STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LOCY DEVELOPMENT, INC.	:	DETERMINATION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1981 through August 31, 1984.	:	

Petitioner, Locy Development, Inc., P.O. Box 146, Mayville, New York 14757, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1981 through August 31, 1984 (File No. 802499).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on March 2, 1989 at 1:15 P.M., with all briefs to be submitted by June 26, 1989. Petitioner appeared by Ralph J. Gregg, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether services provided by petitioner to a condominium as the condominium's managing agent were properly subject to sales tax under section 1105(c)(5) of the Tax Law or whether such services were properly excluded from tax by reason of the existence of a principal-agent relationship between petitioner and the condominium.

II. Whether penalty and interest in excess of the minimum should be abated.

FINDINGS OF FACT

On June 20, 1985, following an audit, the Division of Taxation issued to petitioner, Locy Development, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed $67,137.60, plus penalty and interest, for the period September 1, 1981 through August 31, 1984.

The Division subsequently revised its assessment against petitioner to $49,290.74, plus penalty and interest, and petitioner conceded its liability with respect to $16,171.38 of the revised tax assessment. Tax remaining in dispute, therefore, amounts to $33,119.36 and arises solelyfrom a Division determination that amounts paid by individual condominium unit owners with respect to certain "common charges" assessed by the Board of Managers of the Chautauqua Lake Estates Condominium (the "condominium") were properly subject to tax.

Petitioner owns approximately 45 acres of real property in the Town of Chautauqua,

New York. Petitioner also owns and operates a golf course, restaurant, clubhouse and racquetball facility, all of which are located on petitioner's property. Also during the period at issue, petitioner was engaged as managing agent for Chautauqua Lake Estates, a condominium complex located in the Town of Chautauqua, New York.

Chautauqua Lake Estates was organized in 1972 pursuant to the provisions of Article 9-B of the Real Property Law of the State of New York, commonly known as the New York Condominium Act. The effective date of the offering plan of Chautauqua Lake Estates was June 25, 1973, at which time the sponsor filed the declaration of condominium and related condominium documents in the Office of the Clerk of Chautauqua County. The sponsor of the condominium project was and is Locy Venture Company, a joint venture company organized under the laws of the State of New York.

The partners in Locy Venture Company are petitioner and Chautauqua Lakeside Estates, Inc. Charles J. McBride is the sole shareholder of both partners.

Under the New York Condominium Act, a condominium unit owner owns his or her unit in fee. A unit owner also owns, in common with the owners of all other units, all parts of the condominium property other than the units themselves (the "common elements"). The condominium's offering plan describes the common elements as the land upon which the units are built, the lawns, parking area, the exterior walls and roofs, the swimming pool, tennis courts, sewage treatment plant, water station and dock facilities (see also Real Property Law § 339-e[3]). In order to pay for the maintenance of the common elements and for the operating costs of the property, the board of managers of the condominium assesses "common charges" against the individual unit owners in proportion to each owner's respective interest in the common elements.

Included among the documents filed with Chautauqua Lake Estates' Declaration of Condominium were the By-Laws of Chautauqua Lake Estates. These by-laws governed the operation of the condominium and were in full force and effect at all times relevant herein.

Article II, §§ 1 and 2 of the by-laws provide for a board of managers, elected by the individual unit owners, with powers and duties including, but not limited to, the following:

(a) Operation, care, upkeep and maintenance of the common elements;

(b) Determination of the amounts required for operation, maintenance and other affairs of the condominium;

(c) Collection of the common charges from the unit owners;

(d) Employment and dismissal of personnel as necessary for the efficient maintenance and operation of the condominium;

(e) Opening of bank accounts on behalf of the condominium and designating the signatories required therefor;

(f) Obtaining insurance for the condominium property, including the apartment units, pursuant to the provisions contained in the by-laws; and

(g) Making repairs, additions and improvements to or alterations of the condominium property and repairs to and restoration of the property in accordance with other provisions of the by-laws after damage or destruction by fire or other casualty or as a result of condemnation or eminent domain proceedings.

Article II, § 3 of the by-laws provides that the board of managers may employ for the condominium a managing agent and a manager at a compensation established by the board to perform the board's duties in the operation, care, upkeep and maintenance of the common elements, collection of the common charges from the unit owners, the employment and dismissal of personnel as necessary for the efficient maintenance and operation of the condominium, the granting of licenses for vending machines, obtaining insurance for the condominium property, and making repairs, additions and improvements.

Article II, § 3 also provides that the power granted to the board of managers by the by-laws to determine the amounts required for the operation, maintenance and other affairs of the condominium, the adoption of rules and regulations, the opening of bank accounts on behalf of the condominium and similar matters may not be delegated to the managing agent.

Article V, § 1 provides that the board of managers shall, at least annually, prepare a budget for the condominium, determine the amount of the common charges required to meet the common expenses and allocate and assess such common charges against the unit owners according to their respective interests.

Article V, § 1 also specifies that the common expenses may include such amounts as the board of managers deems proper for the operation and maintenance of the condominium property including an amount for working capital, for a general operating reserve, for a reserve fund for replacements, and to make up any deficit in the common expenses for any prior year.

Article V, § 1 obliges the board of managers to advise each unit owner in writing of the amount of the common charges payable by him and to furnish copies of each budget on which such common charges are based to all unit owners and to their mortgagees.

Article V, § 2 lists the insurance that the board of managers shall maintain including fire and extended coverage, workmen's compensation insurance, boiler and machinery insurance, water damage insurance, fidelity bonds, and public liability insurance.

Pursuant to the authority given to it in Article II, § 3 of the by-laws, the condominium, acting by and through its board of managers, entered into a Management Agreement with petitioner employing petitioner as the "sole and exclusive management agent of the property known as Chautauqua Lake Estates Condominium". At all times relevant herein, petitioner was employed by the condominium as managing agent pursuant to the Management Agreement.

The Management Agreement authorizes petitioner to collect monthly common charges from the condominium unit owners and further authorizes and requires it, at its own expense, to purchase necessary supplies, to make contracts for refuse disposal, vermin extermination, snow removal, landscaping services and for any other utilities or services which the managing agent shall reasonably consider advisable and to maintain and operate the condominium treatment plant, water station, tennis courts and swimming pool, and to make ordinary repairs and alterations.

The Management Agreement also authorizes petitioner, as managing agent, to employ, discharge, supervise and pay all servants, employees or contractors considered by the agent as necessary for the efficient management of the property of the condominium and to perform all services, in addition to these listed above, necessary for the management of the condominium.

With respect to petitioner's employment of personnel, although the board of managers did not do the hiring, it did set minimum qualifications to be met by prospective employees. Also, the board could direct petitioner to fire a particular employee for cause.

Petitioner's general manager met with the board of managers six times a year. He informally met with individual board members responsible for specific areas of the condominium operation on a more frequent, as-needed, basis.

The Management Agreement obliges the managing agent to prepare and file all returns and other documents required under FICA and FUTA, and all withholding tax returns required for employees of the condominium, and to pay all amounts required for the same from the condominium funds.

In addition to the responsibilities noted above, the Management Agreement also imbued petitioner, as managing agent, with the following general responsibility and authority:

> "The Agent shall be authorized and required to perform all services, in addition to the foregoing, necessary for the management of the Condominium. Such services shall include the institution of legal actions, in the name and at the expense of the Condominium, and to enforce the collection of common charges or other amounts due the Condominium. In connection with any such legal action, the Agent may engage counsel at the expense of the Condominium."

As noted previously, petitioner was employed as managing agent for the Chautauqua Lake Estates Condominium pursuant to the Management Agreement during the period at issue herein. As managing agent, petitioner employed about 14 people (including both full and part time) to carry out its obligations under the Management Agreement. Petitioner's employees served as security guards, lifeguards, office help, and general repair and maintenance people.

As managing agent, petitioner also made purchases of tangible personal property when necessary and also engaged the services of independent contractors for services when necessary. It is undisputed that petitioner was responsible for the payment of sales tax on such purchases of property and services.

In or about the October preceding each of the years at issue, petitioner, as managing agent, reviewed all of the costs and expenses of which it had knowledge or could reasonably anticipate for the upcoming year and submitted a budget to the board of managers for approval.

The budgets prepared by petitioner were broken down by the following categories: (1) office wages, (2) repair and maintenance wages, (3) lifeguard wages, (4) security wages, (5) outside services, (6) supplies, (7) utilities, (8) overhead without wages, and (9) management fee.

Overhead was further broken down into these categories: (1) insurance, (2) postage, (3) telephone, (4) rubbish removal, (5) equipment rental, (6) legal and accounting fees, (7) office expense, and (8) miscellaneous.

Petitioner's management fee was $8,400.00 in 1982, $9,000.00 in 1983, and $10,000.00 in 1984.

Following submission and approval of petitioner's proposed budget, the board of managers determined the total amount of common charges to be assessed against individual condominium owners for the ensuing year. This total included the amount of petitioner's approved budget. In addition, as previously noted, the board of managers had the authority to add such amounts as it deemed proper for a general operating reserve and to make up any deficit in the common expenses for any prior year. The record is unclear as to whether such additional amounts were added to the unit owners' common charges during the period at issue.

The unit owners sent their payments of the common charges to petitioner by checks

payable to "Chautauqua Lake Estates". Such payments were made on a monthly basis. The funds were deposited in the account of Chautauqua Lake Estates.

Petitioner was authorized to withdraw funds from the condominium's common charges account to pay its costs in meeting its obligations under the Management Agreement and to receive its management fee. It was petitioner's practice to make a monthly withdrawal from the condominium's account of 1/12th of its annual budget. Petitioner transferred such funds to its own account to pay its expenses, including its employees' wages. Included in petitioner's monthly withdrawals was 1/12th of its management fee.

If the managing agent needed additional funds to meet unanticipated or emergency expenses, it was required to apply to the board of managers for specific approval for the payment of these expenses out of the reserve funds maintained in the account of Chautauqua Lake Estates.

At hearing petitioner submitted summaries of its approved budgets for the years 1982-1984.[1] These budgets are set forth in detail below.

	1982	1983	1984
Office Wages	$ 12,613.00	$ 13,492.00	$ 16,621.00
Repair and Maintenance Wages	31,700.00	30,125.00	36,416.00
Lifeguard Wages	4,500.00	4,500.00	4,500.00
Security Wages	5,000.00	5,000.00	5,000.00
Outside Services	10,746.00	12,150.00	20,282.00
Supplies	12,500.00	13,325.00	18,510.00
Utilities	14,000.00	19,135.00	21,500.00
Overhead	34,780.00	36,982.00	39,082.00
Management Fee	8,400.00	9,000.00	10,000.00
Total	$134,239.00	$143,709.00	$171,911.00

At hearing petitioner also submitted the actual amounts it drew from the Chautauqua Lake Estates common charges accounts in order to perform its duties under the management agreement with respect to the periods January 1, 1982 through March 31, 1982 and January 1, 1983 through December 31, 1983.[2] Specifically, cash was drawn from the account and used by petitioner as follows:

	1/1/83 - 12/31/83	1/1/82 - 3/31/82
Office Wages	$ 17,366.00	$ 2,995.75
Repair and Maintenance Wages	30,246.34	8,106.02
Lifeguard Wages	4,482.19	
Security Wages	5,090.20	729.61

[1]Petitioner's budgets along with its actual expenditures for 1983 and January 1, 1982 through March 31, 1982 (see Finding of Fact "33") were identified on the record as Exhibits "1", "2" and "3". Although the transcript does not so indicate, these Exhibits were received in evidence and are part of the record herein.

[2]See Footnote 1.

Outside Services	14,160.95	846.16
Supplies	11,181.95	2,812.73
Utilities	21,444.18	3,748.55

Overhead	37,438.15	10,145.76
Management Fee	9,000.00	2,100.00
Total	$150,409.96	$31,484.58

On audit, the Division determined that the monthly common charges payments by the individual condominium owners were properly subject to sales tax. The Division's auditor reviewed the accounts receivable records of petitioner listing monthly common charge payments by individual unit owners, totalled the payments for the audit period, and calculated the assessment in dispute herein of $33,119.36.

The Division reviewed certain invoices to certain individual owners which simply billed "common charges" as a lump sum. In the absence of any further breakdown of the common charges the Division assessed the entire amount. The Division did not request any breakdown as to the composition of the common charges; was not shown any budgets for the years at issue; and did not review the Management Agreement between petitioner and Chautauqua Lake Estates.

At the time of the audit herein, the Division of Taxation had not taken a position with respect to the taxability of common charges paid by condominium unit owners.

On May 7, 1984, the Technical Services Bureau of the Taxpayer Services Division of the New York State Department of Taxation and Finance published TSB-M-84(9)S, "Charges By Shopping Mall Operators". This memorandum stated the Division's position with respect to the taxability of "common area charges" by shopping mall operators to mall tenants and "anchor" stores. The "common area charges" discussed in the memorandum included expenses for maintenance, utilities, snow plowing, landscaping, security, insurance, administration and overhead costs incurred by the mall owner in relation to the operation of the "common area" of the mall. The memorandum concluded, in relevant part, as follows:

> "Common area charges which are designated as 'additional rent' or similarly provided for by specific provisions in the lease agreement are considered to be receipts from the rental of real property and are not subject to sales tax when billed to tenants. An 'anchor' store which owns its own building within a mall complex is normally subject to common area charges which are determined by a method similar to the method used for tenants, and will receive the same treatment as mall tenants for sales tax purposes.
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> Administration and overhead charges made by a mall operator to his tenants, where such charges are a percentage of the actual operating costs of the 'common area' and are either designated as additional rent or similarly provided for by specific provision in the lease agreement, are considered to be 'additional rent' and as such are not subject to sales tax. Similar charges to owners of anchor stores will receive the same treatment for sales tax purposes."

As noted previously petitioner conceded its liability with respect to $16,171.38 of the revised tax assessment. Petitioner subsequently made payments in 1986 totalling $16,171.40. Petitioner made these payments under a timely application for tax amnesty under the Division's tax amnesty program then in effect. The Division applied petitioner's payments to tax and simple interest accrued to the time of payment for the quarters ended November 30, 1981, February 28, 1982 and May 31,1982. Petitioner's payments were sufficient to pay in full both its tax and interest liability for the quarters ended November 30, 1981 and February 28, 1982.

Under amnesty, the Division waived all penalties assessed with respect to these two quarters. The remaining portion of the 1986 payments by petitioner (totalling $3,008.42), was applied to petitioner's tax, penalty, and interest for the quarter ended May 31, 1982.

Petitioner submitted proposed findings of fact numbered "1" through "36". These proposed findings have been reviewed and to the extent that such proposed findings are consistent with the Findings of Fact determined herein, such findings are accepted.

CONCLUSIONS OF LAW

A. The assessment of the tax in dispute was premised upon the Division's contention that petitioner provided repair and maintenance services to the condominium[3] the receipts from which were properly taxable pursuant to Tax Law § 1105(c)(5). Inasmuch as it is undisputed that "maintaining, servicing and repairing real property, property and land" (Tax Law § 1105[c][5]) were among the services provided by petitioner to the condominium during the audit period under the Management Agreement, such services were properly subject to sales tax unless petitioner can prove otherwise (see Matter of Colt Industries v. New York City Department of Finance, 66 NY2d 466, 471, 497 NYS2d 887, 889).

B. Petitioner contends that an agency relationship existed between it and the condominium and that therefore petitioner did not sell any services to the condominium. In the absence of a sale, petitioner argues, no sales tax liability could arise.

> "Agency is a fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to so act [Restatement, Agency 2d, § 1.]" (L. Smirlock Realty Corp. v. Title Guar. Co., 70 AD2d 455, 421 NYS2d 232, 238.)

C. Upon review of the Management Agreement and the conduct of the parties pursuant to that agreement, it is concluded that a principal-agent relationship existed between petitioner and the condominium. It is further concluded, however, that the existence of such a relationship did not preclude the existence of a vendor-purchaser relationship between petitioner and the condominium and that such a relationship existed between these two parties with respect to the provision of repair and maintenance services by petitioner to the condominium. Accordingly, it is concluded that, for sales tax purposes, petitioner "sold" repair and maintenance services to the condominium and the receipts from the sale of such services were properly subject to sales tax.

D. Tax Law § 1101(b)(5) defines "sale, selling or purchase" as follows:

> "Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any

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[3]It should be noted that the Division's contention that petitioner and the Board of Managers of the condominium were co-vendors providing taxable services to the individual condominium owners is rejected. For purposes of this determination, petitioner's contentions that the individual condominium owners acted through their duly elected Board of Managers and that the Board and the individual condominium owners were not two separate and distinct entities is accepted.

agreement therefor."

E. "'The language of the statute [Tax Law § 1101(b)(5)] is very broad and inclusive and clearly expresses an intent to encompass most transactions involving the transfer or use of commodities in the business world' (Matter of Albany Calcium Light Co. v. State Tax Comm., 55 AD2d 502, 504, revd. on other grounds 44 NY2d 986). Statutory definitions of the word 'sale' are not guided by the common understanding of the word, but rather by the taxing policies of the legislative body involved. Accordingly, a transaction which might in common parlance not be regarded as a sale might nonetheless be taxed because the Legislature and the courts feel the transaction was devised so as to avoid the tax or because, for all practical purposes, the transaction is the same as others taxed as sales and it is, therefore, taxed as a matter of economic justice (68 Am. Jur. 2d, Sales and Use Taxes, § 65, p. 96)." (Matter of Chemical Bank v. Tully 94 AD2d 1, 464 NYS2d 228, 229.)

F. That the Legislature intended to subject to sales tax transactions such as those at issue is evident from a review of the relevant statutes. Clearly the service of repairing and maintaining property is a service subject to tax (Tax Law § 1105[c][5]) and certainly petitioner provided such services to the condominium for consideration (i.e., petitioner's management fee and all of its expenses, including the wages of its employees). Moreover, neither the Tax Law nor the regulations promulgated thereunder make any explicit reference to exclude from sales tax repair and maintenance services provided by agents (or other persons acting in a representative capacity) to a principal. It is noteworthy that Tax Law § 1105(c)(1) does explicitly exclude from sales tax certain information services provided by "advertising or other agents, or other persons acting in a representative capacity." The explicit reference excluding agents' services from taxation contained in section 1105(c)(1), coupled with the absence of any reference to agents' services in section 1105(c)(5), evinces an intent by the Legislature not to exclude from taxation repair and maintenance services provided by an agent to a principal (see generally McKinney's Cons Laws of NY, Book 1, Statutes § 240). Rather, it appears that, given the "very broad and inclusive language" contained in the statutory definition of the word "sale" (Matter of Chemical Bank v. Tully, supra), the repair and maintenance services provided by petitioner to the condominium were properly subject to tax.

G. The conclusion reached above is supported by Matter of Chemical Bank v. Tully (supra). In that case, the Appellate Division affirmed a determination by the former State Tax Commission that transfers of food and drink by a food service management company to its principal were subject to sales tax pursuant to Tax Law § 1105(d). The court accepted the petitioner's contention that its relationship with the food service management company was that of principal-agent and concluded as follows:

"Therefore, we conclude that the factual pattern herein, when juxtaposed to the explicit language of section 1105 (subd. [d], par. [i]) and interpreted in accordance with the broad and inclusive language of section 1101 (subd. [b], par. [5]) of the Tax Law, compels the conclusion that the transactions between petitioner and its agents are taxable." (Matter of Chemical Bank v. Tully, supra, 464 NYS2d at 230.)

H. Tax Law § 1105(c) does provide for the following exclusion from sales tax:

"Wages, salaries and other compensation paid by an employer to an employee for performing as an employee the services described in paragraphs (1) through (5) of this subdivision (c) are not receipts subject to the taxes imposed under such subdivision."

Petitioner contends, as an "ultimate fact", that since an agency relationship existed between it and the condominium, its employees were really the condominium's employees. It follows, from this argument, that the above-noted exclusion should apply.

Petitioner's contention is rejected. To determine the applicability of the employee exclusion contained in section 1105(c), it is the form of the transaction which controls (107 Delaware Associates v. New York State Tax Commn., 99 AD2d 29, 472 NYS2d 467, revd on dissenting opn below 64 NY2d 935, 488 NYS2d 634; Matter of Tops, Inc., Tax Appeals Tribunal, November 22, 1989). The individuals who provided repair and maintenance services to the condominium were clearly petitioner's employees; they were on petitioner's payroll (see Findings of Fact "22" and "30"). Accordingly, the services at issue do not fall within the employee exclusion of Tax Law § 1105(c).

I. Petitioner also took the position that the Technical Services Bureau memorandum, dated May 7, 1984, "Charges By Shopping Mall Operators" (TSB-M-84[9]S) was supportive of its position. The contents of this memorandum are set forth in Finding of Fact "37".

Petitioner's contention is rejected. First, with respect to the common charges paid by mall tenants, the memorandum concludes that such charges are additional rent. Since the rental of real property is not subject to sales tax (Tax Law §§ 1105[a]; 1101[b][6]; 20 NYCRR 526.8[c][1]), the common charges to the tenants (or additional rent) are not subject to sales tax. The condominium, however, does not rent property, it owns it. The theory by which the common charges to mall tenants are excluded from tax in the memorandum is thus unavailable to petitioner. Second, as to the common charges paid by the anchor store owners, the memorandum does not cite a section of the Tax Law under which such charges may be excluded from tax. Rather, the memorandum notes that the common charges for anchor stores are determined by a method similar to the method used for tenants and concludes that the anchor stores "will receive the same treatment as mall tenants for sales tax purposes". Assuming that the charges to the anchor stores could be subject to sales tax absent apparent policy considerations, the Division's decision not to assess tax in one instance does not preclude it from assessing tax in the instant matter (see Matter of Savemart, Inc. v. State Tax Commn., 105 AD2d 1001, 482 NYS2d 150, 152).

J. As noted previously, the Division assessed tax herein on the condominium's payments to petitioner for the service of repairing or maintaining property. The Division did not dispute that some portion of the total of the common charges upon which it assessed tax was not, by itself, subject to sales tax; it contended, however, that in the absence of documentation delineating the cost to the condominium of specific services and other expenses, the entire amount paid by the individual owners into the common charges account was properly taxable.

Based upon a review of the various services provided by petitioner to the condominium (Findings of Fact "16" through "24"), it is clear that the only taxable services provided by petitioner to the condominium were repair and maintenance services. It is further concluded that the amounts spent by petitioner on "repair and maintenance wages" for its employees and its management fee[4] constituted receipts paid by the condominium to petitioner for the services of repairing and maintaining the common areas of the condominium (see Tax Law § 1101[b][3]). The balance of the monies drawn by petitioner from the common charges

[4]The management fee was clearly a part of the consideration paid to petitioner for the repair and maintenance services. While it may be argued that some portion of the management fee should be allocated to the other (nontaxable) services provided by petitioner, there is no evidence in the record upon which to base such an allocation.

account did not constitute taxable receipts. It is therefore appropriate to recompute the additional taxable receipts in respect of the common charges as determined on audit

(Findings of Fact "34" and "35"). Petitioner introduced evidence of its actual expenditures for the periods January 1, 1982 through March 31, 1982 and January 1, 1983 through December 31, 1983. Petitioner spent $8,106.02 for repair and maintenance wages and received $2,100.00 as its management fee for the January 1, 1982 through March 31, 1982 period. Its taxable receipts for the repair and maintenance services for this period were therefore $10,206.02. For the year 1983, petitioner spent $30,246.34 on repair and maintenance wages and received $9,000.00 as its management fee. Its total taxable receipts for repair and maintenance services for 1983 was therefore $39,246.34. The Division of Taxation is directed to recompute petitioner's liability with respect to the common charges assessment for the January 1, 1982 through March 31, 1982 and January 1, 1983 through December 31, 1983 periods in accordance with the above-noted recomputations.

K. With respect to the remaining periods at issue (September 1, 1981 through December 31, 1981; April 1, 1982 through December 31, 1982; and January 1, 1984 through August 31, 1984), petitioner introduced no evidence of its actual expenditures for repair and maintenance services. The only evidence presented with respect to these periods were petitioner's budgeted estimates of its expenses for the years 1982 and 1984. This evidence is insufficient to provide a basis for a recomputation of petitioner's taxable sales of repair and maintenance services (see Matter of Hoffinger Industries, Tax Appeals Tribunal, July 20, 1989). In the absence of such evidence the total amount paid into the common charges account is properly subject to tax (Tax Law § 1132[c]), notwithstanding the fact that some portion of that total is not subject to tax (see Matter of Reference Library Guild, Inc. Tax Appeals Tribunal, August 4, 1988). Petitioner's failure to present evidence establishing the actual amount of its expenditures thus results in the imposition of tax on the entire amount.

L. The Division imposed penalty for the entire $49,290.74 sales tax assessment herein. With respect to the now revised common charges component of the assessment (Conclusion of Law "J"), petitioner has clearly shown reasonable cause and an absence of willful neglect in its failure to collect and pay sales tax on its provision of repair and maintenance services to the condominium. Given the Division's own uncertainty over the application of the sales tax law to the instant circumstances (Finding of Fact "36") petitioner's misunderstanding of the law was reasonable (see 20 NYCRR 536.5[c][5]; [d][2][i]). With respect to the remaining (and uncontested) $16,171.38 of tax assessed, petitioner attempted to relieve itself of liability for penalty through its amnesty application and payments. It is concluded that petitioner's factual misunderstanding with respect to its amnesty application and payments was reasonable. Penalty with respect to this component of the assessment is therefore cancelled.

M. The petition of Locy Development, Inc. is granted to the extent indicated in Conclusions of Law "J" and "L"; the Division of Taxation is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated June 20, 1985, in accordance therewith; except as so granted the petition is in all other respects denied; and except as so modified, the notice is in all other respects sustained.

DATED: Troy, New York
March 1, 1990

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE