STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :

of :

WHITNEY RESTAURANT MANAGEMENT, LTD., D/B/A CIBO, AND RAYMOND GILMORE :

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, 2011 through February 28, 2014. :

DETERMINATION
DTA NOS. 827440
AND 827441

Petitioners, Whitney Restaurant Management, Ltd., d/b/a/ Cibo, and Raymond Gilmore, filed petitions 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, 2011 through February 28, 2014.

A consolidated hearing was held before Barbara J. Russo, Administrative Law Judge, in Albany, New York, on July 14, 2017 at 10:30 a.m., with all briefs to be submitted by December 18, 2017, which date began 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. (Howard S. Beyer, Esq., of counsel).

ISSUES

I. Whether the audit methodology utilized by the Division of Taxation had a rational basis and was reasonably calculated to reflect the tax due.

II. Whether petitioners have shown reasonable cause for the abatement of penalties.

FINDINGS OF FACT

1. During the period at issue, Whitney Restaurant Management, Ltd. (petitioner),[1] was a business corporation organized under the laws of New York State operating a full-service restaurant in New York, New York. Petitioner was incorporated in New York State in February 1995.

2. The Division of Taxation (Division) had performed audits of petitioner prior to the audit at issue, including audits for the periods September 1, 2001 through February 29, 2004, March 1, 2004 through February 28, 2007, and September 1, 2008 through August 31, 2011. The Division found additional amounts of sales tax due for these prior periods.

3. In May 2014, the Division initiated a fourth audit of petitioner, for the period September 1, 2011 through February 28, 2014 (the period at issue).

4. The Division began the audit for the period at issue by reviewing sales and income tax returns filed by petitioner. The Division also reviewed petitioner's credit card sales information for the period at issue that it received from third parties.[2] This review showed that petitioner's gross sales as reported on its sales tax returns, $3,485,402.00, and gross sales as reported on its income tax returns, $4,939,767.00, were significantly lower than petitioner's credit card sales, $6,324,076.00, for the period at issue.

5. By appointment letter dated May 27, 2014, the Division informed petitioner that a field audit of its New York State sales and use tax records for the period September 1, 2011 through

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[1] Petitioner will refer to Whitney Restaurant Management, Ltd., and petitioners will refer to both Whitney Restaurant Management, Ltd., and Raymond Gilmore.

[2] The bulk of this information came from credit card companies that provided the Division with credit card transactional information for businesses on a yearly basis. However, at the time the Division was conducting the audit for the period at issue, this information was not available for the 2014 calendar year, so credit card sales information for the period December 1, 2013 through February 28, 2014 was obtained from petitioner's bank statements, which were subpoenaed by the Division in November 2014.

February 28, 2014 was scheduled for June 17, 2014. The letter further explained that all books and records pertaining to sales and use tax liability for the audit period must be available for the appointment. Attached to the letter was an information document request (IDR) listing the items to be provided, including, in part, petitioner's general ledger, sales invoices, exemption documents, guest checks, cash register tapes, and bank statements for the audit period.

6. In response to the initial appointment letter and IDR, the Division's auditor was contacted by Michael Buxbaum, CPA, who stated that he was representing petitioner and would provide a power of attorney. Thereafter, Mr. Buxbaum provided a power of attorney on July 17, 2014. The auditor then called the representative on multiple dates to reschedule the audit appointment and request books and records.

7. On October 27, 2014, the Division sent a second written request for petitioner's books and records.

8. Petitioner provided only a partial response to the Division's requests for books and records, consisting of guest checks, daily and monthly point-of-sale (POS) records and bank statements for only the period of September 2013 through November 2013.

9. The Division reviewed the records provided by petitioner for the three-month period and found them to be deficient in that several guest checks were missing and petitioner's POS records did not reconcile with petitioner's credit card sales data the Division received from third parties.

10. The Division sent a third written request for petitioner's books and records on March 13, 2015, again requesting that petitioner provide books and records for the entire audit period. Petitioner did not provide any additional records.

11. Following her review of the available documentation, the auditor concluded that the books and records were inadequate to conduct a complete audit for the audit period because petitioner did not provide records for the entire audit period, the records provided were incomplete and did not reconcile with third-party credit card information (***see*** Finding of Fact 9), and the sales records did not allow the opportunity to trace transactions back to the original source or forward to a final total.

12. Due to the inadequacy of petitioner's records, the Division's auditor utilized an indirect audit methodology. The auditor used the POS records provided by petitioner for the period of September through November 2013, together with petitioner's credit card sales data the Division received from third parties and bank statements. Specifically, the auditor determined credit card receipts for the audit period based on third-party information in the amount of $6,324,076.00, and then deducted tips and "comp" sales, which the auditor calculated based on the POS records provided, to arrive at net credit card receipts of $5,477,914.63. The auditor then divided net credit card receipts by 88.63%, which was the credit card and cash ratio per the POS records provided, to arrive at computed gross receipts of $6,180,655.12 for the audit period. The computed gross receipts were then multiplied by 88.98%, which was the taxable sales ratio calculated based on the POS records provided after sales tax and nontaxable sales, to arrive at computed taxable sales of $5,499,546.92. The auditor gave a credit of $3,340,841.00 for taxable sales reported per petitioner's sales tax returns, to arrive at additional taxable sales of $2,258,705.92 and additional tax due of $200,460.15 for the audit period.

13. A teleconference was conducted between petitioner and the Division on April 29, 2015, during which petitioner proposed penalty abatement for the first five quarters of the audit period. The auditor indicated he would discuss the issue with the Division's program manager.

14. On May 11, 2015, the auditor sent petitioner's representative the audit workpapers showing the calculation of additional tax due as described in Finding of Fact 12. The cover letter sent with the workpapers indicated that the auditor would apply minimum interest for the first five quarters, and penalty and statutory interest for the remaining five quarters of the audit period.[3] The auditor asked the representative to review the workpapers and indicate whether petitioner agreed or disagreed. By email dated May 19, 2015, petitioner's representative replied that the "workpapers appear to be reasonable."

15. Upon review with the Division's program manager, the program manager did not approve the request for abatement of penalties due to a lack of reasonable cause. Of specific concern to the program manager was that this was petitioner's fourth audit, that significant amounts of tax were found to be due in the previous audits, and that despite petitioner's audit history, there was still substantial under-reporting of tax in the current audit period.

16. On June 8, 2015, the Division issued a statement of proposed audit change for sales and use tax to petitioner, asserting additional tax of $200,460.15, plus penalty in the amount of $76,740.28 and interest.

17. The Division issued a notice of determination, notice number L-043263425, dated June 30, 2015, to petitioner Whitney Restaurant Management, Ltd., asserting additional sales and use tax due of $200,460.15 for the period September 1, 2011 through February 28, 2014, plus penalty in the amount of $76,740.28 and interest.

18. The Division issue a notice of determination, notice number L-043271532, dated July 1, 2015, to petitioner Raymond Gilmore as an officer/responsible person of Whitney Restaurant

[3] The auditor had not spoken with the Division's program manager regarding abatement of penalties when he sent the cover letter and workpapers. The auditor testified that the primary focus of the letter was the calculation of additional tax due.

Management, Ltd., asserting tax due in the amount of $200,460.15, plus penalty of $76,740.28 and interest. Petitioners do not dispute the responsible person status of Mr. Gilmore.

19. During the hearing, the Division presented the testimony of the auditor, Dipakkumar Modi, and the program manager, Gwendolyn Cole. Ms. Cole testified that there was an error in the auditor's calculation of the percentage of credit card receipts attributable to tips, and that the rate of tips was 17.4%, rather than 13.36% as calculated by Mr. Modi. The Division concedes that as a result of this error, the estimated amount of tips were lower than they should have been. Ms. Cole further testified that Mr. Modi had incorrectly removed gift card receipts in the amount of $108.00 that should have been included as a sales receipt. To correct these errors, the Division recomputed the amount of tax due for the period at issue to $176,638.33, plus penalty and interest.

20. Petitioners did not present any witnesses or produce any documentary evidence at the hearing, and did not file a post-hearing brief.

21. The Division submitted 12 proposed findings of fact. In accordance with State Administrative Procedure Act § 307 (1), proposed findings of fact 1 - 5, 7 - 9, 11 and 12 have been substantially incorporated in the foregoing Findings of Fact.[4] Proposed finding of fact 6 has been modified to more accurately reflect the record. Proposed finding of fact 10 has been modified to remove a legal conclusion.

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[4] The proposed facts as presented by the Division have been condensed and renumbered as incorporated in the Findings of Fact set forth above.

CONCLUSIONS OF LAW

A. The standard for reviewing a sales tax audit where an indirect audit methodology has been employed in the determination of sales tax liability is well established, and was set forth in ***Matter of AGDN, Inc***. (Tax Appeals Tribunal, February 6, 1997), as follows:

> "a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (***see***, Tax Law §§ 1138[a]; 1135; 1142[5]; ***see***, ***e.g.***, ***Matter of Mera Delicatessen***, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained 'shall include a true copy of each sales slip, invoice, receipt, statement or memorandum' (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, 'the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ' (Tax Law § 1138[a]; ***see, Matter of Chartair, Inc. v. State Tax Commn.***, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (***Matter of Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869); exactness is not required (***Matter of Meyer v. State Tax Commn***., 61 AD2d 223, 402 NYS2d 74, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025; ***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451)."

B. In this case, the record establishes the Division's clear and unequivocal written request for books and records of petitioner's sales, as well as petitioner's failure to produce such books and records for the entire audit period. As noted in Finding of Fact 8, petitioner produced records for only a three month period, consisting of guest checks, daily and monthly POS records and bank statements from September 2013 through November 2013. The Division's auditor reviewed these records and determined that several guest checks were missing from the limited

records provided, and the records could not be reconciled with third-party credit card sales data the Division received. As such, the Division reasonably concluded that petitioner did not maintain or have available books and records that were sufficient to verify gross and taxable sales for the audit period. Having established the unavailability of required books and records, the Division was clearly entitled to resort to the use of indirect methods to determine petitioner's sales and sales tax liability (***see Matter of W. T. Grant Co. v Joseph***, 2 NY2d 196 [1957], ***cert denied*** 355 US 869 [1957]; ***Matter of Del's Mini Deli, Inc. v Commr. of Taxation and Fin.***, 205 AD2d 989 [3d Dept 1994]; ***Matter of Vebol Edibles v Tax Appeals Trib.,*** 162 AD2d 765 [3d Dept 1990]). It was reasonable for the Division to estimate petitioner's liability by utilizing the records provided by petitioner and third-party credit card sales data, and a cash-to-credit card ratio (***see Matter of Beijing China Buffet, Inc.***, Tax Appeals Tribunal, February 23, 2012).

C. Since it is concluded that the audit method was reasonable, petitioners had the burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (***see Matter of Sarantopoulos***, Tax Appeals Tribunal, February 28, 1991). Petitioners failed to meet this fairly substantial burden (***see Matter of Center Moriches Monument Co. v Commr. of Taxation & Fin.***, 211 AD2d 947 [3d Dept 1995]). Indeed, any imprecision in the results of an audit arising by reason of a taxpayer's own failure to keep and maintain records of all of its sales as required by Tax Law § 1135 (a) (1) must be borne by that taxpayer (***Matter of Markowitz v State Tax Commn.***; ***Matter of Meyer v State Tax Commn.***). Petitioners failed to produce any documentary evidence or testimony to dispute the results of the Division's audit or to show that the estimate was unreasonable. As such, petitioners have failed to meet their burden of proof.

D. Addressing the issue of penalties, in establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). The Tax Appeals Tribunal explained that "[b]y first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]" (***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992, ***confirmed*** 193 AD2d 978 [3d Dept 1993]). Petitioner's failure to maintain records of the business's sales supports the imposition of penalties. While the Division's auditor had initially proposed applying minimum interest for the first five quarters, and penalty and statutory interest for the remaining five quarters of the audit period, such proposal was not binding as the parties did not enter a written agreement. Petitioners have failed to demonstrate reasonable cause for the failure to pay the taxes due, and the imposition of penalties by the Division was justified (***see Matter of Miller v State Tax Commn.***, 94 AD2d 841, 843 [3d Dept 1983]).

E. The petitions of Whitney Restaurant Management, Ltd., d/b/a Cibo and Raymond Gilmore are denied and the notices of determination, dated June 30, 2015 and July 1, 2015, are sustained.

DATED: Albany, New York
June 14, 2018

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE