

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WADING RIVER DELI, LTD.	:	DECISION
	:	DTA No. 807035
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1984	:	
through February 29, 1988	:	

Petitioner Wading River Deli, Ltd., 30 Fireside Lane, East Setauket, New York 11733 filed an exception to the determination of the Administrative Law Judge issued on March 28, 1991 with respect to its petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through February 29, 1988. Petitioner appeared by Peter R. Newman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter brief in response. Petitioner's request for oral argument was denied.

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

ISSUES

1. Whether the failure of the Division of Tax Appeals to hold an immediate hearing when informed of the need for an expedited hearing effectively prevented petitioner from presenting any meaningful defense.

2. Whether the Division of Taxation had been timely notified about a change of address of petitioner and ignored such notification when mailing the notices of determination in question to petitioner, thereby requiring the cancellation of the notices.

FINDINGS OF FACT

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

Petitioner, Wading River Deli, Ltd. (hereinafter "Wading River Deli"), operated a delicatessen selling primarily prepared food in Wading River (Suffolk County), New York. By the time the sales tax audit at issue herein was commenced in mid-1987, this Long Island delicatessen had been operated by petitioner for approximately six years and had five employees. Open seven days per week, the delicatessen's usual business hours were 7:00 A.M. to 9:00 P.M.

The Division of Taxation issued three notices of determination and demands for payment of sales and use taxes due, all dated April 21, 1988, against Wading River Deli. The taxpayer's address shown on each of the notices was Rt. 25A & Wading River Road, Wading River, N.Y. 11792. Two of the three notices have United States Postal Service Forms 3811 stapled to them. These return receipts show the date of delivery to petitioner of April 25, 1988, and the "addressee's signature" appears to be N. Seccadanari.¹

One of the notices of determination dated April 21, 1988 asserted tax due of \$58,947.42, plus penalty and interest. This notice provided the following explanation:

"The tax assessed has been estimated in accordance with the provisions of Section 1138(a)(1) of the Tax Law. Since you have not submitted your records for audit as required by Section 1142 of the Tax Law, the following taxes are determined to be due in accordance with Section 1138 of the Tax Law, and are based upon available records and information."

At the bottom of the notice, taxes, penalty and interest due were itemized for 14 sales tax quarters as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
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¹The affirmative statement in the answer of the Division of Taxation that petitioner refused delivery is not supported by the evidence in the record.

5/31/84 - 484	\$4,207.03	\$1,051.76	\$2,456.28
11/30/84 - 285	4,211.92	1,052.98	2,069.68
2/28/85 - 385	4,278.33	1,069.58	1,916.32
5/31/85 - 485	4,325.00	1,081.25	1,750.68
8/31/85 - 186	4,340.00	1,302.00	1,575.14
11/30/85 - 286	4,364.16	1,309.25	1,408.62
2/28/86 - 386	4,321.33	1,296.40	1,228.17
5/31/86 - 486	4,298.00	1,289.40	1,057.13
8/31/86 - 187	3,929.00	1,100.12	820.54
11/30/86 - 287	4,025.16	1,006.29	697.23
2/28/87 - 387	4,068.33	895.03	565.58
5/31/87 - 487	4,111.00	781.09	432.02
8/31/87 - 188	3,751.00	600.16	270.71
11/30/87 - 288	4,717.16	613.23	191.40

The Division of Taxation did not seek to assess the period ending August 31, 1984, the first sales tax quarter of 1985. A review of the auditor's workpapers shows no tax due for this quarter "because expired". Petitioner, by its corporate officer, John Seccadanari, executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes dated March 2, 1988 which provided as follows:

"That the amount of sales and use taxes due from [petitioner]...for the taxable period March 1, 1984 through May 31, 1985...may be determined at any time on or before September 20, 1988."

The Division of Taxation introduced into evidence sales and use tax returns for six sales tax quarters only: the period ending May 31, 1984, the fourth quarter of 1984; the period

ending August 31, 1984, the first quarter of 1985; the period ending November 30, 1984, the second quarter of 1985; the period ending February 28, 1985, the third quarter of 1985; the period ending May 31, 1985, the fourth quarter of 1985; and the period ending August 31, 1985, the first quarter of 1986. The return for the period ending August 31, 1984 (which was not assessed) was dated September 19, 1984. It does not show an indate stamp by the Division of Taxation. The return for the earlier period ending May 31, 1984 (which was assessed) shows an indate stamp of January 15, 1986.

The second notice of determination dated April 21, 1988 asserted tax due of \$4,717.16, plus penalty and interest, against petitioner for the period ending February 28, 1988, which was the third sales tax quarter of 1988. This notice included the same explanation that was included in the other notice described above.

The third notice of determination dated April 21, 1988 asserted penalty under Tax Law § 1145 in the total amount of \$4,664.24 for the following periods:

<u>Period Ending</u>	<u>Penalty Asserted Due</u>
8/31/85 - 186	\$ 434.00
11/30/85 - 286	436.42
2/28/86 - 386	432.13
5/31/86 - 486	429.80
8/31/86 - 187	392.80
11/30/86 - 287	402.52
2/28/87 - 387	406.83
5/31/87 - 487	411.10
8/31/87 - 188	375.10
11/30/87 - 288	471.72
2/29/88 - 388	<u>471.72</u>
Total	\$4,664.24

This third notice explained that "[t]his notice is in addition to [the two other notices]...."

On August 6, 1987, Henry Glassman, a sales tax auditor, visited petitioner's place of business at around 2:00 P.M. for the purpose of performing a so-called "spot check". The auditor took a reading of the cash register tape in the machine used by petitioner to record sales for the business day, which had begun at around 7:00 A.M. Mr. Glassman testified:

"The sales as of 2:00 [P.M.] for that day were \$976.77. Doing a quick calculation, I felt they were severely underreporting their sales based on their returns filed."

Consequently, the auditor determined that an audit of petitioner's books and records was necessary.

A review of the auditor's log as well as Mr. Glassman's testimony supports the finding that from August 1987 through February 1988, a seven-month period, Mr. Glassman made several attempts to obtain petitioner's books and records for audit. Petitioner's accountant, Gerald Rosenfeld (who also prepared each of the six sales tax returns in the record), was unresponsive and uncooperative. Appointments were arranged by the auditor which would subsequently be cancelled. Finally, on February 23, 1988, Mr. Rosenfeld telephoned Mr. Glassman to advise that he "did not have time to get things together or to do write-ups" and requested a further delay of the audit, which Mr. Glassman refused.

The Commissioner of Taxation and Finance issued a subpoena duces tecum dated February 26, 1988 commanding petitioner to produce, on March 16, 1988, the following documents:

"[A]ll books and records pertaining to your Sales Tax liability for the period under audit [designated on the subpoena as March 1, 1984 through November 30, 1987]. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates & all Sales Tax records."

On March 16, 1988, the return date for the subpoena, the auditor's log noted that John Seccadanari appeared without producing any books or records.

As a result of the failure of petitioner to produce any books and records for audit, Mr. Glassman performed a one-day observation test of sales made at petitioner's premises on April 13, 1988.² The auditor's log noted the following:

²The brief narrative portion of the audit file which was repeated in the answer of the Division of Taxation as an "affirmative statement" incorrectly noted that the observation test was performed on April 17, 1988, which was a Sunday. In fact, the auditor's log noted that the test was performed on April 13, 1988, which was a Wednesday. The variance is explained by the fact that the "3" in the "13" in the log is difficult to read and looks like a "7." However, the entry in the log for the observation test is preceded by one for 4/5 and followed by one for 4/14. Furthermore, it is clear that the observation test was performed on a weekday since the auditor would later make an adjustment for Sunday sales as noted, infra.

"Observation performed. Appeared to be new owners. Speaking to them, one of whom is known as Frank Montanez, it was disclosed that they are planning to purchase the deli for \$140,000, pending that they get a beer license. The deli is currently being operated under a managerial agreement. Deli appears to have expanded its grocery inventory. Menu of prepared food the same."

The observation of sales at petitioner's premises resulted in the Division of Taxation calculating audited taxable sales totalling \$946,198.04 for the four-year audit period, March 1, 1984 through February 29, 1988 (except for the sales tax quarter ending August 31, 1984 which had expired as noted above). This calculation was based upon the average daily taxable sales figure of \$691.16, which was calculated as follows:

Taxable sales per observation	\$744.39
Sunday allowance $\frac{6\frac{1}{2}}{7}$	<u>92.85%</u>
Average daily taxable sales	\$691.16

Mr. Glassman testified only briefly at this hearing. In fact, neither the representative for the Division of Taxation nor petitioner's representative were inclined to have him testify. The following exchange occurred:

ALJ: "Now, Mr. Larry Newman, I believe you wish to call Mr. Glassman at this time?"

Mr. L. Newman: "You [Mr. P. Newman] want to call him?"

Mr. P. Newman: "No, you."

After a brief pause, the colloquy continued as follows:

ALJ: "It might be helpful to have some, at least, brief testimony."

Mr. L. Newman: "If the Judge feels it's helpful, all right. We will give you a general idea, okay."

ALJ: "Okay. Mr. Glassman, would you step up to the witness' chair...."

As a result, there is only a minimal explanation of the audit report. (For example, there is no specific explanation for the Sunday allowance noted above.) Furthermore, when petitioner's representative was given the opportunity to cross-examine Mr. Glassman, he asserted that he could not "really effectively cross-examine as to audit techniques and as to number of attempts made" because of the death prior to the hearing of John Seccadanari. Consequently, in lieu of

cross-examination of Mr. Glassman, petitioner's representative requested and received permission to submit with his brief an analysis of the audit report and workpapers³ which would disclose any "inconsistencies within itself and for possible mathematical inaccuracies or possible irrational assumptions." However, no such analysis was provided nor, in fact, was a brief submitted by petitioner.

By a letter dated January 30, 1990, the Division of Tax Appeals notified petitioner's representative, petitioner and the Division of Taxation's representative that it anticipated scheduling the hearing in this matter during either the week of June 18, 1990 or the week of July 30, 1990.⁴ Mr. Peter Newman was advised to indicate on the bottom of the letter any preferred day or week and/or any inconvenient day or week. By a letter dated February 8, 1990, on behalf of Mr. Peter Newman, his legal assistant wrote to the calendar clerk of the Division of Tax Appeals as follows:

"Our client, Mr. John Seccadanari, is suffering from liver cancer, and his wife has requested that we schedule the hearing as soon as possible since he is a necessary witness, and his disease appears to be progressing rapidly. Mr. Ranalli advised me that the attorney for the Tax Department, Lawrence A. Newman, was scheduled to be in New York City for hearings during the week of March 19, 1990 and if there were any cancellations, we would be given the first opening."

Unfortunately, it was not possible to schedule this hearing during the week of March 19, 1990 because no adjournment occurred in time to give the parties adequate advance notice to prepare for a hearing during such week.⁵

³Mr. Peter Newman complained that it was not until the hearing that the audit report and workpapers were made available to him. (As a result, the auditor retained these documents, Exhibit "O", after the hearing in order to make a copy for Mr. Newman. The original was later resubmitted to the administrative law judge.) It is observed that petitioner defaulted at the conciliation conference scheduled for February 16, 1989; neither petitioner nor a representative appeared. The conciliation conference process (see, 20 NYCRR part 4000) serves to air and disclose the parties' positions in a less formal setting, and petitioner's default might explain why it was not until the hearing that Mr. Peter Newman apparently saw the audit report and workpapers for the first time.

⁴The perfected petition was dated June 7, 1989 and signed by Mr. Peter Newman. It was received by the Division of Tax Appeals on June 12, 1989. The answer was dated October 18, 1989.

⁵The letter of February 8, 1990 was not introduced into the record by petitioner, but in order to make the record complete and provide a basis to address Mr. Peter Newman's contention, pursuant to the State Administrative Procedure Act § 306(4), official notice was taken of this letter as well as the letter dated January 30, 1990 described, supra.

Neither Jane Seccadanari nor Nives Seccadanari, who were present at the hearing herein, testified on behalf of petitioner.

Petitioner offered no evidence to prove that it ever notified the sales tax auditor or the Division of Taxation of a new address to which letters and notices from the Division of Taxation should be mailed. In fact, included in the audit papers (Exhibit "O") is a handwritten letter dated March 23, 1988 from John Seccadanari to an unidentified Division of Taxation employee, "Ms. Kotfica", concerning Mr. Seccadanari's partial payment on behalf of petitioner of "back sales tax". The address used by Mr. Seccadanari for petitioner in this last communication from petitioner in the audit file is the address to which the notices of determination, detailed above were sent.

We find the following additional facts:

The hearing held on June 21, 1990 took place just over one year after petitioner filed the petition on June 7, 1989, and only three months after the date petitioner's representative requested the expedited hearing.

John Seccadanari was alive at the time petitioner defaulted at the conciliation conference on February 16, 1989.

The handwritten letter from Mr. Seccadanari to a Division of Taxation (hereinafter "Division") employee, dated March 23, 1988, referred to by the Administrative Law Judge in his fact findings, mentioned that the business in question was soon to be sold, with the closing date set for sometime in June of 1988.

The Division's Exhibit "N" consists of 5 documents.⁶ The fourth document, a Notification of Sale, Transfer or Assignment in Bulk lists the scheduled date of sale of the business as July 1, 1988.

One page of the Division's Exhibit "O" consists of a Consent Form Extending the Period of Limitation for Assessment of Sales and Use Taxes Due, dated February 25, 1988 and signed by John Seccadanari on March 2, 1988 (approximately 1.5 months prior to the mailing of the notices). The Form, which lists the address of the corporation as Route 25A and Wading River, extended the assessment period up to September 20, 1988. There is no indication on this form signed by Mr. Seccadanari that the address of the corporation was scheduled to change in the imminent future, or at any time during the extended period.

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The Administrative Law Judge agreed orally (*see*, Tr., pp.28-30), to number these documents 1-5, but they do not appear to have been so identified. However, the transcript reveals which of the documents the Division wished to correspond with which number.

The latest tax returns introduced by the Division which were filed by petitioner, list the Route 25A and Wading River Road address, the same address to which the notices were sent (see, Division's Exhibits "H", "I", "J", "K", "L", "M", quarterly sales and use tax returns, the latest of which is for the period June 1, 1985 to August 31, 1985).

The Division's Exhibit "A" consists of petitioner's petition for redeterminations of the deficiency or for a refund, signed by John Seccadanari, dated July 16, 1988, and received by the Bureau of Conciliation and Mediation Services (hereinafter the "BCMS") on July 22, 1988. The notice numbers this petition lists as pertinent to the petition -- S880421000F, S880421001F, and S880421002F -- are the same numbers listed on the notices sent to petitioner Wading River Deli, at the Route 25A and Wading River Road address.

OPINION

The Administrative Law Judge concluded that the Division of Tax Appeals took reasonable steps to schedule the hearing at an earlier date, as requested by petitioner, Wading River Deli, and that the fact that the hearing was held after the death of Mr. Seccadanari did not in any way prejudice petitioner's defense.

The Administrative Law Judge found meritless petitioner's argument that the notices of determination were not mailed to its last known address.

Finally, in view of the fact that petitioner, despite ample opportunity, did not offer evidence that the assessments themselves were incorrect, the Administrative Law Judge sustained the notices.

On exception, petitioner asserts that the petition for a revision of determinations or for refund of sales and use taxes due should be sustained, in view of the facts that the Tax Appeals Tribunal [Division of Tax Appeals]⁷ committed error in failing to schedule an immediate hearing when notified of the illness and probable imminent death of petitioner's principal officer, John Seccadanari; and that the Tax Commission [Division of Taxation] had been timely notified about a change of address of petitioner and ignored such notification.

⁷Terms used by petitioner in its filed exception and brief in support have been printed in the original, and, where necessary, corrected in brackets following the original terms used.

Petitioner argues that in the interests of fair play in administrative proceedings, "where a person has been rendered incompetent solely through the acts of the Tax Commission [Division of Tax Appeals], i.e., the incompetence being death of the key witness and the act being the failure to promptly schedule a hearing," it is improper to admit evidence which could have been rebutted, had the person survived (see, Petitioner's brief, p. 3).

In the absence of Mr. Seccadanari, petitioner contends, it could not be proven that the State Tax Commission [Division of Taxation] had been notified of the change of address; a situation which petitioner avers could have been avoided had [the Division of Tax Appeals] scheduled the hearing earlier, as requested, while Mr. Seccadanari was alive. In any case, petitioner claims that the Division knew petitioner was no longer located at Route 25A and Wading River Road because the Division was aware of the sale of the business. Accordingly, the Division should have concluded that the address of petitioner, as the selling corporation, would have changed.

In response, the Division asks that the Administrative Law Judge's findings of fact and conclusions of law be upheld in their entirety.

First, the Division asserts that, contrary to petitioner's claimed inability to present a viable defense due to the failure of the Division of Tax Appeals to schedule a hearing while Mr. Seccadanari was alive, the Division of Tax Appeals made every effort possible to give preference to the matter. Further, the Division maintains that petitioner failed to avail itself of alternate strategies to present a viable defense once the hearing was held. Moreover, the Division argues that petitioner must never have intended to address the merits of the audit, as that would have required the production of books and records which petitioner could not claim depended on the presence of Mr. Seccadanari.

Secondly, the Division refutes petitioner's claim that the notices were mailed to the wrong address, citing the fact that shortly before the notices were mailed, the Division received a letter from Mr. Seccadanari which stated his return address as Route 25A and Wading River Road. In

addition, an officer of the corporation⁸ timely responded to the notices and requested a conciliation conference, thereby preserving the corporation's rights to administrative review.

Finally, the Division argues that petitioner has ignored its burden to disprove the assessment, based on the fact that no business records were at any time produced by petitioner -- not for the conciliation conferee, not for the Administrative Law Judge at the hearing, and not by way of a critique of the audit and workpapers, even after having been granted leave to submit same to the Administrative Law Judge in lieu of cross examining the auditor at the hearing below.

We affirm the determination of the Administrative Law Judge.

Section 1147(a)(1) of the Tax Law states, in relevant part:

"[a] notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed"

Section 1147(a)(1) also advises that such notices should be

"addressed to such person at the address given in the last return filed by him pursuant to the provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable."

In other words, the notices must be sent to petitioner's "last known address" (see, Matter of Karolight, Tax Appeals Tribunal, February 8, 1990).

Once the Division establishes that, upon their records, they have complied with this statutory mailing directive, the burden is on petitioner to rebut the Division's proof with probative evidence substantiating any allegations of error (see, Matter of American Cars 'R' Us v. Chu, 147 AD2d 797, 537 NYS2d 672).

Despite petitioner's plea, we find, based on the following reasons, that the Division properly addressed the notices of determination to petitioner at Route 25A and Wading River Road.

Such address was on all (including the most recently filed) of the quarterly sales and use tax returns filed by petitioner which were introduced into evidence (see, Division's Exhibits "H",

⁸This officer is not named by the Division in its letter brief, but an examination of the Division's Exhibit "A" reveals that the officer was John Seccadanari.

"I", "J", "K", "L", "M"). Petitioner has not alleged, much less established, that it filed later returns using a different address.

Such address was on the consent form dated February 25, 1988 and signed by John Seccadanari March 2, 1988 extending the assessment period to September 20, 1988 for taxes due March 1, 1984 through May 31, 1985 (see, Division's Exhibit "O").

Such address was given by John Seccadanari himself as the corporation's return address, on a handwritten letter to the Division, February 23, 1988, less than one month prior to the sending of the notices (see, Division's Exhibit "O"). In this letter, Mr. Seccadanari noted that the business in question was to be sold, with the closing set for sometime in June.⁹

Therefore, we conclude that the evidence shows that when the Division sent the notices in April of 1988, it complied with section 1147(a)(1) of the Tax Law because the notices were mailed to the address given in the last return filed by petitioner. Further, this was the address given by petitioner's officer in the most recent correspondences from petitioner. Worthy of note, though not dispositive of the Division's compliance with the mailing statute, is that petitioner still, in fact, occupied the location to which the notices were sent at that point in time. We note as support for this, that the auditor listed in his log of December 7, 1988 (see, Division's Exhibit "O") the fact that the bulk sale occurred after the assessments were sent.

The certified mailing of the properly addressed notices was presumptive evidence of the receipt of same by [a representative of] Wading River Deli (see, Tax Law § 1147(a)(1); Matter of Mareno v. State of New York Tax Commn., 144 AD2d 114, 534 NYS2d 453; Matter of Ruggerite v. State Tax Commn., 97 AD2d 634, 468 NYS2d 945, aff'd 64 NY2d 688, 485 NYS2d 517 ["mailing of a notice of determination . . . gives rise to a rebuttable presumption of receipt"]).

Though Tax Law § 1147 does not require us to demand proof of the Division of actual receipt of properly mailed notices of determination by petitioner (see, McPartlin v.

⁹The sale did not actually take place until July (see, the Division's Exhibits "N", p. 5, and "O", notes of Auditor, November 29, 1988).

Commissioner, 653 F2d 1185, 81-2 USTC ¶ 9569; Zenco Eng'g. Corp. v. Commissioner, 75 TC 318 [law presumes delivery of a properly addressed piece of mail]), in this case, we have such proof.

John Seccadanari responded to all three of the notices in question -- notice numbers S880421000F, S880421001F, and S880421002F -- by filing a petition with BCMS, received July 22, 1988, for a redetermination or refund of sales and use taxes.

We find that the two postal Forms 3811 accompanying the Division's copies of notice numbers S88042100F and S880421001F, signed by "N. Seccadanari," together with the petition filed with BCMS regarding all three notices, establishes receipt of the notices in question (cf., Matter of Karolight, supra [where the Tribunal found the notice in question had not been delivered as it was not referred to in the petition and was returned unclaimed]).

Therefore, we conclude not only that the Division properly addressed the notices to petitioner, but also that petitioner actually received the notices. Further, we find that petitioner failed to rebut respondents' proof with any substantive evidence (see, Matter of American Cars 'R' Us v. Chu, supra, 537 NYS2d 672, 674).

Petitioner's claims (see, Petitioner's brief, pp. 2-3) that the Division knew petitioner was no longer located at Route 25A and Wading River Road are without merit.

Petitioner offers as proof of the Division's knowledge a memo dated June 13, 1988, addressed to Bernie Leffler (District Audit Administrator), Attention: Al Fesefeldt (Chief, Sales Tax Section), from Lawrence R. Damiano (Tax Audit Administrator, NYS) (see, Division's Exhibit "O"). This memo regards an impending field audit of petitioner about which the Division had recently received a bulk sale notification. The fact that petitioner's representative has referred to this memo to prove that the Division was aware of petitioner's new address when it sent the notices of determination has confounded this Tribunal. Dated June of 1988, this memo was written two months after the notices were sent to petitioner at the Route 25A and Wading River Road address and, yet, it continues to refer to petitioner as

located at this same address. Therefore, if anything, this memo indicates that the Division was not aware of any address change in June of 1988, much less in April.

Equally puzzling, is petitioner's reliance on "the 'agent's' workpapers" (see, Petitioner's brief, p. 2) to prove that the Division knew about the address change to 30 Fireside Lane, East Setauket, New York 11733. Though petitioner has not referred the Tribunal to a specific date or page of the workpapers of the auditor, a thorough examination of same proves only that the auditor was not apprised of a change in location; rather, that the auditor at all times believed the corporation to be located at Route 25A and Wading River Road, while the home address of its officers was at all times believed to have been 30 Fireside Lane (see, e.g., Sales Tax Audit Report Information Sheet [Division's Exhibit "O"]; see also, notes of November 29, 1988 [Division's Exhibit "O"], wherein the auditor lists the date of sale as July 12, 1988; notes of December 7, 1988 [Division's Exhibit "O"] where the auditor writes that the bulk sale occurred after the initial assessments, i.e., the April 21, 1988 assessments in question, were sent).

For the same reasons, we reject petitioner's assertion that the fact that copies of the same notices were sent to the corporate officers at 30 Fireside Lane is dispositive of the fact that the Tax Commission [the Division of Tax Appeals or the Division of Taxation] was "at all times aware" of the sale of the Wading River Deli (see, Petitioner's brief, p. 3). As we stated, it is clear that the auditor believed the 30 Fireside address to be the officers' home address and that, therefore, his knowledge that the officers could be reached at that address had nothing to do with the proper address of the Wading River Deli itself.

Finally, we reject petitioner's assertion (as proof of the Division's awareness of the change in address) that "[i]t is axiomatic that when a business is sold and a new purchaser takes over its former operations, the address of the selling business will change" (Petitioner's brief, p. 3). We note that both the purchaser (see, Division's Exhibit "N", p. 5) and the auditor (see, Division's Exhibit "O", auditor's notes, November 29, 1988) list the sale as occurring July 12, 1988. This sale date is nearly three months after the notices were sent, rendering petitioner's argument here irrelevant.

Similarly, we find no merit in petitioner's claim that the failure to schedule an earlier hearing unfairly prejudiced (in petitioner's words, "hamstrung") their defense.

Petitioner goes so far as to accuse the Tax Commission [Division of Tax Appeals] of "render[ing] [Mr. Seccadanari] incompetent" because of the "failure to promptly schedule a hearing" (see, Petitioner's brief, p. 3). There is no evidence whatsoever that the Division of Tax Appeals -- either willfully or not -- unduly delayed the hearing until after Mr. Seccadanari passed away. First, it should be noted that petitioner did not request an expedited date for hearing until petitioner had been notified by the Division of Tax Appeals that a hearing would be scheduled. Having filed a petition in June of 1989, petitioner was presumably aware that a hearing would eventually be scheduled. Petitioner has not indicated that there was anything preventing it from requesting an immediate hearing prior to February 1990. The Administrative Law Judge was persuaded that reasonable efforts were made to reschedule the hearing, but that the Division of Tax Appeals was ultimately unable to do so. In the letter from its representative dated February 8, 1990, regarding Mr. Seccadanari's ill-health, petitioner requested a hearing date for the very next month. Due to the fact that there were no adjournments in the hearing schedule which were known of sufficiently in advance so as to give the parties adequate time to prepare, it was not possible to schedule the hearing until June 21, 1991, just three months after the March 19, 1990 date requested by petitioner. Furthermore, the hearing was held just barely a year after petitioner filed its petition.

We find persuasive the following factors, some of which were noted by the Division, which, taken together, validate the Division's contention that petitioner did not explore alternate strategies to "present a viable defense" (see, Division's letter brief, p. 1).

First, petitioner did not cross-examine the auditor at the hearing except to ask him when he made his observations of the Wading River Deli.

Second, although both Jane Seccadanari and Nives Seccadanari were present at the hearing, neither testified on behalf of petitioner. We note, in addition, that petitioner did not even utilize these witnesses to try to establish why John Seccadanari's testimony was so essential.

Third, petitioner did not submit a brief and/or rebuttal of the auditor's assessment to the Administrative Law Judge, despite leave to do so.

Fourth, petitioner defaulted at the conciliation conference scheduled for February 16, 1989, when John Seccadanari was still living.

Fifth, when petitioner's books and records were subpoenaed, John Seccadanari appeared on the appointed date, March 16, 1988; however, he brought no records of any kind with him.

Finally, the record reflects a series of delays and dilatory tactics on behalf of petitioner in response to the Division's attempts to review petitioner's books and records. This complete lack of cooperation and production is what necessitated the auditor's one day observation test to determine sales and use taxes due.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Wading River Deli, Ltd. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Wading River Deli, Ltd. is denied; and
4. The three notices of determination and demand for payment of sales and use taxes due, dated April 21, 1988, are sustained.

DATED: Troy, New York
November 27, 1991

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

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

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