

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
SHANGHAI PAVILION, INC.,	:	DETERMINATION
MENG XIA CHEN AND	:	DTA NOS. 822318, 822137
CHENG JIAN LIN	:	AND 822138
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period June 1, 2000 through May 31, 2003.	:	

Petitioners, Shanghai Pavilion, Inc, Meng Xia Chen and Cheng Jian Lin, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2000 through May 31, 2003.

A consolidated hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 4, 2009 at 10:30 A.M., with all briefs to be submitted by May 22, 2009, which date began the six-month period for the issuance of this determination. Petitioners appeared by Louis Miu, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert Tompkins, Esq., of counsel).

ISSUES

I. Whether the transaction at issue constituted a transfer in bulk under Tax Law § 1141(c) so that the transferee Shanghai Pavilion, Inc., became liable for estimated sales tax determined to be due from the transferor, L.C. Shanghai, Inc.

II. Whether the Notice of Determination addressed to Shanghai Pavilion, Inc., as the purchaser in a bulk sale transaction, was issued beyond the statute of limitations.

III. Whether petitioners Meng Xia Chen and Cheng Jian Lin filed timely petitions with the Division of Tax Appeals following the issuance of notices of determination.

FINDINGS OF FACT

1. L.C. Shanghai, Inc., operated a restaurant located at 1378 Third Avenue, New York, New York. The Division of Taxation (Division) conducted a sales tax field audit of L.C. Shanghai, Inc., between April 1, 2003 and February 7, 2006.

2. L.C. Shanghai, Inc., filed its final New York State and Local Sales and Use Tax Return for the period September 1, 2004 through November 30, 2004 on or about December 20, 2004. The corporation's sales tax identification number was indicated on the return as 13-4087071.

3. L.C. Shanghai, Inc., filed its final Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return, form NYS-45, for the quarter ended December 31, 2004. The return lists 12 individuals, along with their social security numbers, gross wages paid during the quarter of reporting, annual gross wages subject to withholding and total taxes withheld. Among the individuals are petitioners Meng Xia Chen and Cheng Jian Lin. The withholding identification number of the corporation is listed on the return as 134087071.

4. During the course of the audit, L.C. Shanghai, Inc. executed six consents extending period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law which collectively extended the period of limitations for the period June 1, 2000 through February 28, 2003 to June 20, 2006.

5. As a result of the audit, the Division issued to L.C. Shanghai, Inc., a Notice of Determination, dated February 21, 2006, for the period June 1, 2000 through May 31, 2003 assessing sales and use taxes in the amount of \$305,876.40, plus penalty and interest. On February 24, 2006, the Division issued a Notice of Determination for sales and use taxes due in the amount of \$305,876.40, plus penalty and interest for the period June 1, 2000 through May 31, 2003 to petitioner Shanghai Pavilion, Inc. (assessment identification number L-026641262) as an officer or responsible person of L.C. Shanghai, Inc.

6. Petitioner Shanghai Pavilion, Inc., filed a New York State Department of Taxation and Finance Application for Registration as a Sales Tax Vendor on November 14, 2004. The address of the business location was listed as 1378 Third Avenue, New York, New York. The date indicated for the start of business was November 1, 2004, and the reason for the application was the starting of a new business. Petitioner Meng Xia Chen was listed as the president of the corporation. The corporation's federal employer identification number was listed on the application as 201795328. A New York State Sales Tax Certificate of Authority was issued to Shanghai Pavilion, Inc. - Evergreen Shanghai Restaurant, 1378 Third Avenue, New York, New York, ID# 201795328. The certificate of authority was validated on November 17, 2004.

7. Shanghai Pavilion, Inc., filed an Application for Endorsement Certificate with the New York State Liquor Authority on October 7, 2005, requesting a corporate name change. The application requested that the corporate name of the licensed premises be changed from L.C. Shanghai, Inc., federal identification number 13-4087071, to Shanghai Pavilion, Inc., federal identification number 20-1795328, and stated that the ownership of both corporations was the same. The application listed Cheng Jian Lin as president and 100 percent shareholder of the corporations.

A renewal application was filed by Shanghai Pavilion, Inc., on June 26, 2006 for a license to sell alcoholic beverages at retail for consumption on the premises with the State Liquor Authority. The renewal application lists petitioner Cheng Jian Lin as the president of the corporation.

8. Shanghai Pavilion, Inc., filed quarterly combined withholding, wage reporting and unemployment insurance returns, form NYS-45, for the quarters ended December 31, 2004, June 30, 2005, September 30, 2005 and December 31, 2005. Among the individuals listed on the returns are petitioners Meng Xia Chen and Cheng Jian Lin and five other individuals also listed on L.C. Shanghai, Inc's final Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return. The withholding identification number of the corporation is listed on the returns as 201795328.

9. On March 5, 2007, the Division issued to Shanghai Pavilion, Inc., a letter advising petitioner that the Division had information that a possible bulk sale transaction had occurred between L.C. Shanghai, Inc., as seller, and petitioner, as purchaser. The letter further advised petitioner that under the Tax Law, a notification of sale, transfer or assignment in bulk form (AU-196.10) is required to be filed ten days prior to the date of sale. As the Division's records indicated that such a notification had not been received, the letter requested that petitioner complete the enclosed Form AU-196.10 and return it within 20 days of the date of the letter. On March 26, 2007, the Division again requested that Shanghai Pavilion, Inc., provide a completed bulk sale notification. No response was received from petitioner.

10. On April 5, 2007, the Division issued to Shanghai Pavilion, Inc., a Notice of Claim to Purchaser serving notice of a possible claim for any New York State and local sales and use taxes due from the seller, L.C. Shanghai, Inc. The letter further provided as follows:

You are hereby notified that, in spite of any provisions contained in the sales contract, except as indicated in condition number two listed below, no distribution of funds or property, to the extent of the amount of the state's claim, may be made before the following conditions have been met:

1. The Department of Taxation and Finance has determined the seller's liability, if any.
2. Payment of such liability has been made to the department (payment may be made from the funds being withheld in accordance with Section 1141(c) of the Tax Law).
3. This office has authorized you to release the funds or property.

No response was received from petitioner.

11. On April 10, 2007, the Division issued a letter to Shanghai Pavilion, Inc., again requesting that it file a notification of sale, transfer or assignment in bulk and advising that the seller's sales tax liability could be transferred to petitioner under Tax Law § 1141(c). The letter also requested a copy of the contract of sale, payment of the transferor's tax liability from escrow funds and payment of sales tax due on the transfer of tangible personal property. No response was received from petitioner.

On the same date, the Division issued to L.C. Shanghai, Inc., a Notice to Seller requesting certain books and records, and attached a copy of a Consolidated Statement of Tax Liabilities, which included the Notice of Determination issued on February 21, 2006 in the amount of tax due of \$305,876.40, plus penalty and interest. No response was received from L.C. Shanghai, Inc.

12. On April 10, 2007, the Division canceled the Notice of Determination (assessment identification number L-026641262) issued to petitioner Shanghai Pavilion, Inc., as an officer/responsible person of L.C. Shanghai, Inc.

13. The Division issued to petitioner Shanghai Pavilion, Inc., on May 11, 2007, a Notice of Determination of sales and use taxes due in the amount of \$305,876.40. The notice explained that petitioner was liable as a bulk sale purchaser for the taxes determined to be due from the seller, L.C. Shanghai, Inc.

14. The Division of Taxation issued to petitioner Cheng Jian Lin, as a responsible person of L.C. Shanghai, Inc., a Notice of Determination dated February 24, 2006 which was addressed to petitioner at 25-34 76th Street, East Elmhurst, New York 11370-1426. The notice bears assessment identification number L-026641260-7 and assesses sales tax of \$305,876.40, plus penalty and interest, for a total amount due of \$651,708.22 for the period June 1, 2000 through May 31, 2003. The subject Notice of Determination and the corresponding “Mailing Cover Sheet” bears petitioner’s name and address as listed above and certified mail control number 7104 1002 9730 1152 1798.

On the same date, the Division issued a Notice of Determination to petitioner Meng Xia Chen as a responsible person of L.C. Shanghai, Inc., and addressed to petitioner at 25-34 76th Street, East Elmhurst, New York 11370-1426. The notice bears assessment identification number L-026641261-6 and assesses sales tax in the amount of \$305,876.40, plus penalty and interest, for a total amount due of \$651,708.22 for the period June 1, 2000 through May 31, 2003. The subject Notice of Determination and the corresponding “Mailing Cover Sheet” bears petitioner’s name and address as listed above and certified mail control number 7104 1002 9730 1152 1804.

15. Notices of determination, such as the ones at issue, are computer-generated by the Computerized Case and Resource Tracking System (CARTS) Control Unit of the Division of Taxation. The computer preparation of such notices also includes the preparation of a certified

mail record (CMR). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number.

The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service (USPS) through return of the CMR to the CARTS Control Unit.

16. Each computer-generated notice of determination is predated with its anticipated mailing date and each is assigned a certified mail control number. This number is recorded on the CMR under the heading "Certified No." The certified number for each notice appears on a separate one-page "Mailing Cover Sheet" that is generated by CARTS for each notice of determination. The CMR lists an initial date (the date of its printing) and time in its upper left corner which is generally about 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage and mailing. The printing date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, the CMR lists a run date of "20060451700" (meaning February 14, 2006, 5:00 P.M.), which has been manually changed to "2/24/06."

17. After notices of determination, along with accompanying mail cover sheets and appropriate enclosures, are placed in window envelopes by Division personnel, the envelopes are then placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail." A staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk also performs a random review of up to 30 pieces of mail against the information contained on the CMR.

Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or the employee's initials (or signature) or both to the CMR. In this case, the stamped envelopes and CMR were delivered to the Colonie Center branch.

18. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the CARTS Control Unit.

19. The CMR relevant to this case is a 16-page, computer-generated document entitled "Certified Record for Presort Mail - Assessments Receivable." This CMR lists 170 certified control numbers, each of which is assigned to an item of mail listed thereon. That is, corresponding to each listed certified control number is a notice number (under the heading "Reference No."), the name and address of the addressee, and postage and fee amounts. There are no deletions from the list.

20. Information regarding the subject notices of determination is contained on page 9 of the CMR. Specifically, corresponding to the certified control number 7104 1002 9730 1152 1798 is reference (notice) number L026641260, along with petitioner Cheng Jian Lin's name and address, which are identical to that listed on the subject Notice of Determination and on the related Mail Cover Sheet. In addition, corresponding to certified control number 7104 1002 9730 1152 1804 is notice number L026641261, along with petitioner Meng Xia Chen's name and address which are identical to that which is listed on the subject Notice of Determination.

21. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service dated February 24, 2006 and the initials of a Postal Service employee.

22. On page 16 of the CMR there is a preprinted entry of “170” corresponding to the heading “Total Pieces and Amounts.” Below the total pieces entry, and below the heading “Total Pieces Received at Post Office,” the number “170” has been manually written and circled. The initials of a postal service employee appear next to the handwritten “170.”

23. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the handwritten “170” on page 16 as described indicate that all 170 pieces of mail listed on the CMR were received at the post office.

24. The Division generally does not request, demand or retain return receipts from certified or registered mail.

25. The procedures followed and described herein were the normal and regular procedures of the Division’s CARTS Control Unit and Mail Processing Center, and such procedures were followed in the issuance and mailing of the pieces of certified mail on February 24, 2006.

26. The facts set forth above in Findings of Fact 15 through 25 were established through affidavits of Patricia Finn Sears and James Steven VanDerZee. Ms. Sears is employed as a supervisor of the Refunds, Deposits, Overpayments and Control Units which includes the CARTS Control Unit. Ms. Sears’s duties include supervising the processing of notices of determination prior to their shipment to the Division’s Mail Processing Center for mailing. Mr. VanDerZee is employed as a mail and supply supervisor in the Division’s Registry Unit. Mr. VanDerZee’s duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

27. The fact that the Postal Service employee wrote and circled “170 ”on the last page of the CMR to indicate that this was the number of pieces received at the post office was

established through the affidavit of Mr. VanDerZee. Mr. VanDerZee's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

28. Petitioner Cheng Jian Lin's 2004 New York State Resident Income Tax Return (Form IT-201) was filed on June 28, 2005. Petitioner Meng Xia Chen's 2004 New York State Resident Income Tax Return (form IT-201) was filed on June 27, 2005. These were the last returns filed by petitioners prior to February 24, 2006, the date of the notices of determination at issue. These returns list for both petitioners the address 25-34 76th Street, East Elmhurst, NY 11370. This address is the same address to which the notices of determination were sent by the Division (*see* Finding of Fact 14).

29. In support of petitioner Cheng Jian Lin's position that he did not receive the Notice of Determination at issue herein, petitioner submitted copies of bank statements for the November 2005 through December 2005 and July 2006 through August 2006 periods, an automobile insurance policy with a payment due date of August 7, 2005 and copies of checks written in early January 2006. Each of the submitted documents show petitioner Cheng Jian Lin's address as 4 Queens Street, Syosset, NY 11791.

In support of petitioner Meng Xia Chen's position that she did not receive the Notice of Determination at issue herein, petitioner submitted a copy of her driver's license, copies of bank statements for periods November 2005 through August 2006, the same automobile insurance policy with a payment due date of August 7, 2005, copies of checks written in early January 2006 and a traffic ticket summons from the New York City Department of Finance, dated March 31,

2006. Each of the submitted documents show petitioner Meng Xia Chen's address as 4 Queens Street, Syosset, NY 11791.

30. In a letter dated July 18, 2008 from an attorney of the Office of Counsel of the Division of Taxation to petitioners' representative, the Division conceded that petitioners Cheng Jian Lin and Meng Xia Chen had never received the notices of determination issued on February 24, 2006.

31. A Collection Notice and Consolidated Statement of Tax Liabilities, both issued by the Division to petitioner Cheng Jian Lin and both dated June 4, 2007, were attached to petitioner Cheng Jian Lin's petition, which was filed with the Division of Tax Appeals on February 20, 2008. The Collection Notice was addressed to petitioner Cheng Jian Lin at 4 Queens Street, Syosset, NY 11791. The Consolidated Statement of Tax Liabilities, which was enclosed with the Collection Notice, lists as a liability subject to collection assessment L-026641260-7, and further lists the tax assessed of \$305,876.40, plus accrued interest and penalty. Attached to petitioner Meng Xia Chen's petition filed with the Division of Tax Appeals on February 20, 2008 is a copy of a Collection Notice which is dated June 4, 2007. The Collection Notice, in section A thereof, informed petitioner Meng Xia Chen of the assessment which is the subject of this proceeding (Assessment No. L-026641261-6 in the amount of \$305,876.40, plus penalty and interest). The Collection Notice was sent to petitioner Meng Xia Chen's new address, i.e., 4 Queens Street, Syosset, NY 11791-3004.

32. As the collection notices and consolidated statements of tax liabilities were attached to petitioners' petitions, it is clear that petitioners actually received such notice and were, therefore, made aware of the existence of the assessments at issue herein. There is no evidence

in the record, however, as to the date on which petitioners received the collection notices and consolidated statements of tax liabilities.

33. The conciliation orders issued by the Bureau of Conciliation and Mediation Services on November 10, 2006 in the Matters of Cheng Jian Lin and Meng Xia Chen reduced the amount of sales tax determined to be due from each individual to \$51,891.30, plus penalty and interest.

CONCLUSIONS OF LAW

A. Tax Law § 1141(c) requires the purchaser in a bulk sale transaction to give notice of such sale to the Division at least ten days before taking possession of or making payment for the business assets. Compliance with this provision affords the purchaser protection against becoming liable for the seller's unpaid sales tax liabilities. That is, upon the timely filing of a notification of bulk sale, the Division is obligated to inform the purchaser of the existence of a possible claim for sales and use taxes owing by the seller (20 NYCRR 537.6[a][3]). Once this notice of claim is provided to the purchaser, it is then advised of the existence of such claim of taxes due from the seller and of its personal liability for such taxes to the extent of the greater of the fair market value of the assets transferred or the consideration paid (*see* 20 NYCRR 537.0[c][2]; 537.4[a][1];[c]). Thus, a purchaser may protect itself by placing the consideration to be paid for the transfer in escrow, pending resolution of the Division's claim, so as to be available in the event a liability is determined and upheld. In contrast, if the purchaser fails to file a proper and timely notice of bulk sale, then such purchaser remains personally liable for the sales and use taxes due from the seller.

B. The term "bulk sale" is defined at 20 NYCRR 537.1(a) to mean:

any sale, transfer or assignment in bulk of any part or the whole of business assets, other than in the ordinary course of business, by a person required to collect tax and pay the same over to the Department of Taxation and Finance.

This regulatory definition of “bulk sale” includes transfers “by way of gift” providing as an example of a bulk sale: “A husband makes a gift of all his business assets to his wife” (20 NYCRR 537.1[a][3], Example 4; *see also Matter of Gauhan*, Tax Appeals Tribunal, May 14, 1992 [a “sale of assets as part of a liquidation of the seller’s business is considered to be within the purview of section 1141(c)”]).

C. Furthermore, a bulk sale can exist even when the purchaser is not required to transfer over to the seller “any sums of money” (*see Matter of Peconic Bay Motors, Inc.*, Tax Appeals Tribunal, September 26, 1991 [Tax Law § 1141(c) applies in the case where the sole consideration received by the seller takes the form of debt relief]). Moreover, the regulatory definition of “purchaser” encompasses “any person who, as part of a bulk sale, purchases *or is the transferee or assignee* of business assets” (20 NYCRR 537.1[e] [emphasis added]). Here, the record does not include any details concerning the formation of Shanghai Pavilion, Inc., but it is undeniable that this corporate entity took over the ownership of the restaurant formerly owned and operated by L.C. Shanghai, Inc. The final returns filed by L.C. Shanghai, Inc., the application for registration as a sales tax vendor, initial sales tax and withholding tax returns and application for change of corporate name with the State Liquor Authority filed by Shanghai Pavilion all indicate that it took over the operation and ownership of the restaurant located at 1378 Third Avenue, New York, New York. In order for this corporate entity to be in the position of owning and operating the restaurant located at 1378 Third Avenue, New York, New York, the assets of L.C. Shanghai, Inc., had to have been transferred or assigned to this successor entity (despite the lack of any details in the record concerning the specifics concerning such transfer), and such transfer is encompassed by the expansive regulatory definition of “bulk sale” noted above. Consequently, Shanghai Pavilion, Inc., is determined to be a purchaser in a “bulk sale” as

that term is defined at 20 NYCRR 537.1(a) and is therefore subject to the statutory requirements provided in Tax Law § 1141(c).

D. Because, as has been determined, petitioner Shanghai Pavilion, Inc., was a purchaser in a bulk sale transaction, it was required under Tax Law § 1141(c) to give notice of such sale to the Division of Taxation at least 10 days before taking possession of or making payment for the business assets. There is no question that it did not give notice to the Division as required under Tax Law § 1141(c), despite the numerous requests made by the Division for it to file such notification. By this failure to comply with the notice requirements of Tax Law § 1141(c), Shanghai Pavilion exposed itself to liability for sales and use taxes due from L.C. Shanghai, Inc., the bulk seller (20 NYCRR 537.4[j]), limited to the greater of the purchase price or fair market value of the business assets sold (*see* 20 NYCRR 537.0[c][2]). While this liability is limited to the greater of the purchase price or fair market value of the business assets sold (*see* 20 NYCRR 537.0[c][2]), petitioner has lost the measure of protection provided by placing the consideration for the transfer in escrow and having the same available to satisfy the purchaser's liability for the unpaid sales and use taxes.

E. Given its failure to comply with the notice requirements of Tax Law § 1141(c) (*see* Conclusion of Law A), petitioner Shanghai Pavilion, Inc. is properly held to be responsible for the vendor's (i.e., L.C. Shanghai, Inc.) unpaid sales tax as determined by the audit performed on the business operation of the seller (*Matter of North Shore Cadillac-Oldsmobile, Inc. v. State Tax Commn*, 13 AD3d 994 [2004], *lv denied* 5 NY3d 704 [2005]).

F. It is well established that a presumption of correctness attaches to a notice of determination upon its issuance and petitioner bears the burden of overcoming this presumption

(*see Matter of Hammerman*, Tax Appeal Tribunal, August 17, 1995). Petitioner offered no evidence or argument in opposition to the Notice of Determination dated May 11, 2007, and by its failure to present evidence showing error in the audit method or result petitioner has “surrendered to the statutory presumption of correctness” (*see Matter of Tivolacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174, 175 [1980]). Accordingly the assessment issued to Shanghai Pavilion, Inc., as the purchaser in a bulk sale transaction must be sustained.

G. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a notice of determination for additional sales and use taxes due. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination within 90 days of the mailing of the notice of determination (*see* Tax Law § 1138[a][1]). After this 90-day period, the amount of tax, penalty and interest specified in the notice becomes an assessment (*id.*). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

H. Where the timeliness of a taxpayer’s petition of a notice of determination is in question, the initial inquiry focuses on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When a notice is found to have been properly mailed by the Division to the taxpayer’s last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, the burden of

demonstrating proper mailing in the first instance rests with the Division (*Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945 [1983], *affd* 64 NY2d 688, 485 NYS2d 517 [1984]). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*Matter of Accardo*, Tax Appeals tribunal, August 12, 1993).

I. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz,,; Matter of Novar TV & Air Conditioner Sales & Serv.*).

J. With regard to the notices of determination mailed to petitioners Meng Xia Chen and Cheng Jian Lin, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. VanDerZee, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

K. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject notices of determination were mailed as addressed to petitioners on February 24, 2006. Specifically, this document lists certified control numbers with corresponding names and addresses and bears a U.S. Postal Service postmark dated February 24, 2006 on each page. Additionally, a postal employee wrote and circled “170” below the total pieces received heading and initialed or signed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

L. Petitioners do not dispute that the notices were mailed as addressed on February 24, 2006. Rather, petitioners contend that the notices were not mailed to the correct address and that in fact they never received them. As noted, petitioners submitted evidence showing certain articles of mail addressed to them at 4 Queens Street, Syosset, NY 11791.

M. Tax Law § 1138(a)(1) requires that a notice of determination “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.” On the same point, Tax Law § 1147(a)(1) provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to the provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” The mailing of such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*)

N. Here, the record shows that petitioners’ address as listed on their 2004 New York State personal income tax returns filed June 27, 2005 (Meng Xia Chen’s) and June 28, 2005 (Cheng Jian Lin’s) was 25-34 76th Street, East Elmhurst, New York 11370, the address to which the subject notices were mailed on February 24, 2006. The record also shows that the 2004 income tax returns were the last returns filed by petitioners prior to the February 24, 2006 date of mailing of the notices of determination at issue. While petitioners have introduced several articles of mail addressed to them by third parties at the 4 Queens Street, Syosset, New York, address, petitioners have offered no proof to show that they ever advised the Division of any address change at any point prior to February 24, 2006. Accordingly, the Division has shown that it mailed the subject notices of determination to petitioners at their “last known address”

consistent with Tax Law § 1138(a)(1) and at “such address as may be obtainable” under Tax Law § 1147(a)(1).

O. In light of Conclusions of Law J, K and N, the Division has established that it properly mailed the subject notices of determination to petitioners on February 24, 2006 as claimed. However, the admission by the Division that petitioners never received the notices of determination rebuts the presumption of delivery by the mailing of correctly addressed notices by certified mail. Therefore, the 90-day time period for requesting a hearing was never triggered, and petitioners are entitled to a hearing concerning the sales tax assessed in the notices (*Matter of Ruggerite, Inc. v. State Tax Commission*).

P. As previously discussed, a presumption of correctness attaches to a notice of determination upon its issuance and petitioners bear the burden of overcoming this presumption (*see Matter of Hammerman*). Petitioners offered no evidence or argument in opposition to the notices of determination dated February 24, 2006, and by their failure to present evidence showing error in the audit method or result petitioners have “surrendered to the statutory presumption of correctness” (*see Matter of Tavalacci v. State Tax Commn.*). Accordingly the assessments issued to Cheng Jian Lin and Meng Xian Chen as officers or responsible persons of L. C. Shanghai, Inc., must be sustained.

Q. The petition of Shanghai Pavilion, Inc., is denied, and the Notice of Determination dated May 11, 2007 is sustained.

The petitions of Cheng Jian Lin and Meng Xian Chen are denied, and the notices of determination dated February 24, 2006, as modified by the Bureau of Conciliation and Mediation Services (*see* Finding of Fact 33), are sustained.

DATED: Troy, New York
September 17, 2009

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE