STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
MICHAEL SILVERSTEIN	:	DECISION DTA NOS. 826824
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1998 through November 30, 2007.	:	AND 826825

Petitioner, Michael Silverstein, filed an exception to the determination of the Administrative Law Judge issued on November 28, 2016. Petitioner appeared by Elaine Platt, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York on October 11, 2017. Pursuant to Tax Law § 2008 (2), the decision in this matter is due within three months of the filing of the petition with tolling of the due date for any extensions granted, or on December 7, 2017.

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

ISSUES

I. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Crest Auto Leasing, Inc., within the meaning and intent of Tax Law §§ 1131 (1) and 1133 (a) for the periods ended February 28, 1999 through February 28, 2002.

II. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Metro Auto Leasing, Inc., within the meaning and intent of Tax Law §§ 1131 (1) and 1133 (a) for the periods ended February 28, 2002 through November 30, 2007.

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

IV. Whether the Division of Taxation has met its burden of proof for the assertion of fraud penalties against petitioner pursuant to Tax Law § 1145 (a) (2).

V. Whether, as an alternative to fraud penalties, petitioner is liable for penalties asserted pursuant to Tax Law § 1145 (a) (1).

VI. Whether the penalties asserted violate the excessive fines clause of the New York State Constitution (Art. 1, § 5).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. Those facts are set forth below.

1. On June 10, 2013, the Division of Taxation (Division) issued two notices of determination (notices) to petitioner, Michael Silverstein, notice number L-039533892, asserting tax due of $916,553.84, plus interest of $4,289,581.35 and penalty in the amount of $2,673,101.68, for the period ended February 28, 1999 through February 28, 2002, and notice number L-039533891, asserting interest due of $1,593,667.37 and penalty in the amount of $1,201,335.37, for the period ended February 28, 2002 through November 30, 2007. Notice number L-039533892 was issued to petitioner as a person required to collect sales and use taxes pursuant to Tax Law §§ 1131 (1) and 1133 (a) for Crest Auto Leasing, Inc. (Crest). Notice number L-039533891 was issued to petitioner as a person required to collect sales and use taxes

pursuant to Tax Law §§ 1131 (1) and 1133 (a) for Metro Auto Leasing, Inc. (Metro).[1] The notices were addressed to petitioner at P.O. Box 359, Alpine, New Jersey 07620, and mailed by certified mail. This same address was listed on the power of attorney for petitioner, dated April 8, 2010, filed during the criminal proceedings against him, and was the last known address for him at the time of the issuance of the notices.

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

3. The Division began an examination of Crest in June 2001. A review of the Division's records revealed that the last sales tax return filed by Crest was for the period ending August 31, 1998, reporting zero sales and zero tax due, and no subsequent sales tax returns had been filed. On June 4, 2001, the Division sent a letter to Crest d/b/a United Buying Services at its last known address in the Division's records, 1 Beatrice Lane, Glen Cove, New York, stating that the business's sales tax records had been scheduled for a field audit for the period September 1, 1998 through May 31, 2001. The letter stated that "[a]ll books and records pertaining to your sales and use tax liability, for the period under audit, must be available on the appointment date." The

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[1] A separate notice of determination, notice number L-039533890 was issued to petitioner on June 10, 2013 as a responsible person for Metro, asserting tax due in the amount of $292,200.28, plus interest, for the period December 1, 2001 through February 29, 2004. Restitution in the amount of $393,000.00 was applied to the remaining tax due for Metro, for total tax determined due for Metro and petitioner as a responsible person of Metro in the amount of $685,200.28. Said notice is the subject of a separate proceeding with the Division of Tax Appeals.

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

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

appointment date indicated on the letter was July 20, 2001. A records requested list was attached to the letter specifying the books and records to be provided by Crest.

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

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

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

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

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

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

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

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

11. The Division's auditor reviewed information from the DMV, including MV-50 forms, license plate data, registration data and screen-shot print-outs of information from DMV electronic records. MV-50 forms are books provided by the DMV to car dealers to record car sales. Each book contains 50 sets of blank forms in quadruplicate. Each time a car dealer sells a car, the dealer is required to complete one set of forms in quadruplicate, by way of carbon copy of the original form. The pages of the MV-50 books are designed so that the information written on the first page (the original) is also recorded on pages two through four of the set, by way of carbon copy. The original form (page one) is taken by the customer to the DMV when he or she registers the car; page two is the car dealer's copy; page three is the customer's copy; and page

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

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

13. The auditor next reviewed "batch work" from DMV and computer screen-shots of DMV electronic database information. Batch work is the computerized information DMV compiles electronically when an individual seeks to register a vehicle with DMV by providing the DMV with the original MV-50 and a registration application. The Division's auditor reviewed the batch work and computer screen-shots from DMV in order to obtain customer and

car information. The auditor compared the DMV information with the bank account records for Crest and Metro, in order to match the customer and car information with canceled checks deposited into Crest's and Metro's bank accounts.

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

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

15. Upon comparing the information obtained from customers and the DMV with the information reported by Crest and Metro in the MV-50 books, the auditor discovered that the vendors did not properly report the transactions on the fourth page of the MV-50 forms. Specifically, a comparison revealed that for numerous transactions, the information from the

customers and DMV revealed retail sales, but the information was not properly reported on the fourth page of the MV-50 by the vendor. For some transactions, the fourth page of the MV-50 forms was blank while information in corresponding boxes on the customer's copy was filled in; in other cases, the information on the customer's copy differed from the information written by the vendor on the fourth page of the form.

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

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

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

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

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

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

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

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

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

> criminal prosecution (and not the civil matter), the parties agreed that SILVERSTEIN would pay the sum of $393,000 attributable to sales tax, only.
>
> CREST, through the entry of its plea of guilty today, admits that during the approximate period of February 1, 1999, through November 30, 2007, in the County of Queens, with the intent to defraud, made or caused to be made a false entry in the business records of an enterprise, and its intent to defraud included an intent to commit another crime, to wit: larceny and possession of stolen property and to aid or conceal the commission thereof.
>
> METRO, through the entry of its plea of guilty today, admits that during the approximate period of February 1, 1999, through November 30, 2007, in the County of Queens, with the intent to defraud, made or caused to be made a false entry in the business records of an enterprise, and its intent to defraud included an intent to commit another crime, to wit: larceny and possession of stolen property and to aid or conceal the commission thereof."

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

23. Petitioner appeared in the Criminal Term of the Queens County Supreme Court before Justice Camacho on October 17, 2012, to enter his guilty plea as detailed in the October 17, 2012 plea agreement (***see*** findings of fact 20, 21, and 22). During the plea proceedings, petitioner pleaded guilty to count four of indictment number 642 of 2011, falsifying business records in the first degree, a class E felony. During the plea proceedings, petitioner acknowledged to the Court that on or about December 27, 2006, in the County of Queens, with the intent to commit fraud in order to avoid paying sales tax in the amount of $393,000.00, he made or caused to be made a false entry in the business record of an enterprise, and his intent to defraud included an intent to commit the crime of larceny, or to aid or conceal the crime of larceny. Petitioner further admitted during the plea proceedings that he was a responsible person for Crest and Metro during the period from February 1, 1999 through December 28, 2008, and knowingly and deliberately

failed to cause Crest and Metro to report and remit sales tax collected by Crest and Metro of at least $393,000.00. Petitioner further acknowledged during the plea proceedings that he would pay restitution to the Division in the amount of $393,000.00, and that such plea would not bind the Division.

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

> "The Court: You understand it [the plea agreement] fully?
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> The Defendant: I do.
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> The Court: Do you have any questions?
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> The Defendant: No.
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> * * *
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> The Court: Again, you're also agreeing, the plea agreement also indicates this does not bind the New York State Department of Taxation and Finance. They could come after you. Do you understand that?
>
> The Defendant: I do.
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> ***
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> The Court: You understand by pleading guilty you're giving up a number of rights: You're giving up the right to go to trial. This would be a jury trial. At that trial your attorneys would have an opportunity to question or cross-examine the witnesses against you. You would have a right to present witnesses or testify in your own behalf, if you wanted to, although you wouldn't have to. By admitting your guilt, you're giving up your right to remain silent. You're also giving up the right to have the DA's office prove these charges beyond a reasonable doubt, which is a high standard. By pleading guilty, you're giving up those rights. Do you understand that?
>
> The Defendant: I do, your Honor.

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

The Defendant: I do.

The Court: Anyone forcing you to plead guilty?

The Defendant: No.

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

The Defendant: Yes.

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

The Defendant: No."

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

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

26. After the criminal proceedings against Crest, Metro and petitioner were concluded, on January 24, 2013, March 1, 2013, and March 26, 2013, the Division sent additional written requests for books and records of Crest's sales to the addresses on file in the Division's records, including the last address reported by Crest to the Division (1 Beatrice Lane, Glen Cove, New York 11542), as well as the address where the business was located, which was also the address on record with the DMV and Department of State (42-10 27th Street, Long Island City, New York 11101). The Division also sent copies of the requests for Crest's books and records to petitioner at his home address. The additional written requests requested Crest's books and records for the

updated audit period of December 1, 1998 through November 30, 2007. The Division did not receive a single response to the multiple requests for records.

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

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

29. In cases where there was no information or missing information on the MV-50 (***see*** findings of fact 12 and 15), the auditor next reviewed the batch work from DMV and computer screen-shots of DMV electronic database information (***see*** finding of fact 13) in order to obtain customer and car information for Crest and Metro. The auditor compared the DMV information

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

30. The Division's auditor also utilized the third-party information obtained from Crest's and Metro's customers, in response to the Division's questionnaires, in order to determine taxable sales (***see*** finding of fact 14). Where the customer provided relevant information of a taxable sale, such as their copy of the MV-50, bill of sale, registration, title, copies of canceled checks, car loan documentation, etc., and such information matched bank deposits of Crest or Metro, the transaction was treated as a taxable sale.

31. The auditor also utilized the records seized from the businesses in the execution of the search warrant (***see*** finding of fact 18), including sales jackets, MV-50s, copies of checks, bank deposits, bills of sale, titles, and customer information in order to determine taxable sales. Where the auditor found bank deposits or canceled checks associated with vehicle and customer information indicating a car sale, the transaction was treated as a taxable sale.

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

An example of the document review and reconstruction performed by the auditor was described in detail during testimony at the hearing in this matter. For example, the

documentation obtained for transaction number 193 shows a car sale on August 22, 2000 by United Buying Service (the d/b/a for Crest). The Division obtained the DMV copy of the MV-50 (the fourth page of the set; ***see*** finding of fact 11) as well as the original page of the MV-50 filed by the customer with the DMV. Although the fourth page is supposed to be a carbon copy of the original, the information is not consistent. A comparison of the original with the page four copy of the MV-50 reveals the following inconsistencies:

	MV-50 Page One Original	MV-50 Page Four Copy
Weight (Unladen)	2783	Blank
Inspection Certificate Number	10065424	Blank
Date of Inspection	8-5-00	Blank
Inspection Station Number	7036189	Blank
Date of Sale	8-22-00	Blank
Prior Owner Information	Potamkin Volkswagen	Blank
Date of Purchase	8-15-00	Blank
Odometer Disclosure Statement	Box checked for "6 digits, not including tenths"	Box unchecked
Odometer Reading	19	Blank
Odometer Certification	"Actual Mileage" box checked	Box unchecked
Dealer Certification: Print Full Name of Dealer	United Buying Sr	Blank
Dealer Certification Date	8-22-00	Blank
Purchaser: Signature	Signed by Laurie B. Bauer	"orig signed . . ." (remainder not legible but does not match original page)
Purchaser: Date	8-22-00	Blank
Selling Dealer NYS Sales Tax No.	113330794	Blank

A careful review of the balance of the MV-50s in evidence reveals a consistent pattern of missing or inaccurate information contained on the fourth page of the MV-50s in comparison with the first-page originals.

Additional documentation obtained by the Division for transaction number 193 included the DMV batch work, vehicle registration application, vehicle title, insurance documents, third-party verification from the customer, a bill of sale from United Buying Service showing a cash price of $16,782.00, plus sales tax of $1,384.51 and additional fees, for total cash due on delivery of $17,000.00, a canceled check made out from the purchaser to United Buying Service in the amount of $17,000.00, the back of the check showing it was deposited into United Buying Service's account at Amalgamated Bank of New York, and a bank deposit slip for $17,000.00. Based on this information, the auditor determined a taxable sale for Crest in the amount of $16,782.00, and applied the applicable sales tax rate to determine sales tax due on this transaction in the amount of $1,384.51.

A thorough and careful review of the evidence in the record reveals that the auditor followed this same audit method for each transaction, reviewing and analyzing the DMV and customer information, and matching the third-party information to bank deposits and canceled checks for Crest and Metro in order to determine taxable sales. Not all documentation, such as a bill of sale, was available for each transaction, but each transaction where the auditor determined a taxable sale was confirmed by matching documentation of customer and vehicle information to Crest's and Metro's bank deposits. In instances where the Division was unable to obtain documentation linking customer and vehicle information to a bank deposit, such transactions

were not included in the calculation of taxable sales, although the transaction folders and numbers remained in the audit files and workpapers for consistency purposes.[6]

33. Included in the documentation obtained and reviewed by the Division were bank records from State Bank of Long Island, received in response to subpoenas issued by the Division for the bank records of Crest and Metro. The corporate resolution and banking agreement with State Bank of Long Island, dated March 3, 2003, bears the account title of "Metro Auto Leasing NYC Inc. D/B/A Carsbytel." The business address listed on the banking document is the same as Metro's address, and the d/b/a indicated in the title of the account is that of Metro's. Petitioner signed the document as president of the business. A review of the evidence in the record reveals that the bank account was in fact Metro's and was used by Metro to deposit checks from car purchases from the Metro dealership. The transaction documents in the record reveal a pattern of car sales by Metro with checks made out to Metro or its d/b/a Cars By Tel. The backs of the checks and deposit slips bear the bank account number for the account titled "Metro Auto Leasing NYC Inc. D/B/A Carsbytel." Metro's DMV facility number is referenced in the sale documents, the VIN numbers and license plates referenced in the transaction documents show that the vehicles were sold by Metro, and the sale proceeds were deposited into the "Metro Auto Leasing NYC Inc. D/B/A Carsbytel" bank account.[7]

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

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

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

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

36. Pursuant to the plea agreement entered into by petitioner on October 17, 2012, restitution agreed to by petitioner in the amount of $393,000.00 was applied to the principal sales tax amount outstanding for the most recent sales tax period, i.e., the most recent periods for Metro.

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

38. The Division determined that petitioner was a responsible person for the collection and remittance of sales tax due by Crest and Metro for the periods at issue. The Division based this determination on petitioner's admission through his guilty plea that he was a responsible person of Crest and Metro during the periods at issue, as well as the following information gathered by the Division during the investigation and audit:

Crest

a. April 24, 1986 corporate minutes of initial organizational meeting for Crest identifying petitioner as sole incorporator and sole stockholder, officer and director.

b. Original application for DMV dealer license for Crest, signed by petitioner.

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deposited into the "Metro Auto Leasing NYC, Inc. D/B/A Carsbytel" State Bank of Long Island account.

c. Crest lease extension for the period July 1, 1987 to June 30, 1990, signed by petitioner.

d. Certificate of change, dated May 12, 1987, signed by petitioner as secretary and president of Crest.

e. DMV business amendment regarding Crest's change of address, dated March 5, 1990, signed by petitioner as president.

f. New York State Department of State certificate of assumed name for Crest, listing the assumed name "The Any Car Store," dated April 6, 1990, and signed by petitioner as president.

g. DMV business amendment for Crest to reflect Crest d/b/a "The Anycar Store" dated May 3, 1990, signed by petitioner as president.

h. DMV statement of ownership and/or permission for use of place of business for Crest, dated May 5, 1990, signed by petitioner as president.

i. March 25, 1991 DMV facility renewal application for Crest, signed by petitioner as president.

j. March 22, 1993 DMV facility renewal application for Crest, signed by petitioner as president.

k. February 8, 1995 DMV facility renewal application for Crest, signed by petitioner as president.

l. April 17, 1996 DMV business amendment for Crest to reflect Crest d/b/a "United Buying Services" signed by petitioner as president.

m. August 19, 1996 Amalgamated Bank of New York designation of authorized signatories reflecting petitioner as an authorized signer for Crest d/b/a United Buying Service.

n. February 10, 1997 DMV facility renewal application for Crest, signed by petitioner as president.

o. March 1, 1999 DMV facility renewal application for Crest, signed by petitioner as president.

p. August 5, 1999 correspondence from United Buying Service to DMV, signed by petitioner as president.

q. March 15, 2000 correspondence from United Buying Service to DMV, signed by petitioner.

r. February 15, 2001 DMV facility renewal application for Crest, signed by petitioner as president.

s. December 5, 2001 DMV Division of Safety and Business Hearings documentation reflecting petitioner as president of Crest.

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

u. February 11, 2003 DMV facility renewal application for Crest, signed by petitioner as president.

v. April 17, 2003 DMV business amendment for Crest to reflect Crest d/b/a "Auto Plaza," remove petitioner as president and list "Gregory Sloan" as president.

w. April 17, 2003 letter stating that Gregory Sloan is president and secretary of Auto Plaza.

x. February 15, 2005 DMV facility renewal application for Crest, bearing the signature "Gregory Sloan" as president.

y. February 13, 2007 DMV facility renewal application for Crest, bearing the signature "Gregory Sloan" as president.

z. NYS Office of Tax Enforcement (OTE) case report and deposition of Gregory Sloan dated June 15, 2007, summarizing events occurring on June 15, 2007 during the execution of a search warrant at 42-10 27th Street, Long Island City, New York. The case report states that while at the target location, a man entered the premises carrying cleaning supplies and what appeared to be mailing envelopes. Petitioner, who was at the premises, told the man "we don't need anything today." As the man was leaving, he identified himself to OTE as Gregory Sloan. OTE then interviewed Mr. Sloan. Mr. Sloan's deposition states that he is homeless and acts as a courier and performs odd jobs for the business located at 42-10 27th Street, Long Island City, New York, which he knows as Metro, working for three men he knows as "Jerry, Lenny and Mike." Mr. Sloan stated that he did not recall signing any legal documents pertaining to Metro or being asked to have his name on any business records.

aa. May 11, 2009 DMV business amendment for Crest d/b/a Auto Plaza reflecting change of address and removing Gregory Sloan as president, identifying petitioner as president, and signed by petitioner as president.

bb. May 27, 2009 Crest corporate resolution reflecting petitioner as president, secretary, and treasurer.

cc. May 28, 2009 DMV statement of ownership and/or permission to use place of business for Auto Plaza, signed by petitioner as president.

Metro

a. May 10, 1993 DMV original facility application for Metro, signed by petitioner as president, bearing facility number 7063551.

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

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

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

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

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

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

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

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

j. April 10, 2003 DMV facility renewal application for Metro d/b/a Cars Buy Tel signed by petitioner as president.

k. April 11, 2005 DMV facility renewal application for Metro d/b/a Cars Buy Tel signed by petitioner as president.

l. April 15, 2007 DMV facility renewal application for Metro d/b/a Cars Buy Tel signed by petitioner as president.

m. June 26, 2009 DMV request for business amendment for Metro d/b/a Cars Buy Tel, signed by petitioner as president.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination in this matter by citing the Tax Law statutes and case law relevant to the collection and paying over of sales tax to New York State. She observed that the Tax Law imposes personal liability for sales tax imposed, collected or required to be collected under article 28 on any person required to collect the tax, including corporate officers, directors and employees under a duty to act for corporations in compliance with the requirements of article 28.

The Administrative Law Judge noted that the mere holding of corporate office does not, per se, impose tax liability upon the office holder. According to the Administrative Law Judge, whether an individual is personally liable for collection and paying over of sales tax must be determined on the particular facts of each case, considering such factors as the individual's knowledge of and control over the financial affairs of the corporation, the authority to write checks on behalf of the corporation and the individual's economic interest in the corporation.

The Administrative Law Judge stated that petitioner bears the burden of proof to establish by clear and convincing evidence that he was not a person required to collect tax on behalf of Crest and Metro. The Administrative Law Judge determined that petitioner failed to meet that burden by reason that the record does not support his claim, and that it was contradicted by his

own guilty plea entered at the conclusion of his criminal proceeding. The Administrative Law Judge considered and applied the doctrine of collateral estoppel in concluding that petitioner would not be permitted to argue that he was not a person responsible for the collection and payment of sales tax for the periods in question where petitioner had a fair opportunity to litigate that issue during a prior proceeding. The Administrative Law Judge pointed to petitioner's guilty plea and admission that he was an officer and responsible person for Crest and Metro in the course of the criminal proceeding as sufficient to preclude petitioner from arguing otherwise in this matter, noting petitioner's lack of testimony or documentary evidence in support of his argument.

Notwithstanding the application of collateral estoppel, the Administrative Law Judge described the record as supporting a finding that petitioner was a person required to collect tax for Crest and Metro under the Tax Law. Ultimately, according to the Administrative Law Judge, petitioner failed to establish by clear and convincing evidence that he was not an officer or employee of Crest and Metro, that he lacked authority to control the finances or that he was thwarted by others in carrying out his duty to collect and pay over sales tax. The Administrative Law Judge concluded that petitioner was properly held liable for the sales tax obligations of Crest and Metro for the periods at issue.

Turning next to the question of whether the audit method employed by the Division was reasonable, the Administrative Law Judge cited case law and statutes that impose sales tax on the sale of tangible property, require vendors to retain records sufficient for the verification of sales and determination of sales tax due and imposition of a duty on responsible persons to file sales tax returns. The Administrative Law Judge observed that where 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.

The Administrative Law Judge found that the record established the Division's clear and unequivocal written requests for books and records of Crest's and Metro's sales, as well as Crest's and Metro's failure to produce such books and records. As a result, she determined that the Division reasonably concluded that Crest and Metro did not maintain or have available books and records that were sufficient to verify gross and taxable sales for the audit period. According to the Administrative Law Judge, this entitled the Division to resort to the use of indirect methods to determine the businesses' sales and sales tax liability. When doing so, the Division must select a method of audit reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous.

The Administrative Law Judge examined the methodology used by the Division in conducting its audit and found that it was reasonably based on a variety of third-party information sources, including DMV and bank records, as well as records seized from Crest and Metro in the course of the execution of a search warrant. As the audit methodology was reasonable, petitioner bore 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. The Administrative Law Judge concluded that petitioner failed to meet his burden, noting that he failed to produce any documentary evidence to dispute the results of the Division's calculation of tax due for Crest and Metro. The Administrative Law Judge observed that under the circumstances, petitioner's failure to provide testimony or any business records results in the

strongest possible negative inference against petitioner's argument that the audit result was unreasonably inaccurate.

The Administrative Law Judge next addressed petitioner's argument that the Division audited the wrong entity, i.e. Metro Auto Leasing NYC Inc., instead of Metro Auto Leasing, Inc. The Administrative Law Judge concluded that the Division properly examined the records of Metro Auto Leasing NYC, Inc., citing the numerous examples from the record showing that the bank account examined was in fact Metro's. The Administrative Law Judge determined that based upon the evidence in the record, the Division properly analyzed deposits in this account when determining taxable sales, and petitioner failed to present any evidence to show that such calculations were erroneous.

The Administrative Law Judge rejected petitioner's argument that the assessments in this case were time-barred, citing the provision of the Tax Law that provides for the assessment of sales tax at any time where no sales tax returns were filed. According to the Administrative Law Judge, in the instant case, no sales tax returns were filed and thus an assessment could be made at any time. In addition, the Administrative Law Judge pointed to the Division's showing of petitioner's fraud in this case, which she stated would allow assessment at any time.

The Administrative Law Judge also found petitioner's argument that the assessments should be canceled because he never received them to be unconvincing. She noted that petitioner did not make this claim in his petition or provide testimony at the hearing regarding his claimed nonreceipt of the statutory notices. She further noted that a mere assertion of nonreceipt is insufficient to overcome the presumption of receipt that arises under law where a notice is sent to a taxpayer's last known address or, in the absence of a last known address, such address as may be obtainable by the Division. The Administrative Law Judge found that the record showed that

the notices were mailed by certified mail to petitioner at such address as was obtainable, being the address for petitioner as indicated on the power of attorney for the criminal proceeding. In any case, as noted by the Administrative Law Judge, petitioner's claim of nonreceipt was undermined by his timely protest of the notices at issue in this matter.

The Administrative Law Judge similarly determined that there is no resulting prejudice or other basis upon which to cancel the subject notices for failure to have served copies of the same upon the representatives, as was argued by petitioner. The Administrative Law Judge noted that the failure to establish proper issuance of copies of notices to a taxpayer's duly appointed representative does not result in cancelation of such notices, but rather results in a tolling of the limitations period within which to file a petition or request a conciliation conference.

Next, the Administrative Law Judge turned to the question of whether the Division properly imposed fraud penalties on petitioner for the periods at issue. She noted that the Division bears the burden of showing that the failure to pay tax was the result of fraud. The Administrative Law Judge stated that the Division must show that petitioner acted deliberately, knowingly and with the specific intent to violate the Tax Law in order to meet its burden.

The Administrative Law Judge noted that the Division urges that petitioner be collaterally estopped from denying that he committed fraud. According to the Administrative Law Judge, in order for collateral estoppel to apply, the issue as to which preclusion is sought must be the same; the issue must have been decided; and the litigant who will be held precluded in the present matter must have had a full and fair opportunity to litigate the issue in the prior proceeding. The Administrative Law Judge determined that the record demonstrated that the question of whether petitioner committed fraud was decided in the prior criminal proceeding and fully demonstrated through his plea colloquy and guilty plea to falsifying business records. She also noted that

petitioner's admission of fraud in the plea agreement included the periods assessed against petitioner in the notices of determination at issue. The Administrative Law Judge observed that even in the absence of collateral estoppel, the Division had demonstrated that fraud penalties were properly imposed on petitioner. Thus, the Administrative Law Judge concluded that petitioner was estopped from arguing that the fraud penalties in this matter were improperly asserted.

The Administrative Law Judge then turned to petitioner's argument that the assessments at issue in this matter exceeded the amount that he agreed to in his plea agreement. The Administrative Law Judge disposed of this argument by pointing to the language of the plea agreement itself, which specifically does not limit the civil sales tax liabilities of petitioner for the periods in question. She noted that there is nothing in the plea agreement that limited the Division's right to assert fraud penalties and there is nothing in the record to indicate any promise not to impose such penalties.

The Administrative Law Judge denied petitioner's protest and sustained the notices of determination, as modified by finding of fact 32.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner continues to make the same arguments on exception that he made in the proceeding below. First, he argues that Metro Audit Leasing NYC, Inc. was not the proper corporate entity for the sales tax audit. He claims that the statutory notices were not properly mailed. He argues that the statutory notices imposed tax and additions in excess of what he agreed to pursuant to his plea agreement in the criminal proceeding. He claims that the statute of limitations for the assessment of sales tax due had expired. He alludes to the fact that he was not a responsible person for Crest as he was not a signatory on Crest's bank account. He claims that

the powers of attorney for his representatives were valid as was the power of attorney for Silverman, and thus the statutory notices should be canceled as his representatives were not served with the same. He claims that the MV-50's were all properly completed as evidenced by the eventual registrations of the vehicles reported thereon. He argues that the fraud penalties were improperly imposed as a retroactive addition to tax. At oral argument, petitioner argued for the first time on exception that the penalties and interest imposed were so disproportionate to the underlying tax as to violate the New York State Constitution's prohibition against excessive fines.

The Division urges this Tribunal to affirm the determination of the Administrative Law Judge without modification. It rebuts petitioner's arguments by references to the record, which it claims does not support petitioner's assertions. The Division argues that the Administrative Law Judge correctly determined that the Division audited the correct corporate entity. It argues that petitioner is mistaken regarding the validity of the powers of attorney submitted to the Division. The Division disagrees with petitioner's contention that the statute of limitations for assessment of additional tax had expired with respect to the periods here at issue. The Division argues that petitioner's claim of improper mailing of the statutory notices resulted in no prejudice to petitioner as he had a full and fair opportunity to have the merits of his protest heard. The Division argues that petitioner should be collaterally estopped from claiming that he was not a responsible person for Crest or Metro. Finally, the Division states that petitioner is mistaken regarding the effective date for the fraud penalty statute. The Division argues that petitioner has failed to bear his burden of showing that the assessment of additional tax was incorrect, that he was not a responsible person for Crest and Metro and that the imposition of fraud penalties was improper. Finally, the Division argues that it was petitioner's own conduct that resulted in the

penalties and interest imposed, and the amount of those additions is a function of time and is not disproportionate under the circumstances.

OPINION

We begin with the definition of a responsible person for purposes of the sales tax imposed by article 28 of the Tax Law. The Tax Law imposes upon any person required to collect sales tax personal liability for the tax imposed, collected or required to be collected (Tax Law § 1133 [a]). This includes every vendor of tangible personal property or services and officers, directors and employees who are under a duty to act for an entity in complying with the requirements of article 28 (Tax Law § 1131 [1]).

However, as noted by the Administrative Law Judge, mere holding of corporate office does not, per se, impose tax liability upon an office holder (***see Vogel v New York State Dept. of Taxation & Fin.***, 98 Misc 2d 222 [Sup Ct, Monroe County 1979]; ***Matter of Chevlowe v Koerner***; 95 Misc 2d 388 [Sup Ct, Queens County, 1978]; ***Matter of Unger***, Tax Appeals Tribunal, March 24, 1994, ***confirmed sub nom Matter of Landau v Tax Appeals Trib. of State of N.Y.***, 214 AD2d 857 [3d Dept 1995], ***lv denied*** 86 NY2d 705 [1995]). Personal liability for sales tax is determined upon the particular facts of each case and is not limited to those who are officers, directors or employees of the corporation (***Matter of Cohen v State Tax Commn.,*** 128 AD2d 1022 [3d Dept 1987]; ***Matter of Hall***, Tax Appeals Tribunal, March 22, 1990, ***confirmed*** 176 AD2d 1006 [3d Dept 1991]; ***Matter of Martin***, Tax Appeals Tribunal, July 20, 1989, ***confirmed*** 162 AD2d 890 [3d Dept 1990]; ***see also Matter of Ianniello***, Tax Appeals Tribunal, November 25, 1992, ***confirmed*** 209 AD2d 740 [3d Dept 1994]). In determining whether an individual is a responsible person and personally liable for the tax imposed by article 28, all the surrounding circumstances should be considered, including the individual's status as an officer,

his or her knowledge and control over the financial affairs of the corporation, whether he or she had the requisite authority to write checks on behalf of the corporation and the individual's economic interest in the corporation (***id.***; ***Matter of Constantino***, Tax Appeals Tribunal, September 27, 1990; ***Matter of Cohen***).

As noted by the Administrative Law Judge, petitioner bears the burden of showing by clear and convincing evidence that he was not a person required to collect tax for Crest and Metro (***Matter of Sacher***, Tax Appeals Tribunal, July 2, 2015; ***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998). We agree with the Division that the Administrative Law Judge correctly determined that petitioner failed to meet that burden.

We find that petitioner is estopped from claiming in this proceeding that he was not a responsible person for Crest and Metro within the meaning of Tax Law §§ 1131 and 1133. In order to invoke the doctrine of collateral estoppel and preclude an issue from relitigation, the issue necessarily must have been decided in a prior action and be decisive of the present action, and the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the issue in the prior action (***Kuriansky v Professional Care***, 158 AD2d 897 [3d Dept 1990]; ***Kaufman v Eli Lilly & Co.***, 65 NY2d 449 [1985]). The Division has shown that the question of whether petitioner was a responsible person for Crest and Metro was addressed in the prior proceedings and that the issue was necessarily addressed through the plea agreement that concluded those proceedings. Petitioner's guilty plea precludes him from claiming that he was not a responsible person for Crest and Metro. This is because he had a fair opportunity to litigate that issue during the criminal proceeding, which culminated in his voluntary guilty plea to a felony charge of falsifying business records pursuant to a plea agreement entered into on October 17, 2012. The plea agreement not only contained petitioner's admission of falsifying business

records with fraudulent intent in order to avoid paying sales tax, but also contained an admission that he was an officer of and responsible person for Crest and Metro. We concur with the Administrative Law Judge that petitioner was estopped from arguing otherwise without any documentary evidence to support his position or to refute the admissions made in his plea agreement (***Matter of DeFeo***, Tax Appeals Tribunal, April 22, 1999).

Notwithstanding the application of estoppel to the question of whether petitioner was a responsible person for Crest and Metro, we agree that the Administrative Law Judge correctly determined that the record did not support petitioner's argument that he was not a responsible person for Crest and Metro. We find that the Administrative Law Judge completely and thoroughly determined the facts establishing petitioner's status as a responsible person for Crest and Metro, including his status as a stockholder, officer and director of Crest, his status as an authorized signatory on Crest's bank account, his status as an officer of Metro and his status as a signatory to a banking agreement on behalf of Metro. As petitioner bears the burden of showing by clear and convincing evidence that he was not a responsible person for purposes of Tax Law §§ 1131 and 1133 (***Matter of Sacher***; ***Matter of Goodfriend***) but failed to meet that burden, we conclude that petitioner was a responsible person for Crest and Metro.

Next, we address whether the audit method employed by the Division was reasonable and whether petitioner has shown error in the audit method or result. Tax Law § 1105 (a) imposes a sales tax on the receipts from every retail sale of tangible personal property. Tax Law § 1135 (a) (1) provides that every person required to collect sales tax must maintain records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due. A "person required to collect tax" is defined, in relevant part, as every vendor of tangible personal

property or services, including any officer, director or employee of a corporation or dissolved corporation who in such capacity was under a duty to act for the corporation (***see*** Tax Law § 1131 [1]).

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

As noted by the Administrative Law Judge, the standard for reviewing an audit where an indirect audit methodology has been used is well established, and was set forth in ***Matter of AGDN*** (Tax Appeals Tribunal, February 6, 1997) as follows:

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

We agree with the Division that the Administrative Law Judge correctly determined that the audit method employed was reasonable. Crest and Metro failed to provide sales records sufficient to conduct an audit of their transactions, despite the Division's repeated requests for those records. We concur with the Administrative Law Judge that the Division reasonably concluded that Crest and Metro did not maintain or have available books and records sufficient to verify sales for their respective audit periods. In such a case, the Division was entitled to use indirect methods to determine Crest's and Metro's sales and sales tax liability (Tax Law § 1138 [a] [1]; ***see Matter of W.T. Grant Co. v Joseph***; ***Matter of Del's Mini Deli v Commissioner of Taxation & Fin.***, 205 AD2d 989 [3d Dept 1994]; ***Matter of Vebol Edibles v State of N.Y. Tax Appeals Trib.***, 162 AD2d 765 [3d Dept 1990], ***lv denied*** 77 NY2d 803 [1991]). When the Division must resort to indirect methods of determining taxable sales, it is required to select a method that is reasonably calculated to reflect the tax due (***Matter of W.T. Grant Co. v Joseph***; ***Matter of Bernstein-On-Essex St.***, Tax Appeals Tribunal, December 3, 1992). It is the taxpayer's burden to show by clear and convincing evidence that the audit methodology was unreasonable or the amount of the assessment was erroneous (***Matter of Surface Line Operators Fraternal Org. v Tully***; ***Matter of Your Own Choice***, Tax Appeals Tribunal, February 20, 2003).

The auditor compiled information from third-party sources, including DMV and bank records, which were cross-referenced against questionnaires returned from Crest's and Metro's customers, to determine the gross and taxable sales as well as the amount of sales tax due on those transactions. Only those transactions evidenced by bank deposits and DMV information were counted as taxable sales by the Division. As such, we agree that the audit method employed was reasonably calculated to determine the amount of tax due (***see Matter of D & V Liquors***, Tax Appeals Tribunal, March 10, 2005).

Once the Division has shown that its audit methodology was reasonable, petitioner bears the burden of showing by clear and convincing evidence that the audit result was unreasonably inaccurate or that the assessment was erroneous (***Matter of Sarantopoulos v Tax Appeals Trib.***, 186 AD2d 878 [1992]). Petitioner failed to meet this burden of proof for several reasons. First, petitioner argues that a completed MV-50, a DMV form, and bill of sale are not present for each transaction assessed. However, as noted by the Administrative Law Judge, it was petitioner's obligation as a responsible person of Crest and Metro to maintain the businesses' records sufficient to verify all transactions and to provide such records to the Division upon request (Tax Law § 1135 [a] [1]). Having failed in his obligation to maintain and provide such records, any imprecision arising from the application of an indirect audit method that is reasonably calculated to determine taxable sales must be borne by him (***see Matter of Markowitz v State Tax Commn.***; ***Matter of Meyer v State Tax Commn.***). Petitioner's failure to produce any testimony or business records in support of his argument results in the strongest possible negative inference against his position and the conclusion that petitioner did not produce any evidence because it would not have been sufficient to contradict the Division's evidence (***see Matter of Drebin***, Tax Appeals Tribunal, March 27, 1997, ***affd*** 249 AD2d 716 [3d Dept 1998]). We agree with the Administrative Law Judge that petitioner failed to meet his burden of showing that the audit methodology was unreasonable.

We turn next to petitioner's claim that the wrong corporate entity was the subject of Metro's audit, namely Metro Auto Leasing NYC, Inc. rather than Metro Auto Leasing, Inc., thus resulting in an erroneous assessment against Metro. We cannot agree, as the record clearly demonstrates that Metro's sales transactions were the subject of the audit. The Division showed that deposits for sales made by Metro were deposited into a bank account titled "Metro Auto

Leasing NYC, Inc. D/B/A Carsbytel," the banking agreement for that account listed the address for Metro Auto Leasing NYC, Inc. as Metro's business address and petitioner signed the banking agreement as president of the business. Nothing in the record contradicts the Administrative Law Judge's finding of fact that Metro did business under the d/b/a Carsbytel, the name listed on the banking agreement. We find that the Administrative Law Judge correctly determined that the Division properly analyzed deposits in this bank account for purposes of determining Metro's taxable sales.

We also concur with the Administrative Law Judge that petitioner's arguments that the notices should be canceled for failure of service on him or his representatives are without merit. First, we agree with the Administrative Law Judge that petitioner's timely request for a conciliation conference and filing of the petition in this matter undermines his claim that he never received the notices of determination. Tax Law § 1138 (1) requires that notices of determination be mailed to persons liable for collection or payment of sales tax by certified or registered mail at that person's last known address. The Division may mail the notice of determination to the address listed on the last return filed by such a person, or, if no return had been filed, then to such address as may be obtainable (Tax Law § 1147 [a] [1]). The mailing of a notice of determination is presumptive evidence of the receipt of the same by the person to whom it is addressed (***id.***). Petitioner did not offer any testimony or documentary evidence in support of his claim of nonreceipt. In this case, the Administrative Law Judge correctly determined that the notices of determination for Crest and Metro were sent by certified mail to such address as was obtainable by the Division, namely petitioner's home address as listed on the power of attorney filed by petitioner during the criminal proceeding against him, giving rise to a presumption of petitioner's receipt of the notices here at issue.

As noted by the Administrative Law Judge, if a taxpayer's designated representative is not served with a statutory notice, the proper remedy is not cancelation of the statutory notice but rather that the statutory period for filing a protest of the same should be tolled until the representative is served with a copy of the notice (***see Matter of Multi Trucking, Inc.***, Tax Appeals Tribunal, October 6, 1988). Since there is no period of limitations on assessment in cases of fraud or failure to file a return (Tax Law § 1147 [b]), and petitioner has not rebutted the presumption of receipt of the notices of the assessments, which is further evidenced by his request for and the subsequent granting of a conciliation conference, we agree with the Administrative Law Judge that there is no resulting prejudice to petitioner in that he is currently exercising his protest rights to the assessments for Crest and Metro.

We now turn to the question of whether the Division properly asserted fraud penalties against petitioner. Pursuant to Tax Law former § 1145 (a) (2), the Division shall add to any tax due a penalty equal to 50% of the amount of the tax due plus interest if the taxpayer's failure to timely pay sales tax was due to fraud. This penalty is to be assessed in lieu of penalties provided for under Tax Law former § 1145 (a) (1). The Division bears the burden of proving that the taxpayer's failure to timely pay sales tax was due to fraud (***Matter of Alteri***, Tax Appeals Tribunal, August 20, 1998; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989; ***Matter of Ilter Sener d/b/a Jimmy's Gas Station***, Tax Appeals Tribunal, May 5, 1988). As noted by the Administrative Law Judge, the Tax Law does not define fraud, but our prior decisions have held that an assertion of a fraud penalty requires the Division to show:

> "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (***id.***)

In other words, in order to establish fraudulent intent, the Division must show that petitioner acted deliberately, knowingly and with specific intent to violate the Tax Law. However, fraud need not be proven with direct evidence but rather can be shown by evidence of a taxpayer's entire course of conduct with reasonable inferences drawn therefrom (***Matter of Cousins Serv. Sta.***, Tax Appeals Tribunal, August 11, 1988).

In the instant matter, we find that the Administrative Law Judge correctly determined that the Division met its burden of showing petitioner's fraud by direct evidence, namely his admission to fraudulent conduct with the intent to defraud in order to avoid paying sales tax, as recited in the plea agreement petitioner entered into on October 17, 2012. As we discussed in the previous section dealing with the question of whether petitioner is a responsible person for Crest and Metro, petitioner is estopped from arguing before this forum that the admissions he made in his plea agreement are not true. The legal doctrine of collateral estoppel precludes a party from relitigating an issue that was previously decided in a prior action or proceeding against the same party or those in privity (***see Ryan v New York Tel. Co.***, 62 NY2d 494 [1984]). The issue as to which preclusion is sought must be identical to that decided in the prior proceeding, the issue must have been necessarily decided and the party who will be precluded from relitigating the issue must have had a full and fair opportunity to litigate the issue (***Staatsburg Water Co. v Staatsburg Fire Dist.***, 72 NY2d 147 [1988]; ***Capital Tel. Co. v Pattersonville Tel. Co.***, 56 NY2d 11 [1982]).

In this case, petitioner admitted to causing false entries to be made in the business records of Crest and Metro with the specific intent to defraud the Division of the sales tax due on Crest's and Metro's sales transactions during their respective audit periods. As noted by the Administrative Law Judge, the plea colloquy evidences petitioner's full knowledge of the

implications of his plea and that he was apprised of his right to litigate the issue. With petitioner's admission of fraudulent conduct in order to avoid paying sales tax in the plea agreement, we must agree with the Administrative Law Judge that his admissions meet the elements of fraud as described in ***Matter of Ilter Sener***. Thus, petitioner is estopped from arguing that the Division's assertion of fraud penalties against him was improper.

Because we have found that the Division's assertion of a fraud penalty against petitioner was proper, addressing the Division's argument in the alternative in support of the assertion of the penalty pursuant to Tax Law § 1145 (a) (1) is unnecessary. However, to the extent that petitioner takes exception to the Administrative Law Judge's determination that a penalty under Tax Law § 1145 (a) (1) would be warranted even if the fraud penalty is not sustained, we concur with the Administrative Law Judge. The record clearly indicates that petitioner's actions were intentional, willful and deliberate and resulted in the nonpayment or underpayment of sales tax for the tax periods at issue. In contrast to the burden of proof allocated to the Division regarding the imposition of the fraud penalty under Tax Law § 1145 (a) (2), petitioner bears the burden of showing that the Division's imposition of a penalty under Tax Law § 1145 (a) (1) was improper (***see Matter of Ilter Sener***). The Division may abate the penalty if the taxpayer can show that the failure to pay was due to reasonable cause and not due to willful neglect (Tax Law § 1145 [a] [1] [iii]). Here, petitioner offered no evidence to rebut the presumption of correctness that attached to the statutory notices, and thus failed to bear his burden of proof that the penalty should be abated (***see Matter of Leogrande***, Tax Appeals Tribunal, July 18, 1991; ***Tavolacci v State Tax Commission***, 77 AD2d 759 [3d Dept 1980]).

Lastly, we turn to petitioner's argument, first presented at oral argument, that the penalty the Division imposed pursuant to Tax Law former § 1145 (a) (2) for petitioner's failure to pay

sales tax due to fraud violated the excessive fines clause (Art. I, § 5) of the New York State Constitution. From the outset, we note that statutes are presumed to be constitutional (***Matter of Bucherer, Inc.***, Tax Appeals Tribunal, June 28, 1990). The Division of Tax Appeals' jurisdiction does not encompass challenges to the constitutionality of a statute on its face (***see Matter of A&A Serv. Sta., Inc.***, Tax Appeals Tribunal, October 15, 2009; ***Matter of J.C. Penney Co.***, Tax Appeals Tribunal, April 27, 1989; ***Matter of Fourth Day Enterprises***, Tax Appeals Tribunal, October 27, 1988). However, the jurisdiction granted to this forum does empower us to consider whether the application of a statute to a particular set of facts is unconstitutional (***see Matter of Eisenstein***, Tax Appeals Tribunal, March 27, 2003; ***Matter of David Hazan, Inc.***, Tax Appeals Tribunal, April 21, 1988, ***confirmed sub nom Matter of David Hazan, Inc. v Tax Appeals Trib. of State of N.Y.***, 152 AD2d 765 [3d Dept 1989], ***affd*** 75 NY2d 989 [1990]). The key difference between these two kinds of constitutional challenges is that determining the constitutionality of a statute as applied depends on application of the statute to specific facts while resolving the question of facial constitutionality does not (***Matter of Waste Conversion***, Tax Appeals Tribunal, August 25, 1994). We find that the constitutional challenge presented here depends on application of the statute to the facts as determined and thus represents a constitutional challenge to the statute as applied to petitioner's facts. Petitioner bears the burden of proving that a statute, as applied, is unconstitutional (***Matter of Brussel***, Tax Appeals Tribunal, June 25, 1992).

We turn to the excessive fines clause of the United States constitution for guidance on what may constitute an unconstitutionally excessive fine. The excessive fines clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense (***Austin v United States***, 509 US 602 [1993]). Cash payments are fines for purposes of

the excessive fines clause if they constitute punishment for some offense (***United States v Bajakajian***, 524 US 321 [1998]). The Court of Appeals has held that, in the context of a civil forfeiture proceeding, where such forfeiture serves, at least in part, deterrent and retributive purposes, such forfeiture is punitive and subject to the excessive fines clause (***County of Nassau v Canavan***, 1 NY3d 134 [2003], ***citing Austin*** at 619-622 and ***Bajakajian*** at 328-329).

The fraud penalty was originally added to Tax Law § 1145 in 1975 as an alternative to the penalty for failure to file a sales tax return or pay the amount due (***see*** Bill Jacket, L. 1975, ch. 287). According to the accompanying memo from the Commissioner of Taxation and Finance, the purpose of the enhanced penalty for nonfiling and underpayment of sales tax was to encourage compliance with the Tax Law (***id.***). With its stated purpose of encouraging compliance with the Tax Law, the fraud penalty statute has a purpose of deterring fraudulent tax reporting and underpayment. Thus, according to ***Canavan***, Tax Law § 1145 (a) (2) is subject to excessive fine analysis. A fine is excessive for purposes of the excessive fines clause if the fine is "grossly disproportional to the gravity of the defendant's offense" (***County of Nassau v Canavan*** 1 NY3d at 140; ***United States v Bajakajian*** 524 US 321 at 326). In light of the record, and considering the significant number of transactions at issue here for two corporate entities spanning nearly 20 years, we cannot say that the penalty as imposed against petitioner is grossly disproportional to the gravity of his offenses. Petitioner admitted in his plea agreement his intention to commit fraud against the Division to avoid paying sales tax. The potential loss to the state in sales tax revenue from concealing the value of taxable transactions is significant. We have considered the length of time during which the concealment of taxable sales occurred, the total number of transactions at issue, the lengths to which petitioner went to conceal those transactions and their value, the amount of sales tax that went unreported and the effort and

expenditure of resources that the Division has had to expend in detecting and prosecuting petitioner's willful disregard of the Tax Law. We find that the penalty imposed is not grossly disproportional under these circumstances.[8] Considering the effort expended in the audit of Crest and Metro and the criminal prosecution of petitioner, we concur that the government is entitled to "rough remedial justice" even if demand for compensation is made according to imprecise formulas (***see United States v Halper***, 490 US 435, 446 [1989]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Michael Silverstein is denied;

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

3. The petition of Michael Silverstein is denied; and

4. The notices of determination dated June 10, 2013, as modified in accordance with footnote 6 herein is sustained.

[8] We note that contrary to petitioner's contention at oral argument, the penalty that the Division assessed against petitioner was made pursuant to Tax Law former § 1145 (a) (2), which provided for a penalty equal to 50% of the tax due plus interest at a rate set by the statute to be at least 14% per annum measured from the day that payment of the tax was due (contrast current Tax Law § 1145 [a] [2], which petitioner appears to believe was applied in this case, providing for a penalty equal to 200% of the tax due; ***see also*** TSB-M-09(17)S, October 20, 2009).

DATED: Albany, New York
December 7, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner