STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TOP SHELF DELI, INC. T/A BURNS PARK DELI	:	DETERMINATION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1984 through May 31, 1987.	:	

Petitioner, Top Shelf Deli, Inc. T/A Burns Park Deli, 5089 Merrick Road, Massapequa, New York 11758, filed 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 June 1, 1984 through May 31, 1987 (File No. 807115).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on September 18, 1990 at 10:45 A.M., with all briefs to be submitted by February 1, 1991. Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel) and by S. Buxbaum & Co., P.C. (Stewart Buxbaum, CPA). The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

ISSUES

I. Whether certain consents extending the period of limitations on assessment are rendered invalid as a result of alleged flaws in the power of attorney held by the person who executed said consents.

II. Whether the last quarterly period at issue herein was improperly assessed due to the Division of Taxation's alleged failure to specify said period as being under audit.

III. Whether the Division of Taxation properly requested books and records of petitioner and, if so, whether in the absence of complete and adequate books and records the Division

employed an audit method reasonably calculated to arrive at petitioner's tax liability.

IV. Whether use tax was properly determined to be due in connection with a bulk transfer of certain assets to petitioner and, if so, whether the period for which such assessment was made was correct.

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

FINDINGS OF FACT

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

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

The auditor testified that petitioner provided the records requested except for cash register tapes, sales invoices, or any other records by which the amount of taxable sales could be verified. The auditor was advised that while cash registers were used in petitioner's business, the tapes were not retained by petitioner during the period in question. At the first audit meeting, as well as at subsequent meetings, the auditor orally advised petitioner's accountant that the audit period spanned June 1984 through and including May 1987 (see Finding of Fact "16", infra).

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

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

such figure by a six-day work week,[1] in turn by 13 weeks per quarter and, ultimately, by the number of quarters in the audit period to arrive at audited taxable sales of take-out foods. This figure was reduced by 10% per year to allow for price increases due to

inflation,[2] resulting in audited taxable sales of prepared foods for the audit period in the amount of $400,052.00.

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

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

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

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

audited taxable sales resulted in catering sales of $26,137.00.

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

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

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

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

Petitioner paid tax based on the allocation of $15,000.00 to furniture and fixtures acquired. However, the bill of sale reflects total assets acquired (under the categories furniture and fixtures, machinery and equipment, and leasehold improvements) to have been $70,000.00, with

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

"SCHEDULE OF THE FOREGOING BILL OF SALE

F & F	Steam Table - 3 section	$ 3,000
M & E	Microwave Oven - Welbilt Micromite Mod #2000 S/N 511547	500
M & E	Slicing Machine - Globe Mod 400 S/N 413776	1,500
M & E	Slicing Machine - Globe Mod 400 S/N 410498	1,500
L/H	Meat Case 8' Refrigerated/Generator	5,000
L/H	Frozen Food Case - Universal	5,000
L/H	Walk-in Refrigerator Box - Coson approx. 10' x 10' w/ Generator	17,500
M & E	Counter Top Refrigerator 2 dr.	1,000
M & E	Gas Range 6 burner w/oven	3,000
L/H	Range Hood & Fire Extinguisher System for Range	2,500
L/H	3 section stainless steel sink	2,000
L/H	1 counter sink	1,000
L/H	Hot Water Heater[3]	1,500

[3] Not subjected to tax by the auditor.

L/H	13 Sections 5 Shelf Shelving/3 Sections 4 Shelf Shelving (Wood)	2,000
L/H	All counters - bank and front	2,000
M & E	Coffee Maker (Bunn - Property of Ostend Coffee)	500
--	Milk Case - Property of Dellwood Dairy	--
--	Coca Cola Display Case - Property of Coca Cola Co.	--
--	Potato Chip Rack - Property of Wise Potato Chip Co.	--
--	Cigarette Racks - Property of R. J. Reynolds Co.	--
M & E	Toaster	500
F & F	Pots, Pans, Skillets, Plastic Bins	500
F & F	Cooking Utensils	500
F & F	Meat Wrap Dispensers - 2	500
M & E	Heavy Duty Can Opener	500
F & F	Fire Extinguishers	1,500
F & F	Sandwich Sign	500
F & F	2 Outdoor Signs	5,000
F & F	Rubbish Containers - 4	500
F & F	Paper Goods - Catering, Salad Containers, etc.	2,000
--	Stock - Groceries, Beer, Soda, Cigarettes, etc.	--
F & F	Mops, Pails, Brooms	1,000
L/H	Barbeque Spit	1,500
M & E	Deep Fryer	1,500
M & E	Food Chopper	1,500
M & E	Globe Scale	1,500
M & E	Sony Cash Register	1,500
	Total L/H Improvements, M & E, F & F	~~$70,000~~"

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

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

A second power of attorney appointing Kenneth S. Silver and John Cortopassi was offered in evidence. This power is identical to the first such power appointing these representatives, save for the date of execution being July 26, 1989 and for specifying the period

to be "sales and use tax for the period 6/1/84 to 5/31/87" (emphasis added).

On June 2, 1988, the Division of Taxation issued to petitioner two notices of determination and demands for payment of sales and use taxes due. The first such notice assesses total tax due (sales tax plus use tax) as determined on audit in the amount of $29,693.53, plus penalty and interest, for the period June 1, 1984 through May 31, 1987. The second notice assesses "omnibus" penalty for the sales tax quarterly periods spanning June 1, 1985 through May 31, 1987.

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

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

SUMMARY OF THE PARTIES' POSITIONS

Petitioner maintains that the Division of Taxation improperly assessed the bulk sales transaction in the quarter ending August 1984 because the bulk sale actually occurred in July 1985. At hearing, petitioner's president, Michael Saas, testified that he began operating the

business in 1984, but that, in his opinion, since the closing occurred in 1985 after petitioner's application for a liquor license had been granted, this means that the above sale should have been assessed in the quarter ended August 31, 1985. The Division argues, by contrast, that since petitioner exercised dominion and control over the items which were the subject of the contract of sale as of July 1984, the bulk sales transaction was properly assessable in such quarterly period ended August 1984.

Petitioner also contends that two outdoor signs, a refrigerated meat case, a frozen food case and a walk-in refrigerator box were improperly assessed as leasehold improvements for bulk sales purposes. Thus petitioner alleges, at a minimum, that the bulk sale assessment is overstated by the use tax calculated as due on these items (see Finding of Fact "10"). Petitioner argues that the noted items have a useful life in excess of one year and are, clearly by their nature, permanent affixations to the real estate the removal of which would do substantial damage to the item or to the real estate. Therefore, petitioner contends that such items are capital improvements not properly subject to tax. Petitioner offered no evidence on this issue other than very limited and general testimony by Mr. Saas that the walk-in freezer was ten feet by ten feet and could not be moved.

Petitioner also contests the validity of the consents extending the period of assessment for the first three taxable quarterly periods. More specifically, petitioner argues that the power of attorney executed in favor of Kenneth S. Silver & Company is invalid in that it lists the period of authority to be "sales tax from June 1, 1984 to [the] present" as opposed to listing a specific closing date. In addition, petitioner argues that its representative (Mr. Silver) was never given explicit or specific authority to extend the period of limitation or to execute the consents in question. Along the same lines, petitioner argues that the final quarterly period under assessment must be deleted. Petitioner argues that since the audit appointment was scheduled for May 19, 1987, which was prior to the end of the quarterly period ending May 31, 1987 and prior to the June 20, 1987 due date for that quarter's sales tax return, any audit of this period is erroneous and the Division of Taxation should be limited in its assessment to the quarterly

period ended February 28, 1987.

Petitioner concedes agreement with the use of the markup audit methodology and its results with respect to beer, soda, cigarette and candy sales. However, petitioner objects to the audit methodology employed with respect to taxable sales of take-out foods, as well as to the estimate that 5% of petitioner's sales represented catering sales. More specifically, petitioner objects to the use of an observation test as described herein upon the argument that such audit methodology assumes that each day for petitioner's particular business is the same as any other day. Petitioner proposed an alternative method of calculation under which taxable sales per returns filed for the quarterly periods during which each observation day occurred would be extrapolated. Under its method, petitioner arrives at taxable sales of $366.00 per day, as opposed to the $497.00 per day determined by the Division's observation methodology. Petitioner compares these numbers, calculates an error rate of 36% and applies such error rate to taxable sales as reported for the audit period to arrive at $83,090.00 of additional taxable take-out food sales. Petitioner then combines additional taxable sales per the markup portion of the audit ($122,690.00) with the $83,090.00 of additional taxable take-out food sales to arrive at additional taxable sales of $205,780.00. Tax due thereon is computed to be $16,462.00, which together with tax on fixed assets ($3,644.75) leaves an assessment of $20,106.75. Petitioner goes on to eliminate catering sales, to eliminate the first three quarterly periods and the last quarterly period, and to eliminate tax on fixed assets all as invalidly assessed, arriving ultimately at a proposed reduced assessment of $10,981.00.

Finally, petitioner seeks waiver of the penalties imposed based upon the fact that Mr. Saas has a limited education and allegedly must rely on his accountant. Mr. Saas testified that he has completed a high school education but that he has no specific training either in accounting or tax matters, and thus he relied entirely on Kenneth Silver to perform all aspects of petitioner's reporting and payment functions vis-a-vis sales tax.

CONCLUSIONS OF LAW

A. Petitioner's argument with respect to the power of attorney is rejected. Petitioner

maintains, relying upon Matter of Adamides v. Chu (134 AD2d 776, lv denied 71 NY2d 806), that the power of attorney was not sufficiently specific as to the period of time for which Mr. Silver was authorized to represent petitioner, and that petitioner never specifically authorized Mr. Silver to extend the period of limitations. In fact, and unlike the case in Matter of Adamides (supra), the power of attorney in question specifies that it appoints Mr. Silver to represent petitioner for the "sales tax period from 6/1/84 to present". The power of attorney appointing Mr. Silver was signed on June 9, 1987, and it clothed Mr. Silver with authority to represent petitioner without any apparent limitations. In fact the period of authorization is identical to that specified on the audit appointment letter (see Finding of Fact "2"). Petitioner's president (Michael Saas) testified that he executed the power of attorney giving Mr. Silver authority to represent him concerning sales tax for the period June 1, 1984 to June 9, 1987. Petitioner argues that the power is invalid under regulations of the Commissioner of Taxation in that it fails to "clearly describe...the taxable year or period involved" (20 NYCRR 600.5). However, reference to the date of signing (June 9, 1987) places an end date on the appointive period covered by the power. At the least, the power of attorney herein conferred authority upon Mr. Silver to deal with the subject sales tax audit insofar as it encompassed the period June 1, 1984 through the date of execution of the power of attorney, to wit, June 9, 1987. Finally, and perhaps most noteworthy, is the fact that Mr. Saas ratified Mr. Silver's representation of petitioner in the subject audit by executing a second power of attorney on July 26, 1989 wherein the period is specified to be "6/1/84 to 5/31/87" (see Finding of Fact "13"). Hence, the power of attorney appointing Mr. Silver was valid and so too, in turn, were the consents he executed.[4] It is of no moment that petitioner did not specifically authorize

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[4]The petition for hearing in this case, dated July 5, 1989 and received July 10, 1989, is signed on petitioner's behalf by John Cortopassi, CPA, one of the persons listed on the allegedly invalid power of attorney (the petition is dated prior to petitioner's execution of the second power of attorney appointing Messrs. Silver and Cortopassi). This petition was filed to challenge the April 7, 1989 conciliation order sustaining the notice of determination (see Exhibit "D"). In order to have had a conciliation conference, petitioner was required to have filed a request therefor within 90 days of issuance of the notice of determination, and since no question or evidence to the contrary is presented, I assume such a request was timely filed. Without such

Mr. Silver to extend the period of limitations; there remains absolutely no evidence of any limitation in this regard (or otherwise) having been placed by petitioner on Mr. Silver's authority vis-a-vis the audit.

B. The Division of Taxation's assessment of use tax on the bulk sale items was proper, both as to period and as to amount. First, as to the period of assessment, the Division's error, if any, by assessing the bulk sale for the quarterly period ended August 31, 1984 as opposed to the quarterly period ended August 31, 1985, as described, is of no moment. Both of such quarterly periods fall within the period of audit, and there is no evidence that petitioner was unaware of the nature, amount or underlying basis for this portion of the assessment. Assuming the assessment should have been for the period ended August 31, 1985, the Division's indication of

assessment for the period ended August 31, 1984 is nonetheless a harmless error and does not render the notices at issue void in any respect (Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000). As to the dollar amount and specific nature of the items assessed it is noted that the sale of tangible personal property, unless exempt, is subject to the imposition of tax (Tax Law § 1105[a]). Petitioner has the burden of proving that the items in question, specifically the outdoor signs, refrigerated meat case, frozen food case, walk-in refrigerator box, etc., were not items of tangible personal property subject to tax. While it might well be that some of the items in question were not subject to tax, petitioner has not offered evidence sufficient to support such a conclusion. Essentially, petitioner provided scant description and personal opinion concerning the walk-in refrigerator and the other items. Absent more specific evidence, petitioner's argument that such items were capital improvements improperly assessed must be

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request in evidence, it is not known who signed the same -- either petitioner's president, Mr. Saas, or one of its then-appointed representatives, Mr. Silver or Mr. Cortopassi. If either of these latter two signed and if the power of attorney were invalid as petitioner argues, then petitioner would find itself in the unenviable position of having shown the request for conference to be invalid. In turn, without a valid, timely challenge to the notice of determination, the assessment would be fixed and irrevocable and petitioner would lose entitlement to any review. It seems safe to assume petitioner would not desire such result.

rejected (see, Matter of Gem Stores, Inc., Tax Appeals Tribunal, October 14, 1988).

C. Petitioner's argument with respect to the final quarterly period assessed is rejected. While it is true that the audit appointment letter specified that the audit was to proceed from June 1, 1984 "through the present," and that the first appointment date was set for May 19, 1987, subsequent actions by the Division of Taxation constituted proper requests for records for such last quarterly period leaving petitioner on notice of its need to assemble records and present the same for review. More specifically, the auditor noted that over the balance of 1987 and into 1988, audit activity continued and petitioner's representative was "many times left with a list of required records." Even more specifically, the auditor testified to advising petitioner's representative on numerous occasions that the audit period extended through May 31, 1987. In contrast, there is no evidence, either from petitioner's accountant or from petitioner, to refute that petitioner was provided adequate actual notice that the audit period was extended through and including the quarterly period ended May 31, 1987.

D. Petitioner raises no argument with respect to the Division's resort to indirect audit methodologies. Such resort was premised upon petitioner's inability to provide records specifying each taxable sale and the amount of the receipt involved therewith. In fact, not only does petitioner raise no argument that it had adequate records to enable the conduct of a full and complete books and records audit, but petitioner specifically accepted the Division's resort to a markup audit and the results thereof with respect to beer, soda, cigarette and candy sales. What petitioner contests, in fact, is the use of an observation test as opposed to a markup test to determine petitioner's taxable sales of take-out foods. Petitioner's argument essentially amounts to a request for the use of a different indirect audit methodology than the one applied by the Division. However, the Appellate Division has clearly sanctioned the use of an observation test as a viable indirect audit method (see, Matter of Club Marakesh v. Tax Commn. of State of New York, 151 AD2d 908, 542 NYS2d 881, lv denied 74 NY2d 616, 550 NYS2d 276). As to petitioner's request for the use of a markup test in favor of an observation test, there is no requirement that the Division select one method over another where either method nonetheless

results in a reasonable approximation of petitioner's tax liability. The Division is not required to establish its assessment with exactness or precision where petitioner's own failure to keep adequate records precludes the Division from doing so (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679). With respect to the use of an observation test versus a markup test, it is noted that petitioner made cash payouts both with respect to payroll expenses and certain purchases. Finally, it is noted that petitioner objected to the use of an observation test upon the basis that such method of audit assumes each day is the same as any other day. While this to some degree may be true, it is noted that the Division made certain allowances by treating Saturdays and Sundays as having only half the volume as other days and also utilized three separate observation dates during three different seasons of the year. Accordingly, the Division's resort to the particular methodologies employed herein are sustained.

As to petitioner's proposed modification utilizing its current representative's method (see Finding of Fact "20") it appears clear that petitioner's method represents essentially a manipulation of numbers premised upon the correctness and acceptance of petitioner's returns as filed. Such acceptance runs counter to the purpose of conducting an audit (i.e., to verify the correctness of such returns). It is noted that petitioner's own method of recomputing itself admits to an underreporting of over $20,000.00 in tax. Petitioner would eliminate from such amount the 5% estimate for catering, notwithstanding that petitioner's president admitted via testimony that at least every other month catering sales occurred. The Division, having premised its estimate of catering sales upon office experience involving over 50 delicatessens in the same geographic area with the same operational attributes, contrasted with petitioner's admission that some catering sales do in fact occur, leaves the Division's estimate as viable. Petitioner would also eliminate from its calculation of liability the tax on the bulk sale items, the first three quarterly periods assessed, and the last quarterly period assessed. For the reasons discussed in Conclusions of Law "A", "B" and "C", supra, such eliminations are not warranted.

E. The penalties as assessed are sustained. Notwithstanding petitioner's president's claim of reliance upon his accountant, combined with his lack of formal training in tax or accounting

matters, the facts of this case indicate that petitioner filed its returns utilizing a method of estimation thus running the risk that upon audit a large deficiency would occur. In fact, this is exactly what happened. Moreover, petitioner's own recalculation admits that a liability in excess of $10,000.00 exists over the amount of tax reported with petitioner's returns. These bases are sufficient to sustain the penalties imposed.

F. The petition of Top Shelf Deli, Inc. T/A Burns Park Deli is hereby denied and the notices of determination and demands for payment of sales and use taxes due dated June 2, 1988, together with such penalty and interest as are lawfully due and owing, are sustained.

DATED: Troy, New York
4/18/91

ADMINISTRATIVE LAW JUDGE