

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
TOWNHOUSE BUILDERS INC.	:	DETERMINATION
	:	DTA NOS. 831580 AND
	:	851292
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 March 1, 2018 through May 31,	:	
2023.	:	

Petitioner, Townhouse Builders Inc., filed petitions 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 March 1, 2018 through May 31, 2023.

A formal hearing was held before Anita K. Luckina, Administrative Law Judge, in Brooklyn, New York, on October 28, 2025, at 10:30 A.M., with the final brief to be submitted on March 13, 2026, which date began the six-month period for the issuance of this determination. Petitioner, appeared by H. Friedman & Associates, CPA (Herschel Friedman, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly utilized a test period audit methodology following the signing of a test period audit agreement.

II. If so, whether the test period audit methodology had a rational basis and was reasonably calculated to reflect the tax due.

III. Whether petitioner has met its burden to prove entitlement to a refund.

FINDINGS OF FACT

The Division of Taxation (Division) submitted 52 proposed findings of fact pursuant to State Administrative Procedure Act § 307 (1) and section 3000.15 (d) (6) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division's proposed findings of fact 1, 3 through 43, 45 through 49 and 52 are supported by the record, and have been consolidated, condensed, combined, renumbered and substantially incorporated herein. The Division's proposed findings of fact 44 and 51 have been modified to more accurately reflect the record and/or accepted in part and rejected in part as conclusory, irrelevant and/or not supported by the record; to the extent accepted they have been consolidated, condensed, combined, renumbered and substantially incorporated herein, as modified. The Division's proposed findings of fact 2 and 50 are rejected as conclusory, irrelevant and/or not supported by the record.

1. Petitioner, Townhouse Builders Inc., is a general contractor specializing in capital improvement jobs with its principal place of business located at 3611 14th Avenue, Suite 606, Brooklyn, New York, 11218.

The Audit

2. The Division commenced an audit of petitioner in May 2021, and on May 18, 2021, the audit was assigned to the Division's auditor, Althea Alexander. The matter was assigned case ID number X189590115. During a pre-audit analysis, the auditor discovered that petitioner was not registered to collect sales tax and had not filed any New York State sales tax returns. On May 28, 2021, the auditor sent an audit notification letter to petitioner stating that its sales and use tax records had been selected for audit for the period March 1, 2018 through February 28, 2021. The letter advised that the Division would review petitioner's books and records to ensure compliance with applicable tax laws. Enclosed with the letter were audit questionnaires and an

information document request (IDR) particularly requesting the following: (1) sales tax returns, worksheets and cancelled checks showing taxes paid; (2) federal income tax returns; (3) New York State corporation tax returns; (4) general ledger; (5) year-end trial balance; (6) year-end financial statements; (7) general journal and closing entries; (8) sales invoices; (9) all exemption documents supporting non-taxable sales (including: resale, exempt use, exempt organization, capital improvement certificates and any other documentation necessary to prove non-taxable sales); (10) chart of accounts; (11) fixed asset purchase/sales invoices; (12) expense purchase invoices; (13) merchandise purchase invoices; (14) bank statements, cancelled checks and deposit slips for all accounts; (15) cash receipts journal (including sales journal, if applicable); (16) cash disbursement journal (including purchase journal, if applicable); (17) the corporate book (including minutes, board of directors and articles of incorporation); (18) depreciation schedules; (19) lease/rental agreements; and (20) job cost sheets for contracts for entire audit period. The IDR indicates that the response was due by June 18, 2021. Petitioner did not respond by June 18, 2021, and the auditor again sent the audit notification letter and IDR.

3. On July 13, 2021, the auditor received a power of attorney form, dated July 12, 2021, appointing Herschel Friedman, CPA, as petitioner's representative for the audit.

4. On July 20, 2021, the auditor spoke with petitioner's representative (hereafter petitioner). He confirmed that petitioner was not registered for sales tax purposes because petitioner performs only non-taxable capital improvements and pays sales tax when it makes purchases. The parties discussed test review methods and preliminary records to be provided, including: completed audit questionnaires; 2018 and 2019 federal returns; general ledger, trial balance and depreciation schedule for the period March 1, 2018 through February 28, 2021; all exemption documents supporting non-taxable sales; and fixed asset purchases invoices.

5. On July 27, 2021, the auditor received some of the preliminary documents requested during the July 20, 2021, meeting.¹

6. On September 15, 2021, the auditor reviewed the case to select a test period. The auditor selected the period January 2019 to February 2020 because she determined from her review of the records provided that this period was representative of petitioner's business activity.

7. On September 30, 2021, the auditor asked petitioner for a status update on the documents not yet received and requested a sales summary by customer name and an expense purchase summary by vendor name for the following accounts for the test review period January 2019 through February 2020: office expense/supplies and mailing/computer and programming/subcontract/material/other/construction expense.

8. After September 30, 2021, the audit log contains 59 entries over the following two years memorializing the auditor's work on this audit, including discussions between the parties regarding the documents needed, petitioner's provision of those documents and the auditor's test review of the requested documents.

9. On September 1, 2023, the auditor and petitioner discussed the additional documents requested to complete the test review of expenses, updating the audit period and the information needed for the updated audit period, and the test period agreement form. Thereafter, also on September 1, 2023, the auditor sent to petitioner a letter expanding the initial audit period to include the period March 1, 2018 through May 31, 2023 (audit period). That letter included a form AU-377.12, test period audit method election (test period agreement), and an IDR requesting the following for the expanded period March 1, 2021 through May 31, 2023: (1)

¹ The record does not identify these preliminary documents.

federal income tax returns (forms 1120, 1065 or 1040); (2) general ledger (for office expense [#5700]/supplies and mailing [#5702]/computer and program [#5703]/other expense [#6350]/subcontractors [#6100]); (3) fixed asset purchase/sales invoices; and (4) depreciation schedules.

10. During the course of the audit, the auditor determined that petitioner had adequate records and that petitioner had negligible taxable sales, such that the auditor audited only recurring expenses.

11. On November 17, 2023, the auditor provided petitioner with workpapers for the audit period calculating tax due using the test period audit methodology. Included with the workpapers was a test period agreement. On that same date, petitioner spoke with the auditor and stated that it appeared it was due some credits and asked whether those credits could be used to offset the tax due and the audit could be closed as “no change.” The auditor advised petitioner that a form AU-11, application for credit or refund of sales or use tax (AU-11), would need to be submitted along with supporting documentation. Petitioner acknowledged that but asked whether the audit could be approached this way so as not to prolong it. The auditor advised that it would not be her decision and that she would discuss it with her team leader. Her team leader advised that this approach could be taken if petitioner submits an AU-11 for the entire audit period and backup information for the one-year period tested.

12. The November 17, 2023, audit workpapers’ summary of tax due for the audit period provided as follows:

TAX DUE FROM OFFICE EXPENSE (#5700)	\$2,743.09	See TAB “Test of Office Exp #5700”
TAX DUE FROM SUPPLIES & MAILING (#5702)	\$451.70	See TAB “Test of Supplies & Mailing #5702”
TAX DUE FROM COMPUTER & PROGRAM (#5703)	\$4,538.62	See TAB “Test of Computer & Program #5703”

TAX DUE FROM SUBCONTRACTORS EXP (#6100)	\$1,071.48	See TAB “Test of Subcontractors #6100”
TAX DUE FROM OTHER EXPENSE (#6350)	\$9,783.07	See TAB “Test of Other Expense #6350”
	\$18,587.97	

The November 17, 2023, audit workpapers included the supporting schedule for each of the expense accounts reflecting the auditor’s determinations regarding the source documents provided for the test period, the calculation of the error rate and the extrapolation of that error rate over the audit period. The November 17, 2023, audit workpapers bear the following stamp:

**“WORK COPY
FOR DISCUSSION ONLY
SUBJECT TO POSSIBLE
REVIEW & REVISION”**

13. On November 21, 2023, petitioner again reached out to the auditor with questions about the test period agreement. Specifically, petitioner wanted to know when the Division, in its discretion, could elect to discontinue using the test period audit method for the audit period and instead perform a detailed audit. The auditor, in conjunction with her team leader, advised that the test period audit method would be discontinued and a detailed audit would be performed if petitioner did not agree with the results from the test. The parties also discussed the audited tax due and the credits/refund that petitioner was asserting due. Petitioner was asked to provide for the Division’s review a worksheet detailing the proposed credits due and how those credits should be handled, along with an AU-11 and signed test period agreement. No decisions were made.

14. On November 22, 2023, the parties executed the test period agreement. The executed test period agreement provided, in relevant part, as follows:

“Terms and conditions

1. Your complete records must be available

The Tax Department has reviewed your books and records and has determined that they are complete and adequate for a detailed audit. However, the parties agree to use a test period audit methodology to determine whether additional tax is due or owed for some or all of the periods under audit. The parties agree that the Tax Department may in its discretion, elect at any time, to discontinue using the test period audit methodology for the tax periods under audit and instead, perform a detailed audit of your books and records.

* * *

Certification

The NYS Tax Department representative, Ms. Althea Alexander, has to my satisfaction, explained how a test period audit method is conducted. I agree the audit will be conducted using the **test period audit method** for only: **sales and recurring expense purchases.**”

15. On November 27, 2023, the auditor acknowledged her receipt of petitioner’s November 24, 2023, email and attachments including an AU-11 requesting a refund of \$260,137.73 and, in support, petitioner’s markup of the auditor’s November 17, 2023, workpapers indicating petitioner’s determinations and requested changes (petitioner’s marked-up November 17, 2023, refund claim workpapers).

16. Petitioner’s marked-up November 17, 2023, refund claim workpapers proposed summary of tax due for the audit period provided as follows:

TAX DUE FROM OFFICE EXPENSE (#5700)	\$0.00	See TAB “Test of Office Exp #5700”
TAX DUE FROM SUPPLIES & MAILING (#5702)	\$77.32	See TAB “Test of Supplies & Mailing #5702”
TAX DUE FROM COMPUTER & PROGRAM (#5703)	\$3,197.57	See TAB “Test of Computer & Program #5703”
TAX DUE FROM SUBCONTRACTORS EXP (#6100)	(\$252,576.74)	See TAB “Test of Subcontractors #6100”
TAX DUE FROM OTHER EXPENSE (#6350)	(\$10,835.88)	See TAB “Test of Other Expense #6350”
	(\$260,137.73)	

Petitioner’s marked-up November 17, 2023, refund claim workpapers included petitioner’s markup of the auditor’s supporting schedule reflecting petitioner’s determinations regarding the

source documents that petitioner provided for the test period, the calculation of the error rate and the extrapolation of that error rate over each expense category for the audit period.

17. On December 1, 2023, the auditor received formal internal notification that petitioner submitted a refund claim (claim number AM2311175012) associated with audit case number X189590115 in the amount of \$260,137.73. Over the next several weeks the auditor reviewed and attempted to verify the refund claim documentation.

18. On December 12, 2023, the auditor reviewed and discussed the refund claim with her team leader. During this discussion it came up that equitable recoupment had to be considered when processing the refund claim because petitioner was unregistered and did not file sales tax returns. The auditor and team leader sought clarification from their section head, who advised that in addition to considering equitable recoupment, petitioner must provide detailed supporting documentation for the entire refund claim, not just the test period.

19. On December 14, 2023, the auditor and her management team discussed how a refund claim by an unregistered vendor had to be handled. The decision was made to disassociate the refund claim from the audit case.

20. On December 15, 2023, the auditor and her team leader had a call with petitioner to discuss the audit and refund claim. They explained equitable recoupment and the difference in handling on audit a refund claim by an unregistered vendor and advised that petitioner would need to provide support for the entire refund claim period. Following this call, the auditor made a formal request to disassociate the refund claim.

21. On December 19, 2023, petitioner submitted a letter asking that penalty be abated.

22. On December 20, 2023, the auditor sent to petitioner a form AU-346, statement of proposed audit change (AU-346), asserting sales and use taxes due of \$9,964.08, plus interest.

Petitioner's response was due by December 29, 2023.²

23. On December 22, 2023, petitioner responded to the AU-346 with requests for specific adjustments to transactions and tax and interest rate calculations during the test period. During a call with the auditor that same day, petitioner indicated that if such adjustments were made, petitioner would agree with the tax asserted due.

24. On January 2, 2024, the auditor advised petitioner of the adjustments made and updated petitioner on the status of the refund claim. The auditor indicated that a revised AU-346 would be mailed on January 3, 2024. The auditor further advised that the refund claim had been disassociated from this audit and assigned a new claim number, and that she was waiting for that refund claim to be assigned to her.

25. On January 4, 2024, the auditor sent petitioner a revised AU-346 asserting sales and use taxes due of \$9,420.80, plus interest, and revised workpapers.³ The auditor's January 4, 2024, revised workpapers provided a revised summary of tax due for the audit period as follows:

TAX DUE FROM SUPPLIES & MAILING (#5702)	\$77.32	See TAB "Test of Supplies & Mailing #5702"
TAX DUE FROM COMPUTER & PROGRAM (#5703)	\$3,197.57	See TAB "Test of Computer & Program #5703"
TAX DUE FROM SUBCONTRACTORS EXP (#6100)	\$528.19	See TAB "Test of Subcontractors #6100"
TAX DUE FROM OTHER EXPENSE (#6350)	\$5,617.73	See TAB "Test of Other Expense #6350"
	\$9,420.82	

² The December 20, 2023, cover letter to petitioner summarizing this AU-346 was in the audit file; the AU-346 was not.

³ There is a slight discrepancy between the tax asserted due in the revised AU-346 (\$9,420.80) and the revised summary of tax due (\$9,420.82) due to rounding.

The January 4, 2024, revised workpapers included the auditor's revised supporting schedules reflecting the auditor's adjustments. For these expense accounts, the auditor finally determined the following error rates: supplies & mailing (#5702) – 0.73%; computer & program (#5703) – 7.08%; subcontractors exp. (#6100) – 0.01%; and other expense (#6350) – 1.64%. Petitioner's response was due by January 11, 2024.

26. Petitioner did not respond and the auditor closed the case as disagreed.

27. On January 23, 2024, the Division issued to petitioner a notice of determination, bearing assessment number L-059391822, asserting tax due in the amount of \$9,420.80, plus interest (notice).

28. Petitioner timely filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. By conciliation order (CMS number 000358656), dated August 16, 2024, the conciliation conferee sustained the notice.

29. On November 5, 2024, petitioner timely filed a petition with the Division of Tax Appeals. The Division of Tax Appeals acknowledged the petition as DTA number 851292.

30. On December 31, 2024, the Division filed its answer.

The Refund Claim

31. On or about November 24, 2023, petitioner submitted an AU-11 requesting a refund in the amount of \$260,137.73 for the period March 1, 2018 through May 31, 2023 (*see* finding of fact 15). The AU-11 is dated November 22, 2023, and is certified to and executed by petitioner.

In that regard, the certification provides, in relevant part, as follows:

“Certification: I, Herschel Friedman (POA), the applicant named above, or partner, officer, or other authorized representative of such applicant, do hereby:

* * *

certify that all of the tax for which this claim is filed has been paid....”

The supporting documentation provided with the AU-11 includes: a power of attorney for Mr. Friedman; a copy of the Division's November 17, 2023, letter transmitting to petitioner the November 17, 2023, audit workpapers; petitioner's marked-up November 17, 2023, refund claim workpapers with accompanying source documents for the test period; and a copy of the refund claim cover letter from petitioner to the Division, dated November 22, 2024.

32. On or about December 20, 2023, the Division created a case (case number X191474287) for petitioner's refund claim (claim number AM2311175012), and, on January 3, 2024, it was assigned to auditor Althea Alexander.

33. On January 10, 2024, the auditor sent correspondence to petitioner advising that more information is needed before the Division can finish reviewing petitioner's refund claim; included was an IDR (refund claim IDR). The refund claim IDR requested the following:

- “1. Detail schedule for the[r]efund [c]laim, for the period 03.01.18 – 05.31.2023, along with proof of payment of sales and use tax.
2. Documentation/records to verify that New York State, [sic] sales and use tax was not due on [s]ubcontractors work done (#6100) or on [o]ther [e]xpense purchases (#6350).”

Petitioner's response was due by February 9, 2024.

34. On January 22, 2024, petitioner advised the auditor that petitioner received the refund claim IDR and was working on gathering the requested information, stating that it was a lot of work.

35. On January 26, 2024, the auditor received petitioner's response to the refund claim IDR. The response included an email wherein petitioner expressed disagreement with the way the audit and ensuing refund claim were handled. The response also included: the Division's refund document request and refund claim IDR; another power of attorney for Mr. Friedman; a copy of petitioner's request for a BCMS conference regarding the notice (*see* finding of fact 28);

a copy of *Matter of Marine Midland Bank, N.A.* (Tax Appeals Tribunal, May 13, 1993); and miscellaneous Division publications. Petitioner also asked that the Division deny the refund claim so its protest could track the protest of the notice. Petitioner did not provide any additional documentation supporting the refund claim.

36. On February 8, 2024, the auditor and several audit managers had a meeting with petitioner. Petitioner reiterated its concerns and advised that it would not provide any more documentation. The Division again explained why it determined that the refund had to be processed separately from the audit.

37. Subsequent to the February 8, 2024, meeting with petitioner, the auditor reviewed the refund claim and supporting documentation and concluded that it was insufficient to sustain the refund claim.

38. On February 14, 2024, the Division issued to petitioner a refund claim determination notice (refund claim number AM2311175012), which denied petitioner's refund claim in full (refund denial). The refund denial provided as follows:

“We’ve denied your refund application.

We’ve reviewed your application and have concluded that you’re not eligible for this refund.

Additional information needed.

(1) Detail schedule for the Refund Claim, for the period 03.01.18 – 05.31.23, along with proof of payment of sales and use tax. (2) Documentation/records to verify that New York State, [sic] sales and use tax was not due on Subcontractors work done (#6100) or on Other Expense purchases (#6350). This was requested but was not provided in your email response dated 1.26.24.”

39. On February 27, 2024, petitioner timely filed a petition protesting the refund denial with the Division of Tax Appeals. The Division of Tax Appeals acknowledged the petition as DTA number 831580.

40. On May 22, 2024, the Division filed its answer.

41. On December 26, 2024, petitioner filed with the Division of Tax Appeals a motion for summary determination for DTA number 831580. By order, dated May 15, 2025, petitioner's motion was denied.

42. At petitioner's request, DTA numbers 831580 and 851292 were associated for a consolidated hearing.

43. Prior to the hearing, the Division advised petitioner that the Division would agree to allowing a refund in the amount of \$60,564.44 (stipulated refund) (*see* finding of fact 45).

44. At the hearing, the auditor, Althea Alexander, testified for the Division. Ms. Alexander testified that she conducted the audit of petitioner, authenticated the Division's audit and refund claim files (*see* finding of fact 46) and advised that the audit log notes were created contemporaneously on the date that the events memorialized therein occurred.

Ms. Alexander testified in detail that the audit was done in accordance with audit policy, and testified regarding its results, particularly her workpapers. Specifically, Ms. Alexander testified that she reviewed petitioner's expense accounts from its general ledger and identified the expense accounts where tax was found due. Ms. Alexander then reviewed the invoices and other source documents for those expense accounts to determine exceptions. Ms. Alexander explained that where tax was due, she noted if it was paid; however, "[i]f I notice tax not paid, then that becomes what we call an exception, meaning tax should have been paid." For any given expense account that Ms. Alexander "reviewed, whatever percentage of that tax was not paid, then that becomes an error rate. And that error rate gets projected over what the total [expense account] amount is for the audit period." Ms. Alexander further testified that because petitioner was not filing sales tax returns, "there was no credit to be given for purchases subject to use tax." Ms. Alexander explained that "if they're reporting taxable purchases... [w]e would

see that,” and [i]f they're not registered to—to file on—to report and submit, then there would be no way for us to know that.” Ms. Alexander testified that all four of the expense accounts identified in her audit workpapers were audited, and tax due was projected thereon, in the same manner. Ms. Alexander testified that she continually reviewed documentation provided during the audit and adjusted the audit results as appropriate.

Ms. Alexander testified that it was explained to petitioner that refund claims needed to be filed separately because a refund claim is handled differently than an audit. For a refund claim, petitioner must demonstrate that tax was in fact paid and that it is entitled to the refund. Ms. Alexander explained that a refund cannot be calculated using a test period estimate, whereas during an audit, the auditor is trying to determine whether petitioner complied with its sales and use tax reporting obligations. Ms. Alexander also explained that the refund claim had to be disassociated from the audit because when a refund claim is filed, the refund claim is automatically assigned to the open audit case number. However, in this matter, the refund claim could not be considered using a test period audit method, and because petitioner was not a registered vendor during the audit period, there were additional considerations, like equitable recoupment. Thus, to prevent further delay to the audit, the refund claim was disassociated. Ms. Alexander noted that the test period agreement states that the taxpayer does not have to agree with the results and that “the next approach would be to conduct a detailed audit.” Ms. Alexander testified that at no point did petitioner ever request a detailed audit.

On cross-examination, Ms. Alexander further testified that during her initial conversation with petitioner, the test period audit method was discussed and that if petitioner did not agree, then she advised she would conduct a detailed audit. Ms. Alexander also acknowledged that the test period agreement was not executed until November 2023. Ms. Alexander again explained

why a refund cannot be projected using a test period. She also acknowledged that she initially reviewed petitioner's marked-up November 17, 2023, refund claim workpapers and the one year's worth of source documents provided, and that if any workpapers were created at that time summarizing her review they were not final—that all workpapers needed to be reviewed by her supervisor before they were final. Ms. Alexander testified that she “never generated refund work papers” and that petitioner's marked-up November 17, 2023, refund claim workpapers were created by petitioner. Ms. Alexander also testified that a substantiated refund claim would be granted regardless of the amount, and that the amount of the refund is irrelevant.

Finally, Ms. Alexander testified that she had no knowledge of any modifications made to her workpapers as those were done after the audit was closed (*see* findings of fact 43 and 45).

45. At the hearing, in support of the stipulated refund, the Division submitted the affidavit of David Lindhurst, an Auditor 3 Section Head in the Field Audit Management (FAM) unit, sworn to on October 17, 2025, including an attachment consisting of petitioner's refund claim dated November 22, 2023, with its supporting documents (Lindhurst affidavit). Mr. Lindhurst's duties include acting as a liaison with the various district field offices to assist with questions or issues relating to law and policy. Mr. Lindhurst avers that his affidavit is “based upon my recollection of my actions regarding [p]etitioner, communication with Division employees, as well as my subsequent review of the Division's files.” Mr. Lindhurst avers that, “[w]hile DTA number 831580 was pending, [the Division's] Office of Counsel requested that FAM review [petitioner's] form AU-11 with attachments to determine if there was any amount of refund, if the attachments were deemed to be true and without further inquiry, that the Division could potentially issue to [p]etitioner.” Mr. Lindhurst further avers that, upon review of petitioner's AU-11 requesting a refund in the amount of \$260,137.73 and petitioner's marked-up

November 17, 2023, refund claim workpapers and supporting attachments, the Division could possibly issue a refund in the amount of \$60,564.44. Mr. Lindhurst's affidavit detailed the specific invoices that he accepted "with good faith and without further inquiry," calculated an amount for those invoices and stated that "[t]his number was then used in the calculations [p]etitioner presented in its AU-11 which resulted in a calculation of a potential refund due in the amount of \$60,564.44." Mr. Lindhurst's affidavit did not explain why the invoices were accepted or provide workpapers specifically detailing the calculations for the \$60,564.44 stipulated refund.

46. The Division also submitted the audit file (case ID number X189590115) and the refund claim file (case ID number X191474287).

47. At the hearing, petitioner's representative, Mr. Friedman, testified on behalf of petitioner. Mr. Friedman is a certified public accountant, but he was not qualified at the hearing to testify as an expert witness.

On direct examination, Mr. Friedman acknowledged that the auditor discussed the test period audit review and that he was not made to sign anything, so he did not object. Mr. Friedman testified that:

"once I reviewed the documents, and it became clear to me that my client was due money and that there was going to be possibly an issue with the tax period agreement being used until the Division sees and realizes that they might not benefit out of it, I made it clear, crossed my t's and dotted my i's and said, is this going to be used both ways[.]"

Mr. Friedman testified that he felt assured so he signed the test period agreement, and he would not have signed it otherwise. Mr. Friedman testified that he understood when the Division asked for detailed "line-by-line transactions" it meant that "there will be no projection" and he "stopped cooperating." Mr. Friedman acknowledged that "somewhere along the process" the

Division emailed him “a concession, not a settlement, a concession of – of an exact amount. I think it was \$60,564.44.” Mr. Friedman further testified that he only recently, during the prehearing document exchange, was provided with any details for that amount. Mr. Friedman testified that he prepared his own workpapers reconstructing the stipulated refund (*see* finding of fact 49). Mr. Friedman testified at length about those workpapers and stated that it was his observation that Mr. Lindhurst did a projection.

On cross-examination, Mr. Friedman admitted that “[h]e didn’t want a detailed audit done.” Mr. Friedman testified that at the point that he signed the test period agreement “I pretty much figured out that my client is not going to owe any money.” Mr. Friedman acknowledged that the auditor’s workpapers were based on petitioner’s source documents. Mr. Friedman acknowledged that he created petitioner’s marked-up November 17, 2023, refund claim workpapers projecting a refund, not the auditor. Mr. Friedman also acknowledged, deferring to the audit log, that the first time that he raised the possibility of credits due was after receiving the auditor’s workpapers. Mr. Friedman stated that “on November 17th, I went along with the test period because why shouldn’t I go along with the test period audit? I thought I’m going to get a refund.” Mr. Friedman testified that after being informed in December that the audit and refund claim would be split, “I didn’t want an audit by detail, because an audit by detail would turn my refund into a much smaller amount than it would [be] if it would be projected.”

Mr. Friedman admitted that he refused to provide any of the documentation requested by the refund claim IDR “not because I didn’t have it, because the Division was forcing me into a detailed [audit] that would result in a much lower refund than the projected audit was going to show.” Notwithstanding, Mr. Friedman acknowledged that the Division advised him that “refunds are not going to be done by projection.” Mr. Friedman also stated that he had the same

experience in other audits and that “it definitely appears to me from my experience that the Division does not like to project refunds, whether for registered or unregistered vendors.” Mr. Friedman testified that the documents requested by the refund claim IDR exist but he is not producing them because “if I go along with that, I’m telling the Division I don’t want \$260,000, I want a lot less. I’m not going to do that.”

48. Mr. Friedman’s testimony did not include any objections to the tax calculated due on exceptions by the auditor, as detailed by the January 4, 2024, revised workpapers and asserted due by the notice, other than the auditor’s failure to also project petitioner’s refund claim using the same test period audit method.

49. At the hearing, petitioner introduced documents into the record, including: the auditor’s November 17, 2023, audit workpapers; petitioner’s marked-up November 17, 2023, refund claim workpapers; the auditor’s January 4, 2024, revised workpapers; and workpapers petitioner created attempting to detail the basis for the stipulated refund. Petitioner did not submit any additional invoices or other documentation either refuting the tax asserted due on exceptions by the notice or substantiating petitioner’s refund claim.

50. Petitioner argues that the audit was conducted using an agreed-to test period audit method and the Division cannot abandon that audit method because the outcome favors the taxpayer. Petitioner, in its brief, asserts that either the test period audit method be held invalid or the Division be bound to apply that same audit method to estimate a refund for petitioner.

51. The Division, in its brief, asserts that: “it followed proper audit procedure when it determined tax due using a test period audit method, and therefore the [n]otice is proper and must be sustained.” The Division further asserts that it “properly denied [p]etitioner’s refund claim as [p]etitioner failed to substantiate its entitlement to the refund.”

CONCLUSIONS OF LAW

A. Tax Law § 1138 (a) (1) provides, in relevant part, that if a sales tax return was not filed, “the amount of tax due shall be determined by the [Division] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices...” Generally, the use of an estimated audit method, including the use of a test period, is premised on a taxpayer’s failure to maintain or make available adequate records (*see Matter of Blackhat Chimney & Fireplace, Inc.*, Tax Appeals Tribunal, April 9, 2015; *Matter of Chartair, Inc. v State Tax Commn.*, 65 AD2d 44, 46 [3d Dept 1978]).

However, an exception to the rule permits the Division to perform a test period audit where a taxpayer maintains adequate records if the taxpayer knowingly executes a written consent to the use of such an audit (*see Matter of Blackhat Chimney & Fireplace, Inc.*, citing *Matter of Wallach v Tax Appeals Trib.*, 206 AD2d 696, 698 [3d Dept 1994]), *lv denied* 85 NY2d 805 [1995]). The reasons a taxpayer with adequate records may execute such a consent are varied. They could include limiting the time and resources necessary to produce such records; they could also include the belief that a test period audit may benefit the taxpayer. Regardless, the Division memorializes the taxpayer’s consent using a test period agreement.

B. Such an exception to the general rule that a taxpayer must have inadequate records before a test period audit can be conducted arises under the facts here. The Division clearly requested detailed books and records for the audit period (*see* findings of fact 2 and 9); petitioner does not assert otherwise. The auditor and petitioner discussed the test period audit method. The auditor reviewed the initial records petitioner provided and selected the test period January 2019 to February 2020 as representative of petitioner’s business activity. The record does not indicate that petitioner ever objected to the test period selected. Over the course of two years, petitioner

knowingly and willingly provided records to the Division for the auditor's test period. Petitioner never asked for a detailed audit, the alternative to a test period audit. Petitioner, in fact, never wanted a detailed audit (*see* finding of fact 47).

The auditor determined that petitioner's records were adequate and provided petitioner with the November 17, 2023, audit workpapers calculating tax due for the audit period using the test period and the test period agreement form. Thus, petitioner had the Division's documented audit results based on the test period audit method before executing the test period agreement. The test period agreement advises that petitioner has adequate records to perform a detailed audit but, by executing the consent, the parties agree to a test period audit method to determine tax due. On November 17 and 21, 2023, petitioner reached out for clarification regarding potential credits that petitioner discovered might be due, how those credits might be treated and whether the audit could be closed no-change. In that regard, the auditor advised that petitioner's requests would be considered and ultimately advised petitioner to provide for the Division's review a worksheet detailing petitioner's proposed credits, supporting detail for the one-year test period and an AU-11. On November 22, 2023, the parties executed the test period agreement.

On November 24, 2023, petitioner presented the Division with petitioner's marked-up November 17, 2023, refund claim workpapers, reflecting, for the first time, petitioner's determinations with respect to the transactions therein and projecting, i.e., estimating, a refund in the amount of \$260,137.73. The auditor only audited exceptions and never projected a refund for the audit period, and there is nothing in the record indicating that the Division knew that petitioner was proposing this estimated refund when it agreed to consider petitioner's proposal. However, petitioner understood that a test period audit would result in a larger refund than it

could support with a detailed audit (*see* finding of fact 47). So, petitioner knowingly did not want the only alternative to the test period audit—a detailed audit.

Thus, under the circumstances here, petitioner made a knowing and valid consent to the use of the test period. Accordingly, the Division was authorized to use a test period audit method as long as such method was reasonably calculated to reflect the tax due (*see Matter of Top Drawer Custom Cabinetry Corp.*, Tax Appeals Tribunal, November 19, 2015).

C. Where the use of a test period is appropriate, the burden lies with the taxpayer to show by clear and convincing evidence that the result was unreasonable or that the amount of tax assessed was erroneous (*see id.*; *Matter of Blackhat Chimney & Fireplace, Inc.*). It seems that it is here that the crux of petitioner’s argument really lies. Petitioner does not appear to object to the Division’s use of a test period to audit exceptions; rather, it objects to the Division’s refusal to use that same test period to estimate petitioner’s requested refund. In trying to establish that the Division’s refusal to project potential credits as part of its audit renders the test period audit unreasonable or the results erroneous, petitioner makes several arguments.

Initially, petitioner argues that the Division should be estopped from refusing to apply the test period audit method to project a refund for the same period, contending that to do otherwise would render that audit method invalid or the results erroneous. Petitioner’s claim that estoppel should apply here is not supported by the facts.

“Estoppel is an equitable doctrine invoked to avoid injustice in particular cases. Equitable estoppel is not available as a defense to governmental acts absent a showing of *exceptional facts* which require its application to avoid a manifest injustice” (*Matter of Yoel and Sara Goldenberg*, Tax Appeals Tribunal, July 10, 2025 [internal quotation marks and citations omitted]). To impose estoppel on a governmental actor, it is necessary to establish that: “1) there

was a misrepresentation made by the government to a party and the government had reason to believe that the party would rely upon the misrepresentation; 2) the party's reliance on the government's misrepresentation was reasonable; and 3) prior to the party discovering the truth, the party acted to its detriment based upon the misrepresentation" (*id.*, citing *Heckler v Community Health Servs.*, 467 US 51, 59-61 [1984]).

To petitioner's argument that estoppel should apply, it is true that the auditor initially indicated that she would consider using the test period audit method to review petitioner's potential credits. However, that representation was general and made in response to petitioner's general representation that it appeared that petitioner was due some credits and request that the audit be closed no-change. It was not until after the test period agreement was executed that petitioner provided the auditor with its detailed workpapers requesting an estimated refund of \$260,137.73. Thus, the auditor had no reason to believe that petitioner would rely on her general representation regarding this specific refund. The auditor never represented that petitioner would receive a \$260,137.73 refund if it signed the test period agreement, or that the test period would result in a refund of any amount.

Further, petitioner has failed to show that it was reasonable for it to rely on a general representation made by the Division in response to petitioner's partial disclosure of the facts. Petitioner's representative knew from his own audit experience with the Division that auditors do not want to project refunds (*see* finding of fact 47). If petitioner truly wanted guidance on which it could reasonably rely, it could have provided its marked-up November 17, 2023, refund claim workpapers and projected refund to the auditor before signing the test period agreement. Not signing the test period agreement, however, would have resulted in a detailed audit and petitioner did not want a detailed audit because it would result in a smaller refund. It seems that petitioner

may have relied more on how it hoped events would transpire rather than a vetted discussion with the auditor, particularly given petitioner's understanding that auditors do not project refunds.

Lastly and perhaps most importantly, petitioner has not established how it acted to its detriment based on the auditor's representations. Specifically, petitioner has not established that it forwent a better action, or failed to act, in reliance on the auditor's representations and signed the test period agreement to its detriment. Petitioner could sign or not sign the test period agreement. In this case, petitioner had adequate books and records, so the alternative to the test period audit was a detailed audit. There is no other option. Petitioner did not want a detailed audit. Petitioner executed the test period agreement believing that it would support a refund that petitioner could not otherwise support with the only alternative to the test period—a detailed audit. Moreover, the auditor's representations caused no delay in petitioner submitting, thereby preserving, its refund claim. The auditor advised petitioner immediately, on November 17, 2023, to submit an AU-11 when petitioner first raised the possibility of credits. In response, petitioner submitted the AU-11. There is no injustice here and no reason that estoppel should apply.

D. Petitioner also argues that the test period audit was unreasonable and the results are erroneous because the auditor failed to include credits when calculating the tax due. In support of this proposition, petitioner cites to *Matter of Marine Midland Bank, N.A.*. However, that case is distinguishable. The issue in *Matter of Marine Midland* was whether the Division's use of a computer assisted statistical sampling methodology was proper when the taxpayer had adequate books and records absent an agreement to perform such an audit. While *Matter of Marine Midland* discussed the handling of some credits as exception items, that issue was not before the Tax Appeals Tribunal. Moreover, it arose in the context of a computer assisted

statistical sampling audit, not a test period audit. The differences are discussed therein. Notably, a computer assisted statistical sampling audit methodology randomly selects transactions from the entire audit period and relies on probability and chance (*see Matter of Marine Midland Bank, N.A.*). A test period audit methodology, in contrast, involves the selection of a representative period of time and relies on the experience and judgment of the auditor (*see id.*). In *Matter of Marine Midland*, the Tax Appeals Tribunal decided that it was improper for the Division to use a computer assisted statistical sampling audit method absent an agreement to do so when the taxpayer has adequate records (*see id.*). Here, the parties executed an agreement to use a test period audit method.

E. It is well settled that “[c]onsiderable latitude is given an auditor’s method of estimating [tax due] under such circumstances as exists in [each] case” (*Matter of Grecian Sq. v State Tax Commn.*, 119 AD2d 948, 950 [3d Dept 1986]). When selecting an audit method, the Division is required to select an audit methodology that is reasonably calculated to reflect the tax due. Petitioner here has failed to show that the test period audit method selected, which petitioner consented to, was unreasonable or erroneous. The auditor estimated petitioner’s tax liability using petitioner’s records to determine exceptions, that is, transactions on which tax should have been paid but was not paid. Alternatively, petitioner could have requested a detailed audit—petitioner had adequate books and records—but, again, petitioner did not want a detailed audit. Petitioner was further given the opportunity to file a refund claim for potential credits.

In sum, petitioner has not established any cognizable errors with the period tested, the documents reviewed or the audited tax due on exceptions per the notice. Thus, the facts do not establish here that the Division’s use of the test period audit method to calculate tax due on exceptions only was unreasonable or that the tax determined due thereon was erroneous.

Further, for the reasons set forth below, the Division was without authority here to project a refund based on a test period audit of petitioner's credit transactions.

F. Tax Law § 1139 (a) provides, in relevant part, that:

“the [commissioner] shall refund or credit any tax. . . erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the [commissioner] (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the [commissioner] as provided in [Tax Law § 1137].”

Tax regulations promulgated thereunder detail the requirements of Tax Law § 1139 and provide that a refund claim requires that an application be filed with the Division (*see* 20 NYCRR 534.2 [a] [1]) and that the application must contain “a full explanation of facts on which the claim is based, including substantiation of the basis for and the amount of the claim” (*see* 20 NYCRR 534.2 [a] [2] [i] [g]).

A presumption of correctness attaches to a refund denial issued by the Division and the taxpayer must show by clear and convincing evidence a “clear-cut entitlement” to the refund (*see Matter of Global Cos. LLC v New York State Tax Appeals Trib.*, 227 AD3d 1197, 1202 [3d Dept 2024], *lv denied* 43 NY3d 904 [2025]); *Matter of Kroll Bond Rating Agency, Inc.*, Tax Appeals Tribunal, October 1, 2018; *Matter of Broadview Networks, Inc.*, Tax Appeals Tribunal, June 14, 2012). Further, “[a]s is clear from [Tax Law § 1139 (a),] actual payment of sales tax is a prerequisite to entitlement to a refund” (*Matter of Taczanowski*, Tax Appeals Tribunal, January 28, 2010).

Petitioner has failed to demonstrate entitlement to the refund claimed here. On November 24, 2023, petitioner filed its refund claim; in support, attached was petitioner's marked-up November 17, 2023, refund claim workpapers. The Division, on January 10, 2024, requested specific documentation supporting petitioner's refund claim (*see* finding of fact 33).

In response, petitioner provided a copy of the refund document request and refund claim IDR; a copy of petitioner's BCMS request; and various Division publications. On February 8, 2024, petitioner advised the Division that it would not be providing any additional documentation. The auditor considered the documentation provided by petitioner. On February 14, 2024, the Division issued to petitioner the refund denial.

A review of the documentation provided with the refund claim confirms that the Division properly determined that petitioner did not substantiate the claimed refund amount. Petitioner provided documentation for only the test period in support of its marked-up November 17, 2023, refund claim workpapers, and that documentation included nonresponsive documents, such as contracts and quotes. Moreover, there was no proof of actual payment of tax by petitioner. These documents are insufficient to establish clear-cut entitlement to a refund. Further, petitioner provided no additional documentation at the hearing.

The Tax Law does not support estimating a refund. It requires that a refund claim be explained and substantiated in full and that the applicant demonstrate that tax was actually paid (*see* Tax Law § 1139 [a]; 20 NYCRR 534.2 [a] [2] [i] [g]; *Matter of Global Cos. LLC v New York State Tax Appeals Trib.*, 227 AD3d at 1202; *Matter of Kroll Bond Rating Agency, Inc.*; *Matter of Broadview Networks, Inc.*; *Matter of Taczanowski*). Thus, contrary to petitioner's argument, a test period audit method cannot be used here to estimate petitioner's refund.

G. Notwithstanding, after the audit, the Division, through its attorney, advised petitioner of a stipulated refund in the amount of \$60,564.44. The exact determinations and calculations supporting the stipulated refund were not provided with the Lindhurst affidavit (*see* finding of fact 45). A review of the attachment to the Lindhurst affidavit indicates that some projection or other consideration beyond the documents supporting petitioner's refund claim was done, such

that the stipulated refund amount is considerably more than what would be determined using just petitioner's supporting documentation (*see* conclusion of law F).⁴ While estimating a refund is not permitted for the reasons set forth above, the basis for the stipulated refund is not readily discernable, and the Division has already conceded the stipulated refund. Thus, petitioner is entitled to the stipulated refund.

H. The petitions of Townhouse Builders Inc. are denied, the notice of determination dated January 23, 2024, is sustained and the refund denial, dated February 14, 2024, is modified in accordance with conclusion of law G, but is otherwise sustained.

DATED: Albany, New York
September 10, 2026

/s/ Anita K. Luckina
ADMINISTRATIVE LAW JUDGE

⁴ Petitioner provided its own workpapers attempting to recreate the Division's calculation of the stipulated refund (*see* findings of fact 47 and 49); however, petitioner's representative was not an expert witness and those workpapers were not considered.