STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :

of :

CROW & SUTTON ASSOCIATES, INC. AND PINE VALLEY LANDSCAPE CORP. :

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, 2004 through August 31, 2004. :

In the Matter of the Petition :

of :

FOXCROFT NURSERIES, 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 Periods June 1, 2004 through August 31, 2004 and March 1, 2005 through November 30, 2005. :

In the Matter of the Petition :

of :

D. JAMES SUTTON :

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, 2004 through November 30, 2005.[1] :

DETERMINATION
DTA NOS. 822871, 822872, 822873, AND 822874

[1] When the Conciliation Order dated November 14, 2008 (CMS No. 222719) was issued to petitioner, listing the notices that assessed him as a responsible person for the corporate petitioners, the period covered by the order was listed as 6/1/04 - 11/30/04 instead of 6/1/04 - 11/30/05. When petitioner filed his petition with the Division of Tax Appeals, the period petitioned was copied from the order, and the error continued on the records of the Division of Tax Appeals. During the hearing petitioner was allowed to amend his petition to list the quarters actually covered by the assessment that petitioner continues to protest, specifically the one that assesses petitioner as a responsible officer of Foxcroft.

Petitioners Crow and Sutton Associates, Inc., and Pine Valley Landscape Corp. filed petitions 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, 2004 through August 31, 2004. Petitioner Foxcroft Nurseries, Inc., 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 periods June 1, 2004 through August 31, 2004 and March 1, 2005 through November 30, 2005. Petitioner D. James Sutton 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, 2004 through November 30, 2005.

A consolidated hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 5, 2010 and May 6, 2010, at 10:00 A.M., and continued to its conclusion on August 25, 2010 at 10:00 A.M., with all briefs to be submitted by February 11, 2011, which date began the six-month period for the issuance of this determination. The time for issuance of the determination was extended for three months pursuant to 20 NYCRR 3000.5(d). Petitioner D. James Sutton appeared pro se and for the corporate petitioners. The Division of Taxation appeared by Mark F. Volk, Esq. (Lori Antolick, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation (Division) properly assessed petitioners for sales and uses taxes on the basis of a reasonable audit methodology given the lack of books and records provided by petitioners.

II. Whether petitioners met their burden of proof to show that they are not liable for sales and use taxes.

III. Whether D. James Sutton is a responsible officer of the three corporate petitioners.

IV. Whether the Division intentionally protected Lori Chapones by not naming her a responsible person of the corporate petitioners.

V. Whether the Division intentionally obstructed petitioners' legal rights by not producing the General Audit Guidelines prior to the hearing and the issuance of other statutory documents.

VI. Whether the Division's auditor intentionally misrepresented the facts and law surrounding the issues of this case.

VII. Whether petitioners are subject to penalties pursuant to Tax Law § 1145 or whether they have established that their failure to properly report and pay the correct amount of sales and use taxes was due to reasonable cause.

FINDINGS OF FACT

1. These matters concern the asserted sales and use tax liabilities of Crow and Sutton Associates, Inc. (Crow), Pine Valley Landscape Corp. (Pine Valley), Foxcroft Nurseries, Inc. (Foxcroft) (the corporate petitioners)[2] and D. James Sutton (petitioner)[3] for the periods described above.

The corporate petitioners filed sales and use tax returns on an annual basis. For fiscal year 2005 (March 1, 2004 through February 28, 2005) Crow, Pine Valley and Foxcroft filed sales and use tax returns reporting zero taxable sales and services. For fiscal year 2004 (March 1, 2003 through February 29, 2004), Foxcroft filed an annual sales and use tax return reporting taxable sales and services in the amount of $30,899.00.

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[2] Crow, Pine Valley and Foxcroft, when referred to collectively will also be known as the corporate petitioners. Otherwise, references to the individual companies will be by their names, as designated.

[3] "Petitioner" will refer to D. James Sutton. "Petitioners" will refer to the corporate petitioners and the individual petitioner collectively.

2. Crow, a landscaping contract business located in Buskirk, New York, was incorporated in the State of New York in 1980. According to the federal corporate tax return, Form 1120S, for fiscal year July 1, 2004 through June 30, 2005, Crow was 100% owned by petitioner.

3. Pine Valley is also a landscaping business, whose work during all relevant times was primarily for new construction. The majority of Pine Valley's work was commercial in nature and was described as "tax exempt" in large part. The company was also located in Buskirk and was incorporated in the State of New York in 1985. During 2003 and 2004, according to the federal tax returns (forms 1120) for Pine Valley, Ruth Sutton, petitioner's wife, owned 90% of the business and David Sutton,[4] petitioner's brother, owned 10%.

4. Foxcroft, a wholesale tree nursery also located in Buskirk, New York, was incorporated in the State of New York in 1985. Foxcroft grew trees and plants and supplied the two affiliated landscaping companies with about 50% of the products needed for jobs, and supplied many other landscaping companies and nurseries with products. Foxcroft also had a small retail center where it sold nursery products. In 2004, the ownership of Foxcroft was 75% by petitioner, 20% by Ruth Sutton, and 5% by David Sutton.

5. Petitioner started his landscaping and nursery businesses in 1977 when he was in college, built them up, and eventually turned them into the corporations described above, Crow, Pine Valley and Foxcroft. By 1987, petitioner had expanded the companies to a very large scale, spanning from the east coast to Colorado, with some projects abroad, working on 37 corporate world headquarters buildings and many public works projects. He was involved in every aspect of the businesses he created. In 1999, petitioner's wife Ruth, who had been working with him in

[4] The federal tax return lists "Davis" Sutton, however, there appears to be a typographical error, since the social security number next to Davis matches that of petitioner's brother David, who is mentioned during the hearing and who owned a small percentage of Foxcroft, in addition to his share of Pine Valley.

one of the businesses, faced some medical problems. Petitioner made a decision to scale back his businesses significantly to take care of his wife and children, and hired Pat Bassey, a CPA, to handle the office and administrative business details, and Doug Squires to lead the field work. Pat Bassey hired Lori Chapones in October 2000 and together, the two of them ran the office and business portion of the three corporate petitioners. Petitioner terminated Pat Bassey in January 2003 when some problems arose, and he elevated Lori Chapones to the position of comptroller, handling all aspects of the office and business finances. Petitioner then started experiencing business problems for the first time in his career, and the businesses were losing money. Petitioner trusted Doug Squires, a foreman of 20 years, and Lori Chapones, a woman he had known since she was five years old.

In August 2006, when Lori Chapones was preparing to take maternity leave, petitioner hired a new employee to perform the necessary office functions in her absence. In the first week the new employee informed petitioner that his employees, particularly Lori Chapones and Doug Squires, had been stealing from him. Although the new employee was supposed to be trained prior to Ms. Chapones's maternity leave, no training had taken place. The new employee then realized the computers did not have the information that they were supposed to have, software was missing and the business records were missing from the file cabinets. Petitioner never recovered the original missing records. He filed a criminal complaint with the New York State Police on August 16, 2006 and, as of the date of the hearing in this matter, a criminal embezzlement and missing records investigation had been ongoing for nearly four years. At the time of the hearing, however, no charges had been made. No documentation concerning the state police investigation was entered into evidence.

6. Although Ms. Chapones was scheduled to return to her employment after her child was born, by September 2006, she had heard a rumor that petitioner was accusing her of embezzling funds and she was unable to reach him to discuss the matter. She never returned to her employment with any of the corporate petitioners or a successor company named Elhannon.

7. In October 2006, the New York State Department of Labor held a hearing that involved Crow, Pine Valley, and Foxcroft. Pertinent portions of that hearing transcript were offered as evidence in this matter. At the labor hearing, Ms. Chapones testified she had records belonging to the corporate petitioners in her possession. The records were not fully described and her testimony at the labor hearing as to the whereabouts of the records was evasive. Whatever company records she had in her possession were turned over to attorneys representing her in 2006, and others more recently to her criminal defense attorney. The only records Ms. Chapones now claims to have in her possession are some check stubs that were not easily identifiable.

In the labor hearing Ms. Chapones admitted to 1) being responsible for record keeping for the corporate petitioners, 2) often signing the names of Mr. and Mrs. Sutton in their absence, 3) being the one who initiated and devised a scheme to defraud workers of petitioners out of proper wages, 4) working "winter hours" during winter months, but claiming payment was made later in the year, and 5) committing disability insurance fraud. She knew that she was engaged in wrongdoing in numerous ways, and freely admitted the same.

8. The New York State Unemployment Fraud Division found Ms. Chapones guilty of improperly collecting unemployment benefits, and she was required to repay such funds. She has also been contacted by the New York State Police regarding larceny of money, records and a computer belonging to one or more of the corporate petitioners. This matter is still pending.

9. The Division mailed three appointment letters dated July 3, 2007, one each to petitioner as president of Foxcroft and Pine Valley, and a third to petitioner as owner of Crow, in order to schedule a sales and use tax field audit of the corporate petitioners for the period March 1, 2004 through February 28, 2007. The audit was to take place at petitioner's offices on July 16, 2007. A detailed records requested list was provided with each appointment letter and the letters additionally recommended that an owner, officer or employee with personal knowledge of the business attend the meeting, even if a representative was present.

10. The Division received no response to the July 3, 2007 appointment letters.

11. According to the tax field audit record, these matters were put on hold for about five months. Thereafter, the Division corresponded with petitioners by three second-request letters dated December 18, 2007, attached to which were additional records requested lists. The second appointment letters also set forth the audit period as March 1, 2004 through February 28, 2007, and scheduled an appointment with petitioner on January 2, 2008 at 10:00 A.M. at petitioner's office.

12. The auditor received a copy of the December 18, 2007 appointment letter pertaining to Crow back with a handwritten notation that stated, "There has not been any business or income since 2001." Handwritten beneath the notation are what appear to be the initials "DS." In addition, the auditor received a copy of the December 18, 2007 appointment letter pertaining to Pine Valley back with a handwritten notation that stated, "There has not been any income or business of any kind since 2002." Handwritten beneath the notation are initials or a signature that are not legible. The auditor received no other communication or information from petitioners.

13. On January 2, 2008, the date of the scheduled appointment, the Division's auditor drove to petitioner's address in Buskirk, New York. He drove onto the property, knocked on the door and rang the doorbell, but did not get a response and returned to his office. After returning to his office, the auditor mailed three letters dated January 2, 2008 to petitioners indicating that he had arrived at petitioner's address and attempted to perform the scheduled audit, but was unable to do so. The correspondence additionally questioned the handwritten statements on the former correspondence that indicated that Crow and Pine Valley had not been in business since 2001 and 2002, respectively, since federal returns were filed for 2004 for all three corporations showing business activity. The auditor concluded by informing petitioners he would be sending statements of tax due on the basis of the returns filed, and if petitioners had any information that would support a lower amount of tax due, they should communicate the same to the auditor.

14. The auditor was never provided any of petitioners' business records for any portion of the audit period. The auditor had no communication with petitioners until a conference with the Bureau of Conciliation and Mediation Services (BCMS) was held. He instead utilized the federal income tax returns for the corporate petitioners as the basis for the tax assessments issued in these matters.

15. Crow filed a 2003 federal income tax return (forms 1120S) for the period July 1, 2003 through June 30, 2004, reporting gross sales of $98,885.00, and a 2004 federal income tax return for the period July 1, 2004 through June 30, 2005, showing gross sales of $169,226.00. The auditor's goal was to determine whether sales and use taxes had been paid on the amount of reported gross sales. Because petitioners failed to provide any documentation with respect to the businesses, the auditor applied an 8% sales tax to the total amount of gross sales for the two

fiscal tax years, resulting in a sales tax assessment of $21,448.88 ([$98,885.00 + $169,226.00] x 8%).

Next, the auditor identified additional items from the federal returns upon which sales tax was required to be paid. He reviewed the following categories, and in the absence of expense invoices from Crow, he held all items subject to 8% sales and use tax, resulting in sales tax due on these items in the amount of $44,938.32 ($561,729.00 x 8%).

Categories Reviewed	**July 1, 2003- June 30, 2004**	**July 1, 2004- June 30, 2005**	**Totals**
Purchases	$214,891.00	$127,053.00	$341,944.00
Travel and supplies (2003) Job supplies and overhead (2004)	$2,909.00	$207,728.00	$210,637.00
Office Expenses	$9,148.00	0	$9,148.00
Total	$226,948.00	$334,781.00	**$561,729.00**

The total amount of sales and use tax found due from Crow was $66,387.20 ($21,448.88 plus $44,938.32).

16. The Division issued a Notice of Determination, dated February 19, 2008, to Crow in the amount of $66,387.20 plus penalty and interest. When the auditor issued the Notice of Determination, he placed the entire amount of sales tax due into the sales tax quarter June 1, 2004 to August 31, 2004, under the assumption that the work performed and the income earned by Crow as a landscaping company all took place during the 2004 summer months, June through August.

17. Pine Valley filed a federal income tax return (form 1120) for the year 2004, reporting gross sales of $1,310,630.00. Pine Valley also reported purchases for 2004 in the amount of $1,052,079.00. The auditor's goal was to determine whether sales and use taxes had been paid

on the amount of reported gross sales and purchases. Because petitioners failed to provide any documentation with respect to the businesses, the auditor applied an 8% sales tax rate to the total of gross sales plus purchases ($2,362,709.00) for 2004, resulting in total sales tax due from Pine Valley of $189,016.72.

18. The Division issued a Notice of Determination, dated February 19, 2008, to Pine Valley in the amount of $189,016.72 plus penalty and interest. The Notice of Determination placed the entire amount of sales tax due into the sales tax quarter June 1, 2004 to August 31, 2004, based on the assumption that the work performed and income earned by Pine Valley as a landscaping contractor all took place during the summer months, June through August.

19. Foxcroft filed a federal income tax return (Form 1120S) for the year 2004, reporting gross sales of $1,886,579.00. Foxcroft also reported $12,027.00 in office supplies and expenses, $46,348.00 in gasoline and truck expenses, $31,518.00 for equipment repair and $33,656.00 for yard and supplies expense, for an additional $123,549.00 in expenses that the auditor subjected to 8% sales and use tax, resulting in tax due on expenses of $9,883.92.

20. The Division had no record of Foxcroft filing its 2005 federal income tax return, but was aware that the corporation had employees working during that time because withholding tax returns had been filed. The auditor had acquired amounts for wages paid for both 2004 and 2005. He used the wage information provided on Foxcroft's 2004 New York S Corporation Franchise Tax Return and information from the Division's computer system referred to as WRSUM, which was a summary of the information provided on the 2005 withholding tax returns filed by Foxcroft, to determine its sales for 2005. He utilized gross payroll in the amount of $811,700.00 from the 2004 franchise tax return and divided it by $1,886,579.00, the gross sales from the 2004 federal return, which resulted in a 43.02% ratio of wages as a percentage of

sales. The 2005 wage information available from the Division's computer system with respect to Foxcroft for the last three quarters totaled $273,834.76. The auditor used this wage information to back into sales for 2005 by dividing the total wages by 43.02%, to arrive at computed gross sales in the amount of $636,592.47.[5] This amount for 2005 was added to 2004 gross sales as reported for a total of $2,523,171.00. Applying the 8% sales tax rate, the result was sales tax due from Foxcroft of $201,853.72, based on sales for the audit period. This amount was added to the sales tax due on 2004 expense purchases ($9,883.92) for a total amount due from Foxcroft of $211,737.64.

The Division issued a Notice of Determination to Foxcroft, dated February 19, 2008, assessing tax due in the amount of $211,737.64, plus penalty and interest. The sales tax assessment totaling $211,737.64 was broken down into four quarters:

a. The first quarter assessed, June 1, 2004 to August 31, 2004, was comprised of the total sales tax found due on the sales reported on the 2004 sales ($1,886,579.00 x 8%), or $150,926.32, plus the amount determined due on the 2004 expense purchases, $9,883.92, for a total of $160,810.24. The auditor made the same assumption as for Crow and Pine Valley, that all the 2004 income was earned during the summer months of 2004, and assessed Foxcroft for one tax quarter; and

b. Three quarters in 2005: March 1, 2005 to May 31, 2005 ($20,370.96), June 1, 2005 to August 31, 2005 ($20,370.96) and September 1, 2005 to November 30, 2005 ($10,185.48) were computed by calculating the sales tax due (8%) on the computed gross sales of $636,592.47, for a total of $50,927.40. The auditor then divided the amount due, $50,927.40, into the three

[5] This amount should be $636,528.96. Although there appears to be a mathematical error in this calculation, since the effect on sales tax computed is only approximately $5.00, this error will not be corrected, and the auditor's original calculations will continue to be used for the Foxcroft assessment.

quarters, apportioned 40%, 40% and 20% to the respective quarters. No explanation was provided as why the auditor used percentages that were other than equal amounts for the assessment of these three quarters.

21. The Division's auditor was under the impression that one or more of the companies had gone out of business by 2006 or 2007. This fact was referred to, but not substantiated by documentation, or otherwise, in the record. Although the audit period was never formally adjusted to exclude 2006 and 2007, no assessments for petitioners were issued involving these years.

22. The Division issued three notices of determination to D. James Sutton at his Buskirk, New York, address, dated February 19, 2008, asserting additional tax due in the amounts of $66,387.20, $189,016.72 and $211,737.64, each plus penalty and interest, as an officer or person responsible for the liabilities of Crow, Pine Valley and Foxcroft, respectively.

23. A conciliation conference was held before the Bureau of Conciliation and Mediation Services (BCMS) on August 27, 2008, concerning the notices issued to petitioners. At the conference, petitioner informed the Division's auditor that Ms. Chapones should be named a responsible person in this case, that she had taken records from petitioners and kept them, that a New York State Police investigation was ongoing concerning her potential wrongdoing. The auditor did not use this information in formulating his assessment and did not attempt to contact the New York State Police Financial Crimes Unit to verify the records in their possession or in an attempt to acquire the records. The auditor denied having any concrete information that would have led him to assess Ms. Chapones as a responsible person.

24. Four conciliation orders (CMS Nos. 222796, 222721, 222722 and 222719) were issued concerning the notices issued to Crow, Pine Valley, Foxcroft and petitioner, dated November 14, 2008, which sustained all the statutory notices.

25. After the issuance of the conciliation orders, petitioner corresponded with the conciliation conferee by a letter dated December 8, 2008, requesting further articulation of the resolved facts from the conciliation conference. There is no evidence petitioner received any response to this correspondence.

26. Petitioners issued a subpoena duces tecum to Lori Chapones[6] to appear as a witness in this matter at the hearing in May, 2010, and to bring with her the books and records, including general ledgers, all accounting records, resale certificates, sales tax exemption certificates, project cost accounting records, copies of all checks, and all records relating to income earned by Crow, Pine Valley and Foxcroft during the period January 1, 2004 through December 31, 2005, that were in her custody, power or control. Ms. Chapones was the assistant comptroller for all corporate petitioners from 2000 to 2003, and the comptroller from 2003 to 2006, after earning a bachelors degree in accounting and a master's degree in business administration. Accompanied by her criminal attorney, Ms. Chapones appeared and provided testimony at the hearing, liberally exercising her fifth amendment privilege against self incrimination. She testified that she oversaw all aspects of the office operations and all accounting functions, in addition to sundry other administrative duties. Ms. Chapones prepared the sales tax returns and often printed or signed petitioner's name on the returns. She was well versed in the business operations of the corporate petitioners. The only records she claimed to have in her possession at the time of the

[6] The subpoena listed Ms. Chapones as "Lori Chapones-Graham".

hearing were about six weeks worth of check stubs from one of the petitioners for September and October 2005, which were submitted into evidence.

27. A subpoena duces tecum, returnable at the hearing before the Division of Tax Appeals on May 5, 2010, was issued to Mark Mushalla, the vice president and chief financial officer of William H. Lane, Inc. (Lane), a company with whom Pine Valley conducted business in 2004, requesting the production of checks and all proof of payments to Pine Valley during the period June 1, 2004 through August 31, 2004, and a copy of the sales tax exempt certificate for SUNY Binghamton site work. In response, Mr. Mushalla submitted an affidavit and a printout of a history of payments as requested by the subpoena for June 1, 2004 through August 31, 2004. Payments made outside the period requested were redacted. According to the affidavit, the parties never had a tax-exempt certificate for SUNY Binghamton, since it was presumed the tax exempt status was a given. After the hearing, the Division deemed payments from Lane to Pine Valley totaling $108,719.03 as exempt sales, and reduced the assessment to Pine Valley by $8,697.52.

28. Pine Valley also performed work for Malone and Tate Builders, Inc., on a project known as the RPI Biotechnology & Interdisciplinary Studies Building, pursuant to a contract dated January 3, 2003. In correspondence dated April 28, 2010, payments totaling $128,550.36 to Pine Valley on the RPI project were verified by Malone and Tate as all being made in August 2004, and were accompanied by an exempt purchase certificate. After the hearing, the Division deemed the receipts of $128,550.36 as exempt from sales tax, and accordingly, agreed to reduce the assessment issued to Pine Valley by $10,284.03.

29. Pine Valley additionally performed services for the Greene County IDA with Rifenburg Construction, Inc., pursuant to a contract with Greene County. Petitioner requested

payments made between June 1, 2004 and August 31, 2004, in accordance with the assessed period. Rifenburg correspondence indicated two amounts paid to Pine Valley outside of that time frame: $48,422.80 on April 26, 2004 and $35,306.70 on May 30, 2004. The notation across from the April payment indicated that sales tax was invoiced and paid, presumably to Pine Valley. Since, according to the Division, Pine Valley did not remit this sales tax with their returns, the Division did not make any adjustment to the assessment for this amount.

The Division also refused to adjust the Pine Valley assessment for the May 30, 2004 payment of $35,306.70. Although the Division deemed it an exempt sale, since the assessment period was limited to the period June 1, 2004 through August 31, 2004 on the notice issued to Pine Valley, the Division considered any payment outside that period as in a quarter that was not assessed.

30. During 2004 and 2005 Foxcroft predominantly sold wholesale nursery products to other landscape companies and nurseries. Horticultural Associates of Rochester, Inc. (Horticultural), Shemin Nurseries, Inc. (Shemin) and Northeast Nursery, Inc. (Northeast) were three of those companies, all of whom provided petitioners with documentation showing purchases from Foxcroft with either a resale certificate, a statement that the product was resold, or an indication that the product was delivered to them out-of-state and sold at the out-of-state location. The left side of the following table sets forth the adjustments made by the Division to Foxcroft's assessment after the hearing, based predominantly upon the documentary evidence from the three vendors. The Division accepted the sales verified by each of the vendors, as well as the sales to each of these particular vendors that appeared in Foxcroft's records, as exempt sales for additional periods. In cases where the Division confirmed exempt sales but did not make a corresponding adjustment to the assessment, the Division stated that the particular quarter

was not assessed. Specifically, where the Division determined confirmed exempt sales for the period March 1, 2004 through May 31, 2004, but made no adjustment for such exempt sales, the auditor explained it was simply not within the quarter that was assessed, and no adjustment was made.

The right side of the table represents Foxcroft's proposed adjustment to sales as assessed based upon both the vendor information and Foxcroft's own records for all of 2004 and 2005, to the extent such information was available. The source of the information presented was either the vendor supplied information or three of Foxcroft's accounts as identified by the following account numbers: 10900, 10350 and 10300,[7] and references to this information in the table below identify the evidence that was the source of the information.

Date	**Division's Schedule of Foxcroft's confirmed exempt sales**	**Division's actual adjustments to Foxcroft's total sales**	**Source of the Division's confirmed exempt sales**		**Foxcroft's proposed exempt sales adjustments**	**Source of Foxcroft's exempt sales**
4-30-04	$2,196.00	0	Shemin		$2,196.00	Shemin and 10350
4-30-04					$10,000.00	Horticultural and 10900
5-6-04					$10,000.00	Horticultural and 10350
5-14-04					$10,000.00	Horticultural and 10350
5-14-04	$4,480.00	0	Shemin		$4,480.00	Shemin and 10350

[7] Petitioner hired a computer expert to extract as much information as possible from petitioners' computers after he learned of the missing records in 2006 and the alleged embezzlement by his comptroller. Although incomplete, these accounts show income earned by Foxcroft on the dates noted.

Date	Division's Schedule of Foxcroft's confirmed exempt sales	Division's actual adjustments to Foxcroft's total sales	Source of the Division's confirmed exempt sales		Foxcroft's proposed exempt sales adjustments	Source of Foxcroft's exempt sales
5-14-04	$5,472.00	0	Northeast and 10350		$5,472.00	Northeast and 10350
Total 3-1-04 to 5-31-04	**$12,148.00**	**0**			**$42,148.00**	
6-4-04	$10,000.00	$10,000.00	Horticultural		$10,000.00	Horticultural
6-10-04	$5,350.00	$5,350.00	Shemin		$5,350.00	Shemin
6-14-04	$20,000.00	$20,000.00	Horticultural		$20,000.00	Horticultural
6-25-04	$8,047.80	$8,047.80	Northeast and 10900		$8,047.80	Northeast and 10900
6-30-04	$43,558.30	$43,558.30	Horticultural		$43,558.30	Horticultural and 10900
6-30-04	$3,338.00	$3,338.00	Shemin and 10350		$3,338.00	Shemin and 10350
6-30-04					$40,125.00	Horticultural and 10350
7-2-04	$35,928.00	$35,928.00	Horticultural		$35,928.00	Horticultural and 10300
7-7-04	$10,788.00	$10,788.00	Horticultural		$10,788.00	Horticultural
7-14-04	$5,708.00	$5,708.00	Horticultural		$5,708.00	Horticultural
7-14-04	$13,806.80	$13,806.80	Horticultural		$13,806.80	Horticultural
7-22-04	$22,493.72	$22,493.72	Horticultural		$22,493.72	Horticultural
7-22-04	$10,419.60	$10,419.60	Horticultural		$10,419.60	Horticultural
7-31-04	$18,049.00	$18,049.00	Horticultural		$18,049.00	Horticultural and 10300

Date	Division's Schedule of Foxcroft's confirmed exempt sales	Division's actual adjustments to Foxcroft's total sales	Source of the Division's confirmed exempt sales		Foxcroft's proposed exempt sales adjustments	Source of Foxcroft's exempt sales
7-31-04	$5,539.00	$5,539.00	Shemin		$5,539.00	Shemin and 10300
8-4-04	$2,900.00	$2,900.00	Horticultural		$2,900.00	Horticultural
8-15-04	$4,260.35	$4,260.35	Horticultural		$4,260.35	Horticultural and 10300
Total 6-1-04 to 8-31-04	**$220,186.57**	**$220,186.57**			**$260,311.57**	
10-13-04					$8,154.00	Horticultural and 10300
11-15-04					$18,080.80	Horticultural and 10300
11-26-04					$1,750.00	Horticultural and 10300
Total 9-1-04 to 11-30-04	**0**	**0**			**$27,984.80**	
12-8-04					$8,675.00	Horticultural and 10300
12-31-04					$94,897.15	Horticultural and 10300
12-31-04					$5,539.00	Shemin and 10300
1-1-05	$15,818.40	0	Horticultural		$15,818.40	Horticultural
1-9-05	$10,730.00	0	Horticultural		$10,730.00	Horticultural
2-7-05	$25,000.00	0	Horticultural		$25,000.00	Horticultural

Date	Division's Schedule of Foxcroft's confirmed exempt sales	Division's actual adjustments to Foxcroft's total sales	Source of the Division's confirmed exempt sales		Foxcroft's proposed exempt sales adjustments	Source of Foxcroft's exempt sales
2-24-05					$352.50	Shemin
Total 12-1-04 to 2-28-05	**$51,548.40**	**0**			**$161,012.05**	
4-21-05	$24,975.00	$24,975.00	Horticultural		$24,975.00	Horticultural
5-8-05	$6,288.00	$6,288.00	Horticultural		$6,288.00	Horticultural
5-14-04	$27,033.60	$27,033.60	Horticultural		$27,033.60	Horticultural
5-18-04	$14,572.00	$14,572.00	Horticultural		$14,572.00	Horticultural
5-20-04	$11,685.00	$11,685.00	Horticultural		$11,685.00	Horticultural
5-27-05	$4,279.00	$4,279.00	Horticultural		$4,279.00	Horticultural
5-29-05	$15,714.00	$15,714.00	Horticultural		$15,714.00	Horticultural
Total 3-1-05 to 5-31-04	**$104,546.60**	**$104,546.60**			**$104,546.60**	
6-1-05	$8,220.00	$8,220.00	Horticultural		$8,220.00	Horticultural
6-11-04	$12,733.00	$12,733.00	Horticultural		$12,733.00	Horticultural
6-11-04	23,283.00	23,283.00	Horticultural		23,283.00	Horticultural
7-11-05	6,718.00	6,718.00	Horticultural		6,718.00	Horticultural
8-5-05	$1,555.75	$1,555.75	Horticultural		$1,555.75	Horticultural
8-31-05	$11,334.75	$11,334.75	Horticultural		$11,334.75	Horticultural
Total 6-1-05 to 8-31-05	**$63,844.50**	**$63,844.50**			**$63,844.50**	

Date	Division's Schedule of Foxcroft's confirmed exempt sales	Division's actual adjustments to Foxcroft's total sales	Source of the Division's confirmed exempt sales		Foxcroft's proposed exempt sales adjustments	Source of Foxcroft's exempt sales
10-7-05	$10,412.00	$10,412.00	Horticultural		$10,412.00	Horticultural
10-27-05	$13,686.35	$13,686.35	Horticultural		$13,686.35	Horticultural
11-3-05	$3,930.00	$3,930.00	Horticultural		$3,930.00	Horticultural
11-4-05	$3,658.80	$3,658.80	Horticultural		$3,658.80	Horticultural
11-9-05	$5,052.45	$5,052.45	Horticultural		$5,052.45	Horticultural
11-18-05	$15,734.00	$15,734.00	Horticultural		$15,734.00	Horticultural
11-21-05	$1,802.00	$1,802.00	Horticultural		$1,802.00	Horticultural
Total 9-1-05 TO 11-30-05	**$54,275.60**	**$54,275.60**			**$54,275.60**	
Total Adjust-ment to sales		**$442,853.27**			**$714,123.12**	
Total Adjust-ment to tax @8%		**$35,428.26**			**$57,129.85**	

31. Petitioners filed a FOIL request dated December 28, 2009 requesting, in pertinent part, the following documents:

> 1. All documents, internal and external communication within the NYS Taxation of finance office as to how and who selects the companies and individuals to be held accountable for this proceeding; Please provide all emails,

> meeting minutes, audio or video tapes, voicemails, work papers, phone messages, letters and any other forms of communication for this case.

In addition, the FOIL request sought all forms of communication with the conciliation conferee, Lori Chapones, David Sutton (petitioner's brother), Mark Ryan, CPA, between the Office of Counsel and the auditor in this matter, between the Office of Counsel and petitioners, all inter- and intra-agency communication concerning petitioners and all internal notes or work papers that the Division has developed in this matter.

32. Prior to the hearing that took place before the Division of Tax Appeals concerning this matter, on February 11, 2010, petitioner filed an order to show cause before the New York State Supreme Court, Rensselaer County, requesting a temporary restraining order to halt the scheduled administrative hearing before the Division of Tax Appeals, and to grant a permanent injunction, naming Lori Chapones as a responsible person under the Tax Law, on the basis that the Division was proceeding against petitioner unlawfully by failing to name Lori Chapones as a responsible officer. In the order to show cause, petitioner set forth the duties of Ms. Chapones with respect to the corporate petitioners.

33. The New York State Supreme Court decision and order issued by Judge Christian F. Hummel, Acting Supreme Court Justice, on March 30, 2010 dismissed petitioner's order to show cause as procedurally defective, since there was no civil action pending in Supreme Court. Thus, petitioner could not be granted injunctive relief. The decision added that, even if the order to show cause was deemed an Article 78 proceeding (which the Court was not so inclined to do) the proceeding would be dismissed for petitioner's failure to exhaust administrative remedies, and failure to state a cause of action upon which relief could be granted. The Court also stated that in a properly filed Article 78 proceeding, if the Tax Appeals Tribunal refused to recognize Lori Chapones as a responsible person under the Tax Law, and the issue was properly preserved for

the Court's review, a determination would be made as to whether such refusal had a rational basis and was not arbitrary or capricious, or outside the scope of the Tribunal's jurisdiction.

SUMMARY OF THE PARTIES' POSITIONS

34. Petitioners assert that the Division has employed a methodology in this case to calculate taxes that cannot be supported by its own audit procedures or the law in this area, and is neither rational nor consistent. Petitioners make the following arguments:

(a.) Case law does not support the use of income and expenses from a full year federal tax return and apply it to one quarter of the same year.

(b.) The Division's test period occurs outside the audit period and attempts to convert an entire year's income into one quarter of the year.

(c.) The methodology used has statute of limitations problems.

(d.) That Lori Chapones, the former comptroller, should be named as a responsible person under the Tax Law for the tax asserted herein, and the Division has not come forward with a viable explanation as to why she has not been named as such.

(e.) The Division has obstructed the proceedings herein by not producing the General Audit Guidelines until after the examination of Ms. Chapones, and not producing other forms at any time during the proceedings.

(f.) The Division's auditor intentionally misrepresented the facts and law while under oath and did not pursue the information petitioners claim was available from the New York State Police.

(g.) Petitioners have been prejudiced by the Division for its failure to allow any credits against the assessments, despite petitioners' production of exempt certificates and resale certificates from vendors.

35. The Division maintains that petitioners failed to produce sufficient books and records, allowing the Division to choose an audit methodology to estimate the sales tax due. The Division argues that the methodology it chose was a reasonable one, and that petitioners have not carried their burden of proving by clear and convincing evidence that the assessment is erroneous.

The Division also asserts that petitioner is the responsible person for the three corporate petitioners. The Division argues that given the information it had acquired during the audit and thereafter, it did not believe there was sufficient evidence to name Ms. Chapones a responsible person under the Tax Law, and it has chosen not to name her as such.

Lastly, the Division states that petitioners have failed to show reasonable cause for the abatement of penalties.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every "retail sale" of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A "retail sale" is "[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101[b][4][i][A]). Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, "or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by [the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ." When acting pursuant to section 1138(a)(1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (***see Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003).

B. The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of Your Own Choice, Inc***., as follows:

> To determine the adequacy of a taxpayer's records, the Division must first request ***(Matter of Christ Cella, Inc. v. State Tax Commn.***, [102 AD2d 352, 477 NYS2d 858]) and thoroughly examine (***Matter of King Crab Rest. v. Chu***, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (***Matter of Giordano v. State Tax Commn.***, 145 AD2d 726, 535 NYS2d 255; ***Matter of Urban Liqs. v. State Tax Commn.***, 90 AD2d 576, 456 NYS2d 138; ***Matter of Meyer v. State Tax Commn.***, 61 AD2d 223, 402 NYS2d 74, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025; ***see also***, ***Matter of Hennekens v. State Tax Commn.***, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is "virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit" (***Matter of Chartair, Inc. v. State Tax Commn.***, 65 AD2d 44, 411 NYS2d 41, 43; ***Matter of Christ Cella, Inc. v. State Tax Commn.***, ***supra***), "from which the exact amount of tax due can be determined" (***Matter of Mohawk Airlines v. Tully***, 75 AD2d 249, 429 NYS2d 759, 760).
>
> Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (***Matter of Urban Liqs. v. State Tax Commn.***, ***supra***). The estimate methodology utilized must be reasonably calculated to reflect taxes due (***Matter of W.T. Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (***Matter of Scarpulla v. State Tax Commn.***, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (***Matter of Surface Line Operators Fraternal Organization. v. Tully***, 85 AD2d 858, 446 NYS2d 451; ***Matter of Cousins Serv. Station***, Tax Appeals Tribunal, August 11, 1988). In addition, "[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case" (***Matter of Grecian Sq. v. Tax Commn.***, 119 AD2d 948, 501 NYS2d 219, 221).

C. There is no doubt that the Division made an adequate request for all of petitioners' records related to their sales tax liabilities for the entire audit period, March 1, 2004 through February 28, 2007. In fact, after receiving no response from the first request, the Division's

auditor made a second written request, again setting forth all the records needed to perform a detailed audit. The auditor received no records and had no direct communication with petitioner concerning the three businesses. Having placed petitioners on notice of his intention to assess them, using the federal income tax returns of Crow, Pine Valley and Foxcroft, the only information available to the auditor, he calculated sales and use taxes due for each company, and assessed petitioner as the responsible officer of all the companies. Although some of the arguments presented by petitioners overlap and apply equally to each of the assessments, petitioners also take issue with different nuances of each of the assessments. Accordingly, petitioners' objections to the assessments for each company are addressed separately in the conclusions that follow.

Crow & Sutton

D. The Division was well within its power to utilize an estimate to calculate an assessment due, and the auditor's use of the only records available, i.e. the federal returns, was rational. Without records, petitioners were unable to establish whether sales tax had been collected and paid on sales and purchases that may have been subject to tax. However, the manner in which the sales from the federal returns were used resulted in a calculation of Crow's tax liability that arguably was not reasonable. As set forth in the facts, Crow's assessment is based on income and certain purchases reported on two corporate income tax returns: one covering the period July 1, 2003 through June 30, 2004, and the second covering the period July 1, 2004 through June 30, 2005. Petitioners take issue with the Division's use of the entire fiscal period of the first return, since eight months of that fiscal period occurred before the commencement of the audit period on March 1, 2004. The Division's auditor used the entire year because he had no records to determine when the income was earned or purchases were made, admitting that some of the assessments could be barred by the statute of limitations had records been available.

Beyond the common knowledge that landscaping businesses generally operate at least nine months of the year in the Northeast, by the conclusion of the hearing, other facts were also known from which the auditor could have reached a different conclusion concerning the assessment calculations. The three companies operated in tandem, with Foxcroft supplying nursery products to Crow and Pine Valley. Foxcroft's assessment was calculated for the same single quarter in 2004, but assessed for three quarters of 2005, on the basis of wage reporting by Foxcroft obtained from the Division's own records for 2005, which was used to arrive at calculated sales income. The October 2006 New York State Department of Labor hearing involving all three corporate petitioners revealed that the comptroller and other employees worked "winter hours," which they accrued and for which they were paid at some later time. In addition, it was also established by vendor records that Foxcroft collected revenue in January and February 2005, indicating business activity during winter months. Given the information presented about petitioners' operations, a more reasonable calculation using the federal returns would have been to utilize only a portion of the 2003 return, excluding income likely to have been earned in large part before the audit period. Simply stated, a more reasonable calculation would have been for the auditor to allocate the income pro-rata over 12 months.

Once the auditor calculated the sales tax on income and the use tax on purchases, he then created an assessment for one quarter only, June 1, 2004 to August 31, 2004, even though the returns covered a two-year period. The auditor's reasoning for assessing only one quarter was that since Crow was a landscaping company, all of the work must have been done in the summer months, June, July and August, an assumption that was flawed. Equally arbitrary was the auditor's decision to place all the reported income from July 1, 2003 through June 30, 2005 in the one quarter ended August 31, 2004. Petitioner argues it is improper to assign an entire year's income, or in this case two years, to one quarter.

The auditor's creation of a seasonal three months for the actual assessment was inconsistent with the income he included for two fiscal periods, and completely arbitrary. At the very least, for consistency, he should have allocated out income earned, as estimated from those same three months, from the previous year that occurred before the audit period. Petitioners argue that the one quarter assessment left them confused and unprepared to defend. It is well established, however, that if the errors in the statutory notice did not prejudice the taxpayer's ability to effectively challenge the notice, it should not be voided (***see Matter of Pepsico v. Bouchard***, 102 AD2d 1000, 477 NYS2d 892 [1984]). Here, petitioners had notice from two appointment letters that the audit period ranged from March 1, 2004 through February 28, 2007. The Division's counsel provided petitioners with all pertinent documents relating to the assessments prior to the hearing. Before the hearing, petitioners had opportunities to request further explanation of the assessment calculations. Accordingly, the unreasonable assumptions do not rise to the level of prejudice that would prevent petitioners from presenting an effective challenge. However, the facts concerning the companies' operations along with the auditor's flawed assumptions, taken together, are sufficient to support an adjustment in the mathematics of the assessment calculation and the quarters assessed. Case law has determined that such adjustments are appropriate where supported by testimony and evidence (***Matter of Vebol Edibles, Inc.,*** Tax Appeals Tribunal, January 12, 1989; ***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023; 388 NYS2d 176 [1976], ***affd*** 44 NY2d 684, 405 NYS2d 454 [1978]). In accordance with the discussion set forth, adjustments should be allowed to the calculation of Crow's assessment, along with an adjustment to the quarters actually assessed, as follows:

(a) The income earned for the period July 1, 2003 to June 30, 2004 ($98,885.00) should be divided pro-rata over the 12-month period. The first four months of the audit period falls within the period that Crow's income was reported on its federal income tax return. Thus, four months

of pro-rata income, from March 1, 2004 to June 30, 2004, or $32,961.67, will be the income assessed at 8%.

(b) The same pro-rata calculation should be applied to the expense purchases for the period July 1, 2003 to June 30, 2004 ($226,948.00), and only four months from that period ($75,649.33) should be included as subject to use tax of 8%.

(c) Three quarters (3 months out of 4 months) of the assessment for 4 months from (a) plus (b) will be assessed in the quarter March 1, 2004 to May 31, 2004; 1/4 will be added to the assessment calculated for June 1, 2004 to August 31, 2004.

(d) The gross sales and expense purchases that were extracted from Crow's return for the period July 1, 2004 through June 30, 2005 will be utilized in the assessment calculation without adjustment, and the assessment quarters will be adjusted to reflect a 12-month business, spanning four quarters.

(e) Interest and penalties as imposed will be recalculated from the revised quarters.

The following tables show the calculation of revised tax due and the allocation to the appropriate quarters:

Crow & Sutton	**Amounts per Form 1120, 7/1/03-6/30/04**	**Amounts per Form 1120, 7/1/04-6/30/05**	**Sales & Purchases within the audit period, 3/1/04-6/30/04 (4 months)**	**Sales & Purchases within the audit period, 7/1/04-6/30/05**	**Total Revised Sales & Purchases subject to sales tax**	**Revised Sales Tax Due @ 8%**
Sales	$98,885.00	$169,226.00	$32,961.67	$169,226.00	$202,187.66	$16,175.00
Purchases	$226,948.00	$334,781.00	$75,649.33	$334,781.00	$410,430.33	$32,834.43

Total revised assessment						**$49,009.44**

For purposes of the calculation of Crow's interest and penalties, the revised tax due shall be allocated to the sales tax quarters as follows:

Period	Sales	Tax on Sales @8%	Purchases	Tax on Purchases @8%	Total tax due on sales & purchases
3/1/04-5/31/04	$24,721.25 (a)	$1,977.70	$56,737.00 (b)	$4,538.96	**$6,516.66**
6/1/04-6/30/04	$8,240.42 (c)	$659.23	$18,912.33 (d)	$1,512.99	$2,172.22
7/1/04-8/31/04	$28,204.33 (e)	$2,256.35	$55,796.83 (f)	$4,463.75	$6,720.10
6/1/04-8/31/04					**$8,892.32**
9/1/04-11/30/04	$42,306.50 (g)	$3,384.52	$83,695.25 (h)	$6,695.62	**$10,080.14**
12/1/04-2/28/05	$42,306.50 (g)	$3,384.52	$83,695.25 (h)	$6,695.62	**$10,080.14**
3/1/05-5/30/05	$42,306.50 (g)	$3,384.52	$83,695.25 (h)	$6,695.62	**$10,080.14**
6/1/05-6/30/05	$14,102.17 (i)	$1,128.17	27,898.42 (j)	$2,231.87	$3,360.04
6/1/05-8/31/05					**$3,360.04**
Totals		**$16,175.01**		**$32,834.43**	**$49,009.44**

(a) $32,961.67 ÷ 4 x 3
(b) $75,649.33 ÷ 4 x 3
(c) $32,961.67 ÷ 4
(d) $75,649.33 ÷ 4
(e) $169,226.00 ÷ 12 x 2
(f) $55,796.83 ÷ 12 x 2
(g) $169,226.00 ÷ 12 x 3
(h) $334,781.00 ÷ 12 x 3
(i) $169,226.00 ÷ 12 x 1
(j) $334,781.00 ÷ 12 x 1

E. Another argument raised by petitioners was that the audit methodology raised statute of limitations problems. The income generated by Crow between July 1, 2003 and February 28, 2004, to the extent it was subject to sales tax, would have fallen in the annual sales tax filing year of March 1, 2003 to February 29, 2004, due March 20, 2004. The statute of limitations to assess for that annual period expired on March 20, 2007, and since the assessments were not issued until February 19, 2008, they would have been beyond the statute of limitations. The Division argued that without records, it was not known when the income was earned. However, pursuant to the discussion above, it is concluded that on the basis of arbitrary and inconsistent assumptions by the auditor, adjustments to the calculations should be made. By calculating the income earned by Crow for the fiscal year ending June 30, 2004 over a 12-month period pro-rata (Conclusion of Law D), any possible statute of limitations problems are eliminated. Income earned in the fiscal year ended June 30, 2004 commencing with the beginning of the audit period (March 1, 2004) falls within the annual sales tax reporting period March 1, 2004 through February 28, 2005. Three years from the March 20, 2005 filing due date is March 20, 2008. Since the notice was issued on February 19, 2008, there is no statute of limitations violation. Accordingly, this argument is rejected.

Pine Valley

F. The assessment for Pine Valley was determined using sales and purchases for calendar year 2004, as reported on its federal income tax return for that year. As with Crow, the Division was well within its power to utilize an estimate to calculate an assessment due, and the auditor's use of the only records available, i.e., the federal returns, was rational. Without records, petitioners were unable to establish whether sales tax had been collected and paid on sales and purchases that

may have been subject to tax. However, the "seasonal income" assumption which led the auditor to assess only one quarter was an arbitrary one, as previously discussed, and should be adjusted.

G. After the hearing the Division made adjustments to the assessment against Pine Valley as described in Findings of Fact 27 and 28 ($8,697.52 and $10,284.03), having deemed certain receipts as exempt sales, not subject to sales tax. In Finding of Fact 29, another payment is described as being deemed an exempt sale, for which no corresponding adjustment was made, since the payment was made on a date (May 30, 2004) outside the quarter that was assessed (June 1, 2004 to August 31, 2004), even though the payment fell within the audit period. Since it has been determined above that the auditor's decision that all the income be assessed in the quarter ending August 31, 2004 was an arbitrary one, and that the assessment should be divided into the sales tax quarters that fell within the audit period, the Rifenburg payment in the amount of $35,306.70 is accepted as a confirmed exempt sale, and should result in a reduction of the tax assessed. This is consistent with the Division's adjustments permitted for the payments from William H. Lane and Malone and Tate. Accordingly, the revised tax for the period ending May 31, 2004 in the table found below equals $44,429.64 ($47,254.18 less [$35,306.70 x 8%]). Any interest and penalties imposed will also be reduced.

The tax assessed for 2004 ($189,016.72) as adjusted shall be divided into the following quarters:

Quarter	**# of months from 2004 sales and purchases included in the quarter**	**Tax as calculated by auditor, with revised allocations per quarter**
12/1/03-2/29/04	2	$31,502.79
3/1/04-5/31/04	3	$44,429.64

6/1/04-8/31/04	3	$28,272.63[8]
9/1/04-11/30/04	3	$47,254.18
12/1/04-2/28/05	1	$15,751.39
TOTAL		**$189,016.72**

Foxcroft

H. The assessment for Foxcroft was determined using sales and purchases for calendar year 2004, as reported on its federal income tax returns for that year. For 2005, sales were calculated based upon a wages as a percentage of sales computation, as set forth in Finding of Fact 20. As with Crow and Pine Valley's assessments, the Division was well within its power to utilize an estimate to calculate an assessment due, and the auditor's use of the records available, i.e., the federal returns and wage information, was rational. Without records, petitioners were unable to establish whether sales tax had been collected and paid on sales and purchases that may have been subject to tax. However, the "seasonal income" assumption which led the auditor to assess only one quarter was an arbitrary one, as previously discussed, and should be adjusted.

Specific to Foxcroft, the Division made post-hearing adjustments to the assessment on the basis of documentation and testimony provided during the hearing. Those adjustments were substantiated predominantly by vendor information and tax exempt or resale information provided by Horticultural, Shemin and Northeast. However, the Division also made adjustments, though selectively and without explanation, for those vendor payments shown on petitioners' resurrected computer records that came from Horticultural, Shemin or Northeast, but were not separately substantiated by the vendors. Foxcroft maintains that it should be given credit for all the payments it received from all the landscapers and nurseries, including those who did not answer their

[8]($189,016.72 ÷ 12 x 3) less ($8,697.52 + $10,284.03)

subpoenas or other requests to verify that the nursery products were resold, sold and delivered outside New York, or otherwise tax exempt.

The payments received from landscape companies and nurseries other than Horticultural, Shemin and Northeast were not accompanied by independent verification of the type of business transactions they had with Foxcroft, or statements of payments to the company. Therefore, Foxcroft will not be given credit for those receipts as tax exempt. However, consistent with the Division's adjustments, and a reduction in sales tax due in the amount of $35,428.26, Foxcroft should be given credit for the other payments it received from Horticultural, Shemin and Northeast, as set forth in the table in Finding of Fact 30, as confirmed exempt sales. Accordingly, the following adjustments should be made to Foxcroft's assessment:

(a) Tax on 2004 gross sales of $1,886,579.00 ($150,926.32) plus the tax assessed on expense purchases in amount of $9,883.92, for a total of $160,810.24 shall be assessed and divided into quarters as set forth in the table below.

(b) Referring to Foxcroft's proposed adjustments that relate only to payments from Horticultural, Shemin and Northeast (Finding of Fact 30), those that fall into quarters ending in 2004 shall also be deemed exempt sales and the adjustments applied accordingly: a $42,148.00, $260,311.57 and $27,984.80 reduction in taxable sales for quarters ending May 31, 2004, August 31, 2004 and November 30, 2004, respectively, in place of the corresponding $12,148.00, $220,186.57 and zero adjustments made by the Division for the same respective periods (***see*** Finding of Fact 30). The corresponding tax reductions are set forth in the table below.

(c) Foxcroft's 2005 gross sales, computed as a percentage of wages, was $636,592.47, resulting in sales tax of $50,927.40. This amount should be assessed pro-rata over the quarters as set forth in the table below.

(d) Referring again to Foxcroft's proposed adjustments that relate only to payments from Horticultural, Shemin and Northeast (Finding of Fact 30), those that fall into quarters ending in 2005 shall also be deemed exempt sales and the adjustments applied accordingly: a $161,012.05, $104,546.60, $63,844.50 and $54,275.60 reduction in taxable sales for quarters ending February 28, 2005, May 31, 2005, August 31, 2005 and November 30, 2005, respectively. The deemed exempt sales of $161,012.05 for the quarter ending February 28, 2005 will replace the Division's allowance of $51,548.00. The remaining tax reductions will be shown in the table below in accordance with the adjustments made by the Division for the same respective periods after the hearing (***see*** Finding of Fact 30).

(e) Any interest and penalties imposed for the 2004 and 2005 assessments shall be revised in accordance with the quarters as now assessed in the table that follows.

Period	**# months of 2004/2005 sales/ purchases included**	**Revised sales tax allocation per quarters**	**Reduction to sales tax as allocated (Finding of Fact 30 adjustments)**	**Final revised sales tax and allocation to tax quarters**
1/1/04-2/29/04	2	$26,801.71 (a)		$26,801.71
12/1/03-2/29/04				**$26,801.71**
3/1/04-5/31/04	3	$40,202.56 (b)	$3,371.84 (d)	**$36,830.72**
6/1/04-8/31/04	3	$40,202.56 (b)	$20,824.93 (e)	**$19,377.63**
9/1/04-11/30/04	3	$40,202.56 (b)	$2,238.78 (f)	**$37,963.78**
12/1/04-12/30/04	1	$13,400.85 (c)	$4,293.65 (g)	
2004 Totals		**$160,810.24**	**$30,729.20**	

1/1/05-2/28/05	2	$8,487.90 (h)	$8,587.31 (l)	
12/1/04-2/28/05		$21,888.75 (i)	$12,880.96 (m)	**$9,007.79 (r)**
3/1/05-5/31/05	3	$12,731.85 (j)	$8,363.73 (n)	**$4,368.12**
6/1/05-8/31/05	3	$12,731.85 (j)	$5,107.56 (o)	**$7,624.29**
9/1/05-11/30/05	3	$12,731.85 (j)	$4,342.05 (p)	**$8,389.80**
12/1/05-12/31/05	1	$4,243.95 (k)		**$4,4243.95**
Subtotal		**$50,927.40**	**$26,400.65 (q)**	
Total Assessment		**$211,737.64**	**$57,129.85 (s)**	**$154,607.79**

(a) $160,810.24 ÷ 12 x 2
(b) $160,810.24 ÷ 12 x 3
(c) $160,810.24 ÷ 12 x 1
(d) $42,148.00 x 8%
(e) $260,311.57 x 8%
(f) $27984.80 x 8%
(g) $161,012.05 x 8% x 1/3
(h) $50,927.40 ÷ 12 x 2
(i) (c) plus (h)
(j) $50,927.40 ÷ 12 x 3
(k) $50,927.40 ÷ 12 x 1
(l) $161,012.05 x 8% x 2/3
(m) (g) plus (l)
(n) $104,546.60 x 8%
(o) $63,844.50 x 8%
(p) $54,275.60 x 8%
(q) l+n+o+p
(r) [(c) + (h)] - [(g) + (l)]
(s) $714,123.12 x 8%

I. Tax Law § 1133(a) provides that:

> [E]very person required to collect any tax imposed by [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article . . . .

Tax Law § 1131(1), in turn, defines "persons required to collect tax" as follows:

> [E]very vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of [article 28]; and any member of a partnership . . . .

The determination of whether an individual is a person under a duty to act for a business is based upon a close examination of the particular facts of the case (***see Matter of Cohen v. State Tax Commn.***, 128 AD2d 1022 [1987]; ***Matter of Stacy v. State***, 82 Misc 2d 181 [1975]; ***Matter of Chevlowe v. Koerner***, 95 Misc 2d 388, 407 NYS2d 427 [1978]; ***Matter of Hall***, Tax Appeals Tribunal, March 22, 1990, ***confirmed*** 176 AD2d 1006 [1991]; ***Matter of Martin***, Tax Appeals Tribunal, July 20, 1989, ***confirmed*** 162 AD2d 890 [1990]; ***Matter of Autex Corp.***, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (***see*** 20 NYCRR 526.11[b][2]). As summarized previously in ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990):

> [t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (***Cohen v. State Tax Commn.***, ***supra***, 513 NYS2d 564, 565; ***Blodnick v. State Tax Commn.***, 124 AD2d 437, 507 NYS2d 536, 538, ***appeal dismissed*** 69 NY2d 822, 513 NYS2d 1027; ***Vogel v. New York State Dept. of Taxation & Fin.***, ***supra***, 413

NYS2d 862, 865; ***Chevlowe v. Koerner***, 95 Misc2d 388, 407 NYS2d 427, 429; ***Matter of William D. Barton***, ***supra***; ***Matter of William F. Martin***, ***supra***; ***Matter of Autex Corp.***, ***supra***).

The issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporations to be considered a person under a duty to collect and remit the unpaid taxes in question (***see Matter of Constantino***; ***Matter of Chin***, Tax Appeals Tribunal, December 20, 1990). In order to prevail, "petitioner was required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own [citations omitted]" (***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998).

The Division asserts that petitioner is the responsible person for the three corporate petitioners and has assessed him accordingly. Crow and Foxcroft were owned 100% and 75%, respectively, by petitioner during the years in issue. Pine Valley was the only company not owned by petitioner during the years in issue. However, petitioner's testimony during the hearing was most revealing as to his involvement with each of the companies he created. Mr. Sutton handled the day-to-day operations of each of the companies and, although he hired office and field managers, he made all the key decisions as to hiring and firing, how the business would be expanded, and the direction that each business would take. The fact that he delegated certain responsibilities to a comptroller and foreman who may have neglected to perform the jobs they were hired to do, or worse, as accused, does not alleviate his own responsibility for the taxes as assessed. Petitioner is therefore deemed the responsible officer of Crow, Pine Valley and Foxcroft. The officer assessments will be adjusted in accordance with the revised corporate assessments set forth in Findings of Fact 27, 28 and 30, and Conclusions of Law D, F, G and H.

J. Concerning the responsible person status of Lori Chapones, petitioner made a motion before the Division of Tax Appeals dated June 21, 2010, to name Ms. Chapones as a responsible person in this matter. The Division of Taxation opposed the motion, asserting that the Division of Tax Appeals does not have the authority to name another party as responsible officer, and the Division of Taxation has simply chosen not to. The order, issued August 12, 2010, denied the motion on the basis that the Division of Tax Appeals lacks jurisdiction to name Ms. Chapones unless there is a pending assessment issued by the Division of Taxation that has been petitioned before the Division of Tax Appeals.

Although the Division's reasons were not given in the opposition to the motion, during the hearing of this matter, it was revealed that at the time the assessment was issued, the auditor did not have or believe he had, sufficient information about the employee status of Ms. Chapones, her involvement with petitioners, or documents implicating her responsibility. The auditor was informed by petitioner at the BCMS conference that he believed she should be held as a responsible person; however, the auditor did not believe the documents he possessed would substantiate the claim. The fact remains, however, that the Division of Tax Appeals does not have jurisdiction to name Ms. Chapones as a responsible officer in this matter, and her status as a responsible person is not further addressed.

K. Petitioners accuse the auditor of intentionally misrepresenting the law and facts under oath. A complete review of the record indicates that this argument is without merit. Petitioners were not always provided with the response they wanted or the information they were seeking. At times, although the auditor's testimony seemed evasive, I have concluded that he reached a level of frustration with petitioners that may have been misunderstood. As pro se litigants, petitioners may not attach the same meaning to terms used by the auditor. Petitioners believed

they were misinformed about certain facts based upon what they perceived were unclear answers and misrepresentations by the auditor. However, corrections or clarifications were made by both counsel for the Division and the administrative law judge during the proceeding to assist petitioners in their understanding of the testimony presented. What petitioners might have viewed as misrepresentations by the auditor were simply nonexistent, and where testimony was seemingly unclear, it was not intentional.

L. Petitioners also argue that the general audit guidelines were withheld from them, obstructing the proceedings herein and creating an additional challenge to petitioners' presentation of their case, particularly with reference to naming Ms. Chapones. At the hearing on May 6, 2010, during petitioners' cross examination of the auditor, it was revealed that for guidance, certain manuals or guidelines are commonly referred to by auditors and certain criteria used as a means to assess a particular situation with respect to officer status. Petitioners had asked for such information in their FOIL request, and had not received the same. Petitioners assert this has greatly hindered their ability to adequately present their case.

The purpose of the Freedom of Information Law is to promote people's right to know the process of governmental decision making, and it is well established that the law must be liberally construed to grant maximum public access to governmental records (***Matter of Lucas v. Pastor,*** 117 AD2d 736, 498 NYS2d 461 [1986]). Petitioners' FOIL request clearly made a request for the kind of information that would have revealed the audit guidelines ultimately sought, and such request was not fulfilled. The question becomes, to what degree were petitioners prejudiced in their defense given the delay in receiving this information.

Petitioners' FOIL request was made on December 28, 2009, seven months after the case was scheduled for the first prehearing conference call. The hearing commenced on May 5, 2010,

and after a continuation, was concluded August 25, 2010. Pursuant to the instruction of the administrative law judge, after the conclusion of the hearing on May 6, 2010, on or about May 21, 2010, the Division provided petitioners with the New York State General Audit Guidelines regarding responsible person assessments. The guidelines were not provided until after many questions were posed to the auditor at the hearing. The information provided by the guidelines largely references existing case law in the responsible person area, as well as tax law and regulations that govern such decisions by the Division. There is very little that petitioners could not have accessed elsewhere. Although it not acceptable to have a portion of a FOIL request for specific documents ignored without some explanation, petitioners had adequate time after the receipt of the information to clarify their position, recall any witnesses, or otherwise prepare an adequate defense on this issue, before the hearing was ultimately concluded. It is also noted, that any discrepancies such as this one, brought forth during the hearing, were met with the administrative law judge's offer to continue the matter to rectify the issue. No such continuance was sought by petitioners. Accordingly, this argument will have no affect on the outcome of this matter.

M. Petitioners informed the Division that the New York State Police investigation had been commenced, at least by the time of the BCMS conference, and gave the Division contact information for them to verify the issue of missing records, the status of the pending investigation against Ms. Chapones and Mr. Squires, and additional information that would be needed to verify her status as a responsible officer. Petitioners believed an update would shed a great deal of light on the manner in which the instant case unfolded and maintain that the Division had a duty to pursue the information petitioners were providing in support of their case.

However, the auditor did not take any action to obtain additional information that may have assisted him in this case.

Petitioners have the burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (***see Matter of Your Own Choice, Inc.***). Since the onus is on petitioners, not the Division, to present sufficiently credible evidence that carries their burden, petitioners' assertion that an affirmative duty to investigate leads to information offered by petitioners should be imposed upon the Division would, in effect, permit petitioners to avoid the consequences of having failed in the first instance to satisfy their burden of proof (***Matter of Sholly & Hawk Dove Restaurant***, Tax Appeals Tribunal, January 11, 1990). Any information that might have been revealed by such investigation on the part of the Division was simply required to be brought forth by petitioners and was not the duty of the Division. Petitioners' due process rights were ultimately met.

N. Pursuant to Tax Law § 1145(a)(1)(i), any person failing to timely file or pay sales or use tax "shall be subject to a penalty . . . ." This penalty may be canceled if the failure was "due to reasonable cause and not due to willful neglect . . . " (Tax Law § 1145[a][1][iii]; ***see also*** 20 NYCRR 2392.1[a][1]). Reasonable cause and the absence of willful neglect may be determined to exist only where the taxpayer has acted in good faith (***see*** 20 NYCRR 2392.1[g][1]).

In determining whether reasonable cause and good faith exist, the regulations provide several specific grounds and also a catchall, which provides for a finding of reasonable cause based upon any ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay, demonstrating an absence of willful neglect (20 NYCRR 2392.1[d][5]). The taxpayer bears the burden of establishing that its actions were based

upon reasonable cause and not willful neglect (***see Matter of Philip Morris***, Tax Appeals Tribunal, April 29, 1993; ***Matter of MCI Telecommunications Corp***., Tax Appeals Tribunal, January 16, 1992, ***confirmed*** 193 AD2d 978, 598 NYS2d 360 [1993]; 20 NYCRR 3000.15[d][5]).

Petitioners have not argued that penalties should be canceled or set forth sufficient evidence to meet this very heavy burden. Petitioners' misfortune with regard to missing records and possible embezzlement by employees leaves them in a near impossible position, but one that may have been avoided with greater due diligence in management and internal controls. Petitioners simply have not met the burden of proof necessary to abate penalties. Accordingly, penalties on the tax assessments as adjusted herein are sustained (***Matter of Rosemellia***, Tax Appeals Tribunal, March 12, 1992).

O. The final argument raised by petitioners concerning credits against the assessments is moot given the Division's post-hearing adjustments, reducing the assessments (Findings of Fact 27, 28 and 30).

P. The petitions of Crow and Sutton Associates, Inc., Pine Valley Landscape, Corp., Foxcroft Nurseries, Inc. and D. James Sutton are granted to the extent of the adjustments noted in Findings of Fact 27, 28 and 30, and adjustments further allowed pursuant to Conclusions of Law D, F, G, H and I, but are otherwise denied, and the notices of determination, except as so adjusted, are sustained.

DATED: Troy, New York
October 20, 2011

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE