

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**SIMON ASTUTO** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NO. 817616  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period December 1, 1993 through :  
December 15, 1997. :

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Petitioner, Simon Astuto, 201 Gurley Avenue, Staten Island, New York 10308, filed a petition 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 December 1, 1993 through December 15, 1997.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 30, 2001 at 10:30 A.M., with all briefs to be submitted by August 7, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared by Craig A. Eaton, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel, at the hearing, and Michael P. McKinley, Esq., of counsel, on the brief,).

***ISSUES***

I. Whether the audit method employed by the Division of Taxation in its audit of Grotto D'Oro Bay Corp. was reasonable or whether petitioner has shown error in either the audit method or result.

II. Whether petitioner is liable for the sales and use taxes due from Grotto D'Oro Bay Corp. as a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

III. Whether petitioner's due process rights were violated by the fact that the instant matter was not consolidated with *Matter of Grotto D'Oro Bay Corp.* (Division of Tax Appeals, November 8, 2001).

### ***FINDINGS OF FACT***

1. On October 29, 1998, following an audit, the Division of Taxation ("Division") issued to petitioner, Simon Astuto, a Notice of Determination which assessed \$334,328.00 in additional sales and use taxes due, plus penalty and interest, for the period December 1, 1993 through December 15, 1997. The notice informed petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Grotto D'Oro Bay Corp. ("the corporation") and therefore personally liable for the sales and use taxes due from that corporation.

2. Pursuant to a Bureau of Conciliation and Mediation Services Conciliation Order dated December 17, 1999, the Division modified the subject Notice of Determination by recomputing the tax due to \$160,301.86, plus penalty and interest, for the period September 1, 1995 through December 15, 1997. The conciliation order thus canceled tax asserted in the notice for the period December 1, 1993 through August 31, 1995.

3. The corporation owned and operated a restaurant known as the "Grotto D'Oro Bay" located at 3206 Emmons Avenue, Brooklyn, New York. Under the terms of a Sale Agreement made August 21, 1995, petitioner and one Nick Aurilia purchased the shares of the corporation

owned by brothers Bettino Faga and Thomas Faga. Such shares amounted to two-thirds of the issued and outstanding stock of the corporation.

4. The remaining one-third of the shares of the corporation were owned by Joseph Faga, the nephew of Bettino and Thomas Faga. The restaurant had been in operation and owned by members of the Faga family for many years.

5. The Sale Agreement provided for a purchase price of \$466,667.00 for the purchase by petitioner and Nick Aurilia of two-thirds of the issued and outstanding shares of the corporation. Of this total, \$100,000.00 was payable in cash with the balance payable pursuant to the terms of a promissory note executed by the purchasers in favor of the sellers. The Sale Agreement also provided that the purchasers were taking title subject to the trade debt of the corporation and provided that \$60,000.00 of the purchase price was allocable to the trade debt. The purchasers personally guaranteed the promissory note. Additionally, petitioner was aware at the time of his purchase of shares of the corporation that it owed sales tax of approximately \$20,000.00.

6. Petitioner and Mr. Aurilia agreed to the purchase price for the corporation's stock following negotiations with the sellers. In agreeing to the purchase price, petitioner ascribed value to the fact that the restaurant had been in business for over 50 years. Although it had become run-down in recent years, petitioner believed that the restaurant, which had a seating capacity of over 200, had great potential. Petitioner intended to remodel the restaurant over time.

7. At the same time petitioner and Nick Aurilia purchased their shares in the corporation, i.e., August 21, 1995, they entered into a "Shareholders' Agreement" with the remaining shareholder, Joseph Faga. This agreement provided Joseph Faga with 50 percent voting power for purposes of votes of shareholders and votes of the board of directors. The Shareholders'

Agreement also valued the shareholders' good will at \$700,000.00 as of the date of the agreement.

8. As of September 1, 1995, petitioner acquired the shares of Mr. Aurilia and thus became the owner of two-thirds of the stock of the corporation.<sup>1</sup> The Shareholders' Agreement, which provided Mr. Faga with 50 percent voting power, remained in effect.

9. Petitioner had no experience in the restaurant business prior to his involvement with the corporation. He had been employed as a corrections officer by the City of New York for 14 ½ years.

10. Throughout the period of his involvement with the corporation, petitioner was vice-president and a director of the corporation. Joseph Faga was the president of the corporation.

11. Beginning on September 1, 1995, petitioner worked full time at the restaurant. He worked from 4:00 P.M. until closing six days per week and was responsible for the management of the restaurant. He supervised the restaurant's waiters, cooks and other staff. He ordered food and other supplies and paid suppliers. Petitioner handled reservations, booked parties and dealt with customers. He described himself as the restaurant's "heart and guts." In his own words, petitioner "ran the whole thing."

12. Petitioner did not have to answer to or obtain the approval of Joseph Faga regarding the day-to-day management of the restaurant.

13. Petitioner had authority to sign checks on behalf of the corporation. He signed checks to pay the restaurant's suppliers on a daily basis. He occasionally signed checks in payment of

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<sup>1</sup> I have accepted petitioner's unequivocal testimony that he acquired Mr. Aurilia's shares and thus became the owner of two-thirds of the corporate stock as of September 1, 1995. An "Agreement" dated "as of" September 1, 1995 which was entered into the record provides for the sale of Mr. Aurilia's shares back to the corporation.

the corporation's taxes. Petitioner signed a corporate check dated November 20, 1996, which was remitted in connection with the corporation's sales tax return for the period ended October 31, 1996.

14. Petitioner also had authority to sign tax returns on behalf of the corporation and testified that he "probably" signed such returns.

15. Joseph Faga opened the restaurant at 9:00 A.M. each day and worked until 4:00 P.M. During that period of time Mr. Faga managed the restaurant.

16. Petitioner was not involved in the corporation's record keeping, bookkeeping or tax return preparation. When he purchased his interest in the corporation petitioner agreed to continue the bookkeeping and accounting procedures which had been employed under the prior owners. Specifically, Joseph Faga counted the daily receipts and expenditures and recorded such amounts in a daily ledger. Mr. Faga brought the daily receipts to his wife, who was the corporation's bookkeeper. In turn, the bookkeeper dealt with the corporation's accountant, who was responsible for the filing of tax returns. At the time petitioner became an owner, the corporation continued to use the accountant who had provided it accounting services under the previous ownership. This individual was in possession of certain unspecified corporate records from the period prior to September 1, 1995.

17. Other than collecting the daily receipts and placing them in a safe for Mr. Faga's review the following day, petitioner had no involvement in the corporation's record keeping procedures. Petitioner did not count the receipts. Petitioner cited a lack of knowledge and experience in record keeping, bookkeeping and tax matters as the reason for his lack of involvement in these areas of the business.

18. A fire occurred at the restaurant on January 5, 1996. According to a New York Fire Department "Report- Structural Fire" the fire was in a "grease duct in kitchen with extension to roof area." The report further indicates that the fire was confined and extinguished. The restaurant was closed for a period of time following this fire while repairs were made.

19. The corporation reported taxable sales of \$85,287.00 for the quarter ended February 29, 1996; \$96,099.00 for the quarter ended May 31, 1996; and \$87,620.00 for the quarter ended August 31, 1996.

20. From the beginning, petitioner and Joseph Faga argued over how the restaurant should be run. Petitioner believed that Mr. Faga did not want him involved at all in the restaurant. Additionally, in the early part of 1996, petitioner became concerned about Mr. Faga's mental stability and began to question his competence regarding his record keeping and bookkeeping function. Petitioner decided to try to work with Mr. Faga and did not attempt to change the existing arrangement with respect to the corporation's bookkeeping and record keeping practices. Petitioner thus remained uninvolved in this area of the corporation's business.

21. In or about July 1997, petitioner, having concluded that Mr. Faga was not competent, took the record keeping and bookkeeping responsibilities away from him. Mr. Faga became upset, left the restaurant and did not return. From that point on, petitioner was solely responsible for all aspects of the management of the restaurant.

22. A fire occurred on the roof of the building next to the restaurant on July 5, 1996. Damage to the restaurant from this fire was minimal and the restaurant reopened a day or two later.

23. The audit of the corporation began with a letter from the Division to the corporation dated October 15, 1996. By this letter the Division requested that the corporation make its books

and records for the period December 1, 1993 through August 31, 1996 available for review. The Division also scheduled a date to begin its review of the corporation's records.

24. In October or November 1996, petitioner became aware of the audit of the corporation through discussions with Joseph Faga. Petitioner then hired Anthony Compasto, an accountant, to obtain records from the corporation's previous accountant in order to try to resolve the situation with the Division. Petitioner signed a power of attorney dated May 19, 1997 appointing Mr. Compasto to represent the corporation in connection with the sales tax audit.

25. In November 1996 Mr. Compasto sought to delay the start of the audit. He advised the Division's auditor that the corporation was attempting to obtain the corporation's books and records from its prior accountant. Again in May 1997 Mr. Compasto advised the Division (on two occasions) that the corporation's books and records were in the possession of the prior accountant and he canceled an appointment made by the Division to begin the audit.

26. The Division referenced the corporation's request to delay the audit in a letter to Mr. Compasto dated August 12, 1997 in which the Division requested that the corporation sign and return certain waiver forms.

27. By letter dated September 30, 1997, the Division noted its previous request for books and records and advised Mr. Compasto that it would resort to external indices to complete the audit if such books and records were not produced.

28. The Division again requested that the corporation produce books and records by letter dated March 16, 1998. This letter requested such records for an expanded audit period of December 1, 1993 through December 15, 1997 and scheduled an appointment on April 9, 1998 to begin the audit.

29. The record also contains a Division letter dated January 28, 1998 which noted that the corporation's representative failed to appear at an audit appointment on October 21, 1997 and that such appointment was rescheduled for February 17, 1998.

30. On January 16, 1997, petitioner, as vice-president of the corporation, executed a consent extending the period of limitations for the assessment of sales tax against the corporation. Mr. Compasto executed two other consents on behalf of the corporation dated May 7, 1997 and September 1, 1997 extending the limitations period for the assessment of tax.

31. Petitioner's involvement with the corporation ended on December 15, 1997 when Thomas and Bettina Faga foreclosed as a result of a default by petitioner on the promissory note payments.

32. Petitioner never received any salary from the corporation. Similarly, petitioner never received any profits from the corporation, as the corporation earned no profits during the period at issue.

33. The corporation failed to provide any records in response to the many Division requests and the Division did resort to an indirect or estimated method in its audit. Specifically, the Division determined the corporation's sales tax liability by use of a ratio of annual sales to total assets contained in the 1996 Robert Morris Annual Statement Studies. The Division determined the corporation's total assets using the \$466,667.00 price for the sale of two-thirds of the corporation's stock as set forth in the August 21, 1995 Sales Agreement (*see*, Finding of Fact "3"). Based on this value for two-thirds of the corporate stock, the Division calculated a value of \$700,070.00 for one hundred percent of the corporate stock ( $\$466,667.00 \div .6666$ ). The Division then multiplied this total assets amount by a factor of 2.1 to reach audited annual sales of \$1,470,147.00. The Division divided this annual amount by four to reach audited quarterly



sales of \$367,537.00. The Division then subtracted quarterly sales as reported on the corporation's sales tax returns from audited quarterly sales to arrive at additional sales per quarter. The Division then multiplied additional sales per quarter by the prevailing sales tax rate to arrive at additional tax due as set forth in the statutory notice herein.

34. Robert Morris Associates Statement Studies are compilations of information from financial statements of numerous companies. The information is organized by the companies' type of business using their primary product Standard Industrial Classification (SIC) number. In this case, the Division used information listed under SIC number 5812 (designated in the study as "Retailers - Restaurants"). The Robert Morris Statement Studies contain common size balance sheets and income statements which are used to compute a series of ratios grouped into five principal categories: liquidity, coverage, leverage, operating and expense to sales ratios. The study provides three figures for any given ratio: the upper quartile, median and lower quartile. In this case the 2.1 ratio used by the Division in its audit is the lower quartile sales to total assets ratio figure listed in a column headed "Comparative Historical Data" which contains ratios derived from all companies under the 5812 SIC code that reported to the study for the period April 1, 1991 through March 31, 1992.

35. The record contains the pages of the 1996 Robert Morris Annual Statement Studies which contain various ratios related to restaurants. Included among such ratios is the 2.1 sales-to-assets ratio used by the Division in its audit. The record also contains the cover and table of contents of the Robert Morris study, information about the Robert Morris organization and explanations of the source of the data and the ratios used in the study as noted in Finding of Fact "34."

36. The Division also issued a Notice of Determination to the corporation following the audit described herein. The corporation filed a petition with the Division of Tax Appeals in protest of that notice. Following a hearing on January 17, 2001, an administrative law judge determination was issued on November 8, 2001 (*Matter of Grotto D'Oro Bay Corp.*, Division of Tax Appeals, November 8, 2001).

### **CONCLUSIONS OF LAW**

#### ***Issue I***

A. When conducting an audit, Tax Law § 1138(a)(1) requires the Division to determine tax due from the information that is available. It is well established that if records are available from which the exact amount of tax due can be determined, then resort by the Division to estimation procedures is arbitrary and capricious and lacks a rational basis (*see, Matter of Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75; *Matter of Korba v. State Tax Commn.*, 84 AD2d 655, 444 NYS2d 312, *lv denied* 56 NY2d 502, 450 NYS2d 1023). However, when records are not available or sufficient, the use of external indices is permissible so long as the audit method is reasonably calculated to reflect the taxes due (*see, Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348, 478 NYS2d 91, 93). Under such circumstances, the Division is not required to compute the amount due with exactness (*see, Matter of Convissar v. State Tax Commn.*, 69 AD2d 929, 415 NYS2d 305) and the burden rests with the taxpayer to show by clear and convincing evidence that the audit method was unreasonable or that the amount assessed was erroneous (*see, Matter of Shukry v. Tax Appeals Tribunal*, 184 AD2d 874, 585 NYS2d 531, *Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679).

B. In this case, despite several clear and unequivocal requests, the corporation failed to make any records available for audit. Accordingly, the Division's use of an external index, that is, the Robert Morris sales-to-asset ratio, was reasonable (*see, e.g., Matter of Shukry v. Tax Appeals Tribunal, supra; Matter of 24 Hour Grocery & Candy*, Tax Appeals Tribunal, June 27, 1991; *Matter of MNS Cards & Gifts*, Tax Appeals Tribunal, May 7, 1992).

C. Where the Division uses such a methodology the record must contain information identifying the external index used by the Division in order to establish a rational basis for the audit method (*see, Matter of Fokos Lounge*, Tax Appeals Tribunal, March 7, 1991). The purpose of this requirement is to provide petitioner with access to the source of the external index used and therefore with the opportunity to challenge the soundness or applicability of the index (*see, Matter of Bitable on Broadway*, Tax Appeals Tribunal, January 23, 1992). The chart or table which contains the index together with information that adequately identifies the source of the index is sufficient to meet this requirement (*see, Matter of Framapac Delicatessen*, Tax Appeals Tribunal, July 15, 1993).

D. Here, the record contains the pages of the 1996 Robert Morris Annual Statement Studies which contain various ratios related to restaurants. Included among such ratios is the 2.1 sales-to-assets ratio used by the Division in its audit (*see*, Finding of Fact "34"). The record also contains the cover and table of contents of the Robert Morris study, information about the Robert Morris organization and explanations of the source of the data and the ratios used in the study (*see*, Finding of Fact "35"). The Division has thus adequately identified the source of the external index used on the audit herein under the standards set forth in the decisions of the Tax Appeals Tribunal cited above.

E. Petitioner has failed to meet his burden to show error in the audit method or result. Petitioner contends that the audit was flawed because the purchase price he paid in 1995 for his interest in the restaurant was inflated and did not accurately reflect the value of the restaurant. According to petitioner, the application of this inflated and inaccurate price resulted in an inflated total assets figure and, in turn, an erroneous and excessive sales tax assessment. The record shows, however, that petitioner freely agreed to the purchase price for his interest in the restaurant following negotiations with the sellers. Moreover, the Shareholders' Agreement also referenced \$700,000.00 as the value of the shareholders' good will. Petitioner offered no evidence to support his self-serving and unconvincing testimony that he had grossly overpaid for his interest in the corporation. While petitioner referred, in his testimony, to an appraisal which was performed before his stock purchase, no such appraisal was offered in evidence. Under such circumstances, the Division's use of \$700,070.00 as the value of the corporation's assets was reasonable.

F. At hearing, petitioner also contended that the restaurant was closed for four months following the fire on January 5, 1996. If proven, such a fact would indicate an error in the audit result and would warrant an adjustment. Petitioner, however, has failed to establish this contention. Petitioner offered no documentation to show that extensive renovation occurred at the restaurant during this period as claimed and the structural fire report submitted in the record provides limited information as to the extent of damage to the restaurant. Further, the corporation's reported sales for the periods ended February 29, 1996 and May 31, 1996 are not indicative of four months of inactivity from January through April 1996 (*see*, Finding of Fact "19"). Petitioner has thus failed to show that any adjustment is justified.

G. Petitioner also contended that another audit method, such as an observation test, could have been employed and that such other method would have yielded a more accurate result. However, the Division is not limited or otherwise required to use a particular indirect audit method but instead is only required, in the face of inadequate, unreliable or unavailable records, to employ a reasonable method. (*see, Matter of Shukry v. Tax Appeals Tribunal, supra*). Here, the corporation failed to provide any records despite several requests. As noted previously, where a taxpayer's own failure to maintain adequate and accurate records results in resort to external indices, accuracy is not a prerequisite to issuance of an assessment (*see, Matter of Convissar v. State Tax Commn., supra*) and any inaccuracy resulting therefrom weighs against petitioner (*see, Matter of Meskouris Brothers, Inc. v. Chu, supra*). Accordingly, petitioner's general assertion that the index used was not appropriate and that more accurate audit methodologies could have been employed is both unpersuasive and unsupported on the facts of this case.

## ***Issue II***

H. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]). Contrary to statements contained in petitioner's brief, petitioner bears the burden of proof on this issue (*see, 20 NYCRR 3000.15[d][5]*).

I. The holding of corporate office does not automatically impose tax liability upon an office holder (*Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427*). Rather, the resolution of

whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacy v. State*, 82 Misc 2d 181, 368 NYS2d 448). The Commissioner's regulations examine whether the person is authorized to sign the corporation's tax returns, is in charge of maintaining corporate records, or is responsible for managing the corporation (20 NYCRR 526.11[b][2]). In *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), the Tax Appeals Tribunal stated :

The 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*).

J. The facts in this case indicate that petitioner was a responsible officer of the corporation. He was an officer (vice-president) and director of the corporation, owned two-thirds of its stock and had 50 percent of the voting power. With respect to the operation of the restaurant, petitioner testified that he "ran the whole thing." He managed the restaurant and supervised the employees. He ordered supplies for the restaurant and paid suppliers. He was authorized to sign checks for the corporation and regularly signed such checks in payment of suppliers. He occasionally signed checks in payment of the corporation's taxes. He signed a check in payment of sales tax. Although he did not receive a salary, he worked at the restaurant six days a week. He was authorized to sign (and may have signed) tax returns. When he became aware of the Division's audit of the restaurant he hired an accountant to represent the corporation. He also signed a power of attorney appointing Mr. Compasto as the corporation's

representative and signed a consent extending the period of limitations for assessment against the corporation. These facts stand in contrast to petitioner's contention that, while he was "technically" a director, officer and shareholder of the corporation, he was, in reality, a "figurehead," powerless to take any action or make any financial decision. To the contrary, the foregoing facts indicate that petitioner had broad authority with respect to the management of the corporation and thus indicate responsible officer status.

K. Petitioner contends that he was not a responsible officer because he did not have access to the corporation's books and records. The record does not support this contention. Rather, the record shows that petitioner consented to an arrangement whereby Mr. Faga and Mr. Faga's wife handled the corporation's records and bookkeeping. Notwithstanding this division of responsibilities, petitioner had access to the corporation's purchase invoices since he made purchases and paid suppliers. He also had access to the daily ledger that Mr. Faga maintained and to the receipts each night. The record further shows that although he became concerned about Mr. Faga's competence in early 1996 and was aware of the sales tax audit in the fall of 1996, petitioner did not take the record keeping function away from Mr. Faga until July 1997. It is noteworthy that petitioner testified that he "took the receipts" from Mr. Faga, thus indicating that petitioner exercised his authority in relieving Mr. Faga of this responsibility. Additionally, the record does not indicate that petitioner was misled or deceived by Mr. Faga (*cf.*, *Matter of Russack*, Tax Appeals Tribunal, February 8, 1996). Indeed, petitioner testified that "there was never a problem with stealing." To the contrary, petitioner was aware of the corporation's tax problems, was concerned about Mr. Faga's competence, but failed to take decisive action until July 1997. The record thus shows that petitioner had broad authority over the affairs of the corporation and that he was aware of the corporation's tax problems, but that he failed to

exercise his authority. Such failure does not excuse petitioner from responsibility (*see, Matter of LaPenna*, Tax Appeals Tribunal, March 14, 1991).

L. Petitioner conceded that he had access to the corporation's records until September or October 1996. According to petitioner's testimony, at that point, as a result of ongoing disagreements over the restaurant, Mr. Faga refused petitioner access to the records. This testimony was unconvincing, however, and I do not accept it as fact herein. Petitioner's testimony on this significant point was vague and nonspecific. Moreover, I found certain portions of petitioner's testimony to be inconsistent and therefore lacking in credibility. Specifically, regarding the location of the corporation's records, petitioner emphatically testified that the corporation's records were kept at Mr. Faga's home. On cross-examination, when confronted with the apparent inconsistency between such testimony and petitioner's testimony that records were destroyed in the January 1996 fire, petitioner claimed, for the first time, that the records had been moved from the Faga home to the restaurant some time before the fire. Accordingly, absent corroboration, petitioner's testimony is insufficient to prove his claim that he was denied access to records.

M. Petitioner points to the problems in obtaining the corporation's pre-September 1, 1995 records from the prior accountant in support of his position that he was unable to take control of the situation and therefore not a responsible officer of the corporation. However, pre-September 1, 1995 periods are not at issue in this proceeding. Accordingly, the facts and circumstances surrounding the question of petitioner's access to pre-September 1, 1995 provides little support to petitioner's position herein. Moreover, there is no testimony or other evidence identifying the records purportedly in the prior accountant's possession. It is therefore unclear what relevance such documents would have had to the audit.



N. Petitioner also contended that the January 6, 1995 fire destroyed records of the corporation and therefore prevented him from taking control of the tax situation. Regarding this contention, as discussed previously herein, the extent of damage to the restaurant from the fire is unclear. Also, the record does not establish what records, if any, were on the premises at the time of the fire. Furthermore, there is no evidence in the record to show that the corporation ever maintained records of individual sales, such as guest checks or cash register tapes, as required under the Tax Law (*see*, Tax Law § 1135[a][1]).

O. In sum, petitioner has failed to meet his burden to show that he did not have, or could not have exercised, sufficient authority and control over corporate affairs such that he should not be considered a responsible officer (*see, Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1997).

### ***Issue III***

P. Petitioner asserts that the instant matter and *Matter of Grotto D'Oro Bay Corp.* (Division of Tax Appeals, November 8, 2001) should have been consolidated and that the failure to consolidate deprived petitioner of his due process rights. Petitioner also contends that the Division had pre-September 1, 1995 records of the corporation available to it in connection with *Matter of Grotto D'Oro Bay Corp.* and that petitioner could have used these documents in his defense in the instant matter. Petitioner also asserts that the Division could have reviewed documents provided by Joseph Faga and the corporation in connection with *Matter of Grotto D'Oro Bay Corp.* and that petitioner could have used such documents in his defense herein. Finally, petitioner asserts that the Division failed to review sales tax returns filed by the corporation in the instant matter.

These contentions are without merit. There is no evidence in the record to suggest that Joseph Faga or anyone else associated with the corporation provided any documents to the Division in connection with the audit of the corporation. In fact, the record shows that no such documents were provided. Further, contrary to petitioner's contention, the record in this matter clearly shows that the Division did review the corporation's sales tax returns for the audit period (*see*, Finding of Fact "33"). Finally, even accepting petitioner's dubious factual allegations, petitioner has no due process claim because petitioner had the opportunity to issue subpoenas to require the attendance of witnesses or the production of documents in this matter, but did not do so (*see*, Tax Appeals Tribunal Rules of Practice and Procedure 3000.7 [20 NYCRR 3000.7]).

Q. Petitioner also claimed that the instant matter and *Matter of Grotto D'Oro Bay Corp.* should have been consolidated in order to afford him the opportunity to cross-examine Joseph Faga and to examine documents in Mr. Faga's possession. This contention, too, assumes a fact not in evidence, i.e., that Mr. Faga had documents. More significantly, this contention overlooks the fact that petitioner could have subpoenaed Mr. Faga to appear at the hearing in the instant matter but chose not to. Petitioner's due process claim is thus properly rejected.

R. Petitioner also erroneously claimed that the other proceeding relieved Mr. Faga of liability for sales taxes owed by the corporation. The administrative law judge determination in *Matter of Grotto D'Oro Bay Corp.* addressed jurisdictional issues related to the corporation's petition and did not address the issue of Mr. Faga's responsibility.

S. The petition of Simon Astuto is in all respects denied and the Notice of Determination dated October 29, 1998, as modified by the Conciliation Order dated December 17, 1999, is sustained.

DATED: Troy, New York  
January 10, 2002

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE