

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
A & J PARKING CORPORATION	:	DETERMINATION
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, 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 and Titles A and CC of the Administrative Code of New York City for the period June 1, 1983 through May 31, 1986 (File No. 807265).

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on August 3, 1990 at 9:15 A.M., with all briefs to be submitted by November 30, 1990. Petitioner appeared by Charles R. Goulding, Esq. and Christopher R. Smith, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Peter J. Martinelli, Esq., of counsel).

ISSUES

I. Whether parking tickets maintained by petitioner constituted a record of individual sales and provided an adequate basis for verifying petitioner's taxable sales.

II. Whether petitioner has established that the audit method employed by the Division of Taxation was unreasonably unreliable or that the audit results were incorrect.

III. Whether petitioner has shown that any failure to comply with the Tax Law was due to reasonable cause and was not due to willful neglect.

FINDINGS OF FACT

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 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.

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 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.

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 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.

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

(a) 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.

(b) 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.

(c) 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.

SUMMARY OF THE PARTIES' POSITIONS

It is A & J's position that it maintained and made available to the Division adequate books and records, and, therefore, the Division had no authority to estimate the tax due on the basis of observation tests. Petitioner contends that the parking tickets maintained as evidence of

daily parkers satisfy the requirement that a record be kept of each individual sales transaction. A & J points out that it maintained a complete set of ledgers and journals which were examined by the auditor and found to be internally consistent. A & J contends that its own system of internal controls, primarily the counting of cars by Mr. Chiappone and Mr. Sanelli, insured the accuracy of its books and records.

An accountant testifying on behalf of A & J presented his own analysis of A & J's sales tax liability. His analysis used the same audit method employed by the Division but made adjustments for differences in business operations as claimed by A & J.

(a) The accountant's calculations were based on the following assumptions: that fishmarket employees paid a daily fee of \$3.00; that during the audit period, approximately 72,000 cars parked in A & J's lots without making any payments (employees of A & J's loading company, friends, relatives, ex-employees, etc.); that approximately 50 percent of A & J's parking area was unusable during the audit period because of construction; that on weekends A & J operated at 50 percent capacity from November through March and at 80 percent capacity from April through October; and that on certain holidays (Passover, Yom Kippur, Good Friday, Christmas Eve and New Year's Eve) A & J operated at 50 percent capacity.

(b) The adjustments allowed by the accountant resulted in a determination of taxable sales of \$1,032,096.28, \$7,980.72 less than the amount actually reported by A & J for the audit period.

A & J pointed out a number of factors which it viewed as demonstrating the unreasonableness of the audit. In essence, A & J argued that the audit was unreasonably inaccurate in that it failed to take into account many of A & J's actual business practices and incorrectly projected sales on the basis of observations done on four days which were not representative of the audit period.

The Division argues that the daily tickets were not source documents verifying actual sales because they could not be correlated to specific individual transactions.

The Division contends that the observation tests conducted by the Division were

reasonably calculated to reflect the tax due and that A & J did not carry its burden of proof to show any error in the audit. Specifically, the Division contends that the statistical analysis performed by A & J's accountant was pure speculation. It further argues that A & J did not prove that its business operations differed in any significant fashion from the operations observed by the auditors and did not prove any facts which would warrant an adjustment to the audit results.

CONCLUSIONS OF LAW

A. The tax on receipts from the sale of the service of providing parking for motor vehicles is imposed under section 1107(c) of the Tax Law and former sections A46-2.0(g) and CC46-2.0 of the Administrative Code of New York City. The provisions of article 28 of the Tax Law, applicable to taxes imposed under section 1105, apply equally with respect to the tax on parking fees (Tax Law § 1107[c]; Administrative Code former § CC46-5.0).

B. As a vendor of a service taxable under article 28, petitioner was a person required to collect tax on account of the State (Tax Law §§ 1101[b][8]; 1131[1]). Every person required to collect tax must maintain records sufficient to verify all sales transactions, in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Among the records to be maintained are "records of every sale" and the tax due on that sale (Tax Law § 1135[a]). Where a vendor fails to file a return required under article 28, or files a return which is incorrect or insufficient, the Division is authorized to determine the tax due from such information as is available and may estimate the tax due on the basis of external indices if necessary (Tax Law § 1138[a][1]). The Division may not resort to external indices to determine the tax due if the vendor maintains a comprehensive set of books and records from which the exact amount of tax due may be determined (see, Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43).

Among those records which a taxpayer must maintain if its books and records are to be deemed adequate for audit are original records of each, individual sales transaction, such as sales invoices, guest checks or ticket stubs (Tax Law § 1135[a]; see, Matter of Giordano v. State Tax Commn., 145 AD2d 726, 728, 535 NYS2d 255; Matter of Bonanno v. State Tax

Commn., 145 AD2d 693, 534 NYS2d 829; Matter of Goldner v. State Tax Commn., 70 AD2d 978, 418 NYS2d 477, lv denied 48 NY2d 608). The parking tickets maintained by petitioner did not satisfy the requirements of section 1135(a), because they did not state the amount charged or the amount of tax collected. In addition, the Division could not verify through an independent audit that a ticket was present for each and every car parked during the audit period. Petitioner's practice of policing its parking attendants is not a substitute for maintaining verifiable records of sales. The Division cannot be asked to rely on the taxpayer's word that its business practices produced a completely accurate set of journals and ledgers (see, Matter of Giordano v. State Tax Commn., supra). Since petitioner's records were not adequate to verify each sale, the Division was warranted in employing external indices to determine the tax due.

C. Where the taxpayer's records are insufficient, considerable latitude is given to the Division's method of estimating sales (Matter of Carmine Rest. v. State Tax Commn., 99 AD2d 581, 471 NYS2d 402). It is only necessary that the Division select an audit method reasonably calculated to reflect the tax due (Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, cert denied 355 US 869), and the burden is then placed on the petitioner to show "that the result of the method used was unreasonably inaccurate or that the amount of tax assessed is erroneous" (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679, 681). Given the nature of petitioner's business, an observation test was virtually the only method available to the Division to determine taxable sales; however, petitioner has established that the audit results were inaccurate.

D. The Division's audit was based on the assumption that all cars parked in A & J's lots during the early morning hours of the observation tests paid a parking fee. Petitioner proved that this assumption was not entirely correct. During the hours when the Fulton Fishmarket was operating, A & J did not collect parking fees from either customers of the fishmarket, whose vehicles were being loaded with fish, or from employees of the fish loading companies operated by A & J's principals (Finding of Fact "4"). Fees were collected from employees of other fish loading companies; however, the fee was collected on a monthly basis and these monthly fees

were separately assessed. That portion of the audit is examined in Conclusion of Law "E" and is not dealt with here.

During the course of the audit, the Division was informed of petitioner's claim that during the early morning hours A & J's property was used primarily as a loading area and not as a parking lot. Moreover, the Division was provided with copies of A & J's contractual agreements with the City which generally supported A & J's description of its business activities. Nonetheless, the Division did not attempt to either corroborate or disprove petitioner's claim by questioning fishmarket vendors or customers whose vehicles were counted during the observation test. The auditor testified that she asked Mr. Chiappone's son for a list of vehicles associated with the fishmarket business and Mr. Vona for "proof of the exemption from the parking fee". Apparently, it was petitioner's inability to provide the requested information which led the Division to assume that all cars present during the observation tests paid a fee and to assess tax accordingly.

There is a presumption in the Tax Law that receipts for property or services of any type mentioned in Tax Law section 1105, subparagraphs (a) through (f), are taxable until the contrary is established. Inasmuch as fishmarket customers were using A & J's property as a loading area and paid no fee for this use, the presumption of section 1132(c) does not apply. Moreover, since the vehicle owners had no obligation to pay a fee to A & J, A & J had no duty to maintain records of vehicles using the area for loading, and A & J's inability to produce such records is not enough to support the Division's assumption that all cars present were charged a parking fee. In light of the auditor's failure to distinguish between vehicles using A & J's lots for loading fish and those actually parked on those lots, it is concluded that the audit method used to determine daily morning parking fees was not reasonably calculated to reflect the tax due. The Division is directed to eliminate from its calculation of additional taxable sales \$926,435.84 (see, Finding of Fact "16").

E. The Division's determination that employees of the fishmarket paid a monthly parking fee of \$140.00 is not supported by evidence in the record. Several documents filed with the

City Department of Consumer Affairs and the testimony of Mr. Chiappone attest to the fact that A & J charged fishmarket employees a fee of \$60.00 per month. Opposed to this evidence is the auditor's conversations with two to four persons who were obviously loathe to offer any information to the auditor. Their willingness to affirm a figure offered to them by the auditor is not a sufficient basis for the Division's conclusion that the documents filed with the City were false. The Division counted 41 fishmarket employees on June 10, 1987 and 26 fishmarket employees on October 22, 1987 (see Finding of Fact "10"), and, therefore, the average number of fishmarket employees is deemed to be 34 per day. The Division is directed to recompute its calculation of monthly morning parking fees (see, Finding of Fact "16") by allowing for 34 fishmarket employees paying a reduced charge of \$60.00 per month.

F. Likewise, there is no basis for the Division's determination that empty spaces should be treated as paying customers. This determination was based on the auditor's presumption that A & J's employees were turning back cars for the purpose of reducing the auditor's count. The auditor gave no basis for this presumption, while Mr. Chiappone offered a credible explanation for turning away additional cars despite the existence of some empty spaces in the parking lots. The Division will reduce its estimate of daily afternoon, evening and weekend parkers to those cars actually counted by the auditors (see, Findings of Fact "10[b], [c]").

G. An amended rate application filed with the City shows that A & J began collecting weekend parking fees effective August 10, 1983. There is no other evidence in the record to support a conclusion that fees were collected before that date or a conclusion that fees were not collected until after that date. The Division will recompute its estimate of weekend parking fees by calculating such fees only for the period August 10, 1983 through the end of the audit period.

H. The Division agreed at a conciliation conference to reduce the tax determined to be due to \$260,890.81 plus penalty and interest by allowing five additional nonbusiness days per year in its calculations. The Division's recalculation of taxable sales will reflect this agreement.

I. Petitioner established that during the audit period its parking lots were unusable because of construction being performed by the City. Photographs taken by petitioner during

the period of construction contrast sharply with photographs taken by the auditors during the audit period and dramatically illustrate the dimension of the construction activity. However, Mr. Chiappone's testimony that up to 70 percent of A & J's parking area was inaccessible during the height of the construction period was too general a statement upon which to base an adjustment to the audit. Evidence in the record that the City granted petitioner a nine percent rent abatement provides the only objective basis for recognizing the effect of the construction activities on petitioner's business. Consequently, the results of the audit will be reduced by nine percent, after all other computations are completed as directed in Conclusions of Law "D", "E", "F", "G" and "H".

J. Except as indicated, petitioner has shown no other errors in the audit method or results. Mr. Chiappone testified that ex-employees and other individuals were allowed to park without paying a fee, but petitioner provided no evidence whatsoever of the extent of this practice; consequently, there is no basis for reducing fees collected to reflect free parking. Petitioner offered climatological data which established that the days of the observation tests were unusually sunny for New York City, but this evidence is insufficient to support its witness's assertion that A & J operated at 50 percent capacity from November through March and 80 percent capacity from April through October. Likewise, there is no evidence in the record to support a reduction of taxable sales to reflect holidays or nonworking days in addition to those allowed by the Division.

K. Tax Law § 1145(a)(1)(i) authorizes the imposition of penalty for failure to file a return or to pay over any tax under article 28 in a timely manner. Section 1145(a)(1)(vi) imposes an additional penalty where the taxpayer omits from the total amount of taxes required to be shown on a return an amount which is in excess of twenty-five percent of the amount of the taxes required to be shown on a return. In both cases, the penalty may be abated if the delay or failure to pay was due to reasonable cause and not due to willful neglect (Tax Law § 1145[a][1][iii], [vi]). The taxpayer bears the burden of establishing reasonable cause as well as the absence of willful neglect (see, e.g., Matter of T.V. Data, Inc., Tax Appeals Tribunal, March

2, 1989).

Petitioner has not offered any reason for its failure to accurately report and pay all taxes when due. Moreover, its assertion that it maintained complete and accurate books and records has been rejected. Accordingly, petitioner has not established a basis for cancelation of penalties.

L. The petition of A & J Parking Corporation is granted to the extent indicated in Conclusions of Law "D" through "I"; the notices of determination and demands for payment of sales and use taxes due dated May 16, 1988 shall be modified accordingly; and in all other respects, the petition is denied.

DATED: Troy, New York

2/28/91

ADMINISTRATIVE LAW JUDGE