STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EMERALD INTERNATIONAL HOLDINGS, LTD.	:	DETERMINATION DTA NO. 827189
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 December 1, 2009 through November 30, 2011.	:	

Petitioner, Emerald International Holdings, Ltd., 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 December 1, 2009 through November 30, 2011.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in Rochester, New York, on November 9, 2016, at 10:30 A.M., with all briefs to be submitted by February 17, 2017, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by its president, Otu A. Obot. The Division of Taxation appeared by Amanda Hiller, Esq. (M. Greg Jones, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation's general denial of petitioner's allegations, as set forth in its answer to the petition, constituted a failure to comply with the requirements of 20 NYCRR 3000.4(b)(2)(i), such that any allegations of material fact in the petition must be deemed admitted, pursuant to 20 NYCRR 3000.4(b)(3).

II. Whether petitioner has established that it filed a claim for refund on March 4, 2013, and if so, whether the Division of Taxation's failure to have granted or denied that claim within six months thereafter, pursuant to Tax Law § 1139(b), constituted a default requiring that the refund claim must be granted.

III. Whether, if not by default as above, petitioner has nonetheless established that it is entitled to a refund of the additional amount of sales tax calculated upon audit by the Division of Taxation, notwithstanding petitioner's consent to and payment of such additional tax prior to the issuance of a notice of determination.

FINDINGS OF FACT

1. Petitioner, Emerald International Holdings, Ltd., owned and operated a retail wine and liquor store located in Williamsville, New York.

2. Petitioner was the subject of a desk audit conducted by the Casual Sales Unit of the Division of Taxation (Division). In its audit, the Division calculated petitioner's audited sales, and in turn its additional taxable sales, based on comparing petitioner's reported sales, per its sales tax returns, to information provided by suppliers (distributors) from whom petitioner purchased alcoholic beverages, as follows:

> a) the Division first calculated the purchase cost of petitioner's inventory of alcoholic beverages available for sale for each of the years 2010 and 2011, based upon inventory amounts set forth on petitioner's corporation franchise tax returns, as follows:

	01/01/10 - 12/31/10	01/01/11 - 12/31/11
Cost of purchases (per distributors' reports)	$77,855.59	$87,367.08
plus: beginning inventory (per returns)	89,826.00	83,626.00
equals: Inventory available for sale	$167,681.59	$170,993.08
minus: ending inventory (per returns)	(83,626.00)	(76,530.00)
Cost of goods sold (alcoholic beverages)	$84,055.59	$94,463.08

b) the Division next calculated petitioner's estimated total sales receipts by applying a cost of operations ratio of 78.4% to petitioner's cost of alcoholic beverages sold, as follows:[1]

	01/01/10 - 12/31/10	01/01/11 - 12/31/11
Cost of goods sold (alcoholic beverages)	$84,055.59	$94,463.08
divided by: cost of operations (percentage)	.784	.784
Estimated total sales	$107,214.00	$120,489.00

c) the Division compared the total estimated sales for the two years, as above ($227,703.00), to reported total sales per petitioner's sales tax returns for the same period ($137,954.00), and determined a sales difference (increase) of $89,749.00. The Division viewed this difference as additional unreported taxable sales, and subjected the same to tax at the applicable tax rate (8.75%), to arrive at additional tax due in the amount of $7,853.00.

d) the Division divided additional tax due ($7,853.00) by the "base amount" of reported total sales per petitioner's sales tax returns ($137,954.00), to arrive at an error rate of .0569. This error rate was applied to petitioner's reported sales for each of the sales tax quarterly periods spanning December 1, 2009 through November 30, 2011, resulting in additional sales tax due in the amount of $7,849.57.

3. Based upon the foregoing calculations, the Division issued to petitioner a Statement of Proposed Audit Change for Sales and Use Tax (proposed statement), dated December 3, 2012, proposing a sales tax liability for the period December 1, 2009 through November 30, 2011

[1] The source of the 78.4% cost of operations ratio used by the Division was the 42nd Annual Edition of the Almanac of Business and Industrial Financial Ratios (Leo Troy, Ph.D., Commerce Clearing House, Table I, Beer, Wine and Liquor Stores [Retail Trade 445310]). In letters dated December 5, 2012, January 22, 2015, and February 13, 2015, the Division responded to petitioner's queries regarding the use of that edition of the Almanac as opposed to later versions thereof. The Division noted that at the time of audit, the 42nd Edition of the Almanac was the latest volume (and hence the latest information) then available. The Division also noted that the cost of operations ratios set forth in later versions of the same Almanac (75.5% for the 2013 Almanac and 74.6% for the 2014 Almanac), are lower than the cost of operations ratio used on audit (78.4%). As pointed out by the Division, applying such lower amounts would result in higher sales markup percentage amounts (32% for 2013 and 34% for 2014), than the markup percentage resulting on audit (27.55%), and hence would result in higher estimated sales amounts with correspondingly higher amounts of tax liability. The calculation method supporting this result (utilizing the above-set forth dollar amounts from the year 2010 to illustrate) follows:

a) cost of goods sole ($84,055.59) ÷ percentage cost of operations (78.4%) = calculated sales ($107,214.00).
b) calculated sales ($107,214.00) - cost of goods sold ($84,055.59) = profit ($23,158.41).
c) profit ($23,158.41) divided by cost of goods sold ($84,055.59) = percentage markup on costs (27.55%).

(audit period) in the amount of $7,849.57, plus interest of $2,702.82, and penalty of $2,247.25, for a then-current balance due (if paid by January 1, 2013) of $12,799.64.

4. The proposed statement was accompanied by a letter dated December 5, 2012, detailing the method by which the proposed liability was calculated. The letter advised that if petitioner agreed with the proposed liability, the proposed statement was to be signed and dated by an authorized signatory, and returned with remittance of the full amount shown as due on the proposed statement. The letter further advised that if petitioner did not agree, then petitioner was required to submit its books and records for the audit period to substantiate the amounts reported on its sales and use tax returns, together with the name and telephone number of a contact person and an explanation for the disagreement. The December 5, 2012 letter included the following list of items to be submitted for audit review within 30 days of the date of the letter:

"a. A complete copy of your 2010 & 2011 federal returns, including all related schedules and attachments.
b. Sales invoices, guest checks and/or cash register tapes for each sale.
c. Cash receipts journal (also sales journal if applicable).
d. Bank statements and deposit slips.
e. All purchase invoices for the audit period.
f. Disbursement or Purchase journal.
g. General Ledger.
h. All exemption documents supporting non-taxable sales."

5. The lower portion of the proposed statement specified that it was to be returned, in either case, to the following address:

"NYS Department of Taxation and Finance
Audit Division-Transaction Desk Audit Bureau
Sales Tax Section
Wade Road-Casual Sales-WA Harriman Campus
Albany NY 12227-0163"

6. Petitioner responded to the proposed statement by a letter dated December 29, 2012, describing various medical conditions faced by petitioner's president, Otu A. Obot, the impact of

these conditions on the operation of petitioner's business, and requesting a waiver of the penalty and interest set forth on the proposed statement. This letter was addressed as follows:

"Scott Mastroianni, Technician[2]
Audit Bureau Sales Tax Section
NYS Department of Taxation and Finance
WA Harriman Campus, Albany, New York 12227-0163"

7. Petitioner's letter bears a stamp, affixed by the Division, indicating the following:

"RECEIVED
Dept. Of Taxation & Finance
Sales Tax - Desk Audit

Jan 08 2013"

8. The Division responded to the foregoing letter and request by issuing to petitioner a second proposed statement, dated December 31, 2012. The second proposed statement is identical to the above-described first proposed statement, except for revisions reducing the amount of interest and eliminating the imposition of penalty. This second proposed statement thus indicated a tax liability in the amount of $7,849.57, plus interest of $1,366.35, and no penalty, for a then-current balance due (if paid by January 30, 2013) of $9,215.92.

9. Petitioner returned the second proposed statement, dated as signed by its president, Mr. Obot, on January 4, 2013. The portion of the proposed statement indicating petitioner's agreement (consent) to the liability set forth thereon appears directly above Mr. Obot's signature, and specifically sets forth the following:

> "**If you agree** that sales and/or use tax, as summarized above, is due and payable to the commissioner of Taxation and Finance please sign and return one copy of this statement postmarked by 01/30/2013.

[2] Scott Mastroianni was the person who performed the desk audit calculations described above (***see*** Finding of Fact 2).

> I consent to the assessment of the tax and penalties, if any, and accept the determination of any amount to be credited or refunded as shown above, plus any interest provided by law. By signing this consent, I understand that: (1) I am waiving my right to have a Notice of Determination issued to me, and I am also waiving my right to have a hearing to contest the validity and amount of the tax, interest and any applicable penalties determined and consented to. (2) If I later wish to contest the findings in this agreement, I must first pay the full amount shown due, and file an application, within the time provided by law, for a credit or refund. If the Tax Department denies my application in whole or in part, I may then contest the amount denied, within the time provided by law, in the Bureau of Conciliation and Mediation Services, or in the Division of Tax Appeals, or both. (3) If the Tax Department conducted a limited scope audit, it may later, within the time provided by law, determine that I owe additional tax. I may consider these findings final unless I hear from the department to the contrary within 60 days after the department's receipt of this signed consent." (emphasis as in original)

10. Petitioner filed with the Division an Application for Credit or Refund of Sales or Use Tax (Form AU-11), seeking a refund of the foregoing amount of tax and interest paid ($9,215.92). This application is dated as signed by petitioner's president, Mr. Obot, on July 9, 2014, and bears a stamp indicating the following:

"RECEIVED
Department of Taxation & Finance
Transaction Desk Audit Bureau
July 14, 2014
Sales Tax"

11. Every Form AU-11 received by the Division is assigned processing identification information and numbers. The upper center area of the foregoing refund application includes a label setting forth the following processing identification information and numbers assigned by the Division to such application:

"Claim #: 2014-07-0456
Carts #: X 469841390
Emerald Int'l Holdings, Ltd
TP Id#: 161470560
Batch Code: D"

12. The foregoing claim for refund was reviewed by the Division's Sales Tax Desk Audit Refund Unit. This refund claim was also forwarded to the Division's Casual Sales Unit, which had conducted the desk audit of petitioner's business, for review and recommendation in connection therewith. Following such review, the Division denied petitioner's claim for refund. Petitioner was advised of this denial by a letter dated September 5, 2014.

13. Petitioner challenged the foregoing denial by filing a request for conciliation conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS), dated November 28, 2014. A conciliation conference was held on April 29, 2015, and on June 19, 2015, a Conciliation Order (CMS No. 264229) was issued denying petitioner's Request and sustaining the Division's denial of petitioner's claim for refund.

14. Petitioner challenged the conciliation order and refund denial by filing a timely petition with the Division of Tax Appeals. Section (6) of the petition states: "[p]etitioner has enumerated (45) forty five facts regarding this case - see, attached." Consistent therewith, the petition includes an attachment setting forth some 45 enumerated items, including assertions of fact, assertions of error allegedly made by the Division, statutory and regulatory references, and conclusions drawn by petitioner therefrom.

15. On October 21, 2015, the Division filed its answer to the petition. Paragraphs 1 and 2 of the answer state:

> "1. ADMITS the allegations in the petition to the extent that the petitioner signed a Statement of Proposed Change for Sales and Use Tax, filed for a refund, and was denied said refund, the denial of which was sustained by Conciliation Order.
>
> 2. DENIES any and all of the other allegations contained in the petition, inclusive of paragraphs 1 through 45."

The remaining ten separately numbered paragraphs of the answer set forth affirmative statements in support of the Division's denial of petitioner's claim for refund.

16. Included among the attachments to the petition is a copy of a Form AU-11, requesting a refund of the amount of tax and interest paid ($9,215.92). This Form AU-11 is identical to the Form AU-11 described above, but for the fact that it is: a) dated as signed by petitioner's president, Mr. Obot, on March 4, 2013, rather than July 4, 2014, and b) does not reflect any indication of receipt by the Division, including any dated receipt stamp, or any processing identification information or numbers thereon (***see*** Finding of Fact 10).

17. The record includes a copy of a letter from petitioner, dated March 4, 2013, addressed to "Scott Mastroianni, Technician, Audit Bureau Sales Tax Section, NYS Department of Taxation and Finance, WA Harriman Campus, Albany, New York 12227-0163." The fourth paragraph of this letter states: "[w]e are requesting a refund of nine thousand two hundred and fifteen dollars and ninety-two cents ($9,215,92). This was the amount we paid in reliance on your unverified estimates and determination." Petitioner's president stated in testimony that this letter was a cover letter sent to Mr. Mastroianni, and was accompanied by the Form AU-11 dated March 4, 2013 (***see*** Finding of Fact 16).

18. The record does not include any proof of mailing, e.g., certified or registered mailing receipts, with regard to either the claimed filing of the Form AU-11, dated March 4, 2013, or the described cover letter of the same date. Petitioner's president, Mr. Obot, claimed at hearing that he filed the foregoing cover letter and Form AU-11, dated March 4, 2013, by regular (first class) mail on or about March 4, 2013. Mr. Obot further stated that when he realized there had been no response to the filing, he contacted Mr. Mastroianni, who explained that he works in a unit other than the refund unit, and stated that he did not have any record of receiving the Form AU-11

dated March 4, 2013. Mr. Mastroianni advised that in order to avoid being barred from claiming a refund due to expiration of the period of limitations thereon, petitioner should file another Form AU-11. In turn, petitioner filed the Form AU-11, dated as signed on July 9, 2014, and received thereafter by the Division on July 14, 2014 (***see*** Finding of Fact 10).

CONCLUSIONS OF LAW

A. Addressed as an initial issue is petitioner's claim of entitlement to relief via summary determination.[3] On this issue, petitioner states that the Division's use of a general denial in its answer to the petition does not comply with the Tribunal's regulations, specifically in that the answer fails to set forth separately numbered paragraphs corresponding to the separately numbered paragraphs in the attachment to the petition. Petitioner thus maintains that the Division's answer inadequately responds to the petition for failing to expressly admit or deny any of the material facts alleged in the petition. Petitioner argues, in turn, that the allegations set forth in the petition must be deemed admitted, and that the petition, and the refund requested therein, must be granted.

B. The Tax Appeals Tribunal's Rules of Practice and Procedure, at 20 NYCRR 3000.4(a), set forth that "[t]he purpose of the pleadings is to give the parties and the [D]ivision of [T]ax [A]ppeals fair notice of the matters in controversy and the basis for the parties' respective positions. All pleadings shall be liberally construed so as to do substantial justice." The Tribunal's rules require the Division to serve an answer to a petition, advising the petitioner and

[3] This issue, challenging the sufficiency of the Division's answer, was initially raised by petitioner's pre-hearing motion for summary determination, brought under 20 NYCRR 3000.9(b)(1). Since the hearing in this matter was scheduled to commence on November 9, 2016, and the motion was filed on September 7, 2016, there was insufficient time within which to properly consider the parties' arguments and decide the motion (***see*** 20 NYCRR 3000.5([d]). Accordingly, the motion was preserved, was renewed at hearing, and is addressed herein as part of this determination.

the Division of Tax Appeals of the defense (20 NYCRR 3000.4[b]). Petitioner posits, by its motion, that the Division failed to properly answer the petition, pursuant to 20 NYCRR 3000.4(b)(2), since it did not specifically address each of the 45 items set forth in the petition in correspondingly numbered separate paragraphs.

C. 20 NYCRR 3000.4(b)(2) provides, in pertinent part, as follows:

> "The answer as drawn shall contain numbered paragraphs corresponding to the petition, and shall fully and completely advise the petitioner and the Division of Tax Appeals of the defense. It shall contain:
>
> (i) a specific admission or denial of each statement contained in the petition; however, if the [D]ivision of [T]axation is without knowledge or information sufficient to form a belief as to the truth of a statement, then the answer shall so state, and such statements shall have the effect of a denial; . . . "

20 NYCRR 3000.4(b)(3) states that "Material allegations of fact set forth in the petition which are not expressly admitted or denied in the answer shall be deemed to be admitted."

D. Petitioner's position is that the Division's answer does not comply with 20 NYCRR 3000.4(b)(2). To the contrary, however, the answer clearly denies all of the allegations set forth in the attachment to the petition. The Tribunal's regulations do not require the Division to admit or deny each allegation of the petition in a separate and distinct paragraph numerically corresponding to each separate and distinct paragraph contained in the petition. Moreover, in this instance, many of the assertions set forth in the attachment to the petition are simply not "material allegations of fact." Rather, and in addition to allegations of fact, the attachment to the petition also sets forth assertions of error allegedly made by the Division, statutory and regulatory references, and legal conclusions drawn by petitioner therefrom (***see*** Finding of Fact 14). These

are matters with respect to which the Division's is not obligated to make a specific admission or denial in its answer.[4]

In fact, the Division's answer does not admit any of the allegations contained in the petition, except as specified in paragraph one of the answer, and the answer thereafter denies all of the remaining allegations in the petition (***see*** Finding of Fact 15). The Division's answer, including the general denial provided therein, is clearly acceptable under the circumstances. While, as noted, the Division's answer does not contain numbered paragraphs which correspond to the numbered allegations in the attachment to the petition, there can be no doubt from a reading of the answer that the Division is denying each and every material allegation of fact and/or error contained in the petition, and that the answer fully and completely advises petitioner (and the Division of Tax Appeals) of the Division's defense, in accordance with the requirements of 20 NYCRR 3000.4(b), and in a manner consistent with the overall purpose of the pleadings, per 20 NYCRR 3000.4(a). Accordingly, petitioner's claim that the petition, and the refund claimed therein, must be granted on the basis that the Division failed to separately deny the contents of each paragraph in the attachment to the petition, on a paragraph by paragraph basis, is rejected.

E. Petitioner next argues that the Division failed to respond to its claim for refund by either granting or denying the same within six months of the date of its receipt, in accordance with Tax Law § 1139(b). Petitioner's argument is based on the position that its refund claim was filed on March 4, 2013 (***see*** Findings of Fact 16, 17, and 18). Petitioner maintains that the Division's

[4] For petitioner to raise a tenable claim that the Division's failure to expressly, independently, and in numerical sequence, admit or deny each of the allegations set forth in the attachment to the petition, per 20 NYCRR 3000.4(b)(2), such that each of these allegations must be deemed admitted, per 20 NYCRR 3000.4(b)(3), requires accepting that each of such allegations constitutes a material allegation of fact. As concluded, this is simply not the case.

failure to act means that the refund claim must be deemed to have been granted. This claim proceeds from the premise that the Division in fact received petitioner's Form AU-11 dated March 4, 2013. The Division, for its part, denies having received any claim for refund filed by petitioner at any point in time prior to the submission of the Form AU-11, dated July 9, 2014, that was received by the Division on July 14, 2014, as evidenced by the affixation of a receipt stamp, dated July 14, 2014, as well as the accompanying identifying information and numbering affixed thereto by the Division (***see*** Finding of Fact 10).

F. The record includes no evidence confirming that the Form AU-11 signed by petitioner's president, and dated March 4, 2013, was mailed to the Division on that date, or on any other particular date, or that such Form AU-11 was, in fact, ever received by the Division. In support of its position that the March 4, 2013 Form AU-11 was mailed as claimed, petitioner points to the cover letter pertaining to such claim, also dated March 4, 2013 (***see*** Finding of Fact 17), and to the testimony of its president concerning certain conversations he had with the Division's auditor (***see*** Finding of Fact 18). Review of the cover letter reveals that the address for the Division listed thereon (***see*** Finding of Fact 17), differs from the specified address to which refund claims are to be submitted, per the instructions to Form AU-11.[5] Further, the letter itself does not indicate that a Form AU-11 was attached or included therewith. Finally, and to the extent the March 4, 2013 letter itself might be considered as constituting a claim for refund, there is likewise no evidence confirming that it was mailed to the Division on that date, or on any other particular date, or was, in fact, ever received by the Division.

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[5] Pursuant to SAPA § 306[4], official notice is taken of Form AU-11-I (Instructions to Form AU-11) and of the address specified thereon for the filing of refund claims, to wit, "NYS Tax Department, TDAB–*Sales Tax Refunds*, W A Harriman Campus, Albany, NY, 12227." (italics added) This address differs from that set forth on the March 4, 2013 cover letter.

G. Tax Law § 1139(b) states:

> "[i]f an application for refund or credit is filed with the commissioner of taxation and finance as provided in subdivision (a) of this section, the commissioner of taxation and finance shall grant or deny such application in whole or in part within six months of receipt of the application in a form which is able to be processed and shall notify such applicant by mail accordingly."

H. Petitioner seeks a broad ruling that the Division's failure to act on a refund claim within a particular period of time (here, within six months, per Tax Law § 1139[b]) requires a conclusion that the refund must be deemed to have been granted by default. As detailed hereafter, pursuing this position requires petitioner, at the outset, to establish both the fact and date of the Division's receipt of the Form AU-11, dated as signed on March 4, 2013, from which point in time the Division's obligation to act thereon within six months commences. Here, petitioner has established neither. First, there is no direct evidence in the record establishing the Division's actual receipt of such claim. In addition, there is no evidence that the refund claim (or cover letter) was filed using a method of mailing that allows confirmation of both the fact and date of such mailing, from which petitioner would be entitled to a presumption that the item mailed was delivered in due course thereafter. In ***Matter of Sipam*** (Tax Appeals Tribunal, March 10, 1988), the Tribunal addressed the issue of proof of mailing when filing tax documents. In ***Sipam***, petitioner used ordinary (first class) mail, rather than certified or registered mail, to file its petition with the Division of Tax Appeals, and the petition was not received within the statutory time frame. The Tribunal stated that the "[u]se of registered mail is prima facie evidence that the document was delivered. Where a taxpayer uses ordinary mail, the taxpayer bears the risk that a postmark may not be timely fixed by the postal service *or that the document may not be delivered at all*." (italics added) (***Matter of Sipam***, citing ***Matter of Harron's***

Electric Service, Inc., Tax Appeals Tribunal, February 19, 1988; ***see also Deutsch v. Commissioner of Internal Revenue***, 599 F2d 44 [2d Cir 1979], ***Miller v. United States***, 784 F2d 728 [6 Cir 1986]).[6] In this case, the record includes no evidence to establish that the Form AU-11, dated March 4, 2013, was ever delivered to the Division, much less to establish the particular date on which it was delivered. With no evidence to establish the date of filing, the ensuing period within which the Division was required to respond, per Tax Law § 1139(b), was simply not triggered. Even more directly to the point, without proof that the refund claim dated March 4, 2013 was filed with the Division, no obligation of responding thereto can be imposed upon the Division. Accordingly, petitioner's claim for refund based upon the Division's default for failing to respond is rejected.[7]

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[6] Registered or certified mailing allows an expedient method to establish both physical delivery of the item allegedly mailed into the custody of the USPS and, via return receipt cards or the use of USPS Form 3811-A, subsequent delivery information (or confirmation) with respect to the item.

[7] As noted, petitioner's argument is that the Division's failure to respond by either granting or denying the refund claim, dated March 4, 2013, within six months of the receipt thereof, must result, by operation of law, in a deemed grant, by default, of the claimed refund. To the extent the Division addresses this question in its brief, it states that any such failure to respond will result in a deemed denial, thus triggering the period of time within which a taxpayer is entitled to file a petition for a hearing or a request for a BCMS conference challenging such deemed denial. The Division cites in support Tax Law Article 27 (Corporate Tax Procedure and Administration) at § 1089(c). This section essentially provides that if the Division does not act on a refund claim within six months, the taxpayer may presume the refund has been denied and may appeal such "deemed" denial (***see Matter of Wilmorite, Inc.***, Tax Appeals Tribunal, November 14, 2013, ***affd*** 130 AD3d 1388 [3d Dept 2015]. By comparison, Tax Law Articles 28 and 29 contain no such specific "deemed denial" provision, but rather only state that "[i]f an application for refund or credit is filed with the commissioner of taxation and finance as provided in subdivision (a) of this section, the commissioner of taxation and finance shall grant or deny such application in whole or in part within six months of receipt of the application in a form which is able to be processed and shall notify such applicant by mail accordingly" (Tax Law § 1139[b]). In ***Matter of Baker Protective Services, Inc.*** (Tax Appeals Tribunal, November 1, 2001), the Tribunal affirmed the Administrative Law Judge's reasoning that the central purpose of the obligation that the Division "shall grant or deny (an application for refund) in whole or in part within six months," pursuant to Tax Law § 1139(b), is to ensure that a refund application would be acted upon expeditiously, so as to avoid leaving a taxpayer in the position of never knowing what has been determined with regard to its refund claim. This reasoning supports a conclusion that even if petitioner's Form AU-11, dated March 4, 2013, had been filed on that date, as alleged by petitioner, the Division's failure to affirmatively act to grant or deny the same, within six months thereafter, would result in a deemed denial of the claim, and does not support a conclusion that such claim would be granted and payable by default.

I. Finally, petitioner's Form AU-11, dated July 9, 2014, was admittedly received by the Division on July 14, 2014, and the Division timely responded by denying this claim for refund in a letter dated September 5, 2014. Petitioner contests the Division's denial of this claim for refund on the bases that: a) the proposed statement executed by petitioner's president did not constitute a consent to liability under Tax Law § 1138(c), apparently notwithstanding the consent language set forth thereon (***see*** Finding of Fact 9), and b) that the underlying method of audit and the result thereof was flawed, unreasonable and inaccurate. Each of the foregoing bases raised by petitioner are rejected.

J. As to petitioner's first basis for challenge, Tax Law § 1138(c) provides:

> "a person liable for collection and payment of tax (whether or not a determination assessing a tax pursuant to Tax Law § 1138[a] has been issued) shall be entitled to have a tax due assessed prior to the 90-day period referred to in Tax Law § 1138(a), by filing . . . a signed statement in writing, in such form as the commissioner shall prescribe, consenting thereto."

Clearly, the language set forth on the proposed statement, offering petitioner the opportunity to either agree (as it did), or disagree, with the additional sales tax, meets the foregoing requirements of Tax Law § 1138(c). Petitioner indicated its agreement and consented to the proposed liability by its return of the proposed statement, signed by its president and accompanied by its remittance of the tax and interest shown due thereon. The Division did not, in turn, reject the executed proposed statement within 60 days thereafter as allowable under the terms of the consent set forth in the proposed statement (***see*** Finding of Fact 9; ***see Matter of Adirondack Steel Casting Company v. State Tax Commn.***, 121 AD2d 834 [3d Dept 1986]). Therefore the proposed statement became a final and irrevocable assessment of additional sales tax due for the period in issue (December 1, 2009 through November 30, 2011), as of the January 4, 2013 date of petitioner's execution of the consent set forth on the proposed statement (***see*** Tax

Law § 1138(c); ***Matter of BAP Appliance Corp.***, Tax Appeals Tribunal, May 28, 1992; ***Matter of Rosemellia***, Tax Appeals Tribunal, March 12, 1992; ***Matter of SICA Electrical and Maintenance Corp.***, Tax Appeals Tribunal, February 26, 1998). Petitioner's argument attempting to distinguish this case from ***Matter of SICA***, upon the basis that the consent it executed is governed by Tax Law § 1138(a), and not by Tax Law § 1138(c), is rejected. There is simply no separate consent provision in Tax Law § 1138(a), and the only consent provision is set forth in Tax Law § 1138(c).

K. Petitioner's second basis for challenging the denial of its refund claim rests upon assertions concerning the propriety (or rationality) of the audit methodology employed by the Division, and the accuracy of the result derived therefrom. It is clear that a taxpayer bears the burden of proving error in the Division's denial of a claim for refund (***see Matter of 475 Associates, et al,*** Tax Appeals Tribunal, April 27, 2006). The operational effect of the consent petitioner executed under Tax Law § 1138(c) removed the matter from the purview of Tax Law § 1138(a), and its attendant analysis concerning the audit itself, i.e., propriety of audit method and accuracy of audit result. In fact, the Tax Appeals Tribunal has said, in no uncertain terms, that upon the execution of such a consent, the audit methodology and the audit computation ceased being issues (***see SICA***). Petitioner's consent in this case, as above, established the rational basis of the audit methodology employed, and of the resulting amount of additional tax computed based thereon, and both the audit method and result thus are no longer issues (***see id.***). As a consequence, petitioner can establish entitlement to a refund only by demonstrating by clear and convincing evidence that its actual tax liability was less than that to which it consented (***see*** Tax Law § 1139[c]; 20 NYCRR 534.1[b]; ***see also SICA***). In this case (and since petitioner's refund claim seeks only the amount of additional tax to which it consented), petitioner was required to

establish that its returns were correct as filed. The arguments advanced by petitioner in this regard address: a) the audit methodology employed, b) the external index utilized in connection with that methodology, c) the result obtained therefrom, d) the possible impact of using the same external index (source) but for periods of time other than that chosen, e) using different indices, and f) petitioner's assertion that the markup it allegedly employed in the operation of its business was lower than that determined upon audit. As noted, upon petitioner's consent, the Division's audit methodology and its result ceased being at issue (***see SICA***). Petitioner submitted no evidence to establish that its actual tax liability was correctly reported on its returns as filed, so as to support a conclusion that its refund claim was improperly denied and should be granted. Accordingly, the Division's denial of petitioner's claim for refund was proper and is hereby sustained.

L. The petition of Emerald International Holdings, Ltd., is hereby denied, and the Division's denial of petitioner's claim for refund, dated September 5, 2014, is sustained.

DATED: Albany, New York
August 10, 2017

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE