STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL SILVERSTEIN	:	DETERMINATION DTA NO. 826952
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, 2001 through February 29, 2004.	:	

Petitioner, Michael Silverstein, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2001 through February 29, 2004.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (David Gannon, Esq., of counsel), brought a motion dated May 8, 2017, seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, was granted additional time until July 10, 2017 to file a response to the Division of Taxation's motion, and filed a response on that date. Pursuant to 20 NYCRR 3000.5 (d), the time period for the issuance of this determination was extended to six months. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Metro Auto Leasing, Inc., within the meaning and intent of Tax Law §§ 1131 (1) and 1133 (a) for the period December 1, 2001 through February 29, 2004.

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

FINDINGS OF FACT

1. The Division of Taxation (Division) brings this motion for summary determination based upon the doctrine of collateral estoppel. A number of facts relevant to this proceeding are identical to the facts found in a prior decision of the Tax Appeals Tribunal, ***Matter of Silverstein*** (Tax Appeals Tribunal, December 7, 2017) (***Silverstein I***). Those facts are further supported by the evidence the Division has presented in support of this motion, as stated below.

2. On June 10, 2013, the Division issued a notice of determination, notice number L-039533890, to petitioner, Michael Silverstein, as a responsible person for Metro Auto Leasing, Inc. (Metro), asserting tax due in the amount of $292,200.28, plus interest, for the period ended February 28, 2002 through February 29, 2004. Said notice is the subject of this proceeding. Additionally, on June 10, 2013, the Division issued two notices of determination to petitioner: notice number L-039533892, asserting tax due of $916,553.84, plus interest of $4,289,581.35 and penalty in the amount of $2,673,101.68, for the period ended February 28, 1999 through February 28, 2002; and notice number L-039533891, asserting interest due of $1,593,667.37 and penalty in the amount of $1,201,335.37, for the period ended February 28, 2002 through

November 30, 2007.[1] Notice number L-039533892 was issued to petitioner as a person required to collect sales and use taxes pursuant to Tax Law §§ 1131 (1) and 1133 (a) for Crest Auto Leasing, Inc. (Crest). Notice number L-039533891 was issued to petitioner as a person required to collect sales and use taxes pursuant to Tax Law §§ 1131 (1) and 1133 (a) for Metro. Notice numbers L-039533891 and L-039533892 were the subject of a separate proceeding before the Division of Tax Appeals (***Silverstein I***). The notices were all addressed to petitioner at P.O. Box 359, Alpine, New Jersey 07620, and mailed by certified mail. This same address was listed on the power of attorney for petitioner, dated April 8, 2010, filed during the criminal proceedings against him, and was the last known address for him at the time of the issuance of the notices.

3. During the period at issue, Crest and Metro were in the business of automobile sales and operated a dealership at a facility comprising the addresses 42-06 through 42-10 27th Street, Long Island City, New York. Crest did business under the following names: United Buying Service, The Any Car Store,[2] and Auto Plaza. Metro did business under the following names: New York Auto Mall, Metro Auto Mall, The Auto Plaza, and Cars Buy Tel.[3]

4. The Division began an examination of Crest in June 2001. A review of the Division's records revealed that the last sales tax return filed by Crest was for the period ending August 31, 1998, reporting zero sales and zero tax due, and no subsequent sales tax returns had been filed. On June 4, 2001, the Division sent a letter to Crest d/b/a United Buying Services at its last known

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[1]The interest and penalty asserted in notice number L-039533891 were based on the determination of tax due in the amount of $685,200.28. A portion of that tax, in the amount of $292,200.28, is the subject of notice number L-039533890, at issue in this proceeding. Restitution in the amount of $393,000.00 was applied to the remaining tax due (***see*** Finding of Fact 21).

[2] Documents included in the record show variations of this d/b/a, including Any Car Store and Anycarstore.

[3] Documents included in the record show variations of this d/b/a, including Cars By Tel, Carsbytel, and Cars-Buy-Tel.

address in the Division's records, 1 Beatrice Lane, Glen Cove, New York, stating that the business's sales tax records had been scheduled for a field audit for the period September 1, 1998 through May 31, 2001. The letter stated that "[a]ll books and records pertaining to your sales and use tax liability, for the period under audit, must be available on the appointment date." The appointment date indicated on the letter was July 20, 2001. A records requested list was attached to the letter specifying the books and records to be provided by Crest.

5. On July 20, 2001, in response to the Division's records request and audit appointment letter, Alvin Silverman, CPA, contacted the Division as Crest's purported representative and asked that the appointment be rescheduled.

6. On September 21, 2001, the Division's auditor met with Mr. Silverman at the Beatrice Lane address. Mr. Silverman did not have a power of attorney or any books and records for Crest. Mr. Silverman claimed that the original owner of the company was Bill Porter and that he was deceased. Mr. Silverman asked for additional time to provide the requested information.

7. On or about September 26, 2001, the Division received a power of attorney from Mr. Silverman, listing him as the representative for Crest and purportedly signed by Mr. Porter.[4] The taxpayer's signature is undated. Mr. Silverman's signature was dated October 15, 2001. The Division determined that the power of attorney was invalid based on information the Division received, because it was discovered that Mr. Porter was deceased at the time the power of attorney was provided. A death certificate for Mr. Porter indicates his date of death as June 16, 2001.

[4] The taxpayer's first name appearing on the signature line of the power of attorney form is not legible, but it does not appear to be Bill or William.

8. On February 6, 2002, the Division was contacted by Steve Kolakus, who stated that he had a power of attorney and was representing Crest. The Division requested that he send the power of attorney. No power of attorney was provided by Mr. Kolakus.

9. On May 22, 2002, Mr. Kolakus informed the Division that he was having problems obtaining a power of attorney for Crest. The Division explained that they could not speak with him about Crest without a power of attorney.

10. No valid power of attorney was provided for Crest during the course of the audit, and no books and records were produced by the taxpayer. As a result, the Division began compiling and reviewing third-party information regarding Crest's business activities, including information from the Department of Motor Vehicles (DMV), individuals who purchased vehicles from Crest, bank records obtained by the Division via subpoenas and document requests issued to banks, and documentation seized from the business premises during the execution of a search warrant.

11. During the course of the investigation of Crest, Metro was identified as a related entity, and the Division gathered and reviewed information regarding that entity as well. The Division issued subpoenas for bank records of both Crest and Metro over the course of the audit. Information received in response to the subpoenas included copies of bank statements, deposit slips, deposited checks and signature cards for Crest, Metro, and their d/b/a entities.

12. The Division's auditor reviewed information from the DMV, including MV-50 forms, license plate data, registration data and screen-shot print-outs of information from DMV electronic records for Crest and Metro. MV-50 forms are books provided by the DMV to car dealers to record car sales. Each book contains 50 sets of blank forms in quadruplicate. Each time a car dealer sells a car, the dealer is required to complete one set of forms in quadruplicate, by way of carbon copy of the original form. The pages of the MV-50 books are designed so that

the information written on the first page (the original) is also recorded on pages two through four of the set, by way of carbon copy. The original form (page one) is taken by the customer to the DMV when he or she registers the car; page two is the car dealer's copy; page three is the customer's copy; and page four remains in the MV-50 book. The book is returned to the DMV by the dealer once all 50 sets have been used, with the fourth page of each set still in the book. The MV-50 forms include the following relevant information to be completed by the dealer for each transaction: type of sale (wholesale or retail, and new, used, demo or salvage); the vehicle year, make, model, body type, and color; the vehicle identification number (VIN); the vehicle's inspection certificate number, date and place of inspection; the vehicle's license plate or permit number; the selling price; the dealer's information (name and address); the purchaser's information (name and address); the date of sale; prior owner information including name, address, and date of purchase; odometer reading; a dealer certification that the sale occurred and that "[a]ll New York State and local taxes due as a result of this sale have been collected from the purchaser;" the dealer's and purchaser's signatures and date; and the dealer's facility number and sales tax number.

13. Upon review of the MV-50 books obtained from the DMV, the Division's auditor discovered that a number of the MV-50 forms filed by Crest and Metro were not properly completed. Specifically, the last page of sets of transaction documents in the MV-50 books returned to the DMV were missing information or blank for most of the transactions. In cases where the MV-50 forms were complete, the auditor compared the information with canceled checks and deposit slips from the businesses' bank accounts in order to determine a match with the customer name and/or VIN.

14. The auditor next reviewed "batch work" from DMV and computer screen-shots of DMV electronic database information. Batch work is the computerized information DMV compiles electronically when an individual seeks to register a vehicle with DMV by providing the DMV with the original MV-50 and a registration application. The Division's auditor reviewed the batch work and computer screen-shots from DMV in order to obtain customer and car information. The auditor compared the DMV information with the bank account records for Crest and Metro, in order to match the customer and car information with canceled checks deposited into Crest's and Metro's bank accounts.

In order to facilitate the request and review of the proper "batch work" from DMV, the auditor obtained a list of license plate numbers issued by DMV to Crest, Metro, and their d/b/as, and reviewed the batch work for transactions involving the license plates issued to those entities.

15. From the DMV information reviewed, the Division's auditor obtained Crest and Metro customer information. The auditor then solicited information from identified customers who purchased vehicles from Crest and Metro by issuing questionnaires. The questionnaires sought information and verification from customers regarding their purchase of vehicles, including the make, model and year of vehicle purchased, date and amount of purchase, sales tax paid, salesperson, company the customer purchased the vehicle from, bank or finance company, payee on purchase check, method of payment, VIN number and MV-50 number. The questionnaire also requested that the customers send the Division copies of documentation relevant to the vehicle purchase. Responsive customers answered some or all of the questions posed, including whether the vendor had collected sales tax on the transaction. Some customers offered additional information, and some provided relevant documentation such as their copy of the MV-50, bill of

sale, registration, title, insurance, photocopy of driver's license, copies of canceled checks, car loan documentation, and other information.

16. Upon comparing the information obtained from customers and the DMV with the information reported by Crest and Metro in the MV-50 books, the auditor discovered that the vendors did not properly report the transactions on the fourth page of the MV-50 forms. Specifically, a comparison revealed that for numerous transactions, the information from the customers and DMV revealed retail sales, but the information was not properly reported on the fourth page of the MV-50 by the vendor. For some transactions, the fourth page of the MV-50 forms was blank while information in corresponding boxes on the customer's copy was filled in; in other cases, the information on the customer's copy differed from the information written by the vendor on the fourth page of the form. A careful review of the MV-50s in evidence in both this matter and ***Silverstein I*** reveals a consistent pattern of missing or inaccurate information contained on the fourth page of the MV-50s in comparison with the first-page originals.

17. Based on the preliminary findings during the civil audit, the matter was referred to the Division's Revenue Crimes Bureau (RCB)[5] in January 2003. The Division's civil and RCB personnel coordinated efforts to collect, analyze and compile relevant information. Additional third-party information regarding Crest, Metro, and their d/b/as was obtained and reviewed from the DMV, banks and customers during the investigation.

18. RCB subsequently referred the matter to the Queens County District Attorney for potential criminal prosecution.

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[5] The Division's RCB was subsequently renamed the Special Investigations Unit (SIU), which was subsequently renamed the Criminal Investigation Division (CID).

19. During the criminal investigation, on June 15, 2007, a search warrant was executed on the business premises located at 42-06 through 42-10 27th Street, Long Island City, New York. Documents secured from the execution of the search warrant included "sales jackets" (folders maintained by the car dealership which contain information regarding car sales), MV-50s, copies of checks, bank deposits, bills of sale, titles, customers' insurance, customer drivers' licenses and vehicle inspections.

20. A criminal complaint and indictment were filed against petitioner, Crest and Metro in the Queens County Criminal Court.

21. Petitioner entered into a plea agreement, dated October 17, 2012, with the Queens County District Attorney's office. Petitioner signed the agreement individually and on behalf of Crest and Metro. Pursuant to the plea agreement, petitioner entered a plea of guilty to one count of falsifying business records in the first degree, Penal Law § 175.10, a class "E" felony, and agreed to pay restitution to the Division in the amount of $393,000.00. Pursuant to the plea agreement, Crest and Metro also agreed to enter a plea of guilty to one count each of falsifying business records in the first degree, Penal Law § 175.10, a class E felony. The plea agreement provided the following representations:

> "Nothing in the agreement shall in any way bind the New York State Department of Taxation and Finance ('NYSTF'), the New York City Department of Taxation and Finance ('NYCTF'), or any other government taxing agency, except as set forth below. SILVERSTEIN, as Officer of and responsible person for CREST and METRO, agrees that for the period from February 1, 1999 to November 30, 2007, he will pay sales tax in the amount of $393,000. SILVERSTEIN understands that the restitution in the amount of $393,000 which will be paid to NYSTF as a condition of his plea, may not resolve all of the civil sales tax liability of SILVERSTEIN, CREST, and METRO during the audit period of February 1, 1999 through November 30, 2007, and the periods at issue in this criminal proceeding, and all applicable penalties, both fraud and statutory, or interest assessed on the sales tax liability by NYSTF, if any, and that all interest and penalties, if any, continue to accrue until any such further liability is paid in

full. SILVERSTEIN, CREST and METRO reserve any and all defenses to the assertion of any further sales tax liability."

22. The plea agreement entered into by petitioner contained the following admissions:

"SILVERSTEIN, through the entry of his plea of guilty today, admits that on or about December 27, 2006, in the County of Queens, with the intent to defraud in order to avoid paying sales tax in the amount of $393,000, made or caused to be made a false entry in the business records of an enterprise, and his intent to defraud included an intent to commit another crime, to wit: larceny and to aid or conceal the commission thereof. SILVERSTEIN, as Officer of and responsible person for CREST and METRO, through the entry of his plea of guilty today, admits that during the period from on or about February 1, 1999 through December 28, 2008, he knowingly and deliberately failed to cause Crest and Metro to report and remit sales tax collected by CREST and METRO, of at least, but not limited to $393,000 owed to New York State. That to resolve this criminal prosecution (and not the civil matter), the parties agreed that SILVERSTEIN would pay the sum of $393,000 attributable to sales tax, only.

CREST, through the entry of its plea of guilty today, admits that during the approximate period of February 1, 1999, through November 30, 2007, in the County of Queens, with the intent to defraud, made or caused to be made a false entry in the business records of an enterprise, and its intent to defraud included an intent to commit another crime, to wit: larceny and possession of stolen property and to aid or conceal the commission thereof.

METRO, through the entry of its plea of guilty today, admits that during the approximate period of February 1, 1999, through November 30, 2007, in the County of Queens, with the intent to defraud, made or caused to be made a false entry in the business records of an enterprise, and its intent to defraud included an intent to commit another crime, to wit: larceny and possession of stolen property and to aid or conceal the commission thereof."

23. The plea agreement further states, "I have read this agreement and have discussed it with my attorney, who has explained it to me. I hereby acknowledge that it sets forth my entire agreement with the office of the Queens County District Attorney. I state that there have been no other promises or representations made to me by any person in connection with this matter."

24. Petitioner appeared in the Criminal Term of the Queens County Supreme Court before Justice Camacho on October 17, 2012, to enter his guilty plea as detailed in the October 17, 2012 plea agreement (***see*** Findings of Fact 21, 22, and 23). During the plea proceedings, petitioner

pleaded guilty to count four of Indictment Number 642 of 2011, falsifying business records in the first degree, a class E felony. During the plea proceedings, petitioner acknowledged to the court that on or about December 27, 2006, in the County of Queens, with the intent to commit fraud in order to avoid paying sales tax in the amount of $393,000.00, he made or caused to be made a false entry in the business record of an enterprise, and his intent to defraud included an intent to commit the crime of larceny, or to aid or conceal the crime of larceny. Petitioner further admitted during the plea proceedings that he was a responsible person for Crest and Metro during the period from February 1, 1999 through December 28, 2008, and knowingly and deliberately failed to cause Crest and Metro to report and remit sales tax collected by Crest and Metro of at least $393,000.00. Petitioner further acknowledged during the plea proceedings that he would pay restitution to the Division in the amount of $393,000.00, and that such plea would not bind the Division.

During the plea proceedings, Justice Camacho asked petitioner if he read the plea agreement and had a chance to discuss it with his attorneys, to which petitioner answered in the affirmative. Petitioner further acknowledged his understanding of the plea in the following dialogue during the plea proceedings:

> "The Court: You understand it [the plea agreement] fully?
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> The Defendant: I do.
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> The Court: Do you have any questions?
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> The Defendant: No.
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> The Court: Again, you're also agreeing, the plea agreement also indicates this does not bind the New York State Department of Taxation and Finance. They could come after you. Do you understand that?

The Defendant: I do.

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The Court: You understand by pleading guilty you're giving up a number of rights: You're giving up the right to go to trial. This would be a jury trial. At that trial your attorneys would have an opportunity to question or cross-examine the witnesses against you. You would have a right to present witnesses or testify in your own behalf, if you wanted to, although you wouldn't have to. By admitting your guilt, you're giving up your right to remain silent. You're also giving up the right to have the DA's office prove these charges beyond a reasonable doubt, which is a high standard. By pleading guilty, you're giving up those rights. Do you understand that?

The Defendant: I do, your Honor.

The Court: That's because this plea here today has absolutely the same effect as if you had been found guilty after a jury trial. Do you understand that, sir?

The Defendant: I do.

The Court: Anyone forcing you to plead guilty?

The Defendant: No.

The Court: Are you pleading guilty because you are guilty?

The Defendant: Yes.

The Court: Aside from the promises that are set forth in this plea agreement, for the record, have any other promises been made to you in order to get you or induce you to plead guilty?

The Defendant: No."

25. On October 17, 2012, petitioner was convicted, pursuant to the plea agreement, of falsifying business records in the first degree, Penal Law § 175.10.

26. Following the criminal proceedings, the civil audit of Crest was reinitiated, and the civil audit regarding Metro was initiated based on the information discovered during the investigation.

27. After the criminal proceedings against Crest, Metro and petitioner were concluded, the Division sent written requests on January 24, 2013, March 1, 2013, and March 26, 2013 for Metro's books and records for the audit period December 1, 1998 through November 30, 2007. The Division sent requests for Metro's books and records to the address where the business was located and the address on record with the DMV (42-08 27th Street, Long Island City, New York 11101, and 42-06/08 27th Street, Long Island City, New York 11101), and the address reported to the Department of State (24 School Street, 3Fl, Glen Cove, New York 11542). The Division also sent requests for Metro's books and records to petitioner at his home address. Metro failed to provide any books or records in response to the Division's requests.[6]

28. As a result of the businesses' failure to produce books and records, the Division's auditor reviewed the documentary evidence obtained from third parties during the criminal investigation and the civil audit. Preliminarily, the auditor reviewed the MV-50 records and checks that had been deposited into Crest's and Metro's bank accounts, together with deposit slips and bank records, and sought to determine a match of deposits with either the customer name or the VIN, or both. Where there was a match between the vehicle or customer information on the MV-50 form and the bank deposit information, such transaction was treated as a taxable sale.

29. In cases where there was no information or missing information on the MV-50 (***see*** Findings of Fact 13 and 16), the auditor next reviewed the batch work from DMV and computer screen-shots of DMV electronic database information (***see*** Finding of Fact 14) in order to obtain customer and car information for Crest and Metro. The auditor compared the DMV information

[6] The Division also sent additional written requests for books and records of Crest's sales to Crest's last known addresses and petitioner's address. Crest and petitioner did not respond to the requests. Said requests were further discussed in the proceedings in ***Silverstein I***.

with the bank account records for Crest and Metro, in order to match the customer and car information with canceled checks deposited into Crest's and Metro's bank accounts. The auditor obtained a list of license plate numbers issued by DMV to Crest, Metro, and their d/b/as, and reviewed the batch work for transactions involving the license plates issued to those entities. Where the auditor found matching transactions between the DMV information and bank deposits for Crest or Metro, such transactions were counted as taxable sales.

30. The Division's auditor also utilized the third-party information obtained from Crest's and Metro's customers, in response to the Division's questionnaires, in order to determine taxable sales. Where the customer provided relevant information of a taxable sale, such as their copy of the MV-50, bill of sale, registration, title, copies of canceled checks, car loan documentation, etc., and such information matched bank deposits of Crest or Metro, the transaction was treated as a taxable sale.

31. The auditor also utilized the records seized from the businesses in the execution of the search warrant (***see*** Finding of Fact 19), including sales jackets, MV-50s, copies of checks, bank deposits, bills of sale, titles, and customer information in order to determine taxable sales. Where the auditor found bank deposits or canceled checks associated with vehicle and customer information indicating a car sale, the transaction was treated as a taxable sale.

32. The auditor painstakingly reconstructed 847 transactions for Crest and Metro based on a review and analysis of the bank deposits and third-party information obtained during the audit and criminal investigation. All of the relevant documentation obtained by the Division regarding taxable sales for Crest and Metro was sorted and compiled by the auditor into individual folders designated for each transaction.

During the hearing for ***Silverstein I***, the Division's auditor testified regarding the document review and reconstruction he performed for the audit of Metro and Crest. A review of the documentation submitted by the Division in support of this motion, which is identical to the evidence presented in ***Silverstein I***, demonstrates the auditor's review and analysis. For example, a review of the documentation for transaction number 441 shows a car sale on March 6, 2003 by Cars Buy Tel (the d/b/a for Metro). The Division obtained the original page of the MV-50 filed by the customer with the DMV, which shows the sale of a 2003 Toyota Matrix on March 6, 2003 by Cars Buy Tel, with dealer facility number 7063551 (the facility identification number for Metro).

Additional documentation obtained by the Division for transaction number 441 included the DMV batch work, vehicle registration application, vehicle title, insurance documents, third-party verification from the customer, two canceled checks made out from the purchaser to Cars Buy Tel in the amount of $12,456.00 and $6,000.00, respectively, and the backs of the checks showing that they were deposited into Cars Buy Tel's account at State Bank of Long Island. Based on this information, the auditor determined a taxable sale for Metro and applied the applicable sales tax rate to determine sales tax due on this transaction in the amount of $1,167.01.

A thorough and careful review of the evidence in the record herein and the finding in ***Silverstein I*** reveals that the auditor followed this same audit method for each transaction, reviewing and analyzing the DMV and customer information, and matching the third-party information to bank deposits and canceled checks for Crest and Metro in order to determine taxable sales. Not all documentation, such as a bill of sale, was available for each transaction, but each transaction where the auditor determined a taxable sale was confirmed by matching

documentation of customer and vehicle information to Crest's and Metro's bank deposits. In instances where the Division was unable to obtain documentation linking customer and vehicle information to a bank deposit, such transactions were not included in the calculation of taxable sales, although the transaction folders and numbers remained in the audit files and workpapers for consistency purposes.[7]

33. Included in the documentation obtained and reviewed by the Division were bank records from State Bank of Long Island, received in response to subpoenas issued by the Division for the bank records of Crest and Metro. The corporate resolution and banking agreement with State Bank of Long Island, dated March 3, 2003, bears the account title of "Metro Auto Leasing NYC Inc. D/B/A Carsbytel." The business address listed on the banking document is the same as Metro's address, and the d/b/a indicated in the title of the account is that of Metro. Petitioner signed the document as president of the business. A review of the evidence in the record reveals that the bank account was in fact Metro's and was used by Metro to deposit checks from car purchases from the Metro dealership. The transaction documents in the record reveal a pattern of car sales by Metro with checks made out to Metro or its d/b/a Cars By Tel (or Cars Buy Tel; ***see*** Footnote 3). The backs of the checks and deposit slips bear the bank account number for the account titled "Metro Auto Leasing NYC Inc. D/B/A Carsbytel." Metro's DMV facility number is referenced in the sale documents, the VIN numbers and license plates referenced in the transactions documents evidence that the vehicles were sold by Metro, and the

[7] The Division acknowledged during the hearing that transaction number 639 should not have been included in the calculation of sales tax due.

sale proceeds were deposited into the "Metro Auto Leasing NYC Inc. D/B/A Carsbytel" bank account.[8]

34. Based on a review of Crest's bank deposits, the DMV and customer information, and seized records, the auditor determined total taxable sales for Crest of $11,430,620.46 for the period from February 1, 1999 through February 28, 2002, resulting in sales tax due for Crest in the amount of $916,553.84.

35. Based on a review of Metro's bank deposits, the DMV and customer information, and seized records, the auditor determined total taxable sales for Metro of $8,191,464.83 for the period from February 1, 2002 through November 30, 2007, resulting in sales tax due for Metro in the amount of $685,200.28.

36. Pursuant to the plea agreement entered into by petitioner on October 17, 2012, restitution agreed to by petitioner in the amount of $393,000.00 was applied to the principal sales tax amount outstanding for the most recent sales tax period, i.e., the periods for Metro from March 1, 2004 through November 30, 2007, leaving a remaining amount of tax due for the period ended February 28, 2002 through February 29, 2004, as asserted in the notice of determination at issue here, in the amount of $292,200.28.

37. No sales tax returns were filed by Crest or Metro for the periods at issue.

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[8] For example, transaction number 579 includes a check dated April 26, 2004, in the amount of $16,888.00, made out to Cars Buy Tel, referencing VIN number 4T1BF30K34U583605, and a check dated April 27, 2004, in the amount of $9,500.00, made out to Metro Auto Leasing. Both checks bear the same customer name. The backs of the checks bear the bank account number for the "Metro Auto Leasing NYC, Inc. D/B/A Carsbytel" State Bank of Long Island account. The DMV records show that the same VIN number relates to a blue Toyota, license plate number AHG8341, which was part of a group of plates issued to Metro by DMV. The vehicle registration application filed by the customer lists the car dealer facility ID number as 7063551, which is the dealer facility ID number for Metro. The MV-50 shows a sale on April 30, 2004 from Cars Buy Tel, bearing the same address as Metro, of the vehicle bearing the same VIN number, to the customer whose name appears on the abovementioned checks. The MV-50 lists Metro's dealer facility ID number. A deposit slip related to the transaction shows that both checks were deposited into the "Metro Auto Leasing NYC, Inc. D/B/A Carsbytel" State Bank of Long Island account.

38. The Division determined that petitioner was a responsible person for the collection and remittance of sales tax due by Crest and Metro for the periods at issue. The Division based this determination on petitioner's admission through his guilty plea that he was a responsible person of Crest and Metro during the periods at issue, as well as the following information gathered by the Division during the investigation and audit. As relevant to this proceeding, the following documentation was presented during ***Silverstein I*** and with the Division's motion herein regarding petitioner's status as a responsible person for Metro:

a. May 10, 1993 DMV Original Facility Application for Metro, signed by petitioner as president, bearing facility number 7063551.

b. May 10, 1993 correspondence from Metro to DMV signed by petitioner as president.

c. December 7, 1994 DMV Business Amendment for New York Auto Mall, reflecting change of officer from petitioner to William Porter, bearing facility number 7063551.

d. Death certificate of William Porter dated June 16, 2001.

e. August 8, 2001 DMV Request for Business Amendment for Cars Buy Tel, bearing the same facility number (7063551) as Metro, New York Auto Mall, and The Auto Plaza, reflecting a change of officer from William Porter to petitioner, signed by petitioner as president.

f. September 12, 2001 correspondence from Cars-Buy-Tel, facility number 7063551, to DMV stating that William Porter is no longer an officer and that petitioner is president and secretary, signed by petitioner as president.

g. September 17, 2001 correspondence from DMV to petitioner, regarding facility number 7063551, confirming the amendment reflecting a change of officer.

h. August 6, 2002 DMV Safety and Business Hearings Unit decision concerning Crest and Metro, reflecting that petitioner, as owner of both Crest and Metro, appeared and testified at a June 27, 2002 hearing concerning violations stemming from a DMV program audit of Crest and Metro.

i. March 3, 2003 State Bank of Long Island Corporate Resolution and Banking Agreement for "Metro Auto Leasing NYC Inc. D/B/A Carsbytel" with a mailing address of 42-06 27th Street, Long Island City, New York, designating petitioner as president, and the sole signatory for the bank account.

j. April 10, 2003 DMV Facility Renewal Application for Metro d/b/a Cars Buy Tel signed by petitioner as president.

k. April 11, 2005 DMV Facility Renewal Application for Metro d/b/a Cars Buy Tel signed by petitioner as president.

l. April 15, 2007 DMV Facility Renewal Application for Metro d/b/a Cars Buy Tel signed by petitioner as president.

m. June 26, 2009 DMV Request for Business Amendment for Metro d/b/a Cars Buy Tel, signed by petitioner as president.

CONCLUSIONS OF LAW

A. A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented" (20 NYCRR 3000.9 [b] [1]). Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985], ***citing Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck, Inc. v Tri-Pac Export Corp.***, 22 NY2d 439, 441 [1968]; ***Museums at Stony Brook v Vil. of Patchogue Fire Dept.***, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***Gerard v Inglese***, 11 AD2d 381, 382 [2d Dept 1960]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form

sufficient to require a trial of material questions of fact on which he rests his claim'" (***Whelan v GTE Sylvania***, 182 AD2d 446, 449 [1st Dept 1992] ***citing Zuckerman***).

B. The Division's motion for summary judgment is based on the doctrine of collateral estoppel. The Division argues that the issues raised in this matter are identical to the issues raised in ***Silverstein I***, and that petitioner was afforded a full and fair opportunity to contest the issues. Collateral estoppel is a legal doctrine that precludes a party from relitigating, in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (***see Ryan v New York Tel. Co.,*** 62 NY2d 494 [1984]).

In order for the doctrine of collateral estoppel to apply: (1) the issue as to which preclusion is sought must be identical with that in the prior proceeding; (2) the issue must have been decided in the prior proceeding; and (3) the litigant who will be held precluded in the present matter must have had a full and fair opportunity to litigate the issue in the prior proceeding (***see Staatsburg Water Co. v Staatsburg Fire Dist.***, 72 NY2d 147 [1988]; ***Capital Tel. Co. v Pattersonville Tel. Co.***, 56 NY2d 11 [1982]).

The record here demonstrates that the issues in this matter, namely whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Metro, within the meaning and intent of Tax Law §§ 1131 (1) and 1133 (a) for the period ended February 28, 2002 through February 29, 2004, and whether the audit method employed by the Division in determining tax due for Metro for the subject period was reasonable or whether petitioner has shown error in the audit method or result, are identical to this issues decided in ***Silverstein I***. Moreover, these issues were necessarily addressed and decided in ***Silverstein I***, and petitioner had a full and fair opportunity to litigate these issues in the prior proceeding, both

during the hearing before the Division of Tax Appeals and the exception he filed before the Tax Appeals Tribunal in ***Silverstein I***.

C. Regarding the first issue, whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Metro for the period ended February 28, 2002 through February 29, 2004, the Tribunal found that petitioner was a responsible person for Metro within the meaning of Tax Law § 1131 (1) and Tax Law § 1133 (a) for the period ended February 28, 2002 through November 30, 2007 (***Silverstein I***). The period at issue herein is necessarily included within the periods addressed in ***Silverstein I***, wherein the Tribunal held that petitioner was a responsible person for Metro. The Tribunal found that petitioner was a responsible person for Metro, both by virtue of his guilty plea wherein he admitted that he was an officer and responsible person for Metro for the periods at issue, and based on the documentary evidence which showed his status as an officer and signatory to a banking agreement on behalf of Metro (***see Silverstein I***). As such, the identical issue has already been decided in favor of the Division.

Petitioner was present and participated in the proceedings in ***Silverstein I*** , including the hearing and exception, and had a full and fair opportunity to present evidence and testimony to contest the issue in the prior action. Despite having a full opportunity to litigate the issue, petitioner failed to present any evidence to dispute the Division's contention that he was a responsible person for Metro for purposes of Tax Law §§ 1131 and 1133, and the Tribunal concluded that petitioner failed to meet his burden of proof. As such, petitioner is estopped from claiming in this proceeding that he was not a responsible person for Metro for purposes of Tax Law §§ 1131 and 1133 for the period ended February 28, 2002 through February 29, 2004.

D. The second issue raised in this proceeding, whether the audit method employed by the Division in determining tax due for Metro for the subject period was reasonable or whether

petitioner has shown error in the audit method or result, is also identical to the issue decided in ***Silverstein I***. In ***Silverstein I***, the Tribunal reviewed the Division's audit of Metro for the period December 1, 1998 through November 30, 2007, and determined that the audit method employed by the Division was reasonable and that petitioner had not shown error in the audit method or result. Again, the period addressed by the Tribunal in ***Silverstein I*** includes the period at issue herein. Furthermore, in order to determine the propriety of the penalty assessment at issue in ***Silverstein I*** (***see*** Finding of Fact 2), the underlying audit and assessment of tax due for Metro and petitioner as a responsible person were necessarily at issue and decided in the prior proceeding.

In addressing the determination of sales tax due for Metro, the Tribunal noted that Tax Law § 1105 (a) imposes a sales tax on the receipts from every retail sale of tangible personal property; that Tax Law § 1135 (a) (1) provides that every person required to collect sales tax must maintain records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due; and that a "person required to collect tax" is defined, in relevant part, as every vendor of tangible personal property or services, including any officer, director or employee of a corporation or dissolved corporation who in such capacity was under a duty to act for the corporation (***Silverstein I***, citing Tax Law § 1131 [1]).

The Tribunal further noted that sales tax returns are required to be filed by persons required to collect sales tax (Tax Law § 1136), and where a sales tax return has not been filed, or if a return when filed is incorrect or insufficient, the Tax Law allows the Division to determine the amount of tax from "such information as may be available," which may include the use of external indices (Tax Law § 1138 [a] [1]).

The Tribunal next described the well established standard for reviewing a sales tax audit where an indirect audit methodology has been employed in the determination of sales tax liability, as was set forth in ***Matter of AGDN, Inc***. (Tax Appeals Tribunal, February 6, 1997), as follows:

> "a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (***see***, Tax Law §§ 1138[a]; 1135; 1142[5]; ***see***, ***e.g.***, ***Matter of Mera Delicatessen***, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained 'shall include a true copy of each sales slip, invoice, receipt, statement or memorandum' (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, 'the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ' (Tax Law § 1138[a]; ***see, Matter of Chartair, Inc. v. State Tax Commn.***, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (***Matter of Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869); exactness is not required (***Matter of Meyer v. State Tax Commn***., 61 AD2d 223, 402 NYS2d 74, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025; ***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451)."

The Tribunal concluded that the audit method employed by the Division in its audit of Metro was reasonable (***Silverstein I***). The Tribunal found that Metro failed to provide sales records sufficient to conduct an audit of its transactions, despite the Division's repeated requests for those records, and that the Division reasonably concluded that Metro did not maintain or have available books and records sufficient to verify sales for the audit period (***id.***). As such, the Tribunal determined that the Division was entitled to resort to the use of indirect methods to

determine the Metro's sales and sales tax liability (***id.***, citing Tax Law § 1138 [a] [1]; ***Matter of W. T. Grant Co. v Joseph***, 2 NY2d 196 [1957], ***cert denied*** 355 US 869 [1957]; ***Matter of Del's Mini Deli, Inc. v Commissioner of Taxation and Finance***, 205 AD2d 989 [3d Dept 1994]; ***Matter of Vebol Edibles v Tax Appeals Tribunal,*** 162 AD2d 765 [3d Dept 1990], ***lv denied*** 77 NY2d 803 [1991]). The Tribunal noted that when the Division must resort to indirect methods of determining taxable sales, it is required to select a method that is reasonably calculated to reflect the tax due (***id.***, citing ***Matter of W. T. Grant Co. v Joseph***; ***Matter of Bernstein-On-Essex St.***, Tax Appeals Tribunal, December 3, 1992). The burden then rests upon the taxpayer to demonstrate that the method of audit was unreasonable or the amount of the assessment was erroneous (***id.***, citing ***Matter of Surface Line Operators Fraternal Org. v Tully***; ***Matter of Your Own Choice***, Tax Appeals Tribunal, February 20, 2003).

The Tribunal addressed the audit method utilized by the Division, wherein the auditor compiled information from third-party sources, including DMV and bank records, which were cross-referenced against questionnaires returned from Metro's customers, to determine the gross and taxable sales as well as the amount of sales tax due on those transactions, and noted that only those transactions evidenced by bank deposits and DMV information were counted as taxable sales by the Division (***id.***). The Tribunal concluded that the audit method employed was reasonably calculated to determine the amount of tax due (***id.***).

The Tribunal further stated that once the Division has shown that its audit methodology was reasonable, petitioner 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 (***id.***, ***citing Matter of Sarantopoulos v Tax Appeals Trib.***, 186 AD2d 878 [3d Dept 1992]). The Tribunal found that petitioner failed to meet this burden (***id.***). The Tribunal rejected

petitioner's argument that a completed MV-50 and bill of sale were required for each transaction to show a taxable sale, finding that it was petitioner's obligation as a responsible person of Metro to maintain the business's records sufficient to verify all transactions and to provide such records to the Division upon request (***id.***, ***citing*** Tax Law § 1135 [a] [1]). Having failed in his obligation to maintain and provide such records, any imprecision arising from the application of an indirect audit method that is reasonably calculated to determine taxable sales must be borne by petitioner (***id.***, ***citing Matter of Markowitz v State Tax Commn.***, 54 AD2d 1023 [1976], ***affd*** 44 NY2d 684 [1978]; ***Matter of Meyer v State Tax Commn.***, 61 AD2d 223 [1978], ***lv denied*** 44 NY2d 645 [1978]).

In addition to the identity of the issue and the Tribunal's decision in ***Silverstein I*** that the audit method employed by the Division in determining tax due for Metro for the subject period was reasonable and that petitioner failed to show error in the audit method or result, petitioner was afforded a full and fair opportunity to litigate this issue during the proceedings in ***Silverstein I***. Indeed, the Tribunal found that despite having the opportunity to present evidence to support his case, petitioner failed to produce any testimony or business records in support of his argument (***id.***). The Tribunal found that such failure resulted in the strongest possible negative inference against petitioner's position and the conclusion that petitioner did not produce any evidence because it would not have been sufficient to contradict the Division's evidence (***id.***, ***citing Matter of Drebin***, Tax Appeals Tribunal, March 27, 1997, ***affd*** 249 AD2d 716 [3d Dept 1998]).

Accordingly, petitioner is estopped from claiming in this proceeding that the audit method employed by the Division in determining tax due for Metro for the subject period was unreasonable or that the audit method or result was erroneous.

E. Petitioner disingenuously claims in response to the Division's motion that "[t]he Department of Taxation has not provided the subsequent audit report and accompanying paper work that gave rise to the assessment before this Court. Defendant has never seen the audit and has never had an opportunity to review how the Department of Taxation came to determine that an additional $293,463.76 is (sic) unpaid taxes is now due." Contrary to petitioner's contention, petitioner was presented with the audit report, work papers, and complete audit file for Metro both during the hearing in ***Silverstein I***, as well as with the Division's motion in this matter. During the hearing in ***Silverstein I***, the Division's auditor testified regarding its audit of Metro and its determination of sales tax due, and provided a detailed explanation of how the Division arrived at its calculation of tax due from Metro for the period at issue. Indeed, petitioner conducted a lengthy cross-examination of the auditor regarding the Division's determination of tax due from Metro during the hearing in ***Silverstein I***, but failed to refute the Division's determination.

Petitioner raises the same argument here that was raised and rejected by the Tribunal in ***Silverstein I***, claiming that the plea agreement was based on an audit of the wrong company. Petitioner argued both during the hearing and on exception to the Tribunal in ***Silverstein I*** that the wrong corporate entity was the subject of Metro's audit, namely Metro Auto Leasing NYC, Inc., rather than Metro Auto Leasing, Inc. This argument was rejected by both the Administrative Law Judge and the Tribunal in ***Silverstein I***. The Tribunal found that the record clearly demonstrated that Metro's sales transactions were the subject of the audit (***see Silverstein I***). The Tribunal noted that the Division showed that deposits for sales made by Metro were deposited into a bank account titled "Metro Auto Leasing NYC, Inc. D/B/A Carsbytel," the banking agreement for that account listed the address for Metro Auto Leasing NYC, Inc., as

Metro's business address and petitioner signed the banking agreement as president of the business (***id.***). The Tribunal found that nothing in the record contradicted the finding that Metro did business under the d/b/a Carsbytel, the name listed on the banking agreement, and determined that the Division properly analyzed deposits in this bank account for purposes of determining Metro's taxable sales.

Petitioner failed to present any evidence to dispute the Division's determination, either during the proceedings in ***Silverstein I*** or in response to the Division's motion herein. Having failed to "produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,'" petitioner has failed to defeat the Division's motion for summary judgment (***Whelan v GTE Sylvania***).

F. The Division's motion for summary determination is hereby granted, the notice of determination dated June 10, 2013 is sustained, and the petition is denied.

DATED: Albany, New York
January 4, 2018

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE