STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PAY TV OF GREATER NEW YORK, INC.	:	DECISION DTA No. 805298
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 June 1, 1982 through May 31, 1985.	:	

Petitioner Pay TV of Greater New York, Inc., c/o Brian Cooper, President, 1200 Broadway, New York, New York 10001, filed an exception to the determination of the Administrative Law Judge issued on June 3, 1993. Petitioner appeared by Greenberger & Forman (Robert W. Forman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioner filed a brief in support of its exception, the Division of Taxation filed a brief in opposition and petitioner replied. The reply brief was received on January 25, 1994 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether expenses incurred by petitioner for repairs performed by a related company are excluded from sales and use taxes as a repair and maintenance service performed without charge to petitioner's customers.

II. Whether the Division of Taxation properly assessed sales and use taxes on the total monthly amount paid by petitioner for administrative, maintenance and repair services where petitioner failed to present invoices which separated taxable and nontaxable items.

III. Whether penalties and interest in excess of the minimum, which were imposed against petitioner, should be waived.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "26" which has been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings offact, the modified finding of fact and the additional finding of fact are set forth below.

During the period in issue, petitioner, Pay TV of Greater New York, Inc. ("Pay TV"), was in the business of selling TV signals which were transmitted by microwave to subscribers who wished to have the service. In practice, signals were received by an antenna which was located at the top of an apartment building and then transmitted by cable to a decoder box in a subscriber's apartment.

In a letter dated June 12, 1985 the Division of Taxation ("Division") advised petitioner that its returns had been scheduled for a field examination. The letter requested that petitioner make available all of its books and records pertaining to its sales tax liability for the period June 1, 1982 through May 31, 1985 including journals, ledgers, sales invoices, purchase invoices, cash register tapes and exemption certificates. The Division also requested copies of petitioner's Federal income tax returns for the years 1982, 1983 and 1984.

In the course of the audit, petitioner cooperated with the auditor and provided the Division with everything requested. The Division reviewed the documents and concluded that petitioner's records were adequate to conduct a field audit.

At the conclusion of the audit, the Division determined that tax was due in the amount of $2,286.00 arising from petitioner's purchases of fixtures and equipment. The amount of tax due on petitioner's purchases of fixtures and equipment was not challenged at the hearing.

The Division ascertained that petitioner made payments to a firm known as Cooper Cable Co., Inc. ("Cooper Cable"). During the first part of the audit period, petitioner paid Cooper Cable $3.00 a month for the first decoder box in a home and a $1.50 a month for each additional decoder box. In April 1983, petitioner began paying Cooper Cable $4.00 for the first decoder box in a subscriber's home and $2.00 for each additional decoder box. There is no evidence that Cooper Cable ever provided an itemized invoice to Pay TV which allocated the monthly charge to the service being rendered.

The auditor examined petitioner's Federal income tax returns and found that the following items were listed in the cost of goods sold section: programming and transmission costs, service costs and installation costs. Petitioner's accountant advised the auditor that the service costs were incurred in order to repair and service the decoder boxes. The Division accepted this explanation of the nature of the charge and concluded that the expense was subject to sales and use taxes.

The Division observed that if the decoder box was not working properly, petitioner would have it fixed at no cost to the customer. The Division did not consider the expense incurred to repair the boxes as a nontaxable warranty because petitioner's customers did not purchase the equipment. Rather, it was viewed as a payment for the repair of equipment that was owned by Pay TV. Neither Pay TV nor Cooper Cable represented to the auditor that they manufactured the cable boxes.

In order to determine the amount of tax due on the charges by Cooper Cable, the Division multiplied the number of decoder boxes by the rate charged by Cooper Cable to determine the total cost of the service. The auditor was able to determine the number of boxes from an examination of petitioner's general ledger, accounts receivable and sales records. The total cost of the service was then multiplied by the applicable sales and use tax rate to determine the amount of tax asserted to be due.

The Division also concluded that penalties should be imposed because of the absence of reasonable cause.

During the audit, the Division found that customers paid Pay TV for installing cable service and that Pay TV collected sales tax on this charge. Other than the monthly payment to Cooper Cable and the tax due on expense purchases, the auditor felt that petitioner was in substantial compliance with the tax laws.

On the basis of the foregoing audit, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated August 20, 1985, which assessed sales and use taxes for the period June 1, 1982 through May 31, 1985 in the amount of $186,941.68, plus penalty of $35,890.28 and interest of $34,203.60, for a total amount due of $257,035.36.

Prior to the years in issue, petitioner was in the master antenna business. The opportunity to engage in this business arose because, when a building was constructed in petitioner's area, the owner of the building usually installed a master antenna system. The system consisted of a television antenna which was connected to a cable which ran into each apartment. Petitioner charged an annual fee of $2.00 per year per apartment in order to service the master antenna system. This business was lucrative because the master antenna system infrequently, if ever, needed repairs.

In the late 1970's Home Box Office ("HBO") approached petitioner with a service which petitioner could offer to its subscribers. HBO told petitioner that with the new service customers could be charged about $10.00 a month for viewing movies and sports. Further, petitioner could deliver the programming through the master antenna system then in place. Subsequently, petitioner agreed to begin distributing HBO.

In order to distribute its programming, HBO broadcast a microwave signal from the Empire State Building in New York City. The signal was received by a special microwave service antenna that was attached to each regular television antenna which had been placed on the rooftops of buildings. The HBO signal was then transmitted to those subscribers who agreed to accept the HBO service through an unused or open channel in the master antenna

system. The customers who agreed to take the HBO service for a monthly fee were provided with a device which allowed them, and not others, in the building to receive the HBO broadcast.

When petitioner began distributing HBO it was not necessary to add additional wiring to the building. Petitioner was required to simply set up a microwave antenna and input the signal into the existing master antenna system.

When petitioner had the master antenna business only, it dealt exclusively with the landlord. It began dealing with the individual subscribers when it started offering HBO.

Initially, petitioner needed to secure the landlord's permission to put HBO into the building. In order to obtain permission, petitioner either paid the landlord a commission or offered to service the master antenna for free or at a reduced rate. After petitioner had the landlord's permission, it solicited orders from the residents of the building.

Depending on the type of building and which channel was open, petitioner installed a box, known as a trap, which allowed the customers to switch from regular viewing to HBO viewing. The box or trap always remained petitioner's property.

Petitioner did not have a significant increase in maintenance after it began distributing HBO.

Generally, petitioner provided HBO service and master antenna service only to buildings that had more than 100 apartments. Petitioner felt that it was not economical to supply its service to buildings with fewer apartments.

By 1981 or 1982, the HBO business had become a substantial portion of the master antenna business. As a result, petitioner began considering a public stock offering to raise capital to expand the market and promote the service in a broader area in New York. The parties who were working with petitioner on the contemplated public stock offering wanted a way for investors to know that the costs of doing business were going to be stable and that the proceeds of the public offering would be invested in expanding the business rather than spending it on the existing business.

Petitioner felt that it could demonstrate to investors that it could control its costs through the use of a related company known as Cooper Cable Company, Inc. ("Cooper Cable").[1] In exchange for a fixed rate for operating expenses each month, Cooper Cable agreed to provide the company services including general administrative staff, installation staff, and telephone receptionists. Petitioner thought that its contract with Cooper Cable, which was not reduced to writing, made the prospects of a public offering much better because anyone who invested money would know that petitioner could control its costs.

Cooper Cable employed a field staff of from six to twelve people, depending on the volume of work, who were engaged as installers, servicemen and disconnect people. The field staff included one or two technicians who were involved in what was referred to as MATV repair and maintenance. The latter people were able to do the repair work and fine tuning when it was required. Other than labor costs, Cooper Cable incurred costs for parts and materials.

The general ledger of Cooper Cable shows that Cooper Cable incurred a total salary expense of $1,018,258.50 for the period ending March 31, 1985. This amount was divided into four categories - executive, office, shop and sales. The shop category was for the technical staff who performed installation, disconnections and repairs. The total amount attributed to shop was $120,011.77.

Petitioner's contract with its subscribers provided, in part, as follows:

> "No Warranties on Our Equipment. Since we are not selling or leasing Our Equipment to you, we make no warranties, expressed or implied, about Our Equipment nor about the quality of the television reception that can be obtained on your television set. We will, however, repair or replace at no charge to you any of Our EQUIPMENT THAT IN OUR JUDGEMENT FAILS TO OPERATE PROPERLY BECAUSE OF ORDINARY WEAR AND TEAR (that is, a failure because the equipment wore out or broke down by itself). We will not be responsible for the condition or repair of your television set or for the quality of the television signal that can be received at your premises because of location, terrain, buildings, any kind of interference or any other conditions beyond our control."[2]

---

[1]The sole shareholders of Cooper Cable were the principal shareholders of Pay TV.

[2]The paragraph quoted above was from a contract used by an entity which succeeded petitioner. However, testimony at the hearing establishes that the contract between petitioner and its subscribers contained the same wording as the contract quoted above.

We modify the Administrative Law Judge's finding of fact "26" to read as follows:

> The monthly charge that Pay TV remitted to Cooper Cable included the expense for disconnecting sets, collections, mailing bills and other literature, making telephone calls to customers and maintenance of equipment.[3]

The U.S. corporation income tax returns of Pay TV and Cooper Cable for the fiscal year ended March 31, 1985 report, among other things, the following deductions:

Deduction	Pay TV	Cooper Cable
postage	$ 5,041.00	$ 71,641.00
telephone	4,746.00	87,861.00
insurance	-0-	205,492.00

At the hearing petitioner's witness estimated that based on his experience with Pay TV, repair costs would constitute 15 to 20 cents a month.

We make the following additional finding of fact.

> Petitioner had outlined its relationship with Cooper Cable in its S.E.C. registration statement. The statement referred to petitioner's subcontracting out all of its operations except marketing to Cooper Cable for a fixed monthly charge.

Opinion

Tax Law § 1105(c)(3) states, in pertinent part, that (a tax of four percent shall be imposed upon):

> "[t]he receipts from every sale, except for resale, of the following services:
>
> * * *
>
> "(3) . . . servicing or repairing tangible personal property . . . not held for sale in the regular course of business . . . ."

The Division has interpreted section 1105(c) by regulations at 20 NYCRR 527.5. The relevant portions of the regulations are as follows:

> "527.5 Installing, repairing, servicing and maintaining tangible personal property. [Tax Law, § 1105(c)(3)]

---

[3] We modified this finding of fact by changing "$3.00 a month charge" to "monthly charge" and by adding the words "collections, making telephone calls to customers and maintenance of equipment" to more accurately reflect the record.

"(a) Imposition. (1) The tax is imposed on receipts from every sale of the services of installing, maintaining, servicing or repairing tangible personal property, by any means including coin-operated machines, whether or not any tangible personal property is transferred in conjunction with the services.

* * *

"(c) Maintenance and service contracts. (1) The purchase of a maintenance or service contract is a taxable transaction.

* * *

"(d) Warranty work. (1) Repair or maintenance services rendered, without charge to a customer under a warranty agreement are not taxable.

"(2) The vendor performing the warranty services may purchase for resale any tangible personal property which is transferred to his customer in connection with the services rendered.

"(3) Charges for services rendered which are not covered by the warranty are taxable.

"(4) Where a manufacturer reimburses a vendor or repairman performing warranty work, the reimbursement is not taxable, as it was for resale."

The Administrative Law Judge determined that petitioner could not avoid taxation by falling within the parameters of 20 NYCRR 527.5(d)(1) because petitioner did not directly provide repair services.

Further, the Administrative Law Judge determined that petitioner could not utilize 20 NYCRR 527.5(d)(4) because it was not the manufacturer of the item being repaired. Since petitioner did not qualify for either exception, the Administrative Law Judge found petitioner's purchase of the maintenance and repair services subject to taxation under section 1105(c)(3) and 20 NYCRR 527.5(c)(1).

The Administrative Law Judge, relying on statements made by petitioner's accountant at the time of the audit and the absence of itemized receipts, further determined that the Division's audit methodology which resulted in taxation on the entire monthly charge, was not erroneous.

Additionally, the Administrative Law Judge found that Matter of Dynamic Tel. Answering Sys. v. State Tax Commn. (135 AD2d 978, 522 NYS2d 386, lv denied 71 NY2d 801, 527 NYS2d 767) controlled in determining that petitioner provided insufficient evidence to determine the taxable and nontaxable portions of the monthly charge.

Although the Administrative Law Judge determined that petitioner provided credible testimony, he found it insufficient to establish the portion of the charge allocated to the repair and maintenance services.

The Administrative Law Judge also affirmed the imposition of penalties because of petitioner's failure to establish reasonable cause for failing to collect the tax.

First, we address the Administrative Law Judge's finding that the Division properly taxed petitioner's purchase of maintenance and repair services from Cooper Cable.

Petitioner, on exception, contends the disputed services are not subject to taxation under Tax Law § 1105(c)(3) but rather fall within one of two exceptions. Petitioner argues that the repair and maintenance services performed by Cooper Cable are rendered under a warranty agreement and are not subject to taxation pursuant to the Commissioner's regulation 20 NYCRR 527.5(d)(1) and 527.5(d)(4).

Petitioner excepts to what it characterized as too literal a reading of the regulations by the Administrative Law Judge. Petitioner contends the spirit of the regulations was to encourage certain individuals, in the stream of commerce, to provide free repairs to their customers by excluding the charges paid for repairs from tax. Thus, despite the facts that petitioner was not a manufacturer and did not perform the repairs itself, petitioner argues that it is providing free repairs and should be excluded from taxation under 527.5(d)(1) and (4). Petitioner also argues the very language of the contract petitioner enters into with its customers supports its position that the services are performed pursuant to warranty.

Additionally, it appears petitioner is making an argument that any repairs were for resale and petitioner could not sell its services if the equipment in the customer's home was not

working properly. Petitioner argues the box was an essential component of the sale of petitioner's services.

We affirm the Administrative Law Judge's determination with regard to the taxability of the service provided to petitioner.

We deal first with petitioner's contention that the spirit of the regulations supports its position.

The apparent basis for the warranty exclusion is that charges for warranty services are included in the original sale price of the tangible personal property sold to the consumer (see, 3 New York Tax Service, 52.163[3], at V-248). By providing for an exclusion, the regulations avoid a second taxing. This purpose is supported by a review of the regulations which distinguish between warranties -- which are excluded from tax -- and the purchase of extended warranties which are subject to sales tax (20 NYCRR 527.5[c]). If the intent was to encourage repairs by manufacturers and other market place entities in the stream of commerce, as petitioner argues, the regulations would not have made this distinction. Thus, we find petitioner's "spirit of the regulations" argument without merit.

Turning to what we perceive as the purpose of the regulation, i.e., to avoid taxing warranty services sold as part of tangible personal property twice, the maintenance and repair service petitioner provided via Cooper Cable was not taxed as part of the sale of tangible personal property to customers. This is because, at petitioner's own concession, it has neither sold, nor leased the decoder box to its customers, meaning charges for the service at issue could not have been included in the sale price of tangible personal property. As a result, petitioner does not fall within the language of 527.5(d)(1), nor 527.5(d)(4).

Petitioner also contends that the language of every contract entered into between petitioner and its customers makes explicit that repairs and maintenance of the decoder box will be made at no charge to the customer.

The agreement, however, reads, "No Warranties on Our Equipment. Since we are not selling or leasing Our Equipment to you, we make no warranties, express or implied, about our equipment . . . . We will, however, repair or replace at no charge to you any of OUR EQUIPMENT THAT IN OUR JUDGMENT FAILS TO OPERATE PROPERLY BECAUSE OF ORDINARY WEAR AND TEAR."

From the language of the contract entered into between petitioner and its clients, it is clear the maintenance and repair service is not performed pursuant to warranty. Further, there is no dispute that there is a charge to petitioner for this repair service and, in our view, petitioner is the customer of this service. Thus, petitioner's service agreement is squarely within the language of 527.5(c)(1) which covers the purchase of a maintenance and service contract to service tangible personal property.

Petitioner further contends that the boxes provided are an essential component of the sale of petitioner's service. Petitioner asserts that any repairs were for resale because its service could not be sold if the equipment located in the customers' homes was not operating properly.

The issue is whether the repair and maintenance services performed by Cooper Cable were purchased for the purpose of resale so as to permit petitioner to enjoy exclusion from sales tax. We conclude that the purchase of maintenance and repair services from Cooper Cable was not for resale because there was no sale or lease of the tangible personal property serviced (Matter of Niagara Lubricant Co. v. State Tax Commn., 120 AD2d 885, 502 NYS2d 312, lv denied 68 NY2d 607, 506 NYS2d 1031).

In Niagara, a manufacturer of industrial lubricants purchased services of an independent firm to maintain reusable drums in which lubricants were sold. The taxpayer argued that the service was purchased for resale because the drums were a necessary element of the sale of lubricants. The Division argued that the servicing and maintaining of petitioner's drums were not for resale but were merely activities related to keeping the taxpayer's tangible personal property in a condition of fitness and readiness (see, 20 NYCRR 527.5[a][3]). The Court

agreed with the Division and determined that since there was no sale or lease of the property serviced, there was no sale of the services.

Likewise, in the instant case petitioner did not sell or lease the tangible personal property, i.e., the decoder boxes, that it contracted to have serviced. This point is evidenced by the language of the contract between petitioner and its customers. As noted above, the contract explicitly states that the decoder box is not sold or leased. While the box may be necessary to provide cable service to its customers as were the drums necessary to provide lubricants to Niagara's customers, this is not dispositive. The key factor remains that there was no sale or lease of the property.

Accordingly, we conclude that the charge for the repair and maintenance service is subject to taxation.

Petitioner on exception also contends that the audit methodology chosen by the Division was not reasonably calculated to reflect the taxes due.

The Administrative Law Judge determined that the Division rationally concluded that the full amount of the charges in issue was taxable.

We affirm the Administrative Law Judge's determination that the audit methodology was not unreasonable for the reasons stated below.

The Administrative Law Judge based his conclusion on statements by petitioner's accountant to the auditor to the effect that the entire monthly charge was for repair and maintenance. The Administrative Law Judge also found significant the absence of invoices itemizing the taxable and nontaxable portions of the receipt. In the absence of adequate records, the Department is required to select an audit methodology from which to reasonably calculate the sales tax due (Matter of Mobley v. Tax Appeals Tribunal, 177 AD2d 797, 576 NYS2d 412, 413, appeal dismissed 79 NY2d 978, 583 NYS2d 195). The reasonableness of the audit methodology must be evaluated based on the information available at the time of the audit (Matter of House of Audio of Lynbrook, Tax Appeals Tribunal, January 2, 1992). We agree

with the Administrative Law Judge that the audit methodology was reasonable based on the information provided to the auditor.

We next turn to whether petitioner has shown that the amount of tax assessed was erroneous because petitioner established that only a portion of the monthly charge was allocated to taxable maintenance and repair services.

The Administrative Law Judge found that "[p]etitioner has presented credible testimony and records . . . to establish that only a small portion of the $3.00 monthly fee was used to repair equipment" (Determination, conclusion of law "E"). The Administrative Law Judge determined, however, that absent supporting documentary evidence, credible testimony was not sufficient to specifically establish the taxable portion of the assessment. In so ruling the Administrative Law Judge relied on Matter of Dynamic Tel. Answering Sys. v. State Tax Commn. (supra).

As a result, the Administrative Law Judge upheld the assessment based upon the entire monthly charge.

We find the Administrative Law Judge erred in sustaining the entire assessment.

In our view, the Appellate Division, Third Department has explicitly ruled on this exact issue in Matter of Mobley v. Tax Appeals Tribunal (supra). In Mobley, this Tribunal ruled that in the absence of adequate records from the taxpayer, the Division properly resorted to an external index to estimate tax and that the taxpayer had failed to prove the audit methodology unreasonable or the amount of the assessment erroneous (Matter of Yel-Bom's Serv. Ctr., Tax Appeals Tribunal, May 10, 1990, affd sub nom. Matter of Mobley v. Tax Appeals Tribunal, supra). With respect to the last point, the taxpayer offered testimonial evidence (which we found credible for another purpose) indicating that the external index relied on by the Division to compute the tax overstated the amount of tax. In the absence of documentary evidence to support this testimony, we found it insufficient to prove error in the amount of tax assessed. The Court specifically reversed us on this point and held that the testimonial evidence constituted clear and convincing evidence that the amount of tax assessed was erroneous. The

Court acknowledged that assertions that the assessment was inaccurate would not be sufficient proof, but that the taxpayer had presented testimony establishing that the external index relied on by the Division was unreliable and that unreliable evidence could not be substantial evidence. Thus, we think that the clear rule of Mobley is that credible testimony that specifically establishes that the amount of tax imposed is incorrect may itself be sufficient to require a reduction to the assessment, without corroborating documentary evidence. We reached a similar result in Matter of 1605 Bookcenter (Tax Appeals Tribunal, July 25, 1991, affd 188 AD2d 694, 590 NYS2d 591, affd on other grounds 83 NY2d 240, 609 NYS2d 144) where we concluded that testimony determined to be credible, i.e., truthful and competent, by the Administrative Law Judge that specifically identified taxable and nontaxable receipts was sufficient to require a reduction to the assessment (see also, Matter of Avildsen, Tax Appeals Tribunal, May 19, 1994 [where we found credible testimony sufficient to overcome an income tax deficiency]).

In two other cases the Appellate Division, Third Department has rejected our conclusion that testimony alone was insufficient to sustain the taxpayer's burden of proof. In Matter of Capital District Better TV v. Tax Appeals Tribunal (___ AD2d ___, 606 NYS2d 930, lv denied ___ NY2d ___ [June 16, 1994]), the Court concluded that we erred in holding that the cable television companies were required to introduce copies of their franchise agreements into evidence to support their claim that the cable installations were required to be permanent. In Matter of Orvis Co. v. Tax Appeals Tribunal (___ AD2d ___ [Mar. 29, 1994]) the Court held that we had erred in giving no weight to statements made in affidavits submitted by the taxpayer. The Court found that the affidavits were sufficient to establish the facts and to satisfy the taxpayer's burden to prove an unconstitutional imposition of the use tax. Although these cases are not as directly on point as Mobley, they establish, at the least, the general rule that a decision that rejects credible testimony because the testimony is not corroborated is a decision which is not supported by substantial evidence.

In the instant case, testimony was given by Pay TV's president, Mr. Brian Cooper. Mr. Cooper testified that, of the monthly charge bill, approximately fifteen (15) to twenty (20) cents per month was for repairs. Mr. Cooper specifically stated the basis for these figures was his years of experience in the industry with Pay TV and the amount of repair services required.

The Administrative Law Judge found this testimony to be credible and we defer to the Administrative Law Judge's evaluation of credibility (Matter of Avildsen, supra). Thus, we have specific, credible testimony that indicates that the amount of the assessment was erroneous and there is nothing in the record to controvert this testimony. To sustain the entire assessment under these circumstances would, in our view, conflict with the rule of Mobley, Capital District Better TV and Orvis.

Petitioner also submitted documentary proof which, albeit does not establish the specific allocation of tax, nevertheless supports the general proposition that the taxable portion of the charge is far less than what was assessed. Supporting evidence was presented in the form of tax returns for both Cooper Cable and Pay TV, financial statements, an S.E.C registration statement for Pay TV and Cooper Cable's general ledger.

The registration statement outlined petitioner's relationship with Cooper Cable. The statement referred to the subcontracting out of all of Pay TV's operations except marketing to Cooper Cable for a fixed monthly charge. This included maintenance, telephone calls, mailings and collections and supports petitioner's contention that the monthly charge was for performing all of Pay TV's operations save for marketing. Petitioner also provided a general ledger of Cooper Cable that showed only 11.8 percent of Cooper Cable's labor expenses was attributable to employees who perform installation, maintenance, disconnection and repair.

Addressing the Administrative Law Judge's reliance on Dynamic Telephone, we find that decision is not dispositive of this issue. In the instant case, petitioner is not a vendor as the taxpayer in Dynamic Telephone was, therefore petitioner did not create the unapportioned monthly charge. Furthermore, the court in Dynamic Telephone said the taxpayer had the burden to overcome the assessment based on the unapportioned charge, but did not say the taxpayer

was precluded from doing so absent apportioned invoices. The Court also stated the Commission was not bound to accept the taxpayer's estimate, but did not say the Commission could not have accepted the estimate. Finally, in Dynamic Telephone, the petitioner's own proof contradicted its claim, i.e., calls petitioner argued as having a value of $0.50 each were advertised as free to its customers. In the instant case, we find petitioner's claims are directly supported by proof submitted. The general proposition that the taxable charge is far below what was assessed is supported by the documentary evidence submitted by petitioner. Further, the specific allocation of the charge is presented through the credible testimony of petitioner's witness.

Accordingly, we overturn the Administrative Law Judge's determination regarding taxation based upon the entire service charge and find petitioner met its burden to show the assessment was erroneous by clear and convincing evidence.

In light of the Administrative Law Judge's findings and our decision, the Division is directed to modify the Notice of Determination to impose tax on only twenty cents of each monthly charge.

Finally, we address the penalty assessed by the Division.

In support of petitioner's argument, petitioner first points to its filing and payment history which petitioner argues shows a good faith attempt to comply with the law. Petitioner notes that it regularly filed returns and paid the amount due even though the bulk of petitioner's revenues was exempt from tax. Petitioner further contends that its accountant took the position, in good faith that the service charge was not taxable. The Division argues that no reasonable cause has been shown because no explanation has been provided as to why the accountant felt the costs were not taxable. The Administrative Law Judge upheld the penalty imposed based upon petitioner's accountant's statements to the Division that the entire monthly charge was for repairs.

The Administrative Law Judge questioned, despite petitioner's showing that this statement is not completely accurate, why if the accountant felt the charge was for repairs, tax was not collected on these amounts. The Administrative Law Judge found that failure to collect tax under these circumstances precludes a finding that such failure was due to reasonable cause.

We affirm the determination of the Administrative Law Judge that petitioner has failed to sustain its burden of establishing reasonable cause. The penalty and interest shall be reduced according to the provisions of section 1145 of the Tax Law to reflect petitioner's adjusted tax liability.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Pay TV of Greater New York, Inc. is granted to the extent that the Division of Taxation is directed to impose tax on only 20 cents of each monthly charge, but is otherwise denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above;

3. The petition of Pay TV of Greater New York, Inc. is granted to the extent indicated in paragraph "1" above, but is otherwise denied; and

4. The Division of Taxation is directed to modify the Notice of Determination dated August 20, 1985 in accordance with paragraph "1" above, but such Notice is otherwise sustained.

DATED: Troy, New York
July 14, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner