STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NEGAT, INC. AND ARAYA SELASSIE, AS OFFICER	:	DETERMINATION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1984 through February 28, 1987.	:	

Petitioners, Negat, Inc. and Araya Selassie, as officer, 5 Dean Court, Rutherford, New Jersey 07070, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through February 28, 1987 (File No. 806881).

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on August 2, 1990 at 9:15 A.M., with all briefs to be submitted by December 27, 1990. Petitioner appeared by William P. Maloney, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Peter J. Martinelli, Esq., of counsel).

ISSUES

I. Whether petitioners' failure to produce books and records at the time of the audit justified the Division's resort to external indices to estimate tax due.

II. Whether, if the Division of Taxation was authorized to estimate petitioners' sales tax liability, the method of audit selected was reasonably calculated to reflect the tax due.

III. Whether petitioners have established that either the method of audit or audit results were incorrect.

IV. Whether Araya Selassie is personally liable for taxes determined to be due from Negat, Inc., for the entire audit period.

V. Whether the notices of determination issued to petitioners provided adequate notice where they failed to indicate that the tax assessed was estimated as provided for in Tax Law § 1138(a)(1).

FINDINGS OF FACT

Petitioner, Negat, Inc., operated a restaurant on the second floor of a building located at 2628 Broadway in New York City. An audit of Negat was triggered by Negat's filing of a notification of a bulk sale with the Division of Taxation ("Division").

Negat mailed a form entitled "Notification of Sale, Transfer or Assignment in Bulk" to the Division by United States Postal Service certified mail. The postmark on the envelope in which the form was mailed is April 5, 1987. It was date stamped by the Division's Administration Section on April 10, 1987 and by the "Sales Tax" section on April 13, 1987. The notification indicated that on November 5, 1986 Negat sold a restaurant to Bahama Mama, Inc. for a total selling price of $20,000.00, of which $5,000.00 was allocated to furniture, fixtures and other tangible personal property. A sales tax of $412.50 was remitted. The form is signed by Araya Selassie and dated November 5, 1986.

On or about April 16, 1987, the Division issued to Bahama Mama a notice of a possible claim for sales tax due. The notice instructed Bahama Mama not to release any funds or property until authorized to do so. On or about the same date, a similar document was issued to Negat's escrow agent. On or about May 7, 1987, the Division issued a notice to Negat (addressed to Negat, care of Bahama Mama), advising that an examination of Negat's books and records might be scheduled in the future.

On May 28, 1987, a district office was assigned to audit the sales tax records of Negat. Through contact with Negat's escrow agent, the Division identified Araya Selassie as a principal of Negat and received Mr. Selassie's home address and telephone number. A letter was sent to Mr. Selassie, dated June 5, 1987, asking Mr. Selassie to telephone the tax auditor conducting this audit, and on June 15, 1987, Mr. Selassie called the auditor. The auditor explained to Mr. Selassie that the Division would need Negat's sales records for the audit period in order to

conduct an audit. Mr. Selassie stated that he would have Negat's accountant, Joel L. Pogolowitz, contact the auditor. On June 16, 1987, Mr. Pogolowitz did in fact telephone the auditor who was not then available. Two telephone conversations followed between Mr. Pogolowitz and the auditor. On June 17, 1987, Mr. Pogolowitz informed the auditor that he was attempting to gather Negat's business records from Mr. Selassie. On July 7, 1987, Mr. Pogolowitz told the auditor that Mr. Selassie had been unable to provide the requested records because his wife was in the late stages of a difficult pregnancy and Mr. Selassie was flying back and forth between New York and England to be with her.

Because books and records were not available and the 90-day period of limitation for assessment of tax against Bahama Mama was due to expire, the Division decided to estimate Negat's sales tax liability. The auditor's supervisor visited Bahama Mama (the date and time of the visit are not in the record) and noted that it was a restaurant with a sit-down bar. From a conversation with a bookkeeper, he concluded that Bahama Mama's "business was same type as the previous business - except that a new decor set up" (audit workpapers, p. 4). The auditor confirmed through the Division's records that Bahama Mama registered as a sales tax vendor as of December 1986 and filed sales tax returns for the periods December 1, 1986 through February 28, 1987 and March 1, 1987 through May 31, 1987. According to the auditor's workpapers, Bahama Mama reported taxable sales of $132,046.00 for "the first full quarter" (referring to the period ended May 31, 1987).

Based on Bahama Mama's reported taxable sales and the observation of the audit supervisor, the Division estimated that Negat had taxable sales of $10,000.00 per week (or $130,000.00 per sales tax quarter) for the period June 1, 1984 through February 28, 1987, with a sales tax liability of $10,725.00 per sales tax quarterly period. To determine tax due, the Division subtracted sales taxes paid by Negat for each quarter included in the assessment period from the estimated tax due. This resulted in total sales tax due of $112,116.03.

The Division mailed two notices of determination and demands for payment of sales and use taxes due, dated July 13, 1987, to petitioner Negat, Inc. The first notice assessed sales tax

due for the period June 1, 1984 through February 28, 1987 in the amount of $112,116.03 plus penalty and interest. The second notice assessed an additional penalty of $7,414.13 for the period June 1, 1985 through February 28, 1987. Notices dated July 13, 1987 were also issued to Araya Selassie as officer of Negat, Inc., assessing identical amounts of tax, penalty and interest.[1]

Each of the notices of determination issued contain the following statements, preprinted in bold-faced type:

> "The tax assessed above has been estimated in accordance with the provisions of section 1138(a)(1) of the Tax Law." [This statement was preceded by a box.] "If the box above is checked see additional information on back of this notice. If the box above is not checked, the tax has not been estimated.

The boxes referred to on the notices of determination were not checked on any of the notices.

The first notice of determination issued to Negat (S870713144M), which assessed tax, penalty and interest, contains this typewritten statement:

> "Since you have not submitted your records for audit as required by Section 1142 of the Tax Law, the following taxes are determined to be due in accordance with Section 1138 of the Tax Law."

The second notice of determination (S870713145M), which assessed only penalty, contains this typewritten statement:

> "The following penalties are being imposed pursuant to Section 1145 of the Tax Law and are based on the results of an audit of your records: This notice is in addition to Notice Number S870713144M."

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[1]The notices issued to petitioners most probably were issued after the expiration of the 90-day period of limitation for assessment of tax found at Tax Law § 1141(c). The auditor's contact sheet indicates that the notices of determination were prepared on July 13, 1987, 94 days after the Division received the notification of sale from Negat and 99 days after the notification was mailed to the Division. However, the time requirements of article 28 have been held to constitute a statute of limitations which must be pleaded as an affirmative defense (Matter of Servomation Corp. v. State Tax Commn., 60 AD2d 374, 400 NYS2d 887). As petitioners failed to raise this issue, they must be considered to have waived any claim they may have had in this regard (see, Matter of Convissar v. State Tax Commn., 69 AD2d 929, 415 NYS2d 305, 306; Matter of Jencon, Tax Appeals Tribunal, December 20, 1990).

An identical statement appears on the notice of determination issued to Mr. Selassie (S870713147M), assessing a separate penalty. The notice of

determination issued to Mr. Selassie (S870713146M), assessing tax, penalty and interest for the audit period, contains this typewritten statement:

> "You are liable individually and as Officer of Negat, Inc. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

All of the shares of stock of Negat were owned by Abdella Nour and another gentleman from the first day of the audit period until August 1985, when all shares of stock were purchased by Araya Selassie and Tadesse Shiferaw for $27,000.00. Because of disagreements between Mr. Nour and his partner, the restaurant was actually closed from June 1, 1984 through October 1, 1984.

The transfer of stock from Mr. Nour and his partner to Mr. Selassie and Mr. Shiferaw was not reported to the Division as a sale or transfer of business assets. Copies of sales tax returns filed by Negat for the sales tax quarters ended May 31, 1984 and August 31, 1984 were signed by Abdul Ahmed as president.

After the transfer of stock, Mr. Selassie continued to operate the restaurant in essentially the same manner as it had been operated by Mr. Nour. The restaurant was called Nayala; Ethiopian food, beer, wine and non-alcoholic beverages were served. The restaurant did not have a separate bar for serving customers. It was operated by three family members and one unrelated employee. It was open only during dinner hours, approximately 6:00 P.M. to 11:00 P.M., seven days per week. Mr. Selassie began operating Nayala in July 1985 and then closed the restaurant for renovations. He reopened on August 18, 1985. In June and July 1986, Mr. Selassie's wife was ill as the result of a difficult pregnancy, and she eventually suffered a miscarriage. Because he was traveling between America and England to be with his wife, Mr. Selassie began operating the restaurant on a less regular basis. In June 1986, the restaurant was open six days per week, and in July 1986 it was open only three to five days per week.

Negat used individual guest checks to record its sales. Petitioner offered into evidence guest checks for the period August 18, 1985 through July 18, 1986. These were sequentially numbered and arranged by date. Each guest check separately stated food items, beverages, a sub-total, the tax charged on the sub-total amount and a total. Totals taken from the guest checks were posted to ledger sheets in the following categories: sales, tax and total. Expenses were also posted to the same set of ledger sheets. The ledger sheets were also entered into evidence, and a random review of the guests checks and ledger sheets failed to reveal any error in postings. Because of his wife's illness, Mr. Selassie made no entries on the ledger sheets in June and July 1986.

An accountant employed by Negat to represent it in matters involving the instant audit totaled the guest checks and determined tax due for the period July 27, 1985 through July 18, 1986 of $5,100.00.[2] Negat paid sales tax for the period June 1, 1985 through August 31, 1986 of $404.52. The accountant testified that Negat did not accurately report its taxable sales during this period.

Mr. Selassie closed the restaurant in July 1986 and entered into negotiations for the sale of the business. The Division had in its files a contract of sale between Negat and Bahama Mama, dated September 12, 1986.

It is not known how or when the contract came into the Division's possession. The contract indicates that the purchase price of the business was to be $20,000.00 and was to include the sale of any open stocks of beer, wine, alcohol, soft drinks and food. By the terms of the contract, Negat obligated itself to secure the written consent of the landlord to the assignment of Negat's lease and security to Bahama Mama and to negotiate a new lease satisfactory to Bahama Mama. In the event that Negat was unable to secure the landlord's consent to the assignment, the sales contract was to be deemed null and void. Although the date of closing shown in the

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[2]By dividing 1.0825 into $5,100.00, it can be determined that the accountant calculated taxable sales of $61,818.18. An independent review of the guest checks verified this result.

lease was October 15, 1986, negotiations with Negat's landlord delayed the actual closing until November 1986. The final purchase price was $24,000.00. A schedule attached to the contract indicates that the following property was transferred in the sale:

Tables	Freezer	Glasses
Chairs (about 35)	Hot water heater	Cups
Service Bar	Air Conditioner	Kitchen Utensils
4 Burner Stove	Gas Heating System	Fire Extinguishers
3 woks	Glass Display Case	Emergency Lights
Walk-in Refrigerator	Steam Table	Metal Sinks
Low Refrigerator	Food Warmer Shelf	Glass Door Refrigerator
Cash register	Office Desk	

Bahama Mama executed a consent agreement with the Division whereby it accepted liability for taxes determined to be due from Negat for the audit period, up to and including the final purchase price. Mr. Selassie testified that the final amount was $24,000.00. The parties agreed that any amounts paid by Bahama Mama as a consequence of the consent agreement would be applied to Negat's sales tax liability.

The operation of Bahama Mama differed from that of Nayala. Bahama Mama served liquor, as well as beer and wine, and had a sit-down bar along with table service. Bahama Mama totally renovated the restaurant, adopting a tropical decor and serving Caribbean type food. Neither party offered any evidence of the operating hours of Bahama Mama or prices charged.

A conciliation order, dated February 3, 1989, sustained the statutory notices issued to Negat and Mr. Selassie and denied their requests for redetermination of the tax assessments. The books and records offered into evidence at this hearing were made available to the Division at that conference; however, they were not reviewed by the Division at that time.

The Negat auditor testified that at the time of this audit he had been employed by the Division for almost ten years and prior to this audit had conducted five to eight audits of restaurants and had cooperated in the audits of eight to ten other restaurants. He gave no further details with regard to his experience in auditing restaurants, nor did he specifically relate this experience to his audit of Negat.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners argue that the notices of determination issued to them failed to comply with the requirements of Tax Law § 1138(a)(2) and 20 NYCRR 535.2(b)(2), in that they failed to advise them that the amount of tax due was estimated on the basis of external indices and also contained a statement advising them that the tax was not estimated; when, in fact, the tax was estimated on the basis of sales reported by Bahama Mama. Petitioners request that the notices of determination issued to them be deemed to be null and void and that tax paid by Bahama Mama be refunded to Bahama Mama. This issue was raised by petitioners for the first time in their post-hearing memorandum of law.

In the alternative, petitioners contend: (1) that the Division lacked statutory authority to estimate Negat's sales tax liability and (2) that the reliance on Bahama Mama's reported sales as a basis for estimating the tax liability was unreasonable. Petitioners note that they provided the books and records of Negat to the Division at the conciliation conference, and, on that ground, they argue that the Division is now precluded from resorting to external indices to determine tax due. Petitioners also conclude that they proved that there was no similarity between the operation of Bahama Mama and Nayala, beyond the fact that they were both restaurants, a fact ascertainable by the Division at the time of the audit.

If tax is determined to be due from Negat, petitioners contend that no tax is due for the periods after September 1, 1986, since Nayala was not operated after that time. They point out that Bahama Mama filed sales tax returns for the period December 1, 1986 through February 28, 1987, a fact known to the Division at the time the tax assessments under consideration were issued, but nonetheless included in the audit period. Moreover, petitioners argue that Araya Selassie's personal liability must be limited to the period from July 27, 1985 through September 12, 1986, the period during which Mr. Selassie was a shareholder and officer of Negat.

The Division argues that petitioners should not be allowed to challenge the validity of the notices, since that issue was not addressed in petitioners' pleadings or raised at hearing. Alternatively, the Division argues that the failure to check the preprinted boxes indicating that the tax assessments were estimated was cured by the typewritten information contained in the

notices.

It is the Division's position that Negat's failure to make its books and records available at the time of the audit justified the Division's resort to external indices to estimate the tax due. The Division states that the audit methodology is best described as the use of audit experience and a comparison of Negat's reported sales with the actual performance of Bahama Mama. In its memorandum of law, the Division asserts that in his testimony the auditor who conducted this audit demonstrated his experience and expertise in the auditing of restaurants and that this office experience, along with that of the auditor's supervisor, enabled the Division to reasonably estimate the dollar amount of sales of a restaurant like Nayala.

The Division asserts that Mr. Selassie is personally liable for the tax due from Negat for the entire audit period, regardless of whether he was an officer of Negat. The basis for this position is the Division's characterization of the transfer of shares of stock from Mr. Nour to Mr. Selassie as a bulk sale. From this perspective, Mr. Selassie is liable, not as a responsible officer of Negat but as the purchaser in a bulk sale; furthermore, since the transfer from Mr. Nour to Mr. Selassie was never reported to the Division, it is the Division's position that there is no time limitation on the Division's assessment of tax against Mr. Selassie. This theory of liability was raised for the first time in the Division's memorandum of law.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides that if a sales tax return is incorrect or insufficient:

> "the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

In 1979, the Legislature amended section 1138 by adding subparagraph (2) to subdivision (a). Section 1138(a)(2) provides that:

> "Whenever such tax is estimated as provided for in this section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer; that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days." (Emphasis added.)

Tax Law § 1138(a)(3)(B) provides:

> "The liability, pursuant to subdivision (a) of section eleven hundred thirty-three of this article, of any officer, director or employee of a corporation...who as such officer, director [or] employee...is under a duty to act for such corporation...in complying with any requirement of [article 28]...shall be determined by the tax commission in the manner provided for in paragraphs one and two of this subdivision." (Emphasis added.)

In this case, the tax due was not based on Negat's records of sales but was estimated on the basis of taxable sales reported by a different taxpayer, Bahama Mama, and office audit experience. The first issue to be addressed then is whether the failure to place checkmarks indicating that the tax due was estimated renders invalid the notices of determination issued to petitioners.[3]

A recent administrative law judge determination, Matter of Juraiwan Cheakdkaipejchara d/b/a Julia Coffee Shop (Division of Tax Appeals, March 7, 1991), considered whether the failure to comply with section 1138(a)(2) rendered a notice of determination jurisdictionally defective and, therefore, invalid. The facts of that case are similar to those here. The Division estimated tax due from the petitioner on the basis of external indices but failed to check the box on the notice of determination advising the taxpayer that the tax was estimated. The administrative law judge's determination thoroughly outlined the legislative history of section

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[3]The Division argues that petitioners should not be allowed to challenge the validity of the notices since they did not raise that issue until filing their post-hearing brief. The Division of Tax Appeals is "responsible for providing the public with a just system of resolving controversies with [the] department of taxation and finance and to ensure that the elements of due process are present with regard to such resolution of controversies" (Tax Law § 2000). In several instances, the Tax Appeals Tribunal has held that the Division of Taxation may be permitted to raise additional grounds for its action even after a hearing is commenced as long as the petitioner is given an adequate opportunity to respond to the agency's allegations (see, Matter of Barrier Oil Corp., Tax Appeals Tribunal, January 4, 1991; Matter of Diamond Terminal, Tax Appeals Tribunal, September 22, 1988, affd 158 AD2d 38). Obviously, the same standard should apply when a petitioner seeks to raise an issue not addressed in the pleadings. Whether the notices of determination were invalid is by and large a legal issue and one which the Division could and did address in its brief. Inasmuch as the Division had an adequate opportunity to respond to petitioners' argument, petitioners will not be barred from challenging the validity of the notices of determination.

1138(a)(2) and the pertinent caselaw.

Subparagraph (2) was added to section 1138(a) along with other amendments to the Tax Law in a bill that became known as the "Taxpayer's Bill of Rights" (Memorandum of the Division of Budget, Buffalo Evening News [June 30, 1979, B-2], Governor's Bill Jacket, L 1979, ch 714). The purpose of the bill was "to enact certain essential procedural reforms concerning the administration of the sales tax." (Memorandum of Senator Fred J. Eckert, 1979 NY Legis Ann, at 432.) As stated by the bill's sponsor, Senator Eckert, "[t]his bill will assure certain taxpayer and vendors rights, would provide more information and certainty concerning their respective tax liability and hearing procedures..." (id.). In its memorandum in support of the bill, the Division of Budget stated that the bill was intended to "give taxpayers a more predictable environment in which to operate...[and that] [t]o further inform taxpayers, the bill calls for clearer notification of taxpayers, alerting them to the nature of the assessment and the rights of the assessed" (Memorandum of Division of Budget, Governor's Bill Jacket, L 1979, ch 714 [emphasis added]).

In his memorandum in support of the bill, the Commissioner of Taxation and Finance stated that he was wholly in accord with the provisions of the bill despite some defects which he noted in the memorandum. Specifically, the Commissioner referred to the requirement that the notice of determination contain a statement advising the taxpayer that the tax was estimated. He stated that:

> "[t]he requirement of such statement would appear to be relevant where the amount of tax due is determined by the Tax Commission from information as may be available to it other than an audit of the books and records of the taxpayer. In the latter case, some estimating or statistical techniques are used. The proposed amendment should be clarified to exclude estimated assessments based on audits when the taxpayer would be aware of any estimating techniques used..." (see, Governor's Bill Jacket, L 1979, ch 714).

Although the Commissioner requested that the bill be clarified to exclude this notice requirement when the taxpayer is aware that the estimation involved estimating or statistical techniques based on an audit of the books, the bill was not so clarified.

Even if the clarification sought by the Commissioner had been adopted, it would not

apply in Negat's case. The auditor's log shows that there was no communication with Negat's accountant or Mr. Selassie after July 7, 1987, sometime before the Division had decided on the audit method to be used, and there is no indication in the record that petitioners were offered any explanation of the manner in which the tax due was calculated before the notices of determination were issued. Therefore, Negat was not aware of the estimating techniques used to calculate the tax assessment until well after the issuance of the notices.

In Matter of Pepsico, Inc. v. Bouchard (102 AD2d 1000, 477 NYS2d 892), the Appellate Division upheld the validity of a notice of determination even though the notice contained an incorrect date regarding the tax period. The court noted:

> "that the statute mandating that notice be given does not prescribe the content of the notice...and, significantly, that the notice given...accomplished its purpose of apprising petitioner that sales and use taxes had not been paid on this particular aircraft" (id. at 893).

The Court further noted that because the issue involved a one-time payment when an aircraft was based in New York State, and the parties agreed on that date, the incorrect date contained in the notice was immaterial and caused no harm or prejudice to the taxpayer. The Pepsico court concluded that it was apparent from the very fact that petitioner timely challenged the assessment that "petitioner was not confused by the notice and that it was adequately informed of the need to pursue remedies of protest and review" (id.).

The facts of this case distinguish it from Pepsico. Unlike section 1138(a)(1) which does not mandate the content of a notice of determination, section 1138(a)(2) specifically requires that whenever the tax assessment is based on estimates the notice shall contain a statement in boldfaced type that the tax assessment is estimated. It is true that no books and records were made available to the Division, and thus it might be argued that petitioners must have known that the tax was estimated and were "not confused by the notice" (id.). However, there is no indication in the legislative history or statute that the enforcement of section 1138(a)(2) be based on proof that the taxpayer has suffered harm or prejudice because of the Division's failure

to comply with the statutory mandate.[4]

Furthermore, there is caselaw in the context of the Vehicle and Traffic Law that lends strong support to the theory that failure to comply with a statutory notice requirement invalidates the notice notwithstanding any showing that prejudice or harm did not result. In Matter of Nassau Insurance Co. v. Hernandez (65 AD2d 551, 408 NYS2d 956), the Appellate Division held a notice of termination of insurance to be invalid because the notice contained a statement in 6 point type face instead of 12 point type face as required by section 313(1) of the Vehicle and Traffic Law.[5] The Court stated that:

> "[t]he requirement that 12 point type face be used is unambiguous and absolute, thereby indicating that there must be strict compliance with the statutory condition...therefore, proof that the defective notice may have been read and understood is irrelevant to the determination of whether the notice of termination is valid" (id. at 957).

The holding in this case has been followed in both the First and Second Departments of the Appellate Division (In re Empire Mutual Ins. Co. v. Malagoli, 133 AD2d 29, 518 NYS2d 803 [1st Dept 1987]; In re Aetna Casualty

and Surety Co. v. Morales, 70 AD2d 833, 418 NYS2d 17 [1st Dept 1979]; Cohn v. Royal Globe Ins. Co., 67 AD2d 993, 414 NYS2d 19 [2nd Dept 1979], affd 49 NY2d 942, 428 NYS2d 881; Matter of Furstenberg v. Aetna Casualty and Surety Co., 67 AD2d 580, 415 NYS2d 849 [1st Dept 1979], revd 49 NY2d 757, 426 NYS2d 465 [on the ground that the arbitrator's decision to

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[4]The Supreme Court in Matter of Mon Paris Operating Corp. v. Commr. of Taxation and Finance (Sup Ct, Albany County, January 22, 1987, Kahn, J.) rejected a taxpayer's claim that the notice of determination was invalid for failure to contain a statement that the tax had been estimated. It was the court's opinion, based on Pepsico, that the omission was immaterial since the taxpayer had failed to prove that prejudice or harm had resulted from it. Since the Mon Paris court makes no reference to the statutory requirements of Tax Law § 1138(a)(2), it is unclear whether the requirement was raised before the court or considered by it.

[5]Section 313(1) requires that every notice of termination "shall include in type of which the face shall not be smaller than twelve point a statement that proof of financial security is required to be maintained continuously throughout the registration period."

uphold the validity of a notice of cancelation which did not comply with Vehicle and Traffic Law § 313(1) was not lacking a rational basis, where Appellate Division decisions strictly construing the statute were not rendered until after the arbitrator's award was issued]).

The Division, citing to New York UCC § 3-118(b) as an example, notes that in construing a written document typewritten terms control over preprinted terms. On this basis, the Division argues that the lack of a checkmark on the form was cured by the typewritten advisory information placed on each notice of determination. This argument fails for two reasons. First, the typewritten statements on the notices did not advise petitioners that the tax due was estimated (see Finding of Fact "9"). Tax assessed under the authority of Tax Law § 1138(a)(1) may be determined on the basis of either the books and records of the taxpayer or estimated on the basis of external indices; therefore, the typewritten statements advising that "taxes are determined to be due in accordance with Section 1138 of the Tax Law" cannot be deemed to be the equivalent of advising that the tax due was estimated. Second, the principle enunciated by the Division may govern the construction to be given to conflicting language in a document, but it does not address the failure to comply with a statutory mandate. Based upon my own reading of the caselaw and legislative history, I conclude that inasmuch as the notices of determination issued under the authority of Tax Law § 1138(a)(1) and (3)(B) do not comply with the requirements of section 1138(a)(2), the notices are invalid. Moreover, as the penalties separately assessed under the authority of Tax Law § 1145(a)(1)(vi) are premised upon a determination of tax due in excess of 25 percent of the amount of tax reported, and valid notices of determination assessing that tax were not issued, the notices of determination assessing separate penalties must be canceled as well.

B. Having concluded that the notices of determination are not valid, it is unnecessary to address the underlying audit; however, for the sake of creating a complete record for review, the arguments of the parties will be addressed.

C. Every person required to collect tax must maintain records sufficient to verify all transactions, in a manner suitable to determine the correct amount of tax due (Tax Law §

1135[a]; 20 NYCRR 533.2[a]). Among the records required to be maintained are "records of every sale" and the tax due on that sale (Tax Law § 1135[a]). Where such records are requested and not produced, the Division must select an audit method reasonably calculated to determine the sales tax due (Tax Law § 1138[a][1]; see, Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 206, 159 NYS2d 150, 157). The burden is then placed upon the petitioner to prove by clear and convincing evidence that the audit method or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 859, 446 NYS2d 451, 453).

Petitioners do not challenge the Division's assertion that books and records for the audit period were requested from Mr. Selassie and his accountant. Inasmuch as those records were not produced and the Division reasonably concluded that they would not be produced before the expiration of the 90-day period for assessment of tax against the bulk sale purchaser,[6] Bahama Mama, it was warranted in estimating the tax due on the basis of external indices. A conciliation conference, like an administrative hearing, provides the taxpayer an opportunity to submit evidence of the actual amount of tax due or to challenge the reasonableness or accuracy of a tax audit. The production of books and records at the conciliation conference has no material bearing on the authority of the Division to assert a tax deficiency by notice of determination pursuant to Tax Law § 1138(a)(1).

D. The Division's conclusion that Negat's taxable sales amounted to approximately $10,000.00 per week was based on two grounds: "the use of [the auditors'] substantial experience with respect to the dollar amount of sales which could reasonably be expected of a restaurant of the type in question at that location" (Division's Brief at 10) and the reported taxable sales of Bahama Mama. "Considerable latitude is given an auditor's method of

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[6]"Within ninety days of receipt of the notice of the sale...from the purchaser,...the tax commission shall give notice to the purchaser...of the total amount of any tax or taxes which the state claims to be due from the seller,...and whenever the tax commission shall fail to give such notice to the purchaser...within ninety days from receipt of notice of the sale...such failure will release the purchaser...from any further obligation to withhold any sums of money...which the purchaser...is required to transfer over to the seller" (Tax Law § 1141[c]).

estimating sales" where accurate records of sales are not available (Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219; Matter of Carmine Rest. v. State Tax Commn., 99 AD2d 581). Nonetheless, there must be sufficient evidence in the record to enable the trier of fact to determine whether the audit had a rational basis (Matter of Grecian Square v. State Tax Commn., supra; Matter of Alice Fashana,

Tax Appeals Tribunal, September 21, 1989; Matter of Willy Savino d/b/a Willy's Service Station, Tax Appeals Tribunal, September 22, 1988). There is no evidence in this record of the "size, location, number of employees and nature of the operation" (Matter of Grecian Square, supra) of those restaurants which the auditor deemed to be comparable to Nayala. Moreover, under questioning, the auditor was able to articulate only two features shared by Bahama Mama and Nayala, i.e., both were restaurants and both were located in the same premises. Petitioners established that the two restaurants differed in some essential ways: Bahama Mama served alcohol and had a sit-down bar and Nayala did not; the two restaurants served very different ethnic foods; and Bahama Mama had redecorated the restaurant, adopting a tropical decor. Petitioners produced dated and sequentially numbered guest checks for the period July 27, 1985 through July 18, 1986 which established that Negat's taxable sales for that period were $61,818.78 (see Finding of Fact "14"), lending considerable support to petitioners' contention that the audit method selected by the Division was "unreasonably inaccurate" (Matter of Meskouris Bros. v. Chu, 139 AD2d 813; 526 NYS2d 679). Finally, it must be noted that the Division assessed tax against Negat for the period December 1, 1986 through February 28, 1987, although its own records established that Bahama Mama was operating and had filed sales tax returns for the same period. Based on this record, it cannot be concluded that the audit of Negat was reasonably calculated to reflect the tax due.

E. Mr. Selassie's purchase of the stock of Negat from Mr. Nour does not constitute a bulk sale. The term "bulk sale" is defined in the Commissioner's Rules and Regulations. "The term bulk sale...means any sale, transfer or assignment in bulk of any part or the whole of business

assets, other than in the ordinary course of business" (20 NYCRR 537.1[a][1]). Business assets are defined as: "any assets of a business pertaining directly to the conduct of the business, whether such assets are intangible, tangible or real property. Any asset owned by a corporation is a business asset." (20 NYCRR 537.1[b]; emphasis added.)

A corporation is, for most purposes, a separate entity distinct from its shareholders, and the property of the corporation is vested in the corporation itself and not in its shareholders (13 NY Jur 2d, Business Relationships, § 25). A share of stock represents the beneficial interest which the owner of a certificate of stock has in the corporation; it "is the property of the shareholder and, with the exception of shares reacquired by the corporation, is not the property of the corporation" (13 NY Jur 2d, Business Relationships, § 207). In accordance with these basic principles, the transfer of Negat stock from Mr. Nour to Mr. Selassie is not considered a transfer of the business assets of the corporation. The stock sold to Mr. Selassie and Mr. Shiferaw was the personal property of Mr. Nour and his partner and not a business asset of the corporation. Negat's business assets, including its leasehold interest, remained the property of the corporation and was not sold, transferred or assigned to Mr. Selassie as a shareholder of the corporation. Mr. Selassie was not an officer, director, employee or shareholder of Negat and, therefore, was not a person required to collect tax on behalf of Negat (Tax Law § 1131[1]) nor personally liable for taxes determined to be due from Negat (Tax Law § 1133[a]) until July 1985.

F. Petitioners do not have standing to request a refund of taxes paid by Bahama Mama; furthermore, the record merely establishes that Bahama Mama consented to pay taxes, but it does not establish the exact amount agreed to or whether any amount has actually been paid.

G. The petition of Negat, Inc. and Araya Selassie, as officer, is granted, and the notices of determination and demands for payment of sales and use taxes due, issued July 13, 1987, are

dismissed in accordance with Conclusion of Law "A".

DATED: Troy, New York

3/14/91

ADMINISTRATIVE LAW JUDGE