

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**EASTCHESTER ROAD DONUTS, 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, 2010 through :  
February 28, 2011. :

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In the Matter of the Petition :

of :

**QUICK SERVICE FOOD, INC.** :

for Revision of Determinations or for Refund of :  
Sales and Use Taxes under Articles 28 and 29 of the :  
Tax Law for the Period September 1, 2010 through :  
February 28, 2011. :

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In the Matter of the Petition :

of :

**FAST FOOD RESTAURANT CORP.** :

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 September 1, 2010 through :  
February 28, 2011. :

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DETERMINATION  
DTA NOS. 826352,  
826353, 826354, 826355  
AND 826356

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In the Matter of the Petition :  
of :  
**MAADHAV, 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 June 1, 2010 through :  
February 28, 2011. :  
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In the Matter of the Petition :  
of :  
**RAJSUN, 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 September 1, 2010 through :  
February 28, 2011. :  
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Petitioner Eastchester Road Donuts, 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, 2010 through February 28, 2011.

Petitioner Quick Service Food, 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 June 1, 2010 through February 28, 2011.

Petitioner Fast Food Restaurant Corp., 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 September 1, 2010 through February 28, 2011.

Petitioner Maadhav, 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 June 1, 2010 through February 28, 2011.

Petitioner Rajsun, 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 September 1, 2010 through February 28, 2011.

A hearing was held before Herbert M. Friedman, Jr., Administrative Law Judge, in New York, New York, on September 9, 2015, with all briefs to be submitted by February 18, 2016, which date commenced the six-month period for the issuance of this determination. 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).

### ***ISSUES***

- I. Whether petitioners are entitled to refunds of previously collected penalties under the principle of estoppel.
- II. Whether petitioners have demonstrated reasonable cause for the abatement of penalties.

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

1. Petitioners, Eastchester Road Donuts, Inc. (Eastchester Road), Quick Service Food, Inc. (Quick Service), Fast Food Restaurant Corp. (Fast Food), Maadhav, Inc. (Maadhav), and Rajsun, Inc. (Rajsun), at all relevant times were commonly owned businesses operating as Dunkin Donuts and Baskin Robbins in the Bronx and Manhattan.

#### **Eastchester Road**

2. On March 21, 2011, petitioner Eastchester Road filed its quarterly sales and use tax return (Form ST-100) for the quarter ending February 28, 2011. The return reported tax due of

\$9,649.03. Petitioner Eastchester Road failed to remit payment with the return as its accompanying check was dishonored for insufficient funds.

3. As a result of the nonpayment, on April 21, 2011 the Division of Taxation (Division) issued to petitioner Eastchester Road Notice and Demand number L-035670073, assessing tax due of \$9,649.03, plus penalties of \$964.90 and interest for the period of December 1, 2010 to February 28, 2011.

4. The Division, through its Collections and Civil Enforcement Division, subsequently issued to petitioner Eastchester Road a Notice of Intent to Refer Your Debt (Form DTF- 452) on June 17, 2011 for the same tax period. The penalties in this notice were increased to \$1,157.88, as was the interest due.

5. Between July 12, 2011 and August 9, 2011, Division employees made three separate field visits to petitioner Eastchester Road's place of business, leaving copies of Publication 125, which describes the Division's collection process for finally fixed tax liabilities.

6. On September 15, 2011, petitioner Eastchester Road's business was seized by the Division and its locks were changed based on the outstanding liability described in Finding of Fact 3.

7. Eastchester Road subsequently paid Notice and Demand L-035670073 in full.<sup>1</sup>

#### **Quick Service**

8. On September 20, 2010, petitioner Quick Service filed its quarterly sales and use tax return (Form ST-100) for the quarter ending August 31, 2010. The return reported tax due of \$17,456.46.

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<sup>1</sup> The exact date of payment was not established by either party. It is clear, however, that payment was made after September 15, 2011.

9. On December 20, 2010, petitioner Quick Service filed its quarterly sales and use tax return (Form ST-100) for the quarter ending November 30, 2010. The return reported tax due of \$15,300.90.

10. On March 21, 2011, petitioner Quick Service filed its quarterly sales and use tax return (Form ST-100) for the quarter ending February 28, 2011. The return reported tax due of \$13,679.17.

11. Petitioner Quick Service failed to remit payment with the returns referenced in Findings of Fact 8 through 10 as the accompanying checks were dishonored for insufficient funds.

12. On October 18, 2010, the Division issued to petitioner Quick Service Notice and Demand number L-034734847, assessing tax due of \$17,456.46, plus penalties of \$1,745.64 and interest for the period of June 1, 2010 to August 31, 2010.

13. On January 14, 2011, the Division issued to petitioner Quick Service Notice and Demand number L-035302618, assessing tax due of \$15,300.90, plus penalties of \$1,530.09 and interest for the period of September 1, 2010 to November 30, 2010.

14. On April 21, 2011, the Division issued to petitioner Quick Service Notice and Demand number L-035670161, assessing tax due of \$13,679.17, plus penalties of \$1,367.91 and interest for the period of December 1, 2010 to February 28, 2011.

15. The Division, through its Collections and Civil Enforcement Division, subsequently issued to petitioner Quick Service a Notice of Intent to Refer Your Debt (Form DTF- 452) on June 15, 2011 for tax periods June 1, 2010 to August 31, 2010 and September 1, 2010 to November 30, 2010. The penalties for the two periods were increased to a total of \$5,437.21, as was the interest due.

16. The Division, through its Collections and Civil Enforcement Division, also issued to petitioner Quick Service a Notice of Intent to Refer Your Debt (Form DTF- 452) on June 17, 2011 for tax period December 1, 2010 to February 28, 2011. The penalty for the period was increased to \$1,641.49, as was the interest due.

17. Between June 17, 2011 and September 13, 2011, Division employees made three separate field visits to petitioner Quick Service's place of business, leaving copies of Publication 125, which describes the Division's collection process.

18. Payment for the period June 1, 2010 to August 31, 2010 was remitted through a levy of petitioner Quick Service's accounts.

19. On October 5, 2011, Division employees visited petitioner Quick Service's business for the purpose of seizure. At that time, Rakesh Shah, a responsible person for Quick Service, offered immediate payment of \$25,000.00 in order to avoid seizure of the business. Petitioner Quick Service subsequently paid the outstanding liability for notices and demands numbers L-034734847, L-035302618 and L-035670161.<sup>2</sup>

### **Fast Food**

20. On December 20, 2010, petitioner Fast Food filed its quarterly sales and use tax return (Form ST-100) for the quarter ending November 30, 2010. The return reported tax due of \$14,918.83.

21. On March 21, 2011, petitioner Fast Food filed its quarterly sales and use tax return (Form ST-100) for the quarter ending February 28, 2011. The return reported tax due of \$13,935.57.

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<sup>2</sup> The exact date of payment was not established by either party. It is clear, however, that payment was made after October 5, 2011.

22. Petitioner Fast Food failed to remit payment with the returns referenced in Findings of Fact 20 and 21 as the accompanying checks were dishonored for insufficient funds.

23. On January 14, 2011, the Division issued to petitioner Fast Food Notice and Demand number L-035303495, assessing tax due of \$14,918.83, plus penalties of \$1,491.88 and interest for the period of September 1, 2010 to November 30, 2010.

24. On April 21, 2011, the Division issued to petitioner Fast Food Notice and Demand number L-035670091 assessing tax due of \$13,935.57, plus penalties of \$1,393.55 and interest for the period of December 1, 2010 to February 28, 2011.

25. The Division, through its Collections and Civil Enforcement Division, subsequently issued to petitioner Fast Food a Notice of Intent to Refer Your Debt (Form DTF- 452) on June 14, 2011 for tax period September 1, 2010 to November 30, 2010. The penalty for the period was increased to a total of \$2,237.78, as was the interest due.

26. The Division, through its Collections and Civil Enforcement Division, also issued to petitioner Fast Food a Notice of Intent to Refer Your Debt (Form DTF- 452) on June 17, 2011 for tax period December 1, 2010 to February 28, 2011. The penalty for the period was increased to \$1,672.25, as was the interest due.

27. Between July 8, 2011 and August 19, 2011, Division employees made three separate field visits to petitioner Fast Food's place of business, leaving copies of Publication 125, which describes the Division's collection process.

28. On September 15, 2011, petitioner Fast Food's business was seized by the Division and its locks were changed based on the outstanding liability described in Findings of Fact 23 and 24.

29. Petitioner subsequently paid the liabilities asserted in notices and demands numbers L-035303495 and L-035670091.<sup>3</sup>

**Maadhav**

30. On September 20, 2010, petitioner Maadhav filed its quarterly sales and use tax return (Form ST-100) for the quarter ending August 31, 2010. The return reported tax due of \$13,768.54.

31. On December 20, 2010, petitioner Maadhav filed its quarterly sales and use tax return (Form ST-100) for the quarter ending November 30, 2010. The return reported tax due of \$11,943.49.

32. On March 21, 2011, petitioner Maadhav filed its quarterly sales and use tax return (Form ST-100) for the quarter ending February 28, 2011. The return reported tax due of \$11,738.74.

33. Petitioner Maadhav failed to remit payment with the returns referenced in Findings of Fact 30 through 32 as the accompanying checks were dishonored for insufficient funds.

34. On October 18, 2010, the Division issued to petitioner Maadhav Notice and Demand number L-034736137, assessing tax due of \$13,768.54, plus penalties of \$1,376.85 and interest for the period of June 1, 2010 to August 31, 2010.

35. On January 14, 2011, the Division issued to petitioner Maadhav Notice and Demand number L-035303492 assessing tax due of \$11,943.49, plus penalties of \$1,194.34 and interest for the period of September 1, 2010 to November 30, 2010.

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<sup>3</sup> The exact date of payment was not established by either party. It is clear, however, that payment was made after September 15, 2011.

36. On April 21, 2011, the Division issued to petitioner Maadhav Notice and Demand number L-035670090 assessing tax due of \$11,738.74, plus penalties of \$1,173.87 and interest for the period of December 1, 2010 to February 28, 2011.

37. The Division, through its Collections and Civil Enforcement Division, subsequently issued to petitioner Maadhav a Notice of Intent to Refer Your Debt (Form DTF- 452) on June 9, 2011 for tax periods June 1, 2010 to August 31, 2010 and September 1, 2010 to November 30, 2010. The penalties for the period were increased to a total of \$4,262.00, as was the interest due.

38. The Division, through its Collections and Civil Enforcement Division, also issued to petitioner Maadhav a notice of intent to refer your debt (Form DTF- 452) on June 17, 2011 for tax period December 1, 2010 to February 28, 2011. The penalty for the period was increased to \$1,408.63, as was the interest due.

39. Division employees made field visits to petitioner Maadhav's place of business on June 17 and September 13, 2011, leaving copies of Publication 125, which describes the Division's collection process.

40. Payment for the period June 1, 2010 to August 31, 2010 was remitted through a levy of petitioner Maadhav's accounts.

41. On October 5, 2011, Division employees visited petitioner Maadhav's business for the purpose of seizure. At that time, Rakesh Shah, a responsible person for Maadhav, offered immediate payment of the remaining outstanding liability in order to avoid seizure of the business.<sup>4</sup>

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<sup>4</sup> The exact date of payment was not established by either party. It is clear, however, that payment was made after October 5, 2011.

**Rajsun**

42. On December 20, 2010, petitioner Rajsun filed its quarterly sales and use tax return (Form ST-100) for the quarter ending November 30, 2010. The return reported tax due of \$8,693.02.

43. On March 21, 2011, petitioner Rajsun filed its quarterly sales and use tax return (Form ST-100) for the quarter ending February 28, 2011. The return reported tax due of \$8,825.61.

44. Petitioner Rajsun failed to remit payment with the returns referenced in Findings of Fact 42 and 43 as the accompanying checks were dishonored for insufficient funds.

45. On January 14, 2011, the Division issued to petitioner Rajsun Notice and Demand number L-035302123 assessing tax due of \$8,693.02, plus penalties of \$869.30 and interest for the period of September 1, 2010 to November 30, 2010.

46. On April 21, 2011, the Division issued to petitioner Rajsun Notice and Demand number L-035671568 assessing tax due of \$8,825.61, plus penalties of \$882.56 and interest for the period of December 1, 2010 to February 28, 2011.

47. The Division subsequently issued to petitioner Rajsun a Notice of Intent to Refer Your Debt (Form DTF- 452) on June 14, 2011 for tax period September 1, 2010 to November 30, 2010. Any increase to the penalties is not identified in the record.<sup>5</sup>

48. The Division also issued to petitioner Rajsun a Notice of Intent to Refer Your Debt (Form DTF- 452) on June 17, 2011 for tax period December 1, 2010 to February 28, 2011. Any increase to the penalties is not identified in the record.<sup>6</sup>

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<sup>5</sup> A copy of the Notice of Intent to Refer Your Debt was described as an exhibit attached to the affidavit of Sharon Huneau placed in the record, but appears to have been mistakenly omitted by the Division.

<sup>6</sup> See footnote 5.

49. Between July 20, 2011 and November 3, 2011, Division employees made four separate field visits to petitioner Rajsun's place of business, leaving copies of Publication 125, which describes the Division's collection process.

50. Payment for the period September 1, 2010 through February 28, 2011 was remitted through a levy of petitioner Rajsun's accounts.<sup>7</sup>

### **The Bulk Sale Audits**

51. Petitioners were the sellers in bulk sales transactions that closed on December 16, 2011 (the transactions). All five of petitioners' businesses were sold at that time. As a result, prior to the sale, petitioners Eastchester Road, Quick Service, Fast Food and Maadhav were the subjects of bulk sales audits that commenced on October 11 and 12, 2011 for the period of March 1, 2010 through November 30, 2011. Petitioner Rajsun's bulk sale audit period was from December 1, 2009 through November 30, 2011. The bulk sales audits were separate and distinct from the notices and demands previously issued to petitioners for their failure to remit payment with their returns.

52. On November 28, 2011, petitioners' representative Stewart Buxbaum, CPA,<sup>8</sup> sent a letter to Shaye Heins, a representative from the Division's Sales Tax Audit Division. Stewart Buxbaum's letter specifically referenced petitioners' bulk sales tax audits, and requested that all penalties be abated. The letter went on to state "[i]n order to conclude these matters expeditiously this taxpayer [sic] is agreeing to the findings as compared to presenting detailed records for the final audit quarters." The letter does not mention refunds.

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<sup>7</sup> The exact date of payment was not established by either party.

<sup>8</sup> Stewart and Michael Buxbaum are both CPAs with Buxbaum Sales Tax Consulting, LLC.

53. On December 14, 2011, Ms. Heins, on behalf of the Division, sent each petitioner a Statement of Proposed Audit Change stating the additional tax, penalty and interest that was determined to be due from the bulk sales audits pursuant to Tax Law § 1138:

Petitioner	Period	Tax	Penalty	Interest	Total Due
Eastchester Road	3/1/10-11/30/11	\$34,907.59	0	\$1,418.12	\$36,325.71
Quick Service	3/1/10-11/30/11	\$50,234.99	0	\$2,200.65	\$52,435.64
Fast Food	3/1/10-11/30/11	\$46,005.50	0	\$2,050.39	\$48,055.89
Maadhav	3/1/10-11/30/11	\$38,884.38	0	\$2,033.26	\$40,917.54
Rajsun	12/1/09-11/30/11	\$40,100.05	0	\$2,441.45	\$42,541.50
Total					\$220,276.28

54. The statements of proposed audit change do not indicate that petitioners were entitled to any refunds.

55. On December 22, 2011, the law firm of Miller, Rosado & Algios, as escrow agent for the transactions, sent a letter to Ms. Heins, along with a check for the sales tax due on the sale of tangible personal property in the amount of \$23,075.00. The letter also included five checks in the total amount of \$220,276.38<sup>9</sup> for sales tax due in accordance with the December 14, 2011 statements of proposed audit change emerging from the bulk sale audit. Each check referenced the bulk sale audit case number and the amount listed as due in Finding of Fact 53. Also included with the letter was a signed consent dated December 20, 2011 for each petitioner on its respective statement of proposed audit change.

56. The only witness presented by petitioners at the hearing in this case was Michael Buxbaum, CPA, who testified that Stewart Buxbaum had reached an agreement with Ms. Heins

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<sup>9</sup> The total amount of funds sent with this letter was \$286,248.95, which included the liabilities of two other related entities that were included in the transactions but not petitioners in this matter.

to abate all penalties assessed to petitioners throughout the audit period consistent with his November 28, 2011 letter. As further proof of this agreement, petitioners offered two handwritten notes, purportedly written by Stewart Buxbaum. The first was written on Notice and Demand L-037097807, dated December 30, 2011 and issued to Fast Food for the period September 1, 2011 through November 30, 2011. The note reads “1/4/12 spoke to Shay [sic] will cancel.” Notice and Demand L-037097807 asserted a penalty against Fast Food for nonpayment of taxes due for the period reflected thereon. The second note was written on Notice and Demand number L-037144356, dated January 6, 2012 and issued to Fast Food for the period March 1, 2010 through November 30, 2011. This Notice and Demand was a billing for the agreed-upon liabilities in Fast Food’s consent dated December 20, 2011. The note reads “1/6/12 spoke to Shay [sic] Heins will cancel.”

57. Petitioners did not present the live testimony or affidavit of either Stewart Buxbaum or Shaye Heins at the hearing.

### **The Refund Claims**

58. Petitioner Eastchester Road filed a refund claim on February 18, 2013 seeking a refund of sales and use tax penalties in the amount of \$1,350.86 for the period December 1, 2010 through February 28, 2011, which was paid pursuant to Notice and Demand L-035670073. As grounds for the refund, petitioner Eastchester Road stated that 1) “[t]axpayer had an excellent record of payment of tax in a timely manner;” 2) the person responsible for the tax filings and payments left petitioner Eastchester Road without notice; and 3) after audit, the Division waived the penalties based upon reasonable cause. Petitioner Eastchester Road’s refund claim was denied by the Division by notice dated September 13, 2013.

59. Petitioner Quick Service filed a refund claim on February 18, 2013 seeking a refunds of sales and use tax penalties in the amount of \$3,491.24 for the period June 1, 2010 through August 31, 2010, which was paid pursuant to Notice and Demand L-034734847; \$2,677.01 for the period September 1, 2010 through November 30, 2010, which was paid pursuant to Notice and Demand L-035302618; and \$1,332.89 for the period December 1, 2010 through February 28, 2011, which was paid pursuant to Notice and Demand L-035670161. As grounds for the refund, petitioner Quick Service provided the same grounds as those claimed by petitioner Eastchester Road. Petitioner Quick Service's refund claim was denied by the Division by notice dated September 30, 2013.

60. Petitioner Fast Food filed a refund claim on February 18, 2013 seeking refunds of sales and use tax penalties in the amount of \$2,556.80 for the period September 1, 2010 through November 30, 2010, which was paid pursuant to Notice and Demand L-035303495, and \$2,090.30 for the period December 1, 2010 through February 28, 2011, which was paid pursuant to Notice and Demand L-035670091. As grounds for the refunds, petitioner Fast Food cited the same grounds as those claimed by petitioner Eastchester Road. Petitioner Fast Food's refund claim was denied by the Division by notices dated September 13, 2013.

61. Petitioner Maadhav filed a refund claim on February 18, 2013 seeking refunds of sales and use taxes in the amount of \$2,745.01 for the period June 1, 2010 through August 31, 2010, which was paid pursuant to Notice and Demand number L-034736137; \$2,149.78 for the period September 1, 2010 through November 30, 2010, which was paid pursuant to Notice and Demand L-035303492; and \$1,878.15 for the period December 1, 2010 through February 28, 2011, which was paid pursuant to Notice and Demand L-035670090. As grounds for the refunds, petitioner

Maadhav provided the same grounds as those claimed by petitioner Eastchester Road. Petitioner Maadhav's refund claim was denied by the Division by notices dated September 13, 2013.

62. Petitioner Rajsun filed a refund claim on February 18, 2013 seeking refunds of sales and use taxes in the amount of \$1,651.60 for the period September 1, 2010 through November 30, 2010, which was paid pursuant to Notice and Demand number L-035302123; and \$1,500.31 for the period December 1, 2010 through February 28, 2011, which was paid pursuant to Notice and Demand L-035671568 . As grounds for the refunds, petitioner Rajsun provided the same grounds as those claimed by petitioner Eastchester Road. Petitioner Rajsun's refund claim was denied by the Division by notices dated September 13, 2013.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

63. Petitioners argue that the Division agreed to abate all penalties for the audit periods, including those previously paid, thereby entitling them to refunds under a theory of estoppel. Alternatively, petitioners assert that they have demonstrated sufficient good faith and absence of willful neglect to constitute reasonable cause for the abatement and refund of all previously paid penalties.

64. The Division states that petitioners have not met the requirements for invocation of estoppel. Moreover, the Division argues that petitioners failed to remit taxes for the period at issue and have not demonstrated reasonable cause justifying the abatement and refund of the assessed penalties.

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

A. First, petitioners argue that, under the principle of estoppel, they are entitled to refunds of previously paid penalties. They maintain that Ms. Heins, a Division employee, informed their representative Stewart Buxbaum that all penalties for the periods at issue would be cancelled.

According to petitioners, they executed several consents and paid the asserted tax from the bulk sales audits in reliance on Ms. Heins's statements.

Generally, unless there are exceptional facts which require its application to avoid a manifest injustice, the doctrine of estoppel does not apply to governmental acts (*see Matter of Consolidated Rail Corp.*, Tax Appeals Tribunal, August 24, 1995, *confirmed* 231 AD2d 140 [1997], *appeal dismissed* 91 NY2d 848 [1997]; *Matter of Harry's Exxon Service Station*, Tax Appeals Tribunal, December 6, 1988). This proposition is considered especially strong where a taxing authority is involved, since public policy supports the enforcement of the Tax Law (*see Matter of Glover Bottled Gas Corp.*, Tax Appeals Tribunal, September 27, 1990). The Tax Appeals Tribunal has developed a three-part test in order to determine whether to invoke an estoppel: (i) whether there was a right to rely on a representation made by the Division, (ii) whether there was such reliance and (iii) whether the reliance was to the detriment of the party who relied upon the representation (*see Matter of Consolidated Rail Corp.*; *Matter of Harry's Exxon Service Station*). Petitioners bear the burden of proof on this issue (*see Matter of Maximilian Fur Co., Inc.*, Tax Appeals Tribunal, August 9, 1990).

B. A review of the record here demonstrates that petitioners fail to meet the standard required for estoppel. Initially, the actual substance of any representation by Ms. Heins regarding cancellation of penalties is unclear. Although telephone conversations between Ms. Heins and Stewart Buxbaum may have occurred on January 4 and 6, 2012, as petitioners assert, the extent of any discussed adjustment is vague. Crucially, petitioners did not present the testimony or affidavits of either party to the calls, a tactic which severely hampers their case (*see Matter of Meixsell v. Commissioner of Taxation*, 240 AD2d 860 [1997], *lv denied* 91 NY2d 811 [1998]). The confirming notes purportedly written by Stewart Buxbaum are similarly vague. They do not

reference penalties or a particular period at all, and one note is found on a notice and demand for a period that post-dates the period petitioned.<sup>10</sup> Furthermore, Stewart Buxbaum's letter of November 28, 2011, which according to petitioners precipitated the cancellation of penalties by Ms. Heins, references the bulk sales audits, and not refunds of previously paid penalties. Moreover, the statements of proposed audit changes to which petitioners consented arose from the bulk sales audits and patently do not call for refunds. Meanwhile, Michael Buxbaum's testimony, offered by petitioners in support of their claim, can be given little weight as he was neither a party to the relevant telephone conversations with Ms. Heins nor the author of the confirming notes (*see Matter of Lima*, Tax Appeals Tribunal, April 19, 2007). On the whole, petitioners simply did not offer convincing evidence that the Division agreed to cancel the previously paid penalties and provide refunds. Instead, it is equally likely, based on the record, that the Division solely cancelled all penalties associated with either the additional tax deficiencies arising from the bulk sales tax audits or the notices and demands issued after payment was made on December 22, 2011. In sum, petitioners have failed to clearly and convincingly show the nature of the representation upon which they claim to rely, a crucial element in any attempt to demonstrate estoppel.

C. Further, petitioners have not demonstrated that they acted to their detriment even if they relied on their version of Ms. Heins's representations. The evidence shows that petitioners paid the additional tax and interest determined by the Division to be due in the bulk sales audits in order to allow for the sale of the businesses to promptly proceed. In addition, their execution

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<sup>10</sup> This note is contained on a notice and demand dated December 30, 2011 for the period September 1, 2011 through November 30, 2011 and that bears an assessment of \$1,932.80 in penalties. It is reasonable to conclude that the notation "will cancel" referred to items, including penalties, found on that notice and not from previous periods.

of the consents and payment on December 22, 2011 actually allowed for the avoidance of potential penalties from the bulk sales audits, which was a benefit, not a detriment, to petitioners. As a result, petitioners have failed to prove a detriment associated with their purported reliance and do not meet their burden to cause invocation of the estoppel doctrine.

D. Petitioners alternatively argue that they are entitled to abatement and refunds of previously paid penalties based on reasonable cause. The penalties at issue, assessed for petitioners' failures to make timely payments, may be cancelled if the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). In establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). Referring to the mandatory language of Tax Law § 1145(a)(1)(i), the Tribunal has said that "the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation." (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992.)

Petitioners rely on two points in their attempt to establish reasonable cause. First, they assert that "[t]he individual in charge of the payment and preparation of the Sales Tax Returns left without any notice to the taxpayer, thereby, creating non-filing and payment in a timely manner [sic]." While this may have occurred, petitioners failed to present any probative evidence on this point. There was no evidence presented regarding that person's departure or any resultant internal efforts to handle petitioners' tax responsibilities. On the contrary, when questioned on cross-examination, petitioners' only witness, Michael Buxbaum, did not know this individual's name. Hence, petitioners' unsupported claim does not constitute reasonable cause.

Additionally, petitioners state that they acted in good faith, cooperated with the Division, and “had an excellent record of payment of tax in a timely manner.” The evidence surrounding the assessment and collection of the penalties at issue shows exactly the opposite, however. Petitioners failed to make timely payments of reported tax for numerous periods, provided checks to the Division that were dishonored for insufficient funds, and only satisfied their reported tax liabilities when faced with levies or seizures. These facts hardly give rise to the reasonable cause required for abatement of penalties.

E. The petitions of Eastchester Road Donuts, Inc., Quick Service Food, Inc., Fast Food Restaurant Corp., Maadhav, Inc., and Rajsun, Inc. are denied and the refund denial letters of September 13 and 30, 2013 are sustained.

DATED: Albany, New York  
August 18, 2016

/s/ Herbert M. Friedman, Jr.  
ADMINISTRATIVE LAW JUDGE