

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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

Petitioner Center Moriches Monument Co., Inc., 203 East Main Street, P.O. Box 603, Center Moriches, New York 11934, filed an exception to the determination of the Administrative Law Judge issued on November 12, 1992 with respect to its petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1977 through April 30, 1987. Petitioner appeared by Thomas J. Sinnickson, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation submitted a letter received December 18, 1992 which began the Tax Appeal Tribunal's six-month time period to issue this decision. Oral argument was not requested. The Tax Appeals Tribunal reviewed the entire record in this matter.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal.

ISSUES

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

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

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

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

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

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

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

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

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

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

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

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

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

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

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

At the conclusion of the audit, the auditor provided a copy of the audit workpapers to Joseph Giaquinto. Although portions of the audit were conducted at Mr. Giaquinto's office with

Lee Sinnickson in attendance, the Division did not have a power of attorney authorizing Mr. Giaquinto to appear on petitioner's behalf. The Division did not send copies of the audit report to either Mr. Lee Sinnickson or the corporation.

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

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

"Petitioner takes exception to the determination of sales tax, penalty and interest due.

"Petitioner disagrees with the amount of tax due as determined by an affidavit of petitioner's records as some purchasers may not be subject to tax.

"Petitioner did not willfully or intentionally disregard filing and paying the use taxes due but assumed that if sales taxes were to be [sic] that they would be collected by the vendor. Petitioner has paid the additional amounts assessed but respectfully requests an abatement of the penalties charged as he was unaware that use taxes would be due on the purchase of materials used for monument installations."

In March 1988, a conciliation conference was conducted in Hauppauge, New York. During the conference, the conciliation conferee stated that if petitioner had not paid the assessment, he would have rendered a conciliation order waiving the interest and penalties. After the conference, the conciliation conferee issued an order, dated April 15, 1988, which denied the request and sustained the assessments.

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

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

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

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

In a letter dated May 9, 1989, the Division's attorney provided petitioner's representative with a copy of the statute regarding penalties and requests for a refund. In response, petitioner's representative noted, in a letter dated June 21, 1989, that he would be making an application for a refund and requested that petitioner be granted a stay of the petition to the Division of Tax Appeals pending the application for a refund.

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

On December 13, 1989, the Division received an Application for Credit or Refund of State and Local Sales or Use Tax. The application sought a refund for the period March 1, 1977

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

through April 30, 1987 of penalty of \$3,658.02 and interest of \$9,011.76. An affidavit from Lee Sinnickson was included with the application which stated that he is the president and founder of petitioner and that the corporation was organized in June 1977. Petitioner was an outgrowth of the family business, Sinnickson's Moriches Funeral Home, Inc., which was begun in 1940 by Lee Sinnickson's grandfather.

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

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

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

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

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

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

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

OPINION

In the determination below, the Administrative Law Judge, with reference to petitioner's argument that a default determination should be granted because of the failure of the Division to serve a timely answer, held that: 1) when tax has been paid pursuant to a notice of determination which is subsequently found to be erroneous, the tax is to be refunded to the taxpayer without the need for an application for a refund; and 2) since an application for a refund was unnecessary, both the time involved for making the application for a refund and the lack of response by the Division to the application have no bearing on this matter.

The Administrative Law Judge, in discussing petitioner's allegations that the delay by the Division in serving a timely answer resulted in actual prejudice to its position, held that: 1) petitioner's argument relating to prompt payment of the tax is without merit because it does not address the pertinent inquiry, i.e., whether petitioner was prejudiced by the delay; 2) petitioner's argument that it lost the right to have the penalties waived by the conciliation conferee is also without merit since the petition to the Division of Tax Appeals would not have been filed until after the conciliation conference; 3) petitioner has not demonstrated how the administrative delay hindered its defense efforts; and 4) petitioner's last claim of prejudice, that the hearing would have been conducted at the World Trade Center in New York City rather than in Troy, New York, is also unpersuasive as there is no evidence in the record that petitioner made any attempt to make use of the alternatives available under the Rules of Practice and Procedure rather than appear at a hearing in Troy.

The Administrative Law Judge also found meritless petitioner's argument that the assessments should be cancelled as it was impossible to challenge the audit because of the failure to provide the field audit report, audit log and workpapers to the taxpayer or an authorized representative. The Administrative Law Judge rejected this argument because the audit workpapers were sent to the accountant who participated in the audit. Further, petitioner's representative declined an opportunity to examine the documents prior to the hearing. With respect to petitioner's argument that the audit methodology was not reasonably calculated to reflect the taxes due, the Administrative Law Judge noted that the Division is not obligated to reconstruct petitioner's records in order to conduct an audit.

Finally, the Administrative Law Judge concluded that petitioner did not present an adequate basis for waiving penalty. However, the Administrative Law Judge did direct the Division to delete from its sales and use tax assessment: 1) tax on payments arising from a loan to Mr. Sinnickson's sister; and 2) tax on the return of the deposit to Mr. Sullivan. Further, the Division was directed to reduce the assessment by the amount of tax imposed on a \$400.00 receipt of February 19, 1982 from the sale and installation of a monument as well as the \$130.00 receipt of February 1, 1983 for setting a marker in a cemetery.

On exception, petitioner argues that pursuant to the Tax Appeals Tribunal Rules of Practice the motion to strike the answer and render a default determination should be granted. Petitioner argues that in considering an undue delay charge, an administrative body must weigh certain factors including: (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the casual connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation. Petitioner further argues that the determination of the tax is erroneous as there was no valid basis for the determination of the figures and, further, the "failure to provide the taxpayer or appropriate representative the audit workpapers, log and field report, post audit and prior the date of the trial hearing made it impossible for taxpayer to challenge same" (Petitioner's brief on exception, p. 8). Petitioner also argues that the audit methodology

was not reasonably calculated to reflect actual sales and use taxes due, petitioner's request for refund of penalty and interest should be granted, and all assessments should be dismissed.

The Division argues that: 1) petitioner owed use tax for tangible personal property purchased by it for use in petitioner's monument installations and such tax was properly determined by the Division; 2) petitioner is not entitled to any relief arising from the Division's delay in filing the answer because petitioner failed to show substantial prejudice occasioned by the delay; and 3) petitioner has not established reasonable cause or the absence of willful neglect in order to support the cancellation of penalties. The Division further requests the petitions be denied and the statutory notices be sustained.

We find no basis in the record before us for modifying the determination of the Administrative Law Judge in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Center Moriches Monument Co., Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Center Moriches Monument Co., Inc. is granted to the extent indicated in conclusions of law "K," "L" and "P" of the Administrative Law Judge's determination but is otherwise denied; and

4. The Division of Taxation shall modify the notices of determination and demand for payment of sales and use taxes due dated July 29, 1987, accordingly, but such notices are otherwise sustained.

DATED: Troy, New York
May 6, 1993

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner