

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Fradco, Inc.,
Petitioner,

MTT Docket No. 409506
Assessment No. Q179330

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

FINAL OPINION AND JUDGMENT

INTRODUCTION

Fradco, Inc. (Petitioner) appeals an assessment issued by the Michigan Department of Treasury (Respondent) of sales tax, plus interest and penalties. A hearing was held July 25, 2011. The assessment is the result of Respondent's audit which found Petitioner over reported the exempt food deduction. The audit was performed by conducting a sampling of products purchased and applying Petitioner's retail markups in order to determine the gross sales, both taxable and non-taxable. Petitioner disagrees with Respondent's methodology and calculations, contending that the assessment was based on imperfect estimates whereas Petitioner's records were accurate and adequate to determine the actual taxable sales. The Tribunal finds that Petitioner has met its burden to refute the prima facie correctness of the assessment, and the assessment is cancelled. Respondent shall refund Petitioner the full amount of tax, penalty and interest previously collected, and shall pay statutory interest.

BACKGROUND

Petitioner is a grocery store, meat market and delicatessen doing business under the assumed name "O'Brian's Village Market of Ada." It is located in Ada, Michigan, and is owned by Thomas O'Brian ("Mr. O'Brian"). Respondent conducted a sales tax audit of the period March 1, 2004, through July 31, 2007. Field work was completed in May of 2008. Respondent's auditor determined Petitioner had underpaid sales tax in the amount of \$25,317.00, based on his conclusion that Petitioner had overstated the non-taxable food deduction and therefore understated its taxable sales. Respondent issued an Intent to Assess on July 23, 2008.

Respondent imposed the 25% intentional disregard penalty because Petitioner had been audited two previous times, and “. . . had the same issue with disallowed food. The taxpayer’s records were not organized and the taxpayer delayed in providing additional information.” Respondent’s Audit Report of Findings, p. 5.

Petitioner requested and was granted an informal conference with Respondent’s Hearing Division, which was held on December 4, 2008. The Hearing Referee found Respondent’s audit determination to be correct and recommended the Intent to Assess be assessed as originally issued. Accepting the Referee’s recommendation, Respondent issued its Decision and Order of Determination on January 22, 2009, and the Final Bill for Taxes Due (Final Assessment) Q179330 on September 17, 2009, for \$25,317.00 tax, \$6,329.00 penalty, and \$7,109.08 interest. Respondent’s Collections Division commenced collection efforts against Petitioner, seizing funds from the company bank account. As a result, all of the tax, penalty, and interest have been paid in full.

On July 28, 2010, Petitioner filed this appeal with the Tax Tribunal, appealing the assessed tax, interest and penalty. Respondent filed a Motion for Summary Disposition contending that Petitioner failed to file its appeal in a timely fashion. On January 20, 2011, the Tribunal entered an Order denying Respondent’s Motion and therefore jurisdiction is not at issue. .

EXHIBITS

The following exhibits were admitted into evidence:

P1 & P2 FRADCO, Inc. Limited Liability Company Details and Assumed Names, Department of Licensing and Regulatory Affairs (LARA)

P3, R4, p. 2 Final Bill for Taxes Due (Final Assessment), dated September 17, 2009

R4, p. 1 Intent to Assess Q179330

P4 Cash Basis Sales Tax Audit Results

P5-10 Audit Summary Worksheets

R1 Amended Audit Report of Findings

P11, R2 Audit Report of Findings

P12, R3 Sales Tax Audit Work Papers, Detail and Summary Schedules

P15 R205.23 Administrative Rule 23 Records

P17 R205.136 Administrative Rule 86 Food for Human Consumption

P18 Revenue Administrative Bulletin 2009-8 Sales Tax – Food for Human Consumption

P22 Revenue Administrative Bulletin 2005-3 Penalty Provisions

P23, P26, P29, & P32 2004-2007 Annual Returns for Sales, Use and Withholding Taxes

P24, P27, P30, & P33 2004 – 2007 Sales Year to Date Totals – by Day of Month

P25, P28, P31, P34 2004 – 2007 Monthly Sales Detail – by Day of Month

P35 Judy E. Zeppa, CPA Letter dated November 26, 2008 with attachments

P36 Cash Register Tapes – Z Slips

The following exhibits were not admitted into evidence:

P19 and P20 Audit Sampling Manual – Introduction & Overview, pages 3 – 7 and Time Period Sampling, page 60, Respondent objected as incomplete documents and irrelevant because this is not the audit manual for the cash basis type audits.

PETITIONER'S CONTENTIONS

Petitioner appeals the sales tax assessment based on its contention that it is erroneous in fact and in law. Petitioner asserts that “[t]he determination was based on a projection from an invalid sample of purchase invoices which reflects poor audit judgment and results in an erroneous determination.” Petition, p. 5. Petitioner contends that the audit was flawed because the sample used two consecutive months of purchases with the results projected over 41 months. Petitioner further contends that Respondent’s auditor did not look at sales records, bank statements, cash disbursement journals, or cash register tapes. Petitioner’s Prehearing Statement, p. 2. Petitioner contends that it “. . . maintains a double entry system of accounting designed to provide reasonable assurance that all sales are reported for accounting and tax purposes. The system of accounting has internal controls built into the procedures to provide reasonable assurance that if errors occur, they will be discovered.” Petition, p. 2.

Petitioner contends that it primarily sells food for home consumption, exempt from sales tax. It also sells food for immediate consumption, not exempt. Petitioner asserts that its food deduction during the audit period was as follows:

| | |
|-----------------------------|-------|
| 3/1/2004 through 12/31/2004 | 67.2% |
| 1/1/2005 through 12/31/2005 | 61.4% |
| 1/1/2006 through 12/31/2006 | 65.5% |
| 1/1/2007 through 7/31/2007 | 66.7% |

Petitioner contends that all required sales tax returns were properly filed and that it maintained and preserved adequate records, which were made available to the auditor for review.

In support of its contention that sales tax was fully paid and Respondent's audit was flawed, Petitioner called four witnesses. Petitioner's first witness was owner, Mr. Thomas O'Brian, who testified as to Petitioner's general business operations and the sales tax compliance procedures. He testified as to the physical layout of the store and to the fact that there is a single cash register programmed for taxable and non-taxable transactions, based on how any particular transaction is entered. Mr. O'Brian testified with regard to internal controls, noting that a long-term, experienced employee is typically responsible for the daily cashier ("teller") activities; that he himself performs the proof of cash to the Z-slips, reconciles the deposit to the Z-slips, and prepares the monthly sales tax returns from the data recorded daily in a ledger book. Mr. O'Brian testified with regard to his understanding of the proper tax treatment of a number of products sold at his store. He also testified that all tax returns were filed for the audit period and that the annual sales tax returns (i.e., reconciliations) were prepared by an outside CPA. See Transcript, pp. 15-32.

Regarding the audit process specifically at issue, Mr. O'Brian testified that he was only aware of the auditor visiting the store once, when he was informed that they were going to audit. He testified that he was provided a list of requested records for the two-month block sample and that he does not believe any transactions in the store were actually tested or otherwise observed by the auditor. Mr. O'Brian testified that the auditor only asked for invoices, and that he was not asked for sales receipts or deposits. He further stated that he cooperated in providing them and that he believes the records were well organized. As to the two-month sample period, Mr. O'Brian testified that the auditors selected April and May, and that he did not have a choice. He stated that the audit was conducted at the office of Petitioner's CPA. See Transcript pp. 28-34.

Mr. O'Brian testified that this was the third audit of Petitioner by Respondent and deficiencies were found each time. He testified that none of the auditors recommended any

changes to the procedures or identified what was done wrong that resulted in an under payment of tax. See Transcript, pp. 28-42.

Petitioner's second witness was Petitioner's outside CPA, Judy Zeppa ("Ms. Zeppa"), who testified as to the procedures she follows in reviewing Petitioner's financial records and preparing the annual sales tax returns. She testified as to the source documents she uses, the spreadsheets she creates for the annual sales tax recap, purchase journals prepared by Mr. O'Brian, and preparation of a general ledger. Regarding control procedures, Ms. Zeppa testified that she balances the bank statements and makes sure everything is reasonable and nothing looks odd. She testified that she compares the sales with the amounts deposited to make sure they look reasonable. She traces each check to the purchase journal and to the bank statement. See Transcript, pp. 42-52

Ms. Zeppa stated that the audit was performed in her office. She testified that all the records that were requested by the auditor were made available and included bank statements, cash disbursement journals, all the Z rings, and tax returns. She testified that the auditor only reviewed the original purchase invoices, coding each as taxable or not taxable. Ms. Zeppa testified that the auditor did not cross check the purchase invoices to the cash disbursements journal to ensure he had all of the invoices. She testified that she does not believe the auditor went through the Z rings or the bank statements; did not test the Z rings to trace them to the monthly sales records; nor to her knowledge, were any analytical tests done on any of the records. See Transcript, pp. 42-62.

Ms. Zeppa testified that all records were made available to the auditor; all monthly and annual sales tax returns were filed; that Petitioner maintains and preserves proper records adequate to enable both Petitioner and Respondent to accurately determine the sales tax due; and that she has no reason to believe that additional taxes are due in excess of those that were reported and paid on the filed returns. See Transcript, pp. 50-124.

Petitioner's third witness was Tom Soltys ("Mr. Soltys") who was called as an expert witness to testify about audit methodologies for grocery stores. Mr. Soltys testified that he is a self-employed CPA and he has developed a niche in the grocery industry. He testified as to the inherent flaws in the cash-based audit methodology applied by Respondent including the disregard of shrinkage caused by, among others, spoilage, breakage, vendor shortage and employee theft. Mr. Soltys testified with regard to the problems of the mismatching concept

(i.e., false assumption that all purchases will be sold during the same period) and the role of markups and the weighting of the components of the sale, including purchase price variations over time and impacted by inventory changes. He testified that a full year analysis of all the products sold would prove to be a much better methodology because it would minimize the mismatching problems. He also testified as to the numerous implications of applying various markups to purchase price versus the application of a retail sales price markdown to arrive at an actual cost. See Transcript, pp. 124-162.

Petitioner's fourth and final witness was Joseph Tomczyk ("Mr. Tomczyk") also called as an expert witness based on his prior position as Director of Audit with Respondent and his many years as a practicing CPA. Mr. Tomczyk testified that he reviewed the audit report and work papers, and prepared a written summary and statistical analysis. The summary was not introduced into evidence because Petitioner failed to exchange it with Respondent and include it on the list of exhibits. Mr. Tomczyk testified that there was no mention in the audit report or work papers with regard to discussion on internal controls. He also testified as to other issues not addressed in the audit report including inventory turnover, validation of audit determination methodology, and how Respondent's auditor came to the conclusion that the records were inadequate. See Transcript, pp. 162-201.

RESPONDENT'S CONTENTIONS

Respondent contends that it performed a sales tax audit under the authority of MCL 205.3, and determined that Petitioner had incorrectly reported the amount of sales subject to taxation, by over reporting the allowance for food products exempt from taxation. Respondent's Motion and Brief to Establish Burden of Proof (Resp. Brief), p. 3. In this case, Respondent asserts that it had reason to believe that the records maintained or returns filed were inaccurate based upon the audit conducted. Resp. Brief, p. 6. As such, the assessment is considered prima facie correct under MCL 205.68(4) and Petitioner has the burden of proof of refuting that assessment. Respondent contends that its auditor properly determined the food for human consumption deduction and that its sampling method was valid. It states ". . . it is not enough to merely argue that the audit methodology used by the Department is not the most reliable, or that other methods might be used; it must be demonstrated that the method used was actually inaccurate." Resp. Brief, pp. 6-7, citing *By Lo Oil Co v Department of Treasury*, 267 Mich App

19, 42-43; 703 NW2d 822 (2005). Respondent further asserts that it “need only review that information it deems relevant,” *Flynn v Department of Treasury*, unpublished opinion per curiam, Court of Appeals Docket No. 231475 (2002), and that its auditor reviewed all of the records made available by Petitioner.

Respondent called one witness, Ellen Slenk (“Ms. Slenk”), team manager for the cash basis audit team in the compliance bureau. Ms. Slenk testified that she was the supervisor during this audit and that the individual assigned to perform the audit is no longer employed by Respondent. Ms. Slenk testified that her involvement with this audit was “mostly after the fact” and that there is not significant supervision in cash basis audits because the standard procedures are employed. She testified that she reviewed the final audit package for accuracy after it was complete and also participated in the informal conference process. See Transcript, pp. 202-206.

Ms. Slenk testified as to the steps typically taken during a cash basis audit and generally described the various work schedules developed in Petitioner’s audit. She testified as to the auditor’s findings that “based on what they purchased of nontaxable items compared to what they sold was a lot less, so it wasn’t feasible that they sold those items, and that’s how he determined that a portion of that deduction should be disallowed.” She testified that she saw no irregularities in this audit. In cross-examination, Ms. Slenk testified as to records reviewed and those that were not mentioned in the audit report, speculating they were not made available by Petitioner. She testified as to the likely audit results had an alternative method been used, which took into consideration beginning and ending inventory, and that she believed the result would have been the same. Transcript, pp. 206-237.

FINDINGS OF FACT

Petitioner is engaged in retail sales of products, some of which are taxable and others which are non-taxable. For the audit period at issue, Petitioner maintained complete and adequate sales records. Petitioner filed required tax returns and paid all sales tax collected. Petitioner engaged an outside CPA to assist with financial and tax reporting. Petitioner has been in business for approximately 30 years and has been audited by Respondent three (3) times, resulting in similar findings each time. Petitioner’s owner is active in the day-to-day management and has a working knowledge and understanding of the taxability of the products sold by Petitioner. Petitioner’s owner takes the daily Z-ring tape information, which shows

taxable and non-taxable sales, enters it into a ledger which he uses to prepare the monthly sales tax returns. Petitioner's CPA uses the same information to create a monthly spreadsheet which is ultimately used to generate the annual sales tax returns.

Respondent's audit determination was based on an audit block sample including a two month test period: April and May of 2007. The audit determination was based on a review of purchase invoices, not sales transactions. Respondent failed to produce its auditor to testify as to the procedures employed and considerations or assumptions made during the audit process. Respondent's audit methodology resulted in an estimate based on purchases and several mark-up percentages, not an exact determination of tax based on actual taxable sales. Respondent's auditor determined an average food deduction of 57.0333% for each of the 41 months in the audit period whereas Petitioner used a food deduction based on the actual recorded sales transactions.

CONCLUSIONS OF LAW

The assessment at issue in this matter is for unpaid sales tax. The Sales Tax Act, 1933 PA 167 ("the Act"), provides for the levy and collection of a sales tax on the transfer of ownership of tangible personal property. Section 2 of the Act, MCL 205.52, provides,

(1) Except as provided in section 2a, there is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the **gross proceeds** of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act. [emphasis added]

"Gross proceeds" means sales price. MCL 205.51(1)(b) "Sales price" is defined (in relevant part) as:

- (i) [T]he total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, and applies to the measure subject to sales tax.

Certain items sold by Petitioner are not subject to tax. Pursuant to MCL 205.54g, the following are exempt from the sales tax:

- (a) Sales of drugs for human use that can only be legally dispensed by prescription or food or food ingredients, except prepared food intended for immediate human consumption.

The statute requires that taxpayers maintain adequate records to ensure the appropriate taxes are paid. MCL 205.67 (repealed by P.A. 2008, No. 438, § 1, Imd. Eff. Jan. 9, 2009) states in pertinent part:

- (1) A person liable for any tax imposed under this act shall keep accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires.... If the taxpayer fails to file a return or to maintain or preserve proper records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, the department may assess the amount of the tax due from the taxpayer based on information that is available or that may become available to the department. That assessment is considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer.

In addition, the Michigan Administrative Code provides:

R 205.23 Records.

Rule 23. (1) The department, through its field auditors and other employees, may examine the books, records and papers of any person liable for payment of the sales and use taxes. It may issue a subpoena requiring any person to appear for examination and produce any books, records or papers within the scope of the inquiry.

(2) It is the duty of every person engaging in any business subject to the tax to keep and preserve suitable and adequate records of his business to enable such person, as well as the state, to determine the correct amount of tax for which he is liable.

(3) Failure to produce and keep records for the purpose of examination by the department will be considered willful noncompliance with the sales tax law and subject to its penalties. In the absence of sufficient records the department may determine the amount of tax due the state by using any information available whether obtained at the taxpayer's place of business or from any other sources, and assess the taxpayer for any deficiencies, plus penalties.

Respondent is granted authority to examine and audit Petitioner's records if it believes all taxes have not been paid. MCL 205.21 states:

(1) If a taxpayer fails or refuses to make a return or payment as required, in whole or in part, or if the department has reason to believe that a return made or payment does not supply sufficient information for an accurate determination of the amount of tax due, the department may obtain information on which to base an assessment of the tax. By its duly authorized agents, the department may examine the books, records, and papers and audit the accounts of a person or any other records pertaining to the tax.

Respondent determined that the books and records provided to its auditor by Petitioner were inadequate and failed to meet the statutory requirements. Respondent therefore based its audit conclusions on what it believed to be the best information available, as is consistent with MCL 205.67 and *Vomvolakis v Department of Treasury*, 145 Mich App 238; 377 NW2d 309 (1984). The Court of Appeals in *Vomvolakis* affirmed the Tribunal's determination that a state revenue auditor did not exceed his authority in basing sales tax assessments against the petitioner on supplier summaries, under the belief that the petitioner did not keep accurate or complete records. MCL 205.67 establishes that the ". . . assessment is considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer." The Tribunal in *Summerville v Department of Treasury*, MTT Docket No. 149724 (1994), stated that the "taxpayer must show that the assessments are improper, unlawful or inappropriate and what, if any, is the correct and proper tax liability."

Respondent's auditor was not available to testify and therefore defend the completeness and accuracy of his findings. Respondent's audit supervisor testified to the audit report; however, her testimony was not persuasive that the auditor actually performed the review and testing as is indicated in the report. She testified that her involvement was "mostly after the fact" and that supervision in cash basis audits is minimal because standard procedures are applied. The supervisor was unconvincing that the work performed was without error or omission. For example, Respondent's written audit report states that cash register tapes were viewed for the sample period; however, Petitioner's CPA testified that the Z-ring tapes were not reviewed by the auditor. The report also states that gross sales were analyzed using cash register tapes, monthly worksheets, financial statements and tax returns. Petitioner's CPA testified that not only were cash register tapes not reviewed, monthly sales worksheets were not analyzed and

financial statements are not even prepared for Petitioner. Transcript, pp. 44, 57-59. Based on testimony, the auditor's focus was on purchase invoices only, and he failed to ensure that all purchases were accounted for.

Petitioner has provided testimony that Respondent's auditor did not look at the sales transaction documents. Despite requesting the cash register Z-ring tapes, which are source documents, Respondent seems to completely discount the reliability thereof. Its audit supervisor, Ms. Slenk stated ". . . the main problem with the Z-rings is that no one is there to monitor what the cashier is ringing into the register. There is no way to take a transaction . . . and verify that to another set of sales records to confirm what is rung up under the various keys was actually what those keys are." Transcript, p. 215. However, there is nothing in the record to show that Petitioner's Z-ring tapes were incorrect or otherwise not reliable.

Petitioner has shown that the internal controls were reliable, that its records are well maintained and organized, and that Petitioner's owner has a good understanding of the application of sales tax to its transactions. The Tribunal finds the testimony by Petitioner's owner, Mr. O'Brian, to be credible. He testified that he has significant day-to-day involvement with Petitioner, stating that he is "there probably 350 days out of the year." Transcript, p. 15. He testified he has a long-term employee who is a teller and has worked at the store since it opened. "She does most of the training with the new employees on how to ring the register and it's all labeled, taxable, un-taxable, beer, wine, liquor, cigarettes." Transcript, p. 17. He testified that there is a single door for customers' use and the one cash register is strategically located by that door to minimize the chances of a customer leaving without being rung-up. Transcript, p. 18. Mr. O'Brian described the cash register, explaining that it is self-explanatory and tax is automatically added based on the specific item rung up. "The register is labeled. . . beer and wine automatically rings into taxable item. . . We have non-taxable deli and we have taxable deli. I have a pop key, a cigarette key that automatically rings the tax in." Transcript, pp. 19 & 20.

Based on testimony, the Tribunal finds that internal controls were adequate to support the reliability of the sales documentation. Mr. O'Brian testified that he hired qualified employees, adequately trained and supervised them and that there was a separation of duties. Transcript, p. 30. The cash register was managed by the teller whereas he prepared the daily proof of cash to Z rings, deposits and reconciliations. He also prepared the monthly sales tax returns. *Id.* Mr.

O'Brian testified that the outside CPA, Ms. Zeppa, prepared the annual sales tax returns. Transcript, p. 32. Ms. Zeppa also reconciled bank statements for both deposits and purchases.

The Tribunal finds that Petitioner's records were well maintained and adequate. Mr. O'Brian testified that his records are organized and were made available to the auditor. Transcript, p. 35. He stated that on a daily basis he makes a "deposit with the z reading" and he takes "the reading and on the tape it shows how much we did in taxable items that day, and then I record it in. . . a ledger book." Transcript, p. 30. Ms. Zeppa testified that the "deposit slips have the cash register tape stapled right to it, every deposit slip, and [Petitioner] has those all bundled up . . . by month." Transcript, p. 45. She further stated that she prepares a "daily recap by month, and then I do a yearly recap of that for the sales tax. And I do them all off the z rings." *Id.* She testified that she balances the bank statements and then sums up the purchase journals and prepares a general ledger." Transcript, p. 46. Ms. Zeppa testified that Petitioner maintains receipts, purchase invoices, bills of lading, delivery receipts and other records used to determine the annual and monthly sale tax returns. She further stated that she believed these records were adequate to accurately determine the sales tax due and were made available to the auditor for review in her office. Transcript, pp. 49-50.

Ms. Zeppa testified that Petitioner maintains a manual cash disbursements system. She explained that Mr. O'Brian manually writes checks and files invoices alphabetically by vendor for each year. Transcript, p. 48, See also p. 35. She creates a purchases journal from the manual check registry, which she uses to reconcile the bank account. Ms. Zeppa testified that the auditor did not cross check the invoices to the purchases journal (i.e., cash disbursements made by manual check) to ensure that he had all purchases accounted for in the sample. Transcript, p. 54. Further, Ms. Zeppa testified that the Z slips were never examined by the auditor even though they were made available to him, but rather, he started with the invoices and concluded the audit in two days based only on his review of the purchase invoices. Transcript, pp. 56 & 112.

The Tribunal finds that Petitioner's owner has a good understanding of the application of Michigan sales tax rules to his business transactions. Mr. O'Brian testified as to his knowledge of taxable versus non-taxable food. He stated ". . . anything that is in a Styrofoam container is taxable that we prepare while they wait. . . . And all the deli salads [sold by the pound], like the potato salad, the beans, and pasta salad, when somebody buys a container that is not taxable." Transcript, p. 21. He testified as to food sold with utensils, heated versus unheated, raw eggs,

fish, meat and poultry, bakery items, bottled water, deli items sold on a plate, cigarettes, crushed ice, ice cream, prepackaged popcorn, bulk nuts, and cookies. Transcript, pp. 22-26. Mr. O'Brian testified that his employees always know whether an item is taxable or not. Transcript, p. 40.

This Tribunal, upon due, careful, and deliberate consideration of the entire record in this matter, concludes that Petitioner's source documents were well maintained and adequate to allow the Tribunal to determine the proper sales tax due. As such, the burden of proof shifts to Respondent to show that the amount of tax paid was incorrect. The Tribunal further finds that the process and procedures followed by Respondent's auditor cannot be relied upon. The Tribunal agrees with Petitioner that Respondent's calculations and methodologies result in imperfect estimates because they are based on an incomplete sample of purchase invoices for two months, extrapolated over an almost four-year period, using an estimated "average" mark-up. Respondent does not consider inventory fluctuations nor shrinkage inherent in a retail business. Although Respondent's audit methodology may be appropriate where a party has not maintained or otherwise provided sufficient documentation, as determined in *Vomvolakis*, Petitioner has met its burden to refute Respondent's prima facie correct assessment and has further substantiated that no additional sales tax should be due for the reasons set forth herein.

JUDGMENT

IT IS ORDERED that Assessment No. Q179330 is CANCELLED.

IT IS FURTHER ORDERED that the officer charged with collecting the affected taxes, interest, and penalties shall refund the taxes, interest, and penalties as required by this Order within 28 days of the entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: September 26, 2011

By: Cynthia J Knoll