

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
of	:	
<b>JING FONG RESTAURANT, INC.</b>	:	DETERMINATION
<b>SHUI LING LAM AND CHUN TSUI, AS OFFICERS</b>	:	DTA NOS. 822939
	:	822940, 822941
for Revision of Determinations or for Refund of	:	822942, 822943
Sales and Use Taxes under Articles 28 and 29 of the	:	822944 AND 822945
Tax Law for the Period June 1, 2003 through	:	
February 28, 2005.	:	

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Petitioners, Jing Fong Restaurant, Inc., Shi Lam and Chun Tsui, as officers, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2003 through February 28, 2005.

A consolidated hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 19, 2010, at 10:30 A.M., with all briefs to be submitted by May 24, 2010, which date commenced the six-month period for the issuance of this determination. By a letter dated November 17, 2010, this six-month period was extended for an additional three-months (Tax Law § 2010[3]). Petitioners appeared by Miu & Co. (Louis Miu, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori Antolick, Esq., of counsel).

***ISSUES***

I. Whether the Division of Taxation correctly determined that additional sales and use taxes were due using an indirect audit methodology.

II. Whether, assuming the use of an indirect audit methodology was proper, petitioners have shown error in the audit method or result.

III. Whether petitioners have established any facts or circumstances warranting the reduction or abatement of penalties.

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

1. Petitioner Jing Fong Restaurant, Inc. (Jing Fong) is a large restaurant that offers on-premises dining and also provides a catering service. The serving area is approximately one-half the size of a football field.<sup>1</sup>

2. On June 22, 2006, the Division of Taxation (Division) mailed a letter to Jing Fong that scheduled a field audit on July 11, 2006 for the period June 1, 2003 through May 31, 2006. The letter stated that “[a]ll books and records pertaining to the sales and use tax liability, for the audit period, must be available on the appointment date.” A schedule of books and records to be produced was attached to the letter. The Division did not receive a reply to this letter, and on the date of the proposed appointment, the auditor went to petitioner’s place of business and was greeted by a manager. At the restaurant, the auditor received the name and telephone number of petitioner’s representative. Later in the afternoon, the auditor received a telephone call from an individual in the representative’s office stating that they could not meet at the scheduled time.

3. On September 19, 2006, the auditor received a waiver of the statute of limitations from petitioner’s representative. The audit period was then extended through August 31, 2006.

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<sup>1</sup> The liability asserted against the individual petitioners was based upon their status as responsible officers of Jing Fong and is derived from the audit of the restaurant. Accordingly, a reference to petitioner is a reference to Jing Fong.

4. On October 20, 2006, the representative's office asked to postpone the appointment scheduled for October 26, 2006 because the date was not convenient for him. The appointment was rescheduled to December 14, 2006.

5. On December 19, 2006, the Division was required to reschedule the appointment because of a mandatory meeting. The appointment was rescheduled for January 11, 2007, and the audit period was extended through November 30, 2006. On December 21, 2006, the Division made an additional written request for records. On December 26, 2006 petitioner's representative asked to postpone the audit until after the tax season. On April 13, 2007, a member of the representative's staff requested that the audit be postponed until July 2007.

6. On May 14, 2007, the Division prepared estimated assessment information for processing. On May 29, 2007, the Division issued a Notice of Determination to Jing Fong (assessment # L-028625181), which assessed sales and use tax for the period June 1, 2003 through August 31, 2004 in the amount of \$182,935.07 plus penalty and interest for a balance due of \$356,071.13. The notice stated that, since Jing Fong did not submit adequate records for an audit, the Division determined that it owed tax, penalties and interest based upon available records and information. The notice was based on the disallowance of exempt sales and the conclusion that certain purchases were subject to tax. This notice was challenged by the filing of a request for a conciliation conference and later, the filing of a petition with the Division of Tax Appeals. The Division also issued notices of determination, dated May 29, 2007, to Shui Ling Lam and Chun Tsui, as responsible officers of Jing Fong, which assessed sales and use taxes for the period March 1, 2004 through August 31, 2004. To the extent that the notices overlap tax periods, the assessments are premised upon the same findings as used in the assessment against Jing Fong in the notice dated May 29, 2007.

7. On June 18, 2007, the Division and petitioner's representative discussed the status of the audit with the Division and scheduled an appointment for July 18, 2007. The representative was also advised that the audit period would be extended through May 31, 2007.

8. On July 5, 2007, the Division, among other things, issued an additional request for records. On July 18, 2007, an auditor went to petitioner's representative's office and was advised that the representative had not arrived and was instructed to wait. Shortly thereafter, a member of the representative's staff led the auditor to a desk that contained the following: a copy of the federal income tax return for the fiscal year ended November 30, 2005, a power of attorney, copies of sales tax returns for the period September 2003 through May 2007, a spreadsheet of the sales journal for the entire audit period and some bank statements. This was the first time the Division was provided with any records.

9. On the same day as the last office visit, the Division mailed petitioner's representative a list of additional records needed for the audit for the period September 1, 2006 through November 30, 2006. The list included: cash register tapes and guest checks for the test period, sales invoices or documents for banquets for the test period, sales invoices and related exemption documents for the test period, purchase invoices or documents relating to assets, purchase invoices or documents relating to recurring expenses, federal income tax returns for the fiscal years ended November 30, 2004 and November 30, 2006, and the sales journal worksheet for December 2006.

10. On August 31, 2007, the Division scheduled an appointment for October 10, 2007 in order to continue the audit. On September 13, 2007, at the request of petitioner's representative, the appointment was rescheduled to October 15, 2007. On October 15, 2007, the Division received: an updated power of attorney, copies of cash register tapes and guest checks, copies of

sales invoices, the sales journal worksheet for December 2006 through May 2007, and copies of the most recent utility bills.

11. On October 18, 2007, the Division completed the transcript of the available guest checks and cash register receipts for September 2006. On this date, petitioner's representative promised to provide the auditor with the additional information needed to complete the audit. The auditor attempted to schedule the next meeting but petitioner's representative declined because he wanted to review the list of missing information or information needed with petitioner before scheduling the next meeting.

12. On November 1, 2007, the Division faxed petitioner's representative another list of records needed for the audit. This list included credit card statements, purchase invoices or documents pertaining to assets, purchase invoices or documents regarding recurring expenses and copies of the federal income tax returns that had previously been requested.

13. The Division issued a Notice of Determination, dated November 23, 2007, (assessment # L029458681), to Jing Fong, which assessed sales and use tax for the period September 1, 2004 through November 30, 2004 in the amount of \$52,307.90 plus penalty and interest for a balance due of \$99,676.98. The assessment was based upon the disallowance of exempt sales and the conclusion that there were purchases that were subject to tax. The Division also issued a notice dated December 6, 2007 to petitioner Shui Ling Lam (assessment # L029482822), which assessed sales and use tax for the period September 1, 2004 through November 30, 2004 for the same amount of tax, penalty and interest as that assessed against Jing Fong.

14. On January 15, 2008, the Division scheduled a meeting to be held on January 31, 2008. On this date, an assistant to petitioner's representative showed the auditor into a

conference room with two piles of invoices. Except for three invoices, all of the invoices were for recurring purchases outside of the test period of September 1, 2006 through November 30, 2006. No other records were presented.

15. On February 8, 2008, the auditor was directed to issue an assessment for the period that would expire. On February 21, 2008, the Division issued a Notice of Determination (assessment number L029729328) to Jing Fong that assessed sales and use tax for the period December 1, 2004 through February 28, 2005 in the amount of \$17,891.17 plus penalty and interest for a balance due of \$32,303.99. As was the case with the prior notices, the assessment was premised upon the disallowance of exempt sales and the sales and use tax due on Jing Fong's recurring purchases. The Division also issued a Notice of Determination, dated February 25, 2008, to Chun Tsui, as a responsible officer of Jing Fong, which assessed the same quarterly period for the same amount of sales and use tax plus penalty and interest for a balance due of \$32,435.35.

16. On May 6, 2008, the auditor met with petitioner's representative. During the meeting, the representative presented the auditor with certain recurring expense invoices that were found to be the same invoices that were presented on January 31, 2008. He also offered to fax the auditor copies of the federal income tax returns for the fiscal years ended November 30, 2004 and November 30, 2006. In addition, petitioner's representative presented credit card statements, which the auditor transcribed.

17. On April 7, 2008, the Division sent a letter requesting the production of the following documents for the period June 1, 2003 through May 31, 2007: credit card statements; purchase invoices or documents relating to purchases of furniture and fixtures, equipment, computer, software, leasehold improvement and other assets; purchase invoices or documents relating to

garbage removal; office expenses, storage; supplies and linen expenses and copies of federal returns for the fiscal years ended November 30, 2004 and November 30, 2006. On October 15, 2008, the auditor sent an additional letter requesting certain documents for the entire audit period, including: cash register tapes and guest checks, payroll records, bank statements, banquet records, sales invoices, cash receipts journal, exemption documents, fixed asset purchase invoices, expense invoices, computer generated files, copies of leases for the audit period and financial statements.

18. On November 19, 2008, the auditor went to petitioner's representative's office to complete the audit. However, none of the records requested in the letter of October 15, 2008 were available. Petitioner's representative promised to have the records available for the audit in two weeks and an appointment was scheduled for December 18, 2008.

19. Upon returning to the office, the section head directed the auditor to cancel the appointment scheduled for December 18, 2008. On December 15, 2008, the audit team leader and the section head held a conference with the representative wherein they discussed the status of the audit, the records needed for the audit and an appointment for the next field meeting. On March 9, 2009, the auditor, among other things, drafted another letter requesting all records needed for the audit. On March 25, 2009, the auditor attended a meeting with petitioner's representative. After, some initial confusion over whether there was an appointment, petitioner's representative made a presentation for nearly a half-hour. However, none of the records that were previously requested were made available. Petitioner's representative declined to discuss the audit or schedule an appointment to continue the audit but promised to contact the Division after "tax season."

20. When the Division completed its review of the available records, it had obtained sales tax returns for the period in issue, the 2005 federal income tax return, the general ledger, an incomplete set of cash register tapes and guest checks for the period September 2006 through November 2006 and bank statements. The Division opined that Jing Fong's records were inadequate for conducting an audit because, even with the assistance of petitioner's representative, it could not reconcile what the taxpayer reported on the sales tax return with the records that were made available. For instance, the Division could not reconcile the documentation on exempt sales with the amounts reported on the sales tax returns. Further, the Division prepared a transcript of the cash register tapes and guest checks. The net total of the guest checks for September 2006 was \$4,300.00. This month was chosen as part of the block sample. The auditor observed that there were only nine guest checks for September 1, 2006, no guest checks for September 2, 2006 through September 4, 2006, six guest checks for September 5, 2006 and no guest checks for September 6, 12, 14, 24 and 25. A number of boxes with documents were presented, but all of the boxes presented were incomplete. Although bank statements were provided, they were not used because they could not be tied into the general ledger or the tax returns. In order to perform an audit, the Division felt that it needed a complete set of cash register tapes and guest checks, that is, any kind of record that Jing Fong used to record sales.

21. The Division utilized several approaches in order to determine the amount of sales and use taxes due. The Division disallowed the exempt sales claimed by petitioner on its sales tax returns for which the Division did not receive documentation.<sup>2</sup> In order to determine the amount

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<sup>2</sup> Documentation was provided to support some exempt sales. One invoice, for a sale made to Engineers Without Borders USA, Inc., was disregarded because it was purportedly written in a foreign language and the auditor could not discern who was the customer. Although there were invoices that were written in Chinese, this particular



of tax due, the auditor divided the average of the total exempt sales claimed by petitioner on its sales tax returns during the audit period by the number of quarters in the audit period. The applicable sales tax rate was then applied to each quarter. The amount of additional sales tax found due on this portion of the audit was \$210,121.24.

22. The auditor also examined the amount of tax due on recurring purchases. In furtherance of this task, the auditor requested a “block sample” of documentation for the period September 1, 2006 through November 30, 2006. In response, the Division received a portion of the general ledger that contained information regarding fixed assets, leasehold improvements and general administrative expenses. Since no documentation was provided to substantiate the entries on the general ledger for the test period, the purchases recorded on the general ledger were held subject to tax. The amount of tax due during the test period was \$4,966.66. This amount was applied to the entire audit period resulting in tax due on recurring purchases in the amount of \$79,466.56.

23. Following a review of the general ledger, the auditor found that petitioner owed tax on capital expenditures. Although requested, petitioner did not provide any invoices to substantiate the information found on the general ledger for items such as leasehold improvements. The Division imposed tax on each item for which petitioner could not substantiate the payment of tax. The total amount of tax found due on capital expenditures during the audit period was \$74,542.89.

24. On the basis of the forgoing, the total amount of tax found due from Jing Fong during the period June 1, 2003 through May 31, 2007 was \$364,130.69. Nevertheless, the amount of tax

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invoice was written in both Chinese and English. Petitioner also submitted a letter from the Internal Revenue Service to substantiate this organization’s tax exempt status as an IRC § 503(c)(3) organization.

assessed by the Division and challenged by Jing Fong, through the filing of petitions, was \$448,052.10 computed as follows:

Notice Date	Assessment Number	Period	Tax Assessed	Interest Assessed	Penalty Assessed	Total Assessed
06/19/07	L-028625181	06/01/03 - 08/31/04	\$182,953.07	\$102,690.52	\$70,427.54	\$356,071.13
11/23/07	L-029458681	09/01/04 - 11/30/04	52,307.90	26,446.10	20,922.98	99,676.98
02/21/08	L-029729328	12/01/04 - 02/28/05	17,891.17	9,045.51	5,367.31	32,303.99
<b>TOTAL:</b>			<b>\$253,152.14</b>	<b>\$138,182.13</b>	<b>\$96,717.83</b>	<b>\$448,052.10</b>

Similarly, the amount of tax challenged by Ling Lam Shui through the filing of petitions was \$230,198.04 computed as follows:

Notice Date	Assessment Number	Period	Tax Assessed	Interest Assessed	Penalty Assessed	Total Assessed
05/29/07	L-028632040	03/01/04 - 08/31/04	\$69,356.93	\$33,027.95	\$27,742.58	\$130,127.46
12/06/07	L-029482822	09/01/04 - 11/30/074	52,307.90	26,839.70	20,922.98	100,070.58
<b>TOTAL:</b>			<b>\$121,664.83</b>	<b>\$59,867.65</b>	<b>\$48,665.56</b>	<b>\$230,198.04</b>

The amount of tax challenged by Chun Tsui through the filing of petitions was \$162,472.81 determined as follows:

Notice Date	Assessment Number	Period	Tax Assessed	Interest Assessed	Penalty Assessed	Total Assessed
05/29/07	L-028632039	03/01/04 - 08/31/04	\$69,356.93	\$33,027.95	\$27,742.58	\$130,127.46
02/25/08	L-029748998	12/01/04 - 02/28/05	17,891.17	9,086.87	5,367.31	32,345.35
<b>TOTAL:</b>			<b>\$87,248.10</b>	<b>\$42,114.82</b>	<b>\$33,109.89</b>	<b>\$162,472.81</b>

25. This matter is the third sales tax audit of Jing Fong. The first audit resulted in an assessment of sales and use tax that was calculated utilizing a ratio of gratuities to sales. Thereafter, the Division utilized a rent factor to calculate the amount of tax due. However, this

assessment was cancelled at a conciliation conference. The second audit assessed sales and use tax upon gratuities received by the waiters and waitresses. This assessment was cancelled by the Tax Appeals Tribunal.

### **SUMMARY OF PETITIONERS' POSITION**

26. At the hearing, petitioners' representative stated that the Division kept mailing one letter after another requesting documents after those documents had already been submitted to the Division. He also stated that petitioners provided federal income tax returns, sales tax returns, bank statements, credit card statements and all cancelled checks. He argues that if he did not provide the Division with all of the records, the Division would not have been able to list all of the payments as well as the other entries on the Division's workpapers. Petitioner's representative also questions the amount of tax due on tax exempt sales. He also asks how the Division could have found such a large amount of tax exempt sales from this type of enterprise.

According to petitioner, the schedule of additional tax due was prepared on February 7, 2008. However, the first assessment was issued on November 21, 2007. Mr. Miu surmises that the figures were prepared retroactively to support the numbers on the assessment.

Petitioner's representative submits that he was never told that records were missing. He posits that if he had been told, he would have looked for them. In this regard, petitioner's representative maintains that this experience has been very frustrating because he represented Jing Fong on two previous audits with the same audit team.

After the hearing, petitioner's representative produced and offered into evidence the cash register tapes for September 10, 2006 through September 15, 2006 and September 17, 2006.

### ***CONCLUSIONS OF LAW***

A. A proceeding before the Division of Tax Appeals is commenced by the filing of a petition protesting a written notice of the Division of Taxation (Tax Law § 2008 [1]). Since petitioners did not file a petition challenging the assessments for periods after February 28, 2005, there is no jurisdiction to rule on such assessments and no determination is rendered with respect to such periods.

B. It is well established that any person making taxable sales is a “vendor” under Tax Law § 1101(b)(8). As such, petitioners were “required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division” (*Matter of AGDN, Inc.*, Tax Appeals Tribunal, February 6, 1997). The records required to be maintained “include a true copy of each sales slip, invoice, receipt, statement or memorandum” (Tax Law § 1135[a]; 20 NYCRR 533.2[b][1]).

C. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return is not filed, “or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices. . . .” (Tax Law § 1138[a][1].) When acting pursuant to section 1138(a)(1), the Division is required to select an audit methodology reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the audit methodology or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

D. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice, Inc.*, 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.*, [102 AD2d 352, 477 NYS2d 858] *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).

E. Here, the Division made repeated requests for Jing Fong's records. The record shows that written requests were made on June 22, 2006, December 21, 2006, July 5, 2007, July 18, 2007, November 1, 2007, April 7, 2008 and October 15, 2008. When a particular request was not completely satisfied, the Division made additional requests for the same records. In certain instances, there were significant gaps in the records, such as in sales, and in other instances there were very few if any records presented, such as documentation to support the entries in the general ledger. When the audit was underway, petitioner never provided a complete set of cash register tapes, guest checks, sales invoices or the exemption documents for the entire audit period.<sup>3</sup> Even with the help of petitioner's representative, the Division could not correlate the amounts reported on Jing Fong's records with the amounts reported on its sales and use tax returns. This lapse belies any contention by petitioner that it presented complete and adequate records for the audit. Under the circumstances, it was impossible to independently determine

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<sup>3</sup> It appears that the missing guest checks for September 2006 were provided after the hearing.

through the available records the amount of tax due (*see Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948 [3d Dept 1986]). Therefore, it was permissible for the Division to rely upon external indices in order to estimate the amount of tax due and the burden was placed upon petitioners to show that the audit methodology was unreasonable (Tax Law § 1138[a][1]; *Matter of Sandrich Foods, Inc.*, Tax Appeals Tribunal, September 22, 1994).

F. In its brief, petitioner makes numerous allegations of error. Petitioner argues that it provided all of the records that the Division requested. This position is unsupported by the record. Rather, the carefully documented tax field audit record shows that while many records were eventually provided, there were a series of unfulfilled requests for documents. Examples of the unfurnished documents are set forth in the paragraph above. Similarly, petitioner's representative's contention that he was unaware that records were missing is dubious. Clearly, the repeated requests for records should have alerted petitioner's representative that the Division needed additional information.

G. Petitioner contends that since the auditor was able to prepare spreadsheets and list expenses on his workpapers, it must have provided all of the documents requested. This argument is specious. The presence of the spreadsheets merely shows that a portion of the records were supplied. It does not show that all of the records requested were supplied or that the records were presented in a manner from which one could determine the amount of tax due. Perhaps of greatest significance, the presence of the spreadsheets does not establish that the Division could reconcile what petitioner reported on the sales tax returns with the records that were made available.

H. Petitioner correctly notes that on the transcript of cash register tapes for September 2006, the auditor mistakenly entered the total net cash amount for September 2006. However,

the error is of no consequence because this spreadsheet was not utilized in his final audit calculations.

I. In his brief, petitioner's representative takes issue with the testimony of the auditor with respect to the preparation of the transcript of guest checks. According to petitioner's representative, the transcript that the auditor prepared only listed dinner guest checks and omitted the lunch guest checks. Petitioner's representative submits that both lunch and dinner guest checks were submitted to the auditor pursuant to the request dated July 18, 2007. He further contends that the auditor failed to state in his testimony that he was referring to a limited number of dinner guest checks, whereas hundreds of lunch guest checks were presented to him. It is submitted by petitioner's representative that the reason that there were so few dinner guest checks is that Jing Fong is a banquet restaurant and does not draw a dinner crowd.

As pointed out by the Division, petitioner's explanation regarding banquet sales is not supported by any testimonial or documentary evidence in the record. If the testimony by the auditor at the hearing presented an incorrect perspective, it was incumbent upon petitioner to go forward with evidence refuting the matter in dispute. Petitioner did not present any evidence of this nature. Therefore, this argument cannot be given any weight.

J. Petitioner maintains that he never received a copy of the transcript of the guest checks during the audit. If petitioner's representative maintains that he was precluded from presenting an argument at the hearing because he was not provided with necessary documentation before the hearing, he should have raised an objection at the hearing and requested that the hearing be continued in order to allow him to prepare his case. Petitioner did not make any request of this nature at the hearing and, if there was error, it is considered waived.

K. According to petitioner, the audit does not reflect the fact that the vast majority of total sales were banquet sales and that dinner sales represented 2.4 percent of the total sales.

Petitioner submits that Jing Fong was a dim-sum parlor serving traditional Chinese lunch during the day and a banquet hall during dinner hours.

The difficulty with the forgoing position is that there is no testimony in the record to support this argument. Under these circumstances, it is impossible to give any weight to unsubstantiated statements of fact in the brief. Accordingly, this argument must also be rejected.

L. Petitioners point to purported contradictory statements in the workpapers regarding taxable sales and exempt sales. Specifically, petitioners note that the schedule of returns filed shows different amounts of taxable and exempt sales than on the worksheets prepared by the auditor. It is submitted that this difference shows that the worksheets are contradictory and confusing.

This argument is completely without merit. The difference in the amounts stated on the different documents is obviously attributable to the fact that one set of amounts was based on what Jing Fong reported and the second set of amounts was based on a review of the general ledger without the aid of any supporting documentation. In addition, contrary to the position stated in petitioners' brief, the workpapers clearly show that the figure of \$951,694.96 was the total of the invoices examined. The statement in the transcript that this amount constituted exempt sales was either a misstatement or an erroneous transcription. It is noteworthy, that shortly after this statement was reported, the auditor stated that the reported exempt sales were \$127,000.00 (transcript p. 80).

M. In its reply brief, petitioner asserts that the only issue presented at the conciliation conference was whether the audit would be continued and that none of the workpapers



supporting the assessments were ever presented to the conciliation conferee. According to petitioner, the conferee's order was based on the audit's being stopped in December 2008.

Petitioners reliance upon what took place at the conference is misplaced. Conversations taking place during a conciliation conference are in the nature of settlement discussions and have no bearing on the audit conducted or the amount of tax assessed. Therefore, the discussion of what took place at the conference is irrelevant.

N. Petitioner also asserts that all of the cash register tapes were presented to the auditor. According to petitioner, the change in the records requested in the different letters shows that the items requested were furnished to the auditor. Petitioner also submits that the request lists that were issued under different supervisors demonstrates a lack of coordination.

Here the uncontradicted evidence was that the auditor was left to look through numerous cartons of boxes for the documents that he needed to conduct an audit. It is obvious from the workpapers that the auditor was able to find many of the documents he needed and include them in his schedule. However, he was unable to locate a significant portion of the cash register tapes and sales invoices. Under the circumstances, the conclusion must be drawn that the records were neither complete nor in auditable condition and, for practical purposes, insufficient for a complete audit.

O. Petitioner notes that the total exempt sales claimed on the tax returns was \$2,036,590.00 while the total exempt sales disallowed on the worksheet was \$2,506,572.00. Contrary to the inference in petitioners' brief, there is no inconsistency between the two figures. The first figure is the total nontaxable sales reported during the audit period. The second amount represents the purchases shown on petitioner's general ledger for which no documentation was presented showing that tax was paid.

P. Petitioners have established that one portion of the audit warrants an adjustment.

During the audit of exempt transactions, the taxpayer presented an invoice for a banquet sale to a group named Engineers Without Borders USA, Inc., to show that the sale was exempt from tax. At the hearing, petitioners offered a letter from the Internal Revenue Service stating that the organization was exempt from federal income tax pursuant to IRC § 501(c)(3). The invoice was disregarded because it was purportedly in a foreign language. An examination of this invoice clearly shows that the sale was made to the organization Engineers Without Borders and that a sufficient amount of English was used in the document.

Since Tax Law § 1116(a)(4) is similar to Internal Revenue Code § 501(c)(3), it is appropriate to look to federal law for guidance (*see Matter of Great Neck-Port Washington, New York Lodge No. 1543, BPO Elks*, Tax Appeals Tribunal, September 5, 1991). Here, the Internal Revenue Service stated that the organization in question was exempt from federal income tax pursuant to IRC § 501(c)(3). Under the circumstances, it was error to impose tax on this sale and the portion of the assessment premised upon sales to unsubstantiated exempt organizations should be revised to reflect the conclusion that this sale was exempt from sales tax.

Q. It is also noted that, contrary to the assertion in petitioner's brief, the uncontradicted evidence in the record is that the general ledger for the entire audit period was requested (exhibit R) and this request was not satisfied (transcript p. 73).

R. The Division asserted a penalty pursuant to Tax Law § 1145(a)(1)(i). Tax Law § 1145(a)(1)(i) states that any person failing to file a return or to pay over any sales or use tax "shall" be subject to a penalty. This penalty may be cancelled if the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Division's regulations provide that penalty imposed under Tax Law §

1145(a)(1)(i) “must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect” (20 NYCRR 2392.1[a][1]). The burden imposed upon a taxpayer of establishing reasonable cause has been characterized as onerous (*Matter of Philip Morris Incorporated*, Tax Appeals Tribunal, April 29, 1993). Here, while it is clear that Jing Fong made an effort to maintain records, it is evident that the records were not maintained and presented in a manner that made it possible to conduct an audit. Under these circumstances, petitioners have not established that the failure to pay sales tax was due to reasonable cause and not willful neglect.

S. The petitions of Jing Fong Restaurant, Inc., Shui Ling Lam and Chun Tsui are granted to the extent of Conclusion of Law P and the Division is directed to modify the notices of determination accordingly; except as so granted, the petitions are otherwise denied and the notices of determination, dated May 29, 2007, November 23, 2007, December 6, 2007, February 21, 2008 and February 25, 2008, are sustained together with such penalty and interest as is lawfully due.

DATED: Troy, New York  
January 6, 2011

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE