

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
VIGLIAROLO BROS., INC. :
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, 1978 :
through May 31, 1981. :

In the Matter of the Petition :
of :
FRANK J. VIGLIAROLO :
OFFICER OF VIGLIAROLO BROS., INC. :
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, 1978 :
through May 31, 1981. :

DECISION

In the Matter of the Petition :
of :
JOSEPH VIGLIAROLO :
OFFICER OF VIGLIAROLO BROS., INC. :
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, 1978 :
through May 31, 1981. :

Petitioner Vigliarolo Bros., Inc., 820 Elmont Road, Elmont, New York
11003, 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,
1978 through May 31, 1981 (File No. 42829).

Petitioner Frank J. Vigliarolo, officer of Vigliarolo Bros., Inc., 820 Elmont Road, Elmont, New York 11003, 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, 1978 through May 31, 1981 (File No. 42831).

Petitioner Joseph Vigliarolo, officer of Vigliarolo Bros., Inc., 6 Treadwell Drive, Old Westbury, New York 11568, 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, 1978 through May 31, 1981 (File No. 42830).

A consolidated formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 7, 1984 at 9:30 A.M., with additional documents and briefs to be submitted by April 6, 1984. Petitioners appeared by Anchin, Block & Anchin (Herbert Zimmerman, CPA). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether reasonable cause existed for the failure of Vigliarolo Bros., Inc. to timely pay the proper amount of taxes due under Articles 28 and 29 of the Tax Law.

FINDINGS OF FACT

1. On May 12, 1982, subsequent to the conduct of a field audit, the Audit Division issued to petitioner Vigliarolo Bros., Inc. a Notice and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1978 through February 29, 1980 and reflecting overpayment for the period March 1, 1980 through May 31, 1981, scheduled as follows:

<u>PERIOD ENDED</u>	<u>TAX DUE</u>	<u>PENALTY</u>	<u>INTEREST</u>	
11/30/78	\$ 28,674.14	\$ 7,168.54	\$12,070.95	
02/28/79	1,185.91	296.48	464.14	
05/31/79	18,572.70	4,643.18	6,707.16	
08/31/79	63,200.04	15,800.01	20,912.26	
11/30/79	18,915.62	4,728.91	5,693.03	
02/29/80	3,679.67	919.92	998.59	
05/31/80	(60.57)		(14.61)	
08/31/80	(1,627.62)		(343.25)	
11/30/80	(347.34)		(62.86)	
02/28/81	(4,453.47)		(674.17)	
05/31/81	(214.38)		(25.97)	
	<u>\$127,524.70</u>	<u>\$33,557.04</u>	<u>\$45,725.27</u>	\$206,807.01

On the same date, the Audit Division issued to petitioner Frank J. Vigliarolo, as an officer of Vigliarolo Bros., Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing or reflecting overpayment of sales tax for the quarterly period ended November 30, 1978 through the quarterly period ended May 31, 1981, scheduled as follows:

<u>PERIOD ENDED</u>	<u>TAX DUE</u>	<u>PENALTY</u>	<u>INTEREST</u>	
11/30/78	\$ 28,815.12	\$ 7,203.78	\$12,130.30	
02/28/79	(1,779.26)		(696.37)	
05/31/79	17,209.26	4,302.32	6,214.78	
08/31/79	62,102.07	15,525.52	20,548.95	
11/30/79	16,898.98	4,224.75	5,086.09	
02/29/80	260.86	65.22	70.79	
05/31/80	(1,595.58)		(384.74)	
08/31/80	(3,211.10)		(677.19)	
11/30/80	(404.19)		(73.15)	
02/28/81	(4,063.75)		(615.17)	
05/31/81	(42.79)		(5.18)	
	<u>\$114,189.62</u>	<u>\$31,321.59</u>	<u>\$41,599.11</u>	\$187,110.32

On the same date, the Audit Division issued to petitioner Joseph Vigliarolo, as an officer of Vigliarolo Bros., Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing or reflecting overpayment of sales tax for the quarterly period ended November 30, 1978 through the quarterly period ended May 31, 1981, scheduled as follows:

<u>PERIOD ENDED</u>	<u>TAX DUE</u>	<u>PENALTY</u>	<u>INTEREST</u>	
11/30/78	\$ 28,815.12	\$ 7,203.78	\$12,130.30	
02/28/79	(1,779.26)		(696.37)	
05/31/79	17,209.26	4,302.32	6,214.78	
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02/28/81	(4,063.75)		(615.17)	
05/31/81	(42.79)		(5.18)	
	<u>\$114,189.62</u>	<u>\$31,321.59</u>	<u>\$41,599.11</u>	\$187,110.32

On or about September 21, 1981, Joseph Vigliarolo, as president of the corporation, had executed a consent extending the period of limitations for assessment of sales and use taxes for the period September 1, 1978 through May 31, 1981 to December 20, 1982.

2. On March 15, 1982, Joseph Vigliarolo, as corporate president, executed a Consent to Fixing of Tax Not Previously Determined and Assessed, wherein he agreed to the assessment against Vigliarolo Bros., Inc. of sales and use taxes in the amount of \$127,524.70 for the period September 1, 1978 through May 31, 1981. Petitioners contest the imposition of penalty and interest in excess of the minimum statutory rate on two bases: reliance upon the advice of the corporation's certified public accountant, and financial hardship. Petitioner Frank J. Vigliarolo and petitioner Joseph Vigliarolo do not contest, however, their personal liability as officers of Vigliarolo Bros., Inc. for taxes determined to be due from the corporation.

3. As above stated, the assessments against the corporation and its officers resulted from an examination conducted of the corporation's books and records. The largest portion of each assessment is attributable to a discrepancy between the amount shown in the corporation's sales tax accrual account and the amount of taxes remitted to the Audit Division. The account revealed sales tax

accrued in the amount of \$764,637.36, whereas only \$596,720.50 in tax was paid. During the course of the audit, petitioners substantiated reductions to the account totalling \$53,727.24. The amount of sales tax due by reason of accruals to the account was thus \$114,189.62.

4. During 1975 and 1976, the Audit Division performed an examination of the books and records of Vigliarolo Bros., Inc., which resulted in an assessment of sales and use taxes for the period December 1, 1971 through November 30, 1974 in the amount of \$130,852.69. Of the total assessment, \$98,824.54 was attributable to sales tax accrued for said period but not remitted. On April 5, 1976, petitioner Frank J. Vigliarolo executed a Consent to Fixing of Tax Not Previously Determined and Assessed, agreeing to the assessment of sales and use taxes against the corporation in the sum of \$130,852.69.

During 1977, the Audit Division performed an examination of the corporation's books and records, which resulted in an assessment of sales and use taxes for the period December 1, 1974 through February 28, 1977 in the amount of \$69,959.18. The discrepancy between sales tax accrued for the period and sales tax paid amounted to \$59,910.30, for which sum the corporation was assessed. On October 7, 1977, petitioner Joseph Vigliarolo executed a Consent to Fixing of Tax Not Previously Determined and Assessed, wherein he agreed that sales and use taxes in the amount of \$69,959.18 were due and payable by the corporation.

5. Vigliarolo Bros., Inc. is engaged in the manufacture and sale of ready-mix cement. Its records are maintained on a fiscal year cycle ending January 31, in accordance with the accrual method of accounting.

6. Late in 1979, the corporation engaged the firm of Anchin, Block & Anchin ("Anchin, Block"), petitioners' representative in this proceeding, to

perform accounting services. Prior to that time, the corporation's books were kept and its various tax returns were filed by its bookkeeper and certified public accountant (whose names are unnecessary for purposes of this decision). Sometime during 1979, the corporation sought a loan and in connection therewith, the bank requested a certified financial statement. Mr. Zimmerman, who is associated with Anchin, Block, commenced an examination of the corporate records. In Mr. Zimmerman's words:

"[T]he books were a horror...It took us a very substantial length of time to decipher what was going on. The [prior] accountant had a habit of summarizing an extended period of time and then making only one posting to the general ledger of the company. There was no trail as to the source of his posting...It meant practically reconstruction of the books of the company."

Shortly thereafter, the corporation discharged the bookkeeper and accountant and retained Anchin, Block.

7. Frank J. and Joseph Vigliarolo were preoccupied with the day-to-day operations of the business and relied upon the bookkeeper and accountant to properly perform their duties. Their performance was satisfactory to petitioners during the early stages of the business, when it did not manufacture cement but consisted only in the operation of a masonry materials yard. Apparently, the bookkeeper and accountant were unable to manage their responsibilities as the business expanded, although Frank J. and Joseph Vigliarolo were unaware of this until Mr. Zimmerman studied the corporate records. It is petitioners' position that they took steps to remedy the situation as soon as they became cognizant that the bookkeeper and accountant were not fulfilling their duties; and that since Anchin, Block was retained, the corporation has timely filed its returns and paid its taxes.

8. The Audit Division offered in evidence various sales and use tax returns late filed or filed without remittance by Vigliarolo Bros., Inc. during 1981 and 1982. A summary of the returns is set forth below.

<u>PERIOD</u>	<u>TAXES SHOWN ON RETURN</u>	<u>POSTMARK DATE OR DATE RECEIVED</u>
7/1/81-7/31/81	\$23,159.92 ¹	3/15/82
6/1/81-8/31/81	18,030.40 ¹	12/21/81
9/1/81-9/30/81	23,409.95 ¹	12/9/81
9/1/81-11/30/81	76,192.49 ¹	12/18/81
12/1/81-2/28/82	32,174.09 ¹	3/19/82
3/1/82-5/31/82	62,443.10 ¹	unknown
6/1/82-6/30/82	31,470.95 ¹	7/19/82
7/1/82-7/31/82	20,901.79 ¹	8/18/82
6/1/82-8/31/82	66,800.71 ¹	9/20/82
9/1/82-9/30/82	30,424.88 ²	10/21/82

¹ No remittance was made.

² Taxes due \$32,993.98; no remittance made.

9. The overpayments in tax made by Vigliarolo Bros., Inc. during the quarterly periods ended May 31, 1980, August 31, 1980, November 30, 1980, February 28, 1981 and May 31, 1981 were due to payments of tax upon purchases of machinery and equipment exempt from sales and use taxes by virtue of Tax Law section 1115(a)(12) and to payments of tax upon purchases of diesel fuel exempt from sales and use taxes by virtue of Tax Law section 1115(c).

10. Petitioners request abatement of penalties and reduction of interest based upon financial hardship. During the period under consideration, Vigliarolo Bros., Inc. was adversely affected by the economic recession which was detrimental to the construction industry and to the residential home market in particular. The corporation thus experienced critical cash flow problems due to its inability to collect on accounts receivable owed by its customers.

CONCLUSIONS OF LAW

A. That Tax Law section 1145(a)(1)(i) imposes penalty and interest for failure to file a return or to pay tax within the time limitations prescribed by Articles 28 and 29 equal to:

"...five 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 twenty-five percent in the aggregate; plus interest at the rate of one percent of such tax or one-twelfth of the annual rate of interest set by the tax commission pursuant to section eleven hundred forty-two, whichever is greater, for each month of delay after such return was required to be filed or such tax became due."

Where this Commission determines that such failure or delay is due to reasonable cause and not due to willful neglect, it is authorized to cancel the penalty and that portion of interest in excess of the interest computed at the rate established pursuant to section 1142. Section 1145(a)(1)(ii).

B. That petitioner Vigliarolo Bros., Inc. has failed to demonstrate a cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay in paying sales and use taxes and which clearly indicates an absence of gross negligence or willful intent to disobey the tax statutes, so as to warrant the cancellation of penalty and interest in excess of the minimum statutory rate. 20 NYCRR 536.1(b). The corporation's continued reliance upon its bookkeeper and accountant, subsequent to the issuance of two assessments based upon amounts shown in the sales tax accrual account, was unfounded. (Cf. Haywood Lumber & Mining Co. v. Commr., 178 F.2d 769 (2d Cir. 1949), which discusses reliance upon a tax adviser as excusing failure to file returns, so as to justify cancellation of the delinquency penalty imposed by the Internal Revenue Code.) Further, lack of funds with which to satisfy a tax liability does not per se constitute reasonable cause. (Cf. Leo Sanders, 21 T.C. 1012, affd., 225 F.2d 629 (10th Cir. 1955).) Finally,

the corporation's record of filing and payment after retaining a new accountant is far from unblemished.

C. That the petitions of Vigliarolo Bros., Inc., Frank J. Vigliarolo and Joseph Vigliarolo are denied.

DATED: Albany, New York

DEC 03 1984

STATE TAX COMMISSION

Rodriguez
PRESIDENT

Frank J. Vigliarolo
COMMISSIONER

Joseph Vigliarolo
COMMISSIONER