STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
CAPITAL ONE CONSTRUCTION, INC.	:	DETERMINATION
AND		DTA NOS. 825142
SHUAI YIN	:	AND 825208
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2004 through February 28, 2010.	:	

Petitioners, Capital One Construction, Inc., and Shuai Yin, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2004 through February 28, 2010.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in New York, New York, on December 3, 2013, at 10:30 A.M., with all briefs to be submitted by April 18, 2014, which date commenced the six-month period for the issuance of this determination. Petitioners appeared at hearing by Shuai Yin, pro se and as president of the corporate petitioner. Petitioners appeared on their brief by Sales Tax Defense, LLC (Mark L. Stone, CPA, and Jennifer Koo, Esq.). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael B. Infantino, Esq.). The Division of Taxation did not file a brief in this matter.

ISSUES

I. Whether the Division of Taxation clearly requested and, in turn, received from the corporate petitioner books and records that were sufficient for the conduct of a direct audit.

II. Whether, if not, petitioners have established that the audit methodologies utilized by the Division of Taxation were not reasonably calculated to reflect the correct amount of tax due, or that there were errors made in the application of such audit methodologies.

III. Whether petitioner Shuai Yin was properly subjected to liability as a person under the obligation to collect and remit sales and use taxes on behalf of the corporate petitioner Capital One Construction, Inc.

IV. Whether petitioners have established any bases justifying reduction or cancellation of the penalties assessed.

FINDINGS OF FACT

1. Petitioner Capital One Construction, Inc. (Capital One) is a general contractor engaged in the construction of commercial and residential buildings. Petitioner Shuai Yin is the sole owner and president of Capital One.

2. On May 5, 2010, the Division of Taxation (Division) mailed a letter to the corporate petitioner scheduling a field audit pertaining to Capital One's sales and use tax liability for the period March 1, 2004 through February 28, 2010. The audit was to commence with a May 19, 2010 field visit to Capital One's offices by the Division's auditor.

3. The Division's May 5, 2010 audit appointment letter states that "[y]ou must show **all** of your sales and use tax books and records to the auditor." Accompanying this audit appointment letter was a list of records required for sales and use tax audits, further specifying the records required to be made available for review. This list included, among other items, sales tax returns,

worksheets, canceled checks showing taxes paid, federal income tax returns, New York State corporation tax returns, general ledger, general journal and closing entries, sales invoices, exemption documents supporting nontaxable sales (e.g., resale, exempt use, exempt organization and capital improvement certificates), chart of accounts, fixed asset purchase and sale invoices, expense purchase invoices, merchandise purchase invoices, bank statements, cancelled checks and deposit slips, cash receipts journal, cash disbursements journal, depreciation schedules, lease contracts, and job cost sheets.

4. The auditor's interview of Mr. Yin and her review of Capital One's books and records revealed that Capital One was not registered as a vendor for sales and use tax purposes and that no sales and use tax returns had been filed during the audit period. Further, Capital One had no general ledger for the portion of the audit period spanning March 1, 2004 through September 13, 2007. In addition, complete sales and purchase invoices were not available for the entire audit period, and many of the invoices that were available were inconsistent with the transaction entries in the general ledger. In view of these facts, the auditor determined Capital One's records to be inadequate for purposes of conducting a direct and detailed audit based thereon, thus entitling resort to indirect audit methodologies including the use of test periods and projections therefrom.

5. The audit of Capital One's business activities addressed three areas, to wit, sales, fixed asset acquisitions, and expense purchases. First, the auditor reviewed Capital One's existing sales records for the test months of March, July and October 2008. Based upon this review, the auditor concluded that the construction jobs performed by Capital One qualified as capital improvements to real property such that its gross sales were not subject to sales tax.

6. The auditor next examined Capital One's fixed asset acquisitions for the entire audit period by reference to its federal income tax returns (including depreciation schedules) and its

general ledger for periods after September 13, 2007. This review resulted in a finding of tax due in the amount of $6,726.49 based on two fixed asset acquisitions, as follows:

> a) Capital One's federal income tax return for 2006 showed the acquisition and placement in service of "transportation equipment" in the amount of $35,000.00. The auditor was advised that this item represented the purchase of a Mercedes automobile that was shipped directly to China and was not used in New York State. No purchase invoice or contract was furnished with respect to this acquisition and no documentation, including shipping records, was furnished to establish that tax had been paid or that the purchased item was otherwise not subject to tax. Accordingly, the auditor calculated tax due in the amount of $2,931.25 on this acquisition.
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> b) Capital One's federal income tax returns for 2008 and 2009, its general ledger for 2008, 2009 and 2010, and a contract of sale revealed the acquisition of "equipment" from CNH Capital in the amount of $77,000.00 (including a $7,700.00 down payment per contract that was not reflected in Capital One's general ledger). The auditor was advised that this item represented the purchase of an excavator from an out-of-state (Pennsylvania) vendor, to be paid for over a period of 48 months. No documentation was furnished to establish that tax had been paid on this acquisition. Accordingly, the auditor reduced the purchase price ($77,000.00) by the down payment amount ($7,700.00) to arrive at ($69,300.00). The auditor then added "listed taxable expenses related to the sale" ($992.50), to arrive at the total taxable amount due and payable over 48 months ($70,292.50) commencing as of March 2008. The auditor divided this total amount by the 48 months in the payment period to arrive at the monthly taxable payment amount ($1,464.43).[1] Based on the foregoing, the auditor computed the total of the taxable payments falling within the audit period ($20,879.87 for 2008, $19,037.59 for 2009 and $1,464.43 for 2010)[2] and, in turn, the resulting tax due thereon ($1,748.69 for 2008, $1,916.58 for 2009 and $129.97 for 2010), thus arriving at total tax due of $3,795.24.[3]

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[1] The $70,292.50 total taxable amount due and payable over 48 months does not include the taxable down payment amount ($7,700.00). In addition, the resulting monthly payment amount ($1,464.43) represents principal (i.e., selling price) only and does not include the contract interest amount due with each monthly payment, since such interest is not subject to tax.

[2] The taxable amount for 2008 ($20,879.87) includes the $7,700.00 down payment together with the nine taxable monthly payments made in 2008.

[3] In calculating the tax due, the auditor applied the tax rate in effect during the particular months, thus accounting for a change in the tax rate (from 8.375% to 8.875%) that occurred during the audit period.

7. The auditor next examined Capital One's expense purchases based upon its cost of goods sold accounts, using Capital One's general ledger and federal income tax returns for certain test periods. Specifically, the auditor reviewed five categories of expense purchases, consisting of Construction Material Costs (examined for the month of March 2008), and Equipment Rentals for Jobs, Other Construction Materials Costs, Subcontractor Expenses, and Tool and Small Equipment Purchases (examined for the period March 2008 through May 2008). The auditor's conclusions from this review follow:

> a) Construction Materials Costs: Purchases listed for the month of March 2008 totaling $92,712.18 from10 different suppliers, out of total purchases of $348,519.11, were not supported by any documentation (including invoices) establishing that tax had been paid in full or was otherwise not due.[4]
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> b) Equipment Rentals for Jobs: Purchases listed for the months of March through May 2008 totaling $2,806.00 from two vendors (US Gates [$206.00] and G.T. Rentals Corp. [$2,600.00]), out of total purchases of $11,710.48, were not supported by documentation that tax had been paid or was otherwise not due.
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> c) Other Construction Costs: Two purchases listed for the months of March through May 2008 totaling $70,000.00 from First Star Art (in the amounts of $40,000.00 and $30,000.00, respectively), out of total purchases of $172,467.32, were not supported by documentation to explain either the nature of the purchases or support that tax had been paid or was otherwise not due.
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> d) Subcontractor Expenses: Purchases listed for the months of March through May 2008 totaling $191,170.00 from two subcontractors (four separate listed purchases in the individual amounts of $80,000.00, $20,000.00, $50,000.00 and $40,000.00 from USA Auto Group, and one purchase in the amount of $1,170.00 from 609-4618 30 Rd), out of total purchases of $332,897.00, were not supported by documentation to explain either the nature of the purchases or support that tax had been paid or was otherwise not due.

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[4] The suppliers were Grand Electric Equipment, Lightology, Accutech, Crpress, On Time Concrete, Universal Ready Mix, Inc., T.W. Smith Corp., Maya's Pumping Concrete Corp., Landmark Footwear and Time Marble and Granite. The two examined transactions with On Time Concrete reflect that tax was paid on only part of the invoice amount, the impact of which was to reduce the amount of purchases for which tax had not been paid from $92,712.18 to $92,340.45.

e) Tools and Small Equipment: The auditor found no errors in her examination of total purchases of $4,288.08 listed for the months of March through May 2008.

8. The auditor treated the items in the Subcontractor Expenses account as nonrecurring expenses. As a consequence, she did not include the dollar amount of such items ($191,170.00) in developing her error rate, but rather simply computed tax due on these items to be assessed as a separate amount ($16,010.49). This treatment resulted in the calculation of a lower error rate and, consequently, a lower amount of tax ultimately assessed via error rate projection.

9. In contrast, and with respect to the Construction Materials, Equipment Rentals for Jobs, and Other Construction Costs accounts, the auditor treated the items therein as recurring expenses. The auditor totaled the amounts of the transactions in each such account for which there was no proof that tax had been paid or was otherwise not due ($92,340.45, $2,806.00 and $70,000.00, respectively). This total ($165,146.45), denominated "total exceptions," was compared to the total cost of goods sold amounts in the accounts reviewed for the test months ($702,335.09), resulting in an error rate of 23.5139%.[5] In turn, the auditor applied the foregoing error rate to Capital One's total cost of goods sold (expense purchases) for the audit period, as reported on its filed federal income tax returns for the years 2004 through 2009 and as set forth in its general ledger for the

[5] The total cost of goods sold amounts reviewed for the chosen test months consisted of Construction Materials ($348,519.11), Equipment Rentals for Jobs ($11,710.48), Other Construction Costs ($172,467.32) Subcontractors Expense ($141,727.00), Tools and Small Equipment ($4,288.08) and Worker's Compensation ($23,624.00). The Subcontractor Expenses Amount ($141,727.00) represents the difference between the amount of costs reviewed in that account ($332,897.00) less the exceptions therein ($191,170.00) that were assessed as a separate and nonrecurring amount.

months of January and February 2010.[6] By this process, the auditor calculated purchases subject to tax ($5,124,700.87), and computed tax due thereon in the amount of $434,285.25.

10. The auditor added tax determined due on fixed asset acquisitions ($6,726.49 [***see*** Finding of Fact 6]), tax determined due on Subcontractor Expenses ($16,101.49 [***see*** Finding of Fact 8]) and tax determined due on expense purchases ($434,285.25 [***see*** Finding of Fact 9]) to arrive at total tax due in the amount of $457,022.23.

11. On June 27, 2011, the Division issued to petitioner Capital One Construction, Inc., a Notice of Determination (L-03629807-3) based on the foregoing audit and assessing additional tax due for the period March 1, 2004 through February 28, 2010 in the amount of $457,022.23, plus interest and penalties. The auditor noted that penalties were imposed based upon the failure to file returns, the failure to provide adequate records for audit, and because of underreporting of tax due by more than 25%. On June 28, 2011, the Division issued to petitioner Shuai Yin a Notice of Determination (L-036304796-3), assessing the same amounts of tax, interest and penalties upon the premise that Mr. Yin was a person responsible to collect, account for and remit taxes on behalf of Capital One. The auditor noted that Mr. Shin prepared a responsible person questionnaire as part of the audit process indicating that he was the sole shareholder of the corporate petitioner, held the title of president of Capital One, was authorized to sign documents, including tax returns and checks on its behalf, and did so, and that he had and exercised full authority in the operation of Capital One's business activities. This information is consistent with information set forth on the

[6] The auditor used Capital One's federal returns for all but the final two months of the audit period because there were no general ledgers for the earlier years of the audit period (***see*** Finding of Fact 4) and because the postings in the general ledgers for later years were inconsistent. The general ledger amounts were used for the final two months of the audit period because there was not, at the time of the audit, a filed federal tax return for the year 2010.

corporate tax returns, as filed, and with the balance of information supplied by Mr. Yin during the course of the audit and at the hearing.

12. Petitioners do not claim that Capital One maintained complete or adequate records, as required, and do not challenge the Division's resort to indirect auditing methods in view of such record-keeping inadequacies. Instead, petitioners raised a number of general challenges to the auditor's conclusions, and submitted some evidence in connection therewith. First, petitioners challenge the auditor's methods and conclusions regarding fixed assets based upon the following:

> a) With respect to the transaction described in Finding of Fact 6(a) involving the purchase and alleged export of an automobile, petitioners provided a letter dated March 13, 2012 from one Gao Xuemin, the owner of Motor One, Inc., an entity that was closed in January 2012. Mr. Xuemin's letter states that Mr. Yin "bought a 2003 Benz S500 in Feb. 2006 from the auction place in NJ and paid us $35,000, in full. Also the car was shipped to China the following week after the transaction, and never use[d] in NY area." No other documents, such as a purchase or sale invoice pertaining to the vehicle or shipping documents to support its export to China, were provided with this letter or otherwise.
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> b) With respect to the transaction described in Finding of Fact 6(b) involving the purchase of an excavator, petitioners maintain that the out-of-state vendor but not the purchaser, Capital One, is responsible for the payment of tax due on this purchase. Petitioners also argued, at hearing, that tax was imposed upon the interest included in the monthly payments and, by brief, that the amount of tax assessed is incorrect since the auditor did not account for a change in the tax rate during the payment period. No additional argument or evidence was provided concerning this item.

13. With respect to the audit results based upon expense purchases, petitioners submitted a group of various invoices in no particular order. Some of these invoices are largely illegible, some are written partly in Chinese, some are unidentified, some are labeled "guest checks" and allegedly represent cash payments for meals and other purchases, some appear to represent gas purchases, a few appear to represent tool rentals or purchases, and some are one sentence "cash payment

receipts" that do not identify any particular items or services purchased. Many of the invoices are for even dollar amounts and most do not show the payment of tax in any manner.

14. Petitioners also claimed that certain payments, under the category Subcontractor Expenses, represented nontaxable purchases of auto parts from USA Auto Group for resale in connection with an auto parts business Mr. Yin intended to open. In response to this claim concerning the purchase of auto parts, the auditor noted that since Capital One was not registered as a vendor, it was not entitled to issue resale certificates concerning its purchases. The auditor also contacted USA Auto Group for verification concerning the alleged auto parts purchases and was advised that USA Auto Group sells vehicles but does not sell auto parts, had made no sales to Capital One, and that the invoices purporting to be from USA Auto Group were fictitious. When advised of this information, Mr. Yin admitted that the USA Auto Group invoices were false invoices that had been created by Capital One's former bookkeeper, and that these amounts represented "cash exchanges." Mr. Yin also admitted that while he intended to open an auto parts business, he was not able to do so.

SUMMARY OF PETITIONERS' POSITION

15. Petitioners presented the invoices described in Finding of Fact 13 as generic support for the claim that vendors of taxable goods and services (including subcontractors), as opposed to purchasers such as Capital One, are obliged to charge, collect and remit any tax due. Petitioners also claim these invoices bear out that some of the items subjected to tax on audit represented payments, often made in cash, for purchases that were not subject to tax. In this latter regard, petitioners assert that the entire $70,000.00 "Other Construction Costs" amount (***see*** Finding of Fact 7 [c]), plus $190,000.00 of the $191,170.00 in "Subcontractor Expenses" (***see*** Finding of Fact 7 [d]) were actually "cash exchange" transactions that involved no sales of property or taxable

services, but instead involved vendors, as a courtesy, cashing checks for Capital One. Mr. Yin stated that checks were written to and cashed by various suppliers or businesses as a means by which Capital One obtained the sizeable amounts of cash needed for the operation of its business. Mr. Yin claimed, in this respect, that in some instances payment in cash is required by various vendors of goods and services and that, as a consequence, in some instances payment in cash results in a better price for materials or services. Mr. Yin averred that this method of operation involving cash payment is prevalent in the construction industry.

16. As noted, petitioners claimed that some of the cash transactions involved payments for property or services not subject to tax. Petitioners maintain that the entire $70,000.00 Other Construction Costs amount represented cash payments for items upon which tax was either imposed by the vendor at the point of sale (e.g., employee meals, gas purchases) or, if not shown as imposed, was the responsibility of the vendor as opposed to Capital One (e.g., subcontractor expenses). With regard to the $190,000.00 Subcontractor Expenses amount, petitioners' explanations have varied. Petitioners initially claimed that some of this amount represented cash payments to various vendors who would only accept cash in payment for goods and services, with invoices that did not show any amounts for tax merely indicating "all parties understood that the amounts paid included all taxes." Petitioners also claimed that some of the subcontractor expense amounts represented auto parts purchases in connection with Mr. Yin's plan to open an auto parts business, that such items were purchased for resale and hence were not subject to tax, and that while the intended auto parts business was never opened, the purchased parts remain in a Capital One warehouse.

17. Finally Mr. Yin argues that individuals are not responsible for the unpaid taxes owed by corporate entities, and thus disputes the assessment of any liability against him as a person responsible to collect and remit taxes on behalf of Capital One,.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every "retail sale" of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A "retail sale" is "[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101[b][4][i]). Tax Law § 1105(c) imposes a sales tax on certain enumerated services. Tax Law § 1110(a) imposes a compensating use tax on every person for the use within the state of any tangible personal property purchased at retail (***see also*** 20 NYCRR 531.1[a]). Except as otherwise provided by law, all purchases and sales of tangible personal property and of enumerated services are presumptively subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable is upon the person required to collect the tax *or the customer* (Tax Law § 1132[c][1]; 20 NYCRR 532.4[b][1], [2]; italics added).

B. 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 long-standing statutory and regulatory authority of Tax Law § 1135(a) and 20 NYCRR 533.2(b), together with well established case law, clearly mandates that complete and accurate records that are adequate to determine the proper amount of tax due concerning a taxpayer's transactions are to be maintained. These records must be maintained in such form as the Commissioner of Taxation and Finance may by regulation require, and must be made available to the Division for review upon request (Tax Law § 1135[g]; 20 NYCRR

533.2[a][2]). The regulations provide that among the records required to be maintained are a "sales slip, invoice, receipt, contract, statement or other memorandum of sale; . . . guest check, . . . cash register tape and any other original sales document" (20 NYCRR 533.2[b][1]). When faced with inadequate, incomplete or inaccurate records, and acting pursuant to section 1138(a)(1), the Division is required to 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 (***Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003).

C. In this case, there is no claim raised by petitioners that Capital One's records were complete or adequate so as to allow for the conduct of a detailed audit to determine whether the proper amount of tax due on petitioner's transactions had been imposed and collected. In fact, a review of the record bears out the inadequacy of such record keeping. Notably, Capital One was not registered as a vendor, did not file sales and use tax returns, had no general ledgers for the first three and one half years of the audit period and had inconsistent records (including inconsistent general ledger entries, incomplete invoices and fictitious invoices) for the balance of the audit period. Under these circumstances, the Division was clearly entitled to utilize indirect auditing techniques, including resorting to the use of a test period examination and projections therefrom. In turn, petitioners have raised no particular objections to the method of audit chosen and applied in this case, and the record includes no evidence or indication that the same was inappropriate as not reasonably calculated to reflect taxes due. Consequently, in order to refute the audit and its results, in part or in whole, petitioners bear the burden of proving that both were in some manner erroneous. Petitioners have failed to meet this burden.

D. Petitioners have responded to the assessments at issue by making the generic assertion that only a vendor selling property or taxable services may be held responsible by the Division to collect and remit any tax that may be due, and that the customer is not obliged to do so if the vendor fails in its obligation. This generic argument is rejected as plainly contrary to the law (Tax Law §§ 1132[c]; 1133[b]).

E. Petitioners have also challenged certain specific transactions held subject to tax on audit. With respect to fixed asset acquisitions, petitioners maintain that the auditor erroneously imposed tax on the automobile described in Finding of Fact 6(a) upon the allegation that the vehicle was never used in New York State but was shipped, post-purchase, directly to China. This assertion is rejected as unsubstantiated. First, the letter submitted in support of petitioners' claim that no tax was due lacks specificity concerning the acquisition of the car, stating only that the vehicle was purchased at "the auction place in NJ." Further, the letter presents only a bare claim that the vehicle "was shipped to China the following week after the transaction" and "was never use[d] in the NY area." As noted, the record includes no purchase invoice or other paperwork concerning the acquisition of the car and no shipping documents or other evidence supporting the allegation that the vehicle was in fact shipped to China or anywhere else (***see*** Finding of Fact 12[a]).

F. Petitioners also maintain, with regard to fixed asset acquisitions, that any tax due on the purchase of the excavator, as described in Finding of Fact 6(b), was the responsibility of the vendor and not the petitioner as the purchasing customer. Petitioners argue further that the auditor incorrectly calculated the tax due on the transaction by (i) including interest on the monthly payments as subject to tax and (ii) by failing to apply the correct tax rates in effect during the particular months within the audit period. These arguments are rejected. As set forth above, a vendor's failure to impose and collect tax does not relieve the customer from liability (***see***

Conclusion of Law D). In addition, review of the auditor's calculations bears out (i) that the monthly payment amount was specifically computed based on principal only so as to exclude therefrom any interest amounts, and (ii) the auditor specifically accounted for the change in the tax rates that occurred during the audit period (***see*** Finding of Fact 6[b]).

G. With respect to expense purchases, petitioners claim that several transactions reflect "cash exchanges" where vendors cashed checks for Capital One as a courtesy enabling Capital One to have cash on hand to pay for certain expenses, allegedly as required by certain vendors and/or to obtain a lower price for the items or services purchased. This claim is rejected as not substantiated. First, even assuming the transactions (though booked as purchases) were cash exchanges and were followed by purchases using the cash so obtained, Capital One's record keeping does not bear out that the purchases allegedly made with cash were not subject to sales or use tax (e.g., payroll expense) or that tax was in fact paid on the purchases, either by the vendors or by Capital One. In fact, it is not unheard of that payments for goods and services made in cash may result in lower prices for a variety of reasons. Included among those reasons, of course, is the possibility that tax is not being imposed, collected or remitted. At a minimum, choosing to operate in this manner (paying in cash) heightens the importance of obtaining and retaining records of transactions that clearly bear out the nature of the transaction and the fact that tax was imposed and collected where due.

H. Petitioners also claim that some of the cash obtained by cash exchanges was used to make nontaxable purchases of auto parts for resale by a business to be started by Mr. Yin. This claim is rejected as unsubstantiated. As set forth in Finding of Fact 14, this intended auto parts business venture was never commenced. Further, the auditor's investigation of the claim of auto parts purchases revealed that the alleged seller, USA Auto Group, did not sell auto parts and that the

invoices allegedly issued by this entity were fictitious and were created by Capital One's former bookkeeper. Moreover, no evidence was provided to substantiate the claim that the auto parts allegedly purchased remain in Capital One's warehouse.

I. Finally, petitioners claim that certain purchases, including those connected with invoices that do not reflect tax thereon, were understood by the parties to the transactions to mean that "all tax [is] included" in the price shown. On this score, however, Tax Law § 1132(a) and 20 NYCRR 532.1(b) provide:

> (1) Whenever a customer is given any sales slip, invoice, receipt, or other statement or memorandum of the price, the tax shall be stated, charged and shown separately on the first of such documents given to him.
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> (2) Whenever the sales and use tax is separately stated on such document, it may be referred to as "tax."
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> (3) The words "tax included" or words of similar import on a sales slip or other document does not constitute a separate statement of the tax, and the entire amount charged is deemed the sales price of the property sold or services rendered.

Simply put, this method of purchasing and record keeping is clearly not acceptable under the law, and the auditor correctly rejected the claim that tax was charged and collected on any such purchases.

J. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]). The evidence in the record clearly establishes that petitioner Shuai Yin, the sole owner and president of Capital One, was a person under a duty to act on behalf of that corporate entity in complying with the requirements of Article 28 (***see***

Finding of Fact 11). Mr. Yin advances no challenge to that status, but argues only that individuals are not responsible for the unpaid tax liabilities of corporations. This argument is rejected as plainly contrary to the law.

K. Tax Law § 1145(a)(1)(i) imposes a penalty upon persons who fail to timely file a return or timely pay the tax imposed by Articles 28 and 29 of the Tax Law. The penalty and additional interest may be waived if "such failure or delay was due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). The taxpayer bears the burden of establishing that the actions were based upon reasonable cause and not willful neglect (***see Matter of Philip Morris***, Tax Appeals Tribunal, April 29, 1993; ***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992, ***confirmed*** 193 AD2d 978, 598 NYS2d 360 [1993]).

As the Division points out, Capital One was not registered with the Division, did not file sales tax returns, and did not maintain or produce the source records that it was required by law to maintain (***see*** Finding of Fact 4). Moreover, petitioners have failed to prove that the Division's assessment of omnibus penalty pursuant to Tax Law § 1145(a)(1)(vi) for omission of an amount in excess of 25% of the amount of taxes required to be shown on its tax return was improper. Petitioners have not advanced any bases upon which abatement of penalties would be justified and the same are, therefore, sustained.

L. The petitions of Capital One Construction, Inc,. and Shuai Yin are hereby denied and the notices of determination dated June 27, 2011 (regarding Capital One) and June 28, 2011 (regarding Shuai Yin), together with penalties and interest, are sustained.

DATED: Albany, New York
October 16, 2014

/s/ Dennis M. Galli her
ADMINISTRATIVE LAW JUDGE