STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NICHOLAS PALADINO **d/b/a REM FOS AUTO & TRUCK SERVICE**	:	DECISION DTA No. 808197
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 February 28, 1987.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 4, 1993 with respect to the petition of Nicholas Paladino, d/b/a Rem Fos Auto & Truck Service, 965 Remsen Avenue, Brooklyn, New York 11236. Petitioner appeared by Surkin & Handlin, P.C. (Dean L. Surkin, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins and Patricia L. Brumbaugh, Esqs., of counsel).

Both parties filed briefs on exception. Oral argument, at the Division's request, was heard on January 5, 1994, which date began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUES

I. Whether petitioner has established that the audit methodology for the calculation of diesel fuel sales and gasoline sales was not reasonable and the tax as assessed was not reasonably calculated to reflect the taxes due.

II. Whether the Administrative Law Judge acted improperly in the conduct of the hearing.

FINDINGS OF FACT

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

Petitioner, Nicholas Paladino, began operating a service station at 965 Remsen Avenue, Brooklyn, New York in 1961. The service station had twofuel pump islands and four repair bays. Although there were periods between 1961 and 1982 when Mr. Paladino performed primarily or solely repair work, in 1982 he resumed gasoline sales. In mid-1984, petitioner also added the sale of diesel fuel to his operations, having been advised by his former accountant that no particular license was needed to do so. The station operated between 8:00 A.M. and 6:00 P.M., Monday through Friday and, at most, one-half day on Saturday. The station remained closed every Sunday and holiday and was actually open fewer hours than competitors in the same geographic location. Petitioner operated the station himself with two or fewer employees at all times. In the regular course of his business, petitioner maintained a notebook with his accounts receivable, a business checkbook, deposit slips and bank statements. Although it is maintained that petitioner at one time had additional records, on the advice of his former accountant, petitioner discarded records other than those listed above (purchase invoices, sales invoices and other source documentation) after the business was sold in a bulk sale transaction on or about February 1, 1987.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> The audit of petitioner herein was commenced as a result of information from another office within the Division of Taxation ("Division") that petitioner was selling diesel fuel which the Division asserts was not being properly reported. An investigator approached petitioner's place of business and requested to see his license to sell diesel fuel. He proceeded to take a reading of petitioner's diesel fuel pumps during that visit in December 1985. Approximately three weeks later, another reading was taken and the results of the two readings were incorporated into a report. The field audit work papers contain a memorandum dated February 14, 1986 which summarized the result of the visits, showing total gallonage for the 19-day period of 52,666 gallons. Such report was the basis of the calculation of additional alleged unreported diesel fuel sales. There is uncertainty as to who actually read the pumps or whether the same person performed each reading. It is not clear which of the pumps located on the premises were read.
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> On May 21, 1986, the Division again visited petitioner's place of business. Another inquiry was made as to whether petitioner had continued to sell diesel fuel and petitioner advised that no diesel fuel was being sold at that time. This report indicated that three bays for auto repairs existed, but did not state the hours of operation or number of employees working with petitioner at that time. The report stated: "No diesel fuel pumps on station." The file was thereafter recommended for audit.[1]

By correspondence dated May 11, 1987, the auditor in this matter attempted to contact petitioner for purposes of a field audit. At that time a written request for petitioner's books and records was made. The appointment letter requested the following:

> "All books and records pertaining to your Sales Tax liability for the period under audit should be available. This would include journals, ledgers, Sales invoices, purchase invoices, cash register tapes, exemption certificates and all Sales Tax records. Additional information may be required during the course of the audit . . . ."

The period under audit was June 1, 1984 through February 28, 1987. The auditor was referred to petitioner's former accountant, Louis DeStephano, for the purpose of acquiring books and records. The auditor testified the following books and records were not provided to him: the sales journal, the purchase journal, all bank statements, cash receipts, general ledger, register tapes, exemption certificates and deposit slips. The records that were provided included: bank statements from June 1984 through August 1985 and October 1985, Federal income tax returns

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[1] We modified this finding of fact by adding the sentence "The report stated: 'No diesel fuel pumps on station'" to the last paragraph to more fully reflect the record.

and sales tax returns. The auditor indicated he reviewed all books and records that were provided to him but came to a conclusion based on his review that the books and records were inadequate to proceed with a detailed field audit.

The auditor had also determined from documents provided by petitioner that there was a large disparity in reported gross receipts. Gross sales reported on New York State sales tax returns for the audit period were $471,291.00, of which petitioner reported only $61,438.00 as taxable. Gross receipts reported on Schedule C of petitioner's Federal income tax returns for the audit period were $688,686.00. There was no explanation for the difference in reporting to the State and Federal governments provided at the hearing. The auditor had also determined that petitioner had been selling diesel fuel without being registered and without filing diesel returns.

The auditor divided his analysis into three different categories: gasoline sales, repair sales and diesel fuel sales. Having been provided with petitioner's sole proprietorship schedule of profits and losses, the auditor began his calculation using the figures for gross receipts from the 1984, 1985 and 1986 Schedule C's. He divided the 1984 gross receipts of $286,534.00 by four to result in a quarterly figure of $71,600.00 (rounded). He deemed $71,600.00 as audited taxable gasoline sales for the periods June 1, 1984 through August 31, 1984 and September 1, 1984 through November 30, 1984. For the period December 1, 1984 through February 28, 1985, petitioner calculated the audited taxable gasoline sales using one-third of $71,634.00[2] for the December sales, and two-thirds of a similarly-calculated quarterly figure of gross sales for 1985. Gross sales reported on petitioner's Schedule C for 1985 were $240,112.00, resulting in a quarterly amount of $60,028.00. Thus, for the quarter ended February 28, 1985, the auditor calculated sales at $63,896.00 (one-third of $71,634.00 plus two-thirds of $60,028.00). Performing the same calculation for all quarters from June 1, 1984 to February 28, 1987 (factoring no sales for February 1987 due to the bulk sale) with Schedule C gross receipts for

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[2] The auditor's testimony was provided in round figures. The actual field audit work papers indicate total audited gasoline sales of $71,634.00.

1984, 1985 and 1986 as the basis for such calculation, the auditor concluded that total taxable gasoline sales for the period were $688,686.00.

It was revealed by the testimony that all of petitioner's reported sales were allocated to calculate gasoline sales. The Division's auditor thereafter calculated amounts for diesel sales and repair sales and added such amounts to that which he calculated for audited taxable gasoline sales. The auditor's calculation of repair sales resulted from multiplication of 25% times the audited taxable gasoline sales of $688,686.00 previously calculated. The auditor testified that based on his 18 years experience, the repair sales of a gasoline station are generally equal to approximately 25% of the station's gasoline sales. Thus the portion of the total repair sales attributable to gasoline sales was $172,172.00.

The auditor next calculated audited diesel sales. Using the pump readings (the information provided in the investigator's memorandum) as a basis for his calculation, the auditor determined petitioner's sales of diesel fuel amounted to 100,000 gallons per month. He multiplied such gallonage by $1.05 per gallon, yielding total diesel sales of $2,415,000.00, covering the period June 1, 1984 through April 30, 1986 (23 months). The auditor indicated that since the investigator reported no diesel sales when he visited the premises in May 1986, the calculation ceased as of the previous month. The auditor thereafter calculated repairs attributable to diesel sales and calculated such repair work by multiplying audited diesel sales of $2,415,000.00 times 5%, yielding additional repair sales of $110,250.00. The 5% factor was said to also be based upon the auditor's prior experience in the industry. The total repair sales attributable to both sales of gasoline and sales of diesel in total were $282,422.00 ($172,172.00 + $110,250.00). Thus, total audited taxable sales from all sources equalled $3,386,108.00 as follows:

Gasoline sales	$ 688,686.00
Diesel sales	2,415,000.00
Repair sales	282,422.00

$3,386,108.00

Audited taxable sales resulted in tax due of $279,353.89. Petitioner was given credit for tax paid of $5,068.15, yielding additional tax due of $274,285.74.

The Division issued notices of determination and demands for payment of sales and use taxes due dated January 6, 1988, covering the period June 1, 1984 through February 28, 1987, assessing additional sales tax due in the amount of $274,285.74, plus additional penalty and interest of $73,777.75 and $91,891.42, respectively, for a total amount due of $439,954.91. Such notice provided the following explanation:

> "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."

In addition a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner dated January 6, 1988 assessing the omnibus penalty in the amount of $13,864.06.

A consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1984 through November 30, 1984 was executed to allow the determination of tax any time on or before March 20, 1988.

The auditor testified that with respect to his calculation of diesel sales, although he rounded the pro-rated pump readings to 100,000 gallons per month, a monthly calculation using the 20-day reading of 52,666,000 gallons would actually yield a total of 78,999 gallons per month. The auditor was unable to make reference to any price index from which he acquired the diesel price per gallon of $1.05. He stated that he used an average going price of $1.05 in the Brooklyn area where petitioner's business was located to arrive at such price. The auditor did not make reference to using a price per gallon for the years in question, but indicated by his testimony "that was the going price".

Post-hearing the Division's representative adjusted the calculation of additional tax due to reflect more accurately the utilization of the meter readings as described herein. The Division

took 79,000 gallons per month and multiplied such amount by three to arrive at 237,000 gallons per quarter. The Division then multiplied the quarterly figure times $1.05 per gallon to result in adjusted audited diesel sales of $1,990,800.00 for the period June 1, 1984 through April 30, 1986, the period of time over which the Division asserts diesel sales took place. Since a portion of repairs was also calculated on the basis of diesel fuel sales (a factor of 5%), a pro rata adjustment was also made. Such adjustment resulted in adjusted audited diesel repair sales of $99,540.00. Petitioner's audited total taxable sales as adjusted was reduced to $2,951,198.00, yielding tax due of $243,473.83. After applying tax reported by petitioner in the amount of $5,068.15, adjusted assessed tax is $238,405.68.

Petitioner's representative questioned the auditor with respect to his knowledge of the sales tax law relating to sales tax on motor fuel and diesel motor fuel, prior to a change in the law effective June 1, 1985. It was revealed that the sales tax law had been amended effective September 1, 1982, to provide that sales tax on motor fuel other than diesel motor fuel was to be collected by a registered distributor and was not the responsibility of the retailer. The auditor conceded the fact that the distributor was the party responsible for paying sales tax prior to June 1, 1985 not a person (such as petitioner) acting as a retailer. The auditor admitted that the audit work papers did not take this fact into account.

The auditor was questioned about the calculation of repairs using 25% of gasoline sales and 5% of diesel sales. Although the auditor admitted that the number of service bays, the hours of operation and the number of mechanics can vary from gas station to gas station, and that such factors will have a direct effect on the amount of repair sales a service station can handle, he claims to have taken those factors into consideration in applying such factors. The auditor could not refer to a survey or external trade index to support his estimates of 25% and 5%. Although the investigator's report indicated the number of bays in operation in petitioner's business, the auditor testified that he did not independently utilize this information. In addition the audit report does not refer to other service stations to which a comparison was made to substantiate the calculation and utilization of the factors used in the calculation of repair sales.

Although the auditor believes he referred to the details of ten or twelve former audits to reach these factors, there is no reference in the audit work papers that indicates this was done.

The auditor conceded that after petitioner's accountant was not forthcoming with sufficient records in accordance with his request, he did not thereafter make any attempt to contact petitioner directly.

The auditor testified further that based on the tax he calculated and assessed for gasoline sales ($688,686.00), he computed a gallons-per- month equivalent in an attempt to show the reasonableness of the taxable sales as computed. The converted figures are as follows:

Period	Gallons Per Month
6/1/84 to 8/31/84	25,675
9/1/84 to 11/30/84	25,675
12/1/84 to 2/28/85	22,902
3/1/85 to 5/31/85	21,515
6/1/85 to 8/31/85	21,515
9/1/85 to 11/30/85	21,515
12/1/85 to 2/28/86	22,619
3/1/86 to 5/31/86	23,277
6/1/86 to 8/31/86	23,277
9/1/86 to 11/30/86	23,277
12/1/86 to 2/28/87	23,278

The investigative report submitted into evidence as part of the audit work papers dated May 21, 1986 to which reference has been made, indicates that gasoline was being sold at the following rates: unleaded gasoline 93.9, regular 85.9, and super unleaded 98.9, at that time. The report also stated that petitioner's station had three bays for auto repairs and eight pumps for fuel service.

The above calculation of gallons per month was accomplished by using audited gasoline sales per quarter as calculated by the auditor and dividing the same by $.93, the average selling price of the three types of gasoline being sold by petitioner's station. For example, $71,634.00 (gasoline sales for 6/1/84 to 8/31/84) divided by $.93 resulted in a total gallonage for the quarter of 77,026, which when divided by three equals 25,675 gallons per month. He thereafter performed the same calculation for each of the succeeding quarters.

Thus, the auditor concluded that his calculation of gasoline sales was reasonable and had he utilized the average of 29,000 gallons per month as indicated by petitioner's expert witness (see, infra), the calculations of audited gasoline sales would have been significantly higher.

Petitioner provided testimony on his own behalf. Mr. Paladino, advanced in age, spoke with a heavy, broken accent. Mr. Paladino's lack of formal education is reflected by the records produced at the hearing. He confirmed the physical layout of the business as well as the hours of operation, the fact that he never had more than one or two employees working for him at any given point in time, and that he conducted the business in a hands-on manner. He testified that he sold diesel fuel from mid-1984 until the last week in December 1985. He testified that he paid cash for the diesel fuel he purchased, receiving no purchase invoices from a man named Iggy, with whom he only spoke by telephone.

Petitioner introduced the testimony of Jerome Statham, general manager of the petroleum division at MPSI in Tulsa, Oklahoma. MPSI is a computer software company that specializes in demographics. Mr. Statham serves primarily major oil companies which utilize such service for the purposes of planning for new service stations, the modernization of existing stations or for closing stations. In the course of his business, Mr. Statham has had the opportunity to perform surveys of service stations and is personally familiar with Mr. Paladino's business. Mr. Statham had conducted a survey that included Mr. Paladino's service station located at 965 Remsen Avenue, Brooklyn, New York. An independent survey, unrelated to the audit herein, was done in 1981, 1986 and 1988. He indicated that a survey of this kind considers the physical layout of each property, its characteristics, its location, the brand of gasoline sold, its pricing posture, days and hours of operation and traffic patterns in the general location. Three methods are used to determine the amount of sales done by a particular service station encompassed by the survey: a personal interview, a meter reading and/or a supplier's verification of volume. The study performed in 1981, of which petitioner's business was a participating unit, used a meter reading which resulted in estimated gallons of gasoline sales per month at 26,000 for petitioner's business. In 1986 and 1988, based on the same information available to MPSI

through the process of interviewing, the gallons of gasoline sold each month were estimated at 29,000 gallons. It was Mr. Statham's expert opinion that the sales volume of gasoline during the period 1984 through 1987 ranged between 26,000 and 29,000 gallons per month.

One of the additional factors noted by such a survey is whether or not the facility is also selling diesel fuel. Mr. Statham indicated that diesel sales can have a positive or negative effect on gasoline sales. In the three surveys done, it was estimated by MPSI that the diesel sales volume was in the range of 2,000 to 4,000 gallons per month. Mr. Statham stated, unequivocally, in his opinion it would have been impossible for petitioner's service station to sell 100,000 gallons of diesel each month (the amount originally used by the auditor) since the physical layout of the facility and the traffic patterns were such that this station was not capable of handling such high-volume diesel sales. For instance, it was noted that the diesel pumps were located on the same island as gasoline pumps, thereby representing competition for the usage of those pumps during the day. Other pumps were blocked by the diesel purchaser because of the nature of the large vehicles making such purchases. Mr. Statham noted that the study performed encompassing the three years mentioned was for the purpose of determining gasoline sales and that, although an estimate of diesel sales is made in the course of the preparation of such report, the emphasis of the report is geared to the accuracy of gasoline sales.

In an attempt to show a pattern of sales which was comparable to the estimate by Mr. Statham's surveys, though noting the information preceded the audit period, petitioner introduced two items of correspondence indicating gallons of gasoline purchased. The first, a letter from the Department of Energy, indicated petitioner purchased 2,647,965 gallons of refined (Shell) product between March 6, 1973 and January 27, 1981 (95 months) yielding 27,873 average gallons per month. The second item of correspondence was from Alcor Petroleum Corporation and it stated that although its records were no longer retained to substantiate such purchases, the recollection of the field supervisor servicing petitioner's station during 1982 and 1983 was that he purchased between 25,000 and 28,000 gallons of gasoline per month.

Petitioner provided the testimony of Guiseppe DiGirolamo, a former employee of petitioner's service station. He commenced working for Mr. Paladino in February 1986 and worked for him throughout that year. Mr. DiGirolamo testified that petitioner did not sell diesel fuel during 1986. He testified that there were two islands housing the gasoline pumps with three pumps on each island and, at the time of his employment, the center pump was not in operation on both islands. He verified that the service station was open five days a week from the hours of 8:00 A.M. to 6:00 P.M., on Saturday until approximately 12:00 P.M. and never on Sundays or holidays.

Petitioner also presented the testimony of Alfio Fred Paladino, petitioner's son. He confirmed that petitioner's business was a self-run, hands-on type of operation. Alfio was a mechanical engineer by education and once he had completed his schooling had little involvement with the service station. His involvement while he was with the station, from mid-1984 until July 1985, was primarily with respect to the pumping of gas and office work. He testified that it would have been impossible to serve 45 diesel purchasers per day given the station's layout restrictions and the time needed to serve such vehicles.

James Mammone, a certified public accountant, began assisting petitioner with the issues of this case when his former accountant failed to respond to requests by the Division for financial records. He examined petitioner's tax returns and the records which still existed in petitioner's possession for the audit period. Because there were no source records, Mr. Mammone first reconciled petitioner's checkbook to his bank statement for every month from January 1984 through March 1987. He made a comparison of cash receipts from the bank statement to the sales reported on the Federal income tax return. Mr. Mammone instructed Mr. Paladino to calculate from his deposit slips a breakdown of the gasoline, diesel and repair sales separately for each of the periods in question. In separate testimony, Mr. Paladino indicated that he made contemporaneous recordings of a breakdown of the deposits after he received his customer copy of the deposit slip at the time of deposit. Thus, from the deposit slips, and in correlation with the deposits per bank statements, Mr. Mammone reconstructed a

cash receipts journal separating receipts into sales of gasoline, diesel and repairs. In the case where a deposit slip was missing, but a deposit appeared on the bank statement, Mr. Mammone attributed such deposit to each of the three categories based on subsequent months and a pro rata allocation representative of previous deposits. He determined by such analysis that gasoline sales were approximately 71% of total sales and diesel and repair sales were 19% and 10%, respectively. His method of allocation and reconstruction of cash receipts in each of the categories yielded the following: total gasoline sales for the audit period were $409,696.64; total diesel sales were $92,967.36; and repair sales totalled $107,789.35. Diesel sales were calculated from June 1, 1984 through the quarter ended February 28, 1986. In his calculation of gross taxable sales, Mr. Mammone did not consider gasoline sales as being taxable since he believed the distributor was responsible for gasoline taxes during the period June 1, 1984 through February 28, 1987. In addition, Mr. Mammone verified his results by analyzing checkbook expenditures recording total auto parts purchases and comparing the sale to total repairs on a monthly and quarterly basis. He concluded that the auto parts purchases were generally less than the amounts generated from such repair sales and thus there was a correlation between such purchases and that which he had calculated as gross receipts from repairs.

Mr. Mammone thereafter added diesel sales and repair sales for total gross taxable sales of $200,756.71. He calculated the unreported difference at $134,250.56, resulting in a sales tax deficiency of $10,231.57.

Mr. Mammone reconstructed the records on the basis that all sales were deposited into petitioner's bank account and conceded that if all cash and charge receipts were not deposited, such recapitulation would be understated. To support the reasonableness of the fact that sales receipts were reported, Mr. Mammone testified that he reviewed checks written to companies from which purchases of gasoline and diesel product were made and indicated that although he could not verify gallons purchased, petitioner appeared to be making purchases reasonably comparable to the sales so recorded from deposits. The accountant also testified that the

information on the deposit slips, purportedly contemporaneous recordings of the sales by Mr. Paladino, could not be verified by any source documentation.

Petitioner timely challenged the notice of determination asserting tax of $274,285.74 (Notice No. S880106346K). At the Bureau of Conciliation and Mediation Services conference, the notice was thereafter sustained by a Conciliation Order dated February 23, 1990. Petitioner thereafter filed a petition challenging two notices of determination, the one sustained by the conciliation conference as well as a second notice assessing the omnibus penalty (Notice No. S880106347K). The Division submitted into evidence the affidavit of the supervising conciliation conferee indicating that the Bureau of Conciliation and Mediation Services bears no record of ever receiving a request for conciliation from petitioner with regard to the notice of determination assessing the omnibus penalty. Petitioner submitted into evidence a copy of correspondence dated January 12, 1988 addressed to the auditor in this matter from petitioner advising him that petitioner did not agree with the assessment of the omnibus penalty, referring specifically to the same notice number contained on the penalty notice and demanded a hearing thereon.

OPINION

The Division takes exception only to that portion of the Administrative Law Judge's determination concerning gasoline and diesel fuel sales. In addition, the Division asserts that the Administrative Law Judge acted improperly in her conduct of the hearing.

We deal first with gasoline sales.

The Administrative Law Judge determined that: the Division properly requested that petitioner produce books and records for the audit; the Division correctly determined that petitioner did not have adequate books and records; and that the Division was authorized to estimate petitioner's tax liability pursuant to Tax Law § 1138.

The Administrative Law Judge determined that, under the circumstances, it was appropriate for the Division to use gross receipts on petitioner's Schedule C personal income tax

return in the amount of $688,686.00 as attributable to gasoline sales. Specifically, the Administrative Law Judge stated as follows:

> "[f]or some unexplained reason, petitioner reported over $200,000.00 less as gross sales on his New York State sales tax returns, of which petitioner reported only $61,438.00 as taxable. Again, no explanation was provided. The Division had reason to believe that diesel sales were unreported and petitioner could not produce documentation to show otherwise, though a reconstruction of petitioner's records indicates petitioner's position that he reported the same in gross receipts . . . The Division's choice of utilizing gross receipts as a starting point and attributing the same entirely to gasoline sales was reasonable in light of all the circumstances. The auditor calculated a gallons-per-month equivalency in accordance with his use of gross receipts in the amount of $688,686.00 for the audit period in order to show the reasonableness of the resulting tax . . . His gallon-per-month equivalency falls right in line with what petitioner claims to have been selling and, in fact, is slightly less. Petitioner's expert testified that within a small margin of error petitioner was selling between 26,000 and 29,000 gallons of gasoline per month for the years in issue. Petitioner introduced into evidence two items of correspondence indicating purchases between 25,000 and 28,000 gallons per month. Although such correspondence referred to periods prior to the audit period, it certainly indicates a propensity to sell at a certain level. Thus, the Division's use of the estimated amount of $688,686.00 attributable to gasoline sales is upheld" (Determination, conclusion of law "C").

The Administrative Law Judge rejected the Division's assertion that:

> "since Petitioner had no source records to substantiate the number of gallons purchased or gallons sold or the amount of taxes paid to his suppliers, Petitioner could not be given a credit for taxes paid to his supplier, if any [cite omitted]" (Division's brief on hearing, pp. 43-44).

The Administrative Law Judge found that:

> "[p]etitioner did not seek a credit in this case; he merely sought for the Division to place responsibility on the party from whom the Division should properly seek taxes if such are due. Petitioner was not under obligation during the period June 1, 1984 through May 31, 1985 to collect sales tax as a retail service station operator. The auditor concedes so in his testimony and admits that there was no reduction for such provision considered in his calculations" (Determination, conclusion of law "D").

The Administrative Law Judge concluded that the dollar amount of total taxable gasoline sales should be adjusted downward by $267,192.00 because, under the law in effect for that part of the audit period from June 1, 1984 through May 31, 1985, petitioner was not a distributor and, thus, was not under an obligation to collect the tax.

The Division asserts that the Administrative Law Judge erred in finding that petitioner was not liable for sales tax on gasoline transactions for that portion of the audit period prior to June 1, 1985. The essence of the Division's assertion is that:

> "[i]n this case Petitioner's liability does not result from a failure in the collection of the sales tax on the sales of gasoline. Rather, petitioner had a duty to pay the tax upon his purchases of gasoline from the distributor [cites omitted]. The ALJ opined that the petitioner was not seeking a credit, but no matter how the ALJ wants to characterize it, the fact is Petitioner and Mr. Mammone are attempting to excuse Petitioner from his liability for tax due upon his purchases of gasoline by taking a credit for amounts paid as sales tax, without any showing that the tax was in fact paid. Petitioner cannot be given credit for paying sales tax on his purchases in the absence of proof showing that he in fact paid the tax. The fact that Petitioner cannot make that showing because he has no source documentation, is a problem of his own making" (Division's brief, pp. 37-38).

On exception, petitioner asserts that:

> "[t]he ALJ correctly found that the auditor's projection of gasoline sales was erroneous since it did not al all consider the effect of the amendment of Tax Law Section 1101(b)(4)(ii), effective as of June 1, 1985. Since the audit covered a period commencing June 1, 1984, there would have been a full year during which the pre-1985 statutory provisions would have controlled" (Petitioner's brief, p. 27).

Petitioner also argues that the Division's new assertion on exception, that petitioner is liable for the pre-1985 tax period under section 1133(b) as a customer, is an impermissible assertion of a new theory for the audit.

We affirm the determination of the Administrative Law Judge.

First, it is clear that the Division, at hearing, asserted that petitioner was liable as a vendor. Specifically, the Division "[a]lleges that [petitioner] was a vendor pursuant to Section 1101(b)(8) of the Tax Law, and therefore liable for the collection of sales and use taxes due under the provisions of Articles 28 and 29 of the Tax Law" (Division's Answer, ¶ 3).

In this context, the Administrative Law Judge's analysis of the applicable law and her application of that law to the facts in this case is correct. As she stated:

> "[p]etitioner was not under obligation during the period June 1, 1984 through May 31, 1985 to collect sales tax as a retail service station operator. The auditor concedes so in his testimony and admits that there

> was no reduction for such provision considered in his calculations" (Determination, conclusion of law "D").

Next, we reject the Division's assertion that petitioner is liable as a customer under Tax Law § 1133(b)[3] because he has not shown he paid tax on his purchases. The fact of the matter is that petitioner was not called upon to offer such proof at hearing because the assertion by the Division was that he did not collect the tax as a vendor.

This Tribunal has the authority to determine what issues are properly before it on exception and to take appropriate action to insure that a just decision is reached in all cases (Tax Law § 2000, 20 NYCRR 3000.0; Matter of Small, Tax Appeals Tribunal, August 11, 1988). Consistent with this authority, we determine that it would be inappropriate in this case to permit the Division to assert, for the first time on exception, that petitioner is liable as a customer. To find otherwise would be prejudicial to petitioner under the circumstances, as he was not presented with a fair opportunity to meet his burden of proof on the matter (Matter of Clark, Tax Appeals Tribunal, September 14, 1992; Matter of Consolidated Edison, Tax Appeals Tribunal, May 28, 1992).

We deal next with diesel fuel sales.

The Administrative Law Judge stated that while she would generally find the meter readings relied on by the Division to be a reliable source of information that was not the case here since it was not clear whether the same investigator performed both readings and which of petitioner's pumps were read. The Administrative Law Judge also found the vast difference between the Division's calculation and the estimate by petitioner's expert, to be sufficient to cast a "shadow" on the result of the Division's audit methodology.[4] The Administrative Law Judge

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[3]Section 1133(b) provides that: "[w]here any customer has failed to pay a tax imposed by this article to the person required to collect the same, then . . . such tax shall be payable by the customer direct to the [Division]."

[4]Specifically, the Administrative Law Judge stated:

> [p]etitioner's expert testified that an estimate of diesel fuel sales is incorporated into its survey report because he deems it relevant to the analysis whether diesel fuel sales act in a competing manner with the sale of gasoline. Interestingly, the expert's report also indicates that the average diesel volume for stations competing in the same trade market

concluded that, based on these facts and the testimony and report of petitioner's expert witness, the testimony of his son, and the reconstruction of the sales by petitioner's current accountant, petitioner showed that the Division's audit was not a reasonable calculation. The Administrative Law Judge determined that tax due for diesel sales should be based on $92,967.36, the amount of sales reconstructed by petitioner's accountant for the audit period.

The Division asserts that the Administrative Law Judge erred in finding that the audit result for diesel sales was unreasonable. The Division asserts that the burden on petitioner is to prove by clear and convincing evidence that the method and result of the audit were unreasonable. The Division, referring to the statement by the Administrative Law Judge, i.e., "the Division did not show whether the same investigator performed both readings and the vast difference between the Division's calculation and the estimate of Petitioner's expert [witness] . . . 'are sufficient to cast a shadow' on the Division's audit methodology," asserts that "the casting of shadows" is not the same thing as clear and convincing evidence.

The Division asserts that "[n]one of the evidence offered at hearing by Petitioner was sufficient to call [the Division's] method or . . . audit result into question" (Division's brief, p. 39).

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survey location as petitioner's station was 5,000 gallons of diesel fuel per month. In addition, petitioner's son testified that the speed at which the gasoline pumps could pump fuel was approximately five gallons per minute. The diesel fuel pumps operated at a slower rate because the fuel was heavier and needed more pressure. He testified that the average purchase by a diesel fuel customer, i.e., a truck or bus, was 40 to 50 gallons per stop. It would take at least 15 minutes for the transaction to be completed. If one utilized the Division's estimate of 79,000 gallons per month and divided the same by 22 days per month, the time it was testified that petitioner's business was open (5½ days per week), the Division is asserting that petitioner was selling nearly 3,600 gallons of diesel fuel per day. If that figure is divided by 45 gallons, the average amount of diesel fuel pumped by a tractor-trailer or bus, petitioner would have had to service 80 vehicles each day for this to be a reasonable calculation. When petitioner's son was questioned about the reasonableness of servicing 45 trucks in one day, he indicated it would be impossible because a truck would block off an entire island of pumps such that other cars or trucks would be precluded from stopping at that point. Given the hours of operation, such an estimate was not a reasonable calculation" (Determination, conclusion of law "E").

The Division asserts that the opinion of petitioner's expert witness concerning the physical impossibility of petitioner's facility being able to handle traffic patterns sufficient to sell 100,000 gallons of diesel fuel a month is flawed because the expert:

> "did not know where the diesel pumps were located during the audit period. [He] also did not explain how, if Petitioner was not capable of pumping 100,000 gallons of diesel fuel per month, it had metered pump readings showing actual diesel sales of 52,666 gallons between December 12, 1985 and December 31, 1985" (Division's brief, p. 40-41.)

The Division also asserts that the testimony and estimates of Mr. Mammone are not credible. The essence of the Division's position is that the:

> "'reconstruction' of Petitioner's records by Mammone cannot be given credence as a basis for adjusting the tax asserted in this matter. Although the Petitioner gave Mammone more books and records than were provided to the auditor, they were still de minimis. Checkstubs and deposit slips and a five page 'accounts receivable' book are not independently verifiable records of purchases and sales" (Division's brief, p. 45).

Petitioner asserts that the Administrative Law Judge correctly determined that the meter readings, which were the basis for the Division's calculation of diesel fuel sales, were fundamentally flawed. In petitioner's view, the Administrative Law Judge correctly relied on the testimony of Mr. Statham, petitioner's expert witness, the reconstruction of petitioner's diesel sales by Mr. Mammone, petitioner's current accountant, and the testimony of petitioner's son, in concluding that it was a physical impossibility for the station to have sold the amount of diesel fuel alleged to have been sold by the Division.

Petitioner asserts that:

> "[petitioner's] proof consisted of extensive testimony about the nature of the service station and the sheer physical impossibility of achieving anything close to 100,000 (or even 79,000) gallons of fuel per month. Contrary to the Department's assertion (Department's brief at 39), this proof was not 'merely raising questions about the names of the employees who read the pumps.' As the ALJ noted, 'Interestingly, the expert's report also indicates that the average diesel volume for stations competing in the same trade market survey location as petitioner's station was 5,000 gallons of diesel fuel per month. In addition, petitioner's son testified that the speed at which the gasoline pumps could pump fuel was approximately five gallons per minute.' ALJ Opinion at 22. Based upon this pumping speed, the ALJ was able to determine that the petitioner 'would have had to service 80 vehicles per day for this [the Department's calculation] to be a reasonable calculation.' ALJ Opinion at 23.

> "Although this particular audit was not distinguished for its application of arithmetic principles (see infra, Section II.B.2), it is apparent that simple mathematics would have made any further proofs superfluous. Nevertheless, further proof was provided by Mr. Paladino by the testimony of his expert who showed that the 2,000-4,000 gallon figure was completely in accordance with what comparable service stations sold in diesel fuel. [footnote omitted] One wonders why the Department's auditor would not have asked the same obvious questions" (Petitioner's brief, pp. 19-20).

Finally, with respect to the pump readings, petitioner asserts that:

> "[c]ontrary to the Department's claims, this is not an issue of simply raising a few questions regarding the name of the person(s) who read the pumps. This is a case where the Department's numbers are strongly contradicted by all other evidence. Where that is true and where the Department seeks to rely solely on these 'readings' in spite of all the facts to the contrary, the credibility of the readings is clearly the central issue.
>
> "To establish that the readings are credible, the failure to produce the person (or persons) who read the pumps to explain how they were read and under what circumstances is critical. The fact that the Department even refused to state whether the same person read the pumps on each occasion only underscores the possibility that different pumps may have been read, accounting for the wide variation in the two readings. This case is unlike cases mentioned by the Department where they did not name the auditor who read the meter. In In the Matter of Lionel Leasing Industries Company, Inc. v. State Tax Commission [cite omitted], the issue was not whether the identify of the auditor was disclosed, since the readings were not questioned. In that case, the taxpayer's argument was that more mileage was incurred out of state and therefore the tax should be reduced to take out of state mileage into account. The validity of the in-state meter readings was not a central issue as it is here. If the auditor could blithely change his calculations from 100,000 to 79,000 gallons (a difference of approximately 25%) it is entirely impossible that the meter 'readings' could have been altered in a similar fashion. There is just no way to know without asking the person(s) who actually read the meters. Where a witness is under the control of a party and that party fails to produce a witness, it may be presumed that the witness is not being produced since his testimony would support the opposing party [cite omitted]" (Petitioner's brief, pp. 21-22).

We affirm the determination of the Administrative Law Judge.

Where a "taxpayer demonstrates that 'the [Division] in stating the account has proceeded upon a principle or theory fundamentally erroneous' the assessment may be set aside (People ex rel. Charles Kohlman & Co. v. Law, 239 NY 346, 352, 146 N.E. 622, 625). The same rule prevails in the Federal courts (Gasper v. Commissioner of Internal Revenue, 6 Cir., 225 F2d

284)" (Babylon Milk & Cream Co. v. Bragalini, 5 AD2d 712, 169 NYS2d 124, 126, affd 5 NY2d 736, 177 NYS2d 717; see also, Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41).

If the taxpayer proves the methodology unreasonable, he need not prove the proper amount of the assessment (Helvering v. Taylor, 293 US 507).

The record in this case is less than clear with respect to petitioner's sales of diesel fuel. This is due in no small part to petitioner's lack of records. However, we agree with the Administrative Law Judge that the statements and survey of petitioner's expert witness, the uncontroverted testimony of petitioner's son and the reconstruction of petitioner's sales by its current accountant, show that the result of the Division's method was unreasonable. We accept, as did the Administrative Law Judge, petitioner's estimation of its tax liability for diesel sales.

We deal next with the Division's assertion that "[t]he ALJ acted improperly in attempting to impede [the Division's] defense" (Division's brief, p. 49). The Division asserts that:

> "the transcript . . . demonstrates that the ALJ persisted in interrupting [the Division's] attorney to interject her own questions [cite omitted], and at other points, the ALJ would interpose her own comments and responses to questions before the witness could answer [cite omitted]. Such repeated interruptions by the ALJ compromises the ability of an attorney to develop his/her case, to maintain a train of thought in questioning, and to effectively represent a client. Such conduct by the ALJ is fraught with the potential for denying a party's right to due process" (Division's brief, p. 50).

The Division asserts that the Administrative Law Judge improperly limited cross examination by the Division's attorney in contrast "with the broad latitude permitted Petitioner in presenting evidence on direct testimony" (Division's brief, p. 51).

> "The ALJ's invective and persistent interruptions of [the Division's] attorney are in stark contrast with the treatment extended to Petitioner's attorney . . . .
>
> "Continued interference by an ALJ is more than merely disconcerting, but coupled with one sided treatment, it can result in discouraging and intimidating the attorney from a vigorous representation of a client" (Division's brief, p. 53).

The Division concludes by asserting that:

> "[i]n this case, the ALJ's interjection of her own comments and answers to questions, repeatedly interrupting the flow of questioning by injecting her own questions, preventing the [Division's] attorney from cross examining on clearly relevant matters, and making unfounded, insulting personal comments to [the Division's] attorney, constitutes an abuse of this ALJ's authority" (Division's brief, p. 54).

Petitioner addresses the Division's assertion concerning the conduct of the hearing by the Administrative Law Judge stating that the:

> "outrageous personal attacks on the ALJ are both factually and legally false and have no place here. Their unprecedented insertion into this proceeding at this time is designed only to unfairly prejudice [petitioner's] case and therefore the [Division's entire brief] should be dismissed" (Petitioner's brief, p. 33).

With regard to the timing of the Division's assertions, petitioner states that:

> "[i]f any of these allegations had any factual basis, the appropriate forum for addressing them might have been by letter after these proceedings are concluded. If they truly had occurred in other cases, the Department should have moved for recusal prior to the start of the hearing, in accordance with 20 NYCRR § 3000.5(e). It is unfortunate that these allegations have arisen in this context, since they put [petitioner] in the unusual position of having to spend time and money to defend the ALJ rather than his own position. This is not only prejudicial in suggesting that his arguments must rise or fall with the propriety of the acts (specified and unspecified) of the judge below (in other unnamed cases, as well as this one) but is also frivolous conduct designed to increase [petitioner's] expenses in defending the ALJ, who is not a party to this proceeding.
>
> "It is impossible to understand how any actions of the ALJ in this case might have been deemed prejudicial. Particularly, where no jury was present, no comments by her could have influenced the thinking of a jury" (Petitioner's brief, p. 34).

With regard to the merits of the Division's assertions, petitioner states that they are "baseless and gratuitous" and without merit. Petitioner points out that the rules of the Tribunal specifically provide that:

> "'[t]he administrative law judge may, where the record appears unclear, ask questions of the parties or of witnesses for the purpose of clarifying the record.' 20 NYCRR 3000.10(d)(1). . . . Such questions appear to constitute the bulk of the alleged 'improprieties' raised by the [Division]" (Petitioner's brief, p. 35).

In brief, petitioner asserts that:

> "the Administrative Law Judge was in no way biased against [Division's] counsel. On the contrary, the Administrative Law Judge was remarkably patient with many outbursts by [Division's] counsel, and [Division's] counsel is only now claiming bias because the Administrative Law Judge did not permit him to run her courtroom" (Answer to exception, p. 10).[5]

We reject the Division's assertion that the Administrative Law Judge acted improperly in her conduct of the hearing. We have carefully reviewed the hearing transcript in this matter and find absolutely no basis for the Division's assertions that the Administrative Law Judge impeded the Division's presentation of its case. Administrative Law Judges are charged with conducting a hearing in the manner most conducive to finding all of the relevant facts in a case.

The Administrative Law Judge, in this case, did frequently ask questions of the witnesses. The transcript indicates to us, however, that these questions were raised in the context of the Administrative Law Judge seeking to insure that the record fully and clearly reflected the factual content of the statements made by the witnesses.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Nicholas Paladino d/b/a Rem Fos Auto & Truck Service is granted to the extent indicated in conclusions of law "D," "E," "G" and "K," but is otherwise denied; and

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[5] Petitioner, in a document titled "Answer to Notice of Exception," provides a lengthy, detailed, refutation of each of the Division's specific assertions concerning the Administrative Law Judge's conduct of the hearing.

4. The Division of Taxation is directed to modify the notices of determination dated January 6, 1988, in accordance with paragraph "3" above, but such notices are otherwise sustained.

DATED: Troy, New York
June 30, 1994

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

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