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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

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Re: Premier Netcomm Solutions, L.L.C. v. Director, Div. of Taxation
Docket No. 016307-2012

Dear Counsel:

This letter opinion constitutes the court's decision as to defendant's motion for summary judgment. Defendant (Taxation) claims its audit of plaintiff's services and purchases, and resulting Sales and Use ("S&U") tax assessment of $380,566.18 (without penalties and interest) for the tax periods January 1, 2004 to December 21, 2010, was proper because a bulk of the sampled invoices for 2007, or the sampled service contracts, did not have any breakdown of taxable versus non-taxable charges, nor was there adequate documentation to show that sales tax was paid by plaintiff on its purchases/expenses.

*

Plaintiff acknowledges that it did not, and does not, have the requisite breakdown on the sampled invoices, had not remitted sales taxes that it had collected, and does not have any other invoices. However, it claims that per its accountant's certification (the sole submission as opposition to the summary judgment motion), the tax owed is far less than that assessed. The accountant's certification used the same sample invoices as Taxation's auditor, but allocated a portion of the charges as non-taxable for sales tax purposes. The accountant also deemed certain expenses (assessed for use tax) as non-taxable because a bulk of the purchases were allegedly for resale. Finally, the accountant deemed purchases of certain assets as non-taxable because the vendors normally collected sales tax on the same, or because plaintiff paid for the same by credit card. The accountant's allocation of charges, and removal of certain expenses, provided a lower tax of $112,645.65 (exclusive of penalties and interest).

The court finds that the accountant's certification re-computing taxes does not present materially disputed facts. Moreover, the certification was bereft of any objective or external indicia to establish the facts underlying the subjective allocation of charges to non-taxable services for purposes of sales tax. The determination that certain purchases and expenses had to be non-taxable for use tax purposes similarly lacks objective underlying facts or documents. The court is therefore constrained to grant defendant's motion for summary judgment.

However, the grant is partial because the court finds that, as a matter of law, (1) the sales tax assessment for tax year 2004 and the first three quarters of 2005 cannot be sustained because the law deeming prewritten computer software as tangible personal property, thus, triggering sales tax on the sales thereof, or services to the same, was enacted only in October 2005; and (2) Taxation's inclusion of charges for services provided and delivered to out-of-state buyers on grounds the invoices did not allocate charges as taxable versus non-taxable cannot trump the

specific statutory exemption for such charges under N.J.S.A. 54:32B-3(b), therefore, its sales tax assessment based on the inclusion of such charges must be modified.

The court therefore affirms Taxation's final determination in part. The use tax assessments are affirmed. The sales tax assessment should be revised after making the above two adjustments. Taxation should provide a revised computation of the modified sales tax with a conforming form of Order in this regard by January 27, 2017.

FACTS

All the facts herein are based on the certifications in support of Taxation's motion and attachments thereto, such as audit work papers, audit and conference reports, and representations made by plaintiff in its administrative protest. Although the auditor's certification as to the nature of plaintiff's business and services was partially hearsay (what the auditor was told by plaintiff during audit), it is the same as described by plaintiff in its administrative protest, which document was undisputed. Additionally, plaintiff did not contest any of Taxation's Statement of Material Facts, and conceded during oral argument that Taxation's description of its business was accurate.

Plaintiff, a New Jersey entity, is in the business of providing information technology ("IT") solutions. Its range of services include remote or onsite network access support (network connectivity, internet access, software updates); consulting; design and implementation of IT and telephone related projects; remote or onsite troubleshooting (network connectivity, internet access); remote training; onsite visits for installation or replacing network-related equipment (switches, firewalls, router) or to implement new/major policies, projects; software needs (purchases, installation, updates, licenses); data backup; maintenance and repair services; remote monitoring of client's network by using a Remote Security Guard System or RSGS; telecommunication services (reviewing bills, checking phone system, voicemail).

These various services are offered by either (1) a per-hour charge; (2) a monthly maintenance package for a one-year term which includes all IT services at rates set for a fixed block of hours (e.g., $750 up to 10 hours for 20 client/nodes); or (3) a pre-paid maintenance package which includes all IT services at rates set for a fixed block of hours (e.g., $900 for 10 hours, $1,700 for 20 hours and $2,250 for 30 hours). In addition, the RSGS was offered at $500-$1,000 per month depending on the client's size and maintenance package chosen. A sample maintenance contract dated February 21, 2009 shows that plaintiff offered "complete network maintenance" at $1,700 per month ($1,400 for the network maintenance and $300 for RSGS) for a one-year term. The network maintenance services included phone support (which included consultation; coordination of projects; purchasing IT/PC related equipment; budget analysis; general phone support) and remote access support (which included PCs and network troubleshooting; access changes; training; network programming; implementation of network security, i.e., server and firewall maintenance). Onsite visits for installation, repair, and software upgrades would be separately charged on an hourly basis. The contract noted that "any Hardware or Software purchased for support of client will be billed separately."

(A) Taxation's Audit and Final Determination

Taxation audited plaintiff sometime in 2009 for tax periods January 2004 through December 2010. The auditor and plaintiff's representative agreed that 2007 would be the sample year since it was deemed representative of the audit period. Plaintiff had not filed any S&U returns, and did not have federal income tax returns for tax years 2008-2010. Plaintiff provided Taxation with sales and purchase invoices for 2007, a few "random client maintenance contracts," but had no sales tax exemption certificates. The maintenance contracts were all similar in that they offered a whole range of services for a fixed per-moth charge. The 728 invoices examined by the

auditor (none of which were provided to the court) were itemized by her on a spreadsheet, with the following columns: Type (sales invoices); Client's Name; Invoice Number; Invoice Date; Total Billed; Tax Charged; Non-Taxable amount; Taxable amount; Description; and Notes. The Description column delineated the various items for each invoice (e.g., maintenance fee, network service fee, onsite charges, equipment purchases). The Notes column indicated whether sales tax was charged; whether the billing was to an out-of-state client; whether invoices were missing, and the like. The total sales from the sampled invoices was $700,529.79. From this, the auditor deducted the total sales tax charged (collected, but concededly unpaid by plaintiff) of about $12,857, and the non-taxable charges which totaled about $12,817. This gave the total taxable sales as $675,137.79.

The auditor decided to use $691,029 as the total sales, and as the denominator of the taxable-to-total sales ratio, because that was what was reported by plaintiff on its 2007 federal tax return. This yielded a 97.7% ratio ($675,138/$691,029). Since she was not provided the federal income tax returns for 2008-2010, she used $691,029 as the total sales for those years. However, she used the reported sales for 2004-2006 ($261,883; $567,393; $768,780). These sales totaled $4,336,682. She applied the 97.7% rate to this amount for taxable sales of $4,261,858 for the audit period. At 6%/7% tax rates, the total sales tax due for the audit period was $287,500.75.[1]

She employed a similar methodology to assess use tax on expenses incurred by plaintiff for the sample year 2007 (again, agreed to by the auditor and plaintiff as being representative for the audit period). From the invoices examined, she chose those which had items she deemed taxable (e.g., purchases of certain equipment such as adapters, floppy disks, speakers, cables,

[1] Sales tax was imposed at 6% for periods July 1, 1992 to July 15, 2006 and at 7% thereafter. See N.J.S.A. 54:32B-5(a)(3).

switches, water cooler rentals, memory cards), and added transactions for which invoices were missing on the premise that there was no proof that sales tax was charged to, and collected from, plaintiff on these purchases. However, items with Notes that the expense was "Consultant – IT Support for Client" or "Intercompany" were not taxed. A total of $195,585.95 was attributed to taxable expenses, and at 6%/7% tax rate, provided a total use tax for the audit period as $90,865.97.

Finally, the auditor examined the purchases of what she called "fixed assets" (equipment such as monitors, laptops, tower cartridge GPS system, network cables, thumb drive, office rack) totaling $32,375. She concluded that since the invoices were missing, the entire amount was subject to use tax on the premise that there was no proof that sales tax was charged to, and collected from, plaintiff on these purchases, therefore, plaintiff was subject to use tax. The total use tax for the audit period was $2,199.45.

On October 25, 2011, Taxation issued a Notice of Assessment imposing S&U tax of $380,566, interest of $163,259 and penalty of $32,620 (amounts are rounded).

On January 19, 2012, plaintiff filed an administrative protest. It agreed that it provided a range of IT services, for which a client would purchase a block of hours on a monthly basis. Per plaintiff, 90% of its services were non-taxable being in the nature of consulting, contract programming, design, and support, thus, at most 10% were taxable services.

On June 22, 2012, Taxation scheduled a conference but plaintiff's representative/s did not appear. The conferee concluded that plaintiff sold "lump sum hours [which] may be used for either taxable or nontaxable transaction[s]; therefore the entire transaction is taxable." Since no further information or clarification was provided as to the use tax aspect of the audit, the conferee affirmed the same. On July 18, 2012, Taxation issued a final determination affirming the audited assessment. Due to increase in the accrued interest, the total amount due was $606,402.

(B) Plaintiff's Position

In opposition to Taxation's summary judgment motion, plaintiff provided a certification from its accountant who stated that he had "reviewed the audit report and spread sheets prepared by" Taxation's auditor, agreed with the "2007 total sales figure," but disagreed with her conclusion that 97.7% of the total sales were taxable. He stated that his analysis of those very same invoices show that only 35% of the total sales are taxable because "plaintiff's maintenance contract hours, dedicated to consulting," which totaled $186,835, would be non-taxable services. Similarly, $104,561 for "firewall monitoring, internet monitoring, remote back up storage, and ADP programming and consulting," should be non-taxable. Further, a total of $140,024.48 should also be non-taxable as charges to out-of-state customers. Thus, only $242,338 of the total sales were taxable, which was 35% of the total sales ($242,338/$691,029).

The accountant's exhibit to his certification shows that he converted the auditor's schedules from her audit report into a schedule for purposes of the certification, thus, used the same 728 sampled invoices for sample year 2007. He prefaced his spreadsheet with a one page summary, noting that he took the details "from each copy of invoice as provided by Sales Tax Department," and that about 40 invoices were missing. He also noted that the excel spreadsheet "provided by Sales Tax Department," showed that the total taxable sales was $687,955.42 whereas the "final assessment taxable sales" was $691,029, but since the difference of $3,074 was minor, "we will use the sales tax auditor's taxable sales of $691,029." The preface also noted that "invoices were detailed, taxable services were easily identifiable, sales tax was charged and apparently collected" but not paid over. It also noted that plaintiff had unpaid sales tax liability of $12,857.87 (the same number reflected on the auditor's schedule).

The accountant's spreadsheet then essentially converted the auditor's schedules, used the same 728 sampled invoices from sample year 2007, but included additional columns titled Maintenance Contract; Remote Security Guard System Internet Firewall Monitoring; Hosting Fee; Internet Monitoring; Finance Charges; ADP Programming Consulting; Rent; Custom; Backup Storage; Parts, Repair Installation; Travel; Payroll Commissions, Tax Exempt; Out of State; Taxable on Invoice; Taxable Amount; Description (which mirrored the auditor's); Notes (which mirrored the auditor's). Based on the invoice description, the accountant allocated a portion of the amounts of the total invoice to one or more of the columns matching that service. For example, an invoice totaling $1,450 was allocated $850 to Maintenance Contract and $600 to Remote Security Guard System Internet Firewall Monitoring, all of which were carried to the Taxable Amount column. If the total invoice was $1,300, and described as including "Network IT Monthly Maintenance Fee, RSGS, Monthly Maintenance Support Fee, Monthly Email Subscription Fee, Unlimited Accounts," he allocated $1,000 in the Maintenance Contract column; $100 in the RSGS Column; $50 in the Internet Monitoring Column, and carried $1,250 in the Taxable Amount column. These adjustments totaled $291,296 ($186,835 for consulting and $104,561 for "firewall monitoring, internet monitoring, remote back up storage and ADP programming and consulting"). He also removed invoices totaling $140,024.08 if they described the service as being for an out-of-state client.

All these adjustments provided a 35% taxable sales rate, which when applied to the total sales for the audit period (using the same total sales numbers as used by the auditor), provided total taxable sales of $1,529,777. Applying the 6% and 7% tax rate provided for a total sales tax of $103,197.27.

As to the use tax based on expenses, he noted that the purchases (or expenses) included a mark-up in the description, which should never have been taxed. He calculated the average markup as 26% (ignoring outliers, i.e., items with high markups of 60% and above). He further noted that "of nearly every single taxable invoice," the description made it clear that the purchases were for resale, therefore, he removed $178,836 of the $195,585 expenses, leaving taxable expenses of $16,750. He recomputed the use tax for the audit period as $7,781.75.

As to the fixed asset purchases, he re-computed the total taxable purchases by using the auditor's schedule and modifying to add an additional column "Reason Not Taxable." One of the "reasons" was "Company Charges Sales Tax," meaning sellers such as Radio Shack, Home Depot, and Best Buy always collected sales tax when an item was bought. Other reasons for non-taxability were because the payment was a "credit card charge," or it was a "lease payment." He re-computed taxable asset purchases as $24,477.92, thus, re-computed use tax was $1,670.63.

FINDINGS

(A) Summary Judgment Standards

An order granting summary judgment shall be rendered if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). An issue of fact is genuine "only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid. Although the evidence is to be viewed most favorably toward the non-moving party, summary judgment may not be denied simply because the non-movant demonstrates the existence of a disputed fact. Brill v. Guardian Life Ins. Co. of Am.,

142 N.J. 520, 540-41 (1995). Rather, denial is appropriate only where the evidence is of such a quality and quantity that reasonable minds could return a finding favorable to the party opposing the motion. Id. at 534, 540.

Here, there was absolutely no opposition to Taxation's undisputed statement of material facts, even though some of those "facts" were based on the certification of the auditor, which in turn, contained hearsay information as the nature of plaintiff's business and services. The underlying basis for the auditor's spreadsheets contained information about audited invoices, yet none of those invoices were provided for objective verification. However, when queried in this regard by the court, plaintiff submitted that it had no dispute with Taxation's description of its business and services offered. Plaintiff's administrative protest, which document was undisputed for its contents and substance, contained the identical or nearly similar description of plaintiff's business. Moreover, plaintiff conceded that it did not have any additional documents other than what the auditor had reviewed. It also did not dispute the invoices reviewed or that they did not contain a breakdown of taxable versus non-taxable services. Nor did it dispute that it had not paid the collected amount of sales tax. Consequently, the court finds that Taxation's statement of material facts are not in genuine dispute for purposes of considering its summary judgment motion.

(B) S&U Tax on Retail Sales and Services on Computer Software

"The general pattern of the sales tax statute is to tax all sales of tangible personal property unless they are specifically exempt. N.J.S.A. 54:32B-3(a). Only sales of specifically enumerated services are subject to tax. N.J.S.A. 54:32B-3(b)." Williams Termite & Pest Control, Inc. v. Director, Div. of Taxation, 18 N.J. Tax 444, 446 (Tax 1999).

For the tax years at issue here (2004-2010), the S&U tax was imposed on "receipts from every retail sale of tangible personal property," unless exempted or excluded. N.J.S.A. 54:32B-

3(a). The statute was amended in 2006 to include receipts from sales of "a specified digital product for permanent use or less than permanent use."[2]

Effective October 1, 2005, "prewritten computer software" was deemed to be "tangible personal property," and its sales became subject to sales tax. N.J.S.A. 54:32B-2(g).[3] Effective 2006, "prewritten computer software delivered electronically" was included as tangible personal property, ibid., and thus taxable when sold. However, receipts from "sales of prewritten software delivered electronically and used directly and exclusively in the conduct of the purchaser's business, trade or occupation" were exempt, unless the software was "delivered by a load and leave method." N.J.S.A. 54:32B-8.56 (effective 2005). "Load and leave" means delivering the software by using a "tangible storage medium where the tangible storage medium is not physically transferred to the purchaser." Ibid.

Also taxed are receipts from "every sale, except for resale," of certain enumerated services. N.J.S.A. 54:32B-3(b)(1)-(15). Such services include producing, fabricating, processing, installing, maintaining, servicing, or repairing "tangible personal property," or (from 2006 onwards), "specified digital property." N.J.S.A. 54:32B-3(b)(1), (2). Since pre-written computer software was deemed tangible personal property, the above services, when rendered vis-à-vis prewritten computer software, also became taxable starting October 1, 2005.

Thus, prior to 2005, sales of, or receipts from, enumerated services upon prewritten computer software were not taxable. See also 46 N.J.R. 690(a) (April 24, 2014) ("Historically, the law did not impose sales tax on services performed on software in the electronic state because

[2] "Specified digital product" is defined to mean "electronically transferred digital audio-visual work, digital audio work, or digital book." N.J.S.A. 54:32B-2(zz).

[3] Prior to 2005, the term "tangible personal property" was defined as "corporeal personal property of any nature including energy." N.J.S.A. 54:32B-2(g) (pre-2005 amendment).

such software was deemed to be intangible in nature."). Due to the 2005 and 2006 amendments, "services performed on prewritten or 'canned' software in electronic form are subject to sales tax . . . [and] purchase of electronically delivered prewritten software purchased for business use became exempt." Ibid.

After the 2005 and 2006 changes, Taxation issued several publications on the taxability of computer software sales and services. See, e.g., N.J. Div. of Taxation, Tech. Bulletin 51(R) (March 13, 2007) (explaining the 2006 law changes; notifying the public that electronically delivered prewritten software, installation and maintenance services, and service contracts are taxable, however, software maintenance contracts for "only" providing "training, consultation, or . . . advice, help and customer support via telephone or online, but no software," are non-taxable "charges"); N.J. Div. of Taxation, Tech. Bulletin 51(R) (July 5, 2011) (adding information about sourcing of receipts from sales of, or services to, prewritten computer software, or of payments for software licenses or subscriptions); N.J. Div. of Taxation, Tech. Bulletin 72 (July 3, 2013) (tax on cloud computing such as SaaS, PaaS, and IaaS).[4]

In 2014, Taxation promulgated regulations essentially codifying its prior bulletins. See 46 N.J.R. 690(a), supra. The regulations were effective December 1, 2014. 46 N.J.R. 2375(a) (Dec. 1, 2014). They specifically clarified and addressed the taxability or exemption of each aspect of software sales and services. See N.J.A.C. 18:24-25.2 to 24-25.7. Thus, for instance, N.J.A.C.

[4] "SaaS" means Software as a Service. "PaaS" means Platform as a Server. "IaaS" means Infrastructure as a Service. PaaS sales and services are not taxable as long as there is no transfer of tangible personal property. IaaS sales and services are not taxable, including separately stated charges for "servicing or repairing software or hardware." SaaS sales or services are taxable unless it qualifies as "information services" such as "Westlaw, LexisNexis, CCH and RIA." "Information services" does not include sales of "consulting services to advise purchasers of their service about their hardware and/or software needs" which involves "information" gathering and "presenting a written report on findings and recommendations." N.J.A.C. 18:24-35.5(a) Example 3. Nor are sales of "contract programming services, which consist of the design, development, and implementation of computer programs based on the purchaser's particular computer system." Id., Example 4.

18:24-25.7(a)(2) restated the prior Bulletin's notice that a software maintenance contract which provides upgrades or updates to software is generally taxable, however if it "only provides customer support services," then it is a non-enumerated, non-taxable service. If a contract has both aspects (taxable and non-taxable/exempt charges), and the charges are "not separately itemized on the invoice," the regulations clarified that the entire transaction was taxable as "bundled." N.J.A.C. 18:24-25.7(a)(3). However, if a "seller can demonstrate, using a reasonable and verifiable method based on its books and records as of the time of sale, the portion of the contract that is for nontaxable or exempt products," then such portion will not be taxed. Ibid.

It should be noted that the above propositions, i.e., if charges are not itemized the entire charge is taxable, or that the charges are presumed taxable unless proven otherwise, is not new. See N.J.S.A. 54:32B-12(b); N.J.S.A. 54:32B-16 (all vendors must maintain records, including invoices, receipts or statements showing the amount of separately stated tax); N.J.S.A. 54:32B-2(oo)(2)(A) (defining the term "sales price" as not including "interest, financing, and carrying charges," provided the same are "separately stated on the invoice, bill of sale, or similar document given to the purchaser"). See also Tozour Energy Sys., Inc. v. Director, Div. of Taxation, 23 N.J. Tax 341, 354 (Tax 2007) (explaining that the scheme of the S&U Tax Act renders the taxation of non-separately itemized charges absent contrary proof as entirely valid and reasonable). Cf. Steelcase, Inc. v. Director, 13 N.J. Tax 182 (Tax 1993) (if vendor does not present Taxation with the exemption certificates, then the sales are presumed taxable, but the presumption can be rebutted with credible evidence) (citing N.J.A.C. 18:24-10.6(c)).

(1) Validity of Sales Tax Assessment for Tax Years 2004 and First Three Quarters of 2005

The first issue here is whether Taxation's assessment for tax years 2004 and a portion of 2005 is proper. In response to the court's query on the applicability of the 2014 regulations to the

2004-2010 audit period, Taxation contended that the law always taxed sales of, or services upon, tangible personal property, which was defined to include prewritten computer software. However, as noted above, that law was effective only as of October 1, 2005. Taxation itself acknowledged this. See 46 N.J.R. 690(a), supra. As a matter of law then, the audit on plaintiff's receipts for 2004 and for the first three quarters of 2005 should not be subject to sales tax regardless of the lack of breakdown on the invoices for taxable versus non-taxable services because per Taxation itself, plaintiff's business for the audit years at issue was providing IT solutions such as upgrades, installations, repairs, and maintenance to software, and at this time the tangible personal property being sold was prewritten computer software.[5]

(2) Validity of Sales Tax Assessment for October 2005 to December 2010

As to the remaining tax periods audited for sales tax, the only question is whether the accountant's re-computation of the auditor's figures suffices to overcome the presumptive correctness of Taxation's final determination. The court finds that the plaintiff has not overcome its initial burden on most sales. The accountant's allocation of a portion of the charges on several of the audited invoices as non-taxable is not substantiated or supported by any independent ascertainable facts. There is absolutely no factual explanation or basis as to how he arrived at such an allocation. There were no supporting invoices or certifications from plaintiff's members or plaintiff's clients. The sample contract provided to the court, and plaintiff's own representations to Taxation in its administrative protest, showed that there was no breakdown or itemization of the services being billed. See, e.g., TAS Lakewood v. Director, Div. of Taxation, 19 N.J. Tax 131, 139 (Tax 2000) (bare testimony of plaintiff's officer that sales should be non-taxable was

[5] This conclusion does not apply to Taxation's audit of use tax on purchases of fixed assets or fixed expenses since law for 2004 and 2005 remained the same as for later years, namely, that purchase of tangible personal property such as those involved in the audited invoices were taxable, unless proven otherwise.

insufficient since there was no "documentary evidence or records or corroborative testimony . . . to support any of plaintiff's contentions").

That the invoice contains a description of several services, some of which appear non-taxable by name, is insufficient factual basis for plaintiff's claim that the audit was improper. Simply because the invoice states "maintenance contract" does not mean that the charge (with the unexplained allocation) should be a non-taxable item. As Taxation explained:

> Charges for the sale of a maintenance contract for pre-written software are generally subject to tax. Software maintenance contracts usually include the provision of updated, supplemental, and corrected software. Contracts covering delivery of such updated, supplemental, and corrected software via tangible storage media are taxable. Contracts for the delivery of such updated, supplemental, and corrected software entirely electronically, with no tangible storage media, are also taxable *unless* these electronically delivered updates are to be used directly and exclusively in the conduct of the purchaser's business, trade, or occupation. A maintenance contract covering only entirely custom-made updates of custom software, for the exclusive use of the original purchaser, is also nontaxable, regardless of whether delivered electronically or through tangible storage media. If a software maintenance contract covers *only* the provision of training, consultation, or of advice, help and customer support via telephone or online, but no software, then the charges are not taxable.
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> [Tech. Bulletin 51(R) (March 13, 2007).]

Plaintiff argued that what was being presented was a dispute between the experts (accountant and Taxation's auditors) thus, fact-based inquiries were not implicated. However, neither individual was presented to this court as an expert, nor was this court asked to decide the credibility of an "opinion" conclusion of either party. What is at issue is the correctness of Taxation's assessment which is "presumed to be correct," and which correctness is overcome if the taxpayer can prove otherwise with cogent evidence that must "focus on the reasonableness of the underlying data used by the Director and the reasonableness of the methodology used." Yilmaz, Inc. v. Director, Div. of Taxation, 22 N.J. Tax 204, 231, 236 (Tax 2005), aff'd, 390 N.J. Super. 435 (App. Div. 2007). Bare assertions without supporting records or documentation are

insufficient to rebut the presumption of correctness. Ridolfi v. Director, Div. of Taxation, 1 N.J. Tax 198 (Tax 1980); cf. Duncan Truck Stop, Inc. v. Director, Div. of Taxation, 4 N.J. Tax 367, 375-76 (1982) (presumptive correctness of sales tax assessment overcome because plaintiff provided "bona fide business records" as evidence which was qualitatively and quantitatively solid). This court must therefore decide its correctness based on credible factual evidence, not opinions. In any event, expert opinions bereft of factual basis are worthless.

Statutory and administrative law places an obligation on a corporate taxpayer to retain adequate business records for examination and inspection by Taxation. N.J.S.A. 54:32B-16; N.J.A.C. 18:24-2.3; N.J.A.C. 18:24-2.4. Absent records, Taxation is afforded broad authority in determining the tax due from any information that may be available, including external information. N.J.S.A. 54:32B-19; Yilmaz, supra, 22 N.J. Tax at 235; see also Alpha I, Inc. v. Director, Div. of Taxation, 19 N.J. Tax 53 (Tax 2000) (indicating that where taxpayer destroys records prematurely, it places itself in jeopardy for additional tax).

Here, the auditor's schedule for sales tax liability shows that to the extent plaintiff provided documentation, Taxation reviewed the same and used what was reliable to deem a charge taxable or otherwise. To the extent invoices were missing, the auditor's methodology was reasonable. Indeed, the sample contract noted that "any Hardware or Software purchased for support of client will be billed separately." If such invoices had been provided, the audit conclusion may have been different. Taxation candidly conceded that it is very likely that many charges, had they been itemized, would have been non-taxable charges for services pursuant to Taxation's bulletins and regulations, and noted that to the extent it was so satisfied, Taxation did not include such sales in its audited sample. While it is unfortunate that plaintiff's billing methodology and contracts

lumped all services as one, the tax consequences following such a decision cannot be ignored, especially in the absence of credible evidence.

However, the auditor herself noted some of the charges as being for out-of-state clients (by address), thus, as out-of-state transactions. She provided no reason why these charges are taxable other than that they were lumped. Such a reason is contrary to specific language in N.J.S.A. 54:32B-3(b) which states that services specified under N.J.S.A. 54:32B-3(b)(1) or (b)(2) (producing, fabricating, processing, installing, maintaining, servicing, or repairing tangible personal property) are not taxable if "the tangible personal property or specified digital product upon which the services were performed is delivered to the purchaser outside this State for use outside this State." See Airwork Service Div. v. Director, Div. of Taxation, 2 N.J. Tax 329, 346 (Tax 1981) (explaining that the 1977 amendment which provided for such exemption, was "a purposeful alteration in substance of the law," and was intended to benefit New Jersey businesses which were disadvantaged due to the absence of such an exemption) (quoting Assemb. Comm. on Taxation, Statement to Assembly No. 1787 (1977)),[6] aff'd, 94 N.J. 290 (1984), cert. denied, 471 U.S. 1127(1985).

There are no regulations interpreting the exemption for sales tax if the prewritten software, or services to the same, were "delivered" to out-of-state buyers for use therein. However, in other contexts, out-of-state deliveries have been addressed as non-taxable. See, e.g., N.J.A.C.

[6] The Statement was as follows:

> The bill proposes to exempt from the sales tax services performed by New Jersey companies on tangible personal property delivered out of state. Because New Jersey is the only State, with the possible exception of New Mexico, that imposes a sales tax on such transactions, it places New Jersey businesses at a considerable disadvantage in maintaining such operations. The imposition of the tax is one which did not occur in the beginning years of the sales tax but was imposed by interpretation later. Such taxes, when assessed against New Jersey business, in many instances incur a loss because they are unable to collect from customers after the fact.

The prior law contained no exemption although it was modeled after New York's Sales Tax Act which had provided for such an exemption. See Airwork, supra, 2 N.J. Tax at 345-46.

18:24-5.11(c) (if a "fabricator" or a "contractor sells" its "fabricated product, and as a part of that sale agrees to install the product at a location outside this State," the seller is not liable for either use tax or for "the collection of sales tax on installation charges").[7]

The court therefore finds, here, that as a matter of law, inclusion of these service charges (delivered to out-of-state clients) as taxable for purposes of sales tax, was improper. For the same reason, namely, that by law a seller is not obligated to collect sales tax, it matters not that the invoices lacked a breakdown between taxable and non-taxable services. Lack of breakdown does not alter the law or create an exception to this law where it is undisputed that the sales/services were rendered/delivered to out-of-state buyers.

(3) Validity of Use Tax Assessment for Purchases of Assets and For Expenses

Plaintiff's opposition of the use tax assessment is unsubstantiated. As to the expenses, the accountant simply concluded that an examination of the auditor's description of the invoice shows most purchases were for resale. However, almost all the invoices examined did not include a description of a markup, thus, the accountant's methodology of reducing the taxable purchases by applying a modified markup to his cost of goods computation, cannot be sustained. Presumably, the basis for the resale assertion was that some of the invoices indicated a "shipping" to a specific customer. Even if the parts were purchased for resale, plaintiff could have provided Taxation its sales tax exemption certificates to prove the non-taxability of those purchases. It did not. Notably, the sample contracts had stated that "any Hardware or Software purchased for support of client

[7] The example in N.J.A.C. 18:24-5.11(c) states as follows:

> Example: A structural steel fabricator purchases steel which is delivered to his or her facility in New Jersey. The steel is fabricated as provided in shop drawing specifications for on-site installation. The fabricated structural steel is then shipped to a job site located outside this State. Such fabricated steel is not subject to tax in this State.

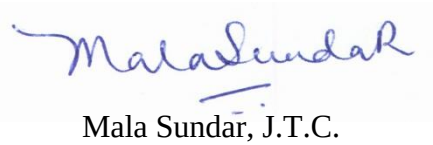
will be billed separately." No such separation was done or proven. Therefore, Taxation's methodology of imputing use tax to the expenses was reasonable.

Similarly, the accountant's removal of certain charges from the fixed asset purchases on grounds they were "credit card charge[s]" or lease payments, and that some sellers do charge tax, is not based on cogent positive evidence to negate the use tax assessment, and is even contrary to law. Lease payments are generally taxable. N.J.S.A. 54:32B-2(e) ("retail sale" includes a lease). While it may be assumed that certain vendors always charge sales tax, such assertions are not only hearsay, but amount to a net opinion, and prove nothing. It would have been a simple exercise for plaintiff to have provided some information in this regard, such as the results of an inquiry with the credit company for a delineation of all or some of the charges (the sample purchases from the commercial vendors numbered about fifteen). Some payments were also through Paypal, indicating internet purchases, and Plaintiff's lack of records goes against it in proving that tax was collected on such purchases.

CONCLUSION

Taxation's motion for summary judgment is granted in part. The use tax assessments are affirmed. The sales tax assessment is affirmed in part due to removal of tax year 2004 and the first three quarters of 2005; and removal of the out-of-state charges from the audited invoices. Taxation should provide a revised computation of the audited sales after factoring these two adjustments, and provide a conforming form of Order in accordance with this opinion by January 27, 2017.

Very Truly Yours,



Mala Sundar, J.T.C.