

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
METRO GROCERY & DELI, INC. :
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, 1985 :
through August 31, 1988. :

In the Matter of the Petition :
of :
KIE SEO AHN (DECEASED), OFFICER OF :
METRO GROCERY & DELI, INC. :
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, 1985 :
through August 31, 1988. :

DECISION
DTA Nos. 809321,
809322, 809323,
809324 AND 809325

In the Matter of the Petition :
of :
GI CHEUL KIM, OFFICER OF :
METRO GROCERY & DELI, INC. :
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, 1985 :
through August 31, 1988. :

In the Matter of the Petition :
of :
HEE YONG KIM, OFFICER OF :
METRO GROCERY & DELI, INC. :
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, 1985 :
through August 31, 1988. :

In the Matter of the Petition	:
	:
of	:
	:
JAE KWON LEE, OFFICER OF	:
METRO GROCERY & DELI, INC.	:
	:
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, 1985	:
through August 31, 1988.	:

Petitioners Metro Grocery & Deli, Inc., 461 Seventh Avenue, New York, New York 10001, and Kie Seo Ahn (deceased), c/o Matthew H. Ahn, 154-16 Third Avenue, Flushing, New York 11354, Gi Cheul Kim, 33-26 145th Street, Flushing, New York 11354, Hee Yong Kim, 32-24 150th Street, Flushing, New York 11354, and Jae Kwon Lee, 33-02 Parsons Boulevard, Flushing, New York 11354, as officers of Metro Grocery & Deli, Inc., filed an exception to the determination of the Administrative Law Judge issued on December 23, 1993. Petitioners appeared by Abraham & Silver (Herbert J. Silver and Jacob W. Abraham, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners' reply brief was received on July 12, 1994, which date began the six-month period for the issuance of this decision. Petitioners' request for oral argument was withdrawn.

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

ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Metro Grocery & Deli, Inc.

II. Whether penalties and interest assessed against petitioners should be abated for reasonable cause.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued 10 notices of determination and demands for payment of sales and use taxes due for the period September 1, 1985 through August 31, 1988 dated September 1, 1989 following a field audit. Five of these notices issued to Metro Grocery & Deli, Inc. ("Metro") and Kie Seo Ahn, Gi Cheul Kim, Hee Yong Kim and Jae Kwon Lee each assessed tax due for the noted period in the amount of \$231,138.68, plus penalty and interest, for a total amount due of \$372,360.93. The other five notices assessed an additional "omnibus" penalty (Tax Law § 1145[a][1][vi]) for the same period in the amount of \$23,113.84 against each of the petitioners. The record reveals that validated consents extending the statute of limitations on the assessments had been executed such that the timeliness of the notices of determination described herein is not at issue.

The sales and use tax as assessed is comprised of two major components: a use tax deficiency of \$111.38 on fixtures and equipment and a sales tax deficiency in the amount of \$231,027.34. The use tax deficiency is not in issue in this matter. Additionally, the status of the personal liability of the four individual petitioners as officers is not in question.

Petitioner Metro is a New York corporation organized for the purpose of operating a retail grocery and deli located at 461 Seventh Avenue, New York, New York. Its Manhattan location is at the corner of 35th Street and Seventh Avenue adjacent to Macy's Department Store.

Metro has been in operation since June 9, 1985 at the same location. Initially, the business consisted primarily of the sale of fresh fruits and vegetables as well as certain grocery items. Approximately one year after Metro began business, a cold salad bar consisting of cut-up fruits and vegetables was added. Subsequently, about a year and one-half after the store was

opened and as a result of customer requests, the salad bar was expanded to include the sale of certain hot food items. One of the petitioners, Jae Kwon Lee, testified as to the evolution of the salad bar and its pricing. When the salad bar began, Metro charged \$1.99 per pound for such food items. In March 1987, the price was raised to \$2.29 per pound. Again, in September 1987, the price was raised to \$2.79 per pound. In February 1988, the price accelerated to \$2.99 per pound and, in December 1988, Metro charged \$3.49 per pound. The testimony of Mr. Lee further revealed that petitioners did not sell beer during the first six months of business operations.

Petitioners submitted into evidence four small signs indicating the price per pound of salad bar items. Testimony was provided on behalf of petitioners that these signs had been used to notify customers of the price per pound for the purchase of items from the salad bar and to support their position that the salad bar had increased its prices over some period of time. Although the signs do not indicate the time frame during which they were used in the business, their informational content corresponds with the testimony and they do appear to be authentic in that they have an aged appearance.

The assessments in this matter were issued after a field audit of Metro's business operations. Several times prior to and during the field audit, the Division corresponded with the business for the purpose of requesting books and records. On May 5, 1988, the Division issued to Metro an appointment letter indicating that Metro's sales tax returns for the period June 1, 1985 through February 28, 1988 would be subject to a field examination and that petitioners were expected to produce all books and records pertaining to the sales tax liability of Metro, including journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all other records pertaining to sales tax. A subsequent letter, dated June 23, 1988, indicated an appointment date of July 7, 1988 and listed the audit period again as June 1, 1985 through February 28, 1988. This second appointment letter provided the same specifics as to the records the Division would expect petitioners to have available for examination. A third letter to Metro issued by the Division, dated April 5, 1989, requested "all records pertaining to

sales in order to update the audit to quarter ended 8/31/88." It included a request for sales per general ledger, bank statements, daybook, purchases and any other records pertaining to Metro's sales tax liability.

The appointment date noted in the correspondence of June 23, 1988 was rescheduled for July 18, 1988 whereby the Division examined certain available records at the office of Wolk and Lawlor, petitioners' representatives. The auditor's tax field audit record indicated that on such date the "accountant suggested that we do an observation. [H]e said we will not be able to read daybook, as it is in Korean. Left list of records needed."

The records available during audit included the Federal and State income tax returns, an incomplete check disbursements journal, a general ledger and incomplete monthly bank statements. The auditor had additionally requested the original daybook and cash register tapes for the period September 1, 1985 through May 22, 1988.

With respect to the records maintained by Metro, Mr. Lee testified that in the early years of the business operations all of the partners took an active role in the daily business activity and each night one of the partners would return to the store and work that night to manage the store along with the manager. Mr. Lee testified that the manager was the person who recorded the figures maintained on petitioners' Exhibits "7" through "10" which represent gross daily sales and current daily expenditures. He stated that these were the documents kept in the ordinary course of business and were ultimately provided to the accountant for preparation of more formal records. Mr. Lee testified that the daily records of sales were recorded from the information obtained from the cash register and expenditure invoices. The documents submitted were a simplified form of a cash receipts and disbursements journal with little detail. When Mr. Lee was questioned with regard to why register tapes were not kept or what advice petitioners had received with regard to maintaining cash register tapes, he indicated that at the inception of the business it was necessary to rely on counting the actual money because the cashiers were too inexperienced to be relied upon, and therefore the tapes themselves were not reliable. When they explained the difficulty they had with regard to inexperienced cashiers to

the accountant, their accountant at that time told them to keep a record of daily sales and submit such information to him for purposes of preparing certain reports. In fact, the auditor's field audit report notes that the Federal and State tax returns filed by petitioners for the tax periods in issue were in substantial agreement with the information contained in Metro's books and records.

The gross sales column on the records of daily sales, submitted to Metro's accountant for his preparation of appropriate tax returns and reports, included both taxable and nontaxable items. Mr. Lee was asked how the accountant would compute the sales tax liability if such a breakdown was not provided. He responded that the accountant would come into the deli, check the items that were sold there, and determine generally what percentage of merchandise was taxable and which was nontaxable.

Since Metro's records were recorded in Korean, the cash register receipts were not maintained, the purchase invoices were not available, and the monthly bank statements and the cash disbursements journal were incomplete, the Division determined that petitioners did not maintain books and records sufficient to conduct a detailed audit. The Division discussed these facts with petitioners' representative and it was agreed that an observation of petitioners' business would be done.

The auditor's field audit record revealed that on August 12, 1988 she contacted petitioners' representative, Robert Wolk, and informed him that, sometime between August 22 and September 2, an observation test of the business operations would be done to estimate petitioners' sales tax liability for the period in question. Before an actual observation test took place, numerous attempts were made by the auditor to set up meetings with petitioners' representative, as well as to acquire such records as the cash register tapes and Metro's daybook. The Division was informed that petitioners' representative would be unavailable in early December and, on December 7, 1988, the Division informed petitioners' representative that the observation would be conducted on December 14, 1988.

The observation test of December 14, 1988 included numerous auditors to monitor the sales of four cash registers between the hours of approximately 7:00 A.M. and 2:30 P.M. During a portion of that time, the Division noted certain key facts which ultimately formed the basis of its decision to abandon the observation test scheduled that day. The Division noted the following facts:

"Candy and gum trays were low at 10 [o'clock] and never refilled. Hot food was not put out until 11:30 [A.M.] and there were between 3 and 4 unused hot trays the entire time. The filled hot trays were not readily replenished. Several (at least 4 seen by me) put back their plastic containers, saying that there wasn't 'anything good' here and 'where was the regular food?' At least 15 [to] 18 people were heard by me to say comments such as 'where's the turkey' or 'chicken', lasagna, 'where's the regular food', 'will the kitchen be back to normal tomorrow?', 'I wonder if they're going out of business?'"

The auditor further observed that certain salads were not being weighed, though the pricing was imposed on a per pound basis. In addition, the full price of certain items was not recorded. The auditor further noted that "at 12:15 the team leader was told, and the accountant told the manager to speak to her [the cashier]. [H]e did speak to her in Korean, but the same incidents continued."

A second page of observation notes were recorded by a second auditor on the premises on December 14, 1988. In pertinent part, the notes provided the following information:

"The trays on the hot plate were either partially or completely empty. When they were empty, there [sic] were not refilled. It was noted on several occasions that the clerk was not ringing up the entire sale. There was one instance when the clerk recorded a sale at \$4[.00] less than what the price should have been based on the weight of the tray's contents."

Prior to the first observation date, which was ultimately disregarded, the Division was informed that Metro did not keep cash register tapes before May 1988. However, beginning on May 25, 1988 and extending to August 17, 1988, Metro recorded total daily sales for each of the days in a 13-week period. The summary was taken from "z" tapes which are a summary of the totals of the sales for a day not providing any breakdown as to items sold, categories or the taxability of the sale. The auditor testified that the figures recorded as such daily sales from the tape readings were not utilized for the purpose of projecting sales for the audit period for two

reasons: they were presented to the auditor well after the commencement of the audit (after petitioners had been given many opportunities to present proper records) and even more importantly, because the tape readings did not even reasonably coincide with amounts that were recorded pursuant to the observation test. In fact, the daily observed sales were more than 150% of the average Wednesday sales as evidenced by the tape readings.

During January 1989, petitioners' representatives met with the Division. The Division introduced into evidence notes from the meeting of January 26, 1989 which indicated that since Mr. Wolk was going to be away, the second observation test would not be conducted during February 1989. The notes additionally reveal the following: "Representatives agreed that next observation day will be conducted as a regular business day, with their normal variety of food [and] that trays would be replenished as needed." Subsequent to that time, a second observation date was chosen. On March 2, 1989, petitioners' representatives were informed that an observation test would be performed the week of March 20, 1989. A week later, petitioners' representatives were informed the observation would be conducted on March 22, 1989 and thereafter such testing was performed on that date.

The auditor again recorded certain notes from her observation. The auditor indicated that the observation of four cash registers in use at various times during the day began at 7:15 A.M. and continued to 7:00 P.M. Subsequently, on June 12, 1989, a conference was held between petitioners' representatives and the Division. Notes of such meeting reveal that the representatives took the position that the observation in March on the Wednesday before Easter was not representative of Metro's business. In addition, major renovations were done on Metro's business premises affecting the volume of business in January 1989.

The results of the observation test performed on March 22, 1989 (a Wednesday) resulted in gross sales for the day of \$4,645.00. As previously described, petitioners made available for the period May 23, 1988 through August 21, 1988 certain summaries of cash register tapes ("z tapes") from which the auditor determined that the portion of Metro's sales attributable to Wednesdays comprise 17.26% of its sales for a week. (This was the only use made of such

information by the auditor.) The auditor then divided \$4,645.00 by 17.26% to calculate weekly gross sales and multiplied the result by 13 weeks to obtain quarterly gross sales of \$349,855.00. This amount was projected to each of the sales tax quarters in the audit period by adjusting it for an inflation factor of 5% per year, resulting in gross sales for the audit period of \$3,906,236.00. Taxable sales for the audit period were then computed by multiplying this gross sales figure by Metro's observed taxable ratio of 81.8%¹ resulting in audited taxable sales of \$3,195,301.00. The audited taxable sales were multiplied by the tax rate for the period, 8.25%, resulting in audited tax due in the amount of \$263,612.34, from which the tax paid per the sales tax returns (\$32,585.00) was subtracted. The resulting amount of \$231,027.34 is the amount of the sales tax deficiency contested herein.

In connection with her calculations, the auditor was questioned about whether she performed any other comparative calculations of the proposed tax deficiency. She indicated by her testimony that she used several other external indices to project the tax due, such as officer's salaries, interest, and the price paid for the business. The workpaper submitted into evidence that indicates such calculations were performed states that the auditor used Metro's Federal return and Dun & Bradstreet Corp.'s "Cost of Doing Business" factors for officers salaries, interest and depreciation. In all three computations, the factors were applied to amounts obtained from Metro's tax returns to arrive at a gross sales figure, which was subsequently multiplied by the observed taxable ratio and the tax rate. In each case, the audited tax due exceeded the amount assessed to petitioners by \$59,000.00 to \$231,000.00. It is somewhat unclear from the testimony at what point the auditor made such calculations and the audit workpaper did not bear a preparation date, as do most others. However, she clearly stated that the comparative computations were "made to verify what I had already calculated" (Tr., p. 190).

The auditor was also questioned about whether she considered the facts that no salad bar existed during the early portion of the audit period and no beer was sold for the first several

¹In accordance with the field audit report, the auditor noted that during the observation on March 22, 1989 nontaxable sales were recorded and found to be at 18.2% of gross sales, thus, resulting in 81.8% as the taxable percentage.

months of the audit period. The auditor indicated that such information could have altered her calculation or the method of observing Metro's sales, if she had been made aware of such facts. The record is clear that the auditor had not been given such information from both her testimony and the manner in which petitioners' representative stated, "We will show there was no salad bar for a period of time of the audit period and I am asking the auditor if she had known that fact would that have made a difference in the calculation." Petitioners attributed the auditor's lack of awareness of such information to her failure to inquire about the history of Metro's business operations. Although the auditor indicated that she customarily makes such inquiry, she did not have any recollection as to whether she did so in this case, or what type of inquiry she may have made.

As previously mentioned, the auditor adjusted the audited tax due by a 5% inflation factor for each of the three years covering the audit period. When questioned as to the basis of the 5% factor, the auditor stated that it was an estimate which she subsequently verified with the U.S. Labor Department. Introduced into evidence by the Division was a workpaper prepared by the auditor which evidenced a telephone call to the Labor Department to obtain the annual average Consumer Price Index. The auditor's notes recorded consumer price indices and from such information, she computed "inflation factors" of 3.6% from 1985 to 1986 and 5.7% for each of the two years from 1986 to 1987 and 1987 to 1988. Given the indices recorded from the telephone conversation, the results should have reflected price percentage changes of 3.3%, 5.1% and 4.83% for the 1985-86, 1986-87 and 1987-88 years, respectively. In an attempt to challenge the Division's use of the estimated 5% inflation factor, petitioners introduced into evidence an excerpt from the U.S. Labor Department's compilation of Consumer Price Index statistics. The expenditure category of food and beverages for Urban Wage Earners and Clerical Workers in the New York City geographic location indicated a percentage change in the index for the period from April 1986 to February 1987 of 5.5%. The food and beverage category was further divided into several component parts, including food at home, food away

from home and alcoholic beverages, each with their own percentage change, some above and some below the 5.5%.

The auditor was additionally questioned regarding her observations of the change in the physical appearance of the deli. The auditor testified that she had noticed a difference in the appearance of the store between the first scheduled observation date of December 14, 1988 and the actual date of the observation test, March 22, 1989. She was aware that the salad bar had been enlarged providing four additional food bins, and that a new staircase existed.

Petitioners provided the testimony of Robert Wolk, a public accountant who retired from New York State service after 27 years with the State in the area of sales tax, beginning his career with the New York City Department of Finance in 1956. Since his retirement, he became engaged in tax consulting. When asked whether he had had an opportunity to evaluate the results of the audit conducted in this matter, and whether he had any opinion as to the methods used by the auditor, he voiced his opinion that the auditor conducted an inadequate investigation of the history of the business, and that such failure distorted the entire audit. Mr. Wolk testified that the daily records were made available to the auditor and claimed that the auditor and the team leader ignored the records because they were recorded primarily in Korean. When questioned whether his schedule conflicted with proposed choices for the observation test date prior to March, which contributed in part to the choice of March 22 as a test date, with which he now takes issue, he stated that he was not aware of such conflict and petitioners' representatives were given no choice regarding the date chosen. Later testimony revealed he was on vacation during January and February 1989. Mr. Wolk characterized the audit as unfair for the following reasons:

- (1) The observation date was within a busier than usual holiday shopping week, as it was the week prior to Easter, and the location of Metro (near Macy's) is directly affected by such activity; and
- (2) The price differences between the observation test date and the beginning of the audit period were not considered; and

(3) Since Metro's records were adequate, they should have been used.

A document prepared by a member of Mr. Wolk's firm was introduced into evidence for the purpose of challenging the 5% inflation factor applied to the audit computations. It was a comparison between 1985 and 1989 prices corresponding to the purchase of food items sold on the premises. The information used in the preparation was extracted from Metro's purchase invoices during those years, according to the testimony of Mr. Wolk and his partner Joseph Lawlor. In each of the years examined, one invoice showing the price of each item listed was reviewed for the pricing information. No invoices were submitted as part of the record. The price differential and the individual percentage increase in the prices paid for 27 items were calculated. The result was an average cumulative (1985-1989) 55% increase in cost. Mr. Wolk stated that this figure should be used in place of the Division's 15% (total) inflation allowance.

Petitioners further provided the testimony of Paul Carucci, an accountant who joined the New York State Tax Department in 1963, and whose sales tax experience stems back to 1965. Presently, Mr. Carucci maintains a sales tax consulting firm. At petitioners' request, Mr. Carucci conducted and supervised his own audit of Metro on February 4, 1992, a Wednesday. His testimony revealed an observation test of Metro, between the hours of 8:00 A.M. and 4:00 P.M. One person kept track of sales made from the front register and another monitored the side register. They recorded the nontaxable sales for the day, listing the items as they were sold. He testified that he called the store the following day and requested "the totals from the tapes". He was told the total sales recorded for February 4, 1992 were \$2,434.00, with \$572.30 as nontaxable sales. Thus, the taxable and nontaxable ratios resulting from the sales on that date were 76.5% and 23.5%, respectively. Mr. Carucci also expressed that in his opinion, the methods employed in the assessment by the auditor in this case were unfair and unreasonable for many of the same reasons stated in Mr. Wolk's testimony.

A conciliation conference was held in this matter on October 4, 1990 and, by a Conciliation Order dated December 28, 1990, the statutory notices were sustained.

OPINION

The Administrative Law Judge reviewed the Tax Law, regulations and abundant case law developed pertaining to requirements for maintaining and making available for audit, complete, adequate and accurate books and records regarding sales tax liability.

The Administrative Law Judge also discussed the estimation of sales tax due when there are insufficient records which make it impossible to conduct a complete audit, holding that: 1) the Division need only adopt an audit method reasonably calculated to determine the amount of tax due; 2) exactness is not required; and 3) the burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (Determination, conclusion of law "B").

The Administrative Law Judge held that since petitioners maintained and made available only limited books and records which were not adequate for an audit to determine the accuracy of Metro's sales tax returns as filed, the Division was entitled to resort to indirect methods and estimates as a means of determining Metro's sales and for calculating petitioners' sales and use tax liability.

The Administrative Law Judge, with regard to petitioners' allegations relating to the rescheduling of the observation test, held that: 1) it did not appear that the delay was caused by the Division, but seems to have been due to petitioners' representative's schedule and 2) if petitioners had some objection to the rescheduled date, there is no record of any comments or objections being voiced at that time by petitioners.

Because of petitioners' failure to keep adequate books and records, the Administrative Law Judge rejected petitioners' allegations that: 1) the salad bar did not exist in the early part of the audit period; 2) a change in pricing adjustment over the audit period should be made due to the percentage of business generated by the salad bar; and 3) the salad bar signs indicate there were price changes during the audit period. Thus, the Administrative Law Judge concluded that petitioners failed to carry their burden of showing that the tax assessed was unreasonable.

The Administrative Law Judge also held that the "z" tapes were not reflective of petitioners' business since they were maintained only for the final quarter of the audit period;

they were merely summary totals that provided absolutely no detail as to the items recorded; they did not show taxable versus nontaxable sales; and they failed to show any separation of items into other sales categories. Thus, it was reasonable for the auditor to rely on said tapes only for the purpose of determining what percentage of sales is represented by Wednesday. The Administrative Law Judge also found: 1) the Division's use of an estimated 5% inflation factor was reasonable and there were numerous problems with petitioners' submission of a 55% inflation allowance and the pricing comparison of food items between 1985 and 1989; 2) the daily sales records of petitioners were primitive, at best, as the recorded information was not verifiable in any manner and, therefore, could not be relied upon to conduct a detailed audit; and 3) the audit of Metro by the use of an observation test should not be disturbed. The Administrative Law Judge upheld the imposition of the omnibus penalty as petitioners failed to meet their burden of proving that the underreporting was due to reasonable cause and not willful neglect, denied the petitions, and sustained the notices of determination and demand for payment of sales and use taxes due dated September 1, 1989.

Petitioners, on exception and citing Matter of Tugal Rest. (Division of Tax Appeals, September 17, 1987), argue that the Tax Appeals Tribunal has the authority and power to rectify an improper assessment by taking into consideration matters generally known by the public although not part of the record (Petitioners' brief on exception, p. 22).

Petitioners request that the Tax Appeals Tribunal determine that: 1) there should have been no additional tax assessment for the period from June 1, 1985 to June 1, 1986; 2) there should have been a modest increase in the taxable sales for the period from June 1, 1986 through June 1, 1987; 3) for the period from June 1, 1987, the Tax Appeals Tribunal should consider that the March 22, 1989 figure was not that of an ordinary customary business day for Metro; and 4) the inflation figure of less than 5% used was not proper.

Petitioners also argue that "while the taxpayer ordinarily must bear the burden of overcoming a tax assessment, where an exclusion rather than an exemption is involved, the

statute must be strictly construed in favor of the taxpayer" (Petitioners' brief on exception, p. 31).

Petitioners further argue that "after a proper determination, the penalty and interest should be waived as the failure or delay to compute a proper amount of taxable sales instead of the estimate by the Korean accountant was not due to the willful neglect of the taxpayer" (Petitioners' brief on exception, p. 35).

The Division, in reply, argues that petitioners have not proven by clear and convincing evidence that the amount due from the corporation is less than the amount computed by the auditor. Further, the Division asserts: 1) petitioners did not provide the auditor with adequate books and records to conduct a detailed audit; 2) in view of the corporation's inadequate records, the Division was entitled to estimate petitioners' tax liability; 3) the use of an observation test to determine petitioners' tax liability was a proper audit method; 4) the audit method employed in this case was more than reasonably calculated to determine the tax due from the corporation; 5) petitioners have not met their burden of proving that the amount assessed was erroneous; and 6) petitioners may not introduce new evidence into the record at this stage of the proceeding.

The Division further argues that: 1) petitioners have the burden of proving the elements required for penalty abatement; 2) the facts of this case support a finding that petitioners willfully neglected their tax obligations; and 3) petitioners have not established that their failure to comply with the Tax Law was due to facts which constitute reasonable cause.

In their reply brief, petitioners argue:

"[t]he memorandum of law submitted by the Department of Taxation and Finance (hereinafter 'Department') in opposition to the exceptions filed by the petitioners and to the memorandum of law submitted on behalf of petitioners in support of the exceptions to and disagreement with the determination of the Administrative Law Judge, is a studied attempt to perpetuate error. The facts are of primary importance in getting to the truth of the issues involved.

"At the hearing before the Administrative Law Judge, everything submitted went into evidence due to the flexibility of administrative law, despite objections to hearsay and the introduction of self-serving documents. That should be considered in connection with the matters to which the Department now makes objection" (Petitioners' reply brief, p. 2).

Petitioners' reply brief again reviews certain testimony and evidence presented at the hearing, discusses various facts which led to the determination of the Administrative Law Judge, and again argues that while the taxpayer ordinarily must bear the burden of overcoming a tax assessment, where an exclusion rather than an exemption is involved, the statute must be strictly construed in favor of the taxpayer.

We affirm the determination of the Administrative Law Judge.

In addition, because we find that the Administrative Law Judge completely and adequately addressed the issues before her, we see no reason to analyze these issues further; nor do we see any reason to hold otherwise.

We do, however, find it necessary to address petitioners' attempt to place before this Tax Appeals Tribunal additional evidence as part of their Memorandum of Law, namely, the present contents of Metro's salad bar as well as information relating to certain "x" or "z" tapes which are not part of the record below.

We reject petitioners' attempt, at this late date, to introduce new evidence after the record has been closed. As we held in Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991):

"[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (see, Matter of Oggi Rest., Tax Appeals Tribunal November 30, 1990; Matter of Morgan Guar. Trust Co. of N.Y., Tax Appeals Tribunal, May 10, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories, Tax Appeals Tribunal, December 15, 1988)."

As previously stated, we find the Administrative Law Judge completely and adequately addressed the issues before her and further, we find no basis in the record before us for modifying the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Metro Grocery & Deli, Inc., and Kie Seo Ahn (deceased), Gi Cheul Kim, Hee Yong Kim and Jae Kwon Lee, as officers, is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Metro Grocery & Deli, Inc., and Kie Seo Ahn (deceased), Gi Cheul Kim, Hee Yong Kim and Jae Kwon Lee, as officers, are denied; and
4. The notices of determination and demand for payment of sales and use taxes due, dated September 1, 1989, are sustained.

DATED: Troy, New York
January 12, 1995

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

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