STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PHILIP MORRIS INCORPORATED	:	DECISION DTA No. 808403
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 June 1, 1982 through November 30, 1987.	:	

Petitioner Philip Morris Incorporated, 120 Park Avenue, New York, New York 10017, filed an exception to the determination of the Administrative Law Judge issued on July 23, 1992 with respect to its 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 June 1, 1982 through November 30, 1987. Petitioner appeared by Hunton & Williams (James W. Shea, Esq. and David A. Agosto, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

Both parties filed briefs on exception. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether petitioner has established reasonable cause and the absence of willful neglect thereby justifying abatement of the penalties and interest imposed for late payment of sales and use taxes.

II. Whether the auditors made representations that penalties would be waived if tax and interest were paid so that the Division of Taxation is estopped from imposing penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "10" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Philip Morris Incorporated ("Philip Morris"), a manufacturer of cigarettes, maintains its corporate headquarters in midtown Manhattan.

The Division of Taxation performed a sales and use tax audit of Philip Morris which took approximately 500 auditor hours for the period June 1, 1982 through November 30, 1987 ("current audit"). This audit followed a prior sales and use tax audit of petitioner for the period March 1, 1977 through May 31, 1982 ("prior audit") which took approximately 900 auditor hours. The current audit was commenced on February 15, 1985 and was completed in December 1988. The prior audit appears to have been completed by the late summer or early fall of 1983. The record does not disclose when it was commenced.

The Division of Taxation issued two statements of proposed audit adjustment dated December 16, 1988 against petitioner showing sales and use taxes due of $828,773.09, plus penalty and interest, for the period June 1, 1982 through May 31, 1987 and of $56,734.66, plus penalty and interest, for the period June 1, 1987 through November 30, 1987, respectively. By a signature of petitioner's assistant treasurer, Diane M. McAdams, dated January 12, 1989, on each of the statements of proposed audit adjustment, petitioner consented to the taxes shown due on the statements. However, petitioner added the following typed statement:

> "We agree with the taxes. However, we do not agree with the statutory interest & penalties. Please see attached letter."

The Division of Taxation issued three notices of determination and demands for payment of sales and use taxes due against petitioner dated December 30, 1988 which assessed sales and use taxes due of $573,434.27, plus penalty and interest, for the period June 1, 1982 through November 30, 1985, sales and use taxes due of $312,073.48, plus penalty and interest, for the period December 1, 1985 through November 30, 1987, and omnibus penalties of $9,930.20 for

the period June 1, 1986 through November 30, 1986, respectively. The first two notices, which assessed taxes due, each included the following typed statement:

> "Your payment of $1,212,119.23 was received and applied against the tax due [shown on such notices]. The remaining portion of the payment will be applied to penalty and interest of the same [notices]."

Petitioner remitted $1,212,119.23 to the Division of Taxation by a check dated December 29, 1988, which appears to have been tendered on the same date. Apparently a day earlier, the Division of Taxation had provided petitioner with a "Summary of Additional Tax and Interest Due" dated December 28, 1988, which showed a "tax total" of $885,507.75 ($828,773.09, for the period June 1, 1982 through May 31, 1987, plus $56,734.66 for the period June 1, 1987 through November 30, 1987) and an "interest total" of $326,611.48 ($321,937.16 for the period June 1, 1982 through May 31, 1987, plus $4,674.32 for the period June 1, 1987 through November 30, 1987). This summary, which showed no penalty due, explained the computation of interest as follows:

> "Minimum interest is computed on a simple basis at: 8.5% per annum until 8/12/81; 14% per annum until 2/28/82; 13.5% per annum until 2/28/83; 9.1% per annum until 8/31/83; and on a compounded basis at 9.1% per annum until 2/29/84; 10% per annum until 2/28/86; 7.9% until 2/28/87; 6% per annum until 2/28/88 and at 7.2 thereafter. Interest on this schedule is computed through 12/29/88. Full payment within ten (10) days of the date interest is computed to will avoid additional interest."

The "attached letter" referenced by petitioner on the statements, described above, also dated January 12, 1989, was signed by Joseph A. Beggans, petitioner's "Director - State and Local Taxes", and directed to Paul Golas, "Group Chief, Tax Auditor III". In this letter, Mr. Beggans outlined the basis for petitioner's request that Mr. Golas should "find that penalties and punitive interest should not be assessed in this case."

Mr. Beggans testified that his motivation for making such request was as follows:

> "I believe that the auditors indicated that the penalties would have to be imposed as a result of a departmental policy, but that requesting the group chief -- having him -- request to him -- have

> the department[1] recommend that penalties not be imposed would be the end of the matter and the penalties would not be imposed."

Mr. Beggans testified that he spoke to the auditors, Steven Suskin and Edward Sandig, as well as Mr. Golas, the group chief, soon after petitioner's receipt of the statement of proposed audit adjustment dated December 16, 1988, which had imposed penalty and statutory interest. According to Mr. Beggans, he "believed that the letter to the group chief was going to be sufficient to take care of the penalty issue."

However, the auditor, Edward Sandig, testified that he did not "agree to waive penalty -- when the audit shows that more taxes is [sic] due the second time around than the first."

PRIOR AUDIT

A review of the narrative portion of the prior field audit report for the period March 1, 1977 through May 31, 1982 discloses that the auditor determined additional sales and use taxes due in the following areas:

> (1) Furniture and fixed assets - "It was determined that furniture and fixtures of $2,125,070.11 were purchased without tax, for which the taxpayer was assessed $173,416.55 in tax."
>
> (2) Leasehold improvements - "Leasehold improvements disallowed...refer to work done at the vendor's prior location at 100 Park Avenue, as tenants...assessed $190,471.03 in tax...."
>
> (3) Recurring expenses - "Expense invoices other than cigarettes were reviewed for October 1979 . . . . A .34 percentage of error was determined and applied to gross sales for the audit period. This resulted in expense purchases tax unpaid of $4,163,628.61 and tax due of $335,044.82."
>
> (4) Cigarettes for employee use - "[T]he vendor was purchasing substantial quantities of cigarettes for employee use.... [O]ne carton of cigarettes per week was distributed to each employee . . . . This resulted in tax due of $74,505.52 for the period 3/1/77-3/31/81. Thereafter, the supplier charged Phillip Morris the proper tax."
>
> (5) Cigarette samples - "The taxpayer accrued use tax on cigarette samples based on production cost [instead of]...the price at which items of the same kind of tangible personal property are offered for sale by him.... [T]he difference between wholesale price and product cost, multiplied by the number of cigarettes

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[1]It appears that the witness misspoke and meant to say "group chief" instead of "department."

reported, was assessed. This resulted in tax of $65,388.32 for the audit period."

(6) Sales of used office furniture - Such sales "to employees for which no tax was charged amounted to sales of $95,494.64 and tax due of $7,649.57."

Philip Morris disagreed with the portion of the prior audit which determined tax due of $190,471.03 on leasehold improvements and $65,388.32 on cigarette samples. Subsequent to the assessment of such amounts, Flah's v. Tully (89 AD2d 729, 453 NYS2d 855), which concerned the taxability of a tenant's leasehold improvements, was decided by the Appellate Division in favor of the taxpayer. Consequently, the tax determined due of $190,471.03 on leasehold improvements was revised, and the only disagreed portion of the prior audit involved the tax due of $65,388.32 on cigarette samples.

CURRENT AUDIT

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

A review of the field audit report for the period June 1, 1982 through November 30, 1987 discloses only two sources for the total sales and use tax deficiency assessed of $885,507.75 ($573,434.27 for the period June 1, 1982 through November 30, 1985, plus $312,074.48 for the period December 1, 1985 through November 30, 1987). They were (1) recurring purchases where tax due of $626,052.78 was calculated and (2) fixtures and equipment where tax due of $259,454.97 was found due.

The basis for tax due on recurring purchases was described as follows:

"Test of random items for the month of 4/85, for the account (060) general and administrative expenses, revealed $46,625.78 N/T/P [no tax paid] NYCNYS rate and $438.94 N/T/P NYC rate. These amounts over the amount tested of $618,204 resulted in error rates of .07542 and .00071, respectively."

Consequently, the Division of Taxation estimated that petitioner had additional taxable purchases/expenses of $7,625,152.00 and additional tax due thereon of $626,052.78.

The basis for tax due on fixtures and equipment was described as follows:

"Furniture and fixture accounts (330, 320, 325) were analyzed in detail for the audit period resulting in additional taxable purchases of $193,672.62 or tax due of $15,977.99. For the years 6/1/82 to 12/31/85 various items were tested in the construction in progress account (380). For the years, 1986 and 1987, items over $5,000.00 were tested. This resulted in the following:

Year	Amount Tested	Amount N/T/P	Error Rate
6/82-12/82	$ 2,597,313	$ 188,846.07	.07271
1983	1,983,544	270,470.80	.13636
1984	3,842,570	374,360.61	.09742
1985	1,686,786	31,357.59	.01859
1986	1,004,855	173,866.30	.17303
1/87-11/87	866,371	96,643.40	.11155
Totals	$11,981,439	$1,135,544.77	
Total Error Rate		9.5%	
Totals (1984-87)	$ 7,400,582	$ 676,227.90	
Total Error Rate (1984-1987)			9.1%

These above error rates were applied to their appropriate year total amount, less O/S aircraft and certain capital improvement jobs, resulting in total tax due of $243,476.98."

Tax due of $15,977.99 (furniture and fixtures accounts) plus $243,476.98 (construction in progress account) equals the tax due of $259,454.97 shown above for fixtures and equipment.[2]

The field audit report for the current audit also discloses that petitioner's sales and purchase records were adequate for a detailed audit. Petitioner executed an audit election method agreement which permitted the Division of Taxation to use a random test of recurring purchases and of items in the construction in progress account.

In addition, the auditors noted that (1) taxable sales were accepted as reported;[3] (2) petitioner maintained a sales tax accrual account and all recorded tax was properly reported; (3)

[2]We modified finding of fact "10" of the Administrative Law Judge's determination by adding the totals and total error rates in order to assist us in our analysis of the current period audit results.

[3]The field audit report noted that all of petitioner's sales were wholesale sales, except a small amount of employee sales.

purchases per records were in substantial agreement with purchases per Federal income tax returns; and (4) petitioner paid proper use tax on promotional items and cigarette samples.

Furthermore, petitioner's representative claims that $130,935.00 of the tax due of $259,454.97 on purchases of fixtures and equipment and $161,446.00 of the tax due of $626,052.78 on recurring purchases relate to items acquired during the period from June 1, 1982 through November 30, 1983, when the prior audit was pending.

It was not until January 1, 1989, after the current audit had been completed, that petitioner implemented a new accounts payable system that had the capacity to accumulate reports of invoices with no tax paid. Mr. Beggans explained the delay in implementation as follows in his letter to Mr. Golas (as referenced above):

> "During 1985 and 1986 a new system was being developed internally which was constantly delayed and eventually scraped [sic] in the later part of 1986. With a personnel change in the head of that department, a new package system was purchased and became operational in 1987. Since we were already in the current audit period we chose to make no change in our sales tax reporting method of self accrued items until it was complete."

In this letter, Mr. Beggans also explained that "by far the largest invoices for which no tax was paid was from Jarret Woodworking" which was not the result of any bad faith on the part of petitioner:

> "The largest item in the previous audit was furniture and fixtures purchased for our then new world headquarters building.[4] In this category one firm, Pilot Woodworking, represented over 75% of the not tax paid invoices. As a result of the audit we contacted Pilot and informed them to collect sales tax on all future billings . . . . During the current audit, only one invoice with no tax paid for approximately $10,000 appears for Pilot and that sum was paid in December 1982 prior to the completion of the previous audit. Subsequent to this, our people became dissatisfied with Pilot and switched contractors for the furniture and fixtures from Pilot to Jarret Woodworking. Also at this time, the two individuals responsible for the construction accounting who were aware of the sales tax problem, left the Company. As a result the Tax department was not informed of the switch from Pilot to Jarret nor was Jarret notified that they must bill sales tax. As far as we were concerned, since by the end of 1983 most of the building was already occupied and we had notified Pilot of their sales tax

[4]However, as noted above, in the prior audit it was determined that furniture and fixtures of $2,125,070.11 were purchased without tax. Recurring expenses on which tax was not paid totalled $4,163,628.61, a larger amount.

> responsibility, we felt we had taken care of the largest part of the audit changes discovered during the previous audit. However, during the current audit by far the largest invoices for which no tax was paid was from Jarret Woodworking."

Joseph A. Beggans testified that it was his "day-to-day responsibility [as petitioner's 'Director - State and Local Taxes'] to ensure that taxes are timely filed and paid." Mr. Beggans' staff consists of 16 employees[5] in five different locations: New York City; Westchester; Chicago, Illinois; and Milwaukee and Madison, Wisconsin. Five of the 16 have supervisory responsibilities.

Mr. Beggans' tax department is a distinct unit from petitioner's accounts payable department. Mr. Beggans described his relationship to accounts payable as follows:

> "[W]e were to receive copies of invoices that the Accounts Payable determined were of an unusual nature and taxes should be paid on it. The procedure with regard to the Accounts Payable was an informal procedure."

Since fixed asset invoices as well as recurring expenses were handled through the accounts payable department, this informal procedure for determining what taxes were to be paid applied to both areas audited as noted above.

Mr. Beggans explained in his letter to Mr. Golas that petitioner was not able to "update its reporting methods [for recurring expenses and purchases of fixed assets and furniture] because of the explosive growth of the Company and the shortage of personnel . . . ." This "explosive" growth is reflected in the following approximate sales figures:

	New York Sales	Total Sales	Consolidated sales of petitioner and affiliated corporations
1977	$180,000,000	$2,100,000,000	$ 5,200,000,000
1981	280,000,000	3,700,000,000	10,700,000,000
1987	570,000,000	9,000,000,000	27,700,000,000

During the current audit period, petitioner purchased a scoreboard for use in Yankee Stadium for $4,000,000.00 which was reported and a tax of $330,000.00 paid. In addition, tax of $395,125.00 was paid on the purchase of a company jet for $5,450,000.00. Sales tax also

[5]However, it is not known whether the staff size was the same during the audit period.

appears to have been properly collected and remitted on a timely basis on sales at petitioner's company store. During the current audit period, petitioner paid a total of approximately $19,000,000.00 in sales and use taxes to the State.

OPINION

In the determination below, the Administrative Law Judge held that because petitioner was assessed additional tax on its recurring purchases and purchases of fixed assets and furniture in the course of the prior audit, its failure to timely remit tax during the current audit due to its increased business, turnover of staff and poorly-designed software did not constitute reasonable cause. The Administrative Law Judge also rejected petitioner's estoppel argument, finding that petitioner failed to make a showing of exceptional facts which would require the application of estoppel to avoid a manifest injustice. Specifically, it was found that petitioner had not established that it received assurances from the Division of Taxation (hereinafter the "Division") that penalty and additional interest would be waived if the tax asserted and minimum interest was paid promptly.

On exception, petitioner makes the following arguments: 1) a substantial part of the underlying assessment is attributable to extraordinary and nonrecurring expenditures incurred in the construction of its worldwide headquarters building and that an insubstantial part of the assessment is attributable to expenditures incurred in the normal course of its business operations; 2) the Administrative Law Judge failed to consider that petitioner's delay in implementing the new accounts payable system to cover fixed asset purchases was primarily due to the legitimate concern that the test period method employed during the current audit would be distorted and result in an erroneous assessment; 3) the Administrative Law Judge gave insufficient weight to the much improved compliance record of petitioner during the current audit period due to the corrective action taken as a result of the findings made during the prior audit; 4) that in light of the above circumstances, this discrepancy is de minimis and not due to bad faith or willful neglect; and 5) this case is clearly distinguishable from the cases cited by the Administrative Law Judge.

In response, the Division states that, based on the facts presented at hearing, it is clear that petitioner has failed to show that it has acted with ordinary business care and prudence. Specifically, it contends that petitioner has not demonstrated a reasonable effort for a party with its experience and knowledge in business and taxation to ensure that tax on its fixed assets and expense purchases was timely ascertained, reported and paid. It also states that petitioner's failure to correct internal control deficiencies within its accounts payable system after the prior audit assessments is evidence of petitioner's negligent behavior. The Division also asserts that petitioner has failed to establish by clear and convincing evidence the grounds for estoppel as set forth in Matter of Maximilian Fur Co. (Tax Appeals Tribunal, August 9, 1990).

We affirm the determination of the Administrative Law Judge.

Tax Law § 1145(a)(1)(i) imposes a penalty upon persons who fail to timely file a return or timely pay any tax under Articles 28 and 29. Under Tax Law § 1145(a)(1)(iii), penalty may be waived if "such failure or delay was due to reasonable cause and not willful neglect . . . ." The burden of establishing the existence of reasonable cause required to abate penalties rests with the taxpayer (see, 20 NYCRR 536.5[b]; Matter of MCI Telecommunications Corp. (Tax Appeals Tribunal, January 16, 1992). In the MCI case, we discussed the onerous task faced by a taxpayer in establishing reasonable cause:

> "[b]y 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 [citation omitted]."

The regulations at 20 NYCRR 536.5(c)(5) provide the following grounds for reasonable cause for delay in payment of taxes:

> "(5) Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause."

The regulations also provide that "[r]easonable cause and the absence of willful neglect may be determined to exist only where the taxpayer has acted in good faith" (20 NYCRR 536.5[d][1]).

"In determining whether reasonable cause and good faith exist, the most important factor to be considered is the extent of the taxpayer's efforts to ascertain the proper tax liability" (Matter of Kal Assocs., Tax Appeals Tribunal, October 17, 1991).

Petitioner first argues that penalty should be abated because a substantial part of the underlying assessment is attributable to extraordinary and nonrecurring expenditures incurred in the construction of its worldwide headquarters building and that an insubstantial part of the assessment is attributable to expenditures incurred in the normal course of its business operations. We simply fail to see the logic behind this argument. The fact that a tax assessment may arise as a result of nonrecurring expenditures does not lessen a taxpayer's responsibility to ensure that all taxes imposed on these expenditures are paid. This point is magnified by the fact that petitioner incurred costs of over $150 million in the construction of its headquarters building. Therefore, we find petitioner's argument that consideration should be given to the nonrecurring nature of these expenditures, especially given the magnitude of this project, to be without merit.

Petitioner next argues that the Administrative Law Judge failed to consider that its delay in implementing the new accounts payable system to cover fixed asset purchases was primarily due to the concern that the test period method employed during the current audit would be distorted, thereby resulting in an erroneous assessment. It is unclear whether this "distortion" refers to a potentially worse tax compliance record under a newly implemented system, or an immediate improvement in compliance rendering a subsequent test period audit not representative of petitioner's poor compliance. In either case, we find this argument unpersuasive, as it fails to focus on the primary consideration in determining whether reasonable cause exists, i.e., the extent of petitioner's efforts to accurately determine its tax liability (Matter of Kal Assocs., supra).

Petitioner next argues that the Administrative Law Judge gave insufficient weight to its much improved compliance record during the current audit period due to corrective action taken

as a result of the prior audit findings. Below is the relevant assessment information for both the prior and current audit periods:

	assessment	error rate
Prior Audit		
Recurring Purchases	$335,044.82	34.0%
Furniture & Fixed Assets	$173,416.55	n/a
Current Audit		
Recurring Purchases	$626,052.78	7.5%
Furniture & Fixed Assets	$259,454.97	9.5%

Although petitioner's compliance rate in the area of recurring purchases improved significantly in the current audit period (an error rate was not available for furniture and fixtures in the prior audit), these error rates for the current audit period continue to be significant, especially given that the prior audit findings placed petitioner on notice that a compliance problem existed in this area.

Petitioner also contends that of the $885,507.75 assessed as a result of the current period audit, $292,382.00 of this amount was identified during the prior period audit, which was completed on November 30, 1983, eighteen months into the current period. This eighteen-month period will be referred to as the "overlap period." Petitioner appears to argue that because this deficiency occurred prior to the receipt of the prior period audit findings, the error rates for the current period do not reflect its improved compliance after this time. Petitioner contends that of this $292,382.00 amount, $161,446.00 represents unpaid taxes on recurring purchases during the overlap period. However, the assessment for recurring purchases was based on the results of a test period audit, using the month of April 1985. Therefore, it is clear that petitioner's compliance during the overlap period had no negative impact on the error rate for recurring purchases in the current audit period.

Petitioner also asserts that the balance of the $292,382.00 amount, or $130,935.00, relates to unpaid tax on fixtures and equipment purchased during the overlap period. However, for the period January 1, 1984 through November 30, 1987, the error rate for this category was 9.1%, only a slight improvement from the overall error rate of 9.5%. Therefore, petitioner's assertion

that its tax compliance improved to any significant degree after it received the prior period audit findings is not supported by the record.

Finally, petitioner asserts that its achievement of full tax compliance in the current period with respect to expenditures for complimentary cigarettes, cigarette samples and leasehold improvements should also weigh in favor of finding the existence of reasonable cause. We agree with the Division that this contention, which cannot be ascertained as these areas were not included in the current audit, is of little value in addressing the critical factor in this reasonable cause analysis -- "the extent of the taxpayer's efforts to ascertain the proper tax liability" as to the taxes not paid (see, Matter of Kal Assocs., supra).

Petitioner also argues that, in light of the above circumstances, the amount of tax not paid is de minimis and not due to bad faith or willful neglect. Specifically, petitioner argues that as the assessment amounts to only 4.4% of its total sales and use tax liability for the current audit period, and in light of its exemplary compliance record, detailed books and records and the extraordinary circumstances which caused this failure, the assessment is de minimis. Authority for this substantial compliance idea can be gleaned from 20 NYCRR 536.5(c)(5). Example 5 deals with an "occasional" misclassification of supplies revealed on the taxpayer's first sales and use tax audit and provides, in relevant part, that:

> "[a]fter a review of a written statement, submitted by the taxpayer, containing all of the facts alleged as a basis for reasonable cause, it was determined that the taxpayer had made reasonable efforts to account for its use tax liabilities, that the understatement of tax was unintentional and that the manufacturer had otherwise substantially complied with the the law" (20 NYCRR 536.5[c][5] Example 5, emphasis added).

We have held, consistent with this regulation, that a taxpayer's substantial compliance with its tax obligations does not alone constitute reasonable cause for abatement of a penalty (Matter of Rochester Gas & Elec. Corp., Tax Appeals Tribunal, January 4, 1991), but is merely a factor to be considered.

In support of its position, petitioner relies on our decision in Matter of G & R Machinery and Equip. Co. (Tax Appeals Tribunal, May 24, 1990). In that case, the subject assessment arose

as a result of the first sales tax audit performed on the petitioner's books. This audit determined that a 2.87 percent error rate existed during the period at issue, roughly one half of which was due to a customer's misrepresentation that sales tax would be paid directly to New York State on an item purchased from the petitioner. In abating the penalties, we stated that:

> "[u]nder these circumstances we conclude that petitioner made reasonable efforts to account for its tax liabilities, that the understatement of tax was not intentional and that petitioner substantially complied with the law" (Matter of G & R Machinery and Equip. Co., supra).

The facts of the present case are in sharp contrast to those in G & R Machinery. First, the assessment at issue arises from an audit commenced in March 1985, less than two years after a prior audit of the same accounts revealed a tax deficiency of $508,461.37.[6] Thus, the results of the prior audit placed petitioner on notice that a tax compliance problem existed in this area. Petitioner's acknowledgement of this problem, and its passive attitude regarding its resolution, is evidenced in a letter from Joseph Beggans, petitioner's Director of State and Local Taxes, to the Division dated January 12, 1989, in which he stated that:

> "[s]ince the completion of [the prior] audit in 1983, Philip Morris has tried to update its reporting methods but because of the explosive growth of the company and the shortage of personnel, this has proved difficult. But steps, as outlined in the letter,[7] were taken to insure that at least the major items were properly accounted for."

We have held that the lack of an adequate tax compliance system is not an acceptable explanation for a taxpayer's failure to meet its tax obligations (Matter of Paramount Pictures Corp., Tax Appeals Tribunal, March 14, 1991). In Paramount Pictures, the petitioner was a large corporation which was required to file tax returns in nearly all fifty states and was under constant Federal audit. In an attempt to establish that its failure to timely notify New York of a change in

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[6]"Furniture and fixed assets" ($173,416.55) and "Recurring expenses" ($335,044.82).

[7]The "steps" taken by petitioner apparently refer to petitioner instructing its primary vendor, Pilot Woodworking, to collect sales tax on all of its future billings. However, Pilot was later replaced, and again sales tax was not paid, as the new vendor did not include sales tax in its billings. This change was overlooked by petitioner.

its Federal taxable income[8] was "due to reasonable cause and not willful neglect,"[9] petitioner argued that its large tax compliance burden, as well as a severe staffing reduction brought on by corporate overhead reductions, made timely filing impossible. In rejecting this argument, we stated that:

> "[a]lthough petitioner contends that it had limited personnel to meet its tax reporting requirements, it acknowledges that there was no attempt to redress this [tax compliance] problem by assigning additional employees. Petitioner's claim that a tax department request for additional personnel was not feasible due to corporate overhead reductions is not persuasive. If a taxpayer decides to allocate its resources in a manner which places a low priority on tax compliance, then it should also assume the additional costs brought on by this decision" (Matter of Paramount Pictures Corp., supra, emphasis added).

Like the taxpayer in Paramount Pictures, it is apparent that petitioner chose to utilize its personnel for objectives other than to ensure tax compliance. Petitioner had significant resources at its disposal, as evidenced by its total sales in 1987 of $9 billion. Therefore, it is apparent that petitioner clearly had the resources to rectify this compliance problem caused by a "shortage of personnel." In light of petitioner's decision to place a low priority on tax compliance, despite the significant resources available to it, we find that petitioner has failed to establish the existence of reasonable cause and the absence of willful neglect (Matter of Paramount Pictures Corp., supra). In view of this conclusion, we find it unnecessary to discuss the issue of whether petitioner's tax deficiency is de minimis.

As to petitioner's argument that the Division should be estopped from imposing penalties, we find that the Administrative Law Judge fully and correctly addressed the argument before us on exception. Therefore, we affirm based on the reasoning set forth in the determination below.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Philip Morris Incorporated is denied;

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

3. The petition of Philip Morris Incorporated is denied; and

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[8]See, Tax Law § 211(3).

[9]See, Tax Law § 1085(a); 20 NYCRR 46.1(d)(4).

4. The notices of determination, dated December 30, 1988, are sustained.

DATED: Troy, New York
April 29, 1993

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

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

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