

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petitions | : | |
| of | : | |
| CORAM DINER CORP. | : | DECISION |
| AND | : | DTA NOS. 824918 |
| KOSTAS HIONAS | : | AND 824919 |
| 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, 2005 | : | |
| through August 31, 2008. | : | |

Petitioners, Coram Diner Corp. and Kostas Hionas, filed an exception to the determination of the Administrative Law Judge issued on October 24, 2013. Petitioner appeared by Barry Leibowicz, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation did not file a brief in opposition, but instead resubmitted and relied upon its letter brief filed with the Administrative Law Judge. Petitioners filed a reply brief. Oral argument was heard on September 17, 2014, in New York, New York, which date began the six-month period for the issuance of this decision.

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

ISSUES

- I. Whether the Division of Taxation properly resorted to an indirect audit method.

II. Whether the Division of Taxation violated tax secrecy provisions with respect to its contact with the corporate petitioner's accountant.

III. Whether petitioners have established any bases justifying reduction or cancellation of the penalties assessed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact 7, 9, 10, 13 through 15, 18 through 20, 22, and 24, which have been modified to more accurately reflect the record. We have also added an additional finding of fact, numbered 32 herein. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

1. Petitioner Coram Diner Corp. (Coram Diner) operates a diner-style restaurant located in Coram, New York. Coram Diner's premises consist of a one-story establishment and include a main dining room with 9 booths and 6 stools, a second dining room with 10 booths and 58 seats and a third dining room with 6 booths, 5 tables and 20 seats. Its total capacity is 161 persons. Coram Diner is open five days per week from 6:00 A.M. until 2:00 A.M., and is open 24 hours on Fridays and Saturdays.

2. Petitioner Kostas Hionas is the owner of the Coram Diner. He immigrated to the United States from Greece in 1979 and worked at various positions at the Coram Diner until he purchased the business in 1999. At the hearing, Mr. Hionas conceded and did not dispute that during the period at issue he was the person responsible to collect, account for and pay over sales and use taxes on behalf of the Coram Diner pursuant to Tax Law § 1131 (1) and § 1133 (a).

3. Since the assessment at issue results from the application of an indirect audit methodology by the Division of Taxation (Division), and since petitioners challenge the

adequacy of the Division's request for and review of Coram Diner's records prior to proceeding via such methodology, it is necessary to review in close detail the events that occurred during the course of the conduct of the subject audit.

4. On November 20, 2008, the Division mailed a letter to the corporate petitioner scheduling a field audit pertaining to Coram Diner's sales and use tax liability for the period December 1, 2005 through August 31, 2008. This audit was a follow-up audit to two previous audits of Coram Diner, including an audit covering the immediately preceding period spanning March 1, 2003 through November 30, 2005. This earlier audit resulted in an adjustment increasing Coram Diner's reported gross sales and a finding of additional tax due in the amount of \$257,911.72.

5. The audit for the period in issue (December 1, 2005 through August 31, 2008) was to commence with a field visit to Coram Diner by the Division's auditor on December 3, 2008. The November 20, 2008 audit appointment letter issued to petitioners by the Division 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." Accompanying this audit appointment letter was a records requested list, further specifying the records required to be made available for review as including, among other items, sales tax returns, worksheets, 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 sale invoices, expense purchase invoices, bank statements, depreciation schedules, lease contracts, utility bills, guest checks and cash register tapes. A note at the foot of the records requested list states, in bold-faced type, that any of the above-requested items "may be submitted in electronic format, if available, and this may facilitate the audit process."

6. On December 2, 2008, the Division received a power of attorney appointing Steven Kohilakis, who was Coram Diner's accountant, as its representative for the audit. The initial audit appointment date of December 3, 2008 was subsequently rescheduled, at Mr. Kohilakis's request, to take place at Mr. Kohilakis's office on December 22, 2008. At this appointment, the Division's auditor was provided with bank statements pertaining to one of Coram Diner's bank accounts (Bank of NY) and some "daily sheets." In turn, the auditor commenced her review of these items.

7. The auditor returned to Mr. Kohilakis's office on January 15, 2009 and resumed her review of the foregoing bank statements and daily sheets. The auditor was advised that Coram Diner had installed a Versitouch point of sale (POS) computerized record-keeping system in September 2005, i.e., very shortly before the beginning of the audit period. During the January 15, 2009 appointment, the auditor "discussed POS system with [Mr. Kohilakis] and he indicated we may be able to obtain the records electronically and stated he would discuss this request with Mr. Hionas" There was insufficient time during the two appointments at Mr. Kohilakis's office for the auditor to review all of the records that were available. At the hearing, the auditor testified that she was unable, during the two appointments, to ascertain the identity of documents contained in certain "boxes of information" that were present.

8. By a March 5, 2009 letter addressed to Mr. Kohilakis, the auditor requested the computerized files from Coram Diner's POS system, as follows:

"Please send me a copy of the RCS and Win32 directories for the audit period . . . from Coram Diner Corporation's computerized register. If you require assistance with this process our IT department can assist you either by phone or in

person. We will then extract the data necessary thereby expediting the audit process.”¹

Petitioner Kostas Hionas responded to this letter by a telephone call on March 24, 2009, advising the auditor that the requested files would be provided via flash drive by March 25, 2009.

9. A power of attorney authorizing Buxbaum Sales Tax Consulting, LLC, to represent petitioners in connection with the audit was filed with the Division on April 20, 2009. In turn, a June 2, 2009 letter from the auditor to petitioners’ newly appointed representative confirmed that an audit appointment was scheduled for June 12, 2009 “at your client’s office.”² A records requested list identical to that appended to the initial (November 20, 2008) audit appointment letter was attached, as was a copy of the March 5, 2009 letter specifically requesting the RCS and Win32 directories. Additionally, at around the same time (i.e., April or May 2009), Coram Diner engaged a new accountant, Nick Mastrogiannis, CPA, to replace Mr. Kohilakis.

10. By a letter from petitioners’ representative dated June 10, 2009, the foregoing June 12, 2009 audit appointment was canceled, with a request that the same be rescheduled for July 1 or July 8, 2009 to take place at petitioners’ representative’s office. In turn, the auditor issued a letter to petitioners’ representative, dated July 13, 2009, confirming that the audit appointment had been rescheduled for July 24, 2009 and would, as requested, take place at petitioners’ representative’s office. Again, a copy of the records requested list was attached to the auditor’s letter. In addition to all previously requested records, the July 13, 2009 records requested list specifically requested Coram Diner’s “Computer generated files that are identical to books and

¹ The RCS and Win32 directories were described as the files necessary to read and extract the information that resides on Coram Diner’s Versitouch POS system hard drive and, presumably, on any copy thereof such as a flash drive or portable hard drive.

² In context, the phrase “at your client’s office” would appear to mean at Coram Diner’s premises.

records for the entire audit period” and “Versitouch computer files to include copy of Win32 directory and RCS folder.” The auditor’s log of “Contacts and Comments of All Audit Actions” (audit log) maintained as part of the auditor’s field audit record notes that a July 17, 2009 telephone call was received from petitioners’ representative advising that “[he] will be sending federal returns, daily sheets, and other records. Per phone conversation computerized records requested will not be forthcoming.”

11. By a letter dated July 23, 2009, petitioners’ representative submitted Coram Diner’s federal income tax returns for the years 2006 and 2007 and daily sales sheets for the month of January 2008. This letter notes that the July 24, 2009 audit appointment has been postponed and requests that the auditor contact petitioners’ representative after reviewing the submitted returns and daily sheets (daily shift sales reports for January 2008). As requested, the auditor compared Coram Diner’s federal income tax returns with its sales tax returns for the years 2006 and 2007, finding that its sales tax returns for the period covering 2006 reported some \$225,144.00 more in gross sales than did its federal returns for 2006 (\$1,107,903.00 versus \$882,759.00), while such returns were in near agreement for the year 2007.³

12. By a letter dated September 3, 2009, the auditor summarized the foregoing audit activities and attempts to schedule appointments and obtain records. This letter also provided, with respect to the July 17, 2009 telephone call between the auditor and petitioners’ representative, as follows:

“You [petitioners’ representative] indicated that the books and records would be sent to this office for my review. I indicated to you that we expect all of the items listed on the Records Requested List be furnished at this time including

³ For 2007, the comparison revealed a difference of \$864.00 (sales tax returns [\$1,368,192.00] versus federal income tax returns [\$1,369,056.00]). No reason other than “accounting error” was provided in explanation of the difference for the year 2006.

the 2 directories for the Versitouch Point of Sales system. You indicated that we would not be receiving the electronic data. We are in receipt of the information you sent on July 23, 2009: the Federal Income Tax Returns for 2006 & 2007 and Daily Shift Sales Reports for January 2008. This information is insufficient to complete the sales tax audit of this company.

Please clarify if the data from the Versitouch Point of Sales system exists as well as the other items listed on the enclosed records requested list. If the data does exist, please provide the basis for not providing it. Also, explain why the records requested have not been provided to this office to date.”

This letter requested a response by September 19, 2009.

13. Petitioners’ representative responded to the foregoing correspondence by letter dated September 15, 2009, citing therein (and quoting from) Tax Law § 1138 (a) (1) and *Matter of Basileo* (Tax Appeals Tribunal, May 9, 1991), and requesting that the auditor provide any workpapers created with regard to the subject audit. The purpose for citing and quoting the noted materials, pertaining to the Division’s statutory authority to determine tax due via indirect audit methods (including the use of external indices) and its obligation to provide information with respect to the method of audit utilized, was not specified in this letter. The September 15, 2009 letter also claimed that the summary of audit activities detailed in the September 3, 2009 letter was inaccurate and that petitioners’ representative was available for an appointment to clarify such inaccuracies.

14. By a letter dated November 12, 2009, the auditor responded to the foregoing correspondence, noting that the Division was still attempting to obtain Coram Diner’s records in order to review the same. This letter further provided:

“While we are not opposed to meeting with you at your office, we first must insist that you answer the following questions, prior to our scheduling any such meeting.

1) Does the flash drive containing the point of sales files which Mr. Hionas promised us in his March 24 phone call still exist?

2) If it does still exist, will either you or Mr. Hionas be providing this information?

3) If so, then *when* will you be providing this information?

4) If it does not still exist, then what happened to it?"

This November 12, 2009 letter goes on to note that in addition to the foregoing (electronic) point of sales files questions, the records requested list had been sent on six separate dates, but that the requested records and information had not been provided.⁴ The letter again included the records requested list, in a columnar "check off" format such that the existence and availability of each of the records requested (listed in column one) could be in turn confirmed (by check mark in the two adjoining columns). The letter requested that petitioners' representative complete the records requested list by "checking" the appropriate columns. A response to this letter, along with a "completed" records requested list, was requested by December 1, 2009.

15. Petitioners' representative responded by a letter dated November 20, 2009, stating that, although he was "not prohibiting the Audit Division from inspecting any records," he would not "perform an additional inventory of any records that may be available for your inspection." The letter further stated that "this will be my last communication; absent any contact to schedule a field appointment or a teleconference."

16. The auditor's field audit record and audit log includes an entry for December 1, 2009, as follows:

"received call from Nick Mastrogiannis, he indicated that he would be representing Coram Diner and that the computerized records would be made available. He stated we were welcome to go the place of business and extract what was needed. I told him Win32 and RCS directories are needed. N.

⁴ The dates specified are 11/20/08, 03/05/09, 06/02/09, 06/26/09, 07/13/09 and 09/03/09. The 09/03/09 letter is a request for records with an attached records requested list, captioned Second Request, and is to be distinguished from the letter, also dated September 3, 2009, referenced and described in Finding of Fact 12.

Mastrogiannis stated that a poa was forthcoming and I requested he complete the questions we had regarding the availability of records.”

In response to this telephone contact, the auditor sent a letter dated January 5, 2010 to petitioners’ representative advising of the foregoing telephone call and its content, and offering an opportunity to petitioners’ representative to accompany the auditor to Coram Diner’s premises when the data extract would take place.

17. A letter from petitioners’ representative dated January 5, 2010, as well as entries in the audit log, clarify that Mr. Mastrogiannis was not serving as petitioners’ representative or acting on behalf of petitioners’ representative. The January 5, 2010 letter also asks that petitioners’ representative be advised when the auditor would be at Coram Diner’s premises for the data extract, confirms that such representative would not be attending any such meeting, and requests any “current work papers.”

18. On January 25, 2010, Mr. Mastrogiannis arrived at the auditor’s office and delivered a flash drive allegedly containing the information from Coram Diner’s Versitouch point of sale system. The data on the flash drive was copied from the point of sale system’s hard drive by the diner’s computer consultant. After scanning the flash drive for viruses, the auditor copied the data therein (in read only format), and Mr. Mastrogiannis advised the auditor as follows:

- a) that he did not know the date on which the data had been extracted from the Versitouch hard drive at Coram Diner’s premises;
- b) that the Versitouch system has been in place for the entire audit period and that all data “should be” on the flash drive;
- c) that he did not know the size of the hard drive, whether the “audit trail” was on or off, if the guest checks were in sequential order and if there were any controls on the guest checks;
- d) that he was unsure of the number of terminals (registers) tied to the system and if there were any offline terminals;

e) that he did not know if the flash drive was password protected; and

f) that he was Coram Diner's new accountant, but that he would not be assisting on the audit.

The flash drive was returned to Mr. Mastrogiannis after being copied.

19. The auditor reviewed in detail the data copied from the flash drive. By this review, the auditor found multiple gaps in internal sequence numbers, as well as gaps in time segments where complete meal times (i.e., times when Coram Diner was open) had no information as to any sales having been made. Further, a comparison of sales information found on the flash drive data for the date October 6, 2006 was made to the information recorded during a daylong observation and recording of sales conducted by the Division on the same October 6, 2006 date as part of its prior audit of Coram Diner (*see* Finding of Fact 4). While some 295 guest checks were generated on October 6, 2006 (as recorded per the Division's observation on that date), the guest check directory within the flash drive data reflected only 14 guest checks for that date. Gross sales as observed totaled \$5,072.34 (including tax and tips) while gross sales per the flash drive data's guest check directory totaled only \$260.96. Further, for the current audit period, while the directory of credit card sales per the flash drive data showed \$2,367,606.67 in customer sales paid by credit card, the flash drive data's guest check directory totaled only \$782,685.82 in checks paid by credit card. The auditor also noted that in contrast to the 27.09 percent credit card to cash sales ratio observed on October 6, 2006 (*see* Finding of Fact 22), the flash drive data's directory information reflected that credit card sales (\$2,367,606.67) represented approximately 65 percent of total reported taxable sales (\$3,623,061.00), and that net credit card sales (\$1,969,717.97) represented approximately 54 percent of total reported taxable sales (\$3,623,061.00). In view of these discrepancies, the auditor concluded that the information copied from the flash drive was incomplete, inadequate and unreliable.

20. By a letter dated June 14, 2010 (denominated a “Third Attempt”), the auditor requested that Coram Diner supply all of its bank statements and merchant service provider statements for the Division’s review by June 21, 2010. The letter noted that such records were included among the records required to be provided to complete the audit. A records requested list was enclosed with the letter.

21. In turn, and having received virtually none of the records requested, the auditor proceeded to determine Coram Diner’s sales tax liability by resort to indirect auditing. Specifically, subpoenas for Coram Diner’s bank statements were issued on October 6, 2010 by the auditor to the banks with whom Coram maintained accounts (Capital One North American Bank [f/k/a North Fork Bank] and JP Morgan Chase Bank of North America). In response, the two banks provided the subpoenaed statements on November 29, 2010.

22. Review of the bank statements, directly and in comparison to the information copied from the flash drive, revealed that direct bank deposits from Coram Diner’s credit card sales (\$2,367,606.67) was, as above, \$1,584,920.85 greater than the amount of credit card sales per the guest check directory in the flash drive data (\$782,685.82). Further, the amount of credit card sales per the bank statements (\$2,367,606.67) represented approximately 77.25 percent of Coram Diner’s total bank deposits of \$3,064,804.92 (i.e., credit card deposits [\$2,367,606.67] plus cash deposits [\$697,198.25]). In contrast, such 77.25 percent ratio of credit card sales to cash sales was significantly higher than the 27.09 percent ratio calculated based on the Division’s October 6, 2006 observation (*see* Finding of Fact 19), and was significantly higher than the ratio (approximately 30 percent credit card sales versus 70 percent cash sales) the auditor testified that she would expect to find based on her experiences in auditing approximately 50 diners located on Long Island over some 31 years of conducting such audits. Further, cash deposits per bank

statements (\$697,198.25) represented 29.45 percent of Coram Diner's total bank deposits of \$3,064,804.92. By comparison, cash sales per the guest check directory on the flash drive data (\$408,469.93) plus guest check directory credit card sales (\$782,685.82) per the flash drive data, totaling \$1,291,155.75, represented only 42.13 percent of total bank deposits per bank statements (\$3,064,804.92). Finally, and in comparison, cash sales per the guest check directory in the flash drive data (\$408,469.93) represented only 58.59 percent of cash deposits per bank statements (\$697,198.25), and credit card sales per the guest check directory (\$782,685.82) represented only 33.06 percent of credit card deposits per bank statements (\$2,367,606.67).

23. To arrive at a calculation of additional tax liability, the auditor first reduced total credit card sales per bank statements (\$2,367,606.67) by tips included therein (based on a 9.63 tip percentage computed during the October 6, 2006 audit observation results), and reduced the resulting amount further by sales tax included therein (8.624%) to arrive at net credit card sales in the amount of \$1,969,717.97. The auditor then applied the 27.09 percent October 6, 2006 observed ratio of credit card sales versus cash sales to such net credit card sales amount (\$1,969,717.97) to arrive at audited taxable sales of \$7,271,015.03.⁵ Audited taxable sales were reduced by reported taxable sales (\$3,623,061.00 per sales tax returns), resulting in additional taxable sales of \$3,647,954.03 with additional tax due thereon in the amount of \$314,636.04.

24. By a letter dated January 19, 2011, the foregoing computations and supporting workpapers were sent to petitioners' representative. The same information was again sent to petitioners' representative on February 1, 2011. Thereafter, in a letter to petitioners' representative dated March 7, 2011, the auditor specified, by list, those records requested but not supplied, and also detailed that the only records that had been provided by petitioners were:

⁵ Accordingly, by the auditor's calculation, cash sales (72.01 percent of all sales) totaled \$5,301,297.06.

-Versitouch Shift Sales Reports for October 6, 2006 and for the period January 1, 2008 through January 31, 2008;

-Versitouch Tickets with pay information for October 6, 2008;

-federal income tax returns for 2006 and 2007;

-flash drive containing electronic Versitouch data (*see* Finding of Fact 19).⁶

The letter states the Division's position that such records were inadequate. The letter also indicates that, despite repeated requests, complete guest checks in either paper or electronic format had never been provided. The letter describes the method by which the auditor computed additional tax due (*see* Finding of Fact 23), and closes with another request that the guest check detail for the audit period be provided to the Division by March 18, 2011. The letter also requests an explanation as to why such data would differ from that supplied on the flash drive previously submitted. The March 7, 2011 letter, and the audit log, reference a March 1, 2011 telephone conversation between the auditor, her section head, and petitioners' representative wherein the Division requested all of Coram Diner's electronic data from its POS system for the entire audit period. The Division subsequently sent a letter to petitioners' representative dated March 25, 2011 noting that no such electronic files had been received and requesting that petitioners' representative advise the Division if such information would be forthcoming by April 8, 2011.

25. No guest check detail or other additional records were provided by petitioners or their representative and on May 2, 2011, the Division issued a statement of proposed audit change for sales and use taxes reflecting tax due as calculated above in the amount of \$314,636.03.

⁶ The letter notes that the flash drive data reflected total sales supported by guest checks of \$1,191,155.75 (cash sales of \$408,469.93 plus guest check credit card sales of \$782,685.82), while taxable sales reported by Coram Diner totaled \$3,623,061.00, and further noted that there was no guest check detail available for the \$2,431,905.25 difference between total sales per the Versitouch flash drive information and reported sales per tax returns.

26. On May 26, 2011, the Division issued to petitioner Coram Diner Corp. a notice of determination (L-036033786-7) assessing additional sales tax due for the period December 1, 2005 through August 31, 2008 in the amount of \$314,636.03, plus interest and penalties. The auditor noted that penalties were imposed based upon the failure to provide adequate records for audit and because of underreporting of tax by more than 25 percent. On May 27, 2011, the Division issued to petitioner Kostas Hionas a notice of determination (L036067859-4) assessing the same amounts of tax, interest and penalties upon the premise that Mr. Hionas was a person responsible to collect, account for and remit taxes on behalf of Coram Diner Corp.⁷

27. At the hearing, petitioner Kostas Hionas described how a customer's order at Coram Diner is entered into the POS system via a computer terminal, noting that there are three such terminals at the premises. The order is then transmitted to the kitchen for preparation, and paper copies of the bill for the order are generated for the customer and for Coram Diner, with the information for each such order stored on the POS hard drive. Petitioner Kostas Hionas claimed in testimony that Coram Diner's paper copies of the bills (i.e., guest checks) are retained at Coram Diner's premises. He also testified concerning customers' orders that are paid for by credit card versus orders paid for by cash, noting that sometimes the ratio was half and half, sometimes credit card sales were double cash sales, and that over the past five years payments have been mostly made by credit card.

28. Petitioners also provided, at the hearing, "Shift Sales Reports" and "Tickets w/Pay Info" (tickets with pay information) from the POS system for the quarterly periods spanning

⁷ A series of consents were executed by petitioners pursuant to which the period of limitations on assessment for the audit period was extended for both petitioners. Petitioners have raised no challenge concerning the timeliness of the assessments issued by the Division.

June 1, 2008 through August 31, 2008 and March 1, 2007 through May 31, 2007. A shift sales report, upon which Coram Diner's sales and use tax returns are prepared, provides a summary of total sales, net sales after discounts, taxable sales, cash sales, credit card (charge) sales and credit card tips for a given time period (a shift). In this instance, petitioner provided a summary shift sales report for each of the two noted quarterly periods, and a shift sales report for each day (referred to as "daily sheets") within such quarterly periods. The "tickets with pay information" sheets reflect seven columns carrying the headings a) Check #, b) Table, c) Server, d) Total, e) Cust. Entree, f) Open and g) Close. These refer, respectively, to a) guest check number,⁸ b) table number, c) server's name, d) total dollar amount of the check and the method of payment,⁹ e) number of customers and number of entrees (if entrees were ordered), and the date and time the check was f) opened and g) closed. Petitioners also provided printouts from the POS system of each guest check for two dates (August 5, 2008 and May 17, 2007), together with a "shift sales report" printout and a "tickets with pay information" printout for such dates. These guest checks for the two noted dates are the only actual guest checks presented with respect to the audit period. They show the check number, table number, number of customers, server's name, seating area and all of the items ordered and prices of such items.

⁸ Guest checks are not listed in sequential number, allegedly as a safeguard against theft by employees and to prevent competitors from having too much information about petitioner's business. The POS system allegedly assigns a sequential (though internal) number to each guest check in the system.

⁹ The "Total" portion of the document indicates, in addition to the total amount of the check, the method of payment (cash versus credit card), the amount of cash tendered (either as "exact change" or "change due" depending on the amount of cash tendered) and, in the case of payment by credit card, the amount of tip if any (no specific information is reflected with regard to cash tips).

29. The shift sales reports for the sales tax quarterly periods spanning March 1, 2007 through May 31, 2007, and June 1, 2008 through August 31, 2008, respectively, reflect the following information:

| Period | 03/01/07 -05/31/07 | 06/01/08 - 08/31/08 |
|------------------------------|--------------------|---------------------|
| Total Accountable | \$371,004.96 | \$466,985.01 |
| less: walkout (no pay) | (\$21.02) | (\$14.07) |
| Net Accountable | \$370,983.94 | \$466,970.94 |
| Cash Sales | \$165,783.36 | \$195,961.32 |
| Credit Card Sales | \$205,200.58 | \$271,009.62 |
| Cash Sales Percentage | 44.69% | 41.96% |
| Credit Card Sales Percentage | 55.31% | 58.04% |

30. In contrast to the foregoing, Coram Diner's bank statements for the same two quarterly periods reveal the following amounts of cash and credit card deposits:

– For the quarterly period March 1, 2007 through May 31, 2007–

| Month | Cash Deposits | Credit Card Deposits | Total |
|------------|---------------|----------------------|--------------|
| March 2007 | \$17,922.00 | \$64,480.60 | \$82,402.60 |
| April 2007 | \$29,063.00 | \$63,152.26 | \$92,215.26 |
| May 2007 | \$25,983.00 | \$76,863.32 | \$102,846.32 |
| Total | \$72,968.00 | \$204,496.18 | \$277,464.18 |

– For the quarterly period June 1, 2008 through August 31, 2008–

| Month | Cash Deposits | Credit Card Deposits | Total |
|-------------|---------------|----------------------|--------------|
| June 2008 | \$30,800.00 | \$94,744.76 | \$125,544.76 |
| July 2008 | \$29,700.00 | \$88,617.37 | \$118,317.37 |
| August 2008 | \$32,123.70 | \$83,887.11 | \$116,010.81 |
| Total | \$92,623.70 | \$267,249.24 | \$359,872.94 |

The credit card deposit amounts result from direct-to-bank electronic deposit of customers' purchases paid for by credit card.¹⁰ The manner and frequency of Coram Diner's bank deposits of cash sales was not specified in the record.

31. As noted, petitioners also submitted shift sales reports, but not guest checks, for the month of January 2008 (*see* Finding of Fact 24). A comparison of these shift sales reports to Coram Diner's bank statements for the same period reveals approximately 53 percent of sales were credit card sales, and that cash sales per shift sales reports were approximately \$24,000.00 greater than cash bank deposits. Petitioners did note that sales per the Division's audit observation conducted on October 6, 2006 matched with sales per the POS system, as reflected on a July 29, 2010 printout of the shift sales report and tickets with pay information for the date October 6, 2006. It is specifically noted that the ratio of credit card sales to total sales per the POS system for October 6, 2006 (27.44 percent) was nearly identical to the 27.07 percent ratio of such sales found by the Division on the observation date.

32. The auditor's log indicates that the auditor spent a total of 22 hours on various dates between January 28, 2010 and March 25, 2010 engaged in review of the records copied from the

¹⁰ The shift sales reports for the foregoing two sales tax quarterly periods also show information for what is denominated "IRS Sales," as follows:

| Period | 03/01/07 - 05/31/07 | 06/01/08 - 08/31/08 |
|------------------------------|---------------------|---------------------|
| IRS Total | \$318,581.43 | \$408,812.36 |
| IRS Cash | \$242,028.46 | \$300,444.52 |
| IRS Credit Card | \$76,552.97 | \$108,367.84 |
| IRS Credit Card Tips | \$16,172.16 | \$21,553.14 |
| Cash Sales Percentage | 75.97% | 73.49% |
| Credit Card Sales Percentage | 24.03% | 26.51% |

This information, appearing on the quarterly shift sales summary sheets, was not discussed or explained in any manner, but presumably presents Coram Diner's accounting summaries with regard to IRS wage and withholding tax reporting requirements as the same apply to wait staff in dining establishments.

flash drive; requesting assistance to read such data; and extracting and exporting files. The audit log refers to the use of an “Export.exe” program in extracting the data contained on the flash drive.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the relevant record keeping requirements imposed on persons required to collect sales tax, noting specifically the right of such persons to retain electronic records. The Administrative Law Judge also reviewed the relevant standards for the Division’s use of indirect auditing methods to estimate sales tax liability.

The Administrative Law Judge concluded that the Division clearly requested records, as required under the law, but that petitioners failed to afford the Division a meaningful opportunity to access and review such records and thus failed to meet their obligation under the law. Accordingly, the Administrative Law Judge concluded that the Division was entitled to use an indirect auditing method.

In reaching this conclusion, the Administrative Law Judge rejected petitioners’ claim that complete records were available for review, but were not accessed by the Division. Rather, the Administrative Law Judge found that petitioners failed to make such records available, notwithstanding multiple requests for records made by the Division. The Administrative Law Judge also rejected petitioners’ assertion that the POS system printouts for the two sales tax quarterly periods as provided at the hearing (*see* Findings of Fact 28 and 29) establish that Coram Diner maintained complete and accurate records for the entire audit period.

The Administrative Law Judge further concluded that petitioners failed to show that the indirect method employed in the present matter was unreasonable or that the results were erroneous. The Administrative Law Judge thus sustained the audit results.

Finally, the Administrative Law Judge sustained the assertion of penalties against petitioners, noting the absence of any bases upon which abatement would be justified.

Accordingly, the Administrative Law Judge denied the subject petitions and sustained the subject notices of determination in their entirety.

ARGUMENTS ON EXCEPTION

In their brief on exception, petitioners contend that, contrary to the Administrative Law Judge's conclusion, the Division was afforded a meaningful opportunity to access and review petitioners' books and records and thus petitioners satisfied their record producing obligations under the Tax Law. Petitioners assert that the Division failed to meet its obligation to request and review such records, thereby invalidating its indirect audit method.

Specifically, petitioners contend that the Division's review of records was flawed because the auditor failed to review all of the paper records that were made available during the auditor's first two meetings at the office of Mr. Kohilakis. Petitioners assert that the auditor could not know whether or not the records presented were complete because she did not review certain "boxes of information" that were present at the office and did not inventory the records provided to her.

Petitioners also contend that, following the second, and last field visit to Mr. Kohilakis's office in January 2009, the auditor postponed meetings with petitioners' representative and, in November 2009, improperly set preconditions for further meetings with petitioners' representative. Petitioners contend that the auditor did not attempt to schedule a meeting with petitioners' representative after November 2009.

Petitioners maintain that the auditor was offered numerous opportunities to review Coram Diner's electronic records on the actual POS system at the place of business and chose not to. Petitioners cite Mr. Buxbaum's letter to the auditor dated January 5, 2010 as an example of an

invitation to examine the POS system at the place of business (*see* Finding of Fact 17). They further contend that the auditor made no attempt to make an appointment to review Coram Diner's records on the actual POS system.

Petitioners claim that the lack of a review by the Division of the electronic records on the POS system itself is particularly problematic because, according to petitioners, an accurate review of such records can be performed only on the actual POS system.

Petitioners also claim that the audit herein did not comport with the guidelines contained in the Division's Publication 132 (Computer-Assisted Audits: Guidelines and Procedures for Sales Tax Audits) or its sales tax field audit manual.

Additionally, petitioners object to requests by the Division for petitioners to create and deliver a copy of two specific directories from the POS system, rather than, according to petitioners, reviewing the electronic records on the POS system itself. Petitioners assert that the Division may not require a taxpayer to create records.

Petitioners also contend that the Administrative Law Judge erred in his conclusion that petitioners' production of its books and records was inadequate. Petitioners note that the auditor did not inventory the paper records that were made available and, as previously noted, did not review the electronic records on the POS system at the business location. On this latter point, petitioners assert that the Division has an obligation to review source records on the POS system itself and cannot meet that obligation by demanding that petitioners make additional records or secondary records where the original records exist on the POS system.

Petitioners further contend that it cannot be determined from the hearing record what records were contained on the flash drive that was provided to the auditor by Coram Diner's accountant. Petitioners assert that the record does not identify the specific records on the flash

drive; the source, accuracy or integrity of such files; or what files the auditor actually ended up working with in making her determination that the records were inadequate.

Petitioners maintain that the auditor lacked the requisite expertise to properly extract files from the flash drive data. They assert that such lack of expertise is demonstrated by the auditor's use of an Export.exe program in extracting the data contained on the flash drive (*see* Finding of Fact 32). Petitioners assert that Export.exe "is a program which is not produced, utilized, referenced or suggested for use with the Versitouch POS suite of files." Petitioners also note the auditor's request for a copy of the POS system's Win32 directory (*see* Finding of Fact 8) and assert that the POS system does not use any files in the Win32 directory. Petitioners request that this Tribunal take official notice of these factual assertions. Petitioners also attached a letter, dated January 6, 2014, purportedly written by the president of Versitouch, Inc. in support of these factual claims. Such letter was not submitted in evidence before the Administrative Law Judge.

Petitioners also infer a lack of auditor expertise from the entries in the auditor's log accounting for time spent reviewing records received in the flash drive, requesting assistance to read data, and exporting and extracting files (*see* Finding of Fact 32). Petitioners contend that the 22 hours allocated to such activity shows that the auditor had great difficulty in extracting the electronic files, and that such incompetent efforts at extraction likely resulted in damage to or corruption of the files.

Petitioners contend that the auditor's finding that petitioners' records were inadequate results from an issue with only one file, the guest check file, and further assert that the auditor documented discrepancies in the records with respect to that single file for only one day, October 6, 2006. Petitioners note that there were more than 1,000 days in the audit period and, according to the auditor, "thousands and thousands" of records on the flash drive. In support of their assertion that the records were adequate, petitioners note the consistency between the electronic

records and the Division's observation test. Petitioners further note the reconciliation of the credit card sales per the electronic records and the bank statements. Petitioners thus contend that the auditor should have sought to review the POS system itself or should have asked for help before making a determination of inadequacy.

Petitioners also note that none of the electronic files reviewed by the Division and determined to be inadequate were submitted in evidence at the hearing. Petitioners assert that, without such files, it is impossible to determine what records that auditor reviewed, what records were missing, and whether files had been corrupted.

Petitioners dismiss the auditor's requests, near the end of the audit, for the production of the Coram Diner's records (*see* Finding of Fact 24) as insignificant. Petitioners reason that since compliance with this request would have involved a similar copying of electronic files, the alleged problems in copying and accessing such files in the first instance would likely recur, given the auditor's alleged lack of understanding in working with electronic files. Petitioners further argue that an additional request for copies of the electronic files does not cure the auditor's failure to request access to Coram Diner's actual POS computer system.

Petitioners also assert on exception that the Division violated tax secrecy provisions by discussing Coram Diner's tax information with the diner's accountant, Mr. Mastrogiannis (*see* Finding of Fact 18). Petitioners reason that such violation occurred because Mr. Mastrogiannis was not serving as either petitioner's representative during the audit and, consequently, did not have a power of attorney to act on either petitioner's behalf.

Finally, petitioners contend that, if the assessments of tax herein are sustained, the asserted penalties should be abated because any failure on petitioners' part was the result of reasonable cause and not willful neglect. Petitioners find such reasonable cause and absence of willful

neglect by their asserted full cooperation with the Division during the audit and by their asserted provision of access to all of Coram Diner's books and records.

As noted, the Division declined to file a brief on exception. Instead, the Division chose to rely on the determination and its arguments made before the Administrative Law Judge. The Administrative Law Judge's summarized these arguments as follows:

“The Division maintains that petitioners did not provide Coram Diner's complete books and records for the audit period, including guest checks or register tapes, either in paper form or in electronic form via Coram Diner's POS system. The Division points out that multiple requests for records were made, but that only minimal records were provided in response and that such limited records were simply insufficient to meet the required records standard or to enable the conduct of a direct audit. In this respect, the Division specifically points out that the flash drive provided for review, allegedly containing full books and records from Coram Diner's POS system hard drive, was thoroughly reviewed and found to be patently unreliable. The Division notes that petitioners were made aware of the problems with the contents of the flash drive, yet took no measures to correct such problems by submitting records as requested.”

OPINION

For the reasons that follow, we affirm the determination of the Administrative Law Judge.

Tax Law § 1105 (d) imposes a sales tax on the receipts from every sale of food or drink sold in or by restaurants or other establishments in New York State. Persons required to collect such tax, including both of the petitioners herein, must “keep records of every sale . . . in such form as the commissioner of taxation and finance may by regulation require” (Tax Law § 1135 [a] [1]). Among the sales records required to be maintained are copies of each “guest check . . . cash register tape and any other original sales document” (20 NYCRR 533.2 [b] [1]). These records must be sufficient to verify all transactions; kept in a manner suitable to determine the correct amount of tax due; and available for the Division's inspection upon request for a period of three years (Tax Law § 1135 [g]; 20 NYCRR 533.2 [a] [1], [2]). Taxpayers have the option to

retain the required records in either hard-copy or electronic format (20 NYCRR 533.2 [a] [2], 20 NYCRR 2402.1 [a]).

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” The standard for the use of external indices is well established. Specifically, the Division must first make an explicit request for the taxpayer’s books and records (*Matter of Christ Cella, Inc. v State Tax Commn.*, (102 AD2d 352 [1984]) for the entire period of the assessment (*Matter of Adamides v Chu*, 134 AD2d 776 [1987], *lv denied* 71 NY2d 806 [1988]). The Division must then make a thorough review of such records (*Matter of King Crab Rest. v Chu*, 134 AD2d 51 [1987]). If such review indicates that the records are so insufficient that it is virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit from which the exact amount of tax due can be determined, then the Division may resort to the use of external indices to estimate tax. (*Matter of Chartair, Inc. v State Tax Commn.*, 65 AD2d 44 [1978]).

Applying the foregoing principles to the facts herein makes clear that the Division’s use of an indirect audit method was proper. As the record shows, the Division made several clear requests, both written and verbal, for Coram Diner’s records, including specific requests for its electronic records (*see* Findings of Fact 5, 8, 9, 10, 12, 20, and 24). Pursuant to such requests, petitioners and their representatives had several opportunities to produce records for the Division’s review. Specifically, petitioners’ first representative, Mr. Kohilakis, had an opportunity to provide records at meetings with the auditor on December 22, 2008 and

January 15, 2009 (*see* Findings of Fact 6 and 7). As noted, certain paper records were reviewed at those meetings and the diner's electronic records were discussed. The March 5, 2009 letter to Mr. Kohilakis was another opportunity for petitioners to provide electronic records to the Division (*see* Finding of Fact 8). At a later point in the audit, petitioners' second representative, Mr. Buxbaum, had an opportunity to provide records at an audit appointment scheduled for July 24, 2009. In lieu of that appointment, Mr. Buxbaum and the auditor agreed to the submission of paper documents to the Division (*see* Findings of Fact 10-12). Still later, the Division's letter to Mr. Buxbaum dated March 7, 2011, explaining the basis for the Division's conclusion that the electronic data copied from the flash drive was inadequate, also demanded production of Coram Diner's guest checks (*see* Finding of Fact 24). The same letter specifically identified documents that had been received and documents that had not been received to date. The Division thus provided petitioners with several meaningful opportunities to produce Coram Diner's books and records for the audit and therefore met the explicit request requirement under *Christ Cella* (*see Matter of Todaro*, Tax Appeals Tribunal, July 25, 1991).

We also find that the Division thoroughly reviewed the records provided by petitioners on audit as required (*see* Findings of Fact 19 and 22). Such review showed electronic guest check detail with respect to audit period sales totaling \$1,191,155.75 (\$408,469.93 in cash sales plus \$782,685.82 in credit card sales). Coram Diner reported taxable sales of \$3,623,061.00 during the same period. Petitioners thus failed to maintain or provide any guest check detail with respect to about 64.4 percent of its reported taxable sales during the audit period. This failure was a clear violation of the record keeping requirements under Tax Law § 1135 (a) (*see Matter of Goldner v State Tax Commn.*, 70 AD2d 978 [1979], *lv denied* 48 NY2d 608 [1979]). We thus find that Coram Diner's records were inadequate for the purpose of conducting an audit to

determine the accuracy of its sales tax returns as filed (*see Matter of Oak Beach Inn Corp. v Wexler*, 158 AD2d 785 [1990]; *Matter of Family Deli of Bellmore, Inc.*, Tax Appeals Tribunal, April 3, 1997). Under such circumstances, the Division was authorized to use an indirect audit method to estimate Coram Diner's taxable sales (*see, e.g., Matter of Ristorante Puglia v Chu*, 102 AD2d 348 [1984]).

As noted previously, petitioners' exception focuses first on their claim that they met their record-producing obligations under the law, while the Division failed to meet its obligations to request and review such records. Pursuant to the following discussion, we find that the record does not support this claim.

We first reject petitioners' contention that the Division's review of records was flawed because the Division did not review certain records that were present at Mr. Kohilakis's office and thus, according to petitioners, did not review all of the records proffered by petitioners on audit. While the auditor did not review, and could not identify, all of the paper records present at Mr. Kohilakis's office during the meetings on December 22, 2008 and January 15, 2009 (*see* Findings of Fact 6 and 7), the audit remained ongoing following such meetings and the Division made further requests for records. Indeed, petitioners' second representative, Mr. Buxbaum, had an opportunity to provide additional records in response to the July 23, 2009 audit appointment letter (with accompanying records requested list), and did, in fact, provide some records (*see* Findings of Fact 10 and 11). There is no dispute that the Division reviewed such additional documents. Moreover, by letter dated March 7, 2011, the Division advised Mr. Buxbaum as to specific records received and not received by the Division during the audit. Hence, contrary to petitioners' contention, the Division did effectively inventory records made available on audit.

Petitioners' complaint of the Division postponing meetings, setting improper preconditions for meetings, and failing to attempt to schedule meetings after November 2009 and thereby failing to properly request and review records must be viewed in the context of the entire audit. That is, even if such complaints are accurate, the Division nonetheless met its obligation under *Christ Cella* by explicitly requesting records on several occasions as discussed. Accordingly, despite the claimed deficiencies in the audit process, it remains that the Division provided petitioners with several meaningful chances to produce records over the course of the approximately 2½ year audit.

Petitioners' claim that petitioners offered the auditor numerous opportunities to review Coram Diner's electronic records at the place of business, but that such invitations were ignored by the Division, is unsupported by the record. The record shows that, on December 1, 2009, Mr. Mastrogiannis told the auditor that the Division was "welcome to go to the place of business and extract what was needed" (*see* Finding of Fact 16). Contrary to petitioners' contention, the Division did not ignore this invitation; rather, it accepted (*id*). Subsequently, however, on January 25, 2010, Mr. Mastrogiannis presented the Division with the flash drive (*see* Finding of Fact 18), thereby obviating the need to extract data from the POS system itself. We note that there were no other invitations from petitioners or their representatives to review the electronic records on the actual POS system during the audit. We also note that, contrary to petitioners' contention, the January 5, 2010 letter from Mr. Buxbaum to the auditor can in no way be construed as such an invitation.

Petitioners' contention that the Division made no attempt to schedule an appointment to review records on the POS system is also unsupported by the record. Specifically, the Division's June 2, 2009 letter to petitioners' representative confirmed an audit appointment on June 12,

2009 at Coram Diner's premises (*see* Finding of Fact 9). That appointment was later rescheduled to take place at the representative's office, at his request (*see* Finding of Fact 10).

Petitioners' claim made in their brief on exception that an accurate review of a POS system can be performed only by viewing the source files on the actual system where they are stored and maintained also finds no support in the hearing record. Significantly, petitioners did not make such a claim at any time during the audit or at the hearing. To the contrary, during the audit petitioner Kostas Hionas promised to provide the Division with copies of Coram Diner's electronic records on a flash drive. Subsequently, Coram Diner's accountant provided data on a flash drive that had been copied from the POS system's hard drive by Coram Diner's computer consultant. These facts indicate that the data on the POS system could, in fact, be accurately copied from the POS system and accurately reviewed on another computer system. Accordingly, we conclude that, under the instant circumstances, it was not necessary for the Division to review Coram Diner's electronic records on the actual POS system.

Additionally, and relatedly, we note that there is no evidence in the record to suggest that the Division's requests for petitioners to provide the Division with copies of electronic records was in any way unreasonable or onerous.

Petitioners contention that the Division's review of the electronic files was inadequate because such review did not comport with the guidelines contained in the Division's Publication 132 (Computer-Assisted Audits: Guidelines and Procedures for Sales Tax Audits) or its sales tax field audit manual was raised for the first time on exception.

Whether the Division followed its own audit guidelines in conducting an audit is a factual issue (*see Matter of Kissel*, Tax Appeals Tribunal, September 21, 2000 [whether the Division complied with certain United States Postal Regulations is a factual issue]). While this Tribunal

has permitted the raising of new legal issues on exception, we have not allowed the raising of new factual issues after the record has been closed (*see Matter of Crow and Sutton Assoc.*, Tax Appeals Tribunal, January 10, 2013). Allowance of such new issues on exception is improper because it deprives the opposing party with the opportunity to offer evidence in opposition to the new factual claim (*see Matter of Friendly Motors*, Tax Appeals Tribunal, March 20, 1997 [petitioner's attempt to raise factual issue on exception concerning certain audited transactions disallowed]).

Here, as noted, petitioners did not raise this factual issue before the Administrative Law Judge. We note further that the auditor testified at the hearing, but was not questioned regarding Publication 132 or the Division's sales tax field audit manual in any respect. Accordingly, we decline to address this new factual issue.

In support of their contention that the Division failed to thoroughly review the electronic files copied from the flash drive, petitioners assert that the auditor lacked the expertise to properly extract data from the flash drive and, as a consequence, may have corrupted or damaged such data.

As detailed previously, petitioners' claim that the auditor lacked the necessary expertise rests, in part, on petitioners' assertion that the Export.exe program and Win32 directory, which were used or requested by the auditor in connection with her review of the electronic data, are not appropriate for use with the Versitouch POS system. In apparent (and indirect) acknowledgment of the absence of any evidence in the hearing record supporting this factual assertion, petitioners request that this Tribunal take official notice of this claim.

We decline to take official notice as requested. As relevant to this matter, the State Administrative Procedure Act (SAPA) permits the taking of official notice in administrative

proceedings if judicial notice could be taken (SAPA § 306 [4]). A court may take judicial notice of particular facts only if the items are of common knowledge or are determinable by referring to a source of indisputable accuracy (*Matter of Crater Club v Adirondack Park Agency*, 86 AD2d 714 [1982], *affd* 57 NY2d 990 [1982]). Petitioners' factual claim regarding Export.exe, the Win32 directory and Versitouch POS system does not satisfy either of the foregoing criteria.

Additionally, we note that we have given no consideration to the January 6, 2014 letter attached to petitioners' brief in reaching our decision herein, as we do not consider evidence that was not made part of the record below (*see, e.g., Matter of Taveras*, Tax Appeals Tribunal, October 9, 2014).

With neither official notice as requested nor consideration of the document improperly offered with their brief on exception, there is no evidence in the record to support petitioners' claims regarding the Export.exe program and the Win32 directory.

Petitioners' claim of auditor incompetence in reviewing the electronic files copied from the flash drive also rests on their assertion that the time allocated to such review (*see* Finding of Fact 32) indicates great difficulty in extracting the electronic files, likely resulting in damage to or corruption of the files.

We disagree, as we do not infer any unusual or undue difficulty in extraction from the audit log entries, much less a likelihood of damage or corruption, as petitioners claim. We note that petitioners' representative did not examine the auditor with respect to the noted log entries or with respect to any specifics regarding the process of extracting files from the flash drive data. We note further that there is no other evidence in the record suggestive of difficulty in extracting files.

Petitioners have thus failed to establish the factual assertions underpinning their claim that the Division's review of the electronic files was inadequate because the auditor lack the expertise to properly extract data from the flash drive. Accordingly, this claim, too, must fail.

As noted, petitioners also contend that the Administrative Law Judge's finding of inadequate records was in error because none of the electronic files reviewed by the Division was submitted in evidence. Petitioners thus reason that it is impossible to determine what records were reviewed, what records were missing and whether any records had been corrupted.

We disagree. The record shows that the Division reviewed the electronic records provided by petitioners and that such review indicated \$1,191,155.75 in sales documented by guest check detail in the context of \$3,623,061.00 in reported taxable sales. The Division advised petitioners of this finding and its conclusion that the records so provided were therefore inadequate. At that point, petitioners had an opportunity to review Coram Diner's electronic records to determine if the Division's audit finding was in error. If such review discovered additional guest check detail, then petitioners could have submitted such records either to the Division prior to the completion of the audit or at the hearing. Petitioners, however, submitted no such records.

Petitioners' contention that the Administrative Law Judge's finding of inadequate records was in error because such finding results from an issue with only the guest check file within the electronic records overlooks the requirement in the Tax Law and regulations, noted previously, that records of each sale be maintained (*see* Tax Law § 1135 [a] [1]; 20 NYCRR 533.2 [b] [1]) and that failure to do so properly results in a finding of inadequate records (*Matter of Goldner v State Tax Commn.*). Additionally, petitioners' contention that the Division documented discrepancies in the electronic records for only one day (i.e., October 6, 2006) overlooks the fact that the Division's review of the electronic files revealed \$1,191,155.75 in sales documented by

guest checks for the audit period, while over the same period petitioner reported \$3,623,061.00 in taxable sales on its sales tax returns. As discussed previously, this is a significant failure of record keeping that justifies the use of an indirect audit method. Moreover, and contrary to petitioners' suggestion, this failure is not cured by the consistency between the electronic records and the results of the observation test (*see* Finding of Fact 31) or the reconciliation between credit card sales per the bank statements and the electronic files' directory of credit card sales (*see* Findings of Fact 19 and 22).

Finally with respect to the audit, we note that, on exception, petitioners did not challenge the Administrative Law Judge's conclusion that they failed to show that the estimate method employed in the present matter was unreasonable or that the results were erroneous. We therefore deem this issue to be abandoned (*see Matter of Crow and Sutton Assoc.*).

As to petitioners' contention that the auditor's contact with Mr. Mastrogiannis violated tax secrecy provisions, we note that pursuant to Tax Law § 1146 (a),¹¹ it is unlawful for Division employees "to divulge or make known in any manner any particulars set forth or disclosed in any [sales tax returns or reports]." Individuals who willfully violate this provision are subject to dismissal from state employment and criminal penalties (*see* Tax Law §§ 1146 [f] [1], 1825).

This Tribunal lacks jurisdiction to consider whether a violation of the provisions of Tax Law § 1146 (a) has occurred or to provide a remedy if a violation did occur (*see Matter of Bankers Trust New York*, Tax Appeals Tribunal, March 14, 1996). As we have stated many times, our jurisdiction is strictly limited by our authorizing statute (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State*

¹¹ In their brief on exception, petitioners cited Tax Law § 697 (e) in support of this claim. That provision, however, addresses secrecy violations related to Article 22 (personal income tax).

Dept. of Taxation & Fin. v Tax Appeals Trib., 151 Misc 2d 326 [1991]). We cannot extend our authority to disputes that have not been specifically delegated to us (*Matter of Hooper*, Tax Appeals Tribunal, July 1, 2010).

The Division asserted penalties herein pursuant to Tax Law § 1145 (a) (1) (i) and (vi). In support of their claim that any failure by Coram Diner to properly report and pay the sales tax at issue was due to reasonable cause and not willful neglect (*see* Tax Law § 1145 [a] [1] [iii] and [vi]), petitioners contend that they maintained complete records and made such records available upon the Division's request. As discussed herein, however, petitioners have failed to establish this contention. We note also that Coram Diner's records were deemed inadequate by the Division in the prior audit (*see* Findings of Fact 4 and 19). Accordingly, we agree with the Administrative Law Judge's conclusion that petitioners have not demonstrated any justification for the abatement of penalties.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of Coram Diner Corp. and Kostas Hionas is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Coram Diner Corp. and Kostas Hionas are denied; and
4. The notices of determination, dated May 26, 2011 and May 27, 2011, are sustained.

DATED: Albany, New York
March 12, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

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