STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT TRUSNOVEC	:	DETERMINATION DTA NO. 818762
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, 1990 through May 31, 1993.	:	

Petitioner, Robert Trusnovec, P.O. Box 674, Wading River, New York 11792, 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, 1990 through May 31, 1993.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 16, 2003 at 10:30 A.M., with all briefs to be submitted by June 5, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se.* The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly determined additional sales and use taxes due from petitioner for the period at issue.

FINDINGS OF FACT

1. Shortly before the commencement of the hearing held in this matter, Robert Trusnovec ("petitioner") requested an adjournment of the hearing which was scheduled for Thursday, December 16, 2003. By letter dated November 25, 2003, Assistant Chief Administrative Law

Judge Daniel J. Ranalli denied petitioner's request on the basis that such hearing had been scheduled seven times over the one and one-half years immediately prior thereto. Apparently, petitioner had indicated that he would be having surgery each time that the hearing was scheduled and, once again, stated that he was to have surgery on or about December 16, 2003, the most recent scheduled date of the hearing. Judge Ranalli, therefore, proposed several alternatives to an adjournment of the hearing, to wit: (1) the hiring of a representative to appear at the hearing on petitioner's behalf; (2) proceeding with the hearing without petitioner's attendance in which case the Division of Taxation ("Division") would present its case, petitioner would be provided with a copy of the hearing transcript and copies of all evidence submitted by the Division and petitioner would then be provided with ample time to file evidence (documents and/or affidavits) in support of his position; (3) proceeding by means of a submission, i.e., both parties would submit their documents and written arguments according to a schedule and the matter would then be determined without a hearing; or (4) petitioner could elect not to appear at the hearing and a default order would then be entered.

At the hearing, the Division's representative, Michael B. Infantino, Esq., indicated that he had spoken with petitioner and that petitioner had stated that he wished to proceed with the second alternative set forth above. Accordingly, petitioner was provided with a copy of the hearing transcript and copies of all evidence presented by the Division. Petitioner was then provided with a schedule for submission of his evidence and legal arguments pertaining to this matter; however, while numerous additional requests for extensions were made and two such requests were granted, petitioner submitted no evidence or legal briefs in support of his position.

2. Petitioner was the sole proprietor of a delicatessen known as Yaphank Community Shop ("YCS") located in Yaphank, New York.

3. On June 18, 1993, an audit of YCS was commenced by the Division. Prior to this audit, YCS had been audited by the Division on three other occasions. By letter dated June 18, 1993, the Division advised petitioner that an audit was being conducted for the period June 1, 1990 through May 31, 1993. The letter requested that the following books and records be made available: Federal income tax returns, State income tax returns, journals, ledgers, sales invoices, purchase invoices, fixed asset invoices, cash register tapes, guest checks, exemption certificates and all other sales tax records.

An additional letter dated October 20, 1993 was sent to petitioner which requested the following information needed to continue the audit: sales and purchase journals for the period June through September 1990 and July 1991, bank statements for the entire audit period, the last two Federal income tax returns filed, check purchase records for the audit period and "the entire box of 1993 records."

Additional letters, dated June 13, 1994 and January 9, 1995, were sent to petitioner requesting information necessary to complete the audit.

4. No general ledger, sales journal, cash receipts journal, purchase journal, monthly bank statements or sales invoices were provided by petitioner to the auditor. While purchase invoices were provided for the period June 1 through December 31, 1990, no journal to tie in such invoices was provided and the purchase invoices were loose invoices, in large envelopes. In addition, the purchases per records were $53,432.16 less than purchases per Federal income tax returns. Therefore, the purchase records were deemed inadequate by the auditor. The only cash register tapes provided were the "ring-out" or total tapes, not the entire tapes. Petitioner had no sales tax accrual bank account.

5. Due to the increase in reporting of gross sales which was attributed to the prior audit, gross sales for the period December 1, 1990 through May 31, 1993, totaling $863,789.00, were accepted as filed. However, for the period June 1, 1990 through November 30, 1990, gross sales were not accepted since they were very low when compared to other quarters. For that period, petitioner's purchases in the amount of $49,582.00 were marked up by petitioner's book markup ratio (per his Federal income tax returns) of 68 percent which resulted in audited gross sales of $122,496.00 for these two sales tax quarters. Therefore, total audited gross sales for the audit period were determined to be $986,285.00.

6. In order to determine a taxable ratio, an observation test was conducted, with the consent of petitioner, on Tuesday, March 12, 1996 from 6:00 A.M. until 7:00 P.M. (the business operated seven days per week, from 6:00 A.M. to 7:00 P.M.). The observation revealed a prepared food (sandwiches, breakfast sandwiches, etc.) ratio of 46.1 percent and other taxable sales (beer, soda, cigarettes, candy, etc.) ratio of 23 percent. The prepared food ratio of 46.1 percent was reduced to 40.5 percent to account for the fact that delicatessens do not sell as much prepared food on weekends as is sold during the week.

The prepared food ratio of 40.5 percent was applied to the audited gross sales of $986,285.00 resulting in audited taxable prepared food sales in the amount of $399,445.45. The other taxable sales ratio of 23 percent was applied to the audited gross sales of $986,285.00 resulting in audited sales of $226,845.55. Total audited taxable sales for the audit period were, therefore, found to be $626,291.00.

For the audit period, petitioner had reported taxable sales in the amount of $447,492.00. Additional taxable sales were, therefore, determined to be $178,799.00 with tax due thereon in

the amount of $14,101.51. Because of petitioner's prior audit history of underreporting, omnibus and statutory penalties as well as interest were imposed by the auditor.

7. During the course of the audit, petitioner executed a series of consents extending the period of limitation for assessment of sales and use tax, the last of which provided that such taxes for the audit period could be assessed at any time on or before June 20, 1997.

8. On May 5, 1997, the Division issued a Notice of Determination to petitioner assessing additional sales and use taxes in the amount of $14,220.91, plus penalty and interest, for a total amount due of $32,591.49 for the period June 1, 1990 through May 31, 1993.

9. Petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). In lieu of appearing at a conference, petitioner opted to have the matter decided by correspondence.

Contending that the taxable ratios determined by the auditor were too high, petitioner performed his own observation test which found the prepared food taxable ratio to be 35.2 percent (rather than the 40.5 percent determined by the auditor) and the other taxable sales ratio to be 20 percent (rather than the 23 percent determined by the auditor). It was determined by the conciliation conferee, pursuant to a Conciliation Order (CMS No. 162846) dated May 25, 2001, to utilize petitioner's taxable ratios which resulted in a reduction in the amount of tax due to $7,599.41. In addition, penalties were canceled and interest was computed at the applicable rate.

CONCLUSIONS OF LAW

A. Every person required to collect sales tax must maintain records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a][1]). Petitioner did not maintain records sufficient to verify his delicatessen's daily sales. Under these circumstances, the Division was authorized to estimate petitioner's sales tax

liability (Tax Law § 1138[a][1]; ***Matter of Licata v. Chu***, 64 NY2d 873, 487 NYS2d 552). Any audit methodology utilized by the Division to estimate sales must be reasonably calculated to reflect tax due, but exactness in the outcome of the audit 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 petitioner to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (***Matter of Meskouris Bros. V. Chu***, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451, 452).

B. In the present matter, petitioner's records were clearly inadequate to perform a detailed audit (***see***, Finding of Fact "4"). Accordingly, the resort to an estimate by the auditor was proper. For most of the audit period (December 1, 1990 through May 31, 1993), petitioner's gross sales were accepted as filed. For the balance of the audit period, June 1, 1990 through November 30, 1990, petitioner's purchases were marked up by his own book markup ratio to determine the gross sales for that period. In order to determine what portion of petitioner's gross sales were taxable, the auditor performed an observation test, the date for which was agreed to by petitioner. After prepared food and other taxable sales ratios were determined based upon this observation test, the Division allowed a further reduction in these ratios based upon petitioner's own observation test which resulted in a reduction in total tax due from $14,220.91 to $7,599.41. In addition, penalties were canceled despite petitioner's underreporting of taxable sales in prior audits. It appears, therefore, that the audit methods utilized and the subsequent reduction to the results thereof were reasonably calculated to reflect tax due and, subsequent to the conciliation conference, petitioner offered no additional evidence at all which would serve to

show that the amount assessed was erroneous. Accordingly, it must be found that the Division properly determined additional sales and use taxes due from petitioner for the audit period.

C. The petition of Robert Trusnovec is denied and the Notice of Determination issued to petitioner on May 5, 1997, as modified by the Conciliation Order dated May 25, 2001 (***see***, Finding of Fact "9"), is sustained.

DATED: Troy, New York
November 24, 2004

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE