STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WFC TOWER A COMPANY	:	DECISION DTA No. 810154
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, 1985 through May 31, 1989.	:	

Petitioner WFC Tower A Company, 237 Park Avenue, New York, New York 10017, filed an exception to the determination of the Administrative Law Judge issued on March 17, 1994. Petitioner appeared by Hutton & Solomon (Kenneth I. Moore, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (John O. Michaelson, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation submitted a letter stating it would not be filing a brief. This letter was received on July 26, 1994, which date began the six-month period for the issuance of this decision. Oral argument, requested by petitioner, was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioner has established by clear and convincing evidence that it is entitled to a reduction (i.e., a credit) in the sales and use tax asserted here based upon amounts asserted against, and paid by, Oppenheimer & Company, Inc., as the second party to the transaction with petitioner.

II. Whether petitioner has established that reasonable cause exists for abatement of penalty.

FINDINGS OF FACT

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

The parties entered into a Stipulation of Facts the relevant portions of which are included in the following Findings of Fact.

Petitioner, WFC Tower A Company (formerly known as Olympia & York Battery Park Company) (hereinafter, "petitioner" or "Landlord"), is a New York partnership, with offices at 237 Park Avenue, New York, New York 10017.

Petitioner is the ground lessee of the Battery Park City World Financial Center Building "A" ("the Building"). The ground lessor is the Battery Park City Authority, which leases the real property from its owner, the Battery Park City Development Corporation, a subsidiary of the New York State Urban Development Corporation. All three of these preceding entities are agencies and/or instrumentalities of the State of New York or one of its subdivisions. Petitioner's purpose in leasing the real property was to construct the Building on the authority's behalf and lease space therein to third parties.

On February 28, 1990, after an audit by the the Division of Taxation ("Division"), petitioner was issued a Notice of Determination and Demand for Payment of Sales and Uses Taxes Due in the amount of $126,100.54, plus penalty and interest, for the period June 1, 1985 to November 30, 1988 ("Notice # 1"). As a result of the same audit, on April 9, 1990, the Division issued to petitioner a second notice of determination asserting sales and use tax in the amount of $23,090.64, plus penalty and interest, for the period December 1, 1988 to May 31, 1989 ("Notice # 2").

Petitioner made a timely Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A conciliation conference was held, and as a result thereof, a Conciliation Order (CMS No. 105495) was issued on August 23, 1991 (the "order"). The order reduced the tax asserted by Notice # 1 to $96,769.69, plus penalty and

interest. The order reduced the tax asserted by Notice # 2 to $17,721.79, plus penalty and interest. On November 4, 1991, petitioner filed the instant petition for hearing with the Division of Tax Appeals.

On or about August 15, 1985, petitioner entered into two separate agreements with Oppenheimer Holdings, Inc. ("Holdings"), as tenant. The first agreement was a lease of office space in the Building ("Office Lease"), and the second was a Leasehold Improvements Agreement ("LIA").

The Office Lease provided that all fixtures, equipment, improvements and appurtenances attached to or built into the leased premises at the commencement of the lease or during the term of the lease shall be the property of the ground lessor, i.e., the Battery Park City Authority (Ex. 7, § 13.01). The Office Lease then carved out an exception stating, in pertinent part:

> "[A]ll machinery and equipment, business and trade fixtures, vaults, . . . communications equipment, office equipment and movable partitions, whether or not attached to or built into the Premises, which are installed in the Premises by or for the account of the tenant and can be removed without structural damage to the Building, and all furniture, furnishings and other articles of movable personal property located in the Premises (herein collectively called 'Tenant's Property') may be removed by Tenant at any time during the term of this lease" (Ex. 7, § 13.02, pp. 133-134; emphasis added).

The parties to this proceeding agree that, upon purchase by petitioner, the tenant's property, under the terms of the ground lease, did not become the property of the Authority, because the tenant property did not become part of the structure.

On the same date, August 15, 1985, petitioner entered into the LIA with Holdings, as tenant. The terms of the LIA are tied to the terms of the Office Lease, including the provisions recited above. The LIA provided, inter alia, that petitioner, as landlord, would advance over $31,000,000.00 to complete construction of the leased premises pursuant to the tenant's requirements and furnish and equip the tenant's offices with tangible personal property required by that agreement. The $31,000,000.00 advanced by petitioner under the LIA, covered both

capital improvement work and the installation of fixtures, equipment and other tangible personal property which were not incorporated into capital improvements (i.e., the tenant's property). Holdings later assigned its interest in the lease and LIA to Oppenheimer & Co., Inc. Hereinafter the term "tenant" is used interchangeably to refer to both Holdings and Oppenheimer & Co., Inc..

Amounts expended by petitioner for the tenant's property required to be furnished under the LIA were to be reimbursed by the tenant in monthly "Leasehold Improvement Payments" which were in addition to amounts otherwise payable as "rent" for the premises (Office Lease § 1.04). The tenant agreed to make annual Leasehold Improvement Payments to petitioner of $2,521,841.00 (id., § 1.04[c]). The record does not reflect how much of these annual Leasehold Improvement Payments related to capital improvement work and how much constituted monthly rental for the tenant's property, consisting of fixtures, equipment and other tangible personal property.

The parties agree that none of the tenant's property giving rise to the tax asserted in this case was incorporated into the Building as a capital improvement.

A work order notice sent from petitioner to the tenant, and in evidence as Exhibit "12", shows that petitioner did not include sales and use tax on its charges to the tenant for work performed under the LIA. Petitioner concedes that it did not report or pay sales and compensating use tax on its purchases of the tenant's property, nor did it charge sales and use tax on the rental payments charged to the tenant.

There is no evidence in the record that the tenant's property provided by the landlord pursuant to the LIA was essential to the construction of the project, nor does the record reflect how the tenant's property was financed. The record is also silent with respect to how any benefit would have accrued to the Authority by not charging sales and use tax to its tenant for the subject items.

Petitioner and tenant agreed, and the Division stipulated, that by August 2, 1986 the landlord had substantially completed all the work required to be performed for the tenant pursuant to the LIA.

After an initial dispute on the issue, petitioner and the tenant finally agreed that the commencement date of the Lease and the LIA was August 2, 1986, and the Expiration Date of the Term of the Lease is August 31, 2006 (Ex. 13).

Of the $114,491.48 in tax remaining in dispute after the BCMS conference, petitioner now concedes it owes $8,170.48 in tax. The balance of the assessment remaining in dispute consists of the following tenant property:

ITEMS	PRICE	TAX @ 8.25%
1. Blinds	$ 145,498.00	$ 12,004.00
2. Intercom Speakers	37,885.00	3,126.00
3. Kitchen	507,923.00	41,904.00
4. Partitions	73,250.00	6,043.00
5. Mail Conveyer	980.00	81.00
6. Trading Desks	481,723.00	39,742.00
7. Planter Liners	11,490.00	948.00
8. Projection Screens	7,510.00	620.00
9. Miscellaneous	22,477.00	1,854.00
TOTALS:	$1,288,736.00	$106,321.00

Sometime in 1987, Oppenheimer & Co., Inc., the lessee and office tenant, was audited for sales and use tax by the Division for the periods March 1, 1981 through February 28, 1987. There was no agreement in that audit to exclude any transactions with petitioner. The Proposed Audit Adjustment asserting sales and use tax of $175,004.16, plus penalty and interest, was agreed to and paid by Oppenheimer. No other information regarding the tenant's audit is in the record.

OPINION

In his determination, the Administrative Law Judge initially concluded that petitioner's purchase of the tenant property at issue herein did not qualify for exemption from tax pursuant to Tax Law § 1115(a)(15) since said property never became an integral component part of an exempt organization's building or property.

Next, the Administrative Law Judge found that petitioner's purchase of the tenant property was a nontaxable purchase for resale. However, the Administrative Law Judge concluded that petitioner was liable for the tax due because it had failed to collect the tax from the tenant upon the sale of the property to said tenant.

The Administrative Law Judge next determined that the assessments could not be reduced based on the Division's "overlapping audit policy" since petitioner and the tenant were not audited for the same periods. Furthermore, the Administrative Law Judge found that petitioner had failed to show by clear and convincing evidence that the tax asserted due on the tenant property had been paid over to the Division.

Finally, the Administrative Law Judge concluded that petitioner had failed to adduce any evidence to show reasonable cause and he, therefore, sustained the Division's imposition of penalty.

On exception, petitioner asserts that it has complied fully with the Division's "overlapping audit policy" and it is, therefore, released from any sales tax due on the tenant property since the sale of said property occurred during the period for which the tenant/purchaser was audited. Petitioner also argues that the penalty should be abated in that said penalty was imposed on the failure to pay use tax on purchases and since it was found that petitioner had actually purchased the tenant property for resale, on which no tax is due, there can be no penalty due.

Initially, we note that petitioner does not dispute that the tenant property is ineligible for exemption from tax pursuant to Tax Law § 1115(a)(15) and we, therefore, need not address this issue. Furthermore, neither party herein takes exception to the Administrative Law Judge's

determination which found that petitioner's purchase of the tenant property was a nontaxable purchase for resale and that the taxable event was petitioner's subsequent sale of the property to the tenant. It is undisputed that petitioner did not pay any sales tax upon its purchase of the tenant property nor did it collect and remit any sales tax from the tenant when the property was sold to said tenant. The sole substantive issue brought before us by the parties is whether petitioner is relieved from its liability for the tax due on the tenant property based on the Division's "overlapping audit policy."

The Division's "overlapping audit policy" is described in a memorandum dated November 4, 1988 from the Sales Tax Audit Administrator to all district office sales tax audit personnel. This memorandum states that for a vendor (petitioner) to obtain an audit adjustment based on an overlapping audit of the vendor and his customer, the vendor must establish the audit period of the purchaser (tenant/Holdings/Oppenheimer), that the purchaser agreed to the audit findings and that there was no agreement to exclude the particular transactions at issue from the audit of the customer. In the instant matter, the parties have stipulated that petitioner satisfied all three of the conditions set forth above (Stipulation, p. 5, ¶ 14). The Administrative Law Judge, relying on Matter of Allied Aviation Serv. Co. of N.Y. (Tax Appeals Tribunal, June 27, 1991), denied petitioner an overlapping audit adjustment because petitioner and the tenant were not audited "for the same audit period." Here, petitioner was audited for the period June 1, 1985 to May 31, 1989, while the tenant was audited for the period March 1, 1981 to February 28, 1987. The Administrative Law Judge concluded that:

> "[s]ince petitioner and the tenant were not audited for the same periods, the Division's policy governing overlapping audits, as construed in Matter of Allied Aviation Serv. Co. of N.Y. (supra), does not apply. That being the case, petitioner, to be entitled to the claimed credit, was required to show by some other means constituting clear and convincing evidence, that the tax here asserted had been paid to the State of New York. That showing has not been made."

The Administrative Law Judge has misconstrued our decision in Matter of Allied Aviation Serv. Co. of N.Y. (supra) as it pertains to an adjustment for overlapping audits and we reverse him on this issue. Examination of our decision in the Allied matter reveals that Allied (the vendor) was audited for the period December 1, 1975 through November 30, 1980, while Pan American (the purchaser) was audited for the periods December 1, 1973 through November 30, 1976 and September 1, 1977 through August 31, 1980. Accordingly, there existed two gaps in Allied's audit period when compared to Pan American's (a nine-month period from December 1, 1976 through August 31, 1977 and a three-month period from September 1, 1980 through November 30, 1980). Although Allied and Pan American were not audited for the same audit period, our decision in the Allied matter allowed petitioner "to have its tax liability reduced by $1,358,995.00, representing tax assessed on sales to Pan American during overlapping audit quarters" (Matter of Allied Aviation Serv. Co. of N.Y., supra, emphasis added). Accordingly, petitioner herein is entitled to an adjustment for the overlapping audit quarters of the tenant.

In its brief filed before the Administrative Law Judge, the Division also asserts that petitioner is not entitled to an adjustment for the overlapping audit of the tenant for the following reasons:

> "[h]ere the same transaction was not audited twice nor has the petitioner has [sic] provided any evidence that the same transaction was audited twice. Petitioner cannot provide this evidence simply because the audit of Oppenheimer did not cover the period when the actual transfer took place. The audit period for Oppenheimer ended on February 28, 1987 [footnote deleted] and the transfer of the property at issue occurred in May 1987. The burden of proof is clearly on the petitioner and the petitioner has not met that burden. Thus, the Division's policy of overlapping audits does not apply here" (Division's brief at hearing, p. 12)

There is no evidence in the record to support the Division's assertion, made for the first time in its hearing brief, that actual transfer of the tenant property occurred in May 1987.[1] To the contrary, petitioner and the Division stipulated that:

> "[p]ursuant to a letter dated December 17, 1990, a true copy of which is annexed hereto as Exhibit "13," the petitioner and its Tenant agreed that the terms of the Agreement, which provided, inter alia, for the furnishing of the items of tangible personal property here in issue, had been substantially complied with as of August 2, 1986" (Stipulation, p. 5, ¶ 13).

Based on the above cited stipulation and the record before us, we conclude that the tenant property at issue herein was transferred to said tenant as of August 2, 1986. No audit workpapers

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[1]In addition to asserting that the tenant property was transferred in May 1987, the Division, also in said hearing brief, changed the theory upon which it believes the tenant property to be taxable. The audit and assessments were based on the theory that petitioner's purchase of the tenant property was the taxable event. The Division's new theory for taxing the tenant property, as stated for the first time in its hearing brief, is as follows:

> "THE RENTAL PAYMENTS RECEIVED BY THE PETITIONER PURSUANT TO THE BUILDING LEASE ARE SUBJECT TO SALES TAX AS RECEIPTS FOR A SALE OR RENTAL OF TANGIBLE PERSONAL PROPERTY.
>
> "If tangible personal property is rented to a tenant, sales tax is due upon the collection of the rental payments from the tenant. The only question is how to measure the sales tax.
>
> "If the lease agreement does not clearly indicate what amount of the payments received are for the rental or sale of tangible personal property, it is presumed that all payments received are subject to sales tax (Empire State Building Company v New York State Department of Taxation and Finance, 150 Misc.2d 747, 570 N.Y.S.2d 419; Dynamic Telephone Answering Systems, TSB-H-86(115)S, May 28, 1986; SOO Broadcasting, State Tax Comm., May 23, 1985; Dynamic Telephone Answering Systems, Inc., State Tax Comm., May 28, 1986). Thus, the Division is entitled to the entire rental receipt. Nevertheless the Division feels that taxing the entire rental amount would be inappropriate.
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> "In this case [sic] better view would be to tax the fair market value of the personal property at the time it is transferred to Oppenheimer. This would provide a precise method for computing the amount of sales tax due, and the result would not be an unfair imposition of sales tax" (Division's brief at hearing, p. 10).

were submitted in evidence, the Division did not take exception to any of the Administrative Law Judge's findings of fact or conclusions of law and it did not file a brief in opposition to petitioner's exception which asserted, inter alia, that the tenant property was transferred as of August 2, 1986. Simply stated, there is no evidence in the record to support the proposition that the tenant property was transferred on a date other than August 2, 1986. Since the audit of the tenant included the August 2, 1986 transfer date, we find that petitioner is entitled to have its tax liability reduced by $106,321.00, representing tax assessed on sales to the tenant during the overlapping audit quarters.

Finally, we must address the issue of penalty as related to the $8,170.48 in tax due as conceded by petitioner. We agree with the Administrative Law Judge that petitioner has failed to adduce any evidence to establish that reasonable cause exists for the waiver of penalty. Accordingly, the penalty is sustained with respect to the $8,170.48 of tax now due.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of WFC Tower A Company is granted to the extent that it is entitled to a reduction in tax of $106,321.00 based on the overlapping audit of the tenant, but the exception is otherwise denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above, but is otherwise affirmed;

3. The petition of WFC Tower A Company is granted to the extent indicated in paragraph "1" above, but is otherwise denied; and

4. The notices of determination and demand for payment of sales and use taxes due dated February 28, 1990 and April 9, 1990, as adjusted by Conciliation Order #105495 and modified by paragraph "1" above, are sustained.

DATED: Troy, New York
January 26, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner