STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

TITAN ELEVATOR & LIFT LLC :

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, 2003 through November 30, 2009. :

In the Matter of the Petition :

of :

MICHAEL ZUCKERMAN :

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, 2003 through November 30, 2009. :

In the Matter of the Petition :

of :

SHARI ZUCKERMAN :

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, 2003 through November 30, 2009. :

DECISION
DTA NOS. 825845, 825858 AND 825859

Petitioners, Titan Elevator & Lift, LLC, Michael Zuckerman and Shari Zuckerman, filed an exception to the determination of the Administrative Law Judge issued on September 1, 2016.

Petitioners appeared by Ken Novick, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Lori Antolick, Esq., of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument was heard on March 9, 2017, in New York, New York, which date began the six-month period for issuance of this decision.

After reviewing the entire record in the matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioners' purchases of elevator products that they sold and installed were subject to sales and use taxes.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact 1, which has been modified to more accurately reflect the record. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

1. Petitioner Titan Elevator & Lift, LLC (Titan) is a firm, located in East Setauket, New York, that engages in the purchase, sale, installation and servicing of elevators, stair lifts, wheel chair lifts, and dumbwaiters. The evidence in this proceeding pertains primarily to the elevator products. The elevators were limited rise, limited size, and limited access elevators. Some elevators are meant to hold just a wheelchair and possibly an attendant. The elevators were designed to go from just one landing to the next. They were installed in private residences and condominium buildings and were not designed or installed for any particular person. Titan was not registered as a sales tax vendor and never paid sales or compensating use taxes on the

purchase of the elevators or other products it installed.

2. On January 28, 2010, the Division of Taxation (Division) mailed a letter to petitioner Shari Zuckerman, as a partner of Titan, scheduling a field audit on February 19, 2010 for the period December 1, 2003 through November 30, 2009. The letter stated that Mrs. Zuckerman must show all of her sales and use tax books and records to the auditor. A schedule of books and records to be produced was attached to the letter. On April 7, 2010, the auditor sent a second request for records to Titan. On June 1, 2010, the auditor sent a letter to Titan's accountant requesting documentation for a review of sales for 2007.[1] Among other items, the auditor requested sales invoices, contracts, exemption documents, and invoices from a firm known as Federal Elevator to ascertain whether materials used on the job would be subject to sales tax. The auditor also requested purchase invoices, any other documentation pertaining to the acquisition or disposition of fixed assets and completed sales tax examination and responsible person questionnaires. Requests for documentation were also made on August 19, 2010, September 29, 2010, February 4, 2011, March 2, 2011, April 26, 2011 and December 29, 2011.

3. In response to the requests for records, the Division did not receive sales invoices or contracts for the years 2004 through 2006, 2008 and 2009. The Division was not provided with general ledgers for the years 2004, 2005 and 2006. Cash receipt journals were not made available for the years 2004, 2005 and 2009.

4. While reviewing documents in the office of Titan's accountant, the Division found letters, purportedly from Titan's customers, in the files of Titan's accountant stating that the

[1] Prior to sending the letter, which just asked for records for 2007, the auditor was at the office of Titan's accountant. During this encounter, the auditor explained that he was going to review sales and the accountant replied that he had sales records commencing in 2007. Consequently, the auditor asked for 2007.

elevators were purchased and installed for medical purposes in order to create accessibility in the home. These letters were disregarded because an investigator from the Division determined that in one instance, the letter was changed after the individual signed the letter and, in two other instances, the individuals whose names appear on the letters said that they never saw the letters.

5. Titan's records were not considered adequate to conduct a detailed audit of sales because of the limited records that were made available. In order to determine the amount of Titan's sales, the Division used Titan's income statements. For those years where the income statements were not available, the Division considered Titan's bank deposits to be sales with an adjustment to remove transfers between accounts.

6. Sales records were reviewed using a test period method. The year 2007 was selected as the test period because this was the only year for which Titan provided sales invoices. In a test of sales, the auditor found that 8.07% of the sales were for the service and maintenance of elevators and dumbwaiters. All service and maintenance sales were held to be taxable because the Division concluded that Titan did not adequately document that the elevators being serviced were for use by individuals with disabilities. The audited gross sales of $3,864,816.10 were multiplied by 8.07% to find audited taxable sales of $311,890.66. The audited taxable sales were then multiplied by the tax rate to determine that tax was due in the amount of $26,998.64.

7. The Division also conducted a review of expense purchases. The expense purchase records were deemed inadequate because purchase records, such as purchase invoices, were not provided for the years 2004, 2005, 2006, 2008 and 2009. General ledgers and cash disbursement journals were not made available for 2004 through 2006. Exemption documents were also not provided.

8. Expense purchases were examined using the year 2007 as the test period because this was the only year for which purchase invoices for elevators were made available. The Division determined that Titan was not paying sales tax on the purchases of elevators and dumbwaiters. Following a test of sales, the Division concluded that 85.03 percent of sales were capital improvement sales and 5.7 percent were dumbwaiter capital improvement sales. The percentages were applied to audited gross sales to calculate audited capital improvement sales of $3,506,547.65. The amount of purchases reported on the federal income tax returns was divided by the gross sales and this percentage was then multiplied by audited capital improvement sales to determine the materials subject to sales and use tax. Since sales tax was not paid or reported, Titan was assessed tax on all materials used for capital improvements for the entire audit period. Following its review, the Division determined that there were additional taxable purchases of $2,053,083.65 resulting in additional tax due of $177,724.06.

9. On May 7, 2012 and May 4, 2012, the Division sent notices of determination to Titan, Shari Zuckerman and Michael Zuckerman, respectively, which assessed sales and use taxes in the amount of $204,722.70 ($26,998.64 and $177,724.06) plus interest in the amount of $256,164.49 and penalties in the amount of $81,886.68 for a balance due of $542,773.87. Both statutory and omnibus penalties were imposed because the amount of tax due was more than 25 percent of what was reported. The notices issued to Shari Zuckerman and Michael Zuckerman stated that they were assessed as responsible officers or responsible persons of Titan.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge described the standard for reviewing a sales tax audit where an indirect audit methodology has been employed by the Division. He reviewed the

taxpayers' obligations to maintain records, the type of records and the manner in which they must be maintained (***see*** Tax Law §§ 1135 [a] [1], 1135 [g]; ***see also*** 20 NYCRR 533.2 [a] [2] and [b] [1]). He also reviewed the Division's responsibility to request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v Chu***, 134 AD2d 776 [3d Dept 1987], ***lv denied*** 71 NY2d 806 [1988]). The Administrative Law Judge found that the Division had made repeated written requests for books and records and that petitioners provided only a portion of the books and records requested. As such, he concluded that the Division was entitled to resort to the use of indirect methods to determine petitioners' sales and sales tax liability. The Administrative Law Judge then concluded that the method of audit was reasonable and, accordingly, that petitioners had 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.

The Administrative Law Judge also explained that petitioners have the burden of proving entitlement to an exemption from the imposition of sales taxes. He then questioned whether the presentation of industrial codes and letters from suppliers or manufacturers stating that the elevators that Titan purchased met those codes was sufficient to satisfy the burden of proving entitlement to an exemption from sales tax under Tax Law § 1115 (a) (3) and (4) and the corresponding administrative regulations, 20 NYCRR 528.4 and 528.5. The Administrative Law Judge concluded that petitioners did not submit sufficient documentation to overcome the rebuttable presumption that Titan's purchases were subject to sales tax. He also determined that petitioners had not sustained their 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.

With regard to penalties, the Administrative Law Judge concluded that the imposition of both statutory and omnibus penalties was proper because of petitioners' failure to maintain and provide proper records and the underreporting of tax due.

Finally, the Administrative Law Judge denied the request that Shari Zuckerman be accorded innocent spouse treatment since there is no provision in Articles 28 and 29 for innocent spouse relief and, in any event, petitioners did not offer any evidence to support such relief, even if such a provision existed.

SUMMARY OF ARGUMENTS ON EXCEPTION

On exception, petitioners continue to argue that Titan purchased, sold and installed products that are manufactured in accordance with construction and safety codes establishing them as for the use of persons with a disability. As such, petitioners argue that the products are exempt from sales tax under Tax Law § 1115 (a) (3) and (4). They argue that the products do not need to be designed for the use of a particular person to be exempt from tax and that no documentation from the end user is required to justify the exemption. Indeed, they argue that federal and state housing and discrimination laws would prohibit any inquiry into a person's disability. They argue that since they are not required to collect sales tax, they are not required to register as a vendor for sales tax purposes or to maintain records for sales tax purposes.

Petitioners further argue that the products were purchased for resale and that they are not materials used in construction and should not be taxable for that reason. Petitioners state that all of Titan's products become an integral part of the housing structure subsequent to installation, but that the installation of the products does not constitute a capital improvement. Petitioners claim that they provided all of the documentation requested by the Division and, generally, take exception to the audit methodology, the audit results and the imposition of penalties.

In its brief in opposition, the Division asserts that petitioners have failed to substantiate and support their claim that the purchase, sale and installation of elevators and dumbwaiters were exempt from sales tax. The Division claims that the industry safety and construction codes and the letters from suppliers provided by petitioners fail to satisfy their burden of proving entitlement to an exemption. The Division asserts that the letters from customers that were provided by petitioners failed to support petitioners' claims. The Division reiterates that petitioners were required, but failed, to keep adequate records of sales, including purchase receipts, sales invoices, contracts, memoranda, general ledgers, and cash receipt journals. Finally, the Division asserts that petitioners have not met their burden of proof to demonstrate that the failure to report and pay the required amount of sales tax was due to reasonable cause and not due to willful neglect. As such, the Division asserts that it was proper to assess penalties.

OPINION

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]." A "retail sale" is a "sale of tangible personal property to any person for any purpose" and includes "a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, . . . regardless of whether the tangible personal property is to be resold as such before it is so used or consumed . . ." (Tax Law § 1101 [b] [4] [i]).

It is presumed that all receipts for sales of tangible personal property are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable will be upon the person required to collect the tax or the customer (Tax Law § 1132 [c] [1]; ***Matter of***

Rizzo v Tax Appeals Trib. of State of N.Y., 210 AD2d 748 [3d Dept 1994]).

Petitioners' brief indicates that Titan sells and installs residential elevators, stair lifts, portable wheel chair lifts and dumbwaiters primarily in residences and condominiums. The record, however, does not include any documentary or testimonial evidence to fully describe the products and their use and function. Petitioners failed to distinguish, for example, the difference between stair lifts and elevators, which terms are used interchangeably in the record. Accordingly, we will proceed, as did the Administrative Law Judge, on the basis that the primary issue in these proceedings relates to elevator products. The issue here is thus whether Titan's purchase of elevator products that it sold and installed were subject to sales or use taxes under Articles 28 and 29 of the Tax Law. Petitioners claim that they were not required to pay tax on the purchase of the elevator products because all of the elevator products that Titan sold and installed were designed and manufactured for use by persons with a disability and, as such, were exempt from sales and use tax as medical equipment or prosthetic devices under either Tax Law § 1115 (a) (3) or (4).

The Audit Methodology

Initially, we review petitioners' assertion that all documentation requested by the Division was provided to it, thereby prohibiting the use of an estimated audit method. 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 [1984]) and thoroughly examine (***Matter of King Crab Rest. v Chu***, 134 AD2d 51 [1987]) the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v Chu***, 134 AD2d 776 [1987], ***lv denied***, 71 NY2d 806 [1988]). 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 [1988]; ***Matter of Urban Liqs. v State Tax Commn.***, 90 AD2d 576 [1982]; ***Matter of Meyer v State Tax Commn.***, 61 AD2d 223 [1978], ***lv denied*** 44 NY2d 645 [1978]; ***see also Matter of Hennekens v State Tax Commn. of State of N.Y.***, 114 AD2d 599 [1985]), 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, 46 [1978]; ***see also Matter of Christ Cella, Inc. v State Tax Commn.***), "from which the exact amount of tax due can be determined" (***Matter of Mohawk Airlines v Tully***, 75 AD2d 249, 251 [1980]).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to estimating the tax due (***Matter of Urban Liqs. v State Tax Commn.***). The estimate methodology utilized must be reasonably calculated to reflect taxes due (***Matter of W.T. Grant Co. v Joseph***, 2 NY2d 196 [1957] ***rearg denied*** 2 NY2d 992 [1957] ***cert denied*** 355 US 869 [1957]), but exactness in the outcome of the audit method is not required (***Matter of Markowitz v State Tax Commn.***, 54 AD2d 1023 [1976], ***affd*** 44 NY2d 684 [1978]; ***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 [1986]) or that the audit methodology is unreasonable (***Matter of Surface Line Operators Fraternal Org. v Tully***, 85 AD2d 858 [1981]; ***Matter of Cousins Serv. Sta.***, 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 New York State Tax Commn.***, 119 AD2d 948, 950 [1986]).

Petitioners contend on exception that the audit in its entirety was unlawful as it reviewed

and calculated tax on "exempt sales of exempt products." They claim that all records were available and that they provided everything that was requested by the Division's auditor. Petitioners claim that the auditor used the "maximum financial year as the test to maximize the fallacy of tax owed upon nontaxable products." They state they have been persecuted by an overly zealous Division staff who manufactured opinions based upon conjecture, non-truths and half-truths. We disagree with these contentions.

It is quite clear from the record that the Division requested a complete list of books and records for the entire audit period at the outset of the audit. On January 28, 2010, the Division mailed to petitioners a letter scheduling a field audit. A schedule of books and records to be produced was attached to the letter. Having received no records, the auditor sent a second request for records on April 7, 2010. On June 1, 2010, the auditor sent a letter to petitioners' accountant requesting documents for a review of sales for 2007, based on the accountant's statement that he had sales records commencing in 2007. After reviewing the records received for 2007, the Division determined that 2007 may not be a representative year and it, again, began requesting complete records for the full audit period, 2004 to 2009. In total, six additional requests for documentation were made between August 19, 2010 and December 29, 2011. Despite petitioners' claims that all records were available and provided, the Division did not receive sales invoices or contracts for the years 2004 through 2006, 2008 or 2009. General ledgers were not provided for years 2004, 2005 and 2006. Cash receipt journals were not made available for the years 2004, 2005 and 2009.

As the Division determined that the records were not adequate to conduct a detailed audit of sales because of the limited records that were made available, the Division used petitioners' income statements (when available) to determine the amount of petitioners' sales. Sales records

were reviewed using a test period method. The year 2007 was selected as the test period because it was the only year for which petitioners provided sales invoices. The Division also conducted a review of expense purchases using the year 2007 as the test period because of the lack of records provided for the other audit years.

As required, the Division requested records for the full audit period, reviewed the records presented, and correctly concluded that they were not adequate to do a detailed audit due to the lack of many source documents (***see Matter of Vebol Edibles v State of N.Y. Tax Appeals Trib.***, 162 AD2d 765 [1990], ***lv denied*** 77 NY2d 803 [1991]; ***Matter of Club Marakesh v Tax Commn. of State of N.Y.***, 151 AD2d 908 [1989], ***lv denied*** 74 NY2d 616 [1989]). As evidenced by both the documentary evidence and the auditor's hearing testimony, petitioners did not even come close to complying with the Division's document requests. The Division, therefore, properly resorted to estimating the tax (***Matter of Urban Liqs. v State Tax Commn.***) and the Administrative Law Judge correctly determined that the method of estimating sales tax was reasonable to determine the amount of tax due (***Matter of W.T. Grant Co. v Joseph***). Other than their bald assertions that all records requested were available and provided and their generalized complaints of unfairness, petitioners have submitted no evidence that the assessment was erroneous (***Matter of Scarpulla v State Tax Commn.***) or that the audit methodology was unreasonable (***Matter of Surface Line Operators Fraternal Org. v Tully***; ***Matter of Cousins Serv. Sta.***).

Medical Equipment or Prosthetic Device Exemptions

Petitioners' primary argument is that Titan's purchases and sales of elevators and other products were exempt from sales tax as medical equipment or prosthetic devices. Statutes creating a tax exemption are to be strictly and narrowly construed (***Matter of Blue Spruce Farms***

v New York State Tax Commn., 99 AD2d 867 [1984], ***affd*** 64 NY2d 682 [1984]; ***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193 [1975], ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]). In cases of statutory exemptions, the presumption is in the favor of the taxing authority and the burden of proving entitlement to an exemption rests with the taxpayer (***Dental Socy. of State of N.Y. v New York State Tax Commn.***, 110 AD2d 988, 989 [1985], ***affd*** 66 NY2d 939 [1985]). Petitioners must establish not only that their interpretation of the law is a plausible one but, also, that their interpretation of the law is the only reasonable construction (***see Matter of Blue Spruce Farms***; ***Matter of Lakeland Farms Co. v State Tax Commn.***, 40 AD2d 15 [1972]). Thus, unless the Division's regulation is shown to be irrational and inconsistent with the statute (***Matter of Slattery Assoc. v Tully***, 79 AD2d 761 [1980], ***affd*** 54 NY2d 711 [1981]) or erroneous (***Matter of Koner v Procaccino***, 39 NY2d 258 [1976], ***rearg denied*** 39 NY2d 943 [1976]), it should be upheld.

Tax Law § 1115 (a) provides in pertinent part that:

> "Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:
>
> (3) Drugs and medicine intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings, medical equipment (including component parts thereof) and supplies required for such use or to correct or alleviate physical incapacity . . ."

Medical equipment is defined in the tax regulations as:

> "machinery, apparatus and other devices (other than prosthetic aids, hearing aids, eyeglasses and artificial devices which qualify for exemption under section 1115[a][4] of the Tax Law), which are intended for use in the cure, mitigation, treatment or prevention of illnesses or diseases or the correction or alleviation of physical incapacity in human beings" (20 NYCRR 528.4 [e] [1]).

To qualify, such equipment must be primarily and customarily used for medical purposes

and not be generally useful in the absence of illness, injury, or physical incapacity (20 NYCRR 528.4 [e] [2]). The regulation lists examples of medical equipment that would qualify for the exemption, such as "hospital beds, wheel chairs, hemodialysis equipment, iron lungs, respirators, oxygen tents, crutches, back and neck braces, trusses, trapeze bars, walkers, inhalators, nebulizers and traction equipment . . ." (20 NYCRR 528.4 [e] [2]). Equipment that is nonmedical in nature and is generally useful in the absence of illness, injury or physical incapacity will not qualify for the exemption even though it may be used by a person to alleviate an illness (20 NYCRR 528.4 [e] [2] ["Example 2: A medical patient purchases an air conditioner to be used to lower air temperature to alleviate his illness. Since the air conditioner is nonmedical in nature, it is not exempt from the tax"]).

In order to qualify for the medical equipment exemption under Tax Law § 1115 (a) (3), petitioners were required to show that their elevators are "primarily and customarily *used* for medical purposes and [are] not generally *useful* in the absence of illness, injury, or physical incapacity" (20 NYCRR 528.4 [e] [2] [emphasis added]; ***Matter of Craftmatic Comfort Mfg. Corp. v New York State Tax Commn.***, 118 AD2d 995 [1986], [Yesawich, Jr., dissenting] ***revd based on dissenting opinion*** 69 NY2d 755 [1987]).

Elevators would generally not be considered medical equipment as elevators are not "primarily and customarily used for medical purposes" (20 NYCRR 528.4 [e] [2]). Furthermore, elevators are "generally useful in the absence of illness, injury or physical incapacity" (***id.***). Thus, by definition, the elevator products purchased by Titan are not medical equipment and do not qualify for the exemption set forth in Tax Law § 1115 (a) (3) (***see also*** TSB-A-97[17]S [elevators are not medical equipment and qualify as prosthetic devices only "when installed in a private residence for use by a disabled person"]). Furthermore, and as previously noted, the record is

bereft of any evidence tending to prove that the elevator products are not "generally useful in the absence of illness, injury or physical incapacity" (20 NYCRR 528.4 [e] [2]).

Petitioners assert that the products purchased, installed and serviced by Titan were designed and manufactured according to the requirements established by the American Society of Mechanical Engineers (ASME) for limited use, limited application elevators as described in ASME Standard 17.1, Chapter 5. In addition, petitioners assert that installation of their products complied with the International Code Council (ICC)/American National Standard Institute (ANSI) standard A117.1-2009 for elevators providing accessibility for persons with a disability in a residence. They provided letters from two manufacturers to confirm that all the elevators purchased by Titan were manufactured to the standards required for residential elevators to provide access for persons with a disability in a residence. Petitioners also point to a number of federal, state and local housing and disability rights laws that include standards for new construction and alteration of existing buildings regarding accessibility for persons with a disability and assert that their elevators comply with those standards and, therefore, qualify for the exemptions in sections 1115 (a) (3) or 1115 (a) (4).

Petitioners' evidence tending to prove that all of the elevator products purchased and installed by Titan were "primarily and customarily used for medical purposes" falls short of meeting their burden of proof on this issue. In any event, there is little, if any, proof in the record tending to show that the elevator products could not be utilized by persons without disabilities.

Tax Law § 1115 (a) also provides an exemption for:

> " (4) Prosthetic aids, hearing aids, eyeglasses and artificial devices and component parts thereof purchased to correct or alleviate physical incapacity in human beings."

The implementing regulations require that:

> "In order to qualify as a prosthetic aid, a hearing aid, eyeglasses or an artificial device, the property must either completely or partially replace a missing body part or the function of a permanently inoperative or permanently malfunctioning body part and must be primarily and customarily used for such purposes and not be generally useful in the absence of illness, injury or physical incapacity" (20 NYCRR 528.5 [b] [1]).

In support of their claim that their products should be exempt under Tax Law § 1115 (a) (4), petitioners point to the Division's Publication 822 ("Taxable Status of Medical Equipment and Supplies, Prosthetic Devices, and Related Items" [06/01]), which provides a list of prosthetic devices, the receipts from which are exempt from sales and use taxes. The list includes "Elevators (for use by a person with a disability in a residence)" and "Stairway elevators and lifts (for use by a person with a disability in a residence)."

The record shows that petitioners made no attempt when installing the elevators to inquire as to whether they were to be used for persons with a disability in a residence. They argue that they were not required (or permitted) by law to inquire as to whom was going to use the elevators. They believed that if the elevators were "designed for use" or "intended for use" by a person with a disability, that was sufficient to allow the exemption. Other than their general conclusory statements that their elevators were designed for persons with a disability, they provided no useful evidence in support of their claim that their elevators should be allowed the exemption under Tax Law § 1115 (a) (3). In response to the Division's audit, petitioners did obtain several form letters from customers stating that the elevators were "purchased and installed for medical purposes to create accessibility in the home." One of the letters produced by petitioners was signed by the manager of the Gardiner's Bay Country Club. Upon investigation, the manager stated to the Division's investigator that the elevator installed by Titan was installed to comply with the law but that it was generally used by patrons other than those with a disability.

In any event, a country club is not a residence. The Administrative Law Judge correctly discounted the usefulness of the letters since they are general in nature and the Division's investigation cast doubt on their authenticity and credibility. Furthermore, the Division found through investigation that petitioners installed elevators in at least two business locations that would have, presumably, allowed the businesses to comply with Americans for Disabilities Act (ADA) requirements for accessibility. In addition, one of the Titan's principals, petitioner Michael Zuckerman, testified at the hearing that Titan installed elevators in condominiums:

> "which according to federal law, must have a certain amount of accessible elevators to support people with disabilities in the condominiums. There is a certain percentage that must be installed so people with disabilities can access the second floor" (Hearing Transcript, p 89, lines 11-16).

Finally, petitioner, Michael Zuckerman, acknowledged that anybody can use one of its elevators even though they may be designed for use by persons with a disability and that Titan is not the "elevator police" (Hearing Transcript p 103, lines 4-23).

As stated above, the record includes no evidence that petitioners' elevators were installed in residences or condominiums for use by a specific person with a disability and they made no attempt to prove that their elevators were not "generally useful in the absence of illness, injury or physical incapacity." Petitioners argue that to obtain the exemption, the installation does not need to be for a specific person. Essentially, their argument is that any elevator installed in a residence or condominium should be exempt if it meets the manufacturing and installation guidelines for disabled-use elevators, which theirs did. The law, however, does not allow for an exemption simply because the elevator was *designed* for use by a person with a disability. To qualify as a prosthetic aid, a hearing aid, eyeglasses or an artificial device under Tax Law § 1115 (a) (4), "the property must either completely or partially replace a missing body part or the function of a

permanently inoperative or permanently malfunctioning body part and must be primarily and customarily *used* for such purposes and not be generally *useful* in the absence of illness, injury or physical incapacity" (20 NYCRR 528.5 (b) (1) [emphasis added]).

Petitioners contend that federal, state and local laws would have prohibited them from inquiring into a person's disability in order to qualify for the sales tax exemption. We find such contention unavailing. Petitioners produced a white paper on the laws protecting people with disabilities against housing discrimination, entitled: *Disability Housing Rights and Building Codes of New York,* written by the Committee on Legal Issues Affecting People with Disabilities. The paper concerns the different laws that protect the rights of people with disabilities in the course of the sale, rental and leasing of housing, none of which is an activity involved in this proceeding. We observe that a Department of Housing and Urban Development regulation does makes it unlawful to make an inquiry "to determine whether an applicant for a dwelling, a person intending to reside in that dwelling after it is so sold, rented or made available, or any person associated with that person has a handicap or to make inquiry as to the nature or severity of a handicap of such a person" (24 CFR § 100.202 [c]). That regulation, however, does allow a housing provider to ask questions regarding disability to determine an individual's eligibility for housing for people with disabilities, or, if special programs are provided, to determine which ones will be needed (24 CFR § 100.202 [c] [2]; ***see Cason v Rochester Housing Authority***, 748 F Supp 1002 [WDNY 1990]). Numerous other examples exist where a person's eligibility for a benefit or entitlement is based on the person's status as disabled and proof of disability must be shown to obtain the benefit. For instance, to obtain disability pension benefits (Retirement and Social Security Law § 362) and workers' compensation benefits (Workers' Compensation Law

§ 217), an individual may properly be asked to provide evidence of his or her disability. In New York, a person who is physically disabled must submit evidence of such disability to obtain the real property tax exemption for persons who are physically disabled (***see*** Real Property Tax Law § 459-c). We find these examples analogous to the circumstances in the present proceeding. The record shows that the Division's auditor did not require any particular evidence, but stated to petitioners that the Division would accept any reasonable proof of disability, which petitioners failed to provide.

Petitioners also point to an advisory opinion, TSB-A-97(17)S, in support of their claim for sales tax exemption. The issue in that advisory opinion, addressed to Access Lifts and Ramps, Inc. ("Access"), was whether the purchase or installation of elevators and lifts for use by a person with a disability in residences and commercial buildings is subject to sales and use taxes. Access sold nine different devices designed for various uses, including residential stair lifts, residential elevators, and dumbwaiters, which were all fully described. As part of its petition, Access also submitted a copy of the ASME standards for residential use elevators. In its advisory opinion, which is applicable only to the taxpayer that requested it (***see*** 20 NYCRR 2326.4), the Department determined that three of the products – the Garaventa Stair-porter, the Garaventa Stair-trac and the Garaventa Evacu-trac, indeed constituted medical equipment eligible for exemption and that "[P]etitioner's purchases of these items from its suppliers are also not subject to sales and compensating use tax, since they are purchased for resale, provided petitioner furnishes the supplier a properly completed Resale Certificate." The CM Solution Patient Lift constituted a prosthetic aid and, therefore, was also deemed eligible for exemption. None of the five other products, the elevators and dumbwaiter, were determined to qualify for exemption

under Tax Law § 1115 (a) (3) or (4).

In support of their claim, petitioners also cite to Tax Bulletin TB-ST-740 ("Quick Reference Guide for Taxable and Exempt Property and Services" [10/16]), which lists the general categories of property and services that are exempt from sales tax and the exemption documents, if any, that a customer must give to a seller for the sale to be treated as exempt from tax. The Bulletin lists medical equipment and prosthetic aids and devices and indicates that no specific exemption document is required to be presented to avoid the need to pay sales tax. Petitioners are correct in their assertion that no specific tax exemption certificate was required to be given to the seller in order for petitioners' purchase of elevators to be exempt from sales tax, but they mistakenly extend that meaning to assert that they are not required to present any evidence in support of their claim for exemption from the requirement to pay sales tax upon their purchase of the elevators and dumbwaiters.

Additional Arguments

In addition, petitioners submit alternating and conflicting arguments that were not supported by evidence sufficient to meet their burden of proof. They argue that Titan purchased exempt products (residential elevators and stair lifts) for resale and, therefore, sales tax was not owed on the purchases. In that scenario, however, Titan should have registered as a sales tax vendor and provided its vendors with resale certificates. Furthermore, in order for Titan's sales to its customers to be exempt, petitioners would be required to prove entitlement to an exemption, which we have concluded they failed to do. They claim, without substantiating proof, that their products did not constitute capital improvements, yet the photographs in evidence depict elevators that would, most likely, meet the definition of capital improvement in Tax Law § 1101 (b) (9) (i). Additionally, they provided no evidence and made no effort to demonstrate

that their dumbwaiter product was also eligible for exemption as either medical equipment or an artificial device for use by a person with a disability in a residence.

Penalties

Petitioners also challenge the imposition of penalties as improper. They argue that they worked within the tax law, rules and regulations and that sales tax was not collected or paid for proper and legal reasons. They contend that a charge of "willful neglect" cannot be supported. A taxpayer may be relieved of a penalty if the failure to pay tax was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145 [a] [1] [iii]). Petitioners argue that they are not liable for sales tax based upon their interpretation of the law and the supporting documents they presented. Neither ignorance of the law nor the good faith advancement of a legal theory constitutes reasonable cause in the absence of the taxpayer's efforts to ascertain the proper tax liability (***Matter of Shuai Yin v State of N.Y. Dept. of Taxation & Fin.***, 151 AD3d 1497 [3d Dept 2017]; ***see Matter of CBS Corp. v Tax Appeals Trib. of State of New York***, 56 AD3d 908 [2011] ***lv denied*** 12 NY3d 703 [2009]; ***Matter of Rubin v Tax Appeals Trib. of State of N.Y.***, 222 AD2d 962, 964-965 [1995]). In view of petitioners' failure to maintain and provide adequate records, failure to register as a sales tax vendor, failure to file sales tax returns or attempt to ascertain the position of the Division, we find no basis on which to disturb the imposition of penalties (***Matter of Shuai Yin v State of N.Y. Dept. of Taxation & Fin.***; ***Matter of Felix Indus. v State of N.Y. Tax Appeals Trib.***, 183 AD2d 203, 206-207 [1992]).

As stated above, the tax laws granting exemptions are to be construed strictly and narrowly (***Matter of Blue Spruce Farms***) and a presumption of correctness attaches to a notice issued by the Division; a presumption that the taxpayer must overcome (***see Matter of Suburban Carting Corp.***, Tax Appeals Tribunal, May 7, 1998, ***citing Matter of Tavolacci v State Tax***

Commn., 77 AD2d 759 [1980]). Petitioners' interpretation of the statute would expand the application of the exemption to a point that we believe was not intended by the Legislature (***see Matter of Craftmatic Comfort Mfg. Corp. v New York Tax Commn.***). In contrast, we find that the Division's interpretation of the tax exemption statutes through its regulation and explanatory material (Publication 822) was reasonable and rational. Petitioners have failed to establish that their interpretation of Tax Law §§ 1115 (a) (3) and 1115 (a) (4) is the only reasonable construction and their exception, therefore, must be denied (***Matter of Blue Spruce Farms***).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Titan Elevator & Lift, LLC, Michael Zuckerman and Shari Zuckerman is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Titan Elevator & Lift, LLC, Michael Zuckerman and Shari Zuckerman is denied; and

4. The notices of determination dated, May 7, 2012 and May 4, 2012, respectively are sustained.

DATED: Albany, New York
September 11, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner