STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	DECISION DTA NO. 825588
TOP DRAWER CUSTOM CABINETRY CORP.	:	
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, 2007 through August 31, 2010.	:	

Petitioner, Top Drawer Custom Cabinetry Corp., filed an exception to the determination of the Administrative Law Judge issued on February 5, 2015. Petitioner appeared by Arthur Richards. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested. The six-month period for the issuance of this decision began on May 21, 2015, the date petitioner's reply brief was received.

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

ISSUE

Whether it was proper for the Division of Taxation to utilize a test period audit methodology following the signing of a test period audit agreement.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. We have also made an additional finding of fact, numbered 14 herein. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

1. During the period in issue, March 1, 2007 through August 31, 2010, petitioner operated a business that manufactured and installed cabinetry. In furtherance of its business, petitioner made purchases and sales of tangible personal property and services that were subject to tax under Articles 28 and 29 of the Tax Law.

2. In November 2010, the Division commenced a sales and use tax field audit of petitioner's books and records for the period in issue. On November 16, 2010, the Division mailed a letter to petitioner requesting an opportunity to review petitioner's sales and use tax books and records. A schedule of books and records to be produced was attached to the letter. At the time, petitioner was represented by David Biskup, CPA. A copy of the power of attorney form appointing Mr. Biskup as the representative was provided to the Division on November 29, 2010.

3. In the course of the audit, the Division concluded that the sales records were adequate to conduct an audit for the audit period. The sales records permitted the auditor to trace any transaction back to the original source or forward to the final total. The Division also concluded that there were adequate internal control procedures. For the same reasons, the Division also found that the expense purchase accounting records were in auditable condition.

4. On December 14, 2010, Zeliko Tomic, president of petitioner, signed a test period agreement in which petitioner consented to the Division's use of a test period method to

determine tax due on sales and expense purchases. The execution of the test period agreement occurred in the presence of petitioner's representative.

5. Under the topic of audit methodologies, the test period election form included a provision that stated:

> "When my records are complete and available for the entire audit period, the Tax Department may not determine my tax based upon a test period audit without my consent. However, if I find that it may be practical to use the test period method audit, I may agree to use such method by completing this form."

6. The test period election form also included a paragraph that was captioned "Test period election" that stated the following:

> "The Tax Department representative has explained to me the various audit methods listed above.[1] If the auditor determines that my books and records are both complete and adequate, I agree the audit should be conducted using a **test period method audit**. It is understood that this agreement is contingent upon the adequacy of my records and pertains to the audit method to be used. It does not preclude my protest of the audit results on grounds such as the particular test period selected, the inclusion of certain transactions within the test, the taxability of certain transactions, or the method of projecting the results of the test period findings. The Commissioner of Taxation and Finance enters into this agreement on the assumption that my books and records, including computer files, are complete and adequate."

7. Directly below this paragraph, the form contained boxes that had been checked in order to show that a test period audit method would be acceptable to the parties for the audit of sales and recurring expense purchases.

8. The Division conducted a test period audit of sales and expense purchases for the period June 1, 2009 through August 31, 2009. This period was selected as representative of the business activity. As a result of the test period audit, the Division determined that there were additional taxable sales of $58,694.00 resulting in additional tax due of $4,915.61. Utilizing a

[1] The reference to audit methods refers to a detailed method audit, a statistical sampling method audit or a test period audit.

test period methodology, the Division also determined that there were additional taxable expense purchases in the amount of $51,764.00 and additional tax due on such purchases in the amount of $4,335.21 for the period in issue. Also utilizing a test period methodology, the Division found that there were additional taxable material purchases in the amount of $671,582.00 and additional tax due on such purchases in the amount of $56,245.00. The Division reviewed petitioner's capital acquisitions in detail for the period in issue and determined that there were additional capital acquisitions during the audit period in the amount of $23,300.00 leading to additional tax due in the amount of $1,951.38.

9. By a series of consents to extend the period of limitations, the date by which the Division could determine or assess tax for the period March 1, 2007 through May 31, 2009 was extended to June 20, 2012.

10. On October 14, 2011, petitioner's new representative, Arthur Richards, was afforded a conference with the auditor to discuss the audit findings. At the conference, Mr. Richards requested an adjustment based upon a sales invoice that was purportedly for a capital improvement. For the purpose of resolving the audit, the Division accepted the proposed adjustment. The adjustment reduced the amount of tax asserted to be due to $67,447.20.[2]

11. At the conference, Mr. Richards also requested that the Division perform a detailed audit for the entire audit period. In response, Mr. Richards was told that this request was denied since petitioner had consented to the use of a test period methodology and the audit was completed.

[2] As originally proposed by the Division, the amount of the assessment was $73,262.77.

12. On January 26, 2012, the Division issued to petitioner a statement of proposed audit change for sales and use tax asserting that sales and use tax was due in the amount of $67,447.20, plus interest, for a balance due of $88,765.18.

13. On March 20, 2012, the Division issued a notice of determination (assessment number L-037402050) to petitioner assessing sales and use taxes for the period March 1, 2007 through August 31, 2010 in the amount of $67,447.20, plus interest of $21,608.46, less payments or credits of $30,000.00, for a balance due of $59,055.66.[3]

14. Prior to the conference between Mr. Richards and the auditor on October 14, 2011, the Division issued to petitioner a statement of proposed audit change for sales and use tax dated July 7, 2011, which asserted additional tax due of $73,262.77 as a result of the audit. The statement of proposed audit change provided that a failure to respond to the Division by either agreeing or disagreeing with the statement within 30 days would result in the issuance of a notice of determination. The deficiency asserted in the July 7, 2011 statement of proposed audit change was adjusted to $67,447.20 based upon the sales invoice submitted by Mr. Richards at the October 14, 2011 conference. This adjustment resulted in the issuance of the January 26, 2012 statement of proposed audit change (***see*** finding of fact 12) and, ultimately, the March 20, 2012 notice of determination (***see*** finding of fact 13).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that the Division was authorized to use a test period audit method because petitioner signed a test period election form consenting to the use of that audit method. The Administrative Law Judge noted that, although petitioner had complete and

[3] At the conclusion of the audit, petitioner remitted $30,000.00 as part payment of the assessed liability.

adequate books and records, it made a valid and knowledgeable consent and was bound by the choice it made. Accordingly, the Administrative Law Judge denied the petition and sustained the notice of determination.

ARGUMENTS ON EXCEPTION

Petitioner continues to argues that, although it consented to the use of a test period, the Division was obligated to conduct a detailed audit of its records when its representative requested such an audit on October 14, 2011. Petitioner asserts that its representative's request was valid because, when it was made, the audit was not completed and the tax was not fixed.

The Division contends that the Administrative Law Judge correctly determined that petitioner knowingly consented to the use of a test period audit method and that, accordingly, the Division's use of that audit method was proper. The Division further contends that it was not obligated to comply with petitioner's representative's request to perform a detailed audit because its test period audit had been completed at the time of the request. The Division also asserts that petitioner has not shown any error in the test period audit method or results.

OPINION

Tax Law § 1138 (a) (1) provides, in relevant part, that if a sales tax return is not filed, "or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ." The Division's right to use external indicies to estimate tax pursuant to Tax Law § 1138 (a) (1), including the use of a test period audit, is predicated upon a taxpayer's failure to maintain or make available complete and adequate records (***see Matter of Chartair, Inc. v State Tax Commn.***, 65 AD2d 44 [1978]).

An exception to this rule allows the Division to use a test period audit method where a taxpayer maintains complete records if the taxpayer knowingly executes a written consent to the use of such an audit method and if such written consent expressly discloses the taxpayer's right to a detailed audit based upon all of its records (***see Matter of Wallach v Tax Appeals Trib.***, 206 AD2d 696 [1994], ***lv denied*** 85 NY2d 805 [1995]; ***Matter of Barton***, Tax Appeals Tribunal, December 28, 1989).

We agree with the Administrative Law Judge that such conditions are present in the instant matter. Specifically, we note that the audit method election form states that the use of a test period method where a taxpayer has complete and adequate records is conditioned upon the taxpayer's consent and further indicates that the Division will use a such a method pursuant to the election agreement only where the taxpayer's records are complete and adequate. We note further that petitioner's president, in the presence of his representative, executed the election form. We thus find that petitioner made a valid and knowing waiver of its right to a complete audit and consented to the use of a test period (***cf. Matter of James G. Kennedy & Co., Inc. v Chu***, 125 AD2d 773 [1986]).

Petitioner does not contest the validity of its consent to a test period audit in the first instance. Rather, petitioner asserts that it revoked such consent when its then-new representative, Mr. Richards, requested that the Division perform a detailed audit during his conference with the auditor on October 14, 2011. Petitioner contends that this attempt to revoke the test period election is valid because it was made before the audit was completed and the tax was fixed. Petitioner also asserts that ***Matter of Wallach*** supports its contention that the Division improperly rejected its request to perform a detailed audit. Specifically, petitioner notes that, in confirming the validity of a taxpayer's written consent to a test period audit method, the court in

Wallach stated: "There is no claim that the corporation revoked its consent and insisted on a complete audit" (***id.*** at 698). In contrast to ***Wallach***, petitioner does claim to revoke its consent in the present matter and contends that the cited language supports its contention that such claim was proper.

We reject petitioner's claim that it validly revoked its consent to a test period audit by its representative's request for a full audit on October 14, 2011. "A waiver, to the extent that it has been executed, cannot be expunged or recalled" (***Nassau Trust Co. v Montrose Concrete Prods. Corp.***, 56 NY2d 175, 184 [1982], ***rearg denied*** 57 NY2d 674 [1982]; ***see also O'Connor v Curcio***, 281 AD2d 100, 103 [2001] ["a valid waiver . . . cannot be withdrawn once the parties have performed in accordance with its terms"]). Here, the record shows that the Division had substantially completed its test period audit by the time petitioner attempted to revoke its consent. Specifically, by that time, the Division had issued to petitioner the July 7, 2011 statement of proposed audit change, setting forth the proposed deficiency resulting from the test period audit. The statement of proposed audit change indicates that a notice of determination, i.e., a formal assessment, would be issued if petitioner did not respond. While the Division made an adjustment to the results of the test period audit based on evidence provided by Mr. Richards at the October 14, 2011 conference, the methodology remained unchanged. By substantially completing the test period audit, the Division thus executed, or performed in accordance with, the terms of the test period agreement. Under such circumstances, we agree with the Administrative Law Judge that petitioner is bound by its choice to consent to the test period audit.

In our view, this conclusion is not contrary to ***Wallach***, as that decision did not address the circumstances under which a revocation or withdrawal of a consent might be valid. ***Wallach*** thus did not address the legal principle, quoted above, upon which our decision herein rests.

Having determined that the Division properly used a test period audit method, we now examine whether petitioner has met its burden of proof to show by clear and convincing evidence that the test period method employed was unreasonable or that the resulting assessment was erroneous (***see Matter of Your Own Choice, Inc***., Tax Appeals Tribunal, February 20, 2003; ***Matter of Evans Delivery Company***, Tax Appeals Tribunal April 17, 2008).

Petitioner has offered no evidence to meet this burden. On this point, we note our rejection of petitioner's contentions on exception that the Division refused to examine quarters that had been examined by its representative; that the Division refused to perform tests on other quarters of their own choosing; that another test period audit would have produced a different result; and that the Division refused to consider certain data for the years 2007 and 2008. There is no evidence in the record to support any of these factual assertions.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Top Drawer Custom Cabinetry Corp. is denied;

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

3. The petition of Top Drawer Custom Cabinetry Corp. is denied; and

4. The notice of determination dated March 20, 2012 is sustained.

DATED: Albany, New York
November 19, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

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