STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
THE PLANT PLACE, INC, JOANNE CHIMERA, AS OFFICER OF PLANT PLACE, INC. AND JOHN CHIMERA, AS OFFICER OF PLANT PLACE, INC.	:	DETERMINATION DTA NOS. 811473, 811474 AND 811475
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, 1987 through May 31, 1990.	:	

Petitioners, The Plant Place, Inc., John Chimera and Joanne Chimera, 1061 Niagara Falls Boulevard, Amherst, New York 14226, filed separate petitions 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, 1987 through May 31, 1990.

A consolidated hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on January 31, 1995 at 1:30 P.M., with all briefs due by October 27, 1995. Petitioners, represented by Damon & Morey LLP (Marc Hopkins, Esq., of counsel), did not file an initial brief. The Division of Taxation, represented by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq., of counsel), filed a brief on October 10, 1995. Petitioners filed a reply brief on October 27, 1995, which date commenced the six-month period for issuance of this determination.

ISSUES

I. Whether petitioners presented sufficient evidence to adjust the tax deficiency with respect to sales to exempt organizations, sales for resale,sales of exempt food items, sales of out-of-state deliveries, and sales received through telephonic delivery associations.

II. Whether consents signed on behalf of the corporation to extend the three-year statute of limitation for issuance of notices of determination also extended the limitations period for issuance of notices of determination to the responsible officers.

III. Whether petitioner Joanne Chimera is a person responsible for the collection of sales tax.

IV. Whether there is reasonable cause to abate the penalties.

FINDINGS OF FACT

1. Petitioner Plant Place, Inc. is a florist business owned by two shareholders, petitioners John and Joanne Chimera, who are married and who each own 50% of the shares. Joanne Chimera is the president and treasurer and John Chimera is the vice-president and secretary.

2. Joanne Chimera is a full-time salaried employee primarily responsible for handling customer orders. John Chimera handles the day-to-day operations of the business including managerial decisions, the maintenance of the books and records and the hiring and firing of employees.

3. Although Joanne Chimera had check signing authority and may have signed some tax returns during the tax periods in question, she would sign such documents at her husband's direction. Joanne Chimera would discuss the business with her husband having some input into the hiring or firing of employees; however, John Chimera was the final decision maker with respect to the running of the business. Joanne Chimera testified that she did not know what was going on with the flower shop during the period in question and that John Chimera managed the business and gave all the information to accountants concerning its finances.

4. The Division of Taxation ("Division") conducted an audit of The Plant Place, Inc. On September 9, 1990 and December 13, 1990, respectively, John Chimera signed a consent to extend the period of limitations for assessment of sales and use taxes on behalf of The Plant Place, Inc. for the period June 1, 1987 through August 31, 1987 until December 20, 1990 and for the period June 1, 1987 through November 30, 1987 until March 20, 1991. On March 4, 1991, James W. Bennet, the corporation's attorney at that time, signed a consent to extent the

period of limitations for assessment of sales and use taxes on behalf of The Plant Place, Inc. for the period June 1, 1987 through February 29, 1988 until June 20, 1991.

5. In its initial appointment letter dated August 13, 1990, the Division's auditor requested The Plant Place to provide all books and records pertaining to its sales and use tax liability including journals, ledgers, sales invoices, purchase invoices, cash register tapes, Federal income tax returns, and exemption certificates. A second letter was sent on August 27, 1990 requesting the same type of books and records including invoices for recurring expenses and fixed assets, copies of all Federal corporate income tax, State franchise tax and personal income tax returns, and exemption certificates to cover all exempt sales.

6. The Division's auditor found the sales records of The Plant Place to be inadequate because it did not provide copies of sales invoices or a detailed receipts journal. Petitioners claimed that a majority of their sales were exempt as sales for resale or as sales to exempt organizations. Although petitioners provided the auditor with exemption and resale certificates, the auditor concluded that, because these certificates could not be reconciled with any sales invoices, exempt sales could not be verified.

7. In determining the amount of sales tax owed, the auditor taxed at 8% the gross sales reported on the tax returns and subtracted the amount of tax paid. Thus, the auditor disallowed all the claimed exempt sales. The auditor found tax due on additional taxable sales in the amount of $71,027.84, plus $2,679.52 in tax due on taxable recurring purchases. At hearing, petitioners' counsel stated that petitioners waived any objections they had to the Division's use tax assessment on recurring purchases.

8. The Division issued six notices of determination -- two notices of determination to each of the three petitioners. The notices were all dated June 11, 1991 and asserted sales and use taxes due for the period June 1, 1987 through May 31, 1990 in the amount of $73,707.36, plus penalty and interest, for the total amount of $118,447.97 in one notice and an omnibus penalty in the amount of $7,370.72 in the second notice.

9. After a conciliation conference, the conferee issued a conciliation order, dated September 11, 1992, to each of the petitioners sustaining the statutory notices.

10. Each petitioner filed a petition, dated December 9, 1992, alleging, inter alia, that the assessments pertained to sales that were exempt from tax as either sales for resale or sales to exempt organizations; that the audit test period did not accurately reflect the taxpayer's normal business tax period; and that the "taxpayer's consent to the test period audit was not knowing of the law and therefore was not informed consent."

11. The Division filed an answer, dated February 18, 1993, stating, inter alia, that the audit was based on a review of the books and records; that the books and records were incomplete; that there was insufficient documentation to support the claims for exemptions; that all claimed exempt sales were deemed to be taxable sales; that petitioners John and Joanne Chimera are "responsible persons" within the meaning of sections 1131 and 1133 of the Tax Law; and that the consent to the test period was proper in all respects.

12. At the hearing held on January 31, 1995, petitioners were granted the opportunity to present further documentation to the Division's auditor for post-hearing review and to submit such evidence into the record in the event the parties could not reach a stipulated settlement based on that evidence. On March 31, 1995, petitioners sent to the Division's counsel further documentation for the auditor's review. After several extensions, the Division responded that it objected to the post-hearing evidence submitted by petitioners and did "not concede any of the alleged facts purportedly established from this evidence." Petitioners submitted the post-hearing evidence into the record on June 16, 1995. The Division was given until July 14, 1995 to submit any rebuttal evidence. The Division did not submit any further evidence.

13. In their post-hearing submissions, petitioners requested adjustments for exempt sales, sales for resale, food baskets, out-of-state deliveries and telephonic deliveries. With respect to exempt sales, petitioners requested an adjustment for $220,230.00 worth of sales to exempt organizations. In support of this claim, petitioners submitted exempt organization certificates from various organizations and statements from these organizations that in a typical year they

purchased on the average a certain amount of business from The Plant Place. Several of those statements were dated March of 1992 and one from the American Heart Association was undated. Among these documents was an exempt organization certificate from the Episcopal Church Home and an invoice, dated November 15, 1988, indicating that it had purchased $615.00 worth of merchandise from The Plant Place without paying sales tax. Similarly, there was an exempt organization certificate from Temple Beth El, an undated statement from the treasurer of Temple Beth El indicating that in the average year the Temple purchases $7,500.00 worth of business from The Plant Place, and a check from Temple Beth El, dated October 22, 1990, in the amount of $544.50 to The Plant Place with respect to six invoice numbers. Petitioners also submitted a resale certificate from Ridge Dinette, dated November 10, 1988, and two invoices, dated November 9, 1988 and February 16,1990, noting that Ridge Dinette was billed, and paid to The Plant Place, $645.00 and $850.00 for merchandise purchased. With respect to these documents, the Division argues in its brief that this group of documents should be rejected because they are illegible, based on estimates and inapplicable to the period in question. The Division also states that the Episcopal Church invoices insufficiently describe the alleged nontaxable transactions.

14. Petitioners further requested an adjustment for $12,646.65 of sales to hospitals with an exempt organization certificate. In support of this claim, petitioners submitted an exempt organization certificate for Millard Fillmore Hospital and Millard Fillmore Suburban Hospital as well as a series of invoices concerning purchases by the two hospitals. Many of these invoices contained the month and day of the purchase but not the year of the purchase. Several of the invoices were dated outside the audit period in question. The remaining invoices contained the following dates and respective amounts:

Invoice number	Date	Amount
	7/87	$1,316.90
	8/10/87	148.00
	8/18/87	112.20
33827	9/15/87	75.20
	12/15/87	119.20
29507	4/09/87	84.95
30290	5/11/88	45.80
28212	6/01/88	91.45
28426	6/14/88	39.90
2196	7/88	288.00
32128	7/05/88	68.50
32140	7/08/88	66.70
32288	7/14/88	102.70
32299	7/17/88	100.50
32420	8/08/88	89.45
33900	9/02/88	104.95
34074	10/17/88	92.40
34663	12/01/88	63.80
	6/15/89	113.70
	6/30/90	187.20
TOTAL		$3,311.50

The following invoices contain the month and day but not the year of the sale, however, the invoice numbers are consistent with the numbers on other invoices that were dated in 1987 or 1988. These invoices contained the following amount of sales:

Invoice number	Date	Amount	Invoice number	Date	Amount
28232	6/4	75.50	33940	9/8	110.50
28345	6/6	43.10	33751	9/9	40.25
28407	6/8	109.80	33980	9/12	67.50
28388	6/11	73.00	33813	9/23	63.85
28444	6/16	82.50	33567	9/29	125.10
28466	6/20	72.10	34070	10/14	53.70
28296	6/21	71.60	34098	10/20	107.50
32255	6/28	44.50	34256	10/28	48.25
32263	6/30	79.40	34264	10/29	114.40
32278	7/2	67.75	34303	11/2	53.60
32279	7/12	110.70	34312	11/4	90.50
32317	7/21	83.80	34347	11/7	53.70
32322	7/25	86.20	34364	11/9	71.20
32339	7/28	97.95	34505	11/14	77.25
32214	7/30	76.10	34896	11/17	97.70
32430	8/4	69.20	34545	11/21	70.70
32447	8/7	29.45	34630	11/25	109.40
32460	8/9	93.20	34640	11/27	94.50
32479	8/12	108.10	34689	12/6	99.95
33101	8/17	53.40	35373	12/10	82.35
33120	8/27	85.70	35645	12/13	66.45

33134	8/26	73.00	35399	12/19	108.20
33139	8/29	86.00	36036	12/22	48.70
33150	8/30	40.40	36070	12/29	54.25
33550	9/2	61.00	36082	12/31	47.70
33913	9/3	20.50			

TOTAL: $3,851.75

With respect to these documents, the Division argues in its brief that these invoices contain "incomplete dates, appear to be duplicates and do not describe the sales transactions."

15. Petitioners requested an adjustment with respect to their claim that they sold $30,706.80 worth of food baskets that were exempt under Tax Law § 1115(a). Petitioners submitted a series of invoices issued to individuals, some of which were dated before the audit period in question, indicating sales of baskets of food items. In some cases the invoices would describe the item sold as a hospitality or gourmet basket, or simply list goodies, or be more specific and list items such as fruit, cheese, candy, popcorn, teas, nuts or crackers. One invoice, dated December of 1989, indicated that 29 "gift baskets" were shipped at a total cost of $22,929.00. Included in that cost was a $174.00 shipping charge. On some invoices there was a separate charge of $3.00 or $5.00 and an 8% tax placed on that charge. In other invoices there was no separately stated charge. Fifty invoices in this group of seventy-eight invoices were dated within the audit period in question and indicated that the items contained food by referring to those items as a gourmet or hospitality basket or by specifically referring to the food items. These 50 invoices represented approximately $5,808.00 worth of merchandise. The Division argues that the items in these invoices are taxable because taxable items (the baskets) and nontaxable items (the fruit and cheese) were sold as a single unit. The Division also argues that candy baskets and "treats" baskets are taxable because "candy and confectionery" are excluded from the exemption of food items under Tax Law § 1115(a).

16. Petitioners requested an adjustment claiming that they had made out-of-state deliveries in the amount of $6,725.05 that were nontaxable under 20 NYCRR 526.7(e)(3)(iii), example 10. In support of this claim, petitioners submitted 28 invoices, 2 of which indicated that certain items were shipped out of state with shipping charges in the amount of $252.00 and

$198.00. The other invoices contained a $6.00 shipment fee on the face of the invoice but did not state that the items were shipped out of state. However, with the exception of three invoices, at the top of the invoices were out-of-state addresses. Of the 28 invoices, 25 were dated in December of 1989, 2 were dated 1989 and 1 was undated. Petitioners also submitted a copy of the United Parcel Service's Pickup Record ("UPS record") which listed the shipping addresses and charges for items picked up from The Plant Place. The UPS record contained pickup dates in November, December and June of 1989 but did not list the value of the items shipped. In comparing the invoices with the names and addresses listed on the UPS record, only three sets of names and addresses (Mr. and Mrs. Repka, Mr. and Mrs. Lane and R. and K. Lavasseur) appear on both the invoices and the record. However, the invoice for Mr. and Mrs. Repka was dated 12/89 whereas the pickup date on the UPS record was dated 6/6/90. There were two invoices for different items ordered for Mr. and Mrs. Lane dated 12/89 and 12/20/89, respectively, and the UPS record indicated a pickup for shipment on 12/21/89. There was an invoice, dated 12/89, for items shipped to R. and K. Lavasseur and the UPS record indicated a pickup on 12/21/89 for delivery to those persons at the same address.

The Division argues that the UPS record did not refer to the sales invoices and therefore the evidence is insufficient. Citing 20 NYCRR 533.2(b)(3), the Division asserts that the "delivery documents must reference a specific sales transaction."

17. Finally, petitioners requested an adjustment for transactions through three florists' telephonic delivery associations where petitioners received telephonic instructions from other florists through the associations for the delivery of flowers. Citing 20 NYCRR 526.7(e)(3)(ii), petitioners argue that the amount received from these orders are nontaxable. In support of this position petitioners submitted a yearly statement issued by Florists' Transworld Delivery Association (FTD) to The Plant Place for the years 1987 and 1988 showing that The Plant Place received incoming orders through FTD in the amount of $116,785.66 and $116,004.24, respectively. Petitioners also attached a computer printout with a run date of September 19, 1990 indicating 609 "in orders" for 1989 in the total amount of $18,883.86. On top of this

printout is handwritten "FTD". Petitioners claimed that an adjustment should be made for $193,281.45 representing the amount received from FTD for orders The Plant Place received from other florists. In calculating this total amount, petitioners apparently added together the amount stated in FTD's yearly statement for 1988 ($116,004.76), one-half the amount stated in the 1987 statement ($58,392.83), and the amount of 1989 "in orders" from the computer printout ($18,883.86).

18. Petitioners submitted a monthly account statement from a second telephonic delivery association, Teleflora, for the month of June 1990 indicating 325 orders were sent to The Place Place for that month in the amount of $10,165.34. Finally, petitioners submitted billing statements and Reports of Incoming Orders from Redbook Florist Services to The Plant Place for telephonic orders. The Reports of Incoming Orders and the billing statement are dated in May through November of 1989, however, there are some overlaps of the dates that appear on the Reports of Incoming Orders and the billing statements. For example, a report dated August of 1989 and a billing statement dated August 25, 1989 both contain five recipient names and the same amounts ordered for those recipients. From a comparison of these two types of documents it becomes clear that the amounts listed on the reports are the gross dollar amounts ordered but not the amounts that The Plant Place actually received from Redbook for delivery of flowers by Plant Place in New York State. In the billing statements there is a breakdown of the amounts ordered, the amount received by The Plant Place for orders that it delivered in New York ($1,360.37), and the amount sent by The Plant Place for orders that were delivered out of state through Redbook ($3,783.600). In their request that an adjustment be made for payments Plant Place received from Redbook for flowers Plant Place delivered in New York State, petitioners totaled the gross dollar amounts from Redbook's Reports of Incoming Orders ($2,333.65) and the amounts stated as the "amount sent" which appeared at the bottom of each billing statement ($3,783.60).

19. In its brief, the Division argues that the evidence from the telephonic associations is insufficient to establish nontaxability under the regulations. The Division claims that the FTD

orders are not itemized, that it is unclear how petitioners arrived at the FTD amount of $193,281.45, and that it is unclear how many of the orders that appear on the 1987 yearly statement took place during the audit period which began on June 1, 1987. The Division also concludes that the evidence should be rejected because there are no sales invoices substantiating the amounts indicated in the billing or monthly and yearly statements from the associations. The Division also argues in its brief that petitioner Joanne Chimera was a person responsible to collect sales tax because she was instrumental in managing the day-to-day affairs of the corporation and was president and a 50% shareholder of the corporation.

20. During the hearing and in their reply brief, petitioners argued that the three-year statute of limitations expired for the issuance of notices of determination to John and Joanne Chimera for the period June 1, 1987 through May 31, 1988 because the only consents to extend the limitations period were signed on behalf of The Plant Place. Petitioners also argue that Joanne Chimera was not a responsible person required to collect tax on behalf of The Plant Place and that petitioners' failure to timely pay sales tax was due to reasonable cause and not due to willful neglect.

CONCLUSIONS OF LAW

A. Tax Law § 1116 provides that any sales to an exempt organization shall not be subject to sales tax. Petitioners submitted a number of exempt organization certificates issued by the Division of Taxation to certain organizations. Petitioners claim that they sold items to these organizations during the audit period. They submitted various documents in support of this claim (see, Findings of Fact "13" and "14"). Some of the documents were undated or were dated outside the audit period and therefore are not acceptable as evidence to support the claim of sales during the audit period. However, sales to the Episcopal Church in the amount of $615.00 and to Temple Beth El in the amount of $544.50 were verified by invoices or a check referencing invoices. These documents are sufficient evidence to support petitioners' claim that $1,159.50 worth of sales were exempt from sales tax, reducing petitioners' liability by $92.76. Also, the exempt organization certificate and certain sales invoices with respect to sales to the

Millard Fillmore hospitals support a further adjustment (see, Finding of Fact "14"). The invoices dated within the audit period, and those invoices that contained only the month and day but also invoice numbers that were consistent with other invoice numbers on invoices that were dated in 1987 and 1988, are adequate proof that those sales were exempt from sales tax in the amount of $7,163.25, reducing the deficiency by $573.06.

B. Petitioners are entitled to an adjustment for two sales to Ridge Dinette in the amount of $645.00 and $850.00, respectively (see, Finding of Fact "13"). The resale certificate from Ridge Dinette and the two invoices are sufficient evidence that these amounts constituted sales for resale that are exempt from sales tax, reducing the deficiencies by $119.60 (see, Tax Law § 1105[b]). The Division has made no argument why these documents should not be accepted.

C. Petitioners argue that $30,706.80 worth of sales were exempt from sales tax because the items included food items that were exempt from sales tax under Tax Law § 1115(a)(1). The Division argues that the food items are taxable because they were sold as a single unit with baskets that are taxable. The Division also contends that the invoices indicate that candy was also included as a food item, and under section 1115(a)(1), candy and confectionery are specifically excluded from the exemption.

The regulations provide that when taxable and exempt items are sold as a single unit, tax should be collected on the total price (20 NYCRR 527.1[b]). Therefore, if the food items and the baskets were sold as a single unit and not separately, then the items in the invoices are not exempt from sales tax. As noted in Finding of Fact "15", many of the invoices were dated before the audit period and many of those dated within the audit period contained a separate charge for a $3.00 and $5.00 item which was taxed at an 8% rate. Without an affidavit or testimony explaining whether this charge was a separate charge for the baskets which contained the food items, petitioners have not demonstrated that the food items sold in the gourmet baskets were exempt from sales tax. Moreover, several invoices specifically state that candy was included in the food baskets while other invoices merely refer to these baskets as hospitality or gourmet baskets. Without an affidavit or testimony explaining what food items

were included in a gourmet or hospitality basket, there is no evidence that candy was not included in those baskets as well. Finally, there is an invoice indicating that 29 "gift baskets" were shipped with a shipping cost of $174.00. There is no evidence that these baskets contained food items that were exempt from tax; however, the shipping charges were not subject to sales tax. Under Tax Law former § 1101(b)(3) in effect at the time of the audit period, shipping charges separately stated were excluded from sales tax. The statute was amended in 1991 to include such charges whether or not separately stated (L 1991, ch 166, § 160). Thus, the $174.00 shipping charge was not subject to sales tax, reducing petitioners tax deficiency by $13.92.

D. Citing 20 NYCRR 526.7 (e)(3)(iii), example 10, petitioners claim that out-of-state deliveries were nontaxable. The Division argues that pursuant to 20 NYCRR 533.2(b)(3), delivery documents must reference a specific sales invoice and that because the UPS pickup record did not refer to the sales invoices, petitioners have not provided adequate proof that they made out-of-state deliveries.

The regulation cited by the Division provides that:

> "[t]he seller must maintain records which substantiate points of delivery if delivery was made at a place other than his place of business. Such documents should include receipts from parcel delivery services, common carriers, unregulated truckers, the United States Postal Service, foreign freight forwarders, and logs from company vehicles. Such documents must be referenced to specific sales transactions."

As noted in Finding of Fact "16", only 3 of the 27 invoices that were dated within the audit period coincided with the same name and addresses that appeared on the UPS pickup record for the month of December. Thus, the UPS record substantiates that items in the invoices with respect to Mr. and Mrs. Lane ($66.00 and $166.00) and to R. and K. Levasseur ($150.95) were delivered out of state, and therefore, were not subject to sales tax. Furthermore, because there were separately-stated shipping charges on many of the invoices dated within the audit period which totaled $570.00 ($252.00 + $198.00 + [20 x $6.00]), this amount was exempt from sales tax (see, Tax Law former § 1101[b][3]). Therefore, the total amount of these exempt charges is $952.95, reducing the tax deficiency by $76.24.

E. With respect to sales through telegraphic or telephonic delivery associations, 20 NYCRR 526.7(e)(3)(ii) provides that:

> "In cases where New York State florists receive telegraphic or telephonic instructions from other florists either inside or outside of New York State for delivery of flowers, the receiving florist is not required to collect tax with respect to any receipts which he may realize from the transaction."

In this case petitioners have provided adequate proof that The Plant Place received $10,165.34 worth of orders of flowers through telegraphic or telephonic instruction from Teleflora for 1990. Inasmuch as these statements were issued by a third party, there is no reason to reject the evidence, as requested by the Division, on the ground that petitioners did not also provide sales invoices for those amounts. Similarly, FTD's yearly statements are sufficient proof that petitioners received orders in the amount of $116,785.66 in 1987 and $116,004.24 in 1988; however, the computer printout stating that petitioners received $18,883.86 worth of orders in 1989 is insufficient proof because there was no evidence as to how that computer printout was generated. Morever, because the audit period began in June 1,1987, the total amount in the 1987 yearly statement cannot be taken into account in making an adjustment. Petitioners requested that only half that amount be considered in an adjustment. Inasmuch as only five months of that year were outside the audit period, petitioners' request for an amount that is less than a seven-month prorated share of the total amount for that year is reasonable.

With respect to petitioners' evidence of the amount of orders received from Redbook, only the billing statements are adequate proof of the amount of orders received in 1989. The Reports of Incoming Orders only contain the amount ordered by the purchaser but not the amount actually received by The Plant Place. Moreover, there appears to be overlap in the dates of the reports with those of the billing statements. In calculating the amount of the adjustment from the billing statements, petitioners mistakenly totaled the amount sent by The Plant Place through the delivery association instead of the amount received by The Plant Place. Therefore, there should be an adjustment for the amounts received that were indicated in Redbook's billing statements ($1,360.37). The total adjustment for transactions through the three delivery

associations amounts to $185,923.30, reducing petitioners' tax deficiency by another $14,873.86.

F. Petitioners argue that petitioner Joanne Chimera was not a person under a duty to collect sales tax for the corporation because, although a shareholder and officer, she did not draw a substantial salary, did not have managerial responsibilities and did not write a check without discussing it with John Chimera.

Tax Law § 1133(a) provides that "every person required to collect any tax imposed by [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article." Tax Law § 1131(1) defines "persons required to collect tax" as "any officer, director or employee of a corporation . . . who as such officer, director or employee is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]."

In determining whether an individual is personally liable under these statutes, consideration must be given to the particular facts in each instance (20 NYCRR 526.11[b][2]; see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564, 565; Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 865; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). The fact that an individual was an officer of the corporation does not in itself make that individual personally liable (Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 537, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Vogel v. New York State Dept. of Taxation & Fin., supra; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427; Matter of Constantino, supra). The question is whether the office holder had a "duty to act" for the corporation or had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee, Thus, a variety of factors are considered such as: the individual's status as an officer; the individual's knowledge of and control over the financial affairs and management of the corporation: the individual's day-to-day responsibilities; the authority to write checks on behalf of the corporation; the authority to hire and fire employees; whether the individual prepared, filed or signed tax returns for the corporation; and the

individual's economic interest in the corporation (Matter of Cohen v. State Tax Commn, supra, 513 NYS2d at 565; Matter of Blodnick v. New York State Tax Commn, supra, 507 NYS2d at 538; Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d at 865; Matter of Constantino, supra; Matter of Autex, Tax Appeals Tribunal, November 23, 1988). While no one factor is controlling, all must be considered (Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186) and petitioners have the burden of overcoming the tax assessment (Matter of McHugh v. State Tax Commn., 70 Ad2d 987, 417 NYS2d 799; Matter of Malkin v. Tully, supra).

In this case, petitioner Joanne Chimera was a 50% shareholder, president and treasurer of the corporation, and a full-time salaried employee. In cases where a taxpayer was the sole shareholder and officer, it has been held that he or she had the legal authority and duty to act on behalf of the corporation and, therefore, should be held liable for taxes due notwithstanding the fact that the taxpayer may not have exercised actual control over the corporation (Matter of Martin v. Commr. of Taxation & Fin., 162 AD2d 890, 558 NYS2d 239; Matter of Blodnick v. New York State Tax Commn, supra; Matter of Marvin H. Mason, Inc., Tax Appeals Tribunal, July 29, 1993; Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991). Similarly, failure of an officeholder, who is one of several officeholders, to exercise his or her share of the responsibility by leaving such duties for someone else to discharge, does not absolve the taxpayer from tax liability (Matter of Ragonesi v. State Tax Commn, 88 AD2d 707, 451 NYS2d 301; Matter of Baumvoll, Tax Appeals Tribunal, November 22, 1989; Matter of Roberto, Tax Appeals Tribunal, December 1, 1988). This reasoning was followed by the Tax Appeals Tribunal's holdings in Matter of Feldman (May 25, 1995) and Matter of Ledman (October 5, 1995) in the situation where the taxpayers, who were 50% shareholders and officers of the business, were held liable as persons required to collect sales tax even though they were not involved in the day-to-day affairs of the business. Although all management decisions were made by John Chimera, there is no evidence in the record that Joanne Chimera lacked the authority to intervene in his decisions or was otherwise misled from exercising any authority, or

taking any action, with respect to the sales tax (compare, Matter of Drew, Tax Appeals Tribunal, February 16, 1995, Matter of Moschetto, Tax Appeals Tribunal, March 17, 1994; Matter of Turiansky, Tax Appeals Tribunal, January 20, 1994). Therefore, Joanne Chimera was a person required to collect sales tax on behalf of the corporation.

G. Petitioners John and Joanne Chimera argue that the notices of determination issued to them for the period June 1, 1987 through May 31, 1988 should be cancelled because they did not sign a consent to extend the limitations period for assessing the tax and the statute of limitations had expired before the issuance of those notices. Although this issue was raised at the hearing, the Division did not address this issue in its brief.

Tax Law § 1147(b) provides that no assessment of additional tax shall be made after the expiration of three years from the date of the filing of a return. Tax Law § 1147(c) provides that if before the expiration of the three-year period, the taxpayer consents in writing to an extension of the period, additional tax may be assessed within such extended period. The question in this case is whether the consent signed on behalf of the corporation by James W. Bennet, the corporation's attorney at that time, to extend the limitations period for the period June 1, 1987 through February 29, 1988 until June 20, 1991 also extended the limitations period for the assessment of tax against John and Joanne Chimera. The notices of determination issued to John and Joanne Chimera were dated June 11, 1991.

The Tax Appeals Tribunal has held that the "only tax that can be assessed during the extended period is the tax of the taxpayer who signed the consent extending the period of limitations." (Matter of Bleistein, Tax Appeals Tribunal, July 27, 1995.) This holding recognizes the principle that the liability of an officer is separate and independent from that of the corporation. Therefore, inasmuch as there is no consent that was signed by, or on behalf of, John or Joanne Chimera to extend the limitations period as to them and the Division has not contested the underlying facts of petitioners' argument that The Plant Place timely filed its sales tax returns for the quarter of March 1, 1988 through May 31, 1988, the three-year statute of

limitations has run and the sales taxes assessed against John and Joanne Chimera for the period June 1, 1987 through May 31, 1988 should be cancelled.

H. Finally, petitioners argue that there was reasonable cause and the absence of willful neglect to justify cancelling the penalties imposed. Section 1145(a)(1)(i) of the Tax Law states that any person failing to pay over any tax to the Tax Commission within the time required by Article 28 "shall" be subject to a penalty on the amount of tax due. The penalty may be waived if it is determined that a taxpayer's failure to pay the tax in a timely manner was due to "reasonable cause and not due to willful neglect" (Matter of LT&B Realty Corp. v. New York State Tax Commn, 141 AD2d 185, 535 NYS2d 121, 122). The regulations provide examples of specific grounds for reasonable cause, none of which apply in this case, and a provision that broadly defines reasonable cause as "[a]ny 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. . ." (20 NYCRR 536.5[c][5]). This provision also clearly states that ignorance of the law will not constitute a basis for reasonable cause.

Petitioners argue that the deficiencies were a result of an honest misunderstanding of the interpretation of the Tax Law and their reliance on their accountants "to serve as a check against" the business' activities. Petitioners assert that there was no diversion of funds and that they did not willfully collect and not remit taxes to the State.

Petitioners' reasons for the deficiencies are equivalent to such excuses as reliance on the advice of a tax counsel or ignorance of the law, none of which has been found to constitute a ground for reasonable cause (see, 20 NYCRR 536.5[c][5]; Matter of LT&B Realty v. State Tax Commn, supra; Matter of Bachman v. State Tax Commn, 89 AD2d 679, 453 NYS2d 774; Matter of Petrolane Northeast Gas v. State Tax Commn., 79 AD2d 1043, 435 NYS2d 187, lv denied 53 NY2d 601, 438 NYS2d 1027). Even if a taxpayer relied on the advice of a tax expert, the taxpayer must demonstrate that such reliance was reasonable (Matter of Bachman v. State Tax Commn., supra, 453 NYS2d at 776). Moreover, the fact that petitioners believed that they were preparing their tax returns accurately does not provide the basis for waiving the

penalty. Acting in good faith is insufficient to warrant an abatement of the tax penalty (Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557).

I. The petition of The Plant Place is granted to the extent indicated in Conclusions of Law "A" through "E" and is otherwise denied, and the notices of determination, dated June 11, 1991, issued to The Plant Place should be modified accordingly.

J. The petitions of John Chimera and Joanne Chimera are granted to the extent of Conclusions of Law "A" through "E" and Conclusion of Law "G" and are otherwise denied, and the notices of determination, dated June 11, 1991, issued to John Chimera and Joanne Chimera should be modified accordingly.

DATED: Troy, New York
April 25, 1996

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE