STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioner, Stephen Gallagher, Inc., 163 East 92nd Street, Apartment # 17, New York, New York 10128, 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 December 1, 1983 through August 31, 1995.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on August 11, 1998 at 10:15 A.M., with all briefs submitted by December 28, 1998, which date began the six-month period for the issuance of this determination. Petitioner appeared by James C. Sherwood, Esq. The Division of Taxation appeared by Terence M. Boyle, Esq. (Brian J. McCann, Esq., of counsel).

ISSUES

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

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

III. Whether penalty assessed against petitioner for failure to obtain a certificate of authority to collect tax should be sustained.

FINDINGS OF FACT

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

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

3. Petitioner, Stephen Gallagher, Inc., was incorporated and began doing business in January 1984. Petitioner's president and sole shareholder was Stephen Gallagher. Petitioner's Federal and State corporation tax returns filed during the period at issue list petitioner's principal business activity or its principal product or service in various years as "catering" (1984 New York franchise tax return), "consultant" (1985 New York franchise tax return), "special events" (1986 New York franchise tax return), "catering" (1987 New York franchise tax return), "catering" and "special events" (1987 Federal income tax return), "special events coordination" (1989 New York S Corporation Information Return), "business catering and promotion" and "special event coordination" (1989 Federal S corporation income tax return), "service - special

events" (1989 New York application for extension for filing return), and "special event coordination" (1990 New York application for extension for filing return).

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

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

6. From the time of its initial contact with petitioner until the issuance of the statutory notices the Division communicated with petitioner several times. In response to the request of petitioner's representative the Division provided petitioner with copies of petitioner's State and

Federal corporation tax returns in the Division's possession for the period at issue. Petitioner provided the Division with copies of nine invoices in connection with work performed in November 1992 through February 1993. Except for certain contracts (***see***, Finding of Fact "10"), petitioner produced no other records either during the audit or at hearing.

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

8. Specifically, the Division determined tax due for the period December 1, 1983 through November 30, 1984 by taking total receipts as reported on petitioner's 1984 New York franchise tax return, dividing that total by four and deeming the resulting quotient to be taxable sales for each of the four quarters which comprised that period. Tax due for each of the quarters was calculated by applying the prevailing rate to taxable sales as determined on audit. The Division performed similar calculations with respect to the years 1985, 1986, 1987, and 1989. For 1988, the Division used audited taxable sales as determined for 1987 because it had no corporate income or franchise tax returns for this year. Similarly, for 1990 and 1991, the Division used audited taxable sales as determined for 1989 because it had no income or franchise tax returns for those years. For the period December 1, 1991 through November 30, 1992, the Division used an invoice for work performed in November 1992 which was provided by petitioner. The invoice totaled $31,415.47. The Division determined that this represented petitioner's total sales for that month and multiplied that amount by three to arrive at a quarterly total sales figure for the quarter ended November 30, 1992. The Division then applied this audited quarterly figure to the quarters ended February 28, 1992, May 31, 1992 and August 31, 1992 and applied the prevailing rate to reach tax due for these quarters. For the period December 1, 1992 through August 31,

1995 the Division used invoices supplied by petitioner for the months of December 1992, January 1993 and February 1993. The Division determined these invoices constituted petitioner's total receipts (and thus total taxable sales) for this quarter. The Division did not have any franchise or income tax returns for petitioner for 1993, 1994 or 1995. Accordingly, the Division applied the audited taxable sales figure and tax due for the quarter ended February 28, 1993 to each of the sales tax quarters in the remaining portion of the audit period.

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

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

11. Copies of the written agreements in the record cover the period December 1, 1986 through June 30, 1994. The agreements state that petitioner shall provide Stephen Gallagher's personal services for the management, supervision and daily operational control of the Director's Suite. The agreements direct petitioner to provide all personnel and services necessary to operate the Director's Suite on a daily basis. The contracts state that such services shall include the selection of all food and beverages upon prior review and approval of MSG, the purchasing of all food and beverages, the purchasing of all relevant supplies, and all staffing. The contracts also provide that all material decisions regarding the management and operation of the Director's Suite shall be determined by MSG and implemented by petitioner, subject to prior consultation between Gallagher, on petitioner's behalf, and senior management of MSG. The contracts

provide that such material decisions include the schedule for the Director's Suite, guest list, and general nature of the food and beverages available. The contracts also provide MSG with the right of approval of all persons hired by petitioner to work in the Director's Suite.

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

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

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

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

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

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

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

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

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

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

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

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

24. Petitioner's 1985, 1987 and 1989 Federal corporation income tax returns were introduced into the record. Petitioner's cost of operations as reported on its 1985 return was $179,608.00. This amount included waiter fees ($81,418.00), decorations and props ($87,099.00) and kitchen prep ($8,187.00). Petitioner's cost of operations as reported on its 1987 return was $317,688.00. This included decorations and props ($100,006.00), food and kitchen preparation ($90,449.00), outside labor ($68,279.00) and rent and storage ($58,954.00). Petitioner's cost of operations as reported on its 1989 return was $776,399.00. This amount included decorations and props ($228,493.00), freelance labor ($132,466.00), food and liquor ($249,153.00) and space and equipment rental ($158,568.00).

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

26. Of the nine invoices provided by petitioner during the audit, three were invoices to MSG in respect of petitioner's operation of the Director's Suite for New York Knick and Ranger games. Petitioner's invoices for such events billed MSG its costs for labor, food, supplies and

miscellaneous expenses. Petitioner did not charge or collect sales tax from MSG for these events. Petitioner submitted invoices to MSG, together with appropriate accounting "back up" documentation, for its expenses in connection with its operation of the Director's Suite for Knick and Ranger games on a monthly basis. Petitioner did not request any such invoices or documentation from MSG either during the audit or for the hearing in this matter.

27. The non-Director's Suite invoices submitted by petitioner during the audit reveal that petitioner did not bill MSG sales tax for a 1992 Christmas and holiday dinner party for which petitioner charged MSG $35.00 per person. Petitioner also did not bill St. John's University sales tax for "catering services rendered" on invoices dated February 11, 1993 and February 19, 1993. Petitioner did bill sales tax for "catering services rendered" at Madison Square Garden on invoices dated January 28, 1993 and February 24, 1993. Petitioner billed MSG sales tax for petitioner's purchase of holiday decorations on an invoice dated January 25, 1993.

28. Petitioner's accountant from the time it began doing business until at least September 1990 was Bruce Parker. As of March 1991 petitioner's accountant was Michael Dyreck. Petitioner fired Mr. Dyreck in 1993 when it first became aware of certain outstanding tax liabilities. Petitioner then hired an accountant who advised petitioner upon review that many of its records were missing. Petitioner subsequently brought suit against Mr. Dyreck to recover records in his possession (***see***, Finding of Fact "5"). Petitioner did not identify any specific records Mr. Dyreck may have had in his possession. Petitioner's president testified that one of petitioner's employees or MSG personnel also may have taken records.

CONCLUSIONS OF LAW

A. Tax Law § 1105(d) imposes sales tax on the receipts, including any cover, minimum, entertainment or other charge, from sales of food or drink of any nature sold by caterers. In

addition, regulations promulgated by the Division under this section provide that "[a]ll charges by caterers selling food or drink who provide serving or assistance in serving, cooking, heating or other services after delivery are taxable" (20 NYCRR 527.8[f][1][i]).

B. As a caterer,[1] petitioner was responsible for collecting sales tax on its retail sales (***see***, Tax Law § 1105[d][i]; § 1132[a]). Petitioner was also obligated to keep records of every sale and the tax due thereon, including "a true copy of each sales slip, invoice, receipt, statement or memorandum" (Tax Law § 1135[a]) upon which the sales "tax shall be stated, charged and shown separately on the first of such documents given to (the purchaser)" (Tax Law § 1132[a]). Failure to maintain and make available such records, or the maintenance of inadequate records, authorizes the Division of Taxation to estimate tax liability on the basis of external indices (Tax Law § 1138[a][1]). Here, petitioner failed to maintain or make available upon the Division's request virtually any source documentation of its sales (***see***, Finding of Fact "6"). The Division was therefore authorized under Tax Law § 1138(a)(1) to estimate petitioner's sales tax liability.

C. Where the Division seeks to estimate a taxpayer's sales tax liability on the basis of an indirect audit method, the methodology selected must be reasonably calculated to reflect the taxes due (***Matter of Ristorante Puglia, Ltd. v. Chu***, 102 AD2d 348, 478 NYS2d 91, 93; ***Matter of W. T. Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, 157, ***cert denied*** 355 US 869), but exactness in the outcome of the audit method is not required (***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, 177, ***affd*** 44 NY2d 684, 405 NYS2d 454; ***Matter of Lefkowitz***, Tax Appeals Tribunal, May 3, 1990). Whether the audit method used was reasonably calculated to reflect the taxes due can only be determined based on information made available to

[1]There is no dispute in this matter that petitioner was a caterer (***see***, Finding of Fact "9" and "21"). The dispute is over the extent of petitioner's catering activities (***see***, Conclusions of Law "F" and "G").

the auditor before the assessment is issued (***Matter of Queens Discount Appliances***, Tax Appeals Tribunal, December 30, 1993; ***Matter of House of Audio of Lynbrook***, Tax Appeals Tribunal, January 2, 1992). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451, 452).

D. In this case, the Division estimated tax due on the basis of gross receipts as reported on petitioner's Federal income and State franchise tax returns filed by petitioner for certain portions of the audit period and on the invoices submitted by petitioner for certain other portions of the audit period. For periods where neither returns nor invoices were available, the Division estimated tax using returns or invoices from an earlier or later period. The Division presumed that all of petitioner's gross receipts were subject to sales tax. Under the circumstances, this method of audit was reasonable. Specifically, during the audit, except for nine invoices, petitioner produced no documentation of its sales or business activities. Additionally, petitioner was no longer in business at the time of the audit. These two facts would seem to have foreclosed the use of many other audit methods, such as a test period audit method. Furthermore, information that was available to the Division during the audit also supports the method used. Specifically, petitioner's business is described as "catering" on certain of the tax returns in evidence. Also, petitioner charged sales tax on three of the nine invoices submitted during the audit and claimed significant expenses for food and kitchen preparation on its tax returns (***see***, Finding of Fact "24"). Moreover, the use of gross receipts as reported on Federal income tax returns to estimate taxable sales has been found to be reasonable in similar situations (***see***, ***e.g.***, ***Matter of Scotto***, Tax Appeals Tribunal, January 16, 1992; ***Matter of Sidel***, Tax Appeals

Tribunal, July 3, 1991). Accordingly, while the audit method employed herein may not be "immune from attack" (***Meskouris Bros. v. Chu***, ***supra***), considering the broad latitude historically given the Division in its choice of audit method (***see***, ***Matter of Grecian Square v. New York State Tax Commn.***, 119 AD2d 948, 501 NYS2d 219, 221), it must be concluded that the method selected was reasonably calculated to reflect tax due (***W.T. Grant Co. v. Joseph, supra***).

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

F. Petitioner claimed that it was an agent of MSG, and that, therefore, it did not sell anything to MSG, but rather bought goods and services on MSG's behalf incidental to its obligations under the contracts. Petitioner thus asserts that payments made to it by MSG were not subject to tax.

This contention is rejected. In ***Chemical Bank v. Tully*** (94 AD2d 1, 464 NYS2d 228), a bank contracted with food service management companies to operate the bank's employee cafeterias and dining rooms at various locations. The contract between the bank and the food

service management companies guaranteed the companies a set percentage of profit, a management fee and reimbursement for operating costs not covered by receipts from sales of food and drink to the employees. Under the facts as found by the former State Tax Commission, the court concluded that the food service companies were agents of the bank. The issue presented was thus whether the payments made by the bank to its agents, i.e., the food service companies, pursuant to the contract were taxable under Tax Law § 1105(d). Notwithstanding the agency relationship between the bank and the food service management companies, the court found that the transactions between the bank and its agents were taxable pursuant to Tax Law § 1105(d) (***id***., 464 NYS2d at 230). The payments made by MSG to petitioner for reimbursement and petitioner's fee are analogous to the payments made by Chemical Bank to its food service management companies. Moreover, as was the case in ***Chemical Bank***, petitioner asserts that it was an agent of MSG. Agency status, however, is irrelevant. Even assuming that petitioner was an agent of MSG, under ***Chemical Bank v. Tully***, the transactions between it and MSG would be subject to tax pursuant to Tax Law § 1105(d) nonetheless.[2]

In its reply brief, petitioner contended that its relationship with MSG was closer than that between Chemical Bank and its restaurant operators, and that petitioner was more than an agent and was actually a *de facto* subsidiary of MSG. This contention is likewise rejected. There is no evidence in the record even suggesting that petitioner was a *de facto* subsidiary of MSG. However, even if one were to consider petitioner a subsidiary of MSG, it is well established that transfers between related entities are subject to sales tax (***see***, ***Sunny Vending Co. v. State Tax Commn.***, 101 AD2d 666, 475 NYS2d 896).

[2]Since the issue of agency has no bearing on the outcome of this case, it shall not be addressed herein.

Petitioner also attempts to distinguish the instant matter from ***Chemical Bank v. Tully*** because in the instant matter there was no sale of food to employees or anyone else. This is a distinction without a difference. In ***Chemical Bank***, the bank subsidized a portion of the cost of the food for its employees. Here, MSG subsidized the entire cost for its guests. In both cases the amounts paid under the food service contracts were taxable pursuant to Tax Law § 1105(d). Whether the individuals who consumed the food actually paid for it is irrelevant (***see***, ***Stouffer Management Food Service v. Tully***, ***supra***).

Petitioner also contended that it could not have provided catering services because, for most of the audit period, petitioner purchased food that had already been cooked and prepared. This contention is without merit. As the regulations make clear, "*[a]ll* charges by caterers selling food or drink who provide serving or assistance in serving, cooking, heating or other services after delivery are taxable" (20 NYCRR 527.8[f][1][i]; emphasis added). The taxability of charges by a caterer does not depend upon whether the caterer actually cooks the food that it sells or whether the caterer purchases prepared food from a third party. If the caterer provides serving or assistance in serving after delivery of the food, then all charges by the caterer are taxable. Accordingly, while petitioner may not have cooked and prepared the food it sold to petitioner, it did provide assistance in serving after the food was delivered to the Director's Suite. All charges by petitioner to MSG were thus taxable.

G. In its brief, petitioner proposed its own computation of its sales tax liability during the audit period. This estimate was based on two contentions: First, that charges by petitioner to MSG under the contracts were not subject to tax, and second, that 50 percent of petitioner's non-MSG business was catering, except for 1984 when less than 50 percent of the business was catering. The first premise underlying petitioner's estimate has been refuted. The second

premise is based on the testimony of petitioner's president. Such testimony was unsupported by any corroborating records or other documentation and is therefore rejected. Accordingly, petitioner's proposed computation is unsupported by either the factual record or the Tax Law. Such "an alternative estimate does not establish that the Division's audit methodology was wrong and is clearly insufficient to establish by clear and convincing evidence that the amount assessed was erroneous" (***Matter of Rosemellia***, Tax Appeals Tribunal, March 12, 1992).

H. Petitioner has established that it was no longer under contract to MSG after September 26, 1993 and that its involvement with MSG effectively ended on August 15, 1993 when its president was injured in an auto accident (***see***, Finding of Fact "23"). Accordingly, the assessment herein is cancelled for the period September 1, 1993 through August 31, 1995.

I. In addition to the taxes assessed, petitioner was also assessed penalty under Tax Law § 1145(a)(1)(i) which states, in pertinent part, as follows:

> Any person failing to file a return or to pay or pay over any tax to the tax commission within the time required by or pursuant to this article (determined with regard to any extension of time for filing or paying) shall be subject to a penalty of ten percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding thirty percent in the aggregate.

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

J. Petitioner asserts that its failure was reasonable because its president lacked knowledge and sophistication in accounting and tax matters and therefore relied on the advice of its accountants. Petitioner also contends that the failure of its former accountant to return records in

his possession was effectively the same as if the records had been destroyed. Petitioner asserted that this "destruction" constituted reasonable cause under 20 NYCRR 536.5(c)(2) and (3).

Petitioner's claims are insufficient to establish reasonable cause. Reliance on the advice of a tax professional may constitute reasonable cause where the taxpayer can show that it relied in good faith on such advice, and that it was reasonable for the taxpayer to rely on such advice (***see***, ***A&V Crown, Inc.***, Tax Appeals Tribunal, May 24, 1990). In order to show that the advice was reasonable, the taxpayer must show that the advice came from competent tax counsel and was based on full knowledge of the relevant facts (***id.,*** citing ***Plante v. Commr.***, 49 TCM 963, 966). Petitioner has failed to make any such showing herein. First, any claim that petitioner relied in good faith on advice that it was not obligated to collect or remit sales tax is contradicted by evidence in the record that petitioner did collect sales tax with respect to some jobs (***see***, Finding of Fact "27"). Indeed, this circumstance indicates a lack of good faith, which negates any finding of reasonable cause and the absence of willful neglect (***see***, 20 NYCRR 536.5[d][1]). Petitioner has also failed to show that the advice was reasonable. The record contains only the vague statement of petitioner's president that its accountants advised that petitioner "was exempt from paying sales tax because of the way it was formed." The meaning of this statement and the intent of any individual proffering it as tax advice is uncertain at best. The record contains no written evidence of such advice and no testimony from either of the accountants who purportedly offered it. Since the reliance on tax advice must be reasonable in order to be a basis for abatement of penalty, it is necessary to examine the specific advice given. The lack of information in the record on this point precludes any such examination. Furthermore, the lack of proof regarding the advice clearly constitutes a failure by petitioner to show that the advice was based on full knowledge of the relevant facts. Petitioner has also failed to show that the

individuals who gave the advice were competent tax professionals. Other than their apparent status as certified public accountants, there is no evidence in the record as to the experience, expertise or competence of these individuals (***see***, ***Plante v. Commr.***, ***supra***). Additionally, as to petitioner's claim that its inability to obtain records in the possession of its former accountant constitutes reasonable cause within the meaning of 20 NYCRR 536.5(c)(2) and (3), these regulations refer to the destruction of records or the inability to obtain information which precludes timely compliance. Here, the inability of petitioner to obtain information did not preclude petitioner's timely compliance with the sales tax law, for difficulties with the accountant did not arise until after sales tax returns and taxes were due. These regulations are thus unavailing to petitioner. Additionally, petitioner has not identified any specific records in the accountant's possession. Further, petitioner's president testified that one of petitioner's employees or MSG personnel also may have taken records. Petitioner has thus failed to show that its failure to file sales and use tax returns and to collect and pay over tax was due to reasonable cause and not due to willful neglect.

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

> Any person required to obtain a certificate of authority under section eleven hundred thirty-four who, without possessing a valid certificate of authority, (A) sells tangible personal property or services subject to tax, receives amusement charges or operates a hotel, (B) purchases or sells tangible personal property for resale, or (C) sells automotive fuel, shall, in addition to any other penalty imposed by this chapter, be subject to a penalty in an amount not exceeding five hundred dollars for the first day on which such sales or purchases are made plus an amount not exceeding two hundred dollars for each subsequent day on which such sales or purchases are made, not to exceed ten thousand dollars in the aggregate.

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

L. Petitioner contended that the penalty assessed for failure to obtain a certificate of authority should be cancelled because the Notice of Determination which assessed this penalty referred to a tax period ended date of September 30, 1995. Since petitioner was no longer in business as of that date, petitioner asserts that this penalty must be cancelled. Petitioner further asserts that it was harmed by this defect in the Notice of Determination because it based its defense solely on the fact that it was not in business and sold nothing in 1995. The Division contended that it was clear that this notice was imposed for the entire audit period because the other notice issued to petitioner was imposed for the entire audit period.

A Notice of Determination is fatally defective and therefore void in its entirety when it contains misstatements or errors that mislead or prejudice a taxpayer (***see***, ***Pepsico, Inc. v. Bouchard***, 102 AD2d 1000, 477 NYS2d 892, ***Matter of Tops, Inc.***, Tax Appeals Tribunal, November 22, 1989). Here, the notice assessing penalty for failure to obtain a certificate of authority indicated that it was for the sales tax period ending September 30, 1995. Petitioner has established that it did not sell anything during this period and therefore was not obligated to obtain a certificate of authority during this period. In its answer the Division reserved the right to show that petitioner was liable for penalty for periods other than the quarter ending September 30, 1995. The Division did not assert this claimed right, however, at any time during the course of the hearing. Moreover, there is no evidence in the record indicating that petitioner was given notice by the Division that this Notice of Determination was intended to cover the entire audit period. Division's failure to give petitioner such notice was clearly misleading and

prejudicial to petitioner. Accordingly, the Notice of Determination assessing penalty for failure to obtain a certificate of authority (Assessment ID L-011398700-7) is cancelled.

M. The petition of Stephen Gallagher, Inc. with respect to the Notice of Determination dated November 24, 1995 and bearing assessment identification number L-011398800-8 is granted to the extent indicated in Conclusion of Law "H"; said petition is in all other respects denied. As modified, said Notice of Determination is sustained.

N. The petition of Stephen Gallagher, Inc. with respect to the Notice of Determination dated November 24, 1995 and bearing assessment identification number L-011398700-7 is granted in accordance with Conclusion of Law "L". Said Notice of Determination is hereby cancelled.

DATED: Troy, New York
June 24, 1999

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE