December 2, 2015

New York Tax Appeals Tribunal Affirms Taxpayer Bound by Consent to Sample Audit Methodology

The New York Tax Appeals Tribunal (Tribunal) has just affirmed the New York Division of Tax Appeals determination that a taxpayer that signed a consent to use a test period audit methodology was bound by the consent and waived its right to a detailed audit of the entire period. *In the Matter of Top Drawer Custom Cabinetry Corp.*, DTA No. 825588 (November 19, 2015). (See "New York Case Highlights Pitfalls of Consenting to Sampling Methodology in Tax Audit," *Day Pitney Alert*, February 20, 2015.)

On appeal to the Tribunal, the taxpayer contended that it had revoked its consent to use a test period audit methodology before completion of the audit. The facts, however, indicate that the Division of Taxation (Division) had substantially completed the audit on July 7, 2011, when the Division issued to the taxpayer a statement of proposed audit change setting forth the proposed deficiency resulting from the use of the test audit period. The taxpayer's request to withdraw its consent came at a meeting between representatives of the taxpayer and the Division on October 14, 2011. Based on those facts, the Tribunal determined:

> We reject petitioner's [taxpayer's] claim that it validly revoked its consent to a test period audit by its representative's request for a full audit on October 14, 2011. "A waiver, to the extent that it has been executed, cannot be expunged or recalled" ***(Nassau Trust Co. v Montrose Concrete Prods. Corp.,*** 56 NY2d 175, 184 [1982], ***rearg denied*** 57 NY2d 674 [1982]; ***see also O'Connor v Curcio,*** 281 AD2d 100, 103 [2001] ["a valid waiver . . . cannot be withdrawn once the parties have performed in accordance with its terms"])."
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> By substantially completing the test period audit, the Division thus executed, or performed in accordance with, the terms of the test period agreement. Under such circumstances, we agree with the Administrative Law Judge that petitioner [taxpayer] is bound by its choice to consent to the test period audit.

The Tribunal also rejected the taxpayer's contentions that the Division refused to examine or perform sample tests on other sales tax period quarters, as there was no evidence in the record to support the taxpayer's contentions.

The Tribunal's decision makes clear that a taxpayer cannot revoke a written consent to use a test period audit methodology once an audit is substantially complete. Again, this should be a reminder to carefully consider the consequences of using a test period audit methodology before signing a consent to do so with the tax authorities.