STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **SANDRICH, INC.** **T/A BRUCE'S YOGURT** 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, 1984 through August 31, 1985.	:	DECISION DTA Nos. 808753 & 808748
In the Matter of the Petition of **RICHARD A. FREEDMAN, OFFICER OF SANDRICH, INC. T/A BRUCE'S YOGURT** 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, 1984 through August 31, 1985.	:	

The Division of Taxation and petitioners Sandrich, Inc. T/A Bruce's Yogurt and Richard A. Freedman, Officer of Sandrich, Inc. T/A Bruce's Yogurt, P. O. Box 1161, Melville, New York 11747-0420, each filed an exception to the determination of the Administrative Law Judge issued on July 2, 1992 with respect to petitioners' petitions 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, 1984 through August 31, 1985. Petitioner Sandrich, Inc. T/A Bruce's Yogurt appeared by its president, Richard A. Freedman. Petitioner Richard A. Freedman appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Each party filed a brief on exception. Requests for oral argument by petitioners and the Division of Taxation were denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

1. Whether a sales tax audit of Sandrich, Inc. T/A Bruce's Yogurt properly determined taxes due, where the audit was based on gross sales projected from a rental factor.

2. Whether the Administrative Law Judge had the authority to modify the adjustments made to the assessment by the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

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

Petitioner Sandrich, Inc. ("the corporation") was organized on May 21, 1984. Its president was petitioner Richard A. Freedman.

On or about May 21, 1984, the corporation acquired an operating yogurt bar known as Bruce's Yogurt. The business was in a large market known as The Pea Patch, located at 8285 Jericho Turnpike, Woodbury, New York.

The operators of The Pea Patch, in addition to selling high-quality produce, subleased space to various entrepreneurs selling specialties such as delicatessen products, baked goods, coffee (beans and by the cup), seafood, yogurt and other items.

The corporation subleased space toward the rear of The Pea Patch. Its counter was about 20 feet in length. Included with the sublease was a large amount of warehouse space which the business did not need. The monthly rental was $3,276.00 and included utilities, garbage collection, advertising and promotion, cleaning, repairs and maintenance.

The business sold nothing but yogurt, toppings, tofu and cookies. In addition to individual sales for on-premises consumption, yogurt was sold in pints and quarts for take-out and cookies were sold by the box.

Although business was good at first, it deteriorated as The Pea Patch developed business problems. The operators of The Pea Patch fell into rental arrears, and in June 1985 the owner of the building commenced eviction proceedings against The Pea Patch and all subtenants, including the corporation.

About the time eviction proceedings were commenced, petitioner Richard A. Freedman learned that a Swenson's Ice Cream Store located across the shopping center from The Pea Patch was for sale.

Mr. Freedman acquired the ice cream store and went to Arizona for two weeks' training with Swenson's. On or about August 14, 1985, he closed Bruce's Yogurt and moved the corporation's yogurt machines to the Swenson's store. Shortly thereafter, The Pea Patch was closed and all of its subtenants were evicted.

The Audit

A sales tax audit of the corporation was commenced in September 1987. The audit findings may be summarized as follows:

(a) Records available for audit were: sales tax returns, Federal corporation income tax return (Form 1120) and State corporation franchise tax return (Form CT-3) for the period May 1984 through December 31, 1984, cash receipts summary for January 1, 1985 through August 15, 1985, cash receipts for September 1984 through December 1984, check disbursements summary for January 1, 1985 through August 15, 1985, check disbursements journal for January 1, 1985 through August 15, 1985, computerized general ledger (incomplete) running from May 1984 through December 31, 1984 (no such records for 1985), monthly bank statements for August 15, 1984 to August 15, 1985, balance sheet for the period ending December 31, 1984 and payroll for January 2 through January 9, 1985.

(b) Records requested but not made available included: sales invoices, purchase invoices, cash register tapes, daily log or daybook.

(c) Sales tax returns for the period September 1, 1984 through August 31, 1985 show the following:

Period	Gross Sales	Taxable Sales	Tax Due	Tax Paid
9/1/84-11/30/84	$ 56,984.00	$31,513.00	$2,599.00	$2,599.00
12/1/84-2/28/85	40,567.00	19,831.00	1,636.00	1,636.00
3/1/85-5/31/85	50,770.00	24,145.00	1,991.00	1,991.00
6/1/85-8/31/85	-0-	-0-	-0-	--
Totals	$148,321.00	$75,489.00	$6,226.00	$6,226.00

The audit worksheets indicate that tax of $5,262.77 was assessed for the period June 1, 1985 through August 31, 1985 under assessment number D8601067986.[1]

(d) The auditor concluded that the corporation's books and records available for audit were inadequate and that the reported taxable percentage of slightly over 50% had not been documented. Accordingly, she decided to estimate taxes using rent as an index. Rent, calculated for this purpose at $3,000.00 per month, was equated to 7.6% of gross sales, based on the National Restaurant Association's Restaurant Industry Operations Report for 1987, showing the ratio of income and expenses to total sales. More specifically, the percentage was derived from the rent factor used in the category of "Limited-Menu - No Tableservice" restaurants with sales volume under $400,000.00. All factors for said category were as follows:[2]

	Lower Quartile	Median	Upper Quartile
Total Sales	100.0%	100.0%	100.0%
Total Cost of Sales	32.0	3 4.7	39.8
Gross Profit	60.3	65.3	68.0
Other Income	0.1	0.4	1.6
Total Income	60.5	65.5	68.7
Controllable Expenses			
Payroll	18.2	21.2	28.6
Employee Benefits	0.9	2.5	3.3
Direct Operating Expenses	1.9	4.1	6.4

[1]Exhibit "E," worksheets, page E-5. The actual sales tax returns are not in the record.

[2]National Restaurant Association, Restaurant Industry Operations Report, 1987, prepared in cooperation with Laventhol & Horwath, CPA's, Exhibit C-15 (Exhibit "F").

Music and Entertainment	**	**	**
Advertising and Promotion	0.7	2.5	4.8
Utilities	2.8	4.0	5.3
Administrative and General	0.5	1.4	8.7
Repairs and Maintenance	0.8	1.6	2.4
Total Controllable Expenses	32.5	39.8	50.2
Income Before Occupation Costs	15.9	23.3	30.2
Occupation Costs			
Rent	4.2	6.2	7.6
Property Taxes	0.5	0.9	1.2
Other Taxes	0.2	0.4	2.4
Property Insurance	0.5	1.1	1.8
Total Occupation Costs	3.9	7.7	10.0
Income Before Interest and Depreciation	10.3	15.9	23.2
Interest	1.2	2.4	3.3
Depreciation	1.6	3.8	5.4
Restaurant Profit	6.1%	10.6%	18.8%

** Insufficient data.

It is noted that the 7.6% figure for rent is from the upper quartile of the range and is the percentage most favorable to the corporation.

(e) This resulted in the computation of gross annual sales of $473,684.00, or $118,421.00 per quarter.

(f) Expense purchases were deemed negligible and were not tested.

(g) Tax due based on audited taxable sales was $39,078.92. After crediting the corporation with sales tax paid of $6,226.00 and for the warranted assessment of $5,262.00 for the period June 1, 1985 through August 31, 1985, additional tax due was determined to be $27,590.92.

On September 23, 1987, petitioner Richard A. Freedman, as president of the corporation, executed a consent extending the period of limitation for assessment of sales and use taxes for the period September 1, 1984 through August 31, 1985 to December 20, 1988.

On December 8, 1988, notices of determination and demands for payment of sales and use taxes due post-dated December 20, 1988 were issued to the corporation, and to petitioner Richard A. Freedman and Sondra S. Freedman, as officers, in the following amounts:

Period	Tax Due	Penalty	Interest	Total

9/1/84-8/31/85	$27,590.92	$7,123.11	$15,253.63	$49,967.66
6/1/85-8/31/85 (omnibus penalty)	-0-	450.77	-0-	450.77

The Bureau of Conciliation and Mediation Services Conference

Pursuant to a Bureau of Conciliation and Mediation Services conference, the assessments against the corporation and Richard A. Freedman were reduced by allowances for ancillary services such as cleaning, heating, lighting, advertising, maintenance and garbage disposal, which were included in rent. Rental used in the factor was reduced from $36,000.00 to $22,800.00 per year, resulting in the additional taxable sales being reduced to $300,000.00 and tax due to $13,262.00. Omnibus penalty was reduced to $92.55. The conferee also cancelled the assessment issued against Sondra S. Freedman, on the basis that she was not a person required to collect tax on behalf of the corporation.[3]

Additional Facts

(a) The corporation's Federal income tax return for the period May 21, 1984 through December 31, 1984, which was dated March 2, 1985, reported gross receipts or sales of $145,609.00.[4]

(b) The corporation's Federal income tax return for the year 1985, which shows the date July 24, 1989 in the space for the date of the preparer's signature, reported gross receipts or sales of $109,579.00.[5] This return was not prepared by the corporation's original accountant, but by a second accountant who was hired to help reconstruct the corporation's records.

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[3]Transcript, page 37.

[4]Exhibit "8" to petitioner Richard A. Freedman's affidavit of April 12, 1991.

[5]Exhibit "9" to petitioner Richard A. Freedman's affidavit of April 12, 1991.

The cash disbursements book showed the last payroll check was dated August 14, 1985 in the amount of $71.81.[6] Review of the cash disbursements shows that typically five or six payroll checks were drawn each week. It is noted that five checks were dated August 7, 1985. These were the last payroll checks issued prior to the one check dated August 14, 1985.[7] No payroll checks were issued to petitioner Richard A. Freedman or Sondra S. Freedman during the period at issue.

The corporation's former accountant had generated a computerized set of records for the corporation for the year ended December 31, 1984 including balance sheet, general ledger, cash disbursements, income statement, etc.[8] These records were reviewed by the auditor, but were essentially disregarded for lack of substantiation. (It is noted that the gross revenues shown in the income statement reconciled with sales as per Federal income tax returns for 1984.)

Petitioner Richard A. Freedman offered several explanations for the lack of records available for audit:

(a) That the corporation's former accountant moved out of state suddenly in the summer of 1985 to avoid creditors and failed to return many of the corporation's records.

(b) That some records were lost when The Pea Patch and its subtenants, including the corporation, were evicted.

(c) That other records were in petitioner's car when it was destroyed by fire on January 1, 1988.

Petitioner Richard A. Freedman claimed that "several income tax refunds" payable to his wife and him were taken by the State for sales tax allegedly due, even though this proceeding had

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[6]Transcript, page 51.

[7]Exhibit "5" to petitioner Richard A. Freedman's affidavit of April 12, 1991.

[8]Petitioners' Exhibit "1."

been commenced. He claimed that the Division of Taxation had offered no explanation for this taking.

OPINION

The Administrative Law Judge determined that: 1) the records offered for audit by petitioners were clearly inadequate and insufficient; 2) even if the records had been lost or destroyed through no fault of petitioners, as they asserted, the Division of Taxation (hereinafter the "Division") was authorized to reconstruct the corporation's sales and use tax by external indices; 3) the Division's use of rent, as a percentage of gross sales for the category designated as "Limited Menu - No Tableservice" restaurants, as per the National Restaurant Association Report (hereinafter the "Report") showing the ratio of income and expenses to total sales, was proper.

However, the Administrative Law Judge modified the adjustments to petitioners' rent made by the Bureau of Mediation and Conciliation Services.[9] The Administrative Law Judge determined that the percentages allowed in the Report for utilities (5.3%); property taxes (1.2%); advertising and promotion (4.3%); and repairs and maintenance (2.145%) should be added together with the percentage for rent (7.6%) and the total (20.545%) should be applied to the original rent figure of $3,276.00 per month given to the Division by petitioners.[10] The Administrative Law Judge also determined that petitioners' payroll records showed that the business was closed by August 14, 1985 at the latest, and reduced the sales figures projected for the quarter ending August 31, 1985 accordingly.

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[9]The assessment issued to petitioners was on the basis that rent was 7.6% of gross sales. The Division used a rental amount of $3,000.00 per month instead of the $3,276.00 per month provided by petitioners. The Bureau of Conciliation and Mediation Services reduced the $3,000.00 to $1,900.00 by deducting amounts paid for ancillary services of cleaning, heating, lighting, advertising, maintenance and garbage disposal. The result was to apply the 7.6% rent factor to a reduced rental figure, i.e., from $3,000.00 per month to $1,900.00 per month.

[10]The Report allowed a factor of 4.8% for advertising and promotion which the Administrative Law Judge reduced to 4.3% to reflect a deduction for advertising paid for by the corporation.

On exception, the Division asserts that the Administrative Law Judge erred in modifying the assessment because "[t]here is no basis in the record on which the Administrative Law Judge could conclude that the indexes included in [the Report] were intended to be added together as they were [by the Administrative Law Judge]" (Division's exception). The Division also asserts that, under the circumstances here, the Administrative Law Judge "had no authority to review and revise the methodology employed by the Bureau of Conciliation and Mediation Services in adjusting the petitioner's [sic] rent" (Division's exception). Specifically, the Division asserts that, absent an allegation of fraud, malfeasance or misrepresentation alleged by the Division, the order could not be challenged by the Division. "Even if the [petitioners were] unsuccessful in [their] petition to the Division of Tax Appeals, the reduction in sales and use tax by the conciliation conferee was still binding on the Department" (Division's brief on exception, pp. 6-7). Moreover, the Division asserts that when petitioners filed a petition with the Division of Tax Appeals, the order ceased to be binding upon petitioners and since it cannot, by statute, be given any force and effect in a subsequent administrative proceeding, it was not subject to challenge by petitioners.

The Division asserts that the burden was on petitioners to show by clear and convincing evidence that the Division's audit methodology was erroneous and that "petitioner's [sic] testimonial evidence, without more, is not sufficient to show that the methodology and computation of the [Division] is erroneous" (Division's exception). The Division asserts that once the Administrative Law Judge concluded that the audit methodology was "proper," "there was no authority for the ALJ to substitute his own audit methodology for that used by the [Division] or the BCMS Conferee . . ." (Division's brief on exception, p. 10). Finally, the Division asserts that petitioners' testimonial evidence as to the date on which the business closed is inconsistent with the testimony of the auditor and insufficient for petitioners to meet their burden of proof to show that the business was closed prior to August 31, 1985.

On exception, petitioners assert that the Administrative Law Judge erred:

1) in concluding that the records offered for the audit were clearly inadequate and insufficient as a matter of law;

2) in not granting petitioners' request to preclude the introduction of the Report into evidence;

3) in concluding that the use of the Report was reasonable;

4) in failing to accept petitioners' testimony as to the amount of the gross sales;

5) in finding that the testimony and evidence were insufficient to prove any nontaxable sales at all; and

6) in concluding that the warranted assessment was not part of the assessment at issue here.

Further, petitioners assert that:

7) the assessment at issue was issued after the statute of limitations had expired and was, therefore, invalid;

8) the failure of the Division to introduce petitioners' sales and use tax returns precludes a finding that they were in error since they were not a part of the record; and

9) the assessment must be dismissed because:

(a) the conciliation order was not timely issued by the Division and

(b) the Administrative Law Judge's determination was not timely issued by the Division of Tax Appeals.

In response to the Division's exception, petitioners assert that: the Administrative Law Judge properly modified the methodology used by the Bureau of Conciliation and Mediation Services; there is ample evidence that the business closed on August 14, 1985 as determined by the Administrative Law Judge; and petitioners were authorized by the Administrative Law Judge to submit additional documents after the close of the hearing and that submission of those documents on August 7, 1991 was proper.

We deal first with the Division's assertion that petitioners did not meet their burden of proof to show that the business closed by August 14, 1985, rather than August 31, 1985, as asserted by the Division.

We affirm the determination of the Administrative Law Judge for the reasons stated therein.

We deal next with petitioners' assertion that the assessment was issued after the statute of limitations expired.

It is well established that the statute of limitations defense is waived unless affirmatively raised by the taxpayer (see, Matter of Agnone, Tax Appeals Tribunal, January 23, 1992; Matter of Jencon, Inc., Tax Appeals Tribunal, December 20, 1990). Petitioners here did not raise the statute of limitations in their petition at hearing. Thus, the defense is waived.

We deal next with petitioners' assertion that the Administrative Law Judge erred in sustaining the audit methodology used by the Division in this case.

We affirm the determination of the Administrative Law Judge on this issue.

The law is clear that, "[t]he honest and conscientious taxpayer who maintains comprehensive records as required has a right to expect that they will be used in any audit to determine his ultimate tax liability" (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43).

To determine the adequacy of a taxpayer's records, the Division must first request (Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859) and thoroughly examine (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978, 979-80) the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (Matter of Giordano v. State Tax Commn., 145 AD2d 726, 535 NYS2d 255, 256-57; Matter of Urban Liqs. v. State Tax Commn., 90 AD2d 576, 456 NYS2d

138, 139; Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 76, lv denied 44 NY2d 645, 406 NYS2d 1025; see also, Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208, 209), that they are, in fact, so insufficient that it is "virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit" (Matter of Chartair, Inc. v. State Tax Commn., supra, 411 NYS2d 41, 43; Matter of Christ Cella, Inc. v. State Tax Commn., supra), "from which the exact amount of tax due can be determined" (Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records of the taxpayer are insufficient or inadequate to permit an exact computation of the sales and use tax due, the Division is authorized to estimate the tax liability on the basis of external indices (Tax Law § 1138[a][1]; see, Matter of Ristorante Puglia, Ltd. v. Chu, 102 AD2d 348, 478 NYS2d 91, 93; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451, 452). The methodology selected must be reasonably calculated to reflect the taxes due (Matter of Ristorante Puglia, Ltd. v. Chu, supra; Matter of W.T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157, cert denied 355 US 869), but exactness in the outcome of the audit method is not required (Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, 177, affd 44 NY2d 684, 405 NYS2d 454; Matter of Lefkowitz, Tax Appeals Tribunal, May 3, 1990). While it is true that "considerable latitude is given an auditor's method of estimating sales under such circumstances as exist" in each case (Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219, 221), certain limitations have been placed on this principle. It is necessary that the record contain sufficient evidence to allow the trier of fact to determine whether the audit has a rational basis (Matter of Grecian Sq. v. New York State Tax Commn., supra) and, further, that the record contain specific information identifying the external index employed by the Division in estimating the taxpayer's liability (Matter of Fashana, Tax Appeals Tribunal, September 21, 1989). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was

erroneous (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; Matter of Surface Line Operators Fraternal Org. v. Tully, supra).

We find no merit in petitioners' assertion that the Administrative Law Judge erred in sustaining the methodology used by the Division on audit. It is quite clear from the record that the Division reviewed the records presented by petitioners and correctly concluded that they were not adequate to do a complete audit since there were no source documents, i.e., sales invoices or cash register tapes to substantiate the computerized general ledger (which covered only the period May 1984 through December 1984) submitted by petitioners (see, Matter of Vebol Edibles v. State of New York Tax Appeals Tribunal, 162 AD2d 765, 557 NYS2d 678, lv denied 77 NY2d 803, 567 NYS2d 643; Matter of Club Marakesh v. Tax Commn. of State of New York, 151 AD2d 908, 542 NYS2d 881, lv denied 74 NY2d 616, 550 NYS2d 276). Under these circumstances, it was not possible for the Division to verify taxable sales and receipts (and conversely nontaxable sales and receipts) and conduct a complete audit.[11] Therefore, the Administrative Law Judge properly concluded that the Division was authorized to resort to an external index to estimate petitioners' tax.

We also reject petitioners' assertion that the Administrative Law Judge erred in finding the use of the Report reasonable. The methodology used by the Division to estimate tax need not be exact (Matter of Markowitz v. State Tax Commn., supra), it need only be reasonable (Matter of Ristorante Puglia, Ltd. v. Chu, supra). We find nothing in the record here to lead us to conclude that the designation "Limited Menu - No Tableservice" restaurants in the Report used by the Division to determine a rent factor for petitioners' business was not reasonable. We also reject as totally without merit petitioners' assertion that the Administrative Law Judge erred in letting the

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[11]We find no basis in the record for petitioners' assertion, and the Administrative Law Judge's conclusion, that there were nontaxable sales. Further, there is nothing in the record to indicate that at the time of the audit the auditor had reason to know that petitioners made nontaxable sales (cf., Matter of Bernstein-on-Essex St., Tax Appeals Tribunal, December 3, 1992). There was no opportunity for the Division to observe petitioners' business operation since the audit was conducted after the business ceased doing business.

Report be introduced into evidence because petitioners had not been given a copy of the entire book in which the Report was included. Petitioners acknowledge that they were aware at the conciliation conference and at the hearing that a rent factor was utilized by the Division to estimate gross sales, that the source of the rent factor utilized by the Division was the Report and that they were given an opportunity to inspect the entire book in which the Report was included (see, Petitioners' brief on exception, p. 4; cf., Matter of Fashana, supra [where the Division could not identify the source of the factor utilized]).

We deal next with petitioners' assertion that the conciliation order issued by the Division and the determination of the Administrative Law Judge issued by the Division of Tax Appeals were not issued timely and, thus, that the case should be dismissed.

First, we reject petitioners' attempt to raise the issue of the timeliness of the conciliation order for the first time on exception. Although a party may raise a new legal issue on exception (see, Matter of Small, Tax Appeals Tribunal, August 11, 1988), a party may not raise factual issues on exception which were not addressed at the hearing (see, Matter of Clark, Tax Appeals Tribunal, September 14, 1992; see also, Matter of Consolidated Edison Co. of New York, Tax Appeals Tribunal, May 28, 1992). The raising of this factual issue by petitioner after the closing of the record deprived the Division of an opportunity to submit evidence of timely mailing of the order. Accordingly, we decline to consider petitioners' assertion of the timeliness issue.

With regard to the Administrative Law Judge's determination, Tax Law § 2010(3) provides that:

> "[a]n administrative law judge shall render a determination after a hearing, within six months after submission of briefs subsequent to completion of such a hearing or, if such briefs are not submitted, then within six months after completion of such a hearing. Such six month period may be extended by the administrative law judge, for good cause shown, to no more than three additional months. If the administrative law judge fails to render a determination within such . . . period . . . the petitioner for such hearing may institute a proceeding under article seventy-eight of the civil practice law and rules to compel the issuance of such determination."

In the instant case, the hearing was held and completed on February 25, 1991. The Administrative Law Judge originally provided petitioners until April 15, 1991 to submit a brief, the Division until May 15, 1991 to respond and petitioner until June 15, 1991 to reply to the Division's brief. The Administrative Law Judge eventually extended the date for petitioners' reply brief to September 16, 1991. The determination was issued July 2, 1992 and was clearly beyond the nine-month period allowed, at the maximum, by section 2010(3) of the Tax Law. We find this failure to comply with the statutory time period unacceptable.

This Tribunal regards the time limitations of sections 2010(3) and 2006(7) (the latter imposing a six-month limitation on the issuance of Tribunal decisions) as requirements to be satisfied in every case. We conduct our operation in a manner to ensure that Tribunal decisions are issued within the six-month period. We expect each of the Administrative Law Judges in the Division of Tax Appeals to do the same. However, this Administrative Law Judge's failure to discharge his statutory responsibility and our dissatisfaction with this failure does not allow us to grant the remedy requested by petitioner, i.e., to cancel the assessment. To do so would penalize one party to this proceeding, the Division of Taxation, for the Administrative Law Judge's failure and would be inconsistent with our responsibility to administer a just system for resolving tax controversies (Tax Law § 2000). In the absence of a statute or court decision that explicitly requires such a result (see, Matter of Janus Petroleum v. New York State Tax Appeals Tribunal, 180 AD2d 53, 583 NYS2d 983), we cannot impose such a remedy. We will, however, pursue administrative action within the Division of Tax Appeals, consistent with our administrative responsibility under sections 2002 and 2004 of the Tax Law, to attempt to prevent such failures in the future.

We deal next with the Division's assertion that the Administrative Law Judge lacked authority to modify the Bureau of Conciliation and Mediation Services' adjustments to the assessment issued to petitioners.

We reverse the determination of the Administrative Law Judge with regard to these modifications.

The Bureau of Conciliation and Mediation Services is established within the Division and is responsible "for providing conciliation conferences" (Tax Law § 170[3-a][a]). Such conferences are provided at the sole option of the taxpayer.

Petitioners here elected to petition for a hearing in the Division of Tax Appeals. As a result, petitioners, at hearing, could not rely in any way on the prior proceedings since the conciliation order cannot "be considered as precedent or be given any force or effect in any subsequent administrative proceeding" with respect to petitioners (Tax Law § 170[3-a][f]).[12] We agree with the Division that because of this statutory language, there was no authority for the Administrative Law Judge to consider the validity of the methodology used in proceedings at the Bureau of Conciliation and Mediation Services and to substitute his own methodology for that of the conferee. To the extent that our decision in Matter of Commack Fish & Seafood Rest. Corp. (Tax Appeals Tribunal, March 12, 1992) implies that an Administrative Law Judge may delve into the substance of the conciliation proceedings, it is hereby overruled.[13]

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[12]Tax Law § 170(3-a)(e) provides that:

> "[a] conciliation order shall be rendered within thirty days after the proceeding is concluded and such order shall, in the absence of a showing of fraud, malfeasance or misrepresentation of a material fact, be binding upon the department and the person who requested the conference, except such order shall not be binding on such person if such person petitions for the hearing provided for under this chapter within ninety days after the conciliation order is issued, notwithstanding any other provision of law to the contrary."

Tax Law § 170(3-a)(f) provides that:

> "[c]onciliation conference orders shall not be required to be published and such orders shall not be considered as precedent or be given any force or effect in any subsequent administrative proceeding with respect to the person who requested the conference or in any other proceeding."

[13]In Commack, the Administrative Law Judge found that the original assessments were proper. However, the Administrative Law Judge recalculated the adjustments made at the conciliation conference. The Division asserted that the Administrative Law Judge, once having determined that the assessments were proper, exceeded his

We deal next with the effect of the conciliation order on the Division in light of the fact that petitioners failed to prove, by clear and convincing evidence, their assertions that the Division's actions with regard to the audit and resultant notice of assessment were wrong. In our view, the conciliation order is still binding on the Division by virtue of the explicit language in the statute, i.e., that "such order shall . . . be binding upon the department and the person who requested the conference, except such order shall not be binding on such person if such person petitions for [a] hearing . . . ." In short, the order ceased to be binding only on petitioners because of their petition for hearing; it did not cease to be binding on the Division.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted to the extent that the modifications to the notices of assessment made by the Administrative Law Judge are reversed and the notices of assessment as modified by the Bureau of Conciliation and Mediation Services are sustained, but in all other respects the exception is denied;

2. The exceptions of petitioners Sandrich, Inc. T/A Bruce's Yogurt and Richard A. Freedman, Officer of Sandrich, Inc. T/A Bruce's Yogurt are denied;

3. The petition of petitioners Sandrich, Inc. T/A Bruce's Yogurt and Richard A. Freedman, Officer of Sandrich, Inc. T/A Bruce's Yogurt is granted to the extent of conclusion of law "D(2)" of the Administrative Law Judge's determination; and

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authority in delving into the substance of the conciliation proceeding. We held that there was "nothing irrational or unreasonable about the [adjustments at conference]" and, on this basis alone, reversed the determination of the Administrative Law Judge without dealing with the issue of whether the Administrative Law Judge exceeded his authority in the first instance, as asserted by the Division.

4. The notices of determination and demands for payment of sales and use taxes due issued on December 8, 1988, post-dated December 20, 1988, are sustained in accordance with paragraph "1" above.

DATED: Troy, New York
April 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