

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	
<b>JING FONG RESTAURANT, INC.</b>	:	DECISION
<b>SHUI LING LAM AND CHUN TSUI, AS OFFICERS</b>	:	DTA Nos. 822939,
	:	822940, 822941,
for Revision of Determinations or for Refund of	:	822942, 822943,
Sales and Use Taxes under Articles 28 and 29 of the	:	822944 and 822945
Tax Law for the Period June 1, 2003 through	:	
February 28, 2005.	:	

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Petitioners, Jing Fong Restaurant, Inc., Shui Ling Lam and Chun Tsui, as officers, filed an exception to the determination of the Administrative Law Judge issued on January 6, 2011. Petitioners appeared by Miu & Co. (Louis Miu, CPA). The Division of Taxation appeared by Mark Volk, Esq. (Lori Antolick, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on September 14, 2011 in New York, New York.

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

***ISSUES***

I. Whether the Division of Taxation correctly determined that additional sales and use taxes were due from petitioners.

II. Whether petitioners have established any facts or circumstances warranting the reduction or abatement of penalties.

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact “2” and “9,” which have been modified. The Administrative Law Judge’s findings of fact and the modified findings of fact are set forth below.

Petitioner Jing Fong Restaurant, Inc. (Jing Fong) is a large restaurant that offers on-premises dining and also provides a catering service. The serving area is approximately one-half the size of a football field.<sup>1</sup>

We modify finding of fact “2” of the Administrative Law Judge’s determination to read as follows:

The Division’s auditor, Renel Saint-Amour, conducted the relevant audits of petitioner and testified at the hearing. On June 22, 2006, the Division of Taxation (Division) mailed a letter to Jing Fong that scheduled a field audit on July 11, 2006 for the period June 1, 2003 through May 31, 2006. The letter stated that “[a]ll books and records pertaining to the sales and use tax liability, for the audit period, must be available on the appointment date.” A schedule of books and records to be produced was attached to the letter. The Division did not receive a reply to this letter, and on the date of the proposed appointment, the auditor went to petitioner’s place of business and was greeted by a manager. At the restaurant, the auditor received the name and telephone number of petitioner’s representative. Later in the afternoon, the auditor received a telephone call from an individual in the representative’s office stating that they could not meet at the scheduled time.<sup>2</sup>

On September 19, 2006, the auditor received a waiver of the statute of limitations from petitioner’s representative. The audit period was then extended through August 31, 2006.

On October 20, 2006, the representative’s office asked to postpone the appointment scheduled for October 26, 2006 because the date was not convenient for him. The appointment

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<sup>1</sup> The liability asserted against the individual petitioners was based upon their status as responsible officers of Jing Fong and is derived from the audit of the restaurant. Accordingly, a reference to petitioner is a reference to Jing Fong.

<sup>2</sup> We modify this fact to more accurately reflect the record.

was rescheduled to December 14, 2006.

On December 19, 2006, the Division was required to reschedule the appointment because of a mandatory meeting. The appointment was rescheduled for January 11, 2007, and the audit period was extended through November 30, 2006. On December 21, 2006, the Division made an additional written request for records. On December 26, 2006, petitioner's representative asked to postpone the audit until after the tax season. On April 13, 2007, a member of the representative's staff requested that the audit be postponed until July 2007.

On May 14, 2007, the Division prepared estimated assessment information for processing. On May 29, 2007, the Division issued a Notice of Determination to Jing Fong (assessment # L-028625181), which assessed sales and use tax for the period June 1, 2003 through August 31, 2004 in the amount of \$182,935.07 plus penalty and interest for a balance due of \$356,071.13. The notice stated that, since Jing Fong did not submit adequate records for an audit, the Division determined that it owed tax, penalties and interest based upon available records and information. The notice was based on the disallowance of exempt sales and the conclusion that certain purchases were subject to tax. This notice was challenged by the filing of a request for a conciliation conference and later, the filing of a petition with the Division of Tax Appeals. The Division also issued Notices of Determination, dated May 29, 2007, to Shui Ling Lam and Chun Tsui, as responsible officers of Jing Fong, which assessed sales and use taxes for the period March 1, 2004 through August 31, 2004. To the extent that the notices overlap tax periods, the assessments are premised upon the same findings as used in the assessment against Jing Fong in the notice dated May 29, 2007.

On June 18, 2007, the Division and petitioner's representative discussed the status of the audit and scheduled an appointment for July 18, 2007. The representative was also advised that the audit period would be extended through May 31, 2007.

On July 5, 2007, the Division, among other things, issued an additional request for records. On July 18, 2007, an auditor went to petitioner's representative's office and was advised that the representative had not arrived and was instructed to wait. Shortly thereafter, a member of the representative's staff led the auditor to a desk that contained the following: a copy of the federal income tax return for the fiscal year ended November 30, 2005, a power of attorney, copies of sales tax returns for the period September 2003 through May 2007, a spreadsheet of the sales journal for the entire audit period and some bank statements. This was the first time the Division was provided with any records.

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

On July 18, 2007, the Division mailed petitioner's representative a list of additional records needed for the audit for the period September 1, 2006 through November 30, 2006. The list included: cash register tapes and guest checks for the test period, sales invoices or documents for banquets for the test period, sales invoices and related exemption documents for the test period, purchase invoices or documents relating to assets, purchase invoices or documents relating to recurring expenses, federal income tax returns for the fiscal years ended November 30, 2004 and November 30, 2006, and the sales journal worksheet for December 2006.<sup>3</sup>

On August 31, 2007, the Division scheduled an appointment for October 10, 2007 in order to continue the audit. On September 13, 2007, at the request of petitioner's representative, the appointment was rescheduled to October 15, 2007. On October 15, 2007, the Division received: an updated power of attorney, copies of cash register tapes and guest checks, copies of

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<sup>3</sup> We modify this fact to more accurately reflect the record.

sales invoices, the sales journal worksheet for December 2006 through May 2007, and copies of the most recent utility bills.

On October 18, 2007, the Division completed the transcript of the available guest checks and cash register receipts for September 2006. On this date, petitioner's representative promised to provide the auditor with the additional information needed to complete the audit. The auditor attempted to schedule the next meeting but petitioner's representative declined because he wanted to review the list of missing information or information needed with petitioner before scheduling the next meeting.

On November 1, 2007, the Division faxed petitioner's representative another list of records needed for the audit. This list included credit card statements, purchase invoices or documents pertaining to assets, purchase invoices or documents regarding recurring expenses and copies of the federal income tax returns that had previously been requested.

The Division issued a Notice of Determination, dated November 23, 2007, (assessment # L029458681), to Jing Fong, which assessed sales and use tax for the period September 1, 2004 through November 30, 2004 in the amount of \$52,307.90 plus penalty and interest for a balance due of \$99,676.98. The assessment was based upon the disallowance of exempt sales and the conclusion that there were purchases that were subject to tax. The Division also issued a notice dated December 6, 2007 to petitioner Shui Ling Lam (assessment # L029482822), which assessed sales and use tax for the period September 1, 2004 through November 30, 2004 for the same amount of tax, penalty and interest as that assessed against Jing Fong.

On January 15, 2008, the Division scheduled a meeting to be held on January 31, 2008. On this date, an assistant to petitioner's representative showed the auditor into a conference room with two piles of invoices. Except for three invoices, all of the invoices were for recurring

purchases outside of the test period of September 1, 2006 through November 30, 2006. No other records were presented.

On February 8, 2008, the auditor was directed to issue an assessment for the period that would expire. On February 21, 2008, the Division issued a Notice of Determination (assessment number L029729328) to Jing Fong that assessed sales and use tax for the period December 1, 2004 through February 28, 2005 in the amount of \$17,891.17 plus penalty and interest for a balance due of \$32,303.99. As was the case with the prior notices, the assessment was premised upon the disallowance of exempt sales and the sales and use tax due on Jing Fong's recurring purchases. The Division also issued a Notice of Determination, dated February 25, 2008, to Chun Tsui, as a responsible officer of Jing Fong, which assessed the same quarterly period for the same amount of sales and use tax plus penalty and interest for a balance due of \$32,435.35.

On May 6, 2008, the auditor met with petitioner's representative. During the meeting, the representative presented the auditor with certain recurring expense invoices that were found to be the same invoices that were presented on January 31, 2008. He also offered to fax the auditor copies of the federal income tax returns for the fiscal years ended November 30, 2004 and November 30, 2006. In addition, petitioner's representative presented credit card statements, which the auditor transcribed.

On April 7, 2008, the Division sent a letter requesting the production of the following documents for the period June 1, 2003 through May 31, 2007: credit card statements; purchase invoices or documents relating to purchases of furniture and fixtures, equipment, computer, software, leasehold improvement and other assets; purchase invoices or documents relating to garbage removal, office expenses, storage, supplies and linen expenses; and copies of federal returns for the fiscal years ended November 30, 2004 and November 30, 2006. On October 15,

2008, the auditor sent an additional letter requesting certain documents for the entire audit period, including: cash register tapes and guest checks, payroll records, bank statements, banquet records, sales invoices, cash receipts journal, exemption documents, fixed asset purchase invoices, expense invoices, computer generated files, copies of leases for the audit period and financial statements.

On November 19, 2008, the auditor went to petitioner's representative's office to complete the audit. However, none of the records requested in the letter of October 15, 2008 were available. Petitioner's representative promised to have the records available for the audit in two weeks and an appointment was scheduled for December 18, 2008.

Upon returning to the office, the section head directed the auditor to cancel the appointment scheduled for December 18, 2008. On December 15, 2008, the audit team leader and the section head held a conference with the representative wherein they discussed the status of the audit, the records needed for the audit and an appointment for the next field meeting. On March 9, 2009, the auditor, among other things, drafted another letter requesting all records needed for the audit. On March 25, 2009, the auditor attended a meeting with petitioner's representative. After, some initial confusion over whether there was an appointment, petitioner's representative made a presentation for nearly a half-hour. However, none of the records that were previously requested were made available. Petitioner's representative declined to discuss the audit or schedule an appointment to continue the audit but promised to contact the Division after "tax season."

When the Division completed its review of the available records, it had obtained sales tax returns for the period in issue, the 2005 federal income tax return, the general ledger, an incomplete set of cash register tapes and guest checks for the period September 2006 through

November 2006 and bank statements. The Division opined that Jing Fong's records were inadequate for conducting an audit because, even with the assistance of petitioner's representative, it could not reconcile what the taxpayer reported on the sales tax return with the records that were made available. For instance, the Division could not reconcile the documentation on exempt sales with the amounts reported on the sales tax returns. Further, the Division prepared a transcript of the cash register tapes and guest checks. The net total of the guest checks for September 2006 was \$4,300.00. This month was chosen as part of the block sample. The auditor observed that there were only nine guest checks for September 1, 2006, no guest checks for September 2, 2006 through September 4, 2006, six guest checks for September 5, 2006 and no guest checks for September 6, 12, 14, 24 and 25. A number of boxes with documents were presented, but all of the boxes presented were incomplete. Although bank statements were provided, they were not used because they could not be tied into the general ledger or the tax returns. In order to perform an audit, the Division felt that it needed a complete set of cash register tapes and guest checks, that is, any kind of record that Jing Fong used to record sales.

The Division utilized several approaches in order to determine the amount of sales and use taxes due. The Division disallowed the exempt sales claimed by petitioner on its sales tax returns for which the Division did not receive documentation.<sup>4</sup> In order to determine the amount of tax due, the auditor divided the average of the total exempt sales claimed by petitioner on its sales tax returns during the audit period by the number of quarters in the audit period. The

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<sup>4</sup> Documentation was provided to support some exempt sales. One invoice, for a sale made to Engineers Without Borders USA, Inc., was disregarded because it was purportedly written in a foreign language and the auditor could not discern who was the customer. Although there were invoices that were written in Chinese, this particular invoice was written in both Chinese and English. Petitioner also submitted a letter from the Internal Revenue Service to substantiate this organization's tax exempt status as an IRC § 501(c)(3) organization.



applicable sales tax rate was then applied to each quarter. The amount of additional sales tax found due on this portion of the audit was \$210,121.24.

The auditor also examined the amount of tax due on recurring purchases. In furtherance of this task, the auditor requested a “block sample” of documentation for the period September 1, 2006 through November 30, 2006. In response, the Division received a portion of the general ledger that contained information regarding fixed assets, leasehold improvements and general administrative expenses. Since no documentation was provided to substantiate the entries on the general ledger for the test period, the purchases recorded on the general ledger were held subject to tax. The amount of tax due during the test period was \$4,966.66. This amount was applied to the entire audit period resulting in tax due on recurring purchases in the amount of \$79,466.56.

Following a review of the general ledger, the auditor found that petitioner owed tax on capital expenditures. Although requested, petitioner did not provide any invoices to substantiate the information found on the general ledger for items such as leasehold improvements. The Division imposed tax on each item for which petitioner could not substantiate the payment of tax. The total amount of tax found due on capital expenditures during the audit period was \$74,542.89.

On the basis of the forgoing, the total amount of tax found due from Jing Fong during the period June 1, 2003 through May 31, 2007 was \$364,130.69. Nevertheless, the amount of tax assessed by the Division and challenged by Jing Fong, through the filing of petitions, was \$448,052.10 computed as follows:

Notice Date	Assessment Number	Period	Tax Assessed	Interest Assessed	Penalty Assessed	Total Assessed
06/19/07	L-028625181	06/01/03 - 08/31/04	\$182,953.07	\$102,690.52	\$70,427.54	\$356,071.13

11/23/07	L-029458681	09/01/04 - 11/30/04	52,307.90	26,446.10	20,922.98	99,676.98
02/21/08	L-029729328	12/01/04 - 02/28/05	17,891.17	9,045.51	5,367.31	32,303.99
<b>TOTAL:</b>			<b>\$253,152.14</b>	<b>\$138,182.13</b>	<b>\$96,717.83</b>	<b>\$448,052.10</b>

Similarly, the amount of tax challenged by Ling Lam Shui through the filing of petitions was \$230,198.04 computed as follows:

Notice Date	Assessment Number	Period	Tax Assessed	Interest Assessed	Penalty Assessed	Total Assessed
05/29/07	L-028632040	03/01/04 - 08/31/04	\$69,356.93	\$33,027.95	\$27,742.58	\$130,127.46
12/06/07	L-029482822	09/01/04 - 11/30/074	52,307.90	26,839.70	20,922.98	100,070.58
<b>TOTAL:</b>			<b>\$121,664.83</b>	<b>\$59,867.65</b>	<b>\$48,665.56</b>	<b>\$230,198.04</b>

The amount of tax challenged by Chun Tsui through the filing of petitions was \$162,472.81 determined as follows:

Notice Date	Assessment Number	Period	Tax Assessed	Interest Assessed	Penalty Assessed	Total Assessed
05/29/07	L-028632039	03/01/04 - 08/31/04	\$69,356.93	\$33,027.95	\$27,742.58	\$130,127.46
02/25/08	L-029748998	12/01/04 - 02/28/05	17,891.17	9,086.87	5,367.31	32,345.35
<b>TOTAL:</b>			<b>\$87,248.10</b>	<b>\$42,114.82</b>	<b>\$33,109.89</b>	<b>\$162,472.81</b>

This matter is the third sales tax audit of Jing Fong. The first audit resulted in an assessment of sales and use tax that was calculated utilizing a ratio of gratuities to sales. Thereafter, the Division utilized a rent factor to calculate the amount of tax due. However, this assessment was cancelled at a conciliation conference. The second audit assessed sales and use tax upon gratuities received by the waiters and waitresses. This assessment was cancelled by the Tax Appeals Tribunal.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge first found that since petitioners had not filed a petition challenging the assessments for the periods after February 28, 2005, the Division of Tax Appeals did not have jurisdiction to rule on such assessments.

Next, the Administrative Law Judge concluded that petitioner Jing Fong was a vendor under the Tax Law and, as such, was required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division. The Administrative Law Judge found that the Division had requested the relevant books and records from petitioners, but that petitioners failed to provide the Division with all of the relevant documents requested. Thus, the Administrative Law Judge determined that the Division properly estimated petitioners' tax liability. The Administrative Law Judge noted that after the Division estimates a taxpayer's tax liability, the burden then rests upon the taxpayer to demonstrate that the audit methodology or the amount of the assessment was erroneous. The Administrative Law Judge explained that if the testimony or analysis provided by the auditor at the hearing presented an incorrect perspective, it was incumbent upon petitioners to come forward with evidence refuting the matter in dispute. The Administrative Law Judge found that petitioners did not present sufficient evidence challenging the findings of the auditor. Furthermore, the Administrative Law Judge found that petitioners had not met their burden of proof to abate the applicable penalties. Thus, the Administrative Law Judge upheld the relevant Notices of Determination with an adjustment for an exempt sale to a group named Engineers Without Borders USA, Inc.

***ARGUMENTS ON EXCEPTION***

Petitioners raise the same arguments on exception as they did below. Specifically,

petitioners argue that: a) adequate books and records were provided to the auditor and that the use of an estimation of tax liability was not justifiable; b) even though they provided the auditors with various books and records during the audit, throughout the process the auditor kept issuing demand letters for certain records that had already been provided by them; and c) there was no rationale behind the auditor's calculation of additional tax due.

The Division argues that the Administrative Law Judge correctly upheld the relevant Notices of Determination (as modified) and correctly determined that petitioners failed to show that reasonable cause existed for the abatement of penalties. The Division reiterates that, although requested by the auditor, petitioners failed to provide significant supporting records to substantiate petitioners' accounting of certain transactions.

### ***OPINION***

As Jing Fong is a "vendor" under Tax Law § 1101(b)(8), petitioners were "required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division" (*Matter of AGDN, Inc.*, Tax Appeals Tribunal, February 6, 1997). The records required to be maintained "include a true copy of each sales slip, invoice, receipt, statement or memorandum" (Tax Law § 1135[a]; 20 NYCRR 533.2[b][1]).

Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return is not filed, "or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available." (Tax Law § 1138[a][1]). When acting pursuant to section 1138(a)(1), the Division is required to select an audit methodology reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the audit methodology or the amount of the assessment was

erroneous (*Matter of Your Own Choice*, Tax Appeals Tribunal, February 20, 2003). In the case at hand, petitioners have failed to provide certain necessary documentary evidence to support the accounting positions taken in their books and records and presumably on their tax returns.

Petitioners have failed to show that the Division's approach was unreasonable.

As the Administrative Law Judge noted, the Division made repeated requests for petitioners' records. When a particular request was not completely satisfied, the Division made additional requests for the same records. Petitioners' representative asserted that the Division continued to mail one letter after another requesting documents after those documents had already been submitted to the Division. The tax field audit record shows that while many records were eventually provided, there still remained a series of unfulfilled requests for documents by the auditor. We do note that although petitioners failed to provide all of the necessary documentation requested, at various times throughout the audit, petitioners did provide certain documentation that the auditor requested; however, even after receiving such information, the auditor issued additional document requests to petitioners, which included therein demands for documentation already provided by petitioners. Such was inappropriate and not in conformity with the appropriate professional practice standards. Moreover, the Division inappropriately attempted to use the reissuance of the same demand lists as proof that none of the items listed on the earlier lists were provided to the Division. Petitioners' representative stresses his valid criticism that, although the auditor was provided with numerous documents that were responsive to the auditor's demands, the subsequent demand lists were never changed to reflect what had already been delivered. The problem magnified itself when petitioners submitted documents that they thought were responsive to a number of items on the demand list; however, the auditor determined that the submission was only sufficiently responsive to a lesser number of items from

the list. That fact would not have been problematic had the auditor indicated to petitioners which items were determined to have been sufficiently responded to. Instead, the auditor continued to issue to petitioners the entire list again with no indication (on the list itself or otherwise) of exactly which documents were outstanding. As such, petitioners were left in the unfortunate position of not knowing what items were sufficiently addressed. The record in this case is not clear enough to determine exactly when and what documents were supplied to the auditor, although such may have been useful in addressing the level of competency of the audit performed. Ultimately, however, the Division's behavior in this regard did not relieve petitioners of their obligation to present all of the relevant documentation.

Petitioners correctly note that on the transcript of cash register tapes for September 2006, the auditor mistakenly entered the total net cash amount for September 2006. However, the error is of no consequence because this spreadsheet was not utilized in his final audit calculations.

Petitioners focus on the alleged contradictory conclusions in the audit workpapers regarding taxable sales and exempt sales. Petitioners note that the schedule of returns filed shows different amounts of taxable and exempt sales than on the worksheets prepared by the auditor. Petitioners assert that this difference shows that the worksheets are contradictory and confusing. This argument is misguided. The difference in the amounts stated on the different documents is attributable to the fact that one set of amounts was based on what Jing Fong reported and the second set of amounts was based on a review of the general ledger, taking into consideration that certain entries lacked any supporting documentation.

Petitioners have established that one adjustment to the audit warrants a modification. During the audit of exempt transactions, petitioners presented an invoice for a banquet sale to a group named Engineers Without Borders USA, Inc., to show that the sale should be accounted

for as exempt from tax. Petitioners offered into evidence a letter from the Internal Revenue Service stating that the organization was exempt from federal income tax pursuant to Internal Revenue Code (IRC) § 501(c)(3). Since Tax Law § 1116(a)(4) is similar to IRC § 501(c)(3), it is appropriate to look to federal law for guidance (*see Matter of Great Neck-Port Washington*, Tax Appeals Tribunal, September 5, 1991). We agree with the Administrative Law Judge that under the circumstances, it was an error to impose tax on this sale and that the portion of the assessment premised upon sales to unsubstantiated exempt organizations should be revised to reflect that this sale should be accounted for as exempt from sales tax.

The Division asserted a penalty pursuant to Tax Law § 1145(a)(1)(i). Tax Law § 1145(a)(1)(i) states that any person failing to file a return or to pay over any sales or use tax shall be subject to a penalty. This penalty may be cancelled if the failure was “due to reasonable cause and not due to willful neglect” (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Division’s regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) “must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect” (20 NYCRR 2392.1[a][1]). In the case at hand, the records provided by petitioners were insufficient and petitioners have not established that the failure to pay sales tax was due to reasonable cause and not willful neglect.

Finally, we note that a proceeding before the Division of Tax Appeals is commenced by the filing of a petition protesting a written notice of the Division of Taxation (Tax Law § 2008 [1]). Petitioners did not file a petition challenging the assessments for periods after February 28, 2005. Therefore, the Division of Tax Appeals lacks jurisdiction to rule on the merits of such assessments.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jing Fong Restaurant, Inc., Shui Ling Lam and Chun Tsui, as officers, is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Jing Fong Restaurant, Inc., Shui Ling Lam and Chun Tsui, as officers, are granted to the extent indicated in conclusion of law “P” of the Administrative Law Judge’s determination, but in all other respects are denied; and
4. The Notices of Determination, dated May 29, 2007, November 23, 2007, December 6, 2007, February 21, 2008 and February 25, 2008, as modified in paragraph “3” above, together with penalty and interest, are sustained.

DATED: Albany, New York  
February 23, 2012

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
President

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner