STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KNOCKOUT PEST CONTROL, INC.	:	DETERMINATION DTA NO. 829537
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 September 1, 2014 through May 31, 2017.	:	

Petitioner, Knockout Pest Control, Inc., 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 September 1, 2014 through May 31, 2017.

A videoconferencing hearing via CISCO Webex was held before Barbara J. Russo, Administrative Law Judge, on April 20, 2021, with all briefs to be submitted by September 13, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared by Boruchov, Gabovich & Associates, P.C. (Leo Gabovich, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Mary Humphrey, Esq., of counsel).

ISSUE

Whether petitioner's purchase of certain products used in its pest control services was subject to sales tax.

FINDINGS OF FACT

1. The Division of Taxation (Division) conducted a sales and use tax audit of petitioner, Knockout Pest Control, Inc., for the period September 1, 2014 through May 31, 2017 (the audit period or period at issue).

2. Petitioner maintained a place of business in Uniondale, New York, and sold pest control services in New York State during the audit period.

3. By letter dated June 20, 2017, the Division scheduled an audit appointment with petitioner on July 5, 2017 and requested that petitioner provide its books and records for the audit period. Attached to the letter was information document request (IDR) number 1, specifying the books and records to be provided by petitioner.

4. The Division sent additional requests for documents to petitioner on September 8, 2017 (IDR No. 2) and October 27, 2017 (IDR No. 3).

5. During the audit, petitioner consented to extensions of time for the Division to review records and issue assessments, extending the deadline for the tax period September 1, 2014 through August 31, 2015 to September 20, 2018.

6. Petitioner agreed to a test period audit method election for the audit period. Petitioner, by its president and owner, Arthur Katz, signed the test period audit method election form on September 14, 2017.

7. The Division's auditor, Amir Gilaad, discussed the test period audit method with petitioner's then-representative, Clifford Maldow, to determine what test period would be representative of petitioner's business activities. Based on those discussions, the Division used the test period of June 1, 2015 through August 31, 2015 for sales, March 1, 2016 through August 31, 2016 for purchases, and June 1, 2016 through August 31, 2016 for expenses.

8. The Division reviewed the books and records provided from petitioner and determined additional tax due on purchases and expenses for the audit period.

9. For purchases, the auditor reconciled purchases per petitioner's general ledger with purchases per its federal returns. The test period of March 1, 2016 through August 31, 2016 was used. During the review, the auditor categorized purchases into the following categories: bait stations, bait, glue boards, traps, insecticides, gels/chemicals, supplies, CO2, nontaxable items, journal entries, Dow Agro Science, and other. From purchases of $351,936.51 during the test period, the Division determined that $299,455.04 of purchases should have been taxable, and petitioner paid $289.66 in tax. The auditor divided additional tax due of $25,538.35 by $351,936.51 and computed an error rate of 7.2565%. The auditor applied this error rate to all purchases for the audit period of $1,397,451.96 and computed additional tax due of $101,406.10.

10. For expenses, the auditor reconciled petitioner's general ledger with its federal returns. The test period of June 1, 2016 through August 31, 2016 was used. The auditor tested the following expense accounts: postage and stationery, computer, repairs and maintenance, and miscellaneous expenses. Of the $33,787.91 expenses from the test period, the auditor determined that $22,711.63 should have been taxable, and petitioner paid $1,644.97 in tax. The auditor divided additional tax due of $313.91 by $33,787.91 and computed an error rate of .9290%. The auditor applied this error rate to all expenses for the audit period of $336,311.82 and computed additional tax due of $3,124.32 on expenses.[1]

11. The Division issued a notice of determination, number L-048712118, dated August 23, 2018 (notice), to petitioner asserting tax due of $104,530.42, plus interest, for the period at issue.

[1] The tax determined due on expenses was not raised as an issue by petitioner.

12. During the hearing, Mr. Katz testified regarding certain products purchased by petitioner for use in its pest control services, including Sentricon Colony Elimination System (Sentricon) equipment, bait and bait stations, gel bait, and bedbug equipment.

13. Sentricon is an insect growth regulator for termite elimination and control. The Sentricon system has two component parts: an in-ground station and an above-ground station. The in-ground station consists of a plastic box, or bait station, with the active ingredient inside. Petitioner uses a tool similar to a gas-powered drill to dig holes in the ground in order to insert these bait stations around the perimeter of a home. In areas where there is cement adjacent to a building's foundation, petitioner uses a cement core driller to drill holes through the cement to install the bait stations. The bait stations are placed into the drilled holes and are secured with a special cap that locks in to prevent damage to the stations.

The above-ground stations of the Sentricon system are adhered to areas of a home where there is an active termite infestation. According to Mr. Katz, the above-ground stations are permanently adhered and could stay up for a very long period of time.

The active ingredient in the Sentricon units, Noviflumuron, does not change form from the time petitioner purchases the units from the supplier to when it installs the units at its customers' properties. The bait is consumed between 30 days and 160 days after installation of the units, on average, but it may take longer for the termites to find the stations and start consuming the bait. The Sentricon system is both curative and preventative, in that it is used to both eliminate a current problem and prevent future infestations. After the initial infestation is eliminated or under control, over 94% of petitioner's customers keep the Sentricon units in place for years to continue the prevention of termite colonies. According to Mr. Katz, some Sentircon

systems are still in place after 25 years. Bait may need to be added to the system from time to time.

If other herbicides or pesticides come into contact with the bait in the Sentricon system, it could be a detriment to the system. If the system's effectiveness is compromised and the bait is not working and petitioner finds an active infestation, petitioner would replace the Sentricon bait stations.

14. Petitioner entered into the record a sample termite colony elimination contract that petitioner uses with customers who engage it to do termite control using Sentricon. The contract provides that petitioner will install and monitor the Sentricon termite baiting system for the elimination of termites at the customer's structure, and that service will be rendered semi-annually. The contract states that colony elimination is anticipated within 24 months and if elimination requires more than 24 months, a conventional liquid barrier treatment may be applied to the structure. The contract further provides that inspection of the Sentricon system is necessary and petitioner will be granted access to the property to service and monitor the system. The contract also provides for "Continuing Protection: One Year Service Contract" and states:

> "Knockout will continue after the first 12 month period to maintain and monitor the Sentricon system, or alternative method, subject to the general conditions of this agreement for $____ per year, plus tax, payable on or before the end of the initial 12 month period. After the second renewal and each year thereafter, Knockout reserves the right to review the annual extension charge. In no event will the renewal charge increase more than 5% in any one year. This contract is transferable to a new owner in the event of the sale of the property at no additional cost. . . . There will be a reinstallation fee in the event the system is removed for non payment of renewal."[2]

The contract does not state how many bait stations will be placed at a property. According to Mr. Katz, the number varies from property to property. Additionally, the cost of

[2] The contract entered into the record does not contain the price for services.

the bait stations is not included in the contract. Mr. Katz testified that the price is not based on how many bait stations are used and that petitioner "give[s] a price for a solution" regardless of how many are needed.

The contract further provides that, "There will be a charge of $150.00 plus tax, in the event 5 or more stations are removed by the customer or contractors of the customer. If cement holes are added, there will be an additional $25.00 plus tax for cement caps" and "The Sentricon System is the property of Dow Agro Science and will be removed from the premises by Knockout upon termination of this agreement."

15. Petitioner entered into the record a letter dated March 24, 2021 from Michael Gelhaus of Corteva Agriscience (formerly Dow Agro Science), petitioner's supplier for Sentricon. The letter states, in part, that once a Sentricon station and other components are removed from a customer's property, they should be disposed of according to the label directions and should not be reused around another property.

16. Mr. Katz testified that petitioner does not reuse the Sentricon bait stations or the bait.

17. Mr. Katz also testified regarding Final All-Weather Blox bait, Niban-FG bait, and bait stations used with these products. The Final All-Weather Blox or Niban-FG bait is secured inside a tamper resistant plastic bait box, which is then secured to the property. In warehouses, the bait boxes are glued to the floor so that they do not move. Outside of homes or buildings, the bait boxes are secured to the ground with a "duckbill," which is a steel rod that anchors into the ground, so that off-target animals do not disturb them. Petitioner does not reuse these bait stations or bait and they remain at the customer's property after installed by petitioner. The bait

is consumed usually after seven to ten days, but could last longer. According to Mr. Katz, the product both eliminates the current problem and prevents additional problems from occurring.

18. Mr. Katz testified regarding gel bait used by petitioner in its pest control services. Vendetta is a gel bait used by petitioner. Vendetta initially has a consistency of toothpaste and is applied into cracks and crevices of a property, where insects are living. Over a few months, the consistency changes from soft to hard, but continues to be consumed by insects. Mr. Katz explained that Vendetta has a useable life for years. It may be consumed within hours after petitioner applies it, eliminating the current insect population, and it also prevents future insect populations if introduced to the structure. Petitioner may reapply the gel on an "as needed" basis. Some customers hire petitioner for a one-time application with a service contract that lasts for approximately 30 days. Other customers have an annual account with petitioner where they call the company as needed. Petitioner will inspect the property and determine whether reapplication of the gel is needed.

19. Mr. Katz also testified regarding heating units petitioner purchased for the bedbug treatment. According to Mr. Katz, the bedbug treatment equipment was only purchased during the test period and petitioner did not purchase such equipment outside of the test period.

CONCLUSIONS OF LAW

A. Tax Law § 1105 (a) imposes a tax on the receipts from every sale of tangible personal property, except as otherwise provided. One of the exceptions to the imposition of tax is found in the definition of the term retail sale in Tax Law § 1101 (b) (4), which provides that retail sale is defined as:

> "A sale of tangible personal property to any person for any purpose, other than . . . (B) for use by that person in performing the services subject to tax under [Tax Law § 1105 (c)

> (5)] . . . where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax" (Tax Law § 1101 [b] [4] [i]).

Petitioner provides pest control services in New York State. There is no dispute that petitioner's services are taxable pursuant to Tax Law § 1105 (c) (5). The question presented is whether petitioner's purchases qualify for the exception set forth in Tax Law § 1101 (b) (4) (i).

B. Petitioner's purchases of the Sentricon system equipment were properly taxable pursuant to Tax Law § 1105 (a) and did not escape taxation through the exception set forth in Tax Law § 1101 (b) (4) (i) as property that becomes a physical component part of the property upon which services are performed or as property actually transferred to a purchaser in conjunction with the performance of a taxable service. The contract between petitioner and its customers clearly provides that "[t]he Sentricon System is the property of Dow Agro Science and will be removed from the premises by Knockout upon termination of this agreement." As the contract explicitly provides that petitioner will remove the Sentricon System at the termination of the agreement, and that the system remains the property of Dow Agro Science, petitioner's arguments that the Sentricon system becomes a part of the property or is actually transferred to a purchaser, or is purchased for resale, are unavailing. As such, the Division properly determined that tax was due on petitioner's purchase of the Sentricon systems, including the bait and bait stations used therein.

C. Petitioner's purchase of the bedbug treatment equipment was properly taxable pursuant to Tax Law § 1105 (a). Petitioner has presented no evidence or argument that the equipment qualified for the exception set forth in Tax Law § 1101 (b) (4) (i). To the contrary, Mr. Katz testified that petitioner purchased the equipment during the test period and still uses the

same equipment. As such, the bedbug treatment equipment was not actually transferred to a customer, did not become a part of a customer's property, and was not purchased for resale. During the hearing, petitioner contended that the purchase was a one-time event during the test period and apparently argues that the purchase should not have been extrapolated over the entire audit period. However, petitioner consented to the test period audit and Mr. Katz signed the test period audit method election form. The Division's auditor discussed the test period to be used with petitioner's then-representative, and based on those discussions, a period was selected that was representative of petitioner's business activities. Petitioner's then-representative did not object to the period selected nor present any information regarding a one-time purchase that would necessitate an adjustment. Because petitioner consented to the test period audit and has presented no documentary evidence to support the argument that this was a one-time purchase, petitioner has failed to meet its burden of proof that the Division's inclusion of the purchase of bedbug treatment equipment in its calculation of tax due was erroneous (***see Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003).

D. Petitioner has met its burden of proving that its purchases of Vendetta gel and the Final All-Weather Blox bait, Niban-FG bait, and associated bait stations, including the duckbills used to secure the bait stations, are not subject to the imposition of tax by virtue of the exception provided for in Tax Law § 1101 (b) (4) (i). The Vendetta gel and the Final All-Weather Blox bait, Niban-FG bait, bait stations and securing duckbills were unquestionably purchased for use in performing petitioner's taxable pest control services and the evidence in the record shows that these items were actually transferred to petitioner's customers in conjunction with the performance of the service.

While there is no definition of the term "actually transferred" in the Tax Law or regulations (***see Matter of Chem-Nuclear Systems, Inc.***, Tax Appeals Tribunal, January 12, 1989), the regulations at 20 NYCRR 526.6 (c) (6) do provide some nonexclusive examples of property actually transferred. Petitioner correctly contends that Example 7 of the regulations illustrates circumstances similar to those at issue here. Specifically, Example 7 indicates that a service station's purchase of grease to be used for lubricating automobiles would not be subject to tax as the grease will be transferred to the customers in connection with the performance of a taxable service (20 NYCRR 526.6 [c] [6], Example 7). The grease purchased by the service station and used to lubricate automobiles is transferred to its customers in connection with the performance of a taxable service, and similarly the Vendetta gel and the Final All-Weather Blox bait, Niban-FG bait, and bait stations are transferred to petitioner's customers in connection with the performance of the pest control services. As explained by Mr. Katz, the gel, bait, and bait stations, secured by duckbills, remain in place after initial installation at a customer's property, in order to eliminate the current pest population and also prevent future pest problems. Just as the grease in the example used by the service station in lubricating a customer's automobile is transferred to the customer at the time of service and continues to lubricate the automobile for the useful life of the grease, so too are the Vendetta gel and the Final All-Weather Blox and Niban-FG bait and bait stations transferred to petitioner's customers at the time of petitioner's service and continue to provide pest control for the useful life of the products. Unlike the Sentricon systems, which in accordance with petitioner's contract remain the property of Dow Agro Science and are removed by petitioner at the termination of the contract, the Vendetta gel and the Final All-Weather Blox and Niban-FG bait, the bait stations used with these baits, and

duckbills securing the bait stations do not remain the property of petitioner or the supplier and are not removed by petitioner after application or installation on a customer's property. Instead, the products remain at the customer's property and possession is transferred to the customer upon petitioner's completion of its services.

The Tribunal's decision in ***Matter of Chem-Nuclear Systems, Inc.*** further supports the conclusion that petitioner's purchase of the Vendetta gel and the Final All-Weather Blox and Niban-FG bait, bait stations, and duckbills qualify for the exception as being "actually transferred" to its customers in conjunction with the performance of the taxable service. In ***Matter of Chem-Nuclear Systems, Inc.***, the Tribunal determined that liners purchased by the taxpayer and used in conjunction with its waste removal services were actually transferred to its customers. The Tribunal noted that the terms "actually transferred" are to be given their commonly accepted meaning (***Matter of Chem-Nuclear Systems, Inc.***, citing ***Building Contractors Assoc., Inc. v Tully***, 87 AD2d 909, 910 [3d Dept 1982]) and found that the fact that actual physical possession of the liners was transferred to petitioner's customers, that the liners remained on the customer's premises for varying periods of time, that Chem-Nuclear would only retake physical possession of the liners where the customer elected to have it transport the radioactive waste for disposal, and Chem-Nuclear did not reuse the liners, all indicated that the liners were "actually transferred" by Chem-Nuclear to its customers.

Applying the factors identified by the Tribunal to the facts here indicate that the Vendetta gel and the Final All-Weather Blox and Niban-FG bait, bait stations and duckbills were "actually transferred" by petitioner to its customers. The record shows that actual physical possession of the Vendetta gel and the Final All-Weather Blox and Niban-FG bait, bait stations and duckbills

was transferred to petitioner's customers, that the items remained on the customer's premises, and that petitioner did not retake or reuse the items. As such, petitioner's purchase of the Vendetta gel and the Final All-Weather Blox and Niban-FG bait, bait stations and duckbills fall within the exception provided for in Tax Law § 1101 (b) (4) (i) and are not subject to the imposition of tax.

E. The Division relies on the advisory opinion for R.J. Schickler, Inc. (TSB-A-03[40]S) and a State Tax Commission decision (***Matter of Ruston Paving, Inc***., State Tax Commission, September 15, 1986) in support of its argument that all of petitioner's purchases are subject to sales tax.

First, it is noted that advisory opinions are not binding except with respect to the person to whom such opinion is rendered and have no precedential value (***see*** Tax Law § 171 [24]). Likewise, State Tax Commission decisions are not binding precedent (***see Matter of Racal Corp. and Decca Electronics, Inc.***, Tax Appeals Tribunal, May 13, 1993). Second, the advisory opinion and State Tax Commission decision relied on by the Division are distinguishable from the instant matter. The advisory opinion and State Tax Commission decision both address whether the taxpayers' purchases of rock salt are subject to sales tax. In the advisory opinion for R.J. Schickler, Inc., the taxpayer used the rock salt in its rock salt spreading services provided to customers (TSB-A-03[40]S) and in ***Matter of Ruston Paving, Inc***., the taxpayer used the rock salt in connection with its snow removal services. The advisory opinion found that the rock salt was not actually transferred to the owner of the real property in conjunction with the performance of a maintenance service because the rock salt did not necessarily have a continued value to the customer, since any rock salt applied to snow or ice would quickly dissipate and

become useless (TSB-A-03[40]S). In ***Matter of Ruston Paving, Inc.***, the State Tax Commission found that the rock salt was not actually transferred to the taxpayer's customers in conjunction with the performance of its snow removal services because any rock salt that remained on a customer's property was merely incidental to the snow removal activities and was of no use to the customer. Unlike the factual scenarios in those matters, here the Vendetta gel and the Final All-Weather Blox and Niban-FG bait, bait stations and duckbills used to secure the stations have a continued value to the customers, as they continue to provide on-going pest control and prevent future infestations. As such, the installation of these items and transfer to the customer's possession is not merely incidental but is part of the pest control services provided by petitioner.

F. As for petitioner's purchases of items other than those discussed in conclusion of law D, petitioner has not met its burden of proving that such purchases were not subject to sales tax. (***see*** Tax Law § 1132 (c); 20 NYCRR 532.4 [a] [1]; [b] [1]). Accordingly, the Division properly determined that petitioner's purchases of items other than the Vendetta gel, the Final All-Weather Blox and Niban-FG bait, and associated bait stations and duckbills used to secure the bait stations, were subject to sales tax.

G. The petition of Knockout Pest Control, Inc., is granted to the extent indicated in conclusion of law D, but is otherwise denied, and the Division is directed to modify the notice of determination dated August 23, 2018 consistent with this determination.

DATED: Albany, New York
March 10, 2022

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE