STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NELSON LI	:	ORDER DTA NO. 822730
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2004 through February 28, 2007.	:	

Petitioner, Nelson Li, 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 June 1, 2004 through February 28, 2007.

The Division of Taxation, appearing by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated March 13, 2009, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with exhibits attached thereto in support of the motion. Petitioner, appearing by Stephen K. Sung Law Offices (Robert Nizewitz, Esq., of counsel), had 30 days, or until April 13, 2009, to respond to the motion, which date began the 90-day period for issuance of this determination. After due consideration of the documents and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following order.

ISSUES

I. Whether the notice of determination issued to petitioner Nelson Li was jurisdictionally defective and, therefore, invalid.

II. Whether petitioner filed a timely Request for Conciliation Conference with the Division of Taxation's Bureau of Conciliation and Mediation Services following the issuance of a notice of determination.

III. Whether the Division failed to serve petitioner's former representatives with the notice thereby tolling the statute of limitations for the request for conciliation conference.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's Request for Conciliation Conference filed in response to a Notice of Determination addressed to petitioner, Nelson Li, at 32 Rockwood Dr, Newburgh, NY 12550-2036.

2. The Notice of Determination, dated September 4, 2007, assessed additional sales and use taxes in the amount of $148,840.72, plus interest and penalties, for a total amount due of $246,831.94, for the period June 1, 2004 through February 28, 2007. The notice bears assessment identification number L-029134730-1 and the corresponding mailing cover sheet (form DTF-997) bears petitioner's name and address as listed above and certified mail control number 7104 1002 9730 0276 3886.

3. Petitioner filed a Request for Conciliation Conference which he dated November 20, 2008 concerning Assessment E-029134730-8. The mailing envelope containing the request bore a metered postmark of November 26, 2008, and the request was received by the Division's Bureau of Conciliation and Mediation Services (BCMS) on November 28, 2008, as evidenced by the in-date stamp of BCMS.

4. BCMS issued a Conciliation Order Dismissing Request (CMS No. 227283), dated December 12, 2008, which denied petitioner's request for a conciliation conference, stating:

> The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on September 4, 2007, but the request was not mailed until November 26, 2008, or in excess of 90 days, the request is late filed.

5. A petition seeking administrative review of the assessment described above, signed and dated by petitioner, on December 26, 2008, was received by the Division of Tax Appeals on January 9, 2009. It sought review of the conciliation order dismissing petitioner's request for a conference.

6. In response to the petition, the Division filed an answer dated February 25, 2009. The Division subsequently brought this motion, dated March 13, 2009, seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction of the matter because petitioner's protest of the statutory notice was filed more than 90 days from the date of issuance of the statutory notices.

In support of its motion for summary determination, the Division submitted: the petition filed with the Division of Tax Appeals; the answer of the Division; a copy of the notice of determination allegedly sent to petitioner; a copy of the certified mail record (CMR) containing a list of statutory notices allegedly issued by the Division on September 4, 2007; a copy of a request for a conciliation conference filed by petitioner dated November 20, 2008; a copy of the envelope in which the request dated November 20, 2008 was mailed; the conciliation order dismissing request concerning notice number L029134730; a copy of petitioner's 2006 Resident Income Tax Return, Form IT-201, dated April 5, 2007; and the affidavits of John E. Matthews, Esq., the Division's representative, as well as affidavits of James Steven VanDerZee and Patricia Finn Sears, employees of the Division.

7. The CMR for the block of statutory notices issued on September 4, 2007, included the Notice of Determination (L-029134730) issued to petitioner. With respect to the CMR prepared for the 117 statutory notices mailed by certified mail on September 4, 2007, each of the pages consists of 11 entries with the exception of the last page (page 11), which contains 7 entries.

8. When the statutory notices are delivered into the possession of a USPS representative, the USPS employee affixes his or her initials or signature and a U.S. postmark to a page or pages of the CMR, and lists the number of notices or circles the number printed, to indicate the total number of pieces received. In this case, the postal representative affixed a postmark to each page of the CMR and beside each postmark initialed each of the 11 pages of the CMR, and circled the number of pieces received to indicate the total number of pieces received at the post office for mailing, on the final page of the CMR.

9. The copy of the corresponding Notice of Determination L-029134730-1 bears the certified control number of "7104 1002 9730 0276 3886," which is identical to that which appears on the corresponding CMR.

10. The facts set forth above in Findings of Fact 7 through 9 were established through affidavits of Patricia Finn Sears and James Steven VanDerZee. Ms. Sears is employed as a supervisor in the Division's CARTS Control Unit. Ms. Sears's duties include supervising the processing of notices of determination. 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.

11. The fact that the Postal Service employee initialed the pages of the CMR and circled the total number of pieces received on 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.

12. Petitioner responded to the Division's motion by filing the following documents: an affidavit of Robert Nizewitz, Esq., petitioner's representative in this motion; the affidavit of Nelson Li, petitioner; a copy of the Notice of Determination dated September 4, 2007; a copy of correspondence from the Division of Taxation dated April 3, 2007 scheduling a field audit of King Buffet of New York, Inc., for the period June 1, 2004 through February 28, 2007; a power of attorney from King Buffet of New York, Inc., to Lam S. Mui and Katherine Sy of G & G Consolidated Service Corp.; correspondence from Mr. Mui to the Division; a schedule of additional tax due; a copy of Form 1120-A, US Corporation Short-Form Income Tax Return, of King Buffet of New York, Inc., for the period August 1, 2005 through July 31, 2006; a copy of Form 1120-A, US Corporation Short-Form Income Tax Return, for King Buffet of New York, Inc., for the period August 1, 2006 through December 31, 2006, hand marked "final return"; and a copy of a Notification of Sale, Transfer, or Assignment in Bulk dated December 28, 2006, listing King Buffet of New York, Inc., as the seller.

13. Petitioner's 2006 Resident Income Tax Return (Form IT-201), signed by petitioner on or about April 5, 2007, was the last return filed by petitioner prior to the issuance of the Notice of Determination dated September 4, 2007, according to the Division's records. This return indicated that petitioner's address was 32 Rockwood Drive, Newburgh, New York 12550, the same address on the notice at issue herein.

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioner opposes the motion for summary determination on the basis that the notice is void due to the following fatal defects: 1) the Division failed to mail the notice to petitioner's then representatives; 2) the notice was absent statutorily required statements, including that the tax due was estimated, that the tax may be challenged through a hearing process and that the petition for such challenge must be filed within 90 days; 3) that certain statements were not conspicuously placed on such notice in bold type as mandated by law; and 4) that the Division failed to present valid proof of delivery necessary to trigger the 90-day statutory time frame in which to file a request for a conciliation conference. Further, any late filing by petitioner should be excused by his prompt forwarding of the notice to his personal representatives, as petitioner does not read or speak English. Lastly, petitioner asserts that the Notice of Determination improperly included an assessment for sales taxes after the corporate taxpayer ceased doing business.

15. The Division maintains that the protest of the Notice of Determination was filed more than 90 days from the date the notice was issued, and having shown proper mailing of the notice, established its untimely filing, leaving the Division of Tax Appeals without jurisdiction to address the merits of petitioner's case.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

> if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v. New York Univ. Med. Ctr***, 64 NY2d 851, 852, 487 NYS2d 316, 317 [1985], ***citing Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or if the material issue of fact is "arguable" (***Glick & Dolleck v. Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93 [1968]; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879 [1960]).

"To defeat a motion for summary judgment the opponent must produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,' and 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (***Whelan v. GTE Sylvania***, 182 AD2d 446, 582 NYS2d 170, 173 [1992], ***citing Zuckerman v. City of New York***).

C. Before consideration is given to the issue of the timeliness of the request for conciliation conference, the issue raised by petitioner concerning the compliance with the statutory requirements of Tax Law § 1138(a)(2) must be first addressed, as it is a jurisdictional

question (***Matter of Cheakdkaipejchara,*** Tax Appeals Tribunal, April 23, 1992, citing ***Shelton v. Commissioner***, 63 TC 193 [1975]). The Tribunal's discussion was as follows:

> Tax Law § 1138(a)(1) provides, in pertinent part, that if a sales tax return is incorrect or insufficient:
>
> the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors.
>
> In 1979, the Legislature amended section 1138 by adding subparagraph (2) to subdivision (a) (L 1979, ch 714). Section 1138(a)(2) provides that:
>
> [w]henever such tax is estimated as provided for in this section, such notice *shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated*; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days (emphasis added).
>
> The notice at issue here clearly apprised petitioner of the amount of tax assessed; that the tax could be challenged through a hearing process; and that a petition for such challenge had to be filed within 90 days. It did not indicate that the tax was estimated.
>
> The crux of the matter is whether the language of section 1138(2), i.e., the notice "*shall* contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated . . ." (emphasis added) is mandatory, as urged by petitioner, meaning that compliance with it is a condition precedent to the validity of the Division's action pursuant to the section (***see, People v. Alejandro***, 70 NY2d 133, 517 NYS2d 927, 931); or is the language directory, as urged by the Division, meaning that it is intended by the Legislature not to be disobeyed, but a disregard of it, or an inexact compliance, will constitute only an irregularity, not a fatal defect (McKinney's Con Laws of NY, Book 1, Statutes § 171).
>
> The task is one of statutory construction and interpretation. The difficulty always is in reconciling a different result from that which would ordinarily flow from the clear mandatory language of a statute. There is no absolute test (82 CJS § 376). As stated in ***Matter of King v. Carey*** (57 NY2d 505, 457 NYS2d 216):

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

While the Legislature's use of terms such as "must" or "shall" is not conclusive, such words of command are ordinarily construed as peremptory in the absence of circumstances suggesting a contrary legislative intent (***see, Escoe v. Zerbst***, 295 US 490, 493; ***People v. Schonfeld***, 74 NY2d 324, 547 NYS2d 266, 267).

Whether a given provision in a statute is mandatory or directory is to be determined primarily from the legislative intent gathered from the entire act and the surrounding circumstances, keeping in mind the public policy to be promoted and the results that would follow one or the other conclusion (McKinney's Cons Laws of NY, Book 1, Statutes § 171; ***People v. Alejandro, supra; People v. Schonfeld, supra; People v. Graves***, 277 NY 115).

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

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

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

We find nothing in this legislative history which supports the conclusion offered by petitioner and embraced by the Administrative Law Judge and dissent

herein that the Legislature intended that a failure of exact compliance with the language of the statute to be a fatal defect which renders the notice invalid as a matter of law. Indeed, we find such result drastic and somewhat unrealistic in that it would have us conclude, in effect, that the Legislature intended that the validity of the entire process depended on the Division's compliance with but one single requirement of section 1138(2). On the contrary, it is clear that the Legislature's expressed intention was to insure that taxpayers were informed of the nature of the assessments against them so that they could properly respond to those assessments through the protest procedures provided to them.

This result is consistent with the rationale of the court in ***Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin.*** (Sup Ct, Albany County, March 16, 1988, ***affd on other grounds*** 151 AD2d 822, 542 NYS2d 61), where the identical issue was dealt with by the Supreme Court in its decision. The court in ***Mon Paris*** held that the Division's failure to indicate that the tax was estimated did not invalidate the assessment. Rather, it held that a taxpayer must be prejudiced by this omission in order to invalidate the notice. Finding that the petitioner was aware of the estimated nature of the tax and of his need to pursue a remedy, the court concluded that no prejudice existed (***Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin., supra;***[footnote ommited] ***see also, Matter of Pepsico, Inc. v. Bouchard***, 102 AD2d 1000, 477 NYS2d 892 [notice misstating the period for which tax assessed not invalid since taxpayer not prejudiced]; ***Matter of Tops, Inc.***, Tax Appeals Tribunal, November 22, 1989 [two sales tax quarters incorrectly listed on the statutory notice did not render it invalid]). The result here is also consistent with those cases which deal with the mandatory requirement that the notice of deficiency be mailed to the taxpayer's "last known address" (Tax Law § 681[a]; ***Matter of Agosto v. State Tax Commn.***, 68 NY2d 891, 508 NYS2d 934; ***Matter of Riehm***, __ AD2d __ [January 30, 1992]). The persuasive fact in each of these cases was that the taxpayer received the notice even though improperly addressed by the Division. In rejecting a strict construction of the word "shall" contained in section 681(a), these cases were grounded upon the legislative history of section 681(a), which stated that the purpose of its enactment was to bring New York in conformity with the comparable Federal provision, Internal Revenue Code § 6212(a) and (b). In accordance with this legislative directive, both cases followed Federal case law in reaching their decisions.

The facts of this case as to the issue concerning the statutory requirements and the composition of the notice are substantially identical, except in this case there is no box requiring a checkmark that the assessment was estimated. In this case the notice apprised petitioner of the amount of tax assessed, indicated that the tax could be challenged through a hearing process and that a petition

for such challenge had to filed by a particular date, December 3, 2007, which was 90 days from the date of the notice, albeit much of this information was on page two of the notice, rather than the front page. It did not however, indicate that the tax determined to be due was estimated. Although not necessarily a fatal flaw, the issue then becomes whether the Division's noncompliance with section 1138(a)(2) was prejudicial to petitioner. In order to determine whether petitioner was prejudiced, it is helpful to identify what information the Division should have provided the taxpayer. Clearly the fact that petitioner was being held liable for the assessment in issue due to his status as an officer of King Buffet was a key factor (see Tax Law § 1138[a][3][b]). The notice, on page one, stated the following:

> This notice is issued because you are liable as an Officer/Responsible Person for taxes determined to be due in accordance with Sections 1138(a), 1131(1) and 1133 of the New York State Tax Law.
>
> Our records indicate that you are/were an Officer/Responsible Person of:
> KING BUFFET OF NEW YORK INC.

However, a closer review of Tax Law § 1138(a)(3)(b) indicates that the liability pursuant to Tax Law § 1133(a) of any officer, director or employee of a corporation, for tax required to be paid under article 28 shall be determined by the Division in the manner provided for in Tax Law § 1138(a)(1) and (2). Thus the question becomes, whether petitioner was not only notified that his liability arose as a result of his status as an officer, but whether he received notice that the tax was estimated in order to properly counter the assessment. This is a factual question requiring a hearing to determine whether petitioner was aware that the assessment was estimated and whether he was prejudiced by his lack of awareness.

D. As to petitioner's other arguments, Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination for additional tax or penalties due under Articles 28 and 29. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such

determination, or alternatively, a request for conciliation conference with BCMS, *within 90 days of the mailing of the notice of determination* (***see*** Tax Law § 1138[a][1]; § 170[3-a][a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit (***see Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance of the notice. Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer 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 (***id.***). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (***see Matter of Accardo***, Tax Appeals Tribunal, August 12, 1993).

F. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory 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.***, Tax Appeals Tribunal, May 23, 1991).

Petitioner argues that the Division has failed to present valid proof of delivery, absent an affidavit by the person who delivered the notice mailed to petitioner to the post office. The case law in this area is well established, and petitioner's assertion is without merit. In this case 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 (mailing) notices of determination. The CMR provides

sufficient documentary proof to establish that the Notice of Determination dated September 4, 2007 were mailed as addressed on September 4, 2007. Each page of the CMR bore U.S. Postal Service postmarks with the date that the notices were asserted to have been mailed, and the initials of a Postal Service employee. A postal employee circled the number "117" beside the "total pieces received," thereby indicating that all 117 pieces listed on the CMR were received at the post office. The notice addressed to petitioner was among the 117 so listed. 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).

G. Tax Law § 1138(a)(1) provides 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." Tax Law § 1147(a)(1) further 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***.)

H. Here, petitioner's personal income tax return for the tax year 2006, filed on or about April 5, 2007, listed petitioner's address as 32 Rockwood Drive, Newburgh, New York 12550. Petitioner did not assert that he filed any personal income or sales tax return after this date and before the issuance of the subject Notice of Determination. Accordingly, the procedures for mailing such notice have been set forth and the Division has shown that the subject Notice of Determination was, in fact, properly mailed to petitioner at his last known address on September 4, 2007.

I. Although the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice (***see Matter of Kushner***, Tax Appeals Tribunal, October 19, 2000; ***Matter of Multi Trucking***, Tax Appeals Tribunal, October 6, 1988, ***citing Matter of Bianca v. Frank***, 43 NY2d 168, 401 NYS2d 29 [1977]). In this matter, petitioner raises as error, the Division's failure to mail the notice in issue to petitioner's former representatives. Petitioner maintains that as early as May 31, 2007, months prior to the issuance of the notice in September 2007, a power of attorney was on file for King Buffet of New York, Inc., with the Division indicating that the corporation was represented by Lam S. Mui and Katherine Sy. A copy of the power, dated May 31, 2007 has become part of the record. Petitioner also states that a power of attorney for the individual was probably sent to the Division as well, however, no copy is provided. In addition, petitioner submitted a copy of correspondence between Lam S. Mui, CPA, and the Division dated June 2, 2007, concerning the sales tax audit of King Buffet, referencing a settlement offer from the company's former officer, but does not mention the name of that officer. Petitioner maintains this reference proves that Mr. Mui was also representing petitioner. I disagree. It is abundantly clear that Mr. Mui was representing King Buffet; however, such is not the case with Mr. Li. Absent clear evidence that establishes that petitioner was represented by Mr. Mui and Ms. Sy, petitioner's burden is simply not met, and the Division was under no obligation to send the notice to anyone except petitioner.

J. Petitioner's final argument that the notice improperly included an assessment of sales taxes after the corporate taxpayer ceased doing business involves the merits of petitioner's case.

K. The Division of Taxation's motion for summary determination is denied, and this matter will be scheduled for a hearing in due course.

DATED: Troy, New York
July 13, 2009

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE