STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TOP SHELF DELI, INC. **T/A BURNS PARK DELI**	:	DECISION DTA No. 807115
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 June 1, 1984 through May 31, 1987	:	

Petitioner Top Shelf Deli, Inc. T/A Burns Park Deli, 5089 Merrick Road, Massapequa, New York 11758 filed an exception to the determination of the Administrative Law Judge issued on April 18, 1991 with respect to its 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 June 1, 1984 through May 31, 1987. Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

Both petitioner and the Division of Taxation filed briefs. Petitioner filed an additional letter brief as well. 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

I. Whether the first power of attorney executed by petitioner is valid, thus validating Mr. Silver's consent to extend the audit period beyond the statute of limitations, or whether, because the power of attorney is not valid, such extension was impermissible, and the resulting assessment for that period necessarily void.

II. Whether the last quarterly period at issue was improperly assessed because the Division of Taxation did not properly request petitioner's books and records for this period.

III. Whether in the absence of complete and adequate books and records the Division of Taxation employed an audit method reasonably calculated to arrive at petitioner's tax liability and whether it was improper or irrational for the Division of Taxation to attribute five percent of petitioner's sales to catering services.

IV. Whether taxes were properly determined to be due in connection with a transfer of a walk-in refrigerator to petitioner, or whether this asset qualified as a "capital improvement" and was, thus, excluded from the tax.

V. Whether petitioner has established any basis upon which penalties assessed may be abated in part or in whole.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "5," "9" and "16" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioner, Top Shelf Deli, Inc. T/A Burns Park Deli, operates a delicatessen located at 5089 Merrick Road, Massapequa, New York. Petitioner is principally involved in the sale of food and drink, including sandwiches and other items sold for take out, as well as beer, soda, cigarettes and candy. Petitioner does not provide tables allowing on-premises consumption of food or drink. Petitioner is open seven days per week during the hours of approximately 6:00 A.M. to 10:00 P.M.

We modify finding of fact "2" to read as follows:

> The Division of Taxation (hereinafter the "Division") commenced its audit of petitioner with the issuance of a letter confirming a scheduled audit appointment for May 19, 1987 at 9:00 A.M. Although the letter itself is not dated, the auditor's action sheets, a contemporaneously maintained handwritten log summarizing the auditor's activities and contacts with petitioner and/or its representative during the audit, indicate that the audit appointment letter was sent pursuant to and to confirm a telephone

> conversation which the auditor had with petitioner's representative on April 22, 1987, at which time the May 19, 1987 audit appointment was scheduled. Apparently, the letter was, in fact, received by petitioner's representative sometime prior to the appointment. Petitioner's representative did not object to the introduction into evidence of the confirmation letter by the Division, although he did point out that the letter was not dated. This letter lists the period under audit as "6/1/84 to Present," and, together with an attached check list, specifies those records necessary for audit as including "all books and records pertaining to your Sales Tax liability for the period under audit;" specifically, a power of attorney, general ledger, cash receipts journal, cash disbursements journal, Federal income tax returns, sales tax returns, purchase invoices, cash register tapes, all exemption certificates, withholding tax returns, LILCO bills and bank statements.[1]

The auditor testified that petitioner provided the records requested except for cash register tapes, sales invoices, or any other records by which the amount of taxable sales could be verified. The auditor was advised that while cash registers were used in petitioner's business, the tapes were not retained by petitioner during the period in question. At the first audit meeting, as well as at subsequent meetings, the auditor orally advised petitioner's accountant that the audit period spanned June 1984 through and including May 1987.

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[1]The Administrative Law Judge's finding of fact "2" read as follows:

> "The Division commenced its audit of petitioner with the issuance of a letter scheduling an audit appointment for May 19, 1987 at 9:00 A.M. The auditor's action sheets, a contemporaneously maintained handwritten log summarizing the auditor's activities and contacts with petitioner and/or its representative during the audit, indicate that the audit appointment letter was sent on April 22, 1987. The appointment letter was sent to confirm the auditor's telephone conversation with petitioner's representative wherein the May 19, 1987, 9:00 A.M. audit appointment date was agreed upon. The audit appointment letter itself specifies the period under audit to be "6/1/84 to present" and, together with an attached check list, specifies those records necessary for audit as including "all books and records pertaining to your Sales Tax liability for the period under audit." More specifically, petitioner was requested to make available a power of attorney, general ledger, cash receipts journal, cash disbursements journal, Federal income tax returns, sales tax returns, purchase invoices, cash register tapes, all exemption certificates, withholding tax returns, LILCO bills and bank statements for the period under audit."

We modified finding of fact "2" because there is no evidence of the date the letter was sent to petitioner.

Faced with a lack of sales records from which to directly verify taxable sales, the auditor concluded that petitioner's records were inadequate and determined to conduct the audit by resort to indirect auditing methodologies, in this case specifically an observation test of take-out food sales coupled with a markup test with respect to beer, soda, cigarette and candy sales.

We modify finding of fact "5" to read as follows:

> With respect to sales of take-out foods, two Division auditors conducted observations of petitioner's take-out food sales on three different dates, to wit: Thursday, August 13, 1987, Wednesday, November 18, 1987, and Monday, February 29, 1988. The first two observations covered the entire period of time that petitioner was open on such dates, while the third observation date covered the period 6:00 A.M. until 2:00 P.M. These three dates, each in a different season of the year, were selected (at petitioner's then-representative's request) in an effort to reduce the possibility that any particular day of observation would be atypical in light of seasonal or other factors. On each of the observation days, the Division's auditors tallied every taxable item sold, multiplied the total number of each of such particular items sold by its selling price, and thus arrived at total taxable sales of take-out foods. Because the third observation only lasted until 2:00 P.M., the auditors compared gross take out sales per such observation with average gross take-out sales up to 2:00 P.M. on each of the prior two observation days. The auditors found such sales on the third observation date to be 12% less than take-out sales as averaged for the first two days of observation and, consequently, reduced gross take-out sales by such 12% amount. The Division's observations resulted in the calculation of average daily taxable sales of take-out foods of $497.95. The Division multiplied such figure by a six-day work week,[2] in turn by 13 weeks per quarter and, ultimately, by the number of quarters in the audit period[3] to arrive at audited taxable

[2]Although petitioner was open seven days per week, the Division's auditor assumed that sales on Saturdays and Sundays were half of the amount of sales on any other day, hence resulting in the six-day week actually used for audit projection.

[3]It should be noted that although the notice of determination lists the first quarter of the audit period as "period ending 8/31/84," the auditor actually assessed petitioner's business from August 1, 1984 rather than June 1, 1984, since petitioner did not acquire the business until the latter part of July 1984. Thus, the tax supposedly assessed for the first quarter audited in truth reflects the tax due for only the last month of that quarter, resulting in a 10-month audit year.

> sales of take-out foods. This figure was reduced by 10% per year to allow for price increases due to inflation,[4] resulting in audited taxable sales of prepared foods for the audit period in the amount of $400,052.00.[5]

The auditor determined that petitioner maintained all purchase invoices for purchases of beer, soda, cigarettes and candy, and the auditor utilized such invoices in auditing these items via a markup audit technique. More specifically, the auditor first computed the individual percentages of beer, soda, cigarette and candy purchases as compared to all purchases. The auditor then compared the then-most current purchase prices for such items (from August 1987 purchase invoices), against then-current selling prices for such specific items (for August 1987). This comparison yielded a percentage of profit and a markup for each of the four items. From these calculations, the auditor computed total sales of beer, soda, cigarettes and candy over the period of audit to have been $122,690.00.

While conducting the observation on August 13, 1987, the auditors observed a telephone order being placed for a six-foot hero submarine sandwich. Upon this basis, the Division's auditors concluded that petitioner provided catering services and determined, based upon the auditors' experience in auditing other delicatessens in the same area, that an amount equal to 5% of petitioner's audited taxable sales constituted sales from catering services. One auditor testified that she had audited approximately 50 similar delicatessens in the same geographic location as petitioner, each having operations similar to that of petitioner. Five percent of audited taxable sales resulted in catering sales of $26,137.00.

Petitioner's president testified at hearing that he has "limited" catering sales consisting of preparing a six-foot hero submarine sandwich as a special order approximately once every two months. No records specifying catering sales were introduced in evidence.

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[4] Although the Consumer Price Index for the years in question reflects increases of less than 5% per year, the auditor nonetheless allowed the 10% inflation factor per year as described.

[5] We modified finding of fact "5" by adding footnote "3" at the second-to-last sentence in order to explain the auditor's calculations.

We modify finding of fact "9" to read as follows:

> The auditor totaled catering sales, audited sales of beer, soda, cigarettes and candy per markup, and audited sales of take-out foods per observation. After subtracting therefrom reported taxable sales of $230,807.00, the auditor arrived at additional audited taxable sales of $318,072.00 and a reporting error rate of 137.81%. This error rate was applied to reported taxable sales per quarter, tax due thereon was computed and, after allowing credit for tax paid per quarter, an underpayment of tax due in the amount of $26,048.78 was determined.[6]

Petitioner commenced operating the business in 1984; however, the sale of the business's assets to petitioner was not formally completed until July of 1985 when the State Liquor Authority granted petitioner a license allowing the sale of alcoholic beverages. The auditor determined use tax to be due in connection with petitioner's acquisition of fixed assets when it purchased the business. The auditor's determination was based on a contract of sale for the premises between petitioner and Burns Park Deli, dated July 26, 1984, and on a bill of sale dated July 23, 1985 including a schedule of furniture and fixtures, leasehold improvements and machinery and equipment purchased by petitioner. The bill of sale reflects the following purchase price allocation:

"Furniture & Fixtures	$15,000
Machinery & Equipment	15,000
Restrictive Covenant	10,000
L/H Improvements	40,000
Inventory	15,000
Goodwill	-0-
	$95,000"

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[6]The Administrative Law Judge's finding of fact "9" read as follows:

> "The auditor totaled catering sales, audited sales of beer, soda, cigarettes and candy per markup, and audited sales of take-out foods per observation. After subtracting therefrom reported taxable sales of $230,807.00, the auditor arrived at additional audited taxable sales of $318,072.00 and a reporting error rate of 81%. This error rate was applied to reported taxable sales per quarter, tax due thereon was computed and, after allowing credit for tax paid per quarter, an underpayment of tax due in the amount of $26,048.78 was determined."

We modified finding of fact "9" to accurately reflect the auditor's calculations as generating an error rate of 137.81%, not 81%.

Petitioner paid tax based on the allocation of $15,000.00 to furniture and fixtures acquired. However, the bill of sale reflects total assets acquired (under the categories furniture and fixtures, machinery and equipment, and leasehold improvements) to have been $70,000.00, with this latter amount reflected on petitioner's Federal income tax returns and on its books. With the exception of a hot water heater, the auditor considered all of the items on the bill of sale to be trade fixtures or furniture and fixtures properly subject to tax since such items were sold to petitioner as the new owner and did not remain in the ownership of the landlord. After reducing the $70,000.00 total amount by the $15,000.00 reported by petitioner, and further by the hot water heater not subjected to tax, the auditor calculated use tax in the amount of $3,644.75 due on the balance of the items. This amount was included as part of the tax assessed for the quarterly periodended August 31, 1984. An itemized list of the assets in question is as follows:

"SCHEDULE OF THE FOREGOING BILL OF SALE

F & F	Steam Table - 3 section	$ 3,000
M & E	Microwave Oven - Welbilt Micromite Mod #2000 S/N 511547	500
M & E	Slicing Machine - Globe Mod 400 S/N 413776	1,500
M & E	Slicing Machine - Globe Mod 400 S/N 410498	1,500
L/H	Meat Case 8' Refrigerated/Generator	5,000
L/H	Frozen Food Case - Universal	5,000
L/H	Walk-in Refrigerator Box - Coson approx. 10' x 10' w/ Generator	17,500
M & E	Counter Top Refrigerator 2 dr.	1,000
M & E	Gas Range 6 burner w/oven	3,000
L/H	Range Hood & Fire Extinguisher System for Range	2,500
L/H	3 section stainless steel sink	2,000
L/H	1 counter sink	1,000
L/H	Hot Water Heater[7]	1,500
L/H	13 Sections 5 Shelf Shelving/3 Sections 4 Shelf Shelving (Wood)	2,000
L/H	All counters - bank and front	2,000
M & E	Coffee Maker (Bunn - Property of Ostend Coffee)	500
--	Milk Case - Property of Dellwood Dairy	--
--	Coca Cola Display Case - Property of Coca Cola Co.	--
--	Potato Chip Rack - Property of Wise Potato Chip Co.	--
--	Cigarette Racks - Property of R. J. Reynolds Co.	--
M & E	Toaster	500
F & F	Pots, Pans, Skillets, Plastic Bins	500
F & F	Cooking Utensils	500
F & F	Meat Wrap Dispensers - 2	500
M & E	Heavy Duty Can Opener	500

[7]Not subjected to tax by the auditor.

F & F	Fire Extinguishers	1,500
F & F	Sandwich Sign	500
F & F	2 Outdoor Signs	5,000
F & F	Rubbish Containers - 4	500
F & F	Paper Goods - Catering, Salad Containers, etc.	2,000
--	Stock - Groceries, Beer, Soda, Cigarettes, etc.	--
F & F	Mops, Pails, Brooms	1,000
L/H	Barbeque Spit	1,500
M & E	Deep Fryer	1,500
M & E	Food Chopper	1,500
M & E	Globe Scale	1,500
M & E	Sony Cash Register	1,500
	Total L/H Improvements, M & E, F & F	$70,000"

On June 9, 1987, petitioner's president, one Michael Saas, executed a power of attorney appointing John Cortopassi, CPA, and/or Kenneth Silver, CPA, of the firm of Kenneth S. Silver & Company, to represent petitioner with respect to the then-ongoing sales tax audit. This power of attorney specifies these individuals as representing petitioner for the "sales tax period from 6/1/84 to present".

Two validated consents extending the period of limitations on assessment were executed on petitioner's behalf by Kenneth S. Silver. The first of these consents was executed on June 14, 1987, and allows assessment of sales and use taxes for the period June 1, 1984 through November 30, 1984 to be made at any time on or before March 20, 1988. The second consent was executed on January 22, 1988 and allows assessment of sales and use taxes for the period June 1, 1984 through February 28, 1985 to be made at any time on or before June 20, 1988.

A second power of attorney appointing Kenneth S. Silver and John Cortopassi was offered in evidence. This power is identical to the first such power appointing these representatives, save for the date of execution being July 26, 1989 and for specifying the period to be "sales and use tax for the period 6/1/84 to 5/31/87" (emphasis added).

On June 2, 1988, the Division of Taxation issued to petitioner two notices of determination and demands for payment of sales and use taxes due. The first such notice assesses total tax due (sales tax plus use tax) as determined on audit in the amount of $29,693.53, plus penalty and interest, for the period June 1, 1984 through May 31, 1987. The second notice assesses

"omnibus" penalty for the sales tax quarterly periods spanning June 1, 1985 through May 31, 1987.

Petitioner operates its business utilizing a cash payroll, and also makes cash payouts for certain purchases. Petitioner's method of filing its sales and use tax returns involves totaling its bank deposits, plus cash payouts, to arrive at total sales. Petitioner's accountant estimates that 38% of such sales represent taxable sales, and the resultant amount (38% x total sales) is reported as taxable sales with tax calculated and remitted thereon.

We modify finding of fact "16" to read as follows:

> Various entries in the auditor's action sheets make reference to audit meetings with petitioner's accountant-representative. Two of the entries specifically note that a "list [letter] of items needed" was left with the accountant, although the period covered by these lists is not indicated. The auditor testified that it was at these meetings that she both provided petitioner's representative with a list of items (various records and information) necessary to the ongoing conduct of the audit and specifically advised the representative that the audit period spanned June 1, 1984 through and including May 31, 1987. The auditor's action sheets confirmed the initial audit appointment was set for May 19, 1987 and that several audit appointments between the auditor and petitioner's representative occurred thereafter throughout 1987 and into and including 1988. The audit report indicates that penalty was assessed in this matter based upon the substantial amount of underreporting determined upon audit as well as the discussed inadequacy of petitioner's records vis-a-vis sales.[8]

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[8]The Administrative Law Judge's finding of fact "16" read as follows:

> "Various entries in the auditor's action sheets make reference to audit meetings at which time the auditor provided petitioner's representative with a list of items (various records) necessary to the ongoing conduct of the audit. The auditor testified that during these various audit meetings, she consistently left a list of materials or information needed with the representative and also specifically advised the representative that the audit period spanned June 1, 1984 through and including May 31, 1987. The auditor's action sheets confirmed the initial audit appointment was set for May 19, 1987 and that several audit appointments between the auditor and petitioner's representative occurred thereafter throughout 1987 and into and including 1988. The audit report indicates that penalty was assessed in this matter based upon the substantial amount of underreporting determined upon audit as well as the discussed inadequacy of petitioner's records vis-a-vis sales."

(continued...)

OPINION

The Administrative Law Judge determined that the power of attorney appointing Mr. Silver and the consents he signed extending the assessment period were valid. In fact, the Administrative Law Judge found that petitioner ratified Mr. Silver's representation for the extended assessment period by executing a second power of attorney to that effect.

The Administrative Law Judge determined that petitioner was provided adequate actual notice that the audit period was extended through and including the quarterly period ended May 31, 1987, and that the Division properly requested books and records of petitioner for this period.

The Administrative Law Judge found the Division's use of the observation test method and the resultant assessment -- including the attribution of five percent of petitioner's taxable sales to catering services -- to be reasonable.

As for the items acquired by petitioner as part of the bulk transfer of assets accompanying its purchase of the deli, the Administrative Law Judge found that petitioner failed to sustain its burden of proving that the assets were not subject to taxation as "capital improvements."

Finally, the Administrative Law Judge sustained the imposition of penalties, finding no reasonable cause for their abatement.

On exception, petitioner asserts that the power of attorney appointing Mr. Silver is invalid because in describing the period of the power as "from 6/1/84 - Present," the instrument is not specific enough to meet the standards of either the governing regulation or case law construing that regulation (citing [former] 20 NYCRR 600.5; Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109). Accordingly, petitioner argues, Mr. Silver's waiver of the statute of limitations is void and, therefore, the assessment pertaining to the quarters audited pursuant to this waiver must be cancelled.

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[8](...continued)
We modified finding of fact "16" to more accurately reflect the record.

Petitioner asserts, as well, that the assessment pertaining to the final quarterly period audited, that ended May 31, 1987, should be vacated. In support of this, petitioner maintains that the Division did not properly specify to petitioner that this period was under audit, nor did it properly request books and records for this period.

Petitioner insists that cash register receipts were kept for the final quarterly period, and that since the Division failed to request the production of same, it improperly resorted to "internal" [sic][9] indices to calculate the assessment for the final quarterly period.

Petitioner next urges that the sum assessed for sales tax be vacated because the observation test was incorrectly conducted. Petitioner advocates, in the alternative, an observation test whereby observations are conducted quarterly. Petitioner asks that the assessment attributed to petitioner's alleged catering services be vacated as well.

Petitioner would also have the assessment of use tax reduced to reflect the fact that the walk-in refrigerator acquired by petitioner in its 1985 purchase of assets of the business is a "capital improvement" and, thus, exempt from tax.

Finally, petitioner objects to the imposition of penalties, claiming that any failure on its part to pay taxes was due to reasonable cause -- specifically, the lack of accounting experience of petitioner's president, and his consequent reliance on a professional accountant.

In response, the Division asks that the Administrative Law Judge's determination be sustained.

The Division adds the following: that even without the written power of attorney, the doctrine of apparent authority would have given petitioner's representative license to extend the audit period; that the Administrative Law Judge's assessment of the credibility of the auditor regarding the requests made for books and records should be accorded great deference; and that, notwithstanding the Administrative Law Judge's conclusion that the adequacy of petitioner's

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[9]Petitioner repeatedly refers to "internal" indices, while the statutes and case law cited in support of petitioner's position use the term "external" indices.

records was not at issue, petitioner's books and records were inadequate, forcing the Division to resort to indirect audit methodologies. Alternatively, even if the record is not conclusive on this last point, the Division argues, it would be seriously prejudiced if the Tribunal were to consider the issue without the Division having had an opportunity to thoroughly and exhaustively present its case.

We modify the determination of the Administrative Law Judge.

First we turn to the issue of whether the power of attorney for the period "6/1/84 to Present" is valid, such that the waiver of the statute of limitations by Mr. Silver for purposes of extending the audit period was proper and binding on petitioner. We find, in view of the evidence, that the power of attorney is valid, and, therefore, that the waiver of the statute of limitations pursuant to this power was valid.

Preliminarily, we agree with the Administrative Law Judge that the period covered by the power of attorney was "6/1/84 to 6/9/87" (or, the period covering quarters ended 8/31/84 to 5/31/87), the "present" being the date the power was signed. Petitioner urges that in view of Adamides v. Chu, supra, the original designation of the period of the power as "6/1/84 to Present" is not specific enough to be deemed valid under the governing regulation [(former) 20 NYCRR 600.5], which requires that a power of attorney "clearly describe the proceeding in which the attorney or agent is authorized to represent the taxpayer and the taxable year or period involved therein." However, we conclude that "6/1/84 to Present" is sufficiently specific to accomplish the intent of this regulation, i.e., to put the Division on notice of the extent of the authority of the agent (see, Matter of Jenkins Covington, N.Y., Tax Appeals Tribunal, November 21, 1991, citing Keyes v. Metropolitan Trust Co. of City of New York, 220 NY 237).

Secondly, it is significant that long after Mr. Silver signed the consent forms in question -- those of June 19, 1987 and January 22, 1988 -- petitioner signed a second power of attorney on

July 26, 1989 for the audit period "6/1/84 to 5/31/87," in effect ratifying both the first power of attorney signed in June of 1987, and Mr. Silver's actions since that time on petitioner's behalf.

Thirdly, contrary to petitioner's assertions, the period covered by the power of attorney was sufficiently clear to petitioner's president, as he so testified (Tr., p. 72).

Finally, if the power of attorney was invalid as petitioner urges, then the petition signed by Mr. Cartopassi on July 5, 1989 to challenge the conciliation order sustaining the notice of determination is null and void, the Administrative Law Judge had no jurisdiction over the matter and, consequently, neither does this Tribunal. Surely, petitioner does not mean to advocate such a result.

As for the consents signed by Mr. Silver, whether or not Mr. Saas specifically gave Mr. Silver oral permission to waive the statute of limitations regarding the period ultimately audited is irrelevant for the following reasons.

First, on its face, the instrument gave Mr. Silver "full power to . . . execute waivers of restrictions on assessment of deficiencies and consents to extensions of the Statute of Limitations with full power of Substitution and revocation" (see, Ex. "B," p. 3). A power of attorney "is to be interpreted so as to accomplish its apparent purpose . . . [and] should be construed according to the natural meaning of its words, bearing in mind the purpose of the agency and the needs for its fulfillment" (Benderson Dev. Co. v. Schwab Bros. Trucking, 64 AD2d 447, 409 NYS2d 890, 896 [citations omitted]).

Secondly, a power of attorney endows the agent with the same powers as those held by the principal (see, Black's Law Dictionary, at "Power of Attorney," p. 1055; "Agent," p. 59, 5th ed., 1979) unless the power given is specifically limited (see, GOL § 5-1501). There is no evidence whatsoever that the power of attorney held by Mr. Silver was in any way limited.

Next we analyze the issue of whether the Division properly requested petitioner's books and records for this period.

Case law requires that actual requests for books and records be made; that is, requests which are more than merely "weak and casual" (Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859). Periods for which books and records are not properly requested may not be assessed (see, e.g., Adamides v. Chu, supra, 521 NYS2d 826, 828).

The only written request for books and records in the record before us was included in the undated letter from the auditor to petitioner confirming the May 19, 1987 appointment. The letter asked that petitioner "have available all books and records pertaining to [its] Sales Tax liability for the period under audit," and the "period under audit" at the top of the page is indicated as "6/1/84 to Present" (see, Ex. "H"). We find that equally reasonable interpretations of this request would be that petitioner was required to produce books and records for the audit period up to the date of the phone call to petitioner's accountant to set up the appointment, the date the auditor's letter was written, postmarked or received, or, finally, the date of the appointment, May 19, 1987. As the auditor did not indicate in her notes or testimony whether at any point during her telephone conversation with petitioner's accountant on April 22, 1987 that she requested petitioner's records for the entire final quarterly period, we cannot speculate that she did so.

Furthermore, beyond the request made in this letter, we cannot find that other requests were actually made for petitioner's books and records for the entire final quarterly period. The auditor's log contains entries regarding requests for petitioner's books and records which occurred at and after the May 19, 1987 meeting, but the log entries do not specify the dates covered by the requests. In other words, these requests may have been for records for quarters in 1984, 1985, 1986, or the beginning of 1987. The auditor was unable to produce a copy of the lists of records requested which she claims to have left with petitioner after various meetings. Petitioner denies that such requests were made. Thus, we are left with no alternative but to find that the request for books and records made in the undated letter was petitioner's only comprehensive notification

of the request. As such, this request was not sufficiently clear to put petitioner on notice as to the period for which records were to be produced. Contrary to the Division's assertion, in no way does this request suffice as one for books and records up to and including May 31, 1987. But for us to pick any of the other possible dates mentioned, as being the most reasonable interpretation of the "present," would be pure speculation, and, we believe, unfair to petitioner.[10]

In short, we cannot find that the auditor made a clear and explicit request for books and records for the entire final quarterly period. Accordingly, the Division's resort to external indices to assess petitioner's tax liability for this period was premature and improper (see, Matter of Christ Cella, Inc. v. State Tax Commn., supra [Division must first request the taxpayer's books and records]; Tax Law § 1138[a][1]).[11]

The fact that petitioner's president, at the hearing below, conceded that he was under the impression, at the time he signed the power of attorney, that the audit period ran from June 1, 1984 to June 19, 1987 (Tr., p. 72), does not aid the Division here. Mere knowledge of the audit period does not obligate petitioner to produce books and records for this period. As noted above, petitioner is only accountable for forwarding records to the Division which were requested. Therefore, even though we find, as did the Administrative Law Judge, that petitioner acquired actual notice of the audit period at some point during the audit, it does not excuse the Division's obligation to explicitly request books and records for this period.

In light of this, we are cancelling the assessment for the final quarterly period of the audit, and order the Division to reduce the notices of determination accordingly.

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[10]For example, since the letter is not dated, we could say that the date of the appointment, May 19, 1987, was the date meant by "present." But if the letter had been dated, we might decide that the date of the letter was the more reasonable interpretation of "present." This then raises a troubling question: if we decide to deem May 19, 1987 as "present," wouldn't this be allowing the Division the benefit of assessing two additional weeks of tax merely because they did not date the letter?

[11]We note that we agree with the Division that deference should be granted to an Administrative Law Judge's findings based on the credibility of a witness(es); however, we find the Division's caveat irrelevant to our situation here. We find that the Administrative Law Judge based his determination regarding the adequacy of the request for books and records on documentary evidence in the record, not on his evaluation of the auditor's credibility.

Regarding the third issue, petitioner insists that the Administrative Law Judge totally misunderstood its argument concerning the Division's observation test. Petitioner's argument, it asserts, is that the observation test was "incorrectly performed," not that a mark-up test should have been conducted instead (petitioner's brief, p. 7). Petitioner stresses that the test conducted was faulty because it is based on the assumption that every day is representative of any other, in terms of sales. Petitioner maintains that "[t]he correct way to perform the test would have been to conduct an observation for each quarter," and that "[b]y doing so, a much more accurate assessment of sales tax would have been achieved" (petitioner's brief, p. 7).

We reject these arguments for several reasons. First, there is a large body of case law upholding both the theory behind the observation test method and the application of relatively short observation periods (see, e.g., Matter of Vebol Edibles v. Tax Appeals Tribunal, 162 AD2d 765, 557 NYS2d 678, lv denied 77 NY2d 803, 567 NYS2d 643 [two-day observation test]; Matter of Club Marakesh v. Tax Commn. of the State of New York, 151 AD2d 908, 542 NYS2d 881, lv denied 74 NY2d 616, 550 NYS2d 276 [one-day observation test]; Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679 [two-day observation test]; Matter of AR & RA Foods, Tax Appeals Tribunal, May 2, 1991 [one-day observation test]).

Secondly, as for the particular observation test conducted here, we find that the auditor accommodated petitioner in many ways, observing sales on three different occasions, during different seasons, as petitioner requested, and by reducing petitioner's seven-day work week to six days, to allow for reduced sales on the weekends. To petitioner's advantage, in fact, the auditor reduced the average daily sales figure gleaned from the first two days of observation by 12% in accordance with a 12% reduction on the third day in sales made by 2:00 P.M.

Thirdly, petitioner cannot overcome its obligation to prove by clear and convincing evidence that the result of the method used was unreasonably inaccurate or that the amount of the tax assessed is erroneous merely by proposing a different method for conducting the observation

test, even if the proposed method had merit[12] (see, Matter of Meskouris Bros. v. Chu, supra, 526 NYS2d 679, 681, citing Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451, 453; see also, Matter of Club Marakesh v. Tax Commn. of the State of New York, supra). The Division is not required to pick the most accurate audit method, but merely a rationally based one, which it has done (see, Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219, 221). Furthermore, exactitude is not required when it is due to the taxpayer's own failure to keep adequate records that the Division must resort to external indices to conduct the assessment (see, Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157, rearg denied 2 NY2d 992, 163 NYS2d 604, cert denied 355 US 869; Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, 177, affd 44 NY2d 684, 405 NYS2d 454). Therefore, we find both the particular observation test conducted on petitioner, as well as the assessment derived from it, to be reasonable.

We also uphold as reasonable the auditor's assessment pertaining to petitioner's alleged catering services. The auditor's testimony that she had audited 50 similar delicatessens in the surrounding area provides a reasonable basis both for the five percent figure attributed to the catering, and the auditor's reliance on office experience (see, Matter of Convissar v. State Tax Commn., 69 AD2d 929, 415 NYS2d 305; cf., Matter of Grecian Sq. v. New York State Tax Commn., supra; Matter of Shop Rite Wines & Liqs., Tax Appeals Tribunal, February 22, 1991 [where the auditors failed to describe the office experience upon which they relied]). Furthermore, petitioner did not prove the assessment attributed to catering to be unreasonable; in fact, petitioner's president admitted below that such catering sales occurred "every couple of months" (Tr., p. 65).

We are not persuaded by petitioner's next argument that the acquisition of the walk-in refrigerator should not have been taxed because the asset is a capital improvement. The retail

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[12]We fail to understand how the Division could have possibly conducted an observation test for each of the quarters assessed, as petitioner advocates, when that would involve going backwards in time.

purchase of tangible personal property -- whether stemming from a sale or a lease -- is subject to tax unless an exemption or exception applies (Tax Law §§ 1105 and 1131[4]). Real property, however, is not subject to sales and/or use taxes. Therefore, the key question here is whether the refrigerator was tangible personal property or real property, and it is incumbent on petitioner to prove the latter.

The Division concluded that the refrigerator was a trade fixture. Since the lease reviewed by the auditor indicated that trade fixtures became property of the tenant, the Division concluded that the refrigerator was tangible personal property. Without benefit of the lease agreement referred to by the auditor, or the contract of sale of the business before us -- nor any other evidence to refute the Division's contention here -- we have no recourse but to uphold the auditor's conclusion.

Petitioner asserts that the refrigerator was real property which was exempt from taxation due to its classification as a capital improvement. To qualify as a "capital improvement," as defined in section 1101(b)(9) of the Tax Law, an asset must be:

> "[a]n addition or alteration to real property which: (i) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and (ii) becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (iii) is intended to become a permanent installation."

We hold that the walk-in refrigerator is not a capital improvement and, thus, is not exempt from sales tax because petitioner failed to sustain its burden of proving each of the three prongs of the test (see, 20 NYCRR 3000.10[d][4], Rules of the Tax Appeals Tribunal, which sets forth that, unless otherwise provided by law, petitioner carries the burden of proof). Based on the sheer size (10' x 10') and price ($17,500.00) of the refrigerator (see, Ex. "G," p. D2a; Tr., p. 64), we concede that the refrigerator substantially adds to the value of the real property and, thus, that petitioner has proven the first prong. As well, because we give credence to petitioner's testimony that removal of the refrigerator would cause material damage to the property or article itself (see,

Tr., pp. 64-65), we find the second prong proven. However, petitioner's proof of the third prong is not sufficient.

Admittedly, the situation at hand is unusual, as the party claiming capital improvement status is not the party who originally installed the refrigerator, but is merely the party purchasing the asset from another party, Burns Park Deli, which may or may not have been the original installer. Thus, the question is not the usual one of whether the service of installing the refrigerator is taxable or, alternatively, exempt from taxation because the refrigerator is a capital improvement; rather, the question is whether the sale of the refrigerator to petitioner was a sale of tangible personal property or of real property.

Despite this, petitioner still must introduce proof of the intent of the installer "at the time the property [was] annexed to the realty to see whether it may fairly be found that the purpos[e] of the annexation was to make the unit a permanent part of the freehold" (Matter of Dairy Barn Stores, Tax Appeals Tribunal, October 5, 1989, citing Voorhees v. McGinnis, 48 NY 278; Marine Midland Trust Co. v. Ahern, 16 NYS2d 656, 659). The intent of the purchaser-petitioner here, regarding the refrigerator, is irrelevant. Even though the intent of an installer may be inferred, based on such factors as "the nature of the article annexed, the mode of annexation, [and] the relation to the property of the person making the attachment" (Matter of Dairy Barn Stores, supra, citing Capri Marina & Pool Club v. Board of Assessors of Nassau County, 84 Misc 2d 1096, 379 NYS2d 341, 345), it defies reason to imagine that we can infer the intent of a party we cannot even positively identify. If, indeed, the installer was the landlord mentioned by the auditor in her notes, then the intent manifest by this installer (according to the auditor's interpretation of the lease) is that of one not planning to permanently affix the structure to the land, as the landlord was planning to let the tenant remove the asset from the property. But even if we were sure of the installer's identity, we would still have to study the overall circumstances of the installation before we could properly infer the installer's intent where no or insufficient evidence of same has been submitted.

In sum, since petitioner carries the burden of proof here, in the absence of sufficient proof that the refrigerator was non-taxable as an item of real property, we have no choice but to resolve the issue against petitioner.

Finally, we uphold the penalties imposed against petitioner because petitioner did not sustain its burden of proving that the failure to pay was due to reasonable cause and that the penalty was wrongfully assessed. Penalties were imposed against petitioner pursuant to section 1145(a)(1)(i) of the Tax Law, which penalizes the failure to file returns or to pay over taxes to the Division within the time specified by statute.

Petitioner seeks the safe harbor of section 1145(a)(1)(iii) which permits the Division to remit the penalty paid by petitioner if it is found that the failure to pay taxes is due to reasonable cause and not willful neglect. Petitioner's excuse of reliance on the company accountant does not constitute reasonable cause as construed by the governing regulation and the case law (see, 20 NYCRR 536.5[c]; see, Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557; Matter of LT & B Realty v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121; Matter of Bachman v. State Tax Commn., 89 AD2d 679, 453 NYS2d 774, 776; Matter of Petrolane Northeast Gas Serv. v. State Tax Commn., 79 AD2d 1043, 435 NYS2d 187, lv denied 53 NY2d 601, 438 NYS2d 1027) in the absence of proof that the reliance was in good faith and was reasonable under the circumstances. Further, while petitioner stresses that its president, Mr. Saas, was forced to rely on the accountant to comply with the filing requirements because Mr. Saas is inexperienced and has no training in accounting matters, this contention does not establish that the reliance was reasonable under the circumstances.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner Top Shelf Deli, Inc. T/A Burns Park Deli is granted to the extent that the assessment for the final quarterly period is cancelled, with commensurate reductions made in all penalties, but is otherwise denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above, but is otherwise affirmed;

3. The petition of Top Shelf Deli, Inc. T/A Burns Park Deli is granted to the extent indicated in paragraph "1" above, but is otherwise denied; and

4. The Division of Taxation is directed to modify the notices of determination and demand for payment of sales and use taxes due dated June 2, 1988, in accordance with paragraph "1" above, but such notices are otherwise sustained.

DATED: Troy, New York
February 6, 1992

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

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

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