

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**SWEET CONSTRUCTION CORP.** : DETERMINATION  
 : DTA NO. 825489  
 :  
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, 2005 through November 30, 2007. :  
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Petitioner, Sweet Construction Corp., 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, 2005 through November 30, 2007.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on March 26, 2014 at 11:00 A.M., with all briefs to be submitted by September 8, 2014, which date began the six-month period for the issuance of this determination. By letter to the parties dated February 25, 2015, this due date was extended pursuant to Tax Law § 2010(3). Petitioner appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

***ISSUES***

I. Whether petitioner is entitled to a refund for sales tax paid on alleged nontaxable sales to Limited Brands and M. & R. Schoenbach.<sup>1</sup>

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<sup>1</sup> The issue regarding the expense purchases was not pursued on brief and, therefore, is deemed abandoned.

II. Whether petitioner has demonstrated reasonable cause such that penalties should be abated and a refund issued.

***FINDINGS OF FACT***

1. Petitioner, Sweet Construction Corp., is a contractor that performs construction services as well as repair and maintenance services to real property in the New York City area.

2. Beginning in 2008, the Division of Taxation (Division) commenced a sales and use tax field audit of petitioner's books and records for the period March 1, 2005 through November 30, 2007 pursuant to a test period audit agreement executed on April 2, 2010.

3. Sales were reviewed for the test period June 1, 2007 through August 31, 2007. After this review, the Division's auditor found that a portion of the reported nontaxable sales were unsubstantiated. In particular, certain sales to Sterling Management, Limited Brands and Mr. R. Schoenbach were unsubstantiated as nontaxable.

4. With respect to Sterling Management, petitioner did not provide a capital improvement certificate but rather an unsigned work proposal. Petitioner stated at hearing that the services provided were repair in nature and, thus, conceded the taxable nature of this transaction.

5. The services provided to M. R. Schoenbach were claimed to be nontaxable. Petitioner provided to the auditor an unsigned, undated capital improvement certificate that identified the services performed as construction work. The certificate did not have a contract attached to it, did not include a Certificate of Authority number or any other detail. Therefore, the auditor determined these services were properly taxable.

6. The documentation for services rendered to Limited Brands was an unsigned change order. Petitioner did provide a signed capital improvement certificate two years after completion

of the work, yet the auditor found the certificate to be insufficient since it lacked detail as to the services rendered. This form also lacked a Certificate of Authority number.

7. The auditor also reviewed expense purchases for the test period of January 1, 2007 through November 30, 2007. Petitioner contested only one expense item, an annual membership fee of \$265 for Timberline Users Group. This membership subscription allowed petitioner access to information and troubleshooting with respect to construction and real estate software used in connection with petitioner's business.

8. On June 1, 2010, a Notice of Determination, Notice L-033925282, was issued to petitioner for additional sales tax due in the amount of \$65,003.33 plus interest and penalty. Penalty was assessed based upon petitioner's failure to sufficiently cooperate on audit in failing to respond to telephone calls, messages and emails, presenting difficulty in scheduling meetings and in failing to provide the books and records requested to substantiate claimed exempt sales. Petitioner did not file a petition with respect to the notice.

9. On November 6, 2012, the Division received a claim for refund from petitioner that requested a refund in the amount of \$150,000.00 for the period March 1, 2005 through November 30, 2007. By letter dated January 3, 2013, the Division denied the refund claim because sufficient documentation was not provided to substantiate the refund request.

10. On January 24, 2012, petitioner timely filed its petition for review of the refund denial letter. Petitioner claims entitlement to a refund based upon alleged "overpaid [s]ales tax, penalty and interest with respect to a previous audit" (Exhibit E, p. 2).

11. At the formal hearing, the Division presented the testimony of the auditor who testified that she was unable to determine that any of the claimed expenses qualified as capital improvements. The auditor stated that the certificates lacked any detail as to the work performed

and petitioner presented no documents to establish what work was performed. Similarly, the auditor stated that without any substantiation, she was unable to determine whether any of the claimed expenses purchases were exempt.

12. Petitioner presented Mr. Boone, its chief financial officer, who testified about the claimed capital improvements. However, Mr. Boone could not provide specificity concerning the exact capital improvements that are at issue in this case. In fact, the witness testified that some of the jobs were taxable repair services. There was no testimony regarding reasonable cause or a lack of willful neglect in petitioner's failure to pay the sales and use tax due.

13. Petitioner also presented its comptroller, who testified stating that, as far as he was concerned, he was cooperative and did not have any communication issues with the Division's auditor. On cross-examination, he did concede that he missed scheduled appointments with the auditor.

### ***CONCLUSIONS OF LAW***

A. This case devolves to whether the forms ST-124 are sufficient enough to demonstrate that the sales made by petitioner to its customer were in the nature of capital improvements. Tax Law § 1105(c)(3) provides for a tax on receipts from every sale, except for resale, for the installation of tangible personal property, with the following exception:

“(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter.”

Tax Law § 1101(b)(9)(i) defines capital improvement as an addition or alteration to real property which:

“(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.”

The regulations adopted by the Division to define capital improvement mirror the statutory language (*see* 20 NYCRR 527.7[a][3]).

B. Exhibit 1 contains a copy of the forms ST-124 that have been rejected by the Division. As noted in the Findings of Fact, these forms are all lacking the Certificate of Authority number. Moreover, there is a question regarding the timely receipt of these forms. The auditor testified that she did not see the forms until after the audit.

The failure to timely provide a certificate of capital improvement is not determinative of capital improvement status (*see Matter of L & L Painting Co.*, Tax Appeals Tribunal, June 2, 2011). What must be determined is whether the work performed by petitioner qualified as a capital improvement under the three-prong test set forth in Tax Law § 1101(b)(9)(i). Petitioner has failed to show that the work qualified as capital improvements.

C. Tax Law § 1132(c) presumes that all receipts are taxable unless the contrary is established. A taxpayer must adequately document and justify the disputed activity it asserts was not subject to tax in order to meet its burden of proof (Tax Law § 1132; *see Matter of Airport Indus. Park*, Tax Appeals Tribunal, April 11, 1991; *Matter of Dac's Trucking*, Tax Appeals Tribunal, March 21, 1991). Petitioner's argument that the burden of proof is upon the Division is without merit.

As noted by the auditor, the forms ST-124 merely state that the work performed was “FABRICATION & INSTALLATION OF SIGNAGE.” Attached to the forms are separate invoices. However, the invoices add little information as to whether the work qualified as capital

improvements. Some invoices state fabrication, installation, travel time and permits while other invoices provide even less information. The auditor requested contracts, which were not provided. In the absence of any detailed description regarding the work performed, the Division properly rejected the forms ST-124 since, on their face, they fail to demonstrate that the work performed by petitioner was nontaxable capital improvements.

D. The next issue to address is whether petitioner has presented reasonable cause to abate the penalties imposed. Tax Law § 1145(a)(1)(i) imposes a penalty for the failure to timely file a sales tax return or to pay any tax imposed under Articles 28 and 29 of the Tax Law. Petitioner has the burden of proof to show that this failure to report and pay over the required amount of sales tax was due to reasonable cause and not due to willful neglect.

Petitioner argues that there were two other matters before the Division of Tax Appeals, relating to this case, that resulted in canceled assessments, and this demonstrates reasonable cause and a lack of willful neglect, such that penalties in this case should be abated. This position is without merit. Although there were two separate proceedings involving alleged individual responsible persons, these matters were discontinued and the assessments canceled. There was no reasoning behind the cancellations or any other indication of the original liability involved in those matters. Moreover, the tax period at issue in those discontinued proceedings was June 1, 2007 through November 30, 2007, which only represents a portion of the tax period at issue herein.

The Division's auditor outlined the difficulty she had with obtaining documentation throughout the audit as well as petitioner's failure to attend scheduled meetings. In fact, petitioner's comptroller did not dispute this claim. Moreover, neither of the witnesses presented

on behalf of petitioner addressed the issue of reasonable cause or a lack of willful neglect in their testimony. Accordingly, petitioner has failed to demonstrate that the penalties should be abated.

E. The petition of Sweet Construction Corp. is denied and the Refund Denial Letter, dated January 3, 2013, is sustained.

DATED: Albany, New York  
June 4, 2015

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE