STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| HOUSE OF LLOYD, INC. | : | DETERMINATION<br>DTA NO. 812039 |
| 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 September 1, 1986 through February 28, 1990. | : | |

Petitioner, House of Lloyd, Inc., 11901 Grandview Road, Grandview, Missouri 64030, filed a petition 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 September 1, 1986 through February 28, 1990.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 12, 1994 at 10:15 A.M., with all briefs to be submitted by August 15, 1994. Petitioner, appearing by Hodgson, Russ, Andrews, Woods & Goodyear, Esqs. (Paul R. Comeau, Esq., and Michel P. Cassier, Esq., of counsel), submitted a brief on June 3, 1994. The Division of Taxation, appearing by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel), submitted a responding brief on July 15, 1994. Petitioner submitted a reply brief on August 17, 1994.

ISSUES

I. Whether, pursuant to the terms of Tax Law § 1138(c), petitioner consented to the fixing of tax due for the period in question.

II. Whether the Division of Taxation is entitled to reject petitioner's tender of a consent pursuant to Tax Law § 1138(c).

III. Whether the Division of Taxation's issuance of notices of determination constituted a rejection of petitioner's consent offers such that petitioner's failure to timely protest such notices bars petitioner from challenging the amount of tax in question.

FINDINGS OF FACT

The facts in this matter are, for the most part, not in dispute and have been stipulated.[1]

Petitioner, House of Lloyd, Inc., headquartered in Grandview, Missouri, sells various items of tangible personal property primarily through the medium of in-home parties.

On or about August 30, 1989, the Division of Taxation ("Division") commenced its field audit of petitioner's business operations. The audit continued through 1989 and into 1990 until approximately early May 1990, by which time the Division had arrived at its calculation of tax owed by petitioner.

The Division issued to petitioner four statements of proposed audit adjustment ("Form AU-3"), setting forth the amounts of tax, interest and penalty asserted as due by the Division pursuant to its audit findings. Two of such statements are dated May 4, 1990, while the other two statements are dated May 7, 1990. The May 4, 1990 statements indicate tax due in the amounts of $443,972.53 and $16,565.35, respectively, plus penalty and interest in each case, thus resulting in total amounts due of $700,647.16

and $22,009.27, respectively. The May 7, 1990 statements indicate the imposition of omnibus penalties (only) in the respective amounts of $1,426.28 and $44.87.

At the bottom of each of the four statements of proposed audit adjustment, the following paragraph appears:

> "The Tax Law provides that a taxpayer is entitled to have a tax due finally and irrevocably fixed by filing a signed consent with the State Tax Commission. Such consent subject to review and approval, waives the ninety (90) day period for fixing tax due. It does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth by law. The agreement to and signing of this statement constitutes such a consent. YOU MAY CONSIDER AN APPROVAL OF THIS MATTER FINAL IF YOU ARE NOT NOTIFIED TO THE CONTRARY WITHIN 60 DAYS FROM THE DATE THE SIGNED CONSENT IS RECEIVED BY THE DEPARTMENT."

Directly below said paragraph is an area where the taxpayer may sign the form to indicate

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[1]As Exhibit "E" at hearing the parties submitted a stipulation of facts with respect to this case. Said stipulated facts have been included in the Findings of Fact herein, together with additional facts to completely reflect the record.

its consent to the amounts set forth on the form. More specifically, said area provides boxes for the "Signature of Owner, Partner or Corporate Officer", "Title" and "Date". In addition, each of the statements issued to petitioner contains specific information showing petitioner's name, address and taxpayer identification number, as well as a "check-off" area to indicate the nature of the audit (i.e., correspondence, audit of records, information on file at office, other), and a specific listing of the sales tax periods involved and the dollar amounts of tax, penalty and interest computed as due.[2]

On June 5, 1990, petitioner contacted the Division by telephone regarding the consent forms (see, Finding of Fact "13"). Thereafter, on

June 20, 1990, petitioner returned to the Division each of the consent forms, together with full payment of the tax, penalties and interest indicated as due on said forms. On each of such forms the signature, title and date sections are completed as signed by one Saul D. Kass, petitioner's vice-president/ controller, on June 19, 1990 (with regard to the first such form) and June 6, 1990 (with regard to the other three forms). In addition, each of the four consent forms includes the handwritten phrase "paid under protest" appearing, in each instance, directly under the listing of dollar amounts due and directly above the consent paragraph on the face of the form.

On June 26, 1990, the Division acknowledged receipt of the consent forms and accompanying payment in full of all amounts indicated as due thereon.

On June 29, 1990, the Division issued to petitioner four notices of determination and demands for payment of sales and use taxes due (the "statutory notices"). The parties have stipulated that although the statutory notices were dated June 20, 1990, they were not in fact mailed until June 29, 1990 (i.e., after the Division had acknowledged receipt of the consent

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[2]The parties agree that the Statement of Proposed Audit Adjustment (Form AU-3) as described is an appropriate form on which to make the consent allowed under Tax Law § 1138(c) (see, 20 NYCRR former 535.6). Such forms AU-3 are sometimes referred to hereinafter as "consent forms".

forms and payment by petitioner).[3]

On June 9, 1992, petitioner filed an application for refund ("the refund claim") seeking a return of the amounts paid under the consent forms. Other than the issuance of the statutory notices described above, the Division did not send petitioner any written correspondence with respect to the consent forms and their effect between the June 20, 1990 date

petitioner submitted such forms and the June 9, 1992 date petitioner filed its refund claim.

The Division acknowledged receipt of the refund claim on June 12, 1992, and thus it is undisputed that the refund claim was filed within two years of the date of petitioner's payment of the amounts in issue.

On November 5, 1992, the Division issued a letter denying petitioner's refund claim. Petitioner, in turn, filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). By letter dated March 31, 1993, BCMS advised that petitioner was not entitled to a conciliation conference. More specifically, petitioner's request for conference was denied on the basis that petitioner had failed to protest the statutory notices within 90 days of their issuance and that, having so failed, petitioner was not entitled to proceed via a refund claim for the amounts in question under Tax Law § 1139.

On June 29, 1993, petitioner commenced the instant proceeding by filing a petition with the Division of Tax Appeals. The parties have agreed that it is appropriate to bifurcate this matter into two components, to wit, (a) the procedural issue of whether petitioner is entitled to a hearing with regard to the substantive merits of its refund claim and (b) if petitioner prevails, a hearing thereafter on the substantive merits of said refund claim.

As may be relevant to this proceeding, the auditor's log of contacts and comments listing audit activities reveals a June 5, 1990 entry where petitioner's assistant controller (Thomas Steil) telephoned the auditor to inquire about the Division's computation of interest as set forth

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[3]The parties have agreed that the Division need not introduce proof as to the certified mailing of the statutory notices.

on the statements of proposed audit adjustment. Thereafter, there is a June 11, 1990 entry revealing the auditor's return telephone call and the mailing of certain workpapers pertaining to the tax and interest computations. Finally, there is a June 26, 1990 entry which recites as follows:

> "Received payment in full under protest. S/W [spoke with] Tom Steil. He said he did not receive items mailed on 6/11/90. He requested we mail them out again. I told him when he receives assessment notices to be sure to formally protest."[4]

In her testimony at hearing, the auditor's supervisor described the telephone conversation with Mr. Steil. She stated her belief that advising Mr. Steil as described above (i.e., "when he receives assessment notices to be sure to formally protest") meant and conveyed the understanding that the consents had been rejected and a protest within 90 days was required. She stated this belief notwithstanding that petitioner's assistant controller (Mr. Steil) was not specifically advised with the words "the consents have been rejected."

Petitioner submitted two affidavits, one made by Thomas C. Steil and one made by Saul D. Kass. The Steil affidavit indicates that Mr. Steil was not an officer of the corporation and, therefore, he did not have the authority to bind petitioner or act as its formal representative in agreeing that the tax at issue was in fact due. Mr. Steil's affidavit goes on to state that he advised the Division that any such matter should be directed to Saul D. Kass, petitioner's vice-president and controller. Finally, with regard to the auditor's telephone conversation, Mr. Steil avers that he did not recall being informed that the consents were rejected, or instructing the Division to keep the payments petitioner had made pursuant to such forms.

The affidavit made by Saul D. Kass reflects his claim that of the persons involved in the audit on petitioner's behalf, he was the one with the authority to act officially and bind petitioner. Paragraph 6 of said affidavit sets forth Mr. Kass's claim that he understood the

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[4] A subsequent entry dated June 27, 1990 notes that the auditor remailed the computation schedules requested by Thomas Steil.

consents to relate only to the "amount of tax dollars developed by the audit" and his understanding "that...a protest on the substantive issue of taxability could be brought later through a refund claim. . . ." Mr. Kass avers that he carefully read the language included on the statements of proposed audit adjustment and signed the same under his belief that doing so would preserve petitioner's right to file a refund claim at a later date. He states that at the time the consent forms were signed, as well as at the present time, the dollar amount of tax indicated thereon was not challenged and that petitioner simply was not conceding the ultimate issue of whether it is subject to tax by New York State.[5] Paragraph 11 of the Kass affidavit relates to the phrase "paid under protest", as written by Mr. Kass on the statements of proposed audit adjustment. He claims that such phrase was written to protect against any suggestion that petitioner was conceding jurisdiction or that there was nexus between petitioner and New York. Furthermore, paragraph 12 indicates Mr. Kass' understanding that since the statutory notices reflected acceptance of petitioner's payments, the consents had been accepted by the State. In this regard, the face of each of the statutory notices carries the following item: "Note: Your payment

of [the amount shown on each of the notices] dated [date of notice] will be applied to this notice number."

SUMMARY OF THE PARTIES' POSITIONS

The Division argues that petitioner's insertion of the words "paid under protest" on the statements of proposed audit adjustment (see, Finding of Fact "6") vitiated the consents. Thus, the Division asserts that the statutory notices as issued were not only proper but were in fact required, and that petitioner's failure to protest the same within 90 days of their issuance leaves the assessments fixed and not subject to protest or challenge in any manner, including by refund

[5]As is set forth in the petition, and as Mr. Kass avers in his affidavit, petitioner's primary objection to taxability is based on the position that petitioner does not have requisite nexus with New York State so as to allow New York State to impose upon petitioner an obligation to collect and remit tax.

claim. Alternatively, the Division maintains that even if the consents as submitted with payment were valid, the Division nonetheless retained the right to reject such consents. On this score, the Division argues that its issuance of the statutory notices served to advise petitioner that its tendered consents were rejected, thus leaving petitioner to protest the statutory notices within 90 days of their issuance or be barred from contesting the same. The Division admits that it neither issued letters nor orally advised petitioner in specific words that its consents were rejected, but rather argues that such position was clearly conveyed to petitioner both by the issuance of the statutory notices themselves and by the comments allegedly made by the supervising auditor to petitioner's assistant controller in the June 26, 1990 telephone conversation.

In contrast, petitioner points out that it complied with the requirements of Tax Law § 1138(c) in executing the consent forms at issue. Petitioner argues that its addition of the words "paid under protest" did not vitiate the consents or have any impact other than to indicate petitioner's intent to preserve its rights to challenge the assessments via refund applications per Tax Law § 1139(c). Petitioner goes on to argue that the consent need not be made within 30 days of the Division's issuance of the forms AU-3 in order to be effective, noting instead that such time period is stated in connection with the Division's advice that failure to consent within 30 days would result in the issuance of statutory notices. Finally, petitioner maintains that not only were its consents valid, but also that the Division does not have any right to reject a taxpayer's consent under Tax Law § 1138(c) and, alternatively, if such a right of rejection exists, the Division failed to inform petitioner that it had exercised this right within 60 days (the time period for rejection set forth on the face of form AU-3).

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides for the Division's issuance of notice of its determination that a taxpayer owes additional sales and/or use tax. Said section goes on to provide that a taxpayer receiving such a statutory notice of determination may protest that notice within 90 days of its issuance, but that failure to do so leaves such determination finally

and irrevocably fixed as an assessment, with the taxpayer losing any right to challenge the same.

B. Tax Law § 1139(c), dealing with refunds, carries over and applies the above general rule by its first sentence, which provides that:

> "[a] person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section eleven hundred thirty-eight [i.e., by the issuance of a statutory notice of determination] where all opportunities for administrative and judicial review as provided in article forty of this chapter have been exhausted with respect to such determination."

However, Tax Law § 1139(c) goes on to provide an exception to this general rule prohibiting challenge where certain circumstances have been met. Specifically, Tax Law § 1139(c) permits the filing of a refund claim challenging the amount of tax assessed, as follows:

> "However, a person filing with the commissioner of taxation and finance a signed statement in writing, as provided in subdivision (c) of section eleven hundred thirty-eight, before a determination assessing tax pursuant to subdivision (a) of section eleven hundred thirty-eight is issued, shall, nevertheless, be entitled to apply for a refund or credit pursuant to subdivisions (a) and (b) of this section, as long as such application is made . . . within two years of the date of payment of the amount assessed in accordance with the consent filed . . . but such application shall be limited to the amount of such payment."

C. Finally, Tax Law § 1138(c), as referenced above, provides as follows:

> "A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto" (emphasis added).

D. In plain terms, the interplay of the above-quoted statutory sections sets forth the Division's power to issue assessments of tax, as well as a taxpayer's right to either challenge the same within 90 days or lose the right to do so. In addition, said sections also provide for a taxpayer to acknowledge and consent to an amount of liability, thereby obviating the requirements of the issuance of a statutory notice and the 90-day protest waiting period thereafter (i.e., a taxpayer may consent to an assessment). However, by so consenting to an assessment, a taxpayer does not entirely forego its right to protest such assessment. Rather, said right to challenge is specifically preserved, to wit, the taxpayer may protest by filing a claim for refund of any such amount assessed within two years of the date of payment thereof.

E. In order to resolve this matter, the first line of inquiry must focus on whether the consent forms, as executed, were valid. If such consents were not valid, then there appears to be no question that the statutory notices were proper and became finally and irrevocably fixed given petitioner's admitted failure to protest the same within 90 days. On the other hand, however, if the consents were valid (notwithstanding inclusion of the words "paid under protest"), then the issue devolves to whether the Division had a right to reject such consents, did so, and clearly communicated such rejection to petitioner. In turn, if there was no right of rejection or if such rejection was not clearly communicated to petitioner, then petitioner's failure to protest the statutory notices will not bar petitioner's right to a hearing on the merits of its refund claim. Conversely, if the Division could and did clearly apprise petitioner that its consents were rejected, then petitioner's failure to protest the statutory notices will bar petitioner from proceeding to a hearing on the merits of its refund claim.

F. In light of the statutory framework set forth above, three conditions must be met in order to allow protest of an assessment via a refund claim. These three conditions are: (1) that the refund application must be filed within two years from the date of payment of the tax at issue; (2) that the tax at issue must have been paid pursuant to the taxpayer's decision to have the amount of tax fixed (assessed) by consent pursuant to Tax Law § 1138(c); and (3) that the assessment by consent under Tax Law § 1138(c) must have been made before the statutory notice of determination was issued. In turn, the focus of this case may be narrowed because two of the three conditions set forth above have been met. First, there is no dispute that petitioner's formal refund application was filed within two years from the date the tax in question was paid (see, Finding of Fact "10"). Secondly, the parties agree that the Statement of Proposed Audit Adjustment (Form AU-3) is an appropriate form by which the Tax Law § 1138(c) consent may be made. In this regard, there is no dispute that petitioner signed and submitted said forms AU-3 together with checks in payment of the amounts shown due thereon prior to the dates on which the statutory notices of determination were issued (see, Findings of Fact "7" and "8").

Thus, the first and third of the requisite three conditions set forth above are not at issue.[6] Therefore, only the second condition, i.e., that the tax in question must have been paid pursuant to the taxpayer's decision to have the amount of tax fixed by consent pursuant to Tax Law § 1138(c), remains at issue.

G. There is no dispute that petitioner, by its authorized representative, Saul D. Kass, signed, dated and returned the consent forms together with full payment of the amounts shown as due thereon prior to the date the statutory notices of determination were issued. In fact, via testimony, the auditor's supervisor stated that such steps without more would have resulted in acceptance of the consents as valid. However, in addition to signing and dating the consents, petitioner also included the three words "paid under protest" in writing on the face of the consent documents. It is this line of writing which is at the heart of the dispute herein.

H. If it is not obvious, then it is certainly implicit that when one makes payment of a tax "under protest", that taxpayer is setting forth its position that it is, or will be in the future, seeking a return/refund of such payment. As described, there is no question that petitioner properly and fully completed the consent forms but, in addition, added the phrase "paid under protest". Although the Division claims that indicating protest is the antithesis of indicating consent, it is crucial to note that what is anticipated by the interaction of Tax Law §§ 1138(c) and 1139(c) is that a taxpayer may consent to the amount of tax proposed by the Division without necessity of the Division's issuance of a formal assessment document (i.e., a statutory notice of determination), but that by so consenting a taxpayer does not forego its right to challenge the assessment of such tax. By this mechanism, a taxpayer may consent and bypass the normal statutory notice issuance and 90-day challenge period, may pay the tax in order to terminate the accrual of interest on any tax deficiency, and may file a claim for refund as a

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[6]The third condition (i.e., consent must be made before the notice of determination is issued) has been met to the extent that the forms AU-3 were in fact submitted before the statutory notices were issued. However, such conclusion does not establish that the forms AU-3 as submitted constituted valid consents per Tax Law § 1138(c).

means of challenging the tax paid. Thus, while "consent" and "protest" are ordinarily terms at odds, such semantic conflict is essentially negated within the context of Tax Law §§ 1138(c) and 1139(c).

I. It has been held that a challenge or protest indicated by writing words similar to those herein (i.e., paid under protest) on a statement of proposed audit adjustment is premature and of no force with regard to preserving challenge rights against a subsequently issued notice of determination (Matter of West Mountain Corp. v. Dept. of Taxation & Fin., 105 AD2d 989, 482 NYS2d 140, affd 64 NY2d 991, 489 NYS2d 62). However, in West Mountain, there was no claim that the petitioner was consenting to (or paying) the amount of proposed assessment. Under the facts presented in this matter, there is no apparent reason why petitioner's method of consenting and paying and including the words "paid under protest" should not be construed as a valid consent coupled with a concurrent informal refund claim. In fact, while it may be assumed (and while it may be the usual course of events) that a refund claim is submitted after a consent is executed, Tax Law § 1139(c) does not require that the refund claim must be made later than the date of the consent. In fact, there is no apparent reason why a taxpayer could not, in the same envelope, include three documents, to wit, a signed Form AU-3, a check tendering payment of the amount shown due thereon, and a refund claim. There is certainly and clearly sufficient evidence on the face of Form AU-3 to apprise the Division of what is at issue and what is protested.[7] While the Division

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[7]The issue of informal claims for refund has been addressed by the Tax Appeals Tribunal. In this regard, the Tribunal has noted that:

> "[t]he federal courts have frequently ruled that a timely claim for refund can be made in an informal manner. A valid informal claim must have a written component that adequately apprises the taxing authority that a refund is requested and the tax year in question. It must contain enough information to enable the taxing authority to begin an investigation of the matter, if it so chooses (citations omitted)" (Matter of Laurance B. Rand as guardian of Hope Sayles, Tax Appeals Tribunal, May 10, 1990).

The Tax Appeals Tribunal recently reaffirmed its holding in Rand in Matter of Greenburger (Tax Appeals Tribunal, September 8, 1994). In that case, the Tribunal determined

argues that petitioner's consents were invalid because they were "conditional", the condition allegedly imposed by petitioner was nothing more than what is anticipated under the statute (i.e., a claim for refund). Thus, under the facts of this case, the Division's argument that the consents in question were invalid or were vitiated because petitioner indicated it was protesting the tax must be rejected. In fact, there would be no reason to have signed the consent forms if petitioner was not consenting. The consents are therefore deemed to be valid, in that petitioner complied with the requirements set forth on the face of the consents and with the requirements as set forth in Tax Law § 1138(c). In sum, petitioner opted to: (a) consent to the assessment of the liabilities shown on the statements of proposed audit adjustment, (b) terminate the accrual of interest on such liabilities via simultaneous payment of the amounts shown as due, (c) obviate any need or requirement for the Division to issue any statutory notices assessing the amounts found due on audit and provide a 90-day protest period, and (d) concurrently preserve its rights and indicate the position that petitioner could challenge the assessments. Accordingly, petitioner's refund claim should be heard on the merits, unless the Division had the right to reject petitioner's otherwise valid consents to have the tax fixed and, if so, clearly communicated such a rejection to petitioner in this case.

J. Notwithstanding petitioner's arguments to the contrary, it has been decided that the

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that the words "paid under protest" written on the face of a check paid upon the filing of a deed constituted a valid informal claim for refund of real estate transfer tax.

Additionally, the Federal courts have held:

> "[A] notice fairly advising the Commissioner of the nature of the taxpayer's claim . . . will . . . be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period" (United States v. Kales, 314 US 186, 41-2 US Tax Cas ¶ 9785 [1941]).

In the instant matter, the words "paid under protest" clearly indicate petitioner's disagreement and expectation of return of the amounts it was remitting. The forms AU-3 certainly identify the tax, periods and amounts in dispute, and thus meet the criteria for an informal refund claim as set forth in prior Tribunal decisions and in Federal cases.

Division does retain the right to reject the tender of a consent under Tax Law § 1138(c) (Matter of Adirondack Steel Casting Co. v. State Tax Commn., 121 AD2d 834, 504 NYS2d 265; Matter of Kayton Specialty Shop, Tax Appeals Tribunal, January 17, 1991). As the Appellate Division held in Matter of Adirondack Steel (supra), Tax Law § 1138(c) specifies that the consent may be made "in [and on] such form as the tax commission shall prescribe." The Court held that since the consent form (AU-3) issued to petitioner by the Division expressly provided that it was subject to the Division's approval (here the consent form included the express reservation of a 60-day period within which the Commissioner could reject such consent), such consent was not final and binding per Tax Law § 1138(c) until approved. That is, a right to reject a tendered consent remains with the Commissioner. Accordingly, given that the consent forms here were valid, but the Division had the right to reject such forms, the only remaining question becomes whether the issuance of the notices of determination under the circumstances presented herein constituted a rejection of the consents which was clearly communicated to petitioner.

K. In Matter of Adirondack Steel (supra), rejection of that petitioner's consent via the Division's subsequent issuance of notices of determination was upheld where there was no question that the petitioner understood that the initial consent documents (statements of proposed audit adjustments) as issued failed to include certain quarterly periods which were covered by the audit (which periods were included and reflected on documents given to the petitioner by the Division prior to the issuance of the consent forms). This case presents dissimilar facts. First, unlike Matter of Adirondack Steel (supra) and Kayton Speciality Shop (supra), no additional monies were sought from petitioner in this case. Petitioner had made full payment, and the Division had, as is indicated on the face of the notices of determination, accepted and applied such payment against the amounts in question. Furthermore, the auditor's advice (to be sure to formally protest when the statutory notices are issued) must be evaluated in light of the nature of the conversations involved. Review of such conversations, as described in the auditor's log and in her testimony, reveals that it is at least possible, and perhaps probable, that petitioner understood its consents as filed served to preserve its right to challenge the

amount in question via a refund claim, and that "be sure to formally protest" could as easily have been understood to mean "be sure to file a timely refund claim preserving your rights" as "be sure to file a petition contesting notices of determination which have been paid."[8] Issuing statutory notices showing tax paid is not the same as specifically advising that consents are rejected. Hence, while a notice of determination can constitute a rejection as described (Matter of Adirondack Steel, supra), the facts in this matter do not clearly and unambiguously support a conclusion that petitioner undeniably realized that the notices of determination constituted a rejection of its consents, that petitioner was required to file a petition, and was by its failure to do so precluded from pursuing its challenge via refund claim. Such being the case, petitioner's request for a hearing on its claim for refund was improperly denied and the

matter should proceed to the merits of petitioner's refund claim. In reaching this conclusion, it is important to remember that what is at stake herein is petitioner's right to a hearing and not the substantive merits of petitioner's case. The unique facts of this case, and specifically the conclusion that reasonable minds could differ as to whether the consents were invalid, militates in favor of preserving petitioner's right to a hearing (see, Matter of Eastern Tier Carrier Corp., Tax Appeals Tribunal, December 6, 1990).[9]

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[8]In practical terms challenging a notice of determination, where payment has been made and accepted by the Division prior to issuance of such notice, is in essence a conversion of what might be an assessment to a refund claim.

[9]In passing, it is noted that petitioner had initiated a declaratory judgment action in Supreme Court, Albany County with regard to this matter (House of Lloyd, Inc. v. James W. Wexler, Commissioner of Taxation & Fin., Index No. 4470-93). By order dated June 15, 1994, the Court (Harris, J.) dismissed said action based on (1) petitioner's failure to exhaust its administrative remedies, (2) lack of jurisdiction for petitioner's failure to have challenged the statutory notices within 90 days of issuance and/or to have timely instituted the declaratory judgment action, and (3) lack of support for petitioner's claim of insufficient nexus to allow imposition of the tax assessed in this case. While both parties have referred to such Supreme Court order, it is clear that the same is not dispositive since (a) the Court itself acknowledged that by filing a petition with the Division of Tax Appeals, petitioner "will receive a hearing at least on the issue of whether it may have a hearing on the merits", and (b) the parties have stipulated that the statutory

L. The petition of House of Lloyd, Inc. is hereby granted to the extent that petitioner is entitled to a hearing with regard to the merits of its refund claim. Said hearing shall be scheduled in due course.

DATED: Troy, New York
February 9, 1995

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

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notices were issued on June 29, 1990 (i.e. after the consents were received by the Division). This latter fact is critical in that Supreme Court's order is premised in part on the erroneous belief that the statutory notices were issued on June 20, 1990 (i.e., prior to the filing of the consents).