STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FRAMAPAC DELICATESSEN, INC.	:	DECISION 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 an exception to the determination of the Administrative Law Judge issued on October 8, 1992. An earlier determination was issued on this matter which addressed certain procedural and jurisdictional matters regarding the validity of petitioner's claim for refund and an amendment to a petition. This determination, which was issued on February 22, 1991, ordered a hearing on the merits of petitioner's claim. No exception was taken to this determination.

On this exception, petitioner appeared by Stewart Buxbaum, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioner filed a brief in support of its exception and a brief in reply to the Division of Taxation's brief in opposition. Oral argument was not requested. Petitioner's reply brief was received on February 18, 1993, which date began the six-month period to issue this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

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 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.

III. 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.

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

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

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

FINDINGS OF FACT

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

FINDINGS OF FACT CONTAINED IN FEBRUARY 22, 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.

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 (hereinafter the "Division"), 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 $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

[1]In his October 8, 1992 determination, the Administrative Law Judge adopted the findings of fact contained in the February 22, 1991 Administrative Law Judge determination.

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.

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."

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.

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 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.

A conciliation order dated December 23, 1988, denied any relief and sustained the

statutory notice.

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.

The answer of the Division 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.

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.

No answer was made by the Division to this petition.

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.

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.

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.

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.

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.

At the December 3, 1990 hearing, the Division 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 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

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[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.

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 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.

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

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	07/31/85	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 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. 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 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.

OPINION

The Administrative Law Judge determined that petitioner's attempt to amend its February 21, 1989 petition by its petition dated March 19, 1990 was not effective by itself because the amendment was not made in accordance with 20 NYCRR 3000.4(c). However, the Administrative Law Judge concluded that the amendment became effective at the time the prior Administrative Law Judge determination in this matter granted the amendment, i.e., February 22, 1991. The Administrative Law Judge found that petitioner was not prejudiced by the Division's failure to answer the amended petition, because at the time the amendment became effective, the Division had already filed an answer, dated November 5, 1990, which stated the Division's position regarding the propriety of the audit method and results.

Next, the Administrative Law Judge held that petitioner was not misled or prejudiced in any way by the Division's failure to indicate on the Notice of Determination that the tax assessed was estimated and, relying on Matter of Blau Par Corp. (Tax Appeals Tribunal, May 21, 1992), sustained the Notice.

With respect to the audit, the Administrative Law Judge concluded that: a clear and unequivocal request for all books and records was made to petitioner; petitioner's records were inadequate; and the use of a statistical report as a basis for the assessment was reasonable because the reports used by the Division were identified by the Division at the hearing. The Administrative Law Judge determined that petitioner has established its markup on particular items but that this proof was insufficient to establish that the overall markup utilized by the Division was unreasonable. Finally, the Administrative Law Judge sustained the imposition of penalties.

On exception, petitioner asserts that the Division did not timely answer the original petition, never answered the amended petition and has exhibited behavior in this matter which has "risen to the level of systematic and unexplained disregard of the Tribunal Rules" (Petitioner's brief on exception, p. 3). Petitioner also asserts that the Notice of Determination

was defective because it failed to indicate that: the taxes were estimated; the Division did not make a clear and explicit request for records; and petitioner's records were adequate. The audit methodology was not reasonable, argues petitioner, because the markup percentage was derived from an external index rather than petitioner's records. Petitioner also states that the Division should have introduced the complete index book at the hearing to allow petitioner to introduce evidence challenging the soundness of the report. Finally, petitioner asserts that the Administrative Law Judge erred in not abating the penalty.

In response, the Division asserts that petitioner did not have complete guest checks for the period and, therefore, that the books and records were inadequate. The Division also argues that petitioner's markup of 99.29% was rejected because it results in an estimate of tax that is significantly less than the tax reported by petitioner. Lastly, the Division contends that petitioner was fully aware of the basis of the assessment.

We affirm the determination of the Administrative Law Judge.

First, we conclude that petitioner has not shown that it was prejudiced by the Division's delay in answering the February 21, 1989 petition or its failure to answer the March 19, 1990 amendment that became effective on February 22, 1991 (the date the earlier determination of the Administrative Law Judge was issued). Petitioner asserts that the delay in answering caused substantial prejudice to petitioner by the additional interest and penalty that accrued during the period of delay. As petitioner paid the total tax due on February 11, 1988, it is not clear to us how additional penalty could subsequently accrue. With respect to any interest that may have accrued, we have already held that interest represents the cost to the taxpayer for the use of the funds during the period of protest and does not constitute substantial prejudice (Matter of Rizzo, Tax Appeals Tribunal, May 13, 1993).

The Division's failure to answer the amended petition is not inexplicable, given the unusual procedural facts of this case, particularly the fact that the amendment was not made until ordered by the earlier determination in this matter. Thus, we do not agree with petitioner's assertion that the Division's behavior in this case rose to the level of a "systematic and

unexplained disregard" for our rules of practice. Further, we agree with the Administrative Law Judge that petitioner was not prejudiced by the Division's failure to answer because the Division had at the time of the amendment already filed an answer which stated its position on the merits of the audit methods and result.

With respect to the late answer, petitioner states "[u]nder the 1992 Taxpayer Bill of Rights, the taxpayer is entitled to a timely response. In the Bill of Rights it is further stated that tax, penalty and interest may be cancelled for such tardy behavior" (Petitioner's brief on exception, p. 3). Petitioner did not cite us to a specific statutory provision as support for this statement and we can find none. The Taxpayer Bill of Rights (Article 41 of the Tax Law), as enacted by Chapter 770 of the Laws of 1992, does contain a provision (section 3008[a] of the Tax Law) requiring the abatement of interest in certain very specific instances involving delayed acts by the Division; however, petitioner has not asserted, much less demonstrated, that he is within the narrow circumstances of the statute (e.g., that the act delayed by the Division was ministerial in nature and that the failure to abate would be grossly unfair). Therefore, we see no basis to abate interest.

Turning to the reasonableness of the audit methodology, we do not agree with petitioner that this case is similar to Matter of Cafe Europa (Tax Appeals Tribunal, July 13, 1989). In Cafe Europa, the Division was able to, and did, perform a markup audit, but abandoned this audit result for an observation audit. The Division in Cafe Europa offered no credible explanation for the abandonment of the markup audit but the record indicated that the observation audit yielded over twice as much tax as the markup audit. Under these very specific circumstances we concluded that the observation audit was unreasonable. In contrast, in this case the Division never performed a complete audit using the markup methodology and has shown that it could not because petitioner's guest checks were not legible. Thus, we find Cafe Europa inapplicable to the instant case and agree with the Administrative Law Judge that petitioner has not sustained its burden of showing that the audit methodology was "not merely imprecise but unreasonably inaccurate and the tax assessed erroneous" (Matter of Shukry v. Tax

Appeals Tribunal, 184 AD2d 874, 585 NYS2d 531, 532).

Next, we find totally without merit petitioner's contention that the statistical report utilized by the Division was not adequately identified by the Division because the Division did not introduce the complete book into evidence at the hearing. The actual charts that were utilized by the Division were introduced into the record, along with sufficient other material to identify the source of the charts (Exhibit "G"; cf., Matter of Fashana, Tax Appeals Tribunal, September 21, 1989 [where the Division was unable to identify the source of the chart utilized]). Petitioner has not specified what additional information he would have gleaned from the entire book. We have previously rejected similar claims for more pages from the book which was the source of the chart utilized by the Division (see, Matter of A & J Auto Repair Corp., Tax Appeals Tribunal, May 6, 1993; Matter of Sandrich, Inc., Tax Appeals Tribunal, April 15, 1993).

In petitioner's remaining contentions, i.e, that the request for records was inadequate, that the Notice of Determination was defective because it failed to state that the assessment was estimated and that penalty should be abated, petitioner has not raised any argument that was not made, and adequately addressed by, the Administrative Law Judge. Therefore, we sustain the Administrative Law Judge's determination on these issues for the reasons stated in the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Framapac Delicatessen, Inc. is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petitions of Framapac Delicatessen, Inc. are denied; and

4. The Notice of Determination dated February 11, 1988 and the Division of Taxation's refund claim denial dated October 15, 1990 are sustained.

DATED: Troy, New York
July 15, 1993

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner