STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JURAIWAN CHEAKDKAIPEJCHARA D/B/A JULIA COFFEE SHOP	:	DECISION DTA No. 807806
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1983 through May 31, 1986.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 7, 1991 with respect to the petition of Juraiwan Cheakdkaipejchara d/b/a Julia Coffee Shop, 32-05 36th Avenue, Long Island City, New York 11106 for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1983 through May 31, 1986. The Division of Taxation appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq. of counsel). Petitioner appeared by Richard C. Antonelli, Esq.

Both parties filed briefs on exception. Oral argument was heard on November 14, 1991.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner timely filed her petition for revision of a determination of sales and use taxes.

II. Whether the notices of determination were jurisdictionally defective and, therefore, invalid.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On July 30, 1986, the Division of Taxation ("Division") mailed to petitioner, Juraiwan Cheakdkaipejchara d/b/a Julia Coffee Shop, by certified mail two notices of determination and demand for payment of sales and use taxes due, dated July 29, 1986. One notice assessed a tax deficiency of $33,077.33, plus interest of $6,653.37 and penalty of $6,870.77, for the period June 1, 1983 through May 31, 1986. The second notice imposed anomnibus penalty of $1,151.24 pursuant to Tax Law § 1145 for the period June 1, 1985 through May 31, 1986.[1]

The assessment in the two notices was based upon an audit of Julia Coffee Shop performed by the Division as a result of a bulk sale of the business by petitioner. The assessment was determined by the use of a rent factor apparently taken from Dun & Bradstreet statistics after the Division determined that the books and records supplied by petitioner's accountant, at the Division's request, were inadequate.

On the face of the notices under the subheading "Explanation" was an unchecked box next to the following statements printed in bold type:

> "THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(a)(1) OF THE TAX LAW.IF THE BOX ABOVE IS CHECKED SEE ADDITIONAL INFORMATION ON BACK

[1]It should be noted that while the auditor and Division's attorney alleged that the Division's Exhibit "F" represented three mailing receipts, dated July 30, 1986, relating to the mailing of the notices of determination (Tr., pp. 9, 17), only the mailing receipts addressed to Julia Coffee Shop bear the postmarked date of July 30, 1986 whereas the mailing receipt addressed to Bobby Calloway, petitioner's accountant, bears the postmarked date of November 27, 1989.

OF THIS NOTICE.[2] IF THE BOX ABOVE IS NOT CHECKED, THE TAX HAS NOT BEEN ESTIMATED."

Underneath the bold type in regular typed format was the following statement:

"The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records."

Attached to the notices were workpapers prepared by the Division's auditor with regard to the assessment. The workpapers were numbered 10 through 13, 14a, 15a, 16, 17c.

Petitioner's accountant, Bobby Calloway, testified that he was not aware that the tax assessment was based on an estimated assessment until he spoke with the Division's auditor sometime after the issuance of the notices. The auditor's log (Division's Exhibit "E") indicated that the audit method was not discussed with Mr. Calloway until August 15, 1986. Mr. Calloway also testified that petitioner did not show him the workpapers that were attached to the notices.

In his testimony, Mr. Calloway claimed that after he spoke with the Division's auditor, he mailed, on August 15, 1986, a petition and power of attorney[3] protesting the estimated audit

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[2] The Division submitted into evidence copies of only the front pages of the notices of determination. However, judicial notice may be taken that the back page of Form AU-16 (8/84) states as follows:

"AUDIT METHODS FOR ESTIMATED TAXES

Section 1138(a)(1) of the Tax Law provides that if necessary, the tax due may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, types of accommodations and service, number of employees or other factors. The tax due may be estimated on the basis of a test period audit. This is an audit method which utilizes a limited period within the audit period to determine the audit results for the entire audit period. Generally, all applicable records within the selected test period are examined and the results, after appropriate adjustments, are projected to the remainder of the audit period."

The back of the notice also contained the mailing address for application for hearing.

[3] In cross examination by the Division's attorney, Mr. Calloway stated that he was not enrolled with the New York State Education Department as a public accountant and had not yet obtained special permission to appear on behalf of petitioner.

method by regular mail to the address on the back of the notice. In support of this claim, petitioner offered a copy of the petition that was dated August 14, 1986 but stamped received by the Division on October 29, 1986. On the top of the petition was a handwritten notation "mailed 8/15/86."

When Mr. Calloway made a telephone call to the Division's Albany office in late October to check on the status of the petition, he was informed that there was no record that the petition had been received. Subsequently, Mr. Calloway hand delivered a copy of the petition to the Division's Queens district office on October 29, 1986.

By letter dated December 22, 1986, a conferee in the former Tax Appeals Bureau wrote to Mr. Calloway stating that because the "Control Unit [had] not been able to confirm receipt of the August 15, 1986 petition," the subsequent delivery of the petition was treated as the original petition and deemed untimely.

By petition dated January 24, 1990, petitioner requested a hearing on the issue of the timeliness of the petition alleging that the Division erred in determining that the original petition was not timely filed. Petitioner further alleged that the notice with regard to the assessment was invalid because it did not indicate that the tax was estimated as required by section 1138(a)(1) and (2) of the Tax Law. Petitioner asserted that the failure to inform petitioner that the tax assessed was estimated was a jurisdictional defect that extended the time for filing a petition, thereby making the physical delivery on October 29, 1989 timely. Finally, petitioner noted that inasmuch as the notice of determination was invalid, any assessment of the tax in question was precluded by the statute of limitations.

OPINION

The Administrative Law Judge determined that the Division timely mailed the notice of determination to petitioner, but that petitioner's petition was late filed since it was received more than 90 days after the notice was mailed by the Division.

The Administrative Law Judge next addressed whether the notice was fatally defective since it did not state that the assessment had been estimated as required by section 1138(2) of the Tax Law. The Administrative Law Judge rejected the Division's position that since the petition was late, the Division of Tax Appeals was without jurisdiction to deal with the sufficiency of the notice. Relying on Shelton v. Commissioner (63 TC 193), the Administrative Law Judge determined that issuance of a valid notice is essential to the jurisdiction of the Division of Tax Appeals; that the validity of a notice upon which a petition is based is a jurisdictional question that, when brought to the attention of the court, should be answered before the court considers whether the petition was timely filed. Thus, the Administrative Law Judge determined that the Division of Tax Appeals had jurisdiction to determine the validity of the notice.

The Administrative Law Judge cancelled the assessment on the basis that the notice issued by the Division was jurisdictionally defective because of the failure of the Division to comply with section 1138(2).

On exception, the Division reiterates its position at hearing that the failure to timely file a petition is fatal, thus, depriving the Division of Tax Appeals of jurisdiction in the matter. In the alternative, the Division asserts that the Administrative Law Judge erred in her conclusion that the failure to indicate on the notice that the assessment was estimated rendered the notice fatally defective.

In its brief on exception, the Division asserts that:

> "by attaching the actual workpapers to the notices, the Division of Taxation went well beyond the minimum requirements of the law. Consistently, errors of this nature on statutory notices have been considered excusable, particularly where no linkage between the cited error and impairment of a taxpayer's rights has been established. In this case, petitioner acknowledges what the undisputed facts establish, that she was aware of the estimated nature of the assessment notwithstanding the clerical error on the notices. Even in the face of this knowledge, petitioner failed to file a timely application for hearing. The delay, however, was a result of the mistaken assumption on the part of petitioner's accountant that a petition had been filed fifteen days after the issuance of the notices, a petition which protested among other items, the estimated nature of the assessment. If permitted into the forum, however,

> petitioner must be charged with the knowledge she did or should have had regarding the use of estimates.
>
> "In view of the lack of a causal link between the clerical error on the notices and the tardiness of the petition, a doctrine of 'no harm - no foul' should prevail. Failure of the petitioner to establish that she met the statutory deadline should serve as a bar to further proceedings in the Division of Tax Appeals" (Division's brief on exception, pp. 2-3, emphasis added).

Petitioner relies on the determination of the Administrative Law Judge that the notice was fatally defective because of the failure of the Division to comply with section 1138(2). Petitioner makes two alternative arguments: first, that she timely filed her petition and "that no written notice of the use of an estimate was ever received and that oral notice, if any, was received after the issuance and receipt of the notices of determination" and, second, that the 90-day period for filing of the petition should run from August 1, 1986, the day petitioner actually received the notice (Petitioner's brief on exception, pp. 5-8).

We deal first with the issue of whether petitioner timely filed her petition.

It is clear from the record that the Division proved that the notices at issue were mailed on July 30, 1986, by certified mail as required by Tax Law § 1147(a)(1), and that they were actually received by petitioner on August 1, 1986. Thus, the 90-day period for petitioning the notices commenced on July 30, 1986, meaning the petition had to be filed by October 28, 1986.

Further, as the Administrative Law Judge pointed out, Tax Law § 1147(a)(2) provides that if a document is required to be filed within a prescribed time period and is delivered by the United States mail after such prescribed period, the date of the United States postmark stamped on the envelope shall be deemed the date of delivery (see, 20 NYCRR 535.1[b][iii]). However, if a taxpayer uses ordinary mail, he or she bears the risk that a postmark may not be timely affixed by the postal service or that the document may not be delivered at all (Matter of Transworld Corp., Tax Appeals Tribunal, October 11, 1990; Matter of Sipam, Tax Appeals Tribunal, March 10, 1988).

In this case, since petitioner used ordinary mail for the August 15, 1986 petition, and there is no record of the petition being received by the Division, the petition delivered on

October 29, 1986 is the original petition for purposes of the 90-day period. Therefore, assuming the validity of the notices and lack of any prejudice to petitioner resulting from the failure of the Division to comply with the requirements of section 1138(a)(2) concerning the content of the notices, the petition which was received by the Division 91 days after the mailing of the notices would be untimely.

We deal next with the Division's assertion that because the petition was untimely, the Division of Tax Appeals was without jurisdiction to reach the merits of petitioner's claim that the notices were invalid.

We agree with the determination of the Administrative Law Judge.

This precise issue is one of first impression for this Tribunal, however, we find, as did the Administrative Law Judge, ample guidance in Federal mailing cases. As the Administrative Law Judge pointed out:

> "In Shelton v. Commissioner (63 TC 193), a similar issue was before the U.S. Tax Court -- did the U.S. Tax Court have the jurisdiction to determine whether a notice of deficiency was valid based on an untimely petition challenging that notice. In that case, the notice of deficiency was not mailed to the taxpayer's last known address. In reaching its decision, the Tax Court stated that:
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> > "'[t]he validity of a notice of deficiency upon which a petition is based is a jurisdictional question that, when brought to the Court's attention, should be answered before the Court considers whether the petition was timely filed' (id. at 198).
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> "The Court determined that it had 'no jurisdiction unless a proper notice of deficiency [had] been mailed to the taxpayer in accordance with the provisions of [the] law' (id.)" (see also, Mulvania v. Commissioner, 81 TC 65; Arlington Corp. v. Commissioner, 183 F2d 448; Matter of Looper v. Commissioner, 73 TC 690).

Thus, the issue of whether the notices of determination comply with the statutory requirements of Tax Law § 1138(a)(2) is appropriately before the Tribunal.

We deal next with the issue of whether the Division's noncompliance with the provisions of Tax Law § 1138(a)(2) was a fatal defect invalidating the notice as a matter of law.

We reverse the determination of the Administrative Law Judge.

Tax Law § 1138(a)(1) provides, in pertinent part, that if a sales tax return is incorrect or insufficient:

> "the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

In 1979, the Legislature amended section 1138 by adding subparagraph (2) to subdivision (a) (L 1979, ch 714).Section 1138(a)(2) provides that:

> "[w]henever such tax is estimated as provided for in this section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days" (emphasis added).

The notice at issue here clearly apprised petitioner of the amount of tax assessed; that the tax could be challenged through a hearing process; and that a petition for such challenge had to be filed within 90 days. It did not indicate that the tax was estimated.

The crux of the matter is whether the language of section 1138(2), i.e., the notice "shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated . . ." (emphasis added) is mandatory, as urged by petitioner, meaning that compliance with it is a condition precedent to the validity of the Division's action pursuant to the section (see, People v. Alejandro, 70 NY2d 133, 517 NYS2d 927, 931); or is the language directory, as urged by the Division, meaning that it is intended by the Legislature not to be disobeyed, but a disregard of it, or an inexact compliance, will constitute only an irregularity, not a fatal defect (McKinney's Con Laws of NY, Book 1, Statutes § 171).

The task is one of statutory construction and interpretation. The difficulty always is in reconciling a different result from that which would ordinarily flow from the clear mandatory language of a statute. There is no absolute test (82 CJS § 376). As stated in Matter of King v. Carey (57 NY2d 505, 457 NYS2d 216):

> "the line between mandatory and directory statutes cannot be drawn with precision [citations omitted]. The inquiry involves a consideration of the statutory scheme and objectives to determine whether the requirement for which dispensation is sought by the government may be said to be an 'unessential particular' [citations omitted] or, on the other hand, relates to the essence and substance of the act to be performed and thus cannot be viewed as merely directory [citations omitted]."

While the Legislature's use of terms such as "must" or "shall" is not conclusive, such words of command are ordinarily construed as peremptory in the absence of circumstances suggesting a contrary legislative intent (see, Escoe v. Zerbst, 295 US 490, 493; People v. Schonfeld, 74 NY2d 324, 547 NYS2d 266, 267). "Whether a given provision in a statute is mandatory or directory is to be determined primarily from the legislative intent gathered from the entire act and the surrounding circumstances, keeping in mind the public policy to be promoted and the results that would follow one or the other conclusion" (McKinney's Cons Laws of NY, Book 1, Statutes § 171; People v. Alejandro, supra; People v. Schonfeld, supra; People v. Graves, 277 NY 115).

We turn then to the legislative history of the statute. Subparagraph 2 of section 1138(a) was added along with other amendments to the Tax Law in a bill that became known as the "Taxpayer's Bill of Rights" (Memorandum of the Division of the Budget, Buffalo Evening News [June 30, 1979, B-2], Governor's Bill Jacket, L 1979, ch 714). The purpose of the bill was "to enact certain procedural reforms concerning the administration of sales tax" (Memorandum of Sen. Fred J. Eckert, 1979 NY Legis Ann, at 432). As stated by the bill's sponsor, Senator Eckert, "[t]his bill will assure certain taxpayers and vendors rights [and will] provide more information and certainty concerning their respective tax liability and hearing procedures . . ." (emphasis added).

Specifically, the bill was intended to "give taxpayers a more predictable environment in which to operate . . . [and that] [t]o further inform taxpayers, the bill calls for clearer notification of taxpayers, alerting them to the nature of the assessment and the rights of the assessed" (Memorandum of Division of Budget, Governor's Bill Jacket, L 1979, ch 714, emphasis added).

The Commissioner of Taxation and Finance, in his comments to the Governor's Counsel after the bill had been passed by the Legislature and was awaiting executive action, was generally supportive of the legislation, but expressed the reservation that "[t]he proposed amendment should be clarified to exclude estimated assessments based on audits when the taxpayer would be aware of any estimating techniques used" (Governor's Bill Jacket, L 1979, ch 714).

We find nothing in this legislative history which supports the conclusion offered by petitioner and embraced by the Administrative Law Judge and dissent herein that the Legislature intended that a failure of exact compliance with the language of the statute to be a fatal defect which renders the notice invalid as a matter of law. Indeed, we find such result drastic and somewhat unrealistic in that it would have us conclude, in effect, that the Legislature intended that the validity of the entire process depended on the Division's compliance with but one single requirement of section 1138(2). On the contrary, it is clear that the Legislature's expressed intention was to insure that taxpayers were informed of the nature of the assessments against them so that they could properly respond to those assessments through the protest procedures provided to them.

This result is consistent with the rationale of the court in Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin. (Sup Ct, Albany County, March 16, 1988, affd on other grounds 151 AD2d 822, 542 NYS2d 61), where the identical issue was dealt with by the Supreme Court in its decision. The court in Mon Paris held that the Division's failure to indicate that the tax was estimated did not invalidate the assessment. Rather, it held that a taxpayer must be prejudiced by this omission in order to invalidate the notice. Finding that the petitioner was aware of the estimated nature of the tax and of his need to pursue a remedy, the court concluded that no prejudice existed (Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin., supra;[4] see also, Matter of Pepsico, Inc. v. Bouchard, 102

[4]In Mon Paris, the taxpayer brought an action under Article 78 commenced in Supreme Court, Albany County, seeking a refund of taxes allegedly demanded unlawfully by a notice of determination. The Division moved to dismiss the petition, claiming the taxpayer had failed to utilize its administrative remedies and that this failure

AD2d 1000, 477 NYS2d 892 [notice misstating the period for which tax assessed not invalid since taxpayer not prejudiced]; Matter of Tops, Inc., Tax Appeals Tribunal, November 22, 1989 [two sales tax quarters incorrectly listed on the statutory notice did not render it invalid]). The result here is also consistent with those cases which deal with the mandatory requirement that the notice of deficiency be mailed to the taxpayer's "last known address" (Tax Law § 681[a]; Matter of Agosto v. State Tax Commn., 68 NY2d 891, 508 NYS2d 934; Matter of Riehm, __ AD2d __ [January 30, 1992]). The persuasive fact in each of these cases was that the taxpayer received the notice even though improperly addressed by the Division. In rejecting a strict construction of the word "shall" contained in section 681(a), these cases were grounded upon the legislative history of section 681(a), which stated that the purpose of its enactment was to bring New York in conformity with the comparable Federal provision, Internal Revenue Code § 6212(a) and (b). In accordance with this legislative directive, both cases followed Federal case law in reaching their decisions.

We deal next with the issue of whether the Division's noncompliance with section 1138(2) was prejudicial to petitioner. We conclude it was.

Here, petitioner filed returns and paid tax for the audit period. When notified of the audit, petitioner provided books and records to the Division at the Division's request for the purpose of allowing the Division to conduct the audit. Petitioner was never informed that the books and records so produced were not adequate to perform the audit. Further, the record is clear that when petitioner received the notice she did not understand that the assessment of tax was not based on her books and records, but was estimated. It is also clear that her representative did not understand that the assessment was estimated until after a discussion with the auditor which occurred on August 15, 1986, 15 days after the notices had been issued (Exhibit "H"). Under these circumstances, we reject the Division's assertion of "no harm - no foul" since its own

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resulted in the tax becoming finally and irrevocably fixed. The Appellate Division, in affirming the Supreme Court, did not deem it necessary to address the issue of the validity of the assessment, but affirmed on the grounds that the taxpayer's payment of tax under the Amnesty Program constituted admission of tax due, thus, making it "unnecessary to reach the other grounds the Supreme Court relied on for affirmance."

noncompliance with section 1138(2) took away 15 days of petitioner's 90-day period to file a petition by depriving petitioner of the knowledge necessary to properly challenge the assessment. The Division's position that the petition is untimely and, therefore, the assessment cannot be challenged by petitioner, would render the language in section 1138(2) with no legal or practical effect, surely not a result intended by the Legislature, nor one consistent with the purpose of section 1138(2). Accordingly, we conclude that the Division's non-compliance here thwarted the very purpose of section 1138(2), that is, providing petitioner with the information necessary to properly challenge the assessments against her, and was prejudicial to petitioner. We believe the appropriate remedy is that the petition filed on October 29, 1986 be deemed timely filed (cf., Matter of A & J Auto Repair Corp., Tax Appeals Tribunal, April 9, 1992; Matter of Negat, Inc., Tax Appeals Tribunal, April 9, 1992).

We find support for this conclusion in Arlington Corp. v. Commissioner (supra) where the notice was not mailed to the last known address of the taxpayer, which delayed the notice from reaching the taxpayer for two days, and set in motion other delays, all of which resulted in the taxpayer's petition being filed on the 91st day after the mailing of the statutory notice. The Court held that:

> "the agents of the Commissioner were negligent in failing to ascertain by a reasonable effort the correct and 'last known address' of petitioner, and that their improper addressing of the deficiency notice caused a delay in its delivery of at least one day which should be credited to petitioner so as to give the Tax Court jurisdiction over its petition. See, Dilks v. Blair, 7 Cir., 23 F2d 831; Commissioner of Internal Revenue v. Rosenheim, 3 Cir., 132 F2d 677, 680; Welch v. Schweitzer, 9 Cir., 106 F2d 885; Cf. Whitmer v. Lucas, 7 Cir., 53 F2d 1006.
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> "It follows that the decision of the Tax Court is reversed and remanded with directions to assume jurisdiction over the petition for redetermination, as amended, and grant petitioner a hearing thereon, allowing the respondent a sufficient time in which to answer under the rules. Rule 14, Rules of the Tax Court, 26 U.S.C.A. 1111" (Arlington Corp. v. Commissioner, supra, emphasis added; see also, Sicker v. Commissioner, 815 F2d 1400; McPartlin v. Commissioner, 653 F2d 1185; Crumb v. Commissioner, 635 F2d 895; Cooper v. Commissioner, TC Memo 1984-329; cf., Matter of Looper v. Commissioner, supra [petitioner found prejudiced by the failure to mail notice to last known address and notice declared invalid]; Pugsley v. Commissioner, supra [court rejected taxpayer's assertion that 90-day period for filing should

be extended because notice mailed to wrong address on grounds that no prejudice was shown, petition dismissed as untimely]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is reversed; and

3. The matter is remanded to the Administrative Law Judge for a hearing on the merits of the case.

DATED: Troy, New York
April 23, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Maria T. Jones
Maria T. Jones
Commissioner

Dissenting Opinion in the Matter of the Petition of

JURAIWAN CHEAKDKAIPEJCHARA D/B/A JULIA COFFEE SHOP

Francis R. Koenig (dissenting):

I respectfully dissent from the result reached by the majority. I would affirm the determination of the Administrative Law Judge that the Division's failure to comply with section 1138(a)(2) of the Tax Law invalidated the notice of determination as a matter of law.

The essence of the majority's decision is that in enacting the language "whenever such tax is estimated . . . such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated" (Tax Law § 1138[a][2], emphasis added), the Legislature intended this statutory direction to be mandatory only when the taxpayer did not otherwise have notice of the fact that the assessment was based on an estimated audit. In my opinion, this conclusion is inconsistent with the language of the enactment, as well as with the case law applying other statutes that prescribe the contents of other required notices.

First, if the Legislature had only meant to require the Division to notify the taxpayer that the tax was estimated, and was not concerned about the precise form of the notification, the Legislature would have enacted a provision that simply required the Division to notify the taxpayer and would not have explicitly prescribed the form that the notification would take. By explicitly describing the form of the notice, section 1138(a)(2) indicates to me that the Legislature did not intend the notification of the estimated assessment to be left to the vagaries of the audit or, as here, the post-audit process. Instead, the Legislature intended that the taxpayer be informed in a certain way (on the notice of determination) and in a definite manner (bold type, conspicuously placed).

That this was the intention of the Legislature is underscored by the legislative history material cited by the majority: "[t]his bill will assure certain taxpayers and vendors rights, [and will] provide more information and certainty concerning their respective tax liability and hearing procedures" (Memorandum of Senator Fred J. Eckert, 1979 NY Legis Ann, at 432,

emphasis added); the bill was intended to "give taxpayers a more predictable environment in which to operate . . . the bill calls for clearer notification of taxpayers, alerting them to the nature of the assessment" (Memorandum of Division of Budget, Governor's Bill Jacket, L 1979, ch 714, emphasis added).

The majority decision undermines this legislative goal of certainty, predictability and clarity because it allows the Division to issue a notice of determination that states that the tax was not estimated and to overcome this error based on subsequent oral information given to the taxpayer. A taxpayer who is the recipient of this absolutely contradictory information then has the burden, under the majority's view, to show that he has been harmed by this misinformation. In my view, this is exactly the type of situation the Legislature sought to avoid when it directed the Division, through the enactment of section 1138(a)(2), to give notice of an estimated assessment in a certain, clear manner.

Further, the majority's remedy for the harm established in this case is simply to extend the petition filing period. I believe that this conclusion further erodes the purpose of section 1138(a)(2) because this remedy provides little, if any, incentive for the Division to comply with the statute.

Although, as noted by the majority, there is nothing in the legislative history that explicitly states that the failure to comply with section 1138(a)(2) of the Tax Law renders the notice of determination a nullity, case law indicates that such an explicit statement is not necessary to give "shall" its normal mandatory meaning.

In Parker v. Mack (61 NY2d 114, 472 NYS2d 882), the plaintiffs sought to commence a civil action by serving upon the defendant two summonses unaccompanied by complaints. Despite the requirement under CPLR 305(b)[5] that a default notice shall be attached to the

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[5] CPLR 305(b) provides as follows:

> "Summons and notice. If the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought, and, except in an action for medical malpractice, the sum

summons, the papers served gave no notice of the relief sought. The New York Court of Appeals, focusing on the imperative language of CPLR 305(b), held that the failure to comply with the statutory notice requirements meant that no action was commenced. Responding to the dissent's contention that the treatment of this defect as jurisdictional should be limited to the effect of default judgments, the Court stated:

> "[w]ere such discrete - and unusual - consequences intended, the Legislature could readily have so provided. No such differentiation is evidenced in the statute however. In that circumstance, respect for legislative authority requires that we give equal effect for all purposes to the explicit addition of the imperative 'shall' in CPLR 305 [subd.(b)]" (Parker v. Mack, supra, 472 NYS2d 882, 883-884).

In Matter of Nassau Ins. Co. v. Hernandez (supra), the Appellate Division held that an insurer's failure to comply with the requirements of section 313(1) of the Vehicle and Traffic Law when issuing a notice of termination, rendered the notice invalid. Section 313(1) required a notice of termination to include a certain statement in 12 point type. In concluding that the use of 6 point type, rather than the required 12, rendered the notice invalid, the court stated:

> "[t]he requirement that 12 point type face be used is unambiguous and absolute, thereby indicating that there must be strict compliance with the statutory condition . . . . Therefore, proof that the defective notice may have been read and understood is irrelevant to the determination of whether the notice of termination is valid" (Matter of Nassau Ins. Co. v. Hernandez, supra, 408 NYS2d 956, 957; see also, In re Empire Mutual Ins. Co v. Malagoli, 133 AD2d 29, 518 NYS2d 803 [1st Dept 1987]; In re Aetna Cas. & Sur. Co. v. Morales, 70 AD2d 833, 418 NYS2d 17 [1st Dept 1979]; Cohn v. Royal Globe Ins. Co., 67 AD2d 993, 414 NYS2d 19 [2d Dept 1979], affd 49 NY2d 942, 428 NYS2d 881; Matter of Furstenberg v. Aetna Cas. & Sur. Co., 67 AD2d 580, 415 NYS2d 849 [1st Dept 1979], revd on other grounds 49 NY2d 757, 426 NYS2d 465).

Like the statutes involved in Parker and in Nassau Ins., section 1138(a)(2) describes the contents of a notice that is required to be given. In both Parker and Nassau Ins., it was held that strict compliance with the statute was required, without regard to whether actual notice was otherwise achieved, and that failure to comply rendered the notice invalid. In neither Parker nor

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of money for which judgment may be taken in case of default" (emphasis added).

Nassau Ins., did the court require explicit legislative history in order to give the term "shall" its total effect, i.e., to find the noncomplying notice a nullity.

I disagree with the comparison drawn by the majority between the instant question and that presented in both Matter of Agosto v. State Tax Commn. (supra) and Matter of Riehm (supra). The issue in the latter cases was the effect of the Division's failure to comply with the statutory direction on how the method of notification was to take place, i.e., by mailing to the last known address. In my view, cases dealing with the method of notification (see also, Margeson v. Smith, 41 AD2d 896, 342 NYS2d 727) are distinct from the case before us which involves a statute that describes the contents of a notice. Where the statute describes in mandatory terms the contents of a notice, I believe it is inappropriate to inquire whether the recipient has been informed despite the noncomplying notice (see, Parker v. Mack, supra; Matter of Nassau Ins. Co. v. Hernandez, supra).

For similar reasons, I do not find the decision in Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin. (supra) persuasive. In holding that the notice of determination was valid, the Supreme Court, Albany County, rejected the taxpayer's argument that the Division's failure to check the estimate box invalidated the assessment. In so doing, the court relied on the holding of Matter of Pepsico, Inc. v. Bouchard (supra). This reliance on Pepsico appears to be misplaced because the court in Pepsico, dealing with the failure of a notice to set forth accurately the period of assessment, stated that "the statute mandating that notice be given does not prescribe the content of the notice . . . and, significantly, that the notice given . . . accomplished its purpose of apprising petitioner that sales and use taxes had not been paid . . ." (Matter of Pepsico, Inc. v. Bouchard, supra, 477 NYS2d 892, 893). In this case, as in Mon Paris, section 1138(a)(2) specifically requires that the notice of determination reveal the estimated nature of the assessment on its face.

For all of the foregoing reasons, I conclude that the failure to comply with section 1138(a)(2) of the Tax Law rendered the notice of determination invalid and that the assessment should be cancelled on this basis.

DATED: Troy, New York
April 23, 1992

/s/Francis R. Koenig
Francis R. Koenig
Commissioner