STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
STEPHEN GALLAGHER, INC.	:	DECISION DTA NOS. 816114
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1983 through August 31, 1995.	:	AND 816115

Petitioner Stephen Gallagher, Inc., 163 East 92nd Street, Apartment # 17, New York, New York 10128-2421, filed an exception to the determination of the Administrative Law Judge issued on June 24, 1999. Petitioner appeared by Schlam, Stone & Dolan, LLP (James C. Sherwood, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner's request for oral argument was withdrawn.

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

ISSUES

I. Whether, as a result of an audit, the Division of Taxation properly determined additional sales tax due.

II. Whether petitioner established that it had reasonable cause for its failure to file sales tax returns and to report and pay over sales taxes when due.

III. Whether petitioner established that an agency relationship existed between it and Madison Square Garden Center, Inc. and that, therefore, no sales tax was due.

IV. Whether the Division of Taxation was required to accept petitioner's estimate of taxable and nontaxable sales.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On November 24, 1995, following an audit, the Division of Taxation ("Division") issued to petitioner, Stephen Gallagher, Inc., a Notice of Determination which assessed a total amount due of $1,162,955.56 for the period December 1, 1984 through August 31, 1995 (Assessment ID L-011398800-8), consisting of $506,682.72 in sales tax due, plus penalty and interest.

Also on November 24, 1995, following the same audit, the Division issued a Notice of Determination to petitioner which assessed penalty in the amount of $10,000.00 (Assessment ID L-011398700-7). This notice stated that the penalty was being assessed "pursuant to section 1145 of the New York State Sales and Use Tax Law for failure to register 20 days prior to taking possession of, or paying for, business assets and/or for operating a business while unregistered." The notice also stated a "tax period ended date" of September 30, 1995.

Petitioner, Stephen Gallagher, Inc., was incorporated and began doing business in January 1984. Petitioner's president and sole shareholder was Stephen Gallagher. Petitioner's Federal and State corporation tax returns filed during the period at issue list petitioner's principal business activity or its principal product or service in various years as "catering" (1984 New York franchise tax return), "consultant" (1985 New York franchise tax return), "special events"

(1986 New York franchise tax return), "catering" (1987 New York franchise tax return), "catering" and "special events" (1987 Federal income tax return), "special events coordination" (1989 New York S Corporation Information Return), "business catering and promotion" and "special event coordination" (1989 Federal S corporation income tax return), "service - special events" (1989 New York application for extension for filing return), and "special event coordination" (1990 New York application for extension for filing return).

Petitioner was not registered as a vendor for sales tax purposes and did not file any sales tax returns during the period at issue.

The audit in this matter began after the Division received information from a third party indicating that petitioner may have been making taxable sales or performing taxable services. In response, the Division sent a letter to petitioner dated November 15, 1993 requesting certain information. Petitioner, through its accountant, responded to this letter by telephone conversation on December 15, 1993 and letter dated December 20, 1993. By such communications, petitioner advised the Division that its records were in the possession of its former accountant and that petitioner had commenced a proceeding in New York Supreme Court against its former accountant in an effort to regain possession of its records. That legal action had led to a stipulation whereby the former accountant had agreed to turn over all records in his possession to petitioner's representative by December 3, 1993. The accountant failed to comply with the stipulation and a contempt order was entered against him on May 12, 1994. Pursuant to an order dated June 15, 1995 petitioner's case against its former accountant was restored to the conference calendar in the New York County Supreme Court and the parties were directed to appear for a status conference on July 17, 1995. Petitioner offered no additional information

regarding its case against its former accountant. Petitioner was unable to obtain any records in the possession of its former accountant.

From the time of its initial contact with petitioner until the issuance of the statutory notices the Division communicated with petitioner several times. In response to the request of petitioner's representative the Division provided petitioner with copies of petitioner's State and Federal corporation tax returns in the Division's possession for the period at issue. Petitioner provided the Division with copies of nine invoices in connection with work performed in November 1992 through February 1993. Except for certain contracts (***see***, below), petitioner produced no other records either during the audit or at hearing.

The Division calculated the tax assessed herein using petitioner's gross receipts as reported on its Federal and State corporate tax returns and the invoices provided by petitioner. The Division presumed all of petitioner's receipts to be subject to sales tax.

Specifically, the Division determined tax due for the period December 1, 1983 through November 30, 1984 by taking total receipts as reported on petitioner's 1984 New York franchise tax return, dividing that total by four and deeming the resulting quotient to be taxable sales for each of the four quarters which comprised that period. Tax due for each of the quarters was calculated by applying the prevailing rate to taxable sales as determined on audit. The Division performed similar calculations with respect to the years 1985, 1986, 1987, and 1989. For 1988, the Division used audited taxable sales as determined for 1987 because it had no corporate income or franchise tax returns for this year. Similarly, for 1990 and 1991, the Division used audited taxable sales as determined for 1989 because it had no income or franchise tax returns for those years. For the period December 1, 1991 through November 30, 1992, the Division used an

invoice for work performed in November 1992 which was provided by petitioner. The invoice totaled $31,415.47. The Division determined that this represented petitioner's total sales for that month and multiplied that amount by three to arrive at a quarterly total sales figure for the quarter ended November 30, 1992. The Division then applied this audited quarterly figure to the quarters ended February 28, 1992, May 31, 1992 and August 31, 1992 and applied the prevailing rate to reach tax due for these quarters. For the period December 1, 1992 through August 31, 1995 the Division used invoices supplied by petitioner for the months of December 1992, January 1993 and February 1993. The Division determined these invoices constituted petitioner's total receipts (and thus total taxable sales) for this quarter. The Division did not have any franchise or income tax returns for petitioner for 1993, 1994 or 1995. Accordingly, the Division applied the audited taxable sales figure and tax due for the quarter ended February 28, 1993 to each of the sales tax quarters in the remaining portion of the audit period.

As noted previously, petitioner was incorporated and began doing business in 1984. Petitioner's business consisted of catering and consulting on special events.

Beginning in 1986, petitioner entered into a series of written agreements with Madison Square Garden Center, Inc. ("MSG") to manage and operate the Director's Suite at Madison Square Garden. The Director's Suite served food and drinks to guests of MSG at no cost to these guests. Director's Suite guests were often celebrities and relatives and friends of MSG officials. MSG determined the guest list for the Director's Suite.

Copies of the written agreements in the record cover the period December 1, 1986 through June 30, 1994. The agreements state that petitioner shall provide Stephen Gallagher's personal services for the management, supervision and daily operational control of the Director's Suite.

The agreements direct petitioner to provide all personnel and services necessary to operate the Director's Suite on a daily basis. The contracts state that such services shall include the selection of all food and beverages upon prior review and approval of MSG, the purchasing of all food and beverages, the purchasing of all relevant supplies, and all staffing. The contracts also provide that all material decisions regarding the management and operation of the Director's Suite shall be determined by MSG and implemented by petitioner, subject to prior consultation between Gallagher, on petitioner's behalf, and senior management of MSG. The contracts provide that such material decisions include the schedule for the Director's Suite, guest list, and general nature of the food and beverages available. The contracts also provide MSG with the right of approval of all persons hired by petitioner to work in the Director's Suite.

MSG and petitioner discussed the operation of the Director's Suite on a daily basis. MSG did not often reject choices made by petitioner in the operation of the Director's Suite. MSG did frequently make requests to petitioner regarding the operation of the Suite. MSG requested that petitioner hire relatives and friends of MSG employees to work in the Director's Suite. Petitioner complied with such requests.

MSG set the schedule for the hours of operation of the Director's Suite with "reasonable, advance notice" to petitioner. The Director's Suite was generally in operation during regular season and playoff games of the New York Knicks and Rangers. Petitioner also operated the Director's Suite for certain other events. Under the contract dated June 6, 1991, petitioner's operation of the Director's Suite for such other events was conditioned upon prior written request of MSG and agreement between petitioner and MSG as to compensation.

The contracts also required Stephen Gallagher to devote "substantially all of his time" to the management and operation of the Director's Suite. MSG would allow Mr. Gallagher to work on other jobs where it gave its consent on a case-by-case basis.

The contracts contained a so-called "morals clause" with respect to Mr. Gallagher's conduct.

Pursuant to the contracts, MSG paid petitioner a fee for the services provided and also reimbursed petitioner for all reasonable out of pocket expenses incurred in the performance of such services.

The contracts also stated that the services of Mr. Gallagher and the services of all other personnel hired by petitioner were being retained in the capacity of independent contractors and that petitioner and all such other personnel shall not be considered employees of MSG for any purpose whatsoever.

In addition to the management and operation of the Director's Suite, the contracts for the period commencing July 1, 1989 directed petitioner to provide reasonable assistance and consultation in other areas as requested by MSG, such as the general operations of MSG's food and beverage department, service programs, personnel decisions, concepts and theming, and equipment selection.

Petitioner did purchase food and hire labor in connection with its management and operation of the Director's Suite pursuant to the contracts. Petitioner hired servers to work in the Director's Suite and administrative assistants to handle administrative chores, such as the preparation of invoices and the payment of bills. Petitioner issued W-2 forms for all such employees.

Prior to about 1990, the Director's Suite did not have a full kitchen. Therefore, petitioner purchased prepared food for the Director's Suite from Harry M. Stevens, Inc., a vendor which supplied food to MSG. After about 1990, kitchen facilities in the Suite were upgraded and petitioner prepared more of the food it served.

During the time petitioner had the Director's Suite contract with MSG, it did perform other jobs. Petitioner's president estimated that 50 percent of such non-Director's Suite jobs were catering. This estimate was based on personal recollection and not on any records.

During the period 1991 through 1993, Mr. Gallagher became vice president of food and beverage of Paramount Communications, at the time the corporate parent of MSG.

Mr. Gallagher was injured in an auto accident on August 15, 1993. This accident effectively ended petitioner's involvement with MSG and effectively ended petitioner's business operations. Additionally, at about the same time, MSG notified petitioner of its intent to terminate their contractual arrangement. Petitioner was no longer under contract to MSG after September 26, 1993.

Petitioner's 1985, 1987 and 1989 Federal corporation income tax returns were introduced into the record. Petitioner's cost of operations as reported on its 1985 return was $179,608.00. This amount included waiter fees ($81,418.00), decorations and props ($87,099.00) and kitchen prep ($8,187.00). Petitioner's cost of operations as reported on its 1987 return was $317,688.00. This included decorations and props ($100,006.00), food and kitchen preparation ($90,449.00), outside labor ($68,279.00) and rent and storage ($58,954.00). Petitioner's cost of operations as reported on its 1989 return was $776,399.00. This amount included decorations and props

($228,493.00), freelance labor ($132,466.00), food and liquor ($249,153.00) and space and equipment rental ($158,568.00).

Stephen Gallagher, petitioner's president and sole shareholder, had a high school education. He had no education or training in business, accounting, finance, law or taxes. Petitioner's Federal income tax returns and New York franchise tax returns were prepared by its accountant. Stephen Gallagher testified that his accountants advised him that petitioner "was exempt from paying the sales taxes because the way my business was formed." (Hearing transcript, p. 115.)

Of the nine invoices provided by petitioner during the audit, three were invoices to MSG in respect of petitioner's operation of the Director's Suite for New York Knick and Ranger games. Petitioner's invoices for such events billed MSG its costs for labor, food, supplies and miscellaneous expenses. Petitioner did not charge or collect sales tax from MSG for these events. Petitioner submitted invoices to MSG, together with appropriate accounting "back up" documentation, for its expenses in connection with its operation of the Director's Suite for Knick and Ranger games on a monthly basis. Petitioner did not request any such invoices or documentation from MSG either during the audit or for the hearing in this matter.

The non-Director's Suite invoices submitted by petitioner during the audit reveal that petitioner did not bill MSG sales tax for a 1992 Christmas and holiday dinner party for which petitioner charged MSG $35.00 per person. Petitioner also did not bill St. John's University sales tax for "catering services rendered" on invoices dated February 11, 1993 and February 19, 1993. Petitioner did bill sales tax for "catering services rendered" at Madison Square Garden on

invoices dated January 28, 1993 and February 24, 1993. Petitioner billed MSG sales tax for petitioner's purchase of holiday decorations on an invoice dated January 25, 1993.

Petitioner's accountant from the time it began doing business until at least September 1990 was Bruce Parker. As of March 1991 petitioner's accountant was Michael Dyreck. Petitioner fired Mr. Dyreck in 1993 when it first became aware of certain outstanding tax liabilities. Petitioner then hired an accountant who advised petitioner upon review that many of its records were missing. Petitioner subsequently brought suit against Mr. Dyreck to recover records in his possession (***see***, above). Petitioner did not identify any specific records Mr. Dyreck may have had in his possession. Petitioner's president testified that one of petitioner's employees or MSG personnel also may have taken records.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that as a caterer,[1] petitioner was responsible for collecting sales tax on its retail sales (***see***, Tax Law § 1105[d][i]; § 1132[a]). The Administrative Law Judge stated that petitioner was obligated to keep records of every sale and the tax due thereon, including "a true copy of each sales slip, invoice, receipt, statement or memorandum" (Tax Law § 1135[a]) upon which the sales "tax shall be stated, charged and shown separately on the first of such documents given to [the purchaser]" (Tax Law § 1132[a]).

However, the Administrative Law Judge concluded petitioner failed to maintain or make available virtually any source documentation of its sales requested by the Division. Thus, the Administrative Law Judge further concluded the Division was, therefore, authorized under Tax

[1]There was no dispute in this matter that petitioner was a caterer. The dispute is over the extent of petitioner's catering activities and whether those activities are subject to sales tax (***see***, Determination, Conclusions of Law "F" and "G").

Law § 1138(a)(1) to estimate petitioner's sales tax liability, and that the taxpayer has the burden to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451).

In this case, the Administrative Law Judge noted, the Division estimated tax due on the basis of gross receipts as reported on petitioner's Federal income and State franchise tax returns filed by petitioner for certain portions of the audit period and on the invoices submitted by petitioner for certain other portions of the audit period. For periods where neither returns nor invoices were available, the Division estimated tax using returns or invoices from an earlier or later period. The Division presumed that all of petitioner's gross receipts were subject to sales tax. Under the circumstances, the Administrative Law Judge concluded this method of audit was reasonable. Specifically, during the audit, except for nine invoices, petitioner produced no documentation of its sales or business activities. Additionally, petitioner was no longer in business at the time of the audit. These two facts would seem to have foreclosed the use of many other audit methods, such as a test period audit method. Furthermore, the Administrative Law Judge found that information available to the Division during the audit supports the method used. Specifically, petitioner's business is described as "catering" on certain of the tax returns in evidence. Further, petitioner charged sales tax on three of the nine invoices submitted during the audit and claimed significant expenses for food and kitchen preparation on its tax returns. Moreover, the Administrative Law Judge noted, the use of gross receipts as reported on Federal income tax returns to estimate taxable sales has been found to be reasonable in similar situations (***see***, ***e.g.***, ***Matter of Scotto***, Tax Appeals Tribunal, January 16, 1992). Accordingly, the

Administrative Law Judge concluded that considering the broad latitude historically given the Division in its choice of audit method, the method selected was reasonably calculated to reflect tax due (***Matter of W.T. Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869, 2 L Ed 2d 75; ***Matter of Grecian Square v. New York State Tax Commn.***, 119 AD2d 948, 501 NYS2d 219).

The contracts between petitioner and MSG and the invoices submitted by petitioner in respect of its operation of the Director's Suite make clear that petitioner purchased food and provided serving and assistance to the guests of MSG in the course of fulfilling its obligations under the contracts. Accordingly, the Administrative Law Judge found that petitioner was providing catering services to MSG. In consideration for petitioner's services, MSG reimbursed petitioner for its costs and paid a fee for services. Accordingly, the Administrative Law Judge found that all payments made by MSG to petitioner under the contracts constituted receipts from sales of food and drink within the meaning of Tax Law § 1105(d) and 20 NYCRR 527.8(f)(1)(i) and were subject to tax (***Stouffer Mgt. Food Serv. v. Tully***, 98 Misc 2d 1128, 415 NYS2d 559, ***affd*** 69 AD2d 1023, 414 NYS2d 948, ***lv denied*** 47 NY2d 709, 419 NYS2d 1025).

The Administrative Law Judge rejected petitioner's argument that it was an agent of MSG, buying goods and services on behalf of MSG pursuant to its agency relationship, and noted that in ***Matter of Chemical Bank v. Tully*** (94 AD2d 1, 464 NYS2d 228), a bank contracted with food service management companies to operate the bank's employee cafeterias and dining rooms at various locations. The issue presented was whether the payments made by the bank to its agents, i.e., the food service companies, pursuant to the contract were taxable under Tax Law § 1105(d). Notwithstanding the agency relationship between the bank and the food service

management companies, the court found that the transactions between the bank and its agents were taxable pursuant to Tax Law § 1105(d) (***Matter of Chemical Bank v. Tully***, ***supra***, 464 NYS2d, at 230). The Administrative Law Judge found that the payments made by MSG to petitioner for reimbursement and petitioner's fee are analogous to the payments made by Chemical Bank to its food service management companies. It is noted that, as in ***Chemical Bank***, petitioner here asserted that it was an agent of MSG. However, the Administrative Law Judge noted, even assuming that petitioner was an agent of MSG, under ***Matter of Chemical Bank v. Tully*** (***supra***), the transactions between it and MSG would be subject to tax pursuant to Tax Law § 1105(d). Since agency status had no bearing on the outcome, the Administrative Law Judge did not address it further.

Petitioner also argued that it could not have provided catering services because, for most of the audit period, petitioner purchased food that had already been cooked and prepared. This contention was also rejected by the Administrative Law Judge. Under the Division's regulation, the taxability of charges by a caterer does not depend upon whether the caterer actually cooks the food. If the caterer provides serving or assistance in serving after delivery of the food, then all charges by the caterer are taxable (20 NYCRR 527.8[f][1][i]). Accordingly, while petitioner may not have cooked and prepared the food it sold, it did provide assistance in serving after the food was delivered to the Director's Suite. Therefore, the Administrative Law Judge concluded that all charges by petitioner to MSG were taxable.

In its brief, petitioner proposed its own estimated computation of its sales tax liability during the audit period. However, such computation was not accepted by the Administrative Law Judge since it was not supported by either the factual record or the Tax Law. The

Administrative Law Judge pointed out that such "an alternative estimate does not establish that the Division's audit methodology was wrong and is clearly insufficient to establish by clear and convincing evidence that the amount assessed was erroneous" (***Matter of Rosemellia***, Tax Appeals Tribunal, March 12, 1992).

Petitioner established that it was no longer under contract to MSG after September 26, 1993 and that its involvement with MSG effectively ended on August 15, 1993. Accordingly, the Administrative Law Judge canceled the assessment herein for the period September 1, 1993 through August 31, 1995.

In addition to the taxes assessed, petitioner was also assessed penalty for failure to timely file a return or pay the tax due pursuant to Tax Law § 1145(a)(1)(i).

Tax Law § 1145(a)(1)(iii) provides that if the failure or delay was due to reasonable cause and not due to willful neglect, penalty and additional interest shall be remitted. Ignorance of the law is not a basis for finding reasonable cause (20 NYCRR 536.5[c][5]).

Petitioner urged that its failure was reasonable because its president lacked knowledge and sophistication in accounting and tax matters and, therefore, relied on the advice of its accountants. Petitioner also contended that the failure of its former accountant to return records in his possession was the same as if the records had been destroyed. Petitioner asserted that this "destruction" constituted reasonable cause under 20 NYCRR 536.5(c)(2) and (3).

The Administrative Law Judge rejected each of these arguments and concluded petitioner had failed to demonstrate reasonable cause. Reliance on the advice of a tax professional may constitute reasonable cause where the taxpayer can show that it relied in good faith on such advice, and that it was reasonable for the taxpayer to rely on such advice. In order to show that

the advice was reasonable, the Administrative Law Judge pointed out, the taxpayer must show that the advice came from competent tax counsel and was based on full knowledge of the relevant facts (***Matter of A&V Crown, Inc.***,Tax Appeals Tribunal, May 24, 1990). The Administrative Law Judge found that petitioner failed to make any such showing here. First, the Administrative Law Judge noted, any claim that petitioner relied in good faith on advice that it was not obligated to collect or remit sales tax is contradicted by evidence in the record that petitioner did collect sales tax with respect to some jobs. The Administrative Law Judge viewed this circumstance as an indication of bad faith, which negates any finding of reasonable cause and the absence of willful neglect (***see***, 20 NYCRR 536.5[d][1]). Further, petitioner failed to show that the advice was reasonable. The record contains no written evidence of such advice and no testimony from either of the accountants who purportedly offered it. Since the reliance on tax advice must be reasonable in order to be a basis for abatement of penalty, it is necessary to examine the specific advice given. However, the Administrative Law Judge found the lack of information in the record on this point precluded any such examination. The Administrative Law Judge also found that petitioner had failed to show that the individuals who gave the advice were competent tax professionals. There is no evidence in the record as to the experience, expertise or competence of these individuals (***Plante v. Commr.***, T.C. Memo 1985-117, 49 TCM 963). As to petitioner's claim that its inability to obtain records in the possession of its former accountant constituted reasonable cause within the meaning of 20 NYCRR 536.5(c)(2) and (3), these regulations refer to the destruction of records or the inability to obtain information which precludes timely compliance. Here, the Administrative Law Judge found that the inability of petitioner to obtain information did not preclude petitioner's timely compliance with the sales tax

law, for difficulties with the accountant did not arise until after sales tax returns and taxes were due. Additionally, petitioner did not identify any specific records in the accountant's possession. Therefore, the Administrative Law Judge concluded that petitioner failed to show that its failure to file sales and use tax returns and to collect and pay over tax was due to reasonable cause and not due to willful neglect.

Since petitioner was making sales subject to tax pursuant to Tax Law § 1105(d), it was required to obtain a certificate of authority to collect tax (***see***, Tax Law § 1134). Petitioner failed to obtain a certificate in accordance with Tax Law § 1134. It was, therefore, subject to the penalty imposed under Tax Law § 1145(a)(3)(i).

Penalty imposed pursuant to this section may be abated where it is determined that the failure was due to reasonable cause and not due to willful neglect (***see***, Tax Law § 1145[a][3][iv]).

Petitioner contended that the penalty assessed for failure to obtain a certificate of authority should be canceled because the Notice of Determination which assessed this penalty referred to a tax period ending date of September 30, 1995. Since petitioner was no longer in business as of that date, petitioner asserted that this penalty must be canceled.

The Administrative Law Judge noted that a Notice of Determination is fatally defective and void in its entirety when it contains misstatements or errors that mislead or prejudice a taxpayer (***see***, ***Pepsico, Inc. v. Bouchard***, 102 AD2d 1000, 477 NYS2d 892; ***Matter of Tops, Inc.***, Tax Appeals Tribunal, November 22, 1989). Here, the notice assessing penalty for failure to obtain a certificate of authority indicated that it was for the sales tax period ending

September 30, 1995. Accordingly, the Administrative Law Judge canceled the Notice of Determination (Assessment No. L-011398700-7).

ARGUMENTS ON EXCEPTION

Petitioner takes exception to so much of the determination of the Administrative Law Judge as sustains the imposition of tax on all of its sales and rejects petitioner's estimate of non-taxable sales. Petitioner also disagrees with the conclusion that it is subject to sales tax even if it was acting as agent of MSG in providing its food services. Finally, petitioner takes exception to the finding by the Administrative Law Judge that petitioner failed to show reasonable cause for its failure to file sales tax returns. While petitioner has taken exception to these conclusions of law, it has offered no arguments in support of its exception to show why it believes that the Administrative Law Judge was in error.

In response, the Division argues that the Administrative Law Judge's findings are supported by the documents in the record. On the other hand, the Division emphasizes that petitioner could not produce any records in support of its position. Therefore, the Division states that petitioner did not meet its burden to show that the amount of tax assessed was erroneous or establish reasonable cause for its failure to file returns or pay the tax. Accordingly, the Division respectfully requests that the determination of the Administrative Law Judge be sustained.

OPINION

Petitioner has offered no arguments that would justify our modifying the determination of the Administrative Law Judge nor could any be found by this Tribunal. After reviewing the facts in the record and the legal conclusions reached by the Administrative Law Judge, we can find no

basis to modify the determination in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Stephen Gallagher, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Stephen Gallagher, Inc. is granted to the extent that the penalty for failure to obtain a certificate of authority is canceled and the tax asserted for the periods when petitioner was no longer in business is canceled, but in all other respects is denied;

4. The Notice of Determination No. L-011398700-7, dated November 24, 1995, is canceled and Notice of Determination No. L-011398800-8, dated November 24, 1995, is modified in accordance with paragraph "3" above.

DATED: Troy, New York
August 3, 2000

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner