STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions :

of :

CROW & SUTTON ASSOCIATES, INC. AND PINE VALLEY LANDSCAPE CORP. :

for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2004 through August 31, 2004. :

In the Matter of the Petition :

of :

FOXCROFT NURSERIES, INC. :

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods June 1, 2004 through August 31, 2004 and March 1, 2005 through November 30, 2005. :

In the Matter of the Petition :

of :

D. JAMES SUTTON :

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 June 1, 2004 through November 30, 2005.[1] :

DECISION
DTA NOS. 822871, 822872, 822873, and 822874

[1] When the Conciliation Order dated November 14, 2008 (CMS No. 222719) was issued by the Bureau of Conciliation and Mediation Services (BCMS) to petitioner, listing the notices that assessed him as a responsible person for the corporate petitioners, the period covered by the order was listed as 6/1/04 - 11/30/04 instead of 6/1/04 - 11/30/05. When petitioner filed his petition with the Division of Tax Appeals, the period petitioned was copied from the Order, and the error continued on the records of the Division of Tax Appeals. During the hearing, petitioner was allowed to amend his petition to list the quarters actually covered by the assessment that petitioner continues to protest, specifically, the one that assesses petitioner as a responsible officer of Foxcroft.

Petitioners, Crow and Sutton Associates, Inc., Pine Valley Landscape Corp., Foxcroft Nurseries, Inc., and D. James Sutton, Inc., filed an exception to the determination of the Administrative Law Judge issued on October 20, 2011. Petitioner, D. James Sutton appeared *pro se* and as an officer or owner the corporate petitioners. The Division of Taxation appeared by Mark Volk, Esq. (Lori Antolick, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners did not file a reply brief. Oral argument, at petitioners' request, was heard on July 11, 2012 in Albany, New York.

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

ISSUES

I. Whether the Division of Taxation (Division) properly assessed petitioners for sales and uses taxes on the basis of a reasonable audit methodology given the lack of books and records provided by petitioners.

II. Whether petitioners met their burden of proof to show that they are not liable for sales and use taxes.

III. Whether D. James Sutton is a responsible officer of the three corporate petitioners.

IV. Whether the Division of Tax Appeals may name Lori Chapones as a responsible person of the corporate petitioners.

V. Whether petitioners are subject to penalties pursuant to Tax Law § 1145 or whether they have established that their failure to properly report and pay the correct amount of sales and use taxes was due to reasonable cause.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "5," "7," "8," "13," "26" and "29." The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

These matters concern the asserted sales and use tax liabilities of Crow and Sutton Associates, Inc. (Crow), Pine Valley Landscape Corp. (Pine Valley), Foxcroft Nurseries, Inc. (Foxcroft) (the corporate petitioners)[2] and D. James Sutton (petitioner)[3] for the periods described above.

The corporate petitioners filed sales and use tax returns on an annual basis. For fiscal year 2005 (March 1, 2004 through February 28, 2005), Crow, Pine Valley and Foxcroft filed sales and use tax returns reporting zero taxable sales and services. For fiscal year 2004 (March 1, 2003 through February 29, 2004), Foxcroft filed an annual sales and use tax return reporting taxable sales and services in the amount of $30,899.00.

Crow, a landscaping contract business located in Buskirk, New York, was incorporated in the State of New York in 1980. According to the federal corporate tax return, Form 1120S, for fiscal year July 1, 2004 through June 30, 2005, Crow was 100% owned by petitioner.

Pine Valley is also a landscaping business, whose work during all relevant times was primarily for new construction. The majority of Pine Valley's work was commercial in nature and was described as "tax exempt" in large part. The company was also located in Buskirk and was incorporated in the State of New York in 1985. During 2003 and 2004, according to the

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[2] Crow, Pine Valley and Foxcroft, when referred to collectively will also be known as the corporate petitioners. Otherwise, references to the individual companies will be by their names, as designated.

[3] "Petitioner" will refer to D. James Sutton. "Petitioners" will refer to the corporate petitioners and the individual petitioner collectively.

federal tax returns (forms 1120) for Pine Valley, Ruth Sutton, petitioner's wife, owned 90% of the business and David Sutton,[4] petitioner's brother, owned 10%.

Foxcroft, a wholesale tree nursery also located in Buskirk, New York, was incorporated in the State of New York in 1985. Foxcroft grew trees and plants and supplied the two affiliated landscaping companies with about 50% of the products needed for jobs, and supplied many other landscaping companies and nurseries with products. Foxcroft also had a small retail center where it sold nursery products. In 2004, the ownership of Foxcroft was 75% by petitioner, 20% by Ruth Sutton, and 5% by David Sutton.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> Petitioner started his landscaping and nursery businesses in 1977 when he was in college, built them up, and eventually turned them into the corporations described above, Crow, Pine Valley and Foxcroft. By 1987, petitioner had expanded the companies to a very large scale, spanning from the east coast to Colorado, with some projects abroad, working on 37 corporate world headquarters buildings and many public works projects. He was involved in every aspect of the businesses he created. In 1999, petitioner's wife, Ruth, who had been working with him in one of the businesses, faced some medical problems. Petitioner testified that he made a decision to scale back his businesses significantly to take care of his wife and children. He hired Pat Bassey, a CPA, to be the Comptroller, handling the office and administrative business details, and Doug Squires to lead the field work. Pat Bassey hired Lori Chapones in October 2000, and together, the two of them ran the office and business portion of the three corporate petitioners. Petitioner terminated Pat Bassey's employment in January 2003 because, as petitioner testified, Ms. Bassey was "a good CPA . . . but she didn't get along with the field people [so] I let her go." Thereafter, petitioner elevated Lori Chapones to the position of Comptroller,[5] requiring her to handle aspects of the office and business finances. Throughout this period, petitioner still

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[4] The federal tax return lists "Davis" Sutton, however, there appears to be a typographical error, since the social security number next to Davis matches that of petitioner's brother David, who is mentioned during the hearing and who owned a small percentage of Foxcroft, in addition to his share of Pine Valley.

[5] The Division of Tax Appeals' hearing transcript refers to this corporate officer title with the corporate petitioners as the "comptroller" position; however, other documentation in the record refer to the same position as the "controller" position. The record is not clear which title is the correct reference.

maintained authority and control over the overall operations of the corporate petitioners and filing of the relevant tax returns. Petitioner started experiencing business problems for the first time in his career, and the businesses were losing money.[6] Petitioner testified that he trusted Doug Squires, who was a foreman of 20 years, and Lori Chapones, a woman he had known since she was five years old.

In August 2006, when Lori Chapones was preparing to take maternity leave, petitioner hired a new employee to perform the necessary office functions in her absence. Within a short time of Lori Chapones starting her maternity leave, the new employee informed petitioner that she believed that his employees, particularly Lori Chapones and Doug Squires, had been stealing from him. Petitioner asserts that within a short time of hiring her, the new employee realized that the company computers did not have the information that they were supposed to have, software was missing and business records were missing from the file cabinets.

At the Division of Tax Appeals hearing, Ms. Chapones testified that she left almost all of petitioners' books and records at petitioners' corporate offices before she left on maternity leave and she was expecting to return to work after her leave of absence. This testimony reconciles with Ms. Chapones' sworn testimony at a New York State Department of Labor hearing that was held on October 26, 2006. Petitioner filed a criminal complaint with the New York State Police on August 16, 2006 and, as of the date of the Division of Tax Appeals hearing in this matter, a criminal embezzlement and missing records investigation has been ongoing. At the time of the Division of Tax Appeals hearing (2010), no charges had been filed against Ms. Chapones. At the 2006 New York State Department of Labor hearing, Ms. Chapones readily admitted to conducting certain illegal activity on behalf of herself and the corporate petitioners. However, Ms. Chapones testified under oath that she never embezzled funds from petitioners and that she had never kept any significant books and records relating to the corporate petitioners for the years at issue.

During the Division of Tax Appeals hearing, both the Division's auditor and Administrative Law Judge suggested to petitioner what business documents might be useful in resolving this case favorably to petitioner. The Administrative Law Judge informed petitioner that such documents should be submitted into the hearing record. During the initial days of the Division of Tax Appeals hearing, petitioner indicated to the Administrative Law Judge that he had previously been contacted by the State Police and had reviewed their files regarding the corporate petitioners and the State Police investigation pertaining to missing funds and records. Petitioner testified that the State Police files in this regard were extensive and contained the necessary information to show that petitioners should not have

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[6] There is nothing in the record to indicate that petitioners' decline in business was anything other than a downturn in the general business climate for petitioners' services and goods.

> any additional tax liability. The Administrative Law Judge suggested that petitioner retrieve copies of relevant materials for this case from the State Police. She also indicated that she would postpone the conclusion of the hearing and provide for an additional future hearing date where she could accept additional relevant submissions. Petitioner indicated that he understood what he needed to obtain to prove his case and that he would be able to get the Administrative Law Judge and Division's auditor the documentation needed. In anticipation of the submission of additional evidence into the record by petitioners, the Administrative Law Judge scheduled a continuance of the hearing to take place approximately three months later. At the continued hearing date, petitioner asserted it was the Division's responsibility to obtain any and all additional documentation related to the case. Petitioner never entered any documentation concerning the State Police investigation into the record.[7]

Although Ms. Chapones was scheduled to return to her employment after her child was born, by September 2006, she had heard a rumor that petitioner was accusing her of embezzling funds and she was unable to reach him to discuss the matter. She never returned to her employment with any of the corporate petitioners or a successor company named Elhannon.

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

> As previously noted, in October 2006, the New York State Department of Labor held a hearing that involved the corporate petitioners. Pertinent portions of that hearing transcript were offered, and accepted, as evidence in this matter. At the labor hearing, Ms. Chapones testified that she had records belonging to the corporate petitioners in her possession. At that hearing, the records were not fully described and she did not clearly articulate the whereabouts of the records in question. However, she did specify that the corporate petitioners' records relating to operations in 2004 had been returned to the corporate offices. At the Division of Tax Appeals hearing, Ms. Chapones testified that whatever other corporate records she had in her possession were turned over to the attorneys representing her in 2006, and other records more recently to her criminal defense attorney.[8] Ms. Chapones also testified that most of the records she had possessed in the past pertained to an entity other than petitioners and for time periods other than those for which petitioners were assessed by the Division. Ms. Chapones testified under

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[7] We modify this fact to more clearly reflect the record.

[8] We note that Ms. Chapones appears to have possessed records for an entity other than the corporate petitioners, and that such records do not appear to relate to the periods at issue in this tax matter.

> oath that the only records she had in her possession that pertained to petitioners and the years at issue were certain check stubs. These check stubs were entered into evidence as Exhibit 10. The check stubs do not appear to be of significant relevance to these tax proceedings. At the Labor Department hearing, Ms. Chapone's testimony was similar to that given later at the Division of Tax Appeals hearing in that she testified that she had left the records relating to corporate petitioners and the years at issue at the corporate petitioners' place of business.
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> At the labor hearing, Ms. Chapones admitted to: 1) being responsible for record keeping for the corporate petitioners; 2) often signing the names of Mr. and Mrs. Sutton in their absence; 3) being an individual who worked on a plan to defraud workers of the corporate petitioners out of payment of their wages; 4) working "winter hours" during winter months, but claiming payment was made later in the year; and 5) helping to commit disability insurance fraud. She knew that she was engaged in wrongdoing in numerous ways, she freely admitted the same and noted that much of her actions were done for the benefit of the corporate petitioners.[9]

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> The New York State Unemployment Fraud Division found Ms. Chapones guilty of improperly collecting unemployment benefits and she was required to repay such funds. She has also been contacted by the New York State Police regarding larceny of money, records and a computer. Ms. Chapones testified at the Labor Department hearing and/or the Division of Tax Appeals hearing that: 1) she had committed an unemployment benefits crime; 2) she had not embezzled money from petitioners; 3) she held a new computer belonging to another company owned by petitioner, but that she had requested that petitioner take the computer back from her, although petitioner failed to do so; and 4) she had left behind, at the corporate petitioners' business location, almost all of petitioners' books and records relating to the periods at issue. According to petitioner, the State Police investigation of Ms. Chapones was still pending as of the final date of the Division of Tax Appeals hearings.[10]

The Division mailed three appointment letters dated July 3, 2007, one each to petitioner as president of Foxcroft and Pine Valley, and a third to petitioner as owner of Crow, in order to

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[9] We modify this fact to more clearly reflect the record.

[10] We modify this fact to more clearly reflect the record.

schedule a sales and use tax field audit of the corporate petitioners for the period March 1, 2004 through February 28, 2007. The audit was to take place at petitioner's offices on July 16, 2007. A detailed records requested list was provided with each appointment letter and the letters additionally recommended that an owner, officer or employee with personal knowledge of the business attend the meeting, even if a representative was present.

The Division received no response to the July 3, 2007 appointment letters.

According to the tax field audit record, these matters were put on hold for about five months. Thereafter, the Division corresponded with petitioners by three second-request letters, dated December 18, 2007, attached to which were additional records requested lists. The second appointment letters also set forth the audit period as March 1, 2004 through February 28, 2007, and scheduled an appointment with petitioner on January 2, 2008 at 10:00 A.M. at petitioner's office.

The auditor received back a copy of the December 18, 2007 appointment letter pertaining to Crow, with a handwritten notation that stated, "There has not been any business or income since 2001." Handwritten beneath the notation are what appear to be the initials "DS." In addition, the auditor received back a copy of the December 18, 2007 appointment letter pertaining to Pine Valley, with a handwritten notation that stated, "There has not been any income or business of any kind since 2002." Handwritten beneath the notation are initials or a signature that are not legible. The auditor received no other communication or information from petitioners.

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

> On January 2, 2008, the date of the scheduled appointment, the Division's auditor drove to petitioner's address in Buskirk, New York. He drove onto the property, knocked on the door and rang the doorbell, but did not get a response. The auditor testified that he saw people within the structure and attempted to get their attention but the individuals moved to the back of the building and did not acknowledge the auditor. Thereafter, the auditor returned to his office and mailed three letters, dated January 2, 2008, to petitioners indicating that he had arrived at petitioner's address and attempted to perform the scheduled audit, but was unable to do so. Additionally, the correspondence questioned the handwritten statements on petitioner's former correspondence that indicated that Crow and Pine Valley had not been in business since 2001 and 2002, respectively, since federal returns were filed for 2004 for all three corporations showing business activity. The auditor concluded by informing petitioners that he would be sending statements of tax due on the basis of the returns filed, and if petitioners had any information that would support a lower amount of tax due, they should provide such to the auditor.[11]

The auditor was never provided any of petitioners' business records for any portion of the audit period. The auditor had no communication with petitioners until a conference with BCMS was held. He instead utilized the federal income tax returns for the corporate petitioners as the basis for the tax assessments issued in these matters.

Crow filed a 2003 federal income tax return (forms 1120S) for the period July 1, 2003 through June 30, 2004, reporting gross sales of $98,885.00, and a 2004 federal income tax return for the period July 1, 2004 through June 30, 2005, showing gross sales of $169,226.00. The auditor's goal was to determine whether sales and use taxes had been paid on the amount of reported gross sales. Because petitioners failed to provide any documentation with respect to the businesses, the auditor applied an 8% sales tax to the total amount of gross sales for the two fiscal tax years, resulting in a sales tax assessment of $21,448.88 ([$98,885.00 + $169,226.00] x 8%).

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[11] We modify this fact to more clearly reflect the record.

Next, the auditor identified additional items from the federal returns upon which sales tax was required to be paid. He reviewed the following categories, and in the absence of expense invoices from Crow, he held all items subject to 8% sales and use tax, resulting in sales tax due on these items in the amount of $44,938.32 ($561,729.00 x 8%).

Categories Reviewed	July 1, 2003-June 30, 2004	July 1, 2004-June 30, 2005	Totals
Purchases	$214,891.00	$127,053.00	$341,944.00
Travel and supplies (2003) Job supplies and overhead (2004)	$2,909.00	$207,728.00	$210,637.00
Office Expenses	$9,148.00	0	$9,148.00
Total	$226,948.00	$334,781.00	**$561,729.00**

The total amount of sales and use tax found due from Crow was $66,387.20 ($21,448.88 plus $44,938.32).

The Division issued a Notice of Determination, dated February 19, 2008, to Crow in the amount of $66,387.20 plus penalty and interest. When the auditor issued the Notice of Determination, he placed the entire amount of sales tax due into the sales tax quarter June 1, 2004 to August 31, 2004, under the assumption that the work performed and the income earned by Crow as a landscaping company all took place during the 2004 summer months, June through August.

Pine Valley filed a federal income tax return (form 1120) for the year 2004, reporting gross sales of $1,310,630.00. Pine Valley also reported purchases for 2004 in the amount of $1,052,079.00. The auditor's goal was to determine whether sales and use taxes had been paid on the amount of reported gross sales and purchases. Because petitioners failed to provide any documentation with respect to the businesses, the auditor applied an 8% sales tax rate to the total

of gross sales plus purchases ($2,362,709.00) for 2004, resulting in total sales tax due from Pine Valley of $189,016.72.

The Division issued a Notice of Determination, dated February 19, 2008, to Pine Valley in the amount of $189,016.72 plus penalty and interest. The Notice of Determination placed the entire amount of sales tax due into the sales tax quarter June 1, 2004 to August 31, 2004, based on the assumption that the work performed and income earned by Pine Valley as a landscaping contractor all took place during the summer months, June through August.

Foxcroft filed a federal income tax return (Form 1120S) for the year 2004, reporting gross sales of $1,886,579.00. Foxcroft also reported $12,027.00 in office supplies and expenses, $46,348.00 in gasoline and truck expenses, $31,518.00 for equipment repair and $33,656.00 for yard and supplies expense, for an additional $123,549.00 in expenses that the auditor subjected to 8% sales and use tax, resulting in tax due on expenses of $9,883.92.

The Division had no record of Foxcroft filing its 2005 federal income tax return, but was aware that the corporation had employees working during that time because withholding tax returns had been filed. The auditor had acquired amounts for wages paid for both 2004 and 2005. He used the wage information provided on Foxcroft's 2004 New York S Corporation Franchise Tax Return and information from the Division's computer system referred to as WRSUM, which was a summary of the information provided on the 2005 withholding tax returns filed by Foxcroft, to determine its sales for 2005. He utilized gross payroll in the amount of $811,700.00 from the 2004 franchise tax return and divided it by $1,886,579.00, the gross sales from the 2004 federal return, which resulted in a 43.02% ratio of wages as a percentage of sales. The 2005 wage information available from the Division's computer system with respect to Foxcroft for the last three quarters totaled $273,834.76. The auditor used this wage information

to back into sales for 2005 by dividing the total wages by 43.02%, to arrive at computed gross sales in the amount of $636,592.47.[12] This amount for 2005 was added to 2004 gross sales as reported for a total of $2,523,171.00. Applying the 8% sales tax rate, the result was sales tax due from Foxcroft of $201,853.72, based on sales for the audit period. This amount was added to the sales tax due on 2004 expense purchases ($9,883.92) for a total amount due from Foxcroft of $211,737.64.

The Division issued a Notice of Determination to Foxcroft, dated February 19, 2008, assessing tax due in the amount of $211,737.64, plus penalty and interest. The sales tax assessment totaling $211,737.64 was broken down into four quarters:

a. The first quarter assessed, June 1, 2004 to August 31, 2004, was comprised of the total sales tax found due on the sales reported on the 2004 sales ($1,886,579.00 x 8%), or $150,926.32, plus the amount determined due on the 2004 expense purchases, $9,883.92, for a total of $160,810.24. The auditor made the same assumption as for Crow and Pine Valley, that all the 2004 income was earned during the summer months of 2004, and assessed Foxcroft for one tax quarter; and

b. Three quarters in 2005: March 1, 2005 to May 31, 2005 ($20,370.96), June 1, 2005 to August 31, 2005 ($20,370.96) and September 1, 2005 to November 30, 2005 ($10,185.48) were computed by calculating the sales tax due (8%) on the computed gross sales of $636,592.47, for a total of $50,927.40. The auditor then divided the amount due, $50,927.40, into the three quarters, apportioned 40%, 40% and 20% to the respective quarters. No explanation was

[12] This amount should be $636,528.96. Although there appears to be a mathematical error in this calculation, since the effect on sales tax computed is only approximately $5.00, this error will not be corrected, and the auditor's original calculations will continue to be used for the Foxcroft assessment.

provided as why the auditor used percentages that were other than equal amounts for the assessment of these three quarters.

The Division's auditor was under the impression that one or more of the companies had gone out of business by 2006 or 2007. This fact was referred to, but not substantiated by documentation, or otherwise, in the record. Although the audit period was never formally adjusted to exclude 2006 and 2007, no assessments for petitioners were issued involving these years.

The Division issued three notices of determination to D. James Sutton at his Buskirk, New York, address, dated February 19, 2008, asserting additional tax due in the amounts of $66,387.20, $189,016.72 and $211,737.64, each plus penalty and interest, as an officer or person responsible for the liabilities of Crow, Pine Valley and Foxcroft, respectively.

A conciliation conference was held before BCMS, on August 27, 2008, concerning the notices issued to petitioners. At the conference, petitioner informed the Division's auditor that Ms. Chapones should be named a responsible person in this case; that she had taken records from petitioners and kept them; and that a New York State Police investigation was ongoing concerning her potential wrongdoing. The auditor did not use this information in formulating his assessment and did not attempt to contact the New York State Police Financial Crimes Unit either to verify the records in their possession or to attempt to acquire the records. The auditor denied having any concrete information that would have led him to assess Ms. Chapones as a responsible person.

Four conciliation orders (CMS Nos. 222796, 222721, 222722 and 222719) were issued concerning the notices issued to Crow, Pine Valley, Foxcroft and petitioner, dated November 14, 2008, which sustained all the statutory notices.

After the issuance of the conciliation orders, petitioner corresponded with the conciliation conferee by a letter dated December 8, 2008, requesting further articulation of the resolved facts from the conciliation conference. There is no evidence that petitioner received any response to this correspondence.

We modify finding of fact "26" of the Administrative Law Judge's determination to read as follows:

> Petitioners issued a subpoena duces tecum upon Lori Chapones[13] requiring her to appear as a witness in this matter at the hearing in May 2010, and to bring with her the books and records that were in her custody, power or control, including general ledgers, all accounting records, resale certificates, sales tax exemption certificates, project cost accounting records, copies of all checks, and all records relating to income earned by Crow, Pine Valley and Foxcroft during the period January 1, 2004 through December 31, 2005. Ms. Chapones was the Assistant Comptroller for all corporate petitioners from 2000 to 2003, and the Comptroller from 2003 to 2006, after earning a bachelor's degree in accounting and a master's degree in business administration. Accompanied by her criminal attorney, Ms. Chapones appeared and provided testimony at the hearing. At times, Ms. Chapones exercised her fifth amendment privilege against self incrimination. Ms. Chapones testified that she oversaw many aspects of the office operations and all accounting functions, in addition to sundry other administrative duties. However, at both the Labor Department and Division of Tax Appeals hearings, Ms. Chapones testified that even with her promotion, petitioner continued general oversight and management of the corporate petitioners. Ms. Chapones prepared the sales tax returns and often printed or signed petitioner's name on the returns upon petitioner's approval. She was well versed in the business operations of the corporate petitioners.[14]

A subpoena duces tecum, returnable at the hearing before the Division of Tax Appeals on May 5, 2010, was issued to Mark Mushalla, the vice president and chief financial officer of William H. Lane, Inc. (Lane), a company with whom Pine Valley conducted business in 2004. The subpoena directed the production of checks and all proof of payments to Pine Valley during

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[13] The subpoena listed Ms. Chapones as "Lori Chapones-Graham."

[14] We modify this fact to more clearly reflect the record.

the period June 1, 2004 through August 31, 2004, and a copy of the sales tax exempt certificate for the SUNY Binghamton site work. In response, Mr. Mushalla submitted an affidavit and a printout of a history of payments as requested by the subpoena for June 1, 2004 through August 31, 2004. Payments made outside the period requested were redacted. According to the affidavit, the parties never had a tax-exempt certificate for SUNY Binghamton, since it was presumed the tax exempt status was a given. After the hearing, the Division deemed payments from Lane to Pine Valley totaling $108,719.03 as exempt sales, and reduced the assessment to Pine Valley by $8,697.52.

Pine Valley also performed work for Malone and Tate Builders, Inc., on a project known as the RPI Biotechnology & Interdisciplinary Studies Building, pursuant to a contract dated January 3, 2003. In correspondence dated April 28, 2010, payments totaling $128,550.36 to Pine Valley on the RPI project were verified by Malone and Tate as all being made in August 2004, and were accompanied by an exempt purchase certificate. After the hearing, the Division deemed the receipts of $128,550.36 as exempt from sales tax, and accordingly, agreed to reduce the assessment issued to Pine Valley by $10,284.03.

We modify finding of fact "29" of the Administrative Law Judge's determination to read as follows:

> Pursuant to a contract with Greene County, Pine Valley performed services for the Greene County IDA with Rifenburg Construction, Inc. Petitioner requested the verification of payments made between June 1, 2004 and August 31, 2004, in accordance with the assessed period. Rifenburg submitted correspondence indicating two amounts paid to Pine Valley, which were outside of that time frame: $48,422.80 on April 26, 2004 and $35,306.70 on May 30, 2004. The notation across from the April payment indicated that sales tax was invoiced and paid, presumably to Pine Valley. Since, according to the Division, Pine Valley did not remit this sales tax with their returns, the Division did not make any adjustment to the assessment for this amount.

> The Division also refused to adjust the Pine Valley assessment for the May 30, 2004 payment of $35,306.70. Although the Division deemed it an exempt sale, since the assessment period was limited to the period June 1, 2004 through August 31, 2004 on the notice issued to Pine Valley, the Division considered any payment outside that period as in a quarter that was not assessed. However, it appears from the record that the $35,306.70 payment was not received by Pine Valley until the assessment period.[15]

During 2004 and 2005, Foxcroft predominantly sold wholesale nursery products to other landscape companies and nurseries. Horticultural Associates of Rochester, Inc. (Horticultural), Shemin Nurseries, Inc. (Shemin) and Northeast Nursery, Inc. (Northeast) were three of those companies, all of whom provided petitioners with documentation showing purchases from Foxcroft with either a resale certificate, a statement that the product was resold, or an indication that the product was delivered to them out-of-state and sold at the out-of-state location. The left side of the following table sets forth the adjustments made by the Division to Foxcroft's assessment after the hearing, based predominantly upon the documentary evidence from the three vendors. The Division accepted the sales verified by each of the vendors, as well as the sales to each of these particular vendors that appeared in Foxcroft's records, as exempt sales for additional periods. In cases where the Division confirmed exempt sales but did not make a corresponding adjustment to the assessment, the Division stated that the particular quarter was not assessed. Specifically, where the Division determined confirmed exempt sales for the period March 1, 2004 through May 31, 2004, but made no adjustment for such exempt sales, the auditor explained that it was simply not within the quarter that was assessed, and no adjustment was made.

The right side of the table represents Foxcroft's proposed adjustment to sales as assessed, based upon both the vendor information and Foxcroft's own records for all of 2004 and 2005, to

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[15] We modify this fact to more clearly reflect the record.

the extent such information was available. The source of the information presented was either the vendor supplied information or three of Foxcroft's accounts, as identified by the following account numbers: 10900, 10350 and 10300,[16] and references to this information in the table below identify the evidence that was the source of the information.

Date	**Division's Schedule of Foxcroft's confirmed exempt sales**	**Division's actual adjustments to Foxcroft's total sales**	**Source of the Division's confirmed exempt sales**		**Foxcroft's proposed exempt sales adjustments**	**Source of Foxcroft's exempt sales**
4-30-04	$2,196.00	0	Shemin		$2,196.00	Shemin and 10350
4-30-04					$10,000.00	Horticultural and 10900
5-6-04					$10,000.00	Horticultural and 10350
5-14-04					$10,000.00	Horticultural and 10350
5-14-04	$4,480.00	0	Shemin		$4,480.00	Shemin and 10350
5-14-04	$5,472.00	0	Northeast and 10350		$5,472.00	Northeast and 10350
Total 3-1-04 to 5-31-04	**$12,148.00**	**0**			**$42,148.00**	
6-4-04	$10,000.00	$10,000.00	Horticultural		$10,000.00	Horticultural
6-10-04	$5,350.00	$5,350.00	Shemin		$5,350.00	Shemin

[16] Petitioner hired a computer expert to extract as much information as possible from petitioners' computers after he learned of the missing records in 2006 and the alleged embezzlement by his comptroller. Although incomplete, these accounts show income earned by Foxcroft on the dates noted.

Date	Division's Schedule of Foxcroft's confirmed exempt sales	Division's actual adjustments to Foxcroft's total sales	Source of the Division's confirmed exempt sales		Foxcroft's proposed exempt sales adjustments	Source of Foxcroft's exempt sales
6-14-04	$20,000.00	$20,000.00	Horticultural		$20,000.00	Horticultural
6-25-04	$8,047.80	$8,047.80	Northeast and 10900		$8,047.80	Northeast and 10900
6-30-04	$43,558.30	$43,558.30	Horticultural		$43,558.30	Horticultural and 10900
6-30-04	$3,338.00	$3,338.00	Shemin and 10350		$3,338.00	Shemin and 10350
6-30-04					$40,125.00	Horticultural and 10350
7-2-04	$35,928.00	$35,928.00	Horticultural		$35,928.00	Horticultural and 10300
7-7-04	$10,788.00	$10,788.00	Horticultural		$10,788.00	Horticultural
7-14-04	$5,708.00	$5,708.00	Horticultural		$5,708.00	Horticultural
7-14-04	$13,806.80	$13,806.80	Horticultural		$13,806.80	Horticultural
7-22-04	$22,493.72	$22,493.72	Horticultural		$22,493.72	Horticultural
7-22-04	$10,419.60	$10,419.60	Horticultural		$10,419.60	Horticultural
7-31-04	$18,049.00	$18,049.00	Horticultural		$18,049.00	Horticultural and 10300
7-31-04	$5,539.00	$5,539.00	Shemin		$5,539.00	Shemin and 10300
8-4-04	$2,900.00	$2,900.00	Horticultural		$2,900.00	Horticultural
8-15-04	$4,260.35	$4,260.35	Horticultural		$4,260.35	Horticultural and 10300
Total 6-1-04 to 8-31-04	**$220,186.57**	**$220,186.57**			**$260,311.57**	

Date	Division's Schedule of Foxcroft's confirmed exempt sales	Division's actual adjustments to Foxcroft's total sales	Source of the Division's confirmed exempt sales		Foxcroft's proposed exempt sales adjustments	Source of Foxcroft's exempt sales
10-13-04					$8,154.00	Horticultural and 10300
11-15-04					$18,080.80	Horticultural and 10300
11-26-04					$1,750.00	Horticultural and 10300
Total 9-1-04 to 11-30-04	**0**	**0**			**$27,984.80**	
12-8-04					$8,675.00	Horticultural and 10300
12-31-04					$94,897.15	Horticultural and 10300
12-31-04					$5,539.00	Shemin and 10300
1-1-05	$15,818.40	0	Horticultural		$15,818.40	Horticultural
1-9-05	$10,730.00	0	Horticultural		$10,730.00	Horticultural
2-7-05	$25,000.00	0	Horticultural		$25,000.00	Horticultural
2-24-05					$352.50	Shemin
Total 12-1-04 to 2-28-05	**$51,548.40**	**0**			**$161,012.05**	
4-21-05	$24,975.00	$24,975.00	Horticultural		$24,975.00	Horticultural
5-8-05	$6,288.00	$6,288.00	Horticultural		$6,288.00	Horticultural

Date	Division's Schedule of Foxcroft's confirmed exempt sales	Division's actual adjustments to Foxcroft's total sales	Source of the Division's confirmed exempt sales		Foxcroft's proposed exempt sales adjustments	Source of Foxcroft's exempt sales
5-14-04	$27,033.60	$27,033.60	Horticultural		$27,033.60	Horticultural
5-18-04	$14,572.00	$14,572.00	Horticultural		$14,572.00	Horticultural
5-20-04	$11,685.00	$11,685.00	Horticultural		$11,685.00	Horticultural
5-27-05	$4,279.00	$4,279.00	Horticultural		$4,279.00	Horticultural
5-29-05	$15,714.00	$15,714.00	Horticultural		$15,714.00	Horticultural
Total 3-1-05 to 5-31-04	**$104,546.60**	**$104,546.60**			**$104,546.60**	
6-1-05	$8,220.00	$8,220.00	Horticultural		$8,220.00	Horticultural
6-11-04	$12,733.00	$12,733.00	Horticultural		$12,733.00	Horticultural
6-11-04	23,283.00	23,283.00	Horticultural		23,283.00	Horticultural
7-11-05	6,718.00	6,718.00	Horticultural		6,718.00	Horticultural
8-5-05	$1,555.75	$1,555.75	Horticultural		$1,555.75	Horticultural
8-31-05	$11,334.75	$11,334.75	Horticultural		$11,334.75	Horticultural
Total 6-1-05 to 8-31-05	**$63,844.50**	**$63,844.50**			**$63,844.50**	
10-7-05	$10,412.00	$10,412.00	Horticultural		$10,412.00	Horticultural
10-27-05	$13,686.35	$13,686.35	Horticultural		$13,686.35	Horticultural
11-3-05	$3,930.00	$3,930.00	Horticultural		$3,930.00	Horticultural
11-4-05	$3,658.80	$3,658.80	Horticultural		$3,658.80	Horticultural
11-9-05	$5,052.45	$5,052.45	Horticultural		$5,052.45	Horticultural

Date	Division's Schedule of Foxcroft's confirmed exempt sales	Division's actual adjustments to Foxcroft's total sales	Source of the Division's confirmed exempt sales		Foxcroft's proposed exempt sales adjustments	Source of Foxcroft's exempt sales
11-18-05	$15,734.00	$15,734.00	Horticultural		$15,734.00	Horticultural
11-21-05	$1,802.00	$1,802.00	Horticultural		$1,802.00	Horticultural
Total 9-1-05 TO 11-30-05	**$54,275.60**	**$54,275.60**			**$54,275.60**	
Total Adjust-ment to sales		**$442,853.27**			**$714,123.12**	
Total Adjust-ment to tax @8%		**$35,428.26**			**$57,129.85**	

Petitioners filed a FOIL request, dated December 28, 2009, requesting, in pertinent part, the following documents:

> All documents, internal and external communication within the NYS Taxation of finance office as to how and who selects the companies and individuals to be held accountable for this proceeding; Please provide all emails, meeting minutes, audio or video tapes, voicemails, work papers, phone messages, letters and any other forms of communication for this case.

In addition, the FOIL request sought all forms of communication with the conciliation conferee, Lori Chapones, David Sutton (petitioner's brother), Mark Ryan, CPA, between the Office of Counsel and the auditor in this matter, between the Office of Counsel and petitioners,

all inter- and intra-agency communication concerning petitioners and all internal notes or work papers that the Division has developed in this matter.

Prior to the Division of Tax Appeals hearing in this matter, on February 11, 2010, petitioner filed an order to show cause before the New York State Supreme Court, Rensselaer County, requesting a temporary restraining order to halt the scheduled administrative hearing before the Division of Tax Appeals, and to grant a permanent injunction, naming Lori Chapones as a responsible person under the Tax Law, on the basis that the Division was proceeding against petitioner unlawfully by failing to name Lori Chapones as a responsible officer. In the order to show cause, petitioner set forth the duties of Ms. Chapones with respect to the corporate petitioners.

The New York State Supreme Court decision and order issued by Judge Christian F. Hummel, Acting Supreme Court Justice, on March 30, 2010 dismissed petitioner's order to show cause as procedurally defective, since there was no civil action pending in Supreme Court. Thus, petitioner could not be granted injunctive relief. The decision added that, even if the order to show cause was deemed an Article 78 proceeding (which the Court was not so inclined to do), the proceeding would be dismissed for petitioner's failure to exhaust administrative remedies and failure to state a cause of action upon which relief could be granted. The Court also stated that in a properly filed Article 78 proceeding, if the Tax Appeals Tribunal refused to recognize Lori Chapones as a responsible person under the Tax Law, and the issue was properly preserved for the Court's review, a determination would be made as to whether such refusal had a rational basis and was not arbitrary or capricious, or outside the scope of the Tribunal's jurisdiction.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the various statutory provisions for the imposition of sales taxes, and the use of external indices by the Division to estimate such taxes if

necessary. The Administrative Law Judge noted that once the Division has selected a method reasonably calculated to reflect the tax due, the burden then resets upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous. The Administrative Law Judge found that, during the audit, petitioners did not provide the Division with any of the information that it had requested. The Administrative Law Judge found that the utilization of an estimate to calculate taxes due was appropriate, but that the estimate the Division used, contained computations which, based upon information finally supplied by petitioner at the hearing, necessitated certain adjustments to the final tax calculated as due. The Administrative Law Judge reviewed the applicable Tax Law with regard to the determination of who may be a responsible person and concluded that petitioner, D. James Sutton, had sufficient authority to be considered a responsible person for the corporate petitioners. The Administrative Law Judge concluded that the Division of Tax Appeals lacked jurisdiction to unilaterally name Ms. Lori Chapones as a responsible person, because the Division had not separately asserted responsible person liability against her. In upholding the liability asserted, subject to certain modifications, the Administrative Law Judge determined that petitioners failed to establish circumstances that justified the cancellation of penalties asserted.

ARGUMENTS ON EXCEPTION

In their exception, petitioners argue that: 1) the Division failed to establish that the relevant statutory notices were actually mailed to petitioners; 2) the assessments were past the statute of limitations; 3) petitioners' income is not subject to sales tax; 4) the Division of Tax Appeals has the legal authority to independently name a responsible person; 5) the Division's estimation of taxes due was incorrect; and 6) the Administrative Law Judge's determination violated petitioners' due process rights. Finally, petitioners argue that if the tax liability is upheld by the Tribunal, penalties and interest should be waived.

In opposition, the Division argues that the information utilized by the Division in its audit of petitioners was the only information available. Thus, petitioners' continuing challenges to the accuracy of the audit results should be disregarded. The Division argues that it did not assert responsible party liability against Ms. Chapones because the limited information made available on audit did not warrant such a conclusion. Moreover, the Division argues that the Division of Tax Appeals does not have jurisdiction to independently name another party as a responsible person. The Division also argues that petitioner, D. James Sutton, cannot be absolved from personal liability by merely asserting that another party may be responsible, as well, for the underlying liability. The Division argues that petitioners' due process rights were not violated by the audit, and that petitioners failed to substantiate their claim that all of the pertinent records were in the possession of the State Police. Finally, the Division requests that the Tribunal uphold the Administrative Law Judge's Determination.

OPINION

Tax Law § 1105 (a) imposes a sales tax on the receipts from every "retail sale" of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A "retail sale" is "[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101 [b] [4] [i] [A]). Tax Law § 1138 (a) (1) provides, in relevant part, that if a sales tax return was not filed, "or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by [the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ." When acting pursuant to section 1138 (a) (1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount assessed was erroneous (***see Matter of Your Own Choice***, Tax Appeals Tribunal, February 20, 2003).

The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of Your Own Choice***, as follows:

> "To determine the adequacy of a taxpayer's records, the Division must first request (***Matter of Christ Cella, Inc. v. State Tax Commn.***, [102 AD2d 352, 477 NYS2d 858]) and thoroughly examine (***Matter of King Crab Rest. v. Chu***, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (***Matter of Giordano v. State Tax Commn.***, 145 AD2d 726, 535 NYS2d 255; ***Matter of Urban Liqs. v. State Tax Commn.***, 90 AD2d 576, 456 NYS2d 138; ***Matter of Meyer v. State Tax Commn.***, 61 AD2d 223, 402 NYS2d 74, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025; ***see also***, ***Matter of Hennekens v. State Tax Commn.***, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is "virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit" (***Matter of Chartair, Inc. v. State Tax Commn.***, 65 AD2d 44, 411 NYS2d 41, 43; ***Matter of Christ Cella, Inc. v. State Tax Commn.***, ***supra***), 'from which the exact amount of tax due can be determined' (***Matter of Mohawk Airlines v. Tully***, 75 AD2d 249, 429 NYS2d 759, 760).
>
> Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (***Matter of Urban Liqs. v. State Tax Commn.***, ***supra***). The estimate methodology utilized must be reasonably calculated to reflect taxes due (***Matter of W.T. Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (***Matter of Scarpulla v. State Tax Commn.***, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (***Matter of Surface Line Operators Fraternal Organization. v. Tully***, 85 AD2d 858, 446 NYS2d 451; ***Matter of Cousins Serv. Station***, Tax Appeals Tribunal, August 11, 1988). In addition, '[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case' (***Matter of Grecian Sq. v. Tax Commn.***, 119 AD2d 948, 501 NYS2d 219, 221)" (***Matter of Your Own Choice***, Tax Appeals Tribunal, February 20, 2003).

This Tribunal has well-established standards for reviewing sales tax audits. As summarized in ***Matter of AGDN, Inc***. (Tax Appeals Tribunal, February 6, 1997):

> "[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)."

Having reviewed the appropriate standards, we now address the instant audit.

Petitioner did not provide any of the requested books and records for the audit period. As such, we find that the Division properly determined that petitioner failed to meet its statutory obligations under the Tax Law. Therefore, we conclude that the Administrative Law Judge properly determined that the Division was entitled to estimate petitioner's tax liability using an indirect audit methodology.

The Tax Law provides the Division with the discretionary authority to use any method that reasonably calculates the amount of tax due (***see Matter of Surface Line Operators Fraternal Org. v Tully***, 85 AD2d 858 [1981]). "[W]here the taxpayer's own failure to maintain proper records prevents exactness in determination of sales tax liability, exactness is not required" (***Matter of Meyer v State Tax Commn.***, 61 AD2d 223, 228 [1978], ***lv denied*** 44 NY2d 645 [1978]). Moreover, the reasonableness of the audit method must be determined based upon the information available to the Division before the assessment was issued. If a taxpayer has insufficient records, the Division is authorized to assess sales taxes with "such information *as may be available*" (***Matter of Continental Arms Corp. v State Tax Commn.***, 72 NY2d 976, 978 [1988], citing to Tax Law § 1138 [a] [1] emphasis in original; ***see also Matter of Queens Discount Appliances***, Tax Appeals Tribunal, December 30, 1993).

The Division's auditor made a request for all of petitioners' records related to their sales tax liabilities for the entire audit period, March 1, 2004 through February 28, 2007. Petitioners never responded to the auditor's first request for information. The Division's auditor made a second written request for relevant information, again setting forth all of the records needed to perform an appropriate audit. Petitioners never provided records in response to the auditor's second written request. The Division's auditor sent petitioners notice of his desire to perform a site visit to review petitioners' business records. Petitioners never responded to the auditor's request and the auditor was unable to access any of petitioners' records. At the end of the audit, the Division had not received any records from petitioners concerning the three businesses. Having placed petitioners on notice of his intention to assess them, using the federal income tax returns of Crow, Pine Valley and Foxcroft, which was the only information available to the auditor for the businesses, he calculated sales and use taxes due for each company, and assessed petitioner as the responsible officer of all the companies.

In her determination, the Administrative Law Judge made several adjustments reducing petitioners' liabilities in order to take into consideration information that was finally provided to the auditor and Administrative Law Judge at the hearing. We need not restate the Administrative Law Judge's detailed analysis in that regard other than to note the appropriateness of her adjustments and that the Administrative Law Judge attempted to reduce the asserted taxes for sales that were attributable to periods outside of the statute of limitations or otherwise deemed inappropriate (***see Matter of Vebol Edibles, Inc.,*** Tax Appeals Tribunal, January 12, 1989, ***affd*** 162 AD2d 765 [1990], ***lv denied*** 77 NY2d 803 [1991]; ***Matter of Markowitz v State Tax Commn.***, 54 AD2d 1023 [1976], ***affd*** 44 NY2d 684 [1978]). As noted, exactness is not required where the party's own failure to maintain the proper records prevents it (***Matter of W.T. Grant Co. v Joseph***, 2 NY2d 196 [1957], ***rearg denied*** 2 NY2d 992 [1957], ***cert denied*** 355 US 869

1957). We find that the Division's audit results, as adjusted by the Administrative Law Judge, are reasonable.

Petitioners have 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 (***see Matter of Your Own Choice***, Tax Appeals Tribunal, February 20, 2003, ***supra***). The onus is on petitioners, not the Division, to present sufficiently credible evidence that carries their burden. Petitioners' assertion that an affirmative duty should be imposed upon the Division to investigate leads for information, offered by petitioners would, in effect, permit petitioners to avoid the consequences of having failed in the first instance to satisfy their burden of proof (***Matter of Sholly***, Tax Appeals Tribunal, January 11, 1990). Any information that might have been revealed by such investigation on the part of the Division is simply required to be brought forth by petitioners and was not the duty of the Division to pursue.

Petitioners assert that the assessment of additional taxes are beyond the statute of limitations. In their brief on exception, petitioners admit that the actual Notices of Determination were issued within the relevant statute of limitations. However, petitioners assert that the Division's field audit reports in the record are dated 18 days after the expiration of the relevant statue of limitations, and therefore the Tribunal should rule that the assessments are late. First, we note that there is no requirement in the Tax Law that the Division's field audit reports be signed-off and dated before the expiration of the relevant statute of limitations. The auditor's decision to have the Division issue the Notices appears to be something that was determined before the audit reports themselves were finally signed by personnel within the Division. It does not appear that there were any changes to the calculations or audit work papers, after the relevant Notices were issued. Ultimately, the dates of the relevant statutory notices are what we consider when analyzing the implications of the statute of limitations; not the date that audit personnel

finally sign off on the audit report. As noted, petitioners concede that the actual Notices of Determination were timely filed.

On exception, petitioners now argue that the Division never placed into evidence proof that the Notices of Determination were properly mailed to petitioners. Petitioners argue that this failure to demonstrate compliance with the mailing requirements of the Tax Law should invalidate the assessments. We note, that this argument was not made before the Administrative Law Judge and is brought up for the first time on exception. We reject petitioners' attempt to raise the issue of the certified mailing of Notices of Deficiency for the first time on exception, noting that:

> "Although a party may raise a new legal issue on exception (see, Matter of Small, Tax Appeals Tribunal, August 11, 1988), a party may not raise factual issues on exception which were not addressed at the hearing (see, Matter of Clark, Tax Appeals Tribunal, September 14, 1992; see also, Matter of Consolidated Edison Co. of New York, Tax Appeals Tribunal, May 28, 1992). The raising of this factual issue by petitioner after the closing of the record deprived the Division of an opportunity to submit evidence of [proper] mailing of the [notice]" (***Matter of Sandrich, Inc.***, Tax Appeals Tribunal, April 15, 1993).

Accordingly, we decline to entertain petitioners' new argument regarding the certified mailing of the relevant statutory Notices.

Petitioners also assert that it is the Division's responsibility to contact third parties to seek and obtain any records relating to the assessments. However, petitioners may not shift the burden of proof from themselves by alleging that the Division must verify their audit results elsewhere (***see Autex Corporation***, Tax Appeals Tribunal, November 23, 1988; ***see also, Matter of Sloan's Supermarkets v Chu***, 140 AD2d 794 [1988]; ***Matter of Sholly***, Tax Appeals Tribunal, January 11, 1990, ***supra***). We note that petitioners' inability to produce records, even if unintentional, does not relieve them of their burden of proof (***see Malinowski v C.I.R***, 71 TC 1120 [1979]).

Petitioners argue that the Division of Tax Appeals must list Ms. Chapones as a responsible person liable for the taxes assessed. As noted, Ms. Chapones was the Assistant Comptroller and, later, Comptroller of the corporate petitioners. During the hearing on this matter, it was revealed that, although information had been requested, the Division's auditor did not have sufficient information about the employee status of Ms. Chapones, her involvement with petitioners, or documents implicating her responsibilities with the corporate petitioners. The auditor was informed by petitioner, for the first time at the BCMS conference, that petitioner believed that Ms. Chapones should be held as a responsible person. The auditor did not believe that the very limited documentation he possessed would substantiate such a claim. A Notice of Determination was never issued to Ms. Chapones, individually. Now, petitioner demands that the Division of Tax Appeals separately assess responsible party liability against Ms. Chapones. In this regard, we note that the Division of Tax Appeals is a forum of limited jurisdiction (***see*** Tax Law §§ 2000, 2008 and 681; ***Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom Matter of New York State Dept. of Taxation and Fin. v Tax Appeals Trib.***, 151 Misc 2d 326 [1991]). Its power to adjudicate disputes is exclusively statutory (***id***). Absent legislative action, the Division of Tax Appeals cannot extend its authority to areas not specifically delegated to it (***Matter of Sir James Cabinetry***, Tax Appeals Tribunal**,** December 22, 2011). We have no jurisdiction over the alleged liability of Ms. Chapones unless and until a notice of determination has been issued by the Division against Ms. Chapones and a petition filed appealing that determination. Absent those occurrences, the Division of Tax Appeals lacks jurisdiction to consider a separate party's tax liability (***see Pietanza v C.I.R.***, 92 TC 729 [1989]; ***Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990). Furthermore, we note that the relevant sales and use tax liabilities in this case are joint and several, and petitioner's responsible party liability is not absolved merely by asserting that

another party may be responsible, as well, for the liability (***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998).

Petitioners assert that they were deprived their due process rights. Although petitioners' argument in this regard is not clear, it appears that petitioners' position is based upon the fact that the BCMS Conciliation Order, dated November 14, 2008 (CMS No. 222719), issued to petitioner, erroneously listed the period covered by the Conciliation Order as 6/1/04 - 11/30/04 instead of 6/1/04 - 11/30/05. Petitioners' allege that this error negatively impacted petitioner's preparation for the hearing. In this regard, we note that Conciliation Order (CMS No. 222719) was issued to petitioner as a responsible person for the corporate petitioners. Although the dates contained in the Conciliation Order issued to petitioner were incorrect, the Conciliation Order still reflected the proper amount of tax due. Additionally, the underlying Notices of Determination issued to petitioner, as well as the Notice of Determination and Conciliation Orders issued to the corporate petitioners all reflected the proper dates. Prior to the hearing, the Division provided petitioners with the pertinent documents relating to the assessments, and petitioners were given opportunities to request further explanations of the assessment calculations. The Administrative Law Judge permitted petitioner to amend his petition to cover the relevant dates, and allowed petitioner several additional months to acquire and organize any additional documentation prior to the continued hearing date. The error made by BCMS to petitioner's Conciliation Order did not materially prejudice petitioner's ability to effectively challenge the underlying liability and should not be voided (***see Matter of Pepsico, Inc. v Bouchard***, 102 AD2d 1000 [1984]). As such, we find that petitioners' due process rights have not been violated.

On exception, petitioner did not challenge the Administrative Law Judge's determination that he was personally liable for taxes due relating to the corporate petitioners. Inasmuch as

petitioners did not raise this particular issue in their exception, we deem it to be abandoned (***see Matter of New York State Defenders Assn. v New York State Police***, 87 AD3d 193 [2011]). As such, the Administrative Law Judge's determination in this regard is affirmed.

Pursuant to Tax Law § 1145 (a) (1) (i), any person failing to timely file or pay sales or use tax "shall be subject to a penalty . . . ." This penalty may be canceled if the failure was "due to reasonable cause and not due to willful neglect . . . " (Tax Law § 1145 [a] [1] [iii]; ***see also*** 20 NYCRR 2392.1 [a] [1]). Reasonable cause and the absence of willful neglect may be determined to exist only where the taxpayer has acted in good faith (***see*** 20 NYCRR 2392.1 [g] [1]).

In determining whether reasonable cause and good faith exist, the regulations provide several specific grounds, and also a catchall that provides for a finding of reasonable cause based upon any ground for delinquency that would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay, demonstrating an absence of willful neglect (20 NYCRR 2392.1[d] [5]). Petitioners bear the burden of establishing that the failure to report and pay the required amount of sales tax was due to reasonable cause and not due to willful neglect (***see Matter of Philip Morris***, Tax Appeals Tribunal, April 29, 1993; ***Matter of MCI Telecommunications Corp***., Tax Appeals Tribunal, January 16, 1992, ***confirmed*** 193 AD2d 978 [1993]; 20 NYCRR 3000.15 [d] [5]).

Petitioners assert that the misappropriation of records and possible embezzlement by employees are the cause of their failure to possess the necessary documents to defend their position with regard to the additional taxes assessed. In this regard, petitioner indicated that the State Police had the requisite records, but he did not establish why he did not, or could not, obtain them from the State Police. Furthermore, petitioners failed to sufficiently establish that petitioners' employee, Lori Chapones, had taken material records that pertained to the years at

issue. Additionally, it was after Ms. Chapones had left the employment of the corporate petitioners that the corporate petitioners inaccurately indicated to the Division that they had not done any business during the periods at issue and refused to supply any documentation or explanations to the Division. During the continued hearings on this matter, when petitioners were supposed to provide additional relevant information to the Administrative Law Judge, petitioners instead focused the vast majority of their efforts on demanding that the Division of Tax Appeals list Ms. Chapones as a responsible party. Petitioners simply have not met the burden of proof necessary to abate penalties. Accordingly, penalties on the tax assessments as adjusted herein are sustained (***Matter of Rosemellia***, Tax Appeals Tribunal, March 12, 1992).

We have considered petitioners' remaining claims and find them to be without merit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Crow and Sutton Associates, Inc., Pine Valley Landscape Corp., Foxcroft Nurseries, Inc., and D. James Sutton, Inc. is denied;

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

3. The petitions of Crow and Sutton Associates, Inc., Pine Valley Landscape Corp., Foxcroft Nurseries, Inc., and D. James Sutton, Inc. are granted to the extent indicated in conclusion of law "P" of the Administrative Law Judge's determination, but are otherwise denied; and

4. The Notices of Determination, dated February 19, 2008, are modified to the extent indicated in paragraph "3" above, but in all other respects, are sustained.

DATED: Albany, New York
January 10, 2013

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner