STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRAMAPAC DELICATESSEN, INC.	:	DETERMINATION DTA NO. 806672
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1983 through August 31, 1986.	:	

Petitioner Framapac Delicatessen, Inc., 101 West 57th Street, New York, New York 10019 filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1983 through August 31, 1986.

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 3, 1990 at 1:45 P.M. At issue in the December 3, 1990 hearing were certain procedural and jurisdictional matters regarding the validity of petitioner's claim for refund and an amendment to a petition. A determination in respect of the December 3, 1990 hearing was issued on February 22, 1991. Said determination ordered a hearing on the merits of petitioner's claim.

Pursuant to the February 22, 1991 determination, a hearing was held before Timothy J. Alston, Administrative Law Judge at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on November 4, 1991 at 1:15 P.M. Petitioner filed a brief on January 22, 1992. The Division of Taxation filed a responding brief on February 28, 1992. Petitioner filed a reply brief on March 13, 1992. Petitioner appeared by Stewart Buxbaum, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation failed to comply with the provisions of 20 NYCRR 3000.4 and therefore should be held in default for its failure to file an answer within 20 days to

petitioner's pleading, designated as an amended petition, dated March 19, 1990.

II. Whether petitioner's refund claim should be granted where the basis for the Division of Taxation's denial, as stated in its denial letter dated October 15, 1990, was that a consent form executed by petitioner was invalid and where the prior determination in this matter concluded that such consent form was valid.

III. Whether the notice of determination herein was jurisdictionally defective for failure to adhere to the requirements of Tax Law § 1138(a)(1), i.e., the Division of Taxation's failure to "check the box" on the notice of determination indicating an estimated assessment.

IV. Whether, upon audit of petitioner's business, the Division of Taxation made an adequate request that petitioner's books and records be made available for review.

V. Whether the Division of Taxation's resort to an indirect audit method utilizing external indices was proper.

VI. Whether petitioner has shown that the audit method herein was unreasonable or that the audit results were in error.

VII. Whether petitioner has shown reasonable cause for abatement of penalties imposed herein.

FINDINGS OF FACT

Findings of Fact Contained in February 27, 1991 Determination[1]

A sales tax audit of petitioner, Framapac Delicatessen, Inc., was conducted for the three-year period September 1, 1983 through August 31, 1986.

(a) On February 11, 1988, a "Statement of Proposed Audit Adjustment" (Form AU-3; see Tax Law § 1138[c]) was signed by petitioner. The statement, which had been prepared by the Division of Taxation, gave a summary of sales and use tax due of $113,573.91, plus penalty under Tax Law § 1145 of $30,311.92 and interest of $45,298.15, for a total amount due of

[1]Since these Findings of Fact are relevant to a determination regarding Issues I, II and III they are adopted and incorporated herein as Findings of Fact "1" through "6" and are reproduced in their entirety.

$189,183.98. (A printed instruction said that "appropriate penalty and/or interest" would run until payment was made.) Petitioner wrote thereon that it agreed to the sales tax of $113,573.91 and minimum interest of $28,110.62 but not to the excess interest of $17,187.53 nor the penalty of $30,311.92. The instructions on the form ask for its return within 30 days to the Division with either agreement or a statement of disagreement. It states that failure to either agree or disagree will result in the issuance of a notice of determination. The taxpayer may consider the matter approved if he is not notified to the contrary within 60 days. The instructions state further that the Tax Law provides for the filing of a signed consent; that "such consent, subject to review and approval" waives the 90-day period for fixing tax, but does not waive a right to apply for a refund; and that the

"agreement to and signing of this statement constitutes such a consent". In this case, the consent would have been considered approved as of April 12, 1988.

(b) On the same date, February 11, 1988, petitioner paid the determination in the amount of $113,573.91. This was endorsed on the determination issued on that date as "for sales tax only."

(c) On the same date, February 11, 1988, a notice of determination was issued for sales and use taxes due for the period September 1, 1983 to August 31, 1986 in the amount of $113,573.91, plus penalty under Tax Law § 1145 of $30,311.92 and interest of $45,298.15, for a total amount due of $189,183.98. This notice contained the typed-in message that: "This tax is being assessed in accordance with the signed Statement of Proposed Audit Adjustment." It also contained the printed statement that it shall be final "unless an application for a hearing is filed with the State Tax Commission within 90 days from the date of this notice...." This notice, by its terms, became final on the 90th day, May 12, 1988.

(d) No document finally and irrevocably fixing the tax pursuant to Tax Law § 1138(c), other than the Statement of Proposed Audit Adjustment or the notice of determination, if either qualifies as such a document, was transmitted to petitioner.

(a) A request was made dated February 24, 1988, for a conciliation conference with respect to the February 11, 1988 notice of determination. This request specified an objection to penalties and excess interest and requested abatement on the grounds that petitioner's records were in good order and petitioner was cooperative in the audit.

(b) A conciliation order dated December 23, 1988, denied any relief and sustained the statutory notice.

(a) A petition dated February 21, 1989 for revision of the determination was filed with the Division of Tax Appeals and was received on March 6, 1989. (This has been conceded to be a timely petition, undoubtedly because the limitation period was suspended for ten months under Tax Law § 170[3-a][b] awaiting the conciliation order.) The petition stated that it contested the penalty and excess interest. Petitioner at this time (and prior thereto) was represented by Sidney H. Fields, C.P.A.

(b) The answer of the Division of Taxation to the petition was dated and mailed on July 24, 1989. It stated the penalty was asserted "by reason of underreporting and/or payment" and requested that the penalty be sustained.

(a) Petitioner filed a new petition dated March 19, 1990, and received March 26, 1990, stated to be an amendment to the original petition. Petitioner at that time was, and still is, represented by Stewart Buxbaum, C.P.A. This petition was directed at the February 11, 1988 notice of determination and requested a revision of that determination. The petition asserted that full records existed which the auditor ignored, reasonable cause existed for the elimination of penalties and that the Division misled petitioner when it obtained any signed agreements.

(b) No answer was made by the Division of Taxation to this petition.

(a) On September 26, 1990, petitioner paid $35,645.34. This was credited to interest due on the February 11, 1988 determination from February 11, 1988 through September 30, 1990.

(b) An application for credit or refund dated October 2, 1990 was filed, seeking a refund of the sales tax of $113,573.91 paid on February 11, 1988 and interest of $35,645.34

paid on September 26, 1990.

(c) This claim for refund was rejected by letter dated October 15, 1990. The letter of rejection stated that the Statement of Proposed Audit Adjustment, Form AU-3, was "invalidated" because it had been "altered" by the taxpayer. (This altering referred to is the statement of the taxpayer as to the amount of tax to which it would agree.) The rejection letter states further that the notice of determination (AU-16) had been properly issued and timely petitioned.

(d) A petition dated October 26, 1990 was filed for a refund, stating, in effect, that the "tax determined" and the "amount of tax contested" were each $113,573.91.

(e) An answer was made, dated and mailed November 5, 1990. This characterized the petition as a "supplemental petition", asserted the propriety of the original audit and asserted that the claim for refund of the amount of tax paid on February 11, 1988 was more than two years after such payment, and therefore was invalid under Tax Law § 1139(c). It further claimed that the interest in issue is minimum interest on the tax where the tax itself is no longer subject to review because of the limitations period.

(f) [At the December 3, 1990 hearing] The Division of Taxation moved (as part of its November 5 answer) that the petition for refund be dismissed on the grounds that there is no jurisdiction over the subject matter of the petition (see 20 NYCRR 3000.5[b][ii]).

Findings of Fact in Respect of the November 4, 1991 Hearing

On or about September 3, 1986, the audit of Framapac Delicatessen was commenced by the Division's mailing of a standard form letter (Form DO-1631) to petitioner advising that petitioner's sales tax returns had been scheduled for audit and that the period under audit would be September 1, 1983 through August 31, 1986. The letter also stated:

> "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."

Additionally, a handwritten notation below the typed body of the letter stated the following:

"In addition

1984 & 1985 Fed. Returns (1120)
Sales Tax Returns (Last six qtrs.)
Expense Bills - March, April & May '86
Non-Taxable Sales March April & May '86
Fixed Asset Bills - Audit Period
Guest Checks - Aug. 27 1986
Purchase Inv. - March, April & May '86
Bank Statements -- 1985."

During the period at issue, petitioner operated a New York-style restaurant and delicatessen known as "Wolf's" located at 57th Street and Sixth Avenue in New York City. Wolf's was open seven days per week and served breakfast, lunch and dinner. Wolf's menu featured large portions and overstuffed sandwiches and also served beer, wine and liquor.

As a result of the audit, the Division found tax due in three areas: overcollection of tax due, additional taxable sales of beer, wine and liquor and additional taxable sales of food.

The additional tax resulting from petitioner's overcollection of tax due was determined by Division review of petitioner's guest checks for August 27, 1986 which were made available upon Division request. This review revealed that petitioner had overcollected tax based upon the sales per the August 27, 1986 guest checks by 1.38%. Specifically, the guest checks totalled $893.08.[2] Sales tax due on these receipts at the prevailing rate of 8.25% totalled $73.68. Petitioner remitted $73.68 in tax in respect of such sales but had erroneously overcollected $1.03 in sales tax. This overcollection resulted in the 1.38% overcollection rate and, ultimately, $15,362.65 of the sales tax assessment herein.

In the area of liquor, beer and wine sales, the Division developed markups using petitioner's records of liquor, beer and wine for the months of March and April 1986. These markups, exclusive of cost, were: liquor 682.21%, beer 291.23%, and wine 864.72%. Application of these markups to petitioner's purchases of liquor, beer and wine throughout the audit period resulted in an audited sales figure for liquor, beer and wine that exceeded the amount of such sales per petitioner's records by $194,047.58. Pursuant to discussions with

[2]It is noted that, considering petitioner's annual sales were in excess of $4,000,000.00, this $893.08 in purported total sales for one day appears rather low. Neither party, however, disputed this fact.

petitioner's representative, this additional sales figure was reduced by approximately 50% to $97,024.58. Following this reduction, total audited taxable sales of liquor, beer and wine was $843,448.00.

Petitioner did not dispute the audit method or result in either the overcollection or liquor, beer and wine sales areas.

The Division's audit of petitioner's food sales was the primary area of dispute both on audit and at hearing. During the course of the Division's auditor's first meeting with petitioner's representative, the representative advised the auditor that petitioner did not maintain its cash register tapes and that its sales tax returns were prepared using

petitioner's bank deposit records. Based upon this information, the Division directed petitioner's accountant to compile certain information to be used to determine petitioner's markup on its food purchases.

In accordance with the Division's direction, petitioner's accountant provided the Division with certain information relevant to determining petitioner's food markup. Specifically, at various points during the audit, the accountant provided information indicating that the amount of meat contained in petitioner's sandwiches was 11 ounces, 8 ounces and 9½ ounces. The 9½ ounces was the last figure provided by the accountant.

At some point during the course of the audit, petitioner's accountant presented the Division with the following information regarding petitioner's markup on certain items:

Item	Size	Selling Price	Markup Over Cost
Corned Beef Sand.	11 oz.	$5.75	108.33%
Turkey Sand.	11 oz.	6.25	45.68%
Shrimp Salad Sand.	7 oz.	7.50	38.37%
Filet Sole Platter	9 oz.	8.95	80.44%
Nova Scotia	4 oz.	7.95	108.66%
Apple Pie	--	2.00	117.39%
Danish Pastry	--	1.75	98.86%

Petitioner determined an overall food markup of 74.26% based on the above information. This overall figure was determined by averaging gross profit and cost figures for

each of the individual items.

At a later point during the audit, petitioner presented the Division with the following, apparently revised (at least to some extent), information:

Item	Size	Selling Price	Markup Over Cost
Corned Beef Sand.	9.5 oz.	$5.25	132.30%
Turkey Sand.	9-9.5 oz.	5.65	13.91%
Shrimp Salad Sand.	7 oz.	7.50	38.37%
Filet Sole Platter	9 oz.	8.95	80.44%

Nova Scotia	4 oz.	7.95	108.66%
Apple Pie	--	2.00	117.39%
Danish Pastry	--	1.75	98.86%
Pastrami Sand.	9.6 oz.	5.25	101.92%
Tongue Sand.	9.5 oz.	5.25	89.53%
Scrambled Eggs	4 eggs	3.25	122.25%
Cheeseburger	10 oz.	5.25	203.46%
Coffee	--	.65	84.50%

With respect to this second set of figures, petitioner determined an overall food markup of 99.29%. This markup was determined by calculating the arithmetic mean of the individual item markups listed above.

It should be noted that petitioner also developed markups for mushroom barley soup (231.60%), french fries (342.72%), jello (324.75%) and V-8 juice (533.33%) at the specific direction of the Division's auditor. These four items were low-volume sale items for petitioner. The remaining items, with the exception of the cheeseburger, were high-volume sale items.

Petitioner's Federal corporate income tax returns for the fiscal years ended July 31, 1984 through July 31, 1986, which were reviewed by the Division on audit, indicated the following information relevant to petitioner's markup:

FYE	7/31/84	7/31/85	7/31/86	Totals
Gross Receipts	$4,058,007	$4,114,518	$4,298,926	$12,471,451
Cost of Goods Sold	2,043,634	2,047,422	1,921,910	6,012,966
Gross Profit	2,014,373	2,067,096	2,377,016	6,458,485
Markup[3]	98.57%	100.96%	123.68%	107.41%

Also during the course of the audit, the question of meals for petitioner's employees was raised by petitioner's accountant. Petitioner's employees were entitled to two hot "wholesome" meals pursuant to union

contract. In attempting to ascertain petitioner's total cost of such meals, the accountant advised the Division that petitioner's average cost of a meal was 40% of the selling price. At hearing, the accountant testified that this 40% figure was an estimate used in an effort to resolve the

[3]The returns do not state a markup figure. This figure is determined by dividing gross profit by cost of goods sold.

audit.

Petitioner's accountant also presented the Division with information regarding pilferage of food in the restaurant industry. Such pilferage was estimated at 2 to 5% of gross sales.

Additionally, the Division was advised that petitioner sold meat by the pound to customers for off-premises consumption. Petitioner had no records of such sales.

Also at some point during the audit, petitioner's accountant presented the Division with workpapers indicating the following markups, using purchase and sales amounts from the corporate returns, adjusted for pilferage, employee meals and an adjustment in certain purchases:

FYE 7/31/84	FYE 7/31/85	FYE 7/31/86
122.79%	125.04%	152.2%

The Division was not satisfied with petitioner's efforts to develop its markup as discussed above. In particular, the Division believed that the overall food markups listed herein in Findings of Fact "16" and "18" were low. The Division reviewed a National Restaurant Association ("NRA") "Restaurant Industry operations Report '82" and a Dun & Bradstreet report entitled "Corporations - Cost of Doing Business Fiscal Years July 1984 - June 1985." The NRA report was prepared in cooperation with Laventhol & Horwath Certified Public Accountants. A portion of both reports was entered into the record. Both reports consisted of a compilation of statistical information derived from an industry-wide data base. The NRA report indicated a median markup for single-unit independent operations of 158%; a median markup for northeast region restaurants of 195%; and a median markup of 187% for restaurants with a sales volume over $800,000.00. The Dun & Bradstreet report indicated a markup of 122%. In the Dun & Bradstreet statistics, however, labor costs were included in cost of goods sold.

The Division concluded that petitioner's records were inadequate to support a detailed audit and elected to utilize a markup using the NRA and Dun & Bradstreet statistics as a guide.

The Division settled upon a markup of 150%. In consideration of the information provided by petitioner's accountant regarding pilferage (which the Division estimated at 2 to 3%) and petitioner's large portions, this markup was reduced to 135%. This 135% markup formed the basis of the Division's calculation of audited taxable sales of food.

The Division determined petitioner's audited taxable sales of food by first totalling petitioner's food purchases per petitioner's records. This figure was then adjusted downward by $404,640.00 to account for employee meals (approximately $280,000.00), supply purchases erroneously included in inventory (approximately $78,000.00), adjustments resulting from changes in accounts payable and beginning and ending inventory ($40,586.00) and a posting error ($6,054.00). Total food purchases, as adjusted, were $5,441,143.00. This cost figure was marked up by 135% to reach total audited food sales of $12,786,686.00.

To compute additional sales tax due, the Division totalled audited food sales and audited liquor, beer and wine sales (see Finding of Fact "11"). This amounted to $13,630,134.00. $136,301.00, or 1%, of this total was determined to be nontaxable sales. Total audited taxable sales were thus $13,493,833.00. Taxable sales reported were $12,303,393.00. Additional taxable sales were thus $1,190,440.00. Tax due on such additional taxable sales totalled $98,211.30.

On September 22, 1987, while the audit was still ongoing, the Division's auditors met with petitioner's accountant. During this meeting, the Division was informed that petitioner did not maintain cash register tapes, guest checks or a day book.

On December 1, 1987, with the audit still ongoing, the Division requested an opportunity to perform an observation test of petitioner's sales. Petitioner refused to allow such a test. Petitioner took the position that such a test during the month of December would not accurately reflect petitioner's overall business activity.

The Division's auditor stated that he was unable to perform a markup test of petitioner's food purchases because of the absence of guest checks for nearly the entire audit period. The auditor also stated that the guest checks which were made available were illegible. The auditor

did not request help from petitioner to read the guest checks. The auditor stated that without guest checks he could not perform a markup test because he could not weight individual menu items and therefore could not determine an overall food markup.

The February 11, 1988 notice of determination (see Finding of Fact "2[c]") contained an unmarked check box next to which was the following sentence:

> "THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(A)(1) OF THE TAX LAW . . . . IF THE BOX ABOVE IS NOT CHECKED, THE TAX HAS NOT BEEN ESTIMATED."

Petitioner's accountant was aware prior to the issuance of the notice of determination and his execution of the consent form of the Division's basis for its assessment. Prior to such time, the accountant had met several times with the Division's auditors and had discussed the Division's audit method. Petitioner's accountant was thus aware that the tax assessed had been estimated.

In the audit report, space under the heading "List Records Requested Not Made Available, If Any" was left blank.

At hearing, petitioner presented the testimony of Wolf's general manager who testified in detail regarding petitioner's purchase and preparation of turkey, shrimp salad, corned beef, pastrami and tongue. In particular, this witness noted the shrinkage resulting from the cooking of the meat and also noted that the amount of meat on a sandwich served at Wolf's was in the range of 9.5 to 11 ounces.

Petitioner's records indicated the following with respect to its overall food markup:

Taxable sales reported	$12,303,393
Beer, wine, liquor sales per petitioner's records	- 746,423
Food sales per petitioner's records	$11,556,970
Food purchases	5,441,143
Markup	112.40%

Summary of the Holding of the February 22, 1991 Determination

The February 22, 1991 determination in this matter held that petitioner's October 2, 1990 refund application was timely under Tax Law § 1139(c). The Division of Tax Appeals therefore had jurisdiction to review petitioner's petition, dated October 26, 1990, in respect of

the Division's denial of said application. In so holding, the determination found that the Statement of Proposed Audit Adjustment dated February 11, 1988 constituted a valid statement under Tax Law § 1138(c) consenting to the fixing of tax due.

The determination also held that the March 26, 1990 petition protesting the basic tax could properly constitute an amendment to the March 6, 1989 petition protesting penalties. The determination granted petitioner's amendment.

The Administrative Law Judge thus determined that the merits of petitioner's protest of the tax found due on audit was properly subject to Division of Tax Appeals review based upon either (or both) of the aforementioned theories.

CONCLUSIONS OF LAW

Issues I, II and III

A. By its petition dated March 19, 1990, petitioner sought to amend its petition dated February 21, 1989. This amended petition was thus not filed within 20 days of the service of the Division's July 24, 1989 answer to the February 21, 1989 petition (see, 20 NYCRR 3000.4[c]). Furthermore, petitioner did not request the Supervising Administrative Law Judge to consent to the filing of the amended petition and no such leave was given. Accordingly, before the prior Administrative Law Judge determination was issued in this matter, petitioner's amended pleading was not authorized by the Rules of Practice and Procedure. The Division's action (or inaction) in not responding to this pleading was therefore not improper.

As noted, however, the prior Administrative Law Judge determination granted petitioner's amendment. At this point, it would appear that the amended petition became a valid and authorized pleading under the Rules of Practice and Procedure. At the same time, the record in this matter contained an answer filed by the Division, dated November 5, 1990, which affirmatively stated the Division's position regarding the propriety of the audit method and results. The Division thus filed an answer to one of the two petitions filed in this matter which protested the merits of the audit. While it would have been better practice for the Division to have filed a response to the amended pleading at least making reference to the November 5,

1990 answer, the Division's position was adequately set forth in a responsive pleading and was known to petitioner. Under these circumstances, it is clear that petitioner was in no way prejudiced by the Division's action. Petitioner's contention that the Division be defaulted is therefore rejected.

B. Petitioner's disingenuous contention that the refund claim should be granted since the Division's denial letter did not go to the merits is also rejected. Even if this determination granted the refund claim on this dubious basis,[4] pursuant to the prior Administrative Law Judge determination, the notice of determination remains in dispute and a loss by petitioner on the notice would cancel out petitioner's win on the refund. This contention, therefore, is moot.

C. With respect to Issue III, Tax Law § 1138(a)(2) provides:

> "Whenever such tax is estimated as provided for in this section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days" (emphasis added).

In the instant matter, the record is clear that petitioner's representative was aware that the Division's assessment was based on external indices and was therefore estimated. It is also clear that by its timely petitions filed in this matter petitioner was not misled or prejudiced in any way by the Division's failure to "check the box" on the notice of determination. Under such circumstances, the Division's failure to issue a formally correct notice does not render the notice invalid (see, Matter of Blau Par Corp., Tax Appeals Tribunal, May 21, 1992).

Issues IV through VII

D. Among the most basic rules of sales tax case law is that before the Division may use an indirect audit methodology or assess tax based on external indices it must first determine

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[4]As to the substance of this contention, the Division's position regarding the merits of the audit is stated in its answer to petitioner's petition filed in respect of the refund claim denial. This position is therefore properly at issue with respect to said petition.

whether a taxpayer's records are adequate. To determine the adequacy of a taxpayer's records, the Division must first request (Matter of Christ Cella v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859) and thoroughly examine (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978, 979-80) the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (Matter of Giordano v. State Tax Commn., 145 AD2d 726, 535 NYS2d 255, 256-57; Matter of Urban Liqs v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138, 139; Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 76, lv denied 44 NY2d 645, 406 NYS2d 1025; see also, Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208, 209), that they are, in fact, so insufficient that it is "virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit" (Matter of Chartair, Inc. v. State Tax Commn., supra, 411 NYS2d at 43; Matter of Christ Cella v. State Tax Commn., supra), "from which the exact amount of tax due can be determined" (Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759, 760).

E. In this case, the Division's audit appointment letter alone (see, Finding of Fact "7") was a clear and unequivocal request for all books and records available during the audit period (see, Matter of M & B Appliance, Tax Appeals Tribunal, April 9, 1992).

Petitioner's contention that the appointment letter's request was restricted to the handwritten list of items at the bottom thereof is rejected. The handwritten notation commences with the phrase "in addition". It does not restrict or contradict the general broad request made in the typed portion of the letter.

Furthermore, and contrary to petitioner's contention, petitioner's accountant advised the Division that petitioner did not maintain guest checks, cash register tapes or a day book. Accordingly, petitioner's failure to maintain or make available cash register tapes, day books and guest checks clearly rendered its records inadequate for the purpose of verifying taxable

sales and justified the Division's resort to external indices.

F. Where, as here, the records of the taxpayer are insufficient or inadequate to permit an exact computation of the sales and use taxes due, the Division is authorized to estimate the tax liability on the basis of external indices (Tax Law § 1138[1]; see, Matter of Ristorante Puglia, Ltd. v. Chu, 102 AD2d 348, 478 NYS2d 91, 93; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451, 452). The methodology selected must be reasonably calculated to reflect the taxes due (Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157, cert denied 355 US 869; Matter of Ristorante Puglia, Ltd. v. Chu, supra) but exactness in the outcome of the audit method is not required (Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, 177, affd 44 NY2d 684, 405 NYS2d 454; Matter of Lefkowitz, Tax Appeals Tribunal, May 3, 1990). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was "not merely imprecise but unreasonably inaccurate and the tax assessed erroneous" (Matter of Shukry v. Tax Appeals Tribunal, ___ AD2d ___, 585 NYS2d 531).

G. Petitioner contends that the audit method herein was unreasonable. Petitioner argues that the use of the Dun & Bradstreet and NRA reports was improper where sufficient records existed for the use of a markup on the various menu items (see, Findings of Fact "15" and "17"). In support of its position, petitioner cites Matter of Cafe Europa (Tax Appeals Tribunal, July 13, 1989) and Matter of Meskouris Bros v. Chu (supra).

Petitioner's contention is rejected. The Tax Appeals Tribunal has held that the use of a statistical report as a basis for a sales tax assessment may be reasonable so long as the report is identified in the record (see, Matter of Bitable on Broadway, Tax Appeals Tribunal, January 23, 1992; Matter of MNS Cards & Gifts, Tax Appeals Tribunal, May 7, 1992). In Matter of Bitable on Broadway (supra), where an NRA report listing a statistic of rental paid as a percentage of total sales was the basis of the audit, the Tribunal explained its rationale in its finding that the audit was reasonable as follows:

> "'The Audit Division is not responsible for demonstrating the propriety of the assessment, including the basis for its audit' (Matter of Blodnick v. New York State

> Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538), and '[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in this case' (Matter of Grecian Square v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219, 221), and petitioner bears the burden to prove the audit methodology unreasonable (Matter of Surface Line Operators Fraternal Org. v. Tully, supra). However, the record must contain sufficient evidence to allow the trier of fact to determine whether the audit had a rational basis (Matter of Grecian Square v. New York State Tax Commn, supra, 501 NYS2d 219, 221; Matter of Fokos Lounge, Tax Appeals Tribunal, March 7, 1991; Matter of Fashana, Tax Appeals Tribunal, September 21, 1989).
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> "The auditor at hearing testified that he utilized the NRA report. The report was clearly identified and was subject to examination by petitioner . . . . The purpose of requiring the Division to identify the report utilized in this type of audit (see, Matter of Fokos Lounge, supra; Matter of Fashana, supra) is to provide a petitioner with access to the source of the chart and, thus, with the ability to introduce evidence challenging the soundness or applicability of the report. In other words, it ensures that a petitioner has the opportunity to sustain his burden of proof."

H. In this case, the statistical reports utilized by the Division were identified in the record (see Finding of Fact "25"). The Division's audit method has thus clearly met the minimal rational basis requirement referred to above. Accordingly, as noted above, petitioner bears the burden of proving impropriety in the audit method or result. To meet its burden, petitioner focused its efforts on establishing the markups on certain individual items. Such items were among petitioner's high-volume items. Through the testimony of its general manager presented at hearing, it is concluded that petitioner has established its markups on the items set forth in Finding of Fact "17". It is noted that the Division did not dispute the selling prices as claimed by petitioner.

Having accepted petitioner's markups on particular items, the effect of such a finding on petitioner's food markup as determined by the Division on audit must be determined . Petitioner's efforts to average the individual item markups (see Findings of Fact "16" and "18") are not satisfactory since such efforts assume that petitioner bought and sold equal amounts of turkey, corned beef, etc. throughout the audit period. There is no evidence in the record to support such an assumption, for the record contains no evidence of sales of individual items as a percentage of total sales. (In other words, based on this record, one could not calculate a

weighted markup on petitioner's food purchases.[5]) In the absence of any such evidence, the individual item markups fail to establish an overall food markup and thus fail to prove that the Division's audited food markup figure is anything more than "imprecise" (Matter of Shukry v. Tax Appeals Tribunal, supra). Since petitioner's failure to maintain records of individual sales prevented exactness in the audit result, exactness was not required (Matter of Convissar v. State Tax Commn., 69 AD2d 929, 930, 415 NYS2d 305). It is noted that the record does contain an overall food markup figure based upon petitioner's records (see Finding of Fact "36"). This figure, however, is similarly flawed in that there is no evidence of individual sales in the record and is, therefore, also insufficient to prove error in the Division's food markup figure. Accordingly, the portion of the assessment relating to petitioner's food sales is sustained.

I. Petitioner did not take issue with either the overcollection or liquor, beer and wine sales components of the audit. These two portions of the assessment are sustained.

J. The imposition of penalties herein pursuant to Tax Law § 1145 is also sustained. Petitioner clearly failed to maintain records, specifically, guest checks and cash register tapes, as prescribed by statute and regulations. This failure led directly to petitioner's failure to properly remit tax. It is noted that petitioner's apparent cooperation with the Division during the course of the audit is insufficient to overcome this significant degree of neglect with respect to petitioner's recordkeeping.

K. The petitions of Framapac Delicatessen, Inc. are in all respects denied. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated February 11, 1988, and the Division's refund claim denial, dated October 15, 1990, are sustained.

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[5]It is noted that, at hearing, the Division contended that in the absence of guest checks it could not calculate a weighted food markup on audit. Petitioner contended that a markup could have been done and that the Division's abandonment of the markup was improper. In my view, the Tribunal's holding in Bitable on Broadway (supra) rejects the notion that the Division must justify abandoning one generally acceptable audit method in favor of another generally acceptable method. Accordingly, the question of whether the Division could have done a weighted food markup is irrelevant.

DATED: Troy, New York
October 8, 1992

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE