

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

---

In the Matter of the Petition	:	
of	:	
<b>SRS NEWS, INC.</b>	:	DECISION
	:	DTA NO. 817006
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, 1994 through August 31, 1998.	:	

---

Petitioner SRS News, Inc., 906 Second Avenue, New York, New York 10017-1504, filed an exception to the determination of the Administrative Law Judge issued on June 14, 2001.

Petitioner appeared by Robert Plautz, Esq. and Mukesh Desai, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception, the Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on March 13, 2002.

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

***ISSUE***

Whether the Division of Taxation used a proper audit methodology to determine additional sales tax due.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. Petitioner's principal business activity was a retail convenience store located at 906 Second Avenue in Manhattan, near 48<sup>th</sup> Street, known as SRS News, Inc. Its principal products included newspapers, magazines, cigarettes, candy, soda, and paperback books. Occasionally there were sales of greeting cards, disposable razors, condoms, and batteries. Petitioner was incorporated on April 22, 1993 in New York State, and elected to report its business operations as an S corporation commencing January 1, 1994. Petitioner's president and sole shareholder was Sureshkumar B. Brahmbhatt. Susan Brahmbhatt, Sureshkumar's wife, was responsible for the day-to-day operations of the store.

2. Petitioner was registered as a vendor for sales tax purposes and filed New York sales tax returns for the audit period, June 1, 1994 through August 31, 1998. Petitioner reported as gross and taxable sales the following amounts for the audit period:

Period Covered by Return	Gross Sales Reported	Taxable Sales Reported
June 1, 1994-August 31, 1994	\$25,879.00	\$5,176.00
September 1, 1994-November 30, 1994	25,204.00	5,041.00
December 1, 1994-February 28, 1995	25,347.00	5,069.00
March 1, 1995-May 31, 1995	25,302.00	5,060.00
June 1, 1995-August 31, 1995	25,912.00	5,182.00
September 1, 1995-November 30, 1995	46,126.00	32,926.00
December 1, 1995-February 28, 1996	42,215.00	28,560.00
March 1, 1996-May 31, 1996	43,324.00	29,424.00

June 1, 1996-August 31, 1996	43,109.00	28,363.00
September 1, 1996-November 30, 1996	42,618.00	28,197.00
December 1, 1996-February 28, 1997	42,578.00	23,178.00
March 1, 1997-May 31, 1997	\$43,976.00	\$24,186.00
June 1, 1997-August 31, 1997	42,722.00	24,102.00
September 1, 1997-November 30, 1997	**	24,845.00
December 1, 1997-February 28, 1998	**	23,871.00
March 1, 1998-May 31, 1998	**	24,669.00
June 1, 1998-August 31, 1998	**	25,705.00

\*\* These amounts no longer appear on the sales tax returns.

3. Prior to the commencement of an audit by the Division of Taxation (“Division”), a survey of petitioner’s business premises was conducted by one of the Division’s investigators. The investigator either observed or was informed that petitioner was open seven days a week, with hours Monday through Saturday from 7:00 A.M. to 10:00 P.M., and Sundays from 7:00 A.M. to 7:00 P.M. Petitioner operated with one cash register and two employees. He observed that petitioner was a small convenience store selling magazines, newspapers, paperback books, candy, cigarettes, soda and some greeting cards. It was noted by the investigator that the store did not sell any beer and had no liquor license. No further information concerning the products sold was noted by the investigator.

4. The Division commenced a sales tax audit of petitioner’s business, and on April 7, 1997, an appointment letter was sent to petitioner from the Division’s auditor, Steven Levine, which defined the original audit period as June 1, 1994 through February 28, 1997, and requested the following books and records from petitioner: journals, ledgers, sales invoices, purchase invoices, cash register tapes, Federal income tax returns and exemption certificates.

5. On May 21, 1997, the Division's auditor had a meeting with petitioner's representative, Mukesh Desai, CPA. Mr. Desai informed the auditor that there were no cash disbursements journal and no cash register tapes for petitioner's business. At that time, he provided Mr. Levine with a few Borough Hall-Oxford Tobacco Corp. ("Borough Hall") invoices representing purchases made by petitioner and sold in petitioner's business. Borough Hall's letterhead indicated it was a wholesale distributor of cigarettes, matches, cigars, tobacco, candy and paper goods. Petitioner primarily purchased cigarettes, candy and, on occasion, soda from Borough Hall. During that meeting, Mr. Levine reviewed all records provided by petitioner's representative and determined there was no general ledger, cash receipts journal, or purchase invoices sufficient to form a test period for audit purposes.

6. After the audit had commenced, petitioner provided the Division with a breakdown of sales and calculated profitability for the original audit period as follows: of total sales in the amount of \$387,614.00, taxable cigarette sales were \$181,365.00 or 46.8% of the total; taxable sales of all other sundry items were \$14,811.00 or 3.8% of the total; and nontaxable sales were \$191,438.00 or 51% of the total. The chart represented the profitability factor for each category as 17%, 67% and 51%, respectively, with an overall profitability factor, taking into consideration the weighted breakdown of sales, of 36%.

7. As a result of petitioner's failure to produce cash register tapes, sales invoices, daily sales records, purchase invoices for soda, maps, cards and other items, bank statements and cash disbursements journals, the Division's auditor determined that there were insufficient records to perform a detailed audit. The Division next obtained directly from Borough Hall-Oxford Tobacco Corp. a record of purchases from June 1994 through February 1997 made by SRS News

which totaled \$161,445.00.<sup>1</sup> The Division utilized this third-party information to determine petitioner's sales for the audit period.

8. In September 1997, petitioner provided the Division with a compilation of Borough Hall purchases for the period June 1994 through March 1997. This summary listed each invoice number, the total amount of the invoice and a monthly total. The total for each month could be traced to the purchases verified by Borough Hall directly through February 1997, which, after a subsequent correction by the company, totaled \$161,445.00. In addition, at the time of the hearing, petitioner submitted substantially all the invoices from Borough Hall which corresponded with the compilation provided to the auditor. Virtually all of the Borough Hall purchases, primarily cigarettes and candy, were made with cash taken from petitioner's daily sales. Consistent with this information provided at hearing, many of the Borough Hall invoices indicate they were paid for by cash, and the general ledgers submitted at hearing show only one check drawn to Borough Hall in the amount of \$400.00 over the entire audit period. The remaining general ledger entries indicate that cigarette purchases made with cash were included in cost of goods sold for each year. The total of other purchases made by check and the cash cigarette purchases, which comprise the purchases component of the cost of goods sold, can be traced from the general ledger to petitioner's corporate tax returns.

---

<sup>1</sup> The amount of purchases originally reported by Borough Hall was \$162,587.00, which formed the basis of the calculation in Finding of Fact "13". Using purchases of \$162,587.00, audited taxable sales per quarter were computed to be \$45,695.00. After consideration of sales as reported by petitioner, the tax assessed totaled \$35,744.06 for the period June 1, 1994 through August 31, 1998. This amount appears as the tax assessed on the notice of determination which is the subject of this matter (*see*, Finding of Fact "13"). The corrected Borough Hall total purchases (\$161,445.00), provided to the Division after issuance of the notice of determination, resulted in a reduction of tax assessed by the Division as set forth in Finding of Fact "11".

9. On May 28, 1998, a consent was executed extending the period of limitation to March 20, 1999, by which time an assessment of sales tax could be made for the original audit period June 1, 1994 through February 28, 1997.

10. On or about September 14, 1998, the Division's Bulk Sales Unit sent a notification to Mr. Levine that SRS News was being sold. As a result, the Division issued an appointment letter which was mailed to petitioner on September 16, 1998, extending the audit period to August 31, 1998, the date the business ceased, requesting journals, ledgers, sales invoices, purchase invoices, cash register tapes, Federal income tax returns and exemption certificates for the updated audit period. The letter set up an appointment with petitioner on September 24, 1998. Petitioner's representative notified the Division that the records could not be ready in such a short time frame, and requested an extension of time to produce the records. The auditor informed petitioner's representative that a 30-day letter would be prepared.

11. In order to compute sales using the Borough Hall purchases, the Division needed a markup or profitability percentage to apply to purchases. Since the Division doubted the reliability of petitioner's records (and likewise its tax return information), the auditor did not use the 36% profitability factor provided by petitioner, but rather computed a mark-up percentage by utilizing Dun & Bradstreet's Cost of Doing Business publication dated July 1987-June 1988,<sup>2</sup> which provides business ratios for 191 lines of business. Under the category Retail Trade, the Division chose to use the business ratios associated with General Merchandise stores, because the Division's auditor deemed this to be the most appropriate category for petitioner's business based on the description of the business provided by the Division's investigator. Using the gross

---

<sup>2</sup> Although the auditor's testimony indicated the report covered the period July 1987 through June 1998, the document was clearly marked as covering the period July 1987 through June 1988.

margin percentage and cost of sales percentage from that category, the Division divided the gross margin of 35.28% by cost of sales of 64.72% to arrive at a mark-up on purchases of 54.51%. When the Division multiplied Borough Hall purchases in the amount of \$161,445.00 by the mark-up percentage, and added that amount to the purchases, the Division arrived at a number representing sales from the Borough Hall purchases in the amount of \$249,454.00. Since the Division knew that all of petitioner's products were not purchased from Borough Hall, could not determine what percentage of sales were represented by Borough Hall purchases, and knew that all the Borough Hall purchases and others were paid for by cash, the auditor doubled sales of \$249,454.00 to arrive at total audited sales for the audit period June 1, 1994 through February 28, 1997 in the amount of \$498,908.00, or \$45,355.00 per quarter for 11 quarters. When the audit period was extended to August 31, 1998, the \$45,355.00 was multiplied by 17 quarters, representing the additional six quarters added to the audit period, bringing audited taxable sales to \$771,035.00. Subtracting from total audited sales the sales reported for the audit period in the amount of \$343,554.00, additional taxable sales in the amount of \$427,481.00 resulted, upon which additional tax was computed in the amount of \$35,267.18.

12. Petitioner did not agree with the Division's use of a 54.51% profit ratio since petitioner had provided the Division with a profitability chart several months prior to that time, showing overall profitability of 36%.

13. The Division issued to petitioner, a Notice of Determination dated October 19, 1998, which assessed a total amount due of \$61,856.13 for the period June 1, 1994 through August 31, 1998 (Assessment ID L-015627924-5), consisting of \$35,744.06 in sales tax due, plus penalty and interest of \$13,220.37 and \$12,891.70, respectively. The amount was recalculated, as

indicated in Finding of Fact “11,” to be \$35,267.18, as a result of the Borough Hall correction brought to the Division’s attention in November 1999, after the Notice of Determination had been issued.

14. On November 16, 1998, petitioner’s representative met with the auditor and his group chief for a final conference. No additional records were presented to the Division and Mr. Levine closed the case with the approval of his supervisor.

15. Pertaining to all tax years which encompassed the audit period, 1994 through 1998, at the hearing petitioner introduced its U.S. corporate tax returns (Form 1120S), general ledgers, statements of transaction detail by account, registers which were identified as cash receipts and cash disbursements journals, daily sales records and monthly bank statements from Chemical Bank. Pertinent figures which appeared on the corporate tax returns for the audit period follow:

<b>Tax Year</b>	<b>Gross Receipts or Sales</b>	<b>Purchases</b>
1994	\$101,469.00	\$ 81,641.00
1995	129,991.00	86,885.00
1996	171,672.00	135,657.00
1997	174,405.00	139,618.00
1998	115,970.00	93,349.00

16. The daily sales record consisted of daily lump sum totals listed on a piece of paper. No breakdown of sales was provided. No cash register tapes or other source documents were available to substantiate these amounts. Mrs. Brahmhatt recorded an amount on an empty cigarette carton and submitted the carton flaps to her accountant to create a daily record. After the daily list was created, the carton flaps were discarded.



The bank statements were used to prepare the general ledger and the cash receipts and disbursements journal. The bank statements reflected deposits which were recorded as Sales and Lotto Collection on petitioner's general ledger. Included in such deposits were two entries made at the close of each year: one to record the Lottery commission earned each year, and a second to record cash received from an unidentified source. The cash received entry is stated to be a deposit, but is not reflected in the deposits section of petitioner's bank statements. No explanation is provided concerning this entry. Subtracted from the total Sales and Lotto Collection amount were payments to Lotto (presumably moneys due to the New York State Lottery), and in years 1995 through 1998, payments of New York State Sales Tax. The resulting amount was found to correspond with gross sales as reported on petitioner's corporate tax returns for tax years 1994 through 1998.

17. During the first day of the hearing in this matter, November 9, 1999, petitioner indicated that it had additional records for the Division's consideration. The Administrative Law Judge requested that the Division review petitioner's records, and permitted the parties to set a mutually agreeable time for doing so upon a later continuance of the hearing. On December 1, 1999, the Division's auditor met with petitioner's representative at his office. The auditor was provided with 1994 and 1995 check disbursements and a list of beverage and soda purchases. The auditor was given seven purchase invoices representing total beverage purchases of all types for the audit period totaling \$705.50. The auditor made a request for cash register tapes, sales invoices, and cash disbursements for the entire audit period, in addition to check disbursements for 1996, 1997 and 1998. None of these records were provided to the Division.

After the meeting, the auditor wrote to the Coca-Cola and Pepsi companies to determine if petitioner had a vendor account with either of them for the purchase of soft drinks. Pepsi did not have an account for petitioner. However, Coca-Cola provided the auditor with a printout of purchases made by petitioner from January 1996 through August 1998 totaling \$4,541.00. The auditor did not separately use this amount in his calculation of tax assessed.

18. Petitioner's representative conducted an informal survey of similar retail establishments in Manhattan to establish the retail sales price of cigarettes, and presented the results of the survey into evidence. The survey represented the sales price of cigarettes as of June 1, 2000, and indicated that the nine business owners employed an average markup percentage of 17.25% on the cost of cigarette purchases, and realized an average gross profit of 14.65%.

19. On or about August 5, 2000, petitioner submitted to the Administrative Law Judge a list of vendors from whom it purchased various items sold by SRS News. It showed substantial purchases by cash, most of which were for cigarette purchases from Borough Hall. These amounts did not tie into the Borough Hall invoices or the vendor verification of purchases. The list additionally showed an estimate of purchases made for other items subject to sales tax for which no invoices could be located. Part of the vendor purchases which appeared on the list could be traced to entries in the general ledger (which was submitted for review by the Administrative Law Judge during the second day of the hearing), where checks were drawn for such items. Total purchases as set forth on this list for each of the years in issue were as follows: 1994, \$73,896.00; 1995, \$113,787.00; 1996, \$166,095.00; 1997, \$134,559.00; and 1998, \$98,884.00.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In her determination, the Administrative Law Judge noted that persons required to collect sales tax are required to keep records of every sale in a manner suitable to determine the correct amount of tax due from those sales. These records must be made available for the Division's inspection upon request.

The Administrative Law Judge found that although a proper request for books and records was made by the Division, petitioner did not produce any original sales documentation on audit suitable for verifying the amount of sales tax due for the period in question. As a result, the Administrative Law Judge concluded that after reviewing petitioner's records, the Division was justified in making a determination that petitioner's records were inadequate for purposes of conducting a complete and accurate audit. While petitioner submitted additional documents at the hearing, the Administrative Law Judge found them unacceptable to substantiate petitioner's daily sales or the accuracy of petitioner's sales tax returns. Therefore, the Administrative Law Judge found that the Division properly calculated petitioner's tax liability based on estimated or indirect audit methods.

The Administrative Law Judge stated that although the Division may resort to an estimated or indirect audit method to calculate sales tax due where a taxpayer has failed to present books and records adequate for the Division to conduct a detailed audit, the method chosen by the Division must be reasonably calculated to reflect the taxes due. The Administrative Law Judge found that the Division had established a rational basis for its audit by using purchase records from one of petitioner's suppliers to calculate total purchases for the audit period and then applying a markup percentage to those purchases.

The Administrative Law Judge rejected petitioner's argument that the doubling of the amount of purchases from one of petitioner's suppliers in order to calculate petitioner's taxable sales for the audit period was arbitrary and without basis. The Administrative Law Judge found the Division's action rational, based on its belief that petitioner purchased products from additional suppliers using cash from its cash register without accounting for such purchases.

The Administrative Law Judge also rejected petitioner's argument that its actual markup on sales was significantly less than the 54% contained in the Dun & Bradstreet study relied on by the Division. The Administrative Law Judge concluded that since petitioner's sales records were unreliable, a profitability factor derived therefrom was likewise unreliable. Furthermore, the Administrative Law Judge noted that petitioner's estimates of profitability ranged from 22% to 36%, allegedly based on the same set of records.

The Administrative Law Judge also upheld the Division's imposition of penalty. Although noting that reasonable cause for failure to report and pay sales tax may be found where destruction of business records is proven, the Administrative Law Judge found that petitioner made no attempt to advise the auditor of the loss of records due to the flooding of his basement at any time until the second day of the hearing, and provided no substantiation for any claim of such destruction.

#### ***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that its tax liability should be reduced by canceling that portion of the assessment that doubled petitioner's taxable sales after applying a 54% markup. Petitioner maintains that Borough Hall was petitioner's sole supplier of cigarettes and occasionally petitioner also purchased candy and soda from Borough Hall. The amount

petitioner reported as purchases from Borough Hall was exactly the same as the amount reported by Borough Hall to the Division. Petitioner asserts that its sales consisted primarily of cigarettes. Petitioner alleges that the 54% markup applied by the Division using the Dun & Bradstreet report of “General Merchandise Stores” was excessive given the nature of the merchandise sold by petitioner. Petitioner maintains that its witnesses, who either owned or were employed at convenience stores in the area of petitioner’s store, and a survey of cigarette markup percentages applied by other convenience stores in Manhattan, demonstrated that the markup of 54% used by the Division was excessive. Petitioner also argues that it was improper for the Division to then double the amount of petitioner’s taxable sales to arrive at the total taxable sales for petitioner for the audit period. Petitioner asserts that even if the Division was justified in resorting to an imprecise audit methodology, that methodology must be reasonable. By doubling the audited taxable sales for petitioner, the Division “crossed the line” from a reasonable audit methodology to an unreasonable one, especially for sales on and after September 1, 1995 (Petitioner’s brief in support, p. 7). Petitioner concedes that its reported sales prior to September 1, 1995 were inaccurate but argues that they were completely accurate thereafter and the doubling of taxable sales for that period was inappropriate. Petitioner also requests that the penalties imposed against petitioner be canceled.

The Division, in opposition, argues that the Administrative Law Judge correctly decided the relevant factual and legal issues in this matter. The Division maintains that it was appropriate to use external indices to estimate petitioner’s taxable sales as petitioner failed to produce adequate books and records. The Division asserts that the auditor’s use of the Dun & Bradstreet study to determine an appropriate markup percentage was reasonable. As petitioner

bears the burden of proving that the assessment methodology was improper and that the additional tax asserted due was erroneous, the Division believes that petitioner's speculation that the audit may contain errors is not sufficient to meet this burden. The Division argues that petitioner has not provided any evidence that a category other than the "General Merchandise" stores category chosen by the auditor in the Dun & Bradstreet index would have been more appropriate to use in estimating an appropriate markup percentage.

As for petitioner's argument that the Division doubled the taxable sales after applying the markup percentage to petitioner's purchases, the Division maintains that this is not an accurate statement of the audit methodology. Rather, the Division doubled the amount of purchases made from Borough Hall. This was done because petitioner admitted that it made purchases from other suppliers. The Division believes that in light of the variety of items sold by petitioner, the estimate of total sales attributed to merchandise purchased from Borough Hall was conservative. Further, the Division points out that petitioner provided no evidence that cigarette sales constituted the substantial majority of its business. The Division agrees with the Administrative Law Judge that the testimony of petitioner's witnesses regarding an appropriate markup percentage or composition of sales during the audit period was not credible. As to the fact that after September 1, 1995, petitioner's reported sales of cigarettes increased by a factor of five, the Division argues that this demonstrates that returns filed prior to that date were inaccurate. Further, even if cigarette sales were accurately reported after that date, the Division maintains that there is no support for petitioner's argument that returns were accurate as to sales of other items.

**OPINION**

Petitioner does not dispute, on exception, that it failed to maintain adequate records to allow the Division to conduct a detailed audit of its sales tax liability. Nor does petitioner dispute the Division's decision to estimate its sales tax liability. Petitioner does complain, however, that the audit methodology employed by the Division resulted in an excessive estimate of this liability. Whether the Division's estimate of petitioner's tax liability is overstated is irrelevant to the resolution of this matter. In fact, by its nature, it would be most unlikely for an estimate of petitioner's sales tax liability to be precisely accurate. However, this does not mean that the Division's estimate of petitioner's liability must be adjusted.

The necessity for using an indirect audit method in this case resulted from petitioner's failure to maintain proper records of its purchases and sales in such a manner that the Division could conduct a detailed audit. As long as the methodology employed was rational given the circumstances of petitioner's business, it is sustainable (*see, Matter of Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869; *see also, Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). The Administrative Law Judge found the methodology to be rational and we agree with this determination. If that estimate resulted in imprecision here, it is due to the actions of petitioner.

Despite petitioner's arguments, we find that the Division was justified in doubling the taxable purchases petitioner made from Borough Hall. A review of the facts set forth hereinabove indicates that petitioner sold numerous items besides cigarettes. On audit, petitioner

provided information to the auditor indicating that nontaxable items, and not cigarettes, accounted for more than one-half of petitioner's sales. Of course, without any sales records to demonstrate what these alleged nontaxable sales consisted of, the auditor could not verify petitioner's assertions. Further, it appears that the Division's doubling of petitioner's Borough Hall purchases yielded an amount of gross sales per quarter that closely approximated the amount of gross sales reported by petitioner in its sales tax returns after September 1, 1995 (the period in which petitioner claims that its tax returns were accurate). On audit, the Division allocated its overall estimate of sales (\$771,035.00) over the 17 quarters of the audit period to arrive at quarterly sales of \$45,355.00. This amount is quite comparable to the amount of gross sales reported by petitioner for the quarters subsequent to September 1, 1995, which range from \$42,000.00 to \$46,000.00 per quarter.

The Administrative Law Judge concluded that the testimony of petitioner's witnesses concerning the composition of petitioner's sales and the markup employed for cigarettes in a Manhattan convenience store was either not credible or not to be accorded any weight. The credibility of witnesses is a determination within the domain of the trier of the facts, the person who has the opportunity to view the witnesses first hand and evaluate the relevance and truthfulness of their testimony (*Matter of Spallina*, Tax Appeals Tribunal, February 27, 1992). However, the Tax Appeals Tribunal (hereinafter the "Tribunal") is not absolutely bound by an Administrative Law Judge's assessment of credibility (*see, Matter of Stevens v. Axelrod*, 162 AD2d 1025, 557 NYS2d 809). As to the weight to be accorded to evidence in the record, the Tribunal's enabling legislation, as implemented by the Tribunal's regulations, provides for *de novo* review of a determination by an Administrative Law Judge (Tax Law § 2006[7]; 20



NYCRR 3000.11[e][1]). After reviewing the record in this matter, we find nothing that would cause us to differ with the Administrative Law Judge's conclusions.

Petitioner has offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge's determination is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented to her and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of SRS News, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of SRS News, Inc. is granted to the extent indicated in conclusion of law "H" of the Administrative Law Judge's determination, but is otherwise denied; and
4. The Notice of Determination, as modified in accordance with paragraph "3" above, is sustained.

DATED: Troy, New York  
September 12, 2002

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.  
Commissioner