STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **ALPHA WINDOW SYSTEMS, LTD.** 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 September 1, 1989 through May 31, 1993.	:	DETERMINATION DTA NOS. 813355 813356, 813357 AND 813358
In the Matter of the Petition of **GARY LEWIS, OFFICER** 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 September 1, 1989 through May 31, 1993.	:	
In the Matter of the Petition of **JAMES BAKER, OFFICER** 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 September 1, 1989 through May 31, 1993.	:	
In the Matter of the Petition of **PETER POULIKIDIS, OFFICER** 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 September 1, 1989 through May 31, 1993.	:	

Petitioner Alpha Window Systems, Ltd., 1760 Fifth Avenue, Bay Shore, New York 11706-1739, filed a petition for revision of a determination or forrefund of sales and use taxes

under Articles 28 and 29 of the Tax Law for the period September 1, 1989 through May 31, 1993.

Petitioner Gary Lewis, Officer, 37 Shinebone Lane, Commack, New York 11725-5510, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1989 through May 31, 1993.

Petitioner James Baker, Officer, P.O. Box 24, St. James, New York 11780-0024, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1989 through May 31, 1993.

Petitioner Peter Poulikidis, Officer, 3133 Enos Street, Bellmore, New York 11710-5318, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1989 through May 31, 1993.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 5, 1995 at 1:15 P.M., and continued to conclusion at the same location on September 18, 1995 at 10:45 P.M., with all briefs to be submitted by March 11, 1996, which date began the six-month period for the issuance of this determination. Petitioners' brief was received on December 26, 1995, and the answering brief of the Division of Taxation was received on February 16, 1995. No reply brief was filed by petitioners. Petitioners appeared by Louis F. Brush, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kathleen D. Church, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Alpha Window Systems, Ltd. for the period at issue.

II. Whether penalties imposed against petitioners should be abated.

III. Whether petitioners' right to a fair hearing was violated by (1) the conduct of the hearing in Troy, New York rather than a more convenient venue for petitioners, (2) the calling of the matter for hearing at the scheduled time and the acceptance into the record of certain documents relating to the scheduling of the hearing without the presence of petitioners or their

representative, (3) the refusal of the administrative law judge to strike certain exhibits and testimony from the record, (4) the use of photocopies of documents instead of original documents by the Division of Taxation, and (5) the denial of petitioners' request to leave the record open for additional evidence after the final day of hearing.

FINDINGS OF FACT

1. Petitioner Alpha Window Systems, Ltd. ("Alpha Window Systems") is a manufacturer of windows. Petitioners did not present a witness to provide details concerning the nature of the business of Alpha Window Systems. Neither did any of the individual petitioners appear at the hearing to testify. Rather, it is necessary to review the audit report and tax returns, which were introduced into evidence by the Division of Taxation ("Division"), in order to make factual findings concerning the company's operations.

2. Alpha Window Systems was a Long Island-based manufacturer of windows. According to an entry dated December 1, 1992 in the auditor's log, which is included in the Division's Exhibit "M", Michael Sheehan, CPA, the company's accountant at the time of the audit in 1992, informed the auditor that Alpha Window Systems did not sell windows to contractors but rather installed all of the windows which it manufactured. However, it is observed that in the narrative section of the audit report (page 10 of Exhibit "M"), the auditor noted to the contrary that when she visited one of the showrooms of Alpha Window Systems, an unspecified employee indicated that windows were also sold without installation. This narrative section also noted that at the time of the audit, Alpha Window Systems maintained three showrooms, all located on Long Island in Merrick, Selden and Bay Shore. A fourth showroom in Carle Place, according to the narrative, was closed in January 1992.

3. Included in the Division's Exhibit "M" (at p. E 78) is a photocopy of an advertisement of Alpha Window Systems which appeared in the Long Island newspaper, Newsday, on July 6, 1993. In this advertisement, the vendor is described as "Alpha Window Factory, Long Island's Window" and offered a free air conditioner with the purchase of "Alpha bays, sliders, bows, casements, double hungs, picture windows, sliding glass doors". Fine print at the bottom of the

ad noted that for a free air conditioner, the minimum purchase was "7 Alpha Windows or 1 bay or bow window". The advertisement also offered immediate installation, low cost financing and "no-obligation in-home design consultation". In addition, the advertisement noted "special savings on all styles" of vinyl siding.

4. A photocopy of a standard sales contract apparently used by Alpha Window Systems as a contractor with its customers, which is also included in the Division's Exhibit "M" at an unpaginated page following the photocopy of the advertisement, provides in relevant part as follows:

> "By this agreement, Contractor agrees to sell and Customer agrees to buy the services and materials set forth in the Work and Materials Description below UPON THE TERMS AND CONDITIONS SET FORTH ON THE FRONT AND REVERSE SIDE HEREOF. There are NO EXTRAS, SPECIAL INSTRUCTIONS OR SPECIFICATIONS unless specifically set forth below. See note* below".

The note referred to above provided as follows:

> "Prices include complete removal of old sashes and clean up. Moldings and frames are not changed unless specified in Additional Remarks below. Air conditioners are the customer's responsibility to remove and replace. Customer is responsible to remove and replace all drapes, curtains, blinds and shutters."

5. A review of the photocopies of the Federal income tax returns of Alpha Window Systems, a subchapter S corporation, for 1990 and 1991, also included in the Division's Exhibit M, described the corporation's business activity as "manufacturing" and its product or service as "replace windows". The corporation reported total income before deductions of $3,031,456.00 and $2,620,150.00, for 1990 and 1991, respectively, calculated as follows:

	1990	1991
Gross receipts or sales	$6,511,992.00	$5,384,575.00
Less: Cost of goods sold	3,483,261.00	2,778,566.00
Gross profit	$3,028,731.00	$2,606,009.00
Miscellaneous Income	2,724.00	14,141.00
Total income	$3,031,456.00	$2,620,150.00

It is further observed that these tax returns disclose deductions for "salaries and wages" of $253,961.00 and $306,204.00 for 1990 and 1991, respectively, as well as deductions for so-called "contract labor" of $865,894.00 and $750,732.00 for 1990 and 1991, respectively, and compensation of officers of $370,403.00 and $369,000.00 for 1990 and 1991, respectively. It is

noted that the corporation reported ordinary losses, after deductions, of $723,994.00 and $351,262.00 for 1990 and 1991, respectively.

6. In addition, the Federal tax returns provide some information about the individual petitioners in respective statements designated "Statement 1, Compensation of Officers". These statements disclose that Peter Poulikidis, Gary Lewis and James Baker each own 33.333% of the corporation's stock, each devoted 100% of their time to Alpha Window Systems, and each received the same compensation of $123,000.00 in 1990 and of $123,470.00, $123,473.00 and $123,460.00, respectively, in 1991. It is observed that the individual petitioners withdrew their respective challenges to the Division's determination that they as individuals were persons responsible for the collection of sales and use taxes on behalf of Alpha Window Systems. As a result, the record does not include any details concerning the specific duties and responsibilities of the individual petitioners in relation to the corporation.

7. Included in the Division's Exhibit "M" (at p. E 53) is a transcription of the sales and use tax returns filed by Alpha Window Systems during the period at issue. The company reported minimal taxable sales as follows:

Quarter Ending	Gross Sales	Taxable Sales	Purchases Subject To Use Tax	Tax Paid
11/30/89	$ 189,520.00	$ 29,986.00	-0-	$ 2,308.07
2/28/90	1,209,174.00	8,648.00	-0-	682.85
5/31/90	1,799,502.00	3,551.00	-0-	271.76
8/31/90	1,746,477.00	1,151.00	-0-	88.77
11/30/90	1,993,339.00	10,317.00	-0-	784.58
2/28/91	727,737.00	802.00	-0-	61.85
5/31/91	1,171,610.00	930.00	-0-	73.24
8/31/91	1,240,082.00	596.00	12,073.00	953.14
11/30/91	1,790,198.00	2,322.00	13,616.00	1,277.83
2/29/92	701,760.00	2,118.00	-0-	176.20
5/31/92	903,204.00	1,595.00	-0-	129.67
8/31/92	849,089.00	749.00	-0-	62.87
11/30/92	1,158,177.00	17,456.00	-0-	1,483.35
2/28/93	582,452.00	1,501.00	-0-	127.67
5/31/93	843,589.00	2,779.00	-0-	236.55
Totals	$16,905,910.00	$84,501.00	$25,689.00	$8,718.40

The fact that Alpha Window Systems reported gross sales of nearly $17,000,000.00 during the audit period while reporting sales and use tax due of an amount less than $9,000.00, apparently prompted the Division to audit the company's returns.

The Audit

8. Alpha Window Systems did not cooperate during the audit. The auditor's log shows that an appointment letter dated August 27, 1992 was sent to Alpha Window Systems scheduling the initial appointment to commence the audit on September 24, 1992. The log indicated that the company cancelled five succeeding appointments for September 24, 1992, November 10, 1992, November 17, 1992, May 4, 1993 and June 3, 1993. Frustrated, the auditor then sent a certified letter requesting the books and records of Alpha Window Systems in order to conduct her audit of the company's sales and use tax returns. The audit report indicates that the company failed to make the following records available: sales journal, cash receipts journal, sales invoices (test period), purchase journal, check disbursements journal, purchase invoices (test period), contractor's job cost book or sheets, exemption certificates (including resale certificates, exempt organization certificates, capital improvement certificates, exempt use certificates, contractor exempt purchase certificates), disposition of assets details, adjusting entries and lease contracts.

9. Consequently, the Division issued a Statement of Proposed Audit Adjustment dated July 1, 1993 against Alpha Window Systems asserting tax due for the audit period of $1,483,048.58 plus penalty and interest. Additional tax due of $1,442,178.99 was computed based upon additional taxable sales of $18,654,822.97, which represented the amount of gross sales taken from the corporation's sales tax returns and federal income tax returns. The Division had disallowed all non-taxable sales claimed by Alpha Window Systems. The auditor described her methodology as follows:

> "[W]e pick up all the gross sales that appear in the federal, we divided it by month, and for the amount that we don't have in the federal, we take the amount that they put it in the sales tax returns like a gross sales. And for the last three months we projected because we can't have any information. And was based in the report December to February before" (tr., p. 76).

Additional tax due of $40,869.58 was based upon the corporation's acquisition and disposal of fixed assets because no documentation was provided to show that sales tax had been

paid on such transactions. It appears that such transactions related to the closing of one of Alpha Window System's showrooms, which occurred during the audit period.

10. On August 5, 1993, about a month after the issuance of the Statement of Proposed Audit Adjustment dated July 1, 1993, the Division received a power of attorney from Louis F. Brush, Esq., authorizing his representation. The auditor's narrative, included in the audit report at page 10 of 11 pages of the Division's Exhibit "M", noted the continued lack of cooperation on the part of petitioners:

> "We contacted him, and asked for the books and records. He said that he will get in contact with the vendor and he will give us a call back. He never did, I left several messages with his secretary, but we did not receive any response. We uploaded the case as not agreed and with no payment."

11. The Division then issued a Notice of Determination dated October 18, 1993 against Alpha Window Systems asserting tax due of $1,483,048.58 plus penalty and interest. Corresponding notices also dated October 18, 1993 were issued by the Division against Gary Lewis, James Baker and Peter Poulikidis, respectively, as officers of the corporate petitioner, which also asserted sales tax due of $1,483,048.58 plus penalty and interest. As noted in Finding of Fact "6", petitioners have conceded that the individual petitioners were each persons required to collect sales tax on behalf of the corporation.

12. Approximately six months after the issuance of the Notice of Determination dated October 18, 1993, a conciliation conference was conducted at petitioners' request on April 11, 1994. Six months after the conciliation conference, by conciliation orders dated October 7, 1994, the amount of tax asserted due against each of the petitioners was reduced by $1,155,018.70, from the $1,483,048.58 asserted in the notices of determination dated October 18, 1993 to $328,029.88 plus penalty and interest as recomputed by the conciliation orders.

13. Much of the hearing in this matter was taken up by questioning of the auditor concerning this recomputation of tax due. It is initially observed that the auditor, in attempting to recompute tax due, again faced a lack of cooperation. In a document marked into evidence as the Division's Exhibit "O", the auditor summarized the continued lack of cooperation in producing necessary records. An appointment scheduled for May 16, 1994 was cancelled by

petitioners' representative. On May 17, 1994, the auditor went to the representative's office, but no invoices were available for her review. An appointment for the following day, May 18, 1994, was canceled by petitioners' representative. The auditor placed three phone calls on June 2, June 6, and June 7, 1994 attempting to make another appointment to review records. On June 13, 1994, the auditor returned the phone call of petitioners' representative of June 9, 1994, and the auditor's notes state that the representative "offer[ed] us a sample". An appointment was set for June 28, 1994, but the petitioners' representative canceled once again, and the appointment was rescheduled for July 8, 1994. However, on July 7, 1994, petitioners' representative left a message for the auditor canceling the appointment for July 8, 1994. The auditor contacted the conferee who scheduled an appointment for her to review records on July 21, 1994. On July 21, 1994, the auditor's notes state that "only invoices for raw materials were available", and that she gave petitioners' representative to July 28, 1994 "to get the rest of [the] documentation". After several additional phone calls to petitioners' representative, the auditor finally reached the representative, who informed her that "there were no more invoices". On August 16, 1994, the conferee advised the auditor to "work with the information available".

14. Despite the frustrations encountered by the auditor in her attempt to recompute tax asserted due, she nonetheless revised her audit. Originally, as noted in Finding of Fact "9", the auditor treated as taxable all of Alpha Window Systems' sales which resulted in an assessment in excess of a million dollars. Following the conciliation conference, the auditor accepted the corporation's nontaxable sales, and her focus shifted to determining whether the corporation paid sales tax on its purchases. According to the auditor, if the corporation did not pay sales tax on its purchases, then use tax was due. The auditor closely examined the purchase invoices of Alpha Window Systems for a three month period, March through May of 1991. The auditor selected this particular test period. If there was no designation of sales tax on a particular purchase invoice or if an invoice was missing, the auditor concluded that tax had not been paid. She determined that sales tax had not been paid on purchases of $225,768.79 out of purchases tested of $296,064.58, resulting in a margin of error of 76.2566%.

15. The auditor's recalculation of tax due was marked into evidence as the Division's Exhibit "N", and on page 4 of this document, a schedule shows the application of this margin of error of 76.2566% to the purchases of Alpha Window Systems during the audit period as follows:

Period Ending	Purchases	76.2566% of purchases	Tax due
Nov.'89	$544,394.95	$ 415,137.08	$31,135.28
Feb.'90	544,394.95	415,137.08	31,135.28
May '90	544,394.95	415,137.08	31,135.28
Aug.'90	544,394.95	415,137.08	31,135.28
Nov.'90	544,394.95	415,137.08	31,135.28
Feb.'91	370,007.14	282,154.86	21,161.61
May '91	282,813.23	215,663.75	16,174.78
Aug.'91	282,813.23	215,663.75	16,174.78
Nov.'91	282,813.23	215,553.75	17,253.10
Feb.'92	250,448.92	190,983.83	15,278.71
May '92	234,266.77	178,643.87	14,291.51
Aug.'92	234,266.77	178,643.87	14,291.51
Nov.'92	234,266.77	178,643.87	15,184.73
Feb.'93	234,266.77	178,643.87	15,184.73
May '93	234,266.77	178,643.87	15,184.73
Totals	$5,362,204.32	$4,089,034.70	$ 315,856.60

16. The auditor testified that in revising the tax asserted due, she utilized the general ledger of Alpha Window Systems for the amounts of raw material purchased as specified in an account known as "inventory-raw materials". The auditor noted that the amount shown in the general ledger for "inventory-raw materials" was not the same as the amount shown on the federal tax return for purchases. Her request for "the adjusting entry" which would reconcile the two went unanswered (tr., p. 171). Further, because petitioners did not provide the general ledger information for 1989 and 1993, the auditor projected amounts. For 1989, she divided the amount of purchases for 1990 by 12 to obtain a monthly amount for purchases. She then multiplied that monthly amount by four to determine the amount of purchases for the four month period in 1989. Similarly, for 1993, the auditor divided the amount of purchases for 1992 by 12 to obtain a monthly amount for purchases. She then multiplied that monthly amount by five to determine the amount of purchases for the five month period in 1993 included in the audit period.

It is observed that the Division's Exhibit "P" is a photocopy of pages from the general ledger of Alpha Window Systems for the months of March, April and May 1991 on which the auditor specifically marked the particular purchases where tax had been paid. Purchases where tax had not been paid according to the auditor can easily be determined. Consequently, the record is clear which purchases are at issue. It is noted that petitioners have introduced no evidence from any of the entities from which the corporation purchased materials to challenge the auditor's determination that no tax was paid on such purchases.

17. The auditor also reduced tax asserted due based upon the corporation's acquisition and disposal of fixed assets from $40,869.58, as noted in Finding of Fact "9" to $12,173.29, as noted on the first page of Exhibit "N" where the auditor noted that such reduction resulted from "additional information provided". This reduced amount of $12,173.29 plus the $315,856.60, calculated as due on purchases, equals $328,029.89, one cent more than the amount specified in the conciliation order dated October 7, 1994, as noted in Finding of Fact "12".

18. As noted in the introductory paragraphs of this determination, the hearing in this matter was continued to conclusion on September 18, 1995 approximately two months after it had been commenced on July 5, 1995. In that interval, petitioners provided the auditor with Alpha Window System's "1991 invoices with a printout by vendor name by quarter" (tr., p. 205). The computer printout by vendor name by quarter was marked into evidence as petitioners' Exhibit "26". Petitioners did not present a witness to identify this document but rather relied on the auditor to give her opinion concerning the nature of this document which she described as a record of the corporation's accounts payable. The auditor testified that she compared invoices, included in petitioners' Exhibits "27" and "28", to this document and redid her test by also including an analysis of the month of September 1991. The auditor testified that when she reexamined the invoices for the months of March, April, and May 1991, by comparing them to this accounts payable record, there was an increase in the margin of error to the disadvantage of petitioners (tr., p. 282). However, she apparently relied upon her earlier calculation of a margin of error for this three month test period, and the Division's Exhibit "U"

shows a summary of the auditor's revised test which resulted in a slight decrease in the margin of error used by her of 76.2566% to a rounded 74% because of a lesser margin of error of a rounded 71% calculated for the month of September 1991. Applying this reduced margin of error to the purchases of Alpha Window Systems resulted in a reduction of tax due on purchases from $315,856.60 as indicated in Finding of Fact "15" to $307,520.65. Since tax due on fixed assets remained $12,173.29, the further revised amount of total tax asserted due is $319,693.94, which is a further reduction of the amount shown due in the conciliation order of $328,029.88.

Petitioners' Presentation

19. Petitioners' case primarily consisted of the cross-examination of the auditor. Petitioners' only witness was the corporation's purchasing agent, Beth Baker, a sister-in-law of petitioner James Baker. She testified that she was responsible for the purchase of all materials for the corporation's manufacturing of windows. She offered no testimony concerning the corporation's practice of paying or not paying sales tax on such purchases. Rather, she merely noted that the corporation relied upon its former accountant, Michael Sheehan, "as to what is the correct amount of tax to be paid" in responding "Yes" to a leading question (tr., p. 293). Further, it is noted that petitioners introduced no evidence from the vendors who sold Alpha Window Systems its raw materials concerning their collection of sales tax on the sale of such raw materials.

Procedural Permutations

20. The letters of the Division's representative which transmitted each of the respective answers to petitioners' representative noted as follows with regard to the scheduling of the hearing in these matters:

> "The case[s] will now be placed on the formal hearing calendar. The Division of Tax Appeals will send to the parties a 'Calendar Call' notice, asking that the parties discuss and, if possible, agree upon a date for a hearing. Upon receipt of the calendar call notice, I will contact you to discuss the same."

The Division of Tax Appeals issued a Calendar Call dated March 15, 1995 to the Division's representative, petitioners' representative, and each of the petitioners. This document provided as follows:

> "The Division of Tax Appeals anticipates scheduling the hearing in the above matter during the months of July or August, 1995.
>
> The parties should contact each other and set a mutually convenient date for the hearing during those months. They then should notify the Division of Tax Appeals of the date and amount of time required for hearing by returning this form no later than May 3, 1995. (Indicate date below.)
>
> If either party elects not to select a date, the other party may request a specific date. If neither party responds, the Division of Tax Appeals will select the date."

By a letter dated May 3, 1995, attorney Church advised the calendar clerk that she had "been unable to reach Petitioners' representative to schedule a date and time for the [hearing]" and requested "an additional day to contact Petitioners' representative before scheduling a date which is not mutually agreed upon." By a follow-up letter dated May 4, 1995, attorney Church advised that she had "been unable to discuss with Petitioners' representative scheduling a date and time for the [hearing]" and requested that these matters be scheduled for hearing on July 6, 1995 at 9:15 A.M. A Notice of Hearing (Division's Exhibit "A") issued May 31, 1995, scheduled these matters for hearing on July 6, 1995 at 9:15 A.M.

By a letter dated May 26, 1995 (more than three weeks after May 3, 1995, which was the date set in the calendar call notice to the parties' representatives before which they were required to request a specific date for the hearing in this matter) which was received on May 30, 1995, petitioners' representative advised the calendar clerk that he would be unable to attend a hearing on July 6, 1995 because "there will be a zoning board hearing on that date for which I am representing a client in a zoning appeal." He suggested that the hearing be set "[d]ue to conflicts in vacation schedules . . . for "September 6th, 7th or 8th".

By a letter dated June 1, 1995, the calendar clerk advised petitioners' representative that he would have to contact the assistant chief administrative law judge to arrange for a different hearing date because the record showed that from the date of the calendar call letter of March 15, 1995 to May 3, 1995, it appeared that petitioners' representative ignored his opportunity to request a particular hearing date.

By a letter dated June 7, 1995, which was received on June 12, 1995, to the calendar clerk, petitioners' representative noted that he had received only two phone calls from attorney

Church, on May 3 and May 4, 1995 and had not been able to return them as of May 4, 1995 because he "was not in the office", and he was "in the middle of tax season" and involved with several other matters. He also advised that he would be commencing a jury trial during the week of June 26, 1995 that he anticipated would last through July 13, 1995.

By a letter dated June 14, 1995 (Division's Exhibit "B"), the assistant chief administrative law judge denied the request of petitioners' representative for a postponement of the hearing until September 1995:

> "The hearing in the above matters has been scheduled for July 6, 1995 for one simple reason. You were given 45 days to select a hearing date and you did not do it. The Division's attorney, Ms. Church, did request a date, and, as is our policy when only one party requests a date, we honored that request.
>
> We do not grant adjournments under these circumstances. I will allow the hearing to proceed on Wednesday, July 5 or Friday, July 7 only if Ms. Church is available and consents to such a change. Otherwise the hearing will proceed as scheduled on July 6 (the day on which petitioners' representative stated in his letter of May 26, 1995 that he had a zoning board hearing)."

By a letter dated June 20, 1995 (Division's Exhibit "C"), the Division's representative agreed to reschedule the hearing in this matter to July 5, 1995 at 1:15 P.M. In response to this letter, the assistant chief administrative law judge by his letter dated June 29, 1995 (Division's Exhibit "D") changed the hearing in this matter to Wednesday, July 5, 1995 at 1:15 P.M., "since this change will free up July 6 for Mr. Brush's zoning board hearing and I have heard no objections from Mr. Brush".

21. On July 5, 1995 at 1:15 P.M., the administrative law judge called these matters for hearing. Neither petitioners nor their representative made a timely appearance, and the administrative law judge, after marking into the record the Notice of Hearing and the correspondence detailed in Finding of Fact "20" which established that the hearing had been set to go forward on July 5, 1995 at 1:15 P.M., observed as follows:

> "[I]t is now approximately 1:30 and I note that there has been no appearance by Attorney Brush or by any of the taxpayers. Before I came upstairs [to the hearing room] at 1:15 I did check with the receptionist of the Division of Tax Appeals to see if she had any contact from the taxpayer[s] or the attorney. She advised me that she had not had any contact. It is my policy not to entertain a motion for default until I give a taxpayer some time, leeway, especially since it would appear they would be traveling to attend the hearing today.

> We will go off the record until 2:00 P.M. At that time we will reconvene and I will entertain any motion that the attorney for the Division of Taxation may have.
> Off the record (tr., p. 7)."

Approximately 20 minutes later, petitioners' representative made his appearance, and the administrative law judge summarized on the record what had transpired prior to his arrival:

> "Back on the record. It is now approximately 1:50. We had called this hearing at 1:15 P.M. And at that time I marked into the record the notices of hearing, Mr. Brush, the letter of Mr. Ranalli dated June 14, 1995 to you, a letter of June 20, 1995 from Attorney Church to Mr. Ranalli, and then Mr. Ranalli's letter of June 29, 1995.
> The reason I marked these documents into the record was to show in the record why the hearing was scheduled to commence today at 1:15 P.M. instead of the date shown on the notices of hearing which has scheduled it for July 6, 1995 at 9:15 A.M. I then went off the record advising Ms. Church that it's my custom to wait at least until 2:00 P.M. to entertain any sort of motion for a default" (tr., pp. 7-8).

Attorney Brush then made a motion to strike from the record the documents that were "marked in the record prior to my appearing today . . ." (tr., p. 9). The administrative law judge responded by noting that:

> "The only purpose given to the document[s] is to show the time for commencing the hearing. I will not give them any other weight. There is no jury to be prejudiced by any sort of evidence" (tr., p. 9).

Attorney Brush continued to object, and the administrative law judge noted that he would not "strike evidence that's already been marked into the record" (tr., p. 9).

22. In the course of the hearing, petitioners' representative objected to many answers given by the auditor during her direct examination. The administrative law judge noted:

> "in an administrative hearing I don't strike answers. The witness will testify and it's in evidence. If it's something that's not worthy of giving any weight to it, I will not be giving weight" (tr., p.89).

Rather than objecting to answers of the auditor, petitioners' attorney was instructed to "object to the question" (tr., p. 89). To which petitioners' attorney responded:

> Attorney Brush: I would like the authority that says I can't object to anything she says. I don't think that's correct.
>
> Administrative Law Judge: You can bring out on cross-examination your objections to what she has said, but when she is responding --[interruption by attorney Brush]
>
> Attorney Brush: Cross-examination is cross-examination, objection.

> Administrative Law Judge: I am going to direct the reporter to take down my words now. Mr. Brush is being extremely persistent . . . . I am directing the reporter to take down the witness' response and it is not necessary for her to take down interruptions to the witness. You [the reporter] are to proceed and take down what the witness says now in response to the question of Ms. Church. You [attorney Brush] will be heard after the witness has given her response and do not interrupt the witness.
>
> Attorney Brush: Note my objection for the record" (tr., p. 90-91).

23. The hearing in this matter on July 5, 1995 was late getting underway not only because of the late arrival of petitioners' representative, as noted in Finding of Fact "21", but also because of the additional hour it took for petitioner's representative to move from his car into the hearing room some 25 cartons of records, which ultimately a sample was marked into evidence as petitioners' Exhibits "27" and "28". At approximately 7:00 P.M., petitioners' representative noted that he was nearing completion of his cross-examination of the auditor:

> "I have a few more questions and I am done" (tr., p. 152).

However, as of 7:30, he had not completed his cross-examination and noted as follows:

> "For the record, I am nowhere near finished doing in terms of the questions in light of the witness changing her answers. I want to make sure her testimony has not changed based upon admissions here" (tr., p. 183).

Ultimately, petitioners' representative could not estimate how much additional time he needed to complete his cross-examination:

> "If I could, I would. I am not going to be bound to something I have no way of estimating (tr., p. 189)."

In response, the matter was continued by the administrative law judge to August 2nd and 3rd, 1995 "so we can assure the hearing will be completed by early August (tr., p. 189) and the hearing on July 5, 1995 was adjourned at approximately 8:00 P.M.

24. On August 1, 1995, a transmittal was received by the administrative law judge from attorney Brush by facsimile transmission noting that he would "not be available for continuation of the Hearing" because he was involved in jury selection in a Suffolk County Supreme Court matter. In response, the administrative law judge agreed to reschedule the continuation of the hearing in this matter to September 18th and 19th, 1995, and a new Notice of Hearing dated

August 14, 1995 was issued scheduling the continuation to commence at 10:45 A.M. on September 18, 1995 and to continue on September 19, 1995 at 9:15 A.M.

25. On September 18, 1995 at 10:45 A.M., these matters were called and the administrative law judge observed:

> "I note that it is now approximately 10:50. We are going on the record for the limited purpose at this time for me to mark into the record these four notices [of hearing] . . . . Before I entertain any motion from the State to close the record to additional evidence, I will give the petitioners some time given the fact that they are more than likely traveling up from Long Island to attend the hearing today. And I will not entertain a motion to close the record until 11:30 (tr., pp. 198-199).

After a short recess, the administrative law judge went back on the record:

> "I spoke to the receptionist of Tax Appeals and she has informed me that she received a phone call from Mr. Brush's office at 11:00 A.M. informing her that the taxpayer would be approximately one hour late to the hearing. So we will recall the matter at 11:45 (tr., p. 199).

At 11:45, the administrative law judge went back on the record and noting that petitioners had not yet appeared:

> "[T]here is still no sign of their arrival. And what we will do is take a lunch break at this time and reconvene at 1:00 P.M. Hopefully the taxpayer will be here at that time" (tr., p. 200).

At 1:00 P.M. the hearing continued with attorney Brush posing additional questions of the auditor after the administrative law judge summarized what had been accomplished on July 5, 1995. The focus of the questioning was on the auditor's further reduction in the amount of tax asserted due based upon her review of additional documents provided by petitioners in the period between the original hearing date of July 5, 1995 and the reconvening of the hearing on September 18, 1995, as detailed in Finding of Fact "18". After the completion of the auditor's testimony, petitioner's representative requested that the record be left open for him to submit "the invoices on the fixed assets to rebut that tax was due or tax was not paid" (tr.p. 285). The administrative law judge denied this request:

> "Today was your opportunity to introduce your evidence and you are not specific enough on the type of document you are going to be putting in" (tr. p. 286).

26. Petitioner's representative also argued that (i) the hearing should have been conducted not in Troy, New York but at a more convenient venue for petitioners, and (ii) the

acceptance into the record of photocopies of the the Division's documents instead of originals was improper.

Summary of the Parties' Positions

27. Petitioners, citing an administrative law judge determination in support, maintain that the Division has the burden of proving that its basis for asserting additional tax against petitioners was correct because the Division abandoned its initial basis for the issuance of the Notice of Determination. Because the auditor had no personal knowledge of the corporation's customers or operations, her testimony was "mere speculation" and therefore fails to provide a rational basis for the assertion of additional tax due against petitioners (Petitioners' brief, p. 4). Further, citing Finch, Pruyn & Co. v. Tully, 69 AD2d 192, 419 NYS2d 232, petitioners maintain that "where a manufacturer purchases raw materials for use as component parts for windows and doors, they are not subject to 'use tax' on out of state purchases" (Petitioners' brief, pp. 3-4). Finally, petitioners maintain that, in the alternative, penalties may not be imposed against petitioners because "the taxpayers acted upon the advice and counsel of their accountant which establishes reasonable cause under the circumstances" (Petitioners' brief, p. 5).

28. The Division counters that petitioners have the burden to prove that the amount of tax determined due was erroneous. The revision in tax asserted due after the conciliation conference was not a new basis for the tax deficiency. Rather, according to the Division:

> "Whether the audit method used was 'reasonably calculated to reflect the taxes due' [citation omitted] can only be determined based on information made available to the auditor before the assessment is issued" [emphasis in original] (Division's brief, p. 2).

According to the Division, given the failure of petitioners to provide books and records, the auditor's estimate of tax due based upon her disallowance of all claimed exempt sales was reasonable. Alpha Window Systems, as the last purchaser of the material before it was installed as part of a capital improvement, was liable to pay tax on such purchases. Further, the Division maintains that penalties should be sustained because petitioners failed to establish that their reliance on their accountant was reasonable, and mere reliance on an accountant is an insufficient basis for abating penalties.

CONCLUSIONS OF LAW

A. Petitioners received a fair and impartial hearing at which they were given a full opportunity to produce witnesses and evidence in support of their position. The many complaints voiced by petitioners' representative, as itemized in Issue "III" at the beginning of this determination, are without merit, and will be addressed in the order noted in Issue "III":

(1) Although the holding of the hearing in these matters in Troy, New York rather than in a geographic location more convenient for petitioners was disadvantageous to petitioners, their due process rights were not violated as a result (see, Matter of Thompson, Tax Appeals Tribunal, January 28, 1993);

(2) It was entirely reasonable for the administrative law judge to call these matters at the scheduled time and to mark into the record the documents establishing the day and time for the hearing. It is an exercise in temerity for petitioners to argue otherwise;

(3) Petitioners have cited no authority for the proposition that testimony and/or evidence may be struck in an administrative hearing. There is no jury to be prejudiced by evidence that is entitled to little or no weight. Further, it seems clear that petitioners' motion to strike testimony and evidence was in essence a strategy to delay the orderly conduct of the hearing and was in keeping with the lack of cooperation displayed in the audit process as well;

(4) The State Administrative Procedure Act § 306(2) expressly authorizes the Division to utilize copies rather than original documents at an administrative hearing;

(5) As noted in Finding of Fact "9", the Statement of Proposed Audit Adjustment dated July 1, 1993 put petitioners on notice, two years before the hearing in this matter, that a portion of the taxes asserted due was based upon the corporation's acquisition and disposal of fixed assets. Further, as noted in Finding of Fact "17", the auditor during the conference stage reduced tax asserted due based upon the corporation's acquisition and disposal of fixed assets from $40,869.58 to $12,173.29 as a result of "additional information provided". If petitioners had even more documents to justify a further reduction, they should have had such documents at the hearing in this matter. Given their record of delay, it was entirely reasonable for the

administrative law judge to deny petitioners' request that the record remain open after the hearing for them to gather and submit further documents to support an additional reduction.

B. In light of petitioners' limited introduction of evidence to support their case, it is important to emphasize the standard concerning the burden of proof in matters before the Division of Tax Appeals. In Matter of Atlantic and Hudson Ltd. Partnerships (Tax Appeals Tribunal, January 30, 1992), the Tribunal provided the following guidance concerning the burden of proof in matters before the Division of Tax Appeals:

> "Although a determination of tax must have a rational basis in order to be sustained upon review (see, Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219), the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (see, Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174; Matter of Leogrande, Tax Appeals Tribunal, July 18, 1991). Evidence that both rebuts the presumption of correctness and indicates the irrationality of the audit may appear: on the face of the audit as described by the Division through testimony or documentation (see, Matter of Snyder v. State Tax Commn., 114 AD2d 567, 494 NYS2d 183; Matter of Fortunato, Tax Appeals Tribunal, February 22, 1990); from factors underlying the audit which are developed by the petitioner at hearing (see, Matter of Ristorante Puglia, Ltd. v. Chu, 102 AD2d 348, 478 NYS2d 91; Matter of Fokos Lounge, Tax Appeals Tribunal, March 7, 1991 [where the petitioner proved that its utility meter readings bore no relationship to its level of business activity]); or in the inability of the Division to identify the bases of the audit methodology in response to questions posed at the hearing (see, Matter of Basileo, Tax Appeals Tribunal, May 9, 1991; Matter of Fokos Lounge, Tax Appeals Tribunal, March 7, 1991; Matter of Shop Rite Wines & Liqs., Tax Appeals Tribunal, February 22, 1991; Matter of Fashana, Tax Appeals Tribunal, September 21, 1989). However, where, as here, petitioner has failed to make any inquiry into the audit method or calculation, the presumption of correctness raised by the issuance of the assessment provides the rational basis for the assessment. To hold otherwise would be in irreconcilable conflict with the principles that the Division does not have the burden to demonstrate the propriety of its assessment (see, Matter of A & J Gifts Shop v. Chu, 145 AD2d 877, 536 NYS2d 209, lv denied 74 NY2d 603, 542 NYS2d 518; Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Matter of Scarpulla v. State Tax Commn., 120 AD2d 842, 502 NYS2d 113) and that the petitioner has a heavy burden to prove the assessment erroneous (see, Matter of Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692)."

C. The Division is correct that in determining whether there was a rational basis for the Notice of Determination dated October 18, 1993, the analysis is based upon what was known by the auditor at the time the notice was issued (see, Matter of Queens Discount Appliances, Inc., Tax Appeals Tribunal, December 30, 1993). As detailed in Finding of Fact "8", petitioners

were uncooperative during the audit and failed to provide adequate books and records for the auditor's review after repeated attempts by the auditor to obtain their cooperation. As a result, the auditor was justified in basing her determination of additional tax by the disallowance of all of the corporation's exempt sales and by imposing tax on the corporation's acquisition and disposal of fixed assets. In Matter of Rainbow Waterproofing Corporation (Tax Appeals Tribunal, April 11, 1996), the Tribunal affirmed the determination of the administrative law judge for the reasons stated in his determination, which were summarized by the Tribunal, in relevant part, as follows:

> "The Administrative Law Judge further found that since no nontaxable documentation was provided the Division properly deemed all gross sales taxable and was entitled to rely on the 'presumption of taxability' contained in Tax Law § 1132(c) with respect to the unsubstantiated claimed exempt sales [citations omitted]."

Similarly, in the matter at hand, the Division properly deemed all of the corporation's gross sales taxable as detailed in Finding of Fact "9".

D. As noted in paragraph "27", petitioners argue that the burden of proof shifted to the Division to prove that the amount of additional tax asserted due was correct when the basis for additional taxes asserted due changed during the conciliation conference stage. The only authority cited by petitioners for this contention is a determination of an administrative law judge which may be given no precedential value or "any force or effect" in this proceeding (see, Tax Law § 2010[5]). Moreover, the administrative law judge determination cited involved the issuance of a revised notice of deficiency. In any event, there is no basis in statute and no cases have been cited by petitioners to support the shifting of the burden of proof to the Division in the circumstances at hand. It is further noted that petitioners have not been prejudiced in any fashion by the recalculation of tax due based upon the auditor's analysis of the corporation's purchases which resulted in a substantial reduction in tax asserted due since they have been given many opportunities to present documentation to show that tax had been properly paid on such purchases (cf., Matter of Chuckrow, Tax Appeals Tribunal, July 1, 1993). Under Tax Law § 1133(b), Alpha Window Systems was properly treated as liable for sales tax which it, as a

customer, failed to pay to its vendors (cf., Matter of Gartner Group, Inc., Tax Appeals Tribunal, December 8, 1994). In sum, petitioners have not shouldered their burden of proving that they are entitled to any further reduction of the amount of taxes asserted due.

E. Petitioners' other argument, as noted in paragraph "27", that there is no use tax due on out-of-state purchases is rejected. First, petitioners have not established that any of Alpha Window System's material purchases were made out-of-state. Furthermore, there is no exemption from use tax for out-of-state material purchases incorporated into real property located in the state (Tax Law § 1118[2]). Petitioners incorrectly cite to Finch, Pruyn & Co., Inc. v. Tully, 69 AD2d 192, 419 NYS2d 232, which involved an analysis of the exemption from use tax under Tax Law § 1118(4) for tangible personal property purchased for use as a component part of a product produced for sale, which is not at issue herein.

F. Finally, it is concluded that petitioners have failed to prove sufficient grounds for the abatement of penalty. Mere reliance on the advice of a professional is an insufficient basis (see, Matter of Rainbow Waterproofing Corporation, supra). In addition, the lack of cooperation in the course of the audit further justifies the imposition of penalty (see, Matter of Malson, Tax Appeals Tribunal, February 22, 1991 [wherein the Tribunal affirmed the administrative law judge who had determined that the taxpayer's lack of cooperation and inadequate recordkeeping justified the imposition of penalty]).

G. The petitions of Alpha Window Systems, Ltd., Gary Lewis, Officer, James Baker, Officer and Peter Poulikidis, Officer are denied, and the notices of determination dated October 18, 1993, as modified by the auditor with total tax due reduced to $319,693.94, as noted in Finding of Fact "18", plus penalty and interest, are sustained.

DATED: Troy, New York
August 15, 1996

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE