STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
A & J PARKING CORPORATION	:	DECISION DTA No. 807265
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law and Titles A and CC of the Administrative Code of New York City for the Period June 1, 1983 through May 31, 1986.	:	

Petitioner A & J Parking Corporation, 306 Avenue Z, Brooklyn, New York 11223 and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on February 28, 1991 with respect to petitioner's petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law and Titles A and CC of the Administrative Code of New York City for the period June 1, 1983 through May 31, 1986. Petitioner appeared by Whitman & Ransom (Michael S. Press and Brian E. Gledhill, Esqs. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Peter J. Martinelli and Donald C. DeWitt, Esqs., of counsel).

Both parties filed briefs on exception. Oral argument, at the request of both parties, was heard on October 10, 1991.

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

ISSUES

I. Whether the notices of determination issued to petitioner were jurisdictionally defective and, therefore, invalid.

II. Whether the Division of Taxation was justified in resorting to external indices to estimate the tax due.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "7" and "8" which have been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

Petitioner, A & J Parking, Inc. ("A & J"), operates three parking lots on property owned by the City of New York (the "City") near the South Street Seaport. The Seaport is situated on the Manhattan bank of the East River and extends from the Brooklyn Bridge to the financial district. It encompasses the Fulton Fishmarket, an active and operating wholesale fishmarket; the Fulton Market, a row of 19th century buildings housing stores and restaurants and an outdoor plaza; and Pier 17, an enclosed shopping plaza overlooking the river. Most of this area was deteriorated and rundown until it was rehabilitated by the City, beginning in 1983 with the opening of the Fulton Market. The Pier 17 shopping complex was completed in mid-1985. The lots operated by A & J border and run parallel to the Seaport. Much of the area occupied by the lots is physically located under a raised strip of the East Side Highway and ramps leading to the Brooklyn Bridge.

A & J has two shareholders, Charles Chiappone and Carmine Sannelli, who share the responsibilities of its operations. In addition to operating the parking lot, each of A & J's principals are separately associated with fish loading companies operating at the Fulton Fishmarket.

The Fulton Fishmarket consists of a series of stalls and storefronts plus truck loading areas. Wholesalers display and sell fish to retail fishmarkets, restaurants, stores, etc. The purchasers walk through the market making their selections, and the employees of the fish loading companies transport the fish through the market on handcarts and load it into the purchaser's vehicle. Eleven fish loading companies operate at the Fulton Fishmarket including the companies owned by Mr. Chiappone and Mr. Sannelli. A & J pays rent to the City for three

parcels of land which it is allowed to use as public parking lots. In addition, at least one of the parcels is used as a loading area in connection with the operation of the fishmarket.

To understand the issues raised by the parties, it is necessary to understand the manner in which the property rented by A & J from the City is used. The Fulton Fishmarket is active between 1:00 A.M. and 8:00 A.M. During this time, A & J's lots are being used by two separate groups: (1) customers of the fishmarket who bring trucks, vans and vehicles to the market to be loaded, (2) employees of the fish loading companies who load the fish into the customers' vehicles and other persons whose work is related to the fishmarket business. A & J does not collect a parking fee from the first group, i.e., the fishmarket's customers whose vehicles were parked in A & J's lots for the purpose of being loaded with fish, nor from employees of the fish loading companies owned by Mr. Sanelli and Mr. Chiappone. A & J does collect a monthly parking fee from the employees of other fish loading companies who park their personal vehicles on A & J's property.

After the fishmarket closes, A & J's lots are used as public parking lots. From approximately 8:00 A.M. to the early evening hours, A & J's customers are persons employed in the financial district. Most park for the entire day and pay a daily parking fee, although some customers pay a monthly parking fee. During the evening hours and on weekends, A & J's parking lots are occupied primarily by tourists, shoppers and occasional visitors to the Seaport who also pay a daily fee.

The Division of Taxation (hereinafter the "Division") began an audit of A & J in June 1986 by sending an audit appointment letter to A & J's business address. A field examination of A & J's books and records was scheduled for July 15, 1986. A & J was asked to make available all books and records pertaining to its sales tax liability, including: sales tax returns and accompanying worksheets, sales journals, sales invoices, ledgers, cash register tapes and Federal income tax returns. A copy of this letter was sent to petitioner's accountant, Sam Vona. In a later telephone conversation with Mr. Vona, the auditor requested bank statements and parking ticket receipts used in the operation of A & J's business.

A & J gave the Division copies of agreements between the City and A & J, permitting A & J to operate parking lots on the City property. A rider attached to the agreements states that A & J would be allowed to use one area in connection with its own fish loading services until approximately 10:00 A.M. each day, to park cars of fishmarket employees, and to provide public parking after 10:00 A.M. each day, as long as none of its operations interfered with "the operation of the Fulton Fish Market, its occupants and its services." By the terms of the rider, A & J was permitted to provide public parking in two other areas, again with the proviso that its operations would not interfere with the Fulton Fish Market operations. A & J also provided the Division with applications for rate changes filed with the City's Department of Consumer Affairs. These showed the following rates to be in effect during the audit period. From April 12, 1982 through October 1, 1984, rates were $100.00 per month for public parking, $60.00 per month for fishmarket employees, $6.00 per day on weekdays and $3.00 per day on Saturdays and Sundays. From October 1, 1984 through the end of the audit period, A & J's rates were $140.00 per month for public parking, $60.00 per month for fishmarket employees, $8.00 per day on weekdays and $4.00 per day on weekends. These documents also show that until September 14, 1984, A & J operated a fourth parking area which it was not operating at the time of the audit.

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

> A & J also provided the Division with records of its sales, as requested. An auditor transcribed petitioner's sales journal and found no significant discrepancies between sales recorded there, gross receipts reported on A & J's Federal income tax return, bank deposits and reported taxable sales. A & J provided the auditor with bundles of parking tickets, each bundle representing one day's daily parking receipts. The tickets were pre-printed slips of paper showing the hours of operation, the location of the particular lot to which it applied and the New York City license number of that lot. Each bundle of tickets was dated and the total number of tickets in the bundle, and the price charged for each car, were noted on the bundle. The auditor tested a sample of these tickets and found they were accurately posted to A & J's sales journal. The Division contacted the company that printed A & J's parking tickets to determine the number of tickets purchased by A & J during the audit period and found there was no significant

difference between the number of tickets purchased and the number of tickets used.[1]

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> The Division deemed A & J's books and records to be inadequate for audit purposes because the parking tickets were not dated and did not identify a customer name or license plate number and, therefore, the individual tickets could not be associated with a particular transaction. The Division's auditors also believed that the fact that the tickets were not prenumbered meant that the tickets were necessarily an unreliable record of sales. A & J did not provide its monthly parkers with any sort of invoice. It merely recorded the payments received from monthly parkers in a separate column of the sales journal. A & J did provide
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> the Division with a list of the license plate numbers of its monthly parkers.[2]

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[1] The Administrative Law Judge's finding of fact "7" read as follows:

> "7. A & J also provided the Division with records of its sales, as requested. An auditor transcribed petitioner's sales journal and found no significant discrepancies between sales recorded there, gross receipts reported on A & J's Federal income tax return, bank deposits and reported taxable sales. A & J provided the auditor with bundles of parking tickets, each bundle representing one day's daily parking receipts. The tickets were preprinted slips of paper showing the hours of operation, the location of the particular lot to which it applied and the New York City license number of that lot. Each bundle of tickets was dated, and total daily receipts collected for the day were noted on the bundle. The auditor tested a sample of these tickets and found they were accurately posted to A & J's sales journal. The Division contacted the company that printed A & J's parking tickets to determine the number of tickets purchased by A & J during the audit period and found there was no significant difference between the number of tickets purchased and the number of tickets used.

We modified this fact to reflect the record in more detail.

[2] The Administrative Law Judge's finding of fact "8" read as follows:

> "8. The Division deemed A & J's books and records to be inadequate for audit purposes primarily because the parking tickets were not verifiable records of individual sales. The parking tickets were not copies of receipts or statements provided to the customer (no such receipts were provided unless asked for). Moreover, since the tickets were not dated and did not identify a customer name or license plate number, the individual tickets could not be associated with a particular transaction. Also, since the tickets were not numbered, the Division could not be sure of the actual number of tickets used in a day. In addition, A & J did not provide its monthly parkers with any sort of invoice. It merely recorded the payments

To estimate A & J's taxable sales, the Division conducted a series of observation tests. The first test was conducted on February 6, 1987 between 11:00 A.M. and 12:00 P.M. The auditor counted the number of cars parked in the A & J parking lot and compared the result with A & J's calculation of its own sales. The auditor counted 295 cars. A & J reported that it collected a daily parking fee from 140 cars. The auditor concluded that the difference would be monthly parkers, but A & J's books showed only 113 monthly parkers, leaving at least 42 cars unaccounted for. The second observation test was conducted on April 27, 1987. This time the auditor counted the number of cars in the lots between the hours of 10:30 A.M. and 12:30 P.M. and also transcribed the license plate numbers of the cars in the lot. The auditor counted 307 cars in the lot. A & J calculated that it had 248 cars in the same lot, 161 daily parkers and 87 monthly parkers. It is not known whether the auditor asked for an explanation of the difference between her count and A & J's or whether one was provided if she did. The results of these observation tests were not used by the Division to calculate tax due.

The Division conducted four more observation tests, the results of which were used to estimate tax due from A & J. The third observation test was conducted on Wednesday, June 10, 1987, and a fourth observation test was conducted on Thursday, October 22, 1987. Each of these tests was conducted in the same manner. An auditor counted the cars in the parking lot three times on each day, in the morning, afternoon and evening. The license plate numbers of the cars were transcribed and entered into a computer which was programmed to eliminate double counting. In addition, the transcribed license plate numbers were matched against lists provided by A & J to identify fishmarket employees and other persons paying a monthly fee. A & J's list showed a total of 87 fishmarket employees and 34 regular monthly parkers, for a total of 121 monthly parkers, but on the two observation days, the Division identified from A & J's list an average of only 25 monthly customers per day. The Division calculated the

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received from monthly parkers in a separate column of the sales journal. A & J did provide the Division with a list of the license plate numbers of its monthly parkers.

We modified this fact to reflect the record in more detail.

monthly fees on the basis of the results of its observation tests, rather than A & J's list of monthly parkers.

On June 10, 1987, the first count was taken between 5:30 A.M. and 6:45 A.M., the second count was taken between 11:30 A.M. and 12:30 P.M., and the third count was taken between 4:00 P.M. and 6:00 P.M. The Division calculated that 557 cars parked in A & J's lot on this day, of which 41 were determined to be fishmarket employees, 20 were determined to be monthly parkers and the remaining 496 were determined to be regular daily parkers.

The fourth observation test, conducted on Thursday, October 22, 1987, employed three auditors. The first count was taken between 5:30 A.M. and 6:30 A.M., the second count was taken between 10:30 A.M. and 11:30 A.M., the third count was taken between 4:30 P.M. and 7:00 P.M. During the second count, A & J employees put up a sign indicating that the lots were full and began turning cars away. The auditors saw empty spots in the lots and concluded that the lots were not full; therefore, they included the cars turned away (24) in their overall count. This observation test resulted in a total count of 558 cars: 26 fishmarket employee parkers, 9 regular monthly employees and 523 daily parkers.

The fifth and sixth observation tests were conducted on Saturday and Sunday, October 24, 1987 and October 25, 1987. On Saturday, the auditor counted a total of 284 cars, and on Sunday, the auditor counted 298 cars. On both days, the auditor observed A & J employees turning cars away before she believed the parking lots were full. Therefore, the auditor deemed the actual number of cars parked to be 322 which was the total capacity of the parking lots.

The auditor's notes for Wednesday, June 10, 1987 include the following statements:

> "Parking lot observation 6 a.m. - 9 p.m. I was told by Johnny Chaipone [sic] [the son of one of the owners] that not all cars & trucks in lot pay A & J. Some of them are part of his loading company and stay in lot for free during fishmarket hours. He said 28 cars are from his company Pier 11 Loading and 23 cars belong to Alberts Loading which also did not pay A & J. Between trucks, vans & station wagons it did amount to over this amount, but I could not tell what belonged to paying customers & what belonged to loading companies. I asked fishmarket at what time do they close they said they are cleaning up by 8:00 a.m. or 9:00 a.m."

In applying the results of the observation tests to compute tax due, the Division did not distinguish among those cars which were on A & J's parking lot to conduct fishmarket business, those which belonged to employees of the fish loading companies operated by A & J's principals, and those which belonged to employees of other fish loading companies. The auditor asked Johnny Chiappone for a list of automobiles associated with the fishmarket, but never received such a list. The auditor testified that she requested "some sort of proof of exemption from the parking fee" in her discussions with Mr. Vona, but none was provided. Therefore, the Division concluded that all cars present in the A & J parking lot during the morning counts paid a daily or monthly fee.

Information provided to the Division, including applications for rate changes filed with the City Department of Consumer Affairs, indicated that A & J charged fishmarket employees a parking fee of $60.00 per month. The auditor attempted to verify this amount by calling persons on the list of monthly parkers provided by A & J. Seven persons identified on the list as fishmarket employees, paying $60.00 per month, were telephoned. None of the seven responded directly when asked how much they paid each month to park. Several stated that their employers paid the parking fee. At least two of them responded positively (the record contains contradictory facts indicating that the number of persons responding was either two or four) when the auditor asked them if the amount was $140.00 per month, although they refused to volunteer an amount on their own. On this basis, the auditor determined that all monthly parkers paid the higher rate of $140.00 per month, regardless of whether they were associated with the fishmarket or not.

The Division was aware that A & J operated a fourth parking lot for approximately one-third of the audit period, but it did not assess any tax on the basis of activity occurring in that lot. It also made no attempt to determine whether cars entered and left the lot in between the auditor's observations. If this occurred, no tax was assessed to reflect it.

An amended rate application filed with the City Department of Consumer Affairs shows that effective August 10, 1983, A & J began charging parking fees of $3.00 per day on

Saturdays and Sundays. The Division was told by A & J's accountant that A & J did not begin collecting fees on weekends until January 1984. A transcript of A & J's sales journal made by the auditor shows no receipts for Saturdays and Sundays in June 1983. A worksheet prepared by the auditor states that her review of A & J's parking tickets and journals established that parking fees were collected on weekends in 1984 and 1986. The Division concluded that A & J began collecting weekend parking fees in July 1983.

To determine the tax due, the Division began by grouping the results of its observation tests into the following categories: morning activity, afternoon activity, evening activity, and monthly parking. Using the June 10th and October 22nd tests, the auditor calculated the average number of cars parked on a daily basis in each category. Thus, the Division calculated an average of 167 cars parked in the morning plus 33 monthly parkers, an average of 280 additional cars parked in the afternoon plus 15 monthly parkers and an average of 63 additional cars parked in the evening plus 1 monthly parker.

A & J charged daily parkers $6.00 per day from June 1, 1983 through October 31, 1984 and $8.00 per day for the remainder of the audit period. The Division determined that there were 346.72 days at the lower rate and 433.40 days at the higher rate. For each category, the number of days at each rate was multiplied by the average number of parkers to determine the total number of parked cars. Thus, the Division calculated that during the audit period there were 57,902.24 daily morning parkers, paying a rate of $6.00 per day; 72,377.80 daily morning parkers, paying a rate of $8.00 per day; 97,081.60 daily afternoon parkers, paying a rate of $6.00 per day; etc. Total daily morning parking fees amounted to $926,435.84. Total daily afternoon parking fees amounted to $1,553,305.60. Total daily evening parking fees amounted to $349,493.76.

The same methodology was used to calculate monthly parking fees. The rate applied was $100.00 per month for the first 16 months of the audit period and $140.00 for the remainder of the audit period. No differentiation was made between fishmarket employees and other

monthly parkers. The Division computed monthly morning parking fees of $145,200.00, monthly afternoon parking fees of $66,000.00 and monthly evening parking fees of $4,400.00.

Total weekend parking fees, using rates of $3.00 per day for the first 16 months of the audit period and $4.00 per day thereafter, were determined to be $356,930.56.

After adjusting the audited parking fees in all categories to eliminate tax included in the charge, the Division calculated total receipts for the audit period of $3,261,900.00 (audited totals were rounded off to the nearest whole dollar). From this, $61,258.00 was subtracted as an allowance for eight days when the parking lot presumably was closed. The eight days represented the following holidays: New Year's Day, Washington's Birthday, Memorial Day, Labor Day, Election Day, Veteran's Day, Thanksgiving Day and Christmas Day. This resulted in total audited sales of $3,200,642.00. A & J reported taxable sales for the audit period of $1,040,077.00. The difference was determined to be unreported taxable sales of $2,160,565.00, with a tax due on that amount of $302,477.29.

On May 16, 1988, the Division issued to A & J a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1983 through May 31, 1986, assessing tax due of $302,477.29 plus penalty and interest. On the same date, the Division issued a second notice of determination to A & J, assessing an additional penalty for the period June 1, 1985 through May 31, 1986 in the amount of $10,254.10. A series of consents executed on behalf of A & J effectively extended the period of limitation for assessment of sales and use taxes for the audit period to June 20, 1988.

Following a conciliation conference, the Division issued an order reducing the tax due to $260,890.81 plus penalty and interest and reducing the additional penalty to $8,844.25. The reduction resulted from an allowance of five additional non-working days. There was no evidence offered at hearing concerning days on which A & J did not operate.

The Division was told that during the audit period the City was installing water and sewer lines underneath the A & J lot, preventing A & J from using the entire area. This construction began on Fulton Street and then continued in opposite directions, up to the Brooklyn Bridge and

down to Wall Street. The trenches built for the sewer lines were approximately ten feet wide and ten feet deep. They were lined with concrete, and steel girders were placed across the trenches to support the street above. Tools, materials and other equipment were stored in a staging area, either on A & J's lots or in the near vicinity of those lots. Construction began in 1983 and continued well into 1986. During a part of this period, the City gave A & J a rent abatement of approximately 9 percent per month to compensate A & J for its loss of usable space. Photographs taken during this time depict construction activity running through the middle of A & J's parking lot in a swath approximately two to three cars deep. Mr. Chiappone testified that A & J was unable to use between 50 and 70 percent of the parking area during the height of the construction. At the time of the Division's observation tests, there was also a small amount of construction occurring on A & J's lots. Photographs taken by the auditors are somewhat unclear, but they do show that the amount of construction at the time of the audit was substantially less than that which was occurring during the audit period.

According to the auditor's workpapers, A & J's parking lots have a legal maximum capacity of 322 cars. For a variety of reasons, A & J's lots were closed before this capacity was reached. For example, the attendants knew the monthly parkers and would turn back daily parkers to ensure that there was space for them when they arrived. The lots in question are unpaved and unmarked. For the most part, cars were parked consecutively in double lines; however, the auditor observed cars parked three deep and in front of entrances and in driving lanes. If parkers planned to exit early in the day or to remain parked only a short time, the attendants attempted to place them where it would be easy for them to leave.

The parking lots were divided into three sections, each of which was supervised by a different attendant. Two of the attendants were related to one of the principals. As cars entered a lot, an attendant collected the parking fee and pocketed it. He also counted out a parking ticket which he kept separately. Generally, no receipt was given to the customer. At the end of the day, the number of parking tickets was expected to correspond to the amount of money collected. The amount collected was entered on a daily sheet. Every day during the audit

period, one of the principals counted the number of cars in the parking lot supervised by a non-family member to ensure that the amount of money remitted to the owners accurately reflected the number of cars in the lot. Lots operated by family members were counted on an occasional basis. The attendants also collected fees from monthly parkers, some of whom actually paid by the week. These fees were separately entered on the daily sheet. No invoices or separate billing statements were prepared for monthly customers. In some cases, the parking fees were paid by employers on behalf of their employees. For instance, an agency of New York State paid A & J monthly to park 14 cars. These arrangements are reflected in petitioner's sales journal where daily receipts are posted. At the end of each week, the daily sheets were reconciled with bank deposits and a weekly record was prepared and kept.

A monthly summary of local climatological data for the City prepared by the United States Department of Commerce establishes that there was 90 to 100 percent sunshine on the six observation days. The average percentage of sunshine during the months of the observation tests ranged from 43 to 77 percent. Thus, the days of the observation tests were unusually sunny for the City of New York.

Mr. Chiappone testified that friends, relatives, and ex-employees of A & J were often allowed to park without paying a fee.

A sales tax audit of A & J was conducted for the years immediately preceding the ones in issue, and another was conducted for the years immediately succeeding the ones in issue. Only a minimal amount of tax was found due on these audits, and the matters were settled by consent.

In addition to the facts found by the Administrative Law Judge, we find the following:

> On the face of each of the notices issued to petitioner, under the subheading "Explanation" was an unchecked box next to the following statements printed in bold type:
>
> > "THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(a)(1) OF THE TAX LAW.
> >
> > "IF THE BOX ABOVE IS CHECKED SEE ADDITIONAL INFORMATION ON BACK OF THIS NOTICE.

"IF THE BOX ABOVE IS NOT CHECKED, THE TAX HAS NOT BEEN ESTIMATED."

At the bottom of the form, in regular type, was the following statement:

"The above taxes have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records."

On the back of the notice the following was stated:

"Audit Methods for Estimated Taxes

"Section 1138(a)(1) of the Tax Law provides that if necessary, the tax due may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

OPINION

In the determination below, the Administrative Law Judge held that:

1. Petitioner's records were not adequate to verify each individual sales transaction, and, therefore, the Division was warranted in employing external indices to determine the tax due;

2. Because the Division's auditors in their visual observation failed to distinguish between vehicles using petitioner's lots for loading fish and those actually parked on the lots, the Administrative Law Judge concluded that the audit method used to determine daily morning parking fees was not reasonably calculated to reflect the tax due. Thus, the Administrative Law Judge directed the Division to eliminate from its calculation of additional taxable sales an amount of $926,435.84;

3. The Division's determination that employees of the fishmarket paid a monthly parking fee of $140.00 was not supported by evidence in the record. The Division was directed to recompute its calculation of monthly morning parking fees using the reduced charge of $60.00 per month;

4. Because the Division had no basis for including empty parking spaces in its count of paying customers, it was ordered to reduce its estimate of daily afternoon, evening and weekend parkers to those cars actually counted by the auditors;

5. Because an amended rate application filed with New York City by petitioner indicates that petitioner began collecting weekend parking fees effective August 10, 1983, any period prior to this date included in the calculations of weekend parking fees must be eliminated;

6. The Division's agreement at conciliation to include five additional nonbusiness days in its calculations must be reflected in its revised calculations;

7. Construction performed within petitioner's parking area by the City of New York during the audit period, for which petitioner received a nine per cent reduction in its rent, requires all of the Division's calculations to be reduced by nine percent after all other calculations are made;

8. The Division's calculations were in all other respects correct;

9. Petitioner has not established a basis for cancellation of the penalties imposed.

On exception, petitioner asserts that: the notices of determination issued to petitioner are jurisdictionally defective in that they fail to comply with the requirements of Tax Law § 1138(a)(2) and 20 NYCRR 535.2(b)(2), i.e., the notices failed to indicate that the assessed amount was estimated. Petitioner also asserts that the records maintained by petitioner conformed to the requirements of the Tax Law and, accordingly, the Division's reliance upon estimates based upon external indices is not permitted. In the alternative, petitioner argues that the audit methodology employed by the Division, as adjusted by the Administrative Law Judge, was not reasonably calculated to reflect petitioner's tax liability.

In response to petitioner's exception, the Division asserts that:

1. Because petitioner failed to raise the issue of the validity of the notice before the Administrative Law Judge, it is not appropriate for the Tribunal to consider it on exception. The Division further contends that such a claim constitutes an affirmative defense which, because it was not raised at the hearing, was waived (Oral Arg. Tr., p. 18).

2. The Division also argues that Tax Law § 1138(a)(2) does not provide that a defect in the notice is necessarily jurisdictional in nature. Moreover, it argues that prejudice to the taxpayer is necessary to invalidate the notice, and that such prejudice did not exist here. In

support of its position, the Division relies on Margeson v. Smith (41 AD2d 896, 342 NYS2d 727) and Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin. (Sup Ct, Albany County, March 16, 1988, affd on other grounds 151 AD2d 822, 542 NYS2d 61).

3. Because the documents presented during the audit and at hearing were not subject to internal controls and, thus, cannot be considered reflective of each transaction, the auditor's use of external indices instead of petitioner's books and records to determine the tax due was justified.

4. Petitioner did not meet its burden of proving that the methodology employed by the Division or the results of its audit were erroneous.

In its own exception, the Division asserts that the Administrative Law Judge erred in equating the possible inaccuracies in the audit with unreasonableness. It states that this holding ignores long established precedents and would defeat a fundamental aspect of the Tax Law, which places the risk of inaccuracy in an estimated audit upon the taxpayer who does not maintain proper records. Thus, the Division asserts that the portion of the audit pertaining to petitioner's morning business activities should be upheld.

Initially, we address petitioner's assertion that the Division's failure to indicate on the notices of determination that the assessed amount was estimated constitutes a jurisdictional defect invalidating the assessment.

We deal first with whether petitioner's failure to raise the issue in its petition or at the hearing before the Administrative Law Judge precludes it from raising the issue on exception.

The absence of a valid assessing document is jurisdictional in nature, which precludes a determination as to the correctness of the amount of tax imposed, and more importantly, causes the assessment to be void (Matter of Scharff, Tax Appeals Tribunal, October 4, 1990; Matter of Malpica, Tax Appeals Tribunal, July 19, 1990).[3] Because the issue raised by petitioner calls

[3]Our decision in Matter of Scharff was later vacated by the Supreme Court; however, the ground for the court's decision was that we had failed to give notice to the parties before we concluded, on our own motion, that we lacked subject matter jurisdiction (New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal, Sup Ct, June 29, 1991, Keniry, J.). Therefore, our conclusion that the absence of a valid assessing document is a jurisdictional defect that results in no assessment was not questioned by the court and remains unimpaired.

into question the validity of the assessing document, we conclude that it could be raised at any time, provided the parties had adequate notice of the issue (New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal, Sup Ct, June 29, 1991, Keniry, J.). Since petitioner raised this issue in its exception, there is no question of notice to the parties.

We deal next with the issue of whether the Division's noncompliance with the provisions of Tax Law § 1138(a)(2) was a fatal defect invalidating the notice.

Tax Law § 1138(a)(1) provides that if a sales tax return is incorrect or insufficient:

> "the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

In 1979, the Legislature amended section 1138 by adding subparagraph (2) to subdivision (a) (L 1979, ch 714). Section 1138(a)(2) provides that:

> "[w]henever such tax is estimated as provided for in this section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days" (emphasis added).

The notice at issue here clearly apprised petitioner of the amount of tax assessed; that the tax could be challenged through a hearing process; and that a petition for such challenge had to be filed within 90 days. It did not indicate that the tax was estimated.

The crux of the matter is whether the language of section 1138(2), i.e., the notice "shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated . . ." (emphasis added) is mandatory, as urged by petitioner, meaning that compliance with it is a condition precedent to the validity of the Division's action pursuant to the section (see, People v. Alejandro, 70 NY2d 133, 517 NYS2d 927, 931); or is the language directory, as urged by the Division, meaning that it is intended by the Legislature not to be disobeyed, but a disregard of it, or an inexact compliance, will

constitute only an irregularity, not a fatal defect (McKinney's Con Laws of NY, Book 1, Statutes § 171).

The issue is one of first impression for this Tribunal. The task is one of statutory construction and interpretation. The difficulty always is in reconciling a different result from that which would ordinarily flow from the clear mandatory language of a statute. There is no absolute test (82 CJS § 376). As stated in Matter of King v. Carey (57 NY2d 505, 457 NYS2d 216):

> "the line between mandatory and directory statutes cannot be drawn with precision [citations omitted]. The inquiry involves a consideration of the statutory scheme and objectives to determine whether the requirement for which dispensation is sought by the government may be said to be an 'unessential particular' [citations omitted] or, on the other hand, relates to the essence and substance of the act to be performed and thus cannot be viewed as merely directory [citations omitted]."

While the Legislature's use of terms such as "must" or "shall" is not conclusive, such words of command are ordinarily construed as peremptory in the absence of circumstances suggesting a contrary legislative intent (see, Escoe v. Zerbst, 295 US 490, 493; People v. Schonfeld, 74 NY2d 324, 547 NYS2d 266, 267). "Whether a given provision in a statute is mandatory or directory is to be determined primarily from the legislative intent gathered from the entire act and the surrounding circumstances, keeping in mind the public policy to be promoted and the results that would follow one or the other conclusion" (McKinney's Cons Laws of NY, Book 1, Statutes § 171; People v. Alejandro, supra; People v. Schonfeld, supra; People v. Graves, 277 NY 115).

We turn then to the legislative history of the statute. Subparagraph 2 of section 1138(a) was added along with other amendments to the Tax Law in a bill that became known as the "Taxpayer's Bill of Rights" (Memorandum of the Division of the Budget, Buffalo Evening News [June 30, 1979, B-2], Governor's Bill Jacket, L 1979, ch 714). The purpose of the bill was "to enact certain procedural reforms concerning the administration of sales tax" (Memorandum of Sen. Fred J. Eckert, 1979 NY Legis Ann, at 432). As stated by the bill's sponsor, Senator Eckert, "[t]his bill will assure certain taxpayers and vendors rights [and will]

provide more information and certainty concerning their respective tax liability and hearing procedures . . ." (emphasis added).

Specifically, the bill was intended to "give taxpayers a more predictable environment in which to operate . . . [and that] [t]o further inform taxpayers, the bill calls for clearer notification of taxpayers, alerting them to the nature of the assessment and the rights of the assessed" (Memorandum of Division of Budget, Governor's Bill Jacket, L 1979, ch 714, emphasis added).

The Commissioner of Taxation and Finance, in his comments to the Governor's Counsel after the bill had been passed by the Legislature and was awaiting executive action was generally supportive of the legislation, but expressed the reservation that "[t]he proposed amendment should be clarified to exclude estimated assessments based on audits when the taxpayer would be aware of any estimating techniques used" (Governor's Bill Jacket, L 1979, ch 714).

We find nothing in this legislative history which supports the conclusion offered by petitioner and embraced by the dissent that the Legislature intended that a failure of exact compliance with the language of the statute to be a fatal defect which renders the notice invalid. Indeed, we find such result drastic and somewhat unrealistic in that it would have us conclude, in effect, that the Legislature intended that the validity of the entire process depended on the Division's compliance with but one single requirement of section 1138(2). On the contrary, it is clear that the Legislature's expressed intention was to insure that taxpayers were informed of the nature of the assessments against them so that they could properly respond to those assessments through the protest procedures provided to them. It is also abundantly clear that the Division's failure to "check the box" on the notice, thereby indicating that the assessment was estimated, did not frustrate the plan of the Legislature to safeguard petitioner's rights.

The record shows that petitioner was aware of the audit methodology during the course of the audit (see, Hearing Tr., pp. 81, 87 and 121) and the fact that the tax would be estimated (see, Division's Exhibit "L" [the auditor's workpapers provided to petitioner by letter dated April 18,

1988, approximately one month prior to the issuance of the notices]; see also, petitioner's petition, Division's Exhibit "G," pp. 5 et seq. [describing the audit methodology]; see, the opening statement of petitioner's representative at the hearing, i.e., "[i]t's our intention to demonstrate our support for two propositions . . . that the Auditor had no basis for disregarding the taxpayer's own records [and] that the application of the observation audit technique was so replete with conceptual errors so as to render its conclusion meaningless," Hearing Tr., pp. 12-23). In short, petitioner was not misled or prejudiced and enjoyed every privilege which a formally correct notice would have given it.

This result is consistent with the rationale of the court in Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin. (supra), where the identical issue was dealt with by the Supreme Court in its decision. The Court in Mon Paris held that the Division's failure to indicate that the tax was estimated did not invalidate the assessment. Rather, it held that a taxpayer must be prejudiced by this omission in order to invalidate the notice. Finding that the petitioner was aware of the estimated nature of the tax and of his need to pursue a remedy, the court concluded that no prejudice existed (Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin., supra;[4] see also, Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892 [notice misstating the period for which tax assessed not invalid since taxpayer not prejudiced]; Matter of Tops, Inc., Tax Appeals Tribunal, November 22, 1989 [two sales tax quarters incorrectly listed on the statutory notice did not render it invalid]). The result here is also consistent with those cases which deal with the mandatory requirement that the notice of deficiency be mailed to the taxpayer's "last known address" (Tax Law § 681[a]; Matter of Agosto v. State Tax Commn., 68 NY2d 891, 508 NYS2d 934; Matter of Riehm, ___AD2d___ [January 30, 1992]). The persuasive fact in each of these cases was that the

[4]In Mon Paris, the taxpayer brought an action under Article 78 commenced in Supreme Court, Albany County, seeking a refund of taxes allegedly demanded unlawfully by a notice of determination. The Division moved to dismiss the petition, claiming the taxpayer had failed to utilize its administrative remedies and that this failure resulted in the tax becoming finally and irrevocably fixed. The Appellate Division, in affirming the Supreme Court, did not deem it necessary to address the issue of the validity of the assessment, but affirmed on the grounds that the taxpayer's payment of tax under the Amnesty Program constituted admission of tax due, thus, making it "unnecessary to reach the other grounds the Supreme Court relied on for affirmance."

taxpayer received the notice even though improperly addressed by the Division. In rejecting a strict construction of the word "shall" contained in section 681(a), these cases were grounded upon the legislative history of section 681(a), which stated that the purpose of its enactment was to bring New York in conformity with the comparable Federal provision, Internal Revenue Code § 6212(a) and (b). In accordance with this legislative directive, both cases followed Federal case law in reaching their decisions.

Turning to the merits of the audit performed by the Division, we agree with petitioner that the Division was not justified in resorting to external indices to estimate the tax.

It is well established that the Division's use of estimate techniques to determine sales tax "must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit" (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43). To support its conclusion that a taxpayer's records are inadequate, the Division must make a sufficient investigation of the records made available to it to justify its conclusion that the records were incapable of supporting a complete audit (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978, 979).

In the instant case, petitioner produced all of the records requested by the auditor (Hearing Tr., p. 22). The auditor concluded that petitioner maintained a complete set of financial books and records (Hearing Tr., p. 77). Notwithstanding this conclusion, the auditor rejected petitioner's books and records, based on the auditor's view that the parking tickets were inadequate "because of the fact that they were missing important information, which is being able to identify them to a particular car" (Hearing Tr., p. 28). The auditor's supervisor believed the tickets and, thus, the records generally, were inadequate because the tickets were not prenumbered and dated. He stated that:

> "for my purposes complete records for a parking lot are tickets prenumbered and dated, they don't have to have the amount--well, it depends. In this particular case they don't have to have an amount--maybe I should take that back. They should have an amount because different periods of time would indicate different parking prices. I don't care for general ledgers. I don't care for sales journals. Original sources of documentation, prenumbered tickets with dates" (Hearing Tr., p. 228).

Thus, the records were determined to be inadequate because the parking tickets did not identify particular vehicles and were not prenumbered and dated (see, Exhibit "K," field audit report, attachment sheet, p. 4).

The decision to reject petitioner's records was made in spite of the fact that the auditor's examination revealed no external or internal inconsistency in the records. The auditor determined that there was no significant difference between the number of tickets purchased by petitioner and the number of tickets used. Further, a test of the tickets indicated that they were accurately posted to the sales journal and the auditor's review of petitioner's other records revealed no significant discrepancies.

Section 1135(a)(1) of the Tax Law provides that:

> "[e]very person required to collect tax shall keep records of every sale or amusement charge or occupancy and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require."

By regulation at 20 NYCRR 533.2(b)(1), the Division has prescribed the following:

> "(b) Sales records. (1) Every person required to collect tax, including every person purchasing or selling tangible personal property for resale must keep records of every sale, amusement charge, charge for dues or occupancy, and all amounts paid, charged or due thereon, and of the tax payable thereon. The records must contain a true copy of each:
>
> "(i) sales slip, invoice, receipt, contract, statement or other memorandum of sale;
>
> "(ii) guest check, hotel guest check, receipt from admissions such as ticket stubs, receipt from dues; and
>
> "(iii) cash register tape and any other original sales document.
>
> Where no written document is given to the customer, the seller shall keep a daily record of all cash and credit sales in a day book or similar book."

We see absolutely nothing in the statute or regulation which supports the Division's requirement that the parking tickets had to identify the particular vehicle to which each related

or that the tickets had to be prenumbered and dated.[5] The regulation clearly envisions and condones a situation where a vendor would maintain sales records that did not identify the purchaser (a cash register tape) or would not result in a customer document at all. Since these situations could be acceptable under the regulation, we see no basis for holding that A & J's records of sales were defective on their face and we can perceive no basis upon which to distinguish the instant facts from those in Matter of King Crab Rest. v. Chu (supra).

Petitioner, as did the taxpayer in King Crab, presented the Division with general records of its business, i.e., a sales journal, bank statements, as well as original source documents (cf., Matter of Vebol Edibles v. Tax Appeals Tribunal, 162 AD2d 765, 557 NYS2d 678, lv denied 77 NY2d 803, 567 NYS2d 643 [where no original source documents were provided to verify the general records]). As in King Crab, the Division rejected petitioner's source documents on their face for reasons that are not articulated anywhere as requirements. Based on the holding of King Crab, we conclude that in these circumstances the Division was required to conduct a further investigation of petitioner's records, an investigation that revealed some substantive inadequacy of the records, before resorting to the observation test. Since the Division failed to conduct an investigation sufficient to justify its resort to estimate techniques, it is not possible to assess the adequacy of the records and the use of the test period was improper (Matter of King Crab Rest. v. Chu, supra).

We are further persuaded that this is the correct conclusion, because we can see no reason why petitioner's parking tickets would be a more reliable record of its sales, were they to comply with the Division's requirements. We do not see how the Division would be any more assured that the tickets represented all of A & J parking receipts just because they stated a license plate number and were themselves prenumbered and dated.

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[5]A legislative proposal, S.6355-B, has been introduced that would require parking lots in the Borough of Manhattan to issue to customers consecutively numbered tickets, which indicate the date and time of entry and exit. The bill provides that the failure to maintain copies of these records would authorize the Division to estimate tax based on external indices. Even if enacted, the record keeping requirements of the bill would apply only prospectively.

It is also important to note that there is no evidence in this case that affirmatively indicates that the parking tickets were an unreliable record of petitioner's total sales. In contrast to the facts of Matter of Cafe Europa (Tax Appeals Tribunal, July 13, 1989), where the petitioner offered evidence indicating that the source documents were unreliable, petitioner here offered extensive, uncontradicted testimony explaining the system employed by petitioner to ensure that its employees accurately accounted for all transactions (Hearing Tr., pp. 126-137).

The Administrative Law Judge rejected petitioner's records because they did not state the amount charged or the amount of tax collected as required by section 1135(a) of the Tax Law. Although the individual tickets did not indicate the charge nor the amount of tax due, the slip on top of the daily bundles did. This appears to us to comply with section 1135(a) which requires records of every sale and the tax due thereon.

The Administrative Law Judge also rejected the parking tickets because "the Division could not verify through an independent audit that a ticket was present for each and every car parked during the audit period" (Determination, conclusion of law "B," p. 17). In view of the records provided, we believe this conclusion was unwarranted and in conflict with King Crab, absent a further investigation by the Division that revealed a substantive inadequacy or an inaccuracy in the records petitioner produced.

In response to petitioner's arguments on exception with respect to the adequacy of the records, the Division made no new arguments, but instead resubmitted the argument made on this point to the Administrative Law Judge (Division's brief on exception, p. 6). In its brief to the Administrative Law Judge, the Division relied on Matter of Licata v. Chu (64 NY2d 873, 487 NYS2d 552) for the principle that petitioner's source documents were inadequate. We find the Division's reliance on Licata misplaced because Licata involved a taxpayer's failure to maintain sales records that allowed the Division to determine whether tax had been charged on all taxable items. Since all of petitioner's sales are taxable, Licata has no bearing on the adequacy of the records. Similarly, we find misplaced the Division's reliance on Matter of S.H.B. Supermarkets v. Chu (135 AD2d 1048, 522 NYS2d 985) and Matter of Meyer v. State

Tax Commn. (61 AD2d 223, 402 NYS2d 74, lv denied 44 NY2d 645, 406 NYS2d 1025) because these cases also involved a vendor's failure to identify accurately nontaxable sales. The Division also cites to Matter of Giordano v. State Tax Commn. (145 AD2d 726, 535 NYS2d 255) which we find inapplicable because it involved a taxpayer who had no records for two-thirds of the audit period, incomplete records for the remainder of the period and the incomplete records in themselves raised doubts as to their accuracy (i.e., purchases exceeded sales). The court's holding that an estimated audit was justified, given such records, does not offer any guidance with respect to the facts presented here.

The Division also argues that purely internal documents cannot suffice as complete books and records. This argument appears to be founded upon the idea that petitioner was required to generate a document that was provided to the customer. However, the statute does not require a vendor to generate such a document. Sections 1132(a) and 1135(a)(1), in combination, only require that a vendor keep a true copy of any receipt that is given to a customer. The Division's regulations, as set forth earlier, do not require such a document and the Division has not directed us to any case law that imposes such a requirement.

Since we have concluded that the resort to the observation test was unjustified, the remaining issues raised by the Division and petitioner are moot.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of A & J Parking Corporation is granted;

2. The exception of the Division of Taxation is denied;

3. The determination of the Administrative Law Judge is modified;

4. The petition of A & J Parking Corporation is granted; and

5. The notices of determination dated May 16, 1988 are cancelled.

DATED:Troy, New York
April 9, 1992

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

/s/Maria T. Jones
Maria T. Jones
Commissioner

Concurring Opinion in the Matter of the Petition of

A & J PARKING CORPORATION

Francis R. Koenig (concurring):

I concur in the result reached by the majority to cancel the assessment, but dissent from their holding that the Division's failure to comply with section 1138(a)(2) of the Tax Law does not render the notice of determination invalid.

The essence of the majority's decision is that in enacting the language "whenever such tax is estimated . . . such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated" (Tax Law § 1138[a][2], emphasis added), the Legislature intended this statutory direction to be mandatory only when the taxpayer did not otherwise have notice of the fact that the assessment was based on an estimated audit. In my opinion, this conclusion is inconsistent with the language of the enactment, as well as the case law applying other statutes that prescribe the contents of other required notices.

First, if the Legislature had only meant to require the Division to notify the taxpayer that the tax was estimated, and was not concerned about the precise form of the notification, the Legislature would have enacted a provision that simply required the Division to notify the taxpayer and would not have explicitly prescribed the form that the notification would take. By explicitly describing the form of the notice, section 1138(a)(2) indicates to me that the Legislature did not intend the notification of the estimated assessment to be left to the vagaries of the audit process. Instead, the Legislature intended that the taxpayer be informed in a certain way (on the notice of determination) and in a definite manner (bold type, conspicuously placed).

That this was the intention of the Legislature is underscored by the legislative history material cited by the majority: "[t]his bill will assure certain taxpayers and vendors rights, [and will] provide more information and certainty concerning their respective tax liability and hearing procedures" (Memorandum of Senator Fred J. Eckert, 1979 NY Legis Ann, at 432, emphasis added); the bill was intended to "give taxpayers a more predictable environment in

which to operate . . . the bill calls for clearer notification of taxpayers, alerting them to the nature of the assessment" (Memorandum of Division of Budget, Governor's Bill Jacket, L 1979, ch 714, emphasis added).

The majority decision undermines this legislative goal of certainty, predictability and clarity because it allows the Division to issue a notice of determination that states that the tax was not estimated and to overcome this error based on information given to the taxpayer through the audit process. A taxpayer who is the recipient of this absolutely contradictory information then has the burden, under the majority's view, to show that he has been harmed by this misinformation. In my view, this is exactly the type of situation the Legislature sought to avoid when it directed the Division, through the enactment of section 1138(a)(2), to give notice of an estimated assessment in a certain, clear manner.

Although, as noted by the majority, there is nothing in the legislative history that explicitly states that the failure to comply with section 1138(a)(2) of the Tax Law renders the notice of determination a nullity, case law indicates that such an explicit statement is not necessary to give "shall" its normal mandatory meaning.

In Parker v. Mack (61 NY2d 114, 472 NYS2d 882), the plaintiffs sought to commence a civil action by serving upon the defendant two summonses unaccompanied by complaints. Despite the requirement under CPLR 305(b)[6] that a default notice shall be attached to the summons, the papers served gave no notice of the relief sought. The New York Court of Appeals, focusing on the imperative language of CPLR 305(b), held that the failure to comply with the statutory notice requirements meant that no action was commenced. Responding to the dissent's contention that the treatment of this defect as jurisdictional should be limited to the effect of default judgments, the Court stated:

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[6] CPLR 305(b) provides as follows:

> "Summons and notice. If the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought, and, except in an action for medical malpractice, the sum of money for which judgment may be taken in case of default" (emphasis added).

> "[w]ere such discrete - and unusual - consequences intended, the Legislature could readily have so provided. No such differentiation is evidenced in the statute however. In that circumstance, respect for legislative authority requires that we give equal effect for all purposes to the explicit addition of the imperative 'shall' in CPLR 305 [subd.(b)]" (Parker v. Mack, supra, 472 NYS2d 882, 883-884).

In Matter of Nassau Ins. Co. v. Hernandez (65 AD2d 551, 408 NYS2d 956), the Appellate Division held that an insurer's failure to comply with the requirements of section 313(1) of the Vehicle and Traffic Law when issuing a notice of termination rendered the notice invalid. Section 313(1) required a notice of termination to include a certain statement in 12 point type. In concluding that the use of 6 point type, rather than the required 12, rendered the notice invalid, the court stated:

> "[t]he requirement that 12 point type face be used is unambiguous and absolute, thereby indicating that there must be strict compliance with the statutory condition . . . . Therefore, proof that the defective notice may have been read and understood is irrelevant to the determination of whether the notice of termination is valid" (Matter of Nassau Ins. Co. v. Hernandez, supra, 408 NYS2d 956, 957; see also, In re Empire Mutual Ins. Co v. Malagoli, 133 AD2d 29, 518 NYS2d 803 [1st Dept 1987]; In re Aetna Cas. & Sur. Co. v. Morales, 70 AD2d 833, 418 NYS2d 17 [1st Dept 1979]; Cohn v. Royal Globe Ins. Co., 67 AD2d 993, 414 NYS2d 19 [2d Dept 1979], affd 49 NY2d 942, 428 NYS2d 881; Matter of Furstenberg v. Aetna Cas. & Sur. Co., 67 AD2d 580, 415 NYS2d 849 [1st Dept 1979], revd on other grounds 49 NY2d 757, 426 NYS2d 465).

Like the statutes involved in Parker and in Nassau Ins., section 1138(a)(2) describes the contents of a notice that is required to be given. In both Parker and Nassau Ins., it was held that strict compliance with the statute was required, without regard to whether actual notice was otherwise achieved, and that failure to comply rendered the notice invalid. In neither Parker nor Nassau Ins., did the court require explicit legislative history in order to give the term "shall" its total effect, i.e., to find the noncomplying notice a nullity.

I disagree with the comparison drawn by the majority between the instant question and that presented in Matter of Agosto v. State Tax Commn. (supra) and Matter of Riehm (supra). The issue in the latter cases was the effect of the Division's failure to comply with the statutory direction on how the method of notification was to take place, i.e., by mailing to the last known address. In my view, cases dealing with the method of notification (see also, Margeson v.

Smith, 41 AD2d 896, 342 NYS2d 727) are distinct from the case before us which involves a statute that describes the contents of a notice. Where the statute describes in mandatory terms the contents of a notice, I believe it is inappropriate to inquire whether the recipient has been informed despite the noncomplying notice (see, Parker v. Mack, supra; Matter of Nassau Ins. Co. v. Hernandez, supra).

For similar reasons, I do not find the decision in Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin. (supra) persuasive. In holding that the notice of determination was valid, the Supreme Court, Albany County, rejected the taxpayer's argument that the Division's failure to check the estimate box invalidated the assessment. In so doing, the court relied on the holding of Matter of Pepsico, Inc. v. Bouchard (supra). This reliance on Pepsico appears to be misplaced because the court in Pepsico, dealing with the failure of a notice to set forth accurately the period of assessment, stated that "the statute mandating that notice be given does not prescribe the content of the notice . . . and, significantly, that the notice given . . . accomplished its purpose of apprising petitioner that sales and use taxes had not been paid . . ." (Matter of Pepsico, Inc. v. Bouchard, supra, 477 NYS2d 892, 893). In this case, as in Mon Paris, section 1138(a)(2) specifically requires that the notice of determination reveal the estimated nature of the assessment on its face.

For all of the foregoing reasons, I conclude that the failure to comply with section 1138(a)(2) of the Tax Law rendered the notice of determination invalid and that the assessment should be cancelled on this basis.

DATED: Troy, New York
April 9, 1992

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