

TAX COURT OF NEW JERSEY

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OF THE TAX COURT COMMITTEE ON OPINIONS

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Re: Stella's Pizza, Inc.  
v. Director, Division of Taxation  
Docket No. 014362-2014

N. Ioakimidis, LLC  
v. Director, Division of Taxation  
Docket No. 014364-2014

Dear Deputy Attorney General Anderson and Mr. Iamurri:

This letter constitutes the court's decision on the motions for summary judgment filed by plaintiffs, N. Ioakimidis, LLC ("N. Ioakimidis, LLC") and Stella's Pizza, Inc. ("Stella's Pizza, Inc.") (N. Ioakimidis, LLC and Stella's Pizza, Inc. shall be collectively referred to herein as "plaintiffs"), and the cross-motions for summary judgment filed by defendant, Director, Division of Taxation (the "Director"). The Director conducted an audit of plaintiffs' business for the period January 1, 2005 through March 31, 2012. At issue is the reasonableness of the Director's

assessment of \$74,101.67, plus penalties and interest, against Stella’s Pizza, Inc. for deficiencies in Sales and Use Tax, N.J.S.A. 54:32B-1 to 29 (“SUT”), Corporation Business Tax, N.J.S.A. 54:10A-1 to 41 (“CBT”), Gross Income Tax – Employer Withholding, N.J.S.A. 54A:7-1 to 7 (“GIT”), and Clean Communities Program Act user fees, N.J.S.A. 13:1E-213 to 223 (“Litter”), for the 2005 through 2010 tax years; and assessment of \$43,386.53, plus penalties and interest, against N. Ioakimidis, LLC for deficiencies in SUT and GIT for the 2010 through 2012 tax years.

For the reasons set forth below, plaintiffs’ motions for summary judgment are denied and the Director’s cross-motions for summary judgment are granted.

**I. Procedural History and Findings of Fact**

In accordance with R. 1:7-4(a), the court makes the following findings of fact based on the submissions of the parties.

During the period from 2005 through 2009, Nick Ioakimidis was the owner and principal shareholder of Stella’s Pizza, Inc. Stella’s Pizza, Inc. operated a pizzeria restaurant under the name “Stella’s Pizzeria” in Jersey City, New Jersey. In 2009, Mr. Ioakimidis transitioned operations of “Stella’s Pizzeria” from Stella’s Pizza, Inc. to another business entity, N. Ioakimidis, LLC, bearing a different taxpayer identification number. The pizzeria operates seven days a week, has nine tables and seven counter seats with a total seating capacity of forty-eight. The pizzeria provides eat-in, take-out and delivery services.

On October 25, 2010, the Director notified Stella’s Pizza, Inc. of an audit of its business. The letter was followed by a pre-audit meeting on April 4, 2011 with the Director’s auditor (the “auditor”), Nick Ioakimidis and his accountant, and completion of a Pre-Audit Questionnaire. The Pre-Audit Questionnaire revealed that guest checks, cash disbursement journals, sales journals, deposit slips, vendor bills and payroll records/journals were not being retained by Stella’s Pizza,

Inc. The Pre-Audit Questionnaire further disclosed that the cash register was not computerized and cash register tapes were not being preserved. During the pre-audit meeting Nick Ioakimidis first revealed to the Director that operations of “Stella’s Pizzeria” had been transitioned to N. Ioakimidis, LLC in 2009. Following the pre-audit meeting, the auditor requested Stella’s Pizza, Inc. and N. Ioakimidis, LLC furnish their business records.

On February 22, 2012, Nick Ioakimidis advised the auditor that his accountant passed away and that he was in the process of retaining a new accountant and obtaining documents and records related to his business.

On August 3, 2012, the auditor received a telephone call from plaintiffs’ new accountant, who advised that he was having difficulty gathering plaintiffs’ books and records, and requested additional time to do so.

On May 1, 2013, another pre-audit meeting was conducted with the auditor, Nick Ioakimidis and his new accountant and a Pre-Audit Questionnaire was completed for N. Ioakimidis, LLC. Following that pre-audit meeting, the auditor renewed her request for the business records of Stella’s Pizza, Inc. and N. Ioakimidis, LLC.

Ultimately, plaintiffs produced limited business records for the auditor, including two Point of Service (“POS”) statements for the tax periods from January 1, 2006 to May 31, 2012.<sup>1</sup> Although requested by the auditor, plaintiffs did not produce W-2 or W-3 forms for the 2010 and 2011 tax years; original general ledgers or worksheets; trial balance worksheets with adjusting journal entries; signed Corporation Business Tax Returns for the 2008 and 2009 tax years; signed

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<sup>1</sup> Plaintiffs also produced copies of W-2 and NJ W-3 forms for tax years 2007 through 2009; a price list for tax year 2011; bank statements from Valley National Bank and PNC Bank; partial vendor purchase invoices from Bart Foods from 2005 to 2010; a vendor list for the period from April 1, 2005 through March 31, 2009 and from May 1, 2010 through May 31, 2012; and partial vendor purchase invoices from Kalimera Foods from 2006 to 2012.

partnership tax returns for the 2010 and 2011 tax years; sales journals, purchase journals, complete vendor purchase invoices; and any statements from its Bank of America account.

The auditor's review of the business records supplied by plaintiffs revealed the following asserted deficiencies: (i) inconsistencies between gross receipts reported on plaintiffs' CBT returns and gross receipts reported on plaintiffs' SUT returns; (ii) disparities between the menu prices identified on plaintiffs' website and the paper menu supplied by plaintiffs following the pre-audit meetings; (iii) the SUT collected by plaintiffs exceeded the SUT remitted to the Director; (iv) plaintiffs' bank statements did not correspond to the reported gross receipts; (v) the sum of plaintiffs' cancelled checks fell short of the purchase totals reported by plaintiffs; (vi) neither of the two sets of POS records corresponded to plaintiffs' SUT returns; (vii) plaintiffs paid wages in cash and did not record all payroll transactions; and (viii) all cash received from business operations was not deposited into plaintiffs' bank accounts.

The auditor's side-by-side comparison of the two POS statements revealed widely disparate figures for individual line items for the identical tax periods, such as delivery fees and gross sales of individual menu items. Furthermore, a discrepancy was identified in the gross sales figures between the two POS records, which plaintiffs' argued resulted from one POS reflecting sales to tax exempt organizations, and the other reflecting gross sales.

Accordingly, as a result of the auditor's inability to verify plaintiffs' reported sales, and correspondingly plaintiffs' tax obligations, the auditor conducted a markon analysis to test plaintiffs' reported taxable sales. During such an analysis, the auditor examines a sampling period, compares the cost of the goods purchased, as developed from a taxpayer's invoices and supplier records, to the prices at which those goods are sold, as indicated by the menu and other records

maintained by the taxpayer. The auditor then computes a ratio of menu item cost to selling price, or “mark up,” and applies that ratio to the taxpayer’s purchases.

In conducting her analysis, the auditor first reviewed the purchases reported on Stella’s Pizza, Inc.’s CBT returns for the period April 1, 2005 through March 31, 2007. The auditor then reviewed both plaintiffs’ purchase invoices and estimated purchase calculations, making adjustments to account for third-party vendor confirmations. Based upon her analysis of the purchases and sales, the auditor determined that a 3.0 markon ratio should be applied to the purchases for the audit period.<sup>2</sup> The auditor maintained this markon ratio was also necessary to account for her finding that unrecorded cash disbursements were used for payroll and certain purchase transactions. The auditor reviewed and rejected plaintiffs’ SUT deductions because plaintiffs failed to present any documentation supporting same. Application of the markon ratio resulted in audited gross sales figures for each audit period exceeding the gross sales figures reported in plaintiffs’ POS statements. The auditor next applied the applicable SUT rate to each audit year to determine the total SUT due. After determining the SUT due, the auditor reduced that sum by the SUT paid by plaintiffs with their SUT returns.

On June 5, 2013, the Director issued Notices of Assessment Related to Final Audit Determination to Stella’s Pizza, Inc. for \$154,229.55 in unpaid CBT, SUT, GIT and Litter, including penalties and interest; and to N. Ioakimidis, LLC in the sum of \$73,073.17 in unpaid SUT and GIT, including penalties and interest. The Notices of Assessment included civil fraud penalties as a result of the auditor’s finding that plaintiffs did not report income, failed to file tax returns, did not report cash payroll and maintained inadequate business records.

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<sup>2</sup> In deposition testimony the auditor acknowledged that the 3.0 markon ratio applied in this matter mirrored the 3.0 markon ratio applied by the Director to Stella’s Pizza, Inc. during a prior audit. However, the auditor testified that it was lower than the markon ratio usually applied to pizzeria restaurants, which she expressed was between 3.5 and 4.0.

In response thereto, on July 18, 2013 plaintiffs filed a notice of protest with the Director's Conference and Appeals Branch challenging the results of the audit. Prior to the conference, the Director's conferee again requested plaintiffs furnish: all cash register tapes and guest checks for the audit period; sales journals for the audit period; daily POS statements for the period October 1, 2009 through December 31, 2009; a reconciliation of plaintiffs' POS statements with the filed SUT return for the October 1, 2009 through December 31, 2009 period; and any documentation supporting plaintiffs reported purchases for the fiscal year ending March 31, 2009.<sup>3</sup>

During the conference, plaintiffs raised several arguments why they deemed the auditor's assessment arbitrary, excessive and capricious. In sum, plaintiffs charged that they maintained the requisite business records, the POS statements were reliable, and the auditor improperly refused to accept the POS statements offered by plaintiffs. In addition, plaintiffs maintained that the geographical area where the business is located struggled after the economic downturn in 2008, resulting in lower sales and correspondingly, reduced gross income.

After reviewing the POS statements and documents furnished by plaintiffs during the audit and conference, the Director's conferee (the "conferee") concluded that the POS records were not reliable business records, noting that for the same tax period the two POS statements identified the same menu items, but with vastly different sales figures, percentages of sales, and quantities sold. Moreover, the conferee observed that the alleged tax exempt sales identified on the POS statement did not correspond with the tax exempt sales reflected on plaintiffs' SUT return for the same quarter. Ultimately, the conferee accepted the 3.0 markon ratio employed by the auditor and determined that plaintiffs failed to maintain adequate books and records, as required under

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<sup>3</sup> Plaintiffs furnished the conferee with daily POS statements only for December 2009; bank statements only for December 2009; a Quarterly Sales Tax report for fourth quarter 2009; and a document captioned "Cash and Vendor purchases" for fiscal year ending March 31, 2009.

N.J.S.A. 54:32B-16, N.J.A.C. 18:24-2.3 and N.J.A.C. 18:24-2.8, and did not make the required records available to the Director. The conferee further concluded that plaintiffs failed to maintain adequate internal control procedures as required by N.J.A.C. 18:24-2.15(a)(1).

Accordingly, on May 16, 2014, the Director issued Final Determination letters (the “Final Determinations”) to Stella’s Pizza, Inc. for \$161,354.04 in unpaid CBT, SUT, GIT and Litter, including penalties and interest; and to N. Ioakimidis, LLC for \$76,506.06 in unpaid SUT and GIT, including penalties and interest.

On August 18, 2014, Nick Ioakimidis submitted a letter to the Clerk of the Tax Court challenging the Final Determinations of the Director. On September 19, 2014, Notices of Appearance were filed by plaintiffs’ counsel with the Tax Court. Thereafter, on December 18, 2014, plaintiffs’ counsel filed Complaints with the Tax Court challenging the Final Determinations.

On April 5, 2016, plaintiffs moved for summary judgment charging that: (i) the Director erred in rejecting the POS statements furnished to determine plaintiffs’ gross sales during the audit periods; and (ii) the markon ratio and methodology employed by the Director in making its assessment is flawed and produced an arbitrary and capricious assessment.

On June 21, 2016, the Director filed cross-motions for summary judgment seeking dismissal of plaintiffs’ Complaints.

## **II. Conclusions of Law**

### **A. Summary Judgment**

Summary judgment should be granted if “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment

or order as a matter of law.” R. 4:46-2(c). An issue of fact is genuine “only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.” Ibid.

In Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. E.d. 2d 202, 214 (1986)), our Supreme Court adopted the federal approach to resolving motions for summary judgment, in which “the essence of the inquiry [is] whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” In conducting this inquiry, the trial court must engage in a “kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials.” Ibid. The standard established by our Supreme Court in Brill is as follows:

[W]hen deciding a motion for summary judgment under R. 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

[Id. at 536.]

Considering all of the material evidence before it with which to determine if there is a genuine issue of material fact, the court must view most favorably those items presented to it by the party opposing the motion and all doubts are to be resolved against the movant. Ruvolo v. American Casualty Co., 39 N.J. 490, 491 (1963). Thus, denial of summary judgment is appropriate when the evidence presented by the non-moving party is of such a quality and quantity that reasonable minds could return a finding favorable to the party opposing the motion. Id. at 540. However,



summary judgment may not be denied simply because the non-movant demonstrates the existence of a disputed fact. Id. at 540-41. “By its plain language, R. 4:46-2 dictates that a court should deny a summary judgment motion only where a party opposing the motion has come forward with evidence that creates a ‘genuine issue as to any material fact challenged.’” Id. at 529. When the party opposing the motion merely presents “facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious,” then an otherwise meritorious application for summary judgment should not be defeated. Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954). Hence, “when the evidence is so one-sided that one party must prevail as a matter of law. . . the trial court should not hesitate to grant summary judgment.” Brill, supra, 142 N.J. at 540 (quoting Anderson, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. E.d. 2d at 214).

#### B. Legal Arguments Presented

In support of their motions for summary judgment, plaintiffs charge that the auditor improperly refused to accept plaintiffs’ POS statements. According to plaintiffs, the POS statements reflect the time and place when the retail transaction was consummated, i.e., the point at which a customer makes payment to the merchant in exchange for goods or after provision of services. Plaintiffs therefore submit that the POS statements satisfy the definition of “summary records” which a vendor is required to preserve to authenticate its gross sales. Thus, plaintiffs submit that they did not maintain “insufficient records” but rather “failed to produce all of the records requested” by the Director during the audit.

Plaintiffs next assert that their failure to produce all of the business records sought by the Director “does not grant the Assessor [sic] with boundless authority to simply disregard records that are available and speculate as to what the numbers might have been in the rest of the records.”

Plaintiffs maintain that the POS records should have been relied upon by the Director in determining plaintiffs' gross sales and in making the assessment of plaintiffs' tax obligations.

Finally, plaintiffs contend that because the 3.0 markon ratio employed by the auditor was an estimate and "not derived from any guideline, formula, book, treatise or anything [the auditor] was ever taught. . ." it is inherently unreliable and lacks support. Plaintiffs assert that the auditor should have considered other "relevant factors" like the geography and demographics of the region where the business is located before determining whether the 3.0 markon ratio was appropriate. Consideration of the POS records and these other factors, plaintiffs argue, would have prevented the use of the 3.0 markon ratio relied upon by the Director, which plaintiffs allege was arbitrary and capricious.

Conversely, in support of its cross-motions for summary judgment, the Director charges that the two POS statements were not produced using a reliable system or effective internal controls, as the gross sales of individual menu items differed on each POS, and could not be reconciled with any of the documentation supplied by plaintiffs, including plaintiffs' SUT returns. The Director further maintains that although it may rely upon external factors and indices in making tax assessments, it has no obligation to limit its examination to plaintiffs' POS statements, especially when their reliability and accuracy is suspect. Moreover, the Director maintains that plaintiffs are precluded from challenging the Director's assessment of taxes when they have failed to maintain adequate books and records, as required by law.

Thus, at issue is the Director's finding that plaintiffs did not maintain adequate books and records, and the reasonableness of the Director's assessment of unpaid SUT, CBT, GIT and Litter against plaintiffs.

Here, the court concludes that because there are no genuine issues of material fact in dispute with respect to the scope of the business records maintained and produced by plaintiffs and the methods employed by the Director in making its assessments, plaintiffs' motions for summary judgment and the Director's cross-motions for summary judgment are ripe for decision.

C. Assessment of tax

New Jersey law vests the Director with broad authority to assess taxes. N.J.S.A. 54:49-6 provides, in part, that:

After a return or report is filed under the provision of any State tax law, the director shall cause the same to be examined and may make such further audit of investigation as he may deem necessary, and if therefrom he shall determine that there is a deficiency with respect to the payment of any tax due under such law, he shall assess the additional taxes, penalties, if any, pursuant to any State tax law or pursuant to this subtitle, and interest ..., give notice of such assessment to this taxpayer, and make demand upon him for payment.

[N.J.S.A. 54: 49-6.]

In addition, when a taxpayer has failed to file a required report or return, the Director is authorized to "make an estimate of the taxable liability. . . from any information he may obtain, and according to such estimate so made by him, assess the taxes, fees, penalties and interest due the state. . ." N.J.S.A. 54:49-5.

The SUT imposes a tax on the receipts from every sale of tangible personal property and certain enumerated services in New Jersey, unless otherwise specifically exempted. N.J.S.A. 54:32B-3. All sales transactions are deemed taxable under the SUT, unless the non-taxable or tax exempt status of any transaction is established by the person required to collect the tax or the customer. N.J.S.A. 54:32B-12(b). Thus, a presumption exists under the SUT that a sale is taxable

unless the party required to collect the tax can affirmatively demonstrate otherwise. Newman v. Director, Div. of Taxation, 14 N.J. Tax 313, 318 (Tax, 1994).

If a taxpayer has failed to file a return required under the SUT, or has filed a return with “incorrect or insufficient” information, the Director shall determine the tax due “from such information as may be available.” N.J.S.A. 54:32B-19. The tax due may be estimated based on “external indices,” including inventory, purchases, location, charges, service, number of employees and other factors. N.J.S.A. 54:32B-19; see also Kramer v. Director, Div. of Taxation, 24 N.J. Tax 105, 113 (Tax 2008).

The SUT further requires “any person required to collect tax to keep detailed records of all receipts. . . charged or accrued, including those claimed to be nontaxable, and also of the nature, type, value and amount of all purchases, sales, services rendered. . . and to furnish such information upon request of the director.” N.J.S.A. 54:32B-24(5). The SUT directs every person required to collect SUT to retain records “of every purchase. . . sale or. . . charge. . . and of all amounts paid, charged or due thereon” for a period of four years, including “each sales slip, invoice receipt, statement or memorandum. . . [and to] make available for inspection and examination at any time upon demand by the director. . .” N.J.S.A. 54:32B-16.

Under regulations promulgated by the Director, a vendor is required to preserve for inspection and examination by the Director “for a period of four years from the filing date of the quarterly period for the filing of sales tax returns” true copies of “all sales slips, invoices, receipts, statements, memoranda of price, cash register tapes, or guest checks issued to any customer by a seller. . . and records of every purchase, both retail and wholesale. . .” N.J.A.C. 18:24-2.3. If a vendor elects to maintain “summary records,” the vendor must nevertheless “maintain individual sales slips, invoices, receipts, statements, memoranda of price, cash register tapes, or guest checks

for a period of four years from the last date of the most recent quarterly period for the filing of sales tax returns. . .” N.J.A.C. 18:24-2.4.

When a taxpayer does not maintain business records, as required under our statutes and regulations, it is within the Director’s discretion to deem the taxpayer’s records “insufficient” and “determine the tax from any available information, and, if necessary, to estimate the tax from external indices.” Yilmaz, Inc. v. Director, Div. of Taxation, 390 N.J. Super. 435, 441 (App. Div.), certif. denied, 192 N.J. 69 (2007). This authority, and the standard by which insufficiency is measured, is reflected in the regulations as follows:

(a) The records of a vendor may be deemed incorrect or insufficient if:

1. An evaluation of the accounting system discloses that the system does not provide adequate internal control procedures which assure the accuracy and completeness of the transactions recorded in the books and records.

2. The records are not maintained in accordance with the general outline of this chapter.

(b) If the records of a vendor are determined to be incorrect or insufficient, the return(s) filed on the basis of the information obtained from such records may be deemed to be incorrect or insufficient and the director may determine the amount of tax due the State by using any information available, whether from the vendor’s place of business or from any other source.

[N.J.A.C. 18:24-2.15 (emphasis added).]

Thus, under the foregoing statutory and regulatory schemes, when a taxpayer fails to retain the requisite business records, or the business records so maintained do not exhibit adequate internal controls ensuring their accuracy and reliability, the Director may deem those records “insufficient” thereby authorizing the Director to use any information available to impose a tax assessment. Yilmaz, Inc., supra, 390 N.J. Super. at 441; N.J.A.C. 18:24-2.15.

Plaintiffs maintain their business records were not “insufficient” because the POS statements constitute “summary records” under N.J.A.C. 18:24-2.4. When properly maintained,

summary records which identify the total and taxable receipts for a given tax period, permit the taxpayer to “dispose of individual sales slips, invoices, receipts, statements, memoranda of price or cash register tapes.” Charley O's, Inc. v. Director, Div. of Taxation, 23 N.J. Tax 171, 187 (Tax 2006). Despite this limited license which affords vendors the option of disposing certain business records, when “summary records” are maintained, the vendor must nonetheless maintain sales slips, invoices, receipts, statements, cash register tapes or guest checks “for a period of four years from the last date of the most recent quarterly period for the filing of sales tax returns. . .” N.J.A.C. 18:24-2.4.

The court’s review of the parties’ submissions reveals that plaintiffs did not comply with their obligations under N.J.A.C. 18:24-2.4 in maintaining “summary records.” Plaintiffs failed to preserve sales slips, invoices, receipts, cash register tapes and guest checks receipts corroborating the accuracy of the two POS statements in accordance with N.J.A.C. 18:24-2.4. In fact, plaintiffs concede in their brief that during the audit they “did not have all the requisite records available” for production or inspection by the Director’s auditor or conferee. The court’s review of the Pre-Audit Questionnaires further demonstrates that plaintiffs did not preserve all of the supporting documents required under the regulations to confirm the integrity of the POS statements.

Here, the auditor and conferee conducted a review and analysis of plaintiffs’ POS statements and the business records offered, ultimately concluding that due to discrepancies identified between the records, the POS statements and plaintiffs’ SUT returns, the POS statements were unreliable. When an “auditor has reason to believe that a taxpayer’s summary records are inaccurate, and no cash register tapes are available, the use of a markup analysis is appropriate.” Charley O’s, Inc., supra, 23 N.J. Tax at 187. See also Yilmaz, Inc., supra, 390 N.J. Super. at 441. Although the two POS statements may reflect plaintiffs’ good faith effort to maintain “summary

records,” because plaintiffs failed to comply with the administrative regulations, when legitimate questions were raised by the auditor and conferee regarding the accuracy of the POS statements, little independent corroborative evidence existed for examination by the Director to ensure the integrity of the figures reported on plaintiffs’ POS statements. Thus, the court rejects plaintiffs’ argument that the auditor and conferee improperly refused to accept plaintiffs’ POS statements.

Plaintiffs further assert that the Director “must use the records made available” by plaintiffs during the audit to calculate its gross sales, and corresponding SUT and CBT liabilities. However, plaintiffs mischaracterize our statutory text and administrative regulations. When a taxpayer has failed to file a required return or report, or has filed a return with “incorrect or insufficient” information, the Director is authorized to determine the amount of tax due from such information which may be available, including estimating the tax “on the basis of external indices. . .” N.J.S.A. 54:32B-19. Moreover, if the Director’s review of a vendor’s business records reveals a lack of “adequate internal control procedures which assure the accuracy and completeness of the transactions recorded,” the Director is authorized to “determine the amount of tax due. . . by using any information available, whether from the vendor’s place of business or from any other source.” N.J.A.C. 18:24-2.15. The Director’s review is not limited or confined to the business records made available by the taxpayer during an audit; the Director is “given broad authority to determine the tax from any available information. . .” Yilmaz, Inc., supra, 390 N.J. Super. at 441. After plaintiffs failed to furnish the auditor with the business records required to be maintained under N.J.A.C. 18:24-2.4, and which would be instrumental to validating the POS statements, the auditor turned to consideration of extrinsic evidence, including plaintiffs’ inventory and vendor purchases. Contrary to plaintiffs’ assertions, the record reveals that the auditor first conducted a detailed review and examination of the POS statements before making the assessments. However, once

the auditor discovered the discrepancies that existed between the two POS statements and plaintiffs’ SUT returns, which could not be adequately explained, coupled with a lack of documentary support for the POS statements, the auditor turned to consideration of other evidence to estimate plaintiffs’ gross sales and tax obligations. Thus, the court further rejects plaintiffs’ argument that the auditor improperly refused to limit her review to the POS statements and business records made available by a taxpayer.

The court’s own review of five randomly selected menu items from the two POS statements for the period January 1, 2010 through March 31, 2010 revealed the following:

	POS 1	POS 1 Quantity	POS 1 Percentage	POS 2	POS 2 Quantity	POS 2 Percentage
Gross Sales	\$68,466.90	-	-	\$68,522.00	-	-
Plain Slice	\$12,828.48	5,727	18.73%	\$6,151.04	2,746	8.90%
18” Large Pie (x)	\$7,534.45	1,901	11.005%	\$18,778.16	1,340	27.06%
CAN	\$1,891.25	2,125	2.762%	\$898.01	1,009	1.30%
Gyro Sandwich	\$2,990.05	585	4.36%	\$1,245.75	245	1.80%
12” Bar Pie	\$655.45	61	0.957%	\$1,242.20	109	1.80%

Although the total gross sales reported for the tax period are very similar, the volume of individual menu items sold is widely disparate and the percentage of sales of those menu items is also vastly different. In plaintiffs’ accountant’s opinion “it is very common to see a variation in the two Point of Statement [sic] printouts for a given year due to the fact that one reflects sales with exemptions and the other reflect sales without exemptions.” Even if the court were to accept plaintiffs’ accountant’s explanation, that fails to account for why plaintiffs’ gross sales (including all exempt sales) of 12” Bar Pies totaled 61 however, during the same tax period plaintiffs’ gross sales (excluding all tax exempt sales) of 12” Bar Pies totaled 109. The gross sales for individual menu items, which include all alleged tax exempt sales, must always equal or exceed the gross sales which exclude exempt sales for the same tax period. More importantly, plaintiffs’ failed to produce any signed SUT exemption certificates for the audit period demonstrating that any of the transactions were exempt from SUT.



The Director's "expertise in the highly specialized and technical area of taxation. . . is entitled to great respect by the courts," and its "interpretation of the operative law is entitled to prevail, so long as it is not plainly unreasonable." Quest Diagnostics, Inc. v. Director, Div. of Taxation, 387 N.J. Super. 104 (App. Div. 2006), certif. denied, 188 N.J. 577 (2006) (citing Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 327 (1984)). See also Aetna Burglar & Fire Alarm Co. v. Director, Div. of Taxation, 16 N.J. Tax 584 (Tax 1997). In essence, the Director's assessment of "tax is presumptively correct" and the burden rests with the taxpayer to rebut that presumption of correctness. Quest Diagnostics, Inc., supra, 21 N.J. Tax at 490. See also Atlantic City Transport. Co. v. Director, Div. of Taxation, 12 N.J. 130, 146 (1953). Thus, when a taxpayer seeks to challenge the Director's audit practices as a result of the Director's determination that a taxpayer maintained inadequate books and records, the taxpayer must present the court with "cogent evidence" to rebut that presumption of correctness. That evidence must be "definite, positive and certain in quality and quantity to overcome the presumption." Yilmaz, Inc., supra, 22 N.J. Tax 204, 236 (Tax 2005) (internal citations omitted). The evidence presented must "focus on the reasonableness of the underlying data used by the Director and the reasonableness of the methodology used." Ibid. The presumption of correctness will stand even if the audit practice is "imperfect." Naked assertions made by a taxpayer without any supporting records or documentation are insufficient to overcome the presumption of correctness which attaches to the Director's assessment. T.A.S. Lakewood, Inc. v. Director, Div. of Taxation, 19 N.J. Tax 131, 140 (Tax 2000). However, when the taxpayer presents independent evidence or evidence from "cross-examination of the auditor" which is credible, competent and distinct establishing that the methodology employed by the Director produced an "aberrant" result, the presumption of correctness will have been overcome. Id. at 442.

Plaintiffs ask this court to conclude that the Director's markon analysis was unreliable, and produced an "arbitrary and capricious" result. In support of this position, plaintiffs identify several passages of the auditor's and conferee's deposition testimony which reveals that the markon analysis and ratio applied to plaintiffs was not derived from any treatise, guideline, formula or book, but rather was based upon the auditor's prior experience and industry standards. Although plaintiffs have presented a number of criticisms and critiques of the audit procedures and methodology employed by the Director, plaintiffs have presented no cogent evidence that the Director's markon analysis or methodology produced an anomalous or aberrant result. The only independent evidence offered by plaintiffs is the certification of their accountant, who concludes that the "POS records are reliable records upon which to determine gross sales." However, plaintiffs' accountant offered no facts, data or support for his bare conclusion. Instead, plaintiffs' counsel urges the court to conclude that application of a 3.0 markon ratio to plaintiffs was inherently flawed because it was the identical ratio applied by the Director in a prior audit of Stella Pizza, Inc. Still, plaintiffs produced no documentation, calculations, formula or "alternative quantitative data" demonstrating that the analysis and 3.0 markon ratio produced an inconsistent or aberrant result. Coliseum Pizzeria, Inc. v. Director, Div. of Taxation, 24 N.J. Tax 369, 373 (Tax 2008). Plaintiffs offered no explanation to the court how the POS statements were prepared, the protocols followed in preparing them, when they were prepared, or by whom they were prepared. Furthermore, plaintiffs provided no evidence who bore responsibility for ensuring the integrity of the data upon which the POS statements were premised.

Plaintiffs' counsel's position that the audit was "arbitrary and unreasonable" because it resulted in estimated gross sales different from the POS statements furnished by plaintiffs is also untenable. When a vendor fails to adhere to statutory and administrative guidelines for the

preservation of books, records and receipts upon which its returns, reports, or summary records are founded and subsequently, discrepancies or disparities are observed with respect to those returns, reports or summary records, alternative means must be explored to estimate the vendor's tax liabilities. Although these alternative means may be imperfect, the Director's assessment is nevertheless presumed correct and the burden rests with the taxpayer to present definite, positive and certain evidence to rebut that presumption.

Here, plaintiffs condemn and disparage the Director's methods and conclusions, however they have not argued, offered, maintained or demonstrated that at trial that they will or are prepared to offer the testimony of an accountant, auditor, examiner or other expert in the field who has conducted a review and analysis of plaintiffs' business records, POS statements, SUT returns and the auditor's file, and would offer substantive alternate calculations to those of the auditor. Thus, a trial in this matter would seemingly amount to the court's review of the Director's audit and conference practices on the basis of plaintiffs' unsubstantiated challenges to the auditor's and conferee's final conclusions. Our standards governing the review of motions for summary judgment do not permit such a proceeding.

As articulated by our Supreme Court in Brill, "a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill, supra, 142 N.J. at 529 (quoting R. 4:46-2(c)). The issues presented in the competing motions in this matter concern the "selection of data and methods employed to analyze that data" and do not implicate "questions of state of mind, or intent or credibility," thus, application of summary judgment is appropriate. Coliseum Pizzeria, Inc., supra, 24 N.J. Tax at 377 (internal citations omitted).

Here, plaintiffs have not tendered any cogent evidence that the data, formula or methodology applied by the Director produced an aberrant result thereby raising genuine issues as to the soundness and accuracy of the audit. Therefore, based upon the tenets espoused in Yilmaz and the principles articulated by our Supreme Court in Brill, plaintiffs have failed to show the presence of a genuine issue concerning a material fact in dispute, to require a trial in these matters.

### **III. Conclusion**

Accordingly, plaintiffs' motions for summary judgment are denied and the Director's motions for summary judgment are granted.

The court will enter final Orders consistent with this opinion.

Very truly yours,

/s/Hon. Joshua D. Novin, J.T.C.