STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions of **SION MISRAHI AND** **ESTHER MISRAHI-ELTING** for the Redetermination of Deficiencies or for Refunds of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2014 and 2015.	DECISION DTA NOS. 828818 AND 828822

Petitioners, Sion Misrahi and Esther Misrahi-Elting, filed an exception to the determination of the Administrative Law Judge issued on March 11, 2021. Petitioners appeared by Gabor & Marotta LLC (Richard M. Gabor, Esq.). The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie Lane, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument was heard by teleconference on August 26, 2021, which date began the six-month period for issuance of this decision.

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

ISSUE

I. Whether petitioners properly classified funds received from Sushell Corporation in tax years 2014 and 2015 as "loans to shareholders" rather than as cash distributions.

FINDINGS OF FACT

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

1. Sushell Corporation (Sushell) is a New York domestic corporation that elected to be treated and taxed as a federal and New York State S corporation. Sushell files its federal and New York State tax returns on the accrual basis. Sushell owns a building located in Manhattan, New York. The building is Sushell's primary asset. The building houses 16 residential apartments and 1 commercial store front.

2. Petitioners, Sion Misrahi and Esther Misrahi-Elting, own 75% and 25% of Sushell, respectively. Sion Misrahi and Esther Misrahi-Elting are brother and sister.

3. In April 2017, the Division of Taxation (Division) contacted Sushell to conduct a field audit of Sushell and its two shareholders (petitioners) for tax years 2014 and 2015. The Division's audit included a review of the increase in the reported "loans to shareholders," petitioners' basis in Sushell, and petitioner Sion Misrahi's tax exempt interest and New York itemized deductions. The Division's auditor also requested documentation to support the increases in both the "mortgages, notes, bonds payable in 1 year or more" and the "loans to shareholders" balances on Sushell's records.

4. During the years at issue, Sion Misrahi was a New York State and New York City resident filing New York State resident income tax returns (form IT-201).

5. During the periods at issue, Esther Misrahi-Elting was a New York State nonresident and filed New York State nonresident, part-year resident income tax returns (form IT-203).

6. Sion Misrahi is a real estate investor, real estate broker and property manager who has been in the real estate business for approximately 46 years.

7. On audit, petitioners supplied business records of Sushell including balance sheets, profit and loss statements, statements of cash flows and certain general ledgers.

8. As part of the audit, the Division requested that petitioners provide information regarding their individual basis in Sushell. Petitioners did not provide information in this regard.

9. During the audit, petitioners supplied the Division with certain documentation relating to a refinancing mortgage arrangement between Sushell and People's United Bank to support the increase in the 2015 balance of "mortgages, notes, bonds payable in 1 year or more" in Sushell's books and records.

10. On May 29, 2015, Sushell obtained a commitment letter from People's United Bank approving a loan application for $5,700,000.00 to refinance and increase an existing mortgage on Sushell's building. The May 29, 2015 commitment letter provided, in part, that: the loan would be secured by a first priority mortgage lien on Sushell's property located on Orchard Street in New York City; in the event a certain restaurant was not in full occupancy on the ground floor and not opened for business by October 1, 2015, Sion Misrahi would become personally liable for 10% of the principal balance of the loan; interest would accrue at 3% per annum; the loan would be due and payable in full after sixty months from the closing date of the loan; monthly payments on the loan would be made each month after the loan closed based upon a 30-year repayment schedule; and Sushell would be charged a $3,090.00 appraisal fee. The May 29, 2015 commitment letter also provided that the lender would accept an assignment of the existing note and mortgage for the property in question. An attachment to the May 29, 2015 commitment letter required that the mortgaged property must be covered by an insurance policy of not less than $5,700,000.00.

11. The May 29, 2015 commitment letter provided that to effectuate the loan certain documentation would need to be executed by the parties, including: a loan and security agreement; a note; a mortgage; an assignment of leases and rents security agreement; and a consolidation and modification agreement. The hearing record does not appear to contain any of the aforementioned agreements.

12. The refinancing loan agreements between Sushell and People's United Bank were executed on June 18, 2015.

13. Sushell had refinanced the mortgage on its property approximately four times in the past.

14. At the hearing, Sion Misrahi testified that in 2015, Esther Misrahi-Elting needed money to buy a partner out of another business arrangement she was involved in. He testified that the main point of the refinancing of the Sushell mortgage was so that funds could be acquired to loan to Esther Misrahi-Elting. All the funds acquired from the refinance of the mortgage were distributed to the shareholders, 75% to Sion Misrahi and 25% to Esther Misrahi-Elting. Sion Misrahi testified that he did not need the money from the loan, and he put his portion of the distribution in the bank. Petitioners testified that there was no written loan agreement for the Sushell loans to them because the transaction was between relatives and the company was wholly owned by them together. Esther Misrahi-Elting indicated to Sion Misrahi that she could not pay interest during the term of her loans so petitioners decided interest would be paid later.

15. During the audit, petitioners supplied the Division with two single page documents both titled "Shareholder Loan Agreements." One shareholder loan agreement was between Sushell and Sion Misrahi and is dated as effective June 22, 2015. It does not provide any

principal dollar amount for the debt and indicates that it is for a term of five years but is expected to be repaid before the balloon payment for the mortgage loan to Sushell is due. The loan document indicates that there are no interest payments due during the life of the loan, but the repayment amount will include all interest that accrues. The interest rate on the loan is 3% and the interest was to accrue annually. The loan agreement was executed on January 4, 2017 by Sion Misrahi as both the borrower and as the president of Sushell. The other shareholder loan agreement appears to have the same terms as the first loan agreement but is between Sushell and Esther Misrahi-Elting. The second loan agreement was executed on December 29, 2017 by Esther Misrahi-Elting as both the borrower and as the vice president of Sushell.

16. During the time the 2014 and 2015 loans to petitioners were originally funded, there was only an oral agreement between petitioners and Sushell.

17. Petitioners testified that the original loan agreements between Sushell and petitioners were verbal because it was a closely-held company and petitioners are relatives. Sion Misrahi testified that the written loan agreements evidencing the 2014 and 2015 shareholder loans were prepared strictly for the Division's audit.

18. Petitioners testified that when they took the loans from Sushell, they believed they would have to repay the money to Sushell.

19. According to Sushell's December 31, 2014 and 2015 balance sheets provided during the audit, Sushell's long term liabilities balance increased by $1,797,378.03 while at the same time its "[d]rawings" account, listed under shareholder equity, increased from $1,523,076.55 in 2014 to $3,306,745.58 in 2015 for a $1,783,669.03 increase. Sushell's 2014 and 2015 balance sheets provided during the audit fail to show any loans to shareholders in the asset portion of the balance sheet. However, Sushell's 2014 and 2015 statement of cash flows show a cash flow for

"drawings" in the equity section of the statements. For 2014, the "drawings" amount on the statement of cash flows was $241,100.00, and for 2015, the "drawings" amount was $1,783,699.03.

20. Sushell's 2014 and 2015 profit and loss statement as supplied to the Division on audit reflected the following on an "accrual basis:"

Year	Mortgage Interest Expense	Interest Income
2014	$175,286.74	$18.67
2015	$211,625.39	$870.19

21. Sushell's U.S. Income Tax Returns for an S corporation, federal form 1120-S, reported:

Year	Sushell Income or (Loss)	Loans to Shareholders Beginning Balance	Loans to Shareholders Ending Balance	Increase or (Decrease) In Shareholder Loan Balance
2007	($184,140.00)	$1,100,000.00	$1,100,000.00	0
2008	$10,534.00	$1,100,000.00	$1,091,999.00	($8,001.00)
2009	($153,348.00)	$1,091,999.00	$1,069,822.00	($22,177.00)
2010	($32,177.00)	$1,069,822.00	$1,043,800.00	($26,022.00)
2011	$53,502.00	$1,043,800.00	$1,195,500.00	$151,700.00
2012	$124,119.00	$1,195,500.00	$1,267,500.00	$72,000.00
2013	($6,388.00)	$1,267,500.00	$1,267,500.00	0
2014	$241,591.00	$1,267,500.00	$1,508,600.00	$241,100.00
2015	$16,408.00	$1,508,600.00	$3,292,269.00	$1,783,699.00
2016	$148,928.00	$3,292,269.00	$3,404,269.00	$112,000.00

22. Sushell's U.S. Income Tax Returns for an S corporation, federal form 1120-S, reported:

Year	Building and Other Depreciable Assets (Net Of Depreciation)	Loans to Shareholders End of Year Balance	Total Assets Per 1120-S	End of year Balance of Mortgages, Notes, Bonds Payable in One Year or More
2007	$1,928,380.00	$1,100,000.00	$3,690,416.00	$4,124,282.00
2008	$1,861,161.00	$1,091,999.00	$3,625,763.00	$4,066,921.00
2009	$1,789,852.00	$1,069,822.00	$3,319,912.00	$4,006,097.00
2010	$1,718,364.00	$1,043,800.00	$3,253,288.00	$3,941,601.00
2011	$1,646,874.00	$1,195,500.00	$3,383,310.00	$4,067,300.00
2012	$1,575,386.00	$1,267,500.00	$3,437,204.00	$3,999,656.00
2013	$1,640,924.00	$1,267,500.00	$3,316,863.00	$3,928,904.00
2014	$1,562,808.00	$1,508,600.00	$3,459,817.00	$3,777,754.00
2015	$1,484,690.00	$3,292,269.00	$5,294,669.00	$5,533,767.00
2016	$1,406,573.00	$3,404,269.00	$5,313,276.00	$5,417,047.00

23. On Sushell's 1120-S tax returns from 2007 through 2016, the asset account "Land (net of any amortization)" remained a constant value of $86,000.00.

24. At the time of the hearing on this matter, February 2020, the mortgage loan was coming due in approximately six months, and Sion Misrahi indicated that Sushell planned to repay all or part of the mortgage. Sion Misrahi testified that Sushell did not have the funds to repay all or part of the mortgage when it matured. However, Sion Misrahi testified that he did have the funds in order for Sushell to repay what was necessary on the mortgage, and therefore the shareholders' loans would have to be repaid back to Sushell or face the lender foreclosing on the property.

25. Sion Misrahi testified that at the time of the hearing, the outstanding principal balance on the mortgage loan was approximately $5,700,000.00. He testified that in his opinion, banks typically will only lend 70% of the value of a property they are mortgaging against. Sion Misrahi testified that as of the date of the hearing, the mortgaged property's market value was "way under" $5,000,000.00.

26. According to petitioners, without repayment of the shareholder loans, petitioners would be insolvent and could not pay back the mortgage. Sion Misrahi paid off both the 2014 and 2015 shareholder loan balances for himself and Esther Misrahi-Elting on February 14, 2020. Sion Misrahi testified that he paid back the shareholder loans early in order to buttress his case before the Division of Tax Appeals.

27. Petitioners submitted a worksheet into evidence reflecting that the 2014 and 2015 shareholder loans in question were paid as follows:

Year	Cash Disbursements from Sushell	Amount Disbursed to Sion Misrahi (75%)	Amount Disbursed to Esther Misrahi-Elting (25%)
2014	$241,100.00	$180,825.00	$60,275.00
2015	$1,783,669.00	$1,337,752.00	$445,917.00

28. At the hearing, petitioners entered into evidence financial records, dated February 4, 2020, representing Sushell's operations for 2014 and 2015. Such statements changed the 2014 and 2015 disbursement amounts that were originally listed as "drawing" on Sushell's books and records provided to the Division during the audit and were changed to show those same amounts were now reflected as "shareholder loans." Sushell's accountant testified that he reclassified the distributions from a drawing account to the loan account on the financial statements because he had told petitioners when the disbursements were originally made that they had to be accounted for as loans because petitioners did not have sufficient basis in the company to otherwise withdraw the money. Sushell's accountant testified that the financial statements originally provided to the auditors were still subject to closing adjustments when they had been provided to the Division's auditors.

29. Sushell's accountant testified that if he used the fair market values as determined by New York City for the mortgaged property for 2014 and 2015 and accounted for the loans as

cash distributions, the result would be that Sushell would be insolvent.

30. At the hearing, petitioners submitted into the record Sushell's pro-forma balance sheets for 2014 and 2015. Petitioners represented that the pro-forma balance sheets would reflect what the impact would be if the Sushell payments were accounted for as deemed cash distributions as opposed to loans:

Account	2014	2015
Current Assets/Cash	$60,581.00	$91,487.00
Other Current Assets	$96,483.00	$21,300.00
Other Assets	$58,375.00	$106,406.00
Loans to Shareholders – Reclassified as Dividends	0.00	0.00
Building at Fair Market Value	$2,335,000.00	$2,420,000.00
Total Intangible Assets	$86,970.00	$212,517.00
Total Assets	$2,637,409.00	$2,851,710.00
Current Mortgages, Notes and Bonds	$77,147.00	$118,512.00
Other Current Liabilities	$44,916.00	$18,122.00
Long-term Mortgages, Notes and Bonds	$3,777,754.00	$5,533,767.00
Other Liabilities	$57,225.00	$105,085.00
Total Liabilities	$3,957,042.00	$5,775,486.00
Shareholder's Equity		
Capital Stock	$20,343.00	$20,343.00
Retained Earnings	($517,568.00)	($1,323,568.00)
Balancing Entry FMV Less Book Value	$686,192.00	$163,118.00
Dividend Distribution	($1,508,600.00)	($1,783,669.00)
Insolvency Amount	($1,319,633.00)	($2,923,776.00)
Liabilities and Equity	$2,637,409.00	$2,851,710.00

31. On the pro-forma balance sheets, the fair market value of the mortgaged property was determined by reference to relevant New York City Department of Finance notices of property valuations for 2014 and 2015 for the mortgaged property.

32. In 2019, the New York City Department of Finance conducted a desk audit of Sushell for the tax year 2016. The result of the audit was that the New York City Department of Finance allowed Sushell to treat the subject 2014 and 2015 shareholder disbursements as loans. During its desk audit, the New York City Department of Finance did not request any documents from Sushell.

33. Petitioners submitted into the hearing record Sushell's balance sheet for December 31, 2019, which reflected shareholder loans as an asset with a value of $3,585,745.58, a building with a value of $2,139,894.53, less improvements of $889,504.60, plus land with a value of $86,000.00. The December 31, 2019 balance sheet also reflected the liability of a mortgage payable of $5,158,112.04.

34. On April 23, 2018, the Division issued a notice of deficiency to Sion Misrahi, notice no. L-047953804, assessing tax, penalty pursuant to Tax Law § 685 (p), and interest.

35. On April 23, 2018, the Division issued a notice of deficiency to Esther Misrahi-Elting, notice no. L-047953775, assessing tax, penalty pursuant to Tax Law § 685 (p), and interest.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by reviewing the case law regarding the burden of proof relating to notices of deficiency and the factors that may be considered when determining whether amounts paid to shareholders of a corporation constitute loans or cash dividends. The Administrative Law Judge observed that the transfers in each of the subject years were allocated to petitioners in direct proportion to their stock ownership interest and were originally treated as "drawings" in the equity section of Sushell's balance sheet, not as shareholder loans. He also observed that the balance sheets reflect the fact that Sushell has been using mortgage debt to finance loans to petitioners for several years, and that between 2007 and 2015, petitioners had not made substantial payments to reduce the balance of the shareholder loans on the corporation's books.

The Administrative Law Judge found that the fact Sion Misrahi repaid the 2014 and 2015 withdrawals after the audit had commenced does not establish that withdrawals constituted unconditionally repayable debts at the time the withdrawals were initially made. He observed that a decrease in the mortgaged property's value and the ongoing scrutiny from the Division auditors likely drove petitioner to make the payments. Further, the Administrative Law Judge observed that the fact that Sion Misrahi repaid the transfers received by his sister supports the conclusion that she was not in a position to repay the advances herself. Based on Sushell's financial history, the Administrative Law Judge concluded that the repayments of the 2014 and 2015 advances were contingent on whether the mortgaged property would appreciate or hold its value by the due date of the mortgage loan on the building. If the mortgaged property were to appreciate or hold its value, he opined that Sushell would refinance the mortgage due in 2020, in which case the shareholders may have had to repay the 2014 and 2015 advances. He found that the shareholder loan agreements executed by petitioners supported the conclusion that repayment of the withdrawals may have been contingent on other economic factors, because they did not recite an amount of principal constituting the purported debt obligation to be repaid, thereby leaving petitioners' options open.

Finally, the Administrative Law Judge rejected petitioners' claim that New York Business Corporation Law (BCL) § 510 prevents the subject withdrawals from being classified as dividends.

As a result, the Administrative Law Judge determined that petitioners failed to establish that the subject withdrawals were actual loans with definite repayment intended regardless of future events. He further determined that petitioners acted in good faith and with reasonable cause in their understatement of taxes for the years under review and, accordingly, he cancelled the penalties that were imposed by the Division.

ARGUMENTS ON EXCEPTION

Petitioners take issue with the Administrative Law Judge's determination that they bear the burden of proof in this proceeding. They contend that the Division used the economic substance doctrine to reclassify the withdrawals as cash distributions and that petitioners submitted sufficient credible evidence to support the classification of the withdrawals as loans. As a result, they argue that, pursuant to Internal Revenue Code provisions, the burden of proof shifted to the Division to adequately support its reclassification of the loans, and the Division failed to make such a showing.

Petitioners further argue, as they did below, that the Division's reclassification of the withdrawals as "dividends" is illegal pursuant to BCL § 510 because those cash dividends or distributions would render Sushell insolvent. Petitioners disagree with the Administrative Law Judge's analysis that Sushell had enough value to refinance the existing mortgage loan and avoid violating the BCL. Petitioners contend that there was insufficient surplus or earnings, and no excess value in the property that could be borrowed against. They claim that they submitted uncontroverted proof that the withdrawals were intended to be shareholder loans, which they knew needed to be repaid in order for Sushell to satisfy the mortgage loan and remain solvent. Therefore, they argue that the withdrawals could only properly be classified as loans and not as cash dividends or distributions.

Petitioners contend that the most important factor supporting a determination that the advances were loans is that they were repaid by Sion Misrahi with accrued interest at 3%.

Petitioners further assert that formalities are often not followed in transactions between shareholders and closely-held corporations. They contend that there is no requirement for a written promissory note and, therefore, any minor omissions in the drafting of the executed shareholder loan agreements should not be determinative. Further, petitioners claim that the New York City Department of Finance audited the corporation in 2016 and made the determination that the subject withdrawals constituted valid loans.

The Division contends that the Administrative Law Judge correctly determined that petitioners bear the burden of proof and that they failed to establish that the subject notices of deficiency were incorrect or improper. The Division asserts that it did not reclassify the withdrawals based on a substance over form, or economic substance analysis and it disagrees with petitioners' argument that the burden of proof shifted to the Division. The Division asserts that the relevant statutory authority for the burden of proof is Tax Law § 689 (e) and not Internal Revenue Code (IRC) (26 USC) § 7491. The Division argues that the notices were issued to petitioners because they improperly classified funds received from Sushell as loans when they were in fact cash distributions. Since the distributions exceeded petitioners' basis in Sushell, the Division asserts that they were properly classified as taxable gains.

The Division argues that the Administrative Law Judge utilized the proper factors and adequately analyzed the withdrawals to determine that there was no bona fide debt between Sushell and petitioners. The Division contends that petitioners did not demonstrate that at the time of the withdrawals, they intended to repay the funds and that Sushell intended to seek repayment. In support of its position, the Division asserts that petitioners had complete control over the corporation and distributed the funds to themselves in proportion to their shareholder interests. The Division argues that petitioners failed to execute promissory notes memorializing the withdrawals until after the Division had initiated its audit. It asserts that the funds disbursed to Sion Misrahi had no business purpose whatsoever and that petitioners failed to establish that Esther Misrahi-Elting had the resources to repay the withdrawals. Further, the Division alleges that the balance sheets provided during the audit showed the withdrawals as “drawings” and that there was no or little accrued interest income reported on the purported loans.

The Division further argues that the 2016 audit by the New York City Department of Finance is not indicative of whether the subject withdrawals were properly classified as loans or taxable distributions. The Division maintains that New York City did not request any documentation from petitioners or Sushell regarding the withdrawals and its finding regarding accrued taxable interest did not require a determination of bona fide debt between Sushell and petitioners or a finding of insolvency. The Division further argues that it is not bound by determinations of other taxing agencies.

The Division contends that Sushell’s distribution of funds to petitioners would not violate BCL § 510 because Sushell had the financial ability to pay the distributions without rendering Sushell insolvent. It asserts that the market values determined by New York City in 2014 and 2015 are suspect, as an independent bank allowed a cash-out refinance of Sushell’s mortgage loan that was well in excess of the valuation determined by the City in those years.

Finally, the Division asserts that petitioners failed to raise any issues concerning the Division’s calculations used in determining petitioners’ basis in Sushell and the tax deficiencies imposed. Thus, it contends that those issues are not before the Tribunal on exception. It contends that Sion Misrahi failed to raise a complaint regarding the secondary audit issues throughout the hearing process. Thus, they argue, those issues are also not before the Tribunal.

OPINION

When the Division issues a notice of deficiency to a taxpayer, a presumption of correctness attaches to the notice and the burden of proof is on the taxpayer to show, by clear and convincing evidence, that the proposed deficiency is erroneous (Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]; ***see Leogrande v Tax Appeals Trib.***, 187 AD2d 768, 769 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993] [petitioner "failed to sustain his burden by clear and convincing evidence that the deficiency assessment and the method used was erroneous"]).

Although not addressed in the proceeding below, petitioners argue on exception that they presented sufficient evidence to shift the burden of proof to the Division pursuant to IRC (26 USC) § 7491. They argue that IRC (26 USC) § 7491 is applicable because the Division has changed the substance of the transactions pursuant to the economic substance doctrine. Petitioners, however, cite no authority for the proposition that the burden of proof provisions of IRC (26 USC) § 7491 are applicable in New York tax proceedings generally or in this proceeding specifically. In contrast, Tax Law § 689 (e) expressly places the burden of proof on the petitioner in any case before the Division of Tax Appeals, with certain enumerated exceptions, none of which applies here. Accordingly, we reject petitioners' contention that they do not bear the burden of proof.

The primary issue in dispute is whether the transfer of funds in 2014 and 2015 between Sushell and petitioners, Sion Misrahi and Esther Misrahi-Elting, should be treated for tax purposes as loans or taxable distributions. "When a taxpayer receives a loan, he incurs an obligation to repay that loan at some future date. Because of this obligation, the loan proceeds do not qualify as income to the taxpayer" (***Commissioner v Tufts***, 461 US 300, 307 [1983]). As correctly observed by the Administrative Law Judge, the controlling factor in the determination of this issue is whether there was a debtor-creditor relationship between the corporation and petitioners. "[A]n intent to establish a debtor-creditor relationship exists if, when the transfers were made, the debtor intended to repay the funds and the creditor intended to enforce repayment" (***Kelly v Commr.***, TC Memo 2021-76 [2021]; ***Miele v Commr.***, 56 TC 556, 567 [1971], ***affd*** 474 F2d 1338 [3d Cir 1973] ["The controlling factor in the determination of this issue is whether at the time the withdrawals in questions were made, the parties intended that the amounts withdrawn be repaid"); ***see also Busch v Commr.***, 728 F2d 945, 948-949 [7th Cir 1984]). If repayment was intended at the time of the transfers, the amounts are generally loans. On the other hand, if no repayment was intended at the time of the transfers, or if repayment was conditional or contingent on some future event, the amounts are generally dividends. Our aim is to determine whether the parties intended to create a definite obligation repayable in any event (***see Illinois Tool Works, Inc., v Commr.***, TC Memo 2018-121 [2018]).

A taxpayer's intent is a factual issue to be determined from all the factors and circumstances present in a case (***see Miele v Commr.***, 56 TC at 567 [1971]. One such factor is a taxpayer's stated intent to repay (***see Busch v Commr.***, 728 F2d at 948). Petitioners maintain that they always intended to repay the 2014 and 2015 withdrawals. They contend that, at the time of the withdrawals, they were of the belief that Sushell would have insufficient funds to pay back the mortgage loan on the building that was due in five years. They allege that they believed repayment would be necessary in order to keep Sushell from defaulting on its loan and losing the building. The corporation's outside accountant and its chief financial officer both confirmed that understanding of petitioners' intentions. A shareholder's declarations alone, however, are insufficient and must be weighed against the objective facts and circumstances surrounding a transaction (***see Williams v Commr.***, 627 F2d 1032, 1034 [10th Cir 1980]). Other factors that have been viewed as more reliable indicia of a taxpayer's intent include: the extent of shareholder control of the corporation; the presence of conventional indicia of debt, such as promissory notes, provision for interest and collateral; the size of the withdrawals; the retained earnings and dividend history of the corporation; the treatment of advances in corporate records; and the taxpayer's use of the funds and the history of repayment (***see generally Busch v Commr.***, 728 F2d at 948; ***Alterman Foods, Inc. v United States***, 611 F2d 866, 869 [Ct Cl 1979]). Also relevant is whether the shareholders were financially able to repay the withdrawals (***see Dolese v United States***, 605 F2d 1146, 1153 [10th Cir 1979]). Our conclusion as to whether petitioners' withdrawals from Sushell constituted genuine indebtedness rather than taxable distributions does not depend on a mechanical counting of the factors, but on evaluating the transactions as a whole (***see Hardman v United States***, 827 F2d 1409, 1412 [9th Cir 1987]). When making this determination, we do not treat any single factor as dispositive (***see Frierdich v Commr.***, 925 F2d 180, 182 [7th Cir 1991]). Each case turns on its own facts (***Busch v Commr.***, 728 F2d at 951), and we consider these objective factors as indications of petitioners' actual intent (***see Tollefsen v Commr.***, 431 F2d 511, 513 [2d Cir 1970], ***cert denied*** 401 US 908 [1971]).

We are mindful that when reviewing the facts and circumstances in a case involving a closely-held corporation, special scrutiny is required because of the unfettered control exercised by a limited number of shareholders (***see Alterman Foods, Inc. v United States***, 611 F2d at 869 [a relationship between shareholder and corporation of total control and identity of interest creates difficulties to thinking of shareholder and corporation as debtor and creditor]; ***Baird v Commr.***, 25 TC 387, 393 [1955] [family control of the corporation invited special scrutiny]). Sushell is a closely-held corporation with petitioners, brother and sister, as the sole shareholders.

Sion Misrahi owns 75% of the corporation stock and is the principal shareholder. Esther Misrahi-Elting owns 25% and is not engaged in the day-to-day affairs of the corporation.

Generally, the statutory concept of a dividend is a distribution out of earnings and profits, and normally is proportionate to shares (***see Casner v Commr.***, 450 F2d 379, 387 [5th Cir 1971], quoting ***Zenz v Quinlivan***, 213 F2d 914, 917 [6th Cir 1954]). In 2014, Sushell reported income of $241,591.00. That year, petitioners took advances from the corporation in the amount of $241,100.00 (***see*** finding of fact 21). The funds were distributed in direct proportion to each shareholder's ownership interest. Sion Misrahi received 75% of the advance amounting to $180,825.00 and Esther Mirahi-Elting received 25% of the advance amounting to $60,275.00 (***see*** finding of fact 27). Although petitioners allege that those transfers were loans, they presented no promissory notes, or other contemporaneously created documentation describing the terms of the purported loans, the interest rate on the loans, or the due date of those particular withdrawals.

In 2015, petitioners again received proceeds from the corporation. The funds for the 2015 disbursements were derived from the refinancing of the mortgage loan on Sushell's main asset, its building at 146 Orchard Street in New York City. Petitioners refinanced the existing mortgage loan with a new $5,700,000.00 loan provided by Peoples United Bank. The new loan was due and payable in full after sixty months and interest accrued at the rate of 3%. Monthly payments on the mortgage loan comprised both principal and interest and were made based upon a 30-year repayment schedule. Shortly after the refinancing and paying off the original mortgage loan, Sushell transferred to petitioners the total sum of $1,783,669.00. Sion Misrahi received 75% of the advance amounting to $1,337,752.00 and Esther Mirahi-Elting received 25% of the advance amounting to $445,917.00 (***see*** finding of fact 27).

When a corporation transfers funds to a shareholder, the use to which the funds are put by the shareholder may be an indication of whether the transfer was a loan or cash dividend (***see Alterman Foods, Inc. v United States***, 611 F2d at 869). Petitioners submitted no proof establishing the purpose for the purported loans in 2014. They did not describe a business need for the capital or an explanation for how the withdrawn funds were used. The alleged purpose of the cash-out refinancing of the Sushell mortgage loan and the ensuing 2015 withdrawals was to provide capital for the personal use of Esther Misrahi-Elting in connection with an unrelated business venture. Petitioners, however, failed to introduce any objective evidence to substantiate that claim or the specific amount allegedly needed for that separate business transaction. There did not appear to be any need for Sion Misrahi to borrow funds from the corporation in 2015. In fact, Sion Misrahi testified that he did not need the capital from the refinancing, yet he still withdrew his share of the funds and deposited the advance into his bank account, thereby essentially giving himself tax-free use of the funds. The lack of evidence regarding any business need for the funds withdrawn in 2014 and 2015, and the personal use of the funds weigh against petitioners position and point to the conclusion that the advances were draws and not bona fide loans (***see Lewis v Commr.***, TC Memo 1985-563 [1985] [sole shareholders extracting cash from a corporation and using that cash for personal purposes leads to conclusion of taxable distribution rather than loan]; ***Illinois Tool Works, Inc. v Commr.*** [shareholder using funds for purely personal purposes supports finding that withdrawals were distributions]).

In 2014 and 2015, the corporate funds were advanced informally with no promissory notes being tendered by petitioners. Petitioners testified that they had an oral agreement and understanding that the withdrawn funds were to be repaid in five years when the Sushell mortgage loan came due, and they argue that formal promissory notes with a closely-held business are not necessary to establish a debtor-creditor relationship. Shareholder loan agreements were later executed between Sushell and each of the petitioners, but only after petitioners became aware of the audit. The shareholder loan agreement between Sushell and Sion Misrahi is dated as effective June 22, 2015, but was executed on January 4, 2017, by Mr. Misrahi as both the borrower and president of Sushell. The other shareholder loan agreement was executed by Esther Misrahi-Elting as both borrower and vice president of Sushell on December 29, 2017. It appears to have the same terms as the first loan agreement. The shareholder loan agreements do not provide any principal dollar amount for the debt and indicate that they are for a term of five years but are expected to be repaid before the balloon payment for the Sushell mortgage loan becomes due. The interest rate on the shareholder loans is 3% and the interest was to accrue annually. No shareholder loan agreements relevant to the 2014 withdrawals were submitted into evidence.

The provisions for loan repayment and interest were also handled informally. Allegedly, Esther Misrahi-Elting indicated to her brother that she could not afford monthly payments while she was trying to run her business. Therefore, petitioners agreed that there would be no monthly payments and that interest would be paid when the loans came due. There was no collateral required for the withdrawals. Although the Division requested them, petitioners did not provide official bank account statements to verify these transactions or financial statements to establish that petitioners had the wherewithal to repay the purported loans that they received from the corporation. While it appears that Sion Misrahi was in a liquid position, as he apparently repaid the 2014 and 2015 advances from his own bank account, there is no evidence in the record to establish that Esther Misrahi-Elting had the ability to repay the amounts she withdrew.

Furthermore, there was no evidence submitted to establish that Sushell was authorized to make loans or that the corporate record book contained a resolution authorizing the subject advances.

We are mindful that transactions within closely-held corporations are frequently characterized by their informality (***see Lewis v Commr.***) and that the lack of formal promissory notes with a closely-held business may not be conclusive evidence of a taxable distribution (***see Busch v Commr.*** [acknowledging that debtor/creditor relationship may exist even where there are no notes, no repayment and no collateral]). The informalities and the circumstances present here, however, cannot be said to objectively demonstrate that petitioners intended to create a debtor-creditor relationship at the time the withdrawals were made and that petitioners intended to make full repayment of the withdrawn funds (***see Alterman Foods, Inc. v United States***, 611 F2d at 872; ***Lewis v Commr.*** [a transfer of a large amount of money as a loan must be done in a more formal way to be respected as a loan]). Neither do the written shareholder loan agreements created and offered into evidence by petitioners. They were drafted only after petitioners were notified of the impending audit and are mere formalisms created for the Division's audit (***see Williams v Commr.***, 627 F2d at 1035 [noting that evidence of what a taxpayer does after being contacted for an audit is not conclusive as to pre-audit intent]; ***Frierdich v Commr.***, 925 F2d at 183-184 [failure of the promissory note to reflect any arm's length bargaining diminishes it as evidence of taxpayer's intent to repay the loan]).

The corporation's financial statements provided during the audit also do not support petitioners' claim that the disbursements were loans. They show that the withdrawals in 2014 and 2015 were recorded as "drawings" in the equity section of Sushell's balance sheets, and not as shareholder loans. This classification was later changed on the balance sheets that were submitted into the hearing record where the withdrawals were then classified as loans to shareholders. Sushell's accountant testified that the withdrawals were always meant to be loans, and the reclassification of the withdrawals on the corporate balance sheet submitted at hearing was the later refinement of Sushell's books and records, which were always subject to the accountant's closing adjustments. The record indicates that the transfers were always classified as shareholder loans on Sushell's federal income tax returns.

The Administrative Law Judge observed that Sushell's balance sheets also reflect the fact that the corporation has been using mortgage debt to finance loans to petitioners for several years, and that between 2007 and 2015 petitioners had not made substantial payments to reduce the balance of the shareholder loans on Sushell's books (***see*** finding of fact 21). The courts have found that recurring loans to shareholders may suggest dividend treatment in the case of corporations that have earnings over a period of years but pay no dividends (***see Busch v Commr.***, 728 F2d at 950); ***Alterman Foods, Inc. v United States***, 611 F2d at 871 [nonpayment of formal dividends may be strong evidence that advances to stockholders are disguised dividends]). Here, the record is not fully developed with regard to Sushell's earnings and dividend history over that period; however, the corporation's financial statements show that Sushell's primary assets were "loans to shareholders" and the book value of the mortgaged property. In contrast, Sushell's primary liability during this period was the mortgage that repeatedly was being refinanced (***see*** finding of fact 22). There is no indication that the corporation declared any dividends during this period or that it made any effort to obtain repayment of loans from the shareholders.

Furthermore, as an accrual basis taxpayer, Sushell's balance sheets should have shown the interest owed to the corporation pursuant to the shareholder loan agreements. Instead, however, Sushell's profit and loss statement covering 2014 and 2015 shows substantial mortgage loan interest expenses accrued for those two years (***see*** finding of fact 20), yet interest income that accrued for those two years was only $18.67 and $870.19, respectively. A loan payoff schedule submitted into evidence by petitioners at the hearing calculated the accurate respective annual interest on the two purported shareholder loans to be $7,233.00 ($5,424.75 + $1,808.25) for 2014 and $53,509.51 ($40,132.56 + $13,377.51) for 2015. As concluded by the Administrative Law Judge, these are material discrepancies that do not support the accounting of actual debt.

Petitioners argue that the best evidence of their intentions is that the withdrawals were actually repaid. After receiving the Division's determination and before the date of the hearing in this matter, Sion Misrahi paid the total amounts withdrawn by petitioners in 2014 and 2015 with accrued interest at 3% interest in order to "take the air out of [the Division's] tires." When questioned at the hearing in February 2020, Sion Misrahi testified that he did not believe the value of Sushell's building was high enough to refinance the mortgage loan when it came due. He testified that since new "draconian" rent laws were enacted in New York State, real estate sales and prices have dropped because "no one wants to invest in New York anymore." "So," he testified, "the only way to get the money, is to keep refinancing and putting it into a lost cause." He testified that his plan was to pay all "or part of" the mortgage loan back when it came due later in 2020 (***see*** tr at 154). In support of their claim, petitioners ask us to take judicial notice of the real estate values in New York since the COVID-19 pandemic began and since New York State adopted new pro-tenant rent laws. [1]

"It is firmly established that a contingent intent to repay, or an intent to repay only if and when the sums are needed by the corporation, is legally insufficient to render advances to

[1] In 2019, New York State adopted "The Housing Stability and Tenant Protection Act of 2019," Chapter 36 of the Laws of 2019.

shareholders bona fide loans" (***Alterman Foods, Inc. v Commr.***, 611 F2d at 872; ***Frierdich v Commr.***, 925 F2d at 185 [the original intention and obligation to repay must be unconditional and not contingent upon some future event]). While petitioners claim that their obligation to repay was definite from the time the withdrawals were made, the circumstances here and the transaction history between the corporation and petitioners lead to a different conclusion. As the Administrative Law Judge surmised, a reasonable conclusion is that petitioners intended to repay the 2014 and 2015 advances to the extent needed to pay off or refinance the Sushell mortgage loan coming due in 2020.

Further, petitioners' arguments regarding the impact of the COVID-19 pandemic and new pro-tenant rent laws on real estate prices and sales in New York add little weight toward establishing their contemporaneous intent to repay the withdrawals. A shareholder's original intention cannot be modified by changed circumstances or by subsequent or newly discovered difficulties not perceived at the time of the withdrawal (***see*** 10 Mertens Law of Federal Income Taxation § 38B:47). As such, the impact, if any, of the COVID-19 pandemic in 2020 and the new rent laws adopted in 2019 are not relevant in assessing petitioners' intention at the time the subject transfers were made in 2014 and 2015. Further, Sion Misrahi's act of repaying the withdrawals taken in 2014 and 2015 appears to be motivated not by a bona fide debt obligation, but more by the attendant circumstances of having his and Esther Misrahi-Elting's finances reviewed under audit by the Division (***see Williams v Commr.***, 627 F2d at 1035 ["Use of the withdrawals for personal interests and repayment after the start of an audit are incompatible with an intent to repay when the withdrawals were made."]. Additionally, the fact that Sion Misrahi paid back the funds withdrawn by Esther Misrahi-Elting supports the conclusion that she was not financially able to repay the advances herself (***see Dolese v United States***, 605 F2d at 1153).

Upon careful review of the all the facts and circumstances presented here, we agree with the determination of the Administrative Law Judge that petitioners did not intend to create a loan with an unconditional obligation to repay when they withdrew corporation funds from Sushell in 2014 and 2015 (***see Frierdich v Commr.***, 925 F2d at 185). We find that petitioners have presented, at most, an intent to repay the withdrawn funds that was contingent on the financial needs of the corporation.

In support of their position, petitioners argue that the determination of whether a corporate withdrawal is deemed a taxable distribution or dividend may be made only after it is first determined that the corporation was permitted to issue a dividend or distribution under BCL § 510. BCL § 510, which limits a corporation's authority to pay dividends and other distributions, provides in relevant part:

> "(a) A corporation may declare and pay dividends or make other distributions in cash or its bonds or its property, including the shares or bonds of other corporations, on its outstanding shares, except when currently the corporation is insolvent or would thereby be made insolvent, or when the declaration, payment or distribution would be contrary to any restrictions contained in the certificate of incorporation.
>
> (b) Dividends may be declared or paid and other distributions may be made either (1) out of surplus, so that the net assets of the corporation remaining after such declaration, payment or distribution shall at least equal the amount of its stated capital, or (2) in case there shall be no such surplus, out of its net profits for the fiscal year in which the dividend is declared and/or the preceding fiscal year" (Business Corporation Law § 510).

Petitioners allege that the reclassification of the shareholder withdrawals to dividends here reduces the capital account of the corporation so much so that Sushell's liabilities would exceed its assets and the corporation would be made insolvent. Thus, they argue that the transfers must be classified as loans. We have considered petitioners' argument regarding the impact of BCL § 510 and for the following reasons we do not agree.

First, we are not in accord with the premise of petitioners' argument. "[T]he form into which a taxpayer casts a transaction will not obliterate the tax consequences that emerge from the substance of that transaction" (***Tollefsen v Commr.***, 431 F2d at 512). The fact that petitioners have labeled the subject distributions as loans in order to allegedly comply with BCL § 510 is not conclusive. BCL § 510 generally protects the interests of a corporation's shareholders and creditors (***see*** BCL § 719 [a] [1]; Chapter 313 of the Laws of 2008). New York and federal tax law, however, control the tax treatment of payments by a corporation to its shareholders. Accordingly, we are guided by such tax law in determining the tax treatment of the payments at issue. As noted, a loan from a corporation to a shareholder requires an unconditional intention to create a debt. Petitioners have failed to establish such an intention here. Petitioners' BCL § 510 argument, as we understand it, would require finding a disbursement to a shareholder to be a loan even in the absence of an intent to create a debt, if the disbursement results in the corporation's insolvency, contrary to New York and federal tax laws.

Even if BCL § 510 were to control how the subject withdrawals were to be treated under the Tax Law, petitioners have failed to establish that Sushell was insolvent or would be made insolvent by the Division's reclassification of the subject withdrawals. As defined in BCL § 102 (a) (8), "'[I]nsolvent' means being unable to pay debts as they become due in the usual course of the debtor's business." There are no bright line tests for determining whether a corporation is insolvent and neither a balance sheet nor an income statement is conclusive evidence of insolvency (Fletcher, Cyclopedia of the Law of Corporations § 5329.10 [2021]). In this particular case, petitioners did not argue or present any evidence that Sushell was at any time unable to pay its expenses or remain current with its monthly mortgage loan payments. This is true even in light of the fact that petitioners were not making any payments to the corporation to repay their shareholder withdrawals. Instead, as proof of insolvency, or impending insolvency, petitioners submitted into the record pro-forma 2014 and 2015 balance sheets for Sushell accounting for the subject withdrawals as cash distributions instead of loans (***see*** finding of fact 30). The values proffered by petitioners in their pro-forma balance sheets, however, are problematic in several respects. As noted, Sushell reported income of $241,591.00 in 2014 and made transfers to petitioners in the amount of $241,100.00 that year. Those transfers would seemingly not be violative of the requirements of BCL § 510. The amount of the dividend distribution listed in petitioners' pro-forma balance sheet for 2014, however, is $1,508,600.00, which is the entire balance of shareholder loans, including those made before 2014. That entry, as well as others, such as the "balancing entry FMV less book value," are not adequately explained and call into question the accuracy of any conclusions that may be drawn from the pro-forma statements.

Furthermore, as proof of the fair market value of Sushell's main asset, the property at 146 Orchard Street, petitioners provided the notices of property valuation issued by the New York City Department of Finance in 2014 and 2015. The notice of property valuation, dated January 15, 2015, estimated that the market value of Sushell's property was $2,457,000.00. That value was revised later in the year to $2,420,000.00. Petitioners provided no testimonial or documentary evidence to lay a foundation for those notices and how the Department of Finance developed its value, beyond what is written in the notices themselves. The notices indicate that the City uses the income capitalization approach, which generally is regarded as the preferred method for determining the value of income-producing property (***see 41 Kew Gardens Rd. Assoc. v Tyburski***, 70 NY2d 325, 331 [1987]). Petitioners, however, failed to produce the income and expense statements that were used by the City in developing the value for the property (***see*** New York City Administrative Code § 11–208.1 [a] [requiring owners of certain income-producing property in New York City to file a statement of all income derived from and all expenses attributable to the operation of such property]). Further, the income approach involves the use of a capitalization rate, which itself is a matter of proof and argument (***see Matter of John P. Burke Apts. v Swan***, 137 AD2d 321, 325-26 [3d Dept 1988]). No information was produced regarding the development of the capitalization rate by the City. Thus, there is no indication in the record that the market value as determined by the New York City Department of Finance for tax assessment purposes would equate to the fair market value of the premises as determined in an independent third-party appraisal.[2] We note that petitioners failed to submit an independent appraisal of the Sushell property, even though an appraisal was required in order to obtain the mortgage loan in 2015 (***see*** finding of fact 10).

Further calling into question the valuation of petitioners' property, Sion Misrahi, an experienced real estate professional, testified that a bank would typically lend at a loan to value ratio of no more than 70%, yet petitioners failed to explain how Sushell was able to obtain a mortgage loan in 2015 for $5.7 million, which is more than 200% of the market value of its property as determined by the City of New York for that year. As concluded by the Administrative Law Judge, the use of a more accurate and likely market valuation for the mortgaged property in the pro-forma balance sheets would appear to cure petitioners' claim that the reclassification of the subject withdrawals violates BCL § 510. Given the foregoing, we accord little weight to the evidence of insolvency submitted by petitioners.

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[2] We note that in July 2017, the New York State Comptroller issued an audit report that is critical of the New York City Department of Finance's property tax assessment process for income producing properties during the relevant tax years. The audit found that more than half of the parcels reviewed were not inspected as required by the New York City Administrative Code, which increases the risk that valuations are materially incorrect. Furthermore, the audit found material disparities in the assessments of similar parcels (***see*** *Selected Controls over the Property Tax Assessment Process, New York City Department of Finance, https://www.osc.state.ny.us/state-agencies/audits/2017/07/11/selected-controls-over-property-tax-assessment-process).*

Lastly, as noted, Sion Misrahi repaid the entire amount of the withdrawals made in 2014 and 2015 in advance of the hearing in this matter. This additional contribution of capital would seem to render moot petitioners' claim that the reclassification of the subject withdrawals results in Sushell's insolvency.

In support of their exception, petitioners also assert that the New York City Department of Finance determined that the subject withdrawals constituted loans during an audit of Sushell's tax return for 2016. As observed by the Administrative Law Judge, however, the City audit was for a different tax year and was only a "desk audit." The City did not request any records of the withdrawals at issue here to indicate that the validity of the purported loans was a subject of its audit (***see*** finding of fact 32). Furthermore, it is well established that the Division of Tax Appeals is not required to defer to the judgments of other jurisdictions such as New York City when making its determinations (***see e.g. Matter of Dutton and Conlon***, Tax Appeals Tribunal, April 6, 1995; ***Matter of DeGroat***, Tax Appeals Tribunal, October 23, 2008).

Finally, we agree with the Division's accounting of the subject withdrawals. Distributions by S corporations to shareholders are governed by IRC (26 USC) § 1368 (a), which expressly references IRC (26 USC) § 301 [c] (***see*** IRC [26 USC] § 1368 [a]). Under IRC (26 USC) § 301 (c) and IRC (26 USC) § 316 (a), a distribution by a corporation to its shareholders, to the extent of its earnings and profits, is a dividend, unless the distribution is within one of the exceptions of the IRC (***see Loftin & Woodard, Inc., v United States*** 577 F2d 1206, 1214 [5th Cir 1978]; IRC [26 USC] §§ 316 [a], 301 [c] [1]). Otherwise, a distribution to a shareholder is merely a recovery from his basis in his shares to the extent that he has such a basis. To the extent that the payments exceed the basis, the payments amount to a gain (***Matter of Babel***, Tax Appeals Tribunal, March 18, 2014). In the case of a subchapter S corporation that does not have any accumulated earnings and profits, distributions are nontaxable to the extent that the shareholder has sufficient stock basis (***see*** IRC [26 USC] § 1368 [b] [1]). But in the case of distributions that exceed the shareholder's stock basis, the excess distributions are treated as gains from the sale and exchange of property (IRC [26 USC] § 1368 [b] [2]).

As part of its audit inquiry, the Division had requested that petitioners supply their basis schedules in Sushell, but neither Sion Misrahi nor Esther Misrahi-Elting provided that information for review by the Division. Without basis schedules, the Division utilized a zero-beginning basis in Sushell in tax years 2014 and 2015 for both individual petitioners (***see Welch v Commr***, TC Memo 2012-179 [2012] [a taxpayer who fails to prove that he or she has a basis in an S corporation is considered to have zero basis in that corporation]). The Division's auditor provided testimony and work papers that detailed the basis calculation in determining taxable income for Sion Misrahi and Ester Misrahi-Elting in 2014 and 2015. The auditor determined that after adjustments, neither Sion Misrahi nor Esther Misrahi-Elting had sufficient basis in Sushell to withdraw the funds from Sushell tax free; rather, the amounts withdrawn were reclassified as distributions in excess of basis. That reclassification properly caused the amounts withdrawn to be treated as gains from the sale or exchange of property according to IRC (26 USC) § 1368 (b) (2) (***see Sleiman v Commr.***, 187 F3d 1352, 1356 [11th Cir 1999] [when an S corporation with no accumulated earnings or profits makes a distribution to a shareholder, the shareholder must recognize capital gain on that portion of the distribution that exceeds her adjusted basis in the shares of the S corporation's stock]. As noted above, the Division's determination is presumed correct, and petitioners have the burden of showing error in the calculation of the determination. Petitioners did not challenge the Division's basis calculations in the hearing below or on exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sion Misrahi and Esther Misrahi-Elting is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Sion Misrahi and Esther Misrahi-Elting are denied; and

4. The notices of deficiency, dated April 23, 2018, are sustained.

DATED: Albany, New York
February 24, 2022

/s/ Anthony Giardina______
Anthony Giardina
President

/s/ Dierdre K. Scozzafava____
Dierdre K. Scozzafava
Commissioner

/s/ Cynthia M. Monaco______
Cynthia M. Monaco
Commissioner