

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HYGRADE CASKET CORPORATION	:	DETERMINATION
for Revision of a Determination or for Refund	:	DTA NO. 809681
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1987	:	
through August 31, 1990.	:	

Petitioner, Hygrade Casket Corporation, c/o Service Corporation International, Attn: Steve Mack, 1504 Third Avenue, New York, New York 10028, 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 March 1, 1987 through August 31, 1990.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 1, 1992 at 1:15 P.M., with all briefs to be submitted by September 15, 1992. Petitioner appeared by Snow Becker Krauss, P.C. (Harvey Krauss, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined that the expenses of Hygrade Casket Corporation, which were allocated to related corporations, were subject to sales and use taxes on the basis that such allocations were additional consideration for the transfer of caskets to such corporations.

II. If so, whether the amount of the assessment was properly calculated.

III. Whether petitioner has shown that its failure to pay the proper amount of tax within the time required was due to reasonable cause, thereby warranting remission of penalty and reduction of the statutory interest to minimum interest.

FINDINGS OF FACT

On May 13, 1992, the parties entered into a written stipulation of facts, the contents of which have been incorporated into the following Findings of Fact, except as otherwise noted.

Pursuant to a field audit of Hygrade Casket Corporation ("Hygrade") which commenced in September 1989, the Division of Taxation ("Division"), on April 26, 1991, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Hygrade in the amount of \$76,201.75, plus penalty and interest, for a total amount due of \$121,576.69 for the period March 1, 1987 through August 31, 1990.

As will be discussed below, the audit resulted in additional sales and use taxes due from Hygrade, other than the amount asserted in the notice of determination. However, these amounts were agreed to and paid by Hygrade. Therefore, it is only the \$76,201.75, plus penalty and interest, which remains at issue herein.

Prior to the issuance of this assessment, certain of Hygrade's officers executed consents extending the period of limitation for assessment of sales and use taxes as follows:

<u>Date Executed</u>	<u>Periods Extended</u>	<u>Date for Assessment</u>
5/16/90	3/1/87 - 8/31/87	12/20/90
12/10/90	3/1/87 - 2/29/88	6/20/91

On April 16, 1990, the auditor (David Gibson) sent an appointment letter to Hygrade in Houston, Texas which advised that an audit would be conducted, at Hygrade's office, on May 7, 1990. The letter requested that all books and records pertaining to Hygrade's sales and use tax liability be made available.

Mr. Gibson testified that the records presented were deemed adequate for the performance of a detailed audit. However, on May 15, 1990, a representative of Hygrade executed an audit method election form whereby it was agreed that a test period audit would be performed to audit sales and recurring expense purchases; fixed asset acquisitions would be audited in detail.

Hygrade was a wholly-owned subsidiary of Service Corporation International ("SCI"), with a mailing address c/o Service Corporation International, 1504 Third Avenue, New York, New York. SCI was a publicly-owned corporation with offices in Houston, Texas as well as in

New York City.

SCI dealt with every aspect of funerals, from caskets to flowers to limousines. It established separate corporations to deal with particular areas of the funeral business.

During the audit period, SCI operated wholly-owned funeral homes throughout the United States, including approximately 35 which were located in the New York City metropolitan area.

Hygrade's sole business purpose during the audit period was to purchase, warehouse and ultimately deliver caskets to SCI's funeral homes in the New York City area. It existed for the administrative convenience of relieving individual SCI funeral homes from the necessity of having to deal directly with independent casket manufacturers. Other than Hygrade's dealings with the SCI funeral homes, Hygrade was not engaged in transactions of a retail nature.¹

When Hygrade delivered or transferred caskets to an SCI funeral home, the computerized bookkeeping charges therefor, which were attended to and maintained by SCI, were based upon Hygrade's purchase price paid to the manufacturer, plus an amount equal to the applicable State sales tax rate. Hygrade remitted the sales tax to the Division upon the filing of its quarterly sales tax returns.

The caskets delivered by Hygrade to the funeral homes were later sold to the public in connection with other funeral services. Hygrade did not provide its services to non-SCI funeral homes.

SCI determined the quantity and quality of Hygrade's inventory. Such determinations were predicated upon projected (anticipated) needs of SCI's funeral homes in the New York metropolitan market.

Hygrade acquired its inventory as completed products and was not engaged in repairing, upgrading, altering or, in any way, enhancing the value of its casket inventory. The prices which Hygrade paid to its casket manufacturers for its inventory were competitive, on an

¹Paragraph "5" of the stipulation of facts sets forth the parties' positions with respect to "retail" transactions. These positions will be set forth in a separate portion of the determination.

industry-wide basis, with the per casket price at which such manufacturers sold caskets to nonrelated funeral home entities.

SCI allocated Hygrade's out-of-pocket operating costs to SCI's funeral homes at the end of each year, at which time Hygrade's sales and expenses were closed out to zero. Any expense balances remaining at that

time were allocated through accounting entries to the SCI funeral homes to which Hygrade provided caskets. The auditor determined that the additional allocation of these year-end expenses to the SCI funeral homes represented an additional sales price for the caskets to the funeral homes. The computation giving rise to this assessment will be hereinafter more fully explained.

The audit report indicates (and the auditor testified at the hearing) that, during the audit, the journals and bookkeeping entries showing the allocations to the SCI funeral homes were initially provided to the auditor, but when he requested to make copies thereof, Hygrade's legal department denied him access to the journals and bookkeeping entries. They were not again made available to the auditor.²

Hygrade's acquisition of fixed assets was audited in detail for the entire audit period and an additional tax in the amount of \$1,567.36 was assessed. Hygrade's sales tax accrual account was examined in detail and errors (debits that could not properly be accounted for) were found which resulted in additional tax due of \$14,889.98. Additional tax due on expense purchases was assessed in the amount of \$48,322.43. A refund previously issued in the amount of \$12,659.20 was denied on the basis that Hygrade had previously taken credit for it. These amounts were agreed to by Hygrade and were paid in full (see, Finding of Fact "1").

²A portion of paragraph "12" of the stipulation relates to the computation of the assessment at issue which will hereinafter be fully set forth. Paragraphs "13" and "14" of the stipulation contain Hygrade's position and a statement of the issue, respectively, and need not be set forth as Findings of Fact.

As previously indicated in Findings of Facts "10" and "11", a review of Hygrade's books and records indicated that Hygrade, at the end of each year, was closing out to a zero balance, i.e., its income and expenses were allocated to the various SCI funeral homes. Such allocations appeared on the tax returns of the funeral homes. In addition, Hygrade, the funeral homes and the other SCI funeral entities filed consolidated tax returns. The auditor requested the journals containing the adjusting and closing entries from Hygrade's legal department which were initially provided. However, when the auditor expressed a desire to make copies of these entries, he was told that the journals were confidential and he was denied access to these records. Due to the fact that he was denied access, the auditor estimated tax due on these year-end allocations which he determined constituted an additional price for caskets provided by Hygrade to the funeral homes.

The estimate was based upon two financial statements which were made available to him; one statement was for the year ended December 31, 1989 and the other financial statement was for the nine-month period January 1 through September 30, 1990. Expenses (referred to as intercompany assistance on the financial statements) were \$270,929.00 for the year ended December 31, 1989 and \$190,603.00 for the nine-month period ended September 30, 1990. Utilizing the financial statements, the auditor determined additional expenses closed out to the funeral homes (he considered these expenses to be part of the sales price of the caskets) in the amount of \$923,657.62, with additional tax due thereon (at 8.25%) of \$76,201.75.³

There were no sales invoices issued on Hygrade's sales of caskets to the SCI funeral homes; a purchase order system containing essentially the same information was used instead.

The expenses of Hygrade which were allocated to the funeral homes consisted of wages

³The financial statement for the year ended December 31, 1989, indicating expenses of \$270,929.00 ($\$270,929.00 \div 12 \times 3 = \$67,732.25$), was used for the period March 1, 1987 through February 28, 1989. The financial statement for the nine-month period January 1 through September 30, 1990, showing expenses of \$190,603.00 ($\$190,603.00 \div 9 \times 3 = \$63,534.30$), was used for the period December 1, 1989 through August 31, 1990. For the period March 1 through November 30, 1989, the figure of \$63,732.24 was used for each quarter. There is no indication how this amount was computed.

and salaries, general operating expenses, utilities and miscellaneous funeral supplies. There was no transfer of funds from the funeral homes to Hygrade on the sale of the caskets; the transactions were reflected solely through accounting entries performed by SCI.

During the course of the audit, no inquiry was made as to the number of caskets sold to the funeral homes during the audit period or as to the fair market value of the caskets. The auditor also did not inquire whether or not the funeral homes paid Hygrade or SCI for the bookkeeping allocation.

Joan Goff, comptroller of SCI's funeral division, testified that budgets were prepared for each of the funeral homes based upon their projected revenues (number of funerals). Based upon such projected revenues, a portion of Hygrade's expenses were allocated thereto. The allocations were made for budgetary purposes and for determining the

financial performance of each funeral home. The projection was based not on actual use (number of caskets purchased), but on projected performance.

Similar bookkeeping allocations were made with respect to SCI's other funeral entities (casket warehouses, centralized embalming facilities, sign company, etc.).

Ms. Goff stated that, in 1990, Hygrade ceased operation and, thereafter, SCI funeral homes purchased caskets directly from manufacturers. Prices paid by the funeral homes for the caskets were comparable to what Hygrade had paid.

Because of Hygrade's existence, the individual funeral homes did not need to employ personnel to order, receive and maintain casket inventories.

SUMMARY OF THE PARTIES' POSITIONS

Hygrade's position may be summarized as follows:

(a) Ms. Goff was not aware or apprised of any actions on the part of the legal or bookkeeping staff of SCI which could be categorized as failing to cooperate and/or withholding information from the auditor.

(b) The auditor failed to make inquiries of Hygrade as to number of caskets sold, the

fair market value of the caskets and whether the funeral homes paid Hygrade or SCI for the bookkeeping allocation.

(c) Hygrade contends that the Division's auditor admitted that the issue in this matter relates to its transfer of caskets to the SCI funeral homes and the proper imposition of sales tax on the fair market value thereof. Since no inquiries were made as to either the number or fair market value of the caskets transferred, the assessment is without basis.

(d) The assessment at issue is predicated upon nonreimbursed overhead and operating expenses and do not constitute "receipts". Tax Law § 1105(a) imposes a tax on "the receipts from every sale of tangible personal property"

(e) Tax Law § 1101 and 20 NYCRR 526.7(d)(8), which deal specifically with transactions between interrelated corporations, require that the consideration delivered in exchange for the sale or other transfer of property be predicated upon fair market value which shall serve as the base for the imposition of the sales tax. 20 NYCRR 531.2 defines "consideration" in general terms to be "the amount of money paid for any property or service valued in money." In the present matter, no money passed to Hygrade from the funeral homes.

(f) Tax Law § 1115(a)(7) exempts morticians, undertakers and funeral directors from all sales tax consequences relating to the sale of tangible personal property and services performed with respect to the conduct of funerals to the public. Sales tax is imposed on third-party suppliers of such property and services. By virtue of this assessment, the effect is to indirectly tax a sales tax base which, by statute, the Commissioner of Taxation and Finance is prohibited from taxing under Tax Law § 1115(a)(7). If sustained, this assessment would pass on an added cost burden to the general public which violates the public policy attributes of such statute.

(g) Since no consideration either passed or was legally imposed by Hygrade upon the SCI funeral homes for its overhead and operating expenses, Hygrade's incurrence of such expenses is tantamount to, and could be construed as, a capital contribution (citing,

20 NYCRR 526.6[d][8][ii]).

(h) Citing Matter of John Hancock Mutual Life Ins. Co. (Tax Appeals Tribunal, April 20, 1992), Hygrade contends that the first issue to be addressed is whether a taxable transfer occurred. While, in the instant matter, physical possession of the caskets changed hands, since there was no meaningful difference between the cost to Hygrade (upon which it paid tax) and the price which the funeral homes would have paid if the caskets were purchased directly from suppliers, the issue to be decided herein is the proper method to determine the sales tax base for the caskets. Since the allocations were based solely upon projections, no meaningful relationship existed between actual transfer of caskets and the tax assessed herein.

(i) The list of expenditures which the Division seeks to add to the sales tax base includes expenses for which Hygrade paid the applicable sales taxes to the vendors and suppliers of such products and services. If the Division's position is sustained, Hygrade would be entitled to a credit for taxes paid on such expenditures.

(j) The Division is attempting to impose a tax on a budget projection (which could have been accomplished by other means which would not have shown up in Hygrade's financial records) developed by SCI's management in order to predict and ascertain the financial performance of its subsidiary entities, as opposed to a tax on the transfer, at fair market value, of an item of tangible personal property.

(k) Penalties and interest imposed in excess of the minimum rate should be cancelled (even if the assessment is sustained) since the disparity between the sales tax base as initially determined by Hygrade and that subsequently determined by the Division was attributable to a difference in judgment as opposed to negligence or willful intent to evade or defeat the tax.

The position of the Division is as follows:

(a) The prices paid by Hygrade for the caskets were competitive, on an industry-wide basis, with the per casket sale price paid to manufacturers when sold to nonrelated funeral

home entities.

(b) The year-end allocation of Hygrade's operating costs to the SCI funeral homes represent part of the consideration paid by Hygrade for the caskets and, as such, are subject to tax.

(c) In the absence of proof by Hygrade, showing that all or part of these allocations were not part of its costs for caskets, the entire amount could properly be deemed an additional part of the price paid by Hygrade and passed on to the SCI funeral homes. Had Hygrade not refused to make the journal entries available to the auditor, it is possible that portions of these allocations could have been identified as being nontaxable which would have resulted in a lower assessment.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) provides for the imposition of sales tax upon the "receipts from every sale of tangible personal property . . ." (emphasis added).

20 NYCRR 526.5(a) defines "receipt" as the:

"amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise."

B. Tax Law § 1101(b)(5) defines "sale" as:

"[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor"

20 NYCRR 526.7(b) provides that:

"[t]he term 'consideration' includes monetary consideration, exchange, barter, the rendering of any service, or any agreement therefor. 'Monetary consideration' includes assumption of liabilities, fees, rentals, royalties or any other charge that a purchaser, lessee or licensee is required to pay."

C. What first must be clarified herein is the nature of the transaction which gave rise to the assessment at issue. In its brief (page 5 thereof), the Division contends that the allocation of Hygrade's year-end expenses to the SCI funeral homes, in effect, represented an addition to the price Hygrade paid to the manufacturers of the caskets for which tax was not paid. I must disagree.

The evidence regarding Hygrade's purchase of the caskets from the manufacturers is not in dispute. Hygrade paid sales tax on its purchase price of caskets paid to the manufacturers. Hygrade then transferred or delivered the caskets to the SCI funeral homes, at which time SCI made computerized bookkeeping entries reflecting a charge based upon Hygrade's purchase price paid to the manufacturer plus an amount equal to the then applicable New York State sales tax rate. Hygrade remitted the sales tax to the Division upon the filing of its quarterly returns.

These facts would seem to indicate that, with respect to the transactions between Hygrade and the casket manufacturers, Hygrade was in full compliance with the applicable provisions of the Tax Law. The transfer or delivery of the caskets by Hygrade to the SCI funeral homes is a different matter, however.

As the Tax Appeals Tribunal noted in Matter of John Hancock Mutual Life Ins. Co. (supra):

"The first issue which must be addressed is whether a taxable transfer occurred. Only then will the existence of separate corporate entities become relevant."

When Hygrade transferred or delivered the caskets to the SCI funeral homes, there was clearly a transfer of possession for a consideration (see, Tax Law § 1101[b][5]). The consideration, while not in the form of money, was a service and/or an assumption of liabilities (see, 20 NYCRR 526.7[b]). Therefore, a taxable transfer did occur between Hygrade and the SCI funeral homes.

In its brief and reply brief, Hygrade contends that the assessment (assuming such assessment is otherwise proper) must be based upon the fair market value of the caskets transferred. However, 20 NYCRR 526.6(d)(8)(i) provides as follows:

"The sale of property by one related corporation to another related corporation is a retail sale, and taxable to the extent of the consideration paid, or the fair market value, if the consideration paid is not an adequate indication of the true value of the property transferred."

In the present matter, the Division's auditor testified that the journals and bookkeeping entries showing the allocations to the SCI funeral homes were initially provided by Hygrade but, upon subsequent requests to review these records, access thereto was denied. Those

required to collect sales tax must maintain records which shall be available for inspection and examination at any time upon demand by the Division (see, Matter of Continental Arms Corp. v. State Tax Commn., 72 NY2d 976, 534 NYS2d 362; Matter of Morano's Jewelers of Fifth Avenue, Tax Appeals Tribunal, January 2, 1992). First of all, there was no evidence presented by Hygrade (other than general allegations) that the consideration (the allocation of Hygrade's expenses to the funeral homes) was not an adequate indication of the true value of the property transferred and, therefore, that the fair market value of the caskets must be utilized in arriving at the amount of the assessment. The fact that, on cross examination, the Division's auditor admitted that the issue in this matter relates to the transfer of caskets and their fair market value is, in no way, binding upon the Division. Such a question, from Hygrade's representative, calls for a legal conclusion which the auditor clearly is unqualified to provide. Moreover, the Division, in the written stipulation of facts, in the legal argument made by its representative at the hearing and in its brief, made its position clear. Therefore, Hygrade was in no way prejudiced nor can it show any detrimental reliance on the statement of the auditor. While Hygrade points to the fact that the auditor made no inquiry as to the number of caskets transferred or the fair market value of the caskets, the record herein reflects that a request was made for all books and records pertaining to Hygrade's sales tax liability (see, Finding of Fact "3"). Once access to relevant records was denied, the Division was within its rights to assess tax based upon "such information as may be available" (Tax Law § 1138[a][1]). And after the assessment was issued, Hygrade still had the opportunity to contest the assessment by production of its books and records (see, Matter of Sol Wahba, Inc. v. State Tax Commn., 127 AD2d 943, 512 NYS2d 542; Matter of On the Rox Liquors v. State Tax Commn., 124 AD2d 402, 507 NYS2d 503, lv denied 69 NY2d 603, 512 NYS2d 1026). Hygrade produced no evidence regarding the number of caskets or fair market value of caskets transferred during the audit period.

D. In Matter of Coyne Industrial Laundry, Inc. of Syracuse (State Tax Commn., March 18, 1983), the petitioner provided laundry service (which included furnishing uniforms,

towels, etc.) to industrial and commercial organizations. The petitioner purchased most of the uniforms and towels from a related corporation, Coyne Supply Corp. (which along with the petitioner were subsidiaries of Coyne Industrial Enterprises Corp.). Coyne Supply Corp. charged the petitioner the actual cost of the supplies plus 7% of the cost (the 7% charge represented Coyne Supply Corp.'s operating expenses in supplying the petitioner). No purchase invoices were sent by Coyne Supply Corp. to the petitioner and no transfer of money between the corporations took place. The entire transaction was accomplished by means of computerized bookkeeping entries. If, at the end of the year, the 7% charge was insufficient to cover the expenses of Coyne Supply Corp., it would assess the petitioner an amount sufficient to recover such expenses, in proportion to the amount of purchases made by the petitioner (this end-of-year adjustment was also effected by means of a computerized bookkeeping entry).

The former State Tax Commission stated:

"The fact that in this case the corporations were related is of no effect since 'the sale of property by one related corporation to another related corporation is a retail sale and taxable to the extent of the consideration paid' (20 NYCRR 526.6[d][8][i]). In this case the consideration paid by petitioner included the seven percent charge and the end-of-year adjustment and the Audit Division, therefore, properly included both items in the taxable selling price of the uniforms and towels supplied to petitioner."

Hygrade, in its brief, has attempted to distinguish Coyne from the matter at issue herein. Hygrade makes much of the fact that, in Coyne, the taxpayer was a retailer while Hygrade transferred the caskets to the SCI funeral homes at their wholesale fair market value. In addition, Hygrade asserts that by being placed in the position of a retailer, it is being taxed in violation of the provisions of Tax Law § 1115(a)(7), which exempts from the imposition of sales and use taxes the sale of tangible personal property sold by a mortician, undertaker or funeral director. Hygrade's position is without merit since Tax Law § 1115(a)(7) further provides that all tangible personal property sold to a mortician, undertaker or funeral director for use in the conducting of funerals shall not be deemed a sale for resale and shall not be exempt from the retail sales tax. Here, Hygrade sold caskets to the SCI funeral homes which were later sold to the general public, by the funeral homes, in connection with other funeral

services (see, Finding of Fact "8").

E. In Matter of Hubbell Electric (State Tax Commn., February 4, 1983), a case which involved intercorporate allocation of various items, the former State Tax Commission held that such expense allocations were taxable, stating:

"[T]he fact that petitioners attempted to describe the transactions in issue as intercorporate allocations or bookkeeping entries is immaterial."

Hygrade asserts that the bookkeeping overhead and operating expense allocations sought to be taxed herein were based simply upon budgeted projections made at the commencement of each year solely to enable the parent corporation (SCI) to determine anticipated financial performance and that the allocation percentages were calculated based upon prior years' performance. In essence, Hygrade contends that these transactions created no rights, entitlements or obligations between SCI, Hygrade or the SCI funeral homes but, instead, were implemented merely as an intercorporate budgetary mechanism. In Matter of Tops, Inc. (Tax Appeals Tribunal, November 22, 1989), the Tribunal, citing 107 Delaware Associates v. State Tax Commn. (99 AD2d 29, 472 NYS2d 467, revd on dissent below 64 NY2d 935, 488 NYS2d 634), held that, for purposes of sales tax liability, a taxpayer is bound by the form it has chosen i.e., by electing to conduct a unitary business in the form of three separate corporate entities and enjoying the benefits of that format, and it cannot now disregard that format to avoid tax disadvantages which subsequently may arise. As pointed out in Conclusions of Law "C" and "D", the sale of property by one related corporation to another is a retail sale and is taxable to the extent of the consideration paid.

Hygrade, in its brief, attempted to distinguish the present matter from Hubbell by noting that Hygrade's allocations were predicated upon anticipated budgetary performance having nothing to do with actual number of caskets transferred and, in addition, by pointing out that, during his testimony at the hearing, the auditor conceded that the issue herein involved the imposition of sales tax upon the fair market value of the caskets. Clearly, the auditor's statement was erroneous since Hygrade admits that the allocations were based upon anticipated budgetary performance having no relation to number of caskets transferred or the fair market

value thereof. The Division's assessment is not based upon the number or fair market value of the caskets transferred since these transfers were already taxed and paid (see, Finding of Fact "7"). It is the expense allocations which are sought to be taxed and, as pointed out in Matter of Coyne Industrial Laundry, Inc. of Syracuse (supra) and Matter of Hubbell Electric (supra) (see also, Matter of Browning-Ferris Industries, State Tax Commn. Advisory Opinion, January 9, 1986 [TSB-A-86(4)S]), such allocations between related corporations, despite being accomplished solely through bookkeeping entries, were consideration for the transfer of tangible personal property between these related corporations and were, therefore, properly subject to tax by the Division.

F. Hygrade contends, and perhaps with some validity, that it should receive a credit for taxes paid on some of the expenses which were allocated to the SCI funeral homes (see, paragraph "18[i]"). However, documentation must be maintained for any refund or credit claimed (20 NYCRR 533.2[d][3]) and since Hygrade did not provide the auditor with the journals and bookkeeping entries relating to the allocations to the SCI funeral homes, the auditor could not be expected to determine if tax had been paid on any of these expenses. Hygrade's claim for a credit must, therefore, be denied based upon its failure to substantiate entitlement thereto.

G. Tax Law § 1145(a)(1)(i) imposes a penalty on a taxpayer who fails to pay any sales tax within the time required and Tax Law § 1145(a)(1)(ii) imposes statutory interest on the amount not paid. Tax Law § 1145(a)(1)(iii) provides for the remission of the penalty and reduction of the statutory interest to minimum interest if the failure is due to reasonable cause and not due to willful neglect. The taxpayer bears the burden of proof on this issue. In determining whether reasonable cause exists, the most important factor to consider is the extent of the taxpayer's efforts to ascertain the proper tax liability (Matter of Northern States Contracting Co., Tax Appeals Tribunal, February 6, 1992; 20 NYCRR 536.5[d][2]).

Other than a statement, in its brief, that the disparity between the value of the sales tax base as initially determined by Hygrade and that which was determined by the Division was

attributable to a difference in judgment as opposed to gross negligence or willful intent to evade the tax, Hygrade offered no evidence as to the steps which it took to determine its tax liability. Absent such evidence, the Division's imposition of penalty and statutory interest must be sustained.

H. The petition of Hygrade Casket Corporation is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to petitioner on April 26, 1991 is sustained in its entirety.

DATED: Troy, New York
March 18, 1993

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE