

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioner, Michael Silverstein, 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 December 1, 1998 through November 30, 2007.

An expedited hearing was held before Barbara J. Russo, Administrative Law Judge, at the offices of the Division of Tax Appeals in New York, New York, on July 23, 2015 at 10:30 A.M. and continued in Albany, New York, on March 2, 2016 at 10:30 A.M., with the final brief to be submitted by November 1, 2016, which date began the period for the issuance of this determination pursuant to Tax Law § 2008(2). Petitioner appeared by pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

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 period 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 period 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).

FINDINGS OF FACT

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

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.

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 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.

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.

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.

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.

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.

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 which 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.

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

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

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?”

The Defendant: I do.

The Court: Do you have any questions?

The Defendant: No.

* * *

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.

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

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

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 transactions documents evidence 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

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

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

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.

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.

CONCLUSIONS OF LAW

A. 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, every vendor of tangible personal property or services, and corporate officers, directors 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 mere holding of corporate office does not, per se, impose tax liability upon an office holder (*see Matter of Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222[1979]; *Matter of Chevlowe v. Koerner*, 95 Misc 2d 388 [1978]; *Matter of Unger*, Tax Appeals Tribunal, March 24, 1994, *confirmed sub nom Matter of Landau v. Tax Appeals Tribunal*, 214 AD2d 857 [1995], *lv denied* 86 NY2d 705 [1995]). Additionally, personal liability under Tax Law § 1131(1) is not limited to persons who are officers, directors or employees of the corporation (*Matter of Ianniello*, Tax Appeals Tribunal, November 25, 1992, *confirmed* 209 AD2d 740 [1994]). Rather, whether an individual is personally liable for tax under Tax Law § 1131(1) must be determined upon the particular facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022 [1987]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006 [1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890 [1990]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The pivotal question is whether the individual had or could have had sufficient authority and control over the affairs of the corporation (*Matter of Ianniello*). Factors to be considered include the individual's status as an officer, 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 (*Matter of Ianniello*; *Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990; *Matter of Cohen* at 1023). As noted by the Tribunal,

“The factual determination demands a consideration of all the surrounding circumstances and involves more than the matching of the traditional indicia of responsibility to an officer's surface acts. Indeed, a person's officer status can be offset by the circumstances, such as where the officer's actions were done under the supervision and control of persons later convicted on criminal racketeering charges Further, the lack of an official title in a corporation should not shield an individual from responsibility where that individual in fact controls the corporation” (*Matter of Ianniello*).

B. Petitioner bears the burden of proof to establish by clear and convincing evidence that he was not a person required to collect tax for Crest and Metro under Tax Law §§ 1131(1) and 1133(a) (*Matter of Sacher*, Tax Appeals Tribunal July 2, 2015; *Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998). Petitioner's claim that he was not a responsible person for Crest and Metro is not supported by the record and is directly contradicted by his guilty plea.

Petitioner is estopped from challenging the notices on the theory that he was not a responsible person for Crest and Metro within the meaning of Tax Law § 1131(1) and Tax Law § 1133 as a result of his guilty plea. For the doctrine of estoppel to apply, petitioner must have had a fair opportunity to litigate the same issues during the prior proceeding (*See Kuriansky v. Professional Care*, 158 AD2d 897 [1990]). This means that:

“the party seeking the benefit of collateral estoppel . . . has the burden of demonstrating the identity of the issues and the necessity of their having been decided, and the party opposing its use . . . has the responsive burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action” (*State of New York v. Sokol*, 113 F3d 303, 306 [2d Cir 1997][citations omitted]).

An essential issue litigated and decided in the criminal proceeding is the same one raised by petitioner here, i.e., that petitioner was a responsible person for Crest and Metro and failed to

report and remit taxes due to New York State on behalf of Crest and Metro. In the plea agreement and during the plea proceedings in the criminal matter, petitioner specifically admitted that during the period of February 1, 1999 through December 28, 2008, he was an officer of and responsible person for Crest and Metro 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 owed to New York State. Moreover, during the plea proceedings, when questioned by the judge as to whether he read the plea agreement, had the opportunity to discuss it with his attorneys and fully understood it, petitioner answered in the affirmative.

Petitioner now argues that he was not a responsible person for Crest or Metro, but offered no testimony or documentary evidence to support this argument or refute the admissions made in the plea agreement. Petitioner is estopped from making this argument in this forum. The Division has shown that the issue of whether petitioner was a responsible person of Crest and Metro was answered in the affirmative during the plea proceedings and that the issue was necessarily addressed during those proceedings (i.e., that petitioner was a responsible person for Crest and Metro and as a responsible person deliberately failed to report and remit taxes collected and due by Crest and Metro to New York State). Therefore, petitioner is estopped from arguing in these proceedings that he was not a responsible person of Crest and Metro for the period of February 1, 1999 through December 28, 2008 (*Matter of DeFeo*, Tax Appeals Tribunal, April 22, 1999).

Moreover, in addition to petitioner's guilty plea, the additional evidence in the record further supports a finding that petitioner was a person required to collect tax for Crest and Metro under Tax Law §§ 1131(1) and 1133(a) for the periods at issue herein. Specifically, with regard to Crest, the Notice of Determination issued to petitioner assessed tax for the periods ending

February 28, 1999 through February 28, 2002. During this period, petitioner was a stockholder, officer and director of Crest. Petitioner was the president and sole incorporator of Crest, applied for the initial dealer license for Crest with DMV in 1987, amended and renewed Crest's DMV license during the period at issue, was an authorized signatory on Crest's bank account, sent correspondence to DMV during the period at issue on behalf of Crest's d/b/a, United Buying Service, listing his title as president, and appeared and testified as the owner of Crest at DMV hearings pertaining to a 2001 DMV audit of Crest.

With regard to Metro, the record shows that for the period petitioner was assessed in the Notice of Determination, ending February 28, 2002 through November 30, 2007, he was a responsible person for Metro. Petitioner applied for the original dealer license for Metro with DMV in 1993, was listed as president of Metro in 1993 and 2001 through 2009, appeared and testified as the owner of Metro at a DMV hearing in July 2002, pertaining to a 2001 DMV audit of Metro, signed the corporate resolution and banking agreement as president of Metro d/b/a Cars By Tel, signed facility renewal applications with DMV as president and secretary of Metro during the period at issue, and signed a request for amendment of Metro's DMV license, listing his title as president during the period at issue.

Petitioner has failed to establish by clear and convincing evidence that he was not an officer or employee of Crest and Metro and that he lacked the authority to control the finances, including payment of sales tax obligations, for Crest and Metro. Additionally, petitioner has not shown that he was thwarted by others in carrying out his corporate duties through no fault of his own (*Matter of Goodfriend*). Indeed, petitioner failed to present any testimony or documentary evidence to support his argument and refute the plethora of evidence, including his guilty plea, which establish that he was responsible for the sales tax obligations of

Crest and Metro. Upon review of the entire record, it is clear that petitioner has not met his burden of proof and was properly held liable for the sales tax obligations of Crest and Metro for the periods at issue.

C. 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 Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation . . . who as such officer, director, employee or manager is under a duty to act for such corporation” (Tax Law § 1131[1]). Tax Law § 1136 requires the filing of sales tax returns by persons required to collect sales tax.

Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices” (Tax Law § 1138[a][1]).

The standard for reviewing a sales tax audit where an indirect audit methodology has been employed in the determination of sales tax liability is well established, and was set forth in *Matter of AGDN, Inc.* (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 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)."

D. In this case, the record establishes 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. Petitioner's contention that Crest and Metro were not given proper notice of the audit or that a proper records request was not made is contradicted by the evidence in the record. Specifically, as noted in Findings of Fact 3 and 26, the Division made multiple written requests for books and records to Crest at the addresses on file in the Division's records and other obtainable addresses. Initially, the Division sent a request for Crest's books and records to the last address reported by the business. After the initial request for records, the Division was contacted by Crest's purported representative, Alvin Silverman, CPA. However, upon meeting with Mr. Silverman for the initial audit appointment, the Division discovered that the power of attorney form Mr. Silverman presented was not valid, because the purported signatory for Crest was deceased when the form was dated and signed by Mr. Silverman. The Division was not subsequently provided with a valid power of attorney for Crest. After the criminal proceedings against Crest, Metro and petitioner were concluded, the civil audit

recommenced, and 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, as well as the address where the business was located, which was also the address on record with the DMV and Department of State. The Division also sent requests for Crest's books and records to petitioner, as a responsible person for Crest, at his home address. The Division was never provided with the books and records for Crest, despite multiple requests.

Similarly, for Metro the Division made multiple written requests for books and records to Metro (*see* Finding of Fact 27). Because Metro did not file any sales tax returns, no address was obtainable from such filings. As such, the Division sent requests for Metro's books and records to the address where the business was located, the address on record with the DMV, and the address reported to the Department of State. The Division also sent requests for Metro's books and records to petitioner, as a responsible person for Metro, at his home address. Metro failed to provide any books or records in response to the Division's requests.

Based on Crest's and Metro's failure to respond to the Division's numerous requests, 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. Having established the unavailability of required books and records, the Division was clearly entitled to resort to the use of indirect methods to determine the businesses' sales and sales tax liability (Tax Law § 1138[a][1]; *see Matter of W. T. Grant Co. v. Joseph*, 2 NY2d 196 [1957], *cert denied* 355 US 869 [1957]; *Matter of Del's Mini Deli, Inc. v. Commissioner of Taxation and Finance*, 205 AD2d 989 [1994]; *Matter of Vebol Edibles v. Tax Appeals Tribunal*, 162 AD2d 765 [1990]). When acting pursuant to section 1138(a)(1), the Division is required to select a method of audit reasonably calculated to reflect the tax due (*Matter of Bernstein-On-Essex St.*, Tax

Appeals Tribunal, December 3, 1992). The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice*, Tax Appeals Tribunal, February 20, 2003).

The audit method utilized by the Division consisted of compiling and reviewing bank deposits and information from third parties regarding Crest's and Metro's sales in order to determine taxable sales, including information from the DMV, third-party verification from individuals who purchased vehicles from Crest and Metro, bank records of Crest and Metro obtained from banks in response to information requests and subpoenas, which included copies of bank statements, deposit slips, deposited checks and signature cards, and documentation obtained from Crest's and Metro's business premises during the execution of a search warrant.

The DMV information reviewed included MV-50 forms, license plate data, registration data and screen shot print-outs of information from DMV electronic records. The Division's auditor first reviewed the MV-50 records and checks that had been deposited into Crest's and Metro's accounts in order to determine a match with the customer name or vehicle identification number. Where the bank deposit matched the information on the MV-50 indicating a customer purchase of a vehicle from Crest or Metro, such transaction was treated as a taxable sale. In instances where the MV-50s had not been properly completed by the dealerships (*see Findings of Fact 12, 15, and 32*), the auditor reviewed "batch work" (computerized information compiled by DMV and stored electronically when an individual seeks to register a vehicle with DMV, including the individual's original MV-50 and registration application) and computer screen shots from DMV in order to obtain customer and car information to match 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," 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, such transactions were counted as taxable sales.

Additional third-party information reviewed by the auditor included information in response to questionnaires sent by the Division to customers who purchased vehicles from Crest or Metro. Some customer responses included the customer's copy of the MV-50, bill of sale, registration, title, insurance, photocopy of driver's license, copies of canceled checks and car loan documents. Where the information obtained by customers verified a vehicle sale from Crest or Metro and a matching bank deposit, such transaction was treated as a taxable sale.

Additional information was obtained and reviewed by the auditor from the execution of a search warrant at Crest's and Metro's business premises conducted during the criminal investigation, and included "sales jackets," which were folders of documentation copied by the car dealerships when cars were sold, including MV-50s and copies of checks, bank deposits, bill of sales, titles, customers' insurance, customers' drivers licenses and vehicle inspections.

The Division's auditor thoroughly examined the information obtained, as described above, and matched the information to Crest's and Metro's bank deposits in order to determine taxable sales. It is concluded that the audit method used by the Division for the audit of Crest and Metro was reasonably calculated to reflect the tax due (*see Matter of D & V Liquors*, Tax Appeals Tribunal, March 10, 2005).

Since it is concluded that the audit method was reasonable, petitioner had 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, 879 [1992]). Petitioner failed to meet this fairly substantial

burden (*see Matter of Center Moriches Monument Co. v. Commr. of Taxation & Fin.*, 211 AD2d 947 [1995]). Petitioner failed to produce any documentary evidence to dispute the results of the Division's calculation of tax due for Crest and Metro.

Petitioner argues that the Division's determination of taxable sales is erroneous on the basis that there was not a completed MV-50 and bill of sale for every transaction assessed. However, 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, including the MV-50 forms and bills of sale. Petitioner failed to maintain and provide such records and as result, the Division used an accepted methodology to reasonably calculate the taxes due. The Division's use of an indirect audit method was the result of the actions of petitioner, who did not produce the records requested. Any imprecision in the results of an audit arising by reason of a taxpayer's own failure to keep and maintain records of all of its sales as required by Tax Law § 1135(a)(1) must be borne by that taxpayer (*see Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023 [1976], *affd* 44 NY2d 684 [1978]; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223 [1978], *lv denied* 44 NY2d 645 [1978]). Moreover, petitioner failed to produce any documentary evidence or testimony at hearing to dispute the Division's determination. As the responsible person for Crest and Metro, petitioner was in the best position to produce books and records for the business. Petitioner did not come forth with such evidence. Petitioner's failure to provide testimony or any business records results in the strongest possible negative inference against petitioner and the conclusion that petitioner did not produce such evidence because it would not have contradicted the evidence presented by the Division (*see Matter of Drebin*, Tax Appeals Tribunal, March 27, 1997).

E. Petitioner's contention that the Division used the wrong records in auditing Metro is without merit. Petitioner argues that the Division improperly audited Metro Auto Leasing NYC Inc., instead of Metro Auto Leasing, Inc., referring to the corporate resolution and banking agreement with State Bank of Long Island, dated March 3, 2003. The title of the account is "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. 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 transactions documents evidence that the vehicles were indeed sold by Metro, and the sale proceeds were deposited into the "Metro Auto Leasing NYC Inc. D/B/A Carsbytel" bank account. As such, the Division properly analyzed deposits in this account when determining taxable sales, and petitioner has failed to present any evidence to show that such calculations were erroneous.

F. Petitioner further argues that the assessment of tax due against Crest and Metro are time-barred. Regarding the period of limitations on assessment, an assessment of additional sales tax generally must be made within three years after the filing of a return, except in the case of a willfully false or fraudulent return with the intent to evade tax (Tax Law § 1147[b]). Where no return has been filed or in the case of fraud, an assessment of tax may be made at any time (*Matter of Aqua-Mania, Inc.*, Tax Appeals Tribunal, March 6, 2008; *Matter of Alvin's Wine*

and Liquor, Inc., Tax Appeals Tribunal, October 29, 2009). The record in this matter is clear that no sales tax returns were filed by Crest and Metro for the periods at issue (*see* Findings of Fact 3 and 37). As such, the sales tax assessments for these periods could be made at any time, and petitioner's argument that the notices of determination are time barred is rejected.

Additionally, as set forth in Conclusion of Law H below, the imposition of the fraud penalty pursuant to Tax Law § 1145(a)(2) was proper. The Division has met its burden of proving fraud. Accordingly, the assessment of tax may be made at any time (Tax Law § 1147[b]), and the assessments in the present case are not time-barred.

G. Petitioner also argues for cancellation of the notices upon his claim that he did not receive them. It must first be noted that petitioner did not allege nonreceipt of the notices or improper issuance of the notices in his petitions filed in this matter, and did not present testimony during the hearing supporting his argument that he did not receive the notices. Petitioner's claim consists merely of his unsupported and unsworn allegations raised in his briefs of nonreceipt of the subject notices, despite the fact that petitioner timely protested the notices by filing requests for a conciliation conference, had a conciliation conference on the merits of the protests, and timely filed petitions with the Division of Tax Appeals.

With respect to the issuance of notices of determination, Tax Law § 1138(a)(1) provides, in pertinent part, that “[n]otice of such determination shall be mailed to the person or persons liable for the collection or payment of the tax. A notice of determination shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.”

Tax Law § 1147(a)(1) further provides:

“Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid

envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice.”

The evidence in the record shows that the notices were mailed by certified mail to petitioner at his last known address. As no returns had been filed by petitioner, the notice was mailed “to such address as may be obtainable” (Tax Law § 1147[a][1]), being the address for petitioner as indicated on the power of attorney for the criminal proceedings, dated April 8, 2010. Petitioner presented no testimony, either personally or through witnesses, nor documentary evidence to show that this address was incorrect or that the Division had been notified of a change of address prior to the issuance of the notices. Petitioner’s claim of nonreceipt is contradicted by the fact that he timely protested the notices, thus evidencing actual receipt thereof. The Division has not alleged that petitioner’s challenge was untimely. Accordingly, petitioner was entitled to have the merits of the assessments addressed, and that is what has occurred in this matter.

Petitioner further argues that the notices should be canceled because they were not sent to his attorneys, Mr. Riso and Mr. Nizen, who were designated to represent petitioner in the criminal proceedings for sales tax for the period 1999 through 2009, by a power of attorney dated April 8, 2010. Contrary to petitioner’s argument, the failure to establish proper issuance of copies of notices to a taxpayer’s duly appointed representative does not result in cancellation of such notices, but rather results in a tolling of the limitations period within which to file a petition or request a conciliation conference (*see Matter of Multi Trucking, Inc.*, Tax Appeals Tribunal, October 6, 1988). Petitioner clearly received actual notice within the period allowed by statute

(there being no period of limitations on assessment in the cases of fraud and failure to file returns), in turn requested and received a conciliation conference, and is currently exercising his due process rights before the Division of Tax Appeals. Hence, 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.

H. The Division has met its burden of proof for the assertion of fraud penalties against petitioner. Tax Law § 1145(a)(2) provides for civil penalties in a case where failure to pay tax is the result of fraud. The burden of showing that such failure occurred as a result of fraud rests with the Division (*Matter of Ilter Sener d/b/a Jimmy's Gas Station*, Tax Appeals Tribunal, May 5, 1988). While fraud is not defined in the statute, a finding of fraud 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” (*Matter of Ilter Sener*).

Fraud need not be established by direct evidence, but can be shown by surveying the taxpayer's entire course of conduct and drawing reasonable inferences therefrom (*Matter of Cousins Serv. Sta.*, Tax Appeals Tribunal, August 11, 1988). In order to establish fraudulent intent, petitioner must have acted deliberately, knowingly and with the specific intent to violate the Tax Law.

The Division urges that petitioner is collaterally estopped from denying he committed fraud. Collateral estoppel is a legal doctrine that precludes a party from relitigating, in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (*see Ryan v. New York Tel. Co.*, 62 NY2d 494 [1984]).

In order for the doctrine of collateral estoppel to apply: (1) the issue as to which preclusion is sought must be identical with that in the prior proceeding; (2) the issue must have been decided in the prior proceeding; and (3) 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 (*see Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 NY2d 147 [1988]; *Capital Tel. Co. v. Pattersonville Tel. Co.*, 56 NY2d 11 [1982]).

The record here demonstrates that the question of whether petitioner had committed fraud, present here, was also present in its previous criminal proceeding. That issue was decided in the Queens County Court upon petitioner's plea of guilty to the charges in full satisfaction. The plea colloquy makes clear that petitioner was fully advised of the implications of his plea and was fully and fairly advised of his right to litigate the issue if he so wished. Instead of going to trial, petitioner accepted the plea bargain by pleading guilty to one count of Falsifying Business Records in the First Degree, Penal Law § 175.10, a class E felony, in full satisfaction of the charges against him contained in the indictment. The basis of these charges, admitted by petitioner in the plea proceedings, is that petitioner, with the intent to defraud in order to avoid paying sales tax, made a false entry in business records, and his intent to defraud included an intent to commit larceny and to aid or conceal the commission thereof. Petitioner further admitted in his plea that as an officer and responsible person for Crest and Metro, 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. The admission of fraud contained in the plea agreement includes the periods assessed against petitioner in the notices of determination at issue herein (February 28, 1999 through

February 28, 2002 as a responsible person of Crest and February 28, 2002 through November 30, 2007 as a responsible person of Metro).

There is simply no doubt that petitioner's actions were fraudulent and that petitioner's admissions alone meet the *Ilter Sener* requirements. Petitioner is estopped from arguing that the fraud penalty in this matter was improperly asserted (*see Plunkett v. Commr.*, 465 F2d 299 [7th Cir 1972]); *Matter of N.T.J. Liquors*; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989).

It must be further noted that even in the absence of collateral estoppel, the Division has met its burden of establishing that the imposition of a penalty for fraud is warranted in this case. On this score, the Division's audit established an enormous level of unreported sales and sales tax over a substantial and continuous period of time. Petitioner failed to produce the records requested for audit, and in fact failed to produce any meaningful, relevant or reliable records for use in the conduct of the audit. Moreover, the record shows that petitioner fabricated incomplete and erroneous MV-50s, in that carbon copies of the same MV-50s contained contradictory information. There is no indication that petitioner in any manner cooperated in the conduct of the audit. Petitioner, on behalf of Crest and Metro, filed no sales tax returns for the entire audit period, and did not file any sales tax returns once the audit commenced. In sum, the circumstances of this case, viewed in their entirety, provide convincing evidence that petitioner knowingly and willingly participated in the failure to remit sales taxes as required and clearly support the imposition of a penalty for fraud.

I. The Division has asserted in its answer, at hearing and in its brief, in the alternative to and assuming the fraud penalty was not sustained, the penalty pursuant to Tax Law § 1145(a)(1). As described above, the evidence shows that petitioner's actions were intentional, willful and

deliberate and resulted in the nonpayment or underpayment of sales taxes due and owing. Therefore, in the event the fraud penalty was not sustained, there is a clear basis to support the imposition of penalty under Tax Law § 1145(a)(1).

J. Petitioner contends in his reply brief that he only agreed to pay \$393,000.00 in his criminal plea, and argues that such amount includes interest, penalties and fraud claims against him, and that the Division should pursue any additional amounts from the corporations. Petitioner's argument is directly contradicted by the language in the plea agreement, which provides that it does not bind the Division in the assessment of additional tax, interest and penalties, stating:

“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.”

Petitioner's claim that he did not understand the plea agreement or was not aware of his rights is disingenuous, given the specific and detailed questioning by Justice Camacho during the plea proceedings, and petitioner's response that he understood the plea and discussed it with his attorneys.

The Division is not restricted as a matter of law from issuing a Notice of Determination for the total amount of taxes it determines is due, where that amount is greater than an amount agreed to as restitution in a criminal case based on the same facts for the same time period (*see*, Penal Law § 60.27[6]; *Matter of Aqua-Mania, Inc.*, Tax Appeals Tribunal, March 6, 2008; *Matter of N.T.J. Liquors, Inc.*, Tax Appeals Tribunal, May 7, 1992). Additionally, there is

nothing in the plea agreement that limits the Division's right to assert fraud penalties and there is nothing in the record to indicate that the State promised not to impose such penalties. Once the criminal proceeding was over and petitioner's file was returned by the Revenue Crimes Unit to the Division of Taxation, it could then properly determine whether fraud penalties should be asserted, as well as an assessment of additional tax and interest (*see Matter of Aqua-Mania, Inc.*).

K. The petitions of Michael Silverstein are denied and the notices of determination dated June 10, 2013, as modified pursuant to Finding of Fact 32, footnote 6, are sustained.

DATED: Albany, New York
November 28, 2016

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE