STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
XUONG TRIEU A/K/A HENRY CHAO	:	DECISION DTA No. 807969
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1982 and 1983.	:	

Petitioner Xuong Trieu a/k/a Henry Chao, 88-19 Justice Avenue, Elmhurst, New York 11373, filed an exception to the determination of the Administrative Law Judge, issued on June 25, 1992. Petitioner then filed a motion with the Administrative Law Judge to reopen the record at hearing to allow for the introduction of evidence regarding the matter at issue, to conduct discovery and to file an amended petition. The Tax Appeals Tribunal delayed decision on the exception to the June 25, 1992 determination pending the Administrative Law Judge's determination on the motion. The Administrative Law Judge issued an order on March 11, 1993 denying petitioner's motion. Petitioner filed an exception to the order of the Administrative Law Judge. We consolidate both exceptions in this decision. Petitioner appeared by Arthur Pelikow, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Both parties filed briefs on the exceptions. Petitioner filed a reply brief which was received on July 12, 1993 and began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUES

I. Whether the Administrative Law Judge properly denied petitioner's motion to reopen the record at hearing.

II. Whether the Division of Taxation properly determined additional personal income tax due from petitioner by utilizing a cash availability audit methodology.

III. Whether petitioner has established any basis warranting reduction or abatement of penalties imposed.

MOTION TO REOPEN

We deal first with petitioner's exception to the order of the Administrative Law Judge denying petitioner's motion to reopen the record at hearing.

FINDINGS OF FACT

We find the same facts as those found by the Administrative Law Judge in his order denying petitioner's motion to reopen the record. These facts are set forth below.

On February 3, 1989, the Division of Taxation ("Division") issued to petitioner, Xuong Trieu a/k/a Henry Chao, a Notice of Deficiency asserting additional personal income tax due for the years 1982 and 1983 in the aggregate amount of $153,508.01, plus penalty and interest.

Petitioner, by his then-representative, Louis Miu, CPA, requested a prehearing conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") to challenge the above-described Notice of Deficiency. A conciliation conference was held on October 26, 1989, at which petitioner appeared by Louis Miu, CPA, and the Division appeared by its auditor, Stanley Smeich. Thereafter, on December 22, 1989, a Conciliation Order (No. 096613) was issued sustaining in full the above-described statutory notice.

On March 21, 1990, a petition challenging the tax, penalty and interest at issue was filed with the Division of Tax Appeals. This petition is signed by Charles Becker, Esq., as petitioner's appointed representative, and is accompanied by a properly executed power of

attorney in favor of Mr. Becker. The petition lists specific allegations of error and of facts to be proven which reveal that petitioner's representative had a clear recognition of the issues involved in the case and the reasons and bases for the amount of tax liability in dispute.

The case was set down for hearing on December 10, 1991 at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York at 1:15 P.M. The hearing took place at that time, before Dennis M. Galliher, Administrative Law Judge, concluding at approximately 2:40 P.M. on the same date. At said hearing, petitioner appeared by Charles Becker, Esq. The Division appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel). Neither party offered direct testimony. Rather, at hearing the Division's attorney offered 12 documents as exhibits and petitioner's attorney offered 5 documents as exhibits, each in support of their respective positions. Near the conclusion of the hearing the Administrative Law Judge summarized his understanding of petitioner's position in the case. In turn, petitioner's counsel agreed that such summary accurately stated petitioner's arguments.

Each party was given an opportunity to submit additional documents, post-hearing, on or before January 31, 1992, and to submit briefs thereafter by April 22, 1992. In turn, both parties submitted additional documents post-hearing (Exhibits "M" and "6," respectively), and also submitted briefs. All of the aforementioned documents, together with the parties' arguments as articulated at hearing and by brief, were considered in rendering a determination in the matter.

On June 25, 1992, a determination in this matter was issued by Administrative Law Judge Dennis M. Galliher, reducing petitioner's audited taxable income by $7,000.00 (reflecting correction of a mathematical error) but otherwise sustaining the Notice of Deficiency. A motion to reopen the record was received by the Division of Tax Appeals on December 23, 1992, approximately six months after the determination was issued.

Petitioner's motion, in essence, is premised upon the position that the hearing record is incomplete and/or inadequate. Specifically, petitioner's current representative states that "[t]he record is devoid of testimony, and is incomplete to the extent that numerous documents, of an

irrefutable nature, should have been, but were not introduced into evidence." Petitioner likens the December 10, 1991 hearing to an "exploratory conference," and seeks to reopen the matter in order to prove petitioner's case as follows:

(a) by calling petitioner and the Division's auditor as witnesses;

(b) through a filed stipulation of facts;

(c) by deposition of witnesses;

(d) by introduction of third-party documents all predating the years at issue;

(e) by deposition of one Yin Kwok;[1] and

(f) by "probing" into the audit report of one Allan Burstein concerning an allegation that deficiency assessments for the years in question had been previously issued to and paid by petitioner.

Petitioner also would file an amended petition alleging that petitioner came to the United States in 1975; that he had transferred capital to this country before 1975; that he had a net worth in excess of over $200,000.00 before the years in issue; that with loan repayments of $278,000.00 his capital (liquid funds) was in excess of $500,000.00; and that the three-year statute of limitations applies because there was no omission of income in excess of 25% of petitioner's adjusted gross income.

By its affirmation in opposition to this motion, the Division points out that petitioner was represented by counsel at, as well as before, the hearing, was afforded ample opportunity to present his case, and that none of the evidence petitioner would offer at a reopened hearing constitutes newly-discovered evidence.

On or about July 27, 1992, an exception to the Administrative Law Judge's determination was received by the Tax Appeals Tribunal. Correspondence between petitioner's counsel and the Secretary to the Tribunal reveals that such exception would be held in abeyance pending the outcome of the instant motion.

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[1] Such desposition would apparently be in addition to an affidavit previously made by Mr. Kwok and submitted during the proceedings on December 10, 1991.

OPINION

The Administrative Law Judge, relying on our decision in Matter of Jenkins Covington, N.Y. (Tax Appeals Tribunal, November 21, 1991) for guidance, denied petitioner's motion, stating, in relevant part, as follows:

> "it becomes apparent (specifically from the allegations set forth in this motion) that petitioner failed to adequately prepare or present the case. '[W]here a party fails to adequately prepare for trial, he is not entitled to another trial' (see, Grossbaum v. Dil-Hill Realty Corp., 58 AD2d 593, 395 NYS2d 246, 248). Petitioner, in large measure, raises the same basic arguments herein as were presented and addressed in the Administrative Law Judge's determination. As to the evidence, allegedly pertinent but not presented at hearing (see above), there is neither allegation nor argument that the same did not exist or was not available at or before the time of hearing, or that petitioner availed himself of steps to obtain and present such evidence (or that such steps were unavailable). In short, the same is not newly discovered evidence (see, Matter of Jenkins Covington, N.Y., supra), and what petitioner seeks (deposition of witnesses, introduction of third-party documents, presentation of testimony by petitioner and the auditor, etc.) represents steps which could and should have been undertaken prior to and/or during the hearing. Noted in particular on this score is petitioner's claim that deficiency assessments were previously issued to and paid by petitioner for the years at issue (see above). This claim was raised in the original petition and was addressed in the June 25, 1992 determination, specifically at footnote "3" thereof. Basic evidence relating to this claim (e.g., a Statement of Audit Changes, cancelled check or other payment receipt, etc.), which presumably would have been in petitioner's possession and control, was not submitted at hearing. There is no claim that such evidence was unavailable to petitioner. Therefore, it cannot be said that the same would constitute newly discovered evidence. Finally, to accept the claim that the asserted shortcomings in petitioner's case were not petitioner's fault due to his alleged ignorance of legal proceedings would ignore the fact that petitioner was represented by counsel at all times and that the Notice of Hearing clearly advises petitioner and his counsel of the burden imposed.[2]" (Order, conclusion of law "E").

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[2] On this score, Exhibit "A" at hearing, the Notice of Hearing, issued to petitioner and his representative, Mr. Becker, specifying the location, date and time of the hearing provides, in pertinent part, as follows:

> "Except as otherwise provided by law, the petitioner has the burden of proof and must establish by a preponderance of the evidence the facts necessary to show that there is no deficiency or that a refund is due. Such proof may be made by sworn testimony of the petitioner's witnesses or by documentary or other evidence introduced during the course of the hearing" (emphasis added).

The Administrative Law Judge concluded that "substantial justice was done with regard to the petitioner in this case, and based upon my experience and sense of fairness, petitioner's motion to reopen the record to allow for the introduction of evidence regarding the matters at issue and for reargument is denied with prejudice (Micallef v. Miehle Co., 39 NY2d 376, 384 NYS2d 115; CPLR 4404[b])" (Order, conclusion of law "G").

On exception, petitioner asserts that "substantial justice and fairness will be accomplished only if a new hearing is ordered pursuant to CPLR 4404(b)" (Petitioner's brief, p. 3).[3] The essence of petitioner's assertion is captured in the following passages from his brief:

> "[c]ounsel for petitioner has referred several times to the chaotic nature of the hearing, so portrayed by the judge himself. See Notice of Exception of July 24, 1992 (p. 2) (Tr. 18, 19, 21, 22, 26, entire transcript).
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> "To reiterate, Mr. Glannon said (Tr. 19): 'And I'm not completely comfortable with why the auditor did seem to treat most or all deposits as applications but did not similarly treat the withdrawals. That's one thing I am a bit troubled with and Mr. Becker has raised it so I would
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> like some additional time to check with the auditor on that as well.'
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> "The judge acknowledges his confusion when he says (Tr. 19): 'Well, it would probably be an understatement to say that this record isn't going to help a whole lot the way it stands right now in understanding the case. You've got a bank deposits analysis on one side and that is not meant as a put down, Mr. Glannon, but there's no explanation of how it was done or what the auditor did. The auditor is not here so that doesn't help me" (Petitioner's brief, p. 5, emphasis in original).

Petitioner asserts that the "newly discovered evidence concept is not what a CPLR 4404(b) motion requires as a condition to its grant" (Petitioner's brief, p. 5).

Petitioner also asserts that nothing in the record justifies the Division in making a second and impermissible audit and that in any event if there was a first audit the result shifts the burden of the Division to justify the six-year statute of limitations.

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[3]CPLR 4404(b) provides:

> "(b) **Motion after trial where jury not required.** After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the Court may set aside its decision. It may make new findings of fact or conclusions of law with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue."

Finally, petitioner asserts that there is no underreporting of income by 25% in that the "Capital existing before 1982 and which may have been deposited during 1982 and 1983, as well as loan repayments do not constitute income" (Petitioner's brief, pp. 8 and 9).

The Division asserts that the order of the Administrative Law Judge is correct.

The order of the Administrative Law Judge fully and adequately addresses the issues raised by petitioner and we affirm for the reasons stated in such order. In particular, we find no basis to interfere with the Administrative Law Judge's rejection of petitioner's assertion that "substantial justice and fairness will be accomplished only if a new hearing is ordered pursuant to CPLR 4404(b)" (Petitioner's brief, p. 3) and that the "newly discovered evidence concept is not what a CPLR 4404(b) motion requires as a condition to its grant" (Petitioner's brief, p. 5). The power conferred upon a court by section 4404 is discretionary in nature and is predicated on the assumption that the judge who presided at trial is in the best position to decide whether substantial justice has been done. The judge "must look to his own common sense, experience and sense of fairness rather than precedents in arriving at a decision" (Micallef v. Miehle Co., supra, 384 NYS2d 115, 118). A motion under section 4404 "encompasses errors in rulings on admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence and suprise, the question the trial judge must decide being whether substantial justice has been done" (Matter of Estate of DeLano, 34 AD2d 1031, 311 NYS2d 134, 136, affd 28 NY2d 587, 319 NYS2d 844, emphasis added). The Administrative Law Judge's determination here was based on his experience and sense of fairness with regard to the record made at hearing before him.

Exception to the Determination

We deal next with petitioner's exception to the determination of the Administrative Law Judge.

FINDINGS OF FACT

We find the facts as found by the Administrative Law Judge in his determination. These facts are set forth below.

Petitioner, Xuong Trieu a/k/a Henry Chao, timely filed a New York State and City of New York Resident Income Tax Return (Form IT-201) for each of the years 1982 and 1983. On such returns petitioner elected filing status "3" ("Married filing separately on one return").[4]

On February 3, 1989, the Division issued to petitioner a Notice of Deficiency asserting additional New York State and New York City personal income tax due for the years 1982 and 1983 in the aggregate amount of $153,508.01, plus penalty and interest. A Statement of Audit Changes previously issued to petitioner on June 1, 1988 separately states the amounts of tax asserted as due for each of the years in question, and also separates such yearly amounts as to New York State versus New York City amounts. This statement also indicates that penalty was imposed pursuant to Tax Law § 685(b) (negligence).

The above-described asserted deficiency results from a Division of Taxation audit of petitioner's personal income tax returns for the subject years. More specifically, this audit, consisting of an analysis of sources and applications of funds by petitioner during the subject years, underlies the Division's claim that petitioner understated his taxable income and also had income unexplained as to source for each of the years in question, as follows:

Year	Understatement	Unexplained Sources	Total
1982	$237,658.82	$155,000.00	$392,658.82
1983	344,848.26	123,000.00	467,848.26

As described hereinafter, the understatement amounts result from an analysis of deposits and withdrawals to and from petitioner's checking and savings accounts, while the unexplained sources relate to amounts received by petitioner as transfers from the Hong Kong and Shanghai Banking Corporation.

The Division first conducted a cash availability analysis for each of the years in question. The Division determined petitioner's available funds (sources of funds) to consist of wages received per Forms W-2, fee income, gross rental receipts, checks to cash, tax refunds and

[4]Petitioner's spouse, also filing separately, utilized the same form. She is not a party to this proceeding.

certain checks received specifically from the Hong Kong and Shanghai Banking Corporation. In turn, the Division determined petitioner's applications or uses of funds to consist of estimated cash living expenses plus deposits to bank accounts. Comparing total funds available for each year to total funds applied for each year resulted in (or revealed) funds applied in excess of funds available. The foregoing may be presented in summary form as follows:

	Funds Available	
	1982	1983
Total Wages	$ 9,631.69	$ 2,716.56
Fee Income	1,400.00	--
Gross Rents	17,830.00	13,800.00
Checks to Cash	3,600.00	--
State tax refund	215.00	--
Subtotal	$ 32,676.69	$ 16,516.56
Checks from Hong Kong and Shanghai Bank	155,000.00	123,000.00
Subtotal	$187,676.69	$139,516.56
Transfers from one bank account to another:[5]	Bank #5 $ 50,000.00 Bank #6 10,000.00 Bank #15 40,000.00	Bank #4 $ 54,823.00 Bank #6 56,000.00 Bank #7 20,000.00 Bank #12 10,000.00
Total Available Funds:	$287,676.69	$280,339.56
	- less -	
	Funds Applied	
Estimated Cash living expenses	$ 15,150.00	$ 16,750.00
Deposits to bank accounts[5]	510,185.51	608,437.82
Total Applications:	$525,335.51	$625,187.82
	- equals -	
	Funds Applied in Excess of Funds Available	
Understated Taxable Income	$237,658.82	$344,848.26

[5] Bank deposits and interbank transfers were determined from the Division's analysis of some 18 different bank accounts held by petitioner. Review of the audit workpapers reveals one mathematical error, to wit, that for 1983 applications of funds were overstated by $7,000.00. More specifically, addition of all deposits to Lincoln Savings Bank account number 14770000951-6 (Bank #7 per auditor's workpapers) reveals the correct total of deposits (treated as applications of funds) to be $142,423.39 rather than $149,423.39 as shown on the workpaper. Other than this math error, noted by petitioner's representative at hearing, petitioner conceded to the mathematical accuracy of the bank account analysis made by the Division.

The Division treated the above-determined excess of funds applied over funds available for each year as unreported income subject to tax. In addition, the Division treated the checks received from the Hong Kong and Shanghai Banking Corporation for each year as additional taxable income. These funds were allowed in the Division's cash availability analysis as a source of available funds, thereby reducing the difference between cash available and cash applied. Such treatment, in effect, decreased the amount of understated income held subject to tax. However, such funds were deemed additional taxable income in their own right for lack of adequate substantiation of nontaxability (i.e., that such available funds were derived from nontaxable sources).

Review of the audit workpapers and comments therein indicates the Division's recognition that the difference or excess of funds applied over funds available might have been explained or attributed to other transfers of funds which the auditors were unable to trace, to loans not shown in petitioner's documents, or to other nontaxable sources of funds undisclosed to the auditors. However, absent such information, the Division treated as additional taxable income the excess of funds applied plus the amounts received from the Hong Kong and Shanghai Banking Corporation for each year as determined upon audit.

Petitioner did not appear at hearing to provide testimony, nor did petitioner offer an affidavit on his own behalf. Submitted into evidence on petitioner's behalf were certain documents including affidavits and summary sheets, and also certain cancelled checks including those from the Hong Kong and Shanghai Banking Corporation.

According to petitioner's representative, petitioner was a successful businessman in South Vietnam prior to 1975, being involved in the match manufacturing business. Petitioner left Vietnam by United States military plane in May 1975 as a refugee immediately prior to the takeover of South Vietnam. Petitioner settled thereafter in the United States.

According to an affidavit made by one Yin Kwok, the amounts received from the Hong Kong and Shanghai Banking Corporation represent repayments of loans made by petitioner to Mr. Kwok during 1972 and 1973 in the aggregate sum of $278,000.00. These loans were

allegedly repaid via the checks drawn on the Hong Kong and Shanghai Banking Corporation between September 25, 1982 and December 2, 1983. According to Mr. Kwok's affidavit, the "precipitate" nature of his departure from Saigon made it impossible for him to take personal and/or business records with him upon departure, including evidence of the debt owed to petitioner. The affidavit claims that Mr. Kwok was required by honor to repay the amount to petitioner and therefore he did the same as evidenced by the drafts to petitioner drawn on the Hong Kong and Shanghai Banking Corporation. Other than the drafts drawn on said bank, no records or other information surrounding the circumstances of the alleged loans and their repayments were offered in evidence. The bank drafts themselves do not carry Mr. Kwok's name or any reference to him on their faces or reverse sides.

With respect to the excess applications of funds, petitioner submitted a one-page summary sheet entitled "source of funds," totalling some $232,649.85 and listing monies received in 1971, 1974, 1975, 1976 and 1979. According to affidavits submitted by, inter alia, petitioner's aunt, some of these funds allegedly involved remittances from a trading company in Hong Kong to petitioner's sister in the United States to be held for safekeeping and future investment purposes. With respect to these and other monies, petitioner maintains that certain withdrawals from various of his 18 bank accounts were not treated as sources of income unless the same were nearly immediately redeposited into other banks. Petitioner's representative noted that such withdrawals should be allowed in "narrowing the gap between available funds and expended funds." Petitioner's representative alleged that funds could have been accumulated over a number of years, and thus would not necessarily represent funds received from taxable sources during the years in question. Petitioner's representative also alleged that petitioner was a "respected elder" within his community, and that petitioner often served as a "stakeholder," under which petitioner would hold monies for other Vietnamese refugees or persons in the community and repay the same to those persons when needed. Such monies were, in essence, allegedly being held "in trust." No documentation pertaining to this claim, or showing evidence of amounts held for particular individuals, was offered in evidence.

Petitioner alleged that the Division bears the burden of showing some reasonable source of income in order to conclude that petitioner's excess applications of funds were derived from taxable income sources as opposed to nontaxable cash sources such as an accumulated cash hoard, repayment of loans or stakeholding of monies.

In response to the foregoing, the Division noted that withdrawals which could not be tied to deposits were not considered sources of income since such withdrawals were "more likely spent on personal expenses or asset acquisitions and were not redeposited." The Division's auditor (via workpaper entries and an affidavit) expressed doubt over the claim that petitioner kept a substantial accumulated cash hoard rather than depositing money in interest-earning bank accounts because petitioner "clearly used bank accounts as evidenced by his multiple accounts with various banks."

OPINION

The Administrative Law Judge, relying on our decision in Matter of Lee (Tax Appeals Tribunal, October 11, 1990), determined that the source and application of funds audit methodology employed by the Division was a valid audit methodology.

The Administrative Law Judge determined that petitioner did not produce sufficient evidence to establish error in the audit calculations or to prove the existence of additional nontaxable sources of funds or substantiate that sources of funds deemed taxable were, in fact, from nontaxable sources. Specifically, he concluded, in pertinent part, that "the evidence submitted [by petitioner] fails to prove that the monies received from the Hong Kong and Shanghai Banking Corporation were in fact repayments of loans and therefore not subject to tax" (Determination, conclusion of law "B"). Further, he determined that "there is no evidence presented in the record, and apparently none was presented at audit, by which the monies applied during the years in question could be traced or tied to additional nontaxable sources of income" (Determination, conclusion of law "C").

The Administrative Law Judge addressed the fact of petitioner's "reaudit" as follows:

> "[a]s the Division admits by its Answer, the audit of petitioner was originally undertaken by one Allan Berstein, who was arrested and

> convicted of accepting bribes on audits he conducted. The Division 'reaudited' those taxpayers previously audited by Mr. Berstein 'to insure that proper audit procedures had been followed.' While the petition herein claims the Division erred by 'invalidating the original audit for the years 1982 and 1983 which the taxpayer had agreed to,' there is simply no evidence to support such claim. In fact, there is no evidence that a Notice of Deficiency was issued prior to that at issue herein, dated February 3, 1989, or that petitioner had agreed in any manner to any audit results (either prior to or after issuance of a Notice of Deficiency). So too, petitioner's representative claims, by brief, that 'negative inferences may have been drawn against petitioner because of an audit of an establishment known as No. 1 Chinese Restaurant, Inc.' In fact, on June 1, 1982, petitioner formally resigned from 'all positions being held by him' with such corporation. The audit report contains two references to such corporation, to wit, listing petitioner's business activity as 'Pres #1 Chinese' and noting '#1 Chinese Rest. Inc. XN1435' under the page 2 heading 'Key Case.' Even though the latter reference was unexplained, such notations do not alone support a conclusion of prejudice or 'negative inferences,' nor do they have any apparent bearing on the results of the audit of petitioner" (Determination, conclusion of law "D," footnote 3).

Finally, the Administrative Law Judge rejected petitioner's assertion that penalties should be waived because of petitioner's positive role in his community. The Administrative Law Judge found that such evidence has no bearing on the issue and that the record was bereft of any evidence.

Petitioner makes several assertions in his brief on exception which we summarize as follows: first, the Division's reaudit was improper since petitioner paid the deficiency resulting from the first audit for the same years; second, petitioner has demonstrated through a "plethora of supporting affidavits from third parties and confirming and unassailable documentary proof, bank letters, etc." (Petitioner's brief, p. 12) that his "transfer of funds on or before the time he entered this country must be credited to him . . . similarly, loan repayments received in 1982 and 1983 must be credited with the result that all credits would not be items of gross income properly includable in New York adjusted gross income" (Petitioner's brief, p. 9); third, with respect to the burden of proof on the application of the six year statute of limitations in section 689(e), petitioner asserts that the Tribunal's decision in Matter of Sholly (Tax Appeals Tribunal, January 11, 1990) allows a "window of opportunity to shift the burden of [proof to] the Division in the case of a 'violation of the principles of fairness or due process'" (Petitioner's brief, pp. 11-

12). Petitioner asserts that such is the case here pointing to comments in the record by the Administrative Law Judge and the attorney for the Division concerning the nature of the audit methodology and the completeness of the record.

The Division asserts that the determination of the Administrative Law Judge is correct in all respects.

The Administrative Law Judge fully and correctly dealt with the issues in this case and we sustain his determination for the reasons stated therein (see also, Matter of Jacobson v. State Tax Commn., 129 AD2d 880, 514 NYS2d 145).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Xuong Trieu a/k/a Henry Chao to the order of the Administrative Law Judge is denied;

2. The order of the Administrative Law Judge is affirmed;

3. The exception of Xuong Trieu a/k/a Henry Chao to the determination of the Administrative Law Judge is denied;

4. The determination of the Administrative Law Judge is affirmed;

5. The petition of Xuong Trieu a/k/a Henry Chao is granted to the extent indicated in conclusion of law "C" of the Administrative Law Judge's determination, but is otherwise denied; and

6. The Division of Taxation is directed to modify the Notice of Deficiency dated Feburary 3, 1989, in accordance with paragraph "5" above, but such notice is otherwise sustained.

DATED: Troy, New York
December 30, 1993

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

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