STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CENTER MORICHES MONUMENT CO., INC.	:	DETERMINATION DTA NO. 805843
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1977 through April 30, 1987.	:	

Petitioner Center Moriches Monument Co., Inc., 203 East Main Street, P.O. Box 603, Center Moriches, New York 11934 filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1977 through April 30, 1987.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 9, 1992 at 1:15 P.M., with all briefs to be submitted by May 19, 1992. The Division of Taxation filed its brief on March 8, 1992. Petitioner filed its brief on May 19, 1992. Petitioner appeared by Thomas J. Sinnickson, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation should be defaulted for failure to timely serve an answer.

II. Whether the Division of Taxation properly determined the amount of tax due and, if so, whether the failure to provide petitioner with a copy of the audit workpapers, log and field audit report at the conclusion of the audit warrants cancelling the assessment.

III. Whether penalties and interest in excess of the minimum, which were imposed against petitioner, should be waived.

FINDINGS OF FACT

During the period in issue, petitioner, Center Moriches Monument Co., Inc., was a corporation which sold monuments and headstones for graves. Petitioner installed most of the stones it sold. Mr. Lee Sinnickson was petitioner's president.

In or about April 1987, the Division of Taxation ("Division") commenced a sales and use tax audit of petitioner. Petitioner was selected for audit because it was disclosed through the audit of another corporation that petitioner was issuing resale certificates using its employer's identification number to make purchases without paying sales tax.

On April 9, 1987, the Division mailed a letter to petitioner which stated that the corporation had been scheduled for a field audit from the inception of the business to the present. The letter requested that petitioner make available all books and records pertaining to its sales tax liability for the audit period including income tax returns, journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all sales tax records.

In response to the appointment letter, the auditor received a telephone call from a Mr. Joseph Giaquinto who set up an appointment in his office in order to conduct the audit. Through this conversation, the auditor was led to believe that Mr. Giaquinto was the corporation's accountant and representative. Thereafter, the auditor and Mr. Giaquinto met in Mr. Giaquinto's office on two occasions. On at least one occasion, Mr. Lee Sinnickson was present.

The Division determined that petitioner was not a registered vendor and did not file sales and use tax returns.

During the audit, the Division analyzed petitioner's sales and concluded that a majority of the corporation's sales were nontaxable capital improvements arising from the sale and installation of monuments. The Division also analyzed petitioner's purchases and determined that petitioner did not pay sales or use tax on its purchases.

In order to calculate the amount of tax due, the Division performed a detailed audit of petitioner's purchase records and recorded all of the corporation's purchases of monuments and other tangible personal property. The amount of petitioner's purchases was reduced by the

amount of nontaxable freight purchases and nontaxable labor. The net taxable purchases were then multiplied by the tax rate to determine that tax was due in the amount of $13,693.81. In performing the foregoing analysis, it was found that petitioner's books recorded amounts on the basis of a fiscal year. Therefore, in order to determine the quarterly purchases, the annual amount was divided by four. This method was easier for the auditor because the alternative would have been to add each purchase invoice for the entire audit period.

The Division also reviewed petitioner's miscellaneous sales which were recorded in its cash receipts records. The Division found that tax was due on 28 sales resulting in tax due of $399.17. The 28 transactions may be summarized as follows:

Date	Amount	Customer	Description
12/21/78	$ 25.00	Gallo	sold cemetery vase
6/7/79	80.00	Gredeski	resetting a loose stone
6/7/79	75.00	Towers	payment on a stone
12/31/79	355.00	Floyd Cemetery	repair work on stone
6/1/81	100.00	A. Smith	repayment of loan from sister
7/6/81	100.00	A. Smith	repayment of loan from sister
8/4/81	20.00	Clancy	sold floral container
8/10/81	75.00	A. Smith	repayment of loan from sister
9/14/81	60.00	A. Smith	repayment of loan from sister
10/1/81	40.00	A. Smith	repayment of loan from sister
12/2/81	70.00	(Unnamed)	sold two floral containers
2/19/82	400.00	G. Herman	sold and installed stone
3/16/82	75.00	Niecko	reset monument previously set
7/8/82	140.00	Meitea	set picture in porcelain and attached item to stone
9/13/82	175.00	Wilczewski	reset stone marker
10/13/82	155.00	Wilczewski	reset marker previously installed
2/2/83	130.00	Langhorn	set marker in cemetery
4/5/83	800.00	Ann Smith	repayment of loan from sister
7/21/83	75.00	Sullivan	return of deposit
8/19/83	800.00	Ann Smith	repayment of loan from sister
10/21/83	200.00	Ann Smith	repayment of loan from sister
12/21/83	300.00	DiMauro	sold bronze plaque
3/26/84	175.00	DiMauro	sold bronze plaque
5/29/84	255.00	Palmer	reset monument
7/20/84	240.00	Westbrook	replaced an existing sink
12/13/84	40.00	Rollini	sold stone
5/10/82	200.00	DeArgelo	sold stone
5/17/83	340.00	Burselmeyer	sold stone

The Division concluded that penalty should be assessed because petitioner was an unregistered vendor and did not file sales and use tax returns.

On the basis of the foregoing audit, the Division issued a series of notices of determination and demands for payment of sales and use taxes due, dated July 29, 1987, which assessed sales and use taxes as follows:

Period	Tax	Penalty	Interest	Total	
3/1/77-8/31/80		$1,967.49	$ 491.89	$2,812.84	$ 5,272.22
9/1/80-2/29/84		6,147.24	1,536.83	5,001.20	12,685.27
3/1/84-4/30/87		5,978.25	1,233.60	1,197.72	8,409.57
6/1/85-4/30/87			395.70		

At the conclusion of the audit, the auditor provided a copy of the audit workpapers to Joseph Giaquinto. Although portions of the audit were conducted at Mr. Giaquinto's office with Lee Sinnickson in attendance, the Division did not have a power of attorney authorizing Mr. Giaquinto to appear on petitioner's behalf. The Division did not send copies of the audit report to either Mr. Lee Sinnickson or the corporation.

At the hearing, Mr. Lee Sinnickson testified that the auditor threatened petitioner that if it did not accept the assessments, it would have to pay additional taxes. In response, the auditor denied threatening this taxpayer or any other taxpayer.

On August 10, 1987, petitioner paid the tax, penalty and interest which had been assessed. Thereafter, petitioner filed a petition dated October 20, 1987 which requested redetermination of a deficiency or revision of a determination. The petition did not request a refund. The original petition set forth the following recitation:

> "Petitioner takes exception to the determination of sales tax, penalty and interest due.
>
> "Petitioner disagrees with the amount of tax due as determined by an affidavit of petitioner's records as some purchasers may not be subject to tax.
>
> "Petitioner did not willfully or intentionally disregard filing and paying the use taxes due but assumed that if sales taxes were to be [sic] that they would be collected by the vendor. Petitioner has paid the additional amounts assessed but respectfully requests an abatement of the penalties charged as he was unaware that use taxes would be due on the purchase of materials used for monument installations."

In March 1988, a conciliation conference was conducted in Hauppauge, New York. During the conference, the conciliation conferee stated that if petitioner had not paid the

assessment, he would have rendered a conciliation order waiving the interest and penalties. After the conference, the conciliation conferee issued an order, dated April 15, 1988, which denied the request and sustained the assessments.

On July 13, 1988, the Division of Tax Appeals received a petition seeking redetermination of a deficiency or revision of a determination of sales and compensating use taxes. The box showing that petitioner sought a refund was not checked. The petition to the Division of Tax Appeals contained the same allegation of error and prayer for relief as that set forth in the original petition.

This matter was assigned to an attorney in the Law Bureau of the New York State Department of Taxation and Finance. When the Law Bureau attorney reviewed the matter, he noticed that the assessments had been paid and that the boxes on the petitions which request a refund had not been checked. Therefore, he concluded that the case had been resolved and closed the matter out.

The attorney for the Law Bureau mailed a letter to petitioner's representative dated January 12, 1989 which stated that full payment of tax for the period March 1, 1977 through April 30, 1987 had been verified. As a result, the assessments relating to the foregoing period were cancelled.[1]

After petitioner's attorney received the letter dated January 12, 1989, the representatives of the respective parties had a telephone conversation which was later confirmed by a letter dated March 6, 1989 from petitioner's representative. In this letter, petitioner's representative explained, among other things, that he wished to proceed with the petition.

In addition, he asked the Division's attorney to contact petitioner's representative to discuss the procedures to obtain a hearing date.

In a letter dated May 9, 1989, the Division's attorney provided petitioner's representative

[1]At the hearing, the attorney for the Law Bureau explained that "cancelled" was a poor choice of words. Rather, he intended to say that the assessments had been paid in full.

with a copy of the statute regarding penalties and requests for a refund. In response, petitioner's representative noted, in a letter dated June 21, 1989, that he would be making an application for a refund and requested that petitioner be granted a stay of the petition to the Division of Tax Appeals pending the application for a refund.

Petitioner mailed an application for a refund of sales and use taxes dated June 21, 1989. No action was taken on this application. Therefore, petitioner filed a second application for a refund of sales and use taxes dated September 22, 1989. There was also no response to this application.

On December 13, 1989, the Division received an Application for Credit or Refund of State and Local Sales or Use Tax. The application sought a refund for the period March 1, 1977 through April 30, 1987 of penalty of $3,658.02 and interest of $9,011.76. An affidavit from Lee Sinnickson was included with the application which stated that he is the president and founder of petitioner and that the corporation was organized in June 1977. Petitioner was an outgrowth of the family business, Sinnickson's Moriches Funeral Home, Inc., which was begun in 1940 by Lee Sinnickson's grandfather.

Mr. Sinnickson explained that since 1960 the funeral home employed a certified public accountant and that since its inception in 1977 petitioner employed a certified public accountant. Mr. Sinnickson submits that he never paid sales or use tax for the funeral home because he was advised that such business was exempt under the Tax Law. This opinion led Mr. Sinnickson to believe that a monument company, which is a similar business, would also be exempt from sales and use taxes.

Mr. Sinnickson submits that before petitioner began operating, advice was requested from a certified public accountant with respect to all taxes which were due and owing, including sales and use taxes. This accountant, as well as his successor, Joseph Giaquinto, never advised that petitioner pay sales or use taxes. According to Mr. Sinnickson, it has been the continuous position of these accountants that petitioner was exempt from sales tax.

Mr. Sinnickson contends that he is well acquainted with monument industry information

and periodicals, and he has never read any information that would indicate he was responsible for paying sales and use taxes. Mr. Sinnickson submits that very few other monument dealers knew of their sales and use tax obligations.

Lastly, Mr. Sinnickson notes that upon receiving the assessments, petitioner immediately made payment.

The refund application also included an affirmation from petitioner's attorney which recited the procedural history of this matter. The affidavit also noted that petitioner's argument that reasonable cause has been established was premised upon 20 NYCRR 536.5(d).

The Division submitted an answer to the petition dated August 2, 1991.

At the hearing on January 9, 1992, petitioner's counsel moved for a default determination because of the delay in submitting the answer. Petitioner's counsel also objected to the receipt in evidence of the field audit report, log and workpapers on the ground that these documents were not provided to petitioner or an authorized representative of petitioner after the audit or prior to the hearing. When asked, petitioner's representative was unable to recall asking for the workpapers prior to the hearing. In addition, petitioner's representative declined an opportunity to review the workpapers before proceeding with his case.

CONCLUSIONS OF LAW

A. Petitioner's first argument is that a default determination should be granted because of the failure of the Division to serve a timely answer. Petitioner submits that there has been a history of years of neglect. It is contended that petitioner's right to challenge an assessment has been compromised. Further, it is argued that petitioner's right to a timely answer and opportunity for a timely hearing has been violated. Petitioner next argues that it has suffered enormous prejudice because by paying the assessment it created a situation where the petition and requests for a refund were ignored. Further, petitioner maintains that it lost the right to have the penalties and interest waived by the conciliation conferee.

Petitioner next argues that the delay prevented it from having a clear recollection of the audit and therefore prejudiced its ability to present a defense. Its ability to present a defense

was allegedly also prejudiced by the fact that the workpapers and audit report were never sent to petitioner or an appropriate representative either after the audit or prior to the day of the hearing. Lastly, petitioner argues that it was prejudiced by the delay in receiving the answer because if the answer had been timely, it would have had the opportunity to have a hearing in New York City.

In its brief, the Division asks that the Division of Tax Appeals take official notice of the date of the letter from the Division of Tax Appeals acknowledging the receipt of the petition in order to determine how late the answer is. The Division then submits that the delay was occasioned by petitioner's prompt payment of the sums assessed and the lack of a formal request for a refund until on or about December 11, 1989. The Division notes that in communications with petitioner's representative on January 12, 1989 it was made clear that the Division's attorney erroneously concluded that an answer was not necessary due to his belief that the matter had been resolved. The Division posits that the prompt payment was to be commended, but submits that it resulted in confusion. The Division concludes this point by noting that after January 12, 1989 there were repeated communications between the Law Bureau's attorney and petitioner's representative which culminated in a request for a refund on December 11, 1989. In addition, at one point petitioner requested a stay of proceedings before the Division of Tax Appeals.

The Division also argues that the time limit for filing an answer is directory and not mandatory. In addition, it is argued that petitioner has not shown that the delay resulted in any prejudice.

B. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide that:

> "The Law Bureau shall serve an answer on the petitioner or the petitioner's representative, if any, within 60 days from the date the supervising administrative law judge acknowledged receipt of a petition in proper form." (20 NYCRR 3000.4[a][1].)

C. It has been recognized that the time period imposed upon an administrative agency for a responsive pleading is directory and not mandatory (see, Matter of Geary v. Commr. of Motor Vehicles, 92 AD2d 38, 459 NYS2d 494, affd 59 NY2d 950, 466 NYS2d 304). The Tax

Appeals Tribunal has recognized the applicability of this principle to the foregoing regulation (Matter of Maggin, Tax Appeals Tribunal, March 8, 1990).

D. In order for a delay to result in dismissal of an agency's action, there must be a showing that the delay caused substantial prejudice (Matter of Cortlandt Nursing Home v. Axelrod, 66 NY2d 169, 495 NYS2d 927, cert denied 476 US 1115 [1986]; Matter of Maggin, supra; Matter of Dworkin Construction Co., Tax Appeals Tribunal, August 4, 1988).

E. The record shows that the petition to the Division of Tax Appeals was received on July 13, 1988. In accordance with the State Administrative Procedure Act § 306, subdivision 4, official notice is taken of the fact that the receipt of the petition was acknowledged by a letter dated July 26, 1988. The answer of the Division was dated August 2, 1991. In view of the fact that the Division had 60 days to answer the petition, the delay involved herein was approximately two years and ten months. The motion to dismiss the petition was made orally at the hearing on January 9, 1992.

F. Before proceeding to the claim of prejudice, it should be noted that petitioner's refund application has no bearing on this matter. Tax Law § 1139 governs refunds of sales tax. Tax Law § 1139(c) sets forth rules which apply when the tax has been paid following the issuance of a notice of determination pursuant to Tax Law § 1138. The last sentence of Tax Law § 1139(c) provides:

> "No refund or credit shall be made of a tax, interest or penalty paid after a determination by the commissioner of taxation and finance made pursuant to section eleven hundred thirty-eight unless it be found that such determination was erroneous, illegal or unconstitutional or otherwise improper, by the division of tax appeals pursuant to article forty of this chapter or by the commissioner of taxation and finance of his own motion, or in a proceeding for judicial review provided for in section two thousand sixteen of this chapter, in which event a refund or credit shall be made of the tax, interest or penalty found to have been overpaid."

This section has been held to mean that when tax has been paid pursuant to a notice of determination which is subsequently found to be erroneous, the tax is to be refunded to the taxpayer without the need for an application for a refund (Matter of Allied Aviation Serv. Co. of N.Y., Tax Appeals Tribunal, June 27, 1991). It follows that since an application for a refund was unnecessary, both the time involved for making the application for a refund and the lack of

response by the Division to the application have no bearing on this matter.

G. Petitioner alleges that the delay resulted in actual prejudice to its position in several ways. These arguments will be discussed seriatum. First, petitioner argues that it was prejudiced because by immediately paying the tax, a situation was created whereby the Division disregarded its petitions.

The record shows that the Division's attorney was confused by the prompt payment of tax. However, the question presented is not whether the prompt payment caused confusion but whether the delay prejudiced petitioner's position. Therefore, this argument is without merit because it does not address the pertinent inquiry.

Petitioner next argues that, as a result of the delay, petitioner lost the right to have the penalties waived by the conciliation conferee. This argument is also without merit. In order to prevail, the prejudice must be the result of the delay (see, Matter of Macbet Realty Corp., Tax Appeals Tribunal, May 17, 1990). As noted above, the rules of the Tax Appeals Tribunal do not require an answer until 60 days from the date that the Supervising Administrative Law Judge of the Division of Tax Appeals acknowledges receipt of the petition. Since the petition to the Division of Tax Appeals would not be filed until after the conciliation conference, it is clear that the delay in the answer could not have had any bearing on what took place during the conciliation conference.

Petitioner next argues that the delay involved herein greatly prejudiced petitioner in its ability to present a defense. Petitioner submits that, given the delay, no reasonable person could be expected to have a sufficient recollection to present a defense. In this regard, petitioner notes that there is a 10-year audit period.

The record shows that the audit herein was based on a detailed review of petitioner's records. Further, when questioned about specific transactions, Mr. Lee Sinnickson was able to examine the corporation's records and explain the transaction involved. Under these circumstances, petitioner has not demonstrated how the administrative delay hindered its defense efforts.

Petitioner submits that it was prejudiced by the delay because if there had been a timely answer and hearing, the hearing would have been conducted at the World Trade Center in New York City rather than in Troy, New York.

The foregoing argument is also rejected. The Rules of Practice and Procedure gave petitioner alternatives to appearing at a hearing in Troy. Initially, it is noted that petitioner's motion for a determination on default could have been made after service of the answer without the need for a personal appearance (20 NYCRR 3000.4[a][4]). If petitioner wished to avoid traveling to Troy, it could have made a motion for a default determination long before the hearing. Other alternatives would have been to proceed by submission (20 NYCRR 3000.8) or pursue a small claims hearing (20 NYCRR 3000.9). Inasmuch as there is no evidence in the record that petitioner considered any of these options, petitioner's last claim of prejudice is also unpersuasive.

H. Petitioner's remaining argument is that the assessments should be cancelled because the failure to provide the field audit report, audit log and workpapers to the taxpayer or an authorized representative made it impossible for petitioner to challenge the audit. This argument is meritless.

The record shows that copies of the audit workpapers were sent to the accountant who prepared the corporation's returns and assisted the Division in the conduct of the audit. Furthermore, the audit was conducted in the offices of this accountant. On at least one occasion this was in the presence of the corporation's president. Under these circumstances, it is concluded that the workpapers were sent to a representative of the corporation despite the absence of a power of attorney form (see, Matter of Jenkins Covington, N.Y., Tax Appeals Tribunal, November 21, 1991).

Furthermore, even if the workpapers were not sent to an authorized representative of the corporation, this argument would not be persuasive. The record shows that, when asked, petitioner's representative was unable to recall asking for the workpapers prior to the hearing. Further, at the hearing, petitioner's representative was given the opportunity to examine the

audit documents before proceeding with his case. This offer was declined. Under these circumstances, petitioner's counsel waived his opportunity to examine the workpapers.

I. Petitioner next argues that the audit methodology was not reasonably calculated to reflect the taxes due. In this regard, petitioner first directs attention to the fact that the purchases for each quarterly period were based on one-quarter of the annual total.

The record shows that the averaging process was followed because petitioner did not maintain a monthly record of purchases. Since it was petitioner's recordkeeping system which made the averaging process necessary, the objection to this process is meritless. It is noted that the Division is not obligated to reconstruct petitioner's records in order to conduct an audit.

J. Petitioner next argues that tax was improperly imposed on certain transactions which were not subject to tax. Specifically, petitioner objects to the imposition of tax on payments involving loans to a family member and payments to an independent contractor. In response, the Division submits that, if the testimony is found credible, the amounts assessed on the repayment of the loan and return of the $75.00 deposit should be adjusted.

K. It is concluded that Mr. Lee Sinnickson's testimony on the foregoing points was credible. Accordingly, the Division is directed to delete from its sales and use tax assessment those payments arising from a loan to his sister and the return of the deposit to Mr. Sullivan.

L. It is well established that the sale and installation of a monument constitutes a capital improvement (Matter of Hollander, State Tax Commn., November 18, 1980; 20 NYCRR 528.8[d][5]). Here, the record shows that the $400.00 receipt on February 19, 1982 arose from the sale and installation of a monument. In addition, the $130.00 receipt on February 2, 1983 was for setting a marker in a cemetery. On the basis of the foregoing principle, the Division is directed to reduce the assessment by the amount of tax imposed on these items. The record does not establish that any of the remaining items meet all of the criteria of a capital improvement and that they should therefore be excluded from tax (Tax Law § 1101[b][9]).

M. Petitioner's last argument is that the penalties should be waived. In support of this position, petitioner refers to 20 NYCRR 536.5(d), its refund application and the testimony at the

hearing.

In opposition to the request to cancel penalties, the Division argues that petitioner blames his accountant but continues to use his services. In addition, the Division asserts that petitioner's claim of ignorance is clearly insufficient. The Division also argues that on September 18, 1981 the Division issued an Advisory Opinion to the New York State Monument Builders Association, Inc. which dealt with the issue of the liability of installers of monuments for tax on the monument and component materials. The Division submits that even if petitioner were not a member of this group, this information was available.

N. In his affidavit, Mr. Sinnickson set forth three arguments for a waiver of penalty: (1) that he was under the mistaken impression that since his funeral home business was exempt from tax, so was the monument company; (2) that petitioner employed two certified public accountants who never advised that petitioner was liable for sales and use taxes; and (3) that many other companies in this industry were also uninformed.

The regulations relied upon by petitioner provide as follows:

> "(d)(1) The provisions of subdivisions (a), (b) and (c) of this section shall apply to the extent pertinent where any taxpayer substantially understates the amount of taxes required to be shown on the return and such understatement or omission was due to reasonable cause and not due to willful neglect (see section 536.2 of this Part for the penalty provisions). Reasonable cause and the absence of willful neglect may be determined to exist only where the taxpayer has acted in good faith. Further, reasonable cause, good faith and the absence of willful neglect shall be considered as a basis for cancellation or waiver of all of the assessed or assessable penalty imposed pursuant to section 1145(a)(1)(vi) of the Tax Law only after the understatement or omission of tax has been reduced in accordance with the provisions of such section by that portion of the tax attributable to any item for which there is or was substantial authority for the tax treatment thereof or for which the relevant facts affecting the tax treatment were adequately disclosed with the original return.
>
> "(2) 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. In addition to any relevant grounds for reasonable cause as exemplified in subdivision (c) of this section, circumstances that indicate reasonable cause and good faith with respect to the substantial understatement or omission of tax, where clearly established by or on behalf of the taxpayer, may include the following:
>
> * * *
>
> "(iii) the reliance by the taxpayer on any written information, professional

advice or other facts, provided such reliance was reasonable and the taxpayer had no knowledge of circumstances which should have put the taxpayer upon inquiry as to whether such facts were erroneous;" (20 NYCRR 536.5[d]).

O. It is concluded that petitioner has not presented an adequate basis for waiving penalty. Initially, it is noted that the regulations cited by petitioner pertain only to the omnibus penalty which was assessed for the period June 1, 1985 through April 30, 1987 in the amount of $395.70.

The first argument raised by petitioner is ignorance of the law which is not considered a basis for reasonable cause (20 NYCRR 536.5[c][5]). Petitioner's third argument is ignorance of the law by other people. This argument is rejected because it is irrevelent that other companies in this industry may not have been informed of their tax obligations.

The second argument raised by petitioner is that it relied on its accountants. It is well established that reliance on a tax advisor does not necessarily constitute reasonable cause for the remission of penalties (see, Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557; Matter of LT & B Realty v. State Tax Commn., 141 AD2d 185, 535 NYS2d 121). In order to establish reasonable cause, the reliance itself must be reasonable (Matter of BAP Appliance Corp., Tax Appeals Tribunal, June 29, 1989). In evaluating whether the reliance was reasonable, the taxpayer is required to show that he acted with ordinary business care and prudence in attempting to ascertain his tax liability (Matter of A & V Crown, Tax Appeals Tribunal, May 24, 1990). Petitioner must also demonstrate that the advice came from a competent tax advisor (id.). In this instance, the record does not contain any evidence that would establish that it was reasonable for Mr. Sinnickson to rely on either accountant. Therefore, petitioner has not shown that the omission was due to reasonable cause.

P. The petition of Center Moriches Monument Co., Inc. is granted only to the extent of Conclusions of Law "K" and "L" and the Division is directed to modify the notices of determination and demands for payment of sales and use taxes due accordingly; except as so granted, the petitioners are otherwise denied and the notices of determination and demands for

payment of sales and use taxes due are sustained.

DATED: Troy, New York
November 12, 1992

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE