

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions
of
**YONKERS WHOLESALE BEER DISTRIBUTORS, INC.
AND RICHARD McDINE**

DECISION
DTA NOS. 827276,
828078, 827554, 827616,
and 827931

for Revision of Determinations or for Refund of Sales and Use
Taxes under Articles 28 and 29 of the Tax Law for the Periods
March 1, 2013 through February 28, 2014, March 1, 2015
through February 29, 2016, and June 1, 2010 through February
28, 2014, and for Review of a Notice of Proposed Revocation of
a License, Permit or Registration dated August 18, 2016.

Petitioners, Yonkers Wholesale Beer Distributors, Inc. and Richard McDine, filed an exception to the determination of the Administrative Law Judge issued October 18, 2018.

Petitioners appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie M. Scalzo, Esq., of counsel).

Petitioners filed a letter brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a letter brief in reply. Oral argument was heard in New York, New York, on July 25, 2019, which date began the six-month period for the issuance of this decision.¹

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

¹ At the commencement of this proceeding, the parties waived the provision by which an expedited determination would be issued in this matter with respect to the proposed revocation of Yonkers Wholesale Beer Distributors, Inc.'s certificate of authority (*see* 20 NYCRR 3000.18 [a], [b]) and agreed that the issue of proposed revocation would be addressed as part of the Administrative Law Judge's determination.

following decision.

ISSUES

I. Whether petitioners have established that the Division of Taxation's assessment of additional sales tax, plus penalties and interest, was improper or erroneous.

II. Whether the Division of Taxation properly imposed penalties for petitioners' failure to have filed information returns required of alcoholic beverage wholesalers for the periods at issue.

III. Whether petitioner Yonkers Wholesale Beer Distributors, Inc., has established that the proposed revocation of its certificate of authority was improper and should be canceled.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except we have modified finding of fact 24 for clarity. The findings of fact as determined by the Administrative Law Judge and the modified finding of fact are set forth below.

1. Petitioner Yonkers Wholesale Beer Distributors, Inc. (Yonkers) is licensed as an alcoholic beverage wholesaler by the State Liquor Authority (SLA). In addition to being licensed as a wholesaler, Yonkers also operates a retail outlet for the sale of alcoholic beverages. Petitioner Richard McDine is Yonkers' president.

2. Pursuant to legislation enacted in 2009, every alcoholic beverage wholesaler licensed by the SLA that sells alcoholic beverages without collecting sales or use tax became required to file an annual transaction information return (information return) with the Division of Taxation (Division). The new filing requirement covered sales by alcoholic beverage wholesalers primarily to retail vendors for resale (Tax Law § 1136 [i]; *see* L 2009, ch 57, pt V-1, subpt G, eff

April 7, 2009; *Empire State Beer Distrib. Assn., Inc. ex rel. Alcoholic Beverage Wholesalers v Patterson*, No. 09 CIV. 10339 DAB, SD NY [Mar. 1, 2010], 2010 WL 749828).

3. The first information returns required by Tax Law § 1136 (i) were due on or before September 20, 2009 and covered the period March 1, 2009 through August 31, 2009. The next information returns were due on or before March 20, 2010 and covered the period September 1, 2009 through February 28, 2010. All subsequent information returns were required to be filed on or before March 20th of each year and to cover the fiscal year period spanning March 1st of the previous year through February 28th or 29th of the then-current year.²

4. The annual information returns were (and are) required to be filed electronically through the Division's web site. The web site contains instructions describing how to file the "Annual Beer, Wine, & Liquor Wholesalers Transaction Information Return" by downloading an Excel spreadsheet template from a provided link, entering the necessary data, and then uploading the completed file to the Division's online tax system.

5. The Excel spreadsheet requires taxpayers to provide information for the period covered by the return with respect to each vendor located in New York State to whom the alcoholic beverage wholesaler made a sale without collecting sales or use tax, as follows:

- a) the vendor's legal name;
- b) the vendor's doing business as (DBA) name;
- c) the vendor's SLA license address, including the city, state and zip code;
- d) the vendor's telephone number;
- e) the vendor's mailing address, including the city, state and zip code;
- f) the vendor's SLA license number;
- g) the vendor's Federal Tax Identification number (EIN);
- h) the vendor's New York State Sales Tax Identification number;
- i) the year and month of reported sales; and the total monthly net sales amount.

² The fiscal year period with respect to which the required information returns are to be filed coincides with the full-year period of time encompassed by the four sales tax quarterly filing periods of March 1 through May 31, June 1 through August 31, September 1 through November 30, and December 1 through February 28 (or February 29 in leap years) (*see generally* Tax Law §§ 1134, 1136).

6. The Division uses the information returns to review the sale of alcoholic beverages by wholesalers, such as Yonkers, and to determine the accuracy of income and sales tax returns filed, in turn, by vendors to whom such sales are made. Since the information returns only report wholesale alcoholic beverage sales, the information report does not provide the Division with any pertinent information about a wholesaler's overall business, including its sales of nonalcoholic beverages.

7. Yonkers filed the required information returns for the tax periods ended August 31, 2009 and February 28, 2010, which together comprised the initial fiscal cycle for which such returns were required but did not file any subsequent information returns. Upon review, the Division concluded that the initial returns filed by Yonkers appeared to be inaccurate as understating Yonkers' taxable sales.

8. The Division's Audit Investigation Selection Unit reviews information returns. In instances of non-filing, or incorrect filing, of such returns, the Investigation Selection Unit attempts to contact taxpayers who have an information return filing requirement, such as in this case. After review, the Investigation Selection Unit may, as was done here, make audit referrals to the Division's Field Audit Management Unit for its use in determining whether further review procedures, including audit actions, should be undertaken. Such a referral was, in part, the genesis of the field audit undertaken in this case, as described hereinafter.

9. By an audit appointment letter dated April 18, 2013, the Division advised Yonkers that it would be conducting a sales tax audit of Yonkers' business for the period spanning June 1, 2010 through February 28, 2013. This audit, scheduled to commence on May 9, 2013, was undertaken following Yonkers' failures to file information returns, as described above, and in

light of the Division's review of Yonkers' quarterly sales and use tax returns (forms ST-100) that reported what appeared to be an "unusually" low taxable sales ratio.

10. The foregoing audit appointment letter was accompanied by an Information Document Request (IDR), listing the records required to be available for audit review. This comprehensive list, denominated IDR No. 1, included, but was not limited to, sales invoices, cash receipts journals, cash disbursements journals, cash register tapes, and all exemption documents supporting nontaxable sales (resale, exempt use and exempt organization certificates, and other documentation necessary to prove nontaxable sales).

11. At the July 22, 2013 initial field audit appointment, the only records that Yonkers provided to the auditor were bank statements, federal tax returns and a listing of fixed assets. The auditor reviewed the records provided and left a written request for Yonkers to provide sales invoices, cash register tapes and sales logs, and to have "all resale and other nontaxable certificates attached to each nontaxable sales [sic]." The auditor also specifically requested that Yonkers provide monthly purchase totals for the audit period and advised that Yonkers needed to file the requisite annual information returns. The auditor observed that Yonkers utilized one cash register and that all major credit cards were accepted. The auditor was advised of Yonkers' claim that its retail (taxable) sales were 20 percent of its total sales, and that the remaining 80 percent of its sales were mainly wholesale (nontaxable) sales.

12. No further records were provided by Yonkers. In turn, by a letter dated June 2, 2014, the Division advised Yonkers that it was expanding the period covered by the sales tax audit to include the period spanning March 1, 2013 through February 28, 2014. This letter was accompanied by IDR No. 2, identical to IDR No. 1 and likewise specifying the records Yonkers was obligated to provide for the expanded audit period.

13. During the course of the audit, the Division's auditor made several requests for documents, including requests for records substantiating Yonkers' claimed nontaxable sales. By a letter dated November 25, 2014, the auditor specifically advised Yonkers that no records in addition to those initially provided (*see* finding of fact 11) had been supplied, including records to substantiate nontaxable sales. The auditor again requested records in substantiation of Yonkers' sales, and attached IDR No. 3, once more specifying the records necessary for review, and requesting that the same be provided by December 19, 2014. Subsequent letters, dated January 13, 2015 and January 29, 2015, again requesting records, were sent to Yonkers by the auditor. The January 29, 2015 letter specified that the requested records must be provided by February 9, 2015.

14. By a responding letter dated January 30, 2015, Yonkers stated that records would be provided "to demonstrate that its taxable ratio is de minimis [sic], as compared to its overall sales."

15. On June 3, 2015, the auditor received certain records from Yonkers, including sales tax returns, a general ledger, a cash disbursements journal, bank statements, a chart of accounts for the audit period, federal corporate income tax returns and New York State corporate franchise tax returns for the years 2010 through 2013, and some SLA certificates pertaining to Yonkers' customers. However, as noted in the auditor's log and confirmed in a July 8, 2015 letter, no detailed sales information, cash register tapes or sales invoices were provided, and none of the required information returns were filed. As a consequence, the Division advised Yonkers that its records were not adequate for purposes of conducting an audit or verifying Yonkers' claimed nontaxable sales.

16. By a letter dated October 28, 2015, the Division advised Yonkers that the audit was completed, stating as follows:

“During our audit, we reviewed the audit area pertaining to your sales and fixed asset acquisitions. We have found that you owe additional tax, as a result of errors you made in recordkeeping and reporting sales. An accounting system that records accurately and adequately all sales transaction (taxable and nontaxable) with an audit trail must be maintained and presented for review when requested. Furthermore, any other NYS taxes as well as information reporting returns that are required should be addressed by you promptly in compliance with reporting requirements. By correcting these errors in future filings, you may avoid having to pay additional tax, penalty, and interest.”

17. In response, Yonkers again asserted that its retail sales were 20% of its total sales, and that the other 80% of its total sales were wholesale sales. Yonkers attempted to substantiate its claimed nontaxable sales by providing copies of some exempt sale certificates and wholesale liquor licenses. However, the documents submitted did not include any information specifying the dollar amounts or quantities of goods sold to any of the purchasers, either as wholesale sales or as sales to otherwise claimed exempt purchasers, such that the same could be verified as nontaxable sales.

18. As noted, Yonkers filed the required information returns for the initial filing periods ended August 31, 2009 and February 28, 2010 (*see* finding of fact 7). Each of those two information returns filed by Yonkers provided data as to the dollar amounts of Yonkers’ reported monthly sales to third party purchasers, and those purchasers’ respective names, addresses, individual SLA license numbers, and New York State Sales Tax identification numbers. No information returns were filed by Yonkers subsequent to the foregoing initial filings.

19. The Division compiled a schedule of Yonkers’ own purchases of alcoholic beverages from third parties for the years 2009 through 2016, as reported to the Division by third party vendors.

20. The Division then compared Yonkers' purchases, as compiled above, to taxable sales as reported on Yonkers' sales and use tax returns for the same period (March 2009 through February 2016), as a means of estimating Yonkers' claimed nontaxable sales for the noted period. In turn, the Division compared the foregoing estimate of Yonkers' claimed nontaxable sales with its third party sales, as reflected on the two information returns that were filed, as well as for the subsequent periods during which such information returns were not filed.³ For the periods reviewed, the Division's calculations reflect unaccounted-for sales in the amount of approximately \$92,944,858.00. It appears to be Yonkers' position that all of such sales are nontaxable sales.

21. In calculating tax due on audit, the Division accepted Yonkers' gross sales, as reported, but was unwilling to accept Yonkers' estimated taxable ratio without proof in substantiation of the portion of its gross sales that were claimed as nontaxable sales, i.e., the difference between Yonkers' reported gross sales and reported taxable sales. It is these claimed nontaxable sales that the Division has held subject to tax.

22. As a consequence of its audit, the Division issued:

- one notice of determination (Notice No. L-043574844), dated August 26, 2015, assessing sales and use taxes, penalties,⁴ and interest against Yonkers;
- one notice of determination (Notice No. L-043579134), dated August 27, 2015, assessing sales and use taxes, penalties and interest, as above, against Richard McDine, as a person under a duty and responsibility to collect and remit sales and use taxes and file required returns on behalf of Yonkers, pursuant to Tax Law §§ 1131 (1) and 1133 (a);⁵

³ For many of the reporting periods, Yonkers' reported third party sales were zero, since Yonkers did not file information returns for those periods.

⁴ Penalties were assessed under Tax Law § 1145 (a) (1) (i), for failure to file a return or pay over any sales or use tax, and Tax Law § 1145 (a) (1) (vi), for the omission of an amount that is in excess of 25 percent of the total amount of tax required to be shown on a return.

⁵ At the commencement of proceedings, petitioner Richard McDine conceded that he was not contesting his status as a person who was under a duty and responsible to collect and remit sales and use taxes and file required

- two notices of determination (Notice Nos. L-042498527 and L-045268175), both dated March 11, 2015, assessing penalties against Yonkers for failure to have filed the required annual information returns pursuant to Tax Law § 1136 (i),
- one notice of proposed revocation of a license, permit or registration, dated August 18, 2016, against Yonkers.

23. The foregoing notices at issue herein are summarized as follows:

Petitioner	DTA No.	Assessment No.	Period	Amount ⁶
Yonkers	827554	L-043574844	6/1/10 - 2/28/14	\$5,274,013.38
R. McDine	827616	L-043579134	6/1/10 - 2/28/14	\$4,235,903.49
Yonkers	827276	L-042498527	3/1/13 - 2/28/14	\$10,000.00
Yonkers	828078	L-045268175	3/1/15 - 2/29/16	\$10,000.00
Yonkers	827931	----	8/18/16	Proposed Revocation

24. Yonkers did not file any of the required information returns other than those that it filed initially, i.e., for the tax periods ended August 31, 2009 and February 28, 2010. As a result of Yonkers' failure to file information returns for the noted subsequent periods, the Division determined and assessed penalty in the amount of \$10,000.00 for the periods ended February 28, 2014 and February 29, 2016, pursuant to Tax Law §§ 1136 (i) and 1145 (i).

returns on behalf of Yonkers. The dollar amount of the assessment against Mr. McDine is less than the dollar amount of the assessment against Yonkers because the Division did not obtain waivers extending the statute of limitations on assessment, with respect to Mr. McDine, that covered the entire audit period. While the assessment as originally issued against Mr. McDine did include the full amount assessed against Yonkers, that amount was subsequently reduced by conciliation order (CMS No. 267821) to reflect the shorter available period of assessment pertaining to Mr. McDine.

⁶ The dollar amounts set forth do not include penalties and interest with respect to DTA Nos. 827554 and 827616, and do not include interest with respect to DTA Nos. 827276 and 828078. Yonkers was afforded appropriate reductions in the Division's audit calculations for vendor collection credits and for sales tax paid with its returns as filed.

25. By a letter dated October 26, 2015, the Division advised Yonkers of its intent to commence the process of revoking Yonkers' certificate of authority unless the required annual information returns for the fiscal year spanning March 1, 2010 through February 28, 2011, and for the same fiscal year period for the ensuing years 2011 through 2015, were filed by November 30, 2015.

26. The Division's notice of proposed revocation of sales tax certificate of authority states that revocation is required pursuant to Tax Law § 1134 (a) (4) (A) because "[y]ou have willfully failed to file a New York State sales tax return as required by the Tax Law."

27. At the hearing, Yonkers' representative made a general assertion that computer problems might have prevented the filing of the required information returns but presented no evidence in support of this assertion.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by quoting the relevant sections of the Tax Law requiring that alcohol beverage wholesalers file annual information returns. The Administrative Law Judge noted that Yonkers did not dispute that it failed to file such returns after the first annual cycle.

The Administrative Law Judge next addressed the audit methodology and stated that it was well-established that the Division can estimate sales tax due from available information where a taxpayer has not filed a sales tax return or where such return is found to be incorrect or insufficient. The Administrative Law Judge described the attempts made by the Division to obtain the information needed for a complete audit and its unheeded requests that Yonkers file the required information returns, resulting in the disallowance of Yonkers' claimed nontaxable sales. The Administrative Law Judge observed that Yonkers ultimately bore the burden of

proving that the tax assessed was erroneous. According to the Administrative Law Judge, Yonker's claim that 80% of its sales were nontaxable was unsupported by the evidence, although Yonkers had the opportunity to provide additional documents and witnesses at the hearing to support this claim. The Administrative Law Judge concluded that under such circumstances, the Division's audit method and result should be upheld.

Turning to the question of penalties, the Administrative Law Judge described the penalties provided for underreporting and failure to file sales tax returns under the Tax Law. The Administrative Law Judge noted that the Division assessed penalties against petitioners due to Yonkers' failure to provide the information required to be shown on the information returns and failure to file the same. The Administrative Law Judge observed that where the number of individual failures could not be discerned, the Tax Law provides that the Division may estimate the number of failures for purposes of computing the penalties. The Administrative Law Judge concluded that, considering the number of transactions, volume of sales, and value of claimed nontaxable sales, it was reasonable for the Division to assess the maximum penalty in this instance and thus the penalties imposed should be sustained.

Lastly, the Administrative Law Judge addressed the proposed revocation of Yonkers' certificate of authority. The Administrative Law Judge considered Yonkers' failure to file the requested information returns even after being requested to do so by the Division. The Administrative Law Judge concluded that Yonkers' failure to file was knowing, deliberate and voluntary, considering that it had complied with the requirement in the first fiscal cycle, and thus constituted a willful failure that supported the Division's notice of proposed revocation. The Administrative Law Judge sustained the notice of proposed revocation of Yonkers' certificate of authority as well as the notices of determination assessing tax and additions.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that the Division's determination of tax for the periods at issue was arbitrary and capricious because the audit method was flawed. Petitioners claim that the Division failed to design a test to reasonably reflect the taxes due. Petitioners maintain that the Division should accept Yonkers' claimed nontaxable sales amounts due to Yonkers' good faith as exhibited by its historical tax reporting compliance. Petitioners argue that Mr. McDine is an unsophisticated user of electronic records and should not be held responsible where the Division failed to provide technical support for filing the new information returns. Petitioners also argue that penalties should be abated because they made a good faith effort to comply with the new reporting requirements.

The Division argues that the Administrative Law Judge correctly determined all the issues in his determination and urges this Tribunal to affirm the same without modification. The Division posits that Yonkers' failure to file information returns was willful. The Division disputes petitioners' contention that Yonkers was unsophisticated and points out that templates and directions for filing the returns were available. The Division argues that it was not compelled to accept Yonkers' stated taxable/nontaxable sales ratio and was entitled to utilize an estimated audit method where Yonkers failed to produce records. The Division also argues that Yonkers has failed to establish any reasonable cause for its failures to file the information returns here at issue and thus penalties should not be abated.

OPINION

We begin our decision by considering petitioners' argument that the Division's assessment of additional sales tax was improper or erroneous because the Division's audit methodology was not reasonably calculated to reflect the amount of tax due. Specifically,

petitioners argue that the determinations of sales tax and additions contained in the notices of determination issued at the conclusion of the audit were arbitrary and capricious because the Division did not employ a reasonable audit methodology for Yonkers. We note that the record contains numerous requests by the Division for Yonkers to file the required information returns and submit records that would substantiate Yonkers' claimed taxable sales ratio. However, Yonkers chose not to submit documents or the requested information to the auditor.

When a return has not been filed or is incorrect or insufficient, the Division may determine the amount of tax due from available information, and such determinations may be estimated (Tax Law § 1138). It is well established that in order to determine the adequacy of a taxpayer's records for an audit, the Division must request and examine the taxpayer's books and records (*Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003). The purpose of such examination is to determine whether such records are, in fact, so insufficient that it is "virtually impossible to verify taxable sales receipts and conduct a complete audit" (*id.*, quoting *Matter of Chartair, Inc. v State Tax Commn.*, 65 AD2d 44 [3d Dept 1978]).

It is the Division's duty to select a method of audit reasonably calculated to reflect the taxes due (*Matter of W.T. Grant Co. v Joseph*, 2 NY2d 196, 206 [1957], *cert denied* 355 US 869 [1957]), while petitioners bear the burden of showing that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v Tully*, 85 AD2d 858 [3d Dept 1981]; *Matter of Cousins Serv. Sta., Inc.*, Tax Appeals Tribunal, August 11, 1988). Where, as here, a taxpayer fails to provide complete and accurate records of its sales as required by Tax Law § 1135, the Division is under no obligation to guess what portion of the taxpayer's sales would be nontaxable (*see* Tax Law § 1132 [c]; *see also Matter of Meyer v State Tax Commn.*, 61 AD2d 223, 228 [3d Dept 1978], *lv denied* 44 NY2d 645 [1978]).

The Division calculated Yonkers' nontaxable sales by 1) accepting Yonkers' taxable sales as reported; 2) comparing these sales to Yonkers' purchases (as shown by third-party records) to estimate Yonkers' nontaxable sales; and 3) comparing such estimate of Yonkers' claimed nontaxable sales with third-party sales as reported on the information returns (using zero for third-party sales for periods where no returns were filed). We find that, under circumstances where the taxpayer has failed to provide sales records adequate for complete audit, it was not unreasonable for the Division to estimate nontaxable sales in such a manner. Ultimately, Yonkers could not show that the audit methodology employed was unreasonable where it failed to provide records it was under a statutory duty to maintain (*see* Tax Law § 1135).

Petitioners also argue on exception that the penalties imposed for its failures to file the information returns here at issue should be abated due to reasonable cause. Penalties under Tax Law § 1145 (i) shall be abated if such failures to file are entirely due to reasonable cause and not willful neglect (*see* Tax Law § 1145 [i] [4]; *see also Matter of Philip Morris*, Tax Appeals Tribunal, April 29, 1993; *Matter of MCI Telecom. Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978 [3d Dept 1993]; *see also* 20 NYCRR 3000.15 [d] [5]).

The penalties here at issue were imposed due to Yonkers' failure to file information returns required by Tax Law § 1136 (i), which provides, in pertinent part:

“(1) The following persons must file, in addition to any other return required by this chapter, annual information returns with the commissioner providing the information specified below about their transactions with vendors, hotel operators, and recipients of amusement charges:

* * *

(C) Every wholesaler, as defined by section three of the alcoholic beverage control law, if it has made a sale of an alcoholic beverage, as defined by section four hundred twenty of this chapter, without collecting sales or use tax during the period covered by the return, except (i) a sale to a person that has furnished an exempt organization certificate to the wholesaler for that sale; or (ii)

a sale to another wholesaler whose license under the alcoholic beverage control law does not allow it to make retail sales of the alcoholic beverage. For each vendor, operator, or recipient to whom the wholesaler has made a sale without collecting sales or compensating use tax, the return must include the total value of those sales made during the period covered by the return (excepting the sales described in clauses (i) and (ii) of this subparagraph) and the vendor's, operator's or recipient's state liquor authority license number, along with the information required by paragraph two of this subdivision

(2) The returns required by paragraph one of this subdivision must also include, for each vendor, operator, or recipient about whom information is required to be reported under such paragraph, the name and address, and the certificate of authority or federal identification number, and any other information required by the commissioner. The commissioner may, in the commissioner's discretion, require the reporting of less than all the information otherwise required to be reported by this paragraph and paragraph one of this subdivision

* * *

(3) The returns required by paragraph one of this subdivision must be filed annually on or before March twentieth and must cover the four sales tax quarterly periods immediately preceding such date. Notwithstanding section three hundred five of the state technology law or any other law to the contrary, the returns must be filed electronically in the manner prescribed by the commissioner.

(4) Any person required to file a return under paragraph one of this subdivision must, on or before March twentieth, give to each vendor, operator, or recipient about whom information is required to be reported in the return the information pertaining to that person. The commissioner may prescribe a form to be used to provide the information required to be given by this paragraph.

(5) Nothing in this subdivision is to be construed to limit the persons from whom the commissioner can secure information or the information the commissioner can require from those persons pursuant to the commissioner's authority under section eleven hundred forty-three of this part or any other provision of law."

The fact that Yonkers failed to file the information returns required by Tax Law § 1136 after the initial reporting cycle is not in dispute. Petitioners assert that Mr. McDine was an unsophisticated user of electronic records and the Division failed to provide technical support for filing the information returns. We do not find this argument compelling, especially given that Yonkers successfully filed two information returns during the initial reporting cycle (*see* finding

of fact 7). Notwithstanding an unsubstantiated claim made at the hearing below and maintained on exception regarding a change of the internet address at which the information returns should be uploaded, the record is silent as to what difficulties Yonkers encountered in attempting to file these information returns after successfully filing the first two. Although petitioners argue that Yonkers' history of compliance in filing its sales tax returns should be a mitigating factor, we do not see how this fact demonstrates reasonable cause and not willful neglect of Yonkers' new filing obligations under the Tax Law (*see e.g. Matter of Ross-Viking Mdse. Corp. v Tax Appeals Trib. of State of N.Y.*, 188 AD2d 698 [3d Dept 1992]). For these reasons, we agree with the Administrative Law Judge that petitioners have not shown that Yonkers' failure to file the information returns was entirely due to reasonable cause and not willful neglect and thus sustain the penalties imposed pursuant to Tax Law § 1145.

Lastly, we address the proposed revocation of Yonkers' sales tax certificate of authority.

Tax Law § 1134 (a) (4) (A) provides, in relevant part:

“Where a person who holds a certificate of authority (i) willfully fails to file a report or return required by this article, (ii) willfully files, causes to be filed, give or causes to be given a report, return, certificate or affidavit required under this article which is false . . . (iv) willfully fails to prepay, collect, truthfully account for or pay over any tax imposed under this article or pursuant to the authority of article twenty-nine of this chapter . . . the commissioner may revoke or suspend such certificate of authority and all duplicates thereof.”

Considering Yonkers' undisputed failures to file the information returns required by Tax Law § 1136, even after being prompted to do so by the Division, taken together with Yonkers' demonstrated ability to file such returns on two occasions, we agree with the Administrative Law Judge that Yonkers' continued failure to file the required information returns was knowing, deliberate and voluntary and therefore constitutes a willful failure to file a required return. We thus sustain the Division's notice of revocation of Yonkers' sales tax certificate of authority.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Yonkers Wholesale Beer Distributors, Inc. and Richard McDine is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Yonkers Wholesale Beer Distributors, Inc. and Richard McDine are denied;
4. The notices of determination, dated August 26, 2015, August 27, 2015, and March 11, 2015, are sustained; and
5. The notice of proposed revocation of a license, permit or registration, dated August 18, 2016, is sustained.

DATED: Albany, New York
January 27, 2020

/s/ Roberta Moseley Nero

Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava

Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina

Anthony Giardina
Commissioner