STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANDREA WOODNER	:	ORDER DTA NO. 827878
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2009.	: : :	

Petitioner, Andrea Woodner, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2009.

Petitioner, appearing by Steptoe and Johnson, LLP (Beth Tractenberg, Esq., of counsel), brought a motion on October 11, 2016 seeking summary determination in favor of petitioner pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion were the affidavits of Beth Tractenberg, Esq., dated October 12, 2017, and petitioner, dated October 13, 2017, and an affirmation of Harold Moehringer, CPA, dated September 28, 2017, together with annexed exhibits and a memorandum of law in support of the motion. In opposition to the motion, the Division of Taxation, appearing by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel), filed the affirmation of Charles Fishbaum, Esq., dated December 7, 2017, and annexed exhibits. Pursuant to 20 NYCRR 3000.5 (d), the 90-day period for issuance of this order began on December 15,

2017. Based upon the pleadings, motion papers and other documents filed by the parties, James P. Connolly, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner has established that there are no material and triable issues of fact in dispute and that the law and the facts presented are sufficient to allow for a determination as a matter of law in her favor.

FINDINGS OF FACT

1. Avenue All Stars, LLC (AAS) was organized in Delaware in 2006. AAS was treated as a partnership for federal and New York tax purposes. The members in AAS and their respective percentage interests were as follows: (1) petitioner, with a 35 percent interest; (2) petitioner's sister, Dian Woodner, with a 50 percent interest; and (3) the estate of petitioner's deceased brother, Jonathan Woodner (Estate), with a 15 percent interest. Petitioner and Dian Woodner were co-executrixes of the Estate. The record does not reveal whether they were also both beneficiaries of the Estate.

2. At all times relevant to this matter, until it sold the interest in 2010, AAS owned an interest in another entity that owned the Evening Star Building in Washington, D.C. The record is not clear as to what other assets AAS owned in 2009.

3. On February 6, 2007, petitioner made a capital contribution in the amount of $10,260,000.00 to AAS, which AAS used to purchase, through 25 Park Place LLC, a wholly-owned limited liability company organized in 2006, real property located at 25 Park Place, New York, New York (the Property).

4. Sometime in 2007, Dian Woodner contributed $14,388,000.00 to AAS. Through 21 East 67th Street Associates LLC, an LLC wholly owned by AAS and created in 2006, AAS purchased real property located at 21 East 67th Street, New York, New York.

5. Effective April 15, 2009, AAS entered into an agreement (Redemption Agreement) with petitioner, Dian Woodner, and the Estate, under which AAS made a liquidation distribution to petitioner, in which petitioner received 100 percent of AAS's interests in 25 Park Place LLC in complete redemption of her membership interest in AAS, and Dian Woodner received 100 percent of AAS's interests in 21 East 67th Street Associates LLC in complete redemption of her membership interest in AAS (Liquidation Distribution). As part of that agreement, AAS assumed petitioner's allocable share of AAS's non-recourse debt. In her petition, petitioner maintains that her allocable share of AAS's non-recourse debt at the time of the Liquidation Distribution was approximately $11,800,000.00. The Redemption Agreement is not part of the record in this matter.

6. According to the petition, the redemption of petitioner's interest in AAS in 2009 did not require her to recognize any income for tax purposes:

> "11. [AAS]'s tax basis in the Property in the Tax Year (prior to its distribution to Petitioner) was approximately $11.78 million. Petitioner's initial tax basis in the Property immediately following its distribution to her was approximately $2.8 million. When distributed to Petitioner, the Property was subject to a non-recourse debt of approximately $100,000.00.
>
> 12. Petitioner's tax basis in her membership interest in [AAS] immediately prior to her withdrawal was approximately $14.5 million, of which approximately $11.8 million represented Petitioner's allocable share of [AAS]'s aggregate non-recourse debt. When she withdrew from [AAS], Petitioner received a "constructive" cash distribution (only for income tax purposes) of approximately $11.7 million, calculated as her pre-withdrawal share of [AAS]'s non-recourse debt (approximately $11.8 million) less the $100,000 non-recourse debt on the Property when distributed to her. The amount of the constructive distribution to Petitioner was less than her tax basis in her interest in [AAS] immediately prior to

> her withdrawal. As a result, Petitioner recognized no taxable gain when she withdrew from [AAS], but the tax basis of the Property in her hands was reduced to the amount of her remaining tax basis in her interest in [AAS] after the constructive distribution (approximately $2.8 million)."

7. Petitioner's affirmation states that she timely filed her 2007 federal, New York State and City returns in November 2008 and that "I never signed a Consent Extending the Period of Limitation for Assessment of Income Taxes as to my 2007 federal, New York state, or New York City personal income tax returns."[1] She also states that she timely filed her Federal, State, and City returns for 2009. Finally, she asserts that "[t]o my knowledge" the Internal Revenue Service (IRS) has not re-determined any items on her 2007 or 2009 Federal income tax return and that the IRS has not sought to apply Treas Reg [26 CFR] § 1.701-2 to her for either tax year 2007 or 2009.

8. In his affirmation, Harold Moehringer states that he was the preparer of AAS's federal, New York State, and City returns for 2007, 2008, and 2009.[2] He also states that AAS timely filed its federal, New York State and City returns for the tax year 2007 on November 13, 2008. He asserts that AAS also timely filed its federal, New York State, and City returns for 2009, but does not give the date on which it did so. Mr. Moehringer's affidavit also asserts that (i) AAS never executed any consent extending the limitations period on its 2007 federal, New York State, or City returns; (ii) the IRS has not re-determined any items on AAS's 2007 or 2009 federal income tax return; and (iii) the IRS has not sought to apply Treas Reg [26 CFR] § 1.701-2 to

[1] The document is captioned as an affirmation, but is sworn to and signed before a notary public, who properly notarized the document.

[2] The document is captioned as an affirmation, and Mr. Moehringer "affirms under penalty of perjury" the statements therein. The document is notarized, but it has no "jurat" – i.e., there is no statement therein that Mr. Moehringer appeared in front of the notary public notarizing the document and swore to the truth of the statements therein.

AAS for either tax year 2007 or 2009. The affirmation states that Mr. Moehringer makes the affirmation based on "his knowledge and belief of the facts and circumstances" of this matter. Apart from stating that he prepared AAS's tax returns through 2009, Mr. Moehringer does not indicate whether he had any other involvement with regard to AAS's New York State or federal taxes after preparing the returns for 2009.

9. This matter arose out of the Division's field audit of AAS, which resulted in the Division's issuance of a notice of deficiency (subject notice) to petitioner, dated March 14, 2014, asserting $1,214,115.00 in additional tax due for 2009, plus penalty and interest. The only information about the audit in the record is a letter dated May 1, 2013, from Ms. Laurie A. Kmiec, the auditor, to Mr. Steven Eliach, JD., petitioner's representative at the time, which states, in pertinent part:

> "Based on the facts of the case (as attached), the department has concluded that neither Dian or Andrea are able to exchange their built in gain within their partnership interest of [AAS] by redeeming their interest for the real property purchased by the partnership and distributed to Dian and Andrea individually according to [IRC §§] 707 and 701 as noted above. Therefore, the department is disallowing the transaction to be treated as a tax free under [IRC §] 731. In substance Andrea and Dian only made cash contributions to [AAS] in order to alleviate their negative capital balances that existed within the partnership. These negative capital balances were indications of the built in gain applicable on any sale by the partners of their interest in [AAS] or any sale of property by the Evening Star. The transaction involving the cash contributions made to AAS is being disallowed. In addition, on April 15, 2009, the date in which Andrea and Dian redeemed their interest in the partnership will be utilized as the date that Andrea and Dian sold their partnership interest in [AAS] and accordingly will need to report the applicable gain."

The letter requested a response by May 13, 2013. The record does not indicate whether there was any response to the letter. Furthermore, the record does not contain the auditor's audit report or workpapers and does not otherwise disclose whether the rationale outlined in the letter in support of the conclusion that petitioner failed to properly report gain from the transactions culminating

in the Liquidation Distribution was the Division's rationale for issuing the subject notice to petitioner.

10. Petitioner protested the subject notice to the Bureau of Conciliation and Mediation Services (BCMS), which, after a conciliation conference, issued a conciliation order, dated July 15, 2016, abating the penalty imposed by the subject notice, but otherwise sustaining it.

11. Petitioner timely filed a petition with the Division of Tax Appeals dated October 6, 2016, protesting the conciliation order.

12. The Division filed its answer to the petition on December 15, 2016, and filed an amended answer on or about December 27, 2016. By letter dated August 22, 2017, the Division sought permission from the Division of Tax Appeals to file a second amended answer, which permission was granted. The second amended answer denies the allegation in the petition that petitioner did not have to report a gain as a result of the Liquidation Distribution. Among other things, the second amended answer asserted that the Liquidation Distribution was "a disguised sale of petitioner's 35% interest in [AAS]" and "a taxable event and not a tax-free distribution of property" and that AAS's assumption of petitioner's allocable share of AAS's non-recourse debt as part of the Liquidation Distribution "was a constructive dividend of cash to [p]etitioner." The second amended answer also asserts that the transactions described in Findings of Fact 3, 4, and 5:

(a) "cannot be respected under substance over form principles";

(b) "constitute a violation of the step transaction doctrine";

(c) "were not undertaken for a substantial business purpose";

(d) "lacked sufficient economic substance and cannot be respected for tax purposes."

Finally, the second amended answer asserts that "[petitioner] violated the anti-abuse rule of Subchapter K of the [IRC]" and that:

> "[petitioner] availed herself of [AAS] for transactions, the principal purpose of which was to substantially reduce the present value of [petitioner's] aggregate Federal tax liability in a manner inconsistent with the intent of Subchapter K of the [IRC]."

13. Petitioner argues that she is entitled to summary determination in this matter because the theories in the Division's second amended answer would, at most, support a conclusion that there was a deficiency in 2007, which is now a closed year, and do not support a finding of a deficiency for 2009. In addition, petitioner argues that the Division lacks the authority to apply Treas Reg [26 CFR] § 1.701-2's anti-abuse rule because the IRS made no such adjustment on the returns of AAS or petitioner for 2009.

14. The Division counters that petitioner is not entitled to summary determination herein because each of the Division's arguments in its second amended answer raises material issues of fact, including whether petitioner had a business purpose for its 2007 contribution to AAS or for entering into the Redemption Agreement. The Division further argues that petitioner's claim that the Division may not apply Treas Reg [26 CFR] § 1.701-2's anti-abuse rule in the absence of the IRS having made a parallel adjustment on that taxpayer's federal return is inconsistent with the requirement in the Division's regulations that taxpayers maintain records to support any deductions claimed on their federal return. The Divisions posits that such a requirement would not be necessary if the Division lacked the authority to adjust an item on a taxpayer's New York State return that the IRS had chosen not to adjust on the taxpayer's federal return.

CONCLUSIONS OF LAW

A. Under the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules), a motion for summary determination shall be granted:

> "if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact" (20 NYCRR 3000.9 [b] [1]; ***see also*** Tax Law § 2006 [6]).

B. A motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to [CPLR 3212]" (20 NYCRR 3000.9 [c]; ***see also Matter of Service Merchandise, Co.***, Tax Appeals Tribunal, January 14, 1999). Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue [citation omitted]" (***Moskowitz v Garlock***, 23 AD2d 943, 944 [3d Dept 1965]; ***see Daliendo v Johnson***, 147 AD2d 312 [2d Dept 1989]). Because it is the "procedural equivalent of a trial" (***Museums at Stony Brook v Village of Patchogue Fire Dept.***, 146 AD2d 572, 573 [2d Dept 1989]), undermining the notion of a "day in court," summary determination must be used sparingly (***Wanger v Zeh***, 45 Misc 2d 93, 94 [S.Ct Albany Cty, 1965], ***affd*** 26 AD2d 729 [3d Dept 1966]). If any material facts are in dispute, if the existence of a triable issue of fact is "arguable," or if contrary inferences may be reasonably drawn from the undisputed facts, the motion must be denied (***see Gerard v Inglese***, 11 AD2d 381 [3d Dept 1960]).

C. Petitioner's notice of motion herein asks for summary determination in relation to five discrete issues. As noted, under the Rules, a summary determination motion may only be granted if there are no material and triable issues of fact, such that "the administrative law judge can,

therefore, as a matter of law, *issue a determination in favor of any party*" (20 NYCRR 3000.9 [b] [1] [emphasis added]). Thus, this forum may not grant summary determination in regard to discrete issues. Petitioner's notice of motion is, therefore, not in proper form. Because, however, petitioner's brief in support of the motion asks the Division of Tax Appeals to "summarily issue a determination . . . in petitioner's favor," this motion will be treated as a proper motion for summary determination.

D. On this motion, the parties have not submitted the audit report or workpapers. The only indication of the adjustment made on audit is a letter from the auditor dated May 1, 2013 (***see*** Finding of Fact 9). Given that the subject notice was not issued until almost a year later, it is not clear that the May 1, 2013 letter reflects the final adjustment made by the auditor. Thus, it cannot be used to establish what the Division found on audit. Based on the pleadings herein, however, it appears that the additional tax found due by the subject notice is attributable to the Division's determination that petitioner should have reported gain with regard to the Liquidation Distribution, whereas petitioner's return treated it as a nonrecognition event.

E. In defending the subject notice, in its second amended answer and in opposing this motion, the Division has raised a wide array of legal doctrines, including IRC § 707 (a) (2) (B)'s disguised sale rule; the anti-abuse rule under Treas Reg [26 CFR] § 1.701.2, and the related common law doctrines of substance over form, economic substance, and step transaction. Petitioner has the burden of proof in this matter (***see*** Tax Law § 689 [e]). Thus, in order to establish entitlement to summary determination in her favor in this matter, petitioner must show that, as a matter of law, none of the Division's theories, or any other legal theory, would support the issuance of the subject notice to her. Petitioner has not met that burden on this motion.

F. Petitioner maintains that, because AAS is an LLC treated as a partnership for federal and New York State tax purposes, the taxability of the redemption of its interest in AAS is governed by IRC § 731 (a), which provides that "[i]n the case of a distribution by a partnership to a partner, gain shall not be recognized to such partner, except to the extent that any money distributed exceeds the adjusted basis of such partner's interest in the partnership immediately before the distribution" (deemed cash distribution). IRC § 752 (a) treats a reduction in a partner's share of a partnership's liabilities as a distribution of "money" for purposes of IRC § 731 (a). Thus, in the case of a liquidation distribution to a partner in which the partner eliminates her allocable share of the partnership's non-recourse debt, such as the Liquidation Distribution here, the partner is required to show gain if that reduction, plus any other "money" distributed to the partner as part of the distribution, exceeds the partner's adjusted basis in the partnership. The premise of petitioner's motion is that her adjusted basis in her interest in AAS exceeded the deemed cash distribution and therefore she was not required to show any gain as a result of the Liquidation Distribution. The petition asserts that petitioner's "tax basis" in AAS was approximately $14.5 million, while her share of AAS's non-recourse debt was $11.8 million immediately prior to the Liquidation Distribution. In its second amended answer the Division denied those assertions in the petition and petitioner has not submitted any proof of those figures on this motion. Thus, petitioner has failed to prove that, apart from the Division's claimed grounds for adjustment, the Liquidation Distribution she received from AAS was a nonrecognition event for her, and, accordingly, questions of fact exist underlying the subject notice, which imposed additional liability as a result of the Liquidation Distribution.

G. Even assuming that petitioner had substantiated the amount of her basis in AAS at the time of the Liquidation Distribution and the amount of reduction of her partnership liabilities as a

result of that distribution, questions of material fact would still exist in this matter. Whether petitioner was required to recognize any income under IRC § 731 (a) as a result of the Liquidation Distribution turns on whether the "money" she received as a result of that distribution exceeded her basis in AAS. Importantly, the amount of the deemed cash distribution she received pursuant to IRC § 752 (a), for purposes of IRC § 731 (a) (1), is subject to adjustment under IRC § 482. That section provides:

> "In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses."

IRC § 482 is "used to determine the arm's length transfer prices for transactions between" commonly-controlled "organizations, trades, or businesses" (***Matter of Panavision, Inc.***, Tax Appeals Tribunal, June 6, 2002). "Under § 482, the Commissioner has broad discretion to correct distortions of income which occur through the strict application of other provisions of the [IRC]" (***Dolese v Commissioner***, 811 F.2d 543, 546-47 [10th Cir. 1987]; ***see also*** Treas Reg [26 CFR] § 1.704-l [b] [l] [ii] [providing that an allocation that is respected under IRC § 704 (b) may still be reallocated under other provisions, such as IRC § 482]; ***Rodebaugh v Commissioner***, T.C. Memo 1974-36 [holding that the Commissioner could make allocations under IRC § 482 that differed from the formula set forth in the partnership agreement], ***aff'd*** 518 F.2d 73 [6th Cir. 1975]). Here, the Redemption Agreement, which is not in the record, was purportedly a three-party agreement between petitioner, Dian Woodner, and the Estate. Given that petitioner and Dian Woodner were co-executrices of the Estate, the Estate was a controlled party for purposes

of section 482 (***see*** Treas Reg [26 CFR] 1.482.1 [i] ["Controlled taxpayer means any one of two or more taxpayers owned or controlled directly or indirectly by the same interests, and includes the taxpayer that owns or controls the other taxpayers."]). Thus, assuming that the three parties to the Redemption Agreement satisfy the "organizations, trades, or businesses" requirement, which itself involves questions of fact, the Division would be authorized under IRC § 482 to increase the amount of the consideration petitioner received as a result of the Liquidation Distribution if that consideration, under all the circumstances, was not an arms-length amount. As a part of that transaction, petitioner received 100% of AAS's interest in 25 Park Place LLC, plus the elimination of her share of AAS's non-recourse debt. If the only remaining asset on AAS's balance sheet was money, the Division could adjust the terms of the Liquidation Distribution to require AAS to pay additional money to petitioner, which would require petitioner, in turn, to recognize income with regard to that distribution to the extent that the total amount of the money, including the deemed distribution of cash arising from the reduction in her share of AAS's non-recourse debt under IRS § 752 (a), exceeded her adjusted basis in AAS. Of course, whether the terms of the Redemption Agreement were at arms-length is a question of fact. To resolve that question, it would be necessary to compare the terms of the Redemption Agreement with the LLC's Operating Agreement and to determine if the Operating Agreement's allocations were at arms-length (***see*** Jeffrey H. Paravano and Daniel P. Meehan, 13 J. Partnership Tax'n 3, at 24 [Spring 1996]; ***see also*** McKee, et. al., Federal Taxation of Partnerships and Partners [2014] at § 11.03 [3]). Because neither the Operating Agreement nor the Redemption Agreement is in the record, material questions of fact exist herein that require a full hearing.

H. The Division's second amended answer also raises three common law doctrines in support of the subject notice: economic substance, step transaction, and substance over form.

The Tribunal has applied the first of these doctrines, economic substance, in a number of cases (***see Matter of The Sherwin-Williams Company***, Tax Appeals Tribunal, June 5, 2003, ***confirmed*** 12 AD3d 112 [3d Dept 2004]; ***Matter of the Talbots***, Tax Appeals Tribunal, September 8, 2008; ***Matter of Kellwood Company***, Tax Appeals Tribunal, September 22, 2011). It has held that, where the Division challenges the economic substance of a transaction, the taxpayer has a two-fold burden: "[t]he taxpayer must prove that it engaged in the transaction for valid, non-tax business purposes and that the transaction has a purpose, substance, or utility apart from [its] anticipated tax consequences" (***Kellwood***). In ***Kellwood***, the Tribunal admonished that "[a] subjective business purpose for engaging in a transaction need not be free of tax considerations . . ., as taxpayers possess a legal right to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits" (internal citations and quotations omitted). Under the economic substance doctrine, transactions that lack economic substance can be disregarded (***see Sherwin-Williams***). Here, the Division has not explained how it believes the economic substance doctrine would apply to the facts of this case in either its second amended answer or in its papers in opposition to this motion. For its part, petitioner argues that the economic substance doctrine cannot be applied to the facts of this case because doing so "necessarily requires recharacterizing or disregarding petitioner's cash contribution to [AAS] and [AAS's] purchase of [25 Park Place LLC] in 2007, a closed year." This argument is unavailing. First, petitioner has not established that, as of March 14, 2014, when the Division issued the subject notice, 2007 was a closed year with regard to petitioner, i.e., a period for which the Division could no longer assess her additional personal income tax. Tax Law § 683 provides that "any tax under this article shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed)," with

exceptions. According to her affidavit, petitioner filed her personal income tax return for 2007 in "November 2008." Thus, to keep petitioner's tax year 2007 open for assessment, the Division had until sometime in November 2011 to obtain a consent to extend the limitations period. Petitioner's affidavit states that she never signed any such consent, but leaves open the possibility that her representative with a valid power of attorney did so (***see*** Finding of Fact 7). Because consents extending the statute of limitations in section 683 (a) can be signed by representatives who have been given a power of attorney by the taxpayer, there remains a question of fact as to whether tax year 2007 was closed for assessment (***see e.g. Matter of Bernard and Barbara Kane***, Tax Appeals Tribunal, February 18, 1999 [finding that a consent signed by petitioner's representative holding a valid power of attorney was effective to extend the time to assess petitioner additional income tax]).[3]

Second, petitioner cites no New York authority for its argument that Tax Law § 683 (a) bars the Division from issuing a notice of deficiency for an open year merely because part of the transaction giving rise to the liability occurred in a year that is closed under that provision. This argument is rejected. By its terms, section 683 (a) merely prohibits the Division from "assess[ing]" tax for a tax year more than three years after the tax return for that year was filed. Thus, it does not preclude the Division from determining the existence of a deficiency in a later

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[3] The Moehringer affirmation asserts that AAS did not consent to extend its statute of limitations for its 2007 New York State or federal return. The evidentiary value of this document is in doubt given that the document represents Mr. Moehringer to be a CPA, and CPAs are not authorized to give evidence through the use of an affirmation (***see*** CPLR 2106 [a]). Moreover, while the document is notarized, it does not contain any jurat (attestation) clause. In any event, the document fails to establish that AAS had not consented to extend the statute of limitations for the 2007 year through the date the subject notice was issued. While Mr. Moehringer asserts that AAS did not execute any such consent, the document does not provide the basis for his knowledge (***see*** Finding of Fact 8). Thus, that document is not sufficient to eliminate all questions of fact on a motion for summary determination as to whether AAS consented to extend its statute of limitations for federal or New York State purposes for its 2007 tax year through the issuance date of the subject notice (***see Matter of Impath, Inc.***, January 8, 2004 ["Credibility has two components: competency and veracity. Opportunity and capacity to perceive combined with capacity to recollect and communicate constitute the ingredients of competency."]).

year that may be inconsistent with a position the taxpayer took in an earlier year. The federal case cited by petitioner in this regard, ***BASR P'ship v United States*** (113 Fed. Cl. 181 [2013], ***aff'd sub nom*. *BASR P'ship v. United States***, 795 F.3d 1338 [Fed. Cir. 2015]), does not support petitioner's position because the entire transaction giving rise to the assessment there occurred in the closed year (***see*** 113 Fed. Cl., at 184).

I. The Division's disguised sale and anti-abuse arguments raise legal questions that are not dispositive of this motion. Therefore, those arguments need not be addressed on this motion.

J. In sum, based on the current record, there remain a multitude of material questions of fact here that preclude summary determination and necessitate an evidentiary hearing.

K. Petitioner's motion for summary determination is denied and the matter will be scheduled for hearing in due course.

DATED: Albany, New York
March 15, 2018

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE