

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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

Petitioners, Shanghai Pavilion, Inc., Cheng Jian Lin, and Meng Xia Chen, filed an exception to the determination of the Administrative Law Judge issued on September 17, 2009. Petitioners appeared by Louis Miu, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert Tompkins, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a letter brief in reply. Petitioners' request for oral argument was withdrawn.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this matter.

ISSUES

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

II. Whether the Notices of Determination issued to petitioners Meng Xia Chen and Cheng Jian Lin were issued beyond the statute of limitations.

FINDINGS OF FACT

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

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

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

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

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

As a result of the audit, the Division issued to L.C. Shanghai, Inc. a Notice of Determination, dated February 21, 2006, for the period June 1, 2000 through May 31, 2003

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

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

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

A renewal application was filed with the State Liquor Authority by Shanghai Pavilion, Inc. on June 26, 2006 for a license to sell alcoholic beverages at retail for consumption on the

premises. The renewal application lists petitioner Cheng Jian Lin as the president of the corporation.

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

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

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

You are hereby notified that, in spite of any provisions contained in the sales contract, except as indicated in condition number two listed below, no distribution

of funds or property, to the extent of the amount of the state's claim, may be made before the following conditions have been met:

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

No response was received from petitioner.

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

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

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

The Division issued to petitioner Shanghai Pavilion, Inc., on May 11, 2007, a Notice of Determination of sales and use taxes due in the amount of \$305,876.40. The notice explained

that petitioner was liable as a bulk sale purchaser for the taxes determined to be due from the seller, L.C. Shanghai, Inc.

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

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

Notices of determination, such as the ones at issue, are computer-generated by the Computerized Case and Resource Tracking System (CARTS) Control Unit of the Division of Taxation. The computer preparation of such notices also includes the preparation of a certified mail record (CMR). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number.

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

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

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

employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or the employee's initials (or signature) or both to the CMR. In this case, the stamped envelopes and CMR were delivered to the Colonie Center branch.

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

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

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

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

On page 16 of the CMR, there is a preprinted entry of "170" corresponding to the heading "Total Pieces and Amounts." Below the total pieces entry, and below the heading "Total Pieces

Received at Post Office,” the number “170” has been manually written and circled. The initials of a postal service employee appear next to the handwritten “170.”

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

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

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

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

The fact that the Postal Service employee wrote and circled “170 ”on the last page of the CMR to indicate that this was the number of pieces received at the post office was established through the affidavit of Mr. VanDerZee. Mr. VanDerZee’s knowledge of this fact is based on his knowledge that the Division’s Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

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

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

In support of petitioner Meng Xia Chen's position that she did not receive the Notice of Determination at issue herein, petitioner submitted a copy of her driver's license, copies of bank statements for periods November 2005 through August 2006, the same automobile insurance policy with a payment due date of August 7, 2005, copies of checks written in early January 2006 and a traffic ticket summons from the New York City Department of Finance, dated March 31, 2006. Each of the submitted documents show petitioner Meng Xia Chen's address as 4 Queens Street, Syosset, NY 11791.

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

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

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

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

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted the statutory and regulatory requirement for notifying the Division in the event of a bulk sale of business assets. The Administrative Law Judge pointed out that if a purchaser fails to file a proper and timely notice of bulk sale, then such purchaser remains personally liable for the sales and use taxes due from the seller.

The Administrative Law Judge observed that a bulk sale includes not only any sale, transfer or assignment in bulk of any part or the whole of business assets, other than in the ordinary course of business, but it also includes a transfer by gift and a transfer where the only consideration is debt relief. The Administrative Law Judge recited that a purchaser in a bulk sale includes “any person who, as part of a bulk sale, purchases or is the transferee or assignee of business assets (citation omitted).” Here, the Administrative Law Judge found that record did not include any details concerning the formation of Shanghai Pavilion, Inc. However, the Administrative Law Judge concluded that it was “undeniable” that this corporate entity took over the ownership of the restaurant formerly owned and operated by L.C. Shanghai, Inc. (Conclusion of Law “C”) and that such transfer is encompassed by the expansive regulatory definition of bulk sale. Consequently, the Administrative Law Judge held that Shanghai Pavilion, Inc. was a purchaser in a bulk sale.

The Administrative Law Judge concluded that since Shanghai Pavilion, Inc. did not give notice to the Division as required under Tax Law § 1141(c), despite the numerous requests made by the Division for it to file such notification, it was responsible for the sales and use taxes due from L.C. Shanghai, Inc., the bulk seller, limited to the greater of the purchase price or fair market value of the business assets sold.

The Administrative Law Judge stated that it is well established that a presumption of correctness attaches to a notice of determination upon its issuance and petitioners bear the burden of overcoming this presumption. The Administrative Law Judge found that petitioners offered no evidence or argument in opposition to the Notice of Determination dated May 11, 2007, and by their failure to present evidence showing error in the audit method or result, petitioners have surrendered to the statutory presumption of correctness. Accordingly, the Administrative Law Judge held that the assessment issued to Shanghai Pavilion, Inc., as the purchaser in a bulk sale transaction, must be sustained.

The Administrative Law Judge noted that when a notice of determination is issued by the Division, a taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination within 90 days of the mailing of the notice of determination. After this 90-day period, the amount of tax, penalty and interest specified in the notice becomes an assessment and the Division of Tax Appeals lacks jurisdiction to consider the merits of the petition.

The Administrative Law Judge observed that where the timeliness of a taxpayer's petition challenging a notice of determination is in question, the initial inquiry focuses on the mailing of the notice, because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail. However, the Administrative Law Judge cautioned that the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division.

The Administrative Law Judge noted that in order for the Division to establish proper mailing, it must provide proof of the standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and there must also be proof that the standard procedure was followed in this particular instance. The Administrative Law Judge

found that the Division introduced adequate proof of its standard mailing procedures and established that the subject notices of determination were mailed as addressed to petitioners on February 24, 2006.

The Administrative Law Judge stated that petitioners did not dispute that the notices were mailed as addressed on February 24, 2006. Instead, the Administrative Law Judge found that petitioners contended that the notices were not mailed to the correct address and that, in fact, they never received them. The Administrative Law Judge held that the record shows that petitioners' address as listed on their 2004 New York State personal income tax returns filed June 27, 2005 (Meng Xia Chen's) and June 28, 2005 (Cheng Jian Lin's) was 25-34 76th Street, East Elmhurst, New York 11370, the address to which the subject notices were mailed on February 24, 2006. He determined that the record also showed that petitioners have offered no proof to show that they ever advised the Division of any address change at any point prior to February 24, 2006. Accordingly, the Administrative Law Judge concluded that the Division has shown that it mailed the subject notices of determination to petitioners at their "last known address" consistent with Tax Law § 1138(a)(1) and at "such address as may be obtainable" under Tax Law § 1147(a)(1).

However, since the Division admitted that petitioners never received the notices of determination, the Administrative Law Judge found that the presumption of delivery was rebutted and the 90-day time period for requesting a hearing was never triggered, and, as such, petitioners are entitled to a hearing concerning the sales tax assessed in the notices.

The Administrative Law Judge reiterated that a presumption of correctness attaches to a notice of determination upon its issuance and petitioners bear the burden of overcoming this presumption. The Administrative Law Judge held that petitioners offered no evidence or

argument in opposition to the notices of determination dated February 24, 2006, and by their failure to present evidence showing error in the audit method or result, petitioners have surrendered to the statutory presumption of correctness. Accordingly, the Administrative Law Judge concluded that the assessments issued to Cheng Jian Lin and Meng Xian Chen as officers or responsible persons of L.C. Shanghai, Inc., as modified by the BCMS, must be sustained.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that there was no bulk sale to petitioner Shanghai Pavilion, Inc. Further, petitioners maintain that there is no proof that any of the notices or letters concerning the Division's belief that a bulk sale had occurred were ever sent to Shanghai Pavilion, Inc. Petitioners assert that the bulk sale could not have been based on information obtained on the audit, as the audit resulted in a responsible person assessment being issued to Shanghai Pavilion, Inc.

Petitioners argue that because Meng Xia Chen and Cheng Jian Lin did not receive the Notices of Determination issued to them on February 24, 2006, the statute of limitations for the assessment of sales and use tax against them had expired by the time they became aware of the assessments.

In opposition, the Division argues that a bulk sale did occur between L.C. Shanghai, Inc. and Shanghai Pavilion, Inc. The Division agrees with the Administrative Law Judge's conclusion that petitioner took over the ownership and operation of the restaurant formerly operated as L.C. Shanghai, Inc.

The Division maintains that the duty to file a Notification of Sale, Transfer or Assignment in Bulk fell on petitioner, Shanghai Pavilion, Inc. and no prior notice by the Division was required. The Division asserts that it provided proof at the hearing that it mailed

three letters and a Notice of Claim to petitioner attempting to obtain information on the assets acquired by petitioner, but it received no response. The Division points out that petitioner did not deny receipt of these letters at the hearing and never alleged that they were not mailed.

The Division argues that while petitioner maintains that the transferred tax liability of L.C. Shanghai, Inc. in the amount of \$305,876.40 exceeded the value of the restaurant, it provided no evidence or argument at the hearing or in its petition. Further, the Division points out that petitioner did not provide any information to the Division that would have allowed the Division to learn the value of the transferred assets or any contract price on a sale.

The Division maintains that it provided proof of mailing of the Notices of Determination issued to Meng Xia Chen and Cheng Jian Lin at their last known addresses, and conceded that they were entitled to hearings on the Notices because they did not receive them. However, the Division does not agree that the Notices should be dismissed.

OPINION

The underlying premise of the Division's assessment of Shanghai Pavilion, Inc. is that a transfer in bulk occurred. The Division's theory of liability began with a visit by an audit supervisor to the restaurant premises formerly operated by L.C. Shanghai, Inc. The audit supervisor learned that the restaurant was now being operated by petitioner, Shanghai Pavilion, Inc., which was owned by the same individuals who had owned L.C. Shanghai, Inc. Based solely on this knowledge, the Division assessed Shanghai Pavilion, Inc. as a responsible person of L.C. Shanghai, Inc. At the time that this assessment was issued, there is no evidence that the Division believed that a transfer in bulk had occurred.

According to the testimony of the Division's witness, it was not until subsequent to the BCMS conference regarding this assessment of Shanghai Pavilion, Inc. that the Division first

considered assessing petitioner as a bulk sale purchaser. In the space of a single month, the Division issued several demands to Shanghai Pavilion, Inc. for information regarding a bulk sale. Despite the fact that no response was received, the Division concluded that a bulk sale had occurred. Without obtaining any evidence of a sale, and without any further investigation, the Division cancelled the responsible person assessment and issued an assessment to Shanghai Pavilion, Inc. as a bulk sale purchaser for the full amount of unpaid sales tax liability of L.C. Shanghai, Inc., the alleged bulk sale seller.

From the facts in the record, the only thing of which we can be certain is that a restaurant business similar in nature to that conducted by L.C. Shanghai, Inc. began operations in the same location at or about the time that L.C. Shanghai, Inc. filed its final sales tax return. Further, the principals of L.C. Shanghai, Inc. and the new business were the same.

We do not find these facts sufficient, absent some indication that assets of L.C. Shanghai, Inc. were actually transferred to Shanghai Pavilion, Inc., to conclude that a transfer in bulk occurred. No evidence has been presented as to what assets, if any, were owned by L.C. Shanghai, Inc. or which, if any, of those assets were supposedly transferred. There is no evidence that the Division's witness ever visited the premises when a restaurant was being operated by L.C. Shanghai, Inc. and the Division's witness did not testify regarding any assets owned by L.C. Shanghai, Inc. Therefore, there is no apparent basis on which the Division's witness could reasonably conclude that a transfer of any assets in bulk had occurred.

While a transfer of assets from one entity to the other is certainly a possibility, it is not a probability. The Division has not directed us to any authority that provides a presumption of the occurrence of a bulk sale, nor is there authority for a presumption that because the principals of both businesses are the same, a bulk sale of assets must have occurred between the entities.

Tax Law § 1141(c) provides as follows:

Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof whether or not the seller, transferrer or assignor, has represented to, or informed the purchaser, transferee or assignee that he owes any tax pursuant to this article, and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing.

Although a determination of tax must have a rational basis in order to be sustained upon review (*see, Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948 [1986]), the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (*see, Matter of Tivolacci v. State Tax Commn.*, 77 AD2d 759 [1980]; *Matter of Leogrande*, Tax Appeals Tribunal, July 18, 1991). Evidence that both rebuts the presumption of correctness and indicates the irrationality of the audit may appear on the face of the audit as described by the Division through testimony or documentation (*see, Matter of Snyder v. State Tax Commn.*, 114 AD2d 567 [1985]; *Matter of Fortunato*, Tax Appeals Tribunal, February 22, 1990); from factors underlying the audit which are developed by the petitioner at hearing (*see, Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348, [1984]; *Matter of Fokos Lounge*, Tax Appeals Tribunal, March 7, 1991 [where the petitioner proved that its utility meter readings bore no relationship to its level of business activity]); or in the inability of the Division to identify the basis of the audit methodology in response to questions posed at the hearing (*see, Matter of Basileo*, Tax Appeals Tribunal, May 9, 1991; *Matter of Fokos Lounge, supra*; *Matter of Shop Rite Wines & Liqs.*,

Tax Appeals Tribunal, February 22, 1991; *Matter of Fashana*, Tax Appeals Tribunal, September 21, 1989).

The *sine qua non* of a bulk sale is a transfer of business assets. We have no evidence as to the assets owned by L.C. Shanghai, Inc., nor do we know whether Shanghai Pavilion, Inc. used the assets of L.C. Shanghai, Inc. when conducting its restaurant operations. There is no evidence, testimonial or otherwise, that assets were, in fact, transferred from one entity to the other. In fact, according to the testimony of the Division's witness, the only impetus for issuing such assessment appears to be a suggestion made by a BCMS conferee to the audit supervisor more than a year after the Division had closed its audit of L.C. Shanghai, Inc. and had assessed Shanghai Pavilion, Inc. as a responsible person of L.C. Shanghai, Inc. However, at the time the audit was concluded, the Division had no apparent reason to believe that a bulk sale had occurred. As a result, we find that the Division, through the testimony of its witness, demonstrated that there was no rational basis for the assessment of Shanghai Pavilion, Inc. as a bulk sale purchaser and we cancel the Notice of Determination issued to petitioner, Shanghai Pavilion, Inc.

With regard to the notices of determination issued to petitioners Meng Xia Chen and Cheng Jian Lin, we agree with the Administrative Law Judge that the Division presented sufficient evidence that it properly mailed the Notices of Determination to these petitioners at the addresses given by them in their respective 2004 New York State Resident Income Tax Returns (Form IT-201), which were the last returns filed by them prior to the issuance of the Notice of Determination on February 24, 2006. These were petitioners' last known addresses consistent with Tax Law §§ 1138(a)(1) and 1147(a)(1).

As we stated in *Matter of Karolight, Ltd.* (Tax Appeals Tribunal, February 8, 1990),

If it was found that the notice of determination was properly mailed to petitioner Karolight, Ltd.'s last known address, the fact that it was returned to the Division marked “unclaimed”, coupled with a showing that the Postal Service failed to comply with its own mailing procedures, would have rebutted the presumption of receipt (*Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634, 468 NYS2d 945, 946 *aff'd*, 64 NY2d 688, 485 NYS2d 517). Under these circumstances, the 90-day time period for requesting a hearing under section 1138 of the Tax Law would not have been triggered and petitioner would have been entitled to a hearing (*Matter of Ruggerite, Inc. v. State Tax Commn., supra*).

If, however, it was found that the notice of determination was not mailed to petitioner Karolight, Ltd.'s last known address and petitioner Karolight, Ltd. never actually received the notice, the notice would be invalid (*Matter of C. Riegel, Inc.*, State Tax Commission, April 26, 1986; *see also, Shelton v. Commr.*, 63 TC 193). Under these facts, we would grant Karolight's request to dismiss the assessment absent a showing that a valid notice was remailed to Karolight, Ltd. during the three-year period of limitations.

The Division admitted that petitioners never received the notices of determination and the Administrative Law Judge properly found that the presumption of delivery was rebutted. However, since the Division demonstrated that it had properly mailed the notices, the 90-day time period for requesting a hearing was never triggered, and petitioners were entitled to a hearing concerning the sales tax assessed in the notices. At their hearing, petitioners offered no evidence or argument in opposition to the notices of determination. By their failure to present evidence showing error in the audit method or result, petitioners are deemed to have surrendered to the aforementioned presumption of correctness of the notices of determination. As a result, we affirm the Administrative Law Judge's determination sustaining the notices of determination issued to Meng Xia Chen and Cheng Jian Lin, as modified by BCMS.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Shanghai Pavilion, Inc. is granted;
2. The exception of Meng Xia Chen and Cheng Jian Lin is denied;

3. The determination of the Administrative Law Judge is reversed with respect to the finding that Shanghai Pavilion, Inc. was the transferee in a bulk sale transaction, but otherwise is affirmed;

4. The petition of Shanghai Pavilion, Inc. is granted;

5. The petition of Meng Xia Chen and Cheng Jian Lin is denied;

6. The Notice of Determination issued to Shanghai Pavilion, Inc. dated May 11, 2007 is cancelled; and

7. The Notices of Determination issued to Meng Xia Chen and Cheng Jian Lin dated February 24, 2006 as modified by the Bureau of Conciliation and Mediation Services are sustained.

DATED: Troy, New York
June 10, 2010

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner