

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions :
of :
EUGENE BURBACKI, :
OFFICER OF RIA RESTAURANT, INC. :
for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1988 :
through February 28, 1991. :

DECISION
DTA NOS. 810862,
810863 AND 810864

In the Matter of the Petition :
of :
RIA RESTAURANT, INC. :
for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1988 :
through February 28, 1991. :

Petitioners Eugene Burbacki, officer of RIA Restaurant, Inc., and RIA Restaurant, Inc., 2770 West 5th Street, Apt. 12A, Brooklyn, New York 11224-4223, filed an exception to the determination of the Administrative Law Judge issued on May 19, 1994. Petitioners appeared by Eleanora M. DiLorenzo, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioners' reply brief would have been due on August 19, 1994, which date began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

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

ISSUES

I. Whether the Division of Taxation properly made a request for the books and records of RIA Restaurant, Inc. for the period at issue.

II. Whether the Division of Taxation properly resorted to external indices to determine additional sales and use taxes due from RIA Restaurant, Inc.

III. Whether, if the resort to external indices was proper, such methodology was reasonably calculated to reflect sales and use taxes due.

IV. Whether petitioners have shown that their failure to pay the proper amount of tax within the time required was due to reasonable cause, thereby warranting abatement of penalties assessed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "4" which has been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional finding of fact are set forth below.

Pursuant to an audit of petitioner RIA Restaurant, Inc. ("RIA"), which commenced in February 1991, the Division of Taxation ("Division"), on June 10, 1991, issued the following notices of determination and demands for payment of sales and use taxes due to RIA:

<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
3/1/88-2/28/91	\$79,206.00	\$18,467.97	\$14,785.41	\$112,459.38
3/1/88-2/28/91	--	7,920.60	--	7,920.60

On the same date, the Division also issued notices of determination to petitioner Eugene Burbacki, as officer of RIA, in identical amounts for the same periods.

On June 14, 1991, the Division issued three notices of determination and demands for payment of sales and use taxes due to Eugene Burbacki as follows:

<u>Period Ended</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
2/28/90	\$3,079.04	\$738.96	\$492.03	\$4,310.03
5/31/90	2,550.08	535.50	319.39	3,404.97
8/31/90	2,515.84	452.83	230.78	3,199.45

These notices of determination were issued as a result of checks (see, Exhibits "N", "O" and "P") issued by RIA and signed by Eugene Burbacki which were for the payment of sales tax for the above quarters. Each of the checks was returned for insufficient funds.

RIA operated a delicatessen/restaurant known as Rudy's which was located at 387-389 South Oyster Bay Road in Plainview, New York. The restaurant began operation in about 1954; the sole owner of the corporate stock and the operator of the restaurant, from its inception until approximately November 1984, was Rudolf Lefkovits.

By written agreement dated November 15, 1984, Rudolf Lefkovits agreed to sell all of the corporate stock of RIA to Eugene Burbacki (see, Exhibit "4"). For purposes of this proceeding, the relevant terms of this agreement were as follows:

(a) There were to be two closings: the first closing to be held within four business days of receiving State Liquor Authority approval of the corporate change of ownership (permitting Eugene Burbacki to become a 50% stockholder) and the second closing to be held approximately 24 months after the first. The total purchase price (to be paid at various stages) was \$600,000.00 (\$275,000.00 for the "First Purchase" and \$325,000.00 for the "Second Purchase");

(b) For the first 24 months following the first closing, both the purchaser (Burbacki) and the seller (Lefkovits) were to be employed at the restaurant. During this period, all corporate checks, notes or other drafts were to bear the signature of both. The seller was to have sole managerial responsibility, including the hiring and firing of personnel, purchasing and setting prices. The seller was to be liable for any tax assessments for any period prior to the date of the first closing with proportionate liability for periods thereafter; and

(c) Upon the first closing, the purchaser was to become a 50% shareholder (100% after the second closing). Immediately after the first closing, the purchaser, along with the seller, were to be elected as directors and the directors were to elect the seller as president and the purchaser as secretary of the corporation.

The Division previously conducted an audit of this business for the period March 1, 1983 through February 28, 1986. Based upon the auditor's determination that books and records were incomplete and, therefore, inadequate for the performance of a detailed audit, an observation of the business premises had been conducted for three days (April 29, 1986, June 24, 1986 and October 27, 1986) between the hours of 8:00 A.M. and 10:00 P.M. Certain adjustments to the results were made (for a smorgasbord held on one day and \$100.00 daily adjustment for increased sales due to local advertisements). The day with the highest taxable sales was eliminated from the observation test. An average of the remaining two days was calculated. As a result, additional taxable sales of \$292,969.00 were determined, with tax due thereon in the amount of \$23,969.50. Penalty and interest were also imposed in the assessment issued on February 3, 1987.

An administrative hearing relative to this assessment was held on July 25, 1989 and the Division of Tax Appeals sustained the assessment in its entirety. Eugene Burbacki testified that he did not agree with the assessment, but that Rudolf Lefkovits paid it.

We modify the Administrative Law Judge's finding of fact "4" to read as follows:

The present audit was initiated by an appointment letter, dated March 20, 1991, which was presented to Eugene Burbacki on that date by the auditor who visited the premises in order to ascertain hours of operation and to obtain a menu indicating what was sold. The auditor initially met with a counterman who identified Eugene Burbacki as the owner. Mr. Burbacki later appeared and showed the auditor how the cash register computed tax. He stated that he zeroed out the register each day. Attached to the letter was a checklist of records to be presented for audit. The appointment letter stated that the audit period was 3/1/88-2/28/91 and set up an appointment to examine books and records on April 8, 1991. The auditor thereafter received a telephone call from Joseph Chanin who stated that he was RIA's representative and who requested that the appointment be changed to March 27, 1991. A consent to extend the statute of limitations for assessment was left for Mr. Burbacki at the initial visit on March 20, 1991 and a revised consent was left with a Mr. Chanin on March 27, 1991. Neither was ever signed by Mr. Burbacki. The

auditor testified that she was aware that the assessment had to be issued soon so as not to have the first quarter at issue barred by expiration of the statute of limitations.

On March 27, 1991, the auditor again went to the restaurant and met Mr. Chanin there. The auditor stated that she did not receive all the records requested. Provided to the auditor were sales tax returns, Federal income tax returns, depreciation schedules, a cash receipts journal, a partial check disbursements journal and payroll records. Register tapes, guest checks, catering contracts, bank statements, complete check disbursement record, purchase records (by check and cash) and utility bills were not provided. The auditor thereupon left a handwritten list of additional records needed and scheduled another appointment for April 5, 1991 (see, Exhibit "V"). Mr. Chanin then telephoned to request a postponement of the appointment because he was busy due to tax season. On April 11, 1991, the auditor telephoned the restaurant but received no answer. On the same date, she again visited the premises and discovered that the restaurant was closed.

On April 16, 1991, Joseph Chanin telephoned the auditor to advise that the business had been abandoned and that he was withdrawing from the case. By letter dated April 22, 1991 and received April 24, 1991 (Exhibit "Z"), Mr. Chanin's power of attorney was formally withdrawn.

On April 18, 1991, the auditor sent a certified letter to Eugene Burbacki requesting that the following records be provided, at her office, on May 6, 1991. The letter stated, in part, as follows:

"Please submit the following records at our office, at 9:00 AM, on May 6, 1991. (All were previously requested on 3/20/91 and 3/27/91. Copies enclosed for your convenience).

- 1) General Ledger or accountants work sheets for the period 3/1/88 - 2/28/91
- 2) Day Books 3/1/88 - 2/28/91
- 3) Bank Statements 3/1/88 - 2/28/91
- 4) ST 100's with accompanying worksheets 3/1/88 - 2/28/91
- 5) Payroll Records 1988,89,90
- 6) Register tapes, and guest checks, as available
- 7) Completed Officer Questionnaire
- 8) Purchase Invoices 3/1/88 - 2/28/91
- 9) Expense Purchases for 1990
- 10) Fixed Asset/Equipment purchases 3/1/88 - 2/28/91
- 11) Personal Income Tax Returns for Corporate officers 1989 & 1990
- 12) Documentation supporting non-taxable sales"

This letter was sent to 785 Ocean Parkway, Brooklyn, New York 11230, which was the address previously furnished by Mr. Burbacki. It should also be noted that the letter of withdrawal by Joseph Chanin (Exhibit "Z") also indicated that all further correspondence should be sent to Mr. Burbacki at that address. This letter was returned as undeliverable. A new address (2770 West 5th Street, Apt. 12A, Brooklyn, New York

11224-4223) was obtained from the Tax Compliance Bureau of the Division and another letter, dated April 29, 1992, was sent, by certified mail, to Mr. Burbacki at the newly obtained address. This letter included copies of all previous letters of correspondence and also advised Mr. Burbacki of Joseph Chanin's withdrawal from the case. The letter referring to the attached letter of April 18, 1992 and the delineation of records requested by the Division renews the request of Mr. Burbacki to present the books and records of the corporation to the Division "at 9:00 AM on May 6, 1991."

On May 7, 1991, the auditor again visited the restaurant which, at that time, was undergoing renovation. She obtained the name of the landlord (Treeco Management) from whom she subsequently learned that RIA had been paying more rent than claimed on its Federal income tax returns. She was also informed that the premises had been abandoned due to nonpayment of rent.¹

At her initial meeting with Eugene Burbacki on March 20, 1991, the auditor was informed that the restaurant was dealing primarily in cash because his suppliers would not extend credit to him. No purchase invoices or list of cash payments was provided, however. At that same meeting, the auditor advised Mr. Burbacki to begin saving register tapes and guest checks. None was furnished to the auditor.

The auditor also testified that, upon her review of the sales tax returns and the Federal income tax returns of RIA, she initially found a discrepancy of approximately \$250,000.00. A subsequent examination of the returns, however, revealed that the actual discrepancy was \$34,510.00 (see, Schedule E of Exhibit "T").

As a result of the auditor's determination that RIA's books and records were inadequate for the performance of a detailed audit and because the restaurant had been closed and abandoned, she decided to determine additional tax due through the use of the prior audit results with adjustments due to rising prices. From the prior audit file, she obtained a menu from March 1986 and compared the prices on that menu with those listed on the menu she had received on her visit to the restaurant on March 20, 1991. A review of the prices revealed that, in the five-year period, prices had risen approximately 19.8%. The audit file from the prior

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We modified finding of fact "4" of the Administrative Law Judge's determination by adding the last sentence to the fourth paragraph to more fully reflect the record.

audit stated that prices were increased 4.6% in August of each year.

As was done in the prior audit, the taxable sales from the day on which sales were the highest (June 24, 1986 - \$1,710.67) were excluded from the calculation. In the prior audit, \$100.00 had been deducted from one of the days utilized in the computation due to an advertising campaign in a local paper. No such deduction was allowed in the present matter because there was no evidence of another such advertising campaign. Taxable sales from the remaining days were averaged ($\$1,653.86$ for 5/29/86 + $\$897.43$ for 10/27/86 = $\$2,551.29$, divided by 2 = $\$1,275.65$). The result was then multiplied by 90 (days per quarter) to determine 1986 quarterly taxable sales of $\$114,808.50$. Five days per year were allowed for holiday closings (six days were allowed for the 1988 leap year).

To determine quarterly taxable sales for the period September 1, 1987 through August 31, 1988, the 1986 quarterly taxable sales figure of $\$114,808.50$ was multiplied by the percentage of annual price increase (.0464) to arrive at quarterly taxable sales of $\$120,135.61$. By using the same method of calculation, quarterly taxable sales for the periods September 1, 1988 through August 31, 1989, September 1, 1989 through August 31, 1990 and September 1, 1990 through February 28, 1991 were determined to be $\$125,709.91$, $\$131,542.85$ and $\$137,646.43$, respectively.

Estimated taxable sales for the audit period were, therefore, found to be $\$1,544,575.12$. Nontaxable sales claimed on RIA's sales tax returns ($\$338,293.00$) were allowed in full. For the period, RIA had reported taxable sales of $\$557,675.00$ which, when subtracted from estimated taxable sales, resulted in additional taxable sales of $\$986,900.12$, with tax due thereon (at 8%) of $\$78,958.00$.

No tax was assessed on expense purchases since such purchases were considered by the auditor to be minimal. Tax of $\$248.00$ was assessed on an equipment purchase in 1989 in the amount of $\$3,100.00$. Total tax due was, therefore, determined to be $\$79,206.00$.

Petitioner Eugene Burbacki testified that he entered the restaurant business in 1984 with no prior experience in the business. After the second closing (see, above), Rudolf Lefkovits

retired (June 1987). Mr. Burbacki testified that soon after Rudolf Lefkovits' retirement, business began to decline almost immediately. The reasons for this decline were as follows:

(a) Plainview Centre, the shopping mall wherein the restaurant was located, underwent extensive construction between April 1988 and June 1989. During the renovation, sidewalks and roads were torn up and the fronts of the various businesses were obscured by scaffolding;

(b) Food Parade, Inc. d/b/a Foodtown began doing business in Plainview Centre on July 11, 1990. Upon opening at this new location, Foodtown operated a delicatessen department. The provisions of RIA's lease in Plainview Centre (see, Exhibit "7") which ran from January 1, 1973 through December 31, 1990 provided, in paragraph 58 thereof, as follows:

"Provided tenant is not in default, Landlord agrees not to lease or rent space to any premises in the future at the Plainview Shopping Center for use as a delicatessen store or containing a delicatessen counter, which operation shall be defined as the sale of prepared and cooked meats, together with the incidentals normally sold at delicatessen counters."

Mr. Burbacki testified that a representative of the landlord presented him with a lease amendment (see, Exhibit "6") in 1986 (the amendment was executed October 17, 1986) which provided as follows:

"1) TREECO/Plainview Limited Partnership as landlord and tenant indicated below has [sic] entered into a lease for premises at the Plainview Shopping Center.

"2) Landlord proposes to add to the center a major, full-service supermarket in excess of 35,000 square feet generally on the site formally occupied by RKO Theatre.

"3) Landlord agrees in connection with such supermarket lease to renovate the entire shopping center.

"4) In consideration for such agreement, and the additional business at the center the supermarket is expected to generate, tenant agrees that any exclusive [sic] in tenant's lease shall not apply to goods and services customarily offered by a full-service supermarket."

Mr. Burbacki stated that he agreed to this amendment because his lease was to expire in 1990 and, when another tenant had refused to accede to a request of the landlord, its

lease was not renewed upon expiration;

(c) Prior to the retirement of Rudolf Lefkovits, on or about April 12, 1987, there was a fire in the restaurant which resulted in the closing of the business for approximately five weeks. Because the restaurant was closed for such an extensive period, business was lost and many of the customers did not return;

(d) Prior to and during the audit period, a declining economy with resulting unemployment extensively affected RIA's business; and

(e) As evidenced by the fact that many of RIA's debts had to be paid from non-corporate funds, most notably the private checking account of Eugene Burbacki's wife, Ella Burbacki (see, Exhibit "8"), petitioner had severe financial problems which ultimately resulted in default in payment of rent in the amount of \$15,178.20. As a result of nonpayment, RIA was directed to surrender the premises by April 4, 1991 (see, Exhibit "10").

Petitioner Eugene Burbacki stated that RIA's representative during the prior audit, Joseph Chanin, had told Rudolf Lefkovits that it was not necessary to keep all register tapes and guest checks because doing so would soon fill the restaurant. Mr. Chanin told Mr. Lefkovits to "keep a week here, a week there, you know, not everyday."

As a result of this advice, Eugene Burbacki testified that he had kept about one year's worth of register tapes and guest checks during the audit period. He also stated that, along with these register tapes and guest checks, he had bank statements, bills, invoices and checkbooks which were kept downstairs in the business premises.

After Joseph Chanin resigned as the corporation's representative, Mr. Burbacki made an appointment to see a new representative, Ira Friedman, who had an office in Manhattan. In preparation for this appointment, he put all of RIA's records in the trunk of the car. However, on August 13, 1991, Mr. Burbacki's vehicle, a 1988 Oldsmobile Cutlass, was stolen in Brooklyn. The vehicle was never recovered. On page 3 of Eugene Burbacki's affidavit of vehicle theft (see, Exhibit "13") submitted to the Allstate Insurance Company, it was stated that

among the personal property in the vehicle at the time of its theft were papers and bills pertaining to RIA relative to a sales tax audit. It should be noted that this affidavit was neither signed nor sworn to by Eugene Burbacki.

Approximately eight or nine months prior to abandoning the restaurant, Eugene Burbacki obtained a license to practice dentistry in New York State. Since he had already spent approximately \$300,000.00 to \$350,000.00 and could not borrow anymore, he decided to abandon the restaurant business and begin the practice of dentistry. He tried to sell the business but could find no buyers. The restaurant equipment belonged to Mr. Lefkovits who received \$10,000.00 therefrom (see, Exhibit "11").

In addition to the facts found by the Administrative Law Judge, we find the following:

At hearing, when the auditor was asked about the normal time for explaining protest procedures to a taxpayer she responded, in relevant part, as follows:

"[a]t any time that I have dealt with anybody that has been under audit I am very careful to point out to them and to their representative that the numbers that I come up with are not chiseled in stone, that there are many, many avenues open to the taxpayer to protest, and that at such time as they become necessary, I will provide them with the information that is needed for them to enter a protest. As a matter of just my own procedure, I call people and I remind them when their 90 days is going to be up. I mean there is no way that we want to do this in any way other than the right way. We do not want anybody to lose their protest rights. I made sure to tell Mr. Burbacki what his protest rights were because I had before me somebody who did not have a professional representative and I went out of my way to explain his protest procedures to him. And the fact that we have had a BCMS hearing and that we are here in Troy today, tells me that I did the proper thing because the taxpayer's rights have been protected.

"I don't quite understand what you are asking me.

"Q. It doesn't matter" (Hearing tr., pp. 65-66).

Shortly thereafter, the following colloquy took place.

"Q. Do you remember telling Mr. Burbacki that if he cut out articles about the down turn in the economy in Long Island that he would probably prevail at the conciliation conference?

"A. No. I didn't tell him he would prevail. I said to him if he can bring some kind of documentary evidence

into the hearing to show that the restaurant business was down or anything other than just the statement, 'Well, business is bad or business fell off,' I said, 'If you could bring in a statistic that shows that the restaurant business on Long Island declined by ten percent in those months, certainly we would take that into consideration,' in the same way that we use the Consumer Price Index for adjusting for inflation. That's a published index and I have used it many times in audits.

"I would point out that in the prior audit Mr. Korenstein made adjustments backward for inflation. These statistics are published from time to time, and if they would serve the taxpayer well, I have no problem in suggesting to them that --

"Q. Why did you need to wait until the conciliation conference for him to present them to you?

"A. That is entirely untrue. There are notes where Mr. Burbacki and Mr. Friedman were on the telephone at which time I said that the taxpayer has a lot of rights and that any time between the issuance of the assessments and the hearing, that if he came up with any information that was pertinent to this audit, I would gladly look at those figures. I have a memorandum of that conversation in with my audit file.

"Q. I do, too, I think, right in front of me. As a matter of fact, you said if the records were lost, then the issue is moot; is that correct?

"A. Well, he said that all his records were lost, so the issue is moot. If, in fact, he has no records, then -- I don't have a crystal ball.

"Q. Just permit me to refresh your recollection and you can point out anywhere in here if you said that he could present anything other than his records to you.

"Where does it say anywhere there that you would be willing to also add anything other than this records that he said were lost?

"A. It --

"Q. It doesn't say it in there. You won't find it, but I'm giving you the opportunity.

"A. Okay.

"ALJ FRIEDMAN: These excerpts are from the audit report that's in evidence?

"MS. DiLORENZO: That's part of the field audit report.

"A. I sent a letter initially --

"MR. HABER: Could I see that document?

"THE WITNESS: Do you want me to comment on the fact it says here that I reminded Mr. 'F' that 'Vendor has many rights'?"

"ALJ FRIEDMAN: We are getting way off the rights here. Let's move along with what's relevant. You stated why you did. Let's move on" (Hearing tr., pp. 66-69).

OPINION

The Administrative Law Judge, relying on Matter of Todaro (Tax Appeals Tribunal, July 25, 1991) and the cases cited therein, determined that the Division made an adequate request for petitioners' books and records. The Administrative Law Judge found that petitioners and their representative, Mr. Chanin, were personally served with a request for the records and this overcame the assertion by petitioners that they did not receive the certified mail request from the Division.

The Administrative Law Judge determined that the Division properly examined such books and records as were provided and properly determined that petitioners did not maintain adequate books and records to allow the conduct of a detailed audit. The Administrative Law Judge found that petitioners' assertion that their books and records were stolen was unsupported by evidence and that the Division properly resorted to the use of the observation test from the prior audit (i.e., for the period March 1, 1983 through February 28, 1986) of petitioners in conjunction with the current menu prices to estimate petitioners' taxable sales for the current audit period (i.e., March 1, 1988 through February 28, 1991).

The Administrative Law Judge rejected petitioners' assertion that the use of the prior observation test as the basis for estimating taxable sales for the period at issue was not reasonably calculated to estimate petitioners' sales due to material changes in the business from the time of the prior audit to the time of the present one. The Administrative Law Judge stated that:

"these circumstances (most notably, the retirement of Rudolf Lefkovits, the renovation of Plainview Centre and the competition of Foodtown's deli department) existed are not in dispute; however, while it is possible that because of these circumstances petitioners may be entitled to some allowances, petitioners have the burden of proving not only the entitlement thereto but also the correct amount of such allowances [cites omitted]. From the evidence presented, it is not possible to properly determine how much of an allowance, if any, should be granted for each of the circumstances advanced by petitioners" (Determination, conclusion of law "C").

The Administrative Law Judge determined that the observation test used by the Division was reasonably calculated to estimate petitioners' taxable sales noting that where a taxpayer fails to maintain adequate books and records "[c]onsiderable latitude is given an auditor's method of estimating sales" (Determination, conclusion of law "C"). Absent source documentation (cash register tapes and guest checks were not available) and with the fact that the the business was closed:

"the auditor was faced with a particularly difficult set of circumstances [and]. . . with few alternatives. Utilization of the prior audit's observation test, with adjustments for price increases, must, therefore, be found to have been reasonable under this particular set of facts" (Determination, conclusion of law "C").

The Administrative Law Judge determined that petitioners failed to show that the failure to timely pay sales taxes was due to reasonable cause and not due to willful neglect.

On exception, petitioners outline their main points as follows:

- "1) Taxpayer's appeal rights were compromised by auditor's wrong advice improperly given.
- "2) Auditor did not examine books and records when she was invited to, so at the time she resorted to external indexes she did not know whether they were sufficient.
- "3) Her own errors did not justify a resort to external indexes.
- "4) The methodology employed was not reasonably calculated to reflect taxes due, due to many facts, and the court neglected the importance of the economic recession.
- "5) The Division misstated the law on what evidence is sufficient to sustain a finding that an assessment was erroneous or methodology employed was unreasonable.
- "6) Adjustment for advertising was unreasonable"

(Exception, pp. 1-2).

On the first point, petitioners assert that:

"[t]he auditor interfered with the [petitioners'] appeal rights following the assessment, telling him he should have no problem proving at a conciliation hearing that the recession seriously slowed down his business if he would just bring newspaper clippings about the recession. The uncontroverted testimony of both the auditor and the taxpayer was that Ms. Bainsong told Mr. Burbacki he shouldn't worry, he should have no problems getting an adjustment this way. She thereby discouraged him from retaining counsel to defend himself in an underhanded, sneaking very unprofessional and unethical way. When Mr. Burbacki showed up at he [sic] Conciliation Conference with his clippings unaided by counsel or other professional representative, no one even listened to him" (Brief attached to exception, p. 2).

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

The Administrative Law Judge fully and correctly dealt with all the issues in this case and we affirm his determination for the reasons stated therein.

We add only the following comments. First, petitioners' assertion that the request for records was "weak and casual" and, therefore, not a proper request is belied by the record. In particular, we note the penultimate act of the Division, i.e., the letter dated April 29, 1992 sent by certified mail to Mr. Burbacki at his correct address, 2770 West 5th Street, Apt. 12A, Brooklyn, New York 11224-4223, that Mr. Burbacki present the books and records of the corporation to the Division "at 9:00 AM, on May 6, 1991" (Division's Exhibit "V"). Second, Mr. Burbacki's testimony that he kept about one year's worth of register tapes and guest checks during the audit period (Tr., pp. 122-123) clearly indicates that petitioners did not keep complete and adequate books and records for the period at issue. Finally, the crux of petitioners' argument, that the use of the 1986 observation test to estimate taxable sales was unreasonable, is that a more accurate estimate could have been obtained if the auditor had used what records petitioners had available for the audit. Such assertion does not meet petitioners' burden of proving by clear and convincing evidence that the result of the method used was unreasonably inaccurate (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679). At best, it is that a better picture of petitioners' liability may have been obtained had a different

method been used. It is well established that where the taxpayer's failure to maintain proper records prevents exactness in determination of sales tax liability, exactness is not required (Matter of Club Marakesh v. Tax Commn., 151 AD2d 908, 542 NYS2d 881, lv denied 74 NY2d 616, 550 NYS2d 276).

Finally, we find no merit to petitioners' assertion that their appeal rights were hindered by advice from the auditor.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Eugene Burbacki, Officer of RIA Restaurant, Inc. and RIA Restaurant, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Eugene Burbacki, Officer of RIA Restaurant, Inc. and RIA Restaurant, Inc. is denied; and
4. The notices of determination and demand for payment of sales and use taxes due issued on June 10, 1991 and June 14, 1991 are sustained.

DATED: Troy, New York
February 9, 1995

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

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