STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
M&R FOOD GROUP, 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 September 1, 2001 through February 28, 2005.	:	
	:	DETERMINATION DTA NOS. 821391
In the Matter of the Petition	:	AND 821408
of	:	
STEVEN M. KIM	:	
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 December 1, 2002 through February 28, 2005.	:	
	:	

Petitioner M&R Food Group, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2001 through February 28, 2005, and petitioner Steven M. Kim 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 December 1, 2002 through February 28, 2005.[1] A consolidated hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax

[1] The petition, conciliation order, and notice of hearing pertaining to petitioner Steven M. Kim list different periods in question. Review of the Notice of Determination issued to Mr. Kim makes clear that the period at issue being challenged by him spans December 1, 2002 through February 28, 2005

Appeals, 641 Lexington Avenue, New York, New York, on August 14, 2007 at 10:30 A.M., with all briefs to be submitted by January 14, 2008, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). Petitioners appeared by Brown & Brown, Esqs. (Cedric A. Brown, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUE

Whether the Division of Taxation's determination upon audit that petitioners owed additional sales tax, plus interest and penalties, was proper and should be sustained.

FINDINGS OF FACT

1. During the period September 1, 2001 through February 28, 2005, petitioner M&R Food Group, Inc. (M&R), operated two restaurants located in adjoined premises in lower Manhattan at 142 Fulton Street and 17 John Street, respectively. These premises are located within two blocks of the site of the former World Trade Center towers and, as stated on their respective menus, were open seven days per week during the period in issue.

2. The Fulton Street premises, initially known as Crown Gourmet and later known as Anytime Café I, were leased and commenced operations in or about March of 2001, and offered deli sandwiches, wraps, salads, pizza, pasta dishes and the like. There were no waiters or waitresses, and customers could either take out their items or could utilize some 17 tables provided for eat-in patrons. The Fulton Street premises had 10 to 15 employees and 2 cash registers. Delivery service and catering services were also available.

3. The John Street premises, known as Anytime Café II, were leased in or about September of 2001 and, following renovations, commenced operations in the latter part of February 2002. These premises occupied two floors and adjoined the Fulton Street premises in

the rear. The John Street premises were initially operated as a gourmet grocery store selling fruits, vegetables, groceries, dairy items, bread, meat, ice cream and frozen foods with the downstairs area serving as storage space. At some point during the audit period, operations changed such that sushi items were sold in the downstairs area, while the upstairs area was operated in essentially the same manner as the Fulton Street premises. There was 1 cash register and some 24 tables in the downstairs area for eat-in patrons, and 2 cash registers and 37 tables for eat-in patrons in the upstairs area. The John Street premises had 10 to 12 employees and, as with the Fulton Street premises, delivery service and catering services were also available.

4. M&R accepted payment via credit card, house account or cash. The five cash registers at the two premises were independent of each other and were not linked as or to a centralized system. The cash registers could print both individual receipts for each purchase and compilation tapes, also known as "Z" tapes, which reflect periodic sales totals, e.g., on an hourly or end of day closing basis. Petitioner Steven M. Kim was an owner of M&R and does not challenge his status as a person responsible to collect and remit sales and use taxes on behalf of M&R during the period in issue.

5. By a letter dated May 11, 2005, the Division of Taxation (Division) advised M&R that a sales tax field audit of its business operations for the period spanning September 1, 2001 through February 28, 2005, would commence on June 2, 2005. This audit appointment letter, issued after the Division conducted a survey of the premises on April 18, 2005, advised M&R that all of its books and records pertaining to its sales and use tax liability for the audit period should be available for review on the audit appointment date. An attached Records Requested List specified a detailed listing of particular records which were to be available for the entire audit period, including sales tax returns, worksheets and canceled checks, Federal income tax

returns, New York State corporation tax returns, general ledger, general journal and closing entries, sales invoices, exemption documents, chart of accounts, fixed asset purchase and sales invoices, expense purchase invoices, bank statements, canceled checks and deposit slips, cash receipts journal, sales journal, cash disbursements journal, purchase journal, financial statements and depreciation schedules. The appointment letter further advised that additional records and information might be required during the course of the audit, and suggested that an owner, officer or employee with personal knowledge of the business operations should be available to meet with the auditor.

6. The auditor met with M&R's representative on June 2, 2006, but was provided only with federal income tax returns for the years 2001 and 2002. Gross sales as reported on these returns were $395,886.97 for 1991 and $590,595.34 for 2002. No other records were made available, and the auditor was advised that cash register tapes identifying each sale were not maintained. The auditor conducted a second survey of the premises on June 3, 2005, and thereafter a second letter, dated July 6, 2005, was sent to M&R's representative again requesting production of the records noted above. The auditor met with M&R's representative on July 26, 2005 and was provided with M&R's sales tax returns, bank statements, cash receipts and cash disbursements journals and a copy of the lease agreement for the Fulton Street premises. M&R's bank deposits for the audit period totaled $1,976,000.00. This amount allegedly included proceeds from loans and from the sale of petitioner Steven M. Kim's house, as well as receipts from M&R's business. Business receipts were not deposited intact into M&R's bank account, but rather some employees were paid in cash and some smaller purchases were made in cash. No original source records of sales, including guest checks, cash register tapes or sales invoices were

presented to the auditor, who was again advised that such records were not maintained or retained.

7. By a letter dated August 5, 2005, the Division advised that M&R's records were not sufficient to allow for the conduct of a detailed audit and that as a consequence an observation of sales test would be conducted at some point within six weeks of the date of the letter.

8. On Tuesday, September 20, 2005, the Division conducted an observation audit at M&R's business premises. The observation was conducted by five Division auditors, who wrote down each sale made between the hours of 6:00 A.M. until 6:00 P.M. when the business closed for the day.[2] Gross sales as observed totaled $6,795.58, with some $6,543.08 of such amount constituting taxable sales, thus resulting in a taxable sales ratio of 96.28 percent. Although M&R was open seven days per week, the auditor adjusted the results so that Saturdays and Sundays were treated as half-days, with one-half of daily sales as observed on audit attributed to each of such days (effectively treating M&R as open six days per week rather than seven days per week).

9. The auditor multiplied daily gross sales ($6,795.58) by six days per week to arrive at weekly gross sales ($40,773.48), and in turn multiplied weekly gross sales by 13 weeks per sales tax quarterly period to arrive at quarterly gross sales ($530,055.24). The auditor eliminated three days per quarterly period as closed days for holidays (based on 12 holidays per year) and arrived at adjusted quarterly gross sales of $509,668.14. This amount was multiplied by the 14 sales tax quarterly periods encompassed within the total audit period, resulting in audited gross sales of $7,135,353.96, to which the 96.28 percent taxable ratio was applied leaving audited taxable sales in the amount of $6,869,923.62. Audited taxable sales were reduced by taxable sales as reported

[2] The restaurants are typically open until 7:00 P.M.

with M&R's sales and use tax returns ($404,776.00) resulting in additional taxable sales in the amount of $6,465,147.62 with sales tax due thereon in the amount of $545,348.79.

10. As a result of its audit, the Division issued to M&R a Notice of Determination, dated February 27, 2006, assessing additional sales tax due for the period September 1, 2001 through February 28, 2005 in the amount of $545,348.79, plus interest and penalties (including the omnibus penalty premised upon failure to report and pay an amount in excess of 25 percent of the amount of tax required to be shown on a return). On March 3, 2006, the Division issued a Notice of Determination to petitioner Steven M. Kim, assessing additional sales tax due for the period December 1, 2002 through February 28, 2005 in the amount of $349,788.06, plus interest and penalties (including the omnibus penalty). Mr. Kim was assessed as a person responsible to collect and remit sales and use taxes on behalf of M&R.[3]

11. The Division conceded that M&R should receive credit for sales it reported on certain sales and use tax returns which were filed late and hence were not included in the Division's audit calculation of reported sales, as follows:

Quarterly period ended February 28, 2002	$34,707.00
Quarterly period ended May 31, 2002	$32,480.00
Quarterly period ended November 30, 2003	$25,557.00
Total	$92,744.00

Adding this total to reported taxable sales ($404,776.00) results in reported taxable sales of $497,050.00.

12. At hearing, petitioners presented photocopies of Z tapes for certain selected weeks during the period in issue as exemplars to show that daily sales were less than the amount of

[3] A consent extending the period of limitations on assessment had been executed on behalf of M&R such that the assessment of tax for the period spanning September 1, 2001 through November 30, 2002 could be made by the Division at any time on or before March 20, 2006.

sales determined on the day of the Division's observation of sales. More specifically, petitioners provided Z tape photocopies together with a covering summary sheet listing total sales for six days (Monday through Saturday) for the respective premises for the following weeks.

Fulton Street

YEAR	WEEKS
2002	08/05, 09/23, 11/04, 12/16
2003	03/19, 06/23, 10/13, 12/08
2004	02/10, 05/03, 08/23, 11/22, 12/27
2005	01/24, 02/21

John Street

YEAR	WEEKS
2002	02/11, 04/22, 09/01, 09/16, 12/02
2003	02/24, 05/19, 08/04, 09/22, 12/22
2004	02/16, 06/14, 08/10, 11/24[4]
2005	01/17, 02/14

13. Petitioners noted that the level of business activity determines the number of cash registers in operation at any given time and that as a consequence not all registers are in use at all times. The Z tape information for the foregoing weeks allegedly reflects the total sales recorded at the various registers in use at the two premises at various times during the selected weeks.

14. The Division's observation method recorded all sales made at both premises on the observation date. In contrast, review of the foregoing Z tape information reveals that, with the exception of the week of November 22, 2004, none of the selected weeks match up for the two

[4] The summary sheet accompanying the photocopied Z tapes listed November 24, 2004 as a Monday. In fact, November 24, 2004 was a Wednesday, and it is assumed the listing represents a simple transcription error.

premises, hence leaving the information provided not readily comparable in arriving at total sales. For the week of November 22, 2004, the following reflects the sales amounts for each of the premises as set forth on the summary sheets petitioners prepared from the Z tape information:

PREMISES	MON	TUE	WED	THU	FRI	SAT	TOTAL
FULTON	$4,071	$3,898	$3,702	closed	$2,508	$1,690	$15,869
JOHN ST.	$2,668	$2,953	$2,222	closed	$ 797	$ 275	$ 8,915
TOTAL	$6,739	$6,851	$5,924	xxxxx	$3,305	$1,965	$24,784

15. M&R's premises were closed on certain days as the result of Health Department violations. In this regard, petitioners submitted a Determination issued by the New York City Office of Administrative Trials and Hearings, dated October 7, 2002, upholding the closure of M&R's premises based upon two "premises failed" inspections by the New York City Department of Health, as well as a subsequent newspaper article from the New York Daily News dated September 14, 2003, noting the closure of the premises by the New York City Department of Health. The specific dates of closure were July 30, 2002 through August 1, 2002, and October 4, 2002 through October 18, 2002.

16. In connection with a gas main repair undertaken by Consolidated Edison, petitioners submitted two photographs showing that a portion of the street in front of M&R's premises had been dug up and was under construction. However, in these photographs the signs in the front windows of the premises appear to be illuminated, the inside lights appear to be turned on, and it is not possible to discern from these photographs whether or not the premises were in fact closed as asserted by petitioners.

17. Petitioners submitted four additional photographs showing debris on the floor of M&R's premises and missing "drop" ceiling tiles allegedly resulting from frozen sprinkler system pipes and ceiling collapse.

18. Petitioners submitted two photographs showing significant dust and debris at an entryway to M&R's premises as well as dust-covered vegetables in serving bins allegedly resulting from the destruction of the World Trade Center towers on September 11, 2001, together with articles and information, including the results of surveys conducted by the Alliance for Downtown New York, Inc., concerning the drastic decline in retail business activity following September 11, 2001 (specifically for the fourth quarter of 2001).

19. The balance of material submitted in support of petitioners' proposed adjustments consisted of petitioner Steven M. Kim's testimony and accompanying handwritten calculations showing a proposed recomputation of the assessment.

SUMMARY OF PETITIONERS' POSITION

20. Petitioners maintain that the Division's audit, based upon a one-day observation of sales, far overstated the amount of business actually conducted at the premises, and that it is unreasonable to extrapolate the results of such a one-day observation over the full audit period. Petitioners assert that sales volume was never as high on any single day during the audit period as the $6,795.58 gross sales volume recorded on the day of the Division's observation. In contrast, petitioners estimate that daily sales averaged approximately $3,200.00 during the audit period, and that only 50 percent of sales were taxable sales. Petitioners also maintain that a number of specific concessions should be made based on periods of time when the premises were actually closed, and when outside factors resulted in slow sales which should be viewed in impact as

"effectively closed" days. Petitioners would calculate these concessions by reducing the number of days of operation of the business, as follows:

NO. OF DAYS	PROPOSED EXPLANATION
364 days	Petitioners claim sales were very slow on weekends such that the premises were either closed outright or were closed "in effect."
134 days	Petitioners claim inclement weather, including rain and snow, resulted in very slow sales and thus closed days "in effect."
17 days (plus)	Premises and area of "ground zero" were in fact closed for two weeks following the terrorist attacks of 9/11/01, and business was severely impacted for at least the following six months.
18 days	Petitioners' business was initially ordered closed on July 30, 2002 by the NY City Department of Health following a failed health inspection, was allowed to reopen on August 2, 2002, and was thereafter ordered closed from October 4, 2002 through October 18, 2002 after a subsequent failed health inspection.
8 days	Petitioners claim that sprinkler pipes at the premises froze and burst causing severe damage and requiring repairs during which the business was actually closed.
24 days	Petitioners claim that gas supply leaks from a street gas main located in front of the premises necessitated construction by Consolidated Edison to replace the gas main and required actual closure of the business.
35 days	Petitioners claim that events such as neighborhood "street fairs" and other community events negatively impacted sales, and that sales were similarly very slow on days falling before or after recognized holidays, thus resulting in "effectively closed" days.

The sum of the foregoing claimed number of closed or "effectively closed" days equals 600 days, and petitioners assert that the 1,278 days encompassed within the audit period should thus be reduced to 678 days of operation. Petitioners would multiply such 678 days of operation

by estimated average daily sales of $3,200.00 to result in gross sales of $2,169,600.00 and tax due thereon in the amount of $187,670.00.[5]

CONCLUSIONS OF LAW

A. Tax Law § 1135(a) requires that a taxpayer maintain and make available for audit upon request such records as are sufficient to verify all transactions, with the failure to maintain or make available such records, or the maintenance of inadequate records, resulting in the Division's estimation of the amount of tax due. Following from this premise, 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, 411 NYS2d 41), 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). (***Id.***, 411 NYS2d at 43.)

B. 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, 353, 477 NYS2d 858, 859 [1984]) and thoroughly examine (***Matter of King Crab Rest. v. State Tax Commn.***, 134 AD2d

[5] Notwithstanding petitioners' estimate that only 50 percent of sales were taxable, and the Division's audit observation that 96.28 percent of sales were taxable, petitioners' proposal appears to treat all such sales as taxable sales.

51, 53, 522 NYS2d 978, 979-980 [1987]) the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v. Chu,*** 134 AD2d 776, 778, 521 NYS2d 826, 828 [1987]*,* ***lv denied*** 71 NY2d 806, 530 NYS2d 109 [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, 225, 402 NYS2d 74, 76 [1978], ***lv denied*** 44 NY2d 645, 406 NYS2d 1025 [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 base upon a detailed audit of those records (***Matter of James G. Kennedy & Co. v. Chu,*** 125 AD2d 773, 509 NYS2d 199 [1989]). 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, 972, 464 NYS2d 304, 305 [1983]).

C. In this case, the audit was commenced by an observation of the premises, followed by the mailing of an audit appointment letter and an attached list of records required for audit which together set forth specifically the records M&R needed to have available for review by the Division's auditor. Thereafter, the auditor met with petitioners' representative, but was provided only with M&R's 2001 and 2002 federal income tax returns. In response, the auditor again sent the list of required records, and again met with petitioners' representative, but only received sales tax returns, bank statements, a cash receipts and cash disbursements journal and a copy of the lease agreement for the Fulton Street premises. In undertaking these steps, the Division made a clear and unequivocal request for M&R's records as required. In turn, the record in this case very clearly bears out that M&R neither maintained nor had available any of the necessary and required records pursuant to which the Division could have conducted a detailed audit based

thereon. Accordingly, the Division's resort to test period and projection auditing to determine tax due was entirely justified and is sustained (***Matter of Urban Liqs. v. State Tax Commn.***, 90 AD2d 576, 456 NYS2d 138 [1982]).

D. 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, 446 NYS2d 451 [1981]; ***Matter of Cousins Serv. Station***, Tax Appeals Tribunal, August 11, 1988), or that the amount of the assessment is erroneous (***Matter of Scarpulla v. State Tax Commn.***, 120 AD2d 842, 502 NYS2d 113 [1989]). 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. Tax Commn.*** 119 AD2d 948, 950, 501 NYS2d 219, 221 [1986]). Here, the use of the one-day observation test performed by the Division to determine M&R's gross and taxable sales for the audit period was a methodology well suited to the circumstances, where M&R failed to maintain adequate source documentation of sales, and is supported by a large body of case law. (***See e.g. Matter of Lombard v. Commr. of Taxation & Fin***., 197 AD2d 799, 602 NYS2d 972 [1993] [one-day observation test]; ***Matter of Club Marakesh v State Tax Commn.***, 151 AD2d 908, 542 NYS2d 881 [1989], ***lv denied*** 74 NY2d 616, 550 NYS2d 276 [1989] [one-day observation test].) It is not, despite petitioners' claim, unreasonable to extrapolate the results of a one-day observation test over the entire audit period (***Matter of Del's Mini Deli, Inc. v. Tax Appeals Tribunal***, 205 AD2d 989, 613 NYS2d 967 [1994]). Petitioners' submission of bank statements, tax returns, and a few selected Z tapes, contrasted with the glaring inadequacy of other records, including specifically the absence of original sales records, does not constitute clear and

convincing evidence sufficient to demonstrate that the method of audit was unreasonable or, save for two adjustments set forth hereinafter, that the amount of the assessment was erroneous.

E. Careful review of all of the evidence does support two adjustments to the Division's audit results. First, the Fulton Street premises were closed, as was virtually all of lower Manhattan, for the balance of the month of September 2001 following the terrorist attacks of September 11, 2001, and petitioner Steven M. Kim's testimony as well as the additional evidence bears out that sales were extraordinarily slow for at least six months following such attacks. Furthermore, petitioners have established that the John Street premises were not opened for business until some six months after commencement of the audit period, a time frame which coincides with the initial impact of the events of September 11, 2001. Accordingly, it is appropriate to eliminate the earliest two sales tax quarterly periods encompassed within the audit period (i.e., September 1, 2001 through February 28, 2002). Secondly, petitioners have established that M&R's premises were closed for a total of some 18 days as the result of violations found upon inspection by the New York City Board of Health (***see*** Finding of Fact 15). Accordingly, the amount of daily sales upon which tax was calculated by the Division should reflect the elimination of such 18 days. The balance of the evidence, consisting principally of petitioner Steven M. Kim's testimony concerning additional actual closed days, caused by inside repairs and outside construction activities, and estimations concerning reduced sales amounts on slow days due to weather factors, neighborhood festivals and events and the like, is not sufficient to overcome the lack of sales records or to support further adjustments to the results of the audit. In this regard, the claim of closed days resulting from the frozen sprinkler pipes and ceiling damage, and from construction in front of the premises to repair a gas main, were not supported by what would seem to be readily available evidence such as bills for repair of the ceiling and

sprinkler system or, given the length of days during which construction in the street was ongoing, utility bills showing days with no charge for gas. Furthermore, the photographs submitted showing street construction do not support the claim that the premises were not, in fact, open for business (***see*** Finding of Fact 16). As to the balance of petitioners' allegations regarding slow business days and times, the same was not supported by sales records, as is a clear requisite under the Tax Law. The Z tapes submitted by petitioners simply do not suffice as records of each sale, as required. Furthermore, and assuming that such tapes could be utilized, it is admitted that not all registers were in use at all times, nor were all Z tapes provided for the entire period. The submission of some tapes for some days is simply an inherently unreliable means of determining sales. Moreover, the Z tapes submitted by petitioners for the two premises do not, with the exception of one week as noted, coincide with each other by date such that the sales for both the Fulton Street and John Street operations could be added together so as to arrive at total sales per day (***see*** Findings of Fact 12 and 14). Finally, while petitioners claimed that there was never a day on which sales were as high or even nearly as high as the $6,795.58 amount recorded on the day of the audit observation, sales per the Z tapes for November 22, 2004 and November 23, 2004 (a Monday and Tuesday) totaled $6,739.00 and $6,851.00, respectively (***see*** Finding of Fact 14), thus casting doubt on the accuracy and credibility of petitioners' claim.

F. The Division imposed penalty pursuant to Tax Law § 1145(a)(1)(i), which provides for penalty to be imposed where a person fails to pay over any tax within the time required by law, and Tax Law § 1145 (a)(1)(vi), which provides that any person who omits from the total amount of tax required to be shown on the return an amount in excess of 25 percent must pay a penalty of 10 percent of the amount of the omission. Tax Law § 1145(a)(1)(iii) and (vi) provide that the

Division can remit the penalty if the failure to pay over the tax was due to reasonable cause and not willful neglect.

G. Petitioners have not provided evidence or arguments sufficient to constitute reasonable cause or support abatement or cancellation of penalties. In establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). Referring to the mandatory language of Tax Law § 1145 (a)(1)(i), the Tribunal stated that "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 Communications Corp.***, Tax Appeals Tribunal, January 16, 1992). In this case, petitioners neither maintained nor produced records as required, and those records petitioners did keep were without any source documentation to establish the veracity of the information set forth thereon. The manner in which M&R's returns were prepared and filed, including the calculation of the amount of M&R's sales subject to tax, rested almost entirely upon estimates as opposed to actual records. In fact, petitioners' own proposed adjustments, relying as described upon estimates, result in sales and sales tax liability far greater than the amounts reported by M&R, and reflect a significant underreporting of sales and of sales tax due. Accordingly, penalties must be sustained.

H. The petitions of M&R Food Group, Inc. and Steven M. Kim are hereby granted to the extent indicated in Conclusion of Law E, but are otherwise denied; the notices of determination dated February 27, 2006 (as to petitioner M&R) and March 3, 2004 (as to petitioner Steven M.

Kim) are to be recalculated in accordance herewith[6]; and such notices, together with penalties and interest thereon, are sustained.

DATED: Troy, New York
June 19, 2008

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[6] The recalculation is to include the two adjustments specified in Conclusion of Law E, and is also to include the Division's concession with regard to taxable sales reported by M&R on late-filed returns not included in the Division's calculation of taxable sales reported with M&R's returns (***see*** Findings of Fact 9 and 11).