

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions :
of :
HIMED DELI CORPORATION, TAHER HIMED : DECISION
AND ABDO M. HIMED, A PARTNERSHIP, AND : DTA NOS. 814493
TAHER M. HIMED : AND 815244
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period June 1, 1990 through May 31, 1994. :

Petitioners Himed Deli Corporation, Taher Himed and Abdo M. Himed, a Partnership, c/o Gopaljee Jaiswal, Esq., 55 West 39th Street, # 702, New York, New York 10018 and Taher M. Himed, 441 3rd Avenue, New York, New York 10016, filed an exception to the determination of the Administrative Law Judge issued on January 21, 1999.¹ Petitioners appeared by Gopaljee Jaiswal, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

¹The caption of the petition filed October 24, 1995 (DTA No. 814493) references only Taher Himed as the petitioner. The notices which are the subject of this petition were issued to Taher Mohamed Himed (as partner of Abdo M. Himed and Taher M. Himed, a partnership) (Notice No. L-010069292-3), Abdo M. Himed (as partner of Abdo M. Himed and Taher M. Himed, a partnership) (Notice No. L-010069293-2), Taher Mohamed Himed (as responsible person of Himed Deli Corporation) (Notice No. L-010069294-1) and Himed Deli Corporation d/b/a Himed Food Store (Notice No. L-010061123-3). The caption of the petition filed July 17, 1996 (DTA No. 815244) references Taher M. Himed and Abdo M. Himed; however, the assessments (Notice No. L-010069292-3 and L-010069294-1) referenced on that petition were issued to Taher M. Himed only. Therefore, the petition filed July 17, 1996 does not pertain to Abdo M. Himed.

On December 26, 1996, the Division of Tax Appeals, in a related proceeding, determined that it had no jurisdiction over Notice No. L-010069293 as a petition protesting same was not timely filed (*see, Matter of Himed Deli Corporation, Taher M. Himed and Abdo M. Himed, as officers*, Division of Tax Appeals, December 26, 1996, [DTA No. 814493]). Pursuant to that earlier determination, it was found that the Division of Tax Appeals had jurisdiction over Notices Nos. L-010061123-3 and L-010061124-2; the Division of Taxation conceded jurisdiction over Notice No. L-010069292-3. Notice No. L-010069294-1 also remains in dispute here.

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Petitioners' request for oral argument was withdrawn.

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

ISSUES

I. Whether the Division of Taxation issued the statutory notices in issue to the correct entities and individuals.

II. Whether the Division of Taxation properly utilized an external index to determine additional sales and use taxes due from Himed Deli Corporation and the partnership of Abdo M. Himed and Taher M. Himed.

III. Whether petitioners have shown reasonable cause for the abatement of penalties imposed under Tax Law § 1145(a)(1)(i) and (vi).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "5," "7," "10" and 30 which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

As a result of sales tax field audits of the books and records of retail grocery and delicatessen stores located at 441 Third Avenue New York, New York ("Third Ave. store"), and 545 Second Avenue, New York, New York ("Second Ave. store"), the Division of Taxation ("Division") issued the following notices of determination.

On February 9, 1995, the Division issued to petitioner Himed Deli Corp. a Notice of Determination (Notice Number L-010061123-3) for sales and use taxes in the amount of

\$110,494.25, plus penalties of \$41,563.18 and interest of \$39,126.53, for a total amount due of \$191,183.96, for the period June 1, 1990 through May 31, 1994.² On the same date, the Division issued to petitioner “Abdo M. Himed & Taher M. Himed” a Notice of Determination (Notice Number L-010061124-2) for sales and use taxes in the amount of \$114,270.28, plus penalties of \$43,362.57 and interest of \$40,702.28, for a total amount due of \$198,335.13, for the period June 1, 1990 through May 31, 1994.³ Included in the explanation and instruction section of each of these notices was a statement that “the tax assessed has been estimated in accordance with provisions of section 1138 of the tax law.”

On February 21, 1995, the Division issued to petitioner Taher M. Himed, as a person required to collect tax on behalf of “Abdo M. Himed & Taher M. Himed,” a Notice of Determination (Notice Number L-010069292-3) for sales and use taxes in the amount of \$114,270.28, plus penalties of \$43,747.17 and interest of \$41,314.76, for a total amount due of \$199,332.21, for the period June 1, 1990 through May 31, 1994. On the same date, the Division issued to petitioner Taher M. Himed, as an officer or responsible person of Himed Deli Corp., a second Notice of Determination (Notice Number L-010069294-1) for sales and use taxes in the amount of \$110,494.25, plus penalties of \$41,934.62 and interest of \$39,717.90, for a total amount due of \$192,146.77, for the period June 1, 1990 through May 31, 1994.

We modify finding of fact “2” of the Administrative Law Judge’s determination to read as follows:

²This notice relates to the Third Ave. store. The notice was addressed to “Himed Deli Corp., Himed Food Store, 545 2 Ave, New York, NY 10016-6329.”

³This notice relates to the Second Ave. store. The notice was addressed to “Abdo M. Himed & Taher M. Himed, Himed Deli, 545 2 Ave, New York, NY 10016-6329.”

Sometime in 1978 or 1979, Mohamed K. Himed opened Himed Food Store at 441 Third Ave., New York, New York. His sons, Taher Mohamed Himed (“Taher”) and Abdo Mohamed Himed (“Abdo”) assisted him in running the store. Mr. Himed’s health deteriorated and on November 1, 1988, Himed Deli Corp. acquired the store from him. The terms and nature of that transaction were not made part of the record. Subsequently, Mr. Himed returned to Yemen, his country of birth.⁴

Sometime in 1988, the Second Ave. location was rented and the store opened. Taher testified that the leases for both premises were in his name and that of his brother Abdo. Taher could not recall the exact amount paid as monthly rent for each store; however, he estimated that, during the period 1990 through 1994, the monthly rent was about \$4,700 or \$4,800 for each store. The record does not include copies of the leases for either store.

On January 19, 1989, a Certificate of Registration was filed with the Division. According to this certificate, Himed Deli Corp., using the trade name Himed Food Store, was to have a principal place of business at 441 Third Ave. It was going to operate more than one place of business and would be filing a consolidated return covering all places of business.⁵ The corporate officers were listed as: Taher - president and Abdo - vice president. The corporation’s bank account was to be maintained at Chemical Bank’s 395 Third Ave. branch. Abdo, whose title was listed as “President” signed the certificate of registration.

Licenses in the name of Himed Deli Corporation were obtained in order to sell beer and cigarettes at the Third Ave. store.

⁴We modified finding of fact “2” to more clearly reflect the record.

⁵A Schedule of Business Locations, Form DTF 172, containing the list of the places of business is not part of the record.

We modify finding of fact “5” of the Administrative Law Judge’s determination to read as follows:

During the period in issue, sales and use tax returns filed with the Division regarding the sales at the Third Ave. store were filed under the name of Himed Deli Corp./Himed Food Store.

The sales tax returns filed for the Second Ave. Store were filed under the name of Abdo M. Himed & Taher M./Himed Deli. The sales tax return filed for the Second Ave. Store for the period September 1, 1991 through November 30, 1991 was prepared by A.M. Gaisi. Typed at the top of this form under “Legal name” is “ABDO M. HIMED & TAHER M.,” and under DBA is “HIMED DELI.” Taher signed this (and other) returns and his title on several returns was listed as “OWNER/PARTNER.” All returns were signed by either Taher or Abdo. The sales tax returns filed on behalf of both stores were timely filed.⁶

The Division commenced its sales tax field audit of both stores with the issuance of two appointment letters on August 4, 1993.⁷ The first letter is addressed to Himed Deli Corp., 441 3rd Avenue and the second letter is addressed to “Abdo M. Himed & Taher M. Himed Deli,” 545 2nd Avenue. Both letters list the same audit period, June 1, 1990 through May 31, 1993, and request that all books and records pertaining to the tax liability for the audit period be made available.

We modify finding of fact “7” of the Administrative Law Judge’s determination to read as follows:

On September 20, 1993, on behalf of Himed Deli Corp., a vendor located at 441 3rd Ave., Abdo executed a consent extending the time for determination of sales and use taxes for the period June 1, 1990 through May 31, 1993 until September 20, 1994. Abdo signed this consent as “Partner.”

⁶We modified finding of fact “5” to more clearly reflect the record.

⁷The appointment date and time are blank on both letters.

On the same date, on behalf of Abdo M. Himed & Taher M. Himed Deli, a vendor located at 545 2nd Ave., Abdo executed a consent extending the time for determination of sales and use taxes for the period June 1, 1990 through May 31, 1993 until September 20, 1994. The vendor name listed above the owner, partner or corporate officer signature line is “Abdo M. Himed & Taher M. Himed.” No title is listed under Abdo’s signature.⁸

On October 27, 1993, both audits were assigned to Helaine Kotlar. On October 29, 1993, Ms. Kotlar sent two letters, the first addressed to Himed Deli Corp., 3rd Avenue, and the second addressed to “Abdo M. Himed and Taher M. Himed,” 2nd Avenue, confirming field audit appointments of New York State sales and use tax returns for the period June 1, 1990 through August 31, 1993, scheduled for November 18, 1993 at 9:45 A.M. at Abdo Gaisi’s office located at 139 Court Street, Brooklyn, New York. Each letter refers to Mr. Gaisi as that particular entity’s accountant. Although the Division made numerous requests throughout the audits for executed powers of attorney in favor of Mr. Gaisi, they were never submitted. Each letter contained the request that all books and records pertaining to the sales and use tax liability for the audit period be available on the appointment date. The documents requested included “journals, ledgers, bank statements, daybook, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates.” Enclosed with each letter was a power of attorney form, as well as Publication 130-F entitled “The N.Y. State Tax Audit - Your Rights and Responsibilities.” In the letter addressed to “Abdo M. Himed and Taher M. Himed,” the auditor stated that the enclosed power of attorney form “must be signed by a partner of the partnership and your accountant.”

⁸We modified finding of fact “7” to more clearly set forth the record.

On November 18, 1993, the auditor met with Taher and Mr. Gaisi. During that meeting, Taher supplied a few bank statements for two accounts, one located at Citibank and the other located at Chemical Bank,⁹ a few purchase invoices for July and August 1993 and a folder containing some legal documents including a certificate of authority.¹⁰ No accounting records, Federal income tax returns, sales invoices, cash register tapes or day books relating to either of the stores were presented to the auditor. At that meeting, Taher claimed the records for both stores were kept in books written in Arabic; however, he failed to produce either store's books. There is a conflict between the auditor's recollection of Taher's statements to her concerning the exact whereabouts of the two books and Taher's recollection of that conversation. According to the auditor, Taher claimed that the books were with his brother who was on vacation in Yemen. However, Taher testified that he had stated that his brother had put the books away in each store, but that he (Taher) did not know exactly where and had to contact his brother in Yemen to find them. At that meeting, Mr. Gaisi explained that withholding tax returns were not filed for either store. Taher never informed the auditor that the corporation at the Third Ave. address had been dissolved. However, Ms. Kotlar did recall seeing, among the documents in Mr. Gaisi's folder, a "request from the IRS for taxes," and on that request was the notation that the corporation was dissolved. (Tr., pp. 194-195.)

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

⁹According to the auditor's notes, the Citibank bank account number 12033597, in the name of Himed Deli Corp., was for the Second Ave. store and Chemical Bank account number 134223543, in the name of Taher Mohamed Himed, was for the Third Ave. store.

¹⁰The record is silent as to which store the certificate of authority pertained.

The auditor found with respect to both business locations that: cash register tapes were not saved. Guest checks were not issued. Federal income tax returns had not been filed. No general ledger, sales journal, cash receipts journal or day book were maintained. Most bank statements and canceled checks were missing. There were sales that were not rung up on the cash registers. No purchase journals or cash disbursement journal was made available. Both business locations purchased the majority of the stores' merchandise for cash, and there was a lack of control over these transactions. The auditor determined that the books and records for both stores were inadequate and that she would be unable to use them to conduct detailed audits. As a result of discussions with her team leader, Mayer Wiesen, and her group chief, Paul Golas, the auditor determined that an observation of each business premises was necessary in order to estimate taxable sales.¹¹

Prior to an observation test of a business premises, a survey is conducted. The survey, usually only 15 minutes or so, consists of an auditor walking through and observing the conduct of the business. The survey is used to get a general idea of the size and layout of a business premises, the number of employees and the type of items sold. The afternoon of May 3, 1994, Mayer Wiesen surveyed both stores. The record includes written summaries of Mr. Wiesen's observations concerning his survey of the stores. With regard to the Second Ave. store, Mr. Wiesen wrote:

Sign in front of store, "Cold Beer • Soda • Cold Sandwiches." Another sign states, "Special Coffee or Tea with Buttered Bagel or Roll .75." Budweiser. Newspapers in front stand.

One aisle in most of store. 2 at back. Meat & cheese counter. Back is [sic] refrigerators selling soda and beer. No dairy. No produce. Canned foods line shelf on long aisle. Some cleaning items and dog food.

Candy. Cigarettes. Coffee to go. Cups near front. Sandwich prices posted.

¹¹We modified finding of fact "10" to more clearly set forth the records that were not made available.

2 employees. Hours not posted. Busy shopping street. Residential neighborhood. 4 customers in store when auditor arrived. 85% Taxable.

Do mark-up test on beer, soda, cigarettes. Do obs test for prepared foods.

With respect to the Third Ave. store, Mr. Wiesen wrote:

Sign in front of store states, "Cold Beer • Soda • Sandwiches • Cigarettes • Newspapers." Coca-Cola & Camels advertisements in front.

Symmetrical of 2nd Av. Store. More conservative appearance. Less customers. Only 2 in store when auditor appeared in mid-afternoon. Newspapers in the store.

One aisle in most of store. 2 at back. Meat & cheese counter. Back is [sic] refrigerators selling soda and beer. Small ice creams in front freezer. Otherwise no dairy. No produce. Canned food line [sic] shelf on long aisle. Some cleaning items and dog food. Premises a little smaller than 2nd Av location.

Candy, Cigarettes prominently displayed. Coffee to go. Did not notice sandwich menu, but they are sold.

2 employees. Hours not posted. Busy shopping street. Residential neighborhood. 80% taxable.

Do mark-up test on beer, soda, cigarettes. Do obs test for prepared foods.

By letters dated May 16, 1994, the auditor advised Himed Deli Corp. and "Abdo M. Himed & Taher M. Himed" that their sales and purchase records were deemed to be inadequate, why they were deemed to be inadequate and that an observation of their respective business premises would be conducted during the period May 23, 1994 through June 3, 1994.

On May 23, 1994, during a telephone conversation with the auditor, Taher agreed to the use of observation tests of both locations sometime between May 24, 1994 and June 3, 1994.

Both stores are located in predominantly residential neighborhoods, a few blocks from each other. The neighborhood includes a number of hospitals, as well as a NYNEX office

located between the two stores. The dimensions of the two stores are: Third Ave. - 52 feet by 8½ feet and Second Ave. - 58 feet by 10½ feet. Each store has only one cash register located on the counter near the entrance.

On May 26, 1994, a warm and sunny Thursday, observations of both stores were conducted. The observation tests commenced at 6:30 A.M. and concluded at approximately 9:30 P.M. The observation tests were conducted by a team of sales tax auditors.¹² At both locations, the observing auditor stood near the cash register in order to watch and record, as well as avoid interfering with sales transactions. At both stores, the auditors observed taxable sales only and did not note the gross sales. On each store's tally sheets, taxable sales of the following items, among other things, were recorded: cigarettes, sandwiches, bagels, coffee, tea, soda, beer, candy and juice. According to the observation tally sheets, few sales were made at either store after it began to rain about 7 P.M. Review of the tally sheets also reveals there were many beer sales at both locations.

The original observation tally sheets for both stores are part of the record. On both sets of observation tally sheets, the following titles appear at the top of each page: Time, Dollar Amt Taxable Sale, Description, Coffee, Cigarettes, Sandwiches, Soda and Beer. Notations appear under the appropriate columns on the lines on each page. Some of the auditors placed short lines in the specific columns relating to the items sold, while others wrote out the type of item or items

¹²The team members were: Helaine Kotlar, Arlene Irvin, Nicola Woods, Christopher Bugaj, Chae Kuo, Robert Steinhaus and Mario Sabillon. Ms. Kotlar, as auditor assigned to the two cases, observed at both locations. The group chief, Paul Golas, was briefly at each location early in the morning.

sold in the description column.¹³ The majority of the auditors recorded their observations in pencil. Some of the very lightly written lines on numerous pages of both sets of observation tally sheets have been overwritten in pencil.¹⁴ Over-rings were noted at both stores. At the Second Ave. store, auditors also noted transactions which were not rung up. Attached to the last page of the Second Ave. observation packet are cash register tapes for that store, as well as one cash register tape for the Third Ave. store.¹⁵ Only one cash register tape, containing only the date 05-26-94 at the top, is attached to the last page of the Third Ave. observation packet. It was taken at 9:30 P.M. by Mario Sabillon. At the end of the tally sheets, there were notations concerning the fact that employees at both stores failed to clear the register between sales and how that failure affected the total gross sales figures on the cash register tapes at the end of the day.

Within a day or two of the observation tests, Ms. Kotlar reviewed each set of tally sheets. She eliminated any nontaxable items which had been listed in error and in instances where she could not read a particular team member's handwriting, after consultation with that person, overwrote the items in order to darken them. The auditor then totaled each set of observation tally sheets. The auditor did not rely on the cash register tapes attached to the tally sheets because of inaccuracies. With respect to the Second Ave. store, the taxable sales for the one-day

¹³The Second Ave. observers kept the tally by set categories of items being sold. However, the Third Ave. observers did not do that until the third shift.

¹⁴The overwriting is different from the faint writing which can be seen underneath and was done by Helaine Kotlar. (*See*, below)

¹⁵The name of the store, "HIMED DELI," along with the 2nd Ave. address and telephone number are faintly printed at the top of each tape along with the incorrect date of "05-26-95." The tape for the Third Ave. store contains only the date "05-26-94" at the top.

observation totaled \$1,087.32. The taxable sales for the one-day observation of the Third Ave. store amounted to \$1,052.63.

During the observation tests, none of the auditors observed, at either store, any sign which stated that sales tax was included in the price of an item. Ms. Kotlar observed that, most of the time, sales tax was not charged. However, she did see some cash register receipts from the stores which indicated that sales tax was a separate charge. At the hearing, Ms. Kotlar stated that it was her belief that the vendors were unaware of what items were supposed to be taxable. She observed that neither store's employees gave cash register receipts to customers. At both stores, the auditors observed that inventory purchases were made in cash.

Petitioners were not given copies of either store's tally sheets at the conclusion of the observation day. However, the auditor included copies of both sets of tally sheets in the audit work papers which accompanied the statements of proposed audit adjustment (*see*, below).

On July 28, 1994, on behalf of Himed Deli Corp., a vendor located at 441 3rd Ave., Taher, as officer, executed a consent extending the time for determination of sales and use taxes for the period June 1, 1990 through November 30, 1991 until March 20, 1995. On the same date, on behalf of Himed Deli Corp. A/K/A Abdo M. Himed & Taher M. Himed, a vendor located at 545 2nd Ave., Taher, as "partner/officer," executed a consent extending the time for determination of sales and use taxes for the period June 1, 1990 through November 30, 1991 until March 20, 1995.

The auditor issued two statements of proposed audit adjustment dated October 12, 1994, the first in the name of Himed Deli Corp. A/K/A Abdo M. Himed & Taher M. Himed for the Second Ave. store and the second in the name of Himed Deli Corp. for the Third Ave. store. The

Second Ave. store's statement proposed additional tax due in the amount of \$114,270.28, plus penalties in the amount of \$41,748.71 and interest of \$35,937.63, for a total amount due of \$191,956.62. The Third Ave. store's statement proposed additional tax due in the amount of \$110,494.25, plus penalties in the amount of \$40,375.90 and interest of \$34,764.97, for a total amount due of \$185,635.12. The proposed penalties on both statements were computed pursuant to Tax Law § 1145(a)(1)(i) and (vi).

Accompanying each statement were the copies of the audit work papers used to compute that statement's tax liability, as well as a cover letter. In that letter, the auditor advised that a closing conference could be scheduled and to contact her in order to schedule one. The letter also advised that all available records, including, among other things, ledgers, journals, daybook, cash register tapes, sales invoices, purchase invoices and Federal income tax returns for the extended period June 1, 1990 through May 31, 1994, should be brought to the closing conference.

The auditor calculated the Second Ave. store's additional tax liability in the following manner. The auditor multiplied the one-day taxable sales total of \$1,087.32 by 91 (7 days X 13 weeks) to determine quarterly taxable sales in the amount of \$98,946.12. The auditor projected the quarterly taxable sales figure over the four-year audit period, applying a rate of 5% to reduce taxable sales for each prior year,¹⁶ and computed total adjusted taxable sales in the amount of \$1,424,824.12. To calculate the tax due on the additional taxable sales, the auditor subtracted the

¹⁶The 5% factor was to account for inflation, price increases, popularity variances and weather variances. It was not based on a published price index; rather, it was used by the auditor because her supervisor thought it was fair and instructed her to use it. The auditor used 100% of quarterly taxable sales for the two audit quarters in 1994, 95% for the four quarters in 1993, 90% for the four quarters in 1992, 85% for the four quarters in 1991 and 80% for the two quarters in 1990.

total taxable sales reported for the audit period from the total adjusted taxable sales (\$1,424,824.12 - \$39,730.00), multiplied the additional taxable sales by 8.25% (statutory rate) and computed the total tax due on the additional taxable sales to be \$114,270.28. The auditor computed the Third Ave. store's additional tax liability in a similar manner. Multiplying the one-day taxable sales of \$1,052.63 by 91, the auditor determined quarterly taxable sales to be \$95,789.33. The auditor projected the quarterly taxable sales figure over the four-year audit period, applying a rate of 5% to reduce taxable sales for each prior year, and computed total adjusted taxable sales in the amount of \$1,379,364.00. The auditor computed a total tax due on additional sales in the amount of \$110,494.25 by subtracting total reported sales of \$40,040.00 from total adjusted sales of \$1,379,364.00 and multiplying the remainder, total additional sales, of \$1,339,324.00 by 8.25%. In calculating the sales tax liabilities, the auditor did not consider the size of the stores relevant.

Taher disagreed with the audit findings for both stores. On November 2, 1994, Taher, accompanied by Mr. Gaisi,¹⁷ met with the auditor. At that meeting, he did not challenge the accuracy of the sales determined on the one-day observation tally sheets for either store. Rather, Taher claimed that sales at both stores were higher than usual on the day of the observations. He again stated that he kept his records in books written in Arabic. Taher failed to bring any records to this meeting. Taher made a December 1, 1994 appointment to present additional records or any evidence to refute the audit findings.

¹⁷Mr. Gaisi again refused to sign a power of attorney form.

Taher failed to keep his appointment with the auditor on December 1, 1994. He did not telephone to cancel or reschedule this appointment. No records were made available to the auditor.

The auditor never saw any type of agreement, either for a partnership or for any type of legal entity, concerning the Second Ave. store. She determined that a partnership was running the Second Ave. store based on what was in the Division's sales tax records.

The audit work papers include Ms. Kotlar's Tax Field Audit Record ("audit log"), the log of her contacts and comments concerning the audit, for the Second Ave. store. Review of that audit log reveals that the auditor consulted with her group chief twice, once in July 1994 and a second time in January 1995, about the correct name to place on the consent and the statutory notice.

As noted above, the Division issued notices of determination with respect to the audits conducted of the two stores. Subsequent to the issuance of the notices of determination in issue, Taher requested that the Division conduct additional observation tests of both stores. The Division did not honor his request.

In support of their position, petitioners presented Taher as a witness. At the hearing, he supplied the following background information. In 1972, he and his brother Abdo came to the United States, joining their father in California. While in California, both Taher and Abdo briefly attended school. Taher's formal education ended about the 7th or 8th grade. Prior to coming to the United States, both brothers attended school in Yemen where they learned to read and write in Arabic. At some point, Taher, Abdo and their father moved to New York State where, in or about 1978 or 1979, Mr. Himed opened the Third Ave. store. Both Taher and his

brother assisted their father in running the Third Ave. store until November 1, 1988 when Himed Deli Corporation purchased the store.

The Himed Deli Corporation was incorporated on July 21, 1988, by Taher's attorney, a member of the law firm of Santangelo and Cohen. Although his attorney obtained licenses and registrations in the corporation's name, Taher testified that the Third Ave. store's business was not conducted in corporate form. According to Taher, no corporate meetings were ever held, no corporate officers were appointed, no income tax returns were filed on behalf of the corporation and the corporation made no sales. Taher testified that he asked his attorney to "cancel" the corporation; however, he did not know whether or not his attorney had actually dissolved the corporation until he (Taher) consulted Mr. Gaisi in 1990. At the hearing, Mr. Gaisi testified that he, on Taher's behalf, instructed the attorney to dissolve the corporation. However, he was not sure what steps the attorney took to cancel the corporation.

On May 12, 1990, Taher, in response to a Notice of Failure to File Corporation Tax Form (CT-3/4) for June 30, 1989, advised the Division that the corporation had been dissolved. According to the New York State Department of State, Himed Deli Corp. was dissolved by proclamation of the Secretary of State on March 24, 1993 pursuant to Tax Law § 203-a, and, as of June 11, 1997, that dissolution has not been annulled.

We modify finding of fact "30" of the Administrative Law Judge's determination to read as follows:

In response to whether or not he had a formal partnership agreement with his brother, Taher responded in the negative. He explained that their agreement was just as a family, with each brother co-owning both stores.

Taher explained that his primary responsibility was the Third Ave. store, while Abdo's was the Second Ave. store. However, because they took turns visiting their respective families in Yemen, the brother who remained in the United States split his time between the two stores. During the audit period, Abdo spent much of his time in Yemen because of ill-health, and in his absence left the running of the two stores to Taher. Taher stated that they were assisted in the operation of the two stores by Abdo's son and two of Taher's sons. He did not pay a salary to any of these individuals.

With respect to the general operation of the stores, Taher stated that the stores were open from approximately 7:00 A.M. until 8:00 P.M., that they closed earlier on weekends and that they were open half-days on holidays. Taher claimed that during the early part of the audit period, the Second Ave. store's sales were lower because it only opened in 1989. He also stated that Thursdays and Fridays were usually the busiest days of the week because of a nearby NYNEX office's Thursday payday, but that weekend business at the stores was slow. Taher claimed that sales on holidays amounted to about 50% less than on an average day. According to Taher, the sales at the stores varied depending on weather conditions. He claimed that beer sales decreased in the winter and increased in the summer. He estimated that average beer sales consisted of five to seven cases of beer a day.¹⁸ The specifics of how Taher arrived at these estimates is unclear, since there is no source documentation to support it. Taher explained that between 1989 and 1995 there was an increase in the cost of goods sold by the stores and that the average inventory for the stores was approximately \$5,000 to \$6,000.¹⁹ The majority of inventory purchases were made in cash and inventory was purchased on a regular basis. During the period in issue, his markup on sandwiches was approximately 175% to 200%. He estimated that

¹⁸It is unclear from the record whether his estimate was for both stores or only one store.

¹⁹It is unclear from the record whether his estimate was for both stores or only one store.

30% of the items sold were nontaxable. He testified that he gave sales receipts to customers when they asked.²⁰

Taher explained that each store maintained a separate sales journal, written in Arabic, in which the total gross sales for each day were recorded. At the end of the day, the cash register totaled the gross sales for the day and either his son or his nephew, under either Abdo's or his supervision, would write that total in Arabic in the book relating to that particular store. At each store, the cash register tape showing the total gross sales would then be placed in a shopping bag near the cash register.

The record includes two spiral notebooks, written in Arabic, which petitioners characterize as the sales journals for the two stores. The sales journal for the Second Ave. store contains entries for the period January 1990 through May 1994, while the sales journal for the Third Ave. store contains entries for the period January 1990 through June 1994. Each month is listed on a separate page in each book. While there are entries for the individual days of the month, those daily figures have not been totaled. The small spiral notebook designated as the Arabic sales journal for the Second Ave. store includes pages containing a person named Abdul's Spanish and English homework assignments, as well as some drawings and paragraphs written in Arabic. The Arabic sales journal for the Third Ave. store also contains some drawings and the phrase "HAPPY HOLIDAY" in the beginning of the book. Taher explained that the drawings and jottings written in the front of both books were made by his son and his nephew, who were teenagers at the time and did not understand the importance of the two books. According to Taher, these same individuals were the ones who recorded the daily sales in each book because

²⁰We modified finding of fact "30" to make clear that there is a lack of source documentation to support this testimony.

they could write in Arabic and his knowledge of written Arabic was limited. The individuals who actually made the entries in both books did not testify at the hearing. The record does not include any of the cash register tapes relating to the numbers written in the two books.

Petitioners submitted English translations of the Arabic books into the record. These translations were prepared in either 1996 or 1997 by Mr. Gaisi and his wife, Neema, and are contained in two composition notebooks. In the translated books, a single month is contained on a page. Each page lists the month and year at the top and is divided in half with two columns of numbers running down the page (i.e., numbers 1 through 14 or 15 down the left-hand column and numbers 16 through 28, 29, 30 or 31 down the right-hand column). Figures, ranging from a low of 260 to a high of 700,²¹ appear next to each number. There is no designation of what day of the week a specific date fell on in this translation. Nor is there a figure, at the bottom of the page which reflects the total of the figures listed on the lines above. A brief review of the translated Second Ave. store's book reveals that there was no entry for December 31, 1990, and February 1994 contained an extra entry for a 29th date. A brief review of the translation of the Third Ave. store's book reveals that both February 1992 and February 1993 contained entries for 30 days and there were entries for 31 days in November 1993. There are other erroneous entries in both books which are not noted here.

At the hearing, Taher admitted that he was aware of his obligation to collect sales tax on the taxable items which were sold in the stores. However, he claimed that he did not have much experience in determining which items were taxable and which items were not taxable.

²¹The majority of the figures appear to be between 400 to 600 for each date throughout the period contained in each translated book.

Before the audit period began, Taher hired Abdo Gaisi to prepare the stores' sales tax returns because of his ability to read and write Arabic and his general knowledge of operations similar to petitioners'. Mr. Gaisi does not have an accounting degree; however, for 20 years he has been preparing sales tax returns for and providing miscellaneous services to clients who are mainly Yemenite grocery store owners. According to Mr. Gaisi, he advised Taher to keep cash journals, sales journals, purchase invoices and cash register tapes on a daily basis. At no time has Mr. Gaisi maintained petitioners' books.

Once every three months, either Taher or his brother visits Mr. Gaisi's office to have the stores' sales tax returns prepared. Taher testified that he provided Mr. Gaisi with all necessary books and records for preparing the sales tax returns. Mr. Gaisi testified that the sales tax returns were not based on books and records but were estimates of petitioners' sales tax liability. However, in later questioning by petitioners' representative, Mr. Gaisi stated that the sales tax liability was not estimated. The record does not include any of Mr. Gaisi's work papers or any source documents which he used as the basis for the determination of taxable sales on the sales tax returns.

Taher stated that the stores tried to follow Mr. Gaisi's advice and maintain books and source records. However, because the Third Ave. store has been remodeled and has twice been vandalized, cash register tapes and purchase invoices have been lost, thrown out or stolen. Some miscellaneous purchase records for the Third Ave. store were submitted into the record. Maintenance of source documents was not any better at the Second Ave. store and petitioners submitted some miscellaneous purchase invoices for that store as well.

At the continued hearing on July 8, 1997, the Division stated that it would have one of its auditors, who could read Arabic, review copies of the two stores' sales journals written in Arabic prior to the continued hearing to be held at the Division of Tax Appeals offices in Troy, New York. The Division had Joseph Botros, an auditor with 15 years experience in auditing corporations and analyzing books and records for compliance with the sales and use tax laws and who could read Arabic, review and analyze copies of petitioners' sales journals. As a witness on December 16, 1997, Mr. Botros, based on his review of copies of the Arabic books, proffered his conclusion that portions of the books were fabricated and not contemporaneous because the books list days which do not exist in either English or Arabic, entries on the pages in the books appear to be made in the same handwriting with the same pen on the same day and corrections appear to be made using the same pen. During the hearing, the Administrative Law Judge, because of her ignorance of the Arabic language, asked Mr. Botros to review the pages of each original book for her. In the Second Ave. store's book, Mr. Botros noted only one error, the entry for December 31, 1990 is missing. He noted the following errors in the Third Ave. store's books: July 1990 had only 30 days, not 31; February 1992 as having 30 days; February 1993 as having 30 days; November 1993 as having 31 days; an entry for January 30, 1994 is missing and February 1994 as having 30 days.

At the hearing, petitioners challenged the Division's basis for contending that the books presented at the hearing were not contemporaneous and a fabrication. Taher testified that, at times, he personally observed his nephew making the entries, that in Yemen every month has 30 days, that at the time these books were maintained his nephew was in the 6th or 7th grade and that the books were maintained on a daily basis.

After the hearing concluded on December 16, 1997,²² petitioners' representative by letter dated December 19, 1997 made a motion to strike the testimony of Mr. Botros on the basis that he was not mentioned in the Division's hearing memorandum, petitioners should have been given ample notice that Mr. Botros was being called as an expert witness to refute the cash journal evidence, Mr. Botros was not qualified to express an opinion on the sales journals, a conflict of interest existed because Mr. Botros testified as an expert for the Division when he was an employee of the Division, petitioners were unable to get a rebuttal witness to counter Mr. Botros's testimony because the rebuttal witness was not in Troy and no one wanted to continue any more.

On January 23, 1998, the Administrative Law Judge denied petitioners' motion to strike the testimony of Mr. Botros on the grounds that petitioners were given the opportunity to continue the hearing on December 17, 1997, but chose not to and petitioners failed to make a timely objection to Mr. Botros's testimony at the hearing. The Administrative Law Judge also advised petitioners' representative that the basis of his objections to the testimony went to the weight of the evidence, not the admissibility, and that he should address those points in his brief.

Petitioners submitted a page from Economic Indicators containing the consumer price index for 1987 to 1997. This publication shows that the consumer price index rose 7.3% from 1989 to 1990; 3.9% from 1990 to 1991; 1.6% from 1991 to 1992; 3% from 1992 to 1993; and 3.4% from 1993 to 1994.

The record includes copies of five checks drawn on Citibank checking account, account number 12033598, in the name of Himed Deli Corp., 545 Second Ave., New York, New York.

²²The record remained open to afford petitioners the opportunity to submit additional documents.

Four of these checks were written in early December 1993, bear sequential numbers 573 through 576, and include one, dated December 16, 1993, payable to N.Y. Sales Tax in the amount of \$239.25. The fifth check, number 646, dated November 21, 1994, is payable to Liberty Mutual. Taher signed all of these checks.

On January 3, 1996, Taher and Abdo signed a Citibank signature card as partners of Himed Deli Grocery, 545 2nd Ave., New York, New York. Both Taher and Abdo, as general partners of Himed Deli Grocery, 545 2nd Ave., New York, New York, signed a Citibank Banking Agreement entitled "Partnership-Declaration Agreement."

Sometime in May or June of 1997, Ms. Kotlar and a fellow auditor visited the Third Ave. store and observed the New York State Liquor License and New York City License to act as a retail dealer of cigarettes on the wall. Both licenses were in the name of the corporation.

During the continued hearing on December 16, 1997, the Division made the following stipulation: "that in most cases there were no separate charges for sales tax on items sold during the observation as reflected on the tally sheets. Whether the taxpayer intended to charge sales tax cannot be verified by the Division." (Tr., p. 610.)

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Division issued notices of determination to Himed Deli Corporation, relating to the operation of the Third Ave. store, and to Abdo M. Himed and Taher M. Himed, a partnership, relating to the operation of the Second Ave. store. Petitioners contended that the Division issued the notices to incorrect entities. They assert that the notice issued to Himed Deli Corporation should be canceled because the corporation never functioned and was dissolved on March 24,

1993. They also argue that a partnership never existed. They maintain that the brothers owned the two stores as tenants in common, not partners.

The Administrative Law Judge rejected petitioners' claims noting that the record establishes that Himed Deli Corporation did function as a corporation. Himed Deli Corporation, incorporated on July 21, 1988, filed a Certificate of Registration with the Division for sales tax purposes. On this certificate, the corporation listed, among other things, its officers and the location of its corporate bank account. The Administrative Law Judge also pointed out that business licenses were obtained in the corporate name which allowed the Third Ave. store to sell both beer and cigarettes throughout the audit period. In addition to conducting business in the corporate name, Himed Deli Corporation also filed sales tax returns. The Administrative Law Judge concluded the corporation did, in fact, function as a corporation.

The Administrative Law Judge determined that while the corporation was dissolved on March 24, 1993, that dissolution did not impair any liability existing prior to the dissolution of the corporation (*see*, Business Corporation Law § 1006[b]). Therefore, the sales tax liability asserted against Himed Deli Corporation for the period June 1, 1990 to March 24, 1993 was appropriately assessed against the corporation. The Administrative Law Judge further determined that the sales tax liability that accrued after March 24, 1993, was also properly assessed against the corporation, because Himed Deli Corporation continued doing business under the corporate name even after its March 24, 1993 dissolution. After that date, officers on behalf of Himed Deli Corporation continued to file sales tax returns, issue checks, sign consents extending the period of limitations and maintain and display licenses in the corporate name. The Administrative Law Judge concluded that since Himed Deli Corporation continued doing

business as a corporation, it cannot seek to avoid the sales tax liability reflected in the corporate notice for the period after its dissolution (*citing Laurendi v. Cascade Dev. Co.*, 5 Misc 2d 688, 165 NYS2d 832, *affd* 4 AD2d 852, 167 NYS2d 240).

The Administrative Law Judge concluded that the Division properly issued to Himed Deli Corporation the Notice of Determination for the sales tax due with respect to the Third Ave. store.

Petitioners also argued that Abdo Himed and Taher Himed operated the Second Ave. store as tenants in common rather than as a partnership. The Administrative Law Judge found this claim to be without merit.

“A partnership is an association of two or more persons to place their money, efforts, labor or skill, or some or all these in lawful commerce or business and to divide the profits and bear the loss in certain proportions” (*citing Hanlon v. Melfi*, 102 Misc 2d 170, 423 NYS2d 132, 134). The Administrative Law Judge concluded, based on her review of the record, that Taher and Abdo operated the Second Ave. store as a partnership. The Administrative Law Judge noted that a written agreement is not necessary for a partnership to exist. An indispensable requirement of a partnership is a mutual promise or understanding of the parties to share in the profits of the business and submit to the burden of making good the losses (*id.*).

The Administrative Law Judge concluded that the evidence established that Taher and Abdo had an agreement to work and manage the Second Ave. store, as well as share in its profits and losses. Both Taher and Abdo on separate and numerous occasions signed documents before, during and after the audit period referring to themselves as partners or as general partners. The Division assessed the Second Ave. store as a partnership because of the way it was listed on

numerous sales tax records filed by or on behalf of Abdo Himed and Taher Himed. The Administrative Law Judge found that the evidence supports the Division's conclusion that Abdo Himed and Taher Himed conducted the operation of the Second Ave. store as a partnership. The Administrative Law Judge concluded that the Division properly assessed Abdo Himed and Taher Himed as a partnership.

Tax Law § 1133(a) states that: "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article"

Tax Law former § 1131(1) defines a "person required to collect any tax imposed by this article [Article 28]" as including:

any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of this article; and any member of a partnership.

Petitioners argue that the Division incorrectly issued assessments to Taher Himed and Abdo Himed as individuals. They asserted that, since they were tenants in common with respect to the operation of both stores, only one-half of the amounts of sales tax due from the corporation and partnership should be allocated to each of them. They further argued that since Taher was not an officer of the corporation, the assessment issued to him as the responsible officer of Himed Deli Corporation should be canceled.

As noted earlier, the Administrative Law Judge determined that with respect to the Second Ave. store, that Abdo M. Himed and Taher M. Himed were members of the partnership that

operated that store. Accordingly, the Administrative Law Judge found that Taher Himed and Abdo Himed, as partners, were under a duty to act for the partnership in complying with the requirements of Articles 28 and 29 of the Tax Law (*see*, Partnership Law § 26[2]; Tax Law former § 1131[1]). The Administrative Law Judge concluded that Taher Himed and Abdo Himed were jointly and severally liable for the sales taxes of the partnership.

The Administrative Law Judge also rejected petitioners' claim that Taher is not an officer of the corporation and the assessment issued to him as a responsible officer of Himed Deli Corporation should be canceled. The Administrative Law Judge found, based on the record, that Taher was an officer of Himed Deli Corporation. The Administrative Law Judge then addressed the issue of whether Taher was under a duty to act for the corporation in complying with the requirements of Articles 28 and 29 of the Tax Law.

The Administrative Law Judge noted that the holding of a corporate office does not, per se, impose sales tax liability upon an officeholder (*citing Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862; *Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427). Rather, whether a person is a responsible officer must be determined based upon the particular facts of each case (*citing, inter alia, Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed Matter of Martin v. Commissioner of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239). Factors to be considered include whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

The Administrative Law Judge quoted our decision in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990) where we stated:

[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation [citations omitted] (*Matter of Constantino, supra*).

The Administrative Law Judge determined, based on the record, that Taher, as officer, signed sales tax returns for the corporation, was authorized to and did write checks on behalf of the corporation, had authority and control over the finances of the corporation, actively participated in the operations of the Third Ave. store and shared in the store's profits.

The Administrative Law Judge found that the evidence supports the conclusion that Taher had or could have had control over corporate affairs and, therefore, Taher was under a duty to act for Himed Deli Corporation in complying with Articles 28 and 29 of the Tax Law.

Tax Law § 1147(c) provides, in pertinent part:

[w]here, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

On September 20, 1993, Abdo M. Himed signed a consent extending the period within which to issue an assessment against Himed Deli Corporation for the period June 1, 1990 through May 31, 1993 to September 20, 1994.²³ On July 28, 1994, Taher M. Himed signed a consent extending the period within which to issue an assessment against Himed Deli Corporation for the period June 1, 1990 through November 30, 1991 to March 20, 1995.²⁴ Consents extending the period of limitations for the partnership listed as “Abdo M. Himed and Taher M. Himed Deli” and “Himed Deli Corporation a/k/a Abdo M. Himed and Taher M. Himed” were signed by Abdo M. Himed and Taher M. Himed on September 20, 1993 and July 28, 1994, respectively, that extended the period of limitations for June 1, 1990 through November 30, 1991 to March 20, 1995.²⁵

Petitioners contended that the consents, obtained from either the corporation or the partnership, did not extend the time within which to assess Taher and Abdo in their individual capacities.

The Administrative Law Judge agreed that consents to extend the statute of limitations signed by an individual officer on behalf of a corporation do not extend the statute of limitations for the individual officers of the corporation (*see, Matter of Bleistein*, Tax Appeals Tribunal, July 27, 1995). In the instant case, on February 21, 1995, the Division issued to Taher Mohamed Himed, as officer of Himed Deli Corp., a Notice of Determination for the period June 1, 1990 through May 31, 1994. The Administrative Law Judge concluded that since the Division

²³ *see*, Finding of Fact “7” of the Administrative Law Judge.

²⁴ *see*, Finding of Fact “20” of the Administrative Law Judge.

²⁵ *see*, Findings of Fact “7” and “20” of the Administrative Law Judge.

obtained consents from the corporation only with respect to the period June 1, 1990 through November 30, 1991, that portion of the Notice of Determination (Notice No. L-010069294-1) issued to Taher, as officer of Himed Deli Corporation, must be canceled for the period June 1, 1990 through November 30, 1991.

However, the Administrative Law Judge found that the consents executed on behalf of the partnership did extend the statute of limitations for individual partners. Tax Law former § 1131(1) defines persons required to collect sales and use tax as including “any member of a partnership.” Every person required to collect the tax shall hold it “as trustee for and on account of the state” (Tax Law § 1132[a]). A member of a partnership is liable for the sales and use tax owed by the partnership. This liability arises from the status of partner and not as a result of the authority or knowledge of acts by other members of the partnership.

Every partner is an agent for the partnership for the purpose of its business, and the authorized act of every partner, including the execution in the partnership name of any instrument, binds the partnership (Partnership Law § 20[1]). This would include a consent extending the period of limitations. Partners are jointly liable with respect to their contractual obligations (*citing* Partnership Law § 26[2]; *citing also, Patrikes v. J. C. H. Service Stations*, 180 Misc 917, 41 NYS2d 158, *affd* 180 Misc 927, 46 NYS2d 233, *lv den* 266 App Div 924, 44 NYS2d 472). However, each partner also has an absolute liability for the whole amount of every debt due from the partnership (*citing* 16 NY Jur 2d, Business Relationships § 1409; *Bank of Commerce v. DeSantis*, 114 Misc 2d 491, 451 NYS2d 974; *Patrikes v. J. C. H. Service Stations, supra.*)

The Administrative Law Judge's conclusion that Abdo Himed and Taher Himed conducted the operation of the Second Ave. Store as a partnership was based, in part, on the numerous tax documents, including the two consents, signed by both Abdo and Taher on behalf of the Second Ave. store.²⁶ Since the consents extended the statute of limitations for the partnership, the Administrative Law Judge concluded that they also extended the statute of limitations for each of the partners. "Their individual liability arises out of the notion of a partnership and is an incident thereof" (*Bank of Commerce v. DeSantis, supra*, 451 NYS2d, at 978). Accordingly, the Administrative Law Judge concluded that the Notice of Determination (Notice No. L-010069292-3) issued to Taher, as a partner of Abdo M. Himed and Taher M. Himed, a partnership, properly included the period June 1, 1990 through November 30, 1991.

The Administrative Law Judge next addressed petitioners' books and records. Every person required to collect tax must maintain and make available for audit upon request records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Failure to maintain and make available such records, or the maintenance of inadequate records, will result in the Division of Taxation's estimating tax due (Tax Law § 1138[a]). To determine the adequacy of a taxpayer's records, the Division of Taxation must first request and thoroughly examine 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; *Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978). The purpose of such an examination is to determine whether the records are so insufficient as to make it virtually impossible to verify taxable sales receipts

²⁶Conclusion of Law "B" of the Administrative Law Judge; *see*, Findings of Fact "5", "7" and "20".

and conduct a complete audit. When estimating sales tax due, the Division must adopt an audit method that will reasonably calculate the amount of taxes due (*see, Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451). Whether the audit method used was "reasonably calculated to reflect the taxes due" (*Matter of W.T. Grant Co. v. Joseph, supra*, 159 NYS2d, at 157) can only be determined based on information made available to the auditor before the assessment is issued (*Matter of Queens Discount Appliances*, Tax Appeals Tribunal, December 30, 1993; *Matter of House of Audio of Lynbrook*, Tax Appeals Tribunal, January 2, 1992).

Petitioners conceded that the use of the observation tests of sales was appropriate in this case. However they are challenging the assessments resulting from the one-day observation tests on a number of grounds.

First, petitioners asserted that it is unreasonable to extrapolate the results of a one-day observation test over a four-year audit period. The Administrative Law Judge disagreed, noting that the courts have concluded that it is reasonable to extrapolate the results of a one-day observation test over a multiple-year audit period (*citing Matter of Del's Mini Deli v. Commissioner of Taxation & Fin.*, 205 AD2d 989, 613 NYS2d 967). Second, petitioners claimed that the stores' sales on the day of the observations were greater than usual and, therefore, were not representative of petitioners' business operations for the entire audit period in issue. They contended that Thursdays and Fridays are the busiest days of the week at both stores

and that sales on weekends and holidays are significantly lower than other days. In addition, they claimed that, at the beginning of the audit period, the stores were in the start-up phase and daily sales were much lower. In support of these claims, petitioners offered the testimony of petitioner Taher Himed and two sales journals written in Arabic, along with their English translations. Since Mr. Himed was the only witness to testify regarding the general operation of both stores, the Administrative Law Judge viewed his testimony as critical. In any event, the Administrative Law Judge did not find Mr. Himed's testimony to be reliable. His testimony was vague, evasive and contradictory. Further, the only documentary evidence concerning daily sales for both stores are the two sales journals written in Arabic. The Administrative Law Judge noted that it was impossible to verify whether these journals contained accurate and true records of either store's sales for the audit period. Neither the individuals who recorded the figures in these books, nor source documents, e.g., the daily cash register tapes, were presented at the hearing. Furthermore, the Administrative Law Judge pointed out, the English translations of the books contained numerous errors which raise questions as to how diligent petitioners were in recording total gross sales at either store. The Administrative Law Judge rejected petitioners' assertion that, at the beginning of the audit period, both stores were in their start-up phase, as not supported by the record. The Third Ave. store was acquired by Himed Deli Corporation, in November of 1988, from Mohamed K. Himed, who had been operating it for 9 or 10 years prior to the sale. While the Second Ave. store was opened in 1988 or 1989, there is no evidence of what daily sales actually were in 1990, other than Mr. Himed's unreliable testimony and unsubstantiated records. Given the unreliability of Mr. Himed's testimony with regard to the stores' daily sales, both generally and specifically during the audit period, the Administrative Law Judge found that the

one-day observation test was reasonable and that the audited taxable sales reflect daily sales throughout the entire audit period. The Administrative Law Judge concluded that petitioners failed their burden of proving, by clear and convincing evidence, that the result of the method used was unreasonably inaccurate or that the amount of the tax assessed was erroneous (*Matter of Meskouris Bros. v. Chu, supra*). Further, the Administrative Law Judge noted, where, as here, a taxpayer has failed to maintain accurate, complete and verifiable books and records, exactness in the audit result is not required and the consequences of a taxpayer's record keeping failures will weigh heavily against it (*id.*).

Third, petitioners contended that the one-day observation tally sheets for each store are not authentic or genuine and reflect the auditor's bias. This claim was rejected, since petitioners offered no proof to establish the allegation. The Administrative Law Judge's review of the original observation tally sheets for both stores did not reveal any alteration by Ms. Kotlar of any of the other auditors' recorded observations, other than deletion of nontaxable sales and the darkening of specific light entries. The Administrative Law Judge pointed out that petitioners' mere assertions without any proof did not constitute a basis upon which to determine that the audit method is unreasonable (*citing Matter of Mera Delicatessen*, Tax Appeals Tribunal, November 2, 1989). Petitioners did not produce any evidence to support their contention that the daily taxable sales as recorded by the Division's auditors were incorrect. Therefore, the Administrative Law Judge concluded that petitioners had failed to demonstrate by clear and convincing evidence that the audit method or results are unreasonable (*see, Matter of Robritt Liq. Store*, Tax Appeals Tribunal, December 27, 1991).

Finally, petitioners argued that the Division erred in not making an adjustment for inclusion of sales tax in the audited taxable receipts. The regulation at 20 NYCRR 532.1(b) states, “[w]henver the customer is given any sales slip, invoice, receipt, or other statement or memorandum of the price, amusement charge, or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him.”

The failure to separately state the sales tax charge renders the entire receipt presumptively taxable (*see, Matter of LaCascade, Inc. v. State Tax Commn.*, 91 AD2d 784, 458 NYS2d 80; *Matter of S & K Smoke Shop*, Tax Appeals Tribunal, July 18, 1991). The Administrative Law Judge determined that petitioners failed to present any evidence or legal arguments in support of their contention that the sales prices of any of the items sold included sales tax.

The Administrative Law Judge noted that 20 NYCRR 532.1(b)(4) allows the absorption of tax where no written receipt is given to the customer. This rule is applicable only as long as the customer is made aware of the inclusion of sales tax in the sales price by visibly displaying a sign to that effect (*see, Matter of Auriemma*, Tax Appeals Tribunal, September 17, 1992). The Administrative Law Judge noted that the auditors who conducted the observation tests testified that there were no signs or other type of written statement at either store declaring the sales price included sales tax. The Administrative Law Judge concluded that since no such signs were displayed at petitioners’ stores, the Division correctly calculated petitioners’ sales tax liability without making an adjustment for the inclusion of sales tax in the purchase price.

Petitioners also argued that, in addition to the 5% inflation adjustment allowed by the Division, allowances should also be made for seasonal weather, holidays, weekends, paydays and other variances. Petitioners’ only evidence concerning daily sales consisted of Mr. Himed’s

testimony and the unsubstantiated sales journals, both of which the Administrative Law Judge found unreliable. The Division allowed a 5% inflation adjustment for yearly inflation, price increases, weather variations and popularity variances. Since the actual annual inflation rate was less than 5%, and petitioners failed to produce clear and convincing evidence to warrant any further allowances, the Administrative Law Judge concluded there was no basis upon which to make any further adjustments. The Administrative Law Judge concluded petitioners had failed to sustain their burden of proving that either the audit methodology or the amount of tax assessed was erroneous (*Matter of Club Marakesh v. State Tax Commn.*, 151 AD2d 908, 542 NYS2d 881, *lv denied* 74 NY2d 616, 550 NYS2d 276).

Next, the Administrative Law Judge addressed the issue of penalties. Petitioners contended that penalties should be abated, because they relied on estimations of their sales tax liability by a qualified accountant. They further argued that Taher Himed, an almost illiterate man, who was prominently involved in the businesses, fully relied upon the expertise of the accountant. They claim that Taher Himed followed the instructions of the accountant as much as he could, depending on his resources and means.

Penalties were imposed under two different provisions of Tax Law § 1145. The first is that set forth in Tax Law § 1145(a)(1)(i) which states, in pertinent part, as follows:

Any person failing to file a return or to pay or pay over any tax to the tax commission within the time required by or pursuant to this article (determined with regard to any extension of time for filing or paying) shall be subject to a penalty of ten percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding thirty percent in the aggregate.

Tax Law § 1145(a)(1)(iii) provides that if the failure or delay was due to reasonable cause and not due to willful neglect, penalty and additional interest shall be abated. Reasonable cause includes any cause for delinquency which would appear to a person of ordinary prudence and intelligence as reasonable cause for the delay in filing a sales tax return and paying the tax imposed under Articles 28 and 29 of the Tax Law (20 NYCRR 536.5[c][5]).

The Administrative Law Judge concluded that the Division properly assessed penalties and petitioners failed to establish reasonable cause for the abatement of penalties. First, penalties are appropriate in this case because there is a substantial discrepancy between the amount of tax reported and the amount of tax determined due on audit, and the fact that petitioners relied on estimates, rather than their books and records, in filing the sales tax returns (*see, Matter of S.H.B. Super Markets v. Chu*, 135 AD2d 1048, 522 NYS2d 985). Further, the record established that Taher Himed, while limited in formal education, was an experienced businessman having been involved in the running of the Third Ave. store since 1978 or 1979. The Administrative Law Judge determined that it was not Mr. Himed's lack of education that resulted in petitioners' failure to maintain books and records. Rather, it was petitioners' failure to follow the advice of their accountant.

Petitioners were also assessed penalty pursuant to Tax Law § 1145(a)(1)(vi) for omission of greater than 25% of the tax due. The Administrative Law Judge also concluded that petitioners had failed to show any evidence that would constitute reasonable cause for the abatement of this additional penalty.

ARGUMENTS ON EXCEPTION

Petitioners argue on exception, as they did below, that the assessments issued to Himed Deli Corporation are invalid because the corporation, although formed, never functioned, and was dissolved on March 24, 1993. Petitioners also contend that the assessments against Abdo M. Himed and Taher M. Himed, a partnership, should be canceled because it was not a partnership, but a tenancy in common. Petitioners also claim there was never a partnership because Abdo and Taher inherited the stores from their father. Petitioners continue to claim that since they inherited the store from their father, they are not jointly liable for sales taxes found due.

Petitioners also contend that a one-day observation test is unreasonable, and that audited sales should be reduced by giving them credit for inflation, weather conditions, holidays, etc. Petitioners also urge that they should be credited for the 8 1/4% tax which they claimed to have included in their gross sales prices.

Petitioners argue that reasonable cause exists and, therefore, the penalties imposed in this matter should be abated.

The Division contends that Himed Deli Corporation operated the Third Ave. store during the audit period; therefore, it was properly assessed for sales tax due before and after the date it was dissolved. The Division also maintains that Abdo and Taher were partners in a partnership that operated the Second Ave. store and, therefore, it correctly assessed them as such. It further maintains that Abdo and Taher are jointly and severally liable for the sales taxes assessed against the partnership and Taher is liable for the sales tax due from the corporation.

The Division also argues that petitioners have failed to offer any credible evidence that would satisfy their burden of proof on any of the issues raised in their petitions.

OPINION

Basing one's tax returns on estimates, rather than actual sales records suggests, at the very least, a lack of due care. Petitioners claim on exception that the audit did not reasonably reflect their actual sales, that their corporation never functioned as such and that the brothers are not partners, but tenants in common. However, petitioners offered no credible evidence as proof to establish any of these claims. In particular, we note that the unreliability of Mr. Himed's testimony and the similar unreliability of the "so-called" Sales Book, whether taken separately or together, do not rise to the level of clear and convincing evidence of petitioners' sales figures. As for petitioners' claim that they are not partners, we agree with the Administrative Law Judge. The record establishes that the Himed brothers were partners and held themselves out to the public as such. As members of a partnership, Taher and Abdo Himed were persons required to collect sales and use tax and hold it "as trustee for and on account of the state" (Tax Law former §§ 1131[1] and 1132[a]). A member of a partnership is liable for the sales and use tax owed by the partnership (*Matter of National Urban Ventures, Inc., Partner of Wintergarden Inn Assocs.*, Tax Appeals Tribunal, January 16, 1997; *Matter of Ceglia*, State Tax Commn., October 15, 1986). Petitioners' claim that the corporation was not a functioning entity is rejected as not supported by the evidence.

Petitioners also argue that they should be given credit for 8 1/4% tax which they included in their gross sales price, but petitioners offered no evidence to establish that sales tax was included in the price they charged their customers.

We affirm the determination of the Administrative Law Judge. We have reviewed the arguments raised by petitioner and conclude that the Administrative Law Judge has fully and

correctly addressed each of the issues presented. We can find no argument raised by petitioners on exception which would lead us to modify the determination in any way.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Himed Deli Corporation, the partnership of Taher Himed and Abdo M. Himed and Taher M. Himed, as an individual, is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Himed Deli Corporation, the partnership of Taher Himed and Abdo M. Himed and Taher M. Himed, as an individual, are granted to the extent set forth in Conclusion of Law "I" of the Administrative Law Judge's determination, but in all other respects are denied;
4. The notices of determination dated February 9, 1995 (Notice Nos. L-010061123-3 and L-010061124-2) and the Notice of Determination dated February 21, 1995 (Notice No. L-010069292-3) are sustained; and

5. The Notice of Determination dated February 21, 1995 (Notice No. L-010069294-1) is to be modified in accordance with Conclusion of Law "I" of the Administrative Law Judge's determination, but in all other respects is sustained.

DATED: Troy, New York
March 30, 2000

/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