

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

GUISEPPE LOGIUDICE :

for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1995 :
through February 28, 1998. :

DECISION
DTA NOS. 817210
AND 817211

In the Matter of the Petition :

of :

JOSEPH LOGIUDICE D/B/A :
NINO'S PIZZERIA OF PATCHOGUE :

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, 1995 :
through February 28, 1998. :

Petitioner Guiseppe LoGiudice a/k/a Joseph LoGiudice d/b/a Nino's Pizzeria of Patchogue, 580 Old Medford Avenue, Patchogue, New York 11772, filed an exception to the determination of the Administrative Law Judge issued on February 1, 2001. Petitioner appeared by Robert J. Zysk, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was withdrawn.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 correctly determined, upon audit, that petitioner owed additional sales tax with respect to the operation of Nino's Pizzeria of Patchogue.

II. Whether, if so, petitioner has nonetheless established sufficient basis to warrant reduction or abatement of penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

In August 1993, the Division of Taxation ("Division") commenced a sales tax field audit of Nino's Pizzeria ("Nino's"), a pizza parlor located in Patchogue, New York and operated as a sole proprietorship by Guiseppe LoGiudice. Guiseppe LoGiudice is also known as Joseph LoGiudice.

The Division's audit commenced with the auditor's issuance of an audit appointment letter and request for books and records dated March 13, 1998, stating "[a]ll books and records pertaining to your sales and use tax liability for the period [03/01/95 through 02/28/98] are to be available on the [04/02/98] appointment date. This includes financial statements, journals,

ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns, federal income tax returns, and exemption certificates.” This letter, which was accompanied by an attached checklist again specifying the records required for audit, also noted that additional information might be required during the course of the audit.

In response to the appointment letter, Mr. LoGiudice telephoned the auditor on March 31, 1998 and directed her to one Robert Smith who served as petitioner’s accountant.¹ The auditor telephoned Mr. Smith on April 1, 1998 and scheduled an appointment for May 6, 1998. On May 6, 1998 the auditor went to Mr. Smith’s office, located in his home, in order to review petitioner’s records. At their meeting, Mr. Smith presented only monthly bank statements for a small part of the audit period, specifically for December 1994 and for January, April, May, and August through December of 1995. No cash receipts journal, sales invoices, sales journal, general ledger, purchase journal, purchase invoices, income tax returns or other records were presented or made available to the auditor.

By a letter dated May 29, 1998, the auditor advised petitioner as follows:

As you are aware, a sales tax audit of [Nino’s Pizzeria] is currently in progress. Per our discussions, the books and records presented for review are insufficient to determine if the proper amount of sales tax has been reported for the audit period.

This letter will confirm our recent conversation regarding the necessity to perform an observation at your place of business within the next six weeks. Sales activity will be recorded for an entire day, from opening to closing. The observation will be performed discreetly, with minimal interruption of business activity.

If there are any questions, please contact me.

¹ Robert Smith’s accounting credentials (e.g., CPA, PA) are not specified in the record.

On Thursday, June 18, 1998, described as a “hot and sunny” day, an observation of petitioner’s sales was conducted by two Division investigators. The observation commenced at 11:00 A.M., with Nino’s cash register set at zero. All sales were recorded and tax was included in the price of all items sold except for dinners and heroes. Petitioner and his son were present and working at the premises during the observation, and petitioner’s accountant was called by petitioner and arrived in the afternoon for a scheduled meeting with petitioner. The observation continued until 10:00 P.M., at which time the cash register was again set at zero and the register tape for the entire observation period was given to the investigator then present. The investigators totaled gross sales for the day at \$828.51, while the register tape totaled gross sales at \$874.15. Taxable sales (versus gross sales) totaled \$807.53.

The auditor reviewed reported taxable sales per petitioner’s sales tax returns and identified the sales tax quarterly period spanning June 1, 1997 through August 31, 1997 as that with the highest reported taxable sales. The auditor divided reported taxable sales for such quarterly period (\$9,053.00) by the number of days in such quarterly period (92) to arrive at average taxable sales of \$98.40 per day. The auditor reduced the taxable sales total for the observation day (\$807.53) by the average reported taxable sales per day (\$98.40), to arrive at audited unreported taxable sales per day of \$709.13. The auditor then compared such audited unreported taxable sales per day (\$709.13) to average reported taxable sales per day (\$98.40), resulting in an error (underreporting) rate of 720.64 percent. The auditor applied such error rate to petitioner’s reported taxable sales for the audit period, and arrived at additional taxable sales of \$724,308.06 with sales tax due thereon in the amount of \$68,606.43. Finally, the auditor allowed credit for

the sales tax reported and paid by petitioner for the audit period (\$8,346.00), leaving sales tax due in the amount of \$60,260.00.

On October 13, 1998 the Division issued to petitioner, Joseph LoGiudice d/b/a Nino's Pizzeria of Patchogue, a Notice of Determination assessing sales tax due for the period March 1, 1995 through February 28, 1998 in the amount of \$60,260.00, plus interest and penalties including omnibus penalty. On November 5, 1998 the Division issued to petitioner, Guiseppe LoGiudice, a Notice of Determination assessing sales tax due for the period September 1, 1995 through February 28, 1998 in the amount of \$50,183.00, plus interest and penalties including omnibus penalty.²

We make the following additional finding of fact.

It is undisputed that Joseph LoGiudice and Guiseppe LoGiudice are one and the same person. The two notices of determination issued in this matter assert sales tax for the same tax periods, with the exception that the October 13, 1998 notice issued to Joseph LoGiudice includes two sales tax quarters not covered by the November 5, 1998 notice issued to Guiseppe LoGiudice. The difference in the dollar amounts of tax assessed on the two notices results from the fact that the notice issued to Joseph LoGiudice covers those two additional sales tax periods. The Division has made no claim here that the amounts assessed by the two notices are cumulative, and it is undisputed that the total amount of tax in dispute is \$60,260.00 plus interest and penalties.

Petitioner timely challenged the notices by filing petitions with the Division of Tax Appeals. At hearing, petitioner presented the testimony of Thomas Mellett, a project engineer

² On May 8, 1998 petitioner executed, under the name Joseph LoGiudice, a Consent Extending the Period of Limitations on Assessment under which the Division could assess tax for the period March 1, 1995 through November 30, 1995 at any time on or before December 20, 1998. It is undisputed that Joseph LoGiudice and Guiseppe LoGiudice are one and the same person. It appears that two notices were issued in this case because Mr. LoGiudice uses two names, Joseph and Guiseppe. It also appears that the later-dated Notice did not include the two additional quarterly periods because there was no Consent executed in the name of Guiseppe LoGiudice.

with the New York State Department of Transportation during the period when Route 112, which runs in front of petitioner's business location, was widened. As a part of this project, a new driveway entrance to the shopping plaza in which petitioner's business is located was constructed and the old driveway was removed. Mr. Mellet was not assigned to this particular project, although he visited the project on approximately five occasions. He was unable to discern from the construction maps for the project the exact manner in which the driveway change occurred, and was unable to state whether or not access to petitioner's place of business was blocked or obstructed in any manner for any period of time. However, the usual manner of proceeding is not to remove an existing driveway before a new one is constructed, and on occasion and if a driveway is of sufficient width, one half may be used for access while the other half is reconstructed. The goal in such projects was to maintain access to business premises and to minimize traffic disruption. The project involving Route 112 spanned the period August 1995 through August 1997. The portion of this period when construction activities occurred in and about the area of petitioner's business location is not specified.

As noted above, the only records provided at the time of audit were business checking account bank statements given to the auditor by petitioner's accountant, Mr. Smith, and covering some 9 months out of the 36 months of the audit period. During, and then after the hearing, petitioner submitted additional business checking account bank statements such that statements for each month of the years 1995 (except for February and March), 1996 and 1997 were provided.

Petitioner also provided meteorological records for the years 1995 and 1996 listing, among other information, daily snowfall amounts. Review of these records reveals the following:

1995: Snowfalls exceeding two inches were recorded on 2/4/95 (5 inches), 11/29/95 (4 inches) and 12/20/95 (8 inches). On four other dates snowfalls ranging from one to two inches were recorded.

1996: Snowfalls exceeding two inches were recorded on 1/7/96 (7 inches), 1/8/96 (14 inches), 2/3/96 (8.5 inches), 2/14/96 (3 inches), 2/16/96 (4 inches), 2/17/96 (4 inches), 3/2/96 (6 inches), 3/18/96 (4 inches), 3/29/96 (2.5 inches), 4/8/96 (3 inches) and 4/10/96 (12 inches). On five other dates snowfalls ranging from one to two inches were recorded.

At hearing, petitioner submitted invoices from Dore Foods, Inc., showing purchases by Nino's for the years 1995, 1996, 1997 and 1998, attached to which were adding machine tapes listing the total of such purchases per year. Petitioner also submitted his Federal income tax returns, including Schedule C ("Profit or Loss from Business") pertaining to Nino's, for each of the years 1996, 1997 and 1998. Review of such documents, as well as review of the sales and use tax returns filed by Nino's, provides the following information:

<u>Sales Tax Returns</u>	<u>Purchase Invoices</u>
<u>Gross Sales as Reported/Period</u>	<u>Purchases/Year</u>
\$35,467.00 (12/01/94 - 11/30/95)	\$24,275.00 (1995)
\$35,117.00 (12/01/95 - 11/30/96)	\$22,160.34 (1996)
\$38,663.00 (12/01/96 - 11/30/97)	\$14,807.00 (1997)
\$80,667.00 (12/01/97 - 11/30/98)	\$22,153.35 (1998)

Schedule C Gross Receipts or Sales/Year Schedule C Cost of Goods Sold/Year

\$71,842.00 (1996)	\$24,902.00 (1996)
\$74,947.00 (1997)	\$26,074.00 (1997)
\$90,238.00 (1998)	\$36,634.00 (1998)

Review of the individual sales and use tax returns for the sales tax quarterly periods ended February 28, 1995 through May 31, 1998 reflect reported gross sales ranging from a low of \$8,129.00 to a high of \$10,569.00. For the two immediately following sales tax quarterly periods ended August 31, 1998 and November 30, 1998, reported gross sales nearly tripled to \$29,423.00 and \$29,189.00, respectively.

In addition to the foregoing, petitioner also submitted a one-page sheet listing gourmet pizzas. The prices for these pizzas were approximately double the prices listed for the pizzas available on petitioner's regular menu.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

At the outset, the Administrative Law Judge noted that 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.³ Failure to maintain and make available such records, or the maintenance of inadequate records, will result in the Division's estimating tax due (Tax Law § 1138[a]).

To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment. The purpose of such an examination is to determine whether the records are so

³ Tax Law § 1135(a); 20 NYCRR 533.2(a).

insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit.⁴

The Administrative Law Judge noted that petitioner received an audit appointment letter specifying the sales tax records requested for audit review, together with a check list of such records. In response, the auditor was specifically directed by petitioner to contact petitioner's accountant in order to obtain records. The auditor contacted and met with petitioner's accountant. The Administrative Law Judge pointed out that the only records made available to the auditor were business checking account bank statements pertaining to Nino's for 9 out of the 36 months of the audit period. Given this response to the request for records, the Administrative Law Judge found it was appropriate for the Division's auditor to conclude that petitioner's records were inadequate and insufficient to conduct a detailed audit such as to verify taxable sales and sales tax due. The Administrative Law Judge found significant the fact that even when the auditor advised petitioner by letter that his records were insufficient and that an observation of sales would be conducted, petitioner did not come forward with additional books and records. Accordingly, the Administrative Law Judge concluded that the auditor's decision to go forward with an indirect auditing methodology to estimate sales tax due on the basis of external indices was proper.

Next, the Administrative Law Judge addressed the reasonableness of the audit method. Where the Division seeks to determine a taxpayer's sales tax liability on the basis of an indirect

⁴*Matter of Adamides v. Chu* (134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109).

audit method, the methodology selected must be reasonably calculated to reflect the taxes due.⁵ However, exactness in the audit outcome is not required.⁶ The taxpayer has the burden of proof by a standard of clear and convincing evidence to show that the methodology was unreasonable or that the amount assessed was erroneous.⁷

In this case, the Administrative Law Judge noted, the Division conducted an observation of petitioner's sales for an entire day, compared the results to the average reported daily sales as computed via reference to petitioner's sales tax returns, then derived by comparison an error rate and projected the same against petitioner's reported sales to arrive at audited taxable sales.⁸ Given the fact that no records other than the noted bank statements were made available at the time of audit, the Administrative Law Judge found the use of an observation test was one of the indirect or estimation audit methods available to the Division.

Petitioner argued that the use of such a method with a projection based on the result of one day of observation is unacceptable. However, the Administrative Law Judge pointed out, the Tax Appeals Tribunal has upheld this methodology.⁹

⁵*Citing Matter of Ristorante Puglia, Ltd. v. Chu* (102 AD2d 348, 478 NYS2d 91); *Matter of W.T. Grant Co. v. Joseph* (2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75).

⁶*Citing Matter of Markowitz v. State Tax Commn.* (54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454).

⁷*Citing 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).

⁸Petitioner complains that the auditor determined average reported daily sales from a sales tax quarterly period for which petitioner reported a comparatively higher amount of sales. While petitioner seems to imply that this would work to his disadvantage, the opposite is actually true since comparison of the highest amount of average daily sales to sales on the day of observation results (mathematically) in a lower error percentage than would comparison of a lower amount of average reported daily sales to sales on the day of observation.

⁹*Citing Matter of Del's Mini Deli v. Commissioner of Taxation & Fin.* (205 AD2d 989, 613 NYS2d 967); *Matter of Top Shelf Deli* (Tax Appeals Tribunal, February 6, 1992).

In attacking the observation audit in this case, petitioner claimed he was given no advance notice of the particular day for the observation to be conducted and asserted that the observation results were not representative of an ordinary day. Petitioner claimed, in particular, that the introduction of a gourmet pizza menu, allegedly for the first time on the day of observation, featuring more expensive pizzas, may have resulted in higher audited sales than on previous days.

The Administrative Law Judge noted that petitioner produced no sales records to support or bear out this claim. Petitioner also maintained that inclement weather during the winter months and a road widening construction project disrupted his business and adversely impacted sales during the audit period. With regard to road construction, the Administrative Law Judge found petitioner produced no evidence to show that access to his business was ever closed for any period of time. In fact, the Administrative Law Judge found that petitioner's claim ran directly contrary to evidence in the record that the contractors tried to minimize business disruption during construction. As to the claim that weather negatively impacted his business, the Administrative Law Judge noted that petitioner's reported sales remained relatively consistent throughout most of the audit period. In fact, Nino's reported sales actually increased somewhat during the quarterly period December 1, 1995 through February 28, 1996, which quarterly period also showed the highest number of large snowfalls.¹⁰ The Administrative Law Judge pointed out that, if true, petitioner's sales should have shown some evidence of fluctuations in light of the claimed disruptions, e.g., marked decreases during the construction period or during the winter months. However, the Administrative Law Judge stated, petitioner's

¹⁰See Finding of Fact "10" of the Administrative Law Judge's determination.

sales as reported on sales tax returns remained essentially consistent. The only marked change occurred in the two sales tax quarterly periods immediately following the Division's issuance of its audit appointment letter. In each of those quarters, the Administrative Law Judge noted, there was a near tripling of reported sales.

Petitioner also suggested that other audit methods could have been employed. However, the Administrative Law Judge pointed out that the Division is not limited or required to use a particular indirect audit method but is only required, in the face of inadequate, unreliable, unavailable or unverifiable records, to employ an audit method that is reasonable. Here, the Administrative Law Judge found that the records submitted were inadequate to perform a detailed audit and verify petitioner's sales and sales tax liability. The Administrative Law Judge noted that petitioner's business is a cash business. In that context, the Administrative Law Judge pointed out, the introduction of checking account statements is not adequate evidence of sales receipts, because there was no proof that all receipts were deposited intact into such account. While the records ultimately furnished might have allowed for the use of a different indirect audit method (or in conjunction with), it remains that such records were not made available at the time of audit. Moreover, the Administrative Law Judge found that the records provided were not adequate to lead to a conclusion that the records were sufficient for the conduct of a detailed audit, or that the Division was required to use some other audit method, or that the method selected was unreasonable or was unreasonably flawed in application.¹¹

¹¹*Citing Matter of Giordano v. State Tax Commn.* (145 AD2d 726, 535 NYS2d 255); *Matter of Shukry v. Tax Appeals Tribunal* (184 AD2d 874, 585 NYS2d 531).

The Administrative Law Judge found petitioner's claim that the auditor did not ask petitioner for records, and never requested "source" documents from petitioner was contrary to evidence in the record.

The Administrative Law Judge also rejected petitioner's claim that the auditor did not obtain a power of attorney from petitioner's accountant, Mr. Smith. The Administrative Law Judge noted that this overlooks the undisputed fact that the auditor was specifically directed to Mr. Smith by petitioner in order to obtain and review records.¹² The fact overriding petitioner's arguments, the Administrative Law Judge stated, is that no sales invoices, cash register tapes, or other original source documents evidencing sales were ever maintained or produced for audit by petitioner.

The Administrative Law Judge also noted that the totals of purchase records allegedly pertaining to petitioner's only supplier, were significantly less than the cost of goods sold reported by petitioner on Schedule C for two of the three comparable periods. The Administrative Law Judge found that comparison of the records ultimately submitted by petitioner (specifically the Federal income tax returns at Schedule C and the purchase invoices) with the sales receipts reported on petitioner's sales tax returns and with the results of the audit, not only supported the audit result but indicated that petitioner was significantly underreporting his sales and his sales tax liability. In sum, the Administrative Law Judge concluded that petitioner failed to submit evidence sufficient to establish that the audit method was

¹² The Administrative Law Judge's footnote stated: "By brief, petitioner claims that Mr. Smith would not have been allowed to testify at hearing without a power of attorney. In fact, Mr. Smith would not have been allowed to appear as petitioner's *representative* at hearing without a power of attorney. The lack of a power of attorney, however, in no way prevented Mr. Smith from appearing at the hearing or providing testimony as a *witness* there. In fact, Mr. Smith was not present at the hearing, nor was he called as a witness by petitioner's representative" (Determination, conclusion of law "F").

unreasonable, or that the results of the audit were unreasonably flawed or incorrect, or that his sales and sales tax liability were correctly reported.

Next, petitioner challenged the imposition of penalties. Here, the Administrative Law Judge pointed to petitioner's failure to maintain or make available for audit the source records of his sales. Other records which petitioner ultimately made available for hearing, including purchase invoices, bank statements and tax returns, were not submitted for audit. The Administrative Law Judge noted that petitioner failed to produce evidence to show the method by which he or his accountant calculated, recorded or accounted for sales as reported on petitioner's sales tax returns or on Schedule C of his Federal income tax returns. In fact, the Administrative Law Judge noted, there were substantial discrepancies not only between sales per sales tax returns versus sales as determined on audit, but also as between receipts reported on Federal income tax returns versus sales reported on sales tax returns. Finally, the Administrative Law Judge found significant the fact that petitioner's sales tax returns showed a sudden, significant increase in reported sales in the quarterly periods immediately following receipt of the audit appointment letter. In view of these factors, the Administrative Law Judge sustained the imposition of penalties.¹³

¹³ The Administrative Law Judge's footnote stated: "Further consideration of petitioner's claim regarding the gourmet pizza menu is revealing not only in the context of the results of the audit, but specifically with respect to the issue of penalties. Petitioner's claim is that the gourmet pizza menu, allegedly first introduced on the day of the observation, had specialty pizza prices approximately twice as high as those for pizzas on the regular menu, and that this factor resulted in far higher than normal sales receipts on the day of observation. In fact, assuming that the availability of doubly expensive gourmet pizzas on the observation day resulted in double the usual amount of sales during the (preceding) audit months, might lead to an argument that observation day sales (\$807.53) should be reduced by half to \$403.77. Following the remaining audit calculations (*see*, Finding of Fact "6"), such reduced total (\$403.77) would be further reduced by average reported taxable sales per day (\$98.40), resulting in audited unreported taxable sales per day of \$305.37. However, not only is there no documentation of actual sales receipts during the audit period to support such a claim for reduction of the observation day sales receipts but, moreover, comparing such reduced total (\$305.37) to average reported taxable sales per day (\$98.40) nonetheless still results (continued...)"

ARGUMENTS ON EXCEPTION

Petitioner, on exception, argues that the determination of the Administrative Law Judge is in error, because:

- a) The Administrative Law Judge failed to find that the auditor testified that she never requested petitioner's books and records;
- b) The Administrative Law Judge failed to find that the auditor admitted to making false entries in the audit report;
- c) The Administrative Law Judge failed to find that petitioner maintained adequate records which were available for audit, but were not requested by the auditor;
- d) The observation test employed as the audit method in this case was not authorized under the circumstances and was not reasonably calculated to estimate petitioner's sales tax due;
- e) The Administrative Law Judge's determination omitted findings of fact which were crucial to petitioner's case;
- f) Petitioner's evidence of meteorological and road construction conditions should have been considered by the Administrative Law Judge;
- g) The Administrative Law Judge's determination disregards facts in the record and is arbitrary and capricious.

Petitioner complains that, notwithstanding the admitted absence of original records of sales, there nonetheless existed other records, including purchase invoices and bank statements, upon which another audit method could have been based. In this regard, petitioner asserts that

¹³(...continued)
in a substantial error (underreporting) rate of 310.33 percent" (Determination, conclusion of law "G").

these other records were available at the time of audit, but that the auditor did not request such records. Petitioner further argues that the auditor should not have met with petitioner's accountant, Mr. Smith, because the auditor did not obtain a power of attorney from petitioner authorizing Mr. Smith to be his representative.

OPINION

Contrary to petitioner's arguments, *supra*, the record shows that the auditor requested petitioner's books and records *in writing*. Further, we do not find evidence in the record to support petitioner's claim that the auditor admitted to making false entries in the audit papers. We reject petitioner's claim that the Administrative Law Judge ignored facts in the record crucial to the case. Unsworn statements by petitioner's attorney are merely hearsay and warrant little weight (*Matter Café Europa*, Tax Appeals Tribunal, July 13, 1989).

We agree with the Administrative Law Judge that a proper request for books and records was made to petitioner in this case. Petitioner directed the auditor to see his accountant, Mr. Smith. The auditor reviewed such books and records as were provided and concluded that they were inadequate for a detailed audit (*Matter of Adamides v. Chu, supra*). The fact that a power of attorney was never provided by petitioner is, in this case, irrelevant because the audit result is not based on conversations with Mr. Smith. The audit result is based on an observation test of petitioner's business. Petitioner opines that other, better audit methods were available and should have been used. However, where a petitioner, as here, has failed to maintain and produce for audit, adequate books and records, the Division can properly resort to an estimate of tax due (*Matter of Surface Line Operators Fraternal Org. v. Tully, supra*).

Petitioner also argues that the Administrative Law Judge should have taken into consideration such things as bad weather and road construction to reduce the amount of tax due. We do not find the evidence in this record sufficient to show that petitioner's sales were affected, up or down, by the weather or the road construction.

The burden of proof was on petitioner in this case to come forward with clear and convincing evidence that would have shown that the audit methodology was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu, supra*). Petitioner has failed to do either. We find petitioner's remaining arguments equally without merit.

The notice of determination issued to petitioner on November 5, 1998 duplicates the tax asserted for the same sales tax quarters covered by the notice issued on October 13, 1998, and the total amount of tax in dispute is \$60,260.00 plus penalty and interest.

We affirm the determination of the Administrative Law Judge for the reasons stated therein. After a thorough review of the record and the argument made thereon, we find that the Administrative Law Judge has completely and adequately addressed each of the arguments raised by the parties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Guiseppe LoGiudice a/k/a Joseph LoGiudice d/b/a Nino's Pizzeria of Patchogue is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Guiseppe LoGiudice a/k/a Joseph LoGiudice d/b/a Nino's Pizzeria of Patchogue is denied; and

4. The notice of determination dated October 13, 1998 issued to Joseph LoGiudice is sustained. The notice of determination dated November 5, 1998 issued to Guiseppe LoGiudice, although a duplicate assessment, is also sustained.

DATED: Troy, New York
November 28, 2001

/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