STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

JOSEPH ROMA & SONS CONSTRUCTION, 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 December 1, 1996 through :
November 30, 2001.

In the Matter of the Petition :

of :

JOHN ROMA :

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 June 1, 1999 through :
November 30, 2001.

In the Matter of the Petition :

of :

JOSEPH ROMA :

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 June 1, 1999 through :
November 30, 2001.

DETERMINATION
DTA NOS. 819508,
819509, AND 819510

Petitioner Joseph Roma & Sons Construction, Inc., 330 Stratton Road, New Rochelle, New York 10804, 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 December 1, 1996 through November 30, 2001.

Petitioner John Roma, c/o Robert Rosenberger, 490 Bleeker Avenue, Mamaroneck, New York 10543, 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 June 1, 1999 through November 30, 2001.

Petitioner Joseph Roma, 330 Stratton Road, New Rochelle, New York 10804, 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 June 1, 1999 through November 30, 2001.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 20, 2004 at 10:30 A.M., with all briefs submitted by August 19, 2004, which date began the six-month period for the issuance of this determination. Petitioners appeared by Robert Rosenberger, PA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Justine Clarke Caplan, Esq., of counsel).

ISSUES

I. Whether the audit method employed by the Division of Taxation was reasonable or whether petitioners have shown error in either the audit method or result.

II. Whether penalties imposed pursuant to Tax Law § 1145(a)(1)(i) and (vi) should be sustained.

FINDINGS OF FACT

1. On March 15, 2002, following an audit, the Division of Taxation ("Division") issued to petitioner Joseph Roma & Sons Construction, Inc. ("the corporation") a Notice of Determination

which assessed $242,997.19 in additional sales and use taxes due, plus penalty and interest, for the period December 1, 1996 through November 30, 2001.

2. On August 26, 2002, the Division issued to petitioner John Roma a Notice of Determination which assessed $116,992.12 in additional sales and use taxes due, plus penalty and interest, for the period June 1, 1999 through November 30, 2001. The notice informed this petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Joseph Roma & Sons Construction, Inc. and therefore personally liable for the sales and use taxes due from that corporation.

3. Also on August 26, 2002, the Division issued to petitioner Joseph Roma an identical Notice of Determination which assessed $116,992.12 in additional sales and use taxes due, plus penalty and interest, for the period June 1, 1999 through November 30, 2001. This notice also informed this petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Joseph Roma & Sons Construction, Inc. and therefore personally liable for the sales and use taxes due from that corporation.

4. The difference between the corporate assessment and the individual officer assessments results from the expiration of the period of limitations for assessment for the period December 1, 1996 through May 31, 1999 with respect to the individual petitioners. The corporation executed consents extending the period of limitations for assessment with respect to such period. The individual petitioners did not. Accordingly, the Division did not assess tax against the individual petitioners for this period.

5. Each of the statutory notices herein assessed penalties pursuant to Tax Law § 1145(a)(1)(i) and (vi).

6. The corporation was in the business of landscaping, lawn maintenance, masonry, and snow plowing and removal. It was located at 330 Stratton Road, New Rochelle, New York. Petitioner John Roma has been involved with the business and has been president of the corporation for over ten years. He was president of the corporation during the audit period and ran the business on a day-to-day basis. Petitioner Joseph Roma is John Roma's father. He founded the business and remained involved in its operation during the period at issue. He was responsible for bookkeeping and billing.

7. Neither John Roma nor Joseph Roma disputed their status as persons responsible for the collection of sales tax for the corporation during the period at issue.

8. The audit of the corporation began with a letter from the Division to the corporation's representative dated February 28, 2000. By this letter the Division requested that the corporation make available for review all of its books and records pertaining to the corporation's sales tax liability for the period December 1, 1996 through November 30, 1999. The letter specifically requested that the corporation make available financial statements, journals, ledgers, sales invoices, purchase invoices, sales and use tax returns, Federal income tax returns, and exemption certificates. The February 28, 2000 letter also scheduled a date to begin the Division's review of the corporation's records. The corporation's representative cancelled a meeting scheduled for May 2, 2000 and also cancelled two subsequent meetings scheduled for July 10, 2000 and October 30, 2000.

9. The Division's auditor and the corporation's representative met on March 2, 2001 and May 8, 2001, and at that time certain records were made available for the Division's review.

Specifically, the corporation produced its bank statements and cancelled checks for the 2000 calendar year and its 1999 sales invoices. The balance of the requested records was not made available.

10. By letter dated December 7, 2001, the Division advised the corporation's representative that the audit period was being extended through November 30, 2001. The Division requested that the corporation make available for review all of its books and records pertaining to the corporation's sales tax liability for the period December 1, 1996 through November 30, 2001. The December 7, 2001 letter also scheduled a date to begin the Division's review of the corporation's records for the extended audit period. Petitioner's representative later cancelled this meeting.

11. In conducting its audit, the Division first reviewed the records made available by the corporation. The Division compared the corporation's taxable sales of $115,171.17 as shown by its sales invoices for the period March 1, 1999 through November 30, 1999 to taxable sales of $38,952.00 as reported on its sales tax returns for the same period.[1] Additionally, the invoices for the March 1, 1999 through November 30, 1999 period indicated $8,157.63 in sales tax charged and collected. The corporation reported and remitted $2,704.00 in sales tax for this same period. All of the invoices that the Division reviewed were for taxable sales.

12. Given the corporation's failure to provide many of the records requested and the disparity between the records that were provided and petitioner's sales tax returns, the Division concluded that such records were inadequate to perform a detailed audit for the period at issue.

[1] The corporation did not provide the Division with copies of its sales tax returns on audit. The Division reviewed its own records for information contained on such returns.

13. The Division's audit found additional tax due in three areas: additional taxable sales, disallowed nontaxable sales, and expense purchases. In light of the corporation's inadequate records, the Division used a test period audit method to determine additional taxable sales. The Division determined an error rate of 2.957 based on the ratio of taxable sales as shown by the corporation's sales invoices to taxable sales reported on its sales tax returns for the period March 1, 1999 through November 30, 1999 (i.e., $115,171.17 ÷ $38,952.00). The Division then multiplied this error rate by taxable sales as reported for the entire audit period and thus calculated audited taxable sales. After subtracting reported taxable sales, the Division determined additional taxable sales of $966,045.65 and, by applying the Westchester County jurisdictional rate of 8.25 percent, calculated additional tax due thereon of $79,698.77.

14. With respect to the disallowed nontaxable sales portion of the audit, prior to the issuance of the statutory notice, the corporation did not offer any evidence of nontaxable sales. In the absence of any such evidence and considering that all sales invoices reviewed were for taxable sales, the Division concluded that all claimed nontaxable sales were properly subject to tax. The Division determined the amount of such disallowed nontaxable sales by calculating the difference between gross sales as reported on the corporation's sales tax returns for the audit period and audited taxable sales. Such difference was $1,963,830.35 and, applying the Westchester County jurisdictional rate of 8.25 percent, the Division calculated sales tax due thereon of $162,016.00.

15. With respect to the expense purchases portion of the audit, the Division contacted a third-party vendor from whom the corporation purchased rock salt for use in its snow plowing and snow removal business. The-third party vendor, which was located in Connecticut, provided the Division with invoices for rock salt purchases by the corporation totaling $8,166.78 during

the audit period. All such purchases were delivered to the corporation in New York, either at its headquarters or at a customer's location, and used in the performance of snow plowing and snow removal services. Sales tax was not charged on such purchases. The third-party vendor also provided the Division with a blanket exemption form which the corporation had provided the vendor. Although otherwise completed with the corporation's name, address, and tax identification number, such form did not indicate an exempt purpose for the purchase as required by the form. The Division also determined in its review of cancelled checks provided by the corporation that six expense purchases totaling $8,750.00 were taxable. The Division thus determined $16,916.78 in expense purchases subject to $1,282.37 in additional tax due.

16. Following the issuance of the subject notices of determination, petitioners submitted to the Division's auditor records of sales totaling $1,034,399.50 claimed by petitioners to be capital improvements. Following review of such documentation, the Division concluded that petitioners established capital improvements of $996,821.50 and therefore revised the disallowed exempt sales amount from $1,963,830.35 to $967,008.85. In addition, the Division revised the jurisdictional rate of tax from 8.25 percent to 6.75 percent. The basis for this revision was that, although the corporation's headquarters was located in an 8.25 percent jurisdiction, most of the work performed by the corporation took place in a 6.75 percent jurisdiction. Such changes modified tax assessed on disallowed exempt sales from $162,016.00 to $65,273.10. The Division also applied the 6.75 percent rate to additional taxable sales of $966,045.65 as determined on audit and thereby modified tax asserted due on such sales from $79,698.77 to $65,208.08. The Division did not modify the asserted tax due on expense purchases.

17. In accordance with the foregoing revisions and following a Bureau of Conciliation and Mediation Services ("BCMS") conference on November 19, 2002, BCMS issued

conciliation orders dated March 7, 2003 to petitioners herein. The order issued to the corporation asserted $131,763.56 in additional tax due, plus penalty and interest, for the period December 1, 1996 through November 30, 2001. The orders issued to the individual petitioners asserted $95,944.77, plus penalty and interest, for the period June 1, 1999 through November 30, 2001.

18. Approximately 50 percent of the corporation's business during the audit period was with two large customers: Riverwoods Community Association and Wildwoods Condominium. Petitioners conceded that the services provided by the corporation to these large customers was subject to sales tax and that the corporation had improperly failed to charge and collect sales tax on such services. Petitioner John Roma testified that he erroneously believed that such transactions were exempt from tax. Petitioners' representative estimated that the amount of sales tax due on services provided by the corporation to these large customers was $46,379.00.

19. Of the 20 sales tax periods which make up the audit period herein, the corporation filed its sales tax returns late 11 times. The corporation reported $33,942.00 in tax due on its sales tax returns for the audit period.

20. Among the records submitted by the corporation following the issuance of the notices of determination were two invoices totaling $1,250.00 for services provided to a customer named Larchmont Manor Park. The Division deemed $850.00 of such services to be capital improvements and thus exempt from tax on the revised assessment.

CONCLUSIONS OF LAW

A. The Division's use of a test period method with respect to the "additional taxable sales" portion of the audit was proper. In response to the Division's clear and unequivocal requests that the corporation make available all of its books and records pertaining to the

corporation's sales tax liability for the period December 1, 1996 through November 30, 2001, the corporation made available only its bank statements and cancelled checks for the 2000 calendar year and its 1999 sales invoices. Such incomplete records fell well short of the record keeping requirements imposed under the Tax Law (***see***, Tax Law §§ 1135, 1142[5]) and were clearly inadequate for the purpose of conducting an audit to determine the accuracy of the corporation's sales tax returns as filed (***see***, ***Matter of AGDN, Inc.***, Tax Appeals Tribunal, February 6, 1997). Accordingly, the Division was authorized to use an estimated audit method, so long as such method was reasonably calculated to reflect the taxes due (***see***, ***Matter of Ristorante Puglia, Ltd. v. Chu***, 102 AD2d 348, 478 NYS2d 91, 93). The test period is well established as an acceptable audit method (***see***, ***e.g.***, ***Continental Arms Corp. v. State Tax Commn.***, 72 NY2d 976, 534 NYS2d 362).

B. Where, as in the instant matter, resort to a test period audit is appropriate, the burden of proof lies with the taxpayer to show by clear and convincing evidence that the audit method was unreasonable or that the results were unreasonably inaccurate (***see***, ***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679). Here, petitioners have failed to meet their burden as they offered no evidence to show error in either the audit method or result.

In their post-hearing letter-brief petitioners asserted that the corporation's cash flow in the months of November through April is "severely diminished due to the winter season in this very seasonal business." Petitioners asserted that the Division "should have used this period as the test barometer for their audit." With respect to these assertions, it is noted that the test period included the months of March, April and November of 1999 and thus did include a portion of the period described by petitioners as "severely diminished." Additionally, the corporation's business included snow plowing and removal services and was thus active in the winter months.

More significantly, however, as noted previously, the corporation failed to maintain or produce adequate records from which the exact amount of tax could be determined. In the face of inadequate, unreliable or unavailable records, the Division is required merely to employ a reasonable audit method; exactness is not required (***see***, ***Matter of Ristorante Puglia, Ltd. v. Chu***, ***supra***; ***Matter of Convissar v. State Tax Commn.***, 69 AD2d 929, 415 NYS2d 305). Accordingly, petitioners' assertion that the test period should have encompassed the months of November through April is both unpersuasive and unsupported on the facts of this case.

C. The "disallowed nontaxable sales" portion of the audit was not based on an estimated audit method. Rather, the Division relied on the presumption of taxability pursuant to Tax Law § 1132(c)(1) and effectively denied the claimed nontaxable status of all such sales. Considering that, prior to the issuance of the statutory notices, the corporation offered no evidence of nontaxable sales and that all sales invoices reviewed during the audit were for taxable sales, the Division's disallowance of all reported nontaxable sales on audit was reasonable. Following the issuance of the statutory notices petitioners submitted documentation which resulted in the Division's allowance of $996,821.50 in nontaxable sales. Petitioners offered no evidence at hearing to show that any of the remaining disallowed nontaxable sales were properly nontaxable.

D. The tax asserted due on expense purchases was based upon the Division's detailed review of invoices for rock salt and checks in payment of certain other expenses. The rock salt was delivered to the corporation in New York and was used in the performance of snow plowing and snow removal services. The purchases of rock salt were therefore retail purchases properly subject to sales tax (***see***, Tax Law § 1101[a][4]). As to the purchases deemed taxable based on the Division's review of checks, petitioner has provided no evidence to show that such purchases were not taxable.

E. Petitioners asserted at hearing that one of its customers, Larchmont Manor Park, (***see***, Finding of Fact "20") was an exempt organization. Petitioner, however, submitted no proof of such purported exempt status. Accordingly, there is no basis upon which to make any further audit adjustment.

F. The Division asserted penalty herein pursuant to Tax Law § 1145(a)(1)(i) and (vi). Tax Law § 1145(a)(1)(i) states that any person failing to file a return or pay over any sales or use tax to the Commissioner of Taxation and Finance ("the Commissioner") "shall" be subject to a penalty. This penalty may be canceled if the Commissioner determines that the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Commissioner's regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1[a][1]).

Tax Law § 1145(a)(1)(vi) states that any person who omits from the total amount of tax required to be shown on a sales tax return an amount which is in excess of 25 percent of such total amount "shall be subject to a penalty equal to ten percent of the amount of such omission." Here, the corporation reported $33,942.00 in sales tax due for the audit period, and following adjustments made after the conciliation conference, the Division determined $131,763.55 in additional tax due. This determination has sustained the Division's assessment as adjusted. The corporation thus underreported taxable sales by more than 25 percent and was therefore properly subject to the section 1145(a)(1)(vi) penalty. Like the penalties imposed under Tax Law § 1145(a)(1)(i), penalties imposed under section 1145(a)(1)(vi) must be remitted if the failure was due to reasonable cause and not due to willful neglect.

G. In the instant matter, petitioners have established neither reasonable cause nor an absence of willful neglect to justify abatement of penalties. Petitioners conceded that the corporation improperly failed to collect tax on transactions with the condominium associations. Petitioner John Roma testified that he erroneously believed that such transactions were exempt from tax. Such ignorance of the law is not a basis for finding reasonable cause (***see***, 20 NYCRR 536.5[c][5]). Moreover, the record contains ample evidence supporting the imposition of penalties. Specifically, the corporation's taxable sales as shown by its own invoices during the nine-month test period exceed reported taxable sales by a factor of three. Such invoices thus indicate that the corporation collected but did not remit sales tax during the period at issue. The corporation's failure to report and remit the amount of sales tax due as indicated by its own records strongly supports the imposition of negligence penalties. Additionally, the corporation's failure to maintain or make available records also supports the imposition of penalties (***Matter of Rosemellia d/b/a The Burt Restaurant,*** Tax Appeals Tribunal, March 12, 1992). Penalties assessed herein are thus properly sustained.

H. The petitions of Joseph Roma & Sons Construction, Inc., John J. Roma, and Joseph Roma are denied and the notices of determination dated March 15, 2002 and August 26, 2002, as modified by the conciliation orders dated March 7, 2003 (***see***, Finding of Fact "17"), are sustained.

DATED: Troy, New York
January 20, 2005

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE