

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**RUBEN MARTE** : DETERMINATION  
**D/B/A MARTE GROCERY** : DTA NO. 818999  
: :  
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, 1998 through May 31, 2000. :  
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Petitioner, Ruben Marte d/b/a Marte Grocery, 48 Pocantico Street, Sleepy Hollow, New York 10591, 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 September 1, 1998 through May 31, 2000.

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 8, 2003 at 10:45 A.M. and continued to conclusion on January 9, 2003 at 10:45 A.M. with all briefs to be submitted by May 27, 2003, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Gopaljee Jaiswal, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

***ISSUES***

I. Whether petitioner has proven error in the Division of Taxation's audit method or result where such method consisted of an observation of the sales of Marte Grocery.

II. Whether penalties should be canceled.

***FINDINGS OF FACT***

1. Petitioner, Ruben Marte, purchased Marte Grocery, which was known as Coleman's Grocery, in 1998. During the period in issue, Marte Grocery was a bodega style convenience store which was located at 107 Bethune Boulevard, Spring Valley, New York. Among other things, the store sold rice, beans, canned goods, milk, pet food, vegetables, fruit, paper products, cigars and cigarettes, beer, soda and cold cuts. The business lost money, and in 2000 the store was closed. Mr. Marte sold Marte Grocery on July 29, 2001.

2. On or about July 26, 2000, the Division of Taxation ("Division") commenced a field audit of the Marte Grocery. On this date, the auditor, Mr. Richard Wessels, sent a letter to petitioner at 107 Bethune Blvd., Spring Valley, New York stating, in part, that his tax records have been scheduled for a field audit on August 16, 2000 at 9:30 A.M. The letter requested that petitioner make available all of his books and records pertaining to his sales tax liability for the period under audit including "financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns, federal income tax returns, and exemption certificates." There was no response to this letter.

3. On August 16, 2000, the auditor sent a second audit appointment letter to petitioner which scheduled an audit on September 5, 2000 at 9:30 A.M. This letter was addressed to petitioner at 43 Bethune Blvd., Spring Valley, New York, because this was the address listed in a telephone book. John Barr, who was an investigator with the Division, personally delivered the letter.

4. On August 23, 2000, Mr. Wessels received a telephone call from Mr. Marte acknowledging that he had received the appointment letter. Mr. Marte confirmed the audit appointment, which was scheduled to be held on September 5, 2000 at the store, and indicated

that he would return the questionnaires which had been sent to him. Nevertheless, when Mr. Wessels went to the store, Mr. Marte did not appear for the meeting.

5. On September 14, 2000, the auditor mailed a third letter which scheduled an audit appointment on October 12, 2000. However, Mr. Marte did not appear for the meeting.

6. At this juncture, Mr. Wessels concluded that Mr. Marte was not going to be cooperative on the audit. Therefore, he asked investigators for the Division to perform an observation test at the store in order to obtain an estimate of the amount of taxable and nontaxable sales.

7. On September 26, 2000, an observation test was conducted on Marte Grocery by Investigators John Barr and Ricardo Cruz. Initially, Investigator Barr made a point of arriving before the store opened so that he could see when the store opened. At 9:45 A.M., an employee opened Marte Grocery. The employee apologized for being late that morning and said that he had been detained by public transportation. The employee also stated that the normal hours of operation were 9:30 A.M. to 12:00 A.M. Investigator Barr did not confirm the store hours with Mr. Marte.

8. Investigator Barr noted that the cash register was located behind the counter and that the employee was usually located near the cash register. However, he would occasionally step away. From the time the store opened, Investigator Barr noted the sale of each taxable item with a tick mark on a tally sheet.

9. Investigator Barr remained near the cash register until 5:00 P.M. without a break for lunch or the use of the bathroom. Thereafter, the observation test was continued by Investigator Richard Cruz. When Investigator Barr was finished with his portion of the observation test, Mr. Marte was not present and the tally sheet was not shown to him because he did not ask to see it.

10. Investigator Barr did not observe sales tax being collected during the observation test. Nor did he see the person behind the cash register maintain a record of what was being sold or run a cash register tape.

11. Investigator Barr did not count the number of customers. Nor did he take an inventory or ask to examine purchase invoices. Investigator Barr did not regard any of these matters as pertinent to his observation. In addition, Investigator Barr did not ask to examine cash register tapes because he was not interested in the level of sales on prior occasions.

12. At 5:00 P.M., Investigator Cruz took over the observation test from Investigator Barr. Investigator Cruz continued keeping track of the taxable sales on the same tally sheet which was started by Investigator Barr. Investigator Cruz stood behind the counter a little to the right of the cash register while sales were taking place. As Investigator Barr had done, Investigator Cruz would note the taxable items being sold. The nontaxable sales were grouped together because they were not in issue on this audit.

13. Investigator Cruz had to depend on the clerk to tell him the price of the items which were sold. While the observation was in progress, Investigator Cruz also confirmed with the employee the hours of the store's operation.

14. If a customer bought multiple items, Investigator Cruz would note the items sold on a scrap of paper. When the clerk was finished with the customer, Investigator Cruz would ask the clerk for the price of each item. The maximum number of items bought at a particular time was three.

15. It was Investigator Cruz's impression that cigars were the best-selling item. A customer would purchase from one to three cigars.

16. The Division authorizes investigators to conclude an observation test whenever it would be unsafe to proceed. Investigator Cruz concluded the observation test at 8:00 P.M. because someone was tampering with his vehicle. At the time he left, the store was still open and operating.

17. Investigator Cruz did not see any sales being rung up on the cash register. However, he observed the clerk making change from the cash register. Investigator Cruz did not see any vendors being paid from the cash register, nor did he count the amount of cash in the cash register.

18. Petitioner was cooperative during the observation, and Mr. Marte did not cause any difficulty for Investigator Cruz in performing the audit.

19. The tally sheet did not identify that it pertained to Mr. Marte's business or who prepared it. However, at the hearing Investigator Barr was certain that he could identify the tally sheet that was used during the audit of Mr. Marte's business. Further, there was no chance that the tally sheet for the audit of Marte Grocery could be mixed up with another tally sheet because the investigators only perform one observation at a time. In this case, Investigator Cruz handed the tally sheet back to Investigator Barr and he, in turn, turned it over to the auditor, Richard Wessels.

20. After the observation test, Mr. Wessels requested that Investigator Barr prepare a memo stating whether he noticed anything unusual during the audit. Investigator Barr responded in a memo that the cash register was left open a lot of the time. After the observation test was completed, the auditor reviewed the results with Investigator Barr to make sure he understood what was recorded.

21. In order to take into account the fact that Investigator Cruz left the store at 8:00 P.M., the results of the observation test were extended by mathematical extrapolation until midnight. Taxable sales for the one day were determined to be \$757.82 and nontaxable sales were determined to be \$100.73, for total sales of \$858.55. The taxable and nontaxable sales were each multiplied by seven to get weekly sales. The weekly total was then multiplied by 13 to get a quarterly total. The auditor next prepared a schedule comparing the amount found on audit with the amount that the taxpayer had reported. The difference in the taxable amount was multiplied by the appropriate tax rate to determine the additional tax due. A penalty for failure to pay tax was assessed. An omnibus penalty was assessed also assessed because the amount found due on the audit exceeded the amount reported by 25 percent. When he prepared the assessments, the auditor did not deduct sales tax from the amount of sales because the investigators did not see any sales tax being charged and there was no record kept of sales tax being collected.

22. When the computations were complete, the auditor prepared a Statement of Proposed Audit Change for Sales and Use Tax which was sent to Mr. Marte along with the work papers. According to the statement, tax was due in the amount of \$33,202.54 plus interest in the amount of \$5,550.37 and penalty in the amount of \$11,403.18 for a balance due of \$50,156.09. In response, petitioner indicated his disagreement with the amount of tax asserted to be due and requested a conference.

23. On April 23, 2001, a courtesy conference was conducted with the Division. Mr. Marte was accompanied by Victor Cannistra, CPA. At the conference, Mr. Marte offered a notebook containing entries, but no other supporting data. Mr. Marte stated that the book was a record of sales. The notebook was written in ink and appeared to be brand new. The pages had hardly been used and the book was not broken in. No corroborating documentation was offered

in connection with the amount of sales. The Division did not regard the notebook as a basis for an adjustment to the proposed assessment.

24. At the courtesy conference, Mr. Cannistra expressed his opinion that the actual sales were lower than was found during the observation test. He also disagreed with extrapolating the results of the observation test for the period of 8:00 P.M. until midnight. Mr. Cannistra did not object that the observation was done on a particular day of the week. However, he did raise an objection that he was not advised in advance when the observation would take place. Mr. Cannistra felt that the fairest way of resolving the difference of opinion between the parties was to conduct a second observation test. Therefore, he requested that a second observation test be conducted when he could be present. In furtherance of this request, Mr. Cannistra explained that he would only need a couple of days notice to clear his calendar for the new observation test. Despite the fact that each of the investigators observed the store selling beer and also observed Mr. Marte rearranging the beer inventory, Mr. Marte maintained at the conference that he did not sell beer or cigarettes.

25. The Division decided not to conduct a second observation test because it feared that it would not include beer sales, and consequently, not lend itself to an accurate result. The Division also declined a related request to conduct a second observation test but use the beer sales from the first test to determine total sales. The Division did not regard Mr. Cannistra's conditions that he be notified in advance of when the observation test would occur or that he be present to observe the observation test as acceptable. Further, the Division did not feel that there was a need to conduct a new test. As a result, the courtesy conference did not resolve the differences between the parties.

26. The Division issued a Notice of Determination, dated March 13, 2001, which assessed a deficiency of sales and use tax, for the period September 1, 1998 through May 31, 2000, in the amount of \$33,202.54 plus interest in the amount of \$6,257.36 and penalty in the amount of \$11,639.03 for a balance due of \$51,098.93. The notice explained that since petitioner did not submit adequate records to prove his liability, the tax due was based on available records and information.

27. Mr. Marte or an employee used a calculator when the cost of items in his store had to be added together. Petitioner kept the calculator tapes in order to obtain the amount of receipts from sales. The tapes do not show the date of the transaction or what item or items were sold. According to Mr. Marte, if one item was sold it was recorded in a notebook but if multiple items were sold, the sale was kept on tape. The notebook was not offered into evidence at the hearing.

28. Mail addressed to the grocery store was received by the individual who handled the morning shift. Mr. Marte never bothered checking the mail.

29. Deliveries to the store were paid for in cash from receipts from the previous day.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

30. At the hearing, Mr. Marte stated that he never received any of the letters from the Division requesting an opportunity to review the books and records of Marte Grocery. Further, Mr. Marte maintained that on September 26, 2000 he was in the store at 4:00 P.M. and spoke to Investigator Barr. At the time, Mr. Marte thought that Investigator Barr was concerned with food stamps.

31. Mr. Marte asserted that Investigator Cruz did not spend a lot of time in the store. Rather, he loitered outside of the store and left at 8:00 P.M. with one of Mr. Marte's employees.



According to Mr. Marte, Investigator Cruz was lying when he said that he was present for the entire three hours and that he left at 8:00 P.M. because his car was tampered with. Investigator Cruz purportedly told Mr. Marte that he was leaving because there was little business taking place and did not mention anything about someone tampering with his car. Mr. Marte maintained that Investigator Cruz said that Mr. Marte had nothing to worry about because the total sales for the day were only a couple of hundred dollars.

32. According to Mr. Marte, the store opened at 10:00 A.M. and closed at 10:00 P.M. on Mondays through Thursdays. On Fridays and Saturdays, the store opened at 10:00 A.M. and closed at midnight. On Sundays, the store allegedly opened at 10:00 A.M. and closed between 6:00 P.M. and 7:00 P.M.

33. Mr. Marte maintained that his nontaxable sales were greater than his taxable sales and that the store did not sell cigarettes for \$3.80 or incense for \$1.00. He also contended that he did not sell a brand of cigar for \$3.75, noting that the store was located in a low income area.

34. Mr. Marte explained at the hearing that his cash register broke in 1998 and money was not available to replace it. Consequently, he allegedly used a notebook to record the total sales for the day.

35. Petitioner submits that the Division did not agree to a second observation test because it knew that the sales would be lower. Petitioner also claimed that the Division did not want to be bothered with conducting a second test.

36. Mr. Marte asserted that sales tax was included in the price of the item charged and reported on the quarterly sales and use tax returns. In this regard, Mr. Marte contended that he had a sign which said "Tax included in price."

37. Mr. Marte alleged that he did not sell beer for a period of time because he had difficulty paying suppliers. Mr. Marte lost his beer license in 2001 but he did not recall at the hearing if it was before or after the courtesy conference. Invoices for the purchase of beer were presented at the hearing. However, no records were presented to show that the invoices were complete or accurate. Mr. Marte posits that he did not state at the courtesy conference that he did not sell beer or cigarettes. Petitioner also offered a package of loose undated calculator tapes in order to show that his sales were less than \$700.00 a day. The tapes were not in any ascertainable sequence and did not list the items sold. Petitioner also presented a letter from the clerk who worked at the store which stated, among other things, that sales on the day of the observation were \$250.00

38. Mr. Marte contended that the tally sheet presented at the hearing was not the sheet used for the observation of Marte Grocery.

39. In its brief, the Division argues that petitioner failed to produce books and records upon request; that the audit method employed was reasonable; that the evidence presented by petitioner was insufficient to meet his burden of proof; and, that petitioner has not established reasonable cause for the abatement of the penalty.

#### ***CONCLUSIONS OF LAW***

A. It is well established that every person required to collect tax must maintain and make available for audit 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's estimating tax due (Tax Law § 1138[a]; *see, Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348, 478 NYS2d 91, 93; *Matter of Surface Line Operators Fraternal Org. v. Tully*,

85 AD2d 858, 446 NYS2d 451, 452). 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 insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit (*Matter of King Crab Rest. v. State Tax Commn.*, 134 AD2d 51, 522 NYS2d 978).

When a taxpayer's records are inadequate, the Division may select an audit method reasonably calculated to reflect the sales and use taxes due (Tax Law § 1138[a][1]; *see, Matter of Grant v. Joseph*, 2 NY2d 196, 206, 159 NYS2d 150, 157, *cert denied* 355 US 869). It is only necessary that sufficient evidence be produced to demonstrate that a rational basis existed for the auditor's calculations (*Matter of Grecian Square v. State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219). The burden is then placed upon petitioner to show, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully, supra*, 85 AD2d 858, 446 NYS2d 451).

B. At the outset, it is readily evident that there is sharp discrepancy between the testimony of the auditor and the two investigators, on the one hand, and the testimony of Mr. Marte, on the other hand. Many of the arguments raised by petitioner's counsel are premised upon the assertion that the testimony given by the auditor and the two investigators was false while the testimony of Mr. Marte was entirely truthful.

In order to accept petitioner's testimony on many key aspects of this audit, one would have to surmise that the auditor and the two investigators had engaged in an elaborate scheme from the outset of the audit, without any apparent gain, to have Mr. Marte found liable for a

substantial deficiency of taxes. One would have to further conclude that, Mr. Marte, who has an obvious financial stake in the outcome of this matter, was completely forthright. When viewed from this perspective, petitioner's position becomes highly implausible. Other aspects of Mr. Marte's testimony also render his version of events questionable. For example, Mr. Marte claimed that he never received any of the Division's requests for books and records yet it is clear from the Division's records that one of the requests was delivered in person. Also, Mr. Marte claimed at the courtesy conference that he kept a contemporaneous record of the store's sales in a notebook. The auditor rejected the notebook at the courtesy conference, however, because he felt that it had been created for the conference. Petitioner did not offer the notebook into evidence at the hearing. If, in fact, this were an accurate and contemporaneous recording of the store's sales, then the failure to offer such a highly probative record would be inexplicable. In sum, petitioner's position regarding credibility of his testimony vis-a-vis the auditor and the investigators is rejected.

C. Petitioner argues that the observation test was unreasonable because it was not conducted over a longer period of time. In support of this position, petitioner relies upon *Matter of Ace Provision & Luncheonette Supply v. Chu* (135 AD2d 1070, 523 NYS2d 208) and *Matter of W. T. Grant Co. v. Joseph (supra)*. As noted by the Division, the cases cited by petitioner do not support this argument. Rather, they simply hold that the audit method employed in those cases was reasonable. It is concluded that the audit method employed in this matter was reasonable because the law is now settled that it is reasonable to extrapolate the results of a one-day observation test over a multiple-year audit period (*see, Matter of Del's Mini Deli, Inc. v. Commissioner of Taxation and Finance*, 205 AD2d 989, 613 NYS2d 967; *Matter of Sarantopoulos v. Tax Appeals Tribunal*, 186 AD2d 878, 589 NYS2d 102).

D. Petitioner objects to the fact that the results of the observation test were extrapolated for the period 8:00 P.M. until the time the store closed. The record shows that the observation test was terminated at 8:00 P.M., which was before the store closed, because Inspector Cruz's car was being tampered with. Under the circumstances, this aspect of the audit methodology was reasonable (*Matter of Surface Line Operators Fraternal Org. v. Tully, supra*). Further, petitioner has not presented any evidence to show that this aspect of the audit was erroneous (*Matter of Sarantopoulos v. Tax Appeals Tribunal, supra*). It is noted that it was petitioner's failure to maintain proper records which made it necessary to estimate the amount of tax due (*Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, 78, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454).

E. Petitioner argues that the Division erred by not making an adjustment for inclusion of sales tax in the audited taxable receipts. The Regulations of the Commissioner at 20 NYCRR 532.1(b)(1) state, "[w]henever 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." Here, it is clear that petitioner did not provide cash register tapes to his customers which separately stated sales tax since the cash register was broken. The failure to separately state the sales tax charge renders the entire receipt presumptively taxable (*see, LaCascade, Inc. v. State Tax Commission*, 91 AD2d 784, 458 NYS2d 80; *Matter of S & K Smoke Shop, Inc.* Tax Appeals Tribunal, July 18, 1991).

20 NYCRR 532.1(b)(4) allows the absorption of tax where no written receipt is given to the customer. However, 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). Here, the only evidence presented that such a sign existed was the testimony of Mr. Marte. In contrast, Investigator Barr expressly stated that he did not observe sales tax being collected. Therefore, it is concluded that petitioner has not sustained his burden of proof of establishing that such a sign existed and, as a result, the Division correctly calculated petitioner's sales tax liability without making an adjustment for the inclusion of sales tax in the purchase price.

F. Petitioner contends that the tally sheet that was used to calculate the amount of tax due was unreliable because it did not have the date, name or address of the business. The tally sheet is also allegedly infirm because it did not have the Federal identification number or sales tax number at the top of the page.

This argument does not have any merit. There is no requirement that the tally sheet follow a prescribed format. Further, the reliability of the observation test is not dependent upon whether the investigators placed the date, name or address of the business on the tally sheet.

Petitioner further asserts that the Division "did not prove with clear and convincing evidence that it was the same tally sheet that was the result of the observation of September 26, 2000." This argument is also lacks merit. First, at the hearing, the investigators were able to identify the tally sheet in the audit file as the one which was developed during the audit of Marte Grocery. Further, the investigators explained that they only perform one observation test at a time and that, as soon as the observation test is completed, they present the tally sheet to the auditor. Therefore, there is no chance that the assessment was based on a tally sheet from an observation of a different business.

G. Petitioner maintains that Investigator Cruz's testimony was inconsistent because he stated that he stood by the cash register from 5:00 P.M. until 8:00 P.M. However, he also stated that his car alarm began ringing because someone lingering in front of the store was tampering with his vehicle. These statements are not inconsistent. Contrary to petitioner's assertion, Investigator Cruz did not say that he made repeated trips to his car while the observation test was in progress. It is noted that if he had made repeated trips to his car it would have been to Mr. Marte's benefit because it would have increased the possibility that some sales would have been overlooked, thereby lowering the assessment.

H. Petitioner contends that Investigator Cruz was negligent by not counting the cash in the cash register in order to verify his tally sheet and bring more evidence to the auditor. This argument is also fallacious. First, the investigators were present in order to record taxable sales. There was no requirement that they count the cash in the cash register. Second, unless the first investigator counted the amount of cash in the cash register when the store opened for business, there would have been no reason for Investigator Cruz to count the cash in the cash register at the end of the day because there would have been no way to verify whether the amount of cash that Investigator Cruz counted was from the sales of that day only.

I. Petitioner argues that the sales recorded during the observation test were not representative of the sales of the business. In support of this argument, petitioner first attempted to convert the number of items sold into a calculation of the number of customers who visited the store. According to this calculation, petitioner's representative interpreted the Division's tally sheet to mean that 344 customers visited the store and purchased merchandise during the period of the observation. Petitioner's representative further submits that the tally sheet must be in error because the store could not have sold 211 cigars over the course of a day. Petitioner's

representative notes that, according to the tally sheet, the sale of cigars amounted to approximately 28 percent of taxable sales.

The foregoing argument is flawed. The tally sheet developed by the investigators recorded taxable sales. The investigators did not keep track of the number of customers. Therefore, petitioner's attempt to convert the recording of items sold into a record of the number of customers who patronized the store is rejected. Further, petitioner's speculation regarding cigar sales does not outweigh the detailed record of actual sales which was kept by the investigators and does not constitute clear and convincing evidence that the amount of tax assessed was erroneous (*Matter of Meskouris Bros. v. Chu, supra*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully, supra*).

J. At the hearing, petitioner offered a package of loose undated calculator tapes in order to show that his sales were less than \$700.00 a day. The tapes were not in any ascertainable sequence and did not list the items sold. Under these circumstances, the tapes do not have any probative value with regard to the level of the store's taxable sales. It is noted that, in those instances where a customer purchased only one item, a calculator was not used, and therefore those sales would not be reflected on a calculator tape.

K. Petitioner also offered a letter from the clerk who worked at the store which stated, among other things, that sales on the day of the observation were \$250.00. This letter is also not entitled to any weight. As was the case with the level of cigar sales, there is no reason to think that an unsworn statement from a person who worked for petitioner and which lacks any documentary support would be more reliable than the detailed observations of two investigators who carefully observed the store's operation (*see, Mobley v. Tax Appeals Tribunal*, 177 AD2d 797, 576 NYS2d 412, 414, *appeal dismissed* 79 NY2d 978, 583 NYS2d 195).



L. Petitioner asserts that the Division unreasonably denied Mr. Cannistra's request to conduct a second observation test. This argument is rejected. The Division was not under any obligation to conduct a second observation test when there was no reason to believe that the result of the first observation test was not representative of the store's sales. Contrary to the assertion of petitioner's representative, there is no requirement that the results of an observation test be recorded on a columnar pad or sheet. Moreover, assuming that the store employee or Mr. Marte were unaware that an observation test regarding sales tax was being conducted on the day in question, petitioner has not shown that the misunderstanding by petitioner over what was occurring had any impact on the results of the observation. Furthermore, Mr. Marte's claim that the second investigator said that the sales were only a couple of hundred dollars and that he had nothing to worry about is not credible.

M. Petitioner contends that the audit computations are based upon the erroneous premise that the store hours were 9:45 A.M. to 12:00 A.M. each day. The record in this matter shows that each of the investigators asked the store clerk what the hours of operation were and his response was utilized to calculate the assessment. It is concluded that the audit methodology used by the Division was reasonable and petitioner's testimony on this point is not sufficiently reliable to warrant an adjustment.

N. Penalties were imposed pursuant to Tax Law § 1145(a)(1)(i) which authorizes the imposition of penalties for failure to pay any tax imposed under Articles 28 and 29 of the Tax Law. 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]). In this case, penalties were properly imposed because of the substantial discrepancy between the amount of reported taxable sales and the amount of tax determined on audit (*see, Matter of S.B.H. Super Markets v. Chu*, 135 AD2d 1048, 522 NYS2d 985; *Matter of Himed Deli*, Tax Appeals Tribunal, March 30, 2000). As noted by the Division, the failure to maintain and provide records is another reason to sustain the imposition of penalties (*Matter of Rosemellia d/b/a The Burt Restaurant*, Tax Appeals Tribunal, March 12, 1992).

Petitioner has also been assessed penalty pursuant to Tax Law § 1145(a)(1)(vi) for omission of greater than 25% of the tax due. Since the initial issue of penalty assessed pursuant to Tax Law § 1145(a)(1)(i) has been determined against petitioner, the additional penalty must also be sustained in the absence of a showing of reasonable cause.

It is noted that petitioner's reference to the Amnesty Program is completely misplaced. Petitioner had the option of pursuing the Amnesty Program or proceeding with the hearing. Having chosen the latter course, the Amnesty Program has no bearing on this matter.

O. The petition of Ruben Marte d/b/a Marte Grocery is denied and the Notice of Determination issued March 13, 2001 is sustained.

DATED: Troy, New York  
November 13, 2003

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE