STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CJEFA PIZZA, INC.	:	DETERMINATION DTA NO. 821644
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 March 1, 2001 through February 29, 2004.	:	

Petitioner, Cjefa Pizza, Inc., 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 March 1, 2001 through February 29, 2004.

A hearing was commenced before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 6, 2007 at 10:30 A.M. and continued to conclusion at the same location on December 7, 2008 at 9:30 A.M., with all briefs to be submitted by July 18, 2008, which date began the six-month period for the issuance of this determination. Petitioner appeared at hearing by Barry Leibowicz, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUE

I. Whether the Division of Taxation properly estimated petitioner's taxable restaurant sales.

II. Whether penalties were properly imposed.

FINDINGS OF FACT

1. Petitioner operates a restaurant and pizzeria named Intermezzo in Fort Salonga on Long Island. During the three-year period at issue, petitioner reported gross sales of $2,223,537.00, of which $2,180,840.00 were reported as taxable sales.

2. By an appointment letter dated March 25, 2004, the Division of Taxation (Division) notified petitioner that its "New York State Sales and Use Tax Records have been scheduled for a field audit" for the three-year period of March 1, 2001 through February 29, 2004. The Division's auditor was an experienced employee who, in the course of his 31 years with the Division, had conducted 350 to 400 sales tax audits. By this letter, the auditor detailed the specific books and records, for the entire audit period, which "must be available" on the appointment date of April 14, 2004:

> Sales tax returns, worksheets and canceled checks
> Federal income tax returns
> NYS corporation tax returns
> General ledger
> General journal and closing entries
> All exemption documents supporting non-taxable sales
> Chart of accounts
> Bank statements, canceled checks and deposit slips for all accounts
> Cash receipts journal
> Cash disbursement journal
> Power of attorney properly executed
> Depreciation schedules
> State Liquor authority license
> Guest checks
> Cash register tapes

The auditor indicated that any of the above requested items "may be submitted in electronic format, if available, and this may facilitate the audit process."

3. The audit to be commenced on April 14, 2004 was a follow-up audit to one conducted of petitioner's restaurant sales for the earlier period of June 1, 1998 through February 28, 2001.

This earlier audit resulted in the Division's increasing petitioner's reported taxable sales by 27% from $1,801,536.00 to $2,293,942.00 with additional tax due of $46,124.96.

4. With the appointment letter dated March 25, 2004, the auditor included a sales tax computer audit questionnaire for completion by petitioner if any of its records were computerized. This questionnaire included instructions as well as a contact telephone number for the Division's EDP (Electronic Data Processing) Field Audit Support Section if petitioner had any questions concerning the completion of the questionnaire. Properly completed, the questionnaire would disclose relevant details concerning petitioner's computerized records including:

> 1. Whether computerized records at the detail transaction level were maintained for sales, accounts payable, fixed assets, general ledger, purchasing system;
> 2. If so, what data elements are captured electronically in separate fields, and for sales whether "description of items or services sold" are captured electronically;
> 3. Media types computer system is capable of producing;
> 4. Person to contact for data processing information such as a data processing manager or systems analyst.

5. Petitioner's corporate president, Robert Gardner, advised the auditor that petitioner was unable to provide any books and records due to civil litigation between family members concerning the ownership of petitioner: "My son James Gardner . . . has the records and refuses to turn them over." By a letter dated July 20, 2004, Robert Gardner advised the auditor that his attorney was still attempting to obtain petitioner's "documents." Consequently, some three months beyond the initial appointment date of April 14, 2004, the auditor had not been provided with any books and records for review. The auditor did not ask for access to any computer databases since he was not informed that they were available for review; petitioner did not complete and return to the auditor the computer audit questionnaire detailed in Finding of Fact 4.

6. On November 3, 2004, the auditor met with petitioner's prior representative, James B. Lebenns, who produced no sales records and no purchase records. Rather, he provided "very spotty records" consisting of "one federal income tax return, sales tax returns and some bank statements, which weren't complete for the audit period." In addition, the auditor was provided with some information concerning petitioner's "Pixel Point system, which is a computerized register system, but it wasn't for the whole audit period," and the information consisted of summaries with no backup details. The auditor determined that the summaries provided "can't prove whether every sale was rung up." He was also told by petitioner's president that the records can be adjusted. As a result, the auditor notified petitioner by a letter dated November 24, 2004 that its records were not adequate and an observation test was going to be conducted. By this letter, petitioner was advised that its "sales activity will be recorded for an entire day, from opening to closing and that the observation will be performed discreetly, with minimal interruption of business activity." Neither Mr. Lebenns nor Mr. Gardner noted any disagreement with the auditor's initial decision to conduct the observation test

7. On Friday, December 10, 2004, an observation test was conducted in a thorough and professional fashion by two investigators of the Division, who have performed 1,500 observation tests in their employment with the Division. Since the restaurant served lunch and dinner, the first investigator arrived at the premises at 11:00 A.M. and ascertained that the computerized register was zeroed out at the start of the business day. The second investigator relieved the first investigator at 3:30 P.M. and stayed until the restaurant closed at approximately 10:30 P.M. During their observation, the investigators recorded total gross receipts of $5,364.77, which was less than petitioner's "final Z-out" per its register tape of $6,431.54 comprised of credit card sales of $2,788.74 and cash sales of $3,642.80. The Division's investigators viewed the final Z-

out as "a more accurate figure of what was sold during the course of this observation" and used the higher amount.[1] After deducting credit card tips of $188.82, gift certificates of $50.00, catering orders of $124.00 and other sales of $39.00, the Division determined that gross sales for the day were $6,028.09. Since Friday was petitioner's busiest day of the week, sales for the remainder of the week were determined at a reduced percentage[2] of Friday's sales: Sunday sales as 65% of Friday's sales; Monday's sales as 51.63% of Friday's; Tuesday's sales as 42.87% of Friday's sales; Wednesday's sales as 36.34% of Friday's sales; Thursday's sales as 45.38% of Friday's sales; and Saturday's sales as 75% of Friday's sales. The investigators then computed total weekly taxable sales of $25,090.12, average daily taxable sales of $3,584.30 and quarterly taxable sales of $319,002.70 for the quarter ending February 28, 2005 (the quarter within which the observation day of December 10, 2004 fell). For the quarters ending February 28, 2002, February 28, 2003 and February 28, 2004, petitioner reported taxable sales of $184,358.00, $191,189.00 and $177,494.00, respectively. After allowing inflation adjustments of 9% for 2002, 6% for 2003 and 3% for 2004, the Division computed an average of $195,339.18 for

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[1] The investigators were "not supplied with all of the guest checks for this day [of the observation test]" and decided to rely upon the sales that were recorded by petitioner's computerized register. As noted in Finding of Fact 6, the auditor had only limited information concerning petitioner's computerized register system. At the hearing, by the testimony of the salesman who sold the system to petitioner, it was established that there were four terminals at the restaurant where entries could be made by wait staff or bartenders who placed orders. Since the investigators focused their attention on the restaurant's main register, the lesser amount of sales which they tabulated based on guest checks, as compared to the "final Z-out," might be explained by orders placed at other terminals as well as the fact that they were not provided with all of the guest checks used by the wait staff.

[2] Included in the audit workpapers is a "Transcript of Weekly Percentage Relationship" of taxable sales based upon observation tests performed on 75 Long Island pizzerias and 16 Long Island pizzeria/restaurants over a period of several years. Observation tests were performed on 7 Fridays, 39 Thursdays, 25 Wednesdays, 17 Tuesdays, and 3 Mondays. Average Friday taxable sales were $2,060.51; average Thursday taxable sales were $935.01; average Wednesday taxable sales were $748.76; average Tuesday taxable sales were $883.38, and average Monday taxable sales were $1,063.93. The percentages shown above for the weekdays were calculated by comparing the average sales from the 91 observation tests on Monday, Tuesday, Wednesday and Thursday to the higher average sales on Friday.

quarterly sales reported by petitioner for each of the quarters ending February 29, 2002, February 28, 2003 and February 28, 2004. The Division then subtracted such average quarterly sales reported of $195,339.18 from audited taxable sales, based upon the observation test, for the quarter ending February 28, 2005 of $319,003.70 and determined additional taxable sales of $123,663.52 for the test quarter. Dividing additional taxable sales of $123,663.52 for the test quarter by $195,339.18, the average of reported quarterly sales as adjusted for inflation (for the quarters ending February 28 for the prior three years), the Division computed an error rate of .6331. This error rate was then applied to reported taxable sales for the audit period of $2,180,840.00 to compute additional taxable sales of $1,380,689.80 and additional tax due on sales of $118,066.62.[3]

8. During the performance of their observation test, the investigators observed that petitioner's restaurant had 16 employees in the course of the day including the owner, Robert Gardner. Their report noted that there were 22 tables and 65 chairs for dining with many take-out orders placed and picked up.

9. On February 23, 2005, the Division mailed copies of the audit workpapers related to the observation test to petitioner explaining that it owed additional tax of $118,367.33[4] for the audit period, plus penalties and interest. The auditor met with petitioner's former representative, James Lebenns, to discuss the audit on May 4, 2005. Mr. Lebenns disagreed with the audit findings contending that petitioner recorded all of its sales and there should be no tax liability.

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[3] In early November 2005, the auditor in order not "to hit [petitioner] for catering sales for the whole audit period" backed out catering sales included in sales as observed on the test day of December 10, 2004. This subsequent adjustment resulted in a lower "margin of error" and a decrease in additional tax due on sales to $112,604.83.

[4] In addition to tax due on sales of $118,066.62, the Division also determined additional tax due of $300.71 on petitioner's fixed asset purchases, which has not been contested by petitioner. Consequently, tax asserted due as noted above was $118,367.33 ($118,066.62 plus $300.71).

He complained that the Division did not utilize petitioner's records in computing a tax liability and contended that petitioner's computerized register system represented adequate sales records. The auditor was provided with a written explanation by Robert Gardner dated May 1, 2005, which explained the operation of the computerized system.

10. After discussions between the auditor and his team leader, the Division decided to use a "cash to credit card ratio" which would be computed based upon the observation test. By then utilizing petitioner's bank deposit records, which showed the deposit of its credit card sales, sales tax due could be recalculated in an alternative fashion which utilized some of petitioner's own records. Since credit card deposits were automatically made into petitioner's bank account by its credit card service, the auditor believed that petitioner's "credit card sales can't be played with, they're going to be deposited" in contrast with petitioner's cash sales. In contrast, bank records were not available to show all of petitioner's deposits of its cash sales. Consequently, on October 21, 2005, the auditor contacted Mr. Lebenns to obtain copies of the rest of petitioner's bank statements so the cash to credit card sales methodology could be utilized.

11. On November 21, 2005, the auditor received a letter from an attorney, Barry Leibowicz, who advised that he now represented petitioner and claimed that the auditor "improperly" estimated sales "when adequate books and records exist." By a follow-up letter dated December 3, 2005, attorney Leibowicz noted that, "All records for the entire audit period are in fact available inclusive of pixelpoints." Nonetheless, the Division proceeded with recalculating tax due by utilizing the cash to credit card sales methodology after the auditor met with attorney Leibowicz on February 7, 2006. Although additional bank deposit information was provided, no backup was presented for petitioner's Pixel Point system.

12. The auditor recalculated tax due by determining that credit card receipts on December 10, 2004, the observation test day, were 43% of total receipts and cash receipts were 56%[5] of total receipts. A "cash to credit card ratio of 1.3023 was calculated by dividing the cash receipts percentage of 56% by the credit card receipts percentage of 43%. Analyzing petitioner's bank deposit information, the auditor determined credit card receipts of $1,228,745.66 for the periods December 1, 2001 through May 31, 2002 and December 1, 2002 through February 29, 2004. Cash sales of $1,600,195.48 were calculated by multiplying credit card receipts of $1,228,745.66 by the cash to credit card ration of 1.3023. Total receipts for the periods December 1, 2001 through May 31, 2002 and December 1, 2002 through February 29, 2004 of $2,828,941.14 were calculated by adding credit card receipts of $1,228,745.66 and cash sales of $1,600,195.48. After deducting credit card tips of $191,519.34 and sales tax of $115,202.00, the Division computed audited taxable sales of $2,522,219.80 for the periods December 1, 2001 through May 31, 2002 and December 1, 2002 through February 29, 2004. The auditor deducted reported taxable sales of $1,337,665.00 from audited taxable sales of $2,522,219.80 to determine additional taxable sales of $1,184,554.80 for the periods December 1, 2001 through May 31, 2002 and December 1, 2002 through February 29, 2004 and a margin of error of .8855. This margin of error was then multiplied by reported taxable sales for the audit period of $2,180,840.00 to determine additional taxable sales of $1,931,133.82 and additional tax due on sales of $165,136.64, an amount considerably greater than $118,066.62, the amount determined due based upon the observation test as detailed in Finding of Fact 7.

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[5] Cash receipts were initially determined to be 57% of cash receipts but after the Division deducted $124.00 in catering receipts from the cash receipts, cash receipts represented 56% of total receipts.

13. By a letter dated May 10, 2006, the Division advised petitioner's new representative why it continued to deem petitioner's records to be inadequate notably that:

> No backup presented for Pixel Point system. No proof that Pixel Point system ties into deposits or amounts reported.

Further, the Division complained that not even Pixel Point system "*summaries* for the whole audit period" were made available (emphasis added). Moreover, petitioner never provided for review any computer report with details of daily sales by individual sales transactions. Petitioner's principal, Robert Gardner, during his cross-examination was specifically asked why petitioner did not retrieve such detail from its computer system and provide it for review by the Division. His answer was cagey:

> [B]ecause the summary [of daily sales] is what's in the computer. It would be a redundancy. The computer, what's in the computer is in the report, that's what it is. It's not that there is some isolated field of information. It's there. What that summary is, is a regurgitation of the information in that system precisely (Transcript at 439).

Mr. Gardner denied during his cross-examination that petitioner had guest checks by a response which was not forthcoming:

> Attorney Jack: Were guest checks provided to the investigators?
>
> Mr. Gardner: We don't have guest checks.
>
> Attorney Jack: Do you recall what you provided to the investigators?
>
> Mr. Gardner: What I think happened is that those checks that were going to be cleared at the register they saw. That is, prior to validating them, they saw that check. In a sense they saw the credit card receipt, that's what they're terming guest checks. We don't have any guest checks. We have a credit card receipt. (Transcript at 448.)

Later during his testimony on redirect examination, petitioner's principal responded "Yes" to the following leading question:

> Did you indicate to [the auditor] that you believed that the backup for the transactions as recorded in the system was reflected in the Pixel Point summaries you gave him? (Transcript at 450).

Finally, late in his testimony just before he was excused as a witness, Mr. Gardner revealed in the course of his "Yes" or "No" responses to a series of leading questions that petitioner's computer system, in fact, has the capacity to print out records that provide details concerning *individual* sales transactions:

> Attorney Leibowicz: Now, with regard to guest checks . . . you talked about some flimsy pieces of paper that were given to the customer, okay. Might someone call that a guest check?
>
> Mr. Garner: Yes.
>
> Attorney Leibowicz: Was that a part of an accounting system that was retained by you in paper?
>
> Mr. Gardner: No.
>
> Attorney Leibowicz: Was that because the data was inside your computer system anyway?
>
> Mr. Gardner: Yes.
>
> Attorney Leibowicz: Was it possible that, at the request of an auditor or an investigator, you could reprint one of these customer slips for her benefit?
>
> Mr. Gardner: Yes.
>
> * * *
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> Attorney Leibowicz: Mr. Gardner, does this [Exhibit 44] represent . . . an example of the kinds of bills that the waitress retrieves from the system and gives to the customer?
>
> Mr. Gardner: Yes.
>
> Attorney Leibowicz: Does the system have the ability of reprinting it on request by an auditor or whoever or even a customer?
>
> Mr. Garner: Yes.

Attorney Leibowicz: Do you recall whether the investigators on the day of the observation asked for some of these bills to be reprinted?

Mr. Gardner: I honestly don't recall.

Attorney Leibowicz: If they had asked for them to be reprinted, would you have done it?

Mr. Gardner: Yes.

Attorney Leibowicz: Did Cjefa keep reprint records in the ordinary course of business?

Mr. Garner: No.

Mr. Leibowicz: Might that account for some of the "guest checks" that the investigators referred to?

Mr. Gardner: Yes.
(Transcript at 460-464.)

14. A close review of an example of the "customer slips" or "bills," which the Division's investigators viewed reasonably as "guest checks" during their observation test, shows that they provide a complete record of individual sales transactions including the following information: food and beverage items sold; New York sales tax due on the sale; table number; name of particular waiter or waitress; an individual transaction number; and the specific day and time, to the *second,* of the sales transaction.

15. Rather than utilizing the results of its observation test, as detailed in Finding of Fact 7, the Division recalculated tax due based upon its "cash to credit ratio" analysis, as detailed in Finding of Fact 12, which resulted in an assessment which was 29% higher than an assessment based upon the results from the observation test. The Division issued a Notice of Determination dated July 27, 2006 asserting sales tax due of $165,437.35 (which includes the additional tax due of $300.71 on petitioner's fixed asset purchases, as noted in footnote 4) against petitioner plus

penalties and interest, rather than the lesser amount of $118,066.62 based on its observation test. Penalties were imposed for underpayment of tax, including the omnibus penalty since additional tax due was more than 25 percent of the audited tax due.

SUMMARY OF THE PARTIES' POSITIONS

16. Based upon the testimony of its expert witness, Jay Oher, a certified public accountant who was a New York State sales tax auditor for ten years, petitioner contends that its records were adequate and it was improper for the Division of Taxation to base an assessment on external indices. Mr. Oher reviewed petitioner's bank deposits and the worksheets of petitioner's accountant, who prepared the sales tax returns at issue, and concluded that petitioner's "deposits float the sales tax returns." He faulted the Division's auditor for not attempting to reconcile the work papers of petitioner's accountant to petitioner's bank deposits and the sales tax returns the accountant prepared for petitioner. Therefore, in his opinion, the Division's auditor in this case had no basis to estimate petitioner's sales. Petitioner asserts that it maintained exemplary books and records which utilized the latest technology and therefore the audit methodology at the time the assessment was made, which estimated petitioner's sales, was invalid.

17. The Division argues that no source documentation for petitioner's sales was ever provided during the audit or at hearing. The computer generated summaries did not constitute adequate books and records. Petitioner was required to produce the backup for the summaries. If adequate books and records are not provided, the Division maintains that it has the right to estimate tax due. It maintains that the audit methodologies employed were reasonable since they were based on an all-day observation test of petitioner's business together with available bank deposit information.

CONCLUSIONS OF LAW

A. As noted in the Findings of Fact, the audit of petitioner commenced in the early spring of 2004, and the Notice of Determination dated July 27, 2006 under review was issued over two years later, during which period the Division was faced with changing circumstances with regard to the availability of petitioner's records for its review and analysis. As noted in Finding of Fact 2, in response to the Division's initial request, petitioner made available for the auditor's review very limited documentation of its business operations including only very limited documentation of its sales and use taxes due. Most important, petitioner failed, as detailed in Finding of Fact 4, to complete the computer audit questionnaire which would have disclosed relevant details concerning petitioner's computerized records. In particular, the questionnaire specifically posed the question, unanswered by petitioner, "whether computerized records at the detail transaction level were maintained for sales." Consequently, the auditor's initial decision to utilize an indirect audit methodology by conducting an observation test of one day's sales was proper. Pursuant to Tax Law § 1135(a)(1), petitioner, as a person required to collect sales tax, had a responsibility to maintain records sufficient to verify its sales transactions "in a manner suitable to determine the correct amount of tax due." In the spring of 2004, when the audit was commenced, petitioner was not in compliance with this requirement, and there is simply no basis for petitioner to object to the Division's conduct of an observation test on December 10, 2004. In sum, at the time of such test, petitioner had not completed either the computer audit questionnaire or made its computer records available for analysis by the Division. Therefore, the Division's right to resort to an estimate of petitioner's sales, as long as it selected an audit method reasonably calculated to reflect the sales and use taxes due, was unassailable at the time it conducted its observation test on December 10, 2004 (***see Matter of Rincon,*** Tax Appeals

Tribunal, October 9, 2003). Simply stated, by December 10, 2004, petitioner had been given nearly nine months to provide records for the auditor's review and failed to do so. Consequently, it may be concluded that the Division properly resorted to an estimate of petitioner's taxable sales in December of 2004 (***cf. Matter of Sarantopoulos***, Tax Appeals Tribunal, February 28, 1991, ***confirmed*** 186 AD2d 878, 589 NYS2d 102 [1992]). Further, the law is clear that the results of a one-day observation test may reasonably be extrapolated over a multiple-year audit period (***Matter of Marte***, Tax Appeals Tribunal, August 5, 2004).

B. However, as noted in Finding of Fact 15, the Division did not utilize the results of the observation test in the usual fashion, which has been recognized as a reasonable methodology. Rather, for purposes of the Notice of Determination dated July 27, 2006, as detailed in Finding of Fact 12, the auditor determined a cash to credit card ratio based upon the observation test and applied such ratio to audited credit card receipts in a complex calculation. The auditor justified such alternative computation of tax due on the basis that he could utilize petitioner's own bank records in performing such calculation. The auditor denies petitioner's contention that he chose this more complex methodology over the more easily understood and well-accepted methodology, which estimates sales based upon an observation of daily sales, because it produced a higher assessment. Although petitioner's relationship with the Division became very adversarial, it cannot be concluded that the auditor utilized the cash to credit card ratio merely to punish petitioner and produce a higher assessment. In any event, it may be concluded that this more complex methodology for estimating sales was, regardless of the auditor's motivation, in the first instance, a reasonable audit methodology (***see Matter of Burbacki***, Tax Appeals Tribunal, February 9, 1995).

C. The analysis therefore shifts to whether petitioner has shown, despite the conclusion that the audit methodology in the first instance was reasonable, that "the amount of tax assessed was erroneous" (***Matter of Pay TV of Greater New York, Inc.***, Tax Appeals Tribunal, July 14, 1994 [wherein the Tribunal concluded that the administrative law judge "erred in sustaining the entire assessment"]).

D. As noted in Finding of Fact 13, it was not until nearly the end of the testimony of petitioner's president that it became clear that petitioner had the capability of printing out records from its computerized system that provide details concerning individual sales transactions. As noted in Finding of Fact 14, the "customer slips" or "bills" provided complete details concerning the individual sales transaction. It is difficult to understand why petitioner failed to bring out this capability earlier and to cooperate with the Division in permitting the auditor to evaluate the details of its sales transactions. Petitioner's contention, based on the opinion of its expert witness, that the Division was without authority to resort to an estimate of its sales is rejected: even if the worksheets of petitioner's accountant, who prepared its sales tax returns, show bank "deposits float the sales tax returns," the Division may not be barred from estimating sales when petitioner failed to produce for the auditor's review records sufficient to verify its individual sales transactions. Moreover, in light of the fact that petitioner was capable of producing such records of individual sales transactions but failed to do so, it is proper to hold such failing against petitioner and conclude that it did not properly account for its sales and report and pay over all of the sales tax due on its restaurant sales (***see Matter of Meixsell v. Commissioner of Taxation***, 240 AD2d 860, 659 NYS2d 325 [1997], ***lv denied*** 91 NY2d 811, 671 NYS2d 714 [1998]; ***Matter of Greenwald***, Tax Appeals Tribunal, November 24, 1993). Such failure to produce the details of individual sales transactions, when petitioner had the capacity to do so, is also of concern in

light of the fact that "computer records can be tampered with" (***see*** *With Software, Till Tampering Is Hard to Find*, New York Times, August 30, 2008).[6]

E. Nonetheless, it is concluded that the administrative record supports a conclusion that the assessment should be reduced to $112,905.54, made up of tax due on sales of $112,604.83, as computed based upon the methodology detailed in Finding of Fact 7, and as modified in order to back out catering sales as noted in footnote 3, plus the tax due of $300.71 on petitioner's fixed asset purchases. Although both of the methodologies used by the Division to calculate sales tax due were "reasonable," there is no doubt that the customary methodology of estimating sales based upon the careful observation of one day's sales was more reasonable than the cash to credit card ratio methodology. In particular, it is noted that the Division calculated a very reasonable estimate of petitioner's *weekly* sales after utilizing a reduced percentage of the sales observed on the Friday test day to estimate sales for the other, less busy, days of the week as noted in Finding of Fact 7. It also very reasonably compared its estimated quarterly sales to an amount representing reported quarterly sales after accounting for inflation and averaging reported sales for *three sales tax quarters*. In contrast, the cash to credit ratio was based upon sales on only *one day*.

F. Finally, petitioner has not established that its failure to pay tax was due to reasonable cause and not due to willful neglect. In the words of the Tax Appeals Tribunal, in establishing

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[6] Pursuant to State Administrative Procedure Act § 306(4), the administrative law judge took official notice of a fact of common and general knowledge, well-established and settled, that "computer records can be tampered with" as indicated by this article in the New York Times. This article discussed how "zapper" programs on computer cash registers alter records, then are removed, masking the theft. By notice dated October 17, 2008, the parties were provided with a copy of the article and the opportunity to submit comments. Neither party responded with any comments.

reasonable cause, the taxpayer faces an "onerous task" (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained why the task is onerous as follows:

> By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]" (***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992).

In addition, the audit at issue, as noted in Finding of Fact 3, was a follow-up audit to one conducted of petitioner's restaurant sales for an earlier period so that petitioner was on notice that it was required to maintain records, available for review by the Division's auditors, which would provide substantiation of its individual sales transactions. Penalties were therefore properly imposed (***cf. CBS Corp. v Tax Appeals Tribunal***, __ AD3d __, 867 NYS2d 270 [wherein the court reaffirmed the rigid standard imposed upon a taxpayer to establish that its failure to pay tax was due to reasonable cause and not willful neglect emphasizing that "'willfulness does not require an intent to deprive the government of its money but only something more than accidental nonpayment' (***Matter of Auerbach v. State Tax Commn.***, 142 AD2d at 395)"]).

G. The petition of Cjefa Pizza, Inc. is granted to the extent indicated in Conclusion of Law E, and the Notice of Determination dated July 27, 2006 is to be modified to so conform, but, in all other respects, is denied.

DATED: Troy, New York
January 8, 2009

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE