

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SUPER PC SYSTEMS, INC.	:	DETERMINATION DTA NO. 830355
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, 2017 through November	:	
30, 2019.	:	

Petitioner, Super PC Systems, 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, 2017 through November 30, 2019.

A hearing was held before Nicholas A. Behuniak, Administrative Law Judge, in Brooklyn, New York, on February 3, 2023, with all briefs due by August 22, 2023, which date began the six-month period for the issuance of this determination. Petitioner appeared by Gabor & Marotta, LLC (Richard M. Gabor, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel).

ISSUE

Whether petitioner has established that the amount of additional use tax asserted is unreasonable and should be cancelled.

FINDINGS OF FACT

Pursuant to 20 NYCRR 3000.15 (d) (6), the Division of Taxation (Division) submitted 20 proposed findings of fact. The Division's proposed findings of fact 1 through 6, 8, 9, 11, 13 through 15, and 17 are supported by the record and have been substantially incorporated herein.

Proposed findings of fact 7, 12, and 16 and 18 through 20 are not supported by the record.

Proposed finding of fact 10 is rejected as irrelevant and/or not supported by the record. In addition, petitioner, Super PC Systems, Inc., submitted unnumbered proposed findings of fact in a narrative format as part of its post-hearing brief. Given the manner in which such proposed findings of fact were presented, it is not possible to make rulings on such (*see* State Administrative Procedure Act § 307 [1]). However, the relevant and appropriately supported portions of petitioner's proposed findings of fact have been incorporated herein.

1. Petitioner conducted a business in Brooklyn, New York, where petitioner sells point of sale (POS) equipment and services to customers. POS equipment may include sales register computers, cash drawers, receipt printers, kitchen printers, chip readers, and bar code scanners. Different customers need different POS equipment.

2. At the time petitioner purchased the POS equipment, it did not pay sale tax because it intended to resell the equipment.

3. Petitioner may sell POS equipment to customers at either the relevant full market price or subject to conditional sales contracts where petitioner receives \$.01 every month for 48 months (penny contracts). During the 48-month penny contract term, petitioner retains title to the POS equipment. In instances where sales are made pursuant to penny contracts, in addition to paying petitioner \$.01 per month, customers also agree to enter into an agreement with certain credit card processing (CCP) vendors. Said CCP vendors will pay petitioner certain amounts associated with the sales it processes for petitioner's POS penny contract customers (residuals). The record is not clear on the amount of the residual payments made to petitioner during the period at issue.

4. At the end of the 48-month penny contract term, petitioner's customers take title to the POS equipment.

5. The Division initiated an audit of petitioner in May of 2019. The Division's audit covered the period of March 1, 2017 through November 30, 2019.

6. The Division sent petitioner three information document requests (IDRs), one dated May 27, 2020, one dated November 6, 2020, and one dated December 3, 2020 (IDR No. 3). Each of the IDRs requested substantially the same information and documentation for the audit.

7. IDR No. 3 reflected the following dates that the information requested by the Division had been provided by petitioner or was otherwise not applicable (n/a).

Request Number:	Description of documents and information requested:	Date Provided:
1.	Sales tax worksheets used to prepare the returns filed for the audit period	6/5/2020
2.	Sales tax accrual account for the audit period	6/5/2020
3.	Billing Register if available for the Test Period	6/11/2020
4.	Sales invoices for a test period TBD	6/11, 6/12, 8/24/2020
5.	All exemption documents supporting non-taxable sales, including: resale, exempt use, exempt organization, and capital improvement certificates any other documentation necessary to prove non-taxable sales	10/22/2020
6.	Sample Blank Contract for Services	8/18/2020
7.	General journal and closing entries	n/a
8.	Depreciation schedule	n/a
9.	Fixed asset purchase/sales invoices	n/a
10.	Chart of accounts	6/5/2020
11.	General ledger – TBD	6/30/2020
12. ¹	Expense purchase invoices for a test period TBD	8/18/2020
14.	Open Accounts Receivable at 8/31/2020 for Hardware	
15.	Open Accounts Receivable at 8/31/2020 for Software	
16.	List of customers charged \$.01 for POS and cost of POS provided for each currently in use in NYS	

8. During the audit, in response to the Division's requests, petitioner provided the Division the cost of goods sold (COGS) dollar amounts for all the POS equipment that was subject to

¹ IDR No. 3 goes directly from request number 12 to request number 14. The Division offered no explanation for the discrepancy.

penny contracts for the period at issue. COGS is the dollar amount paid by petitioner for its purchases of the subject POS equipment. During the audit, petitioner also provided the Division a blank example of a penny contract.

9. The Division determined that the penny contracts were not actual sales of the POS equipment and assessed petitioner additional use tax for the POS equipment subject to penny contracts. The Division used the POS equipment COGS dollar amounts to calculate the additional use tax due.

10. On February 18, 2021, the Division issued a notice of determination, bearing assessment number L-052920034 (notice), to petitioner for use tax in the amount of \$15,063.40, plus interest for the period at issue.

11. Subsequent to issuance of the notice, and prior to the hearing, petitioner supplied to the Division an executed penny contract.

12. At the hearing, the Division presented the testimony of Laura Liberio, a Tax Auditor I with the Division. Ms. Liberio performed the audit of petitioner and testified to the Division's audit findings. The Division determined that, because the consideration was only \$.01 per month for the penny contracts, petitioner did not actually sell the POS equipment and that petitioner's purchase price for the equipment, COGS, should be subject to use tax. The Division was aware of the residual amounts on petitioner's books and records, but determined such were not independently taxable. The Division did not request information regarding what portion of the residual payments received by petitioner related to the penny contracts.

13. At the hearing, petitioner presented the testimony of Vladimir Sadovsky, Chief Operating Officer of Netevia. Netevia a company that is a CCP vendor that petitioner did business with as part of the penny contracts. Mr. Sadovsky testified about Netevia's operations as a CCP vendor. At the hearing, petitioner also presented the testimony of Andrey Belyayev,

owner of petitioner during the period at issue. Mr. Belyayev testified about petitioner's sales of POS equipment and the penny contracts. Both Messrs. Sadovsky's and Belyayev's testimony revolved around establishing that the penny contracts were actual sales made by petitioner.

SUMMARY OF THE PARTIES' POSITIONS

14. The Division consistently asserted that petitioner's penny contract sales of POS equipment were not actually sales and that petitioner should be liable for use tax on the subject equipment. However, in its brief, for the first time during these proceedings, the Division concedes that the penny contract POS equipment sales are legitimate sales, but because the penny contracts include a required arrangement between a CCP vender and the POS equipment purchaser, and petitioner receives residuals for such, the assessment should be upheld.

15. Petitioner asserts that its sales of POS equipment to customers subject to the penny contracts are legitimate sales of equipment and not a use by petitioner. Upon learning of the Division's concession that the penny contract sales were in fact legitimate sales, petitioner argues that the Division should not be allowed to change its arguments so drastically at this point in the process and that the assessment should not be upheld.

CONCLUSIONS OF LAW

A. A presumption of correctness attaches to a properly issued statutory notice issued by the Division and the taxpayer bears the burden to prove that the assessment is incorrect (*see Matter of Hotel Depot, Inc.*, Tax Appeals Tribunal, January 24, 2020, citing *Matter of Darman Bldg. Supply Corp. v Mattox*, 106 AD3d 1150, 1151 [3d Dept 2013]; *Matter of Blodnick v New York State Tax Commn.*, 124 AD2d 437, 438 [3d Dept 1986], *appeal dismissed* 69 NY2d 608 [1987]). Although a determination of tax must have a rational basis in order to be sustained, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (*see Matter of*

Leogrande v Tax Appeals Trib., 187 AD2d 768, 769 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]). In this case, the Division initially asserted that the penny contract sales were not sales at all but rather the equipment was used by petitioner. For the first time in this case, in its post-hearing brief, the Division concedes that the penny contracts were actual sales but nevertheless seeks to have the assessment sustained.

B. The hallmarks of due process are notice and an opportunity to be heard (*see Matter of Mayo*, Tax Appeals Tribunal, March 9, 2017, *confirmed* 172 AD3d 1554 [3d Dept 2019], *lv denied* 34 NY3d 1140 [2020], *rearg denied* 35 NY3d 1005 [2020], citing to *Matter of Balkin*, Tax Appeals Tribunal, February 10, 2016). The Tax Appeals Tribunal has held:

“[T]he Division must at hearing, through witnesses or documents, be able to respond meaningfully to inquiries regarding the nature of the audit performed. Such information is necessary in order to provide petitioner with an opportunity to meet its burden of proving such methodology unreasonable” (*see Matter of Silver Saddle Deli Grocery, Inc.*, Tax Appeals Tribunal, April 25, 2019, citing *Matter of Basileo*, Tax Appeals Tribunal, May 9, 1991).

The Division’s assessment is based upon a COGS calculation under one theory of liability but now it desires that same calculation to apply to a very different theory of liability. There is a lack of evidence in the record for the dollar amounts that relate to the residuals tied to the penny contracts. This in large part appears to be the result of the fact that, until the Division filed its post-hearing brief for this matter, it was pursuing a different line of liability. During the audit, the Division was aware of the residual income on petitioner’s books and records but did not pursue finding out how such income pertained to the penny contracts. At the hearing, the Division did not pursue its newfound theory for the liability, even though witnesses made available by petitioner could have offered insight into the issue. In this case, in light of the Division changing its theory for liability after the hearing, the assessment is deemed unreasonable since the record fails to establish a compelling connection between the additional

liability calculated based upon the COGS and the relevant residual payments or the penny contracts at issue. Additionally, petitioner was thwarted from effectively addressing the Division's newfound theory for liability since this issue was not raised until after the hearing was completed and the record was closed.

C. In its post-hearing brief, the Division appears to insinuate that its material change in position was driven by a lack of information provided by petitioner during the audit. However, it appears petitioner provided the Division most of what was requested on audit (*see* finding of fact 7). Furthermore, the inference that the Division was significantly hindered in making its conclusions in this case based on petitioner's disclosures during the audit was also an argument not seriously pursued by the Division at the hearing. There is nothing in the record that indicates that petitioner was particularly evasive during the audit, and the witnesses petitioner provided at the hearing gave the Division ample opportunity to pursue the issue.

D. The petition of Super PC Systems, Inc., is granted and the notice of determination, bearing assessment number L-052920034, is canceled.

DATED: Albany, New York
February 22, 2024

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE