

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

WINNERS GARAGE, 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 March 1, 2001 :
through February 29, 2004. :

DECISION
DTA NOS. 821662,
821663 AND 821664

In the Matter of the Petitions :

of :

RUTH WOLKOWICKI :
AND LEV WOLKOWICKI :

for Revision of Determinations or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period December 1, 2001 :
through February 29, 2004. :

Petitioners, Winners Garage, Inc.¹, and Ruth Wolkowicki and Lev Wolkowicki, filed an exception to the determination of the Administrative Law Judge issued on August 11, 2011.

Petitioners appeared by Andrew B. Schultz, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument was heard on October 16, 2013 in Albany, New York.

¹ This petitioner's name is also spelled "Winner's Garage, Inc." on various documents in the record.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this matter.

ISSUES

I. Whether the Division of Taxation properly resorted to an indirect audit methodology in this matter and, if so, whether such methodology was reasonably calculated to reflect the tax due.

II. Whether the amount of tax assessed as a result of the application of the methodology used in this case was erroneous.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact 1 and 22, which have been modified to more accurately reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. Petitioner Winners Garage, Inc. (Winners Garage), at all relevant times herein, was a taxicab agent licensed by the New York City Taxi and Limousine Commission (TLC) that operated a fleet of New York City medallion taxicabs. Winners Garage owned or managed the taxicabs and leased the medallions from their respective owners. In turn, Winners Garage leased the taxicabs and the medallions, attached to such taxicabs, to drivers. Winners Garage managed and maintained the medallion taxicabs from its Woodside, New York, business location.

2. Winners Garage was incorporated on November 15, 1989, and elected to be treated as a federal S corporation effective the same date. At all relevant times, petitioner Ruth Wolkowicki was president and 100% shareholder of Winners Garage. At all relevant times, petitioner Lev Wolkowicki was vice president of Winners Garage. At the hearing, they admitted that they were responsible persons of the corporation.

3. During the audit period at issue, consisting of three years running from March 1, 2001 through February 29, 2004, Winners Garage reported on its sales tax returns total gross sales and total taxable sales in the same amount of \$2,156,490.00 as follows:

Sales tax quarter ending	Sales reported
May 31, 2001	\$169,890.00
August 31, 2001	174,720.00
November 30, 2001	171,780.00
February 28, 2002	169,260.00
May 31, 2002	169,260.00
August 31, 2002	170,310.00
November 30, 2002	181,860.00
February 28, 2003	189,000.00
May 31, 2003	189,420.00
August 31, 2003	188,790.00
November 30, 2003	191,100.00
February 29, 2004	191,100.00
TOTAL	\$2,156,490.00

4. On February 5, 2004, the Division of Taxation (Division) assigned an auditor, Linda L. Vera, to conduct a sales and use tax field audit of Winners Garage for the period March 1, 2001 through November 30, 2003. Ms. Vera sent an appointment letter to Winners Garage, dated February 5, 2004, which stated that its sales and use tax records for the period March 1, 2001 through November 30, 2003 had been scheduled for a field audit beginning March 1, 2004 at the corporation's office. The letter further advised that all books and records pertaining to Winners Garage's sales and use tax liability for the audit period must be available on the appointment date, and a "Records Requested List," containing a "detailed list of all records

required to be available for audit on the appointment date,” was attached to the letter. Among the records specifically requested in the Records Requested List were the corporation’s sales tax returns, federal income tax returns, New York State corporation tax returns, general ledger, sales invoices, exemption documents, fixed asset purchase and sales invoices, expense purchase invoices, merchandise purchase invoices, bank statements, cash receipts journal, cash disbursements journal, and depreciation schedules for the entire audit period.

5. On February 20, 2004, the audit was reassigned to an experienced auditor in the Division’s Queens District Office, David Perl, who immediately called Winners Garage regarding the appointment date listed in Ms. Vera’s February 5, 2004 letter. During the February 20, 2004 telephone call, Mr. Perl spoke with Renee, a corporate employee, who indicated that she had not received the letter and that she would have the owner call the auditor the next week.

6. Subsequently, on February 26, 2004, Mr. Perl called Winners Garage and the first audit appointment was scheduled for March 16, 2004. Mr. Perl also prepared an appointment letter dated February 26, 2004, in which he confirmed that the field audit of Winners Garage’s sales and use tax records for the period March 1, 2001 through November 30, 2003 was scheduled to begin on March 16, 2004 at the corporation’s office. The letter further advised that all books and records pertaining to Winners Garage’s sales and use tax liability for the audit period must be available on the appointment date, and a Records Requested List containing the same items requested in the February 5, 2004 letter was also attached to this letter.

7. The audit to be commenced March 16, 2004 was a follow-up audit to one conducted by Steven Cassel, an auditor in the Division’s Queens District Office, for the earlier period of September 1, 1994 through August 31, 1997. The prior audit resulted in the Division’s determination of additional tax due in the amount of \$238,849.00, which was reduced by a

settlement set forth in a Stipulation of Discontinuance filed with the Division of Tax Appeals in November 2002.

8. On March 1, 2004, Harold Kriegsman, CPA, the corporation's former accountant, left a voice mail message requesting a postponement of the March 16, 2004 field audit appointment. Subsequently, on March 2, 2004, the auditor called Mr. Kriegsman to discuss the postponement request. During that telephone conversation, Mr. Kriegsman requested a postponement of the March 16, 2004 appointment because of tax season and his need to get the corporation's records together. The field audit appointment was rescheduled for May 3, 2004 at Winners Garage's office. During the telephone call, the auditor informed Mr. Kriegsman that the audit period would be updated to include the period December 1, 2003 through February 29, 2004, and requested a letter explaining the reasons for the postponement of the field audit appointment.

9. On March 2, 2004, Mr. Perl sent a second letter to Winners Garage stating that the audit period had been expanded to include the corporation's sales and use tax records for the subsequent period, December 1, 2003 through February 29, 2004, and that a field audit to review the additional records was scheduled for May 3, 2004 at Winners Garage's offices. This letter further advised that, in addition to the records previously requested for audit, all books and records pertaining to the sales and use tax liability for the updated audit period must be available on the appointment date, and a Records Requested List was attached to the letter. This list for the amended audit period March 1, 2001 through February 29, 2004 detailed the same records requested for the original audit period.

10. On May 3, 2004, a field audit was conducted at Winners Garage's business location. Present at this audit were Mr. Wolkowicki, Mr. Kriegsman, Mr. Perl and his former team leader, Theodore Bernstein. Books and records made available and reviewed at this appointment

included sales tax worksheets, federal income tax returns for the years 2001 and 2002, bank statements for part of the audit period, a printout of the computerized general ledger's revenue accounts for the period December 5, 2003 through January 7, 2004, the daybook for the period December 5, 2003 through January 7, 2004, and medallion leases for the period December 1, 2003 through February 29, 2004.

11. At the May 3, 2004 audit appointment, Messrs. Wolkowicki and Kriegsman explained that Winners Garage purchased and capitalized cars that it leased to drivers. They further explained that, for the period March 1, 2001 through February 29, 2004, the reported sales on the returns did not include medallion sales, and that the sales tax reported due on each quarterly sales tax return was computed in the following manner: for each of the 13 weeks in a quarter, the number of cars in Winners Garage's weekly inventory was multiplied by the base amount of \$210.00, resulting in the weekly amount of taxable sales. Then, the sum of the 13 weekly amounts of taxable sales was multiplied by the applicable sales tax rate (i.e., 8.25% or 8.625%). Winners Garage did not report any taxable sales subject to the special tax on passenger car rentals (i.e., 5%) on its sales tax returns filed for the period March 1, 2001 through February 29, 2004. No backup documentation was provided to the auditor regarding the sales reported on the sales tax returns for that period. Messrs. Wolkowicki and Kriegsman also explained that sales reported on Winners Garage's federal S corporation income tax return included medallion rental revenue, and that the corporation's federal S corporation income tax return for the year 2003 was on extension.

12. During the initial audit appointment, the auditor suggested that a test period of December 1, 2003 through February 29, 2004 be used to review sales and expenses. The auditor reviewed medallion leases for that period and found them to be in order. He was advised that

Winners Garage had contracts with 75 drivers during the period December 1, 2003 through February 29, 2004. The auditor's handwritten field audit visit notes for May 3, 2004 indicate that Winners Garage computed and paid sales tax on its sales (contracts) for 70 cars during the period December 1, 2003 through February 29, 2004. To ascertain why Mr. Wolkowicki claimed that Winners Garage had contracts with 75 drivers during the period December 1, 2003 through February 29, 2004 but reported sales tax due on its sales for only 70 cars for that period, the auditor requested AM/PM dispatch sheets. However, he was advised that Winners Garage did not have any dispatch sheets. Mr. Bernstein's notes for May 3, 2004 indicate that the printout of the corporation's computerized general ledger for the period December 5, 2003 through January 7, 2004 did not separate out car revenue and medallion revenue.

13. During the May 3, 2004 field audit appointment, Mr. Perl also reconciled deposits per Winners Garage's day book to deposits per bank statements and sales per general ledger for the period December 5, 2003 through January 7, 2004. Subsequently, on May 4, 2004, after performing a deposit analysis for the period December 5, 2003 through January 7, 2004, Mr. Perl determined that further review was unwarranted because bank deposits were in substantial agreement with Winners Garage's books and records. The next field audit appointment was scheduled for June 3, 2004.

14. In a letter dated May 4, 2004, Mr. Perl advised Mr. Kriegsman that the following items were still required for Winners Garage's sales tax audit for the period March 1, 2001 through February 29, 2004:

- 1) Copies of federal income tax returns - 2001 - 2003
- 2) Bank statements - 4/5/02 - 12/5/02, 2/7/03 - 5/6/03, 8/7/03 - 9/5/03
- 3) Fixed asset invoices - audit period
- 4) Expense invoices - audit period (suggested test period: 12/1/03 - 2/29/04):
 - a. Utilities

- b. Office
 - c. Auto Parts
 - d. Equipment Repairs
 - e. Maintenance
- 5) Sales per books - audit period
- 6) Lease contracts for drivers - audit period (suggested test period per discussion on 5/3/04).

The letter further requested that all of the items be available at the next appointment scheduled for June 3, 2004.

15. On June 1, 2004, Mr. Kriegsman called Mr. Perl and requested a postponement of the June 3, 2004 audit appointment. Subsequently, on June 3, 2004, the second field audit appointment was rescheduled to July 7, 2004 at Winners Garage's business location.

16. On June 16, 2004, after reviewing the prior audit findings, the auditor discussed the findings with Mr. Bernstein and the prior auditor, Mr. Cassel. During that discussion, Mr. Cassel recommended reviewing the contracts with the drivers for the inclusion of the following information: the dates covered by the contract, car model information and any rate changes. He also recommended reviewing the insurance for the cars for unnamed or named drivers and the rate cards for that information, as well. Assuming the contracts with drivers were long-term leases, Mr. Cassel recommended checking to see if the tax was paid up front (at the beginning of the term of the contract). A notation in Mr. Bernstein's handwritten audit notes indicates that the prior audit used approximately \$390.00 (the amount varied by year) as the car rental.

17. Messrs. Perl, Bernstein and Kriegsman were present at the second field audit appointment conducted on July 7, 2004. Business records presented for review included a bank statement for the period August 7, 2003 through September 5, 2003, fixed asset invoices, expense invoices for the period December 1, 2003 through February 29, 2004, 18 contracts with the drivers for the period December 1, 2003 through February 29, 2004, some rate cards, some

insurance documentation and computer printouts of one driver's profile and payment history. No cash receipts were presented during this audit appointment. Mr. Perl found that all 18 contracts with drivers were similar; most of the contracts did not have named drivers; and all of the contracts did not have dates or stated rates. Therefore, Mr. Perl was unable to tie the reviewed contracts to the sales tax return filed for the period December 1, 2003 through February 29, 2004. The examination of the rate cards presented revealed that multiple drivers were listed for different periods. Mr. Perl did not make a list of the 18 contracts reviewed. However, a photocopy of one contract was made.

18. Subsequently, in September 2004, Mr. Perl prepared audit work papers summarizing his findings to date, and concluded that additional information was needed to complete the audit. At that time, lists of the medallions managed by Winners Garage on February 26, 2001, October 7, 2002 and March 4, 2004 were also obtained by the Division from the TLC. Information on these lists included, among other things, each specific medallion managed by Winners Garage, along with the year and vehicle identification number of the vehicle to which each medallion was affixed. The TLC records indicated that Winners Garage managed 85 medallions on February 26, 2001, 77 medallions on October 7, 2002 and 77 medallions on March 4, 2004.

19. On November 17, 2004, Mr. Perl called Mr. Kriegsman and scheduled a third field audit appointment for December 21, 2004. On the same date, Mr. Perl prepared and sent a letter to Mr. Kriegsman advising that the following items were still required for Winners Garage's sales tax audit for the period March 1, 2001 through February 29, 2004:

- 1) Copies of federal income tax returns - 2003
- 2) Bank statements - 4/5/02 - 12/5/02, 2/7/03 - 5/6/03
- 3) Test period agreement for expenses
- 4) Sales per books - audit period

5) Lease contracts for drivers - audit period (suggested test period: 12/1/03 - 2/29/04).

The letter further advised that “[t]o date, you have provided approximately one fifth of lease contracts for the suggested test period of 12/1/03 - 2/29/04. We must review all contracts for the test period (if not for the audit period as a whole).” It also requested that all items be available at the next appointment scheduled for December 21, 2004, so that the audit could be completed at that time.

20. At the third field audit appointment, Mr. Perl reviewed the corporation’s 2003 federal income tax return and the daily summary report of cash receipts. Neither the bank statements for the periods April 5, 2002 through December 5, 2002 and February 7, 2003 through May 6, 2003, nor the remaining contracts with drivers for the period December 1, 2003 through February 29, 2004 were presented. To determine whether the contracts with drivers for the period December 1, 2003 through February 29, 2004 were long-term leases, Mr. Perl selected January 12, 2004 through January 16, 2004 to trace the drivers to the cars that they were using. No documentation associating the drivers to the cars was provided by Messrs. Kriegsman and Wolkowicki at that time. As a result, Mr. Perl was unable to complete his analysis of the contracts with drivers for the period December 1, 2003 through February 29, 2004.

21. Although requested by the Division, Winners Garage failed to provide sales books and invoices, all contracts with all drivers, and complete bank statements. Mr. Perl found all 18 contracts with drivers presented to be incomplete because they did not have contract term dates or stated rates, and many failed to have the drivers’ names on them, as well. Therefore, Mr. Perl concluded that Winners Garage’s sales records were inadequate and he resorted to external audit

resources to conduct an estimated audit to determine whether the correct amount of sales taxes owed by Winners Garage for the period March 1, 2001 through February 29, 2004 had been paid.

22. To determine rental revenue from the leasing of vehicles to drivers during the audit period, Mr. Perl used the method previously agreed to by the Metropolitan Taxicab Board of Trade and the Division, which was later adopted by the Tax Appeals Tribunal in *Matter of Best Taxi Mgt.* (January 24, 2002, *confirmed sub nom Matter of Statharos v. Tax Appeals Trib. of State of N.Y.*, 306 AD2d 650 [2003]). First, Mr. Perl calculated individual taxicab revenue as follows: \$24.00 per 12-hour shift was multiplied by two shifts per day, resulting in \$48.00 daily rental revenue. This amount was multiplied by seven days per week, resulting in \$336.00 weekly rental revenue per taxicab. \$336.00 was multiplied by 13 weeks per sales tax quarter, resulting in \$4,368.00 of quarterly rental per vehicle. Based upon records obtained from the TLC, Mr. Perl determined that Winners Garage managed 85 medallions during the period March 1, 2001 through August 31, 2002 and 77 medallions during the period September 1, 2002 through February 29, 2004. For each of the first six quarters in the audit period, Mr. Perl multiplied quarterly revenue per taxi in the amount of \$4,368.00 by 85 medallions and determined quarterly rental revenue to be \$371,280.00. For each of the last six quarters in the audit period, Mr. Perl multiplied quarterly revenue per taxi in the amount of \$4,368.00 by 77 medallions and determined quarterly rental revenue to be \$336,336.00. Mr. Perl determined total quarterly rental revenue to be \$4,245,696.00 for the period March 1, 2001 through February 29, 2004. After allowing 16.40% for downtime, an allowance also adopted from the method previously agreed to by the Metropolitan Taxicab Board of Trade, Mr. Perl determined adjusted taxable sales in the amount of \$3,549,402.00 for the audit period. Then, he subtracted \$2,156,490.00, total reported taxable sales for the audit period, from \$3,549,402.00, and determined additional taxable sales to

be \$1,392,912.00. After applying the appropriate sales tax rate for each quarter (8.25% for the quarters ending May 31, 2001 through May 31, 2003 and 8.625% for the quarters ending August 31, 2003 through February 29, 2004) to additional taxable sales determined, Mr. Perl determined that \$115,937.00 in additional sales tax was due for the period March 1, 2001 through February 29, 2004.

23. Since Winners Garage never provided adequate proof during the audit that its leases of taxicabs to drivers were long-term leases, Mr. Perl concluded that all of its rentals of vehicles to drivers for the period March 1, 2001 through February 29, 2004 were subject to the 5% special tax on passenger car rentals because they were short-term vehicle rentals. Mr. Perl multiplied \$3,549,402.00, the adjusted taxable sales determined for the audit period, by the 5% tax rate on passenger car rentals and determined \$177,470.10 in sales tax due on passenger car rentals for the period March 1, 2001 through February 29, 2004.

24. During the December 21, 2004 field appointment, Winners Garage's former representative executed a Test Period Audit Method Election (Form AU-377.12) agreeing to the use of a test period audit of Winners Garage's recurring expense purchase records. The test period utilized was the sales tax quarter December 1, 2003 through February 29, 2004. Based upon his review of Winners Garage's recurring expense records, Mr. Perl determined that additional taxable recurring expense purchases, consisting of a fire extinguisher, brake cleaner, glass cleaner and glue, totaling \$6,450.00 were subject to use tax for the test period. Mr. Perl multiplied \$6,450.00 (the additional taxable recurring expense purchases for the test quarter December 1, 2003 through February 29, 2004) by 12 (the number of quarters in the audit period), and determined that Winners Garage's additional taxable recurring expense purchases totaled

\$77,400.00, with additional use tax due of \$6,458.10 for the period March 1, 2001 through February 29, 2004.

25. Based upon his review of Winners Garage's asset acquisition records, Mr. Perl determined the records were adequate and concluded that no additional tax was due on the fixed asset purchases of vehicles (taxis) for resale.

26. The Division subsequently issued to Winners Garage a Statement of Proposed Audit Change for Sales and Use Tax dated December 28, 2004, which asserted additional tax due on sales and expenses as noted above and thereby asserted a total of \$299,865.48, plus penalty and interest. Mr. Perl sent the statement and supporting work papers, including the medallion management lists obtained from the TLC, to Winners Garage and its former representative, Mr. Kriegsman.

27. Winners Garage never provided the auditor with any of the supporting documentation used to prepare its sales tax returns filed for the period March 1, 2001 through February 29, 2004 prior to the issuance of the Statement of Proposed Audit Change.

28. On February 8, 2005, Mr. Kriegsman called the Division's Queens District Office and spoke with Mr. Bernstein. During that telephone conversation, Mr. Kriegsman advised that he disagreed with the audit findings and would submit an appeal on Winners Garage's behalf. At that time, Mr. Bernstein reminded Mr. Kriegsman of Winners Garage's protest and appeal rights. No additional information was provided to the Division after the issuance of the Statement of Proposed Audit Change.

29. Winners Garage executed two consents extending the period of limitations for assessment of sales and use taxes under articles 28 and 29 of the Tax Law that collectively extended the period in which to assess sales and use taxes due for the period March 1, 2001

through February 28, 2004 to June 20, 2005. Ruth Wolkowicki and Lev Wolkowicki, as responsible persons of Winners Garage, each executed a consent extending the period of limitations for assessment of sales and use taxes due from Winners Garage for the period September 1, 2001 through May 31, 2002 to June 20, 2005.

30. As a result of the audit, the Division issued to Winners Garage, a Notice of Determination, dated March 18, 2005, asserting additional sales and use taxes due for the period March 1, 2001 through February 29, 2004 in the amount of \$299,865.48, plus penalty and interest.

On March 21, 2005, the Division also issued two additional notices of determination, one to Lev Wolkowicki, as an officer or responsible person of Winners Garage, and one to Ruth Wolkowicki, as an officer or responsible person of Winners Garage, for additional sales and use taxes due for the period December 1, 2001 through February 29, 2004 in the amount of \$217,491.23.

31. At the hearing, Lev Wolkowicki testified about Winners Garage's day-to-day operations during the audit period, and its responsibilities as a taxicab agent licensed by the TLC. According to Mr. Wolkowicki, if Winners Garage did not follow the rules and regulations of the TLC, it would lose its taxicab agent license. When Winners Garage enters into a medallion management agreement with a medallion owner, it must submit all required documentation related to the medallion; the medallion owner; its designation as agent for the medallion owner; the car to which the medallion is affixed and any assigned drivers, to the TLC immediately. The TLC must be notified of any subsequent replacement of the vehicle to which that medallion is attached. It also must be notified of the termination of the medallion management agreement that Winners Garage had with that medallion owner. In order to drive a medallion taxicab managed

by Winners Garage, a driver must have a valid New York State Driver's License and a valid Vehicle Operator's License issued by the TLC.

32. In 1992, Spyros Drakos created a software program still being utilized by Winners Garage for its computerized business records. Since that time, Mr. Drakos has provided technical computer support to Winners Garage, as needed. All information contained in Winners Garage's computerized records was and continues to be input by Winners Garage's employees.

33. Winners Garage's Woodside, New York, location sustained fire damage on August 7, 2002. The only evidence submitted regarding that fire was a copy of a check that the landlord received from an insurance company for the damaged building. According to Mr. Wolkowicki, all of the corporation's original records were destroyed by that fire and, as a result, Winners Garage only has computer records for dates prior to August 7, 2002.

34. At all relevant times, Winners Garage did not own the medallions affixed to the vehicles. Rather, it leased each medallion from its owner pursuant to a four-page Medallion Management Agreement (agreement). Under the terms of this agreement, Winners Garage, as agent, was given the exclusive right to manage the medallion for a specified period of time, to collect all lease payments on behalf of the medallion owner, to pay the owner a specified amount per month per medallion from the collected funds and to retain all amounts above that payment as a management fee and for general expenses. The terms of this agreement, among other things, also required Winners Garage to "provide a vehicle without additional expense" to the owner of each medallion and to "[e]nter into leases on behalf" of the medallion owner "with drivers who are duly licensed by the [TLC]." The terms of this agreement required, among other things, the medallion owner to pay all federal, state and local taxes associated only with the medallion and lease payments to the owner for the medallion.

35. The record includes documentation submitted to the TLC for one medallion (number 7B64) managed by Winners Garage between March 1, 2001 and February 29, 2004. This documentation included, among other things, copies of two executed medallion agreements for the management of medallion number 7B64, and a copy of a Taxi Medallion Agent Designation form. The record also includes a summary of all expenses that Winners Garage paid with respect to medallion number 7B64 from May 31, 2001 through March 1, 2004. This summary, printed from Winners Garage's computerized business records, lists the following information for each expense payment: the check number, the medallion number, the check date, the named payee and the amount.

36. As their Exhibit 96, petitioners submitted documentation consisting of copies of, among other items, a "Sign-Up Sheet" and a two-page "Contract" for 140 taxi drivers who were either new drivers, restarting as drivers or changing medallion taxicabs during the period January 3, 2003 through June 3, 2004.² The contract between a driver and a medallion owner (contract with driver) contained 21 typewritten paragraphs. A review of the terms of this contract indicates that the medallion owner leased "to the driver said medallion together with a car for a 53 week period during the hours of 5:00 A.M. to 5:00 P.[M.] OR 5:00 P.M. to 5:00 A.M. seven days a week" (paragraph 1). Further review of this contract indicates that it remained in effect and covered "all cars driven by The Driver" (paragraph 18). In addition, while the agreement was in effect, the medallion owner reserved "the right to change lease prices for any type of shift at any time," upon providing two weeks advance notice to the driver (paragraph 21). Fill-in lines were provided in the contract for the driver's name; the medallion owner (name or medallion number);

² Documentation was submitted for a total of 142 drivers. However, the documentation for one of the additional drivers included a copy of only the second page of the contract, while the other driver's documentation did not include a copy of a contract at all.

the weekly consideration for the lease; the designated payday for the lease payment; the signature of the driver, along with the date of such signing, and the signature of Winners Garage, as agent for the medallion owner (name or medallion number). No fill-in lines were provided for the year and vehicle identification number of any car referenced in the contract. Additionally, there was no fill-in space for the beginning and ending dates of the contract. At the hearing, Mr. Wolkowicki explained that the contract covered all cars driven by the driver because a driver might be promoted to a better (i.e., newer) car or leave for a period of time due to an emergency, an extended vacation or license suspension. According to Mr. Wolkowicki, a returning driver must wait in line for the next available medallion taxicab.

37. A review of all 140 contracts with drivers indicated that the typewritten contents of each one were the same and that the second page had the number “3” at the top. However, further review of these contracts revealed that all 140 were incomplete because one or more of the following fill-in items were left blank: the driver’s name; the medallion owner’s name or medallion number; the amount of the weekly lease payment; the designated payday; the date the driver signed the contract; and Winners Garage’s signature as agent for the medallion owner. Additionally, approximately 60% of these contracts bore only a stamp “Winners Garage, Inc., 34-14 64th Street, Woodside, NY 11377, Tel (718) 458-7000, Fax. (718) 458-0468” as the agent’s signature for an unidentified medallion owner. It is noted that none of the contracts contained beginning and ending dates or any identifying information (the year and vehicle identification number) for cars.

38. During the hearing, Mr. Wolkowicki admitted that Winners Garage was acting as an agent for the medallion owners in entering into the contracts with drivers.

39. As one of their exhibits, petitioners submitted the payment histories for 97 drivers printed from Winners Garage's computerized records. The payment history for each driver lists payments by date and time, the amount due, the amount paid, the balance due and receipt number. None of the payment histories contain any information regarding vehicle leases.

40. The record includes the affidavits of 47 drivers who allegedly leased "taxicab vehicles from medallion owners or vehicle owners managed by Winners [Garage]" for periods exceeding 53 weeks. None of these affidavits contain the vehicle identification numbers for the vehicles allegedly leased or the dates of such leases. No exhibits were attached to any of these affidavits.

41. Documents in the record indicate that some medallions managed by Winners Garage were affixed to vehicles owned by third parties, including, among others, Winners Service & Management, Inc. (Winners Service), during the period March 1, 2001 through February 29, 2004.

42. The record does not include any lease agreements between third-party vehicle owners and Winners Garage for the period March 1, 2001 through February 29, 2004. It also does not include copies of cancelled checks paid to third-party vehicle owners by Winners Garage for its leasing or its management of their vehicles for the period March 1, 2001 through February 29, 2004. A list of third-party owned vehicles leased to or managed by Winners Garage during the audit period is not part of the record.

43. The record includes copies of seven checks drawn on Winners Service's checking account in payment of sales taxes due for the periods December 1, 2000 through November 30, 2001 and March 1, 2002 through November 30, 2002. Neither copies of the sales tax returns filed by Winners Service for the periods December 1, 2000 through November 30, 2001 and

March 1, 2002 through November 30, 2002, nor the supporting documentation for such returns are part of the record.

44. Depreciation on vehicles owned by Winners Garage was deducted as part of the cost of goods sold from gross sales reported on each of the corporation's federal income tax returns for the years 2001, 2002 and 2003. Attached to each of these federal income tax returns was a depreciation and amortization report that contained information regarding each asset being depreciated, including, among other things, its description, acquisition date, the life of the asset, the unadjusted cost or basis, the basis for depreciation and the amount of depreciation. Each separately listed asset was merely described as a transportation vehicle on the depreciation and amortization report. The number of transportation vehicles acquired on a specific date was not included on the depreciation and amortization report. For the year 2001, depreciation was claimed on transportation vehicles acquired by Winners Garage on various dates between March 1, 1999 and November 16, 2000. For the year 2002, depreciation was claimed on transportation vehicles acquired on various dates between March 1, 1999 and November 13, 2002. For the year 2003, depreciation was claimed on transportation vehicles acquired on various dates between February 10, 2000 and April 01, 2003.

45. On June 30, 2003, Winners Garage purchased a used 2003 Ford Crown Victoria from Peekskill Lincoln Mercury. The purchase price of \$18,030.00 was paid by a check drawn on Winners Garage's checking account. Winners Garage was listed as the owner of this vehicle on its Certificate of Title. This vehicle purchase was not listed on the depreciation and amortization report attached to Winners Garage's 2003 federal income tax return. At the hearing, Mr. Wolkowicki admitted that he did not know if all of the vehicles owned by Winners Garage were listed on the depreciation and amortization reports attached to the corporation's federal income

tax returns for the years 2001, 2002 and 2003. No itemized inventory of the specific vehicles owned by Winners Garage during the audit period is part of the record.

46. One of the reports printed from Winners Garage's computerized records and submitted into the record was the "Daily Totals Summary Report" for the period December 1, 2003 through February 29, 2004. Information on this report indicates that payments from drivers were processed for 77 medallions during the period December 1, 2003 through February 29, 2004.

47. In support of their position that Winners Garage properly reported the sales tax due on its sales (contracts with drivers) during the period March 1, 2001 through February 29, 2004, petitioners submitted into evidence 142 exhibits, many of which were hundreds of pages long.

48. The record does not include the supporting documentation used to prepare Winners Garage's sales tax returns for the period March 1, 2001 through February 29, 2004.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the relevant legal standards. In so doing, the Administrative Law Judge noted that petitioners bear the burden of proving the notice erroneous through clear and convincing evidence. The Administrative Law Judge then turned to the record in order to analyze petitioners' claim that they had submitted complete and accurate books and records. Considering the documentation provided by petitioners, the Administrative Law Judge found these documents to be insufficient to determine sales for the entire audit period. The Administrative Law Judge did not find sufficient source documentation, such as complete sets of sales books, invoices, bank statements, or driver contracts to substantiate petitioners' claims. As such, the Administrative Law Judge found that the Division properly estimated the tax liability of Winners Garage.

The Administrative Law Judge also rejected petitioners' argument that the *Best Taxi* formula did not accurately reflect the sales of Winners Garage. In reviewing the record, the Administrative Law Judge did not find clear and convincing evidence supporting the lower rate that petitioners claim Winners Garage charged for its car leases. As such, the Administrative Law Judge found that the use of the *Best Taxi* formula was appropriate.

ARGUMENTS ON EXCEPTION

Petitioners challenge the determination on several grounds. Initially, they contend that, despite the Division's general requests, Winners Garage provided sufficient records to substantiate its returns. Petitioners similarly contend that the Administrative Law Judge inexplicably disregarded or overlooked the records and did not consider them as a whole. Additionally, they contend that the records prove that each lease was a long-term agreement, and, therefore, the Division inappropriately assessed the additional five percent tax. Petitioners also contend that the Division is acting in bad faith because it is using a different calculation than one assertedly agreed upon in a previous audit of prior years. Based upon the foregoing, petitioners request that this Tribunal reverse the determination and cancel the respective notices of determination.

In opposing the exception, the Division asserts that the Administrative Law Judge properly resolved this matter. In so doing, it contends that both on audit and at the hearing, petitioners failed to produce sufficient records as required under the Tax Law. The Division specifically references the absence of source documentation sufficient to corroborate the Winners Garage returns, as well as the anomalies referenced by the Administrative Law Judge. As such, it argues that the Administrative Law Judge properly determined that the Division appropriately estimated Winners Garage's tax liability. The Division also agrees with the conclusion that

petitioners failed to prove that the *Best Taxi* methodology was not reasonably calculated to produce the amount of tax due. Additionally, it notes that petitioners failed to prove that sales tax was, in fact, paid on expense purchases or that grounds exist for abating penalties. As such, the Division submits that the determination should be affirmed in its entirety.

OPINION

We affirm the determination of the Administrative Law Judge.

New York imposes sales tax on “[t]he receipts from every retail sale of tangible personal property, except as otherwise provided” (Tax Law § 1105 [a]). The term “sale” includes a lease or rental (Tax Law § 1101 [b] [5]). Winners Garage’s lease of taxicabs to drivers was thus a taxable retail sale (*see Matter of Statharos v. Tax Appeals Trib. of State of N.Y.*, 306 AD2d 650 [2003]). Conversely, the lease of taxicab medallions, an intangible right to operate a taxicab in New York City, is not subject to sales tax (*see Matter of Best Taxi Mgt.*, Tax Appeals Tribunal, January 24, 2002). New York also imposes a special tax at the rate of five percent in addition to sales tax with respect to car leases for a term of less than one year (Tax Law § 1160).

Every person required to collect tax must maintain and make available for audit upon request records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (Tax Law § 1135 [a]; 20 NYCRR 533.2 [a]). Failure to maintain and make available such records, or the maintenance of inadequate records, results in the Division’s estimating tax due.

The standard for reviewing sales tax audits has often been discussed (*see e.g. Matter of Your Own Choice*, Tax Appeals Tribunal, February 20, 2003). To determine the adequacy of a taxpayer’s book and records, the Division must first request and thoroughly examine such 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]; *Matter of King Crab Rest. v Chu* 134 AD2d 51 [1987]). The purpose of such an examination is to determine whether the records are so insufficient as to make it virtually impossible to verify taxable sales receipts and conduct a complete audit (*Matter of Chartair, Inc. v State Tax Commn.*, 65 AD2d 44 [1978]).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, it may resort to indirect methods to estimate tax (*Matter of Urban Ligs. v State Tax Commn.*, 90 AD2d 576 [1982]). When estimating sales tax liability, the Division must adopt an audit method that will reasonably calculate the amount of tax due (*see Matter of W.T. Grant Co. v Joseph*, 2 NY2d 196 [1957], *cert denied* 355 US 869 [1957]), but exactness in the audit results is not required (*Matter of Markowitz v State Tax Commn.*, 54 AD2d 1023 [1976], *affd* 44 NY2d 684 [1978]).

The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (*Matter of Scarpulla v State Tax Commn.*, 120 AD2d 842 [1986]) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v Tully*, 85 AD2d 858 [1981]). In addition, “[c]onsiderable latitude is given an auditor’s method of estimating sales under such circumstances as exist in [each] case” (*Matter of Grecian Sq. v New York State Tax Commn.*, 119 AD2d 948, 950 [1986]). Whether the audit method used was “reasonably calculated to reflect the taxes due” (*Matter of W.T. Grant Co. v Joseph*, 2 NY2d at 206) can only be determined based on information made available to the auditor before the assessment is issued (*see Matter of Queens Discount Appliances*, Tax Appeals Tribunal, December 30, 1993; *see also Matter of House of Audio of Lynbrook*, Tax Appeals Tribunal, January 2, 1992).

The record herein shows that the Division issued several written records requests to Winners Garage seeking, generally, “all books and records pertaining to its sales and use tax liability” for the entire audit period (*see* Findings of Fact 4, 6, 9, 14 and 19). The Division specifically requested, among other items, copies of lease contracts with drivers for the entire audit period (*see* Finding of Fact 14 and 19).

As the Administrative Law Judge noted, Winners Garage responded to these requests by making available the following items: its federal income tax returns for the years 2001, 2002 and 2003; bank statements for part of the audit period; a printout of the computerized general ledger’s revenue accounts for the period December 5, 2003 through January 7, 2004; the daybook for the period December 5, 2003 through January 7, 2004; medallion leases for the period December 1, 2003 through February 29, 2004; 18 contracts with drivers for the period December 1, 2003 through February 29, 2004; some insurance documentation; some rate cards; and a printout of one driver’s profile and payment history. As the Administrative Law Judge also noted, the 18 standard form driver contracts were incomplete because they lacked contract term dates, stated rates or even drivers’ names. Additionally, medallion revenue and car revenue were not separated out in the corporation’s computerized general ledger revenue accounts.

The Administrative Law Judge found that the Division was justified in resorting to an indirect audit methodology given the limited records provided in response to the Division’s requests. We agree. The 18 driver contracts were the only source documents of taxicab rentals provided to the Division on audit. Moreover, the contracts that were made available were largely incomplete, such that the Division could not tie them to the December 1, 2003 through February 29, 2004 sales tax return to which they were assertedly attributable (*see* Finding of Fact 17). To further underscore the inadequacy of this offering, we note that Winners Garage conceded that it

had 75 contracts with drivers for the December 1, 2003 through February 29, 2004 period (*see* Finding of Fact 12), and submitted 140 similarly incomplete driver contracts at the hearing (*see* Finding of Fact 36). Given this almost complete lack of source documentation of taxable sales, the records of Winners Garage as made available to the Division on audit were clearly insufficient to conduct a full audit (*Matter of Chartair*). Accordingly, the Division's resort to an indirect audit method was proper (*Matter of Urban Liqs.*).

We also agree with the Administrative Law Judge that the Division employed a reasonable audit methodology. Specifically, the Division relied upon the \$24 per shift rate and a 16.40% allowance for downtime established under *Best Taxi*, and multiplied it by two shifts per day, seven days per week, and 13 weeks per quarter. Based upon TLC records, the Division multiplied this number by the number of medallions managed by Winners Garage during each quarter, respectively, 85 during the first six quarters and 77 during the last six quarters. The Division also assessed an additional 5% tax under Tax Law § 1160 because the record did not establish that the leases were long term. The foregoing audit method is reasonable because it relies upon the taxicab rental rate established under *Best Taxi*, the third party data to estimate the number of taxis rented, and deficiencies in the evidence with respect to the lease term.

Petitioners' challenges to the audit methodology are without merit. First, they contend that the Division's requests for records were inadequate because the Division did not specifically request a list of taxicab medallions managed by Winners Garage during the audit period. While we agree with petitioners that a request for a list of medallions managed should be part of a records request of a taxicab agent and taxicab fleet operator such as Winners Garage, we note that the purpose of a request for records in a sales tax audit is to determine their adequacy in conducting a complete audit (*Matter of Adamides*). Where, as here, a taxpayer produces very

few source documents of its sales, the inadequacy of the records is clear even if corroborative evidence of taxable sales, such as the medallion list, were requested and produced. At best, the medallion list is only indirect evidence of taxicab leases and is insufficient to conduct a complete audit in the absence of source documentation of such leases, i.e., driver contracts.

Petitioners also contend that the Division's acquisition of the TLC medallion list during the audit was improper and evinces a bad faith intent by the Division to estimate petitioners' liability without properly considering Winners Garage's books and records. This contention is rejected. Even where a taxpayer produces ostensibly complete books and records, the Division may use third party information to verify such records (*Matter of Morano's Jewelers of Fifth Ave.*, Tax Appeals Tribunal, January 2, 1992).

Petitioners also failed to prove that the TLC medallion counts were incorrect. We agree with the Administrative Law Judge that there is insufficient evidence in the record to warrant any adjustment to the Division's audit determination, based on the medallion counts, that Winners Garage had taxable leases for 85 taxicabs in each of the first six quarters of the audit period and 77 taxicabs in each of the remaining six quarters of the audit period.

Petitioners offered no evidence to show that the \$15 per 12-hour shift taxicab rental rate by which Winners Garage computed its sales tax liability was reasonable. Specifically, petitioners offered no evidence to show that the \$15 rate was comparable to "the average rental charge for the rental of similar motor vehicles in New York City," which was the basis of the \$24 rate employed by the Division on audit (*see Best Taxi*). Rather, petitioners' objection to the Division's use of the \$24 rate is premised on their claim that the Division accepted Winners Garage's use of the \$15 rate during the prior audit (*see* Finding of Fact 7) and is thus acting in bad faith by its use of the \$24 rate herein. We reject this contention. Our review of the record

does not support petitioners' claim that the Division validated the \$15 vehicle rental rate during the prior audit. Moreover, even if the Division had accepted the \$15 rate during the prior audit, it is well-established that audits are limited to the tax years at issue, and previous assessments and audits are non-binding upon future years (*see e.g. Matter of Maximillian Fur Co.*, Tax Appeals Tribunal, August 9, 1990).

Finally, we note our agreement with the Administrative Law Judge's determination that petitioners were properly subject to the 5% special tax on car leases because they failed to establish that such leases were for a term of one year or more. The Administrative Law Judge properly addressed the defects in the voluminous documentation submitted in support of petitioners' position. Specifically, the Administrative Law Judge noted the 140 standard form driver contracts, all of which purport to be 53-week leases, but none of which bore beginning or ending dates for the term, or specifically identified the vehicle referenced in the contract. Moreover, the generic terms of each contract include a provision indicating that the contract covers all cars driven by the driver. The 97 payment histories contain details as to lease payments, but do not contain any information regarding vehicle leases. The 47 driver affidavits lack any reference to specific vehicles or lease dates. Hence, the documentation fails to establish 53-week leases.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Winners Garage, Inc., Ruth Wolkowicki and Lev Wolkowicki is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Winners Garage, Inc., Ruth Wolkowicki and Lev Wolkowicki are denied; and

4. The notices of determination, dated March 18, 2005 and March 21, 2005, are sustained.

DATED: Albany, New York
April 16, 2014

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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