

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
636 DELI, INC.	:	
for Revision of a Determination or for Refund of Sales	:	DETERMINATION
and Use Taxes under Articles 28 and 29 of the Tax Law	:	DTA NO. 820412
for the Period March 1, 2001 through November 30, 2003.	:	

Petitioner, 636 Deli, Inc., 636 Walt Whitman Road, Huntington Station, New York 11747, 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 March 1, 2001 through November 30, 2003.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 30, 2005 at 10:30 A.M., with all briefs to be submitted by March 15, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared by Benedict C. DiVenti, Jr., CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUE

I. Whether the audit method employed by the Division of Taxation was reasonable or whether petitioner has shown error in either the audit method or result.

II. Whether penalties were properly imposed.

III. Whether the Division of Tax Appeals has authority to address petitioner's claim that the confidentiality of its tax records was breached by the Division of Taxation.

FINDINGS OF FACT

1. Petitioner, 636 Deli, Inc., doing business as Good Times Delicatessen & Catering since March 24, 1998, operated a small deli on Long Island located at 636 Walt Whitman Road in Huntington Station.¹ Petitioner was an S corporation, with all of its stock owned by Andrew Boecklin. During the audit period at issue, consisting of 11 sales tax quarters (which equates to a period of 2 years and 9 months), petitioner reported on its sales tax returns total gross sales of \$286,519.00 and total taxable sales of \$140,464.00 as follows:

Sales tax quarter ending	Gross sales reported	Taxable sales reported	Taxable portion Taxable sales reported ÷ gross sales reported
5/31/01	\$ 33,426.00	\$ 16,224.00	48.5%
8/31/01	34,004.00	17,250.00	50.7
11/30/01	30,246.00	16,487.00	54.5
2/28/02	33,927.00	13,624.00	40.2
5/31/02	25,008.00	11,692.00	46.8
8/31/02	33,962.00	16,982.00	50.0
11/30/02	23,801.00	11,717.00	49.2
2/28/03	20,172.00	9,657.00	47.9
5/31/03	20,394.00	9,809.00	48.1
8/31/03	19,276.00	9,735.00	50.5
11/30/03	12,303.00	7,287.00	59.2
Totals	\$286,519.00	\$140,464.00	

Petitioner was selected for audit based on what the Division of Taxation (“Division”) considered the “low gross revenue” reported on its tax returns, as detailed above.

¹ The deli’s location is described on various documents in evidence as at the street address of 636 Walt Whitman Road but in either Huntington Station, Huntington or Melville. There is no explanation for this variance in the record. Since petitioner in its petition used Huntington Station, it is shown as such above.

2. A report of Linda Caracappa, an investigator employed by the Division, which was prepared after her field visit to the deli on Monday, October 27, 2003, noted that petitioner had hours of operation from 6 A.M. to 4 P.M., Monday through Sunday, and she observed two employees. She described the deli as “small,” which was supported by her description of the premises and equipment: deli counter, no tables or chairs, five steam tables, one ice case, one ice cream case, and two racks of chips. She also observed the following inventory of drinks: six cases of bottled drinks and one case of bottled beer, and the following advertised specials: hero, \$2.99; 12 pack of Budweiser, \$8.49; small coffee, \$1.25; and large coffee, \$2.00.

3. A bulk sale notice reported a scheduled date of sale of the deli of November 4, 2003, from petitioner to 517 Deli Corp. for the total sales price of \$25,000.00. This occurred only one week after Ms. Caracappa’s field visit on October 27, 2003. The auditor’s field audit report shows that the new business owner was an individual named Michael Scansarole, and the same street address of 636 Walt Whitman Road was used as the purchaser’s address as well as petitioner’s, as seller. The record does not disclose any particulars concerning the relationship between Mr. Boecklin and Mr. Scansarole and whether the parties were, in fact, independent and on an equal footing or, in other words, at arm’s length.² Although the bulk sale notice was dated November 4, 2003 by the purchaser, it was not received by the Division until March 11, 2004, approximately four months after the reported sale. On the bulk sale notice, the reported sales price of \$25,000.00 was allocated as follows: fixtures, \$5,000.00; leasehold, \$10,000.00; good will, \$10,000.00.

² Petitioner presented no witnesses on its behalf.

4. A few days after the receipt of the bulk sale notice, the Division's auditor sent a letter dated March 15, 2004³ advising petitioner that its tax records for sales tax for the period at issue were going to be audited commencing April 6, 2004 at its office. Petitioner was further advised that it must make available for audit all books and records pertaining to its sales and use tax liability, and a "Records Requested List" was enclosed with the letter. This list of records to be produced by petitioner included the following:

- Sales tax returns, worksheets and canceled checks for entire audit period
- Federal income tax returns
- NYS corporation tax returns
- General ledger
- General journal and closing entries
- Sales invoices
- All exemption documents supporting non-taxable sales
- Chart of accounts
- Fixed asset purchase/sales invoices
- Expense purchase invoices
- Merchandise purchase invoices
- Bank statements, canceled checks and deposit slips for all accounts
- Cash receipts journal and sales journal
- Cash disbursement journal and purchase journal
- The corporate book
- Power of attorney
- Financial statements
- Depreciation schedules
- State Liquor Authority license
- Lease contracts
- Utility bills
- Computer generated files that are identical to books and records
- Guest checks
- Cash register tapes

³ Although the bulk sale notice was received by the Division on March 11, 2004 and the auditor's letter scheduling the start of the audit was dated March 15, 2004, the auditor's log reveals that this matter was selected for a detailed audit back on February 27, 2004 based upon a "low taxable ratio," and was assigned to the auditor on March 9, 2004. As noted in Finding of Fact "1", taxable sales, as a percentage of petitioner's gross sales, were reported as ranging from 40.2% to 59.2%. The Division's database developed from observation tests performed on 123 Long Island delicatessens reflected a significantly higher range of taxable ratios. Of the 123 Long Island delicatessens observed, 2 had taxable ratio percentages in the 40s, 5 in the 50s, 18 in the 60s, 50 in the 70s, 41 in the 80s, 6 in the 90s and 1 had a 100% taxable ratio percentage.

The auditor also requested a copy of the contract for the sale of petitioner's business on November 14, 2003.

5. The field audit visit was postponed until April 27, 2004 at the request of petitioner's representative. At such time, only some scattered information was provided by petitioner in response to the records request detailed above. Petitioner's limited production of records included:

- One sales tax return for the quarter ending May 31, 1998 (outside the audit period)
- Check stubs for the period 11/1/01-3/31/03
- 2003 Federal income tax return only
- A few blank checks
- Three deposit slips: 10/14/03 for \$600.00, 10/15/03 for \$380.00, 11/17/03 for \$6,000.00
- One monthly American Express statement for 9/24/03-10/23/03
- One columnar worksheet-formless with no company heading or description
- Some internally generated bank activity statements for the period 4/1/02-11/30/03

Furthermore, petitioner offered no documents to support the gross sales and taxable sales which it reported on the tax returns detailed in Finding of Fact "1".

6. Prior to his field audit visit, the auditor worked on developing a projection of petitioner's taxable sales based upon his use of the Division's "Observation Database." This database consisted of the results obtained by the Division's investigators who conducted observation tests of the taxable sales at the premises of 123 Long Island delicatessens. For each of these 123 Long Island delicatessens, the database provided the following information: (i) date observed, (ii) hours observed, (iii) gross sales, (iv) taxable sales, (v) taxable portion, (vi) location, (vii) employee count, (viii) patron count, and (ix) the specific day of the week of the observation. The auditor used the data for 7 of the 123 Long Island delicatessens included in the

database. He selected ones which represented “similar types of business in the neighborhood.”⁴

The chosen seven were as follows:

Location	Employee Count	Patron Count	Day and Date Observed	Hours Observed	Gross Sales	Taxable Sales	Taxable Portion
Farmingdale	3	-	Tuesday, 12/10/96	5:00AM-5:00PM	\$ 1,215.97	\$ 891.39	73%
Farmingdale	6	346	Thursday, 10/24/02	5:00AM-5:00PM	1,416.01	1,188.72	84%
Farmingdale	4	527	Wednesday, 9/27/00	5:00AM-4:00PM	1,596.01	1,404.41	88%
Farmingdale	6	342	Friday, 5/3/02	5:00AM-5:00PM	2,007.30	1,553.39	77%
Huntington	4	307	Tuesday, 4/29/97	7:00AM-8:00PM	1,242.29	976.33	79%
Huntington	6	407	Thursday, 12/16/99	5:00AM-8:00PM	1,918.77	1,190.74	62%
Huntington	7	563	Thursday, 12/6/01	6:00AM-6:00PM	2,136.45	1,699.31	80%
TOTALS					\$11,532.80	\$8,904.29	77%

The auditor then divided by seven (since seven delis were used in the sample) the above gross sales totaling \$11,532.80 and taxable sales totaling \$8,904.29 to compute a daily average per Huntington/Farmingdale delicatessens of gross sales of \$1,648.00 and of taxable sales of \$1,272.00, resulting in a taxable percentage of 77% (\$8,904.29 divided by \$11,532.80).

7. The auditor then calculated an estimate of petitioner’s weekly sales by multiplying the daily average of gross sales of \$1,648.00 and taxable sales of \$1,272.00 of the seven delis by

⁴ By a letter dated July 13, 2006, the administrative law judge advised the parties that he was taking official notice of a map of the section of Long Island covering the area that includes Huntington, Huntington Station and Farmingdale and also shows Route 110 which is another way to reference Broadway, Broad Hollow and Walt Whitman Avenue as it runs south to north. Such map confirms that the seven delis selected to be used from the database are fairly described to be in “the neighborhood” of petitioner’s deli.

seven, the number of days open in a week, resulting in projected weekly gross sales of \$11,536.00 and weekly taxable sales of \$8,904.00. To project annual sales, the auditor then multiplied these weekly sales by 50 (factoring in an estimated two weeks that the business would be closed for holidays and vacation time), resulting in projected annual gross sales of \$576,800.00⁵ and annual taxable sales of \$445,200.00. The auditor computed average quarterly sales of \$111,300.00 by dividing the annual taxable sales of \$445,200.00 by four. He then projected taxable sales for the entire audit period of \$1,224,300.00 by multiplying the average quarterly sales of \$111,300.00 by 11 since the audit period consisted of 11 sales tax quarters. As noted in Finding of Fact “1”, petitioner reported total taxable sales for the 11 sales tax quarters at issue of only \$140,464.00. Comparing his projected taxable sales for the audit period of \$1,224,300.00 to taxable sales reported of \$140,464.00, the auditor calculated an error rate for projected sales to reported sales of 871.6% since projected sales were 8.716 times greater than reported sales (\$1,224,300 divided by \$140,464.00 equals 8.716).

8. It is observed that the auditor did not include in the sample he utilized, the data from the observation test of the sales of a delicatessen located in Huntington Station (included among the 123 Long Island delicatessens in the database) which had the following information:

Location	Employee Count	Patron Count	Day and Date Observed	Hours Observed	Gross Sales	Taxable Sales	Taxable Portion
Huntington Station	5	322	Wednesday, 3/14/01	6:30AM-7:00PM	\$1,083.85	\$731.71	68%

⁵ On cross-examination, the auditor conceded that, in his opinion, this estimate of annual gross sales of \$576,800.00 did not comport with Ms. Caracappa’s description of the small size of the business, as noted in Finding of Fact “2”. He also admitted on cross-examination that it would have been “fairer” if all delis included in the database, described in Finding of Fact “6”, located in the same area as petitioner were utilized.

9. As noted in Finding of Fact “5”, the auditor was provided with minimal records by petitioner at the field audit visit on April 27, 2004. Consequently, he utilized the error rate for projected sales to reported sales of 871.6% as detailed in Finding of Fact “7” to calculate additional sales tax due of \$92,130.00 for the period at issue as follows:

Period Ending	Quarterly Taxable Sales as Reported	Error Rate	Projected Taxable Sales	Additional Taxable Sales (Projected Taxable Sales Minus Reported Taxable Sales)	Tax Rate	Additional Tax Due
5/31/01	\$ 16,224.00	871.6%	\$ 141,408.00	\$ 125,184.00	8.25%	\$10,328.00
8/31/01	17,250.00	871.6%	150,351.00	133,101.00	8.50%	11,314.00
11/30/01	16,487.00	871.6%	143,701.00	127,214.00	8.50%	10,813.00
2/28/02	13,624.00	871.6%	118,747.00	105,123.00	8.50%	8,935.00
5/31/02	11,692.00	871.6%	101,907.00	90,215.00	8.50%	7,667.00
8/31/02	16,982.00	871.6%	148,015.00	131,033.00	8.50%	11,138.00
11/30/02	11,717.00	871.6%	102,125.00	90,408.00	8.50%	7,684.00
2/28/03	9,657.00	871.6%	84,170.00	74,513.00	8.50%	6,334.00
5/31/03	9,809.00	871.6%	85,495.00	75,686.00	8.50%	6,433.00
8/31/03	9,735.00	871.6%	84,850.00	75,115.00	8.75%	6,573.00
11/30/03	7,287.00	871.6%	63,513.00	56,226.00	8.75%	4,920.00
Totals	\$140,464.00		\$1,224,282.00	\$1,083,818.00		\$92,139.00

10. In reviewing Federal form 4797, Sales of Business Property, attached to petitioner’s U.S. Income Tax Return for an S Corporation for 2003, the auditor observed that petitioner reported the gross sales price of \$24,999.00 for equipment which was sold on October 31, 2003. Consequently, rather than utilize the \$5,000.00 reported on the bulk sale notice as allocable to the sale of fixtures, the auditor determined that sales tax was due on the sale of equipment in the

amount of \$25,000.00. He calculated additional sales tax due on the bulk sale of petitioner's business of \$1,750.00 as follows:

Taxable portion of bulk sale reported on bulk sale notice	Taxable portion of bulk sale based on Federal tax form	Additional portion of bulk sale subject to tax	Tax Rate	Additional Tax
\$5,000.00	\$25,000.00	\$20,000.00	8.75%	\$1,750.00

11. The Division issued a Notice of Determination dated May 24, 2004 against petitioner asserting additional sales and use taxes due of \$93,889.00 plus penalty and interest. This amount included the additional tax due of \$92,139.00, as detailed in Finding of Fact "9", as well as the additional tax due of \$1,750.00, as detailed in Finding of Fact "10", from the bulk sale. Penalties were imposed for underpayment of tax, including the omnibus penalty, since petitioner underreported sales tax due by more than 25 percent. The following explanation was provided:

Since you have not submitted adequate records for audit, as required under sections 1135 and 1142 of the Tax Law, we determined that you owe tax, interest, and any applicable penalties, under sections 1138 and 1145 of the Tax Law, based upon available records and information.

You owe tax on the transfer of tangible personal property in accordance with the provisions of sections 1133, 1138 and 1141(c) of the Tax Law.

12. A copy of the Notice of Determination dated May 24, 2004 was sent to petitioner's representative at an incorrect address in Amityville, New York. There is no explanation in the record why this mistake occurred. In light of the fact that the representative communicated with the Division's auditor on business stationery which showed his address in Massapequa, it is puzzling why the notice was sent to an Amityville address. Further, a Statement of Proposed Audit Change dated April 28, 2004 (one day after the auditor's field visit) was sent to petitioner's representative at his correct office address in Massapequa.

SUMMARY OF THE PARTIES' POSITIONS

13. The Division maintains that it used an audit method that was reasonably calculated to determine petitioner's sales tax liability in light of petitioner's failure to keep and maintain sales records adequate for audit purposes. It contends that its estimate of petitioner's taxable sales based upon its observation database was reasonable. The field data from seven observation reports of similar types of businesses in petitioner's neighborhood "was a reasonable means of determining Petitioner's sales tax liability" (Division's brief, p. 10). According to the Division, petitioner failed to show that the audit methodology employed was not reasonable. The Division points out that "at no time has Petitioner ever claimed that the records provided were adequate" (Division's brief, p. 7). The Division also contends that there is no basis to abate the penalties imposed given "the substantial discrepancy between the amount of reported taxable sales and the amount of tax determined on audit" (Division's brief, p. 11).

14. Petitioner argues that the estimated audit was performed and concluded prior to the auditor's review of petitioner's documentation. Further, the 7 delis selected from the observation database of 123 delis were arbitrarily chosen. According to petitioner, "a larger population would give a fairer representation" (Petitioner's brief, p. 2). Petitioner argues that the report of investigator Caracappa, which described a small operation with only two employees, "did not [accord with] a place that would do \$576,000 in [annual] sales volume" (Petitioner's brief, p. 3). Further, petitioner argues that "A reasonable businessman would not sell a Deli [sic] for \$25,000 while its sales were close to \$600,000 per year" (Petitioner's brief, p. 3). Further, since the entire business sold for \$25,000.00, only \$5,000.00, the portion allocable to equipment, should be subject to tax, not the \$20,000.00 allocable to goodwill and the lease.

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]). As noted in the findings of fact, petitioner failed to produce any records sufficient to verify its sales. The pivotal fact in this matter is that the gross sales and taxable sales reported by petitioner on its sales tax returns were not supported by any records available for audit and verification. Consequently, the Division's right to resort to an estimate of petitioner's sales, as long as it selected an audit method reasonably calculated to reflect the sales and use taxes due, remains unassailable (*see, Matter of Rincon*, Tax Appeals Tribunal, October 9, 2003).

B. Petitioner correctly points out that the Division was under a time constraint in issuing the Notice of Determination as a result of petitioner's bulk sale of its deli business. In order to preserve its right to collect any unpaid sales tax owed by petitioner from the bulk sale purchaser pursuant to Tax Law § 1141(c), the Division was required, within 90 days of receipt of the notice of the bulk sale, to give notice to the purchaser and to petitioner of "the total amount of any tax or taxes which the state claims to be due from the seller" (*cf., Matter of North Shore Cadillac-Oldsmobile*, Tax Appeals Tribunal, April 3, 2002, *confirmed* 13 AD3d 994, 787 NYS2d 463, *lv denied* 5 NY3d 704, 801 NYS2d 1). Nonetheless, this time pressure on the Division does not alter the fact that petitioner has never offered any documents or evidence to support the gross sales and taxable sales which it reported on its tax returns. In addition, the fact that the auditor took steps to prepare his estimate of petitioner's taxable sales prior to his confirming the lack of records does not invalidate his estimate because the Division did not decide to *resort to* external indices to estimate tax until *after* it confirmed that it was impossible to verify petitioner's taxable sales receipts and conduct a complete audit. The fact that the auditor, faced with time pressure,

had made a preliminary estimate of petitioner's taxable sales simply establishes that he followed a prudent course of conduct in the performance of his professional duties. The auditor in the matter at hand *did not fail to determine the adequacy of a taxpayer's records*, which would support the cancellation of audit results based upon an estimate utilizing external indices (*cf.*, ***Matter of Cronos Enterprises, Inc.***, Tax Appeals Tribunal, January 26, 2006).

C. As of the spring of 2004 when the auditor made his field audit visit, petitioner was no longer operating its delicatessen business. Consequently, the auditor could not utilize an observation test of petitioner's own delicatessen business to estimate its taxable sales. Instead, he chose to utilize the database that the Division had developed based upon observation tests conducted of 123 Long Island delicatessens, as detailed in Finding of Fact "6". In the first instance, it is concluded that the use of such database in the circumstances at hand, where an observation test of petitioner's own business was not possible, represented a reasonable methodology for the estimate of petitioner's sales. Of course, such estimate was imprecise but it has been noted that such imprecision results by reason of petitioner's failure to maintain adequate books and records as required by Tax Law § 1135(a)(1) and must be borne by the taxpayer (*see, Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *aff'd* 44 NY2d 684, 405 NYS2d 454). Furthermore, it is observed that no adjustment for rising prices was made in the matter at hand which benefitted petitioner in light of the fact that the results from the seven observation tests utilized were conducted in years as early as 1996, five years prior to the start of the audit period at issue here. In addition, as noted in footnote "4", the seven delis selected from the data base were in "the neighborhood" of petitioner's deli business.

D. The analysis therefore shifts to whether petitioner has shown, despite the conclusion that the audit methodology was reasonable, that "the amount of tax assessed was erroneous"

(Matter of Pay TV of Greater New York, Inc., Tax Appeals Tribunal, July 14, 1994). Petitioner has vigorously argued that the Division should have utilized “a larger population” of delis from the Division’s database to estimate its taxable sales. This argument is accepted to the extent that sales tax due from petitioner is more accurately determined if the results from the observation test of the deli located in Huntington Station, as detailed in Finding of Fact “8”, is also utilized in the auditor’s calculation since it is also clearly within “the neighborhood” of petitioner’s deli business. Consequently, the Division is directed to recompute the “daily average of gross sales and taxable sales” of the seven delis, as detailed in Finding of Fact “7”, to include this eighth “Huntington/Farmingdale” delicatessen in the calculation so that *all* of the Huntington/Farmingdale delicatessens in the database are utilized.

E. Furthermore, petitioner at the hearing introduced into evidence the report by the Division’s investigator, Linda Caracappa, that supports the conclusion that the amount of tax assessed was erroneous. As detailed in Finding of Fact “2”, the investigator characterized petitioner’s deli as markedly “small” with no tables and chairs, limited inventory, and only two employees. In addition, as noted in footnote “5”, the auditor conceded that his estimate of annual gross sales of \$576,800.00 did not comport with the investigator’s description of the small size of petitioner’s deli. Consequently, the amount of taxable sales for the audit period estimated by the use of data from the observation tests of the eight Huntington/Farmingdale delicatessens must be further reduced to account for the markedly smaller size of petitioner’s operation as described by the investigator. It is observed that the employee count for the eight Huntington/Farmingdale delicatessens is 41, or an average of *five* employees per deli compared to petitioner’s *two* employees. Therefore, after the Division recalculates the estimate of petitioner’s taxable sales by utilizing data from the eight Huntington/Farmingdale delicatessens

instead of only seven, it is directed to treat only 40%⁶ of such estimate as representing the taxable sales of petitioner in order to account for the smaller size of petitioner's operation.

F. As noted in Finding of Fact "10", the Division imposed sales tax on the gross sales price of \$24,999.00 (rounded up to \$25,000.00) for equipment reported as sold by petitioner on October 31, 2003,⁷ as indicated on its Federal form 4797 included with its 2003 income tax return. Petitioner contends that the bulk sale notice showed only \$5,000.00 of a total sale price of \$25,000.00 allocable to equipment with the remaining \$20,000.00 allocable to goodwill and the lease and challenges the Division's assertion of additional sales tax on the bulk sale of the deli business. Petitioner had the burden to offer evidence to explain the variance between its Federal report and the bulk sale notice. It failed to offer the testimony of Andrew Boecklin, who owned 100% of the stock of petitioner and had personal knowledge of the sale of his business to Mr. Scansarole. Since Mr. Boecklin had the capability to explain the discrepancy between the Federal tax return and the bulk sale notice, such failure must be held against petitioner (*see, Matter of Meixsell v. Commissioner of Taxation*, 240 AD2d 860, 659 NYS2d 325, *lv denied* 91 NY2d 811, 671 NYS2d 714; *Matter of Greenwald*, Tax Appeals Tribunal, November 24, 1993). Since petitioner has the burden of proof in this proceeding, such failure results in the conclusion that the Division properly calculated additional sales tax due of \$1,750.00 on the bulk sale of petitioner's business as detailed in Finding of Fact "10" (*see, Matter of Center Moriches Monument Co. v. Commr. of Taxation & Fin.* 211 AD2d 947, 621 NYS2d 720; *Matter of Sarantopoulos*, Tax Appeals Tribunal, February 28, 1991, *confirmed*

⁶ With only two employees, petitioner had 40% of the average number of employees, i.e., five employees, of the eight Huntington/Farminale delis selected from the Division's database.

⁷ This date is very close to November 4, 2003, the scheduled date of sale of the deli reported on the bulk sale notice, and the Division acted reasonably in viewing the Federal form 4797 as a report of the sale of business property from the bulk sale.

186 AD2d 878, 589 NYS2d 102 [wherein the Tribunal noted that the burden of proof is on the taxpayer to show, by clear and convincing evidence, that the amount of tax assessed was erroneous]).

G. Petitioner has not established that its failure to pay tax was due to reasonable cause and not due to willful neglect. In the words of the Tax Appeals Tribunal, in establishing reasonable cause, the taxpayer faces an “onerous task” (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained why the task is onerous as follows:

By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner’s discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted] (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992).

It is noted that basing one’s tax returns *not on actual sales records* as was the case here indicates “at the very least, a lack of due care” (*Matter of Himed Deli Corp.*, Tax Appeals Tribunal, March 30, 2000). The Tax Appeals Tribunal has noted on many occasions that in considering abatement of penalty the most important factor to be taken into account is the taxpayer’s efforts to comply with its obligations under the Tax Law (*see, e.g., Matter of Northern States Contracting*, Tax Appeals Tribunal, February 6, 1992). In short, merely *estimating* the amount of tax due on tax returns does not provide a basis to abate penalties (*see, Matter of A & A Service Station, Inc.*, Tax Appeals Tribunal, February 5, 2004). Furthermore, even with the reduction as noted above, petitioner’s underreporting of taxable sales will still be in excess of 25%, and the omnibus penalty is also properly imposed.

H. Finally, petitioner’s concern for the confidentiality of its tax records must be addressed. Tax Law § 1146(a) prohibits the disclosure of “any particulars set forth or disclosed in any such return or report.” Similar language has been interpreted to mean information whose

source is a filed tax return or report (*cf.*, *Kooi v. Chu*, 129 AD2d 393, 517 NYS2d 601). At Tax Law § 1146(b)(1) and (2), the following penalties for violation of this “secrecy requirement” are set forth:

(1) Any officer or employee of the state who *willfully* violates the provisions of subdivision (a) of this section shall be dismissed from office and be incapable of holding any public office in this state for a period of five years thereafter.

(2) Cross-reference: For *criminal* penalties, see article thirty-seven of this chapter. [Emphasis added.]

The Division of Tax Appeals, which has limited jurisdiction, lacks statutory authority either (i) to direct the dismissal from office of any officer or employee or (ii) to hear and determine criminal matters. Consequently, the imposition of penalties for violation of the secrecy requirement of the Tax Law is beyond the scope of this proceeding, even if petitioner had proven that the violation in this instance was “willful.”

I. The petition of 636 Deli, Inc. is granted to the extent indicated in Conclusions of Law “D” and “E”, and the Notice of Determination dated May 24, 2004 is to be modified to so conform, but, in all other respects, the petition is denied.

DATED: Troy, New York
August 24, 2006

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE