STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM AND GLORIA KATZ	:	DECISION DTA No. 805768
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1984.	:	

Petitioners William and Gloria Katz, 217 Harborview North, Lawrence, New York 11559 filed an exception to the determination of the Administrative Law Judge issued on February 7, 1991 with respect to their petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1984. Petitioners appeared by Blum, Gersen & Stream, Esqs. (Eugene B. Fischer, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a letter brief in response. Neither party requested oral argument.

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

ISSUES

I. Whether the proof offered by the Division of Taxation regarding the mailing of the Notice of Deficiency pursuant to Tax Law § 681(a), is sufficient to create the presumption that the Notice of Deficiency was properly mailed and that, consequently, it has become an unchallengeable assessment pursuant to Tax Law § 681(b).

II. Whether the "findings of fact" contained in other Administrative Law Judge determinations are admissible in the case at hand to refute testimony as to the "general office

practice" of the Division of Taxation, or whether such "facts" are themselves considered "determinations" and inadmissible as evidence under section 2010(5) of the Tax Law.

III. Whether the Division of Taxation's internal administrative procedures in maintaining records to prove the mailing are so inadequate that to accept these procedures as adequate would be to deny the petitioners their due process rights, under the New York State Constitution, to a hearing on the merits.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "8" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

In 1984, petitioners had net gambling winnings in Atlantic City, New Jersey of $2,202,482.00. On their 1984 New York State Resident Income Tax Return, they claimed a resident tax credit of $76,318.00, the amount of tax paid by them to New Jersey on their gambling winnings.

The Division of Taxation issued a Statement of Audit Changes dated May 20, 1987 which disallowed:

> "the resident credit claimed...as New York State does not allow a resident credit based on gambling winnings earned in another state as the income is not connected with personal service income or a trade or business carried on in the other jurisdiction."

The statement asserted additional income tax due of $58,372.00, plus interest. (No penalty has been asserted by the Division of Taxation.) It was addressed to petitioners at their then current residence, 1420 57th Street, Brooklyn, New York 11219.

The Division of Taxation then issued a notice of additional tax dated July 10, 1987 to petitioners at their Brooklyn residence showing tax due of $58,372.00, plus interest. This notice further provided, in part, as follows:

> "If you do not agree with this adjustment, you may submit additional information pertinent to your case by writing to this office [Tax Compliance Division], referring to the above assessment number.
>
> Your failure to respond to this letter within 15 days will result in the issuance of a statutory Notice of Deficiency for the amount of the additional tax plus accrued interest. The issuance of this Notice represents the Division's first formal step towards taking legal action to compel payment."

The notice of additional tax described, supra, was soon followed by the Division of Taxation's issuance of a Notice of Deficiency dated August 20, 1987, which also asserted additional tax due of $58,372.00, plus interest. It too was addressed to petitioners at their then current Brooklyn residence. The notice provided, in part, as follows:

> "A deficiency has been determined as shown. The Statement previously sent to you shows the computation of the deficiency.
>
> * * *
>
> If you do not return the signed consent, the deficiency will become an assessment subject to collection, with interest to date of payment, unless you file a petition within 90 days after the date of this notice...."

Approximately four months later, the Division of Taxation issued a Notice and Demand for Payment of Income Tax Due dated December 28, 1987 which demanded payment of 1984 income tax of $58,372.00, plus interest. The notice and demand was also addressed to petitioners at their then current Brooklyn residence.

On May 9, 1988, petitioners by their attorney, Eugene B. Fischer, filed a Request for Conciliation Conference protesting the assessment of additional tax for 1984 of $58,372.00, plus interest. Approximately two weeks earlier, on or about April 21, 1988, Mr. Fischer had written to the Tax Compliance Division challenging the disallowance of the resident credit claimed by petitioners for taxes paid to New Jersey on their gambling winnings. Mr. Fischer noted in his letter that the only notice received by petitioners was the notice of additional tax dated July 10, 1987 (described above).

The Bureau of Conciliation and Mediation Services issued a conciliation order dated May 27, 1988 which dismissed petitioners' Request for Conciliation Conference for the following reason:

> "The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on August 20, 1987, but the request was not received until May 11, 1988, or in excess of 90 days, the request is late filed."

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> The Division of Taxation introduced into evidence an affidavit dated November 8, 1989 of Stanley K. DeVoe, the principal clerk of the manual assessments unit for the past 18 years, whose regular duties include the supervision of the issuance of notices of deficiency. In his affidavit, Mr. DeVoe described his general practice for the issuance of notices of deficiency: He compares the notices of deficiency listed on a certified mail record with the copies of the notices of deficiency which "are then stuffed in envelopes and brought to the United States Postal Service." After verification by a postal service employee, a Post Office stamp is affixed to the last page of the certified mail record. Mr. DeVoe noted that the general practice was not to request return receipts.
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> Attached to Mr. DeVoe's affidavit was a copy of a purported certified mail record. This purported mailing record consists of three unconnected pages:
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> 1) The cover sheet bears the printed label "New York State Dept. of Taxation and Finance." The date of 8/20/87 has been handwritten next to the word "Mail," and the time and date of the document's creation is printed

as 2:46 on 8/7/87. Mr. DeVoe's signature appears underneath the 8/20/87 date.

2) The second sheet is labeled "Certified Mail Record," and bears the heading "Tax Compliance Bureau - Notice of Deficiency - Record of Mailing and Fees." The fact that this is page 43 of some document created on 8/7/87 is indicated in the upper right hand corner of the page. Certified numbers 542075 to 542089 are listed in a vertical column on the left side of the page and certified number 542080 is listed as assigned to addressee William and Gloria Katz of 1420-57 Street, Bklyn, N.Y. 11219 (petitioners' then current address). This page bears no postmark.

3) The "last page" (so indicated) bears no heading and, thus, offers no indication of what it is. A postal stamp of "Aug. 20, 1987" of the Roessleville Branch of the United States Post Office in Albany, N.Y. appears on the page, as does a list of certified numbers 542151 to 542163. At the bottom of the page, next to the words "certified nos = " is the printed number 719. Under that number, someone, in their own hand, has subtracted "23" from the 719, leaving the number at 696. There is no indication on the sheet as to who made this calculation or why it was done. In addition, the postage fees were apparently recalculated as the typewritten numbers on the form were crossed out and new numbers were handwritten in their place. Finally, this last page is initialed "W.M.," but these initials are not in any way identified, neither on this sheet nor in DeVoe's affidavit.[1]

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[1] The Administrative Law Judge's finding of fact "8" read as follows:

> "The Division of Taxation introduced into evidence an affidavit dated November 8, 1989 of Stanley K. DeVoe, the principal clerk of the manual assessments unit for the past 18 years, whose regular duties include the supervision of the issuance of notices of

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deficiency. Attached to Mr. DeVoe's affidavit was a copy of the certified mail record dated August 7, 1987 of the notices of deficiency to be mailed on August 20, 1987. In his affidavit, Mr. DeVoe described his general practice for the issuance of notices of deficiency: He compares the notices of deficiency listed on a certified mail record with the copies of the notices of deficiency which 'are then stuffed in envelopes and brought to the United States Postal Service.' After verification by a postal service employee, a Post Office stamp is affixed to the last page of the certified mail record.

"A review of the certified mail record attached to the affidavit bears out Mr. DeVoe's general practice. The Notice of Deficiency issued to petitioners at their then current Brooklyn residence* was assigned certified number 542080. The last page of the certified mail record shows the August 20, 1987 stamp of the Albany, New York, Roessleville Branch of the United States Postal Service. Mr. DeVoe noted that the general practice was not to request or retain return receipts."

* This Brooklyn address was also the Division of Taxation's last known address for petitioners at the time the Notice of Deficiency was issued.

We modified this fact to more accurately reflect the record.

Petitioners testified that they never received the Statement of Audit Changes dated May 20, 1987 (described above), the Notice of Deficiency dated August 20, 1987 (described above), or the notice and demand dated December 28, 1987 (described above). As noted above, petitioners' attorney conceded that petitioners received the notice of additional tax dated July 10, 1987.[2]

Gloria Katz testified that she first became aware of the asserted tax deficiency in early 1988 when she was contacted by a collections agent from the State by telephone. William Katz's testimony concerning when he first became aware of the asserted tax deficiency was confused, although on recross-examination he ultimately testified that the deficiency first came to his attention when "my wife told me that she got a phone call and she was all panicky."

It is observed that the Notice of Deficiency dated August 20, 1987 was issued at a time of family travail for petitioners. Rose Katz, Mr. Katz's mother, died on August 31, 1987. Morris Katz, Mr. Katz's father, was hospitalized with pneumonia from August 8, 1987 through August 25, 1987 and from August 30, 1987 through September 9, 1987. In April 1987, Mr. Katz's parents had come from France to live with petitioners because Morris Katz had

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[2]However, Gloria Katz testified on cross-examination that she did not recall ever receiving this notice dated July 10, 1987. The testimony of Mr. Katz on this point was confused:

"Q. [Mr. Zalewski]: Could you tell me if you have ever seen that letter[dated July 10, 1987] before today?

A. [Mr. Katz]: This is June, 1988. Let me just tell you that until my wife called me in a panic, we got in touch with the accountants. I remember some mail coming through and when I got the mail I ran to Manhattan and gave it to the accountant.

Q. [Mr. Zalewski]: Do you believe you saw this prior to today?

A. [Mr. Katz]: To be honest with you, the minute I saw New York State I ran to Manhattan, I parked illegally, I went up to the accountant and brought him the papers. You have to understand that it is all Chinese to me."

become "totally bedridden due to Parkinson's and Alzheimer's", and Rose Katz could no longer care for him by herself.

During the summer of 1987, Mrs. Katz lived in a bungalow community in the Catskills. Mr. Katz was in charge of receiving and reviewing mail at the Brooklyn residence. He testified that he checked the mail at night when he returned home anywhere from 8:00 P.M. to 10:00 P.M. According to Mr. Katz, many times it was left on the floor[3] because the letter carrier could not get in during the summer when his family was away. There were two other families in the building, but they apparently spent the summer in the country as well. Consequently, Mr. Katz knew of no one in the building who could have received a certified mail document. Mr. Katz also testified that he did not receive a notice from the Post Office to pick up certified mail.

OPINION

The Administrative Law Judge determined that the Division of Taxation (hereinafter the "Division") had offered "minimally adequate" proof that the Notice of Deficiency in question had, in fact, been mailed to petitioners on the date in question at their then current address. Implicit in this conclusion is the fact that the notice has become an unchallengeable assessment under Tax Law § 681(b), as the 90-day period following the issuance of the notice had passed.

Based on the statutory provisions of section 681(a), which are concerned only with the proper mailing of the notice and not the receipt of same, the Administrative Law Judge rejected the notion that petitioners' constitutional rights would be violated if they were not permitted to challenge the notice they "never received."

In addition, the Administrative Law Judge concluded that, in accordance with Tax Law § 2010(5), the fact findings contained in determinations of administrative law judges can have no bearing on other matters before the Division of Tax Appeals.

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[3]Mr. Katz testified that he "used to get it [the mail] all over."

Finally, the Administrative Law Judge declined to address the issue of whether or not petitioners' due process rights under the United States and State Constitutions[4] would be violated if they were not allowed to contest the Notice of Deficiency which they allegedly did not receive, because that would require an analysis of whether or not Tax Law § 681(a) is unconstitutional on its face rather than merely unconstitutional as applied. Furthermore, the Administrative Law Judge found the facts of this case to be insufficient ones on which to base a constitutional challenge.

On exception, petitioners assert that contrary to the determination of the Administrative Law Judge, evidence of the timely mailing of the Notice of Deficiency was "woefully inadequate" for purposes of section 681(a) of the Tax Law and, therefore, a valid assessment, in contemplation of section 681(b), does not exist. Petitioners assert, in the alternative, that should a valid assessment be found to exist, petitioners should be granted a hearing on the merits. Implicit in this argument is that petitioners ask that their petition for a hearing challenging the assessment, received by the Division of Tax Appeals on June 23, 1988, be deemed timely.

Petitioners maintain that the affidavit of Mr. DeVoe -- "the only proof of mailing of a notice of deficiency offered" (see, Petitioners' brief, p. 3) -- is insufficient to persuade a reasonable fact finder that the notice was mailed. Petitioners contend that Mr. DeVoe's affidavit establishes only that the Division has a mailing procedure for notices of deficiency and that Mr. DeVoe "surmises" that if the normal mailing procedures were followed, then the notice was sent (see, Petitioner's brief, p. 4).

In connection with these allegations, petitioners urge that the "Findings of Fact" contained in the determinations of other administrative law judges be admissible in evidence -- for purposes here of refuting the general practices of Mr. DeVoe -- as "facts" are not included

[4]On exception, petitioners allege solely a State Constitutional violation, asserting that at no time did they ever allege a Federal constitutional violation.

within the statutory meaning of "Determinations" which, petitioners concede, may not be cited as precedent pursuant to Tax Law § 2010(5).

Petitioners argue that, in any case, the Division's internal procedures in complying with the requirements of Tax Law § 681(a) are so inadequate as to render the denial of a hearing for a redetermination of the assessment a violation of petitioners' due process rights.

Finally, petitioners aver that even if the proof of mailing was "minimally adequate," this is an indication that the evidence fails to meet the standard of section 306 of the State Administrative Procedure Act, which requires that all determinations of administrative agencies be supported by "substantial evidence."

In response, the Division asks that the fact findings and conclusions of the Administrative Law Judge be upheld and that the application of petitioners be dismissed due to the untimely filing of their petition with the Division of Tax Appeals. The Division asks that if, alternatively, the Tribunal concludes that the Division of Tax Appeals has jurisdiction over the merits of the matter, that the tax assessed by Notice of Deficiency A8705200511 remain unchanged and the matter remanded solely to determine the amount of interest to be assessed.

The Division asserts that it has established, through the affidavit of Stanley DeVoe and the three attached sheets of an alleged certified mailing record entered into evidence, that Notice of Deficiency A8705200511 was issued to petitioners on August 20, 1987.

The Division contends that in light of the fact that on September 12, 1990, petitioners were granted a full refund plus interest from New Jersey for taxes paid in 1984 -- taxes that had formed the basis for the resident credit claimed by petitioners and rejected by the Division -- petitioners are not entitled to the resident credit claimed and, therefore, there is no longer any controversy regarding the disallowance of said resident credit. According to the Division, even if the Tribunal concludes that the Division of Tax Appeals may reach the assessment itself, the

only remaining issue is the amount of interest petitioners must pay on the tax deficiency properly assessed and owed.[5]

In response to the Division's letter brief in opposition, petitioners submitted a letter to the Tribunal (hereinafter "reply letter," dated 5/21/91) in lieu of a motion to strike portions of said reply brief. Maintaining that their 1984 New York State taxes were correctly filed, petitioners specifically objected to the Division's insinuation that petitioners had abandoned pursuit of a merits determination of the taxes assessed.[6] To the contrary, petitioners asserted that the jurisdictional issue has been and remains the focus, and that to remand the matter solely to consider the limited issue of interest owed on the assessment, as the Division requests, would be to decide the issue without affording petitioners a hearing on the merits. Petitioners also objected to the Division's references (see, Division's letter brief, p. 2) to events which occurred subsequent to the administrative hearing below, as these can have no bearing on the present question of jurisdiction.

We reverse the determination of the Administrative Law Judge and thereby deem the petition timely.

Pursuant to Tax Law § 681(a):

> "[i]f upon examination of a taxpayer's return . . . the tax commission determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer . . . . A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state."

Tax Law § 681(b) provides, in relevant part, that:

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[5]The Division makes these assertions in light of the following facts alleged on page 2 of its letter brief in opposition: On November 9, 1990, the Administrative Law Judge was advised that petitioners were granted a full refund and interest for those taxes that had been paid to New Jersey. On November 21, 1990, the Administrative Law Judge was advised that petitioners were considering withdrawing their petition for a hearing. On January 14, 1991, a conditional notice of withdrawal was forwarded to the Administrative Law Judge Unit. On January 18, 1991, the notice of withdrawal was withdrawn.

[6]For instance, petitioners state that even if the assessment is not cancelled, it remains unclear as to the year in which they should report the New Jersey refund on their New York State taxes, an issue they believe the Division has failed to recognize.

> "[a]fter ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition . . . ."

Until a notice of deficiency has been mailed, "[n]o assessment of a deficiency in tax and no levy or proceeding in court for its collection shall be made," pursuant to Tax Law § 681(c).

Section 681 of the Tax Law was adopted to "bring New York in conformity with the comparable Federal provision (26 U.S.C. § 6212 [a], [b]; 1962 McKinney's Session Laws of N.Y., Memorandum of State Dept. of Taxation and Finance, at 3536-3537, Executive Memoranda, at 3681-3682)" (see, Matter of Agosto v. Tax Commn. of State of New York, 68 NY2d 891, 508 NYS2d 934, 935; see also, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990). State and Federal case law supports the proposition that a notice of deficiency is deemed "properly mailed" when mailed by registered or certified mail to the taxpayer's last known address (see, Matter of Agosto, supra, 508 NYS2d 934, 935; Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112; Dorff v. Commissioner, T.C. Memo 1988-117, 55 TCM 412; Pugsley v. Commissioner, 749 F2d 691, 85-1 USTC ¶ 9121, rehearing denied 758 F2d 660).

As the Tribunal held in Malpica, Tax Law § 681(a) "does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received" (see, Matter of Kenning v. State Tax Commn., 72 Misc 2d 929, 339 NYS2d 793, affd 43 AD2d 815, 350 NYS2d 1017, appeal dismissed 34 NY2d 653, 355 NYS2d 384, lv denied 34 NY2d 514, 355 NYS2d 1025; see also, Matter of Malpica, supra; Keado v. United States, 86-1 USTC ¶ 9321, affd 853 F2d 1209 [re: parallel Federal provision § 6212(b)(1)]; cf., Ruggerite v. State Tax Commn., 97 AD2d 634, 468 NYS2d 945, affd 64 NY2d 688, 485 NYS2d 517 [dealing with sales tax deficiency, under section 1147(a)(1) of the Tax Law]). Once deemed "properly mailed," the "risk of

nondelivery" is on the taxpayer (Matter of Malpica, supra), i.e., "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (see, Dorff v. Commissioner, supra, citing Zenco Eng'g. Corp. v. Commissioner, 75 TC 318; and Cataldo v. Commissioner, 60 TC 522).

However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been proffered (see, Matter of MacLean v. Procaccino, supra, 386 NYS2d 111, 112; see also, Caprino v. Nationwide Mut. Ins. Co., 34 AD2d 522, 308 NYS2d 624, 625). The proof required consists of the following: the establishment of a standard procedure for the issuance of such notices by one with knowledge of such procedures, and the introduction of evidence to show that this procedure was followed in the particular case at hand (see, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991; see also, Cataldo v. Commissioner, supra, at 524). For instance, in Matter of Rosen (Tax Appeals Tribunal, July 19, 1990), the Tribunal held as sufficient proof of mailing the affidavit of a Division employee and a copy of the certified mailing record. The affidavit not only explained the general mailing procedures, it identified the certified mailing record, and described how this mailing record evidenced that the notices in question were, in fact, issued to petitioners.

It is true that the "presumption of official regularity" (United States v. Wright, 658 F Supp 1, 86-1 USTC ¶ 9457, at 84,120; Matter of Abrahams v. New York State Tax Commn., 131 Misc 2d 594, 500 NYS2d 965, 967), i.e., that government agencies "act honestly and in accordance with the law and do nothing contrary to official duty nor omit anything which official duty requires to be done," (Matter of Abrahams v. New York State Tax Commn., supra, 500 NYS2d 965, 967, citing Fisch on Evidence § 1134) may be properly asserted to support proof of mailing; however, this may be done only after some foundational evidence of the mailing exists (see, United States v. Wright, supra, 86-1 USTC ¶ 9457, at 84,120 [presumption does not arise where foundational evidence of certified mailing is entirely lacking]).

The evidence here does not support the Administrative Law Judge's conclusion that the proof of mailing offered by the Division is "minimally adequate" to establish that the Notice of Deficiency was mailed to petitioners on August 20, 1987. This is because the Division has not overcome both of the "proof of mailing" hurdles.

We find that the Division has introduced adequate proof of its general mailing procedures by way of an affidavit of Mr. Stanley K. DeVoe, the Principal Clerk of the Manual Assessments Unit of the Department of Taxation and Finance. Mr. DeVoe has been in charge of the issuance of notices of deficiency for 18 years, and held this position on the date in question, August 20, 1987. Mr. DeVoe's affidavit generally describes the Division's mailing procedures for issuing notices of deficiency, and notes that the Department of Taxation and Finance does not, in the ordinary course of business, request, demand, or retain return receipts from certified or registered mail. In addition, the affidavit identifies the attached copy of the Notice of Deficiency allegedly issued to petitioners as certified mail number 542080, and purports to identify and explain the attached three sheets of an alleged certified mail record.

It is here that the Division's proof fails. We find this alleged certified mail record inadequate to establish the second portion of the Division's burden of proof; namely, that the Division's general issuance procedures were, in fact, followed in this case. Despite the fact that the cover sheet of the purported certified mail record bears Mr. DeVoe's signature as well as the date of August 20, 1987, that the middle page contains the listing of the Notice of Deficiency assigned to petitioners, and that the last page bears a Post Office stamp dated August 20, 1987, which has been initialed "W.M." (initials which, as noted, are not identified either by Mr. DeVoe or by "W.M." him/herself), the flaws in this "proof" are manifold.

Firstly, the last page of the purported certified mail record -- the only one with a postmark -- gives no indication as to whether or not it is related to the pages before it. At most, it shows that the notices assigned certified numbers 542151 through 542163 were mailed on 8/20/87. The certified number assigned to petitioners on page 43 of the purported certified mail record is

542080, a number not within the range on the last page, and one which does not directly precede those listed on the the last page. In addition, the last page does not tell us how many pages are contained in the document of which it is the last page. Perhaps the document to which it relates contains far less than 43 pages and, thus, does not include the page on which petitioners' notice is listed ("page 43").

Secondly, if the calculation on the last page is meant to indicate that only 696 of the original 719 certified pieces of mail were sent -- a rather large assumption given that no explanation is offered on the document itself or on any accompanying document -- it is not at all clear which notices corresponding to which certified mail numbers were withdrawn. For that matter, it is not at all clear that the notice assigned certified number 542080 and addressed to the Katzes was not one of the notices withdrawn. Further, as noted, there is no indication as to who made the adjustment nor why it was done.

Thirdly, whereas a properly completed postal form 3877 is "considered highly probative evidence that the notice of deficiency was sent to the addresses specified" (see, United States v. Ahrens, 530 F2d 781, 76-1 USTC ¶ 9241, at 83,511; Cataldo v. Commissioner, supra, at 524; Keado v. United States, supra, at 83,659), due, in part, to the space provided for the postmaster's signature verifying receipt, the purported certified mail record submitted does not contain such a box to indicate receipt. Also, unlike Form 3877, the last page of the document submitted here does not list the total number of documents received by the post office, giving this Tribunal no way of knowing whether or not page 43 (the page on which petitioners' certified number was listed) was included in the pages postmarked 8/20/87. The purported certified mail record submitted is not accompanied by contemporaneous statements of Division employees describing the delivery, stamping, addressing and depositing of the notices (cf., Matter of Davidson, Tax Appeals Tribunal, March 23, 1989).

Finally, there is no postmark on the page containing petitioners' notice. The date 8/20/87, which appears on the copy of the attached Notice of Deficiency addressed to

petitioners, is not dispositive of the date on which the notice was actually mailed, if at all (see, Magazine v. Commissioner, 89 TC 321; Matter of Malpica, supra [held insufficient proof of mailing the "Division's bare assertion . . . that the stamped date (on the Notice of Deficiency) is also the date that the certified mailing occurred," without other supporting evidence such as: "an authenticated mailing log, a return receipt, evidence as to (the Division's) course of business or office practice or any other relevant evidence . . . to substantiate the Division's claim . . . ."]).

In short, because the mailing record is insufficiently authenticated and, thus, cannot serve as proof that the general issuance procedures attested to by Mr. DeVoe were actually followed in petitioners' case (cf., Magazine v. Commissioner, supra; Dorff v. Commissioner, supra, 55 TCM 412, 413 [where postmarked Forms 3877, once validated as products of a general issuance procedure, have been held to be direct evidence of the date of mailing of notices of deficiency]), we find that the evidence submitted fails to satisfy the Division's burden that the notice in question was properly mailed to petitioners.[7]

The evidence of custom and habit submitted through Mr. DeVoe's affidavit cannot on its own rise to the level of direct proof that the notices in question were actually mailed to the petitioners on the date in question (see, Magazine v. Commissioner, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra). As noted, proof of mailing requires evidence of the ordinary issuance procedure as well as evidence of the fact that the procedure was actually followed in a particular case.

Despite our decision here, we find it necessary to dispute petitioners' argument that the "Findings of Fact" contained in other administrative law judge determinations are admissible to

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[7]It is surprising to us that the Division has not better regimentized their mailing procedures, as is clear from the varying degrees of proof available to establish mailing in the above mentioned cases of Davidson, Rosen, Malpica, MacLean, and the case at hand. It seems that in addition to some type of evidence, such as an affidavit, attesting to the Division's ordinary practice for issuing a notice of deficiency, the Division should be able to produce either a "certified mailing record" which has been postmarked on each page, or, alternatively, other direct evidence, including testimony to the effect that the notices were, in fact, delivered to the post office on the date in question (see, Matter of Nova TV & Air Conditioner Sales & Serv., supra [where the Division also failed to provide direct evidence of delivery to the Post Office]).

refute testimony as to the "general office practice" of the Division in this case. Tax Law § 2010(5) provides that:

> "Determinations issued by administrative law judges shall not be cited, shall not be considered as precedent nor be given any force or effect in any other proceedings conducted pursuant to the authority of the division . . ."

While it is true that section 2010(5) does not specifically mention the "factual findings" portion of Tax Appeals determinations, petitioners fail to realize that to use the fact findings of an Administrative Law Judge's determination to refute the facts in another case is to use a part of the Administrative Law Judge's determination as precedent, i.e., to attribute precedential value to the facts. Because a determination is based upon consideration of the specific facts in a particular case, the factual findings are an inextricable part of the ultimate determination of the Administrative Law Judge. To employ the fact findings as petitioners wish would be to obviate the intent of the statute.

We do not find it necessary to address any other of petitioners' arguments as our decision in favor of petitioners renders such discussion moot.

In conclusion, we find the Division's procedures in this case to be insufficient to assure us that the Notice of Deficiency was, in fact, mailed to petitioners on the date in question, in conformity with section 681(a) of the Tax Law. Hence, it follows that the statutory 90-day filing period was never triggered; therefore, petitioners' petition for a redetermination of the deficiency claimed or for refund, dated June 23, 1988, is deemed timely (see, Matter of Novar TV & Air Conditioner Sales & Serv., supra).

Finally, we feel compelled to note that because the Administrative Law Judge specifically limited the first hearing to proof on the jurisdictional issue, petitioners have never had an opportunity for a hearing on the merits. Thus, we reject the Division's contention that the issue on remand should be limited to how much interest is owed by petitioners. Petitioners at no point waived their right to a merits determination and the fact that New Jersey apparently

refunded the money for which petitioners were claiming a credit on their taxes in New York State does not change the fact that petitioners have a right to be heard on the issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners William and Gloria Katz is granted; and

2. The determination of the Administrative Law Judge is reversed and the matter remanded for a decision on the merits.

DATED: Troy, New York
November 14, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner