STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CRYSTAL CLEAR POOL SERVICE, INC.	:	DETERMINATION DTA NO. 826209
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2008 through November 30, 2010.	:	

Petitioner, Crystal Clear Pool Service, 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 period March 1, 2008 through November 30, 2010.

A hearing was held before Herbert M. Friedman, Jr., Administrative Law Judge, in Albany, New York, on May 1, 2015 at 10:30 A.M., with all briefs to be submitted by October 5, 2015, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel).

ISSUES

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

II. Whether petitioner has established any basis justifying reduction or cancellation of the penalties assessed.

FINDINGS OF FACT

1. Petitioner, Crystal Clear Pool Service, Inc., was, at all relevant times, a pool installation, maintenance and repair business located in Nanuet, New York. Petitioner also sold pool equipment and supplies at retail. Petitioner conducted business in both New York and New Jersey.

2. By letter dated December 22, 2010, the Division of Taxation (Division) scheduled an appointment with petitioner to commence a sales and use tax field audit for the period March 1, 2008 through November 30, 2010. The Division's letter requested that all of petitioner's books and records pertaining to its sales and use tax liability for the audit period be available for review. The letter specifically requested, among other records, the general ledger, sales invoices, bank statements, federal income tax returns, exemption documents and purchase invoices.

3. In response to the Division's written request for records, petitioner's then representative, Christopher Moro, CPA, met with the Division's auditor to examine the books and records. The parties agreed that based on the volume of materials for the audit period, a test period was warranted. As a result, petitioner and the Division entered into a Test Period Audit Method Election (form AU-377.12) (Test Period Agreement) and agreed on a test period of July 2009 for sales, and June through August 2009 for expenses. The Test Period Agreement specifically included language acknowledging that the Division could not determine the tax due by means of a test period audit without petitioner's consent, and that such consent was given. After several field visits, the Division's auditor completed his review of the records provided by petitioner for the test period and deemed them adequate to perform the audit.

4. The Division's auditor determined that adjustments were appropriate to both sales and purchases reported by petitioner and reviewed his findings with Mr. Moro in December 2011.

5. The Division's review of petitioner's sales records found discrepancies in the reporting of petitioner's sales in New York and New Jersey, and their taxable status. In particular, the Division found that numerous entries in petitioner's records indicated sales as nontaxable in either New York or New Jersey when, after review, they appeared taxable in New York. These discrepancies totaled sales of $48,601.10 for the test period, resulting in an additional tax due of $4,069.08. An error rate of 0.5367 was calculated by dividing the additional tax due ($4,069.08) by petitioner's bank deposits of $759,601.00 for the test period. The error rate was applied to petitioner's reported gross sales of $19,486,457.00 for the entire audit period, resulting in an additional tax due of $104,388.95 on sales.

6. Another area of adjustment involved petitioner's expense purchases. The parties agreed upon a test period of June through August 2009. A review of petitioner's expense purchase records for that period discovered recurring taxable expense purchases on which tax had not been paid by petitioner. Examples of such purchases include trash collection and printers. These discrepancies totaled purchases of $30,661.98 for the test period, resulting in an additional tax due of $2,551.15. An error rate of 0.028872 was calculated by dividing the additional tax due ($2,551.15) by petitioner's total expenses of $88,360.72 for the test period. The error rate was applied to petitioner's reported expense purchases of $1,062,459.57 for the entire audit period, resulting in an additional tax due of $30,675.33 on expenses.

7. Another area of adjustment involved petitioner's purchases of materials used for capital improvement projects. The parties agreed upon a test period of July 2009. A review of petitioner's materials purchase and sales records discovered that during July 2009 petitioner had $43,904.00 in capital improvement sales. The Division divided this figure by petitioner's total sales of $808,398.03 for the test period, resulting in a New York capital improvement sales ratio

of 0.05430988. The Division then ascertained from petitioner's records that petitioner paid tax of $1,974.29 on materials purchased and used in capital improvement projects during the test period. Next, the Division calculated the percentage of tax paid on materials of 0.00704941 by dividing the tax paid on purchased materials ($1,974.29) by the amount spent on materials purchased during the test period ($280,064.58). Finally, the percentage of tax paid on materials of 0.00704941 was subtracted from the New York capital improvement sales ratio of 0.05430988 to determine the additional taxable materials ratio of 0.04726047. This ratio was applied to petitioner's reported materials purchases for the entire audit period resulting in additional taxable materials purchases of $260,556.74 and additional tax due of $21,821.63 on materials purchases.

8. The Division reviewed its results with Mr. Moro and petitioner's subsequent representative, Michael Buxbaum, CPA, who was appointed in February 2012. First Mr. Moro, and then Mr. Buxbaum, disagreed with the Division's conclusions and sought a detailed audit of the entire period. Mr. Buxbaum also provided the Division with a list of proposed adjustments. In response, the Division's auditor agreed to conduct a full audit and made numerous requests to both representatives for additional books and records to substantiate petitioner's proposals and the reported sales and expenses in the full audit period. Despite the requests, no additional documents were provided to the Division on behalf of petitioner.

9. On February 26, 2013, the Division issued to petitioner a Notice of Determination, which assessed tax due of $156,885.91, plus penalties of $47,064.74, and interest, for the period March 1, 2008 through November 30, 2010. The penalties included those for failing to pay over tax (Tax Law § 1145[a][1][i]) and omission of tax in excess of 25% of the amount required (Tax Law § 1145[a][1][vi]) .

10. Petitioner did not present any witnesses or introduce any documents into the record at hearing.

CONCLUSIONS OF LAW

A. It is well established that the Division may, in appropriate circumstances, resort to a test period audit method in arriving at its determination of tax due (***see*** Tax Law § 1138[a][1]; ***see also Matter of Top Drawer Custom Cabinetry Corp.***, Tax Appeals Tribunal, November 19, 2015). In fact, a taxpayer who maintains and makes available complete and adequate records may nonetheless consent to the Division's use of indirect auditing methodologies, including the test period method (***see Matter of Wallach v. Tax Appeals Tribunal***, 206 AD2d 696 [1994], ***lv denied*** 85 NY2d 805 [1995]; ***Matter of Evans Delivery Company, Inc.***, Tax Appeals Tribunal, April 17, 2008). The reasons for making such a consent are various, and may include a taxpayer's desire to limit the amount of time, cost and personnel required to be devoted to the retrieval and presentation of records necessary for the conduct of a full and detailed audit examination. Whatever the reasons for such a consent, the Division specifically provides for the objective memorialization of such a consent by requiring a taxpayer to execute a Test Period Audit Method Election form.

B. Here, by its letter dated December 22, 2010 the Division clearly and unequivocally requested petitioner's records pertaining to its sales and use tax liability for the entire audit period. Rather than produce all records, on February 23, 2011, petitioner's representative executed the Test Period Agreement for the audit of its sales and recurring expense purchases. Hence, petitioner consented to the Division's use of a test period methodology, without qualification as to period, and simultaneously agreed to forego a review of all of its books and records for the entire audit period.

C. Under such circumstances, the Division was authorized to use an estimated audit method, so long as such method was reasonably calculated to reflect the taxes due (***see e.g. Matter of AGDN, Inc.***, Tax Appeals Tribunal, February 6, 1997). Exactness in the audit results is not required (***see Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023 [1976], ***affd*** 44 NY2d 684 [1978]). Moreover, the test period has long been considered an acceptable audit method (***see e.g. Matter of Continental Arms Corp. v. State Tax Commn.***, 72 NY2d 976 [1988]).

D. Where, as in the instant matter, resort to a test period audit is appropriate, the burden of proof lies with the taxpayer to show by clear and convincing evidence that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (***see Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003). In trying to meet that standard, petitioner argues that the audit is flawed for several reasons. First, petitioner contends that the test of expenses included errors that were nonrecurring and, thus, should not be projected throughout the audit period. Additionally, petitioner maintains that the test for materials expenses was too limited to be a reasonable representation. Finally, petitioner asserts that several of the items included in the sales extrapolation were, in actuality, capital improvements and caused the results to be flawed.

It is well settled that "[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. State Tax Commn.***, 119 AD2d 948, 950 [1986]). Here, the Division estimated petitioner's tax liability from petitioner's own records provided in the audit. At the hearing, the auditor repeatedly provided a legitimate rationale for his conclusions, in particular pointing out the numerous

discrepancies in the nature of reported sales and expenses during the test period and his extrapolation of those errors over the course of the audit period.

Meanwhile, petitioner offered no evidence whatsoever to support its position or to refute the audit findings. In order to prevail, petitioner was required to advance more than mere argument and speculation attacking the Division's audit methodology (***see Matter of Evans Delivery Company, Inc.***). It was incumbent upon petitioner to produce evidence to rebut the audit conclusions (***see Matter of Top Drawer Custom Cabinetry Corp.***). In the absence of favorable testimony or documentary evidence, petitioner failed to carry its burden of proving that the audit method was unreasonable or that the assessment was erroneous.

E. Furthermore, petitioner's attempt to avoid the test period election must fail. Petitioner consented to a test period audit even though it claimed that it had adequate records to support an audit of the entire audit period. "Having consented to the use of a test period audit method with full knowledge of its right to insist upon a complete audit based upon all of its records for the audit period, the corporation cannot now claim that a complete audit was required" (***Matter of Wallach*** at 698). Indeed, the Tax Appeals Tribunal recently rejected petitioner's exact argument on this issue in ***Matter of Top Drawer Custom Cabinetry Corp.***. Hence, the record dictates that the methodology selected was reasonably calculated to reflect the tax due for the audit period and was fully consistent with the Test Period Agreement signed by petitioner (***Matter of Wallach*** at 698).

F. It must be noted that petitioner makes the following statement in its reply brief:

> "[d]uring the brief hearing on March 27, 2015 [sic], in Albany, NY, the auditor. . . testified falsely. This false testimony cannot be excused or condoned."

Petitioner has offered no evidence whatsoever to support this strong allegation. In fact, the Division's auditor's testimony was forthright and credible. Consequently, petitioner's assertion on this point is firmly rejected.

G. Finally, petitioner also seeks a reduction or cancellation of the penalties in the statutory notice. Tax Law § 1145(a)(1)(i) provides for penalty to be imposed where a person fails to pay over tax within the time required by law. Tax Law § 1145(a)(1)(vi) provides for an additional penalty when tax is understated by more than 25 percent. Tax Law § 1145(a)(1)(iii) and (vi) provide that the Division can remit the penalty if the failure to pay over the tax was due to reasonable cause. In establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (***see Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). In the instant case, petitioner has offered no evidence to uphold a finding of reasonable cause. Thus, the penalties must be sustained.

H. The petition of Crystal Clear Pool Service, Inc. is denied, and the Notice of Determination dated February 26, 2013 is sustained.

DATED: Albany, New York
March 17, 2016

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE