

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ANNA DI PACIFIC, :
AS PARTNER OF DI PACIFIC STEAK HOUSE :
: :
for Revision of a Determination or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Periods December 1, 1981 through February 28, :
1983 and June 1, 1983 through August 31, 1983. :

In the Matter of the Petition :
of :
HELEN DI PACIFIC, :
AS PARTNER OF DI PACIFIC STEAK HOUSE :
: :
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, 1981 through May 31, 1983. :

DECISION

In the Matter of the Petition :
of :
ANNA DI PACIFIC AND HELEN DI PACIFIC, :
AS PARTNERS OF DI PACIFIC STEAK HOUSE :
: :
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, 1983 through :
November 30, 1984. :

Petitioner, Anna Di Pacific, Route 96, Victor, New York 14564, filed an exception to the determination of the Administrative Law Judge issued on January 12, 1989 with respect to her 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 periods December 1, 1981 through February 28, 1983 and June 1, 1983 through August 31, 1983 (Files Nos. 803113, 803943 and 803951).

Petitioner, Helen Di Pacific, Route 96, Victor, New York 14564, filed an exception to the determination of the Administrative Law Judge issued on January 12, 1989 with respect to her 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, 1981 through February 28, 1983 (Files Nos. 803112 and 803942).

Petitioners, Anna Di Pacific and Helen Di Pacific, Route 96, Victor, New York 14564, filed an exception to the determination of the Administrative Law Judge issued on January 12, 1989 with respect to their 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, 1983 through November 30, 1984 (File No. 804340). Petitioners appeared by Thomas W. O'Connell, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel). Petitioners did not file a brief in support of their exception. The Division of Taxation filed a brief in opposition to the exception. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation was barred from assessing tax, penalty or interest for periods in which petitioners paid tax under the tax amnesty program.

II. Whether the Division has established that each petitioner's failure to accurately report and pay over sales tax was due to fraud.

III. Whether petitioners have established that the amount of sales tax assessed by the Division was incorrect or that the method of audit was unreasonable.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. The Administrative Law Judge's findings of facts are set forth below.

Di Pacific Steak House is a restaurant located in Victor, New York, approximately one mile from the Finger Lakes Race Track. Petitioner Anna Di Pacific inherited the restaurant from her husband. In 1966, Anna Di Pacific formed a partnership with her daughter, petitioner Helen Di Pacific, to conduct and transact business as Di Pacific Steak House. A certificate of partnership, signed by Anna Di Pacific and Helen Di Pacific, was filed in the Ontario County Clerk's Office on September 28, 1966.

Following an audit of Di Pacific Steak House, the Division of Taxation issued to petitioners a series of notices of determination and demands for payment of sales and use taxes due as follows:

<u>Date Issued</u>	<u>Assessment No.</u>	<u>Period</u>	<u>Petitioner</u>	<u>Tax Due</u>
12/20/85	S851220026R	12/1/81-11/30/82	Anna Di Pacific	\$8,692.97
12/20/85	S851220027R	12/1/81-11/30/82	Helen Di Pacific	8,692.97
3/12/86	S860312000R	12/1/82-2/28/83	Helen Di Pacific	1,948.80
3/12/86	S860312001R	12/1/82-2/28/83	Anna Di Pacific	1,948.80
6/20/86	S860620012R	3/1/83-5/31/83	Helen Di Pacific	1,737.75
6/20/86	S860620013R	3/1/83-5/31/83	Anna Di Pacific	1,737.75
9/12/86	S860912000R	6/1/83-8/31/83	Helen Di Pacific	1,737.75
9/12/86	S860912001R	6/1/83-8/31/83	Anna Di Pacific	1,737.75
12/8/86	S861208001R	9/1/83-11/30/84	Anna and Helen Di Pacific	4,970.42

All of the notices were issued to Anna Di Pacific, Helen Di Pacific or both, as partners of Di Pacific Steak House. In addition to assessing tax due, each notice assessed a fraud penalty equal to 50 percent of the amount of tax due plus statutory interest pursuant to Tax Law § 1145(a)(2).

Anna Di Pacific did not file a petition with regard to assessment number S860620013R. Helen Di Pacific did not file a petition with regard to assessment number S860912000R.

On July 10, 1984, Helen Di Pacific and Anna Di Pacific each granted a power of attorney to Nathan W. Gordon to represent her before the Department of Taxation and Finance in connection with proceedings involving "sales tax for the periods September 1, 1981 through August 31, 1984".

Acting under the powers of attorney, Mr. Gordon executed two consents having the effect of extending the period of limitation for assessment of sales and use taxes for the period September 1, 1981 through May 31, 1982 to September 20, 1985.

Anna H. Di Pacific and Helen Di Pacific filed Federal partnership tax returns in 1981, 1982, 1983 and 1984. The Division of Taxation began a sales tax field audit of the partnership's books and records in May 1984, when a review of the partnership's 1982 Federal return disclosed a discrepancy of \$135,475.00 between taxable sales as reported on petitioners' sales tax returns for 1982 (with adjustments to conform sales tax quarters to calendar year) and gross receipts reported on the partnership's Federal return.

At the commencement of the audit, the auditor was referred to Mr. Gordon, petitioners' accountant, for any necessary information. The auditor made several telephone calls to Mr. Gordon, and they discussed which books and records would be required on audit. By letter dated June 12, 1984, an auditor asked that the following books and records be made available for the purpose of conducting an initial examination: copies of the partnership's 1981, 1982 and 1983 Federal returns; sales and purchase journals; and worksheets for preparing sales tax returns. The auditor also requested that the partnership complete a "Bar Fact Sheet" and "Questionnaire".

Mr. Gordon provided these records to the auditor: sales tax returns with related worksheets; Federal and State income tax returns with related worksheets; depreciation schedules; a sales journal; a purchases journal; a check disbursements journal; and some purchase invoices.

A review of the partnership's records revealed that the partnership had claimed a tax credit of \$5,940.99 in the quarter ended August 31, 1984 relating to capital acquisitions. The Division disallowed \$3,935.33 of this credit. The basis for the disallowance is not contained in the record. A review of individual invoices disclosed tax due of \$525.00 for the quarter ended February 28, 1984; thus, total tax due on recurring purchases and capital asset acquisitions was approximately \$4,460.00.

On November 14, 1984, the auditor visited the premises of Di Pacific Steak House and spoke with Anna Di Pacific. He was told that the restaurant's party rooms were not used until early in 1984. He was also told that the partnership owned a driving range and refreshment stand located near the restaurant.

The auditor's examination of records supplied by Mr. Gordon showed no discrepancy between sales recorded in the restaurant's sales journal and sales reported on sales tax returns. Bank deposits substantially correlated with gross receipts as shown on the Federal returns. Furthermore, the auditor identified no discrepancies between sales reported in 1983 and 1984 on sales tax returns and gross receipts reported on 1983 and 1984 Federal returns.

The auditor asked Mr. Gordon to explain the discrepancy between sales reported on sales tax returns and gross receipts reported on the Federal return in 1982. The explanation given was that the partnership had income from the rental of real property and from the rental of meeting rooms in the restaurant and these receipts were not subject to sales tax. The auditor requested documentation which would verify claimed nontaxable receipts. In or about May 1985, Mr. Gordon provided the auditor with two sets of worksheets listing the partnership's rental receipts for 1982. The first set was entitled "1982 Rental Received" and showed recurring monthly rentals of real property as follows:

<u>Source</u>	<u>Address</u>	<u>Amount</u>
Cardinal Transport	Rt. 96, Victor, N.Y.	\$ 500.00
Ariel Amusement	Rt. 96, Victor, N.Y.	1,000.00
John Butler	1428 County Rd. 41, Acton, N.Y.	660.00
Scott Smothers	18 Santa Circle, Pittsford, N.Y.	595.00
Rainbow Apts.	Phoenix St., [illegible], N.Y.	125.67
Bristol Harbor Sign	Rt. 96, Victor, N.Y.	50.00
Barn Rental	Hathaway Farm, Victor, N.Y.	300.00

In addition, the golf range was shown as rented to Terry Hart in the months of April through September for \$2,500.00 per month.

The second set of worksheets is entitled "1982 Rooms Rented Out - Provided People To Serve" and has this notation: "Source - 1982 Appointment book". By date, the worksheets list:

organizations to whom rooms were purportedly rented, the room charge, a labor charge and a total. There is also a column entitled food, but no entries were made here.

At hearing, Mr. Gordon denied preparing either set of worksheets and stated that he could not recall who prepared them and did not personally know how the information contained on the worksheets had been compiled.

After receiving the rental information described above, the auditor repeatedly requested documentation with which to verify the income shown on the worksheets. Over a period of several months, several audit appointments were scheduled with Mr. Gordon and later cancelled or postponed by him. In or about September 1985, Mr. Gordon presented the auditor with several letters which various organizations purportedly sent to Di Pacific Steak House in connection with the rental of rooms from the restaurant in 1982.

Upon receipt of the letters from Mr. Gordon, the Division of Taxation attempted to verify their authenticity. Eventually, telephone calls were made and letters sent, not only to the authors of the letters submitted by Mr. Gordon, but also to other organizations shown on the rental worksheets. The responses received by the Division's auditors established that the letters submitted by Mr. Gordon were fabrications.

(a) A letter on the letterhead of the American Cancer Society bears the signature of Betty Lou Capron. The letter is dated January 10, 1982 and states: "Enclosed please find payment for the room rental for our semi-annual meeting." The letter indicates that a payment of \$450.00 was enclosed. In response to an inquiry from the Division, Ms. Capron sent a letter stating that the signature on the letter was not hers, that she was not employed by the American Cancer Society until November 1983, and that the American Cancer Society did not use the facilities of the Di Pacific Steak House in January 1982. The rental worksheet submitted by Mr. Gordon showed no rental to the American Cancer Society in January 1982.

(b) A letter on the letterhead of Mobil Chemical Company is dated August 10, 1982 and bears the signature of Michael Johnson. The letter indicates that the company rented meeting rooms from Di Pacific Steak House on May 12 and August 5 at a charge of \$325.00 per day. In

response to the Division's written inquiry, Mr. William A. Erickson, Supervisor of Receivables and Tax Accounting for Mobil Chemical Company, wrote: "We are unable to locate any payments made by us to Di Pacific [sic] Steak House, Victor, NY for items listed by you for 1982."

(c) A customer letter from the Manchester Social Club bears the signature of Marianne Kent. The Division was unable to find a telephone listing for the Club or Ms. Kent. A letter sent to the address shown on the customer letter was returned to the Division marked "no such street".

(d) A letter dated March 1983 bears the signature, Jack Litzelman. The letter is on the letterhead of De-Kalb-Pfizer Genetics and indicates that such company held a seminar at the restaurant, paying \$750.00 for room rental. De-Kalb did not pay for or use any facilities at the Di Pacific Steak House in 1982, and Mr. Litzelman did not prepare or sign the letter addressed to Di Pacific Steak House.

Under questioning by the Division's representative, Anna Di Pacific expressed no knowledge of the customer letters. Mr. Gordon stated only that he had received them from "someone" at Di Pacific Steak House.

In 1982, Anna Di Pacific filed a New York State Resident Income Tax Return. An attached Federal schedule E shows income from her partnership interest in Di Pacific Steak House of \$6,314.00. In addition, the return shows income to Mrs. Di Pacific from rentals of two properties. The first property is shown as located at 1428 County Road #41, Victor, New York. The second property is shown as located at 1233 Route 332, Victor, New York. A worksheet states that the first property was owned by Anna Di Pacific and Peter Furfare as joint tenants and the second property was owned by Anna Di Pacific and Helen Di Pacific as joint tenants. Helen Di Pacific also showed rental income from this second property on a worksheet attached to her 1982 New York State Resident Income Tax Return.

The real property rental listings provided by Mr. Gordon show that Ariel Amusement rented property located at Route 96, Victor, New York from the partnership in 1982. Ariel never

rented property from Di Pacific Steak House, although a predecessor corporation, K & W Vending Co., did.

In September 1985, the Division was contacted by an attorney, Thomas O'Connell, who stated that he represented the Di Pacifics. A meeting was scheduled with Mr. Gordon, Mr. O'Connell and the Division's representatives on October 9, 1985. At this meeting, the Division asked that further business records be provided. Mr. O'Connell requested that Anna Di Pacific and Helen Di Pacific be provided with written assurance that no criminal investigation would ensue as a result of the audit. The Division's representatives stated that they had no authority to provide such assurance.

By letter to Mr. O'Connell dated October 16, 1985, the Division requested the following records of Di Pacific Steak House: 1984 Federal and State partnership returns; itemization and substantiation of all receipts from the rental of real property for 1983, 1984 and 1985; itemization and substantiation of nontaxable room rentals for 1983, 1984 and 1985; bank statements, deposit slips and cancelled checks for 1983, 1984 and 1985; sales and purchase journals for 1982, 1983, 1984 and 1985; and cash register tapes and guest checks for 1982, 1983, 1984 and 1985. None of these records were provided to the Division.

On or about December 13, 1985, Anna Di Pacific was served with a subpoena from the New York State Department of Taxation and Finance, commanding her, among other things, to produce certain records of the business. In response, she made a motion to quash in New York State Supreme Court. An affidavit accompanying the motion and signed by Anna Di Pacific includes these statements:

"7. That your deponent has been informed by her attorney, Thomas W. O'Connell and accountant, Nathan Gordon, that a tax agent working on your deponent's file had stated that the subpoenaed material could be used to lodge a criminal charge of conspiracy.

8. That considering the aforesaid facts, and upon the advice of Counsel, your deponent asserts the privileges guaranteed under the law against self-incrimination.

9. That as a gesture between your deponent and her only child Helen, your deponent allowed some documents to convey the impression that she and her daughter were partners.

10. That no articles of partnership were ever drawn between your deponent and her daughter.

11. That no certificate of partnership was ever filed in the Ontario County Clerk's Office."

A second affidavit signed by Anna Di Pacific and Helen Di Pacific contains these statements:

"1. That they are mother and daughter, sole proprietors of Di Pacific's Restaurant.

2. That all of the business records pertaining to the restaurant were prepared, kept, and maintained by your deponents, all in their own handwriting (attached hereto and made a part here are representative random samples of the records).

3. That no one else kept the records.

4. That the said records were kept for the personal and private use of your deponents, there are no other persons involved in the ownership of Di Pacific's.

5. That the restaurant itself does not have any distinct institutional identity."

The business records referred to in the affidavit show receipts from food, liquor and beer, but do not show rental receipts.

The Division eventually chose to withdraw the subpoena.

Since petitioners failed to present documentation to support their claim of nontaxable receipts from the rental of rooms and real property, the Division deemed the difference between reported sales per sales tax returns and gross receipts per the 1982 Federal return as unreported taxable sales, and on December 20, 1985, it issued assessments in accordance with this conclusion.

Gross receipts as shown on the partnership's 1983 and 1984 Federal partnership returns were substantially the same as sales reported on sales tax returns for the same period; however, the returns evidenced a change in the manner in which the partnership reported rental income, as compared with 1982.

In 1982, the partnership filed Federal partnership returns reporting gross receipts of \$502,100.00 and rental income of \$13,000.00.

In 1983, the partnership filed Federal partnership returns showing gross receipts of \$323,388.00 and rental income of \$99,300.00. The attached depreciation schedule lists a real property asset acquired in 1983 with a cost basis of \$98,154.00 and an expected useful life of 15 years.

In 1984, the partnership filed Federal partnership returns showing gross receipts of \$350,654.00 and rental income of \$41,350.00. The depreciation schedule lists a real property asset acquired in 1984 with a cost basis of \$246,928.00 and an expected useful life of 18 years. The depreciation schedule does not list the real property asset acquired in 1983, as shown on the 1983 return, and the return shows no capital gains, capital losses or casualty losses which would explain the absence of the 1983 asset.

By its letter of October 16, 1985, the Division requested substantiation of all real property rentals for 1983 and 1984. Petitioners failed to submit any documentation. Therefore, the Division deemed the rental income as shown on the 1983 and 1984 Federal partnership returns to be unreported taxable sales. Based on this determination, assessments were issued over a period of time.

Late in 1985 or early in 1986, Di Pacific Steak House filed amended sales tax returns and amnesty applications for some, but not all, of the periods at issue. The Division granted amnesty for the periods and taxes designated on the applications. Because the partnership claimed a lesser tax liability under amnesty than the tax due determined by the Division, an outstanding balance remains for each quarter at issue. The schedule below shows the period at issue, the tax determined to be due by the Division, the amount of tax paid under amnesty, and the balance of tax due asserted by the Division at hearing.

<u>Period Ended</u>	<u>Tax Due</u>	<u>Tax Paid</u>	<u>Balance</u>
2/28/82	\$1,580.54	\$ 985.23	\$ 595.31
5/31/82	2,370.81	1,123.26	1,247.55
8/31/82	2,370.81	876.25	1,494.56
11/30/82	2,370.81	1,332.66	1,038.15

2/28/83	1,948.80	499.39	1,449.41
5/31/83	1,737.75	--	1,737.75
8/31/83	1,737.75	--	1,737.75
11/30/83	1,737.75	--	1,737.75
2/28/84	1,061.69	525.00*	1,061.69
5/31/84	723.66	--	723.66
8/31/84	4,659.19	4,460.52*	723.66
11/30/84	723.66	--	723.66

* These amounts represent tax due on petitioners' purchases of sales and services. The amended returns filed under amnesty were not submitted into evidence. Apparently the returns showed a greater tax due in the category of "use" tax than that which had previously been determined by the Division (see Finding of Fact "9"). All balances due as shown above and as assessed represent unreported taxable sales as determined by the Division.

After the amnesty application period expired, assessments were issued to petitioners covering the last seven periods shown above. The amount of tax assessed per the notices made allowance for tax paid under the amnesty program.

At hearing, Mr. Gordon testified regarding the method he used to determine petitioners' tax liability in conjunction with petitioners' amnesty applications. He stated that before the audit at issue occurred he believed (and apparently advised his clients) that the rental of rooms in the restaurant was not subject to sales tax if no food was served in connection with the room rental. After the audit, he became aware that petitioners could not prove that food was not served each time a rental occurred; therefore, he treated all room rentals as taxable sales.

In order to calculate taxable receipts from room rentals, Mr. Gordon began with the Division's statement of audited additional sales for each sales tax quarter. From this, he subtracted amounts he attributed to nontaxable receipts. The balance was considered to be unreported taxable sales. Tax was paid on these amounts under amnesty. As shown above, additional tax was calculated in this manner only for the period December 1, 1982 through February 28, 1983. At no time were documents substantiating the existence of room rentals submitted to the Division.

To demonstrate that additional revenues as shown on petitioners' 1982, 1983 and 1984 partnership returns represented income from other than taxable sales, Mr. Gordon prepared a worksheet captioned, "Di Pacific Steak House/ Deficiency per N.Y.S. Sales Tax." The

worksheet calculations were performed in essentially the same manner as the calculations performed for the amnesty applications. Mr. Gordon's starting point was the balance of tax due for all periods at issue as asserted by the Division. He calculated audited taxable sales by dividing tax due by .07, and he subtracted from taxable sales amounts he deemed to be nontaxable receipts. This resulted in total sales tax due for all periods in issue of \$3,771.46. The worksheet lists two sources of income deemed by Mr. Gordon to be not subject to sales tax: "K & W Vending" and "Bldg & Sign Rental".

Petitioners presented two documents to explain and substantiate their claim of revenue not subject to sales tax.

(a) The first document is on the letterhead of K & W Vending Co., Inc. It is addressed to Di Pacific Steak House and lists dollar amounts, by month, for the year 1982. It is undated, unsigned and contains no explanatory material. Mr. Gordon testified that he obtained this document from someone at Di Pacific Steak House and presumed it to show commission income from vending machines placed on the premises, but he could provide no other details regarding the document.

(b) The second document is a two-page worksheet prepared by Mr. Gordon. Each page is captioned, "Di Pacific Steak House Rental Income Outside Properties." One page is denoted 1983 and the other is denoted 1984. The worksheet lists, among others, properties located at 1233 Route 332 and 1428 Route 332. The lessees are not identified. Mr. Gordon testified that he prepared the worksheet using a log book provided to him by either Anna Di Pacific or Helen Di Pacific, rental receipts from a printed receipt book and information provided by Anna Di Pacific and Helen Di Pacific; none of these documents were introduced at hearing.

In 1983, Anna Di Pacific and Helen Di Pacific each filed a New York resident income tax return. Each return showed rental income from jointly owned property located at 1233 Route 332, Victor, New York. In 1984, each petitioner's State income tax return showed rental income, but the property or properties on which rentals were received were not identified.

During the periods in issue, the sales journal of Di Pacific Steak House was prepared by Helen Di Pacific. Sales tax returns were prepared by Mr. Gordon based on the figures contained in the sales journal. Anna Di Pacific signed six sales tax returns filed during the periods at issue.

In 1982, the Division of Taxation conducted a sales tax field audit of Di Pacific Steak House for the period March 1, 1979 through November 30, 1981. Because no cash register tapes, guest checks or exemption certificates were produced during the audit, the Division deemed the restaurant's records inadequate to verify reported sales and resorted to a markup audit to estimate taxes due. The markup audit yielded additional taxable sales of \$210,503.38 for the audit period with a tax due on that amount of \$14,796.68. After a Tax Appeals Bureau conference, the tax due was reduced to \$8,856.36, and the petition filed in the matter was withdrawn. Mr. Gordon was the partnership's accountant during this time.

The Division of Taxation submitted 36 proposed findings of fact. In accordance with New York State Administrative Procedure Act § 307(1), these proposed findings of fact have been generally accepted and incorporated into this determination. Proposed findings of fact "14", "21", "25" and "26" have been rejected as containing statements not necessary to the determination. Proposed findings of fact "5" and "24" have been rejected as containing statements not supported by the record as a whole.

OPINION

The Administrative Law Judge found that payments under the tax amnesty program had no effect on assessed taxes which remained unpaid or on the Division's right to assess additional tax, penalty and interest for periods for which petitioners had paid tax under amnesty. In addition, the Administrative Law Judge found that the Division had established that each petitioner's failure to accurately report and pay over sales tax was due to fraud. The Administrative Law Judge also held that petitioners had not established that the amount of sales tax assessed by the Division was incorrect or that the method of audit was unreasonable.

Petitioners except to many of the findings of fact made by the Administrative Law Judge and every one of the conclusions of law. The exception, however, does not contain proposed alternative findings of fact or conclusions of law, and it contains only two paragraphs which purport to be explanations of petitioners' objections to the Administrative Law Judge's determination. Petitioners did not file a brief in support of their exception.

The Division filed a brief in opposition to the exception and additionally requests that its brief, filed at the conclusion of the hearing, be considered by the Tribunal. The Division's brief to the Tribunal is primarily concerned with procedural errors it believes the Administrative Law Judge made at the hearing and its disagreement with certain statements of law which the Division believes were made in the determination. However, the Division also requests that petitioners' exception be denied.

We affirm the determination of the Administrative Law Judge for the reasons stated in that determination.

The arguments we glean from petitioners' far from clear explanatory paragraphs in their exception appear to be as follows: (1) that the only evidence before the Administrative Law Judge supported petitioners' position on the real estate rentals, and (2) that the Division could not argue that petitioners' failure to produce their books and records provided a basis for making an estimated assessment because the Division withdrew its subpoena for those records. With regard to the first argument, we find no reason to disturb the Administrative Law Judge's determination not to credit petitioners' claim that the additional income shown on the Federal partnership returns was real estate rental income. The Administrative Law Judge concluded that the records provided by petitioners on audit and at hearing were inconsistent and unreliable and that the Division's assessment which found these receipts to be unreported taxable sales was supported by documentary and other evidence. There is ample support for this conclusion in the record. For example, the books and records provided by the partnership show no receipts from sources other than taxable restaurant sales, the Division's repeated requests for source documents to verify petitioners' claims resulted only in the production of letters, the authenticity of which was called

into serious question by testimony at the hearing, and the rental receipts which petitioners claimed were partnership receipts were separately reported on the personal income tax returns of petitioners.

We reject petitioners' second argument based on the New York Court of Appeals decision in Matter of Continental Arms Corp. v. State Tax Commn., (72 NY2d 976, 534 NYS2d 362, rev'g 130 AD2d 929, 516 NYS2d 338). In that case the Court overturned the decision of the Appellate Division and concluded that the former State Tax Commission was not required to use its subpoena powers to obtain books and records before it could resort to a test period audit.

Finally, we believe it appropriate to comment on the content of the exception filed by petitioners. The rules of the Tribunal require that an exception contain the grounds of the exception, specifically the findings of fact and the conclusions of law in the determination of the Administrative Law Judge to which the party filing the exception objects (20 NYCRR 3000.11[b][ii]). The purpose of these requirements is to assure that the parties apprise the Tribunal, as well as the opposing party, of their position with respect to the relevant facts, issues and applicable law in the case. Here, petitioners have objected to many of the significant findings of facts made by the Administrative Law Judge and to every one of the conclusions of law in her determination. However, petitioners' exception does not indicate what they believe the facts should be. Except as discussed above, petitioners have not indicated the specific errors they assert were made by the Administrative Law Judge in her determination. Nor has petitioners' position been amplified by the filing of a brief or memorandum of law detailing the elements of their legal argument.

Under these circumstances, the arguments made by petitioners before the Tribunal do not support a modification of the Administrative Law Judge's determination in any way.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Anna Di Pacific and Helen Di Pacific is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Anna Di Pacific and Helen Di Pacific are denied; and

4. The notices of determination and demands which are the subject of the petitions here are sustained.

DATED: Troy, New York
August 30, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner