STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **AMUSEMENTS OF WNY, INC.** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2006 through November 30, 2009.	:	DETERMINATION DTA NOS. 825356 AND 825357
In the Matter of the Petition of **MARTIN DIPIETRO** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2007 through November 30, 2009.	:	

Petitioner Amusements of WNY, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2006 through November 30, 2009.

Petitioner Martin DiPietro filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2007 through November 30, 2009.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, in Rochester, New York, on March 28, 2014 at 10:00 A.M., with all briefs to be submitted by November 24, 2014, which date began the six-month period for the issuance of this determination. Petitioners

appeared by Lemery Greisler LLC (Robert J. May, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

ISSUES

I. Whether the Division was warranted in resorting to an indirect audit methodology in this matter and whether the methodology chosen had a rational basis and was reasonably calculated to determine sales tax due.

II. Whether petitioners have demonstrated reasonable cause for the abatement of the penalty asserted.

FINDINGS OF FACT

1. Petitioner, Amusements of WNY, Inc. (WNY),[1] operated an amusement park in Grand Island, New York, during the period December 1, 2006 through November 30, 2009 (audit period).

2. WNY's sales were comprised of park admissions, food sales at concession stands, games of chance, gift shop sales and miscellaneous rentals. Games of chance were not subject to sales tax while the food, gift shop and rentals were taxed at the rate of 8.75%. Park admissions were taxed at 25% of the full amount of the charge.

3. An audit of WNY's sales for the audit period was commenced on August 28, 2009, when the Division of Taxation (Division) issued an appointment letter in which it sought all books and records pertaining to the sales and use tax liability for the audit period. Included in the list of records requested were sales tax returns, the general ledger, sales invoices, exemption documents, fixed asset purchase invoices, expense purchase invoices, bank statements, the cash

[1]As used herein, the term "petitioner" will refer to WNY.

receipts journal, cash disbursement journal and depreciation schedules. Petitioners provided the Division with vendor invoices for 2007 through 2009; bank statements for the same period; sales tax returns for the audit period; summary sheets of deposits and payments for 2007; and 2009 exempt sales information. However, petitioners informed the Division they did not maintain detailed sales documentation. A second request for sales documentation was sent on June 23, 2010, but yielded no additional information.

4. The Division determined that the records provided with regard to the capital purchases made by WNY during the audit period were adequate to trace transactions from their sources to their totals. When reviewed in detail, it was determined that appropriate tax had been paid on all capital purchases and no additional tax was due.

5. An examination of the records produced regarding expense purchases indicated that these were adequate and in auditable condition. However, after a test period audit method was agreed to by WNY, it was determined that an additional $29,621.48 was due on expense purchases. After issuance of a statement of proposed audit change on February 10, 2011, WNY agreed to this additional tax and made a full payment of $36,200.49, which reflected the tax due and interest only of $6,575.01. As part of the agreement between the Division and WNY, in exchange for WNY's promise to account for and collect taxes on expense and capital purchases going forward, the Division waived penalty and additional interest.

6. Petitioner's sales records were far more problematic. WNY did not produce adequate, complete or auditable source documentation like register tapes, invoices or daily summaries of sales revenues from food stands or gift shops. In addition, as noted above, the various categories of sales were taxed at different rates and WNY's failure to provide records of each category made it impossible to tell how any of the sales were taxed. Thus, bank records of deposits were also of

little value in determining proper tax liability because the deposits were not accompanied by any records of allocations among the various sources of revenue.

7. WNY had been audited three times previous to this audit, and in each instance additional sales tax was determined to be due. Further, WNY was instructed in the most immediate prior audit to maintain adequate books and records and a record of revenue from the various sources. Despite several requests for books and records that would substantiate the sources of revenue, they were never produced, indicating that the Division's directive was not followed.

8. Petitioner did not differentiate between the sources of income when it collected cash from admission booths, food stands and gift shops. The funds were intermingled, then counted and deposited without any effort to allocate between revenue sources. Instead, WNY relied on historical sales figures, an understanding of park operations and daily bank deposits to arrive at the amounts reported on the sales tax returns filed during the audit period.

9. After reviewing the records WNY had made available, the Division deemed them inadequate to perform a detailed audit and determined that an indirect audit methodology should be used to determine sales tax liability for the audit period. The methodology chosen was based upon an analysis of bank deposits, which entailed a review of all bank statements for the audit period, totaling the deposits and making adjustments for rental income, the Canadian exchange rate, sales tax paid, exempt groups, games of chance and refunds. The resulting figures were used as a taxable base.

10. The gross sales analysis focused on WNY's three bank accounts: the M&T control account, the M&T ATM account, and the Plus First Niagara account. Totals from these accounts were recorded and adjusted as noted above. The deposit totals were also adjusted to eliminate

royalty income received by a separate business venture and deposited into these accounts. Likewise, the rental income that was eliminated was sourced to a different venture as well.

11. As a result of this analysis of gross deposits and adjustments made with the assistance of petitioner's representative, the Division determined an audited gross sales base for the audit period of $12,580,389.00.

12. After establishing the audited gross sales base, the auditor determined how the monthly amounts were allocated among the various revenue producing sources, which, as noted above, were subject to different tax rates. It was agreed by the auditor and petitioner's representative that detailed records would be kept for the month of July 2010 and allocation percentages computed therefrom. The results were reviewed by the auditor and petitioner's representative and the following allocation percentages were agreed upon:

Category	Allocation Percentage	Applicable Tax Rate
Food	34.84%	Full
Store	6.96%	Full
Games of Chance	6.57%	Exempt
Miscellaneous	.82%	Full
Admissions	50.81%	25% of Full
Total	100%	

13. The allocation percentages were then applied to the previously determined audited gross sales base on a monthly basis so that the appropriate tax rate could be applied. A seasonal adjustment was made due to the fact that the park was closed in January, February, March, April, the first three weeks of May, twenty days of September, October, November and December. All sales for these periods were attributed to preseason ticket sales and the lower admissions tax rate

was applied. For the remaining periods, when the park was open, the adjusted gross sales base was allocated to the five categories consistent with the percentages set forth in the table above.

This methodology resulted in total estimated revenue for each category of sales to which the proper tax rate was applied, yielding total audited tax due of $513,411.00. After giving credit for tax reported of $384,966.00, additional tax on sales was determined to be $128,444.00.

14. On July 8, 2011, the Division issued to WNY a second statement of proposed audit change based on its audit of petitioner's sales for the audit period, asserting tax due of $128,444.00, plus penalty and interest. Subsequently, the Division issued notices of determination, dated August 10, 2011 and August 12, 2011, to WNY and Mr. DiPietro, respectively, asserting additional sales and use taxes due in the sum of $128,445.00, plus penalty and interest for WNY, and $123,416.00, plus penalty and interest for Mr. DiPietro.[2]

15. Following the issuance of the notices of determination, a conference was held in the Bureau of Conciliation and Mediation Services (BCMS) that resulted in a reduction of $8,648.15 to the amount of sales and use taxes due for the audit period. The basis for the reduction was an allowance for nonpark revenue of $124,553.83, $34,372.62 and $57,277.23 for the years 2007, 2008 and 2009, respectively. Other than a disallowance of $11,974.25, the Division agreed to additional adjustments of $216,203.68 of petitioner's requested $228,177.93. Ultimately, the amount of tax due from both WNY and Mr. DiPietro after the BCMS conference was $119,797.00, plus penalty and interest.

16. A significant number of exempt sales was credited to petitioner during the audit period, comprised of noncatered and catered events by exempt organizations and school groups. Initially,

[2]Mr. DiPietro was not assessed for the quarter ended February 28, 2007.

WNY produced exempt sales summaries and supporting documentation only for the year 2009, claiming that its total of exempt sales for that year was $331,065.00. Of this amount, the Division was only able to verify, through exemption certificates, the validity of $164,491.49 of catered and noncatered sales and $63,782.00 in school sales.

However, the Division agreed to credit WNY with $300,000.00 in exempt sales for each of the three years in issue, for a total of $900,000.00 for the audit period. Petitioner requested an additional $150,000.00 based on sales to Native American organizations, but had no documentation to substantiate the claims. The Division, seeking to move the case and resolve the audit, agreed to the proposal and allowed $1,350,000.00 in exempt sales for the audit period. Part of the $150,000.00 allowance included sales to the Seneca Nation.

17. Petitioner submitted documents at hearing that purported to support $1,497,664.93 in total exempt sales for the audit period. The documentation submitted concerned catered and noncatered events by exempt groups and sales to school groups. WNY also provided evidence of "good any day" (GAD) admission tickets, which it believes accounted for an additional $670,000.00 in exempt sales.

18. GAD sales were sales of park admission tickets. These tickets did not include catered or noncatered group events and were made available to various entities, like credit unions, at a discount. WNY did not track the sale of these tickets and had no way of knowing to whom they were ultimately sold. Martin DiPietro, WNY's president, confirmed that the tickets were given to entities in a block at the beginning of each season without any concurrent payment or contractual obligation, and that he did not know if the entities that received the tickets collected sales tax or deferred to WNY. WNY looked upon GAD tickets as an additional opportunity to sell more admission tickets. The Division took the position that these sales were not exempt, even if the

entity to whom the tickets were given was exempt, since there was no way of determining who ultimately purchased the tickets or if sales tax was ever paid.

19. Following the hearing, the Division reviewed substantial documentation submitted by WNY at hearing. Petitioner had summarized each exempt group sale (catered, noncatered and schools) for the audit period and determined a total of $1,497,664.93. However, when the Division examined the documentation, a significant number of the groups had no evidence of exempt status. As a result, based on WNY's own records, the Division determined total non-catered and catered substantiated exempt sales to be $1,045,987.58. The Division agreed with WNY's exempt sales to schools in the sum of $180,207.16, thereby finding that WNY had established total exempt sales of $1,226,194.74, substantially less than the amount allowed by the Division on audit.

20. With respect to the $126,000.00 in sales to the Seneca Nation, the Division credited these sales as exempt and included them in its additional allowance of $150,000.00 for each year in the audit period.

21. Martin DiPietro was an officer and owner of WNY during the years in issue and was responsible for the operations of the business, including supervision of accounting and record keeping for the business.

SUMMARY OF THE PARTIES' POSITIONS

22. Petitioners contend that the Division's audit methodology was not reasonably calculated to determine WNY's sales tax liability. Petitioners believe the use of the 2009 test period for exempt sales did not account for GAD sales or a $126,000.00 sale to the Seneca Gaming Corporation. Further, petitioner contends that the records it submitted at hearing established entitlement to about $670,000.00 more exempt sales.

23. Petitoners argue that the Division's methodology for establishing the allocation among cash receipts at the park should also have been used to project sales over the entire audit period and used to reflect the taxes that were actually collected. Petitioners argue that the Division simply used the sales tax that was remitted on its returns, which was lower than that reflected in the July 2010 test.

24. Finally, petitioners argue that WNY's failure to pay sales tax due for the audit period was due to reasonable cause. Petitioners contend that the combination of the company's small size and the complexity of the applicable sales tax law presented many difficulties in its attempt to report accurately. Although WNY concedes its lack of internal controls, it believes it did its best to comply with the Division's rigorous documentation standards.

25. The Division contends that it made proper requests for books and records with which WNY did not comply, thus justifying a resort to external indices and estimated audit methodologies. Choosing the bank deposit analysis utilized petitioner's own records and allowed for petitioner to substantiate its exempt sales. However, the burden was on petitioner to show by clear and convincing evidence that the estimate was unreasonably inaccurate or that the amount of tax determined to be due was erroneous, and the Division argues petitioner has not done so.

26. The Division believes penalties should be sustained because petitioner did not maintain adequate records, despite being told to do so on prior audits. Petitioner failed to keep source documentation for the sales records it did keep.

27. Finally, the Division argues that petitioner's documentation of exempt sales produced at hearing did not justify a modification to the assessment because its review of the records indicated that petitioner's total documented exempt sales were less than the amount the Division allowed on audit.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every "retail sale" of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A "retail sale" is "a sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101[b][4][i][A]). Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, "or if a return when filed was incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices. . . ." (Tax Law § 1138[a][1].) When acting pursuant to section 1138(a)(1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (***see Matter of Your Own Choice, Inc.,*** Tax Appeals Tribunal, February 20, 2003).

B. The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of Your Own Choice, Inc***., as follows:

> "To determine the adequacy of a taxpayer's records, the Division must first request ***(Matter of Christ Cella, Inc. v. State Tax Commn.***, [102 AD2d 352, 477 NYS2d 858] ***supra***) and thoroughly examine (***Matter of King Crab Rest. v. Chu***, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (***Matter of Giordano v. State Tax Commn.***, 145 AD2d 726, 535 NYS2d 255; ***Matter of Urban Liqs. v. State Tax Commn.***, 90 AD2d 576, 456 NYS2d 138; ***Matter of Meyer v. State Tax Commn.***, 61 AD2d 223, 402 NYS2d 74, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025; ***see also***, ***Matter of Hennekens v. State Tax Commn.***, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is 'virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit' (***Matter of Chartair, Inc. v. State Tax Commn.***, 65 AD2d 44, 411 NYS2d 41, 43; ***Matter of Christ Cella, Inc. v. State Tax Commn.***, ***supra***), "from which the exact amount of tax due can be

determined" (***Matter of Mohawk Airlines v. Tully***, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (***Matter of Urban Liqs. v. State Tax Commn.***, ***supra***). The estimate methodology utilized must be reasonably calculated to reflect taxes due (***Matter of W.T. Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (***Matter of Scarpulla v. State Tax Commn.***, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451; ***Matter of Cousins Serv. Station***, Tax Appeals Tribunal, August 11, 1988). In addition, '[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case'" (***Matter of Grecian Sq. v. New York State Tax Commn.***, 119 AD2d 948, 501 NYS2d 219, 221).

C. It is clear from the record that the Division made a proper written request for books and records on more than one occasion and then thoroughly examined what was produced. Unfortunately, those records, particularly sales records, fell woefully short of what would have been required to perform a full and detailed audit.

The Division mailed an appointment letter to petitioners, dated August 28, 2009, with an exhaustive list of sales tax records it requested be produced for the audit period. An additional request for records was made on June 23, 2010. In response, petitioners provided the Division with vendor invoices for 2007 through 2009; bank statements for the same period; sales tax returns for the audit period; summary sheets of deposits and payments for 2007; and 2009 exempt sales information. Petitioners never produced adequate, complete or auditable source documentation like register tapes, invoices or daily summaries of sales revenues from food stands or gift shops. In addition, petitioners provided no proof of the amounts of sales in the

various categories, which are taxed at different rates, thus making it impossible to tell how any of the sales were taxed or if the amounts collected were accurate.

The inadequate records produced precluded performing a detailed audit. Thus, the Division made the valid decision to resort to an estimated methodology that it believed was reasonably calculated to reflect taxes due.

D. The methodology chosen by the Division was a bank deposit analysis, which assumed all deposits to be receipts from taxable sales. The Division performed the chosen audit methodology with the assistance of petitioners' representative. The total deposits were adjusted for rental income, the Canadian exchange rate, sales tax paid, exempt groups, games of chance and refunds, which resulted in net audited gross sales base. Other adjustments were made for nonpark related deposits. Bank deposit analysis methodology has been affirmed by the Tax Appeals Tribunal as a reasonable methodology (***Matter of MacLeod v. Megna***, 75 AD3d 928 [2010]; ***Matter of D & V Liquor***, Tax Appeals Tribunal, March 10, 2005).

Because WNY's sales were allocated to several revenue sources that were taxed at different rates, it was necessary to know the allocation percentage of sales in each category. With the continued assistance of petitioner's former representative, the month of July 2010 was chosen as a test period for a detailed examination because there were no records available for any month in the audit period that could have been used for this purpose. Complete records were kept and analyzed for July 2010. Once the percentage for each source of revenue was determined, the audited gross sales base was multiplied by each to determine the tax due. Credit was given for sales tax paid for each period and the remainder yielded additional sales tax due.

Petitioners argue that use of the data collected for the month of July 2010, collected with the cooperation of their prior representative, should have been used for a much wider purpose

than just allocation of sales receipts. Based on the accuracy of the deposits and sales taxes deposited, petitioner believes it would have been a better indicator of actual taxes collected. The flaw in this argument is that petitioner had little documentation of its sales and the sales tax it actually collected during the audit period. The Division's reliance on the taxes WNY actually paid with its returns, given its lack of record keeping, was both reasonable and rational. Petitioners' argument that the Division should have used a methodology that would have reduced their additional tax liability is meritless. Accuracy is not a requirement imposed on the Division when it is forced to rely on estimated audit methodologies due to a taxpayer's failure to produce adequate books and records (***Matter of Markowitz v. State Tax Commn***.).

E. Petitioners argue that the GAD sales should have been accepted as exempt sales. However, there is no evidence to support this treatment. In fact, Mr. DiPietro conceded that there were no internal controls over sales of admission tickets by organizations that took responsibility for GAD sales. It was not known to whom the tickets were sold or if sales tax was charged or collected on behalf of WNY. As a result, GAD sales cannot be deemed exempt.

F. The Division's agreement to increase its allowance for exempt sales by $150,000.00 for each year in the audit period was based on the auditor's acceptance of sales to the Seneca Nation or the Seneca Gaming Corporation, for which evidence was initially lacking. However, this concession did not include an acceptance of GAD sales as exempt, as argued by petitioner. As noted above in the findings of fact, this additional allowance brought accepted exempt sales to $450,000.00 per year, or $1,350,000.00 for the audit period, or more than all documented exempt sales demonstrated by petitioners on audit and at hearing. Indeed, the total of all valid exempt sales documented by petitioners at hearing, plus the Division's allowance for school sales, did not equal the Division's total allowance for exempt sales. Petitioners were only able to

substantiate $1,226,194.74 in exempt sales for the audit period, while the Division gave them credit for $1,350,000.00.

G. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

Generally, the resolution of whether a person is responsible to collect and remit sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (***Matter of Cohen v. State Tax Commn.,*** 128 AD2d 1022 [1987]; ***Stacy v. State,*** 82 Misc 2d 181 [1975]).

In this matter, petitioners never seriously challenged Mr. DiPietro's responsibility for the sales and use taxes. He was the owner and chief executive officer of WNY during the years in issue and was responsible for the operations of the business, including supervision of accounting and record keeping. WNY had no accounting or bookkeeping department and those functions were performed by Mr. DiPietro and his daughter. Mr. DiPietro was under a duty to act for WNY in complying with the requirements of Article 28 (Tax Law § 1131[1]) and he is responsible for the additional sales and use taxes determined by the Division herein.

H. In establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). In order to abate penalties, a taxpayer must show that the failure to comply with the law was due to reasonable cause and not due to willful neglect (Tax Law § 1145[a][1][iii]). Here, petitioners have not established that WNY's underreporting of sales resulted from anything other than their own

failure to maintain accurate records of sales. Therefore, as there has been no showing of reasonable cause and an absence of willful neglect for their failure to pay the sales and use taxes, there is no basis for abating the penalties assessed (***Matter of Rosemellia***, Tax Appeals Tribunal, March 12, 1992.) Mr. DiPietro conceded as much at hearing when he stated, "Yes, they're right, our records were terrible."

I. The petitions of Amusements of WNY, Inc., and Martin DiPietro are denied, and the notices of determination, dated August 10, 2011 and August 12, 2011, as modified by the BCMS orders, dated August 31, 2012, are sustained.

DATED: Albany, New York
April 16, 2015

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE