

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

TITAN ELEVATOR & LIFT LLC :

for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period December 1, 2003 through :
November 30, 2009. :

DETERMINATION
DTA NOS. 825845,
825858 AND 825859

In the Matter of the Petition :

of :

MICHAEL ZUCKERMAN :

for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period December 1, 2003 through :
November 30, 2009. :

In the Matter of the Petition :

of :

SHARI ZUCKERMAN :

for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period December 1, 2003 through :
November 30, 2009. :

Petitioner Titan Elevator & Lift, LLC, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2003 through November 30, 2009.

Petitioner Michael Zuckerman filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2003 through November 30, 2009.

Petitioner Shari Zuckerman filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2003 through November 30, 2009.

A hearing was held before Arthur S. Bray, Administrative Law Judge, in New York, New York, on September 28, 2015, with all briefs to be submitted by March 22, 2016, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Ken Novick, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Lori Antolick, Esq., of counsel).

ISSUE

Whether petitioners' installations of elevators were subject to sales and use taxes.

FINDINGS OF FACT

1. Petitioner Titan Elevator & Lift, LLC (Titan) is a firm, located in East Setauket, New York, that engages in the installation and servicing of elevators and dumbwaiters. Titan was not registered as a sales tax vendor. The elevators installed by Titan are relatively small and are intended to go up or down a stairway in a home or small business. Some elevators are meant to hold just a wheelchair and possibly an attendant. The elevators can only go from one landing to another.

2. On January 28, 2010, the Division of Taxation (Division) mailed a letter to petitioner Shari Zuckerman, as a partner of Titan, scheduling a field audit on February 19, 2010 for the period December 1, 2003 through November 30, 2009. The letter stated that Mrs. Zuckerman must show all of her sales and use tax books and records to the auditor. A schedule of books and records to be produced was attached to the letter. On April 7, 2010, the auditor sent a second request for records to Titan. On June 1, 2010, the auditor sent a letter to Titan's accountant requesting documentation for a review of sales for 2007.¹ Among other items, the auditor requested sales invoices, contracts, exemption documents, and invoices from a firm known as Federal Elevator to ascertain whether materials used on the job would be subject to sales tax. The auditor also requested purchase invoices, any other documentation pertaining to the acquisition or disposition of fixed assets and completed sales tax examination and responsible person questionnaires. Requests for documentation were also made on August 19, 2010, September 29, 2010, February 4, 2011, March 2, 2011, April 26, 2011 and December 29, 2011.

3. In response to the requests for records, the Division did not receive sales invoices or contracts for the years 2004 through 2006, 2008 and 2009. The Division was not provided with general ledgers for the years 2004, 2005 and 2006. Cash receipt journals were not made available for the years 2004, 2005 and 2009.

4. While reviewing documents in the office of Titan's accountant, the Division found letters, purportedly from Titan's customers, in the files of Titan's accountant stating that the elevators were purchased and installed for medical purposes in order to create accessibility in the home. These letters were disregarded because an investigator from the Division determined that

¹ Prior to sending the letter, which just asked for records for 2007, the auditor was at the office of Titan's accountant. During this encounter, the auditor explained that he was going to review sales and the accountant replied that he had sales records commencing in 2007. Consequently, the auditor asked for 2007.

in one instance the letter was changed after the individual signed the letter and, in two other instances, the individuals whose names appear on the letters said that they never saw the letters.

5. Titan's records were not considered adequate to conduct a detailed audit of sales because of the limited records that were made available. In order to determine the amount of Titan's sales, the Division used Titan's income statements. For those years where the income statements were not available, the Division considered Titan's bank deposits to be sales with an adjustment to remove transfers between accounts.

6. Sales records were reviewed using a test period method. The year 2007 was selected as the test period because this was the only year for which Titan provided sales invoices. In a test of sales, the auditor found that 8.07 percent of the sales were for the service and maintenance of elevators and dumbwaiters. All service and maintenance sales were held to be taxable because the Division concluded that Titan did not adequately document that the elevators being serviced were for use by individuals with disabilities. The audited gross sales of \$3,864,816.10 were multiplied by 8.07 percent to find audited taxable sales of \$311,890.66. The audited taxable sales were then multiplied by the tax rate to determine that tax was due in the amount of \$26,998.64.

7. The Division also conducted a review of expense purchases. The expense purchase records were deemed inadequate because purchase records, such as purchase invoices, were not provided for the years 2004, 2005, 2006, 2008 and 2009. General ledgers and cash disbursement journals were not made available for 2004 through 2006. Exemption documents were also not provided.

8. Expense purchases were examined using the year 2007 as the test period because this was the only year for which purchase invoices for elevators were made available. The Division

determined that Titan was not paying sales tax on the purchases of elevators and dumbwaiters. Following a test of sales, the Division concluded that 85.03 percent of sales were capital improvement sales and 5.7 percent were dumbwaiter capital improvement sales. The percentages were applied to audited gross sales to calculate audited capital improvement sales of \$3,506,547.65. The amount of purchases reported on the federal income tax returns was divided by the gross sales and this percentage was then multiplied by audited capital improvement sales to determine the materials subject to sales and use tax. Since sales tax was not paid or reported, Titan was assessed tax on all materials used for capital improvements for the entire audit period. Following its review, the Division determined that there were additional taxable purchases of \$2,053,083.65 resulting in additional tax due of \$177,724.06.

9. On May 7, 2012 and May 4, 2012, the Division sent notices of determination to Titan, Shari Zuckerman and Michael Zuckerman, respectively, which assessed sales and use taxes in the amount of \$204,722.70 (\$26,998.64 and \$177,724.06) plus interest in the amount of \$256,164.49 and penalties in the amount of \$81,886.68 for a balance due of \$542,773.87. Both statutory and omnibus penalties were imposed because the amount of tax due was more than 25 percent of what was reported. The notices issued to Shari Zuckerman and Michael Zuckerman stated that they were assessed as responsible officers or responsible persons of Titan.

SUMMARY OF THE PARTIES' POSITIONS

10. Relying upon industry safety codes regarding the design and installation of elevators for individuals with disabilities, Titan argues that it does not owe sales tax on any purchases of materials used in the installation of elevators since the elevators were installed for medical purposes. Titan also offered letters from the suppliers of the equipment that it installed. A letter from Federal Elevator Systems, Inc., stated that from 2003 to 2008, it only manufactured

residential disabled accessible elevators for Titan. The second letter, from Elevator Concepts, Ltd., stated that all of the equipment that it supplied to Titan was for residential accessibility installations and that the equipment met the requirements of ASME A17.1, Section 5. Titan also relies upon Tax Bulletin TB-ST-740, which states that exemption documents are not required for the sale of prosthetic aids and devices and the services performed thereon. Titan surmises that it does not have to produce letters to prove that the elevators were installed in residences with people who have specific disabilities.

11. In response, the Division contends that Titan has not provided “any purchase invoices, sales contracts or other documentation to prove that it designed, installed and serviced elevators specifically for persons with a disability.” Further, the Division submits that petitioners owe sales tax on the purchase of materials used in the installation of the elevators because the elevators were not used for medical purposes.

CONCLUSIONS OF LAW

A. The standard for reviewing a sales tax audit where an indirect audit methodology has been employed is well established. When the records maintained by the taxpayer are inadequate to conduct a complete audit, the Division may estimate the tax liability (Tax Law § 1138(a)(1); *Matter of AGDN, Inc.*, Tax Appeals Tribunal, February 6, 1997). Tax Law § 1135(a)(1) requires persons required to collect sales tax to keep records of every sale. These records must be kept in a manner suitable to determine the correct amount of tax due and must be available for the Division's inspection upon request (Tax Law § 1135[g]; 20 NYCRR 533.2[a][2]). Among the sales records required to be maintained are “sales slip, invoice, receipt, contract, statement or other memorandum of sale . . . and any other original sales document” (20 NYCRR 533.2[b][1]). To determine the adequacy of a taxpayer's records, the Division must first request and

thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776 [3d Dept 1987], *lv denied* 71 NY2d 806 [1988]). When a taxpayer's records are incomplete and unreliable for determining sales, the Division may resort to external indices to estimate the tax (*Matter of Skiadas v. State Tax Commn.*, 95 AD2d 971 [3d Dept 1983]).

B. The record establishes that the Division made repeated clear and unequivocal written requests for books and records, as well as Titan's failure to produce such books and records. After repeated requests for records, petitioners were only able to provide a portion of Titan's records. Having established the unavailability of required books and records, the Division was clearly entitled to resort to the use of indirect methods to determine Titan's sales and sales tax liability (*see Matter of Del's Mini Deli, Inc. v. Commissioner of Taxation and Finance*, 205 AD2d 989 [3d Dept 1994]; *Matter of Vebol Edibles v. Tax Appeals Tribunal*, 162 AD2d 765 [3d Dept 1990], *lv denied* 77 NY2d 803 [1991]). Since it is concluded that the audit method was reasonable, petitioners have the burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (*Matter of Sarantopoulos v. Tax Appeals Tribunal*, 186 AD2d 878 [3d Dept 1992]).

C. Petitioners have the burden of proving their entitlement to an exemption (*see Matter of Lake Grove Entertainment, LLC v. Megna*, 81 AD3d 1191 [3d Dept 2011]). The question presented is whether the presentation of industrial codes and letters from suppliers stating that the elevators that Titan purchased met those codes is sufficient to satisfy this burden of proof.

D. Exemptions from the imposition of the sales tax are set forth in Tax Law § 1115(a) and include supplies used to alleviate physical incapacity (Tax Law § 1115[a][3]) and prosthetic aids (Tax Law § 1115[a][4]). The exemption for medical equipment is not all encompassing.

Exempt medical equipment has been defined to mean “machinery, apparatus and other devices . . . which are intended for use in the cure, mitigation, treatment or prevention of illnesses or diseases or the correction or alleviation of physical incapacity in human beings” (20 NYCRR 528.4[e][1]). In order to qualify as exempt medical equipment, the “equipment must be primarily and customarily used for medical purposes and not be generally useful in the absence of illness, injury or physical incapacity” (20 NYCRR 528.4[c][2]).

E. As pointed out by the Division, Titan seems to contend that since the elevators it purchased conformed to the code for disabled accessible elevators, their sale was exempt from sales tax. The difficulty with this position is that it cannot be reconciled with the provisions of the Tax Law that require a vendor to have supporting documentation.² Tax Law § 1132(c)(1) and its corresponding regulation, 20 NYCRR 533.2(a)(1), create a rebuttable presumption that every receipt is subject to sales tax and the burden of proof is placed upon the vendor or the customer to establish that a receipt is not subject to tax. Tax Law § 1135(a)(1) directs that every person required to collect tax shall keep a record of every sale, all amounts charged and the tax due thereon. The required records “include a true copy of each sales slip, invoice, receipt, statement or memorandum” (Tax Law § 1135[a][1]). Moreover, upon request, these records are to be made available for an audit by the Division (Tax Law § 1142[5]; 20 NYCRR 533.2[2]). In this instance, Titan did not have any documentation, such as contracts or memorandums to show that the cost of the materials used to install the elevators were sales not subject to tax. Under the

² Any person required to collect sales tax is required to register as a vendor (20 NYCRR 533.1[a][1][i]). Without considering the installation of the stair-lifts, wheelchair lifts or residential elevators, petitioners’ argument that Titan was not required to register as a sales tax vendor is without merit because it overlooks the fact that a substantial portion of petitioners’ business involved selling, installing and repairing dumbwaiters. A contractor’s purchase of materials for use or consumption in construction is a retail sale subject to sales and use taxes (20 NYCRR 541.1[b]).

circumstances, Titan has not sustained its burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

F. Both statutory and omnibus penalties were imposed because of the inadequacy of the records and the amount of tax due was more than 25 percent of what was reported. Tax Law § 1145(a)(1)(iii) provides that if the failure or delay was due to reasonable cause and not due to willful neglect, penalty and additional interest shall be remitted. Reasonable cause includes any cause for delinquency which would appear to a person of ordinary prudence and intelligence as reasonable cause for the delay in filing a sales tax return and paying the tax imposed under Articles 28 and 29 of the Tax Law (20 NYCRR 2392.1[d][5]). Here, such penalties were properly imposed because of the failure to maintain and provide proper records and the underreporting of tax due (*see Matter of Rosemellia*, Tax Appeals Tribunal, March 12, 1992; *see also Matter of Shukry v. Tax Appeals Tribunal*, 184 AD2d 874 [3d Dept 1992]).

G. Petitioners also request that Shari Zuckerman be accorded innocent spouse treatment. This request is denied because there is no provision in Articles 28 and 29 for innocent spouse relief. Moreover, even if such a provision existed, petitioners have not offered any evidence to support such relief.

H. The petitions of Titan Elevator & Lift LLC, Michael Zuckerman and Shari Zuckerman are denied and the notices of determination, dated May 7, 2012, are sustained together with such penalties and interest as may be lawfully due.

DATED: Albany, New York
September 1, 2016

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE