STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HOTEL DEPOT, INC.	:	DETERMINATION DTA NOS. 827555
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 June 1, 2005 through February 28, 2011.	:	AND 827556

In the Matter of the Petition	:	
of	:	
DIPESH PARIKH	:	
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 June 1, 2005 through February 28, 2011.	:	

Petitioners Hotel Depot, Inc., and Dipesh Parikh 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 June 1, 2005 through February 28, 2011.

A consolidated hearing was held before Catherine M. Bennett, Administrative Law Judge, on February 16, 2018 at 11:00 a.m. in Albany, New York, with all briefs to be submitted by July 13, 2018, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (M. Greg Jones, Esq., of counsel). As a result of Administrative Law Judge Bennett's retirement from New York State service, this

matter was reassigned to James P. Connolly, Administrative Law Judge, who renders the following determination.

ISSUES

I. Whether the audit methodology used by the Division of Taxation in its audit of petitioner Hotel Depot, Inc., had a rational basis and was reasonably calculated to reflect the tax due.

II. Whether petitioner Dipesh Parikh is a person required to collect sales tax on behalf of petitioner Hotel Depot, Inc.

FINDINGS OF FACT

1. During the period at issue petitioner Hotel Depot, Inc.,[1] sold hotel furnishings, such as beds, draperies, and electronics, with installation if necessary. Its headquarters was in South Plainsfield, New Jersey. Petitioner filed a form DTF-17, Application to Register for a Certificate of Authority, dated March 30, 2011. The application listed Dipesh Parikh as a "Responsible Person" for the corporation, and showed his title as "President."

2. The Division of Taxation (Division) opened a sales and use tax audit of petitioner's business in July 2011 for the period June 1, 2005 through May 31, 2011. The audit was commenced by Jaclyn Bettiol of the Division's Westchester District Office, and was completed by Kwaku Fordjour, who testified at hearing. Ms. Bettiol commenced the audit by mailing an audit appointment letter, dated July 29, 2011, to petitioner, which enclosed a page listing the books and records that needed to be provided for the whole audit period, including sales invoices, the general ledger, and general journal and closing entries. In response, petitioner's

[1] "Petitioner" as used below shall refer exclusively to petitioner Hotel Depot, Inc. Petitioner Dipesh Parikh will be referred to as "Mr. Parikh."

representative, Mr. Stewart Buxbaum, phoned the auditor and contended that petitioner did not have nexus with New York State until the company hired a salesman to seek additional sales in the State, and for that reason had filed the form DTF-17.

3. By a letter to Stewart Buxbaum, dated March 6, 2012, the auditor enclosed documentation, with certain information redacted, regarding a 2006 sale by petitioner to a New York hotel and three other such sales in 2009. The letter stated that the documentation showed that petitioner was performing installation and measurement services in New York, and asked petitioner to review that documentation. Attached to the letter was an information document request (IDR) asking petitioner to supply invoices for specified quarters in the audit period and to fill out the Division's "Responsible Person Questionnaire." By a letter to the auditor, dated March 19, 2012, Mr. Buxbaum provided petitioner's unredacted records with regard to those three sales, which included (i) an invoice dated November 20, 2006 for window treatment items, with a separate charge for installation, along with petitioner's purchase order to the manufacturer that was going to fulfill the order; (ii) an invoice dated January 16, 2009, also for window treatment items, with installation included on the same invoice line, and a separate line for freight charges; and (iii) a credit memo, dated December 31, 2008 for the third transaction, which had been canceled. Each of the invoices included a "Bill To" box and a "Ship To" box, the latter box listing the name of a hotel and its address in New York City. Towards the bottom of each was the following preprinted language: "All taxes and freight will be paid by the customer or the owner to the appropriate authority." Underneath the "Subtotal" box for the two invoices is a box for "Sales Tax (0.0%)," which shows no sales tax being charged. The audit file contains many more copies of invoices issued by petitioner, which have the same basic format as the November

20, 2006, and January 16, 2009 invoices described above, including the same language regarding the handling of taxes and freight charges.

4. The auditor replied to Mr. Buxbaum's March 19, 2012 letter with a letter dated April 19, 2012, stating that, upon review of the aforementioned records from petitioner, the Division had concluded that petitioner did have nexus with New York State prior to its application for a sales tax certificate of authority. The letter enclosed another IDR, which requested, among other things, invoices for certain quarters in the audit period and "[p]ayments made for freight bills and delivery charges for the entire audit period." The IDR has a column on which the auditor can check and date to indicate when the requested item was received by the auditor. The box in that column for the entry seeking the invoices was checked and dated May 30, 2012, but the box for the payments made for freight bills and delivery charges was not checked.

5. After the issuance of further IDRs, the auditor eventually determined that petitioner's sales records were an adequate basis on which to perform an audit. The auditor reviewed petitioner's invoices in detail with the help of the Division's Technology Assist Audit Unit, ultimately concluding that 1,675 of petitioner's invoices during the audit period were taxable. All sales invoices showing a New York address in the "Ship-To" box were initially deemed taxable prior to some being excluded as discussed below.

6. To apply the Division's overlapping audit policy, the auditor analyzed petitioner's transactions and identified those sales in regard to which petitioner's New York customer paid sales tax to the Division on audit, and gave petitioner credit for the sales tax paid by the customer. The auditor also treated as nontaxable those sales where petitioner's customer was a seller in a bulk sale and the purchaser in the bulk sale paid sales tax to the customer as part of that bulk sale. Finally, the auditor gave petitioner credit for any sales tax it paid on its purchases

of hotel room furnishings from its suppliers on the ground that such purchases should have been treated as purchases excluded from tax as sales for resale.

7. As a result of the audit, the Division issued to petitioner notice of determination number L-043675981, dated September 18, 2015, asserting additional sales tax due in the amount of $2,356,443.87, plus interest, for the audit period, and notice of determination number L-043692953, dated September 21, 2015, to Mr. Parikh, as a person responsible to collect, account for and remit sales and use taxes on behalf of petitioner, asserting tax and interest for the same periods and in the same amounts as the notice issued to petitioner. Both notices indicate, erroneously, that the tax amounts asserted due by the notices were "estimated."

8. Petitioner and Mr. Parikh filed separate requests for conciliation with the Division's Bureau of Conciliation and Mediation Services (BCMS), which, after holding a conciliation conference, issued conciliation orders sustaining the respective notices of determination issued to petitioners.

9. In response to the conciliation orders, petitioners filed separate petitions with the Division of Tax Appeals and this consolidated proceeding ensued.

10. At hearing, Mr. Fordjour testified that the Division's audit was not an estimated audit, as petitioner's invoices were analyzed in detail, but provided no explanation as to why the notices issued to petitioners indicate that the audit was an estimated one. Consistent with Mr. Fordjour's testimony, the audit file's field audit report states that "[s]ales records were reviewed in detail."

11. On cross-examination, Mr. Fordjour testified that, "as far as he knew," the prior auditor had not requested any freight records from petitioner. This is incorrect, as IDR number 3, dated April 19, 2012, asked for freight records (***see*** finding of fact 4). The audit file's "Tax Field

Audit Record" (DO-220.5) states in an entry dated July 11, 2012 that Ms. Bettiol noted that she discussed with her section head "additional information" provided by the taxpayer, which included "some freight bills and charges." That documentation is not further described in that entry or elsewhere in the DO-220.5 and does not appear to be mentioned anywhere else in the audit file.

12. As evidenced by Mr. Fordjour's testimony and the audit file, petitioner did not provide the general ledger requested by the first IDR to the auditor.

13. The audit file includes many of petitioner's sales invoices, all of which appear to have the language noted in finding of fact 3 that "[a]ll Taxes & Freight will be paid by the customer or the owner to the appropriate authority." None show any sales tax being charged by petitioner, but a few list sales tax paid by petitioner as a charge for which petitioner seeks compensation from the customer. Included in the audit file is a 17-page bid for a contract to provide furnishings for 70 rooms in a hotel on Fifth Avenue in Manhattan. Page five of the bid package is a document with petitioner's name at the top and that is entitled "Terms and Conditions of Sales and Security Agreement," which, among other things, states: "Shipments: All shipments are by common carrier in accordance with the freight terms set forth on page 3." Page three of the package, in turn, shows that the shipping address is the Fifth Avenue address of the hotel, and lists a charge for freight. Based on their placement in the audit file, these same terms and conditions appear to have been appended to many, if not all, of petitioner's bids for large contracts with hotels.

14. Review of the 14-page DO-220.5 reveals more than 20 entries that describe telephone calls between the auditor (or the auditor's team leader or section head) and petitioner's representatives, with a short description of the substance of the subject of the conversation.

While two entries show a discussion of petitioner's nexus status and at least four show discussions of the overlapping audit adjustment issue, not a single one of the entries reveals a discussion about any contention on petitioner's part that the hotel room furnishings it sold to its New York customers were not delivered to those customers in New York.

15. Petitioner did not present any witnesses or exhibits at hearing.

CONCLUSIONS OF LAW

A. Petitioners do not contest the computation of the notices of determination issued to them. Petitioners also do not dispute that the sales at issue would be taxable if they occurred in New York. Rather, petitioners argue that the Division failed to show a rational basis for its conclusion that the transactions on which tax was imposed on audit occurred in New York because "the Division failed to introduce into the record any proof of shipping by the taxpayer or any shipping documentation." In petitioners' view, as a result of the Division's failure to produce proof that the goods were actually shipped to New York, it should be presumed that all transactions occurred at petitioner's place of business in New Jersey, citing New York Uniform Commercial Code § 2-401 (3) (b).[2] This argument lacks merit for the reasons discussed below.

B. Tax Law § 1105 (a) imposes tax on the receipts from every retail sale of tangible personal property, while Tax Law § 1105 (c) (3) imposes tax on the installation of tangible personal property, with some exclusions, such as where the installation constitutes a capital improvement. Tax Law § 1132 (c) creates a presumption that all receipts from the sale of property or services subject to tax under subdivisions (a) through (d) of Tax Law § 1105 are subject to tax until the contrary is established and places the burden of proving that any receipt is

[2] For the period in question, that UCC section provided that "(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods, * * * (b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting."

not taxable upon the taxpayer. In addition, the sales tax regulations at 20 NYCRR 525.2 (a) (3) provide that:

> "The sales tax is a 'destination tax,' [that is, t]he point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate."

C. Thus, petitioners' argument to the contrary, the issue of where a sale takes place is controlled by where delivery occurred, not where title passed (***see Matter of Monroe Distributing, Inc.***, Tax Appeals Tribunal, October 6, 1994). Here, it is undisputed that the Division treated as taxable petitioner's invoices that listed a "ship-to" address that was in New York. This was not an irrational conclusion on the auditor's part. Indeed, the absence of other evidence to the contrary, the presence of a "ship-to" address on an invoice itself makes it rational for the Division to conclude that the tangible personal property was delivered to the customer at that address. Additionally, the presence of the "[a]ll taxes and freight will be paid by the customer or the owner to the appropriate authority" notation on the invoices is consistent with petitioner's sales involving delivery to customers, and not customer pick-ups. Finally, petitioner's standard "Terms and Conditions" form for bids for large contracts with New York hotels included terms indicating that the hotel room furnishings were to be transported by petitioner to the New York hotel in question (***see*** finding of fact 13).

D. Even without this evidence in the audit file indicating that petitioner's sales involved New York deliveries and thus occurred in New York, the conclusion on audit that petitioner's sales of hotel room furnishings were taxable would nevertheless have a rational basis. Petitioner has the burden of proof on the issue of where delivery occurred, and, if petitioner fails to show that those sales occurred outside the State, the Division would be entitled to rely on the presumption of taxability in Tax Law § 1132 (c) to assume that the sales occurred in New York

(see Matter of David Hazan, Inc. v Tax Appeals Tribunal of State of N.Y., 152 AD2d 765, 766–67 (3d Dept 1989), ***aff'd*** 75 NY2d 989 [1990] [presumption of taxability puts burden on vendor to prove that delivery occurred outside New York]). Review of the audit file indicates that petitioner did not even raise the issue of whether its sales involved out-of-state deliveries and thus were not New York sales, let alone produce documentation substantiating that point (***see*** findings of fact 14-15). Furthermore, petitioner's hearing brief provides no citations to the audit file indicating that the issue was raised on audit. Under these circumstances, the Division was entitled to rely on the presumption of taxability in Tax Law § 1132 (c) to conclude that, in those cases where petitioner's invoice indicated a New York "ship to" address, the sale occurred in New York (***see David Hazan, Inc.*** [pursuant to the presumption of taxability in section 1132 (c), it was rational for the Tribunal to conclude the transactions were taxable where petitioner could not substantiate its claims that sales occurred out-of-state]; ***see also Matter of Academy Distributors, Inc.,*** Tax Appeals Tribunal, January 21, 1993, ***confirmed*** 202 AD2d 815 [3d Dept 1994], ***lv. denied***, 83 NY2d 759 [1994] [Appellate Division reasons that, in light of petitioner's failure to produce documentary evidence in support of its claim that the resale exclusion applied, "it was not irrational for the (Division) to apply the presumption of taxability and find that all of the $1,385,021 in sales were taxable"]). The audit, therefore, has a rational basis.

E. The remaining issue is whether Mr. Parikh, petitioner's president, is a responsible person of petitioner and thus liable for the tax due from petitioner. The Tax Law imposes personal liability upon any person required to collect sales tax for the tax imposed, collected or required to be collected (Tax Law § 1133 [a]). The definition of a person required to collect sales tax includes corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of article 28 of the Tax Law (Tax Law § 1131

[1]). The mere holding of a corporate office does not, per se, impose tax liability upon an office holder. Whether an officer or employee of a corporation is a person required to collect, truthfully account for, or pay over the sales tax is to be determined in every case on the particular facts involved (20 NYCRR 526.11 [b] [2]). Mr. Parikh bears the burden of proof to show, by clear and convincing evidence, that he was not a person required to collect tax under Tax Law §§ 1131 (1) and 1133 (a) (***see Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998). Here, having introduced no proof that he was not a person required to collect tax on behalf of petitioner, Mr. Parikh has not met his burden of proof on that issue.[3]

F. The petitions of Hotel Depot, Inc. and Dipesh Parikh are denied and the notices of determination, dated September 18, 2015 and September 21, 2015, are sustained.

DATED: Albany, New York
January 03, 2019

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE

[3] The petitions herein also raise a question whether the Division properly applied its overlapping audit policy. Petitioners' representative did not mention the issue in his opening summary of the issues, petitioners' hearing brief, or in its reply brief. Moreover, petitioners did not present any proof with regard to the issue at hearing. Accordingly, the issue is deemed abandoned.