STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **AMERICAN CAR LIFT SERVICE LLC** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2015 through November 30, 2017.	:	DETERMINATION DTA NO. 829498

Petitioner, American Car Lift Service LLC, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2015 through November 30, 2017.

A hearing was held in New York, New York, before Donna M. Gardiner, Administrative Law Judge, on July 21, 2021, with all briefs to be submitted by December 6, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared by Armstrong Teasdale, LLC (Robert J. Browning, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel).

ISSUES

I. Whether petitioner has demonstrated that its installations of car lifts qualify as capital improvements.

II. Whether petitioner has demonstrated that its failure to pay taxes was due to reasonable cause and not willful neglect.

FINDINGS OF FACT

1. Petitioner, American Car Lift Service LLC, is in the business of design, installation, repair and maintenance, and the sale and lease of car lifts.

2. On or about February 22, 2018, the Division of Taxation (Division) commenced an audit of petitioner. An appointment letter was mailed to petitioner along with an information document request (IDR) that requested, among other items, sales invoices, exemption certificates, bank statements and Federal tax returns. Petitioner did not file New York State corporate or partnership tax returns.

3. In a review of the New York State sales tax returns and the sales reported on its schedules C, the auditor noted that there were additional gross sales that were not reported. Petitioner stated that these sales were installations of car lifts that are exempt from tax as capital improvements. The Division disagreed and stated that the work performed did not meet the requirements to be deemed a capital improvement.

4. On August 13, 2018, the Division issued to petitioner a notice of determination (notice), assessment number L-048678597, for additional sales tax due in the amount of $101,593.58 plus penalty and interest for the tax period June 1, 2015 through November 30, 2017.

5. In protest of the notice, petitioner filed a request for conciliation conference (request) with the Bureau of Conciliation and Mediation Services. A conciliation conference was held on March 5, 2019. A conciliation order, dated April 26, 2019, was issued to petitioner that denied the request and sustained the notice. Thereafter, on July 24, 2019, petitioner timely filed its petition with the Division of Tax Appeals in protest of the conciliation order.

6. A hearing was held on July 21, 2021. In support of its argument that the installations of the car lifts qualified as capital improvements, petitioner presented the testimony of George Wilkinson. Mr. Wilkinson is the sole member of petitioner.

7. Mr. Wilkinson has been in the car lift industry since 2000. In 2004, he started petitioner and, in 2007, he began designing his own equipment.

8. He testified regarding the types of car lifts that are sold by petitioner. He specifically discussed the installations of the car lifts that are in issue. The installations were provided to J. E. Levine Builders, Inc., Forge Realty, LLC, MetroTech Development Corp., and Joel Braver.

9. When discussing the installation at a building located at 2 North 6th Place in Brooklyn, Mr. Wilkinson testified that the contractor, J. E. Levine, approached petitioner prior to the building process to design the parking garage as part of its project. He stated that before the property is even purchased, it is already designed. Mr. Wilkinson testified that it was his understanding that to construct a 500-plus unit building in Brooklyn, the occupancy code requires a certain number of parking spaces. Mr. Wilkinson then described his design process. He testified that it starts with a square block that is designated space for parking and he is asked to determine how many parking spaces he can fit into that set space. After that, it goes back to the contractor's architects and engineers to see if petitioner's design is feasible. He explained it is a back-and-forth process that can go on for years because the car lift installations need to work in conjunction with HVAC systems and sprinkler systems. Mr. Wilkinson stated that the types of lifts sold by petitioner included hydraulic lifts and electric lifts. He then testified about the different models of lifts sold on the invoices at issue herein.

10. With respect to the project at 2 North 6th Place in Brooklyn, Mr. Wilkinson stated that once his design is finalized, the machines are ordered, and J. E. Levine is invoiced. Mr.

Wilkinson testified that petitioner collects capital improvement certificates for the jobs at the beginning of the first invoice, at the beginning of the project. Petitioner did testify that it enters into a contract with its customer. At no point were any design drawings, blueprints or even contracts for the installations submitted into evidence for any of the specific projects at issue.

11. Mr. Wilkinson testified that the lifts come in pieces and are assembled on site. To install the lifts, petitioner will drill and anchor posts into the floor with either a wedge anchor or an epoxy anchor. For a wedge anchor, a hole is drilled into the floor and an anchor that expands when it is tightened is installed. For an epoxy anchor, a hole is drilled into the floor and epoxy glue is placed in the hole along with an anchor and, once it dries, the legs and other parts get tightened. Anchors are usually six inches in length and 5/8th of an inch wide. Four anchors are installed for each post. The footprint for a beam bolted to the ground is either 8 x 12, 12 x 12, or 16 x 16 inches. The legs of the structure then are affixed to the anchor by bolts. Subsequently, the frame gets built by assembling the beams to each other with either nuts and bolts or by welding. Each beam is either 19, 26 or 27 feet long. Finally, any electrical components are installed on the structure and integrated with the building's electrical system.

12. Once installation is complete, the lifts get tested to make sure that they can support a standard of vertical and horizontal loads of a vehicle.

13. If an anchor needs to be removed, Mr. Wilkinson said it is possible to remove the bolt by jackhammering the concrete, pulling it out and then repairing any resulting hole in the concrete. A bolt could also be cut off at the top of the anchor and the concrete resealed if permitted by the engineers on the project.

14. Petitioner submitted a six-page brochure for a Hilti HIT=HV 200 system. Petitioner was asked whether Hilti was the vendor that provides the anchor system to petitioner. Mr.

Wilkinson said "mostly.'' However, he failed to state affirmatively if this system was used on the projects at issue in this case.

15. Many questions asked during the direct examination of Mr. Wilkinson regarding each of the invoices were leading in nature with him merely replying "correct." Although Mr. Wilkinson was able to describe the specifics regarding certain lifts sold by petitioner and the process of meeting building code specifications and detailed installations, Mr. Wilkinson's testimony was general in nature. Similarly, when asked to testify regarding the abatement of penalty issue, petitioner's representative asked four leading questions to which Mr. Wilkinson answered "correct."

16. When asked on cross examination whether petitioner had been audited previously, Mr. Wilkinson stated "I think my accountant deals with most of this stuff - - I think so. I am not 100 percent sure, I think so."

17. The Division presented the testimony of its auditor, Greg Tienken, in support of its determination that petitioner's installations did not qualify as capital improvements. Additionally, the auditor noted that petitioner reported its sales using the cash method of accounting rather than the accrual method. The auditor stated that since tax is due at the time the service is rendered, petitioner should have used the accrual method of accounting.

18. The auditor testified as to his usage of the sales reports to calculate the additional tax assessed to petitioner. Specifically, he calculated gross sales totaling $5,158,778.02 using the accrual method. He then subtracted exempt sales (sales made in New Jersey and to an Industrial Development Agency) in the amount of $1,727,627.37 that resulted in total taxable sales of $3,431,150.65. The auditor than multiplied these sales by the tax rate of 8.875% and determined a total tax due of $304,514.62. He then subtracted sales tax already reported in the amount of

$204,722.31, which resulted in additional tax due of $99,792.30.[1] The auditor then added $8,923.82 for items identified on invoices with only a charge for sales tax to the $99,792.30 and subtracted out $7,122.54 in sales tax paid on exempt jobs for a net adjustment of $101,593.58. As set forth in finding of fact 4, a notice of determination for additional tax due in this amount, plus penalty and interest was issued to petitioner.

19. The auditor discussed the projects at issue and his determination as to his conclusion that the installations did not qualify as capital improvements. In referring to the J. E. Levine photographs in evidence, the auditor stated that the pictures did not reflect that the lifts were permanently affixed such that substantial material damage would result from removing them. Additionally, he testified that in his experience, car lifts do not add significant value to the property nor does the removal of them cause material damage to the property itself or the real property.

20. The auditor was asked to review the Certificates of Capital Improvement (form ST-124) for each of the installations at issue. The first form ST-124 is between petitioner as contractor and the customer, B Genco Contracting Corp. The description of the capital improvement to be performed merely states "General Construction." The auditor stated that this certificate did not identify the job nor any capital improvement. With respect to form ST-124 for the customer MetroTech Development Corp., the description of the capital improvement states "Garage lift anchored to concrete" which the auditor found vague, and he also noted that petitioner executed this form six months prior to the customer. Form ST-124 for Express Builders JB Inc. has no description provided of any work performed and the form is only signed by Joel Braver as customer. The final form ST-124 for the 2 North 6th Place property describes

[1] This number should be $99,792.31. This error in favor of petitioner is deemed insignificant.

the capital improvement to be performed as "Construction of a 41 story 361,609 square foot luxury residential building and related amenities. Approximately consisting of 554 rent apartments and one cellar." The auditor stated that he could not determine what type of car lift, or even if a car lift, was installed by his review of the forms ST-124.

21. Petitioner also submitted into evidence five invoices that Mr. Wilkinson testified were directly related to the four forms ST-124. The invoices are as follows: #4964 dated July 15, 2016, issued to Forge Realty, LLC, in the amount of $137,900.00 for 11 hydraulic 3 high custom lifts, one power pack, 3 custom end legs, installation of the lifts and a credit for 11 lifts that were installed, #4749 dated April 26, 2016, issued to Metrotech Development Corp in the amount of $240,000.00 for 32 mini 4 post lifts with a description of when payments are due, #5314 dated November 1, 2017, issued to Joel Braver in the amount of $207,000.00 for 23 electric parking lifts with a description of when payments are due, #4940 dated November 30, 2016, issued to Levine Builders in the amount of $250,000.00 for 50 mini 4 post lifts which represented a 50% deposit and #5139 dated May 31, 2017, issued to Levine Builders in the amount of $125,000.00 for a 30% deposit on delivery of mini 4 post lifts.[2]

22. The auditor testified that he informed petitioner's then-representative that, even if the installations were deemed capital improvements, petitioner was required to pay tax on materials. However, the auditor was told that petitioner did not track the materials purchased for, and used in, its jobs. The auditor explained that if these installations were capital improvements, it is necessary for him to verify that sales tax was paid on all of petitioner's materials purchased.

[2] If invoice #4940 represents a 50% deposit, in the amount of $250,000.00, then the cost of the project is $500,000.00. Invoice #5139 for a payment of 30% should then be $150,000.00 and not $125,000.00. No explanation is provided to explain the discrepancy.

23. Lastly, the auditor was asked to explain the imposition of penalties in this case. He testified that this was petitioner's third audit and, despite the Division's requiring petitioner to use the accrual method of accounting, it still failed to do so. Additionally, the auditor stated that petitioner's claiming its installations were exempt from tax as capital improvements was not accurate.

CONCLUSIONS OF LAW

A. Tax Law § 1105 (c) (3) imposes a sales tax on the receipts from every sale, except for resale, of the service of installing tangible personal property, except for installing property which, when installed, will constitute an addition or capital improvement to real property. It is presumed that all receipts for services of any type mentioned in Tax Law § 1105 (c) are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable will be upon the person required to collect the tax or the customer (***see*** Tax Law § 1132 [c] [1]; ***see also Matter of Mendon Leasing Corp. v State Tax Commn.***, 135 AD2d 917 [3d Dept 1987], ***lv denied*** 71 NY2d 805 [1988]). The question here is not whether the subject installations are subject to taxation, but whether taxation is negated by a statutory exclusion or exemption (***see Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of the State of N.Y.***, 33 NY3d 587 [2019]).

B. Primarily, petitioner argues that it accepted the forms ST-124 in good faith and, as such, is relieved from responsibility for collecting the tax from its customers. However, the forms ST-124 submitted into evidence are so defective that it cannot be determined that such certificates were accepted in good faith (***see*** 20 NYCRR 532.4 [b] [2]).

The regulation at 20 NYCRR 532.4 (b) provides, in pertinent part, that:

> "(2) A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation

> evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the vendor's burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.
>
> (i) a certificate or other document is 'accepted in good faith' when a vendor has no knowledge that the exemption certificate or other document issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax.
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> * * *
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> (3) When a vendor has met the criteria in paragraph (2) of this subdivision, it is protected from liability for failure to have collected tax from the purchaser and the burden of proving the nontaxability of such transaction rests solely on the purchaser.
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> * * *
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> (5) A vendor is not relieved of the burden of proof when it failed to obtain an exemption certificate or accepted an improper certificate, or had knowledge that the exemption certificate issued by the purchaser was false or fraudulently presented."

It is noted that the regulation states that for a form ST-124 to be accepted in good faith, such form must be properly completed. There is no question that the four forms submitted into evidence are not properly completed. Invoice #4964 relates to a form ST-124 that describes the capital improvement to be performed as general construction. It is noted that the invoice was dated July 15, 2016, yet the form ST-124 was not executed by petitioner and its customer until May 10, 2017. These two documents directly contradict the testimony of Mr. Wilkinson that the capital improvement certificates were accepted at the time the first invoice is issued to its customers. Similarly, with respect to invoice #4749, the invoice was dated April 26, 2016, yet form ST-124 was not executed by the customer until October 1, 2016. Invoice #5314 was dated November 1, 2017. The form ST-124 that relates to this invoice has no description whatsoever

regarding the capital improvement to be performed by petitioner and it was not signed by petitioner. Lastly, invoices ## 4940 and 5139 are dated November 30, 2016 and May 31, 2017, respectively, yet the form ST-124 was dated August 30, 2014 and, in the description section of the form, it does not mention any car lifts whatsoever and is not signed by petitioner. Given the inconsistencies demonstrated between the incomplete forms ST-124 submitted into evidence, the invoices to which these forms relate and the testimony from petitioner which is not borne out by the dates of the forms ST-124 and the invoices, it is determined that petitioner did not rely in good faith in its acceptance of these defective forms ST-124.

C. The primary issue in this case is whether the installations of the car lifts by petitioner qualify as capital improvements. The term "capital improvement" is defined in Tax Law § 1101 (b) (9) (i) as follows:

> "An addition or alteration to real property which:
>
> (A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
>
> (B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
>
> (C) Is intended to become a permanent installation."

Petitioner relies heavily on the testimony of Mr. Wilkinson. As set forth in the facts, much of his testimony came in the form of leading questions and lacked specificity needed to demonstrate entitlement to the exemption from sales tax as a capital improvement. Despite acknowledging that each project required a contract between petitioner and the customer, no contracts were submitted into evidence. Petitioner argues that the parking lifts cost more than $100,000.00 and by doubling, and in some cases tripling, the number of vehicles that may be stored in a particular space, the lifts increase the amount of revenue that the real property can

generate. As the Division correctly notes, none of this was borne out by the evidence in the record. No facts regarding the value of the real property were introduced at all. Moreover, no argument can be made that the car lifts appreciably prolong the useful life of the real property. As such, petitioner has failed to demonstrate that the installation of its car lifts qualified as capital improvements.

Although all three conditions above must be met to qualify as a capital improvement, it is noted that petitioner has failed in its burden of proof on all factual issues. The leading questions undermine the credibility of petitioner's witness and without any documentation to support his testimony, coupled with the contradictions to his testimony in comparison to the invoices and the defective forms ST-124, petitioner has fallen quite short of proving the installations qualified as capital improvements.

D. The remaining issue is whether reasonable cause has been established for the abatement of the penalties imposed. The Division assessed penalty under Tax Law § 1145 (a) (1) (i) and (vi). The penalty may be abated if the failure to pay over the tax due was a result of reasonable cause and not willful neglect. Petitioner argues that it relied on its accountants and that the penalties should be abated. The Tax Appeals Tribunal has held that reasonable reliance upon the advice of an accountant or tax professional does not, in and of itself, provide reasonable cause for the abatement of penalties (***see Matter of Reuben***, Tax Appeals Tribunal, August 27, 2019). Reliance on the advice of a tax professional may constitute reasonable cause where the taxpayer can show that it relied in good faith on such advice, and that it was reasonable for the taxpayer to rely on such advice (***see Matter of A & V Crown, Inc.***, Tax Appeals Tribunal, May 24, 1990).

As the auditor testified, petitioner has been the subject of three audits. Petitioner was told to use the accrual method of accounting and refused to do so. Petitioner admitted it failed to track any of its materials purchased. However, Mr. Wilkinson testified that he thought this was his first audit and that he relied on his accountants for the proper filing of petitioner's returns. Clearly, petitioner did not rely in good faith on the advice of counsel. Mr. Wilkinson failed to explain any discussions that were had between him and his tax professionals during any of the audits. Mr. Wilkinson failed to explain why petitioner still used the cash method of accounting and why it failed to keep records of its materials purchased for its jobs. In fact, he testified that he thought petitioner was audited only a single time. Thus, it is concluded that any reliance by petitioner on advice from its accountants was not reasonable and the penalties are sustained.

E. The petition of American Car Lift Service LLC is denied and the notice of determination, dated August 13, 2018, is sustained in full.

DATED: Albany, New York
June 02, 2022

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE