complete set of invoices to substantiate the deposits, and there was no separate system of accounting for the New York State sales tax, the additional New York City sales tax or the hotel occupancy tax, at the point of sale. Petitioner did not maintain a tax accrual account and failed to provide a

---

[3] We modify this fact to more accurately reflect the record.

[4] We modify this fact to more accurately reflect the record.

general ledger, balance sheet or chart of accounts.

A review of petitioner’s bank deposits was performed and the Division determined that the bank deposits were substantially in agreement with the federal tax return and the sales tax returns. A test of the bank deposits was performed after the Division made adjustments for the hotel occupancy tax and the New York City occupancy tax. Some inconsistences in cash reporting, however, were detected by the Division. The Division noted that the ratio of cash deposits to total deposits averaged 28% in 2004, 48% in 2005 and 41% in 2006. However, in some months, the same ratio was only 7%. During those months, the cash deposits were inconsistent with the pattern of the business practices established by the documentation and according to that which had been confirmed by petitioner. Consequently, the Division determined that the cash deposits were so distorted that they were unusable to develop taxable sales.

We have modified finding of fact “8” of the Administrative Law Judge’s determination to read as follows:

> Using petitioner’s own records for September 2006, the Division estimated sales tax due. The auditor reviewed the registration cards and invoices representing credit card sales for the month of September 2006 and arrived at a total for the month of $38,323.29. This amount was multiplied by three to represent credit sales for a quarter, for a quarterly total of $114,969.87. The auditor also reviewed the registration cards and invoices representing cash sales for the test period and arrived at $45,578.71. This amount was multiplied by three to arrive at sales per quarter of $136,736.13. This amount was added to the credit sales ($114,969.87) to arrive at total taxable sales in the amount of $251,706.00. The registration cards provided the amount charged to customers as a gross dollar amount and such numbers were inclusive of the applicable sales and occupancy

taxes.[5]

In estimating petitioner's taxable sales for the test period, the auditor neglected to make any adjustment to remove any applicable sales taxes or hotel occupancy taxes from the gross dollar amount charged to customers as was reflected on the registration cards.[6] The total taxable sales amount was compared to the gross sales reported on the sales tax returns as filed for the quarter ending August 31, 2006 ($225,096.00), in order to determine an error rate of 112% ($251,706.00/$225,096.00). The error rate was applied to each of the reported gross sales from petitioner's sales tax returns[7] to yield adjusted taxable sales of $3,278,769.20.

The auditor then determined from records provided by petitioner's representative, what portion of the sales tax and hotel occupancy tax total represented only the hotel occupancy tax, in order to isolate the sales tax paid. Taxable sales upon which petitioner had computed sales tax for each of the quarters were identified and compared to the adjusted taxable sales computed from the application of the error rate.

The result was additional taxable sales in the amount of $1,371,587.77 for the audit period. An adjustment agreed upon by both parties in the amount of $252,042.00, stemming from sales in August 2006 that were included in the September 2006 test period, was made, to result in additional audited taxable sales of $1,119,545.77. This resulted in additional sales tax attributed to sales in the amount of $94,921.59 ($34,042.33 attributed to the period March 1, 2004 through February 28, 2005,[8] plus $60,879.26 for the period March 1, 2005 through August 31, 2007).

At the hearing, the auditor, for the first time, recognized that she should

---

[5] Such is consistent with the record and the Administrative Law Judge's conclusions found in paragraph "B" of the Determination. A review of petitioner's Exhibit 1 (invoices for September 2006) reflects that almost all of the invoices provided reconcile with the registration card information as summarized by the auditor in the audit workpapers; that is, the invoices provide a room charge with sales and occupancy taxes separately added thereto arriving at a total amount charged to customers for a room. Such total amounts reconcile with the audit workpaper summary of the registration card information for that room use.

[6] The Division conceded this fact in its appearance before the Tribunal.

[7] New York State and Local Quarterly Sales and Use Tax Return form ST-100, line 1, specifically instructs all filers that the gross sales amount reported on the form should "not include sales tax," thus utilization of the amount reported on that form by petitioner was appropriate for the auditor to use.

[8] This amount is a portion of the $35,201.04 determined by Bureau of Conciliation and Mediation Services (BCMS) to be due for the period 3/1/04 through 2/28/05 (***see*** Finding of Fact herein).

> have compared the sales per quarter as computed to the gross sales as reported for the quarter ending November 30, 2006, rather than the gross sales as reported for the quarter ending August 31, 2006. The auditor noted that with this adjustment, the error rate would have been a larger percentage (126%) and the estimated tax due also correspondingly higher. Upon recognizing her error, the auditor requested that the parties assume that utilization of the gross sales reported for the quarter ending August 31, 2006 could accurately be used in her applicable audit computations in place of the quarter ending November 30, 2006 numbers. The auditor provided no workpapers, computations or other support substantiating the asserted 126% error rate calculation and upon requesting that the parties assume that the initial 112% error rate computation could be used, proceeded to go through her workpapers and analysis in detail based upon the 112% error rate computation.[9]

The auditor also performed a review of capital expenditures and found that purchase invoices were missing, the records did not permit the auditor to trace any transaction back to the original source, there were insufficient internal control procedures in this area of the business, and the capital records were not able to be audited. Utilizing the depreciation schedules on petitioner's federal tax returns, capital expenditures were identified in the amount of $11,512.00 for carpets, furniture and fixtures during the period March 1, 2004 through February 28, 2005. Since petitioner could not provide invoices showing that sales tax had been paid, the Division assessed an additional $992.91.

The auditor performed a review of expense purchase invoices to again determine if proper sales tax was paid by petitioner. The invoices for tax year 2006 were reviewed and petitioner was unable to provide proof that he paid taxes on $1,979.70 of expense purchases for that year. Projecting the tax due in the amount of $165.80 (for the period March 1, 2004 through February 28, 2005) over the rest of the audit period, an additional $414.50, for the period March 1, 2005 through August 31, 2007, was assessed. Thus, the total tax due from expense purchase was

[9] We modify this fact to more accurately reflect the record.

$580.30 for the entire audit period.

The Division issued two Notices of Determination to petitioner covering the entire audit period. The first was an estimated Notice, dated May 25, 2007, assessing additional sales tax due in the amount of $100,000.00 (which was eventually reduced) for the period March 1, 2004 through February 28, 2005. The circumstances surrounding the estimated notice follow. When the Division's auditor first contacted petitioner's representative, he was sent a power of attorney and a statute of limitations waiver to sign and return. When it appeared as though the waiver was not going to be returned to the Division in a timely manner, in an effort to protect the state's interest, the Division estimated quarterly sales at $25,000.00 per quarter, plus penalty and interest, and issued an assessment for the period March 1, 2004 through February 28, 2005. After a thorough review of evidence presented, the $100,000.00 assessment was reduced by BCMS by Conciliation Order No. 223873, issued December 26, 2008, to $35,201.04, plus penalty and interest at the applicable rates. This assessment represented additional sales and use taxes on sales, capital expenditures and expense purchases in the respective amounts of $34,042.33, $992.91 and $165.80.

The second Notice of Determination, dated May 12, 2008, assessed additional sales and use taxes due for the period March 1, 2005 through August 31, 2007 in the amount of $61,293.76, plus penalty and interest. It is comprised of sales and use taxes on sales and expense purchases in the respective amounts of $60,879.26 and $414.50.

Rushin Ghandi, the general manager of petitioner's motel, testified at the hearing. He established that when a customer first arrives at the motel, he or she completes a registration card and makes payment, by either cash or credit card. The motel operates in three eight-hour shifts.

The desk agent assigned for a particular eight-hour shift is not issued a certain number of registration cards for which he or she is responsible. Nor is there any numerical sequencing of the registration cards used within a shift or over the course of a particular day. A video recording system that was available in 2006 was the method by which petitioner kept an eye on any potentially dishonest employees handling cash. Mr. Ghandi and petitioner's owners check these video recordings periodically for any dishonest activity, and Mr. Ghandi randomly reviews the front desk operations to insure proper compliance with cash and credit transactional reporting.

At the end of each shift, the amount of cash is totaled and placed into an envelope. Either that same day or the next day, Mr. Ghandi collects the envelope and sends it to the owners of the company, who then transmit the same to accounting department personnel, who are ultimately responsible for making the bank deposit. A sheet of all the daily transactions is prepared. It bears the hotel rental rate, indicates whether it was a credit or cash sale and shows total income for the day. The total income for each daily sheet is transferred to a monthly summary, at which time petitioner backs out the New York State sales tax, the New York City sales tax and the New York City hotel occupancy tax, resulting in net income.

Petitioner submitted into evidence nine invoices for the month of September 2006, all representative of cash transactions. Seven could be traced to the daily sheet of the corresponding date, representing income from that day. The income from a September 20, 2006 transaction could not be traced from the invoice to the daily sheet, though in addition to the invoice, a registration card existed for the customer.[10] Another invoice dated September 11, 2006, which

[10] The Division's auditor listed the information from each of the registration cards she was provided for the test month, September 2006. The information extracted included the date, customer name, room number, and the room rate.

indicated a payment collected from the customer in the amount of $128.00, could be traced to the daily sheet under the same customer name and room number. However, $49.00 of income was reported as received.

The registration cards for cash and credit transactions, as summarized by the auditor by date, were compared to daily sheets that totaled income corresponding to the same date. Many cards could be traced to the daily sheet by the same information summarized by the auditor: the room number, customer name or room fee. However, some registration cards bore a higher rate than what was reported as income from that customer; some postings on the daily sheet did not have a corresponding registration card; and on some days there was a significant number of cash transactions for which there were registration cards that were not recorded on the daily income sheet. Based upon the auditor's workpapers, on September 20, 2006, for example, there were 39 registration cards of customers who entered into a cash transaction with petitioner. The daily income sheet for the same day reported 21 cash transactions that could be traced to registration cards. No explanation was provided for any of the discrepancies noted, particularly the 18 unreported cash transactions for September 20, 2006.

Mr. Ghandi identified photos of a sign that appears at the front desk of the motel where customers check in that states: "ALL RATES INCLUDE CITY AND STATE SALES AND OCCUPANCY TAXES."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed the relevant standards for reviewing a sales tax audit, noting that the taxpayer bears the burden of proving, by clear and convincing evidence, that either the audit methodology was unreasonable or that the assessed amount was erroneous.

In addressing the arguments, the Administrative Law Judge noted that petitioner's main contention is that the Division inherently rejected petitioner's use of the tax-inclusive unit pricing methodology.

The Administrative Law Judge accurately found that this accounting methodology is permissible under the regulations, but it did not absolve petitioner from its statutory duty of maintaining records properly indicating the amount of sales tax collected on its room rentals. The Administrative Law Judge determined that petitioner's records were inadequate, that the Division was within its powers to estimate the sales tax due, and that petitioner had not met its burden of proving that either the audit methodology was unreasonable or that the assessed amount was erroneous. Accordingly, the Administrative Law Judge sustained the subject Notices of Determination.

ARGUMENTS ON EXCEPTION

In support of its exception, petitioner argues that the registration cards submitted into evidence clearly prove that petitioner met its burden of maintaining adequate records as required under the unit pricing methodology. Petitioner also contends that the audit methodology was erroneous because the Division purportedly ignored the fact that sales tax was included on the registration cards and that the hotel business was seasonal. Petitioner also contends that the error rate calculated by the Division was clearly erroneous.

The Division argues that the Administrative Law Judge properly determined that petitioner failed to maintain adequate books and records and that the audit methodology was proper. In its brief, the Division concedes that the unit pricing method, as provided by the regulations, is a permissible accounting method. However, the Division argues that utilizing this

method does not discharge the responsibility of maintaining adequate books and records. The Division also contends that petitioner failed to introduce clear and convincing proof that the audit methodology was unreasonable.

OPINION

The Tax Law provides that a person required to collect tax under the law must make such collection from the customer at the time the price, amusement charge or rent to which the sales tax applies is also collected (Tax Law § 1132[a][1]). Tax Law § 1132(a)(1) also requires that when a vendor gives a customer any type of receipt, sales tax shall be separately stated on that receipt (***see also*** 20 NYCRR 532.1[b]). However, the regulations additionally provide for a situation where no written receipt is provided (20 NYCRR 532.1[b][4]), called the "unit price method." The unit price method is a means of setting forth and accounting for sales where a vendor has collected tax on a sale but where no written receipt is given to a customer. Under this method, the "unit price" is the total price, including sales tax, at which the sale is recorded, and the seller is required to make the customer aware of the inclusion of sales tax in the price by visibly posting a placard stating that the prices of all taxable items include sales tax (***see*** 20 NYCRR 532.1[b][4]). In addition, the vendor may record the sales by the use of a cash register, or otherwise maintain accurate records, indicating such sales of taxable and nontaxable products.

There is no dispute that petitioner was responsible for the collection of New York State and City sales tax and the hotel occupancy tax. Petitioner fulfilled the requirement that it must visibly display a placard by placing a sign at the check-in desk, which indicated that all room rates included city and state sales and occupancy taxes. Petitioner's nine sales invoices that were introduced into evidence displayed a round number as the final amount collected from the

customer, with the taxes backed out from that amount, leaving the net room rate an odd number. From all appearances, petitioner handled all of its transactions, cash and credit, in the same manner: stating a rate to the customer that included all of the taxes. The issue in this case is whether the records maintained by petitioner were sufficient for the Division to determine that the proper amount of sales were recorded and the proper amount of sales tax was collected and remitted.

Under Tax Law § 1135(a), "[e]very person required to collect tax shall keep records of every sale . . . in such form as the commissioner of taxation and finance may by regulation require." These records must be kept in a manner suitable to determine the correct amount of tax due and must be available for the Division's inspection upon request (Tax Law § 1135[g]; 20 NYCRR 533.2[a][2]). The regulations provide that among the sales records required to be maintained are "sales slip, invoice, receipt, contract, statement or other memorandum of sale; . . . guest check, . . . cash register tape and any other original sales document" (20 NYCRR 533.2[b][1]). Failure to maintain or make available such records, or the maintenance of inadequate records, can result in the Division's estimation of the amount of tax due (Tax Law § 1138[a]). It has been well established that the Division may, in appropriate circumstances, resort to indirect auditing methods, including the use of test periods and projections therefrom, in arriving at its estimated determination of tax due. However, in ***Matter of Chartair v. State Tax Commn.*** (65 AD2d 44, 46 [1978]), the Court stated:

> Although there is statutory authority for the use of a "test period" to determine the amount of tax due when a filed return is incorrect or insufficient (Tax Law § 1138, subd. [a]), resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit (citations omitted). However, if records are available from which the exact amount of tax

> can be determined, the estimate procedures adopted by the respondent become arbitrary and capricious and lack a rational basis (citation omitted).

Because the statutory and decisional authority allowing for a taxpayer's sales tax liability to be calculated by estimate procedures rests upon a finding that the taxpayer's books and records are inadequate to conduct a complete audit, the Division is required to first request (***Matter of Christ Cella v. State Tax Commn.***, 102 AD2d 352 [1984]) and thoroughly examine (***Matter of King Crab Rest. v. Chu***, 134 AD2d 51 [1987]) the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v. Chu***, 134 AD2d 776 [1987], ***lv denied*** 71 NY2d 806 [1988]), in order to determine from verification drawn independently from within these records whether they are sufficient to support a complete audit (***Matter of Meyer v. State Tax Commn.***, 61 AD2d 223 [1978], ***lv denied*** 44 NY2d 645 [1978]). If the Division's examination establishes that the taxpayer's records are adequate and complete, the taxpayer is entitled to have its assessment calculated based upon a detailed audit of those records (***Matter of James Kennedy & Co. v. Chu***, 125 AD2d 773 [1986]). In contrast, when a taxpayer's records are incomplete and unreliable for determining sales, the Division may resort to a test-period audit using external indices (***Matter of Skiadas v. State Tax Commn.***, 95 AD2d 971 [1983]).

In this case, the Division made clear written requests for books and records twice during the audit, and numerous times verbally, as well. In response to those requests, petitioner's representative and general manager objected on the basis that the records were too voluminous to produce. The parties eventually came to an agreement that a test period of September 2006 would be used to ease this burden. However, this agreement was in no way permission to produce less than complete and accurate records from which the Division could determine that petitioner was recording all sales and remitting the proper amount of sales tax. Petitioner

provided room registration cards for the test month. The registration cards did not bear any sequential numbering, nor were there any other controls to ensure that they were all accounted for on a daily basis. There were no cash register or other tapes recording individual transactions. The daily sheet, which allegedly bore a listing of each transaction for September 2006, showed significant discrepancies, particularly as to unreported cash transactions, when compared to the registration cards for the same days. There were no internal controls over the flow of cash, from original collection to deposit and reporting. Even if the daily sheets could have been reconciled to the bank statements and ultimately the tax returns, the fact that at the first level of recording the transactions was not properly recorded meant that the same discrepancies would simply carry all the way through. Any consistency in that flow did not exist. Further, with respect to expense purchases and fixed asset acquisitions, petitioner simply did not retain sufficient documentation to prove that the sales tax had been properly paid. The Division's conclusion that the records were inadequate to support a determination that proper sales tax had been remitted is well supported and paved the way for the Division's calculation of estimated tax.

Where the Division has established entitlement to the use of indirect auditing methods, the burden of overcoming the results of such an audit rests upon the taxpayer, who must prove by clear and convincing evidence that the audit method is unreasonable (***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858 [1981]; ***Matter of Cousins Serv. Sta.***, Tax Appeals Tribunal, August 11, 1988), or that the amount of the assessment is erroneous (***Matter of Rizzo v. Tax Appeals Trib.***, 210 AD2d 748 [1994]; ***Matter of Mobley v. Tax Appeals Trib.***, 177 AD2d 797 [1991], ***appeal dismissed*** 79 NY2d 978 [1992]; ***Matter of Surface Line Operators Fraternal Org. v. Tully, supra***; ***Matter of Scarpulla v. State Tax Commn.***, 120 AD2d 842

[1986]). In addressing the method of audit, "[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, 950 [1986]). Furthermore, a presumption of correctness attaches to a notice issued by the Division, and the taxpayer must overcome this presumption (***see Matter of Suburban Carting Corp.***, Tax Appeals Tribunal, May 7, 1998, ***confirmed Matter of Suburban Carting Corp. v. Tax Appeals Trib.***, 263 AD2d 793 [1999]). Since the accuracy of petitioner's reported sales receipts was doubtful, as a result of inadequacy in petitioner's own records and record keeping, the Division was justified in estimating taxes due and used a reasonable audit method to do so. The Division used petitioner's own records, and when it was concluded that reported sales were not equal to actual sales, additional liability was estimated. It is well settled that the Division is granted a great deal of latitude in the method it chooses to estimate the sales tax due, and the presumption of correctness attaches to the resulting notice of liability. In general, petitioner has failed to overcome such presumption due to an absence of clear and convincing evidence that the audit methodology was unreasonable or that the assessment was erroneous (***Matter of Surface Line Operators Fraternal Org. v. Tully, supra***; ***Matter of Scarpulla v. State Tax Commn., supra***). However, in the case at hand, it has been sufficiently established that the Division's auditor did not, but should have, removed the applicable sales and hotel occupancy taxes from the registration card gross dollar amounts before utilizing such to calculate the applicable "error rate." The Tribunal has held that the reasonableness of an audit method can only be determined based on information made available to the auditor before the issuance of the statutory notices (***see Matter of Queens Discount Appliances***, Tax Appeals Tribunal, December 30, 1993; ***Matter of House of Audio of Lynbrook***,

Tax Appeals Tribunal, January 2, 1992). The Division's auditor established that the Division was justified in estimating petitioner's gross sales and sales tax due. The auditor had a number of different options available from which to select, in order to estimate petitioner's taxable sales for the period. In this case, although aspects of the books and records of petitioner were considered suspect, the auditor elected to utilize certain records of petitioner (in particular petitioner's registration cards) in order to estimate petitioner's taxable sales. During the audit, petitioner had informed the auditor that it utilized the unit pricing method with regard to the registration cards and the information supporting this assertion was made available to the auditor during the audit. To appropriately utilize the registration cards in the calculation of the applicable error rate, the Division needed to back out the applicable sales and occupancy taxes (which can be done based upon the rates in effect during those periods) from the total dollar amount provided on the cards. Inclusion of the applicable sales taxes and occupancy taxes resulted in an inflated calculation of the "error rate" and estimated sales, since the auditor treated the sales and occupancy taxes themselves as sales to consumers. The Tribunal has the authority to adjust a taxpayer's liability in order to more accurately reflect such liability (***see Matter of Clone Enterprises***, Tax Appeals Tribunal, March 19, 1992). In this case, the applicable Notices of Determination should be modified to account for an adjusted "error rate" that must be recomputed by removing the applicable sales and occupancy taxes that were included in the amounts reflected on the registration cards. Once adjusted, petitioner has failed to meet its burden of proof that the Division's methodology was unreasonable given the circumstances.

Although, because of the potential underestimation of the applicable error rate, the liability calculated by the auditor may have been less than it might otherwise have been, it is

noted that by making the request for the parties to assume that the 112% error rate could be used effectively in the audit computations and then continuing to use the 112% error rate when discussing the audit computations and work in detail for the remainder of the hearing, the taxpayer's representative was placed at some disadvantage to review and effectively cross examine the auditor on the computations and use of a revised error rate. Use of the 112% error rate appears to result in a more conservative calculation of taxes due and the mistake is not deemed a critical error in the auditor's methodology. Accordingly, we affirm the Administrative Law Judge's determination as modified herein.

Tax Law § 1145(a)(1)(i) imposes a penalty upon persons who fail to timely file a return or timely pay the tax imposed by Articles 28 and 29 of the Tax Law. The penalty and additional interest may be waived if "such failure or delay was due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). In determining whether reasonable cause and good faith exist, the regulations provide several specific grounds and also a catchall, which provides for a finding of reasonable cause based upon any ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay, demonstrating an absence of willful neglect (20 NYCRR 2392.1[d][5]). The taxpayer bears the burden of establishing that its actions were based upon reasonable cause and not willful neglect (***see Matter of Philip Morris***, Tax Appeals Tribunal, April 29, 1993; ***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992, ***confirmed Matter of MCI Telecommunications v. Tax Appeals Trib.*** 193 AD2d 978 [1993]; ***see also*** 20 NYCRR 3000.15[d][5]). Petitioner has not offered any information that would allow for an abatement of penalties, and therefore, has not carried this burden. The imposition of penalty should be adjusted based upon the revised

calculation of taxes ordered herein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Aum Sidhdhy Vinayak, LLC is granted to the extent that the applicable Notices of Determination be modified to account for an adjusted "error rate" that must be recomputed by removing the applicable sales and occupancy taxes that were included in the amounts reflected on the registration cards, but is otherwise denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above;

3. The petition of Aum Sidhdhy Vinayak, LLC is granted to the extent indicated in paragraph "1" above, but is otherwise denied; and

4. The Division of Taxation is directed to modify the Notice of Determination, dated May 25, 2007, as adjusted by Conciliation Order No. 223873 and the Notice of Determination, dated May 12, 2008, in accordance with paragraph "1" above and to adjust the penalty based upon the revised calculation of taxes, but such Notices are otherwise sustained.

DATED: Troy, New York
December 8, 2011

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

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