

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT TRUSNOVEC	:	DECISION
D/B/A YAPHANK COMMUNITY SHOP	:	DTA No. 811135
	:	
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 March 1, 1987	:	
through February 28, 1990.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on May 18, 1995 with respect to the petition of Robert Trusnovec d/b/a Yaphank Community Shop, P.O. Box 674, Wading River, New York 11792. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael B. Infantino, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition and a supplemental brief. The Division of Taxation filed a reply brief. The Division of Taxation withdrew its request for oral argument.

Commissioner Pinto delivered the decision of the Tax Appeals Tribunal. Commissioners DeWitt and Jenkins concur.

ISSUE

Whether the Division of Taxation made an adequate request to examine petitioner's books and records so that petitioner's lack of response to such request justified the Division of Taxation's estimation of petitioner's sales tax liability in lieu of conducting a complete audit of petitioner's books and records.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "3," "4" and "5" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioner, Robert Trusnovec, owns and operates a delicatessen located on Main Street in Yaphank, New York (which is on Long Island) as a sole proprietorship. Mr. Trusnovec, who noted that he started working for his father in the business when he was 13 years old, testified that he has owned the delicatessen since January 12, 1970 (tr., p. 77). The delicatessen is a labor-intensive family business, which was closed for only two days each year, Christmas and New Year's.

Mr. Trusnovec has had a long and troubled relationship with State sales tax auditors in the course of three audits, including the audit at issue, which is the third audit conducted by the Division of Taxation ("Division") of his delicatessen's taxable sales. It is observed that a fourth audit, for the period June 1, 1990 through May 31, 1993, was commenced during the summer of 1993 and apparently is still underway. (Petitioner's Exhibit "15" includes a letter dated June 18, 1993 of the State's auditor conducting this fourth audit.)

The Previous Audit (Audit #2)¹

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

The Tax Appeals Tribunal, in its decision dated March 6, 1993 in the Matter of Trusnovec (DTA #805982) concerning the imposition of additional sales and use taxes on petitioner for the period June 1, 1981 through November 30, 1986, "affirm[ed] the determination of the Administrative Law Judge for the reasons stated in said determination." The Administrative Law Judge, in his determination dated July 19, 1990, upheld the Division's use of an observation test to

¹Petitioner noted that during the first sales tax audit of the delicatessen, his father, who apparently was still involved in the business, was dying and petitioner was in the hospital recovering from injuries suffered after being struck by a car in a hit-and-run accident. According to petitioner, the business was shut down by the Division for an unspecified period of time as a result of the first audit and that he was unable to challenge the findings of the first audit (tr., p. 257).

estimate the taxable sales of petitioner's delicatessen. The auditor, with one assistant, had conducted an observation of petitioner's sales of prepared foods on Thursday, September 25, 1986. Finding of Fact "6" of the determination described the auditor's calculation that additional sales tax of \$103,523.40 was due from petitioner for this earlier period, which consisted of 5½ years (June 1, 1981 through November 30, 1986), as follows:

"[O]n September 26, 1986, [footnote omitted] the auditor (and one assistant) conducted an observation of petitioner's sales of prepared foods between the hours of 6:00 A.M. and

2:00 P.M. The results of this observation test included the following:

"(a) Gross sales for the observation, per cash register summary, totalled \$2,137.54. Taxable prepared food sales, as observed, totalled \$718.81. The difference between these two amounts (\$1,418.73) represented 'other sales' (taxable and nontaxable).

"(b) The auditor calculated weekly gross sales of \$13,884.00 as follows:

observed taxable prepared food sales of \$718.81 x 5.5 days per week.....	\$ 3,953.00
plus	
other sales of \$1,418.73 x 7.0 days per week.....	<u>9,931.00</u>
= Gross Sales.....	<u>\$13,884.00</u>

"(c) The auditor calculated weekly and quarterly taxable sales as follows:

weekly taxable prepared food sales.....	\$ 3,953.00
plus	
other sales of \$1,418.73 per day x 31.18% ² taxable x 7 days per week.....	<u>3,097.00</u>
= weekly taxable sales.....	\$ 7,050.00
number of weeks per quarter x	<u>13</u>
= quarterly taxable sales.....	<u>\$91,650.00</u>

A footnote in the determination noted that "[t]he estimate that 31.18% of other sales represent taxable grocery sales is based on Division of Taxation experience. There is no evidence that petitioner challenges such estimate."

"(d) The auditor compared weekly taxable sales (\$7,050.00) to weekly gross sales (\$13,884.00), determining a taxable ratio of 51%. In turn, by extension, the auditor computed gross sales of \$4,021,003.00 and taxable sales of \$2,057,387.00 for the audit period. This latter figure resulted in sales tax liability of \$150,823.35 which, after credit for tax paid (\$47,299.95) leaves additional tax due of \$103,523.40.

"Among other additional steps, the auditor divided petitioner's reported gross sales per returns for the quarterly period ended November 30, 1986, (\$71,855.00), by the 91 days in such three-month quarterly period, yielding an average daily gross sale amount of \$790.00. The auditor compared such resulting daily gross sale amount to the \$718.81 in taxable sales of prepared foods as determined during the 8-hour observation test, concluding that petitioner's returns were inaccurate and incorrect as filed. Accordingly, the auditor recommended assessment of the \$103,523.40 of tax found due on audit, plus penalty and interest."

In his arguments to the Tax Appeals Tribunal in the prior case, petitioner partially based his appeal of the Administrative Law Judge's determination on the "credibility given to the auditor whose intent was to harass and not to audit."³

Request for Records for a Third Audit

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

The Division presented its evidence in a clear manner, offering the candid testimony of Robert DeFilippis, a sales tax auditor employed in the Division's Suffolk District Office, who was responsible for the third sales tax audit of petitioner's delicatessen. Mr. DeFilippis detailed his attempt to obtain the books and records of petitioner's business in order to conduct his audit. On March 22, 1990, the auditor mailed to petitioner a letter dated March 21, 1990 requesting that petitioner telephone him "in order to arrange a mutually agreeable time" for a field

examination of petitioner's sales tax returns for the period March 1, 1987 to the date of the letter. The auditor requested that the following records be made available:

"All books and records pertaining to your Sales Tax liability for the period under audit should be available. This would include Income Tax returns, journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all Sales Tax records. Additional information may be required during the course of the audit."

The address on this letter dated March 21, 1990 requesting books and records, which appears to have been a mailing label generated by the Division's computer system, was as follows:

"Robert Trusnovec/Yaphank
Communit [sic]
-- Main St
Yaph?nk⁴ [sic] NY 11980"

The auditor received no response from petitioner to his letter dated March 21, 1990, and a couple of weeks later, on April 5, 1990, he mailed another copy of this letter to petitioner. With no response from petitioner to this second mailing of the letter dated March 21, 1990, on April 24, 1990, the auditor sent by certified mail, return receipt requested, another copy of the March 21, 1990 letter, along with a waiver and extension of the period of limitation to assess sales tax for petitioner's review and signature. The auditor's certified mailing of April 24, 1990 was "returned to sender" by the post office with the reason "unclaimed" checked on the post office rubber stamp which lists seven potential reasons for returning certified mail to the sender.⁵

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The letter designated by a "?" was unreadable.

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The other reasons listed were: refused; addressee unknown; insufficient address; no such street; no such number; no such office in state. It is observed that included in the Division's Exhibit "F" is a photocopy of "Certified Mail No. 559765" with an office meter stamp showing the date of April 25, 1990 at Hauppauge, New York (which is the location of the Division's Suffolk District Office). A rubber stamp indicates that the certified mailing was received back by the "Suffolk Office Sales Tax" on May 14, 1990. This photocopy shows that the address portion of the envelope has been obliterated and is unreadable.

On May 16, 1990, two days after he received his certified letter back, the auditor "made copies of everything I sent on April 24th.⁶ And I sent it to the vendor via first-class mail" (tr., p. 36). The auditor still did not get a response from petitioner. In sum, the auditor mailed his letter requesting records to petitioner three times by first-class mail and once by certified mail. It is observed that the letters sent by first-class mail never came back to the auditor, only the letter sent by certified mail was returned by the post office to the auditor.⁷

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As noted in footnote "5," it would appear that the letter sent by certified mail was actually sent on April 25, 1990.

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We modified finding of fact "4" of the Administrative Law Judge's determination in order to more accurately reflect the record. The original finding of fact stated:

The Division presented its evidence in a clear manner, offering the candid testimony of Robert DeFilippis, a sales tax auditor employed in the Division's Suffolk District Office, who was responsible for the third sales tax audit of petitioner's delicatessen. Mr. DeFilippis detailed his attempt to obtain the books and records of petitioner's business in order to conduct his audit. On March 22, 1990 (which it is observed is a date prior to the issuance of the Administrative Law Judge determination dated July 19, 1990 concerning the second sales tax audit), the auditor mailed to petitioner a letter dated March 21, 1990 requesting that petitioner telephone him "in order to arrange a mutually agreeable time" for a field examination of petitioner's sales tax returns for the period March 1, 1987 to the date of the letter. The auditor requested that the following records be made available:

"All books and records pertaining to your Sales Tax liability for the period under audit should be available. This would include Income Tax returns, journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all Sales Tax records. Additional information may be required during the course of the audit."

The address on this letter dated March 21, 1990 requesting books and records, which appears to have been a mailing label generated by the Division's computer system, was as follows:

"Robert Trusnovec/Yaphank
Communit [sic]
-- Main St
Yaph?nk* [sic] NY 11980"

The auditor received no response from petitioner to his letter dated March 21, 1990, and a couple of weeks later, on April 5, 1990, he mailed another copy of this letter to petitioner. With no response from petitioner to this second mailing of the letter dated March 21, 1990, on April 24, 1990, the auditor sent by certified mail another copy of the March 21, 1990 letter, along with a waiver and extension of the period of limitation to assess sales tax for petitioner's review and signature. The auditor's certified mailing of April 24, 1990 was "returned to sender" by the post

Petitioner Denies Receipt of Appointment Letter

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

Petitioner denied receiving any of the auditor's mailings of the letter requesting the scheduling of an appointment for an examination of his books and records for the period at issue. Petitioner stated his denial as follows:

"[TRUSNOVEC]: In the meantime, I have been over in his building many, many times. The communication was made. There was absolutely no reason why his particular audit couldn't have been communicated to me because I didn't receive it. That's my purpose of this, my main purpose of this. They were there. This was worse news than I could ever -- And I produced the satisfaction for this and everything. And I was told I was a liar, that I never paid this, that it was never satisfied.

"We already called the county complex. I brought in a computer sheet of assessments against them. They reported them all as being satisfied. I went in there. If you wanted to check the sign-ins, I was regularly once or twice a week, they were dragging me in because of this thing.

"So, there really is no reason why they couldn't have given me his. You know what I am trying to say.

"ALJ Barrie: His request for records?"

office with the reason "unclaimed" checked on the post office rubber stamp which lists seven potential reasons for returning certified mail to the sender. **

On May 16, 1990, two days after he received his certified letter back, the auditor "made copies of everything I sent on April 24th. *** And I sent it to the vendor via first-class mail" (tr., p. 36). The auditor still did not get a response from petitioner. In sum, the auditor mailed his letter requesting records to petitioner three times by first-class mail and once by certified mail. It is observed that the letters sent by first-class mail never came back to the auditor, only the letter sent by certified mail was returned by the post office to the auditor.

* See footnote "4" of this decision.

** See footnote "5" of this decision.

*** See footnote "6" of this decision.

"THE WITNESS: Right. I was there all the time"
(tr., pp. 190-191).

He suggested that the address used by the auditor, "just plain Main Street, Yaphank, New York," might explain why he did not receive any of the mailings. Petitioner stated at the hearing:

Mr. Trusnovec: "Okay. On page 32 in this here, I noticed a question was by Mr. Infantino, and it asked you on March 21, 1990 and the address on the letter was what. And your answer is this is a preprinted label and the address is just plain Main Street, Yaphank, New York. There did not even show a zip in here. And that's one of the reasons the stickers -- that she had no post office boxes and so on they told me. That could have been part of it."

Auditor: "All labels do have zip codes. The testimony I am looking at --"

Mr. Trusnovec: "What it says in here. I am reading exactly what you said from here."

Auditor: "All right. I didn't know the zip code off hand" (tr., pp. 233-234).

According to petitioner, the post office decided, despite the fact that Yaphank was a small town where "everybody knows everybody," if a letter "didn't have a post office box on it," it would not be delivered (tr., p. 216). However, petitioner submitted a letter he brought to the post office in which he stated that many businesses and private parties do not use their post office boxes on addresses and they did not have their mail returned. Petitioner said he believed the new postmistress "was friends with one of the other owners of one of the other stores in town" (tr., p. 212). Petitioner stated in the letter to the post office mentioned above that the postmistress "singled out [his business] for her own personal prejudices." Petitioner introduced into evidence a letter dated July 21, 1993 from Theresa A. Hansen, Financial Services Officer of the Yaphank, New York office of Key Bank of New York on the bank's letterhead to the Division's representative explaining that the bank had problems sending mail to petitioner during 1990:

"As of 1990, our customer began experiencing problems with mail delivery to his P.O. box . . .

We have since had to hand deliver bank statements to this customer" (emphasis added).

However, a bank statement in evidence, for the period ending December 31, 1989 and bearing a postal metered date of January 4, 1990, was addressed to "Yaphank Community Shop, Main St, Yaphank NY 11980" and shows no evidence of being returned to sender. Also, one of the cancelled checks included in that envelope

was payable to "NY State Sales Tax," dated December 20, 1989, in the sum of \$1,575.76 with the following handwritten address: "Robert Trusnovec DBA Yaphank Community Shop, Main Street Yaphank N.Y. 11980." This is the very address he supplied to the Division. It is the same address petitioner used on his business checks, guest checks and tax-exempt certificates. There is no evidence petitioner informed the Division of a mail problem as he did with the bank or the exact date a mail problem began, despite his many visits to their offices with respect to prior audits.

In addition, petitioner submitted an undated note from one Doris Gordon, purportedly a former Yaphank Postal Service employee, who said she had been instructed in the latter part of 1989 to return mail to sender which had been incorrectly addressed, including mail to box holders without the box number.

On cross-examination, the auditor testified as follows concerning why he did not phone petitioner at his delicatessen or visit the store to deliver the appointment letter:

Mr. Trusnovec: "The reason that you wouldn't go any further as far as notifying me for books and records further than you did, because of other tax agents or auditors saying I was a real bad person, did I have a bad reputation being nasty and something like that with the people in New York State Taxation and Finance? What I am getting: Is that the reason? The people say I was a bad person?"

Auditor: "I think I said in my testimony last time is that there is a couple instances where you and your representative had sales tax personnel removed either from your property or from a courtroom. And the previous audit, you or your representative requested a second observation. When an auditor and his team leader went to make the observation, you asked the Suffolk County police to have them removed from your property."

Mr. Trusnovec: "So, basically that's your reason for not going any further, just to go and make your assessment? If I didn't have that type of a reputation, if people had not said that about me, you would have called me or done something like that to find out why I had not responded to you?"

Auditor: "Most likely would have been the case. It just seemed to me that if you were not responding to my first class mail, that you just did not want to cooperate with this audit."

Mr. Trusnovec: "Would that make much sense, though, the situation I was sitting in?"

Auditor: "Well, the prior audit, what had happened with the prior audit when you prevented the auditors from doing what you, in fact, and, in fact, requested them to do, seemed to me that you were not cooperating with them and you were not responding to my letters. I felt you were not cooperating with the follow up audit."

Mr. Trusnovec: "But yet you still came in the store and didn't say anything to anyone, correct?"

Auditor: "I came into the store to observe."

Mr. Trusnovec: "Which you could have done something then and handed somebody a piece of paper and envelope, correct? And another time you stood outside the window with Mr. Hoffman, I believe it was?"

Auditor: "We were in the store" (tr., pp. 237-239).

Petitioner made a similar remark about the postmistress who allegedly had a "prejudice" against his business. In the same letter mentioned above, petitioner stated that the postmistress had been a customer in his store and did not take that opportunity to notify him of her "new" rule concerning the use of post boxes "while [he] waited on her."

A review of the Administrative Law Judge determination dated July 19, 1990 concerning the prior audit discloses that State auditors arrived, with no advance notice, at the store to conduct a second observation test. Petitioner testified that on that day, he and his then representative were attending a meeting concerning a personal income tax audit with State personnel. Petitioner would not consent to the observation test being conducted when he was away from his store, and it appears that the police were phoned in order to ask the sales tax auditors to leave the delicatessen's parking area. As noted in Finding of Fact "7" of the determination, "In turn, the auditors relocated across the street and counted the number of persons entering petitioner's premises."

The auditor's reference to the removal of sales tax personnel from a courtroom at the request of petitioner and/or his then representative is not explained. Although somewhat speculative, a request to segregate witnesses at the prior formal hearing might explain such "removal" of sales tax personnel.

Finally, it is noted that the auditor testified that "normally" he gets a response to appointment letters and that the matter at hand is the

only one he can recall where he did not get a response (tr., p. 60). In short, this was a unique situation.⁸

Taxable Sales as Reported by Petitioner

Included in the Division's Exhibit "F" is a "Schedule of Returns Filed". This schedule shows that, since 1980, petitioner has reported and paid sales tax on taxable sales of his delicatessen which he was estimating as 40% of his reported gross sales. For the period at issue, petitioner reported gross sales, taxable sales and tax due (which was paid) as follows:

<u>Period Ended</u>	<u>Gross Sales</u>	<u>Taxable Sales⁹</u>	<u>Tax Due</u>
5/31/87	\$ 74,572.00	\$ 29,828.00	\$ 2,237.00
8/31/87	90,955.00	36,382.00	2,729.00
11/30/87	85,604.00	34,241.00	2,568.00
2/29/88	75,429.00	30,171.00	2,262.00
5/31/88	70,594.00	28,237.00	2,117.00
8/31/88	69,547.00	27,819.00	2,086.00
11/30/88	60,717.00	24,287.00	1,821.00
2/28/89	54,506.00	21,802.00	1,635.00
5/31/89	61,521.00	24,608.00	1,845.00
8/31/89	67,118.00	26,847.00	2,013.00
11/30/89	52,523.00	21,009.00	1,575.00
2/28/90	<u>42,203.00</u>	<u>16,881.00</u>	<u>1,266.00</u>
Totals	\$805,289.00	\$322,112.00	\$24,154.00

Auditor Estimates
Additional Sales Tax Due
Based Upon Prior Audit Results

The auditor testified that on Tuesday, June 12, 1990 (which it is observed is a date prior to the issuance of the determination dated July 19, 1990 concerning the second sales tax audit), he went to petitioner's delicatessen and "from the outside, I counted the number of persons entering the deli during the hours of eleven a.m. to one p.m." (tr., p. 38). The auditor compared

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We modified finding of fact "5" of the Administrative Law Judge's determination to more accurately reflect the record.

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Each of the amounts listed under the column heading "taxable sales" equals 40% of the respective amounts under the "gross sales" column heading.

his count made on June 12, 1990 to "a similar count that was made in the prior audit in 1987 [on Friday, November 6, 1987], and I found that there was -- I counted 31 more people entering the deli the day that I did the count" (tr., p. 38). The auditor determined that he could utilize the audit results from the second audit because, from his count in 1990, he concluded that "the business had not declined in this three-year period."

The auditor testified that audited taxable sales for the prior audit period of June 1, 1981 through November 30, 1986 was determined to be \$1,455,080.00.¹⁰ He divided this amount by 22, which represented the number of sales tax quarters in the prior audit period, to determine average taxable sales per quarter of \$66,140.00. He then added an inflation factor of 5% per year to determine taxable sales for each of the 12 quarters at issue herein as follows:

Average taxable sales per period prior to 1987	\$66,140.00
	x 1.05
Average taxable sales per period during 1987	\$69,447.00
	x 1.05
Average taxable sales per period during 1988	\$72,919.00
	x 1.05
Average taxable sales per period during 1989	\$76,565.00
	x 1.05
Average taxable sales per period during 1990	\$80,393.00

Using these amounts as adjusted by an inflation factor, the auditor estimated petitioner's taxable sales for the three-year period at issue as \$886,670.00 computed as follows:

<u>Quarter Ended</u>	<u>Audited Taxable Sales</u>	<u>Audited Sales Tax Due</u>	<u>Sales Tax Paid</u>	<u>Additional Sales Tax Due</u>
May 31, 1987	\$ 69,447.00	\$ 5,208.53	\$ 2,237.00	\$ 2,971.53
August 31, 1987	69,447.00	5,208.52	2,729.00	2,479.52
November 30, 1987	69,447.00	5,208.53	2,568.00	2,640.53
February 29, 1988	72,919.00	5,468.93	2,262.00	3,206.93
May 31, 1988	72,919.00	5,468.92	2,117.00	3,351.92
August 31, 1988	72,919.00	5,468.93	2,086.00	3,382.93
November 30, 1988	72,919.00	5,468.92	1,821.00	3,647.92
February 28, 1989	76,565.00	5,742.38	1,635.00	4,107.38
May 31, 1989	76,565.00	5,742.37	1,845.00	3,897.37
August 31, 1989	76,565.00	5,742.38	2,013.00	3,729.38

¹⁰As noted above, the auditor of this earlier period initially determined taxable sales of \$2,057,387.00. This larger amount was reduced pursuant to a conference in the former Tax Appeals Bureau.

November 30, 1989	76,565.00	5,742.37	1,575.00	4,167.37
February 28, 1990	<u>80,393.00</u>	<u>6,029.47</u>	<u>1,266.00</u>	<u>4,763.47</u>
Total	\$886,670.00	\$66,500.25	\$24,154.00	\$42,346.25

The auditor summarized the results of his analysis on the cover sheet of his field audit report as follows:

	<u>Reported</u>	<u>After Audit</u>
Gross Sales	\$805,289.00	\$1,369,847.00
Taxable Sales	322,112.00	886,670.00

In other words, the auditor determined that petitioner underreported his taxable sales by \$564,558.00 ($\$886,670.00 - \$322,112.00 = \$564,558.00$, which is also the difference between gross sales after audit of \$1,369,847.00 and reported gross sales of \$805,289.00).

Based upon the auditor's analysis detailed above, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 18, 1990 (a date still prior to the first determination dated July 19, 1990) was issued against petitioner asserting tax due of \$42,346.25, plus penalty and interest. The auditor testified that penalty was imposed due to the substantial underreporting of taxable sales despite two prior audits. The total amount asserted due was broken down by quarters in a fashion that corresponds to the quarterly breakdown of "additional sales tax due" shown in the column with such heading above. In addition, omnibus penalty totalling \$4,234.62 was asserted due against petitioner by a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due also dated June 18, 1990 because, in the auditor's words, more than 25% "of the tax that was originally reported" was "found to be due" (tr., p. 44). The notices were mailed to petitioner at the same address used for the request for records by certified mail, return receipt requested, and were returned as unclaimed. They were remailed to the same address and not returned.

Conciliation Conferee Reduces Assessment

A conciliation conference was conducted on May 23, 1991 at which time the conferee directed the auditor to examine petitioner's records and to perform an observation test of the delicatessen's sales.

The auditor testified that the following records were made available for his review:

- (a) A day book for the period March 1987 through December 1989;
- (b) Federal income tax returns for the years 1987, 1988 and 1989;
- (c) Summaries of cash register tapes for 1989; and
- (d) Purchase invoices for cash purchases for 1989.

Business checks and bank statements were not presented to the auditor.

According to the auditor, "by mutual agreement between petitioner's [then] representative Vito LaMonica, an enrolled agent working for a certified public accounting firm and [the auditor's] team leader Gary Glubiak" (tr., p. 50), Wednesday, July 10, 1991 was selected as the day to perform an observation test. The auditor and three colleagues observed the taxable sales of petitioner's delicatessen on this chosen date which amounted to \$869.93. The business has two cash registers, one in the front of the store and one at the rear, and the auditors observed purchases by 285 customers as follows:

	<u>Number of Customers</u>
Front register 6:00 A.M. to 1:30 P.M.	93
Rear register 6:00 A.M. to 1:30 P.M.	50
Front register 1:30 P.M. to closing	128
Rear register 1:30 P.M. to closing	<u>14</u>
Total	285

The Division's Exhibit "G" includes 16 pages of detailed listings of the delicatessen's taxable sales. Two summary pages show the following taxable sales:

<u>Item</u>	<u>Item Price</u>	<u>Front Register 6:00 A.M.- 1:30 P.M.</u>	<u>Rear Register 6:00 A.M.- 1:30 P.M.</u>	<u>Front Register 1:30 P.M.- Closing</u>	<u>Rear Register 1:30 P.M.- Closing</u>	<u>Total of Particular Item Sold</u>	<u>Totals</u>
Coffee	\$.60	101	6	21	--	128	\$ 76.80
	.95	26	--	5	--	31	29.45
Hot chocolate	.60	--	--	1	--	1	.60
Buttered rolls/bagels	.60	41	3	3	--	47	28.20
with cream cheese	.95	13	--	--	--	13	12.35

Iced tea	.95	2	1	5	2	10	9.50
	1.75	7	1	12	--	20	35.00
Very Fine drinks	.90	2	--	--	--	2	1.80
Gatorade	1.00	6	3	8	--	17	17.00
<u>Soda</u>							
12 oz.	.90	1	20	22	1	44	39.60
16 oz.	1.00	19	1	21	6	47	47.00
1 ltr.	1.40	3	1	7	--	11	15.40
2 ltr.	1.45	--	--	1	2	3	4.35
Wine coolers	1.00	2	--	--	--	2	2.00
Evian water	2.00	2	--	--	1	3	6.00
<u>Beer</u>							
12 oz.	1.10	3	--	11	--	14	15.40
16 oz.	1.40	--	--	14	2	16	22.40
6 pack	3.95	--	--	1	--	1	3.95
6 pack	5.50	--	--	8	1	9	49.50
Cigarettes	2.40	36	--	23	--	59	141.60
Cigars	1.89	1	--	--	--	1	1.89
	1.94	--	--	--	1	1	1.94

Toilet paper	1.00	--	--	1	--	1	1.00
Ice	1.50	--	--	4	--	4	6.00
Candy/gum	.60	18	--	3	--	21	12.60
Buttered muffin	1.25	1	--	--	--	1	1.25
Pops	.15	1	--	--	--	1	.15
Cups	.89	1	--	--	--	1	.89
Sun glasses	5.99	1	--	--	--	1	5.99
<u>Prepared Foods:</u>							
<u>Breakfast</u>							
Egg on Roll w/coffee or juice	.99	--	8	--	--	8	7.92
2 eggs on roll w/coffee or juice	1.29	--	24	--	--	24	30.96
Above w/peppers or mushrooms	1.79	--	6	--	--	6	10.74
<u>Extras</u>							
Home fries	.30	--	2	--	--	2	.60
Meats	.50	--	29	--	--	29	14.50
Cheese	.30	--	3	--	--	3	.90
Home fries special	2.89	--	3	--	--	3	8.67
<u>Sandwiches</u>							
Other	?	--	30.95	--	3.00	?	33.95
Cold	2.00	--	3	--	--	3	6.00
Cold	2.25	--	3	--	2	5	11.25
Cold	2.75	--	4	--	3	7	19.25
Cold	3.25	--	5	1	5	11	35.75
<u>Extras</u>							
Dressing/tomatoes/rolls	.30	--	5	--	--	5	1.50
Hot sandwiches	--	--	28.90	7.00	--	--	35.90
<u>Chili</u>							
small	1.50	--	1	--	--	1	1.50
large	2.25	--	--	1	3	4	9.00
largest	2.95	1	2	--	--	3	8.85
<u>Soups</u>							
small	.75	--	1	--	--	1	.75
large	1.50	--	2	--	--	2	3.00
Macaroni & cheese	2.25	--	--	1	--	1	2.25
<u>Specials</u>							
Italian special	3.49	--	1	--	--	1	3.49
Salad bar		14.65	18.94	--	--	--	33.59
						Total	\$869.93

The conferee reviewed the observation test performed by the auditors and directed that the taxable sales observed on Wednesday, July 10, 1994 of \$869.93 should be reduced: (1) by \$33.59 for salad bar sales because, according to auditor DeFilippis, "Mr. Trusnovec told the conferee that he did not have a salad bar during the audit period" (tr., p. 52); and (2) by 10% to

account for two years of inflation at 5% per year so that the number would equate to sales on Wednesdays in July 1989, which the auditors compared to the sales observed on July 10, 1991. Consequently, at the direction of the conferee, taxable sales for the observation test were reduced from \$869.93 to \$752.71.

Auditor DeFilippis reviewed petitioner's records (in particular, cash register tape summaries) to calculate an average for taxable sales reported by petitioner for Wednesdays in July 1989 as follows:

<u>Wednesdays in July 1989</u>	<u>Gross Sales</u>
July 5	\$ 718.33
July 12	809.62
July 19	830.05
July 26	<u>902.23</u>
	\$3,260.23
divided by 4 =	
\$815.06 Average gross sales	
x .40 Reported taxable sales ¹¹	
\$326.02 Reported taxable sales	

The auditor then determined a margin of error of 230.88% by comparing taxable sales per observation of \$752.71 to this average of taxable sales reported of \$326.02 (\$752.71 divided by \$326.02 equals 2.30878, which expressed as a percentage is 230.88%). Applying this margin of error of 230.88% to taxable sales reported for the period at issue (March 1, 1987 through February 28, 1990) of \$322,112.00 resulted in audited taxable sales of \$734,692.00, with additional taxable sales of \$421,580.00 (\$734,692.00 - \$322,112.00 = \$421,580.00).

A schedule included in Exhibit "G" shows the recalculation of additional sales tax due for the audit period of \$31,618.50 as follows:

Taxable Sales	Additional Taxable Sales	Additional
---------------	--------------------------	------------

11

Petitioner estimated his taxable sales as 40% of the sales shown on his cash register tape summaries as noted in footnote "7" (which apparently did not include his Lotto sales).

<u>Period Ended</u>	<u>Reported</u>	<u>@ 1.3088</u> ¹²	<u>Sales Tax Due</u>
5/31/87	\$ 29,828.00	\$ 39,039.00	\$ 2,927.93
8/31/87	36,382.00	47,617.00	3,571.28
11/30/87	34,241.00	44,815.00	3,361.13
2/29/88	30,171.00	39,488.00	2,961.60
5/31/88	28,237.00	36,957.00	2,771.78
8/31/88	27,819.00	36,410.00	2,730.75
11/30/88	24,287.00	31,787.00	2,384.03
2/28/89	21,802.00	28,534.00	2,140.05
5/31/89	24,608.00	32,207.00	2,415.53
8/31/89	26,847.00	35,137.00	2,635.28
11/30/89	21,009.00	27,497.00	2,062.28
2/28/90	<u>16,881.00</u>	<u>22,092.00</u>	<u>1,656.86</u>
Total	\$322,112.00	\$421,580.00	\$31,618.50

As a result of the observation test as adjusted, a Conciliation Order dated January 24, 1992 was issued which recomputed the notices of determination described above by reducing (i) tax asserted as due of \$42,346.25 to \$31,618.50 and (ii) omnibus penalty asserted as due of \$4,234.62 to \$3,161.85.

Petitioner Contests the Observation Test

Petitioner persists in arguing that his books and records were complete and that the Division improperly utilized an observation test to estimate his sales, even in the face of the fact that petitioner himself estimated his taxable sales as 40% of the sales shown on his cash register tape summaries. Consequently, it is necessary to closely review the books and records maintained by petitioner for his delicatessen.

Most important, it is observed that petitioner does not have any records that document the delicatessen's individual sales that were subject to sales tax. The cash register tape summaries produced by the delicatessen's registers show only total sales for a (usually) 24-hour period, which, according to Mr. Trusnovec's testimony, ran from approximately 2:00 P.M. to 2:00 P.M.

¹²

The auditor explained that he utilized "an accounting shortcut just to determine additional taxable sales in lieu of total audited taxable sales" (tr., p. 54). A multiplier of 2.3088 would have been used to determine total audited taxable sales.

of the following day (so that, for example, the register tape for November 3rd would actually cover the period from 2:00 P.M., November 2nd to 2:00 P.M. on November 3rd (tr., p. 210).

At the hearing, a close examination was made of petitioner's records as they pertain to one randomly selected day, November 1, 1989. The so-called daily envelope¹³ for November 1, 1989 (petitioner's Exhibit "9-1") contained the following invoices for purchases made by petitioner in cash for his delicatessen:

<u>Vendor</u>	<u>Items Purchased</u>	<u>Amount of Purchase Invoice</u>
Tuscan	Milk and Dairy Products	\$ 170.69
Conservative Gas	Propane gas	91.92
Frito-Lay	Snack foods	<u>137.40</u>
	Total	\$400.01

Mr. Trusnovec testified that he paid in cash, not by check, because these vendors "came right to the door" (tr., p. 119). Attached to the outside of this representative daily envelope were the following: (1) a "New York's Lottery" slip summarizing petitioner's Lotto sales in the amount of \$585.50 for November 1, 1989; (2) a slip which summarized by category the delicatessen's cash purchases for the day as well as total sales for the day of \$489.88 and sales tax of \$14.70; and (3) a cash register tape which was unreadable so that another envelope was randomly selected by the Administrative Law Judge (for Saturday, April 1, 1989) to permit petitioner to describe the nature of the cash register tapes included with his daily envelopes. The cash register tape attached to the daily envelope for Saturday, April 1, 1989 (petitioner's Exhibit "9-2"), according to Mr. Trusnovec, shows "the cash that was taken into the register" of \$573.10 and "the amount of the tax that the register computed" was \$16.11 (tr., p. 126-127). This tape also shows according to petitioner a "gross total", from the very first day that the register went into use until April 1, 1989, of \$797,551.78. Mr. Trusnovec testified that he has used the same two registers in his delicatessen since 1977. The registers each have a separate key for taxable

¹³The daily envelopes constituted the bulk of the documents introduced into the record by petitioner.

sales and nontaxable sales. They do not produce a register tape that identifies the item being purchased.

Petitioner testified that about one month after the preparation of a daily envelope, he would transfer the daily envelope amounts to his so-called yearly "journal". For the representative example detailed above, it was observed that the journal for 1989 (petitioner's Exhibit "2") had corresponding entries.

At the hearing on July 22, 1993, petitioner explained that he estimated that 40% of his sales were subject to sales tax during the period at issue by an analysis of his purchases. At the continuation of the hearing on November 3, 1994, petitioner testified that he performed his own "observation tests" with his wife for Wednesday, July 24, 1991 and for Saturday, July 28, 1991 with results significantly different from the Division's observation test. However, this testimony was not persuasive.

It is observed that at the earlier hearing petitioner made no mention that he had performed his own observation tests two years earlier, and moreover, he failed to document his "observation tests" with the type of detailed schedules developed by the Division for its observation test, as noted above.

Petitioner sought to undercut the results of the Division's "observation test" by the following additional evidence:

(1) photographs of a farmstand near his delicatessen which was in operation on the day of the observation test, but not during the period at issue which, according to petitioner, meant an increase to his delicatessen's sales of \$150.00 to \$200.00 per day because the farmstand apparently brought more customers to his business;

(2) testimony that he ran a promotion related to Lotto during the period when the observation test was conducted but not during the sales quarters at issue;

(3) photographs of competitors' stores¹⁴ and of petitioner's personal automobiles to show he did not make "these kinds of money" (tr., p. 201) claimed by the Division; and

(4) sworn statements by his prior representative, Vito W. LaMonica, Jr., an enrolled agent, who stated that the auditor determined that petitioner "had adequate books and records".

OPINION

In his determination, the Administrative Law Judge concluded that although petitioner did not respond to the requests which the Division made to him to present his records for examination, the Division was nonetheless precluded from estimating petitioner's tax liability because those requests were not adequate to advise petitioner that the Division sought to examine his books and records in order that his sales tax liability for the period might be audited.

On exception, the Division argues that it made proper and appropriate requests (three requests by ordinary mail, one by certified mail) for petitioner's books and records but petitioner failed to respond to any of the auditor's requests. The auditor testified that, in his experience, he could not remember a taxpayer not responding to a request for books and records. The address used by the auditor was obtained from the Division's master file; this same address was used by petitioner on his sales invoices, checks and bank statements; and this same address was used successfully by the Division to send the notices of determination in issue to petitioner, albeit on two attempts -- the first was left "unclaimed" by petitioner. Petitioner failed to meet his burden of proof to establish that he did not receive any of the requests for records mailed to him. The auditor did all that reasonably could have been expected of him and petitioner, having failed to respond to the requests to examine his books and records, cannot claim, without more, that

¹⁴Petitioner introduced photographs of two competitors not three as claimed. Photographs marked petitioner's Exhibits "18" and "19" were of the same competitor.

those requests were never made. Thus, the auditor was entitled to perform an indirect audit of petitioner's business using the results of the prior sales tax audit of petitioner.

Further, the Division argues that because the Administrative Law Judge found petitioner's records to be inadequate to serve as the basis for a detailed audit, the Division was justified in using estimating techniques to determine petitioner's sales tax liability. The failure of the Division to review petitioner's records prior to the issuance of notices of determination did not prejudice petitioner.

In opposition, petitioner argues that the Administrative Law Judge correctly concluded that the Division did not properly request his books and records. Further, petitioner argues that his books and records were adequate for use as the basis of an audit by the Division but that the Division improperly failed to rely on them in calculating his sales tax liability. However, since neither petitioner nor the Division took exception to that portion of the determination of the Administrative Law Judge which found the books and records of petitioner to be inadequate to serve as the basis for an audit, we will not consider those arguments herein. In addition, petitioner makes numerous factual assertions in his brief which are not supported by the record in this case. Relying on our decision in Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991), we cannot consider those factual assertions herein.

We reverse the determination of the Administrative Law Judge with respect to the issue of whether the Division made an adequate request for petitioner's records.

Tax Law § 1138(a)(1) provides, in part, that if a return required to be filed is incorrect or insufficient, the amount of tax due shall be determined based on such information as may be available including, if necessary, an estimation based on external indices. However, the Division may not utilize external indices unless it first determines that the taxpayer's books and records are inadequate for purposes of verifying sales and purchases subject to sales and use taxes (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). 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) and thoroughly examine (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978) 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, lv denied 71 NY2d 806, 530 NYS2d 109). The request for records must be explicit and not "weak and casual" (Matter of Christ Cella, Inc. v. State Tax Commn., supra). The purpose of such examination is to determine whether the taxpayer's books and records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commn., supra; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989). When the books and records are not sufficient, the Division may resort to external indices to estimate tax.

The sufficiency of petitioner's books and records as the basis for conducting a complete audit is not at issue herein. The Administrative Law Judge found that "petitioner did not maintain cash registers which registered and produced tapes showing the specific nature of individual transactions. As a result, individual sales transactions were not subject to independent review and verification. Consequently, the Division could properly resort to methodologies for estimating petitioner's taxable sales" (Determination, conclusion of law "F"). Neither party took exception to this conclusion. Further, the Administrative Law Judge found the observation test reasonable and "carefully performed" and sustained its results in whole and also sustained the imposition of penalties. No exception was taken to this conclusion. The issue, rather, is whether prior to deciding to estimate petitioner's tax liability and issuing assessments for additional sales tax due, the Division made an adequate request to examine petitioner's books and records.

The threshold requirement, that the Division must first request and thereafter thoroughly examine a taxpayer's books and records before resorting to external indices as the basis for an audit, is not a statutory mandate. There is little guidance for determining what constitutes an adequate request for books and records by the Division other than that the request for records

must be explicit and not weak and casual. There is no formal or informal requirement to send such a request by registered or certified mail.

In the instant case, the auditor testified and the Administrative Law Judge found that the request for books and records was mailed to petitioner three times by ordinary mail and once by certified mail. The auditor testified that he had never experienced a situation where a mailed request did not elicit some response from the taxpayer, at least on the second mailing. Given the bad feelings which had developed between the Division and petitioner on prior audits, it would not be beyond the realm of possibility that petitioner would choose not to respond to such a request given his inability to produce adequate records on the prior audits and his belief that, in the prior audits, the auditor's intent was "to harass" and not to audit.

In any event, several points were raised below that need to be discussed. First, the Administrative Law Judge noted that the address used by the Division on its label was "incomplete." However, the auditor testified that it was the one he transcribed from the "master file" which is based upon information supplied by the taxpayer when he registers as a vendor with the Division. There was ample evidence in the record that the address was used by the taxpayer on his business checks, guest checks and the same address appears on his bank statements, all of which appear in the record. In addition, the address was used successfully to mail petitioner his notices of determination in the instant audit, notwithstanding the fact that it took more than one attempt to deliver the notices herein since they were "unclaimed" by petitioner on the first attempt. It is noteworthy that the Postal Service stamp affixed to the certified, return receipt requested envelope used to mail petitioner the third request for books and records herein listed various possible reasons for its "return to sender," including "insufficient address," which has been raised herein by petitioner as a reason for his alleged nonreceipt of the requests. However, the Postal Service indicated the reason for the return of the mail was because the item was "unclaimed." As stated above, the address, as it appeared on the label, was used successfully on several occasions by the Division, and there was no evidence

of petitioner objecting to its use on prior occasions. In fact, petitioner wrote it in on a check remitted for sales tax in December 1989. The significance of the three first class mailings, which could not be left unclaimed by petitioner, should not be overlooked. Not one of those letters was returned by the Postal Service, which petitioner claimed was the policy of his local post office when an insufficient address was used. Even if petitioner had contended, which he did not, that the postal regulations regarding the holding of mail without a specific address (Domestic Mail Manual, F030.4.6) was the cause of his alleged nonreceipt, he has not established a factual basis for such a contention or, if he knew this was the policy, why he did not go next door and pick up his mail.

Faced with the auditor's testimony with respect to these four mailings, petitioner raised the specter of a conspiracy, stating under oath that he believed the postmistress "was friends with one of the other owners of one of the other stores in town," inferring that she misdirected, withheld or otherwise disposed of his mail to somehow benefit one of his competitors. He also said she was prejudiced against his business. Unfortunately, there was absolutely no evidence to support these allegations. In fact, nothing in the record convinces us that the requests were not received by petitioner and that he chose not to respond. Even the note from Key Bank, which listed its address as "Main Street, Yaphank, NY 11980," was not convincing. Therein, the bank noted problems with mail addressed to Yaphank Community Shop's post office box and, therefore, they began hand delivering his statements to the shop. The bank statements in the file, if they pertain to the same account (none was set forth on the Key Bank letter), were all addressed to the same address used by the Division, without a post office box, although the most recent were for the month of January 1990, when the "return" policy was supposedly in effect. Those envelopes do not indicate that they were returned to the bank.

In addition, petitioner submitted an undated note from one Doris Gordon, purportedly a former Postal Service employee, who said she had been instructed in the latter part of 1989 to return mail to sender which had been improperly addressed, including mail to box holders

without the box number, but she never stated that she followed this directive or if she had personal knowledge of petitioner's circumstances or claims. Further, the evidence shows that mail to petitioner in the "latter part of 1989" was not returned. Attached to the Doris Gordon note was another undated, unsigned note, presumably written by petitioner, addressed to "Mr. Martin," complaining of the delivery of mail to Yaphank Deli. The letter indicates that the postmistress, who was also a patron of the deli, had singled out Mr. Trusnovec "for her own personal prejudices." In that note, petitioner said that the postmistress could have notified him personally of her policy to return mail "while [he] waited on her," just as he now contends the auditor should have delivered personally the request for books and records to him. In passing, it is noted that this same letter stated that many businesses and private parties with whom petitioner checked, none of whom used their post office boxes, had their mail returned.

The Administrative Law Judge agreed with petitioner that the Division should have attempted to deliver personally the request for books and records to petitioner at his place of business or telephone him prior to resorting to external indices and an indirect audit methodology. However, the Administrative Law Judge conceded there was no statutory or regulatory basis for this ruling. The Administrative Law Judge considered what he perceived as animosity between the Division and petitioner and concluded that the Division should have made a proportionately stronger request for books and records. Four detailed requests for records were mailed to petitioner, three by first class mail, which were not returned to the Division, and one by certified mail (return receipt requested), which was left unclaimed and returned, at an address he had provided to the Division. This address had been used by the Division successfully on prior occasions and petitioner used it on checks, exemption certificates, bank statements and guest checks, yet this was discounted by the Administrative Law Judge in favor of petitioner's unfounded claims of a conspiracy against him by the United States Postal Service and one of his competitors, the postmistress' personal prejudice against his business and a perception of animosity between the Division and petitioner. We conclude that

an adequate request for records was made and that when petitioner did not respond, it was prudent and reasonable for the Division to proceed with their audit. Further, we are not persuaded by petitioner's unsubstantiated assertion that the postmistress was actively conspiring with one of his competitors to divert his mail or that he had been the lone target of a new program to return mail that did not exhibit a proper post box number.

The silence of the Tax Law and regulations with regard to the form of requests for books and records accords the Division broad discretion in the mode it chooses to use in any particular circumstance. In this case, the use of first class and certified, return receipt requested mail was more than a weak and casual request for books and records (Matter of Christ Cella, Inc. v. State Tax Commn., supra [where the Division began a markup test prior to requesting the records and only requested records when necessary to complete the test and the Division never insisted on the production of the records]). The fact that the first class mailings were not returned and the certified mailing was returned as "unclaimed" indicates that petitioner was aware of the requests. Further, his attempts to explain his nonreceipt by means of a conspiracy theory is without basis in fact. The four mailed requests satisfied the Christ Cella requirement for more than a weak and casual request for books and records. It was petitioner's burden to show that these requests were insufficient. That petitioner barely claimed nonreceipt at hearing, could produce no credible or cogent documentation or other support for his claim of nonreceipt and ultimately relied on an unsubstantiated claim that the United States Postal Service purposely diverted his mail because the postmistress was prejudiced against his business were fatal to his position on this issue. Although there have been cases where the Division has personally delivered requests for books and records to a taxpayer (see, Matter of Burbacki, Tax Appeals Tribunal, February 9, 1995 [where personal service of a request for books and records overcame assertion that the taxpayers did not receive a subsequent request sent by certified mail] and Matter of DeFilippis Crane Serv., Tax Appeals Tribunal, June 9, 1994 [where appointment letter with attached checklist mailed to taxpayer coupled with personally delivered supplemental

list of records and oral request for records of subsequent tax period was found to be an adequate request]), it has never been required, and we will abide in the discretion exercised by the Division, having given due consideration to all the circumstances of this audit, in determining which method of requesting books and records from petitioner was warranted.

Having decided that there was an adequate request for books and records, we now turn our attention to the estimated audit methodology, records produced by petitioner and the audit results. Since petitioner ignored the requests for his records, the Division was provided with nothing to review prior to issuance of the notices. Thus, in this instance, petitioner's failure to respond to the Division's requests satisfied the requirements of Adamides, King Crab and Chartair.

The Administrative Law Judge, properly following our directive to analyze all the issues raised by the parties (Matter of Bleistein, Tax Appeals Tribunal, August 11, 1994), thoroughly and adequately dealt with the issues of the insufficiency of petitioner's books and records, thus permitting the Division to resort to external indices; whether an observation test was properly performed and reasonably calculated to reflect sales and use taxes due; whether petitioner was able to show that said audit method was in error; and whether petitioner had established reasonable cause and the absence of willful neglect to justify the abatement of penalties. Therefore, we affirm the Administrative Law Judge's determination with respect to those conclusions in the determination below.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is modified to the extent set forth above;
3. The petition of Robert Trusnovec d/b/a Yaphank Community Shop is denied; and

4. The notices of determination, dated June 18, 1990, as modified by the Conciliation Order, dated January 24, 1992, are sustained.

DATED: Troy, New York
April 10, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner